

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

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

**ENV-2020-CHC-128**

**UNDER** the Resource Management Act 1991 (RMA)

**IN THE MATTER** of the Omnibus Plan Change - Plan Change 8, 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**

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**MEMORANDUM OF COUNSEL AND CLOSING LEGAL SUBMISSIONS OF  
COUNSEL ON BEHALF OF THE OTAGO REGIONAL COUNCIL**

**PRIMARY SECTOR PROVISIONS**

**17 November 2021**

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## **MAY IT PLEASE THE COURT**

### **Introduction**

- 1 Following the hearing of Proposed Plan Change 8 (**PC8**) to the Regional Plan Water for Otago on 8 and 9 November 2021, Otago Regional Council (**Council** or **ORC**) was directed to consult with the parties to the Part B effluent provisions mediation agreement regarding some proposed amendments to Policy 7.D.7 of PC8.
- 2 These amendments arose following concerns expressed by the Court, that in the absence of any policy regarding the duration of resource consents granted under the PC8 provisions to discharge animal effluent, these resource consents could be granted for long terms, and potentially undermine the new regional planning framework that is in the process of being developed by the Council.
- 3 This memorandum has been structured to address:
  - (a) The proposed amendments to Policy 7.D.7;
  - (b) The outcome of the consultation with the parties on the amended wording for Policy 7.D.7;
  - (c) Provide closing legal submissions on:
    - (i) A legal issue raised by the Court concerning the extent to which Policy 7.D.7 is able to be considered in the context of a restricted discretionary rule; and
    - (ii) The scope for making the changes to Policy 7.D.7 that is now proposed by the Council.

### **Proposed amendments to Policy 7.D.7**

- 4 The Court has already had the benefit of seeing an initial version of the amendments to Policy 7.D.7 proposed by the Council. In short, the following amendments have been made:
  - (a) To subclause (b)(ii) to remove “in the case of equipment or system failure” in relation to contingency measures to prevent discharges. This amendment was to ensure that contingency measures are considered in all scenarios to prevent discharges of effluent, not only those related to equipment or system failure.

- (b) To subclause (b)(iii), which is in relation to the operation of animal effluent systems in accordance with a management plan, to reflect the purpose and objective of management plans set out in Schedule 21. Animal systems are to be operated in accordance with a management plan for the “purpose of preventing the unauthorised discharge of liquid or solid effluent to water”.
  - (c) To include a new subclause (e) which provides policy direction that resource consents for the discharge of animal effluent are to be granted for a maximum duration of up to 10 years in order to facilitate an efficient and effective transition from the operative freshwater planning framework towards a new integrated regional planning framework.
- 5 Given the need to consult with the parties regarding the amendments, the Council elected to have Ms Boyd prepare further evidence, which was circulated in draft to the parties, to explain the rationale for the changes made to Policy 7.D.7 (as at the time of consulting the parties a transcript was not available). Rather than repeat that explanation in this memorandum, the Council thought an efficient way forward would be to have the evidence given by way of affidavit evidence. Accordingly, Ms Boyd has produced an affidavit explaining in further detail the changes to the Policy 7.D.7.
- 6 It is recognised that many of these matters were already addressed by Ms Boyd when she gave her evidence on the amendments to Policy 7.D.7, but Counsel considered that it may be of assistance to the Court to have a full explanation for the changes provided (being the explanation provided to the parties).

### **Consultation with parties**

- 7 Counsel for the Council circulated the proposed amendments to Policy 7.D.7 to the parties to the mediated agreement for Part B on 10 November 2021, including a draft of the evidence of Ms Boyd dated 17 November 2021. The parties consulted were:
- (a) Beef + Lamb New Zealand;
  - (b) Central Otago Environmental Society;
  - (c) Dairy NZ Limited;

- (d) Director-General Conservation Tumuaki Ahurei;
- (e) Federated Farmers of New Zealand;
- (f) Fonterra Co-operative Group Limited;
- (g) Landpro Limited;
- (h) Lower Waitaki Irrigation Company Limited;
- (i) New Zealand Deer Farmers Association;
- (j) New Zealand Pork Industry Board;
- (k) Ngāi tahu ki Murihiku;
- (l) Otago Fish and Game Council and the Central South Island Fish and Game Council;
- (m) Pomahaka Water Care Group;
- (n) Ravensdown Limited;
- (o) Royal Forest and Bird Protection Society of New Zealand Incorporated; and
- (p) Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kai Tahu ki Otago).

8 All of the above parties have responded confirming that they either support the proposed amendments to Policy 7.D.7 or agree to abide by the Court's decision. The Council wishes to again acknowledge the willingness of the parties to reach consensus on this matter.

**Legal submissions - ability to consider Policy 7.D.7 when considering an application under Rule 12.C.2.5**

9 At the hearing the Court raised a legal question concerning the ability of a decision maker to consider Policy 7.D.7 (including the proposed amendment to the policy regarding the duration of effluent discharge resource consents) when considering an application for a restricted discretionary activity under Rule 12.C.2.5.

10 Section 87A(3) of the Resource Management Act 1991 (**RMA**) describes the classes of activities and provides that if an activity is described in a plan or proposed plan as a restricted discretionary activity, a resource consent is required for the activity and:

(a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise);

- 11 Further, section 104C of the RMA, which relates to the determination of applications for restricted discretionary activities, states:
- (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—
- (a) a discretion is restricted in national environmental standards or other regulations:
- (b) it has restricted the exercise of its discretion in its plan or proposed plan.
- 12 It is clear based on case law that the restriction in section 104C does not prevent a consent authority considering the objectives and policies of relevant planning instruments under section 104, but the consent authority is restricted to the extent that the objectives and policies relate to the matters of discretion.
- 13 In multiple instances, the Environment Court has concluded that in considering an application for a restricted discretionary activity, pursuant to section 104 and 104C, the consent authority must consider the objectives and policies of a plan to the extent they relate to the matters over which discretion has been restricted.<sup>1</sup>
- 14 Further, the Environment Court has held that in order to have a proper understanding of the matters of discretion, an understanding of a plan's objectives and policies related to those matters is also necessary.<sup>2</sup>
- 15 This approach will also extend to the consideration of higher order instruments, including in this case the National Policy Statement for Freshwater Management 2020. In *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* the Environment Court held that the consent authority, when considering an application for a restricted discretionary activity, had a duty to consider the objectives and policies of the relevant national policy statement (the National Policy Statement

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<sup>1</sup> *Oman Holdings Ltd v Whangarei District Council* [2012] NZEnvC 137 at [7], *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [186] and *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13 at [119] to [120].

<sup>2</sup> *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13 at [120].

for Freshwater Management 2014 in that case) to the extent that they relate to the matters of discretion.<sup>3</sup>

- 16 The Court recognised that the provisions of the RMA cannot be undermined by a national policy statement without that being expressly stated but sections 104 and 104C require that the objectives and policies of a national policy statement “are seen as relevant insofar as they relate to the matters over which discretion has been restricted”.<sup>4</sup>
- 17 Given the Environment Court’s approach to the consideration of a plan’s policies in determining an application for a restricted discretionary activity, the question in this case is whether Policy 7.D.7 is related to the matters over which discretion is restricted under Rule 12.C.2.5.
- 18 It is submitted that Policy 7.D.7 squarely relates to the matters of discretion under Rule 12.C.2.5. The chapeau of Policy 7.D.7 provides that it relates to the appropriate management and operation of animal effluent systems and management of the application of animal effluent to land. There are also a number of subclauses of Policy 7.D.7 (version now proposed by the Council) that directly refer to the discharge (or similarly the application or disposal) of animal effluent including:

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(b) Ensuring that all animal effluent systems:

(i) Have sufficient storage capacity to ensure that the **disposal of effluent** to land does not occur under conditions that will result in contaminants entering into water; and

(ii) Include contingency measures to prevent **discharges of effluent** to a water body, an artificial watercourse, or the coastal marine area, either directly or indirectly; and

(iii) Are operated in accordance with a management plan for the purpose of preventing the unauthorised **discharge of liquid or solid effluent** to water; and

(c) Avoiding the **discharge of liquid and solid animal effluent** to:

(i) water bodies, artificial watercourses, bores and soak holes, and the coastal marine area; and

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<sup>3</sup> *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37at [107] and [186].

<sup>4</sup> *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37at [107].

(ii) land in a manner that results in ponding or overland flow to water; and

(iii) land when the soil moisture exceeds field capacity; and

(d) Requiring **effluent application** to be in accordance with good management practice.

(e) Granting resource consents for **discharges of animal effluent** for a maximum duration of up to 10 years in order to facilitate an efficient and effective transition from the operative freshwater planning framework towards a new integrated regional planning framework.

[emphasis added]

19 Similarly, multiple matters of discretion under Rule 12.C.2.5 relate to the application of animal effluent to land (i.e. the discharge of animal effluent), and specifically one matter relates to the duration of such consents, including:

- (a) The extent to which the application depth and rate is consistent with industry agreed good management practice;
- (b) Size and location of the disposal area, including separation distances from lakes, rivers, natural wetlands, bores, soak holes, the coastal marine area, water supply for human consumption and dwellings;
- (c) Duration of consent and any review conditions; and
- (d) Quality and content of, and compliance with, a management plan for the purpose of preventing the unauthorised discharge of liquid or solid animal effluent to water that is prepared in accordance with Schedule 21.

20 Given the above, it is submitted that the Council, in considering an application under Rule 12.C.2.5 for the discharge of animal effluent, would clearly be able to consider, and must consider, the policy direction in relation to the duration of such consents set out in Policy 7.D.7 under sections 104 and 104C of the RMA.

### **Legal submissions - Scope for the changes to Policy 7.D.7 to include duration**

21 In making a decision on PC8, the Environment Court must (relevantly):<sup>5</sup>

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<sup>5</sup> RMA, s 149U(6)(a)-(b).

- (a) apply clause 10(1) to (3) of Schedule 1 as if it were a local authority; and
  - (b) may exercise the powers under section 293.
- 22 Clause 10 of Schedule 1 of the RMA provides for the making of decision on provisions and matters raised in submissions. In giving its decision on the provisions of PC8 and any matters raised in submissions, the Court must be satisfied that there is scope to make any such amendments to PC8. In doing so, the Court must consider whether:
- (a) submissions received are "about" PC8;<sup>6</sup> and if so
  - (b) any amendments are within the scope of a submission such that the Court has jurisdiction to make the amendments.
- 23 The terminology used in section 149E(1) of the RMA for a submission to be "about" a matter is different to the terminology used in Schedule 1 of the RMA, which requires that submissions be "on" the proposed plan. For the reasons set out in the Memorandum of Counsel on behalf of the Council dated 23 July 2021,<sup>7</sup> counsel considers that, despite the difference in language, the scope of a submission made "about" a matter under section 149E of the RMA is the same as the scope of a submission made "on" a planning document under Schedule 1.
- 24 Accordingly, the principles regarding scope established by case law in regards to Schedule 1 of the RMA are applicable in the context of Part 6AA of the RMA.

*Amendments within the scope of a submission*

- 25 Case law has established that for an amendment to be considered within the scope of a submission, the amendment must be fairly and reasonably within the general scope of:<sup>8</sup>
- (a) An original submission; or
  - (b) The proposed change as notified; or

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<sup>6</sup> Section 149E(1) of the RMA provides that, when a matter is called in under section 142(2) and publicly notified under section 149C, any person may make a submission "about" the matter to the Environmental Protection Authority.

<sup>7</sup> Memorandum of Counsel on behalf of the Otago Regional Council dated 23 July 2021 at paragraphs 11 to 15.

<sup>8</sup> *Re Vivid Holdings Ltd* (1999) 5 ELRNZ 264 at [19].

(c) Somewhere in between.

- 26 The question of whether an amendment goes beyond what is reasonably and fairly raised in submissions will usually be a question of degree, to be judged by the terms of the proposed change and the content of submissions.<sup>9</sup> This should be approached in a realistic workable fashion rather than from the perspective of legal nicety,<sup>10</sup> with consideration of the whole relief package detailed in submissions.<sup>11</sup>
- 27 The Courts have recognised that decision-makers need scope to deal with the realities of the situation and a legalistic interpretation that a council can only accept or reject relief sought in any given submission is unreal.<sup>12</sup>
- 28 Ultimately, the Court must be satisfied that the proposed changes are appropriate in response to the public's contribution.<sup>13</sup>

*Scope for amendments to Policy 7.D.7*

- 29 The Council is proposing an amendment, along with other minor amendments, to Policy 7.D.7 in order to provide policy direction in relation to the duration of resource consents for effluent discharges. Whether there were any submissions on PC8 that provide scope to make such an amendment to Policy 7.D.7 was an issue raised at the hearing.
- 30 The Council has reviewed the submissions made on PC8 and consider that the proposed amendment to Policy 7.D.7 is within the scope of the submissions made by Central Otago Environmental Society (**COES**), Otago Fish and Game Council and Central South Island Fish and Game Council (**Fish and Game**) and Blackstone Hill Ltd.
- 31 The Affidavit of Ms Boyd dated 17 November 2021 further sets out the relevant parts of COES's, Fish and Game's and Blackstone Hill's

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<sup>9</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 41.

<sup>10</sup> *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 10. This proposition was recently endorsed by the High Court in *Gertrude's Saddlery Limited v Queenstown Lakes District Council* [2020] NZHC 3387 at [74].

<sup>11</sup> *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [58]-[60].

<sup>12</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [107], citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at [170].

<sup>13</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

submissions. Importantly, these submissions raised concerns generally with the interim nature of PC8 and the need to give effect to the NPSFM 2020. The proposed amendment to Policy 7.D.7 in relation to the duration of effluent discharge consents, specifically that the proposed amendment provides direction for durations of less than 10 years, ensures that consents issued under the PC8 rule framework are consistent with the interim nature and purpose of PC8.

- 32 Additionally, providing policy direction for durations less than 10 years for effluent discharge consents better enables to the Council to give effect to the NPSFM 2020. This is achieved in two ways. Firstly, that effluent discharge consents with durations of less than 10 years will assist in maintaining water quality which is consistent with Policy 5 of the NPSFM 2020. Secondly, durations of less than 10 years assists in enabling the Council to give full effect to the NPSFM 2020 through the new land and water regional plan for Otago, and it is through this process that catchments that may be at risk from effluent discharges can be identified.
- 33 For the above reasons, it is submitted that the proposed amendment to Policy 7.D.7 is reasonably and fairly raised in submissions.

### **Conclusion**

- 34 In light of all parties agreeing to the amended wording proposed for Policy 7.D.7 and in the absence of any other outstanding issues as a result of the hearing held on 8 and 9 November 2021, the Council respectfully considers that no further directions are required at this time in relation to the hearing of PC8 as it relates to the primary sector provisions.

Dated this 17<sup>th</sup> day of November 2021



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**L F de Latour**

Counsel for Otago Regional Council