

**BEFORE INDEPENDENT COMMISSIONERS**

**UNDER** the Resource Management Act 1991

**IN THE MATTER** of Plan Change 3 to the Canterbury Land and Water  
Regional Plan

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**LEGAL SUBMISSIONS ON BEHALF OF THE CANTERBURY REGIONAL  
COUNCIL  
12 May 2016**

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**MAY IT PLEASE THE PANEL**

- 1 These legal submissions are filed on behalf of the Canterbury Regional Council ("Council") in respect of Plan Change 3 (South Coastal Canterbury Streams) to the Canterbury Land and Water Regional Plan ("PC3").
- 2 These submissions respond to the letter of legal advice dated 4 May 2016 filed with the Hearing Panel on behalf of Federated Farmers of New Zealand.
- 3 There are two main aspects of the letter which Counsel will respond to:
  - (a) the test for a valid permitted activity rule; and
  - (b) whether proposed Rule 15.5.2E is "better" classified as a permitted activity.

**Valid permitted activity rules**

- 4 Counsel relies on its previous legal submissions set out in the section 42A Reply Report<sup>1</sup> and does not intend to repeat the legal framework applicable to valid permitted activity rules.
- 5 Mr Gardner considers that Rule 15.5.2E and the associated methodology is sufficiently certain to be valid as part of a permitted activity rule framework.<sup>2</sup> Mr Gardner also states in relation to the exercise of discretion by third parties, that "*in practice the methodology will be applied by the Council and there is no discretion as to the applicability of the resultant threshold or limit 'number'*".<sup>3</sup>
- 6 It is submitted that this focus on whether the rule and associated schedules are "sufficiently certain" does not resolve the separate issue of the element of subjective discretion involved.
- 7 Mr Gardner seems to suggest that discretion on the part of the Council is acceptable for a permitted activity rule.<sup>4</sup> However, it makes no difference

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<sup>1</sup> Section 42A Reply Report dated at [8.167]-[8.183].

<sup>2</sup> Letter from Mr Gardner on behalf of Federated Farmers dated 4 May 2016 at [6].

<sup>3</sup> Letter from Mr Gardner on behalf of Federated Farmers dated 4 May 2016 at [15].

<sup>4</sup> Letter from Mr Gardner on behalf of Federated Farmers dated 4 May 2016 at [15].

whether the subjective discretion arises on behalf of the Council or some third party. The case law (as set out in the Section 42A Reply Report<sup>5</sup>) treats any element of subjective discretion (irrespective of who the decision-maker is) as invalid in a permitted rule framework.

- 8 As discussed with the Panel at the Reply hearing, new or amended input parameters may be required to update the flexibility and/or maximum caps when a new version of Overseer is released. Any new or amended information that may be required cannot be anticipated prior to the release of a new version of Overseer.
- 9 There is a difference between a farmer re-running his/her inputs to calculate their updated Overseer number versus calculating the updated flexibility and/or maximum cap under a new version of Overseer. This is because a farmer will be modelling what occurs "on the ground" i.e. their farming system, and as nothing is changing, the updated number will accurately reflect current practice.
- 10 However, updating the thresholds/limits set in PC3 (i.e. the flexibility cap of 15 kg N/ha/yr in the Waihao-Wainono Plains Area) involves an element of subjective discretion when deciding the appropriateness of any new / amended inputs required.
- 11 This may reserve some amount of discretion to the person/people carrying out the calculation to update the flexibility and/or maximum caps on the release of a new version of Overseer.
- 12 Elements of subjective discretion are more acceptable and appropriate within a consenting framework. Accordingly, to mitigate this legal risk, PC3 seeks to encapsulate this element of subjective discretion in a consenting framework (as a controlled activity).
- 13 The proposed rule framework provides that people may demonstrate that a breach of the flexibility cap is only due to a new version of Overseer as part of a consenting framework (assessed as a controlled activity). Accordingly, applicants will have the opportunity to engage with the Council over the updated flexibility caps (if there is a dispute).

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<sup>5</sup> Section 42A Reply Report dated at [8.167]-[8.183].

**Appropriate activity status for Rule 15.5.2E**

- 14 The second issue raised in the letter is the appropriate activity classification for Rule 15.5.2E. This is a question of the merits of the activity status.
- 15 It is Mr Gardener's "*opinion that the Council's proposed Rule 15.5.2E in its version of the Plan Change would be better if it was to be cast as a permitted activity rule*".<sup>6</sup>
- 16 I submit that Rule 15.5.2E is more appropriately classified as a controlled activity. The Council has undertaken a section 32 analysis of the proposed rule framework.<sup>7</sup>
- 17 The rule only affects those who have intensified above their Nitrogen baseline. The Waihao-Wainono Plains Area is an over-allocated catchment. It is appropriate to more closely monitor (compared to a permitted activity rule) persons who have intensified up to or close to the flexibility cap of 15 kg N/ha/yr via consenting framework. The Council has more resources to monitor resource consents compared to permitted activity rules (for one thing it knows who/where they are).
- 18 As discussed at the hearing, evidence given by submitters indicates that very few farming activities will actually be affected (they are either operating at their nitrogen baseline, or far below the flexibility cap of 15 kg N/ha/yr).<sup>8</sup>

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<sup>6</sup> Letter from Mr Gardner on behalf of Federated Farmers dated 4 May 2016 at [7].

<sup>7</sup> Section 32AA report at section 8.2. We note that this will be further addressed in the response to Minute 9.

<sup>8</sup> We note that this will be further addressed in the response to Minute 9.

- 19 In light of the social, cultural and economic factors and the higher order documents (particularly in giving effect to the National Policy Statement for Freshwater Management 2014) and relevant tests in section 32, it is submitted that Rule 15.5.2E is more appropriately classified as controlled activity.

Dated this 12<sup>th</sup> day of May 2016



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P A C Maw  
Counsel for Canterbury Regional Council