

IN THE MATTER OF the Resource Management Act 1991 ("the RMA")

AND

IN THE MATTER OF applications by Central Plains Water Trust to:

Canterbury Regional Council for resource consents to take and use water from the Waimakariri and Rakaia Rivers and for all associated consents required for the construction and operation of the Central Plains Water Enhancement Scheme

Selwyn District Council for resource consents to construct and operate the Central Plains Water Enhancement Scheme

AND

IN THE MATTER OF a notice of requirement by Central Plains Water Limited to:

Selwyn District Council for the designation of land for works associated with the construction and operation of the Central Plains Water Enhancement Scheme

MEMORANDUM OF COUNSEL FOR SELWYN DISTRICT COUNCIL

AND CANTERBURY REGIONAL COUNCIL

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INTRODUCTION

- 1 This memorandum responds to the Minute/directions of the Commissioners and Request for Further Information dated 1 April 2009 ("the Commissioners' Minute") and the Memorandum of Counsel for the Applicant in Response dated 1 May 2009 ("the Applicant's Response").
- 2 The purpose of this memorandum is to assist the Commissioners by providing a legal opinion on behalf of Selwyn District Council ("SDC") and Canterbury Regional Council ("ECan") on some of the matters raised in the Commissioners' Minute and the Applicant's Response. In particular this memorandum addresses the primary and associated issues on which the Commissioners have sought advice as set out in paragraphs 27 and 28 of the Commissioners' Minute.
- 3 For the sake of clarity, the comments within this memorandum are restricted to the applications and notices of requirement by Central Plains Water Trust and Central Plains Water Limited ("the CPWT Scheme"). This memorandum is not intended to apply to the related application by Ashburton Community Water Trust.
- 4 I consider my role is to provide limited legal advice to the Commissioners on the law and make some suggestions as to process, which the Commissioners may adopt or may disregard. The advice contained in this memorandum does not cover substantive issues or issues of merit.
- 5 Both SDC and ECan are not opposed to the approval of a modified scheme the Commissioners decide it is within their jurisdiction and in accord with the purpose and principles of the RMA.
- 6 Both SDC and ECan consider that its s42A report writers should have the opportunity to fully consider the issues raised by any reduced or amended proposal and have the opportunity to raise any issues of concern at a reconvened hearing.

PRIMARY ISSUE (A) CLOSE THE HEARING OR RECEIVE FURTHER EVIDENCE

- 7 Paragraph 27 of the Commissioners' Minute sets out two alternatives:
 - Whether the Commissioners should close the CPWT part of the hearing and proceed to issue a final decision; or
 - Whether the Commissioners should leave the hearing open so as to receive further evidence from CPWT later in the year.
- 8 The alternatives are phrased as "*should*". It is not appropriate for these submissions to deal with the issue of "*should*" as this is an issue of substance and merit that properly remain at the discretion of the Commissioners. However, it is

appropriate to deal with the issue of whether the Commissioners can, as in have jurisdiction to, adopt either of these alternatives.

- 9 If the Commissioners were satisfied that the change to the proposal was within jurisdiction and the components to be granted were in accordance with the purpose and principles of the RMA then, in my submission, the Commissioners, can
- recommend that the dam and reservoir, upper intake and tunnel be modified or withdrawn and decline the associated consents;
 - can potentially grant some or all of the consents for the taking and use of water and the distribution network;
 - recommend confirmation of the headrace canal and the lower Waimakariri and Rakaia intakes.

PRIMARY ISSUE (B) AND ASSOCIATED ISSUE (C)

Jurisdiction

- 10 The key question is whether the Commissioners have jurisdiction to make a decision that provides for a modified proposal that excludes the dam and reservoir, upper intake canal and tunnel. This jurisdiction questions involves two key components:
- (a) Whether the Commissioners can grant a consent for something different to what was sought in the resource consent applications; and
 - (b) Whether the Commissioners can recommend that the requiring authority modify and/or withdraw the notices of requirement to provide for a different scheme.
- 11 In relation to the resource consents, the Applicant's response deals with this issue in paragraphs 9 to 16. I agree with these submissions. The tests set out in *Coull v Christchurch City Council (C77/06)* are appropriate to determine whether any change in an application is within jurisdiction. The tests are:
- (a) Does the change increase the scale or intensity of the activity?
 - (b) Does it exacerbate or mitigate the impacts of the activity, in terms of adverse effects in the plan? and;
 - (c) Would parties who have not made submissions have done so if they were aware of the change?

12 In my submission, if the Commissioners conclude, based on the evidence presented and, applying these tests, that the change is within jurisdiction, then it is available to them to grant or decline the consents for the modified proposal.

13 The Applicant's Response refers to the decisions of *Motorimu Windfarm Limited v Palmerston North City Council* (W67/08) and *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* (A95/08) as situations where the Environment Court has granted consents for a proposal of a significantly lesser scale than was applied for. The same approach is available in this case.

14 In relation to the notices of requirement, section 171(2) provides:

"(2) The territorial authority may recommend to the requiring authority that it—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement."

15 Section 171(2)(b) provides that the territorial authority may recommend to the requiring authority that it modify the requirement. In my submission, a recommendation by the Commissioners that the dam and reservoir not be included in the scheme is a modification of the requirement that is within the jurisdiction of section 171(2). As the tunnel from the upper intake was a separate notice of requirement, removing this component from the scheme would require a recommendation to completely withdraw that notice of requirement.

16 Based on the above, subject to the tests provided in *Coull* and provided that the modified proposal meets the objectives of the requiring authority, it is submitted that the Commissioners do have jurisdiction to consider a modified proposal without the need for re-notification of any potentially affected parties.

Holistic approach

17 Closely related to the above jurisdictional issue is the question of whether it is appropriate to grant or recommend confirmation of some parts of the proposal while declining other parts. The particular issue is whether such an approach would be contrary to case law which requires all aspects of a proposal should be bundled together and viewed holistically.

18 The requirement to bundle all aspects of a proposal together and view them holistically is a requirement to be undertaken at the commencement of the consent

process. The purpose of this approach is to ensure that all matters are properly considered together.

- 19 In this case, the CPWT proposal has been treated holistically and bundled together according to the relevant case law. ECan exercised its power under section 91 to require that all necessary consent applications be made. The applications by CPW have proceeded past notification and are now in the process of being heard.
- 20 Based on the process completed to date, the case law requiring that all aspects of a proposal should be bundled together and viewed holistically has already been complied with. Adopting an approach whereby a modified scheme is considered is not contrary to this case law. The Commissioners, having heard evidence, can grant consents for some parts of the proposal but not others.
- 21 It is therefore submitted that, the Commissioners, if they consider it is in accordance with the purpose and principles of the RMA, can approve and recommend in favour of the modified proposal. All consents relevant to the dam based scheme have been considered together. Provided that all consents relevant to a reduced scheme are considered together then the process will be consistent with s102, s103 and the case law requiring a holistic approach.

ASSOCIATED ISSUES (D) TO (L)

- 22 These issues are substantive issues going to the merits of whether or not consent should be granted. I do not propose to comment on these issues.

ASSOCIATED ISSUE (M)

- 23 If the Commissioners accept that they could potentially approve/confirm the modified proposal, we recommend that the following process be adopted. CPWT be required to provide the Commissioners and all submitters with additional evidence required to support any modified proposal. This would include identifying:
- key components or providing a full description of the modified proposal;
 - all the resource consents required for the modified proposal;
 - the modifications or withdraws required in respect of the notices of requirement;
 - the evidence already presented that was to be relied on for the modified proposal; and
 - areas where new evidence was required.

- 24 This information would be considered at a reconvened hearing, which would involve the following, in an order to be determined by the Commissioners:
- CPWT presenting the case for the modified proposal;
 - submitters having the opportunity to present submissions and call evidence;
 - the section 42A report writers being given the opportunity to consider the changes and comment; and
 - the right of reply from CPWT.
- 25 In the event that the Commissioners decide to reconvene the hearing to consider the modified proposal, ECan request that the Commissioners give it the opportunity to report on issues arising from the reduced proposal including:
- the distribution and application efficiency; including management of total surface and groundwater use by each property;
 - use of groundwater for storage;
 - the relevance of land use practices to the management of groundwater levels;
 - provisions for managing groundwater levels around Te Waihora and flows in lowland streams;
 - the relevance of land use practices to the management of effects on surface and groundwater quality; and
 - the need for maximum flexibility in the design of the main canal to allow for potential connection to future storage.

ASSOCIATED ISSUE (N)

- 26 The Commissioners have sought advice on whether any delays in the release of the final decision would be unfair to submitters.
- 27 Section 39(1) provides that the procedure adopted by the Commissioners is *“appropriate and fair in the circumstances”*.
- 28 Submitters could argue that the extension of the hearing could exhaust their financial resources to the extent that they are precluded in partaking in any appeal process that may follow. They could argue that the Commissioners should not

extend the hearing, but rather the Commissioners should make a decision now to decline and allow an appeal to proceed.

- 29 Whether or not reconvening the hearing to consider the reduced proposal is unfair needs to be determined after hearing from submitters. If any submitters were going to argue that the suggested approach was unfair, they would need to present evidence on the possible effects of the reconvened hearing and why this was unfair.
- 30 In my submission, if the process adopted is consistent with the Act, no issue of unfairness arises. In addition, if the outcome suggested by the Commissioners is available under the RMA, this is a relevant matter for the Commissioners to take into account in determining whether or not any unfairness arises to any party.
- 31 Section 21 of the RMA requires that every person who exercises or carries out functions, powers or duties, or is required to do anything under the Act for which no time limits are prescribed, shall do so as promptly as is **reasonable** in the circumstances.
- 32 Many of the relevant circumstances have been identified by the Applicant in its submission. Any delays in the release of a final decision need be viewed against the scale and complexity of the application and the scale and complexity of the hearing process to date.
- 33 Section 115 of the RMA, which provides for time limits for notification of decisions, does not apply because the hearing as such has not concluded.

ASSOCIATED ISSUE (O)

- 34 In paragraph 21 -23, the Commissioners have set out a preliminary view that they are prevented from issuing a decision on some parts of the joint application but not others. This view is based on section 103(a) in the context of the Commissioners' finding in paragraph 21 that:

"We do not consider that ... the applications are sufficiently unrelated so that it is unnecessary to hear and decide the applications together".

- 35 In my submission, the Commissioners preliminary view is correct. The conclusion in paragraph 21 means that, as a consequence of Section 103(a), the Commissioners are required to hear and decide the matter together. The Commissioners are therefore unable to issue a decision on some aspects of the joint application ahead of others because the decision would not be made together as required by section 103(1)(a).

- 36 If the Commissioners conclude that the reduced proposal is within jurisdiction, then they can leave the hearing open so as to receive further evidence from CPWT on the reduced proposal.
- 37 Both SDC and ECan support the issuing of a minute in a form that clearly provides that the minute is not a final or interim decision, but rather it is a strong intimation that certain parts of the proposal are unlikely to receive consent. In addition, the purpose of the minute, in my view, is to inform the parties to the balance proceeding of what remains in issue and what is relevant for the balance part of the proceeding. This forms the obvious purpose of ensuring that the parties who take part in the balance of the proceeding can focus their presentations on the matters that remain relevant.

Dated this 9th day of May 2009.



Paul Rogers
Counsel for Selwyn District Council and Environment Canterbury