WYNNWILLIAMS

MEMORANDUM

Date: 14 August 2019

To: Section 42A officers, Environment Canterbury

From: Lucy de Latour, Kate Woods

AUTHORISING ADDITIONAL USES OF WATER - FULTON HOGAN LIMITED – ROYDON QUARRY

Introduction

1. The Canterbury Regional Council (**Council**) is currently processing a suite of regional resource consents relating to a proposed new quarry in Templeton to be operated by Fulton Hogan Limited (**FHL**).

2. FHL requires water for aggregate washing and dust suppression and to facilitate rehabilitation plantation.

3. FHL holds an existing resource consent CRC182422. This resource consent currently provides that it is a consent to take and use groundwater. It was granted to enable the irrigation of an area of land, as shown on the accompanying plans.[1]

4. In the resource consent application for the new quarry, FHL sought a change to condition 3 of the resource consent CRC182422 to enable the water permit to also be used for the purposes of aggregate washing and dust suppression (and a change to Condition 5c). This change has been sought under section 127 of the Resource Management Act 1991 (**RMA**).

5. We understand the Council expressed some concerns regarding the application to enable the new uses being processed under section 127 of the RMA. Accordingly, FHL has applied for new use permit as an alternative to the application under section 127 of the RMA to change the conditions of CRC182422.

6. You have asked us to provide a legal opinion addressing:

   a. Whether the application to vary CRC182422 can be processed as a variation to the conditions under section 127 of the RMA; and

   b. If not, whether the application can be processed as a new "use" permit to authorise the additional use of water taken under resource consent CRC182442.

Executive summary

7. Section 127 of the RMA allows a consent holder to apply to a consent authority to change or cancel the conditions of a resource consent. Case law has established that in some cases section 127 will not be the most appropriate method to change a condition. Where the activity would result in a fundamentally different activity, or one having materially different adverse effects, or one that seeks to expand or extend the original activity, it should be treated as a new application (under section 104 of the RMA).

8. Whether the activity should be treated as a change of conditions or a new application is a matter of fact and degree in the particular circumstances for the consent

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[1] In particular, condition 3 provides "Water taken for irrigation shall only be applied to the area of land shown on the accompanying plan CRC010516."

authority to consider, but case law has clarified that it is the effect of the proposed amendment that is relevant, rather than the form on which the amendment was applied for.

9. The High Court has recently confirmed that a consent authority does not have jurisdiction to grant a consent for more than what was applied for, and that it is necessary to have recourse to the original application to determine what the application was for.

10. In this case, the application for the original consent (prior to the transfer to FHL) (CRC010516) was stated as being for spray irrigation of 32 hectares of pasture. Even though the irrigation plan attached as part of the original consent indicated a wider area on which irrigation could occur, we consider that the application was clear in that it only sought to irrigate 32 hectares of pasture within that area.

11. In addition, FHL seeks to change the use of the water from irrigation of pasture to "aggregate washing, dust suppression and other activities ancillary to quarrying occurring at the site" (in addition water being taken for irrigation). We consider that this change would likely have different effects to the use of water for irrigation, and therefore should be processed as a new activity under section 104 rather than section 127.

12. A new take and use cannot be applied for under the Canterbury Land and Water Plan, as the site is within the Selwyn-Waimakariri Groundwater Allocation Zone, which we understand to be overallocated (and therefore any new take and use of water is a prohibited activity, for which consent cannot be sought).

13. For this reason, the only way in which consent for a new activity can be sought is as a separate "use" permit.

14. We consider that section 14 of the RMA anticipates that a regional council may regulate the "take" and "use" of water separately, and consequently grant a "use" permit in addition to a water permit to "take" water. However, we note further that the Council is currently involved in a High Court proceeding (set down to be heard on 9 and 10 December 2019) which will provide further clarity on this matter.

15. In this situation, an application for a separate "use" would need to be processed under Rule 5.6 of the Canterbury Land and Water Regional Plan as an activity not otherwise regulated by the Plan.

16. We consider the environmental effects of the existing take will form part of the existing environment against which the additional uses will need to be considered, as FHL has not proposed any changes to the consented depth, rate or volume of take. If the Council decides to grant a new use permit, we consider that this permit will be able to sit alongside CRC182442 (provided that the new "use" permit clarifies that the permit only authorises additional uses under CRC182442 and does not amend the rate or volume of abstraction authorised by CRC182442).

Additional use outside scope of a section 127 application

17. Section 127 of the Resource Management Act 1991 (**RMA**) enables the holder of a resource consent apply to a consent authority to change or cancel conditions in their resource consent.

18. Section 127(1) provides:

> The holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of the consent, subject to the following:

(a) the holder of a subdivision consent must apply under this section for a change or cancellation of the consent before the deposit of the survey plan (and must apply under section 221 for a variation or cancellation of a consent notice after the deposit of the survey plan); and

(b) no holder of any consent may apply for a change or cancellation of a condition on the duration of the consent.

19. An application under section 127 is processed as if it were an application for a resource consent for a discretionary activity.

20. While on an initial review of CRC182422 it would appear open to FHL to simply seek to amend condition 3 of the consent to provide for the additional uses, case law has made it clear that section 127 does not need to be invoked every time an application is made to amend or cancel a condition of a resource consent. In some circumstances it will be appropriate for the application to be processed under section 104 as a new application.

21. In particular, case law has made it clear that:

a. Section 127 is not able to be used where the variation would result in a fundamentally different activity, or one having materially different adverse effects, or one that seeks to expand or extend the original activity, it should be treated as a new application.[2]

b. The form that the application has been lodged (i.e. as a variation under section 127, or as a new application under section 104) does not influence whether an application should be processed under section 127, instead of section 104. Rather the Council should consider the effect of granting the proposed amendment.[3]

c. Whether an application is truly one seeking variation, or whether, in reality, it is seeking consent to a materially different activity, is a question of fact and degree to be determined in the circumstances of the case.[4]

22. The Court of Appeal, upholding the High Court's judgement in *Body Corporate 97010 v Auckland City Council*, summarised the relevant principles as follows:[5]

> [36] In his judgment Randerson J said that whether an application is truly one for a variation or in reality seeks consent to an activity which is materially different in nature is a question of fact and degree to be determined in the circumstances of the case. Relevant considerations include a comparison between the activity for which the consent was originally granted and the nature of the activity if the variation were approved. The terms of the resource consent were to be considered as a whole. Artificial distinctions should not be drawn between the activity consented to and the conditions of consent. "The scope of the activity is not defined solely by the introductory language of the consent but is also delineated by the conditions which follow". From none of this did we understand counsel for the appellant to dissent.
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> [37] Randerson J said that the consent authority should compare any differences in the adverse effects likely to follow from the varied purpose with those associated with the activity in its original form. Where there was a fundamentally different activity or one having materially different adverse effects a consent authority "may decide the

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2 *Body Corporate 97010 v Auckland City Council* (2000) 6 ELRNZ 183 (HC); this approach was upheld by the Court of Appeal in *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).

3 *Warbrick v Whakatane District Council* [1995] NZRMA 303 (PT).

4 *Body Corporate 97010 v Auckland City Council* (2000) 6 ELRNZ 183 (HC); this approach was upheld by the Court of Appeal in *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).

5 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA), at [36]-[37].

> better course is to treat the application as a new application", particularly where it is sought to expand or extend an activity with consequential increase in adverse effects. Here the number of apartments was reducing and they would be located entirely within the profile of the original building. Adverse effects would remain but would be less. The Judge could see no grounds for review of the Council's decision to proceed under s127.

23. In this case, it is necessary to consider what the scope of the original resource consent held by FHL is in order to determine whether the Council can process an application to amend the conditions of CRC182422.

24. The High Court in *Aotearoa Water Action v Canterbury Regional Council* has recently confirmed that the scope of a water permit, including for what purpose the water is to be used, is limited to that which was applied for.[6] The High Court stated:[7]

> A council does not have jurisdiction to grant a consent for more than was applied for. Therefore, in establishing that a consent fell within jurisdiction, it is necessary to analyse exactly what the application was for.

25. The water permit in question was transferred to FHL from Royden Lodge Stud Limited under section 136 of the RMA, as the owner or occupier of the same site for which the original consent was held.

26. Following the transfer, the water permit was given the consent identifier CRC182442. The original consent, CRC010516, was applied for in September 2000 as a replacement to an expiring consent (with only some slight amendments to allow for the drawing of more water following a compliance monitoring report).

27. The water applied for was for the purpose of spray irrigation of pasture. The application for CRC010516 described the proposed activity as:

> To take up to 753 cubic metres of water per day at a maximum rate of 9.5 litres per second from bore M36/257, 200mm diameter and 63.4 metres deep at or about map reference M36:651-383 for spray irrigation of 32 hectares of pasture.

28. We understand there is some disagreement between the Council and FHL regarding the original area for irrigation. The application states in several places that the consent is sought for irrigation of 32 hectares of pasture, but the certificates of title and the plan attached as part of the application (which was later incorporated as part of the conditions of CRC010516) shows a larger area than 32 hectares.[8]

29. Condition 3 of CRC010516 states that "Water taken for irrigation shall only be applied to the area of land shown on the accompanying plan CRC010516." We understand there may be some dispute as to whether the consent authorises irrigation on the entire area indicated in the irrigation plan, or 32 hectares of that area.

30. The application states several times that the activity proposed is spray irrigation of 32 hectares of pasture only. The 32 hectare amount is stated with the description of the activity itself, as well as being indicated on the application form as the area to be irrigated, and being included within the calculations on the application form for average application rate per day.

31. In our opinion, it is clear that the irrigation of 32 hectares was the activity that was applied for. The irrigation plan simply demonstrates the area within which irrigation can take place, not that irrigation can take place over the entire area. Applying the

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6 *Aotearoa Water Action Incorporated v Canterbury Regional Council* [2018] NZHC 3240, [128].

7 *Aotearoa Water Action Incorporated v Canterbury Regional Council* [2018] NZHC 3240, [79].

8 We understand from the certificates of title provided with the application for CRC010516 that the area on the irrigation plan comprises approximately 64 hectares.

High Court's decision in *Aotearoa Water Action,* the Council cannot grant more than what was applied for. The application was clearly for the spray irrigation of 32 hectares of pasture (within the area identified on plan CRC010516), and to allow irrigation of more than 32 hectares would be inconsistent with the original application.

32. Applying all of the above, we consider the variation sought by FHL would be outside the scope of the existing consent. The existing consent, CRC182422, is a water permit to take and use groundwater for the irrigation of land within a specified area. FHL seeks to change condition 3 to enable water to be taken for the purposes of "aggregate washing, dust suppression and other activities ancillary to quarrying occurring at the site" (in addition water being taken for irrigation).

33. It appears that the new activity would be fundamentally different to that for which the consent was granted. It is also likely that the use of water for aggregate washing and dust suppression will have different effects to the use of water for irrigation.

Authorising the water under a new application

A new take and use application

34. The FHL site is within the Selwyn Waihora sub-region of the Land and Water Regional Plan (**LWRP**).

35. The FHL site is within the Selwyn-Waimakariri Groundwater Allocation Zone.

36. Rule 11.5.33 of the LWRP regulates the take and use of groundwater in the Selwyn-Waimakariri Groundwater Allocation Zone (as the LWRP states that this rule prevails over the more general regional rule 5.128). Such a take and use is a restricted discretionary activity, provided that the take does not result in any exceedance of any allocation limits.

37. Table 11(e) of the LWRP provides the combined surface water and groundwater allocation limit for Selwyn-Waimakariri is 193 million m^3/year. We understand that this limit is currently exceeded, and therefore the Selwyn-Waimakariri Groundwater Allocation Zone is currently overallocated.

38. Therefore, the take and use of groundwater from the Selwyn-Waimakariri Groundwater Allocation Zone cannot meet condition 1 of rule 11.5.33, and is therefore a prohibited activity (as regulated by rule 11.5.37). Being a prohibited activity, resource consent cannot be sought for the take and use of groundwater within this zone.

A new use application

39. Given that a new take and use cannot be applied for under the LWRP framework, the only way that an application can be processed in order to allow water taken under CRC182422 to be used for the additional uses sought by FHL is for a new use permit to be granted by the Council.

40. The following section of this advice explains the basis on which the Council can process a new use permit.

41. Section 14 of the RMA controls water. It states (relevantly):

> (2) No person may take, use, dam, or divert … [water] … unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (3) A person is not prohibited by [subsection (2)] from taking, using, damming, or diverting any water, heat, or energy if—

(a) The taking, [using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one),] or a resource consent

42. Section 14 does not regulate "take and use" but separately regulates "take" and "use". Accordingly, we consider the RMA anticipates that a regional council may regulate the “take” and “use” of water separately, and consequently grant a "use" permit in addition to a water permit to “take” water.

43. We note there has been some legal uncertainty regarding the separate components of section 14 of the RMA that regulates the take and use of water.

44. In *P & E Limited v Canterbury Regional Council,*[9] the Environment Court suggested (without deciding the matter) that the "use" of water under section 14 is confined to instream use. In other words, a water permit to use water would only ever be needed when the water was being used instream (for example, for hydroelectricity generation). This point has not been determined by the Environment Court or High Courts. The same question arose in *Federated Farmers of New Zealand (Inc) v Mackenzie District Council,*[10] with the Court noting that "there are important issues here which need to be considered by the Senior Courts at some stage."

45. However, while these two cases suggest that use (i.e. the purpose to which water taken is used) is not regulated by section 14, other earlier High Court case law clearly suggests that under section 14 both "the taking of water and the use to which it is put" are controlled. Both aspects must be either "expressly allowed" by a rule in a plan or by a consent.[11] While not determining the issue, the Environment Court has also previously contemplated that a separate use permit might be applied for after a take and use permit has been granted.[12]

46. We consider the general approach of regulating the use of water, in addition to the take, is permissible. We also consider that it is permissible for a council to grant a completely separate "use" permit.[13]

47. In this situation given that the LWRP only has rules that together regulate the take and use of water, such an application would need to be processed under Rule 5.6 of the LWRP as an activity not otherwise regulated by the Plan.

48. FHL has not proposed any changes to the consented depth, rate or volume of the abstraction (i.e. take) from what as originally authorised to be taken, and the adverse environmental effects of the consented rate and volume of the take was considered when the existing consent was granted. Accordingly, we consider the environmental effects of the existing take therefore form part of the existing environment against which the additional uses will need to be considered.

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9 *P & E Limited v Canterbury Regional Council* [2015] NZEnvC 106 (Procedural Decision) at [26]. Quoted with approval in *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2017] NZEnvC 53 at [484].

10 *Federated Farmers of New Zealand (Inc) v Mackenzie District Council* [2017] NZEnvC 53, at [488].

11 *Bruce v Canterbury Regional Council,* High Court, Timaru, 6/4/2005, CRI-2004-476-15, Panckhurst J, [24].

12 *Royal Forest & Bird Society of New Zealand v Canterbury Regional Council* [2013] NZEnvC 301 and *Simons Hill Station Ltd v Canterbury Regional Council* [2013] NZEnvC 62, [2013] NZRMA 215.

13 While not deciding the matter, other Environment Court decision certainly indicate this, e.g. *Royal Forest & Bird Society of New Zealand v Canterbury Regional Council* [2013] NZEnvC 30, *Simons Hill Station Ltd v Canterbury Regional Council* [2013] NZEnvC 62, [2013] NZRMA 215, *Koha Trust Holdings Ltd v Marlborough District Council* [2016] NZEnvC 152, (2016) 19 ELRNZ 581.

49. If granted, the new "use" permit will be able to sit alongside CRC182422 and authorise the additional uses. There is nothing in the RMA that restricts two resource consents from sitting alongside one another and being exercised concurrently, provided that exercising one consent does not cause a breach of conditions of the other consent. In this case, we would expect that the new "use" permit would need to clarify that the permit only authorises the additional uses under CRC182422 and does not amend the rate or volume of the abstraction, at any one time, under CRC182422.

50. For completeness, we note that the Council is currently involved in a High Court case that will consider this particular issue and whether it is lawful for a regional council to process a new "use" permit to authorise a change in use under an existing resource consent to take and use groundwater.[14] The matter is set down to be heard in the High Court on 9 and 10 December 2019. It is the Council's position that it is lawful for a regional council to process a new "use" permit to authorise a change in use under an existing resource consent.

Wynn Williams

[14] *Aotearoa Water Action Incorporated v Canterbury Regional Council* CIV-2018-409-000121