

IN THE MATTER

of the Resource Management Act 1991
(the Act)

AND

IN THE MATTER

of the Resource Management Act 1991
and the Environment Canterbury
(Temporary Commissioners and
Improved Water Management) Act 2010

AND

IN THE MATTER

of the hearing of submissions on the
Proposed Land and Water Regional Plan

**LEGAL SUBMISSIONS IN RELATION TO GROUP 1 HEARINGS FOR
HORTICULTURE NEW ZEALAND**

12 APRIL 2013



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INTRODUCTION

1. These legal submissions are made of behalf of Horticulture New Zealand ("**Horticulture NZ**") in relation to the matters covered in Group 1 of the Hearings Schedule.
2. The structure of these submissions and the case presented today for Horticulture NZ is as follows:
 - (a) A brief overview of who Horticulture NZ and its interest generally in proposed Land and Water Regional Plan for the Canterbury Region ("**pLWRP**");
 - (b) How Horticulture NZ has and will present its case in relation to the Group 1 matters; and
 - (c) The Group 1 matters of concerns that are addressed in the submission and evidence to be presented today.

HORTICULTURE NZ AND ITS INTEREST IN THE PLWRP

3. Chris Keenan, the Manager Natural Resources and Environment of Horticulture NZ, will address you shortly and provide an overview of:
 - (a) Who Horticulture NZ are;
 - (b) The place of horticulture in the Canterbury region;
 - (c) The role that Horticulture NZ has played to date in the development of the pLWRP; and
 - (d) The concerns with the plan framework relevant to Group 1 matters.

HORTICULTURE NZ'S CASE

4. As will be covered in Mr Keenan's presentation Horticulture NZ is part of a broader group known as the Canterbury Primary Sector Policy Group.
5. The Commissioners have already heard from this Group in late February and the statement from Lionel Hume and Chris Allen¹ sets out how the Group have collectively commissioned expert evidence. This expert evidence has already been presented to you during the presentation from

¹ Dated 26 February 2013

the Group on 26 February and during the presentation from Fonterra and DairyNZ on 11 March.

6. For ease of reference the evidence that Horticulture NZ was involved in commissioning is that of:
 - (a) Andrew Curtis
 - (b) Ian McIndoe
 - (c) Peter Callanderall presented on 26 February.
7. The evidence that Horticulture NZ was closely involved in the preparation of and adopts is that presented by DairyNZ and Fonterra from Shirley Hayward and Geoff Butcher presented on 11 March.
8. As the matters in the evidence referred to have already been considered by the Commissioners the focus of the presentation today is to provide a specific Horticulture NZ perspective on the Group 1 issues.
9. In addition to Mr Keenan, Ms Lynette Wharfe is also present to answer questions on her written pre-circulated brief of evidence dated 4 February 2013. I have also asked Ms Wharfe to provide to you in table format the response from Horticulture NZ to the recommendations (on a provision by provision basis) in the Section 42A report.

THE HORTICULTURE NZ FOCUS IN RELATION TO GROUP 1 MATTERS

General comments

10. The focus of today is on the approach to the setting of limits (in Section 2.6 and Policy 4.1 of the pLWRP) and the flow on implications of this.
11. In relation to the approach taken by the Council in developing its plan Horticulture NZ wants to commend the Council team on what is acknowledged to be a radically different approach to land and water policy and planning.
12. As we hope is evident from the evidence of Ms Wharfe Horticulture NZ is largely supportive of the pLWRP and the recommendations of the Officers in the Section 42A report.

13. Horticulture NZ does not support submissions that are seeking to have the entire plan withdrawn.
14. The key issue for Horticulture NZ is not the objective and strategic policy framework, apart from some relatively important but minor (in the scheme of things) changes, but primarily the rule framework.
15. In short Horticulture NZ is concerned that the approach signalled in the pLWRP and in the Section 42A report is currently an amalgam of:
 - (a) On the one hand acknowledgement that the limits (in a National Policy Statement for Freshwater Management (**NPSFM**) sense) will largely be determined by the sub regional zone committees (i.e. the limits are interim stop-gap limits); and
 - (b) On the other hand sets a rule framework which will mean the limit setting exercise at the sub regional level could be of limited impact.
16. Mr Keenan will talk to you more about the practical considerations for horticulture. This is also something that will be covered in more detail in Group 2 during the focus on farming.

Does the pLWRP give effect to the NPSFW?

17. You have those parties/submitters (including Horticulture NZ and the officers in the Section 42A report) telling you that the pLWRP does give effect to the NPSFW and those parties/submitters (such as Fish & Game this week) telling you it does not.
18. In my submission, whether the pLWRP gives effect to the NPSFW is as much a planning or expert issue as a legal issue. I refer you back to the evidence of Mr Gerard Willis for Fonterra and DairyNZ that Horticulture NZ supports and endorses.
19. At paragraphs 3.9 to 3.35 Mr Willis provides an analysis of the NPSFW, concluding by setting out his view on the process of setting freshwater objectives. In particular he states²:

Based on that [the implementation guide and the preamble to the NPSFW as discussed in paragraphs 3.28 –

² Paragraphs 3.32 to 3.35 Willis EIC

3.31] (and on my understanding of Section 5 of the RMA and its primacy over any NPS), I understand that freshwater objectives should be set having regard to the need to use water for economic and social well-being. That is, **the level of environmental “ambitiousness” needs to be informed by the knowledge of what the economic effects will be.**

This contrasts with an approach to setting freshwater objectives purely as “ideal” environmental states based on ecological and recreational values alone (accepting that “life-supporting capacity” has a particular prominence due to Objective A1 of the NPSFM).

Related to this is my understanding that freshwater objectives under the NPSFM need to be achievable. This contrasts with the way objectives have been set in plans in the past which was often more aspirational in nature. **That is, they were seen as states to aim for; not thresholds that necessarily trigger an end to the granting of consents or the claw back of “resource” from existing consent holders.**

As discussed above, because under the NPSFM the meeting of freshwater objectives is one of the key tests of whether over-allocation occurs, **such objectives need to be carefully defined so as to be clear (and measurable) and avoid unintended consequences.** (That is, catchments being defined as over allocated when the underlying values are not compromised or when the implications for resource users are dramatic and were not considered in the objective setting process).

[emphasis added]

20. I note that Counsel for Fish & Game invited you to conclude that the current form of the pLWRP does not give effect to the NPSFW but the Fish & Game version (which we are yet to see the rule framework for but have a preliminary overview) will³.
21. No one supporting the pLWRP is saying that the current version of the plan is at the end of the process. All these supporting submitters acknowledge that the pLWRP contains interim elements that may well be changed later during the sub regional stages.

³ Legal Submissions for Fish & Game paragraph 61

22. The officers acknowledge in the Section 42A report that the outcomes set out in Table 1 and Policy 4.1 are interim (or may be default if no sub-regional setting occurs).
23. The changes recommended to the relevant sections of Part 2 of the pLWRP by the officers seek to clarify this, for example:

The intention of the region-wide limits is not to introduce any preconception of what limits should be determined at the catchment level. It is vital that communities in those catchments openly consider analyses of social, bio-physical, economic and cultural costs and benefits under a range of limits specific to that catchment before deciding on a desired end point. In this way, communities can determine the best solutions for their catchments.⁴

24. This in turn is reflected in the changes recommended to Policy 4.1 by the Officers as follows:

That Policy 4.1 be amended as follows:

4.1 Lakes, rivers, wetlands and aquifers will meet the fresh water outcomes set in Sections 6-15 within the specified timeframes. If outcomes have not been established for a catchment, then each type of lake, river or aquifer will meet the outcomes set out in Table 1 by 2023.

25. To further support this the Section 42A report states that the provisions in the pLWRP in part implement the NPSFW but that this is part of an overall implementation programme that includes the work to be done by the Zone Committees:

The RPS 2013, the pLWRP as notified, along with existing catchment plans in the region will fully implement all but two policies (Policies A2 and B6) of the Freshwater NPS, prior to December 2014.

Policy A2 requires that where the quality of water in a water body does not meet a plan's freshwater objective, that targets and methods to improve water quality, within defined timeframes, are to be specified.

Policy B6 requires that methods be set out in plans to phase out over-allocation of surface and groundwater quantity within defined timeframes.

Canterbury Regional Council has a program to collaboratively work with communities in partnership with

⁴ Page 77 of the Section 42A report under Section 2.8

Canterbury Water Management Zone Committees and Ngāi Tahu to develop targets, methods and defined timeframes to eliminate over allocation of surface and groundwater where it has occurred.⁵ [emphasis added]

26. The Report then attaches the implementation timetable for the Zone Committees.
27. Mr Willis had this to say on the topic:

*In my opinion, (as I discussed from paragraph 3.28) the NPSFM anticipates that freshwater objectives will be developed based on community values (national and local). The developing expert view on this is that community values and hence freshwater objectives are best agreed through a collaborative stakeholder process where all the threats and opportunities, costs and benefits are transparent. My understanding based on the evidence of Ms Hayward is that that has not been the case with the outcomes of Table 1 (albeit high-level, region-wide values were identified and acknowledged through the development of the CWMS). However, the general scheme of the plan is that Table 1 acts as a “back- stop” or interim framework until such time as the sub-regional sections are developed (according to the processes developed through the Canterbury Water Management Strategy). **The fact that the Table 1 objectives have not been developed through a catchment-scale, community values identification and evaluation process, does not in my view mean that they ought to be removed from the plan** (as noted they have an important interim role) but it is important context that should inform how they are to be applied. This is discussed further below⁶. [emphasis added]*

28. This is also the position of Horticulture NZ as set out in their submission, further submission and evidence.
29. Further, Horticulture NZ wishes to point out the redraft from Fish & Game can hardly be said to have been through a community value setting process as is envisaged by the NPSFW.
30. These submissions now turn to consider some specific issues arising out of the framework in the context of the rules.

⁵ Page 37 of the Section 42A report

⁶ Paragraph 7.2 EIC

Expert evidence on the rule framework

31. You have already heard from the various experts noted above about the technical concerns they have with the approach in some of the rules.
32. Ms Wharfe's evidence also addresses these concerns and puts them in a planning perspective.
33. Mr McIndoe had this to say:

I support the setting of interim limits, but my view is that if a prohibited status is going to be implemented, the final limits must be set following detailed and robust assessment of the resources involved and with appropriate consultation. The current limits, most of which have been transferred from the NRRP, have not been determined on that basis. I also think that consideration must be given to the dynamic nature of the resource when setting those final limits. It may be that a single volumetric limit may not be the best approach for providing for sustainable management of the resource, and that other allocation models may be more appropriate. Making the limits non-complying would allow better knowledge to be incorporated into the limit setting process.⁷
[emphasis added]

34. This interim nature of the outcomes is very important to reflect on when considering the rule framework which is reliant on the Table 1 and Policy 4.1 outcomes even though there are acknowledged to be only interim and likely to change.
35. Mr Callander deals with this in detail in his evidence when he is discussing the prohibited and non-complying activity status of a number of activities thus:

8.2 *Such a classification may be appropriate if well defined allocation limits have been determined through a rigorous procedure that has gone through an appropriate consultation process and the hearing of technical evidence to establish the limits, but that is not the case for the groundwater allocation limits that appear in sections 6-15.*

8.3 *I expect that through the zone committee process and subsequent hearings that appropriate limits may be established and the appropriate classification of*

⁷ Paragraph 17 McIndoe EIC

activities in relation to those limits can be defined within those sections.

36. And in relation to prohibited activities specifically he states
- 8.4 *By establishing a prohibited activity status in the more generally applied Rule 5.104 it creates two problems:*
- *A pre-determination of how activities related to those limits should be classified;*
 - *A restriction on abstractions based on the currently defined limits which in many cases are of an interim nature that have not been properly defined.*
37. There is no doubt that Table 1 and Policy 4.1 are only interim. They are not purporting to implement Policies A2 and B6 of the NPSFW they are but a step on the way to implementing those policies.
38. For all the technical reasons set out in the expert evidence before you it is important that the interim nature of Table 1 and Policy 4.1 is appropriately recognised and the rule framework that relies on these interim outcomes has sufficient flexibility to adapt to change as those outcomes change without the need in all cases (acknowledging there will be in need in some cases) to undertake a plan change process.
39. The relief sought by Horticulture NZ - which is (crudely) to change prohibited status to non-complying, and non-complying to discretionary - will provide adequate environmental safeguards as well as providing flexibility into the system while the sub regional work is developed and implemented.

Helen Atkins

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12 April 2013