

BEFORE THE HEARING COMMISSIONERS

UNDER of the Resource Management Act 1991
("the Act")

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

LEGAL SUBMISSIONS FOR HORTICULTURE NEW ZEALAND

17 OCTOBER 2014



ATKINS | HOLM | MAJUREY

Helen Atkins
PO Box 1585
Shortland Street
AUCKLAND 1140

Solicitor on the record
Contact solicitor

Helen Atkins
Helen Atkins

Helen.Atkins@ahjmlaw.com
Helen.Atkins@ahjmlaw.com

(09) 304 0421
(09) 304 0421

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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION AND BACKGROUND

1. The essence of Horticulture New Zealand's submission on Variation 1 ("**Var1**") to the proposed Canterbury Land and Water Plan ("**pLWRP**") was that Var1 was prepared and notified without sufficient assessment of the significant consequences which the provisions of Var1 may have on the economic, social and cultural wellbeing of Canterbury's communities.
2. Specifically, Horticulture New Zealand was concerned that the methods employed by Var1 will have unintended adverse effects on the horticultural sector.
3. Horticulture New Zealand submitted that Var1, or portions of Var1, would better be postponed until sufficient analysis has been completed on the methods and limits employed in the variation. The National Policy Statement on Freshwater Management 2014 ("**NPSFM**") provides for gradual implementation of water quality and water quantity standards, and the time provided by this gradual shift should be properly used to ensure scientifically sound planning.

Update of the position of Horticulture New Zealand since the start of the hearings

4. Horticulture New Zealand has been taking careful note of matters as they have unfolded during the course of the hearings. The matters that have been picked up that have a bearing on Horticulture New Zealand (by no means an exhaustive list) are:
 - (a) The role of Var1 at this stage – namely is it an interim regime on the way to a more permanent one.
 - (b) Does the Council (and the Commissioners) have a duty to act now albeit that the technical and scientific underpinning for Var1 may well be incomplete and/or imperfect.
 - (c) The interrelationship of the NPSFM and the New Zealand Coastal Policy Statement 2010 in a freshwater plan and the implications of the *King Salmon* decision.
 - (d) The definition of the Nitrogen Baseline – specifically whether the baseline is determined by an average of the rates over the 2009-2014 four year period or whether the highest leaching rate in that period will be the baseline.

- (e) The way in which farming enterprises are dealt with in Var1 specifically the interplay between rules 11.5.9 and 11.5.10.
 - (f) Which 'science' the Commissioners should prefer – particularly the question is whether this is a debate about the science at this stage or whether the role of the science is to inform the ongoing work.
- 5. In addition, the witnesses called will correct or elaborate on matters as appropriate when presenting formally to you.
 - 6. Prior to addressing you on the matters listed in paragraph 4 above I cover a few preliminary and contextual matters about the submission of, and evidence presented by, Horticulture New Zealand.

Overview of Horticulture New Zealand

- 7. On behalf of its 5,454 active grower members Horticulture New Zealand takes a detailed involvement in resource management planning processes as part of its National Environmental Policies. Horticulture New Zealand works to raise growers' awareness of the Resource Management Act 1991 ("**RMA**") to ensure effective grower involvement under the Act, whether in the planning process or through resource consent applications. The principles that Horticulture New Zealand considers in assessing the implementation of the RMA include:
 - (a) The effects based purpose of the RMA;
 - (b) Non-regulatory methods should be employed by councils;
 - (c) Regulation should impact fairly on the whole community, make sense in practice, and be developed in full consultation with those affected by it;
 - (d) Early consultation of land users in plan preparation; and
 - (e) Ensuring that RMA plans work in the growers interests both in an environmental and sustainable economic production sense.¹
- 8. Horticulture New Zealand participated at an early stage in developing the Selwyn Waihora plan changes, by encouraging

¹ Horticulture New Zealand, Submission on Proposed Variation 1 to the Canterbury Land and Water Regional Plan.

a group of growers to participate in workshops with the community.²

Evidence

9. Horticulture New Zealand is calling evidence from:
 - (a) **Chris Keenan** - Manager, Natural Resource and Environment with Horticulture New Zealand, who provides background to the submitter's involvement in Var1, gives an overview of various water quality and quantity management regimes, and highlights a number of management concerns raised by the Variation. Mr Keenan also provides a statement of rebuttal in relation to other evidence particularly around the various alternative allocation options explored by others;
 - (b) **Case study evidence** from three growers in the Selwyn-Waihora region regarding what their growing operations are and their concerns over the impact that the proposed regime may have on their operations. These growers are:
 - i. David Hadfield;
 - ii. Jade Gardens (Allen Lim);
 - iii. Andrew Crozier.
 - (c) **Stuart Ford** – agricultural and resource economist, who provides expert analysis of the economic impact of Var1 on the horticulture sector, and reviews the Council's economic evidence;
 - (d) **Vance Hodgson** – planner, who provides an expert planning assessment of the provisions on which Horticulture New Zealand submitted, and reviews the Council's s42A report. Mr Hodgson also provides a statement of rebuttal in relation to other planning statements of evidence;
 - (e) Joint expert evidence from a team of experts at Jacobs (previously Sinclair Knight Merz) who in general terms conclude that the modelling approach used by the Council is not sufficiently reliable to predict the effect of Var1 on achieving the proposed objectives of the plan, or to assess the effects on the plan. These staff are:

² EIC CHRISTOPHER MARTIN KEENAN at paragraph [2.3].

- i. **Nicholas Conland**, Environmental Consultant;
- ii. **Michelle Sands**, Environmental Scientist;
- iii. **Phillip Jordan**, Senior Hydrogeologist;
- iv. **Richard Cresswell**, Senior Hydrogeologist.

These experts also provided a statement of rebuttal and responded to questions of clarification from the Commissioners via a supplementary statement.

10. As previously noted to the Commissioners only Ms Sands from the Jacobs team is present today to answer any Horticulture New Zealand specific technical questions you may have. Jacob's presented their evidence to you on Monday as part of the case for Central Plains Water Limited. It is understood that the Jacobs team corrected a number of errors and undertook to provide a track change version which we have with us today.

A SUMMARY OF THE KEY POINTS FROM THE SUBMISSION AND EVIDENCE OF HORTICULTURE NEW ZEALAND

11. The context of the concerns Horticulture New Zealand had with Var1 at the time of making its submission and still have is that:
 - (a) The purposes of Var1 are contradictory, in that new load limits are set while new irrigation and intensification is provided for;
 - (b) Non-Central Plains Water ("**CPW**") farmers are compromised by opportunity costs, direct effects on capital land value, and reduced land use flexibility;
 - (c) Food production, cultivation, food security, and economic and social well-being values are not appropriately addressed;
 - (d) The s32 evaluation is deficient in respect of economic impacts and the effects of the Good Management Practice Nitrogen and Phosphorus Loss Rates ("**GMPNPLR**");
 - (e) The science and modelling underpinning Var1 are deficient.
12. Since the submission and further submissions were lodged and the evidence exchange process has been worked Horticulture New Zealand has been reviewing its relief and I cover its current position in this section of my submissions.

A new Sub-Regional Policy

13. Horticulture New Zealand sought the inclusion of a new objective in the pLWRP to acknowledge the importance of food production in the sub-region.³ The Section 42A report concludes this would be out of scope, but suggests a new policy could be added to Var1.
14. Horticulture New Zealand supports the inclusion of such a new policy, to implement the region-wide objectives set out in Section 3 of the pLWRP.⁴

Farming Enterprises

15. While there are some interpretation difficulties with the provisions that refer to 'farming enterprise' all parties seem to be in agreement on the purpose of the provisions noting that improvements in wording are needed.
16. While it is accepted that farming enterprises are discretionary activities in the pLWRP Horticulture New Zealand is unclear why full discretion is required for this activity when 'farming activities' are restricted discretionary. Therefore restricted discretionary activity status is sought for farming enterprises (see Rule 11.5.10).
17. For completeness it is noted that the consultation document for the Hinds sub-catchment identifies a farming enterprise as a restricted discretionary activity.⁵ Variation 2 has now been notified (27 September 2014) and a farming enterprise in the Hinds/Hekeao Plains Area is now noted as a discretionary activity.
18. In its submission Horticulture New Zealand sought an amendment to the definition of 'Baseline Land Use' by adding after the word 'property' the words 'or farming enterprise'⁶. Mr Hodgson notes that an alternative to this relief would be to amend Rule 11.5.10 to provide that the use of land for farming

³ Horticulture New Zealand, Submission V1pLWRP – 1384.

⁴ Horticulture New Zealand, Submission V1pLWRP – 1384: "Amend policies, rules and methods consequentially."

⁵ EIC VANCE ANDREW HODGSON at paragraph [8.24].

⁶ Appendix to HODGSON EIC, Page 1 and Horticulture New Zealand, Submission V1pLWRP 1392, 1393.

enterprises be a restricted discretionary activity⁷ as provided in the submissions of Horticulture New Zealand to this Rule.⁸

19. In passing (noting that this was not in the submission relief or noted in Mr Hodgson's evidence) it is very unclear why Rule 11.5.9 refers to a date of 'From January 2017' but Rule 11.5.10 does not. In light of this an alternative to an amendment to Rule 11.5.10 would be to merge it with Rule 11.5.9.

Baseline Land Use and Nitrogen Baseline Definitions

20. As noted in the evidence, the definitions of 'baseline land use' and 'nitrogen baseline' are not workable for the horticultural sector largely due to the rotational nature of horticultural operations.
21. The specific relief sought by Horticulture New Zealand was that variability in approach is provided for to ensure that any assessment of nutrient losses that is intended to be used as a baseline is as accurate as it can be.⁹
22. It is understood that the CPW team (in particular Hamish Lowe) addressed you in detail on this issue and Horticulture New Zealand support the evidence Mr Lowe has given. Ultimately this is an issue of implementation¹⁰ but there does need to be acknowledgment of this in the policy and planning framework to ensure workability even if for an interim period.

Defining Good Management Practice Nitrogen and Phosphorous Loss Rates

23. GMPNPLR is a cornerstone method in Canterbury and is supported by Horticulture New Zealand.
24. The implications of the outcome of the Matrix of Good Management ("MGM") process that will in turn define the GMPNPLR are likely to be significant (see the evidence of Chris Keenan). As already covered by other submitters and in questions of the Regional Council, defining GMPNPLR will be

⁷ Appendix to HODGSON EIC, Page 1

⁸ Appendix to HODGSON EIC, Page 4

⁹ Horticulture New Zealand, Submission V1 pLWRP – 1399.

¹⁰ Noting that ECAN have published an explanatory guide in relation to the definition in the context of the pLWRP - <http://ecan.govt.nz/our-responsibilities/regional-plans/regional-plans-under-development/lwrp/Documents/lwrp-baseline-ga.pdf>

done formally via a plan change to the pLWRP on or before 30 October 2016.¹¹

25. Horticulture New Zealand supports the clear policy signal that there will be a plan change to introduce these good management practices.
26. Due to the potential significance of the changes it is submitted that it is important to be cautious in imposing arbitrary limits and timeframes now when changes are likely over the next two to three years.
27. One mechanism to address this in part is to consider the implication of the timelines in Var1 (addressed below). An additional mechanism is to consider carefully what numbers are included in Var1 particularly in terms of the assessment of the current existing environment nitrogen load is (a point already made at length by CPW). The latter is addressed in relation to the point below regarding Horticulture New Zealand's submission on the tables.

Timelines

28. There are various dates set out in Var1 and these are not repeated here. However, there are two important dates signalling a review of Var1 namely:
 - (a) 31 December 2015 for any programme of time limited stages to be formally adopted and publicly notified by the Council (NPSFM Policy E1 (d)).
 - (b) 30 October 2016 for a plan change to introduce a definition of GMPNPLR (Policy 4.11 pLWRP).
29. A key issue is the deadline of 1 January 2017 where consents for land use activities may be required if the nitrogen baseline is not met. This provides a 2 month period from the time a plan change will be introduced defining GMPNPLR and when the regime comes into effect.
30. Horticulture New Zealand did not specifically seek to amend the 1 January 2017 date (but notes other submitters did). To this end the submitter notes that amending the dates to provide a greater lead in for any plan change and a better analysis of the technical and scientific information underpinning Var1 would meet the concerns of Horticulture New Zealand.

¹¹ Policy 4.11 pLWRP

Transfer of Water Permits

31. In terms of transferability, as noted in the evidence before you, there are a variety of methods available and reasons for transfers in a water allocation framework. Also as noted to you by others (and in the submitter's submission) there is concern around the requirement to surrender 50% of the volume of water taken on transfer.
32. The core issue from the perspective of Horticulture New Zealand is the need to continue to work and assess the success of the nitrogen allocation system over the next few years.
33. Clawbacks are currently proposed to apply from 1 January 2022. It is considered that this provides time to consider the system fully prior to that date. In the interim the submission of Horticulture New Zealand was to delete policy 11.5.37 (4) (which relates to the 50%) at this time.¹²
34. As noted in the rebuttal evidence of Mr Keenan, given the alternative approaches requested for clawback of nutrients by various other parties an alternative approach is proposed. In essence this alternative grandparents some discharges in transition followed by a move to an equal allocation across similar production land over a period of time. In the short term this alternative recognises the legitimate expectations of individuals, and in the long term ensures that similar production land has a similar entitlement, which encourages flexibility.¹³
35. It is acknowledged that there is an issue of scope around this relief but it has been signalled now as part of what is essentially an interim regime as a flag for possible future changes.

Reliability

36. In terms of reliability of water the evidence before you is that there are limited, and in some cases no, alternatives for the horticultural sector. There are two matters of concern:
 - (a) Policy 11.4.30;¹⁴ and
 - (b) The 8.5 out of 10 year reliability for a system with an application efficiency of 80%.¹⁵

¹² Horticulture New Zealand, Submission V1pLWRP – 1417.

¹³ Rebuttal KEENAN paragraph 6.

¹⁴ Horticulture New Zealand, Submission V1pLWRP – 1409.

¹⁵ Horticulture New Zealand, Submissions V1pLWRP – 1406, 1407, 1557.

37. In terms of Policy 11.4.30 Horticulture New Zealand supports the suggested changes set out in the Section 42A report.¹⁶
38. In terms of the 8.5 out of 10 year reliability the submission sought that the 8.5 is replaced by a 9 out of 10 year reliability.¹⁷
39. While it is acknowledged that Var1 contains a package of elements designed to address over-allocation there are large implications for the sector around reliability of supply. One option (that was not specifically covered in the submissions of Horticulture New Zealand but would meet the concern) is if Var1 specifically addressed the issue of crop survival water.¹⁸
40. There is a potential question of scope as the submitter did not specifically request any wording on this matter but as the submitter did request a change from 8.5 to 9 then anything that would meet the underlying concern ought to be able to be considered within scope.

Other matters

41. There are a number of other matters of detail included in the submission and evidence that I do not intend repeating here as they are largely related or consequential to the matters already addressed.
42. I now intend to come back to the matters listed in paragraph 4.

SPECIFIC LEGAL SUBMISSIONS ON MATTERS RAISED IN THE COURSE OF THE HEARING TO DATE

43. To recap on my list, the matters are repeated below. I have indicated where I have already addressed these in my submissions so will only address the remaining ones in this section. In dealing with the interplay between the NZCPS and NPSFM I also cover off the issue of section 32.
44. The matters list is:

Matter	Where considered
The role of Var1 – interim or permanent?	In this section
Does the Council (and the Commissioners) have a duty to	In this section

¹⁶ Variation 1 pLWRP – Section 42A Report paragraph 13.179

¹⁷ Horticulture New Zealand, Submissions V1pLWRP – 1406, 1407, 1557.

¹⁸ HODGSON EIC paragraph 13.12; FORD EIC paragraphs 4.64-4.79.

Matter	Where considered
act now albeit that the technical and scientific underpinning for Var1 may well be incomplete and/or imperfect?	
The interrelationship of the NPSFM and the New Zealand Coastal Policy Statement 2010 in a freshwater plan and the implications of the <i>King Salmon</i> decision.	In this section
The definition of the Nitrogen Baseline.	In paragraphs 20-22 above
The way in which farming enterprises are dealt with in Var1 specifically the interplay between rules 11.5.9 and 11.5.10.	In paragraphs 15-19 above
Which 'science' the Commissioners should prefer – particularly the question is whether this is a debate about the science at this stage, or whether the role of the science is to inform the ongoing work.	In this section

The role of Var1

45. Horticulture New Zealand acknowledges (as Council has noted) that Var1 is but a step on the journey towards an allocation system for Selwyn Waihora. As noted above there are at least two occasions where Var1 will be subject to changes.
46. The interim or transitional nature of Var1 is therefore important to bear in mind when setting any particular limits or timeframes around its implementation now.

Duty to act

47. I understand that the Commissioners have posed a question to a number of submitters along the lines of whether the Council (and the Commissioners) have a duty to act now albeit that the technical and scientific underpinning for Var1 may well be incomplete and/or imperfect.

48. As noted in the evidence in chief of Mr Hodgson¹⁹ it was the submission of Horticulture New Zealand that Var1 be withdrawn pending the improvements needed and completion of the science and technical work.
49. On advice Horticulture New Zealand is no longer pursuing this submission and it acknowledges that Var1 is interim (see points made above) and that the Council and the Commissioners do have a duty to act now (under the NPSFM) to address what issues can be addressed now as part of the process to develop an allocation regime for the catchment over the coming years. In short the process is iterative now and is likely to be so for the foreseeable future.

The interrelationship of the NPSFM and the NZCPS

50. The Commissioners have had advice from a number of Counsel (most particularly Counsel for the Regional Council) in relation to:
 - (a) the legal status of the NPSFM,
 - (b) the implications of the *King Salmon* case, and
 - (c) the interrelationship between the NPSFM and the NZCPS.
51. I do not intend to repeat the submissions that you have already heard and I agree with and adopt the submissions presented to you by Mr Maw. What I have done here is to elaborate on a few matters that were discussed last with Mr Maw on 30 September, notably the interrelationship of the NPSFM and the NZCPS in light of the decision of the Supreme Court in *King Salmon*.
52. In summary it is my submission that:
 - (a) The Regional Council is correct that the policy framework in the NPSFM (whether it is the 2011 or 2014 version) is not written in the same directive language as the NZCPS. The only directive objective (in the sense of using the word 'avoid') is Objective B2. This objective is clearly directive in terms of stating any further over-allocation must be avoided but less directive in terms of avoiding existing over-allocation – noting this has to be phased out over

¹⁹ HODGSON EIC at paragraph 4.3.

time.²⁰ A further discussion of this point is made in the context of section 32 below.

- (b) In terms of section 32 the appropriateness of the provisions in Var1 (in terms of whether they are the most appropriate way to achieve the objectives of the NPSFM) must be assessed in the round which includes a consideration of all matters including opportunities for economic growth and employment.²¹ I comment further on this matter below.
- (c) There is an interrelationship between the NPSFM and the NZCPS in the coastal environment and this is discussed in more detail below.

Section 32 Evaluation

53. It is understood that the Commissioners have asked for comment on the interrelationship of directive high order policies on the one hand and section 32 on the other. In my submission this involves consideration of the following:
- (a) the *King Salmon* case is clear that directive policies must be given effect to as if they were rules (in essence); and
 - (b) if, to give effect to a policy would cause economic harm to a party; then
 - (c) how does a decision maker balance the competing factors, particularly in light of the *King Salmon* direction that 'balancing' is not permissible in this situation.
54. In consideration of this issue it is necessary to restate the point made in paragraph 50(a) above that the differences in language between the NZCPS and the NPSFM are very important to factor into the assessment.
55. It is acknowledged that Objective B2 of the NPSFM contains the directive word "avoid" which was a focus of the Supreme Court's decision in *King Salmon*. However, it is submitted (and on this point the opinion of Counsel for Environment Canterbury is respectfully adopted) that the direction provided by Objective B2 is a process direction.

²⁰ Memorandum of Counsel for the Regional Council dated 30 September 2014 at paragraphs 9-11.

²¹ Memorandum of Counsel for the Regional Council dated 30 September 2014 at paragraph 15.

56. The wording of the Objective itself requires Councils to “avoid any further over-allocation” and then to gradually “phase out existing over-allocation” (my emphasis).
57. It is submitted that the ‘balance’ between implementing the NPSFM and carrying out Part 2’s purpose, is in fact provided for on the face of the NPSFM. Namely, the timing of the “phase out” will be guided by the application of Part 2 of the RMA.
58. In regards to a section 32 evaluation, it is submitted that this is the mechanism by which the nature of Objective B2’s ‘phasing-out’ is given effect to. As set out by Counsel for the Council, section 32 is a method of assessment of a proposed plan which sits alongside both section 67(3), and Part 2.²²
59. It is then submitted that where the section 32 report is deficient (which Horticulture New Zealand made a submission on), it is very difficult, if not impossible to hold with confidence that the requirements of the NPSFM, Part 2, and indeed the pLWRP, have been met. It is submitted that essentially, a section 32 report should answer the question: “Why is this provision in the plan?”²³
60. In regards to variations to existing plans, the guidance on the amended section 32 provided by the Ministry for the Environment (noting it is only guidance and has no legal weight) is that the section 32 evaluation acts to ensure that new proposed policies and rules give effect to the existing objectives, and do not undermine them.²⁴
61. ‘Environmental results anticipated’ have been described as “one of the reasons a section 32 analysis is so important: to ensure that the chances of achieving the projected results are sufficiently high to justify the cost imposed by the method chosen.”²⁵
62. On this basis, a section 32 evaluation is an essential tool by which a decision-maker is able to ensure that a provision/s in a plan or similar instrument achieves Part 2 of the RMA.

²² Memorandum of Counsel for the Canterbury Regional Council in Response to Questions, 30 September 2014, at paragraphs [18-20].

²³ Ministry for the Environment *A Guide to section 32 of the Resource Management Act 1991: Incorporating changes as a result of the Resource Management Amendment Act 2013, Interim Guidance* (Wellington: 2013) at page 7.

²⁴ Ministry for the Environment *A Guide to section 32 of the Resource Management Act 1991: Incorporating changes as a result of the Resource Management Amendment Act 2013, Interim Guidance* (Wellington: 2013) at page 8.

²⁵ *Canterbury Regional Council v Christchurch City Council* C217/2001 EnvC, Christchurch, at paragraph [96].

63. As you will note from the submission by Horticulture New Zealand it considered that there are a number of deficiencies in the section 32 evaluation, and that these deficiencies have resulted in flaws in Var1. These deficiencies, as identified in Horticulture NZ's submission, are:
- (a) A lack of detail to correspond to the scale and significance of the environmental, economic, social and cultural effects of the proposal;²⁶
 - (b) Particularly inappropriate assessment of food production; cultivation; food security and economic and social well-being values;²⁷
 - (c) Insufficient analysis of the economic growth and employment which are anticipated to be provided or reduced by the proposal;²⁸
 - (d) Inaccurate assessment of the risk of not acting by initiating the variation;²⁹
 - (e) Fundamentally flawed modelling assumptions on which the s32 report is based.³⁰
64. It was the submission by Horticulture New Zealand that the section 32 evaluation prepared by the Council does not meet the requirements of the RMA, and thus it is impossible to conclude that Var1 as notified achieves Part 2 of the Act.
65. As already noted the tight timeframes set by the Council, mean that collaborative planning processes (MGM being the prime example) which are intended to be incorporated into Var1 have not yet been completed. This means that information regarding the effects of the limit and the transition time on farms is not available. It is the submission of Horticulture New Zealand that without that information it is near impossible to make an adequate assessment of the effects of the limit set and the very short transition time.³¹
66. It is also of note (see the next point in covered in this part of the submissions) that there are flaws in the modelling undertaken

²⁶ Horticulture NZ, Submission on Proposed Variation 1 to the Canterbury Land and Water Regional Plan at page 3.

²⁷ Submission at page 3.

²⁸ Submission at page 3.

²⁹ Submission at page 3.

³⁰ Submission at page 6.

³¹ Submission at page 4.

by Council which underpins the allocation approach in the Variation.³² To recap the submission of Horticulture New Zealand states:³³

The submitter has undertaken a preliminary review of the material including modelling in support of the variation. This preliminary work indicates that there are some fundamental flaws in the modelling undertaken by Council which has led to the allocation approach taken by Council. The submitter is continuing to develop this work in more detail with a view to present the outcome of this at the hearings on the variation. Suffice to say here that there is sufficient evidence now to suggest that the variation will need significant work and may need to be withdrawn in order to address the issues arising.

The Section 32 report is based on the material and modelling undertaken by Council and by implication is subject to the same criticisms that can be levied at that modelling work. Therefore the Section 32 evaluation itself is challenged by this submission as no[t] meeting the requirements of the Act.

67. As Commissioners in making your decision you have the opportunity (and requirement to the extent you make changes to Var1) to reconsider the requirements of section 32 and evaluate your decision against these requirements³⁴. As far as the submission from Horticulture New Zealand is concerned the section 32 evaluation you will undertake ought to support the submissions made around timeframes particularly related to defining GMPNPLR and locking in load amounts in what is an accepted interim position.

Interrelationship between the NPSFM and the NZCPS

68. There is no debate (at least not from Horticulture New Zealand) that Var1 includes areas within the coastal environment (noting that the actual delineation of this is far from clear at this stage). Therefore the NZCPS applies to Var1. The interrelationship between the NZCPS (particularly those directive provisions in it) and the NPSFM is therefore very important to consider and I note that the Commissioners are clearly doing this.
69. Policy 21 of the NZCPS is concerned with water quality. In *King Salmon*, the Supreme Court specifically referenced Policy 21 as not being the same in terms of directiveness as Policies 13 and 15:³⁵

³² Submission on page 6.

³³ Submission on page 6.

³⁴ Section 32AA

³⁵ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at paragraph 127.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account", "have (particular) regard to", "consider", "recognise", "promote" or "encourage"; use expressions such as "as far as practicable", "**where practicable**"[Footnote 136: 'Policies 14(c), 17(h), 19(4), **21(c)** and 23(4)(a)'], and "where practicable and reasonable"; refer to taking "all practicable steps" or to there being "no practicable alternative methods". Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

70. It is noted that in the Answers to Various Planning Questions of Council Officers tabled and presented on 30 September that there is some uncertainty as to the application of the Regional Coastal Plan on Var1.³⁶
71. There is no definitive ruling on the matter but it is likely that natural features and natural character could include aspects of water quality. For example, if a feature included very blue, clear water then this aspect could possibly be a feature in its own right to the extent that change to that feature could run counter to the direction in Policies 13 and 15.
72. In *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZEnvC 25, the EnvC had this to say about water as a part of the characterisation of Moutere Inlet as an Outstanding Natural Feature ("**ONF**"):
 - (a) The Court held the Moutere Inlet to be an ONF, which included the coastal waters immediately to the north east of the relevant site on the inlet (para [62])
 - (b) Expert landscape evidence held the terracing, shoreline, banks, gravel dunes, back dunes and shrub land of the Peninsula **together with the surrounding water** all as contributing to natural character (para [77]).
 - (c) In this context the surrounding water appears to have been considered in the context of its visual values rather

³⁶ See the section on the Regional Coastal Plan 2005 where reference to 'limited relevance' and 'marginally relevant' are made

than any strict water quality sense – noting of course that quality can result in an impact

73. In my submission while there are some aspects of both Policies 13 and 15 which could include the quality of water, the key policy in relation to water quality (in an ecological health sense) in the NZCPS is Policy 21.
74. Policy 21 is clearly concerned about degraded water quality (whether that is freshwater or salt water). Given that the issue in Selwyn Waihora in terms of the coastal environment is about the degraded water quality of Te Waihora it is my submission that the key policy in the NZCPS for you to consider is Policy 21. That Policy requires you to give priority to improving the water quality - you are not required to avoid any particular action or inaction. As already noted by the Regional Council in answer to questions it is its view that Var1 meets this policy direction in the NZCPS. Horticulture New Zealand supports this position (subject to its submissions on Var1).

Summary of this section

75. In summary there are no specific directive high order objectives and policies in the NPSFM or the NZCPS relevant to Selwyn Waihora that would result in the Commissioners not being able to apply the overall judgment approach in Part 2 when considering the following:
- (a) The competing interests for water;
 - (b) The environmental, cultural social, and economic considerations;
 - (c) The intergenerational issues – namely the historical contamination of Te Waihora that is still impacting today and will continue to do so into the future.
76. Horticulture New Zealand requests that the way you achieve this appropriate consideration in Var1 is to consider the limits and timeframes that are imposed now to ensure that the long term environmental benefits to Te Waihora and the catchment are achieved but not to the absolute detriment of the other important values of social, cultural and economic wellbeing of people and communities.
77. I make one final comment on equity as this has arisen in the hearings. The RMA does not refer to 'equity' or 'fairness' per se. However, I would submit that the concepts of equity and fairness are embodied in the RMA framework in the manner in

which competing interests are to be considered in Part 2, the costs and benefits are to be considered in section 32, the effects based approach that the RMA takes and the philosophy that those who have adverse effects ought to be required to avoid, remedy or mitigate them.

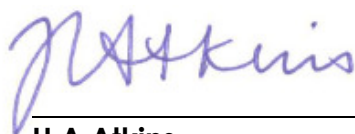
Which 'science' the Commissioners should prefer

78. You have been presented with technical and scientific information that is at odds in some key respects. It is understood that this has already been put to the Jacobs team and the Council will no doubt address it in their reply.
79. It is respectfully submitted that in relation to expert debate and disagreement that the appropriate way that this could be addressed is by the Commissioners directing that the experts' conference prior to the Council reply. This conferencing would, of course, be open to any relevant experts to attend not just those called by the primary sector grouping.
80. Even if the conferencing does not resolve all the issues, from the perspective of Horticulture New Zealand in the context of Var1 it may not be necessary for you to finally determine which evidence you prefer. Rather, the submitter is asking that the Jacobs evidence is flagging the need to be careful:
- (a) not to impose unachievable timeframes; and
 - (b) to ensure that the current existing nitrogen load is correctly established before setting any load limits for the catchment and any activities within the catchment.

CONCLUSION

81. In conclusion, the key for Horticulture New Zealand is to set the proper (noted interim) framework in Var1 so we have the correct platform for moving forward to further develop what is needed in the medium and long term for Selwyn Waihora.

DATE: 17 October 2014



H A Atkins

Counsel for Horticulture New Zealand