

**BEFORE THE HEARING PANEL
INVERCARGILL**

UNDER the Resource Management Act 1991

IN THE MATTER of the proposed Southland Water and Land Plan

**OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE SOUTHLAND
REGIONAL COUNCIL
17 May 2017**

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MAY IT PLEASE THE PANEL

Introduction

- 1 Water quality has become an issue of national significance. Managing activities that have the potential to adversely affect water quality is a difficult task, but is nonetheless, a task that Councils are required to do.
- 2 The understanding of the connections between land use activities and water quality outcomes is improving all of the time. In the context of this proposed plan, Environment Southland has invested significant resources in a ground-breaking project resulting in the identification of physiographic zones to better manage the effects of land use on water quality.
- 3 The pSWLP utilises this physiographic work as a primary tool to inform the objective, policy and rule framework to manage land use. However, change cannot simply be led by regulatory actions. A community mind-set change is required, being a combination of regulatory and non-regulatory actions, recognising that current practices will need to change if water quality is to be maintained.
- 4 Industry support has the potential to assist with this mind-set change. Where it is possible for Council and industry groups to work together to achieve this mind-set change that should be facilitated and encouraged.
- 5 The reason that this mind-set change is required is because water quality shows declining long-term trends in the Southland Region. In some places it fails to meet National Objectives Framework bottom lines. The available science shows that current actions are not maintaining water quality, as is required by the Resource Management Act 1991 (**RMA**), the National Policy Statement for Freshwater Management 2014 (**NPSFM**), the Southland Regional Policy Statement, and the proposed Southland Regional Policy Statement.
- 6 In order to address this issue, Environment Southland has notified the proposed Southland Water and Land Plan (**pSWLP**). The proposed plan seeks to:
 - (a) Maintain water quality;
 - (b) Make improvements to water quality through the implementation of good management practices; and

- (c) Set up a framework to enable further improvements where water quality is degraded, through the Freshwater Management Unit process.
- 7 To achieve this, the proposed plan adopts an integrated approach to the management of natural and physical resources; Ki uta ki tai, from the mountains to the sea.

Structure of submissions

- 8 In these submissions I will provide an outline of:
- (a) the proposed structure of the Council's opening presentation;
 - (b) the purpose of the pSWLP;
 - (c) the key concepts and legal tests relating to the pSWLP;
 - (d) an overview of key themes arising from submissions; and
- 9 I will also provide answers to questions asked in advance by the Hearing Panel, where those questions require a legal response.

Structure of the Council's opening presentation

- 10 The presentation of the Officers' Report will comprise four parts:
- (a) these opening legal submissions;
 - (b) an outline of the science that informed the proposed plan, including:
 - (i) current state of water quality in the Southland Region;
 - (ii) trends in water quality;
 - (iii) water quantity; and
 - (iv) physiographic units.
 - (c) non-regulatory actions assisted by the Land Sustainability Team; and
 - (d) an overview of the plan structure.
- 11 The Council Officers are grateful to have received questions on their Section 42A Report in advance of the hearing. Written answers have been prepared to those questions, and those answers will be read into the record during the course of the opening.

What is the purpose of the proposed Southland Water and Land Plan?

- 12 The pSWLP has been developed by Environment Southland under the RMA, and forms part of a suite of planning documents managing Southland's water and land resources. It provides a regulatory tool for a variety of issues relating to these resources, with a particular emphasis on the management of activities that may adversely affect the quality of the region's freshwater, much of which is deteriorating.
- 13 The proposed plan is intended to provide direction and guidance regarding the sustainable use, development and protection of water and land resources in the Southland region. The proposed plan seeks to amalgamate, simplify and strengthen the existing planning framework, whilst commencing the process of giving effect to the NPSFM.
- 14 The proposed plan also seeks to recognise the national significance of Te Mana o te Wai, which puts the mauri (inherent health) of the water body and its ability to provide for te hauora o te tangata (the health of the people), te hauora o te taiao (health of the environment) and te hauora o te wai (the health of the waterbody) to the forefront of freshwater management.

Proposed Southland Water and Land Plan

Key concepts

- 15 The proposed plan seeks to strike a balance between managing urban and rural land uses and discharges that have the potential to adversely affect water quality.
- 16 In relation to urban land use the proposed plan seeks to better manage discharges of stormwater and sewage. For example, the proposed plan seeks to restrict the direct discharge of stormwater and sewage to water.
- 17 The proposed plan also seeks to better manage rural land use activities that are considered to contribute a disproportionate amount of contaminants (nitrogen, phosphorus, sediment, and microbes). In particular, further land use controls are introduced in respect of intensive winter grazing and further intensification or establishment of new dairy farms.
- 18 In order to better understand the Southland region's water, scientists have divided Southland into nine physiographic zones. Each zone

represents areas of the landscape with common attributes that influence water quality, such as climate, topography, geology and soils. Zones differ in the way sediment, microbes (e.g. *E.coli*) and nutrients, such as nitrogen and phosphorus, build up and move through the soil, aquifers (areas of groundwater) and into rivers and streams.

- 19 In order to utilise the physiographic zones, the proposed plan provides zone-specific objectives, policies and rules. This planning framework seeks to respond to the key transport pathways for contaminants within each of the zones and to manage particular activities proportionate to the risk that those activities pose.

Key legal tests

- 20 The pSWLP has been prepared in accordance with the RMA's statutory framework, as it applies to the preparation of regional plans. These requirements have been set out in section 2 of the Section 42A Report. A brief overview of these requirements is set out below. However, before addressing those matters it is useful to consider the implications of the Resource Legislation Amendment Act 2017 in relation to this proposed plan.

Implications of the Resource Legislation Amendment Act 2017

- 21 The RMA was recently amended by the Resource Legislation Amendment Act 2017 (**Amendment Act 2017**), which received Royal assent on 18 April 2017.
- 22 The changes introduced by the Amendment Act 2017 come into force at various times, the first of those being on 19 April 2017 (being the day after Royal assent).
- 23 The Amendment Act 2017 also contains transitional provisions about the application of the amendments where a proposed plan has been notified and is going through the Schedule 1 hearing process.
- 24 Clause 13 of Schedule 12 of the RMA (as inserted by the Amendment Act 2017) provides that a proposed plan that immediately before the commencement of a relevant amendment made by the Amendment Act 2017:
- (a) has been publicly notified under clause 5 of Schedule 1; but

- (b) has not proceeded to the stage at which no further appeal is possible,

must be determined as if the amendments made by the Amendment Act 2017 had not been enacted.

- 25 As the pSWLP was notified before the commencement of any of amendments made by the Amendment Act 2017, the pSWLP must be determined as if the amendments made by the Amendment Act 2017 had not been enacted.
- 26 Accordingly, the version of the RMA that is relevant to the Hearing Panel when considering the pSWLP is the RMA as it was prior to the amendments made by the Amendment Act 2017.

General requirements

- 27 The pSWLP must be designed to accord with, and assist the Council to carry out, its functions so as to achieve the purpose of the Act.¹
- 28 The pSWLP must give effect to:²
- (a) the New Zealand Coastal Policy Statement;
 - (b) any applicable national policies statements, including, of particular relevance, the NPSFM; and
 - (c) the RPS.
- 29 "Give effect to" is a strong direction and requires full compliance and positive implementation of the superior instrument.
- 30 The pSWLP must not be inconsistent with:³
- (a) a water conservation order, or
 - (b) any other regional plan for the region.
- 31 Whether the pSWLP is "not inconsistent with" the relevant documents is usefully tested by asking:⁴

¹ See sections 30, 63(1) and 66(1) of the Act.

² Section 67(3) of the Act.

³ Section 67(4) of the Act.

- (a) Are the provisions of the pSWLP compatible with the provisions of these higher order documents?
 - (b) Do the provisions alter the essential nature or character of what higher order documents allow or provide for?
- 32 When preparing the proposed plan the Council must also:⁵
- (a) have regard to any proposed regional policy statement for the region (noting that it is submitted that the pSWLP should give effect to those parts of the pSRPS that are beyond challenge);
 - (b) have regard to any relevant management plans and strategies under other Acts, any relevant entry in the Historic Places Register and to various fisheries regulations;
 - (c) have regard to consistency with any regional policy statements, plans and proposed regional policy statements and plans of adjacent regional councils;
 - (d) take into account any relevant planning document recognised by an iwi authority;
 - (e) not have regard to trade competition.
- 33 "Have regard to" requires the decision maker to give genuine attention and thought to the matter.⁶
- 34 "Take into account" requires that the decision maker must address the matter and record it has been addressed in the decision; but weight of the matter is for the decision makers' judgment in light of the evidence.⁷
- 35 The High Court has held that the RMA (in this context section 66) does not create an exhaustive list of considerations and that non-binding documents may be considered, as relevant background material, even if

⁴ *Re Canterbury Cricket Association* [2013] NZEnv 184 at [51]-[52]; *Norwest Community Action Group Inc v Transpower New Zealand* EnvC A113/01, 29 October 2001 at [55]-[56].

⁵ Section 66 of the Act.

⁶ *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308, at page 314.

⁷ *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at [42].

those documents do not have any status under the RMA.⁸ One such document that may be referred to by submitters during the course of these hearings is The Southland Economic Project: Agriculture and Forestry Report.⁹

- 36 This report was published in mid-April of this year, and contains useful information to enable a better understanding of the implications of nutrient reductions on farming and forestry in Southland.
- 37 The report is in three parts:
- (a) Part A contains a general description of the land, water and people of the Southland region. It introduces the five FMUs, and explains a number of constraints related to the climate and soils of the Southland region.
 - (b) Part B contains a description of the agricultural and forestry sectors operating in Southland. It addresses the history of each of the sectors, the characteristics as well as opportunities and limitations for the future.
 - (c) Part C is the more substantial section of the report, and analyses 95 case study farms. The 95 case study farms are spread relatively evenly across the Southland region geographically and spread across the farming industries in Southland, roughly proportional to the size of each industry.
- 38 Parts A and B provide important context for understanding agriculture and forestry in the Southland region. The aim of Part C is to build a data set for the Southland Economic Model that is currently under development. The purpose of the Southland Economic Model is to help understand the social and economic impacts of the limit setting processes under the FMU planning processes that are yet to occur.
- 39 There are a number of limitations expressed in the report, as to its use and context. These are primarily set out on pages xi and xii of the Report.

⁸ *West Coast Regional Council v The Friends of Shearer Swamp* [2012] NZRMA 45.

⁹ Moran, E., Pearson, L., Couldrey, M., and Eyre, K. (2017). The Southland Economic Project: Agriculture and Forestry. Technical Report. Publication no. 2017-02. Environment Southland, Invercargill, New Zealand.

- 40 Overall, the report contains useful information and the Hearing Panel are invited to read the report and draw their own conclusions. It is likely to be referred to by submitters and given its publication after the release of the Section 42A Report, was unable to be referenced in that report.
- 41 It is submitted that the context in which the report has been produced is critical to its interpretation, and the weight that may be afforded to it in this hearing:
- (a) The primary context of the report is to understand the on-farm implications of requirements to reduce nutrient leaching across the different farming and forestry sectors operating in Southland. While informative, it is important to note that the pSWLP does not require nutrient reductions through a limit setting process, and therefore the findings of the report are of relatively low significance with respect to the pSWLP.
 - (b) The modelling is based on a single year, and is effectively a snapshot in time for 95 individual farms. It does not model, or assess the costs and benefits of particular nutrient reduction regimes or planning provisions. That is to be enabled under the yet to be developed Southland Economic Model. Therefore it is not equivalent to a section 32 assessment under the RMA.
- 42 The pSWLP must be prepared in accordance with any regulation and any direction given by the Minister for the Environment.¹⁰
- 43 Regard must be had to the section 32 report for the pSWLP and a further evaluation under section 32AA of any changes proposed must also be undertaken and regard had to.¹¹ It is anticipated that the Council Officers' will prepare a further section 32 assessment if they make further recommendations following the hearing of submissions.

Objectives, policies and rules

- 44 The formal requirement is that a regional plan must also state its objectives for the region, the policies to implement the objectives and the

¹⁰ Section 66(1) of the Act.

¹¹ Section 66(1)(e) of the Act.

rules (if any) to implement the policies and may state other matters, including issues, reasons, and expected environmental results.¹²

- 45 The Council must be satisfied that the provisions in the pSWLP meet their statutory purposes, namely:¹³
- (a) the objectives of the pSWLP are the most appropriate way to achieve the purpose of the RMA;
 - (b) the policies are to achieve and implement the pSWLP objectives; and
 - (c) the rules, if any, are to achieve the pSWLP objectives and implement the pSWLP policies.
- 46 In *Rational Transport Society Inc v New Zealand Transport Agency*¹⁴ the High Court held that "most appropriate" means "most suitable". This assessment should not be undertaken in isolation, but a holistic approach to assessing the appropriateness of the provisions should be adopted.¹⁵
- 47 In making a rule the Council must have regard to the actual or potential effect of activities on the environment¹⁶. A rule in the pSWLP must not be more lenient than a national environmental standard.¹⁷ To the extent the pSWLP allocates the taking and use of water, it must record how it is done so.¹⁸
- 48 There are also special provisions which deal with permitted activity rules about discharges, and rules that require the adoption of the best practicable option.¹⁹

¹² Section 67 of the Act.

¹³ Section 67(1) of the Act.

¹⁴ High Court, Wellington, CIV-2011-485-002259, Gendall J, at [45].

¹⁵ *Art Deco Soc (Auckland) Inc v Auckland Council* [2012] NZEnvC 125, [2012] NZRMA 451.

¹⁶ Section 68(3) of the Act.

¹⁷ Section 43B(3) of the Act.

¹⁸ Section 67(5) of the Act.

¹⁹ Section 70 of the Act.

Overview of key themes in submissions

- 49 A number of key themes emerged from submissions. In broad terms, a number of submitters say that the proposed plan seeks to impose an unnecessary degree of regulatory intervention, whereas other submitters say that the proposed plan does not go far enough.
- 50 Many submitters appear to be concerned solely with the economic consequences of the proposed plan. The key themes that emerged from those types of submissions were:
- (a) relying on existing good management practices to maintain water quality;
 - (b) delaying the introduction of regulatory requirements;
 - (c) waiting for more science; and
 - (d) reducing the number of rules, and activities being regulated.
- 51 On the other hand, a number of submitters say that the proposed plan will not maintain water quality, and does not do enough to halt the decline in water quality. Those submitters seek additional regulatory intervention and a strengthening of the policy and rule framework in particular physiographic zones.

What does "maintain" mean in the context of the RMA?

- 52 As set out above, the pSWLP must give effect to the NPSFM. One of the key themes arising from submissions relates to the requirement in Objective A2 of the NPSFM that the overall quality of fresh water within a region is maintained or improved. A discussion of how "overall water quality" should be interpreted is set out in the Section 42A Report.²⁰
- 53 Under the RMA the Council also has the function (amongst other things) of the control of the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies.²¹
- 54 This raises the issue of what the requirement to, at the very least, maintain water quality means for the Council in respect of the proposed plan.

²⁰ Section 42A Report at [2.28]-[2.31].

²¹ Section 30(1)(c)(ii) of the Act.

- 55 In respect of a regional council's functions under section 30, the Environment Court in *Ngati Kahungunu Iwi Inc v The Hawke's Bay Regional Council* stated that while maintaining water quality may be something of a moving target, the requirement is to strive for management practices that will prevent degradation, and to strive to ensure that quality is, at a minimum, maintained.²²
- 56 One of the issues before the Court in that case was how to incorporate or account for the "load to come" (or "lag") when seeking to "maintain" water quality. The "load to come" being the contaminants leaked through soils and into ground water or surface water that may not be observed until many years later, which meant that even if there was no further land use change in the catchment and no additional contaminants leaked through the soils into water, there would still be unavoidable degradation of water quality observed in the future.²³ However, this phenomenon (i.e., the load to come) does not mean that a Council is failing to maintain water quality.
- 57 The Court considered that if such historic causes of water quality lead to decline later, and are causes which cannot be foreseen or controlled, then that will have to be dealt with at the time the quality decline is identified and its extent becomes known. What a Council can predict, and can, and should be planning for, are the effects of current anthropogenic activities affecting waterbodies. Although there may be some uncertainties in the extent of the load to come (which is beyond the control of the current generation) the Court considered that what was known is what makes the quality worse – putting pollutants into it. The Court noted that better land use practices can result in a reduction in the release of contaminants to land (and ultimately to water). The Court considered that if the council appropriately managed potential pollutants entering land or water now, water quality will at least not get worse (i.e. it

²² *Ngati Kahungunu Iwi Inc v The Hawkes Bay Regional Council* [2015] NZEnvC 50 at [69].

²³ *Ngati Kahungunu Iwi Inc v Hawke's Bay Regional Council* [2015] NZEnvC 50 at [38]-[41].

will be maintained) and, as the inherited pollutants slowly work their way out of it, it will get better (i.e. it will be improved).²⁴

- 58 While this may mean that instream concentrations or quantitative measures of aspects of water quality may not stay the same, or improve, in the short term, (i.e. because of the load to come) better management of land uses will ultimately "maintain" water quality.
- 59 Finally, notable tension has arisen as between urban and rural discharges, and how they are managed. On the one hand the rural community suggests that not enough is being done to improve the quality of discharge from reticulated stormwater and sewerage systems. Whereas, the territorial authorities have submitted that it is more economically efficient to further restrict discharges from rural land use rather than focusing on stormwater and sewerage systems.

Dated this 17th day of May 2017



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²⁴ *Ngati Kahungunu Iwi Inc v Hawke's Bay Regional Council* [2015] NZEnvC 50 at [66]-[74].