

BEFORE INDEPENDENT COMMISSIONERS

UNDER the Resource Management Act
1991

IN THE MATTER of Variation 1 to the Proposed
Canterbury Land and Water
Regional Plan

**MEMORANDUM OF COUNSEL FOR THE CANTERBURY REGIONAL
COUNCIL IN RESPONSE TO QUESTIONS**

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Introduction

1. This memorandum addresses the legal questions that arose during the presentation of the section 42A report.

Meaning of "ephemeral water bodies" and "significant"

Ephemeral water bodies

2. Commissioner Solomon asked whether there were any definitions for "ephemeral waterways", and for the word "significant".
3. "Ephemeral water bodies" as used in the NPSFM 2014 is not defined in the RMA, or in the NPSFM 2014.
4. The Courts generally refer to ephemeral waterways or water bodies as water bodies that are intermittent and generally rely on rainfall.
5. For example, in *Waikato Regional Council v Professional Harvesting Systems (NZ) Ltd*¹, in the course of a prosecution under the RMA, the Court explained that one gully was ephemeral, by which it meant "flowing only in rain events" and contrasted this with a gully that was perennial, i.e. "flowing all the time".
6. In *Director-General of Conservation v Ferguson*², the Court accepted that ephemeral wetlands were those "*where the fluctuation of water level is so pronounced that it can lead to complete drying up in summer months or in dry years*".³

Significant

7. Counsel is unaware of caselaw directly considering the meaning of the term "significant" as that word is used in the NPSFM 2011 or the

¹ *Waikato Regional Council v Professional Harvesting Systems (NZ) Ltd* DC Hamilton CRI-2011-075-866, 25 January 2013 at [8]

² *Director-General of Conservation v Ferguson*, EnvC Christchurch C19/06, 23 February 2006,

³ [38]-[45].

NPSFM 2014. However, caselaw on section 6(c) of the RMA, which requires the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna can be of assistance.

8. The leading case on the definition of "significant" in the context of section 6(c) is *Minister of Conservation v Western Bay of Plenty District Council*.⁴ It states:

"[18] Importantly, in determining whether an area of indigenous vegetation or a habitat of indigenous fauna is significant for the purpose of paragraph (c), the area or habitat is not required of itself, or in combination with other areas or habitats, to be nationally important. Neither does its importance have to be regional in character or otherwise exceed the bounds of the planning district. Rather, it is a question of identifying and assessing (with the aid of qualified advice and assistance) those areas or habitats that are significant within the district as to require protection.

[19] "Significant" in its context necessarily imports the notion of informed judgement as to those natural resources of the district that need to be protected. In the case of Western Bays, a factor in coming to that judgment is the extent to which the biodiversity resource of the district has already been diminished. As Dr Clarkson commented:

"Indeed, in parts of the coastal zones the loss is on a par with the districts having greatest loss anywhere in New Zealand including the Canterbury Plains, Waipaoa River Plains (Gisborne), Wairarapa District and the Taranaki ringplain."

[20] Dr Clarkson went on to specify a list of evaluation criteria bearing on the issue of significance, which it will be helpful to record in summary. They comprise: representativeness (concerning the extent of range of genetic and ecological diversity); diversity and pattern (in relation to ecosystems, species and landforms); rarity factors and/or special features; naturalness/intactness; size and shape (affecting the long-term viability of species, communities and ecosystems, and amount of diversity); inherent ecological viability/long-term sustainability; relationship between natural areas and other areas of more modified character (inasmuch as well-buffered areas linked to other natural or semi-natural areas tend to have higher value than unbuffered isolated ones); vulnerability to "threat processes" liable to disturb existing equilibrium; and finally, management input required to maintain or enhance an area's significance (including

⁴ *Minister of Conservation v Western Bay of Plenty District Council* EnvC Auckland A71/2001, 3 August 2001

nature and scale of input or degree of intervention, and degree of restoration potential).

[21] We refrain from characterising the above criteria as definitive or exhaustive for general purposes. But for present purposes they represent a helpful means of guidance in assessing an item's significance."

9. This example of the meaning of significant in the context of section 6(c) illustrates that its meaning requires an informed judgment in context within which the word is used.

Duty to consider discretionary considerations

10. Commissioner Sheppard asked where the public authority has discretion whether to include something in a plan is it then under a duty, as a matter of administrative law, to consider whether to include those matters in the plan?
11. This question arose in the context of section 67(2) and whether or not a regional council has a duty to consider whether to include the matters listed in sub-section (2) in Variation 1.
12. Counsel is unaware of any authority that establishes a duty to consider whether or not to include the matters in section 67(2) in a regional plan.
13. It is submitted that section 67(2) is an enabling provision, which allows are regional plan to include the matters listed in the section.⁵
14. As a principle of administrative law, there is no duty to consider non-mandatory considerations. As was stated in *Body Corporate 970101 v Auckland City Council* by Randerson J:⁶

"[36] It was also submitted for the plaintiff that the Council did not consider whether there were special circumstances requiring

⁵ This is consistent with the equivalent district plan provision, section 75. Caselaw considering the relevant formulations on what need to be included in a district plan do not address or consider a potential duty to consider whether to include these matters, but instead enable these matters to be listed in a plan: *Long Bay-Okura Great Park Soc Inc v North Shore CC* EnvC A078/08

⁶ *Body Corporate 970101 v Auckland City Council* (2000) 6 ELRNZ 195

notification of the application for resource consent under s94(5). It was suggested that the size of the development proposed was a special circumstance which ought to have been taken into account in terms of s94(5). This provision enables a consent authority to require notification where it considers special circumstances exist, even if it has concluded that it need not be notified in terms of subs (1), (2) and (3). Properly construed, subs (5) is an enabling power which the Council may exercise in special circumstances. It is not obliged to give consideration to it. Failure to give consideration to a non-mandatory consideration is not generally a ground for judicial review: Thomas v Attorney-General and Others (CA139/96, 14 August 1997 per Keith J at 9). I do not see this point as having any substance. It is difficult to see how the size of a building which complied with the relevant development controls as to bulk and location could amount to a special circumstance. The District Plan contemplated a building of the scale proposed."

Meeting targets under the NPSFM 2014

15. Commissioner Sheppard asked whether the targets set out in policies needed to be fully implemented by 2025, in accordance with Policy E1(c) of the NPSFM 2014.
16. Policy E1(c) provides that where a regional council is satisfied that it is impracticable for it to complete the implementation of a policy fully by 31 December 2015, the council may implement it by a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2025.
17. This Council has notified a programme of defined time-limited stages, by which all policies of the NPSFM 2014 are to be fully implemented by 31 December 2025.
18. Policy A2 requires the Council to specify targets and implement methods to assist in the improvement of water quality in water bodies, to meet those targets, and within a defined timeframe.
19. On a plain reading of this policy, the Council must only specify targets and implement methods, within a defined timeframe. In other words, a policy must be drafted, which specifies the timeframes in which the targets will be met. The timeframe in which the targets must be met is not specified by the NPSFM 2014 (so the timeframe could be at any point in the future).

20. It is submitted that this interpretation is supported by the preamble to the NPSFM 2014 which acknowledges that:

"Improvements in freshwater quality may take generations depending on the characteristics of each freshwater management unit."

Scope – amendments required for clarity and refinement of detail

21. Commissioner Sheppard asked for a reference to the authority for the proposition that amendments required for clarity and refinement of detail are allowed on the basis that such alternations are considered minor and prejudicial.⁷
22. The Environment Court in *Oyster Bay Developments Ltd v Marlborough District Council*⁸ applied the law as Justice Wylie declared it to be in *General Distributors*⁹ and recognised that alterations to a plan change that would not broaden the plan change beyond the limits of what was originally requested, nor extend it beyond what is reasonably and fairly to be understood from the content of submissions, and not prejudice anyone who failed to lodge a submission on the original request, are within jurisdiction.
23. In that decision, the Environment Court allowed amendments to the plan change that were required for clarity and refinement of detail. These alterations were considered to be minor and unprejudicial.

Scope – Amendment to Schedule 13

24. Commissioner Sheppard asked whether the changes sought by Bowden Environmental Limited to Schedule 13, as discussed at paragraph 13.332 of the section 42A report, were on the Variation.

⁷ Section 42A report, paragraph 7.184.

⁸ *Oyster Bay Developments Limited v Marlborough District Council* EnvC Blenheim C081/2009, 22 September 2009 at [22]-[23] and [46].

⁹ *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC)

25. Variation 1 seeks to add additional requirements to Schedule 13 in respect to the Selwyn Te Waihora catchment in relation to combined groundwater and surface water allocation regimes. Submissions on the proposed additions to Schedule 13 would be considered within the scope of the Variation.
26. Bowden Environmental Limited sought changes to other parts of Schedule 13 by inserting provisions to enable an "effective allocation", an approach adopted by the Council in relation to its Natural Resources Regional Plan.
27. Insofar as the changes sought by Bowden Environmental Limited seek to change the existing parts of Schedule 13 (as opposed to those parts of the Schedule which Variation 1 seeks to insert) it is submitted that they are not on the Variation. As such, it is submitted that those changes are beyond the scope of the Variation.

Scope – Amendment to rule 5.128

28. Commissioner Sheppard asked whether the part of Ngāi Tahu's submission that sought an addition to rule 5.128 was beyond the scope of this Variation.
29. Variation 1 seeks to add a condition to rule 5.128 in respect to the West Melton Special Zone. Submissions on the additional condition would be considered to be within the scope of the Variation.
30. The submission of Ngāi Tahu in relation to the proposed amendment to rule 5.128 is one of support. It is noted in the submission that in the view of Ngāi Tahu the amendment sought should be a condition of being a restricted discretionary activity rather than a matter over which discretion is restricted.
31. There appears to be some confusion on the part of Ngāi Tahu in relation to the proposed additional condition to rule 5.128 because it already does operate as a condition of a restricted discretionary activity rule, rather than a matter over which discretion is restricted.
32. I also note that the relief requested by Ngāi Tahu refers to "Table X" of Section 9.6.2. It is not clear whether "Table X" refers to the existing

table in section 9.6.2 or some other table. This issue would benefit from further clarification from Ngāi Tahu when it gives its submission.

DATED this 19th day of September 2014



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