

**BEFORE THE CANTERBURY REGIONAL COUNCIL
HEARING COMMISSIONERS**

UNDER the Resource Management Act 1991

AND the Environment Canterbury (Transitional Governance Arrangements) Act 2016

AND

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

**MEMORANDUM OF COUNSEL FOR CHRISTCHURCH CITY COUNCIL IN
RESPONSE TO MEMORANDUM OF COUNSEL FOR WAIMAKARIRI
IRRIGATION LIMITED**

16 December 2020

Christchurch City Council
53 Hereford Street, Christchurch, 8011
PO Box 73016, Christchurch, 8154
Solicitor: Ron Lemm
Tel: 03 941 6789
Email: Ron.Lemm@ccc.govt.nz

May it please the Hearing Panel:

1. This memorandum of counsel is filed on behalf of Christchurch City Council (City Council) in response to a memorandum of counsel for Waimakariri Irrigation Limited (WIL) dated 2 December 2020 on proposed plan change 7 to the Canterbury Land and Water Regional Plan (PC7).
2. The City Council first became aware of WIL's memorandum of counsel on 9 December 2020.
3. This memorandum responds to WIL's assertion that there is a need for the hearings commissioners to resort to Part 2 of the RMA on the basis the National Policy Statement for Freshwater Management 2020 (NPSFM 2020) does not "cover the field" regarding social and economic well-being and/or contains uncertainties as to the meaning of provisions.
4. The City Council disagrees with WIL's assertion. For the reasons given below, the City Council submits there is no need to refer back to Part 2 of the RMA, and certainly not for the purpose of overturning or overriding the clearly stated hierarchy of priorities for the management of natural and physical resources as articulated in the NPSFM 2020 objective (at clause 2.1).

The *King Salmon* exceptions

5. There is generally no need to refer back to Part 2 of the RMA when developing plans because higher order planning documents are assumed to already give substance to Part 2.¹ The Supreme Court in *King Salmon* indicated three circumstances which would allow resort to Part 2:
 - (a) invalidity;
 - (b) incomplete coverage of "the field" where Part 2 may provide assistance in dealing with the matters not covered; and

¹ *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [204] NZSC 38 at [85] and [90].

- (c) uncertainty as to the meaning of particular provisions where reference to Part 2 may well be justified to assist in a purposive interpretation.²
- 6. WIL does not suggest the NPSFM 2020 is invalid.³ WIL's concerns relate to incomplete coverage of "the field", and uncertainty of meaning.

Coverage of "the field"

- 7. WIL assert that a single objective which provides for social and economic well-being as a third ranking priority and a single policy on that well-being is not sufficient to avoid the need for reference to Part 2.
- 8. Contrary to WIL's submission, having social and economic well-being as a third priority in an objective with a mention in a single policy does not result in a failure to "cover the field". It does not take "*economic and social well-being considerations almost entirely out of decision-making*"⁴.
- 9. The NPSFM 2020 clearly covers the field of social and economic well-being. The NPSFM 2020 objective covers the spectrum and breadth of the broad considerations under Part 2, and assigns a priority to these considerations as follows:
 - (a) environmental protection is covered under clause (a) of the objective as first priority;
 - (b) the health needs of people and communities are covered under clause (b) of the objective as second priority;
 - (c) social, economic and cultural well-being is covered under clause (c) of the objective as third priority.
- 10. It is unsurprising that most of the policies in the NPSFM 2020 are specifically directed at freshwater, as the NPSFM 2020 is intended to apply to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments⁵. However, this does not mean the NPSFM 2020 takes "*economic and social well-being*

² Ibid, at [88].

³ Memorandum of counsel for Waimakariri Irrigation Limited at 8.

⁴ Ibid at 15.

⁵ NPSFM 2020 at clause 1.5(1).

*considerations almost entirely out of decision-making*⁶. Policy 15 expressly enables social and economic well-being considerations to be accounted for in decision-making. The consideration of social and economic well-being is also enabled under policy 1 as it requires freshwater to be managed in a way that gives effect to "Te Mana of te Wai", a concept that includes reference to social and economic well-being⁷.

11. At its core, it appears WIL's concern is not about a failure to "cover the field" per se, but that the NPSFM 2020 imposes a hierarchy of priorities that is "largely inconsistent" with the balancing approach inherent in section 5 of the RMA⁸. WIL considers this could cause conflict or perverse outcomes necessitating resort to Part 2⁹. In effect, it appears the intent is to circumvent the NPSFM 2020 hierarchy of priorities by appealing to an "overall judgement" approach to Part 2. However, it is submitted adopting an "overall judgement" approach in this case will be contrary to the Supreme Court's decision in *King Salmon*.

12. The Supreme Court in *King Salmon* confirmed that the scheme of the RMA provides decision-makers with considerable flexibility and scope for choice.¹⁰ This flexibility and scope can be observed from the broad terms of Part 2 of the RMA, including section 5 which provides scope to weigh different, and often competing, factors to promote the sustainable management of natural and physical resources. Section 5(2) outlines the different factors to be weighed as follows:

In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

- (a) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) *safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) *avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

⁶ Memorandum of counsel for Waimakariri Irrigation Limited at 15.

⁷ NPSFM 2020 at clause 1.3(5)(c).

⁸ Memorandum of counsel for Waimakariri Irrigation Limited at 10.

⁹ *Ibid* at 13 and 16.

¹⁰ *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [204] NZSC 38 at [91].

13. However, the Supreme Court confirmed that the statutory requirement to "give effect to" a national policy statement is intended to constrain decision-makers.¹¹ In the context of the New Zealand Coastal Policy Statement (NZCPS), the Supreme Court held that while section 5(c) of the RMA refers to "avoiding, remedying, or mitigating" adverse effects, policies 13 and 15 of the NZCPS constrains decision-making by requiring adverse effects to be avoided (meaning not allowed or prevent the occurrence of) in coastal areas with outstanding value.¹² The ability for the Minister to utilise a national policy statement to constrain the choices of decision-makers was confirmed by the Supreme Court at paragraph [152]:

*The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. **Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.***

14. As mentioned at paragraphs 9 and 10 above, this is not a case where the NPSFM 2020 fails to "cover the field". The NPSFM 2020 covers the field, but it acts to provide decision makers with lesser flexibility or scope for choice when dealing with the field of considerations. Given environmental protection is an element of the concept of sustainable management as confirmed in *King Salmon*, the Minister is fully entitled to require in the NPSFM 2020 that particular parts of the environment (in this case freshwater including groundwater and their receiving environments¹³) are to be protected from adverse effects. The Minister is entitled to include in the NPSFM 2020 an objective that places environmental protection at a higher priority than the health needs of

¹¹ Ibid.

¹² Ibid, at [92] and [150].

¹³ NPSFM 2020 at clause 1.5(1).

people and the ability of people and communities to provide for their social, economic and social well-being.

15. There can be no resort to Part 2 through an "overall judgment" approach to overturn or override the clearly stated hierarchy of priorities for the management of natural and physical resources under the NPSFM 2020. To do otherwise would be to render redundant the very clear hierarchy of priorities that must be given effect to pursuant to section 62(3) of the RMA, and conflict with the *King Salmon* decision.

Uncertainty

16. The Supreme Court in *King Salmon* considered that if there is uncertainty as to the meaning of particular provisions in a higher order planning document, then reference to part 2 of the RMA may be justified to assist in a purposive interpretation.¹⁴
17. WIL say there is uncertainty as to exactly how the provisions of the NPSFM 2020 should and can be interpreted in the absence of Te Mana o te Wai having been articulated and implemented. Yet unlike the previous NPSFM 2017, the NPSFM 2020 articulates the concept of Te Mana o te Wai, including in particular the inclusion of an explicit explanation of the hierarchy of priorities that the concept entails¹⁵.
18. The uncertainty that WIL refers to is not the type of uncertainty that would allow decision-makers to rely on Part 2 to overturn or override the clearly stated hierarchy of priorities for the management of natural and physical resources under the NPSFM 2020 because there is no uncertainty regarding what the hierarchy is.
19. As mentioned at paragraph 9 above, the NPSFM 2020 objective clearly gives first priority to environmental protection, second priority to the health needs of people, and third priority to social, economic and cultural well-being. There is no doubt or uncertainty as to the hierarchy necessitating resort to Part 2. The hierarchy is further reinforced by

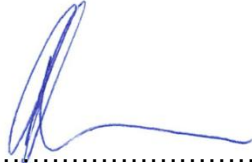
¹⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [204] NZSC 38 at [88].

¹⁵ Objective AA1 and Policy AA1 of the previous NPSFM 2017 required recognition and consideration of Te Mana o te Wai, but it was not made clear what this might mean, particularly in relation to any need to implement a hierarchy of priorities.

policy 1 which refers to Te Mana o te Wai, which in turn is defined with reference to the same priorities articulated in the NPSFM objective.

20. Accordingly, no uncertainty arises warranting reference to Part 2 of the RMA, and certainly not for the purpose of applying some "overall judgement" to overturn the hierarchy of priorities in the NPSFM 2020.

Dated at Christchurch this 16th day of December 2020



.....
Ron Lemm

Counsel for the Christchurch City Council