

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

UNDER: the Resource Management Act 1991

AND: the Environment Canterbury
(Transitional Governance
Arrangements) Act 2016

IN THE MATTER OF: Proposed Plan Change 7 to the
Canterbury Land and Water Regional
Plan – Section 14: Orari-Temuka-
Opihi-Pareora

**LEGAL SUBMISSIONS ON BEHALF OF
THE ADAPTIVE MANAGEMENT WORKING GROUP (SUBMITTER NO. PC7-385)**

Dated: 28 October 2020

GRESSON DORMAN & CO
Solicitors
PO Box 244, Timaru 7940
Telephone 03 687 8004
Facsimile 03 684 4584
Solicitor acting: G C Hamilton / N A Hornsey
georgina@gressons.co.nz / nicola@gressons.co.nz

MAY IT PLEASE THE COMMISSIONERS

INTRODUCTION

Interests represented by the AMWG

1. The Adaptive Management Working Group (**AMWG**), comprising representatives of Timaru District Council, Central South Island Fish & Game Council and Opuha Water Limited, has a united view on the elements of Plan Change 7B to the Canterbury Regional Land and Water Plan (**PC7B**) that address the future environmental flow, allocation and partial restriction regime for the mainstems of the Opuha and Opihi Rivers at Saleyards Bridge (**SYB**) for water permits affiliated to the Opuha Scheme. Collectively, the AMWG represents a range of interests in the Orari-Temuka-Opihi-Pareora (**OTOP**) sub-region including municipal and community water supplies, recreational angling, farming and agriculture.
2. As will be apparent from the AMWG's submissions and evidence that has been filed in support, the AMWG's position on PC7B represents the culmination of over four years of engagement and careful consideration of the relevant issues and options, informed by the knowledge that has been gained by the Opuha Environmental Flow Release Advisory Group (**OEFRAG**) in managing the freshwater resources of the Lake Opuha catchment over the last 20 years, together with independent ecological, hydrological and technical assessment and advice. The AMWG's position is also reflects the outcome of engagement on biodiversity and conservation matters with the Department of Conservation, which was an active member of the AMWG pre notification of PC7B.

Scope of legal submissions

3. Since primary evidence was filed on 17 July 2020, significant progress has been made through hydrological and ecological expert witness caucusing. These submissions therefore focus on the following matters arising from the evidence filed by AMWG and other submitters, the Section 42A Report and questions from members of the Hearings Panel:
 - (a) Environmental flows at SYB;
 - (b) Alternative planning options for the Alternative Management Regime (**AMR**);

- (c) Mr McCallum-Clark's suggested consolidation of Policies 14.4.35 to 14.4.37; and
- (d) Partial restrictions.
4. While the AMWG's various work-streams commenced well before the new National Policy Statement for Freshwater Management (**NPSFM**) took effect on 3 September 2020, unlike PC7B as notified (or the recommendations contained in the Section 42A Report) each element of the AMWG's proposed alternative regime has been designed to provide for the environment first and foremost, followed by community water supply and lastly abstractive uses (including irrigation), a position that has been confirmed by the modelling undertaken on behalf of both the AMWG and ECan for this hearing.
5. As will be addressed in further detail in these legal submissions, the changes to PC7B sought by the AMWG are, in our submission, fully aligned with Te Mana o Te Wai and consequently the NPSFM, and otherwise are the most appropriate provisions for achieving the objectives of PC7B. Accordingly, we submit that those changes should be preferred by the Hearings Panel.

The AMWG's witnesses

6. The AMWG relies on the evidence of the following witnesses:

| Witness / Role | Description of evidence |
|---|--|
| Judy Blakemore , Timaru District Council's Water Supply Operations Manager and representative on the AMWG. | Introduction to the OEFRAG and its historical role in the Lake Opuha catchment, overview of the AMWG and its workstreams since 2016, Section 42A Report and the AMWG's position on PC7B. |
| Mark Webb , Fish and Game Officer, Fish and Game New Zealand (Central South Island Region) and Fish and Games' representative on the AMWG. | Assessment of PC7's proposed augmentation regime and amendments sought by the AMWG from a sports fish habitat and recreational perspective. |

| | |
|---|--|
| Andrew Mockford , OWL’s Chief Executive, and representative on the AMWG. | Operational aspects of the Opuha Dam relevant to PC7B and the AMWG’s submission, and related aspects of the Section 42A Report. |
| Julia Crossman , OWL’s Environmental Manager and representative on the AMWG. | Background to the AMWG’s submission focusing on the planning framework for the Saleyards Bridge minimum flow regime and partial restrictions for water permits affiliated to OWL (i.e. AA and BA permits) and related aspects of the Section 42A Report including compliance/enforceability issues and the planning framework. |
| Richard Measures , Hydrodynamics Scientist, NIWA. | Expert witness, artificial freshes. |
| Dr Gregory Ryder , Environmental Scientist, Ryder Environmental Ltd. | Expert witness, freshwater quality and ecology. |
| Dr Tim Kerr , Director, Rainfal.NZ Ltd. | Expert witness, surface water hydrology and hydro-meterology. |
| Timothy Ensor , Principal Planner, Tonkin and Taylor Ltd. | Expert witness, planning. |

SYB ENVIRONMENTAL FLOWS: “FULL AVAILABILITY”, “LEVEL 1” AND “LEVEL 2”

“Full availability” environmental flows

7. On the basis of the agreement reached at the expert caucusing, in our submission:

7.1 Table 14(v) can be amended to reflect the AMWG’s proposed “full availability” environmental flows¹; and

¹ Submission PC7-385,

- 7.2 Table 14(w) can be deleted.
8. As the Panel will be aware, Table 14(w) provides increases in environmental flows beyond those under Table 14(v)'s "full availability" regime to take effect from 2030. In this regard, the AMWG understands that Table 14(w) was included in PC7B as a means for implementing the OTOP Zone Committee's desire for flow gains achieved by PC7B's environmental flow increases on the Upper Opihi and Te Ana Wai rivers being reflected in environmental flows at SYB.² Those "gains" are reflected as Table 14(w)'s "full availability" flows, and its Level 1 and 2 regimes reflect those set out in Table 14(v) without change.
 9. Mr Webb³, Mr Mockford⁴ and Dr Kerr⁵ have variously explained the fundamental flaws in the approach adopted by Table 14(w), which goes much further than that envisaged by the Zone Committee. Dr Kerr's assessment indicates that the proposed environmental flow increases will come at a cost to Lake Opuha storage and consequently maintenance of environmental flows at SYB, with an increased risk of restriction regimes through PC7B's AMR being needed with greater frequency when compared with the AMWG's alternative.⁶
 10. Mr Webb has also questioned the proposed flow increases from an equity perspective; no commensurate increases in environmental flows are proposed by PC7B for AN permits at State Highway 1 (Table 14(u)).⁷ We also note the difficulties identified by Mr Mockford if the Zone Committee's recommendation was to be properly implemented by PC7B.⁸
 11. In our submission, the ecologist's agreement to the AMWG's "fully availability" flows confirms that retention of Table 14(w) is not required to give effect to Te Mana o Te Wai and consequently the NPSFM.⁹ Further, in light of Mr Ensor's assessment that the AMWG's regime (without Table 14(w)) is more efficient and effective than PC7B¹⁰, we submit that the AMWG's "full availability"

² Evidence in Chief of Mark Webb on behalf of the AMWG, dated 17 July 2020, at [5.18].

³ Evidence in Chief of Mark Webb on behalf of the AMWG, dated 17 July 2020, at [5.19] – [5.20].

⁴ Evidence in Chief of Andrew Mockford on behalf of the AMWG, dated 17 July 2020, at [4.26] – [4.32].

⁵ Evidence in Chief of Dr Tim Kerr on behalf of the AMWG, dated 17 July 2020, at [8.6].

⁶ Evidence in Chief of Dr Tim Kerr on behalf of the AMWG, dated 17 July 2020, at [8.4] – [8.5].

⁷ Evidence in Chief of Mark Webb on behalf of the AMWG, dated [5.19(e)].

⁸ Evidence in Chief of Andrew Mockford on behalf of the AMWG, dated 17 July 2020, at [4.26] – [4.32].

⁹ Confirmed by Mr Webb in his evidence update, dated 27 October 2020.

¹⁰ Evidence in Chief of Timothy Ensor on behalf of the AMWG, dated 27 October 2020, at [6.26].

environmental flow regime is the most appropriate regime on the basis that it is suitable (not superior)¹¹ and the least restrictive regime¹².

12. For these reasons, we submit that the AMWG's primary request for the deletion of Table 14(w) can and should be accepted.

Level 1 and Level 2 environmental flows

13. Similarly, we submit that Table 14(v) can be amended to include the AMWG's Level 1 environmental flows, these being accepted by the ecological experts as providing adequate habitat retention for ecological values for the Opihi River below SYB.¹³

14. Regrettably, agreement to the AMWG's Level 2 environmental flows (3,500 L/s) was not reached. The JWS records the ecologists' disparate views as follows:

14.1 Dr Ryder, Mr Measures and Mr Webb (for the AMWG): *the Adaptive Management Working Group's level two regime provides an acceptable compromise between preserving lake storage to maintain river connectivity in the future at the risk of losing some ecological values in the short term.*¹⁴

14.2 Dr Drinnen (for Department of Conservation) and Ms Hayward and Dr Jellyman (for Environment Canterbury) that the AMWG's Level 2 regime (3,500 L/s) *...year round is less than optimum and may risk loss of some ecological values depending on the timing, duration and frequency of the level two regime.*¹⁵

15. In our submission, it is essential that the appropriateness or otherwise of the AMWG's Level 2 environmental flow regime is assessed with reference to the wider context of the AMWG's proposed AMR framework (as acknowledged by Dr Ryder, Mr Measures and Mr Webb), as well as the AMWG's intention for the Level 2 flows to reflect an "ecological minimum", commensurate with PC7B's proposed environmental flow at State Highway 1 (SH1) bridge of 2,600 L/s. We note Mr Webb's reservations about the ECan/DOC view on the

¹¹ *Rational Transport Society v New Zealand Transport Agency* [2012] NZRMA 298, at [45].

¹² *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 051, at [59].

¹³ JWS – Freshwater quality/ecology, at [41].

¹⁴ JWS – Freshwater quality/ecology, at [43].

¹⁵ JWS – Freshwater quality/ecology, at [42].

AMWG's Level 2 regime in that regard, in the sense of being inconsistent with ECan's acceptance of the suitability of the SH1 flows/Table 14(u) as notified.¹⁶

16. For these reasons, and the evidence addressed later in our submissions confirming that the AMWG's regime in its entirety is the most appropriate option, we respectfully submit that Table 14(v) should be amended to reflect the AMWG's Level 2 environmental flows.

Implementation timeframe

17. In terms of the Reporting Officer's recommended changes to the timing for implementation of the Table 14(v) environmental flows and partial restrictions, the AMWG takes a neutral position.
18. Notwithstanding that, the AMWG does not consider bringing forward the implementation timing of those flows gives any greater weight to Te Mana o Te Wai as claimed by the Reporting Officers; as Mr Webb has acknowledged in relation to the Temuka catchment¹⁷, adjusting the timeframe for implementation does not provide any more ecological habitat.
19. We submit that should the Panel be minded to adopt the Reporting Officers' recommendations with respect to implementation timing, it will obviously need to ensure there is sufficient scope to make the changes. In our view, the issue of scope is not as clear-cut as the Reporting Officers suggest given the lack of specificity in the very generalised submissions that have been relied upon for the changes.

AMR PLANNING FRAMEWORK

Retention of an AMR in PC7B

20. The AMWG remains of the view that retaining an AMR framework in PC7B that expressly provides for stakeholder consultation and involvement in water management decisions in the Opihi FMU (in a similar way to how OEFRAG has historically operated) is preferable.
21. As the Reporting Officers have acknowledged, PC7B's proposed AMR arose out of substantial engagement between the Zone Committee and the local

¹⁶ Evidence Update of Mr Webb, dated 27 October 2020, reflecting comments made in his Evidence in Chief on behalf of the AMWG, dated 17 July 2020, at [5.27] and [5.28].

¹⁷ Statement of Evidence of Mark Webb on behalf of Fish and Game New Zealand, Central South Island Region (Submitter No. PC7-351), at [6.32].

community. Informed by ECan's advice that ongoing reliance on Water Shortage Directions issued under section 329 RMA were not an acceptable long-term solution,¹⁸ the AMWG has undertaken a considerable amount of technical assessment and stakeholder engagement to ensure the shortcomings of the current ORRP flow regime would be fully addressed by the future OTOP regional plan change.¹⁹ As Mr Ensor has acknowledged, ECan too has undertaken considerable work with the AMWG in developing and refining the AMR and supporting plan provisions.

22. Mr Ensor notes that one of the key benefits of the plan driven approach is that the majority of the work to develop and socialise the AMR has been done, which means that there is a level of certainty regarding what any future resource consent process and subsequent management of the FMU might look like.²⁰ Mr Ensor notes further that this will hopefully avoid a protracted and expensive resource consent process where the issues being discussed at this hearing are re-litigated.
23. Notwithstanding that, the AMWG acknowledges the fundamental difficulty with the AMR framework as proposed by PC7B as notified, namely ECan's inability (legally) to delegate its statutory functions to third parties, an issue which Commissioner Sheppard raised with Mr Maw on the first day of the hearing. Mr Ensor addressed that issue in his primary evidence and offered a robust solution, involving the introduction of an ECan certification role in entry/exit processes under the AMR.²¹ In our submission, should the Panel's preference be for an AMR to be retained in PC7B (as opposed to PC7B providing a consenting pathway for the development of an AMR, which we discuss later) then Mr Ensor's solution is an appropriate fix. We submit that the fix which would enable PC7B to continue to provide for discretionary entry/exit into the AMR (as proposed), which Dr Kerr's evidence indicates is critical to the overall performance of the AMR.²²
24. Dr Kerr's evidence²³ demonstrates the various deficiencies in the modelling and analysis undertaken by Mr Clark for ECan, and the serious shortcomings of both the AMR proposed by PC7B as notified and the alternative recommended in the Section 42A Report. Dr Kerr has, however,

¹⁸ Evidence in Chief of Julia Crossman on behalf of the AMWG, dated 17 July 2020, at [4.1(a)].

¹⁹ Evidence in Chief of Judy Blakemore on behalf of the AMWG, dated 17 July 2020, at [5.1] – [5.10].

²⁰ Mr Ensor's Evidence Update, dated

²¹ Evidence in Chief of Timothy Ensor on behalf of the AMWG, dated 17 July 2020, at [6.35] and [6.39].

²² Evidence in Chief of Dr Tim Kerr on behalf of the AMWG, dated 17 July 2020, at [11.2].

²³ Evidence in Chief of Tim Kerr on behalf of the AMWG, dated 17 July 2020, at Section 10, and Dr Kerr's evidence update dated 27 October 2020.

acknowledged that Mr Clark's modelling shows similar shortcomings in the notified PC7B regime, despite the noted deficiencies.²⁴

25. In this regard, we note Dr Kerr's assessment that (unlike the AMWG's regime) neither of those regimes is likely to prevent the draining of Lake Opuha in drought years²⁵, leading to a high risk of an inability to maintain the regimes' environmental flows and flows dropping below the 'ecological minimum' of 3000 L/s (being the point at which the habitat available for fish and invertebrates declines rapidly²⁶).²⁷ In our submission, this presents a fundamental hurdle in terms of the mandatory requirements for regional plan provisions prescribed by:

25.1 Section 67(1)(c), specifically the Reporting Officer's revised directive in Policy 14.4.35 for "*Connectivity, ecological health and flow variability in the augmented Opuha and Opihi mainstems is maintained...*"; and

25.2 Section 67(3), given the first order priority (ecological health) of Objective 1 and Policy 1 of the NSPFM.

26. By contrast, the evidence before the Hearings Panel confirms unequivocally that the AMWG's proposed regime will be effective at prioritising the ecological health of the Opihi River, and in doing so, will give effect to Te Mana o Te Wai in accordance with Policy 1 of the NPSFM.

27. Should the Panel determine that it would be more appropriate for PC7B to retain an AMR framework, we submit that Dr Kerr's evidence supports:

27.1 The adjustments to PC7B recommended by Mr Ensor in his primary evidence for the AMWG, Attachment B; and

27.2 The replacement of Table 14(x) as notified with the AMWG's proposed alternative Tables 14(x)(i), (ii) and (iii).²⁸

Consenting pathway for an AMR

28. Through their questioning of the authors of the Section 42A Report, members of the Hearings Panel have socialised an alternative option whereby PC7B

²⁴ Evidence in Chief of Dr Tim Kerr for the AMWG, dated 17 July 2020, at [10.5]; Dr Kerr's evidence update dated 27 October 2020.

²⁵ Evidence in Chief of Dr Tim Kerr on behalf of the AMWG, dated 17 July 2020, at [11.2] and [11.3].

²⁶ Evidence in Chief of Mark Webb on behalf of the AMWG, dated 17 July 2020, at [5.28].

²⁷ Evidence in Chief of Dr Tim Kerr on behalf of the AMWG, dated 17 July 2020, at [3.2].

²⁸ AMWG submission on PC7, pages 39 – 41.

would instead provide a consenting pathway for the development of an AMR.²⁹ This option appears to have been driven by the Panel's concerns regarding the disparity in views (as between the experts for the AMWG and ECan) of the various elements of PC7B's proposed AMR framework, particularly Table 14(x) and its supporting policies (Policies 14.4.37 and 38).

29. The AMWG accepts that this is an available option, which may be preferable from the perspective of providing a simpler approach. It also acknowledges that this alternative would enable the merits of the various elements of the AMR to be fully examined and tested through the future consenting process.
30. To assist the Panel, Mr Ensor has drafted a set of alternative policies and rules that could be adopted if the consenting pathway option is preferred. Those alternative provisions are set out in Attachment A to his evidence update (dated 27 October 2020) and include the consequential deletion of Table 14(x) of PC7B as notified.
31. Before moving from this topic, we note that an offer was made by the AMWG for planning caucusing to occur on this discrete issue prior to the commencement of the hearing, but was declined by ECan. Mr Ensor remains willing to participate in such caucusing, should the Commissioners consider that would be useful.

CONSOLIDATION OF POLICIES 14.4.35 TO 37

32. In response to questions from the Hearings Panel, Mr McCallum-Clark has drafted a new Policy consolidating Policies 14.4.35 – 37 as notified, which appears to proceed on the assumption that the AMR would be retained within PC7B and incorporates the ecologist's agreement to Mr Measures' recommended revised wording of the artificial fresh policy (Policy 14.4.35(e))³⁰.
33. Regrettably, the new Policy appears to have also been drafted without any consideration of the uncontested evidence of Dr Kerr regarding the performance of the Section 42A Report's recommended "two tier" regime for SYB against regime effectiveness measures, including maintaining ecological flows and environmental flow requirements.³¹

²⁹ Questions posed to Mr McCullum-Clark on the first day of the hearing; Officers response to Hearing Panel Questions 28 May 2020 and 16 June 2020, page 51.

³⁰ JWS – Freshwater Quality/Ecology, at [24].

³¹ Evidence in Chief of Dr Tim Kerr on behalf of the AMWG, dated 17 July 2020, at [10.24].

34. Mr Ensor has considered Mr McCallum-Clark's suggestion, and raises several additional concerns, which include:
- 34.1 Issues of scope;
 - 34.2 Risks for the future consenting process contemplated by Rule 14.5.29 associated a policy framework lacking detail; and
 - 34.3 Failure to address the various fundamental errors in the notified version of Policies 14.4.35 – 37 as identified in the AMWG's submission and evidence.
35. For those reasons, we submit that Mr Ensor's recommendation should be preferred, that is:
- 35.1 If the Panel is minded to retain an AMR framework in PC7B, Policies 14.4.35 – 37 should be revised in the manner set out in Mr Ensor's Primary Evidence, Attachment B; or
 - 35.2 If the Panel is minded to instead provide a consenting pathway for the development of an AMR in PC7B, Policies 14.4.35 – 37 should be revised in the manner set out in Mr Ensor's Evidence Update, Attachment A.

PARTIAL RESTRICTIONS

36. The AMWG's position on the form of partial restrictions that should apply to affiliated water permits in the Opihi FMU remains as set out in its submission on PC7B. In summary, the AMWG's proposed approach (i.e. the inclusion of a new Table 14(v)(iii)³²) differs from PC7B in two fundamental ways:
- 36.1 The AMWG's proposal is a more fine-tuned approach, imposing monthly variable stepped partial restrictions depending on instream environmental, recreational and irrigation demands, abstraction location, applicable SYB flow requirements and water levels in Lake Opuha, rather than a blanket 50% (Level 1)/75% (Level 2) restriction regime as proposed by PC7B.
 - 36.2 The AMWG's proposal is for a fortnightly volumetric restriction, rather than a 24-hour volumetric restriction as is proposed by PC7B.

³² AMWG's submission, page 38.

37. Ms Crossman has noted ECan's acceptance of, and successful monitoring consent compliance under, similar partial restriction regimes recommended by OEFRAG and implemented through WSDs.³³ She has also canvassed the tiers various operational difficulties of PC7B's proposed 24-hour average, consequential gross water inefficiencies and losses in Lake storage.³⁴
38. The Reporting Officers' primary concern about the AMWG's alternative partial restriction regime appears to be based on a perception that the regime would create further unnecessary complexities in PC7B. However, that position seems at odds with ECan's prior approach to WSDs, as discussed by Ms Crossman, and her advice that a robust Scheme-wide compliance system that is compatible with ECan's consent monitoring programme is wholly achievable and that OWL is prepared to bear all costs in its implementation.³⁵
39. The Reporting Officer's reluctance to acknowledge the concerns expressed by various AMWG's witnesses³⁶ regarding the timing of PC7B's proposed 50% partial restriction being "too little too late" in terms of preserving Lake storage to maintain environmental flows at SYB, is also particularly concerning.
40. We urge the Hearings Panel to give careful consideration to those very valid concerns of the AMWG, and the advantages of the AMWG's partial restriction regime proposed over that proposed by PC7B. In our submission, the ability of the AMWG's partial restriction regime to adjust according to the relative criticalities in the river environmental and other demands, would support a finding from the Panel that (unlike PC7B as notified) the AMWG's regime gives effect to the NPSFM priorities, implements PC7B's policies, particularly Policy 14.4.35 (as recommended to be revised), and is the most appropriate regime when assessed against the alternative, blanket approach, proposed by PC7B.

Dated: 28 October 2020



G C Hamilton / N A Hornsey

Counsel for the Adaptive Management Working Group

³³ Evidence in Chief of Julia Crossman on behalf of the AMWG, dated 17 July 2020, at [4.37] – [4.45].

³⁴ Evidence in Chief of Julia Crossman on behalf of the AMWG, dated 17 July 2020, at [4.32] – [4.36].

³⁵ Evidence in Chief of Julia Crossman on behalf of the AMWG, dated 17 July 2020, at [4.46] – [4.51].

³⁶ See for example Evidence in Chief of Julia Crossman on behalf of the AMWG, dated 17 July 2020, at [4.21] – [4.23].