

**BEFORE INDEPENDANT 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 – Section 14: Orari-Temuka-
Opihi-Pareora

**LEGAL SUBMISSIONS ON BEHALF OF
THE TEMUKA CATCHMENT WORKING GROUP AND THE TEMUKA
CATCHMENT GROUP INCORPORATED (SUBMITTER NOS. PC7-319)**

Dated: 29 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

1. These legal submissions are presented on behalf of the Temuka Catchment Working Party (**Working Party**)¹ and the Temuka Catchment Group Incorporated (**TCGI**) (collectively **the Submitters**), who made primary submissions on aspects of Proposed Plan Change 7's (**PC7's**) concerning activities within the Temuka Freshwater Management Unit (**Temuka FMU**).
2. As a result of a historical policy approach adopted by Environment Canterbury (**ECan**) that has enabled the consenting of surface water and stream-depleting groundwater takes beyond the allocation limits set by the Opihi River Regional Plan (**ORRP**), the current state of "A" and "B" allocation within the FMU is 134% and 163% over-allocated respectively.² The FMU is referred to variously throughout the documents supporting PC7 as being over-allocated both ecologically and culturally.
3. The Working Party played a pivotal role in developing a 'solutions package' for the Temuka FMU to reverse the present state of over-allocation and to drive improvements in surface water flows and water quality over the next 20 years, such outcomes that would have not been achieved by earlier OTOP Zone Committee and ECan proposals. The Working Party's package recognised that a long-term solution for the Temuka FMU is required as the complexity of issues and the challenges they present for the future management of its freshwater resources cannot be resolved in the short-term.
4. To the extent that PC7 codifies the Working Party's 'solutions package', it is supported by the Submitters. However, the Submitters remain concerned that key elements of that package have not been carried through into PC7 or will be undermined by changes recommended by the Section 42A Report or sought by other submitters. Those areas of concern, which are the focus of these legal submissions, relate to:
 - 4.1 The implementation timing of the environmental flow, allocation and partial restriction regime provided for in Tables 14(i) through (l);

¹ Whose membership comprises representatives of TCGI, Barker Fruit Processors Ltd, Central South Island Fish and Game Council, Timaru District Council and OTOP Zone Committee Members (Statement of Evidence of Brent Schrider, dated 17 July 2020, at [17]).

² Based on a comparison between the allocation figures referred to in Table 14(i) and 14(l) of PC7.

- 4.2 PC7's mechanisms to support and facilitate the successful implementation of that regime.
5. In addition of the Section 32 Report and documents supporting PC7, the Submitters rely on the evidence of the following witnesses:
- 5.1 **Brett Schrider**, TGCI's Chairman and representative on the Working Party;
- 5.2 **Hayden McKenzie**, TCGI member and representative on the Working Party;
- 5.3 **Mark Webb**, Fish and Game Officer, Fish and Game New Zealand (Central South Island Region) (**Fish and Game**) and Fish and Game's representative on the Working Party;
- 5.4 **Keri Johnson**, hydrology consultant to the Working Party
- 5.5 **Grant Porter**, farm economics consultant to the Working Party.

Implementation timeframes

Table 14(l)

6. The Submitters' request is a simple one; they seek more time for the implementation of PC7's 2035 step in Table 14(l), comprising a final step in environmental flow increases and allocation reductions, and the introduction of pro-rata partial restrictions.³
7. The Submitters' position in this regard has been informed by the economic assessments of Mr Porter and Mr Harris, which confirm the severe economic implications of PC7's proposed regimes for affected consent holders, and consequently, the wider communities within the Temuka FMU. The Submitters consider that extending the window a further five years (such that implementation would occur at 2040) is needed to enable alternative water supplies to be explored and for adjustments to be made on-farm to accommodate the expected (significant) reductions in water availability/reliability.

³ Submission Points PC7-318.40, PC7-319.37, PC7-319.38, PC7-318.42, PC7-319.42, PC7-318.60, PC7-319.64, PC7-318.60, PC7-319.64.

8. In our submission, the Submitters' request is entirely reasonable and within the contemplation of Policy 11 of the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**), that existing over-allocation "...is phased out...". As acknowledged by the Environment Court in *Lindis Catchment Group Incorporated v Otago Regional Council* [2019] NZEnvC 179 with respect to the same directive in the former NPSFM 2017:

[373] To the extent that we may find the river is over-allocated we note that this objective of the NPSFM is to "phase out" over-allocation. The idea behind the objective is not to cut off the supply to people taking "too much" water but to give them time to adjust. We bear that in mind in all our subsequent discussion.

9. The evaluations undertaken by the TCWP with the assistance of ECan staff during the ZIPA development phase confirmed that their proposed regime would result in various benefits, including:⁴

- 9.1 Significant improvement in river flows by 2040, when flows less than 2 m³/s will occur only 20% of the time (compared with 50% under the existing scenario);
- 9.2 Monthly variable flows, which will benefit instream ecology; and
- 9.3 Water availability for irrigators will improve over time due to the intended reductions in allocation.

10. These 'substantial improvements' of the regime are acknowledged variously in the documents supporting PC7 and in the Section 42A Report. The Submitters have taken those acknowledgements, and the absence of any substantive changes to the environmental flows and allocation regimes recommended by the Section 42A Report, as an indication that the Reporting Officers are content with the environmental flows and allocation reductions proposed by Tables 14(i) and (l) from the perspective of the NPSFM 2020 and the wider statutory planning requirements for regional plans.

11. Assuming that is the case, we submit that by providing more time for transition, the Submitter's requested change would be closer to giving effect to Te Mana o Te Wai than PC7 as notified as it would achieve all three of the priorities in the NPSFM 2020's Objective. In addition, as it is the least restrictive regime

⁴ Working Party's submission to the OTOP Zone Committee, dated 31 October 2020, Attachment to Brent Schrider's evidence in chief (dated 17 July 2020).

of the two options and will result in less social and economic costs, from section 32's perspectives of efficiency and effectiveness, we submit that the Submitters' requested change would be the most appropriate regime. We therefore respectfully submit that the Submitters' request to be accepted.

Implementation timeframes

12. The Section 42A Report and Supplementary Report recommend significant changes to the implementation timeframes for PC7's proposed regimes for the Temuka FMU. Those changes would see:
 - 12.1 The 2025 flow regimes for A and B Permits (Tables 14(i) and (j)), and pro-rata partial restrictions, taking effect immediately; and
 - 12.2 The steps in allocation reductions for A and B Permits (Tables 14(i), (j)) and (k) taking effect two years earlier in 2025 and 2027, with final reductions taking effect in 2030 than was proposed by PC7.
13. These recommendations appear to have been made primarily in response to the submission of Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu. The Section 42A Report also records the view that the changes are *better aligned with Te Mana o te Wai and sustainable management of freshwater*.⁵ However, no further explanation is provided.
14. We submit that the Hearings Panel should approach the Officer's recommendations with caution. The Officer's narrow focus on Te Mana o Te Wai, without reference to current state or the expected improvements, and absent assessment against the wider statutory tests for regional plans (which would ordinarily take account of economic evidence, such as that provided for Mr Porter and Mr Harris' economic report for PC7), is particularly concerning.
15. As we have submitted earlier in these submissions, a regime that allows time for the transitioning of flow, allocation and partial restrictions regimes is more likely to achieve all three priorities of the NPSFM's Objective and be the most appropriate option in terms of the section 32 'tests'. We therefore urge the Hearings Panel to disregard the Reporting Officer's recommendations in relation to Tables 14(i) to (l).

⁵ Section 42A Report, at 7.15, page 299.

16. For the same reasons, we submit that the various (and somewhat confused) requests for changes to environmental flows and allocations in the Temuka FMU addressed in the evidence of Mr Henry for Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu should likewise be dismissed.

Supporting mechanisms

17. The Submitters sought various changes to PC7 to ensure its policy and rule framework provides a range of effective alternative options for the holders of A and B surface water permits in the Temuka FMU, recognising the significant challenges they face as a consequence of the Table 14(i) – (l) regimes and to encourage voluntary compliance. Those changes include:

17.1 Retaining the new “C” (harvesting) allocation block without PC7’s proposed requirements for (i) the surrender of an existing surface water or stream depleting groundwater take on grant⁶, and (ii) the proposed consented volume to be based on past use.^{7 8}

17.2 In relation to deep groundwater swaps:

(a) Re-aligning Policy 14.4.8(c) with Rule 14.5.8 to provide for swaps from surface water or stream depleting groundwater to deep groundwater based on *reasonable use* (in accordance with Schedule 10 LWRP), not *past use*;⁹ and

(b) Amending Table 14(zb) to provide a “T” allocation block for the Orari-Opihi groundwater allocation zone to enable permit swaps and otherwise rectify anomalies in the limits (which do not reflect total current consented abstraction as intended).¹⁰

17.3 Lifting the prohibition on water permit transfers once the Temuka FMU has returned to full-allocation as defined with reference to the limits in Table 14(l).¹¹

⁶ Submission Points PC7-318.77 and PC7-318.79.

⁷ Submission Points PC7-318.76 and PC7-319.19.

⁸ We note that the first qualification to accessing the “C” block was not envisaged by the OTOP ZIPA. It undermines the Working Party’s original intention that this block be available to off-set the expected significant reductions in water availability/reliability resulting from PC7’s proposed increases in environmental flows, partial restrictions and reductions in allocation.⁸ The second qualification is, in the Submitter’s view, unjustified and does not reflect other similar rules elsewhere in the Canterbury Land and Water Plan (e.g. Hinds Plains).

⁹ Submission Points PC7-318.79 and PC7-318.80.

¹⁰ Submission Points PC7-318.61 and PC7-319.63.

¹¹ Submission Points PC7-318.37, PC7-319.34, PC7-318.43 and PC7-319.43.

17.4 The inclusion of two additional mechanism to assist in addressing over-allocation:

(c) A consenting pathway (controlled activity) to incentivise the voluntary reduction of consented allocation;¹² and

(d) Providing the opportunity for global consenting of water permits in the Temuka FMU, e.g. by an irrigation scheme.¹³

18. The legal submissions that follow address these changes in light of the responses and recommendations provided in the Section 42A Report.

“C” Allocation Block

19. The Reporting Officers have recommended the deletion of Table 14(k) and all references to the associated “C” allocation block from PC7. The primary concern appears to be that if the block was included, and the restriction sought by the Submitters removed, there may be an interim period where a further worsening of overallocation could occur as takes from the A or B Block would not be commensurably reduced.¹⁴ The Reporting Officers raise related concerns about consistency with Te Mana o Te Wai and also note the potential benefit of the block is limited to only a small number of existing users.¹⁵

20. With respect, we submit that the response provided by the Reporting Officers is overly simplistic and the identified “risk” associated with the block is overstated. In this regard, we note:

20.1 It is clear from the documents supporting PC7 that the environmental flow, partial restriction and allocation regime for the “C” Block proposed in Table 14(k) was informed by robust and extensive ecological and hydrological assessment in the context of the existing and proposed regimes for the A and B allocation blocks, as a high flow, harvesting block.

20.2 The suggestion that overallocation might worsen as a result of the block being introduced reflects, in our submission, a complete misunderstanding of how the block is intended to operate i.e.

¹² Submission Points PC7-318.65, PC7-318.48 and PC7-318.49.

¹³ Submission Point PC7-318.67, PC7-318.41, PC7-318.56. See also Submission Points at Note 10 above.

¹⁴ Section 42A Report, 5.26, at page 272.

¹⁵ Section 42A Report, 5.27, at page 272.

independently of the A and B allocation blocks, where the over-allocation issue lies. The position simply undermines the considerable work undertaken by both ECan, the Submitters and their consultants in developing the block and its parameters.

- 20.3 The opportunity for ECan to review current allocations will be possible on the expiry of water permits, which for the Temuka FMU, range from 2019 to 2039.¹⁶ We note further Mr Schrider's indication that there is a willingness on the part of the permit holders in the Temuka FMU to explore voluntary allocation reductions¹⁷.
- 20.4 Deletion of the "C" block entirely from PC7 reduces the options available to A and B consent holders to address expected changes in water availability/reliability resulting from increasing environmental flows and reducing allocations under Tables 14(i) to (l).
21. In our submission, the Hearings Panel should have some comfort that the "C" allocation block and associated environmental flow regime is robust technically, and as such, PC7 should retain this option, subject to the amendments requested by the Submitters and referred to earlier in these submissions.

Transfers

22. The Reporting Officers' have accepted the Submitters' requests in relation to the lifting of the prohibition on transfers and global consenting could be an option, also providing an alternative recommendation whereby PC7 would allow transfers in the Temuka FMU subject to surrender requirements.¹⁸
23. The Submitters accept that alternative suggested by the Reporting Officer may provide a more effective means through which allocation reductions and efficiencies could be achieved in the Temuka FMU than the blanket prohibition on transfers proposed by PC7. Should the Panel prefer that option, the Submitters respectfully request that consideration still be given to the global consenting option (water permit transfers to an irrigation scheme), as a further mechanism for improving management and efficiencies within the Temuka FMU.

¹⁶ Resource Consent Inventory for Orari, Temuka, Ophi and Pareora Canterbury Water Management Strategy Zone, at page 19.

¹⁷ Evidence in Chief of Brent Schrider, at [27] – [29].

¹⁸ Section 42A Report, at [5.47] (page 279).

Groundwater swaps

24. The position expressed in the Officer's Report with respect to groundwater swaps and "T" allocation blocks may need to be reconsidered in light of the ECan Memorandum *Differences in groundwater allocations between the OTOP RCI and the Water Data accounting tool: Description, implications and possible solutions* (dated 21 August 2020). That Memorandum refers to a new method that has been developed to "provide a more consistent way of reporting water quantity allocation against limits across Canterbury", which would have the effect (if adopted) of significantly changing the allocation status of all of the groundwater allocation zones.
25. Ms Johnston has considered the Memorandum and agrees that the new method should be applied.¹⁹ While Ms Johnston has expressed some reservations about the underlying assumptions and implications for ECan's surface water accounting approach, her preference is for the following recommendation to be implemented:²⁰

Retain the total existing GWAZ limits for the Levels Plains and Orari-Opihi GWAZ's but split these into A and T blocks to reflect the intent of the Zone Committee's recommendation in the notified PC7 Limits. This could be achieved by setting the A block at the current 'discounted' allocation using the catchment accounting methodology and the volume remaining within the existing limit could be assigned as a T block. This would provide a pathway for surface water and/ or stream depleting groundwater abstractors to swap for lower depleting groundwater. This would help reduce surface water allocation in the Temuka Catchment where the catchment is deemed to be over allocated. There would however be the possibility that surrendered surface water may be re-allocated in catchments which are not deemed over-allocated

26. In our submission, this is an appropriate approach and is would address the concerns expressed in the Submitters' submission with respect to the provision of a "T" allocation block for the Orari-Opihi Groundwater Allocation Zone. It would, however, require retention of Rules 14.5.7 and 14.5.8, together with the Submitter's requested adjustment to Policy 14.4.8(c) (referred to earlier in these submissions) to ensure 'alignment' with Rule 14.5.7(2).

¹⁹ Evidence Update of Ms Johnston, dated 28 October 2020, at 2.7.

²⁰ Evidence Update of Ms Johnston, dated 28 October 2020, at 2.8.

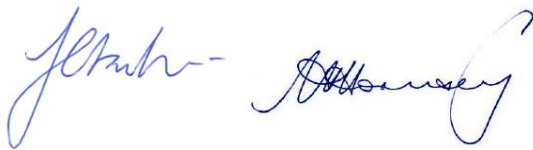
Controlled activity to incentivise voluntary reductions

27. The Submitter's request for a new controlled activity rule appears to have been overlooked by the Reporting Officers.
28. The Submitters remain of the view that the inclusion of a controlled activity consenting pathway for voluntary allocation reductions would be a positive addition to PC7 by incentivising consent holders to make changes ahead of consent expiry (or review) to ensure PC7's policy directive for a time-limited phasing out of over-allocation is achieved.

Further issues arising from the Section 42A Report

29. A further and final issue of concern to the Submitters is the Reporting Officers' recommended changes to Tables 14(i) to (l) that are stated for the purpose of addressing the current overlap in the A and B allocation blocks.
30. This issue was expressly addressed by the Working Party and ECan during the ZIPA development process. In the Submitters' view, the recommended changes are simply not required as the regime as proposed by PC7 suitably rectifies that issue. This is a matter that Ms Johnston could address orally at the hearing, should that be of assistance to the Hearings Panel.

Dated: 29 October 2020



Two handwritten signatures in blue ink. The first signature is 'G C Hamilton' and the second is 'N A Hornsey'. They are written in a cursive style.

G C Hamilton / N A Hornsey

Counsel for the Temuka Catchment Working Party and the Temuka Catchment Group Incorporated