

## REVIEW OF DECISIONS ON PROPOSED PLAN CHANGE 2 TO THE CANTERBURY LAND AND WATER REGIONAL PLAN



Variation/Plan Change 2 (PC2) would apply to the Hinds Plains/Hekeao area, which includes the catchment of the Hinds River and the plains between the Rangitata and Ashburton Rivers. The area is in the Ashburton district, and has an area of about 1,380 square kilometres.

This review of the decision on PC2 includes the following:

- An overview of the key legal issues relevant to Horticulture New Zealand's submissions
- A general comment on what Horticulture New Zealand achieved in the process
- Crop survival Water
- Capped Flexibility in the Lower Plains

### Legal issues

In the context of its submissions as a whole, Horticulture New Zealand and other submitters made a number of legal submissions on matters that are both relevant to PC2 and have a wider application. These are in the following areas:

- Update to give effect to the NPSFM 2014
- The role of Part 2 of the RMA
- Overs and unders in terms of water management
- Is a prohibition on consent transfers permissible
- Economic viability considerations

#### Update to give effect to the NPSFM 2014

PC2 was prepared before the NPSFM 2014 came into effect but was notified after it was in effect. PC2 was prepared to give effect to the NPSFM 2011, not the 2014. A number of submitters, including Horticulture New Zealand, noted that to the extent that the Panel has scope to do so it should ensure that PC2 gives effect to the NPSFM 2014. The Panel noted that to the extent that the submissions focus on the 2014 version the Panel have considered the NPS 2014. However, the Panel noted that PC2 does not give complete effect to the NPSFM 2014 and the Council will need to review the Land and Water Regional Plan in accordance with its staged implementation plan (prepared under Policy E1 of the NPSFM).

#### The role of Part 2

Since the decision of the Supreme Court in *King Salmon* there has been some confusion about the role of Part 2 of the RMA in the context of plan making. The Panel succinctly stated their approach as follows:

*[64] Although Part 2 states the purpose of the Act and principles in elaboration of the purpose, where specific, unqualified prescriptions of a superior instrument by which Part 2 is given effect (the lawfulness and the meaning of which are not disputed, and which 'cover the field'), a decision-maker is not free to 'refer back' to Part 2 to diminish the effect given to such a prescription.*

The Panel therefore decided the submissions of PC2 in the context of the applicable superior instruments (such as the RPS and NPSFM) without qualifying them by reference to Part 2.

### **Overs and unders in terms of water management**

The Panel considered a number of decisions that touch on the issue of whether an unders and overs approach is appropriate for water management. The decisions reviewed were:

- *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* (concerned with the Hawkes Bay RPS)
- *Puke Coal v Waikato Regional Council* (concerned with a discharge consent)
- *The Tukituki High Court decision* (concerned with the designations and consents for the Ruataniwha dam and the plan change for the Tukituki River)

The particular focus of the Panel was to consider the *Kahungunu* case as the Environment Court found deficiencies in the way the Regional Council had applied the 'overall quality' term in Objective A2 of the NPSFM (2011 version noting same objective in 2014 version). In short, the Court found that the approach was 'fundamentally flawed'.

The Panel concluded that while the Court found the approach flawed that:

- (1) while the Court found the 'unders and overs' approach flawed it did not propose an alternative;
- (2) the same wording was included in the 2014 NPSFM so if the Minister for the Environment was aware of the deficiencies there was an opportunity to fix them;
- (3) there is a distinction between the provisions in the *Kahungunu* case and PC2;
- (4) the findings of the Court did not amount to a declaration of the law of general application, nor do they have any legal precedent;
- (5) following the approach in *Puke Coal*, the provisions in PC2 for further intensification, in their context, do not preclude giving effect to Objective A2 and Policies A1 and A2 NPSFM.

### **Is a prohibition on consent transfers permissible?**

A number of submitters, including Horticulture New Zealand, argued that that making transfers a prohibited activity was not permissible. The Panel considers this matter in some detail and concludes:

*[257] In conditions in which expressly allowing transfers would not be consistent with a regional council managing transfers for its functions,*

*including giving effect to superior instruments, such as the NPSFM, management of transfers requires not expressly allowing transfers, but restricting transfers for the purpose of that management. Because section 136 directs that transfers are to be considered as if they are applications for resource consents, using the classes of activity listed in section 77B is a method of considering applications for approval of transfers consonant with considering them as if they are resource-consent applications.*

In short, the Panel was of the opinion that making transfers prohibited was permissible.

### **Economic viability considerations**

A number of submitters, including Horticulture New Zealand, raised economic issues to support their positions. The Panel noted:

*[296] We can accept that a rule constraining farming activity that is physically incapable of being obeyed might well be ineffective and should be revised. But a constraint that is physically capable of being complied with, though at an economic cost that may contribute to imperilling the viability or profitability of the business, is not similarly open to challenge.*

### **General statement on what Horticulture New Zealand achieved**

The specific matters achieved were:

- an agreement that an unders and overs approach to water management is acceptable;
- an acknowledgement that while crop survival water is important it is best addressed by providing a more flexible mechanism for growers to switch from surface water to groundwater takes;
- changes to the flexibility cap for lower leachers.

### **Crop Survival Water**

#### **Horticulture New Zealand relief**

Horticulture New Zealand sought the specific inclusion for crop survival water in PC2 as follows:

- Add an issue: *The inclusion of a new issue statement to describe the water need.*
- Add a new policy: *In times of water shortages provide for taking of water for the sole purpose of avoiding the death of horticultural root stock or crops as provided for in consent conditions.*
- Add a definition of rootstock and crop survival water: *water provided for the*

*protection of root stock of permanent horticulture, and protection of crops, excluding pasture species, animal fodder crops and maize through a reliability standard set at 100%.*

- Include an additional consent assessment matter: *Within the Hinds/ Hekeao Plains Area the need for crop survival water as determined using Schedule 10 Method 1*
- Amend Schedule 10 Reasonable Use Test Method 1: *Within the Hinds/ Hekeao Plains Area method 1 shall determine seasonal irrigation demand for horticultural crops for crop survival water as 10 years out of 10.*

## **Horticulture New Zealand Submission to the Panel**

Horticulture New Zealand submitted that the inclusion of specific provisions for crop survival water would allow surface water takes to continue during times of take restrictions (max 615 L/s) in order to prevent the death of capital root stock (perennial crops such as blackberries and raspberries) and food crops.

Council officers did not support Horticulture New Zealand's request and considered that:

- Growers currently relying on low reliability surface water takes can seek alternative deep groundwater takes,
- Providing greater flexibility for transfers will enable higher reliability water to be sourced; and
- At times of low flow restrictions, many of the surface water bodies in the Lower Hinds/Hekeao Plains area run dry, so there is no water available to be taken.

The Commissioners were not persuaded by the Horticulture New Zealand's arguments and considered that the amendments to the 'T Block' and the transfer provisions address the concerns.

## **What are the 'T Block' provisions?**

The surface waterbodies of the Lower Hinds/Hekeao Plains area are generally depleted as a combined result of declining groundwater levels, surface water takes and stream depleting groundwater takes. In response PC 2 sought to enable existing surface water takes and stream depleting groundwater takes to switch to deep groundwater.

The Lower Hinds/Hekeao Plains area is divided into two Groundwater Allocation Zones (GAZ); the Mayfield-Hinds GAZ (fully allocated) and the Valetta GAZ (over-allocated). Council officers determined the volume of takes in the catchment that could potentially switch to deep groundwater and the Commissioners agreed that a volume can be provided for as separate 'T Block' allocation that would be additional to the core GAZ allocations as follows:

- 33 million m<sup>3</sup>/year for the Valetta GAZ
- 28.3 million m<sup>3</sup>/year for the Mayfield-Hinds GAZ.

The Commissioners noted that additional groundwater takes of this magnitude would exacerbate the problematic decline in groundwater levels. This is to be offset by:

- Existing stream depleting shallow groundwater takes switching to deep groundwater under the new 'T Block' allocations, reducing the existing over-allocation of the core GAZs.
- Managed aquifer recharge (MAR) to restore historically available groundwater storage.
- If the benefits of MAR do not eventuate, then the depletion in surface waterbody flows resulting from a further decline in groundwater levels (caused by the recommended 'T Block' allocation being exercised) would be less severe than the depletion in surface waterbody flows that would result from the surface takes and stream depleting groundwater takes if they do not switch to deep groundwater.
- The substitute groundwater well to be at least 103m deep unless an applicant's site specific investigation demonstrates that a lesser depth is appropriate.

Rule 13.5.31 is as follows:

*The taking and use of groundwater within the Valetta and Mayfield-Hinds Groundwater Allocation Zones that will substitute an existing surface water or groundwater permit with a direct, high or moderate stream-depletion effect is a restricted discretionary activity provided that the following conditions are met:*

- 1. The use of groundwater is on the same property as the existing resource consent and there is no increase in the annual volume, or is for the sole purpose of augmenting a surface waterbody; and*
- 2. The groundwater take will not have a direct or high stream-depletion effect; and*
- 3. The bore interference effects are acceptable, as determined in accordance with Schedule 12; and*
- 4. The proposed take, in combination with all other resource consents granted under this Rule will not exceed the T allocation limits in Table 13(f)[33m<sup>3</sup>/yr Valetta GAZ, 28.3m<sup>3</sup>/yr Mayfield-Hinds GAZ]; and*
- 5. The take is from deep groundwater or the application for resource consent demonstrates that the take is not from stream-depleting groundwater.*

*The exercise of discretion is restricted to the following matters:*

- 1. Whether the volume and abstraction rate of water to be taken and used is reasonable for the proposed use assessed in accordance with Schedule 10; and*

2. *The timing of the surrender of the existing surface water or groundwater permit or permits; and*
3. *The effects the take has on any other authorised abstraction, including interference effects as indicated by an Aquifer Test undertaken in accordance with the requirements of Schedule 11 and well interference calculated in accordance with the method in Schedule 12; and*
4. *Where the take is less than 2 km from the coast, whether salt-intrusion into the aquifer or inland movement of the salt water/fresh water interface is prevented; and*
5. *The protection of groundwater from contamination, including the prevention of backflow of water or contaminants.*

### **Capped Flexibility in the Lower Plains**

The Commissioners have confirmed a capped flexibility for land used for a farming activity that enables nitrogen losses of up to 15 kg/ha/year as a permitted activity, and up to 20 kg/ha/year as a restricted discretionary activity. All farms of 5 hectares or less are excluded from the farming rules.

Providing flexibility for low-leaching land uses was a matter of concern to Horticulture New Zealand. From the rebuttal evidence of Mr Stuart Ford, the Commissioners noted that the annual nitrogen loss rates for a typical arable cropping enterprise operating a seven-year rotation, vary between 24 kg/ha/year and 27 kg/ha/year, averaging 26 kg/ha/year. Some of the individual crops have nitrogen losses of less than 10 kg/ha/year (carrots, barley and grass seed), and others have nitrogen losses exceeding 20 kg/ha/year (wheat, peas and potato). Consequently, the capped flexibility provisions would not cater for all of the arable cropping activities in the area. However, the Commissioners noted that Mr Ford also advised that the majority of horticultural operations have nitrogen leaching figures below the 15 kg N/ha/year and in that case, those operations would be a permitted activity under plan. The arable cropping growers that Mr Ford referred to could either choose to alter their cropping rotations, reduce their nitrogen losses or alternatively seek consent as a farming enterprise.

Of interest is the Matters of Discretion for the Restricted Discretionary Activities.

Rule 13.5.17 is as follows:

*The use of land for a farming activity in the Lower Hinds/Hekeao Plains Area where the nitrogen loss calculation exceeds 15kg per hectare per year is a restricted discretionary activity, provided the following conditions are met:*

1. *The nitrogen loss calculation for the property:*

*(a) does not exceed 20 kg per hectare per year, and the nitrogen loss calculation has not increased by more than 5kg per hectare per year above the nitrogen baseline; or  
(b) exceeds 20 kg per hectare per year but does not exceed the nitrogen baseline; and*

*2. A Farm Environment Plan has been prepared in accordance with Schedule 7 Part A.*

*The exercise of discretion is restricted to the following matters:*

- 1. The quality of, compliance with and auditing of the Farm Environment Plan; and*
- 2. The nitrogen loss rate reductions applicable to the property to fulfil Policy 13.4.13; and*
- 3. The potential benefits of the activity to the applicant, the community and the environment; and*
- 4. The potential effects, including cumulative effects, of the activity on surface water and groundwater quality, sources of drinking-water, and aquatic ecosystems.*

Matters of discretion are those specific matters Council can consider in deciding to grant or refuse resource consent and the conditions it can impose when granting consent.

*Matter of Discretion 1:*

Is a standard condition across the Canterbury Land and Water Regional Plan, requiring the preparation of good quality Farm Environment Plans, consistency with the information required and ongoing compliance and auditing.

*Matter of Discretion 2:*

Relates to policy that sets the nitrogen loss rate reductions required to be achieved by 2035 for farming activities in the catchment.

*Matter of Discretion 3:*

Is a matter of discretion that relates to the supporting principles of the Canterbury Water Management Strategy which includes natural character, indigenous biodiversity, access, quality drinking water, recreational and amenity opportunities, and community and commercial use. An important matter of discretion that enables all benefits from an activity (including economic) to be considered.

*Matter of Discretion 4:*

Is a matter of discretion that specifically focuses on the potential effects of an activity on the three elements of water quality, drinking water and aquatic ecosystems. Cumulative effects are highlighted which reflects the PC2 shift in the plan from effects-based management of individual consents to integrated management based on water management zones and management of cumulative effects of both water abstraction and land-use intensification.