

**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
COURT'S QUESTIONS FOR EXPERT CONFERENCING
(SCHEDULE 10A.4) PLAN CHANGE 7**

(21 April 2021)

Introduction

[1] This Minute is released for the purpose of case management.

Expert conferencing Schedule 10A.4

[2] Attached to the Minute and labelled Annexure 1 are the court's questions for witnesses participating in expert conferencing on the topic of Schedule 10A.4.

[3] All questions pertain to the version of the plan change attached to the Joint Witness Statement dated 8 April 2021. These questions are in addition to any

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matters in dispute as between the participating witnesses.

Expert Conferencing: Controlled activity and restricted discretionary rules

[4] The court invites the planning witnesses to conclude expert conferencing in relation to the controlled activity and restricted discretionary activity rules. The Schedule excepted, the court does not otherwise wish the planners to conference on bespoke provisions for community water supply and hydroelectricity generation.

[5] In relation to the controlled activity rule, the court directs the planners to consider two controlled activities. First, the version in the 8 April 2021 JWS (Planners) and the second additional controlled activity supported by McArthur Ridge Vineyard Ltd, Mt Dunstan Estates Ltd and Strathclyde Water Ltd.¹ The second version is to provide for a limited consent pathway in circumstances where horizontal mainlines (for irrigation) have been installed ('McArthur proposition'). While this is proposed as a controlled activity, consideration is also to be given to an alternative restricted discretionary activity pathway and the matters for control/discretion.

[6] Any planner not already participating in expert conferencing, but whose party has an interest in the above rules, is invited to participate on this limited topic.

Objective 10A.1.1

[7] In addition, the court seeks the planners views as to whether the objective could be strengthened by the inclusion of any of ORC's stated purposes² for the plan change and if so, is there scope to consider the same under the submissions and/or s 293 of the Act? Are consequential amendments to the policies also

¹ Memorandum of counsel dated 20 April 2021.

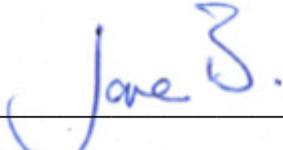
² De Pelsemaecker, EIC at [15-17].

required including for the McArthur proposition?

[8] Again, any planner not already participating in expert conferencing, is invited to participate on this limited topic.

Agenda

[9] Counsel, having conferred with their expert witnesses, are to confer and file a draft Agenda for the expert conference which, in addition to the court's questions, may identify other issues arising in relation to provisions. That said, the court does not refer to expert conferencing other than restricted discretionary activity, discretionary and non-complying activity rules proposed by submitters/parties. The draft agenda must be filed within **three working days** of the expert conference.



J E Borthwick
Environment Judge



Issued: 21 April 2021

Annexure 1

Controlled Activity Rule 10A.3.1

[1] The court is interested in two entry conditions to the controlled activity rule as follows:

- (iv) Except where (vii) applies, the rate of take shall be no more than the rate of take limit recorded during the ~~period 1 July 2015 30 June 2020~~ and water years (1 July to 30 June) for which water meter data is available, as calculated in accordance with the method in Schedule 10A.4; and
- (v) Except where (vii) applies, the volume of water taken shall be no more than the daily volume limit, and monthly volume limit, and annual volume limit (whichever one or more are applicable) recorded during the ~~period 1 July 2015 30 June 2020~~ and water years (1 July to 30 June) for which water meter data is available, as calculated in accordance with the method in Schedule 10A.4;

[2] By way of a general question, what is meant by ‘water meter data is available’?

- (i) what year would (or might) that extend back to for irrigation, community water supplies or hydroelectricity generation, and again what are the implications (if any)?
- (ii) is a possible outcome under this methodology data is used prior to the introduction of the Resource Management (Measuring and Reporting of Water Takes) Regulations 2010 – and if so, could this include unreliable data?

[3] Another general question: why have the date limitations on the use of water meter data to calculate the rate of take and volumes³ been struck out of both entry

³ That is, the period 1 July 2015 – 30 June 2020.

conditions to the controlled activity rule and what does this mean in practice for the calculation of 'historical use' for the primary, community water supply and hydroelectricity generation sectors?

- (i) Would a consequence of deleting the date limitations be that water use from an earlier period results in a higher maximum rate of take or higher maximum daily volume, monthly volume or annual volume under the methodology proposed as may have occurred when a comparatively inefficient irrigation system⁴ was used in the earlier period of data record.
- (ii) If this is a possible outcome, how does the approach in these entry conditions reflect the Primary Sector JWS at [16]:

All witnesses agree that the starting point for the data required for Schedule 10A.4 is the flow rate data that is consistent with the current infrastructure of the system at the point of take.⁵

- (iii) What could be done to align the entry conditions with the historical use under the current infrastructure system?
- (iv) If the rule is to apply to superseded infrastructure systems, what is the potential for increases in water takes and volumes ?

[4] If data yet to be collected (and outside any date limitations) is to be 'available' how could the potential for any manipulation of the maximum take or volumes be checked or factored into decision making? Would this require an RD status with matters of discretion directed at that?

[5] While 'all data may be good data' from the perspective of the technical experts, the planning witnesses will need to examine the implications of extending indefinitely the data set that may be used. Further to this the planners will need to provide an updated s 32 analysis that succinctly and comprehensively, evaluates

⁴ For example, border dyking or wild flooding.

⁵ [16] JWS Primary Sector dated 25 March 2021.

the provisions relative to the objective.

Matters of Control

[6] As amended in the JWS:

Within the limits of historical use and existing water permits, the volume and rate of water taken, dammed, discharged or diverted;

[7] What is intended by this control?

- (i) Does it (or could it be interpreted to) confer on ORC a discretion to impose a condition for a rate of take and volume that is less (or more) than the historical rate of take?
- (ii) Could it be drafted to make clear what is intended by the phrase ‘within the limits of historical use and existing water permits’?

10A.4.1 Methodology for calculating ‘Rate of Take Limit’

[8] What (if any) are the reasons for exempting community water supplies or hydroelectricity generation from the new Step 4? What are the implications of that exemption? Can these be quantified?

Restricted Discretionary Activity Rule 10A.3.A

[9] By way of a general question – what is the activity and circumstances that the RD rule set out in the 8 April JWS (Planners) is concerned with? Is it intended to provide an alternative pathway for applicants without available (or insufficient) meter data to establish their historical use? Note: at least two technical witnesses involved in the Primary Sector expert conferencing, have subsequently given evidence that the RD pathway is not (or should not be) concerned with historical use.

[10] The matter of discretion (a) reads:

Within the limits of historical use, as established through consideration of water meter data and other relevant methods and data.

[11] Similar questions arise to the RD pathway as to the controlled activity pathway particularly in relation to the phrase ‘within the limits of historical use...’. Notwithstanding that, the Regional Council has the discretion to consider and decline or apply conditions on an RD application.

[12] What are the implications of an open-ended historical use and does it have the potential to include data for a period when comparatively inefficient infrastructure for the conveyance of water and/or its application were in place.

[13] What would be included in ‘other relevant methods and data’? Should there be a matter of discretion providing direction or guidance on other relevant methods and data?

[14] The primary sector JWS lists a number of methods that could be applied. For example, can the Aqualinc or Irricalc methodology be used to ground truth the limits of historical use? All things being equal would the rate of takes and volumes calculated under the Schedule’s methodology for a controlled activity and secondly, Aqualinc or Irricalc differ? If so, is it the assumed 90% reliability of supply under Aqualinc/Irricalc the principal reason for the difference or something else?

Relief sought in a Memorandum of Counsel for Strathclyde Water Limited et al 20 April 2021 (attached)

[15] The proposed relief is for an amendment to Rule 10A.3.1.1(iii) (controlled activity) to provide for a maximum area planned to be irrigated where all necessary mainline irrigation pipes for the planned irrigation had been installed before [notification date] and an associated policy hook in 10A.2 Policy (b). These provisions are intended to address the topic of stranded assets.

[16] Are the requirements of the entry condition clear and certain?

[17] The proposed relief has no additional matters of control, are any required?

[18] Would an RD status with specific matters of discretion be a more appropriate approach to considering the individual factual situation? What might that involve?

Further evidence (including by way of a comprehensive Joint Witness Statement)

[19] In addition to an updated s 32 analysis, to better understand the impact on effectiveness of the plan change, the court wishes to receive further evidence as to:

- (i) The reasons for, along with the assumptions and worked examples for all sectors that should include the scenarios summarised in the primary sector JWS, the adoption of the maximum rate of takes and volumes as the appropriate method. Other methods that were evaluated should also be identified with reasons given, including any worked examples, for their unsuitability.
- (ii) Worked example(s) of the 'historical' water use where the technical efficiency of the irrigation system has improved on the irrigation system over the period of the data sets. These examples should also make clear whether these periods include a change/improvement in the infrastructure for the conveyance of water, the application of water or both.
- (iii) What information is held by the ORC and secondly, permit holders as to the effective date(s) of improvement in the technical efficiency of irrigation systems?
- (iv) Could (should) an applicant for resource consent be reasonably expected to be able to identify and quantify the period in the data set where historical use is determined under less efficient irrigation

systems with a consequential impact on maximum rate of take or volume?

- (v) The circumstances whereby takes prior to 1 July 2015 could (or would) result in a higher maximum rate of take or higher maximum daily, monthly volume or annual volume for irrigation, community water supplies and hydroelectricity generation under the methodology proposed? What is known about the potential for increases in water take and volumes, including any quantification?
- (vi) Any other matters for all sectors that would inform the decision-making.



**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

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

OTAGO REGIONAL COUNCIL

Applicant

**MEMORANDUM OF COUNSEL FOR STRATH CLYDE WATER LIMITED,
MCARTHUR RIDGE VINEYARD LIMITED & MOUNT DUNSTAN ESTATES LIMITED –**

RELIEF SOUGHT IN RELATION TO POLICY 10A.2 AND RULE 10A.3.1

Dated 20 April 2021

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MAY IT PLEASE THE COURT:

- 1 At the hearing on 20th April 2021, the Court requested that Counsel provide a Memorandum setting out the amendments Strath Clyde Water Limited, McArthur Ridge Vineyard Limited and Mount Dunstan Estates Limited are seeking to Policy 10A.2 and Rule 10A.3.1 of Plan Change 7. These amendments are specifically in regard to the restriction on irrigated area included in the Policy and Rule.
- 2 The amendments sought are attached as Appendix 1 to this Memorandum. The amendments in the Appendix supersede those signalled to the Court in the Opening Submissions of Counsel dated 20th April 2021.

Dated this 20th day of April 2021



Kelvin Reid

Counsel for Strath Clyde Water Limited, McArthur Ridge Vineyard Limited
and Mount Dunstan Estates Limited

APPENDIX

Proposed Amendments to Policy 10A.2

10A.2 Policies

...

10A.2.1 ...

- (b) There is no increase in the area under irrigation, if the abstracted water is used for irrigation, or an increased irrigated area where all necessary mainline irrigation pipes for the additional irrigated area have already been installed.

Proposed Amendments to Rule 10A.3.1

Rule 10A.3.1 Controlled activity: Resource consent required

...

10A.3.1.1...

is a ***controlled*** activity provided the following conditions are met:

...

- (iii) The application demonstrates that the total land area under irrigation or planned to be irrigated does not exceed the greater of;
 1. The maximum area irrigated in the period 1 September 2017 to 18 March 2020, if the abstracted water is used for irrigation, or
 2. The maximum area planned to be irrigated where all necessary mainline irrigation pipes for the planned irrigation had been installed before [notification date].