

**BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE CANTERBURY REGIONAL COUNCIL**

UNDER the Resource Management Act 1991

IN THE MATTER of Proposed Plan Change 7 to the Canterbury Land and
Water Regional Plan and Proposed Plan Change 2 to the
Waimakariri River Regional Plan

**MEMORANDUM OF COUNSEL ON BEHALF OF THE CANTERBURY
REGIONAL COUNCIL
31 August 2020**

Canterbury Regional Council's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

WYNNWILLIAMS

Solicitor: P A C Maw
(philip.maw@wynnwilliams.co.nz)

MAY IT PLEASE THE HEARING COMMISSIONERS

- 1 This Memorandum of Counsel is filed on behalf of the Canterbury Regional Council (**Regional Council**) and responds to certain matters raised in the Memorandum of Counsel filed on behalf of the Christchurch City Council (**CCC**) dated 20 August 2020.
- 2 In its Memorandum, the CCC referenced its earlier position in respect of the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**) and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**), as follows:

The NPS-FM (2020) was gazetted yesterday and will be in legal effect from 3 September 2020. Counsel expects that the Canterbury Regional Council will be making a suggestion to the Commissioners as to any changes to process that may be necessary to address the relevance of the NPS-FM and NES FM.
- 3 The CCC also suggested that the NPSFM 2020 and NES-F “make fundamental changes to the higher order objectives, policies and rules within which the Panel’s decision making will occur.” Counsel for the CCC identified three procedural options to address the NPSFM 2020 and NES-F, namely:
 - (a) Withdrawal of the plan changes, or parts of the plan changes, and reassessment of policies and rules associated with water quality targets, limits and timeframes, (in particular nutrient management) in light of the new framework;
 - (b) Adjourning the hearing to allow time for the Council to reassess the proposed provisions in light of the new framework, with timetabled steps for the production of new officers’ reports, variation of the plan changes, possible re-notification, and further evidence exchange;
 - (c) Timetabled steps for a supplementary s42A report, followed by further supplementary evidence in chief and rebuttal evidence.
- 4 Further, the CCC requested that the Panel direct the Regional Council to file a Memorandum of Counsel setting out its position on the NPSFM 2020, NES-F and the implications of those documents on the present matter.

- 5 In order to assist the Hearing Commissioners with respect to the CCC's request for directions, this Memorandum sets out the Regional Council's position in respect of the matters raised in the CCC's Memorandum.

Procedural matters

- 6 The Hearing Commissioners have been delegated the functions and duties of hearing submissions on PC7 and PC2, and of making recommendations to the Regional Council on them. They have not been delegated the powers of the Regional Council with respect to withdrawing all or part of PC7 and PC2, or notifying a variation(s) with respect to those plan changes.
- 7 The power to withdraw all or part of PC7 and PC2, or to notify a variation(s) with respect to each of them rests with the Regional Council, and that power may be exercised at any time up to the formal approval of each of the plan changes.
- 8 In these circumstances it is not appropriate for the Council Officers to recommend a potential course of action to the Hearing Commissioners that is beyond the scope of the functions that have been delegated to them. Nor, with respect, can the CCC expect to deprive the Regional Council of its freedom to exercise those powers within those time periods.

NPSFM 2020

- 9 A regional council must prepare and change any regional plan in accordance with, amongst other matters, a national policy statement.¹ Further, a regional plan must give effect to relevantly, any national policy statement.²
- 10 The NPSFM 2020 was gazetted on 5 August 2020, and comes into effect on 3 September 2020.
- 11 Part 4 of the NPSFM 2020 contains timing and transitional provisions. Relevantly, clause 4.1(1) provides:

Every local authority must give effect to this National Policy Statement **as soon as reasonably practicable.**

¹ RMA, s 66(1)(ea).

² RMA, s 67(3)(a).

(our emphasis)

- 12 Therefore, PC7 and PC2 do not need to immediately give full effect to the NPSFM 2020. Rather, the Regional Council must give effect to the NPSFM 2020 as soon as is reasonably practicable.
- 13 The extent to which it is reasonably practicable to give effect to the NPSFM 2020 is a legal question, and the extent is confined by the scope within submissions to make changes to PC7 and PC2.
- 14 Counsel intends to address the extent to which it is reasonably practicable for the provisions of PC7 and PC2 to give effect to the NPSFM 2020 in opening legal submissions. Those submissions will be made available to both the Hearing Commissioners and submitters a week in advance of the hearing, i.e., by 22 September 2020.
- 15 In any event, if there is insufficient scope to fully give effect to the NPSFM 2020 in this process, the Council is required to give effect to the NPSFM 2020 no later than 31 December 2024.³
- 16 Given that the question of whether PC7 and PC2 are required to give effect to the NPSFM 2020 is a legal one, Counsel does not consider it is appropriate to adjourn the hearing with a view to reassessing the provisions of PC7 and PC2, reproducing officers' reports, initiating variations to PC7 and PC2, and providing for further evidence exchange, as suggested by the CCC. Rather, submitters may invoke the provisions of the NPSFM 2020 and address the extent to which PC7 and PC2 are required to give effect to the NPSFM 2020 when presenting their cases at the hearing.⁴

Incorporation of freshwater objective and policies in the LWRP

- 17 For completeness, Counsel note that the NPSFM 2020 requires regional councils to insert an objective and several policies into regional plans, in accordance with sections 55(2)-(2A) of the RMA. As such, the following changes must be made to the Council's regional plans without using the Schedule 1 RMA process:

³ RMA, s 80A(4)(b).

⁴ For completeness, in accordance with Minute 8, submitters are reminded that any material that they intend to table at the hearing must be emailed to the hearing manager (planhearings@ecan.govt.nz) at least 3 working days prior to the submitter's scheduled appearance at the hearing.

- (a) Insertion of a policy regarding natural inland wetlands (clause 3.22(1) NPSFM 2020);
 - (b) Insertion of a policy regarding rivers (clause 3.24(1) NPSFM 2020); and
 - (c) Insertion of an objective regarding fish passage (clause 3.26(1) NPSFM 2020).
- 18 The Council anticipates incorporating these provisions on 10 September 2020 and will issue a public notice within five working days of having done so.

NES-F

- 19 The status of National Environmental Standards (**NES**) in relation to plan rules, and the Council's obligation to amend plans and proposed plans in response to NESs can be summarised as follows:
- (a) A plan rule which is more stringent than an NES (in that it prohibits or restricts what the NES provision permits or authorises) conflicts with a provision of the NES if the NES does not expressly say that the rule may be more stringent than it (sections 43B(1), 44A of the RMA); or
 - (b) A plan rule which is more lenient than an NES provision (in the sense that it permits or authorises an activity that the NES prohibits or restricts) conflicts with the NES if the NES does not expressly say that a rule may be more lenient (sections 43B(3), (4), 44A of the RMA).
- 20 In each case, the conflict must be removed from a plan or proposed plan without using a Schedule 1 RMA process.
- 21 Similarly, any duplication between a plan or proposed plan and an NES provision must also be removed without using a Schedule 1 RMA process.
- 22 The Council is undertaking its assessment of the NES-F and the implications of these regulations for both the existing planning framework and for PC7 and PC2. Relevantly, regulation 6(1) of the NES-F provides that a regional rule may be more stringent than the NES-F regulations. Accordingly, the Council's assessment has been limited to identifying first, any duplication, and second, any conflict by

virtue of plan rules being considered more lenient than the provisions of the NES-F (unless provided for by regulation 6(2)).

- 23 A further Memorandum of Counsel on behalf of the Council will be filed on or around 3 September 2020, accompanied by the Council's assessment of the provisions of PC7 and PC2 against the requirements of the NES-F.

Dated this 31st day of August 2020



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P A C Maw / I F Edwards
Counsel for Canterbury Regional Council