IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2017-

UNDER	Environment Canterbury (Temporary Commissioners & Improved Water Management) Act 2010
IN THE MATTER	of an appeal under Section 66 of the Act
BETWEEN	**RANGITATA DIVERSION RACE MANAGEMENT LIMITED** a duly incorporated company having its registered office at 18 Kermode Street, Ashburton 7740
	Appellant
A N D	**CANTERBURY REGIONAL COUNCIL** a local authority constituted under the Local Authority Government Act 2002 having its principal office at 200 Tuam Street, Christchurch
	Respondent

NOTICE OF APPEAL UNDER SECTION 66 OF THE ENVIRONMENT CANTERBURY (TEMPORARY COMMISSIONERS & IMPROVED WATER MANAGEMENT) ACT 2010

Dated: 21 July 2017

HOBEC Holland Beckett LAWYERS

525 Cameron Road
DX HP40014
Private Bag 12011
Tauranga 3143
Telephone: (07) 578 2199
Facsimile: (07) 578 8055

Solicitor: Vanessa Hamm

Email: vanessa.hamm@hobec.co.nz

NOTICE OF APPEAL UNDER SECTION 66 OF THE ENVIRONMENT CANTERBURY (TEMPORARY COMMISSIONERS & IMPROVED WATER MANAGEMENT) ACT 2010

TAKE NOTICE that the Appellant hereby appeals to the High Court against the following decisions of the Canterbury Regional Council ("the Respondent") contained in the Report and Recommendations of the Hearing Commissioners on Proposed Plan Change 5 to the Canterbury Land and Water Regional Plan dated 1 June 2017 which were publicly notified on 24 June 2017 ("the Decision") **UPON THE GROUNDS** that the Respondent made errors of law in parts of the Decision.

The Appellant lodged submissions and further submissions on Proposed Plan Change 5 to the Canterbury Land and Water Regional Plan.

1. **Parts of the Decision Appealed**

1.1 The Appellant appeals against parts of the Decision in relation to Proposed Plan Change 5 to the Canterbury Land and Water Regional Plan ("Plan"). The following parts of the Decision are appealed:

(a) Policy 4.41C(b); and

(b) Method s28.4.

1.2 In particular, the Appellant appeals against the Respondent's decision to:

(a) Fail to properly provide for an 'alternative pathway' to the Farm Portal where an irrigation scheme or principal water supplier has elected to manage nutrient losses within their command area on an aggregated basis; and

(b) Fail to provide for farming activities which have lawfully irrigated including those which have lawfully irrigated after 13 February 2016, or which have the ability to lawfully irrigate after 13

February 2016, under existing resource consents granted to irrigation schemes or principal water suppliers.

(c) Rectify a purported "anomaly" in Method s28.4 by deleting the exceptions for travelling irrigators and sprayline irrigators.

2. **Errors of Law**

2.1 The Appellant alleges that the Respondent made errors of law in respect of Policy 4.41C(b) in that:

(a) The failure to provide for farming activities which have lawfully irrigated including those which have lawfully irrigated after 13 February 2016, or which are authorised to lawfully irrigate after 13 February 2016, under existing resource consents granted to irrigation schemes or principal water suppliers, is an unlawful derogation from existing consents because:

(i) In light of other rules in the Plan it appears to amount to a re-allocation of nitrogen loss to other farming activities;

(ii) Alternatively or additionally it may be intended to achieve minimum standards of water quality;

(iii) In either case, this has been done through a policy rather than a rule and is therefore *ultra vires*.

(b) It made a decision in relation to which there was no evidence or which, on the evidence, it could not reasonably have made.

(c) The Decision failed to undertake a proper evaluation or further evaluation of Policy 4.41C(b) in accordance with ss 32 and 32AA of the Resource Management Act 1991 ("RMA").

(d) Policy 4.41C(b) does not give effect to the Decision.

(e) Policy 4.41C(b) lacks clarity and is in error because it is not a decision which could reasonably have been reached.

2.2 The Appellant alleges that the Respondent made errors of law with respect to its decision to rectify the purported "anomaly" in Method s28.4 by deleting the exceptions for travelling and sprayline irrigators because:

(a) It had no justification to make the decision.

(b) It made a decision in relation to which there was no evidence or which, on the evidence, it could not reasonably have made.

(c) The decision failed to undertake a proper evaluation or further evaluation in accordance with section 32AA of the RMA.

3. **Questions of Law**

3.1 The Appellant alleges that the above errors of law, with respect to Policy 4.41C(b), give rise to the following questions of law:

(a) Did the Respondent's failure to provide for farming activities which have lawfully irrigated, including those which have lawfully irrigated after 13 February 2016, or which are authorised to lawfully irrigate after 13 February 2016, under existing resource consents granted to irrigation schemes or principal water suppliers, amount to an unlawful derogation from existing consents because:

(i) In light of other rules in the Plan it appears to amount to a re-allocation of nitrogen loss to other farming activities;

(ii) Alternatively or additionally it may be intended to achieve minimum standards of water quality;

(iii) In either case, this has been done through a policy rather than a rule and is therefore *ultra vires*?

(b) In the alternative, did the Respondent, in deciding on the wording of Policy 4.41C(b), make a decision that was not open to it on the evidence, or which, on the evidence, it could not reasonably have made?

(c) In the alternative, did the Respondent fail to undertake a s 32 evaluation, or a proper analysis under s 32AA of the Act, in that it failed to:

(i) Undertake the evaluation at a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 4.41C(b) as required by ss 32(1)(c) and 32AA(1)(c) of the Act?

(ii) Identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 4.41C(b) as required by ss 32(2) and 32AA(1)(b) of the Act?

(d) In the alternative, did the Respondent err in settling the wording of Policy 4.41C(b) in that it does not give effect to the Decision?

(e) In the alternative, does Policy 4.41C(b) lack clarity such that it is in error because it is not a decision which could reasonably have been reached.

3.2 The Appellant alleges that the above errors of law, with respect to Method s28.4, give rise to the following questions of law:

(a) Did the Respondent have jurisdiction to delete the exceptions and make consequential changes to Method s28.4?

(b) Did the Respondent, in deleting the exceptions and making consequential changes to Method s28.4, make a decision that was not open to it on the evidence?

(c) Did the Respondent fail to undertake a proper analysis under section 32AA RMA, in that it failed to:

(i) Identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated through the implementation of Method s28.4 as amended by the Decision, as required by sections 32(2) and 32AA(1)(b) RMA?

(ii) Undertake an evaluation at a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects that are anticipated through the implementation of Method s28.4 as amended by the Decision, as required by sections 32(1)(c) and 32AA(1)(c) RMA?

4. **Grounds of Appeal**

Policy 4.41C(b)

4.1 The Decision accepted, in response to a submission from Amuri Irrigation Company Limited, that it was appropriate for an irrigation scheme or principal water supplier to state whether it would manage nutrient losses within its command area on an aggregated basis or on a 'property by property' basis.[1]

4.2 The Decision also accepted that it was appropriate to provide for an 'alternative pathway' to the Farm Portal.[2] See for example Appendix A to the Decision:[3]

[1] Policy 4.41C(ab). Submission point PC5LWRP-1008.
[2] See for example paragraphs [409]-[415].
[3] Submissions requesting an alternative consent path to the Farm Portal.

These submissions request provision in Plan Change 5 for an alternative method to the Farm Portal for estimating nutrient losses under good management practice. We agree that, in limited circumstances, an alternative method is appropriate and have recommended amendments to Plan Change 5 accordingly. See also Chapter 9 of this report.

4.3 Policy 4.41C(b) appears to provide for an alternative pathway (to the Farm Portal) for irrigation schemes and principal water suppliers, by cross referring to rule 5.42B and requiring criteria in that rule to be met. This is problematic in that:

(a) The rule relates to properties greater than 10 ha;

(b) It is not clear how these criteria relate to a resource consent application being made by an irrigation scheme or principal water supplier;

(c) If the rationale (which is not explained anywhere in the Decision) is that only certain properties within an irrigation scheme may utilise the alternative pathway then this does not sit well with an irrigation scheme or principal water supplier managing nutrient losses within its command area on an aggregated basis.

4.4 Accordingly, in cross referring to rule 5.42B, it does not appear that Policy 4.41C(b) gives effect to the Decision to provide an alternative method for estimating nutrient losses under good management practice within irrigation schemes.

4.5 As outlined in evidence at the hearings on the Plan, the Appellant holds resource consent CRC121664 which authorises the discharge of nutrients to land arising from the loss of farming. Resource consent CRC121664 expires on 26 May 2019. It covers (in part) the Ashburton-Lyndhurst Irrigation Scheme which is in the Red and Orange Zones and subject to the Plan.

4.6 Policy 4.41C appears to say that any irrigation lawfully established in the Orange or Red Zone under a permit before 13 February 2016 is limited to Good Management Practice Loss Rates, whilst irrigation lawfully established in the Orange or Red Zone after 13 February 2016 would be

restricted to Baseline GMP Loss Rates. This requires the Farm Portal to estimate the average nitrogen loss rate below the root zone for the farming activity carried out during the nitrogen baseline period, if operated at good management practice, which relates to the period 1 January 2009 to 31 December 2013. Accordingly, Baseline GMP Loss Rates for irrigation established after 13 February 2016 will not be reflective of irrigated farming practices.

4.7 Under resource consent CRC121664, the Appellant's Ashburton-Lyndhurst Irrigation Scheme has shareholders who:

(a) Have lawfully established irrigation and intensified land use based on that irrigation in the year or years before 13 February 2016;

(b) Have lawfully established irrigation and intensified land use based on that irrigation after 13 February 2016; and

(c) Wish to lawfully establish irrigation and intensify land use based on that irrigation after 13 February 2016 but before the expiry of resource consent CRC121664 on 26 May 2019.

4.8 Under the Plan it appears that other farming activities have intensification opportunities. Rule 5.44A for the use of land for farming on a property greater than 10 ha in the Red Nutrient Allocation Zone includes as a condition to a permitted activity that:

> For any property where, as at 13 February 2016, the area of the property authorised to be irrigated with water is less than 50 hectares, any increase in the area of the property that is irrigated is limited to 10 hectares above that which was irrigated at 13 February 2016

4.9 There does not appear to be any assessment of the effects of allowing as a permitted activity an additional 10 hectares (per relevant property) above that which was irrigated as at 13 February 2016, nor any assessment of the impact of restricting the lawful exercise of existing resource consents such as resource consent CRC121664 through Policy 4.41C at the time of renewing such resource consents.

4.10 There is no reasoning in the Decision which explains why some intensification opportunities are provided for permitted activities, but existing resource consents are not able to be considered for renewal on the terms on which they were lawfully exercised. This is a decision in relation to which there was no evidence or which, on the evidence, it could not reasonably have made.

4.11 To that end, the Plan appears to create a de facto re-allocation of lawfully established or authorised nitrogen loss away from irrigation schemes or principal water suppliers to permitted farming activities. This is a contravention of s 30(4) of the RMA which provides that a rule may not, during the term of an existing consent, allocate the amount of a resource that has already been allocated to the consent. It is therefore an unlawful derogation from existing resource consents.

4.12 If the intention is not re-allocation but an intention to halt nitrogen loss within a particular catchment for water quality purposes then the proper and lawful way for a regional council to do this is through rules in a regional plan which set minimum standards of water quality. The regional plan can then state in accordance with s 68(7) of the RMA whether the rule is to affect existing resource consents which contravene the rule, and review powers are available to the regional council under s 128 of the RMA.

4.13 The Decision does not include any such rules. The Decision instead creates a strong policy directive to act as an incentive against exercising existing resource consents in the knowledge that they will not be considered for renewal on the terms on which they were granted. This amounts to an unlawful derogation from existing consents.

4.14 The Respondent failed to meet the legal requirements of ss 32 and 32AA of the RMA because:

(a) Although the Decision makes reference to a s 32 or s 32AA evaluation, any discussion of these in the Decision is cursory and high level only.

(b) Further, nothing in the Decision identifies and then assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of Policy 4.41C(b) as amended by the Decision, as required by ss 32(2) and s 32AA(1)(b) of the Act.

(c) The Decision fails to contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 4.41C(b).

4.15 Appendix A to the Decision suggests that this may not have been the intention of the Decision. In relation to the following submission requests:

> Amend Policy 4.41C(b) by inserting a new clause as follows:
> the nitrogen loss that was authorised by a resource consent that was granted prior to 13 February 2016 (including any renewal or replacement of that resource consent after 13 February 2016); or

the recommendation/decision is:

> In response to this and other submissions we recommend an amendment to the general effect requested, for the reasons in the original submission or advanced in the evidence and legal submissions in support of original submissions.

4.16 Policy 4.41C(b) does not however include an amendment to that effect. Accordingly, Policy 4.41C(b) does not give effect to the Decision.

4.17 Finally, two aspects of Policy 4.41C(b) lack clarity and to that end reflect decisions which could not reasonably have been reached:

(a) As outlined above, it is unclear how the criteria in rule 5.42B (referred to in Policy 4.41C(b)) relate to a resource consent application being made by an irrigation scheme or principal water supplier. This is because Policy 4.41C clearly anticipates that an irrigation scheme may manage nutrient loss on an aggregated basis, yet the criteria in rule 5.42B relate to “a property” or “the property”;

(b) It is not clear whether the final words in Policy 4.41C(b) relate to all irrigation areas encompassed by an existing resource consent granted to an irrigation scheme or principal water supplier (e.g. in the context of resource consent CRC121664, the existing irrigation areas and the new irrigation areas) so that an aggregated Good Management Practice Loss Rate is required for the entire command area, or whether these words relate to irrigation that was newly established on the basis of such resource consents (e.g. in the context of resource consent CRC121664, the new irrigation areas only).

Method s28.4

4.18 As notified, Plan Change 5 included exceptions in Method s28.4 for cropping blocks using travelling and sprayline irrigation systems on soils with PAW60 of 40 to 80mm.

4.19 The exceptions recognised the constraints specific to these irrigation systems (which restrict the minimum depth of irrigation application) by providing a fixed irrigation application depth of 40mm for travelling irrigation systems and 35mm for sprayline irrigation systems.

4.20 In its Decision, the Respondent deleted the above exceptions in Method s28.4. The practical effect of the Decision is that most travelling and sprayline irrigators will be unable to meet GMP on light soils, more likely forcing associated farming activities into a non-complying or prohibited activity status under Plan Change 5, and more likely to fail an audit for the irrigation objective in the FEP.

4.21 One of the Appellant's shareholding irrigation schemes, the Ashburton-Lyndhurst Irrigation Scheme, is predominantly comprised of medium to light soils.

4.22 This outcome is significantly different to Method s28.4 as notified and was not sought or contemplated by any submitter.

4.23 Parties affected by the proposal had no opportunity to consider the proposal, or make representations to the Hearings Panel before the decision was issued.

4.24 There was no evidence before the Respondent to support its Decision to delete the exceptions from Method s28.4. Rather, the (limited) evidence before the Hearings Panel on this matter was that the exceptions should be retained.

4.25 Further, there was no evidence before the Respondent to support its conclusion at paragraph [407] of the Decision that deletion of the exceptions was necessary as it would result in a modelling proxy that is a more appropriate way to achieve the objectives of the LWRP, particularly Objective 3.24.

4.26 Specifically, no evidence was presented to support the position that the deletion of the exceptions would be more efficient and effective than Method s28.4 as notified, or that the benefits outweighed the costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the decision made.

4.27 Section 32AA RMA requires a further evaluation to be carried out for changes that have been made to, or are proposed for, a proposed plan change since the original section 32 RMA evaluation report was completed, in accordance with section 32(1) to (4) RMA. Any further evaluation must be at a level of detail that corresponds to the scale and significance of the changes.

4.28 The Respondent failed to meet the legal requirements of sections 32(1), 32(2) and 32AA RMA because:

(a) The Officer's Reply Report did not recommend that the exceptions be deleted.

(b) The version of Method s28.4 recommended by the Officers in their Reply Report was the notified version.

4.29 The Decision makes no reference to a section 32AA assessment of this matter. Further, nothing in the Decision identifies and then assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of Method s28.4 as amended by the Decision, as required by sections 32(2) and s32AA(1)(b) RMA.

4.30 The Decision at paragraphs [406] – [408] fails to contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Method s28.4 as amended by the Decision (as required by sections 32(1)(c) and 32AA(1)(c) of the RMA). This is in stark contrast to the section 32 evaluation originally prepared by the Officers regarding Method s28.4 as notified.

5. Relief sought

5.1 The Appellant seeks:

(a) That the appeal be allowed;

(b) That the matter be referred back to the Respondent for reconsideration in light of the findings of this Honourable Court;

(c) Such further or other relief, including consequential relief, as may be appropriate;

(d) The costs of and incidental to these proceedings.

Dated this 21st day of July 2017

Vanessa Jane Hamm
Counsel for the Appellant

TO: The Registrar of the High Court, Christchurch

AND TO: The Canterbury Regional Council

AND TO: Those parties who filed submissions and further submissions on the matter (to be advised).

This Notice of Appeal is filed by **VANESSA JANE HAMM**, solicitor for the Appellant of the firm Holland Beckett. The address for service of the Plaintiff is at the offices of Holland Beckett, Solicitors, 525 Cameron Road, Tauranga.

Documents for service on the Plaintiff may be left at the address for service or may be:

(a) posted to the solicitor at Private Bag 12011, Tauranga; or
(b) left for the solicitor at a document exchange for direction to DX HP40014, Tauranga; or
(c) transmitted to the solicitor by fax to 07 578 8055;
(d) emailed to the solicitor at vanessa.hamm@hobec.co.nz