

**BEFORE THE COMMISSIONERS ON BEHALF OF  
ENVIRONMENT CANTERBURY**

**IN THE MATTER**

of Plan Change 5 to the  
Canterbury Land and Water  
Regional Plan

**WAITAKI IRRIGATORS  
COLLECTIVE LIMITED**

**Submitter**

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**LEGAL SUBMISSIONS OF COUNSEL FOR WAITAKI IRRIGATORS  
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**MAY IT PLEASE THE COMMISSIONERS:**

**Scope**

1. In order for the Commissioners to grant the relief sought by the Waitaki Irrigators Collective (“WIC”) it must be within the scope of the plan change. Another way of expressing this is asking whether a submission is “on” the plan change.
2. If a submission is not “on” a plan change there is no jurisdiction to grant the relief sought.<sup>1</sup>
3. The legal position on scope is set out in *Palmerston North City Council v Motor Machinists Ltd*,<sup>2</sup> which adopts the test set out in *Clearwater Resort Ltd v Christchurch City Council*.<sup>3</sup> These cases have been considered most recently in *Well Smart Investment Holding (NZQN) Limited v Queenstown Lakes District Council*.<sup>4</sup> *Well Smart* set out the test in 2 parts.<sup>5</sup>
  - (a) Is the relief sought in the submission incidental to, consequential upon or directly connected to the plan change?
  - (b) Have potential submitters been given fair and adequate notice of what is proposed in the submissions or has their right to participate been removed?
4. The first question acts as a filter. There must be a direct connection between the submission and the degree of notified change to the plan; it must address the status quo.<sup>6</sup> The second question addresses the principle of natural justice; is there any procedural unfairness?<sup>7</sup>

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<sup>1</sup> *Well Smart Investment Holding (NZQN) Limited v Queenstown Lakes District Council* [2015] NZEnvC 214 at [15]

<sup>2</sup> *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

<sup>3</sup> *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

<sup>4</sup> *Well Smart Investment Holding (NZQN) Limited v Queenstown Lakes District Council*, above n 1.

<sup>5</sup> *Ibid* at [16].

<sup>6</sup> *Palmerston North City Council v Motor Machinists Ltd*, above n 2, at [80].

<sup>7</sup> *Well Smart Investment Holding (NZQN) Limited v Queenstown Lakes District Council*, above n 1, at [26].

5. If the answers to both questions (in paragraph 3(b)) are “yes”, the submission is “on” the plan change and the panel (or Court) will have jurisdiction to grant the relief sought. The questions are conjunctive, so if one of the tests is not met then the submission cannot be considered to be ‘on’ the plan change. Each case must be determined on its own merits as matters of fact and degree.<sup>8</sup>
6. In considering whether the submission gets through the question 1 filter it is helpful to ask whether the submission raises matters which should have been addressed in the s 32 report.<sup>9</sup> Alternatively, it is useful to determine whether a submission proposes a new management regime for a resource. Where the plan change is proposing a new management regime and a submission is also, the submission addresses the “status quo” and will be within scope. Where the plan change is not proposing a new management regime, a submission which proposes a new management regime will not be in scope.<sup>10</sup>

#### *PC5 and the Status Quo*

7. PC5 proposes to impose a new management regime for nutrient losses throughout the region. The current nutrient management regime (the status quo) relies on the nitrogen baseline. The new regime relies on a combination of nitrogen baselines, GMP baselines and catchment load limits to manage nutrient losses within the various Freshwater Management Units.

#### **WIC and Scope**

*Is the relief sought in WIC’s submission incidental to, consequential upon or directly connected to the plan change?*

8. The answer to this question is obviously - Yes.
9. WIC has proposed an alternative management regime for nutrient losses for the Freshwater Management Units within the Lower Waitaki Catchment. Nutrient loss management regimes, generally, were

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<sup>8</sup> Ibid at [26].

<sup>9</sup> *Palmerton North City Council v Motor Machinists Ltd*, above n 2, at [81]

<sup>10</sup> Ibid at [81].

discussed in the s 32 report,<sup>11</sup> and WIC's provisions are directly connected to ECan's proposed provisions.

10. WIC's submission addresses a matter addressed in the s 32 report and it is not proposing a new management regime unanticipated by the plan change.
11. It is clear that WIC's proposed (alternative) nutrient management regime passes the first limb of the test.

*Have potential submitters been given fair and adequate notice of what is proposed in the submissions?*

12. The alternative rule framework proposed by WIC's was attached to its original submission. Appendix A of that submission clearly identifies what relief is being sought. The final two rows of that Appendix direct the reader to Appendix B. Appendix B sets out the proposed (alternative) nutrient management regime.
13. On 30 April 2016, ECan notified the summary of decisions requested.<sup>12</sup> Submission point PC5LWRP-790 identified the alternative nutrient management regime.<sup>13</sup> The summary of decisions cover page identified that further submissions closed on 13 May 2016.
14. The fact that WIC's relief was set out in its original submission, and ECan identified the relief WIC was seeking enabled potentially affected parties to submit on the appropriateness of WIC's relief.
15. Once the summary of decisions requested was released, potentially affected parties had two weeks to submit on original submissions. That is fair and adequate notice of what relief was requested. It is the process set out in the Act.

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<sup>11</sup> Canterbury Regional Council, Plan Change 5 s 32 Report. See, for example, page 13-9.

<sup>12</sup> see

[http://ecan.govt.nz/publications/Plans/Plan\\_Change\\_5\\_Summary\\_of\\_Decisions\\_Requested.pdf](http://ecan.govt.nz/publications/Plans/Plan_Change_5_Summary_of_Decisions_Requested.pdf)

<sup>13</sup> *Ibid* at 236.

16. Further to that the proposed alternative framework promoted by WIC is generally less restrictive than the notified provisions, this minimises any potential unfairness to any directly affected parties.

#### *Conclusion*

17. WIC's relief directly addresses matters raised in the s 32 report. PC5 proposes a resource management regime change for nutrients throughout the region. WIC's relief seeks an alternative management regime for the Lower Waitaki. Its relief is directly connected to the plan change.
18. WIC's relief was identified in its original submission. Its relief was further identified through ECan's summary of decisions requested document. Once ECan's document was published potentially affected parties had almost 2 weeks to comment on the appropriateness of WIC's relief. There has been no procedural unfairness resulting from WIC's proposed relief.
19. In relation to WIC's relief, the answers to the questions raised in paragraph 3(a) and (b) are both "yes".
20. WIC's relief is "on" the plan change and within scope. The panel has jurisdiction to grant the relief sought by WIC.

#### **Evidence error**

21. Nat Small noticed a minor error in his evidence following the hearing. Reference to 'Morton Stream' at paragraph 11 should have been 'Gorman Stream'.

#### **Closing Comments**

22. As will have been apparent from the hearing, WIC's members and associated parties are extremely passionate and concerned about PC5 and the impact it will have going forward. Regulatory processes applying to their catchment have been ongoing for a considerable period of time. These processes have required significant investment, both in terms of time and money, to participate in. They have also led to considerable changes in how WIC members go about their day-to-day business in

order to meet the expectations of the Council and the wider community with respect to efficient water use and water quality.

23. WIC's members do not begrudge those changes. They recognise that they have been necessary to ensure that their activities do not have adverse environmental effects. The benefits of those existing measures can be seen in the state of water quality within the Lower Waitaki which is generally good despite the considerable land development that has taken place over many years.
24. It is WIC's view that a further resource consent process is not necessary or appropriate within the Valley and Tributaries, Hakataramea Flat Zone and Whitney's Creek where water quality is good and land development is largely complete. Where there is some land development still to occur, the level of development will easily fall within the catchment load limit for the relevant areas.
25. This is a critical point. ECAN have calculated the nutrient loads for the catchment in order to protect water quality. Where catchment activities are controlled through existing mechanisms, anticipated land development can occur within catchment loads and water quality is good no further regulatory intervention is necessary to achieve the objectives. It is submitted that the purpose of the Act is better served by enabling land use activities and doing so efficiently by allowing them to occur as permitted activities.
26. Where water quality is poor or there is a risk of land development leading to nutrient enrichment that may adversely affect the life supporting capacity of water, greater regulatory intervention is the more appropriate method to achieve the objectives.
27. Either way, whatever mechanism the commission recommends it must be as simple as possible. As highlighted by the flow charts provided by Ms Soal the proposed PC5 framework is extraordinarily complex. It will require the vast majority of land users within the entire Canterbury Region to obtain resource consent to continue to operate their farms.
28. For those within the Valley and Tributaries, Hakataramea Flat Zone and Whitney's Creek the resource consent process is unlikely to require any

changes to their operations given the existing obligations they must meet. This begs the question, what is the point? You also have to ask how on earth the Council will deal with the flood of consent applications that will be required? Particularly considering that all of these consents will need to be applied for within 6 months of the Plan becoming operative.

29. Evidence was presented from numerous farmers within the catchment about the steps that they already take to manage their land use activities in accordance with GMP. Evidence was also presented from a number of irrigators which outlined the Farm Management Plan audit process. It is clear from that evidence that the framework already exists and creates a virtuous circle of continuing improvement. Farming to a consented N loss number will tend to disincentivise people pushing the envelope to improve on the status quo. They simply won't have to in order to achieve compliance.
30. At the heart of this is a difference between a framework that manages nutrient losses (through FMP's and audit processes) and one that caps nutrient losses at a specific level. The former recognises the variability and complexity of farm systems but requires all decisions to be made through a lens of environmental performance. Accountability for this is achieved through the FMP audit process. The latter boils everything down to a magic number which can enable farmers to avoid or miss opportunities to employ techniques that will improve nutrient performance but which may not be accounted for in the N loss measure (Overseer).
31. It is submitted that overlaying a further consenting process in catchments that display good water quality is not appropriate. It runs contrary to the enabling nature of the Act with respect to land use activities and is not efficient or effective.
32. Within the Freshwater Management Units that have poor water quality, or potential exists for intensification beyond the nutrient load limits some regulatory intervention is justified. However, this can be achieved more simply whilst retaining effectiveness. WIC's proposed rule framework

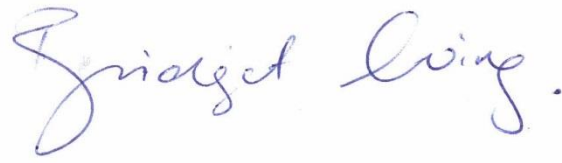
strikes this balance more effectively than PC5 and therefore better achieves sustainable management.

33. Attached to these submissions is a revised set of provisions that reflect the amendments made by Ms Taylor and following questions from the Panel.
34. With respect to Policy 15B.4.16, it is WIC's position that the inclusion of this whole policy is appropriate in the context of WIC's proposed framework. However, the details regarding a consent term of 15 years is not appropriate as part of the notified PC5 framework where considerably more consents will be required and in catchments where water quality is good. Requiring renewal of consents every 15 years in such catchments will create a significant regulatory cost and high degree of operational uncertainty for land users. Such uncertainty will likely stifle capital investment in infrastructure resulting in inefficiencies in the use of the land and in the regulatory process.
35. The inclusion of the review condition is appropriate either way although of questionable utility given that the power to include such conditions is provided for in the Act.

### **Site Visit**

36. Mr Sutton would once again like to extend an invitation to the panel to carry out a site visit at his property. As will have been apparent from the hearing the farming community represented by WIC are anxious to ensure that their concerns are fully understood. There remain concerns that this has not yet been achieved. It is difficult to articulate the complexity of day to day farming operations and decision making in written evidence. The PC5 process is also a forum that many farmers are uncomfortable with. WIC's members and Mr Sutton in particular, believe that this challenge could be overcome by the Commissioners having the benefit of a more detailed site visit to assist in understanding the 'on the ground' implications of the existing framework and that which is proposed.



A handwritten signature in blue ink that reads "Bridget Irving." The signature is written in a cursive style.

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**B Irving**

Counsel for Waitaki Irrigators Collective Limited

Dated: 15 September 2016.