PROPOSED PLAN CHANGE 5 CANTERBURY LAND AND WATER REGIONAL PLAN (NUTRIENT MANAGEMENT & WAITAKI)

RESPONSES TO THE QUESTIONS OF THE HEARING COMMISSIONERS ARISING AT THE REPLY HEARING ON 12 DECEMBER 2016

Philip Maw (PM), Devon Christensen (DC)

1. At the Reply Hearing on 12 December 2016, two further issues arose in response to the Council Officers' section 42A Reply Report (dated 2 December 2016). The Panel advised that a written response could be filed addressing these matters, which are as follows:

    a. consideration of the issue raised in legal submissions on behalf of BCI at paragraph 47.2 in respect of existing but unimplemented resource consents; and

    b. further consideration of the drafting of Policy 15B.4.13.

2. The Council Officers' responses are set out below.

Existing Environment

Response: PM

3. The summary of submissions on behalf of BCI dated 23 August 2016 at paragraph 47.2 provides:

> "*47 But at least two factors point away from a situation where existing but unimplemented resource consents should, in all cases, be 'reversed out' by a plan change:*
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> *…*
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> *47.2 second, the legal position is that existing and unimplemented consents form part of the 'environment' against which plan changes should be measured."*

4. The existing environment in respect of plan changes is further addressed in paragraphs 56 to 59 of those submissions.

5. Counsel for BCI submitted that unimplemented resource consents form part of the 'environment' against which plan changes should be measured, on the basis that the decisions in *Shotover Park v Queenstown Lakes District Council*[1] and *Milford Centre Limited v Auckland Council*[2] extend the principles in *Hawthorn*[3] to plan changes. On that basis, Counsel for BCI submitted that it is on "orthodox ground" in seeking the relief in its submission point 10 on Policies 4.37 to 4.38E, and submission point 19 on Policy 4.41C.

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[1] *Shotover Park v Queenstown Lakes District Council* [2013] NZHC 1712.

[2] *Milford Centre Limited v Auckland Council* [2014] NZEnvC 23.

[3] *Queenstown Lakes District Council v Hawthorn* [2006] NZRMA 424.

6. The appeal in *Hawthorn* questioned whether the High Court Judge erred by determining "*that the receiving environment should be understood as including not only the environment as it exists but also the reasonably foreseeable environment*". The context was a consent application and section 104(1)(a) of the RMA was in issue. The Court of Appeal in that case stated that "environment" embraces the future state of the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.[4]

7. While the cases cited by counsel for BCI, including the *Shotover* decision[5] and *Milford Centre*[6] have applied aspects of *Hawthorn,* these cases were decided in a district planning context.

8. The High Court recently considered this issue again in *New Zealand Aviation Museum Trust v Marlborough District Council.*[7] There the High Court considered a private plan change to the Wairau Awatere Resource Management Plan ("WARMP") to rezone rural land for residential development. The WARMP integrates the regional coastal plan, the regional plan and the district plan. One of the questions of law on appeal was whether the Environment Court incorrectly defined the "future environment" when it allowed the plan change.

9. Under this heading, Goddard J stated:[8]

> *"In considering the actual and potential effects on the environment of allowing an activity, it is often necessary to consider the future state of the environment, in which these effects will occur.*[9] *The assessment of the future environment includes consideration of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan;*[10] *as well as commercial activity competing for use of the subject and surrounding land; and associated regulatory initiatives by way of proposed change.*[11] *Such considerations must be "reasonably foreseeable"."*

10. Based on these comments, it is submitted that *Hawthorn* does have applicability in the planning context when considering how the environment should assessed.

11. However, as Fogarty J stated in the *Shotover* decision:[12]

> *"The Court was not obliged to assume that the environment within PC19 contained the Pak'nSave supermarket and Mitre 10 Mega. This is because when deciding the*

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[4] *Queenstown Lakes District Council v Hawthorn* [2006] NZRMA 424 at [84].

[5] *Shotover Park v Queenstown Lakes District Council* [2013] NZHC 1712 at [4].

[6] *Milford Centre Limited v Auckland Council* [2014] NZEnvC 23 at [120].

[7] *New Zealand Aviation Museum Trust v Marlborough District Council* [2014] NZHC 3350, (2014) 18 ELRNZ 253.

[8] *New Zealand Aviation Museum Trust v Marlborough District Council* [2014] NZHC 3350, (2014) 18 ELRNZ 253 at [57].

[9] Citing *Queenstown Lakes District Council v Hawthorn* [2006] NZRMA 424 at [42]-[57].

[10] Citing *Queenstown Lakes District Council v Hawthorn* [2006] NZRMA 424 at [84].

[11] Citing *Queenstown Central Ltd v Queenstown Lakes District Council* [20913] NZHC 815 at [35] discussed in the context of section 104D.

[12] *Shotover Park v Queenstown Lakes District Council* [2013] NZHC 1712 at [4].

content of a plan for the future, as distinct from the grant of a particular resource consent, the Court is not obliged to confine "environment" to the "existing environment", as defined in [84] of Hawthorn."

12. The other matter which may mean that a different approach should be taken in regional planning matters is that there are significant differences between district plans and regional plans and presumptions applying under those plans:

    a. The duration of land use and subdivision consents can be unlimited whereas consents issued by regional councils must not exceed 35 years;[13] and

    b. The existing uses in relation to land that contravene a rule in a district plan can continue indefinitely provided that certain conditions are met.[14] In contrast, existing use rights are more limited for existing activities that contravene a rule in a regional plan. Under section 20A of the RMA, there is a requirement to seek a resource consent within six months after the date that the rule became operative if a person wishes to rely on existing use rights under section 20A whilst an application for resource consent is processed.

13. Accordingly, even if a resource consent is considered as part of the existing environment there is no obligation to provide for it beyond the term of the consent.

14. The key issue in relation to the existing environment and the regional planning context, is what the Council is obliged to provide for in relation to the BCIL scheme in these circumstances.

15. As set out in its submission, BCI holds resource consent CRC143165 to take up to 17 cumecs of water from the Rakaia River to irrigate up to 40,000 hectares of land (and to fill on-farm storage reservoirs and to generate electricity). For present purposes it is simply noted that part of the BCI Scheme falls within an area covered by a sub-regional chapter (being the Plan Change 2 area) and the balance of the scheme will be more directly impacted by PC 5. This consent expires in 2035.

16. BCIL also holds resource consent CRC162882, which authorises the use of land for farming up to 40,000 ha and the discharge of nutrients to water arising from the authorised farming activities.[15] This consent was granted in September 2013 and expires in September 2018.

17. In September 2013, Barrhill was granted resource consent CRC141388 (now CRC162882) to use land for a farming activity and to discharge nutrients onto or into land arising from that authorised farming. This consent expires on 9 September 2018.

18. Although it is submitted that the BCIL Scheme forms part of the background environment against which PC5 should be assessed, when adopting a forward thinking approach, it is relevant that the resource consent currently held by BCIL, which authorises the discharge of nutrients expires in 2018. This is of particular relevance when determining the scale of the activities which are authorised by its consents, and which form a part of the background environment. There is no guarantee that the consent will be renewed once it expires. In those circumstances, it is submitted that when applying a real-world analysis to the consents that have

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[13] RMA, s 123.

[14] RMA, s 10.

[15] The consent identifies an area of 17,604 hectares where supply agreements were in place prior to July 2013 and a further 22,396 hectares of 'new irrigation'.

been issued, it is only the land that is likely to be irrigated upt to the date that the consent expires in 2018 that should be taken into account when determining the extent of the background environment against which the provisions of PC5 should be assessed.

19. The very point of a planning process such as PC5 is to put in place provisions bearing in mind the various statutory directions in sections 30, 32, 66 and 67 (amongst others). Considering the background environment as incorporating the BCI Scheme does not negate the need for PC5 to give effect to higher order directions and for the provisions to be assessed against the various statutory directions in sections 30, 32, 66 and 67 (amongst others).

20. The merits of providing for existing intensification that has occurred through a resource consent process and of specifically recognising existing unimplemented resource consents in policy or rules is discussed by the Council Officers at paragraphs 4.78 to 4.83 of the Section 42A Reply Report, which provides as follows:

> "*4.82 Several submitters, including DHL, Hunter Downs and BCI, are concerned that the policy and rule framework does not adequately recognise intensification that has occurred as a consented activity, primarily under irrigation scheme consents. In addition, there are resource consents for irrigation schemes that have been granted, but only partially implemented. These submitters request recognition in the policy and rule framework, particularly in relation to the unimplemented irrigation scheme consents.*
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> *4.83 I have recommended some minor adjustments to the policy and rule framework to better recognise existing intensification that has occurred through a resource consent process. However, I am doubtful of the merits of specifically recognising existing unimplemented resource consents in policy or rules, particularly as many of these have been granted on a short-term basis with a view to enabling reviews of sub-region sections of the plan being more readily able to be given effect. I am concerned that a specific reference to unimplemented resource consents may prevent effective subregion planning and create an inequity between those farms within scheme areas and those outside, with respect to compliance with Baseline GMP Loss Rates, at least on a scheme-wide basis.*"

Drafting of Policy 15B.4.13

Response: DC

21. As noted at the Reply hearing, Policy 15B.4.13 is relevant to controlled activity rules[16] and restricted discretionary activity rules in Section 15B (Waitaki) of the LWRP.[17]

22. When considering an application for a controlled activity under the relevant rules, a decision maker would have regard to Policy 15B.4.13 in determining the conditions of consent (including the nitrogen loss limit).

23. When considering an application for a restricted discretionary activity under the relevant rules, a decision maker would have regard to Policy 15B.4.13 in deciding whether to grant the consent, and in relation to determining conditions of consent (including the nitrogen loss limit).

24. Following the comments of the Commissioners at the Reply hearing, the Council Officers have had the opportunity to reconsider the drafting of Policy 15B.4.13.

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[16] Rules 15B.5.15, 15B.5.19 and 15B.5.34.

[17] Rules 15B.5.16 and 15B.5.18B.

25. The Council Officers recommend that Policy 15B.4.13 be amended as follows:

> 15B.4.13 Within the Waitaki ~~Sub-region, consider~~ when granting ~~applications~~ ~~for~~ any resource consent ~~to exceed the nitrogen baseline where~~ for the use of land for a farming activity, impose conditions that:
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> (a) prevent the nitrogen loss calculation from exceeding the nitrogen baseline except where that ~~the~~ nitrogen baseline has been lawfully exceeded prior to 13 February 2016 and the application for resource consent contains evidence that directly and specifically establishes that the exceedance was lawful; and
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> (b) limit the nitrogen loss calculation ~~below~~ to the lesser of the Good Management Practice Loss Rate or the nitrogen loss ~~that occurred in~~ for the four years prior to 13 February 2016.

26. Forest and Bird sought that Policy 15B.4.13 be amended to ensure that the grant of consent will be limited to the lawful exceedance that existed at 13 February 2016.[18] It is submitted that that submission point provides scope for the above recommended amendments to Policy 15B.4.13 (along with consequential alterations necessary arising from that submission to ensure the policy makes grammatical sense).

[18] Forest and Bird NZ PC5LWRP-1888.