

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

IN THE MATTER of the Resource Management Act 1991

AND of a notice of motion under section 149T(2) to decide proposed Plan Change 7 to the Regional Plan: Water for Otago (referred to the Environment Court by the Minister for the Environment under section 142(2)(b) of the Act)

BETWEEN OTAGO REGIONAL COUNCIL

(ENV-2020-CHC-127)

Applicant

**MINUTE OF THE ENVIRONMENT COURT
PLAN CHANGE 7
(deemed permits)
(7 April 2021)**

[1] Counsel for the Otago Regional Council, Otago Water Resource Users Groups and the Director-General of Conservation, have filed a memorandum dated 26 March 2021 setting out the legal issues that arise in relation to deemed permits.

[2] It is not clear to us whether the legal rights can be recognised in a Regional Plan as appears to have been assumed by the parties' memorandum. It may be that the right of priority is a creature of statute and applies in the manner prescribed by the Resource Management Act.

[3] That said, it is our preliminary view that the plan change does not



adequately respond to the non-regulatory¹ methods of water management and that something more may be required if there is to be an orderly transition from the operative Regional Plan: Water to a future Regional Plan that gives full effect to the National Policy Statement for Freshwater Management 2020. If the expiry of deemed permits on 1 October 2021 creates a policy vacuum, how does this space get filled (if at all) in PC7?

[4] The interpretation and application of ss 413-417 RMA is a matter on which the Minister may be expected to have a view. Given the likely importance of the above issues to the determination of the plan change we are specifically seeking the assistance of counsel for the Minister for the Environment for this.

[5] In this Minute we will set out the legal issues that we say arise in relation to rights of priority and secondly, indicate the subject matter of the court's questions for witnesses appearing in weeks 4-6 on the wider topic of non-regulatory methods.² The court may also direct further evidence.

Statutory context

[6] From the commencement of the Resource Management Act 1991 (RMA) on 1 October 1991, every current mining privilege³ and right granted under the Water and Soil Conservation Act 1967 ceased [our emphasis] to have any effect.⁴

[7] However, transitional provisions were included in the RMA such that every current mining privilege or right was deemed to be a water permit if it authorises something that would otherwise contravene s 14 RMA.⁵ In addition, these deemed water permits were deemed to include as a condition of consent the right of

¹ 'Non-regulatory' in the sense of actions taken by permit holders in relation to regulating flows in the waterbodies.

² Weeks 4-6 mainly comprise parties and witnesses from the primary sector.

³ See RMA 413(1)(a). 'Mining privilege' within the meaning of section 2 of the Water and Soil Conservation Amendment Act 1971.

⁴ RMA s 366(g).

⁵ RMA s 413(1)(c).

priority that formerly attached to the mining privilege.⁶

[8] This right of priority allows the holder of a superior mining privilege to give notice to another permit holder to cease or reduce abstraction, if the supply of water is less than what they are entitled to. The exercise of priority to water is limited to cases where the water flowing in a watercourse is insufficient to supply fully to all the races connected to the same.⁷ The term ‘race’ is defined in the Water and Soil Conservation Amendment Act 1971 as meaning any artificial channel or ditch for the conveyance of water, or into or in which water may be diverted or conveyed, for any authorised purpose.⁸

[9] No enforcement order may be made against the holder of a deemed permit except on application by the Regional Council or a Minister of the Crown.⁹

[10] The deemed water permits resulting from a mining privilege will finally [our emphasis] expire on 1 October 2021.¹⁰

Further evidence in relation to the rights of priority

[11] Thus far the court has only heard anecdotal evidence as to the exercise of priorities by holders of deemed permits. The court does not know whether and in what circumstances holders of deemed permits exercise their right of priority. There has been evidence that when applying for a replacement consent, the holders of deemed permits do not seek to impose as a condition of consent a right of priority. However, we do not know whether that is invariably the case.

[12] For catchments **outside** of those listed in Schedule 2A of the operative

⁶ RMA s 413(2) and s 11 Water and Soil Conservation Amendment Act 1971.

⁷ RMA s 413(2).

⁸ We omit the definition references to waste and refuse, as we assume these purposes do not arise under PC7. The Regional Council is to say if we have assumed wrongly.

⁹ RMA s 413(6).

¹⁰ RMA s 413(3) noting that this section refers to both water and discharge permits.

Regional Plan: Water, where deemed permits have been replaced under the RMA, is the new water permit subject to a right of priority, allocation limit and minimum flow, recession flow or cessation conditions? For these replacement permits, are there other types of conditions which could regulate the availability of water flow within a waterbody¹¹ between abstractors?

[13] For any of the catchments listed **in** Schedule 2A, have the minimum flow and allocation limit been applied to existing permit holders¹² on review?

[14] For any of the catchments listed **in** Schedule 2A, where deemed permits have been replaced under the RMA, are those new water permits subject to a right of priority, an allocation limit and minimum flow,¹³ recession flow or cessation conditions? For these replacement permits, are there any other type of conditions which could regulate the availability of water flow within a waterbody¹⁴ between abstractors?

[15] Where any permit holder has exercised their right of priority was this for the purpose of ensuring water is supplied to the races or were there other factors motivating the exercise of that right?

Legal issues arising in relation to rights of priority

[16] The court seeks counsels' assistance on the legal effect of a deemed condition on a deemed water permit, as follows:

- (a) with reference to s 5 of the Interpretation Act 1999, what is the purpose of s 413 RMA's deeming provisions?
- (b) does s 413 RMA's deeming provisions create a statutory fiction or

¹¹ Waterbody includes hydraulically connected groundwater.

¹² Including deemed permit holders.

¹³ For allocation limits, identify which Policy 6.4.2 was applied.

¹⁴ Waterbody includes hydraulically connected groundwater.

something else?¹⁵

- (c) do rights of priority exist after 1 October 2021 or alternatively, beyond the date of determination of an application lodged prior to that date to replace a deemed permit? If so, how does this arise?

[17] The parties have raised issues to do with the validity of deemed conditions on a deemed permit.¹⁶ If an Act of Parliament deems the right of priority a condition of consent, is not the validity of the condition a moot point?

[18] Subject to paragraph [16] above, the better issue may be whether pursuant to s 108AA RMA a permit holder can seek, and the Regional Council grant, a replacement consent on conditions that include the right of priority under:

- (a) the operative Regional Plan: Water; or
- (b) PC7.

[19] From the parties' memorandum the additional issues may arise depending on the outcome of the issues identified in paragraph [16]. These issues may be addressed provided counsel set out and apply the relevant principles of statutory interpretation.¹⁷ The issues are:

- (a) does s 108AA affect the application of s 413(2) RMA?; and
- (b) is the deemed condition included on the permit with priority or the subservient permit, or both?
- the answer to this depends (we think) on the provisions in a Regional Plan.

¹⁵ For discussion, see for example Statute Law in New Zealand J F Burrows and R Carter, 5th ed at pp 450-453 and Bennion, Bailey and Norbury on Statutory Interpretation 8th edition pp 562-565. See also Resource Management Bill 1989 (224-1) Explanatory Note and Hansard.

¹⁶ ORC memorandum in relation to legal issues to be determined regarding deemed permit priorities dated 26 March 2021 at [4].

¹⁷ ORC memorandum in relation to "legal issues to be determined regarding deemed permit priorities" dated 26 March 2021 at [3](b) and (c).

[20] Presently we are accepting of the fact that if a right of priority has been exercised, this will be recorded in the water meter data collected by logger or telemetry. However, data alone will not reveal the exercise of priority or say anything about the circumstances existing at the relevant time. The evidence heard thus far is insufficient for the court to reach a view on the importance of the right of priority for holders of existing deemed permits.¹⁸ We think a similar observation could be made about the taking and use of water that is regulated by a flow sharing agreement which we come to next.

Water management groups

[21] The Regional Council has promoted water management groups to assist the Council in the management of water. This was to be achieved by a water management group exercising at least one of the following functions:¹⁹

- (a) coordinating the take and use of water authorised by resource consent;
- (b) rationing the take and use of water to comply with relevant regulatory requirements; and
- (c) recording and reporting information to the Regional Council on the exercise of resource consents as required by the conditions of consent.

[22] Again, anecdotally the court heard that the Regional Council policies have culminated in water sharing agreements. The court has not yet received analysis of those agreements and does not know whether the agreements are legally binding or informal; the scale of waterbody in relation to which the agreements apply (i.e. catchment, sub-catchment, mainstem or tributary); whether any water sharing agreement has been implemented or whether the exercise of any agreement is

¹⁸ We can add also that the court is struggling with why the Regional Council says data alone is adequate to capture the right of priority.

¹⁹ Regional Plan: Water, Policies 6.4.12A-6.4.13.

contingent on every permit holder in the relevant waterbody agreeing to be bound (among other issues).

[23] Finally, the court has not been told how the rights of priority and any flow sharing agreement interface with the methods used by the Regional Council in the management of water including minimum flows, allocation limits, recession flows and cessation conditions.

Possible way forward if PC7 is confirmed

[24] Many parties and submitters seek for PC7 to be rejected, or if approved, then substantially amended to enable permit holders to seek long-term consent.²⁰ The court has yet to hear all of the evidence and has no view on the outcome of this proceeding.

[25] If PC7 is approved in some form, it is important that the court and parties know whether it is within scope for the plan change to include, within its provisions, non-regulatory methods as may be applied by permit holders now to the taking of water.²¹

[26] If the hitherto non-regulatory methods are able to be recognised, is their purpose in PC7 to restrict the exercise of a water permit with the outcome of either:²²

- (a) allowing other permit holders to continue to take water; and/or
- (b) reducing the risk of adverse habitat and ecological effects, and/or
- (c) something else?

²⁰ This is among the range of relief sought by the parties and submitters.

²¹ Until we hear from the parties, we are treating the right of priority where it arises in the context of an application to replace a deemed permit under PC7 as a non-regulatory method.

²² We rephrase the issue stated at paragraph [4](a) of the ORC memorandum in relation to “legal issues to be determined regarding deemed permit priorities” dated 26 March 2021.

[27] What informs the outcomes under paragraph [26], assuming these methods are to be recognised?

[28] Does their recognition necessitate change to the objective and policies?

[29] Could the matters of discretion in the operative Regional Plan: Water, Rule 12.1.4.8 apply instead of simply citing²³ in the plan change the right of priority? The matters of discretion are:

- whether the taking of water under a water permit should be restricted to allow the exercise of another water permit; and
- any arrangement for cooperation with other takers or users.

[30] If this were to be recognised, would it require a controlled activity rule or restricted discretionary activity rule?

[31] If there is an appetite by parties for or if the court decides to include non-regulatory methods, the planners are likely to be redirected to expert conferencing.

Deemed permits – general matters

[32] Thus far the parties have focused on mining privileges that are deemed water permits pursuant to s 413(1)(c) of the Act.

[33] There are two other mining privileges deemed by s 413 to be permits, namely a discharge permit to do something that would contravene s 15 of the Act and secondly, a permit conferring its holder rights over land.

[34] The Regional Council is to file a memorandum and confirm whether deemed permits described in s 413(1)(d) and (e) RMA are within scope of the plan

²³ As OWRUG and the Director-General have done.

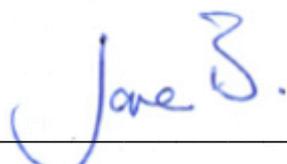
change.

Directions

[35] The court makes the following directions:

- (a) The Regional Council is to file a memorandum by **Friday 16 April 2021** responding to paragraph [34] above; and
- (b) Counsel and party representatives are to provide a copy of this Minute to any witnesses scheduled to appear during weeks 4-6 of the hearing. This is to be done by tomorrow, **Thursday 8 April 2021**.

[36] Leave is granted for any party to seek directions or clarification in relation to matters raised in this Minute.



J E Borthwick
Environment Judge



Issued: 7 April 2021