

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

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

ENV-2020-CHC-127

UNDER the Resource Management Act 1991 (RMA)

IN THE MATTER of the Water Permits Plan Change - Plan Change 7, being part of a proposal of national significance directed by the Minister for the Environment to be referred to the Environment Court under section 142(2)(b) of the RMA

AND

IN THE MATTER of an application under section 149T of the RMA

BETWEEN **OTAGO REGIONAL COUNCIL**
Applicant

**MEMORANDUM OF COUNSEL FOR OTAGO REGIONAL COUNCIL IN
RELATION TO EXPERT CONFERENCING
1 March 2021**

Judicial Officer: Judge Borthwick

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MAY IT PLEASE THE COURT

- 1 This Memorandum of Counsel is filed on behalf of the Otago Regional Council (**Council** or **ORC**) in respect of the directions in:
 - (a) Paragraph [9] of the Environment Court's Minute dated 23 February 2021 regarding the conferencing of expert witnesses in relation to Schedule 10A.4 and other topics that warrant expert conferencing; and
 - (b) The Notice of Expert Witness Conference dated 12 February 2021.

Refined agenda for expert witness conferencing in relation to Schedule 10A.4

- 2 The Notice of Expert Witness Conference directed Counsel to prepare a refined agenda. ORC has circulated a proposed refined agenda with the other parties.
- 3 The following parties have confirmed they do not have any further comments in relation to the topics proposed for Schedule 10A.4 conferencing as set out below:
 - (a) Ngā Rūnanga;
 - (b) Landpro;
 - (c) Trustpower;
 - (d) The Minister for the Environment;
 - (e) The Director-General of Conservation; and
 - (f) Federated Farmers.
- 4 Otago Water Resources Users Group suggests the inclusion of "Validity of method" as an additional topic for conferencing on Schedule 10A.4 in order to facilitate discussion regarding whether the method achieves what Plan Change 7 (**PC7**) is designed to do.
- 5 McArthur Ridge Vineyard Ltd, Mount Dunstan Estates Ltd, Strath Clyde Water Ltd (**McArthur Ridge**) suggests the inclusion of how the Schedule should deal with water used for frost fighting as an additional topic.
- 6 The Council agrees that these additional topics should be included in the agenda.

- 7 Wise Response Society Incorporated suggests the refinement of the following topics as follows:
- (a) Reliability of supply:
 - (i) Effect of land use options;
 - (ii) Marginal value of water;
 - (iii) Improving rainfall efficiency; and
 - (iv) Rescheduling method for seasonal shortfall or environmental flow.
 - (b) Technical efficiency (including both application efficiency and infrastructure efficiency):
 - (i) Effective efficiency at catchment scale.
 - (c) Method amendments/alternative options:
 - (i) How to take into account different past levels of reliability on irrigable areas in reassessed take.
- 8 Counsel considers that these matters go beyond the level of detail required for the agenda. However, conferencing participants for Wise Response can raise these matters as part of the discussion at conferencing.
- 9 Wise Response also suggests the inclusion of an additional topic of 'clarifying relationship of methodology with environmental flow provisions'. Counsel does not consider this to be within the scope of Schedule 10A.4 and therefore does not propose to include this in the agenda, unless parties take a different view.
- 10 Trustpower considers it would be efficient to consider the issues of the application of Schedule 10A.4 to hydroelectricity and community water supplies earlier in the expert conferencing rather than at the conclusion.
- 11 Counsel considers that an appropriate agenda is as follows:
- (a) How, or should, Schedule 10A.4 address the following key issues raised in evidence:
 - (i) Reliability of supply;
 - (ii) Technical efficiency (including both application efficiency and infrastructure efficiency);

- (iii) Data Quality;
 - (iv) Consideration of legitimate overtaking;
 - (v) The use of additional water metering data;
 - (vi) The complexity of Schedule 10A.4;
 - (vii) Validity of the method – does the method achieve what Plan Change 7 is designed to do;
 - (viii) Method amendments / alternative options;
 - (ix) Water used for frost fighting;
 - (x) Hydroelectricity; and
 - (xi) Application to community water supplies.
- 12 Counsel will confer further with parties in relation to the order of the agenda and time required for each topic, noting Trustpower's suggestion that it would be efficient to consider the issues of the application of Schedule 10A.4 to hydroelectricity and community water supplies earlier in the expert conferencing rather than at the conclusion.

Filing of joint witness statement and witnesses attending expert conferencing in relation to Schedule 10A.4

- 13 In its Minute dated 23 February 2021, the Court directed that having conferred with the other parties calling witnesses to give expert evidence in relation to the schedule, ORC is to propose further directions including:
- (a) The filing date for the joint witness statement (if different from 9 April 2021);
 - (b) A list of witnesses (including areas of expertise) attending the conference;
 - (c) If witnesses are required to appear to present the joint witness statement, whether counsel/parties agree on nominating particular witnesses who may represent their collective views and answer any questions by counsel or from the court.
- 14 Counsel has liaised with the other parties regarding these matters.
- 15 Having conferred with other parties, Counsel proposes the filing date for the joint witness statement be **Friday 7 May 2021**.

- 16 Witnesses attending the conference include witnesses of the following parties:
- (a) Otago Regional Council:
 - (i) Sean Leslie (Systems and Information Analyst at ORC); and
 - (ii) Simon Wilson (Manager Regulatory Data and Systems at ORC).
 - (b) Landpro:
 - (i) Christina Bright (Hydrology).
 - (c) Trustpower:
 - (i) Paul Mitchell (Hydrology).
 - (d) Otago Water Resources User Group:
 - (i) Matt Hickey (Hydrology);
 - (ii) Ian McIndoe (Hydrology);
 - (iii) Tom Heller (Hydrology); and
 - (iv) Dave Graham (Irrigation).
 - (e) Horticulture New Zealand Limited:
 - (i) Ian McIndoe (Hydrology).
 - (f) Territorial Authorities:
 - (i) Thomas Heller (Hydrology).
 - (g) Wise Response Society Incorporated:
 - (i) Dugald MacTavish (Irrigation, Geohydrology).
 - (h) McArthur Ridge
 - (i) Anthony (Tony) Davoren (Hydrology).
- 17 The contact details for parties' witnesses will be provided to the Court separately.
- 18 In general, the parties consider that witnesses could be nominated to represent the collective views of the parties and answer any questions. The parties do not anticipate that all expert witnesses will need to attend court to lodge and confirm the joint witness statement. Federated

Farmers note that this would add additional cost and complexity. However, determining an appropriate expert will depend on confirmation of a refined agenda and list of experts attending conferencing, the outcome of the Joint Witness Statement and whether the Court is likely to have questions.

- 19 ORC proposes that if parties agree to nominate a witness(es) to represent the collective views of the parties and answer any questions that any witness(es) is specified in the Joint Witness Statement, proposed to be filed on **Friday 7 May 2021**.

Additional topics for expert conferencing

- 20 In its Minute dated 17 February 2021, the Court directed that if any party considers that expert conferencing is warranted on discrete topics (in addition to that already directed by the Court) they are to raise the matter with counsel for the ORC so that it can be dealt with in this Memorandum.
- 21 In its Minute dated 23 February 2021, the Court directed ORC, having conferred with the parties calling expert evidence, to address in this Memorandum:
- (a) A list of topics in addition to Schedule 10A.4 that warrant expert conferencing;
 - (b) Whether an Environment Court Commissioner is required to facilitate that additional conferencing; and
 - (c) If an Environment Court Commissioner is required, whether the conferencing can be accommodated in the time already scheduled for expert conferencing on Schedule 10A.43 or whether additional time is required.
- 22 ORC, having conferred with other parties, has received the following comments in relation to additional topics for expert conferencing:
- (a) Otago Fish and Game Council and Central South Island Fish and Game Council (**Fish and Game**) suggest caucusing of the ecologists on the quantitative measures that Dr Hayes proposes for measuring habitat quality as an alternative to referring to no more than minor adverse effects;

- (b) Otago Water Resources User Group considers the topic proposed by Fish and Game warrants expert conferencing but notes that if there is to be ecological expert conferencing, topics should be broader than Dr Hayes' measures.
- (c) Wise Response Society Incorporated support expert conferencing proposed by Fish and Game.
- (d) Parties that have confirmed they do not propose any additional topics include:
 - (i) Ngā Rūnanga;
 - (ii) Landpro;
 - (iii) The Minister for the Environment;
 - (iv) The Director-General of Conservation;
 - (v) Federated Farmers;
 - (vi) Horticulture New Zealand Limited; and
 - (vii) McArthur Ridge.

23 Currently there is not a consensus as to additional discrete topics that warrant expert conferencing. Counsel will pursue this matter further with parties and advise the Court as to whether an Environment Court Commissioner is required to facilitate conferencing on additional topics. Counsel's preliminary view is that expert conferencing of ecological witnesses may not be required. However, it would like to confer with parties further on this, noting the urgent need for the Court to schedule this conferencing if required.

Attendance of planning witnesses at expert conferencing

- 24 In its Minute dated 23 February 2021, the Court at paragraphs [5] to [7] considered the attendance of planning witnesses at expert conferencing of other experts and that any directions regarding planning witnesses' attendance will be made by Commissioner Edmonds.
- 25 If it is of assistance to Commissioner Edmonds' in making directions regarding the attendance of planning witnesses, ORC has conferred with parties on this matter.
- 26 ORC considers that given the divergence of views in the evidence, that scheduling and setting an agenda for expert conferencing of planners on

the range of methods required to implement the outcomes of the plan change is of limited utility at this time.

- 27 ORC proposes that parties reassess the utility of planning expert conferencing once the Court has heard the expert evidence. The issues will be further distilled after hearing the evidence and the Court may have its own questions that it directs the planners to conference on.
- 28 ORC propose that parties ensure that their planning witnesses are available during that time, should expert conferencing be required.
- 29 The following parties are in general agreement with ORC's proposal above:
- (a) Ngā Rūnanga;
 - (b) Landpro;
 - (c) Trustpower;
 - (d) The Minister for the Environment;
 - (e) The Director-General of Conservation;
 - (f) Federated Farmers;
 - (g) Otago Water Resources User Group;
 - (h) Horticulture New Zealand Limited; and
 - (i) Wise Response Society Incorporated.

Dated this 1st day of March 2021



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P A C Maw / M A Mehlhopt

Counsel for Otago Regional Council