

**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: Expert Conferencing
(23 April 2021)**

Introduction

[1] As signalled in an earlier Minute,¹ the court will refer to expert conferencing the topic of deemed permits and their associated rights of priorities. The court endeavoured to set out the factual and legal issues that arise in relation to deemed permits in its Minute dated 7 April 2021.

¹ Minute dated 16 April 2021: Expert Conferencing: Schedule 10A4.1 at [4].



The Issue

[2] The court's basic proposition in relation to rights of priority is this: they create a type of flow regime, exercisable at will, between holders of deemed permits on the same waterbody. Secondly, it is not a purpose of the rights of priority to benefit the environment. If the exercise of the right has benefited the environment this is incidental to their purpose.

Special Advisor

[3] The court has invited its Special Advisor, Mark St Clair to attend and participate in this expert conference. Any party objecting in principle to his participation, is to file a memorandum giving reasons.

[4] As the court's Special Advisor, Mr St Clair may assist in any way that the court determines but he is not a member of the court (i.e. is not deciding the plan change nor this topic).² He will attend the hearing and be available to answer counsel's questions in relation to any statement he is a signatory to. However, as he is not a witness he will not be subject to cross examination.

[5] The court proposes to set down the priorities conference **on Monday 3 May, with Monday 10 May as a reserve day**. If the planning witnesses are not available, then court will look to set down the conference in the following week on **11–12 May 2021**.

Participating parties

[6] Mr de Pelsemaecker filed a supplementary brief of evidence identifying persons who filed a submission or further submission on this or related topics.³ The Regional Council is now to file a memorandum identifying parties to the

² RMA s 259.

³ De Pelsemaecker, supplementary evidence dated 24 March 2024.

proceeding calling planning evidence on this topic.

[7] While the Minister for the Environment may not have filed a submission on this matter, his planning witness – Mr Ensor – gave evidence on the topic and I propose he participate in the conference. Any party objecting in principle to Mr Ensor’s participation, is to file a memorandum giving reasons.

Matters to be conferenced

[8] Expert conferencing may seem premature in the absence of comprehensive legal submissions on the nature of permit holders’ rights of priority, nevertheless we think there is value in the conference proceeding on the following bases:

- (a) the rights may be recognised in Plan Change 7. In which case:
 - (i) is it enough to refer to the rights of priority in PC7’s policies and rules or is something more required?⁴
 - (ii) should recognition be limited to deemed permits that are to expire 1 October 2021 or should all permits be recognised including those that have been replaced?⁵
- (b) alternatively, the rights may not be recognised in Plan Change 7 but:
 - (i) policies and regulatory methods may respond to the expiry of the rights; or
 - (ii) policies and non-regulatory methods may respond to the expiry of the rights.⁶

⁴ See, Brass supplementary evidence dated 23 March 2021, Attachment 1 and Dicey, supplementary evidence dated 19 March 2021.

⁵ Evidence was led from Ms Bright, Landpro during the hearing that replacement consents may have been granted on terms recognising rights of priority. The Smallburn Water Permit was said to be one example. The Regional Council subsequently filed a memorandum dated 19 April 2021 (Notice to Cross Examine Lay Witnesses and Provision of Smallburn Water Permit Examples) that throws doubt on the correctness of the witnesses understanding.

⁶ We have in mind policies in the Regional Plan: Water, Policies 6.4.12-6.4.13 (inclusive). However, this is not to limit the planners’ consideration of any policy support and methods.

Further factual evidence

[9] First, the court would benefit from the planners' response to factual matters noted at paragraphs [12]–[15] of the Minute dated 7 April 2021.

[10] Second, the court wishes to have a better understanding of the number of persons and waterbodies potentially affected by the expiry of the deemed permits. This includes:

- (a) is the Regional Council able to produce a report which lists by waterbody the deemed permits expiring 1 October 2021?⁷
- (b) do all deemed water permits have deemed conditions that include rights of priority or only some?
- (c) for abstractors whose source of water is an irrigation scheme and the scheme⁸ is the holder of the deemed permit(s), would the occurrence of declining flows with consequential effect on abstractors, be effectively managed by existing contractual arrangements between the scheme and abstractors?⁹
- (d) likewise, would the occurrence of declining flows with consequential effect on abstractors, effectively managed by existing flow sharing agreements?

[11] The planning witnesses are also to consider and respond to paragraphs [24]–[30] inclusive of the 7 April 2021 Minute.

⁷ For the moment, the report is not required. Rather, the enquiry is whether a report can be produced from the Regional Council's database.

⁸ Scheme or a related person including an individual, company, incorporated society.

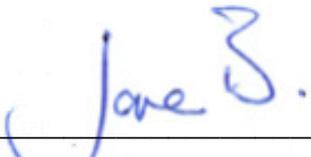
⁹ Obviated in the sense that the regulation of taking of water under declining flows is a contractual matter between the irrigation scheme and the end user of water?

Directions

[12] I direct by **Tuesday 27 April 2021** the Regional Council is to file a memorandum in response to paragraph [6].

[13] I further direct by **Wednesday 28 April 2021**:

- (a) any party that opposes the participation of Mr St Clair or Mr Ensor attending expert conferencing is to file and serve a memorandum giving reasons as to why; and
- (b) parties are to confirm their witness availability for the preferred conference dates of both 3 May and 10 May (latter if required) or failing that 11-12 May. Any party who is unable to attend the conference on any of the proposed dates above is to advise the court.



J E Borthwick
Environment Judge



Issued: 23 April 2021