



ENVIRONMENT COURT OF NEW ZEALAND

Dr Royden Somerville QC
PO Box 5117
Dunedin 9054

27 April 2021

Dear Dr Somerville

Amicus

Further to our discussion last Friday, I am grateful that you are in a position to consider an appointment as amicus to assist the court on the topic of rights of priority hitherto recognised as deemed conditions on deemed water permits.

Attached documents

To orientate you into the topic I attach links to important documents, all of which are to be found on the [court's website](#).

In addition, I attach links to submissions and evidence heard to date in relation to this topic.

Background

In Otago, a total of 1,495 permits¹ will expire over the next five years, with 821 of these expiring this year.²

¹ We understand these to be water and related discharge permits.

² [Gilroy, EiC dated 13 March 2021](#). In 2021 821 permits expire.

Included in the total above are some 312 deemed permits that expire on 1 October 2021. The majority of those are in the Manuherekia, Cardrona and Arrow catchments.³

We understand that most (if not all) deemed permits are subject only to deemed conditions authorising large takes of water based on historical mining requirements and secondly, certain rights of priority relative to other permit holders.

In 2019 Professor Peter Skelton was engaged by the Ministry for the Environment to investigate whether the Otago Regional Council was adequately carrying out its functions under s 30(1) of the RMA in relation to freshwater management and allocation of resources. He concluded, among other matters, that the existing planning provisions to manage freshwater were inadequate.

Plan Change 7

As matters presently stand,⁴ under PC7 the Regional Council would create an interim regime wherein deemed permits⁵ will be replaced subject to the same conditions.

If the existing permit is not subject to controls on minimum flows and allocation limits, recession flows or cessation conditions then the replacement consent will likewise not be subject to such conditions. We understand the majority (if not all) deemed permits are not subject to these types of control.

Finally, the plan change would strongly discourage – indeed the proposed policy is to avoid – the granting of consents for a term longer than six years. Of the 295 persons who filed submissions on the plan change, 137 are parties and most of them oppose the plan change, seeking a range of relief from its rejection to making provision for long term consents.

³ Gilroy, EiC dated 13 March 2021.

⁴ As set out in Mr de Pelsemaeker's supplementary evidence dated 14 March 2021 and Attachment.

⁵ More particularly, deemed permits together with resource consents for activities pursuant to ss 14 and 15 RMA.

Rights of priority

The matter that we are seeking your assistance on, concerns rights of priority granted or authorised under the Water and Soil Conservation Act 1967 in substitution for mining privileges pursuant to s 413(1)(a) RMA.

As we understand it, the right of priority creates a flow regime of sorts as between abstractors on a waterbody. The right ensures water is available to be diverted into the downstream race of the person holding a superior right.

The holder with the superior right may exercise that right to require other, presumably upstream deemed permit holder(s), to cease or reduce taking water.

On any one waterbody there may be one or more deemed permit(s), with each successive permit holder taking water subject to the rights of the superior permit(s).

The first-in-time permit holder may be located at the head of a waterbody/catchment, in which case they may never or have infrequently exercised their right of priority.

Equally, the first-in-time permit holder may be at the bottom of the waterbody/catchment and has exercised the right from time to time during periods of declining or low flows.

Indeed, the holders of deemed permits can be located anywhere along the waterbody or in the catchment.

The Regional Council has no oversight over their exercise and will not be told by a permit holder when the right is being exercised.

The problem

The problem that the court is grappling with is the potential after 1 October 2021 or secondly after a replacement permit is granted, that water permits may be exercised in a

way that is inconsistent with the former rights of priority. If that were to occur this may be to the detriment of abstractors whose farm systems, in the absence of a common flow and allocation regime for permit holders, may be geared to the continuation of those rights. Secondly, the expiry of those rights may *potentially* change the flow in waterbodies adversely affecting the environment.

The legal issues

- (i) are deemed permits a creature of statute that finally expire 1 October 2021?
- (ii) in accordance with s 124 RMA, on an application for resource consent to replace a deemed permit, can the right of priority continue to be exercised until a decision is made either granting or refusing consent?
- (iii) can rights of priority be recognised in the provisions of PC7 if they ceased to have effect on enactment of the RMA (s 366(g)) and/or deemed permits finally expire on 1 October 2021 (s 413(3))?⁶

This is fundamentally a question of statutory interpretation.

We would be grateful to know whether you are available to provide an opinion and to address the court when the hearing resumes in May. It is anticipated your opinion would be pre-circulated to parties in the week of 10 May 2021 and presented in the week commencing 24 May 2021.



J E Borthwick
Environment Judge

⁶ As proposed by the Otago Water Resources User Group and the Director-General of Conservation.

Attachment

- i. [Minute: Deemed Permits dated 7 April 2021](#);
- ii. [Minute: Deemed Permits, Expert Conferencing dated 23 April 2021](#);
- iii. [PC7 – notified version](#);
- iv. PC7 – as recommended to be amended by ORC Policy Planner, Mr T de Pelsemaeker. See [supplementary evidence dated 14 March 2021](#);⁷
- v. Professor Skelton’s [Investigation of Freshwater Management and Allocation Functions at Otago Regional Council](#) dated 1 October 2019. He reports on mining permits from p 50;
- vi. [Ministerial direction to call-in plan change pursuant to s 142\(2\) RMA](#).

Hansard, Supplementary Order Papers and Bills (can be provided if requested)

Legal submissions

Director General of Conservation, [opening submission dated 15 March 2021](#) at [18]-[27].

Otago Water Resources User Group, [opening submission 23 March 2021](#) at [66]-[77].

Minister for the Environment, [opening submission 15 March 2021](#) at [75.3].

Evidence

- vii. Tom de Pelsemaeker, [evidence-in-chief dated 7 December 2021](#) at [39], [497]-[498].
- viii. Tom de Pelsemaeker, [supplementary evidence dated 24 March 2021](#) addressing persons who have filed a submission on the topic.

⁷ This version of the plan change removes several matter of control (Controlled Activity Rule) for which there was no corresponding policy support or support under the proposed new objective. This version of the plan change has been labelled by parties and witnesses as the “Process Plan Change”.

- ix. Tim Ensor, [evidence-in-chief on behalf of Minister for the Environment dated 5 February 2021](#) at [2.3], [46], [64]-[65], [77], [84] and [supplementary evidence dated 18 March 2021](#) at [30].
- x. Murray Brass, [evidence-in-chief for the Director General of Conservation dated 5 February 2021](#) at [summary point 6] and [16], [21], [59] and at [62]-[70], [72]-[73], [109], [112] and [supplementary evidence dated 18 March](#) at [12]-[16], [17]-[19], [22]-[27].
- xi. Sally Dicey, [evidence-in-chief for Otago Water Resources User Group dated 5 February 2021](#) at [5] and [supplementary evidence dated 19 March 2021](#) at [18]-[20].