IN THE HIGH COURT OF NEW ZEALAND

CHRISTCHURCH REGISTRY **CIV-2015-**

IN THE MATTER	of an appeal under section 299 and Clause 14, First Schedule of the Resource Management Act 1991
BETWEEN	**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED,** an incorporated society having its registered office at Level 1, 90 Ghuznee Street, Wellington *Appellant*
AND	**CANTERBURY REGIONAL COUNCIL,** a regional authority under Schedule 2 of the Local Government Act 2002 *Respondent*

NOTICE OF APPEAL

2 June 2015

Royal Forest and Bird Protection Society of New Zealand Inc.
PO Box 2516
Christchurch 8140
Ph 03 9405524
Solicitor acting: Peter Anderson/Sally Gepp

To: **The Registrar of the High Court at Christchurch**

And to: **Canterbury Regional Council**

TAKE NOTICE that the Royal Forest and Bird Protection Society of New Zealand Incorporated (the Appellant) will appeal to the High Court against the decisions of the Canterbury Regional Council (the Respondent) into Variation 1 to the Canterbury Land and Water Regional Plan dated 9 May 2014, upon the grounds that the decisions are wrong in law.

DECISIONS OR PARTS OF DECISIONS APPEALED AGAINST

1. Variation 1 inserts regional plan provisions that are specific to the Selwyn Te Waihora catchment (or sub-region) of Canterbury into the existing region-wide Proposed Canterbury Land and Water Plan.

2. The Appellant appeals against decisions on Variation 1 of the Canterbury Land and Water Regional Plan. The decisions were adopted by the Respondent on recommendations made by the Independent Commissioners appointed by the Respondent (the Commissioners).

ERRORS OF LAW

First error of law – Scope

3. The Appellant was a submitter on Variation 1. The Appellant sought changes to water quality limits and loads proposed in the notified version of Variation 1. The Commissioners declined to consider the changes sought by the Appellant, because they held that the changes were beyond the scope of the Council's jurisdiction.

4. The Commissioners erred when they concluded[1] that the changes sought by the Appellant were beyond the scope of the Council's jurisdiction, in that the Commissioners:

    (a) Applied the wrong legal test, specifically that clear notice of proposed amendments must be given within a primary submission,[2] when the correct test was whether or not the relief sought was fairly and reasonably within the scope of submissions;

[1] [250]
[2] [250]

(b) Conflated the test for whether a submission is "on" a variation, with the test for whether relief sought at hearing was fairly and reasonably raised in the submission.

(c) As a result, in deciding that the relief sought at hearing was not fairly and reasonably raised in the submission, took in account an irrelevant consideration, specifically the Commissioners' view that the relief sought would be likely to have adverse economic effects and reduce economic growth, and that there would be disadvantage to other people who might have submitted.[3]

Second error of law – Existing water quality / Existing environment

5. The Commissioners erred in concluding that existing water quality and/or the existing environment in the Selwyn Te Waihora sub-region included the additional nitrogen load attributable to unimplemented consents granted for the Central Plains Water Enhancement Scheme (CPW).[4]

Third error of law – Reliance on a future plan change not referred to in Variation 1

6. When concluding that Variation 1 gave effect to Objective A2 of the National Policy for Freshwater Management 2014, the Commissioners took into account an irrelevant consideration, specifically, a plan change the Commissioners said was envisaged by Table (j).

Fourth error of law: Giving effect to the National Policy for Freshwater Management 2014

7. The Commissioners failed to give effect to the National Policy for Freshwater Management 2014 by failing to ensure that Policy 11.4(1) as amended by their decision would, together with other objectives, policies, rules and methods, improve water quality in an over allocated catchment.

Fifth error of law: Limits set without reference to freshwater objectives

8. In setting limits and targets in section 11.7.3, the Commissioners applied the wrong legal test and failed to have regard to a relevant consideration, specifically that limits and targets should be determined with reference to the maximum amount of

[3] [249]
[4] [415]

resource use available, which allows a freshwater objective (environmental outcome) to be met.

Sixth error of law: Failing to consider section 70

9. The Commissioners failed to take into account a relevant consideration when they did not satisfy themselves that none of the effects in section 70(c)-(g) of the Resource Management Act 1991 were likely to arise when approving the permitted activities in Variation 1 to which section 70 (1)(a) and (b) apply.

Seventh error of law – Section 15(1)

10. When approving Rules 11.5.15 and 11.5.15A of Variation 1, the Commissioners applied the wrong legal test by using section 15(1) to require irrigation schemes to obtain resource consents for discharges of nitrogen and phosphorous, when such activities are not regulated by section 15(1).

Eighth error of law – Giving effect to the New Zealand Coastal Policy Statement and National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990

11. The Commissioners reached a conclusion that was not available to them when they concluded that Variation 1:

    a. gave effect to Policy 21 of the New Zealand Coastal Policy Statement (the coastal policy statement); and

    b. was not inconsistent with the National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990 (the water conservation order).

QUESTIONS OF LAW

12. The questions of law to be resolved are:

    (a) Did the Commissioners have jurisdiction to make the changes sought by the Appellant at the hearing?

    (b) How should the Commissioners have treated the nitrogen load attributable to the Central Plains Water Enhancement Scheme when determining existing water quality for the purposes of the National Policy for Freshwater Management 2014 and/or the existing environment?

(c) Was it permissible for the Commissioners to rely on a plan change in 2022 to assist in giving effect to Objective A2 of the National Policy for Freshwater Management 2014?

(d) Did the Commissioners err when they purported to rely on a plan change in 2022 that they said would reduce the losses allowable from CPW farms and was envisaged by Table (j), when neither Table (j) nor Variation 1 make reference to such a plan change?

(e) Does Policy 11.4(1) as amended by the Commissioners, together with the objectives, policies, rules and methods in Variation 1 give effect to the requirement in Objective A2 of the National Policy for Freshwater Management 2014 to improve water quality in an over allocated catchment.

(f) Were the Commissioners required to set limits and targets in Variation 1 with reference to the maximum amount of resource use available, which allows a freshwater objective to be met? If so, did they err in failing to set the limits and targets in that manner?

(g) Did the Commissioners err when they failed to satisfy themselves that none of the effects in section 70(c)-(g) were likely to arise when approving the permitted activities in Variation 1 to which section 70(1)(a) and (b) apply?

(h) Is the deposition of cow faeces and urine to land in circumstances where contaminants from the cow faeces and urine may enter water regulated by section 15(1) of the Resource Management Act 1991?

(i) Was the Commissioners' conclusion that Variation 1 gave effect to Objective 1 and Policies 11 and 21 of the coastal policy statement as required by section 67(3)(a) of the Resource Management Act 1991 available to them?

(j) Was the Commissioners decision that Variation 1 was not inconsistent with the water conservation order, as required by section 67(4)(a) of the Resource Management Act 1991 available to them?

GROUNDS OF APPEAL

13. Variation 1 is a variation to the Proposed Canterbury Land and Water Plan. Variation 1 relates to water management, including the management of nitrogen,

within the Selwyn te Waihora sub-region. Nitrogen is a contaminant which, in elevated quantities, causes adverse effects on water quality and aquatic ecology.

14. Variation 1 includes Tables (a)-(l) which contain, among other things, freshwater outcomes, limits and targets (including "limits" and "targets" related to nitrogen) for water quality and water quantity. Tables (a)-(l) are referred to in Section 11.4 Policies, including Policy 11.4(1) and 11.4.17A.

First error of law – Scope

15. The Appellant and other parties made submissions on Variation 1, including on the targets and limits. The complex nature of the material and the relatively short submission period meant that many submitters were unable to fully assess the appropriateness of the limits and targets, and lodged submissions that were general in nature and, while clearly referring to the limits and targets, did not propose exact changes to the limits and targets. [5]

16. At the hearing, the Appellant and the North Canterbury Fish & Game Council put forward in evidence a schedule of amendments to the limits and targets in Tables (c) to (k) that they were jointly seeking.These are summarised at [246] of the decision.

[5] Relevant parts of the Forest & Bird submission stated:
11.4.6-11.4.11 Support in part.
These policies rely on targets and limits for nitrogen as set out in Table 11 (i) to improve water quality with the target to be met no later than 2037.
Forest and Bird considers that there needs to be an assurance that Council is able to monitor how these targets are tracking with provision for review during the life of the Plan with an ability to take appropriate action to ensure the target will be met by 2037. As it stands the community has no such assurance or indeed any real knowledge as to whether or not the targets will properly sustain the water bodies, meet the reasonably foreseeable needs of future generations and safe guards the life supporting capacity of water and ecosystems. The public is being asked in a sense to 'have faith' in targets that may or may not be able to be met particularly when the lag effect is at this point unknown.
***Relief sought** - Amend Polices 11.4.6-11.4.11 and add a sentence to end of each policy to read <u>these limits will be reviewed within 5 years</u> or words similar and amend Table 11 (i) accordingly.*
11.4.12-11.4.15-Support in part
*Forest and Bird's concerns are similar to those expressed above in relation to Policies 11.4.6-11.4.11. It is appreciated that the intent of the Policies are an effort to reduce the discharges of nitrogen and phosphorous along with sediment and microbial contaminants within the Catchment but again there seems to be no mechanisms to review and take appropriate action if it is the case reductions are not on track or the extent of the reductions as proposed are appropriate as new knowledge comes to hand. For example in relation to policy **11.4.15** it should not be the case that at 2022 it emerges that the reductions are unable to be achieved. Such non compliance should be signalled well before 2022.*
Relief sought
<u>Provide for a review of the achievement and efficacy of the proposed reduction targets and nitrogen baseline within five years</u> or words to that effect.
Tables (c) to (k)
Forest & Bird would like to reserve its position on the data contained within the Tables until it has had time to consider them in some detail and seek advice on the extent to which it can rely on them protecting the significant natural values within the Catchment."

17. The Respondent had jurisdiction to make any changes to the notified version of Variation 1 where those changes were:

    (a) on Variation 1; and

    (b) fairly and reasonably within the scope of submissions.

18. The Courts have considered both of these as separate matters.

19. The Commissioners do not make a finding about whether the relief sought by the Appellant was "on" the variation, however there can be no question that it was.

20. However, in determining that the relief sought by the Appellant was not fairly and reasonably raised within the Appellant's submission, the Commissioners:

    (a) applied the wrong legal test, specifically that the Appellant was required to demonstrate that a primary submission gave clear notice of proposed amendments within the primary submission, when the correct test was whether or not the relief sought was fairly and reasonably within the scope of submissions.

    (b) took into account their view that the relief sought by the Appellant would be likely to have adverse economic effects and to reduce economic growth, and the disadvantage to people whose businesses might be adversely affected by the relief sought by the Appellant.[6] In doing so, the Commissioners took into account an irrelevant consideration (that consideration being relevant to whether a submission is "on" a variation, and not to whether relief sought is within the scope of submissions).

Second error of law – Existing water quality / existing environment

21. The Commissioners accepted that the Selwyn te Waihora sub region is overallocated in terms of water quality (its assimilative capacity is exceeded).[7]

22. The Central Plains Water Enhancement Scheme (CPW) is an irrigation scheme within the Selwyn te Waihora sub region. The Respondent has issued a number of consents relating to CPW including for the take and use of water for irrigation

[6] [249]
[7] [419] –[420]

purposes. The water consents contain a condition requiring that the consents are varied to ensure they are consistent with Variation 1.[8]

23. No consent has been issued for the use of land or the discharge of contaminants (cow faeces and urine) to land in circumstances where it may enter water, where the use and discharge are associated with irrigation by CPW.

24. Construction work has begun on CPW, but irrigation has not commenced.

25. Variation 1 contains provisions specific to irrigation schemes. Rule 11.5.15 provides that discharge consent is required for irrigation schemes within the Selwyn te Waihora catchment.[9] The activity status is discretionary if the irrigation scheme complies with the load limit in Table (j). If it does not comply with this load limit, consent is required under Rule 11.5.15A as a non-complying activity.

26. Those sub regional rules prevail over regional rules in the Proposed Canterbury Land and Water Plan.[10]

27. The Commissioners considered the status of the unimplemented resource consents granted to CPW. The Commissioners applied the Court of Appeal decision in *Queenstown Lakes DC v Hawthorn*[11] and concluded that CPW had all the core consents that it needed and could be considered part of the existing environment.[12] Consequently, the Commissioners provided a nitrogen allocation for CPW in Table (j).

28. Notwithstanding the conclusion that CPW formed part of the existing environment, the Commissioners identified that there would be an "*over-allocation occasioned by the CPW farms*".[13] The Commissioners considered that this over-allocation was the "*inevitable result of the CPW irrigation scheme being a fully consented scheme that now forms part of the background environment*".[14]

[8] Condition 35 of C14C 154702 CRC061973 provides "*Within 6 months of a regional plan becoming operative that provides catchment wide NDA within the area to which the scheme supplies water, the consent holder shall apply to vary the conditions of consent that relate to nutrient discharges in a way that is consistent with the catchment wide NDA that are defined in the regional plan.*
[9] Rules 11.5.14 and 11.5.15
[10] Index to Rules , page 26
[11] [2006] NZRMA 424 (CA).
[12] Paragraph 410
[13] Paragraph 695
[14] Paragraph 695

29. The Commissioners erred, because future nitrogen losses attributable to CPW do not form part of the existing environment in circumstances where:

    (a) CPW does not have all the consents necessary. Resource consent for the discharge of contaminants is needed under Rule 11.5.15 or Rule 11.5.15A.

    (b) The Commissioners were considering planning provisions, including establishing limits that would determine how CPW could effect the existing environment. The Commissioners erred in applying *Hawthorn* in these circumstances.

    (c) The CPW consents contain a condition requiring that the consents are varied to ensure they are consistent with Variation 1.[15] *Hawthorn* is distinguishable where activities which might otherwise form part of the existing environment are authorised by resource consents that are required to be varied such that they are consistent with the plan which is under consideration.

    (d) The conclusion that the allocation to CPW could be reduced through a 2022 plan change is inconsistent with the finding that CPW forms part of the existing environment.

30. Accordingly, the future nitrogen losses attributable to CPW do not inevitably result in Variation 1 needing to provide for additional over-allocation in an over-allocated catchment, contrary to Objective A2(c) of the National Policy Statement for Freshwater Management 2014. The Commissioners erred in failing to give effect to Objective A2(c) of the National Policy Statement for Freshwater Management 2014.

Third error of law – Reliance on a future plan change

31. Section 63 of the Resource Management Act requires that Variation 1 give effect to the National Policy Statement for Freshwater Management 2014.

[15] Condition 35 of C14C 154702 CRC061973 provides "*Within 6 months of a regional plan becoming operative that provides catchment wide NDA within the area to which the scheme supplies water, the consent holder shall apply to vary the conditions of consent that relate to nutrient discharges in a way that is consistent with the catchment wide NDA that are defined in the regional plan.*

32. Objective A2(c) of the National Policy Statement for Freshwater Management 2014 requires regional councils to ensure the overall quality of fresh water within a region is maintained or improved while improving the quality of fresh water in water bodies that are over-allocated.

33. The Commissioners accepted that the Selwyn Te Waihora catchment was overallocated and that the quality of the degraded water needed to be improved.[16]

34. The Commissioners concluded that Variation 1 provided for an improvement in water quality. As noted above, they identified an "*over-allocation occasioned by the CPW farms*"[17] and considered this was the "*inevitable result of the CPW irrigation scheme being a fully consented scheme that now forms part of the background environment".*[18] The Commissioners held that the phasing out of this over-allocation would be assisted by a 2022 plan change envisaged by Table (j) which would reduce the losses allowable from CPW farms.[19]

35. In doing so, the Commissioners took into account irrelevant considerations because:

    (a) They could not properly rely on a plan change in 2022 as a method to assist in avoiding over-allocation, as they had no control over the whether such a plan change would be notified, and if so, what the contents of the plan change would be.

    (b) Neither Table (j) nor Variation 1 contains any reference to a plan change in 2022 that would provide for a lower loss limit for CPW farms.

Fourth error of law: Giving effect to the National Policy Statement on Freshwater Management 2014

36. The relief sought by the Appellant included more stringent targets and limits than those in the notified version of Variation 1. The Commissioners concluded that they did not have jurisdiction to grant the relief sought, and so did not consider

[16] *[419] and [420]*
[17] Paragraph 695
[18] Paragraph 695
[19] Also, Table 11(j) envisages a lower allowable loss limit for that CPW-supplied land being set for 2022 by way of plan change. That 2022 loss limit would assist with phasing out the over-allocation specifically occasioned by the CPW farms.

the merits of the targets and limits sought by the Appellant. The first error of law challenges this jurisdictional finding.

37. Leaving aside jurisdiction, the Appellant says that the Respondent erred in the consideration of whether Variation 1 would give effect to the National Policy Statement for Freshwater Management 2014, Objective 2 of which provides:

> *The overall quality of fresh water within a region is maintained or improved while:*
>
> *a) protecting the significant values of outstanding freshwater bodies;*
>
> *b) protecting the significant values of wetlands; and*
>
> *c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.*

38. The Commissioners concluded that the catchment was over-allocated from a water quality perspective and that "*by Objective A2(c) of the NPSFM 2014, the quality of the degraded water that has led to that over-allocation has to be improved."*[20]

39. Despite this conclusion, the Commissioners made a number of changes to Policy 11.4.14 that mean that this policy, which was clear and unambiguous in the notified version of Variation 1, is now so uncertain that it does not give effect to the NPSFM.

40. Variation 1 provides that some farms that currently have nitrogen losses of *less than* 15kg/hectare/year of nitrogen can intensify as a permitted activity under Rules 11.5.7 and 11.5.8. This intensification is predicted to result in an increase in nitrogen losses modelled at 520 tonnes per year.[21]

41. In order to achieve an improvement in water quality, the notified version of Variation 1 included a policy that farms with current nitrogen losses of *more than* 15kg/hectare/year have to reduce their nitrogen losses. This was set out in notified Policy 11.4.14 as follows:

[20] Paragraph 420
[21] Table 1, Evidence of Shirley Hayward,

11.4.14 From 1 January 2022, to achieve the water quality limits in Section 11.7.3 require farming activities to:

(a) Implement a Farm Environment Plan prepared in accordance with Schedule 7 Part A, where a property is greater than 20 hectares; and

(b) Where a property's nitrogen loss calculation is greater than 15 kg of nitrogen per hectare per annum, make the following further percentage reduction in nitrogen loss rates, beyond those set out in Policy 11.4.13(b), to achieve the catchment target for farming activities in Table 11(i):

(i) 30% for dairy;

(ii) 22% for dairy support; or

(iii) 20% for pigs; or

(iv) 13% for irrigated sheep, beef or deer; or

(v) 10% for dryland sheep and beef; or

(vi) 7% for arable; or

(vii) 5% for fruit, viticulture or vegetables; or

(viii) 0%for any other land use.

42. The reductions in losses under this policy were modelled at 653 tonnes of nitrogen from the catchment per year.[22] These reductions are to be achieved through rules which require resource consents to be obtained for farming activities which result in nitrogen losses greater than 15kg/hectare/year.[23] The assessment of applications for consents under these rules will include an assessment as to whether the reductions in nitrogen losses anticipated by Policy 11.4.14(1) are achieved and the imposition of conditions to secure that outcome.

43. Excluding the additional nitrogen allocated to CPW, the policy framework in the notified version of Variation 1 provided for a overall nitrogen reduction of 133 tonnes per year (520 tonne increase less the 653 tonne reduction).

[22] Table 1, Evidence of Shirley Hayward
[23] Rule 11.5.9

44. The Commissioners made number of changes to Policy 11.4.14, such that it now provides:

> *11.4.14 (1) ~~From 1 January 2022~~, Assist with achieving ~~achieve~~ the water quality limits in Section 11.7.3, being a 14% reduction in nitrogen losses across the catchment beyond those that could be reasonably anticipated by adopting good management practices, by 1 January 2022 by requiring farming activities to:*
>
> *(a) Implement a Farm Environment Plan prepared in accordance with Schedule 7 Part A, where a property is greater than 10 ~~20~~hectares ~~in area~~; and*
>
> *(b) Where a property's nitrogen loss calculation is greater than 15 kg of nitrogen per hectare per annum, further reduce losses of nitrogen by implementing management practices that are at least half-way between good management practice and maximum feasible mitigation, which means the required reduction in the losses of nitrogen for each farming sector are likely to be in the order of: ~~make the following further percentage reduction in nitrogen loss rates, beyond those set out in Policy 11.4.13(b), to achieve the catchment target for farming activities in Table 11(i):~~*
>
> *(i) 30% for dairy; or*
>
> *(ii) 22% for dairy support; or*
>
> *(iii) 20% for pigs; or*
>
> *(iv) 5% ~~13%~~ for irrigated sheep, beef or deer; or*
>
> *(v) 2% ~~10%~~ for dryland sheep and beef; or*
>
> *(vi) 7% for arable; or*
>
> *(vii) 5% for fruit, viticulture or vegetables; or*
>
> *(viii) 0% for any other land use.*

45. The Commissioners have removed the clear and unambiguous requirement to achieve certain and identified reductions in nitrogen losses for identified land

uses and replaced it with a policy that is so uncertain that it is not possible to determine what nitrogen losses are required or whether the losses required to achieve an improvement in water quality will be reached.

46. The uncertainties arise because:

    (c) Good management practise is not defined;

    (d) Maximum feasible mitigation is not defined;

    (e) The amount of the required reduction is unclear, except that is *"at least halfway"* between good management practise and maximum feasible mitigation;

    (f) The requirement to make reductions *"in the order"* of 14% for each farming sector is imprecise and uncertain;

    (g) The reductions required for irrigated sheep, beef or deer and dryland sheep and beef have been reduced.

    (h) The meaning of farming sector is ambiguous, as it is uncertain if this is to be applied on a farm wide or farming sector wide basis.

47. As a result of the changes made by the Commissioners, Policy 11.4.1 is so uncertain that does not give effect to a requirement to improve water quality that has been degraded by human activities to the point that it is overallocated.

Fifth error of law – Limits and targets set without reference to environmental outcomes

48. The National Policy Statement for Freshwater Management 2014 contains the following definitions:

    "Freshwater objective" *describes an intended environmental outcome in a freshwater management unit.*

    "Limit" *is the maximum amount of resource use available, which allows a freshwater objective to be met.*

    "Target" *is a limit which must be met at a defined time in the future. This meaning only applies in the context of over-allocation.*

49. Section 11.6 sets out the freshwater outcomes for the Selwyn te Waihora sub region.

50. Table (i) and (j) contain limits and targets. These limits and targets have not been established as the maximum amount of resource use available which allows the freshwater outcomes in the plan, as set out in Section 11.6, to be met.

51. In setting limits and targets that are not the maximum amount of resource use available which allows a freshwater objective to be met, the Commissioners applied the wrong legal test and failed to have regard to a relevant consideration, specifically that limits and targets should be determined as the maximum amount of resource use available, which allows a freshwater objective[24] to be met.

Sixth error of law: Failing to consider section 70

52. Section 70 required the Commissioners, before including rules permitting certain discharge in Variation 1,[25] to satisfy to themselves that the effects set out in section 70(1)(c)-(g), were not likely to arise.

53. At the hearing the Appellant submitted that Variation 1 was inconsistent with section 70.[26] The Commissioners acknowledged that section 70 was applicable.[27]

54. However, aside from acknowledging that section 70 was applicable, the Commissioners made no further reference to section 70. As a result, the Commissioners did not did not satisfy themselves that none of the effects in section 70(c)-(g) were likely to arise when approving the permitted activities in Variation 1 to which section 70 (1)(a) and (b) apply. In doing so the Commissioners failed to have regard to a relevant consideration.

Seventh error of law –Section 15(1)

55. As set out below, the Appellant has instructions to file an application for a declaration that cows depositing faeces and urine on land is regulated by section 15(1) such that irrigation schemes and farmers are responsible for the deposition of faeces and urine from cows which occur within their irrigation schemes and farms as a discharge of contaminants to land in circumstances where it may enter water. The seventh error of law is alternative relief if the declaration is not granted.

[24] In this case these are set in Section 11.6
[25] Set out in section 70(1)(a)-(b)
[26] Paragraphs 103-107
[27] [78]

56. Variation 1 regulates diffuse nutrient discharges to land, and from land to water, from farming land uses associated with irrigation schemes through discharge permits under section 15(1).

57. In a recent case in the Environment Court (*P&E Ltd v Canterbury Regional Council*) the Environment Court called for submissions on whether or not the discharge of cows' faeces and urine to land was regulated by section 15(1).

58. P&E Ltd (the applicant in that case) and Canterbury Regional Council argued that they were not; that is, that when cows deposit faeces and urine onto land (and when nutrients from such deposits make their way into water), this is not a "discharge" for section 15(1) purposes. There is High Court authority which potentially supports that position. [28]

59. The Appellant argued before the Environment Court that such discharges are covered by section 15(1). The Appellant maintains that view.

60. The Environment Court has yet to issue a decision. If the Environment Court accepts the submissions put forward by P&E Ltd, this could result in Rules 11.5.15 and 11.5.15A being ineffective, as they purport to require a resource consent under section 15(1), when no consent is required under this section.

61. Counsel for the Appellant and Respondent have:

    (a) brought this issue to the Environment Court's attention;

    (b) advised that declaratory proceedings regarding this issue are proposed in the High Court; and

    (c) advised that the Environment Court may not need to make a decision on the issue in the circumstances.

62. It is anticipated that the declaratory proceedings will be lodged shortly. If declaration is not granted, the Commissioners erred in regulating irrigation schemes under section 15(1), when section 15(1) does not provide for such regulation.

[28] *Awarua Farm Marlborough Ltd* v *Marlborough District Council* CIV-2014-406-23

Eighth error of law – New Zealand Coastal Policy Statement and National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990

63. Te Waihora/Lake Ellesmere is within the coastal environment.

64. Section 63 requires that Variation 1 give effect to the New Zealand Coastal Policy Statement (the coastal policy statement). Objective 1 and Policies 11 and 21 of the coastal policy statement are relevant to Variation 1.

65. Section 67(4)(a) requires that a regional plan not be inconsistent with a water conservation order. The National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990 (the water conservation order) provides that:

> ***3 Outstanding features***
>
> *It is hereby declared that Te Waihora/Lake Ellesmere has or contributes to the following outstanding amenity or intrinsic values which warrant protection:*
>
> - *habitat for wildlife, indigenous wetland vegetation and fish; and*
> - *significance in accordance with tikanga Māori in respect of Ngāi Tahu history, mahinga kai and customary fisheries.*

66. The Appellant called expert ecological evidence from Mr Brett Stansfield which addressed the coastal policy statement and the water conservation order.

67. Mr Stansfield's evidence was Variation 1 would not give effect to Objective 1, Policy 11 and 21 of the NZCPS and would not protect the outstanding features of te Waihora / Lake Ellesmere. Other than Mr Stansfield, there was no expert ecological evidence on these matters.

68. In reliance on Mr Stansfield's evidence, and the absence of any other evidence addressing those matters, the Appellant submitted that Variation 1 did not give effect to the coastal policy statement and was inconsistent with the water conservation order.

69. The Commissioners did not accept these submissions, saying:

    (a) with respect to the coastal policy statement, they favoured all the expert evidence, rather than just that provided by called Mr Stansfield. The

Commissioners did not identify the expert evidence that they favoured over Mr Stansfield's;[29]

(b) with respect to the water conservation order, the submission was not substantiated by the evidence received.[30]

70. The Commissioners concluded that Variation 1 gave effect to the coastal policy statement [31] and was consistent with the water conservation order.[32]

71. In doing so the Commissioners reached a conclusion not available on the evidence.

RELIEF SOUGHT

72. The Appellant seeks the following relief:

(a) That the appeal is allowed.

(b) A declaration that the Respondent erred in relation to the questions of law set out in this notice of appeal;

(c) That the Respondent's decisions are quashed;

(d) That the Respondent's is directed to reconsider Variation 1 in light of the High Court's findings on the matters set out above.

(e) The costs of this appeal.

Dated 2 June 2015

Peter Anderson / Sally Gepp
Counsel for the Royal Forest and Bird Protection Society of New Zealand Incorporated

Address for service
M: 0212866992
Email: p.anderson@forestandbird.org.nz
Post: Royal Forest and Bird Protection Society of New Zealand Incorporated
PO Box 2516
Christchurch 8140

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