

BEFORE THE HEARING COMMISSIONERS

UNDER of the Resource Management Act 1991
 ("**the Act**")

IN THE MATTER of Variation 1 to the Proposed Canterbury
 Land and Water Regional Plan

LEGAL SUBMISSIONS FOR HORTICULTURE NEW ZEALAND

25 NOVEMBER 2020



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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION AND BACKGROUND

1. The essence of Horticulture New Zealand's (**HortNZ**) submission on proposed Plan Change 7 (**PC7**) to the Canterbury Land and Water Plan (**CLWRP**) was that PC7 does not provide for, nor enable, Commercial Vegetable Production (**CVP**) in the Canterbury Region in a way that provides for the change and growth of the industry in the region that has occurred since 2013, nor for future projected CVP to keep pace with population growth and domestic food supply requirements over the anticipated life of the Plan.
2. The growth and production of vegetables in Canterbury is of key importance to the food security of New Zealand's domestic market. The Canterbury region accounts for 47% of the national productivity of carrots and parsnips, 46% of the potato crop, 16% of lettuce and 38% of process vegetables.¹ This shows how important implementing a bespoke consenting regime for CVP is for the region.
3. HortNZ supports a multiple consenting pathway for CVP (as part of an irrigation scheme, mixed farming system or standalone) and commends Environment Canterbury (**ECan** or **Council**) for its work on identifying the particular values and constraints for CVG rotational activity and seeking a consent 'fix'. HortNZ proposed additional amendments to the CLWRP to provide better clarity and certainty for growers and producers in the region without compromising water quality outcomes.
4. Providing for CVP in Canterbury in the way sought by HortNZ will also further promote the concept of Te Mana o te Wai which was strengthened in the gazetting of the National Policy Statement for Freshwater Management 2020 (**NPSFM**) in September. We submit that while the NPSFM does not need to be given effect to in this plan change, to the extent there is scope to do so the provisions of the plan change should at the very least be consistent with the NPSFM.
5. HortNZ has suggested policy wording and some changes to the consenting frameworks which would further enable and promote CVP in the region while still striving to achieve the

¹ Evidence Statement of Rachel McClung, dated 17 July 2020, at [38].

policy direction and outcomes Council have sought, and that are provided for in the NPSFM.

Overview of Horticulture New Zealand

6. HortNZ is an industry good body representing the interests of horticultural growers. Its mission is to:
 - (a) provide a unifying vision for the horticulture sector which increases collaboration between product, sector, regional and district groups and enhances the sector's ability to respond to and influence decisions that affect it; and
 - (b) develop and encourage industry-wide projects which benefit all growers.
7. HortNZ participates in regulatory and legal proceedings on behalf of growers nation-wide to ensure the best outcome is secured not only for growers but for the continued food security of all New Zealanders. Over the years HortNZ has refined its submissions in these regulatory proceedings having been guided by what is occurring at the national level. In addition, HortNZ has been assisted by a dedicated expert team who have provided the detailed technical work that underpins organisations position. In general terms, for CVP, it is the position of HortNZ that consenting pathways for this activity need to be flexible and enabling provided the activity is operating within environmental limits. The evidence before you is presented in support of this position in relation to PC7.
8. HortNZ participated at an early stage in the plan change promulgation process dating from the production of draft plan change. This participation included meeting with Ecan staff and with grower working groups to clarify the consenting issues in the CLWRP. HortNZ made a submission and further submissions on the plan change at notification. Throughout this process, HortNZ engaged with the growers it represents in the Canterbury Region and sought their views on matters they considered relevant. HortNZ also encouraged growers to participate directly in the process and the Panel has heard/will hear from a number of growers.

Evidence

9. Horticulture New Zealand is calling evidence from:

- (a) **Rachel McClung** – the Environmental Policy Advisor for HortNZ who will provide an industry perspective and outline the practical effects of PC7;
- (a) **Vance Hodgson** – an independent planner, who provides an expert planning assessment of the provisions on which HortNZ submitted, and reviews the Council's s42A report. Mr Hodgson also provides a statement of rebuttal in relation to relevant aspects of other planning statements of evidence;
- (b) **Stuart Ford** – an agricultural and resource economist, who provides expert analysis of the economic impact of PC7 on the horticulture sector, and reviews the Council's economic evidence;
- (c) **Thomas Nation** – a Geographic Information System (**GIS**) expert who will provide a view on the future expansion of CVP and the effect it may have, with regard to PC7;
- (d) **Andrew Barber** – an agricultural engineer, who will give evidence on the whole system approach of Farm Environment Plans (**FEPs**) and erosion and sediment controls;
- (e) **Susan Goodfellow** - an agri-food solutions enabler, who will give evidence on the importance of a regulatory framework for Canterbury that allows for market led sustainable land use opportunities; and
- (f) **Damien Farrelly** – the New Zealand Good Agricultural Practice (**NZGAP**) manager at HortNZ. Mr Farrelly is giving evidence in his expert capacity on the implementation and effectiveness of NZGAP programmes; and
- (g) **Jacob Scherberg** – a hydrologist, has provided expert hydrology evidence on the effects of submissions requesting modification of the framework to provide for rootstock survival in times of drought. We thank the Commissioners for indicating that Mr Scherberg's evidence can be taken as read without questions. As noted in the evidence of Ms McClung the issue of rootstock survival is accepted as not being within scope for PC7 and will be addressed as part of HortNZ's submissions on future plan changes. We hope the evidence is helpful for the Council as part of

its preparation of these future plan changes. A note on CVG and CVP.

10. For clarity, and as noted in the evidence of Ms Rachel McClung, CVP and CVG refer to slightly different activities.² Commercial Vegetable Production (**CVP**) refers to all three consent pathways proposed by HortNZ, detailed later in these submissions. The term Commercial Vegetable Growing (**CVG**) best applies to the stand alone activity of growing vegetables.
11. We submit that appreciation of this distinction is important as the consenting framework needs to address the activity of vegetables grown as a stand-alone activity and when vegetables are grown within irrigation schemes and in mixed farming operations.

SUMMARY OF WHAT HORTNZ IS SEEKING

12. HortNZ is generally supportive of the proposed PC7 framework but with some amendments to the following:
 - (a) That there be three pathways for consenting commercial vegetables as follows, those grown:
 - i. within an irrigation scheme,
 - ii. as part of a mixed farming system; and
 - iii. as a stand-alone activity;
 - (b) That there is greater clarity in the definitions section for CVG;
 - (c) That the baseline date is moved so that it aligns with notification date of PC7. This is a change to the definition of *Baseline commercial growing area*;
 - (d) That recognition of domestic food supply values is included in Policy 4.36A;
 - (e) That there is a permitted activity pathway for CVG on 5 hectares or less (Rule 5.42CA);
 - (f) The inclusion of a restricted discretionary activity pathway for CVG that is not yet consented (Rule 5.42CB);

² McClung, at [13].

- (g) The inclusion of a restricted discretionary activity pathway for a capped area of 1000ha) for CVG (proposed new Rule 5.42XX);
 - (h) The inclusion of a discretionary activity pathway where it can be demonstrated that the nitrogen loss from the new or expanded commercial vegetable growing area is not greater than the lawful nitrogen loss rate of the new location (Rule 5.42CC);
 - (i) A default non-complying rule (Rule 5.42CD); and
 - (j) No prohibited activity rule (deletion of Rule 5.42CE).
13. HortNZ is no longer pursuing the relief in relation to low intensity horticulture or rootstock survival water. As noted by Ms McClung, while these remain important issues for HortNZ it is accepted that there are scope issues in pursuing these matters at this stage.³ They will be the subject of submissions and evidence on future plan changes. As noted above, Mr Jacob Scherberg provided an expert evidence statement on this issue, but is not required to present at this hearing.

Industry growth in the region

14. We submit that it is clear from HortNZ's evidence⁴ that the population of New Zealand, including Canterbury is projected to grow over the next 30-40 years. It is notable that the statistics supported this evidence pre-date any impacts that Covid-19 has had on New Zealand's population. In addition, anecdotally we know that there have been a significant number of returning New Zealander's over the last few months and that this trend is likely to continue for the foreseeable future. This projected population growth supports the need to provide for future expansion for the increased demand on the supply of vegetables in particular. Obviously, such expansion can only occur if it does not result in adverse environmental effects.
15. Mr Ford notes that this expected expansion will require about 1,000 hectares (**ha**)⁵ of land, which in relation to the total land area used for horticultural production in Canterbury is very

³ McClung, at [9].

⁴ Ibid at [40]

⁵ Note that this is an increase from the submission that sought 600ha as noted in Ms McClung's evidence at [40].

small.⁶ It is the case for HortNZ that the expansion of land area required is justified when it is considered in the light of providing for an essential New Zealand food supply.

16. In addition to this projected expansion of 1,000 ha, HortNZ is also seeking the permitted activity pathway for CVG on 5 hectares or less.
17. Mr Nation undertook an investigation to assess the nitrogen load that would increase as a result of both the 5ha permitted activity rule and the 1000ha projected expansion.
18. In relation to the permitted activity pathway Mr Nation's analysis shows that increasing the CVP footprint to the 0.5 ha cap results in a nitrogen load between 0.0001% and 0.0014% of the current sub catchment nitrogen loads. He notes that increasing the growing footprint up to a 5 ha cap increased the nitrogen load by a maximum of 0.25% in the Christchurch West Melton sub catchment.
19. In relation to the expansion Mr Nation concluded that the nitrogen load increase required for 1000ha of expansion is approximately 0.05%, based on the most intensive crop rotation.⁷
20. Ms Susan Goodfellow sets out the size of New Zealand's food and beverage exports, which equate to almost 50% of New Zealand's total goods and service exports.⁸ The Canterbury Region alone has a 38% share of the process crops produced in New Zealand. Growers are under pressure to implement continually better and more sustainable growing practices. This requires flexibility in the planning framework so that vegetables can be grown sustainably across the region. Certainty is required so that growers, producers, and marketers have the confidence in the plan framework and market, to invest in the methods which increase production sustainability.⁹
21. Evidence has also been provided by Mr Ford and Mr Nation with regards to expansion to provide for export, specifically root vegetable rotations, which include onions, potatoes, carrots and peas for processing. Mr Nation concluded that a

⁶ Evidence Statement of Stuart Ford, dated 17 July 2020, at [66].

⁷ Evidence Statement of Tom Nation, dated 17 July 2020, at [30].

⁸ Evidence Statement of Susan Goodfellow, dated 17 July 2020, at [11].

⁹ Goodfellow, at [43] – [46].

large area (9115 ha) of dairy land could support root vegetable rotations and result in an improvement in total nitrogen load, (or Baseline GMP Loss Rate as proposed in the section 42A report).¹⁰ This expansion to serve growing export demand could be achieved through the discretionary pathway. Mr Hodgson comments on the scenario where the loss rate is exceeded and provides a consenting pathway for this in his proposed changes.¹¹

Nitrogen Baseline Date

22. The Plan uses a common reference point for nitrogen rules obtained from baseline data from 2009 - 2013. The case for HortNZ is that there is evidence that CVG has changed location, and some growers have exited and some new growing operations have established, and that some crops have increased within rotations. However, the overall total land area and nitrogen load associated with, commercial vegetable rotations has stayed similar since 2013.¹² As noted by Mr Hodgson and Mr Ford, under PC7 as notified, these changes would be considered expansion and therefore either discretionary activities (if the Baseline GMP Loss Rate is not exceeded) or prohibited if the Loss Rate is exceeded.
23. HortNZ's submission sought the moving of the baseline years to 20 July 2014 - 20 July 2019. Mr Hodgson agrees with the Council expert team that changing the baseline years is challenging in a planning framework that has embedded the earlier baseline and other farming activities have been consented to. However, Mr Hodgson considers that a solution has to be found to ensure that CVG that has changed location since 2013 is consentable if it can be proved that water quality outcomes will not be compromised.¹³ The evidence of Mr Nation is that growth between 2013 and 2019 would have little impact on sub-catchment N load.¹⁴ As noted by Mr Hodgson (reflecting on Mr Nation's evidence) it is also possible for this growth to have zero net effect if the vegetable production replaced existing arable and dairy/dairy support land uses.¹⁵

¹⁰ Nation, at [33].

¹¹ Statement of Evidence of Vance Hodgson, dated 17 July 2020, at [42].

¹² Hodgson, at [36] and Ford, at [104].

¹³ Hodgson, at [40] – [41].

¹⁴ Nation at [15] and [16].

¹⁵ Hodgson at [41].

24. It is HortNZ's position that a pathway needs to be found. Mr Hodgson's solution is that the prohibited pathway is replaced with a non-complying one. Mr Hodgson's position is founded on the HortNZ technical evidence.
25. In relation to prohibited activities we note that the Court of Appeal considered the use of a prohibited activity status in the case of *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*¹⁶. This is still the leading case on the use of prohibited activities. The Court noted that when inserting a prohibited activity rule into a plan a council is required "to focus on what is 'the most appropriate' status for achieving the objectives of the district plan".¹⁷ HortNZ submit that a prohibited activity status is not appropriate in the Canterbury Region as:¹⁸
- (a) it does not provide the flexibility for situations where the nitrogen loss from the new vegetable growing area exceeds the lawful nitrogen loss rate (or Baseline GMP Loss Rate);
 - (b) is an extremely blunt tool from a planning perspective; and
 - (c) Mr Ford casts doubt on whether there is certainty in the information that the Council has used to support its use of a prohibited activity status.
26. It is HortNZ submission that a non-complying activity status would enable a grower to advance an application to show that their growing activity is appropriate and can be achieved within the planning framework and within environmental limits. The non-complying activity status and 104D gateway do not make this an easy task but the door is not shut on a proposal as is the case in a prohibited situation.

New Policy 4.36A

27. Currently new Policy 4.36A(b) uses the word "avoid" which, as per *King Salmon*, makes it clear that the consent pathways for new, or for growth, in CVG should be prevented or not allowed.¹⁹ The 'avoid' language is problematic for HortNZ

¹⁶ 13 ELRNZ 279 [2008].

¹⁷ Ibid, at [28].

¹⁸ Hodgson, at [76] – [77].

¹⁹ *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38, at [96].

as it directs a prohibition on such activities which in not what the discretionary pathway, or the pathway proposed by HortNZ, provides.

28. Mr Hodgson agrees with the evidence of Ms Taylor for Ravensdown Limited that replacing the word 'avoid' with 'restrict' in new Policy 4.36A(b) is an appropriate resource management response in this circumstance and is necessary if a non-complying activity status is established.²⁰

Acknowledgment of multiple consenting pathways

29. The Officers s42A report recommends retaining a number of rules relating to CVG as notified, and thus not providing for the consent pathway proposed by HortNZ. However, on the first day of the hearing, you would have heard from the Council Officer (Ms Adele Dawson) that there was a willingness to consider further investigation into the multiple consenting pathways as sought by a number of horticultural parties, including HortNZ.²¹
30. HortNZ is pleased to note this constructive and positive approach on the Council's part and looks forward to seeing the details in the Council's reply. As is clear from the evidence HortNZ is seeking that there be three consenting pathways for consenting commercial vegetables, as follows, those grown:
- (a) within an irrigation scheme,
 - (b) as part of a mixed farming system; and
 - (c) as a stand-alone activity;
31. CVG in Canterbury spans across a number of sub-catchments, both as an overall industry and within some individual growing operations. It is HortNZ's view that PC7 does not equitably provide for CVP as compared to other farming operations.²² However, this equitable treatment could be achieved through the multiple consent pathway proposed.
32. Mr Hodgson notes that CVG activities which are currently managed as part of an irrigation scheme will not be affected. Further, for those growers who already hold land use consents,

²⁰ Statement of Rebuttal Evidence of Vance Hodgson, dated 15 September, at [13].

²¹ Hearings Video: 29 September 2020 – AM, at 41 minutes.

²² Hodgson at [18].

these are likely to be within a mixed farming system.²³ We submit that it is essential that PC7 enables a multiple consenting pathway regime to ensure the various ways in which CVG occurs are able to be consented.

NATIONAL POLICY STATEMENT FRESHWATER MANAGEMENT 2020

33. The National Policy Statement for Freshwater Management 2020 (**NPSFM**) came into force on 3 September 2020, and replaces the 2017 policy. We agree with the submissions for the Director General of Conservation and the Council that ECan must give effect to the NPSFM as soon as reasonably practical.²⁴

34. In this regard it is noted that Counsel for the Council notes that *"It is for submitters to invoke the policies of the NPSFM 2020 relevant to the changes that they seek to PC7 and PC2, and to illustrate the extent to which their relief gives effect to the NPSFM 2020"*.²⁵ It is our submission that this statement is a somewhat contradictory and it not a matter that submitters should be required to illustrate at this stage. In terms of what Ecan are actually doing with regards to the NPSFM and related regulatory reforms, the Council website states that:

We are analysing the new requirements against our current planning framework to determine the relationship between the new [National Environmental Standards for Freshwater 2020 \(NES-F\)](#) rules, and rules in our freshwater plans.

*Once this assessment has been completed, we will be in a position to provide advice on the implications of the package.*²⁶

35. In our submission we agree with the Council's counsel that in practice, PC7 is too far along to make major changes to the policy wording to fully give effect to the NPSFM. However, where there is scope in submissions to make changes to the policy wording of PC7 to give effect to the NPSFM, ECan should strive to achieve this.²⁷

²³ Hodgson at [33] – [34].

²⁴ Opening Legal Submissions of Counsel for the Canterbury Regional Council, dated 22 September 2020, at [25].

²⁵ Ibid, at [40].

²⁶ <https://www.ecan.govt.nz/your-region/your-environment/water/canterburys-water/essential-freshwater-package-our-advice/>

²⁷ Ibid, at [25].

Effect of the NPSFM on HortNZ's position

36. It is HortNZ's position that the provision of fruit and vegetables plays a crucial role in providing for the health of all New Zealanders, and therefore must be enabled through the planning hierarchy.

37. The concept of Te Mana o Te Wai was included in the NPSFM 2017 but has been further developed in the NPSFM 2020 which sets out the fundamental concept as:²⁸

Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

38. The concept of Te Mana o te Wai sets out a framework:²⁹

(5) There is a hierarchy of obligations in Te Mana o te Wai that prioritises:

(a) first, the health and well-being of water bodies and freshwater ecosystems

(b) second, the health needs of people (such as drinking water)

(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

39. It is our submission that the term "such as" in the framework of Te Mana o te Wai does not limit the health needs of people to only considerations of drinking water. The Merriam-Webster dictionary defines "such as" as a phrase which is "used to introduce an example or series of examples".³⁰ Therefore, we submit that the health needs of people also includes access to healthy fresh fruit and vegetables, such as the types grown in the Canterbury region.

40. By providing for horticulture within the Canterbury Region in the manner proposed by HortNZ, the health needs of people and the framework of Te Mana o te Wai will be better implemented in the CLWRP.

²⁸ National Policy Statement 2020 at [1.3] [CB.052].

²⁹ National Policy Statement 2020 at [1.3(5)] [CB.053].


³⁰ Merriam-Webster dictionary online.
<https://www.merriamwebster.com/dictionary/such%20as>.

41. While there is no obligation on ECan to fully implement the NPSFM through this plan change, HortNZ submits that it should implement the NPSFM where there is scope to do so. The changes proposed by HortNZ provide scope to ensure that the Plan will not be out of step with the NPSFM. Enabling a multiple consenting pathway framework for horticulture within the Canterbury Region, in the way described at paragraph 8 above, will:
- (a) provide for the health needs of people;
 - (b) give effect to the concept of Te Mana o te Wai; and
 - (c) better align with the NPSFM.

CONCLUSION

42. In conclusion, the key for Horticulture New Zealand is to set a practical consenting pathway which enables horticulture in the Canterbury Region.
43. The three pathways, other amendments, and increased clarity in the CLWRP suggested by HortNZ achieve the sustainable purpose of the RMA and better give effect to the NPSFM.

DATE: 25 November 2020



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