

Tabled at Hearing 07/09/2016

**BEFORE THE COMMISSIONERS ON BEHALF OF
ENVIRONMENT CANTERBURY**

IN THE MATTER

of Plan Change 5 to the
Canterbury Land and Water
Regional Plan

**WAITAKI IRRIGATORS
COLLECTIVE LIMITED**

Submitter

**LEGAL SUBMISSIONS OF COUNSEL FOR WAITAKI IRRIGATORS
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MAY IT PLEASE THE COMMISSIONERS:**Introduction**

1. The Waitaki Irrigators Collective (WIC) was formed by the irrigation schemes and a society of independent irrigators that take water from Lake Waitaki and the lower Waitaki River (or connected water bodies) and utilise that water on land downstream of the Waitaki Dam. The shareholders have common issues and concerns regarding the allocation of water, water quality and their surety of supply.
2. Maintaining surety of supply to the irrigators is of critical importance to the social, cultural and economic wellbeing of the Waitaki Community. Surety from a water supply perspective has been largely dealt with via the Lower Waitaki Water Allocation Plan process. Decisions on PC3 to that Plan were released earlier this year and to WIC's great satisfaction no appeals were filed. I would venture to suggest that was because the PC3 decision largely reflected the outcomes anticipated by the collaborative Zone Committee process. With the major stakeholders (including WIC's members, Te Runanga o Ngai Tahu, and Meridian Energy) buying into the solution and committing to its implementation. A stark contrast from the prior water allocation arrangements that were totally hamstrung by a lack of stakeholder commitment.
3. Surety of supply is a broader concept that simply having access to adequate water volume. It also requires the ability to utilise that water in a manner that enables efficient production from the land and a high degree of certainty about the ongoing ability to utilise those physical resources.
4. As set out in the evidence of Ms Soal, Mr Ross, Ms White, and Mr Keeling the Waitaki community, irrigators and more recently WIC have been actively participating in Regional Planning matters since 2001 when Meridian Energy began pursuing the Project Aqua proposal. The planning process has morphed a number of times since and most relevantly into the Water Management Zone Committee process. WIC has engaged fulsomely in the Zone Committee process. As an organisation WIC believed that the Zone Committee reached a workable and achievable framework for managing water quality matters in the

Lower Waitaki. Those recommendations were viewed as striking an appropriate balance between the need to maintain and enhance water quality whilst enabling farming activities to operate efficiently.

5. Given that, WIC were extremely disappointed when PC5 was notified. The simple efficient framework they had bought into during the Zone Committee process was simply not reflected in the notified provisions. What has been proposed appears to have almost no regard for the existing regulatory framework and extent of regulation that resource users in the Lower Waitaki are already subject to.

Assessment Process

6. Before getting into the detail of this particular Plan Change it is necessary to highlight some important principles that should inform the assessment of Plan Change 5 in my submission.

The enabling nature of the Act with respect to the use of land

7. Part III of the Act sets out the duties and restrictions under the Act. As we all know Section 9 relates to the use of land whilst (relevantly to this hearing) Sections 14 and 15 relate to water use and discharge of contaminants respectively.
8. There is a telling difference in the treatment of these resource 'uses' under the Act, which is, in my submission significant.
9. Section 9 is drafted in a permissive fashion. i.e. the use of land is permitted unless there is a standard or rule that says it is not. The converse is true of water use and contaminant discharge. This distinction is important and in my submission relevant to your assessment of the Rules within PC5.
10. PC5 seeks to control the use of land. The use of land is enabled by the Act and in my submission the rules within PC5 should also be enabling unless there is a good resource management reason to regulate. The Environment Court in *Otago Presbyterian Girls College Board of Governors Inc (Columba College) v Dunedin City Council* EnvC C128/2001 agreed with the proposition that it should settle on the most

liberal of options available to it when controlling the use of land unless there was good reason for imposing a restriction¹.

11. I must point out that the evaluation criteria under section 32 have changed since the *Columba Decision*. At the time the Court made the *Columba Decision* the Act required a rule to be 'necessary' to meet the objectives as opposed to being the 'most appropriate' method. However, that change this does not unsettle the principle that the least restrictive method should be preferred.
12. In my submission the distinction inherent in how the Act controls land use compared to water and contaminants gives us a clear signal about what solution is likely to be the 'most appropriate' under section 32.

Integrated Management

13. Under section 30(1) the first function given to Regional Councils under the RMA is to achieve integrated management of natural and physical resources. Whilst I don't think that there has ever been a suggestion that the order of functions under section 30 suggests any semblance of hierarchy, integrated management is a principle that transcends the more resource specific functions that make up balance of section 30(1).
14. As highlighted by the Court in *NZ Shipping Federation v. Marlborough DC* EnvC W038/06 the concept of integrated management acknowledges that protection of one resource may have a positive (or negative effect) on another resource.
15. It is submitted that PC5 does not achieve integrated management. It ignores the protection that water quality has already obtained through the existing water allocation framework. As a result the proposed rules, particularly those applicable to Valley and Tributaries, Whitney's Creek and parts of the Hakatarama Freshwater Management Zones are inefficient and unnecessary.

¹ *Otago Presbyterian Girls College Board of Governors Inc (Columba College) v Dunedin City Council* EnvC C128/2001 at [34]-[36]

The 'most appropriate' solution

16. Under section 32 the provisions of the Plan Change need to be assessed as the 'most appropriate' to achieve the purpose of the Act². The Courts have been clear that this does not require a proposed provision to be the best of the possible solutions. To require this would be to put a gloss on the term 'most appropriate' that does not exist under the Act³.
17. Instead the provision must be suitable for achieving the desired result⁴.

The issue that PC5 seeks to address

18. The section 32 report outlines the issues that PC5 is seeking to address. In a nutshell it is the risk posed by nutrient enrichment of the Region's water bodies and the effects that arise, both environmental and sociological from poor water quality. As I understand it, there are declining water quality trends in parts of the region. The Council is obligated to address this under the National Policy Statement: Freshwater Management (NPSFW).
19. I don't think that there is any argument about the need to manage (and to large extent avoid) effects of activities on water quality. Water is the life-blood of the region.
20. WIC's objection is to a further suite of regulatory control that:
- (a) is not required because the issues of concern to Council are absent from large areas of the Lower Waitaki; and
 - (b) does not achieve anything new with respect to the activities already being undertaken within the Lower Waitaki.
21. In my submission, when assessing whether the proposed objectives, policies and methods within PC5 are the most appropriate for the Lower Waitaki you must first understand whether the issue exists or is as significant as the Council suggest. It is WIC's view that for the Valley and Tributaries, Hakataramea Flat and Whitney's Creek Freshwater

² Or Objectives in the case of a policy or a rule.

³ *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45]

⁴ *Ibid*

Management Units water quality is good, land development is largely complete and existing land use is already taking place in accordance with GMP by virtue of existing water take consents, scheme membership and/or discharge consents. Therefore, the issues that PC5 seeks to address are being addressed already.

22. It is submitted that in those instances the regulatory response via PC5 is not the most appropriate. It is instead overly cumbersome and inefficient.

Is there a problem looming that needs to be managed?

23. Of course, land use activities may not remain the same forever. PC5 must be forward looking and capable of managing effects of future activities. However, the scale and level of risk that future activities might present must be assessed through a lens tinted by reality.

24. As is discussed in detail in Ms Johnston's evidence the PC5 framework has been prepared to address an environmental risk that is not as significant as the Council suggest. Council's catchment modelling is based on some inaccurate information and flawed assumptions regarding likely nutrient loss increases due to the limited potential for further development within some of the Freshwater Management Units due to the existing high levels of intensification or natural constraints from topography and water availability).

25. As stated by the Court in *Johns Road Horticulture Ltd v Christchurch City Council*⁵

"Risk is the product of the probability of an effect and the costs of its consequences"

26. Based on the analysis in Ms Johnston's evidence for the 3 FMU's identified above there is a low, if not zero risk of increased development leading to nutrient losses in excess of the Council's nutrient allocation limits. In my submission this is a significant factor to be considered when assessing the scale and appropriateness of any regulatory

⁵ (No 9) [2011] NZEnvC 185 at [60]

intervention, particularly regulation of land use activities which are enabled by the Act.

27. Under WIC's proposed framework existing farming activities can continue to operate as permitted activities as opposed to almost all activities requiring further resource consents. The Council will still be able to account for nutrient allocation by virtue of the farm portal and utilise the existing consent processes to manage nutrient losses effectively. In my submission WIC's proposed regime presents no greater environmental risk than the PC5 regime. It does however have significant advantages in terms of efficiency.
28. For the other FMU's within the Lower Waitaki where water quality is not as good or there is more potential for increased nutrient losses, by expanding or intensified land use, WIC has proposed a consent framework to enable closer management of land use. This is considered appropriate because the risk of an adverse effect on water quality is greater, justifying greater regulatory intervention.

Is the framework within PC5 the 'most appropriate'?

Efficiency

29. In determining the most appropriate provisions to achieve the objectives the efficiency and effectiveness of the proposed provisions must be examined⁶. To assess the efficiency and effectiveness you must carry out the assessment process outlined in section 32(2). This is an assessment of the benefits and costs of the proposed provisions and the risk of acting or not acting⁷.
30. The Environment Court has frequently framed the s 32 test as *which provisions better meet the purpose of the Act*⁸. As you will know the purpose of the Act is about managing the use, development and protection of resources in a way that enables people and communities to provide for their wellbeing.

⁶ RMA, s 32(1)(b)(ii).

⁷ RMA, s 32(2)(c).

⁸ *TKC Holdings Ltd v Western Bay of Plenty District Council* [2015] NZEnvC 100 at [88].

31. Taking WIC's alternative proposal you have 2 methods to assess with respect to their ability to achieve the objectives of the LWRP and the purpose of the Act. Based on the range of evidence you have received, both options can probably be said to achieve the Objectives. The question is really which option is the most appropriate method to do that.
32. It is submitted, that where both sets of provisions can satisfy the council's functions the effectiveness and efficiency of the respective provisions should be the determining factor in deciding which provisions to adopt.
33. As detailed above, the Council has overestimated the degree of risk in the Waitaki sub-region, resulting in overly onerous provisions, which control little that is new. As a result it is submitted that the provisions promoted by the Council are neither effective nor efficient. This is discussed further in the evidence of Ms Taylor.
34. WIC's proposed provisions as discussed by Ms Taylor are considerably more streamlined, whilst still achieving effective management of land use activities that might have effects on water quality. This makes them more efficient and effective, and in my submission the 'most appropriate' to achieve the Objectives.

Relevance of the Zone Committee recommendations

35. Under the Canterbury Water Management Strategy, Zone Committees were formed for each water 'zone'. The purpose of the Zone Committees was to:

"work collaboratively to develop effective water management solutions that deliver economic, social, cultural and environmental outcomes which align with what their local community wants".
36. This is strikingly similar outcome to that which PC5 must achieve under section 32. It also provides us with a clear steer about where we need to look to understand what option is likely to be effective for the purposes of assessing the Plan Change under section 32(1)(b)(ii).
37. It is my submission that you should have considerable regard to the Zone Committee recommendations when assessing the effectiveness of

PC5, because a plan framework that reflects the expectations of the community has a much higher likelihood of being implemented effectively.

38. A number of WIC's witnesses discuss their expectations and understanding about what PC5 was going to deliver. It is clear that it has not lived up to expectations. WIC's proposed alternative framework has been developed with the Zone Committee recommendations at front and centre. Therefore, it more effectively gives effect to the community's expectations and on that basis is more appropriate.

Prohibited Activity Status

39. Winston Churchill once said of democracy:

*"Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all wise. Indeed it has been said that democracy is the worst form of Government, except for all those other forms that have been tried from time to time"*⁹

40. I would venture that you can replace the words 'Government' and 'Democracy' with 'Regional Rule' and 'Overseer' and the statement remains true. Nevertheless, as is the case with numerous Regional Plans throughout New Zealand, Overseer is being relied on as a tool for managing nutrient losses.
41. The uncertainties and issues inherent in using Overseer as a regulatory tool have been well traversed and are understood. As we all know Overseer updates come thick and fast. Each update has unpredictable effects on modelled nutrient losses for each property modelled. These unpredictable effects are exacerbated further by the proposed PC5 framework where the farm portal will measure actual farm systems against theoretical ones. By necessity the theoretical farm systems do not possess the same complexity or variety of actual farms.
42. Essentially compliance with the PC5 framework measures modelled actual farms against modelled model farms. To have the outcome of

⁹ Winston Churchill, House of Commons, 11 November 1947, ref *Churchill by Himself*, page 574.

such a fickle process be prohibited activity status is a bridge too far. Non-complying consent would be more acceptable.

43. At this point in time it is impossible to anticipate the changes to Overseer that will take place during the life of PC5 and as a result prohibited activity status is inappropriate. It risks prohibiting activities when water quality is not being compromised, missing opportunities to more efficiently utilise the land and it creates considerable regulatory uncertainty for land users.

Conclusion

44. WIC has presented comprehensive evidence in support of its position. It is submitted that WIC's alternative framework is the most appropriate way to achieve the purpose of the Act and objectives of the LWRP in the Lower Waitaki for the following reasons:
- (a) The WIC framework is enabling consistent with Part III of the Act.
 - (b) The WIC framework imposes more regulatory control where there is a good resource management reason to do so.
 - (c) The WIC framework achieves superior integrated management of land use, water use and discharge activities by recognising the existing regulatory process that control these activities within the Lower Waitaki.
 - (d) The WIC framework has been developed with a better understanding of the extent of possible intensification and irrigation expansion than PC5.
 - (e) The WIC framework establishes an appropriate level of regulatory control having regard to the risks to water quality within the different Freshwater Management Units. This strikes a more appropriate balance between environmental protection and enabling the Lower Waitaki community to utilise resources to provide for its wellbeing.

- (f) The WIC framework will be more efficient and effective.

Brian Irving

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Dated: 7 September 2016.

