

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

CIV NO 2021-409-

UNDER The Environment Canterbury (Transitional Governance Arrangements) Act 2016

IN THE MATTER OF an appeal under section 25 of the Act in relation to Plan Change 7 to the Canterbury Land and Water Regional Plan and Plan Change 2 to the Waimakariri River Regional Plan

BETWEEN **RANGITATA SOUTH IRRIGATION LIMITED** a duly incorporated company having its registered office at 144 Tancred Street, Ashburton

Appellant

AND **CANTERBURY REGIONAL COUNCIL** a local authority constituted under the local Authority Government Act 2002 having its principal office at 200 Tuam Street, Christchurch

Respondent

NOTICE OF APPEAL BY RANGITATA SOUTH IRRIGATION LIMITED

Dated 10 December 2021

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NOTICE OF APPEAL BY RANGITATA SOUTH IRRIGATION LIMITED

TAKE NOTICE that Rangitata South Irrigation Limited (**the Appellant**) hereby appeals to the High Court parts of the decision of the Canterbury Regional Council (**the Respondent**) contained in the *Report and Recommendations of the Hearing Commissioners on Proposed Plan Change 7 to the Canterbury Land and Water Regional Plan and Proposed Plan Change 2 of the Waimakariri River Regional Plan* adopted by the Respondent as its decision on 17 November 2021, which was publicly notified on 20 November 2021 (**the Decision**) **UPON THE GROUNDS** that the Respondent made errors of law in respect of parts of the Decision.

The Appellant lodged submissions¹ and further submissions² on proposed Plan Change 7 (**Plan Change 7**) to the Canterbury Land and Water Regional Plan (**LWRP**).

PARTS OF DECISION APPEALED

- 1 The Appellant appeals parts of the Decision relating to Plan Change 7, specifically:
 - 1.1 Policy 14.4.20A; and
 - 1.2 The Nitrogen Baseline definition, as it applies (or ought to apply) within the Orari-Temuka-Opihi-Pareora sub-region.

- 2 In particular, the Appellant appeals against the Respondent's decisions to:
 - 2.1 delete sub-clause (c) from Policy 14.4.20A, restricting the ability for the Respondent to consider the capital and operational costs upon landowners, when determining whether to grant an exemption from meeting the timeframes for increased nitrogen loss reductions required by Table 14(zc) in Plan Change 7;³ and
 - 2.2 fail to provide an amended Nitrogen Baseline definition for those 15 shareholders of the Appellant who intensified or expanded their farming operations after the 2009-2013 Nitrogen Baseline Period, following construction delays of the Rangitata South Irrigation

¹ Rangitata South Irrigation Limited (Submitter No. PC7-235) submission on Plan Change 7 to the Canterbury Land and Water Regional Plan, dated 13 September 2019.

² Rangitata South Irrigation Limited (Submitter No. PC7-235) further submission on Plan Change 7 to the Canterbury Land and Water Regional Plan, dated 6 December 2019.

³ The Decision, Appendix A Part 1, at PC7-235.31

Scheme, to legitimise the nitrogen losses from those intensified and/or expanded farming operations.⁴

(1) POLICY 14.4.20A

Alleged Errors of Law

3 The Appellant considers that the Respondent's decision to delete sub-clause (c) from Policy 14.4.20A is:

- 3.1 a decision in relation to which was not available to it on the evidence before it (**First Error of Law**);
- 3.2 a decision which, on the evidence, it could not reasonably have come (**Second Error of Law**);
- 3.3 a decision that failed to take into account the third priority of Te Mana o te Wai in the National Policy Statement for Freshwater Management 2020 (**NPS-FM2020**), which materially affected the decision (**Third Error of Law**);
- 3.4 a decision it was not lawfully able to come to without making a further evaluation of the costs and benefits of removing sub-clause (c) under sections 32 and 32AA of the RMA (**Fourth Error of Law**).

Questions of Law

4 The Appellant alleges that the above errors of law give rise to the following questions of law:

- 4.1 Did the Respondent, in deleting sub-clause (c) from Policy 14.4.20A, make a decision that was not open to it on the evidence?
- 4.2 Did the Respondent err in its application of the third priority of Te Mana o te Wai in the NPS-FM2020?
- 4.3 Did the Respondent fail to give effect to its own reasoning?
- 4.4 Did the Respondent give insufficient regard to the potential impacts on farmers as required by sections 32 and 32AA of the RMA?

⁴ The Decision, Appendix A Part 1, at PC7-235.21.

Grounds for Appeal

First and Second Errors of Law

5 The grounds for appeal include:

- 5.1 There was no evidence before the Respondent to support its decision to delete sub-clause (c) alone from Policy 14.4.20A. One submitter requested sub-clause (c) be deleted yet that submitter did not file evidence or rebuttal evidence in support of its submission point.
- 5.2 No evidence was filed stating that removing sub-clause (c) was the most appropriate solution to improving water quality outcomes.
- 5.3 The s42A Officers ultimately recommend that sub-clause (c) be amended, not deleted.

Third Error of Law

6 The grounds for appeal include:

6.1 The NPS-FM2020:

- (a) sets out as its fundamental concept *Te Mana o te Wai*, which 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.⁵ The NPS-FM2020 states that *Te Mana o te Wai* “*is about restoring and preserving the balance between the water, wider environment, and the community*”.
- (b) sets out at Clause 1.3(5) and Objective 2.1(1) the hierarchy of obligations in *Te Mana o te Wai* that prioritises:
 - (i) *first, the health and well-being of water bodies and freshwater ecosystems*
 - (ii) *second, the health needs of people (such as drinking water)*
 - (iii) *third, the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future*

6.2 At [281] of the narrative Decision, the Respondent set out its interpretation of the NPS-FM2020 hierarchy of obligations. It accepted that the third order priority is to be provided for, where it does not diminish providing for the second and first order priorities:

⁵ NPS-FM2020 at Clause 1.3(1).

"...first to have the plan change provide for the health and well-being of water bodies and ecosystems, and health needs such as drinking water; and only to extent that does not diminish providing for them, allow for activities for the social and economic well-being of people and communities, including those engaged in or dependent on farming."

- 6.3 At [278] of the narrative Decision, the Respondent acknowledged, in relation to the Table 14(zc) nitrogen loss reductions, that compliance with the reductions would possibly compromise business survival:

"...we accept that compliance with further reductions in nitrate limits would require incurring substantial costs, and forgoing profits, possibly compromising business survival. So greater constraints should only be imposed when well justified."

- 6.4 The deletion of sub-clause (c) precludes the Respondent from providing for the third order priority in Te Mana o te Wai when considering granting an extension of time under Policy 14.4.20A. It particularly prevents any balancing of the first and third order priorities where it can be shown that granting an extension of time under Policy 14.4.20A will provide for the social, economic and cultural well-being of people and communities and also not further diminish the health and well-being of water bodies and freshwater ecosystems. For example, a landowner may demonstrate that an extension from meeting the 2028 reductions in Table 14(zc) would result in ongoing viability and better spread of the capital costs required to implement changes, and therefore enable the landowner to ultimately achieve the greater 2035 reductions.
- 6.5 This is a more onerous planning outcome than that envisaged by the NPS-FM2020, and will have significant economic and social impacts upon those farmers who may seek to apply for an extension of time to meet the Table 14(zc) reductions.

Fourth Error of Law

- 7 The grounds for appeal include:

- 7.1 The Respondent failed to meet the legal requirements of sections 32(1), 32(2) and 32AA RMA because:
- (a) The s42A Officer ultimately did not recommend sub-clause (c) be deleted.
 - (b) The Decision makes no reference to a section 32AA assessment of removing sub-clause (c). Further, nothing in

the Decision identifies and then assesses the benefits and costs of the environmental, economic, social and cultural effects that are anticipated to be lost upon removal of sub-clause (c), as required by sections 32(2) and s32AA(1)(b) RMA.

- (c) The Decision fails to contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated to be lost upon removal of sub-clause (c), (as required by sections 32(1)(c) and 32AA(1)(c) of the RMA).

(2) AN AMENDED NITROGEN BASELINE

Alleged Errors of Law

- 8 The Appellant alleges that the Respondent's decision to not implement an amended Nitrogen Baseline in respect of the affected shareholders is:
- 8.1 a decision which, on the evidence, it could not reasonably have come **(Fifth Error of Law)**.
- 8.2 a decision that failed to take into account the third priority of Te Mana o te Wai in the NPS-FM2020, which materially affected the decision **(Sixth Error of Law)**;
- 8.3 a decision it was not lawfully able to come to without making a further evaluation of the costs and benefits of not providing an amended Nitrogen Baseline definition under sections 32 and 32AA of the RMA **(Seventh Error of Law)**.

Questions of Law to be Resolved

- 9 The Appellant alleges that the above errors of law give rise to the following questions of law:
- 9.1 Did the Respondent, in failing to provide for an amended Nitrogen Baseline for the Appellant's affected shareholders, make a decision to which there was no evidence to reasonably support?
- 9.2 Did the Respondent err in its application of the third priority of Te Mana o te Wai in the NPS-FM2020?
- 9.3 Did the Respondent fail to give effect to its own reasoning?

- 9.4 Did the Respondent give insufficient regard to the potential impacts on farmers as required by sections 32 and 32AA of the RMA?

Grounds of Appeal

Fifth and Sixth Errors of Law

- 10 The grounds for appeal include:

- 10.1 The NPS-FM2020:

- (a) sets out as its fundamental concept *Te Mana o te Wai*, which 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.⁶ The NPS-FM2020 states that *Te Mana o te Wai* “is about restoring and preserving the balance between the water, wider environment, and the community”.
- (b) sets out at Clause 1.3(5) and Objective 2.1(1) the hierarchy of obligations in *Te Mana o te Wai* that prioritises:
- (i) *first, the health and well-being of water bodies and freshwater ecosystems*
 - (ii) *second, the health needs of people (such as drinking water)*
 - (iii) *third, the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future*

- 10.2 At [281] of the narrative Decision, the Respondent set out its interpretation of the NPS-FM2020 hierarchy of obligations. It accepted that the third order priority is to be provided for, where it does not diminish providing for the second and first order priorities:

“...first to have the plan change provide for the health and well-being of water bodies and ecosystems, and health needs such as drinking water; and only to extent that does not diminish providing for them, allow for activities for the social and economic well-being of people and communities, including those engaged in or dependent on farming.”

- 10.3 At [278] of the narrative Decision, the Respondent acknowledged, in relation to the Table 14(zc) nitrogen loss reductions, that compliance with the reductions would possibly compromise business survival:

“...we accept that compliance with further reductions in nitrate limits would require incurring substantial costs, and forgoing profits,

⁶ NPS-FM2020 at Clause 1.3(1).

possibly compromising business survival. So greater constraints should only be imposed when well justified."

- 10.4 The evidence before the Respondent established that it had used outdated data in relation to, and it had over estimated, nitrogen losses for the Appellant's irrigation command area, and therefore in turn the Respondent had over estimated the percentage reductions required to achieve the required water quality outcomes within the Rangitata-Orton High Nitrogen Concentration Area (**Rangitata-Orton HNCA**) over time.
- 10.5 The evidence before the Respondent established that, once the nitrogen loss assessment was updated to reflect current farming operations and after including losses from the intensified and expanded farms, nitrogen losses for the command area were no worse than estimated by the Respondent.
- 10.6 The technical flaws in the Respondent's assessment were not resolved by evidence for the Respondent, nor were the percentage reductions in Table 14(zc) for the Rangitata-Orton HNCA decreased to account for the over estimation of current nitrogen losses.
- 10.7 The evidence before the Respondent established that failing to provide an amended nitrogen baseline for the Appellant's affected shareholders would result in significant negative outcomes on the third order priority of Te Mana o te Wai, in particular:
- (a) Three properties (one dairy and two dairy support) are prohibited from operating, or applying for resource consent to operate, above their dryland sheep and/or beef baseline nitrogen loss rates. Being prohibited from continuing their current dairy and dairy support landuse will have devastating social and economic consequences upon those families who only recently invested in significant irrigation on their properties.
 - (b) A further 12 properties would be required to revert or partially revert to their previous dryland or pre-expanded operations, again at significant and potentially fatal cost to those properties, given their recent investment in significant irrigation.

- 10.8 Te Mana o te Wai does not always require the option that solely serves the first order priority be implemented at the expense of all else. To require otherwise would not implement the balancing required by clause 1.3(1) NPS-FM2020. If the first and second order priorities can be shown to not further diminish in the event the third order priority is also provided for, then Te Mana o te Wai requires that option be preferred.
- 10.9 Overall, the evidence shows the first order priority will not further diminish if the third order priority is provided for, in relation to the Appellants' affected shareholders. The Decision fails to take this not account.

Seventh Error of Law

11 The grounds for appeal include:

11.1 The Respondent failed to meet the legal requirements of sections 32(1), 32(2) and 32AA RMA because:

- (a) The Decision makes no reference to a section 32AA assessment of failing to provide for an amended Nitrogen Baseline. Further, nothing in the Decision identifies and then assesses the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of an amended Nitrogen Baseline, as required by sections 32(2) and s32AA(1)(b) RMA.
- (b) The Decision fails to contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of an amended nitrogen baseline (as required by sections 32(1)(c) and 32AA(1)(c) of the RMA).

RELIEF SOUGHT

12 The Appellant seeks:

12.1 That the appeal be allowed;

12.2 The following amendments are made the Plan Change 7:

- (a) Sub-clause (c) of Policy 14.4.20A is reinstated; and

- (b) The Appellant's proposed amended Nitrogen Baseline definition is inserted into Chapter 14 LWRP to provide an alternative Nitrogen Baseline calculation for the Appellant's affected shareholders; or
- (c) In the alternative, that the matter be referred back to the Respondent for reconsideration in light of the findings of this Court;

12.3 Such further or other relief, including consequential relief, as may be appropriate; and

12.4 The costs of and incidental to these proceedings.

Dated this ^{10th} day of December 2021



J R King

Solicitor/Counsel for the Appellant

This Notice of Appeal is filed by **JOHANNA RACHEL KING**, Solicitor acting for the Appellant, of the firm Tavendale and Partners. The address for service of Appellant is at the offices of Tavendale and Partners, Level 3, Tavendale House, 329 Durham Street, Christchurch.

Documents for service on the Appellant may be delivered to that address or may be:-

- (a) Posted to the solicitor at PO Box 442, Christchurch 8140; or
- (c) Emailed to the solicitor for the Appellant at johanna.king@tp.co.nz.