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Otago Regional Council
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For: Dale Meredith/Tom De Pelsemaeker

Dear Dale and Tom

Proposed Plan Change 5A - Transitional Arrangements

Introduction

1 I refer to your email of 12 April 2016 and subsequent correspondence.

Issue

2 The Commissioners have asked for legal advice on whether transitional matters raised by submitters (in particular the Lindis Catchment Group and Otago Fish and Game Council) are within the scope of Proposed Plan Change 5A (PC 5A).

Background

3 The PC 5A is described in its introduction as:

- 3.1 Setting allocation limits and minimum flows for surface water and connected groundwater in the Lindis catchment.
- 3.2 Setting maximum allocation limits and take restrictions for specified aquifers within the Bendigo-Tarras basin.
- 3.3 Mapping the minimum flow catchment boundaries and monitoring site associated with the Lindis River.
- 3.4 Mapping the boundaries of the Ardgour Valley, Bendigo and Lower Tarras aquifers and amending the boundary of the Lindis Alluvial Ribbon Aquifer.

4 The proposed primary allocation limit and associated minimum flow appear to be the most significant feature of PC 5A.

5 PC 5A proposes to amend policy 6.4.5 to apply to the Lindis catchment area. That policy determines when minimum flows for the Lindis catchment area will apply.

6 In summary, if PC 5A becomes operative, minimum flow restrictions will apply to new takes when consent is granted. For existing consents, the minimum flows will apply after a collective review of consents in the catchment which will occur before 2021 if holders of mining privileges agree to adhere to the minimum flows or on the expiry of

mining privileges on 2 October 2021. If environmental benefit will result from applying minimum flows to any resource consents (other than deemed permits) a review of resource consent conditions may occur earlier.

- 7 PC 5A adds the Lindis catchment area to Schedule 2 of Regional Water Plan. Schedule 2 will contain allocation limits and associated minimum flows for each allocation band in the Lindis catchment. For the Lindis catchment area, takes will be restricted by the flow at the Ardgour Road monitoring site.
- 8 A number of submitters have requested transitional arrangements for the introduction of this allocation and minimum flow regime.

Legal framework

- 9 The relief sought in a submission on a proposed plan change can only be entertained by the Commissioners if that relief is “on” the plan change.
- 10 The legitimate scope of submissions determines the jurisdiction of the Commissioners to amend the proposed plan change.
- 11 A series of High Court decisions has developed a two-fold test for determining when a submission is “on” a plan change¹.
- 12 The test is first whether the submission addresses the change to the status quo contained in the proposed plan change, and, secondly whether there is a real risk that persons potentially affected by the change sought in the submission, have not had an opportunity of commenting on it.
- 13 Both parts of the test must be met. If not, the Commissioners have no jurisdiction to consider the submission.
- 14 The principles are summarised in Palmerston North City Council v Motor Machinists at paragraph [91]:

“[91] To sum up:

- (a) *This judgment endorses the bipartite approach taken by William Young J in Clearwater v Christchurch City Council in analysing whether a submission made under sch 1, cl 6(1) of the Act is ‘on’ a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.*
- (b) *This judgment rejects the more liberal gloss placed on that decision by the Environment Court in Naturally Best New Zealand*

¹ Clearwater Resort Limited v Christchurch City Council, High Court Christchurch, AP34/02, 14 March 2003; Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1; Auckland Council v Byerley Park Limited [2014] NZRMA 124; Palmerston North City Council v Motor Machinists Limited [2014] NZRMA 519; Protect Pauanui Inc v Thames Coromandel District Council [2014] NZRMA 91; Federated Farmers of New Zealand (Incorporated) Mackenzie Branch v Mackenzie District Council [2015] NZRMA 52

Ltd v Queenstown Lakes District Council, inconsistent with the earlier approach of the Environment Court in Halswater Holdings Ltd v Selwyn District Council and inconsistent with the decisions of this Court in Clearwater and Option 5 Inc v Marlborough District Council.

- (c) *A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.*
- (d) *The first limb of the Clearwater test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be “on” the plan change, unless the change is merely incidental or consequential.*
- (e) *The second limb of the Clearwater test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.”*

Lindis Catchment Group Inc submission

- 15 The Group’s submission seeks inclusion of a package of provisions that:
 - 15.1 Provide an effective and appropriate transition period and process for replacing deemed permits and water permits.
 - 15.2 Delay the imposition of the minimum flow regime.
 - 15.3 Provide a holistic approach to river management specifically tailored to the Lindis catchment.

- 16 At page 5 of its submission, the Group “request the development of a transition package including policies and rules to create a clear process, and appropriate timeframes, for an effective transition to new water permits with conditions imposing a minimum flow regime and a new primary allocation limit”. The Group also seeks “the inclusion of a range of river management options which, in combination with the provisions (including the minimum flow regime) proposed by LCG, would maintain and enhance the values associated with the Lindis River”.
- 17 The evidence presented by Sally Dicey for the Group elaborated on this aspect of its submission². It is best to consider Ms Dicey’s evidence in light of the two-fold test set out in paragraph 12.

Lindis Catchment Group Inc assessment

- 18 Proposed Policy 1 proposes a timeframe before the minimum flows apply.
- 19 The proposed policy is clearly within the ambit of the plan change. It directly responds to the plan change and its consequences. No one could be prejudiced by the Commissioners considering the proposed policy. Both limbs of the test are met.
- 20 Proposed policy 2 is that residual flows will be considered for consents to take water from tributaries of the Lindis River, but not for takes from the Lindis mainstem itself.
- 21 The proposed policy is a response to the minimum flow regime in PC 5A. It is within the ambit of the plan change. No one could be prejudiced by the Commissioners considering the proposed policy. Both limbs of the test are satisfied.
- 22 Proposed policy 3 is that in considering applications for water permits in the Lindis catchment area, the consent authority will recognise the positive environmental effects resulting from the disestablishment of the Tarras, Ardgour or Begg’s races. It assumes that new takes will be downstream, have piped and screened intake structures and abstract at lower instantaneous rates.
- 23 The proposed policy does not directly address any of the matters in the proposed plan change. It tries to deal with perceived consequences of the allocation and minimum flow regime which the plan change seeks to establish. To the extent the proposed policy addresses consequences, it is within the ambit of the plan change. It is unlikely that any person will be prejudiced by the Commissioners considering the proposed policy. On that basis it satisfies both limbs of the test.
- 24 Proposed policy 4 prescribes, in an apparently non-exhaustive way, the conditions which the consent authority will impose on a resource consent to take surface water in the Lindis catchment area if the take is managed by a water management group.
- 25 It is unclear how this relates to the plan change. No justification is provided in the submission or in the evidence of Ms Dicey. In the absence of justification, it cannot be said that this policy responds to the plan change and is within its ambit. It fails the first limb test. In addition, this proposed policy goes beyond the Group’s submission on PC 5A. That is not permissible.
- 26 New Rule 1 would create controlled activity status for the transfer of surface water takes from the Lindis catchment area to the Clutha catchment area or any alternative source aquifer where water is available to be taken as primary allocation.

² Paragraphs 151-161, pages 31-38

- 27 This proposed rule provides for water takes outside the Lindis catchment area. To that extent, it is outside the ambit of the plan change. It does try to deal with consequences of the water management regime intended by PC 5A for the Lindis catchment. For that reason, it is arguable it passes the first limb of the test. However, it has potential to impact directly or indirectly on persons who are not participants in the PC 5A process. There is a real risk that persons who should be heard have not been heard. The proposed rule fails the second limb of the test. Accordingly, the new rule is not “on” the plan change.
- 28 New Rules 2 and 3 deal with the taking of surface water as primary allocation from the mainstem and tributaries of the Lindis River respectively when existing consents are replaced and gives them controlled activity status.
- 29 These proposed rules are within the ambit of the plan change because they relate to the allocation and minimum flow regime in PC 5A. There is no prospect that any person directly or indirectly affected will be disenfranchised. Both limbs of the test are satisfied.
- 30 The Lindis Catchment Group also proposes channel management provisions comprising a new issue, objective and rules to allow for channel management works to take place.
- 31 These proposed provisions are outside the ambit of PC 5A. They are not discussed in the Section 32 report. Interested parties on these proposals may not be participants in the 5A process. Neither limb of the test is satisfied.

Fish and Game submission

- 32 In its submission, Fish and Game asked for transitional matters to be added:

“Other objectives, policies, methods, rules and Schedules to the Regional Plan: Water.”

- 33 In explanation it said:

“The transition from deemed permits to resource consents, involving alternative sources of water will require other amendments to the regional plan.”

- 34 The covering letter also dealt with this matter, under the heading “*Transition and other matters*”. Peter Wilson wrote³:

“There is a need for this plan change to adduce the general issue of transition from deemed permits to resource consents, regardless of water source. The Section 32 report does not adequately address matters of transition. It only addresses transition times under Policy 6.4.5. The topic of transition from deemed permits to resource consents is wider. These transition matters include:

- (a) *Facilitating the shifting of deemed permits to resource consents from alternative resources;*

³ Paragraph 26

- (b) *The potential for gravel management and extraction in locations where there is substantial deposits to restore surface flows;*
- (c) *Changing methods of take to restore fish passage and prevent ingress of small fish and elvers;*
- (d) *Providing for variable rates of take through consents to mimic flushing flows and to ensure fine-tuning of water management;*
- (e) *Providing certainty in a process to facilitate the fair break-up and reallocation of large deemed permits held by existing irrigation companies into individual or small components. This may also include the reallocation of former Lindis rights to alternative sources.*

Fish and Game is open to planning measures, including amendments to other parts of the Regional Plan: Water to facilitate transition.”

35 Peter Wilson’s evidence does not expand on the submission.

Fish and Game assessment

36 The Fish and Game proposals are expressed in general and unparticularised terms. There are no draft provisions.

37 Reference is made to Peter Wilson’s evidence at paragraph 23.

38 In paragraph 23(a), Mr Wilson proposed phased implementation of the final minimum flow.

39 For the reasons given in relation to a similar proposal by the Lindis Catchment Group to defer commencement of the allocation of minimum flow regime, this proposal is “on” the plan change.

40 At paragraph 23(b), Mr Wilson proposes “*facilitating the shifting of deemed permits to resource consents from alternative sources*”.

41 If those alternative sources are outside the Lindis catchment area, then they are beyond the scope of the plan change. They fail both limbs of the test.

42 In paragraph 23(c), Mr Wilson proposes the possible potential for small scale gravel management and extraction in locations, where there are substantial deposits, to improve fish passage.

43 This proposal is beyond the scope of the plan change. It raises a topic which is not part of PC 5A at all. It fails the first limb of the test.

44 In paragraph 23(d), Mr Wilson proposes changing methods of take to restore fish passage and prevent ingress of small fish and elvers.

45 This too is beyond the scope of the plan change. This subject is not part of PC 5A at all. The proposal fails the first limb of the test.

46 In paragraph 23(e), Mr Wilson proposes providing for variable rates of takes in consents to mimic flushing flows and enable the fine-tuning of water management.

- 47 Variable rates of take are not a topic dealt with in the plan change nor the supporting Section 32 report. They are beyond the ambit of the plan change. The proposal fails the first limb of the test.
- 48 In paragraph 23(f), Mr Wilson proposes provisions providing certainty and a process to facilitate the fair break-up and reallocation of large deemed permits held by existing irrigation companies into individual or smaller components. He adds this may also include the reallocation of former Lindis rights to alternative sources.
- 49 For the reasons already given, if alternative sources are outside the Lindis catchment area, the relief sought by Fish and Game is outside the scope of the plan change. It is also unclear how the break-up and reallocation of large deemed permits is a matter in or arising out of the plan change. It is not a subject which is addressed in PC 5A. It is not explained to be a consequence of the plan change. This proposal does not meet either limb of the test.

Conclusions

- 50 The views expressed in this advice are tentative.
- 51 The Commissioners should make this advice available to all parties and invite comment.
- 52 No view is expressed on the merits of the proposals reviewed. The focus is entirely on whether or not the relief promoted conforms with the statutory requirement to be "on" the plan change.
- 53 If in any particular case the relief does not satisfy that test, but the Council considers it meritorious, the Council may promote a variation to the plan change. Alternatively, the plan change could be withdrawn and a fresh plan change prepared.

Yours faithfully

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