

Tabled at Hearing 30/09/14

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 question that arose on 19 September 2014 regarding the interplay between section 67 requiring the Council to give effect to higher order directions (in light of the direction in *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited*¹) and the new requirements in section 32 of the RMA. In particular, the new section 32 provisions that require the Council to identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for economic growth that are anticipated to be provided or reduced and employment that are anticipated to be provided or reduced.
2. The question asked was what provision applies to guide a decision maker where the evaluation under section 32 might indicate substantial economic costs in giving effect to directions contained in superior instruments. Is there something somewhere which indicates that one might trump the other, or vice versa?
3. In addition, Counsel was also asked to provide guidance on whether, and the extent to which, decisions on submissions on Variation 1 may be constrained by the Council's duty to avoid the proposed Land and Water Regional Plan ("pLWRP") being inconsistent with the coastal environment plan.

The implications of the Supreme Court decision in *King Salmon*

4. As was set out in the section 42A report, the Council's position regarding the implications of the Supreme Court decision is that an overall judgement approach (which would include economic

¹ *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38.

considerations) cannot be relied on to justify a departure from directive policies in higher order directions.²

5. The Council accepts and acknowledges that Variation 1 is required to give effect to a number of superior instruments, including the National Policy Statement for Freshwater Management 2014 ("NPSFM 2014"), the Regional Policy Statement ("RPS") and the New Zealand Coastal Policy Statement ("NZCPS"). One of the key purposes for Variation 1 was to give effect to the National Policy Statement for Freshwater 2011, in accordance with the Council's staged implementation programme.
6. In my submission Part 2 and section 32 are highly relevant to the overall assessment of the provisions of Variation 1 in *how* they give effect to higher order directions.
7. In my submission the issue is not whether the requirement to give effect to higher order directions in section 67 trumps or overrides the requirements in section 32. But rather the question is of the role of section 32 in how the Council ought to give effect to higher order directions.

NPSFM 2014 and section 32

8. Under section 67(3) of the RMA and the Council's staged implementation programme, the Council is required to give effect to the objectives of the NPSFM 2014, including:

Objective A1

To safeguard:

- a) *the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water; and*
- b) *the health of people and communities, at least as affected by secondary contact with fresh water;*

in sustainably managing the use and development of land, and of discharges of contaminants.

² Paragraph 7.45 of the Section 42A report.

Objective A2

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.*

Objective B1

To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the taking, using, damming, or diverting of fresh water.

Objective B2

To avoid any further over-allocation of fresh water and phase out existing over-allocation.

Objective B3

To improve and maximise the efficient allocation and efficient use of water.

Objective B4

To protect significant values of wetlands and of outstanding freshwater bodies.

9. The directive nature of the wording in the objectives differs. For example the use of the word "avoid" in Objective B2 can be interpreted, in light of *King Salmon*, as not allowing further over-allocation of fresh water.
10. However, the wording in Objectives A1 and A2 is different. For example, Objective A2 requires the overall quality of fresh water within a region to be maintained or improved while protecting the significant values of outstanding freshwater bodies, protecting the significant values of wetlands and improving the quality of freshwater in water bodies that have been degraded by human activities to the point of being over-allocated.
11. While Objective A2 of the NPSFM 2014 requires water quality in over-allocated water bodies to be improved, it does not specify the timeframes in which improvement is to occur.

12. That is where the role of assessing the provisions of Variation 1 under section 32 is relevant.
13. In this case, as Variation 1 is not proposing to change the objectives in the pLWRP, the section 32 assessment must address the extent to which the provisions in Variation 1 are the most appropriate way to achieve the objectives by:
 - a. identifying other reasonably practicable options for achieving the objectives;
 - b. assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - c. summarising the reasons for deciding on the provisions.
14. The efficiency and effectiveness assessment under section 32(2)(a) must identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for economic growth that are anticipated to be provided or reduced; and employment that are anticipated to be provided or reduced.
15. While opportunities for economic growth and employment must be identified under the new section 32 provisions, the question of appropriateness in my submission must still be addressed in the round.
16. While decided under the pre-2013 version of section 32, the High Court decision in *Rational Transport Society Inc v New Zealand Transport Agency*³ provides assistance in terms of the meaning of the phrase "most appropriate" as used in the pre-2013 version of the Act.
17. The Court stated:

"[45] I do not accept the submission by the appellant's counsel that the policy "most appropriate" must be the superior method in terms of stream protection. Section 32 requires a value judgment as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and

³ *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298

there is no need to place any gloss upon that word by incorporating that it be superior. Further, the Freshwater Plan does not only have stream protection as a sole object; its objectives relate to preserving, safeguarding, and protecting identified values (objectives 4.1.4–6) and to avoid, remedying, or mitigating adverse effects (7.1.1).

[46] As to Mr Bennion's argument that s 32(3)(b) mandated that "each objective" had to be the "most appropriate way" to achieve the Act's purpose; that is, it was an error to look at the combined objectives; I do not agree that the Board is to be constrained in that way. It is required to examine each, and every, objective in its process of evaluation – that may, depending on the circumstances result in more than one objective having different, and overlapping, ways of achieving sustainable management of natural and physical resources (the purpose of the Act). But objectives cannot be looked at in isolation, because "the extent" of each may depend upon inter relationships. Provided the Board examined, in its evaluation the extent of each objectives relationship to achieving the purpose of the Act, it complied with s 5(3)."

18. Accordingly, in my submission the provisions of Variation 1 must be assessed in terms of whether they are the most appropriate to achieve the objectives of the pLWRP, but whilst also bearing in mind the requirement to give effect to superior instruments including the NPSFM 2014.
19. If significant impacts are predicted, for example, if the efficiency and effectiveness assessment identifies that opportunities for economic growth and employment are anticipated to be significantly reduced then it may be found that the provisions are not the most appropriate, compared to provisions that require the improvement in water quality to occur over a longer time frame.
20. In other words the section 32 analysis is relevant to how the higher order directions in the superior instruments are given effect to.
21. Timing for improvements in water quality is a clear example where the section 32 analysis of the appropriateness of the provisions will be highly relevant to determining whether the provisions in Variation 1 are the most appropriate in terms of section 32. This is supported by both Policy A2 and the preamble of the NPSFM 2014.

22. Policy A2 requires targets to be met, but within a defined timeframe.⁴ It does not direct the timeframe in which improvements are to occur, and this is a matter for the decision maker to decide, applying section 32 along with the other relevant statutory directions.

23. The preamble to the NPSFM 2014 also supports this approach. It states

"Freshwater planning will require an iterative approach that tests a range of possible objectives and methods for their achievement, including different timeframes for achieving objectives. This is intended to ensure that the implications of proposed objectives are clear for councils and communities.

...

National bottom lines in the national policy statement are not standards that much be achieved immediately. Where freshwater management units are below national bottom lines, they will need to be improved to at least the national bottom lines over time. It is up to communities and iwi to determine the pathway and timeframe for ensuring freshwater management units meet the national bottom lines. Where changes in community behaviour are required, adjustment timeframes should be decided based on the economic effects that result from the speed of change. Improvement in freshwater quality may take generations depending on the characteristics of each freshwater management unit.

24. A similar analysis must be applied for other higher order directions, including those in the New Zealand Coastal Policy Statement 2010 ("NZCPS") and the Canterbury Regional Policy Statement 2013 ("RPS").

Relevance of Part 2

25. In considering the interplay between section 67(3) and section 32, it is submitted that Part 2 of the RMA is also relevant. This is partly because Objective A1 and Objective B1 of the NPSFM 2014 both refer to safeguarding life-supporting capacity, ecosystem processes and indigenous species in *sustainably managing*:

⁴ Although I note that the Council has time staged implementation of this policy.

- a. the use and development of land, and of discharges of contaminants; and
 - b. the taking, using, damming and diverting of fresh water.
26. In my submission, section 5, along with sections 6, 7 and 8, are relevant to how the Council sustainably manages the use and development of land and the taking, using, damming and diverting of fresh water as required by Objective A1 and Objective B1.
27. Accordingly, the provisions of Variation 1 that require improvements in water quality and the reduction in over-allocation must still be considered through the filter of section 5 and Part 2 in terms of how they give effect to the higher order directions in the NPSFM 2014.
28. Part 2 is also relevant as section 66(1) requires regional councils to prepare and change regional plans in accordance with the provisions of section 66(1) (which include the provisions of Part 2), and its obligation to have particular regard to an evaluation report prepared in accordance with section 32, amongst other matters.

Conclusion

29. Overall it is submitted that neither section 32 or section 67(3) trump each other but rather the provisions need to be read and applied together to avoid conflict between the provisions.
30. A plan, such as Variation 1 must be prepared to give effect to higher order directions. Section 32 is then relevant to assessing the provisions of the plan so prepared in terms of whether they are the most appropriate (but not superior) way, in the case of objectives, to achieve the purpose of the Act, and in the case of policies, rules and other methods, to achieve the objectives.

Regional Coastal Environment Plan

31. Counsel has also been asked to provide guidance on whether, and the extent to which, decisions on submissions on Variation 1 may be

constrained by the Council's duty to avoid the pLWRP being inconsistent with the coastal environment plan.

32. Section 67(4)(b) of the Act states that a regional plan must not be inconsistent with any other regional plan for the region. As such, Variation 1 to the pLWRP must not result in a situation where the pLWRP is inconsistent with other regional plans, including the Regional Coastal Environment Plan ("RCEP").
33. Mr McCallum-Clark has prepared a summary setting out the relevant provisions from the RCEP. Of particular relevance are chapters 4, 5 and 6. Particularly relevant policies include Policy 6.2 and Policy 6.3.
34. The phrase "not inconsistent with" has been considered by the Courts as providing greater flexibility than the phrase "give effect to". The following passage from *Clevedon Cares Inc v Manukau City Council* provides useful guidance as to the distinction:⁵

[50] Section 75(3) requires that the Plan Change "must give effect to" the operative Regional Policy Statement. We agree with Mr Allan, that with respect to Section 75(3) of the Act, the change in the test from "not inconsistent with" to "must give effect to" is significant. The former test allowed a degree of neutrality. A plan change that did not offend the superior planning instrument could be acceptable. The current test requires a positive implementation of the superior instrument. As Baragwanath J said in Auckland Regional Council v Rodney District Council:

"This does not seem to prevent the District Plan taking a somewhat different perspective, although insofar as it would be inconsistent, it would be ultra vires. (The 2005 Amendment to Section 75, requiring a District Plan to 'give effect to' national policy statements, NZCPS and

⁵ *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211, at [50].

Regional Policy Statements, now allows less flexibility than its predecessor). ”

35. From these cases, it is submitted that t Variation 1 must not offend against the provisions of the RCEP. A degree of flexibility is acceptable, provided the provisions to be inserted into the pLWRP by Variation 1 are at least neutral in relation to the provisions of the RCEP. Positive implementation of the RCEP provisions is not required.

DATED this 30th day of September 2014



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P A C Maw

Counsel for the Canterbury Regional Council