

**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

**JOINT MEMORANDUM OF COUNSEL IN RELATION TO DEEMED PERMITS
AND RIGHTS OF PRIORITY
30 July 2021**

Judicial Officer: Judge Borthwick

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MAY IT PLEASE THE COURT

- 1 The purpose of this Memorandum is to respond to the court's directions of 13 July 2021¹ that interested parties, having conferred with counsel and their planning witnesses, are to file a joint memorandum responding to the court's proposed provisions, suggesting amendments (if required).
- 2 Parties are also to confirm that if PC7 is approved there is scope for the amendments proposed by the court.

Policy 10A.2.4

- 3 The interested parties support the court's proposed Policy 10A.2.4 and consider that the inclusion of the definitions of Upstream Deemed Permit and Upstream Replacement Water Permit make the policy approach clear.
- 4 The interested parties have considered whether some additional words are required in Policy 10A.2.4 to ensure that the policy is consistent with the structure of PC7. For example, including reference to 'irrespective of any other policies in this Plan, only grant a resource consent to replace a Deemed permit provided...'. However, attempts to draft the policy in a manner that includes these additional words has resulted in an awkwardly drafted policy which is potentially less clear. If the policy still contained the requirement that abstractors are to cease taking only when given notice, then it would be necessary to include these additional words. However, as the court has proposed that this requirement be replaced with 'may be required to cease taking water' together with two new definitions, these additional words are not considered necessary.

Rules

- 5 The parties support the entry conditions for controlled activity and restricted discretionary activity and the matters of control/discretion subject to the following amendment:

Notice has been given by the holder of ~~that permit~~ the Downstream Permit with a Higher Right of Priority

¹ Minute of the Environment Court Deemed Permits & Rights of Priority 13 July 2021.

- 6 This amendment was suggested by Ms King to clarify that it is notice given by the holder of the Downstream Permit with a Higher Right of Priority (as defined).

Definitions

- 7 The parties support the Court's proposed amendments to the definitions subject to the following amendment to the definitions of Downstream Permit with a Higher Right of Priority and Upstream Deemed Permit:

Downstream Permit with a Higher Right of Priority means a Deemed Permit that had not been replaced by a resource consent commencing ~~on or~~ before 2 October 2021, that is-was subject to a right entitling the permit holder to require the holder of an upstream Deemed Permit to cease taking water.

Upstream Deemed Permit means a Deemed Permit that had not been replaced by a resource consent commencing ~~on or~~ before 2 October 2021, that is-was subject to a right of priority entitling a Downstream Permit with a Higher Right of Priority to require the holder of an Upstream Deemed Permit to cease taking water.

- 8 The parties support the date of 2 October on the basis that any applications that are processed prior to 2 October are likely to be processed under both the operative Regional Plan Water (**RPW**) and PC7 and therefore are likely to include residual flow or minimum flow conditions where appropriate.
- 9 The removal of 'on or' in the definitions above will ensure that any consents that are replaced on 2 October (i.e. following the expiry of deemed permits on 1 October) will be subject to the provisions.
- 10 The amendment of 'is' to 'was' in the definitions above will ensure that the definition is referring to a right of priority that existed prior to 1 October (i.e. it has not expired). If 'is' remains, then it may be arguable whether the permit is still subject to a right of priority.
- 11 The interested parties support the definition of Insufficient Flow with the following amendment to refer to the defined term of Downstream Permit with a Higher Right of Priority:

Insufficient flow Where the flow is below the level at which the ~~downstream permit holder~~ of a Downstream

Permit with a Higher Right of Priority is able to abstract water at their authorised rate of take.

12 The interested parties support the remaining definitions.

Scope for amendments proposed by the court

13 The interested parties confirm that there is scope for the amendments proposed by the court. This scope is provided by the submissions for the Director-General of Conservation (71180), Otago Water Resource Users Group (71161) and Marian Weaver (71008). These submissions are addressed in the closing legal submissions of counsel for the Otago Regional Council dated 7 July 2021.

Dated this 30th day of July 2021



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P A C Maw / M A Mehlhopt

Counsel for Otago Regional Council



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R Dixon

Counsel for Minister for the Environment



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P Williams

Counsel for Director-General of Conservation



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P Page / B Irving

Counsel for
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