BEFORE ENVIRONMENT CANTERBURY

Under	the Resource Management Act 1991
In the matter	of resource consent applications by various parties to take and use water in the Upper Waitaki Catchment

LEGAL SUBMISSIONS ON BEHALF OF UPPER WAITAKI APPLICANT GROUP (UWAG)

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Opening Submissions

Introduction

1. This is a momentous day for applicants like the Government Race [CRC991473]. About 11 years after the initial receipt of their application in December 1998 their consent application has reached the stage that their application is about to be considered.

2. It is an application for the renewal of an existing consent.

3. During the intervening years this applicant has been fortunate in being able to continue to exercise its consent pursuant to s124 – but the effects and costs associated with applications being on hold, and then grouping them for hearing, has meant that any improvements to the overall system of water reticulation have also been placed on hold.

4. For this group of irrigators, and others appearing before you this week, the uncertainty associated with the procurement of consents has placed ongoing improvements to their farming operations on hold.

5. To upgrade to a centre pivot system from an open race border-dyke system involves both a financial cost and risk when:

    5.1 You are in a queue with approximately 50 other applicants to have your consent determined; and

    5.2 You have no certainty about what the ultimate outcome of the renewal/consent process might be.

6. Development or conversion to more modern irrigation systems has connotations of making further inroads into the sustainable management of the Mackenzie environment. However, deferment of this type of development has in part forced farmers to make do with existing systems which are:

    6.1 Less efficient in terms of WQN9;

    6.2 More likely to generate higher levels of nutrient runoff; and

    6.3 Ultimately for farmers, more time consuming to maintain and operate.

7. That farmers are more likely to have their applications determined, will be more likely to lead to more efficient irrigation systems with lesser overall effects on the environment.

8. Keeping these applications in the queue for so long has not been conducive to the overall sustainability of the environment.

9. The farmers who I represent are looking forward to moving on – to be able to once again make positive decisions in relation to their irrigation proposals and to avoid the perhaps insidious delays in the processing of their applications.

10. These farmers live, work and play in the Mackenzie Basin and Waitaki Valley – in many cases for generations. They have no wish to see a deterioration of the quality of their air, soil and water resource. Ultimately their role is to husband these resources – not because of any policies incorporated in a regional plan or because of any purpose enshrined in the RMA but because their livelihood depends on it.

11. Harsh climatic conditions in the Basin mean that there is an inherent conservatism in the way these applicants farm to deal with snow in winter, long winters and summer droughts.

12. The evidence you will hear from the farmers will show there is a strong correlation in their management between the need for irrigation and the protection of vulnerable erosion prone soils.

13. Some of the applicants before you have been through, or are going through, tenure review. While I do not wish to traverse the merits of that process here – that process has as one of its guiding principles that, for those lands which do not warrant the protection of Crown management of conservation values, individual ownership is appropriate. Farmers in giving up leasehold areas as part of tenure review, want to be able to manage their balance land holding – being essentially left to their own devices. This does not imply a whole raft of over intensive land use practices being introduced. To the contrary, the farmer evidence to this hearing will focus on the need to adopt a balanced approach to farm management over the whole of their property. Irrigation and irrigable areas cannot be looked at in isolation to the balance of the working farm.

14. A whole of property approach is being taken by my clients. The impact of not irrigating or not continuing to irrigate as the case may be has a corresponding impact on erosion and protecting the soils.

15. Unfortunately no consent is required to allow the soils to blow off properties in northwesterly winds. Similarly no resource consent is required to prevent over-grazing in times of drought.

16. But these water take consents can "remedy and avoid" two very significant environmental issues for the Basin. Strategic use of water can avoid the loss of soil cover and it can prevent erosion and overgrazing. Strategic use of water can ensure that newly cultivated areas get a good seed strike first off – without exposing the soils to the potential for ongoing erosion.

17. What the UWAG farmers are looking for from these consents is to stabilise in some meaningful way, their working environment against the threats of the severe weather conditions in which they live – ultimately for the benefit of the overall environment. The positive effects of these proposals have, in our view, not been taken account of in the MWRL study, but it will need to be at the forefront of your minds when considering the effects on the environment of these applications.

The path to this hearing

18. Many of the UWAG applicants have had different pathways to approach this hearing.

19. Many applications were originally submitted in the early 2000s. There is no logic to application dates, other than for renewal consents where applications were lodged in compliance with s124 requirements – ie 6 months prior to the expiry date.

20. Again there is a range of dates as to when applications became first notifiable[1].

21. As a result of the number of applications being made generally in the Waitaki Catchment for abstractive uses and the need to consider an alternative mechanism to the "first-in, first-served" allocation process the then Minister for the Environment called in all applications yet unheard[2] pursuant to s140 of the RMA.

22. The effective date for the call in was 6 December 2003. From that date the "WAB" process was initiated. The process was put into effect by the establishment of a Board under the Resource Management (Waitaki Catchment) Amendment Act 2004 ("the Waitaki Act") which then heard from all vested interests during the 12 month timeframe.

23. Many of the UWAG applicants appeared before that hearing.

24. The Board prepared a plan, the Waitaki Catchment Water Allocation Regional Plan ("WAP") which was issued in September 2005 and a subsequent appeal to the High Court was resolved in July 2006.

25. The WAP is operative and all applicants before this hearing are subject to it by virtue of the Waitaki Act.

26. Since the WAP these applications have been re-notified consistent with that plan and in addition to pre WAP s92 requests there has been a further round of s92 requests based on the rules relating to that plan which was issued in September 2006.

27. From that point on the focus of the applicants has been the preparation of evidence; and responses to s92 requests.

28. This has involved the UWAG members funding, on a proportionate basis, the MWRL study which was presented to you in the first week of hearing.

29. The decision by ECan to draw all applicants together into a common hearing process has involved co-ordination between UWAG applicants and the other applicants.

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[1] Priority decision Commissioner Skelton dated 8th April 08

[2] One remaining application CRC021330 was adjourned part heard and is yet to be determined outside the consent process

30. Essentially the purpose of summarising this process is to show the degree to which these applicants have been subjected to considerable delays and costs – well beyond that contemplated by the usual processing of consents under the RMA.

31. This delay is not a factor for the Commissioners to attach particular importance to in the 104 deliberation process but it does provide background as to why the detail associated with the initial applications differed substantially. In its form and content a 1998 application was of a different scale to a 2006 application.

Formation of UWAG

32. Evidence will be provided by Mr Shepherd on the reasons for the formation of UWAG.

33. Essentially it is an umbrella group, separately incorporated, with voluntary membership by those applicants who wished to engage in a degree of common representation and common witness sharing.

34. UWAG is not stepping into the shoes of an applicant.

35. For those applicants who have joined, I am authorised to appear on their behalf in this hearing.

36. To the extent that there can be a common thread amongst UWAG clients it is as follows:

    36.1 The applicants are all existing farmers in the Basin – many on an inter-generational basis;

    36.2 They are not seeking to change their activity type or farm;

    36.3 The irrigation is integrated into a whole farm approach to farm management.

    36.4 In relative terms the irrigable area is small in proportion to the overall farm area.

    36.5 The irrigation is confined to the lower flats on the respective properties – although there is a significant range between the elevation of these flats on the properties.

    36.6 The irrigation is a mode of increasing sustainability of vulnerable soils and avoiding erosion of the steeper hill country.

Some Statistics concerning UWAG applicants

37. I attach a map of the Upper Waitaki Basin as Appendix A which shows the UWAG members' application sites and size (**red**) in comparison to the other applicants (**green**).

38. Some statistics emerge from this information.

38.1 UWAG represents in broad terms 72% of all applicants for water takes.

38.2 In terms of water volumes applied for (excluding stock water and non-consumptive diverts) the total water applied for is 101,278,532m^3 of which UWAG represents 31%.

39. In terms of overall irrigable area at 4,793 hectares UWAG applicants represent 29% of the total.

40. Taking the whole farm area, all applicants represent approximately 30-35% of the total Upper Waitaki farmed land mass.

41. The remaining 70% is either existing dry land operations or existing properties with irrigation but which are not up for renewal.

42. Renewal consents applied for by UWAG members represent 88% of all renewal applications.

43. Renewal consents constitute 15% of the total irrigation consents applied for.

44. The figure that has not been analysed is the percentage of UWAG overall farm areas bears to the total applicant farm area but this figure is likely to be in the 80% range – an issue I will come back to shortly.

45. The RMA does not promote sustainable management using a statistical approach to water allocation. However, the figures do support that UWAG generally represents the smaller applicants, but not small scale farmers, looking to irrigate a small proportion of their overall holding with the corollary that any mitigation measures proposed can be "spread" over the balance of the farm property.

46. This ability to "spread" environment management is important to your deliberations in that it decreases potentially the risk associated with implementation of these measures – a point that I will return to.

47. In addition the ability to implement farm environmental management plans has consequential benefits to mitigating a range of issues to do with management of the South Island High Country such as erosion control, weed and pest control and loss of soils.

48. You will hear evidence from a number of applicants in this regard. You are entitled to take these positive effects into account in terms of your 104 deliberations.

The Range of Applicants

49. The range of applicants for this hearing – even within the UWAG group – has presented its own issues.

50. Whilst there appears to be a convention of grouping applicants together when considering surface water and ground water takes, the RMA states:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

51. The consent authority has given notice of the hearings of these applications on a joint basis but the Act requires the consideration of each application in isolation from others.

52. The grant of consent, and the consideration of conditions, follows the path of deciding on a particular application on the merits of that application. Importantly, the imposition of conditions must fairly and reasonably relate to the development authorised by the consent[3].

53. In the context of these hearings, based on the MWRL study there are a number of applications for which irrigation has been previously sanctioned [consents running on under 124] and for which a new (renewal) consent has been applied for.

54. These applications need not rely on the modelled scenarios undertaken under the GHD scenario. Their effects are known – and form part of the baseline. The report concludes that there are no unacceptable levels of nutrient discharge being experienced at the nodal measuring points at present.[4]

55. Accordingly in my submission the Commissioners will need to evaluate these applications in a different scientific context than new irrigation development.

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[3] *Newbury District Council v Sec of State for the Environment* [1981]AC 578 and s108 RMA

[4] GHD summary report at page

56. Conditions which might be appropriate to safeguard against the risks of scientific modelling may not be appropriate to every application before you.

57. UWAG applicants are concerned that all consents will be evaluated on a worst case scenario.

58. To put this in context taking a midsized UWAG applicant, Glenmore, which seeks to take approximately 1% of the overall application volume and use that over 1% of its total property area – to continue to irrigate the area as they have been doing in the past – for the same land same activities, needs to be evaluated against a very different matrix than an applicant seeking to take near 20% of total volume and apply it to near 100% of the total property for a new take.

59. In the first scenario you will hear evidence that the effects are known, do not need modelling, and are associated with an existing stocking regime. In the latter the applicant is relying principally on modelled information to predict effects in an environment where the land use is changing significantly.

60. UWAG is not saying that its applicants can pass through the gateway to consent unnoticed. The evidence which will be presented supports the need to take practical steps to avoid undue nutrient enrichment in all cases.

61. Accordingly UWAG is indicating that different risk profiles will need to be applied to different applications based on the degree of certainty associated with the degree of reliance on modelled information and the degree of change that is forecast to occur on the respective properties.

Status of activities

62. Mr Batty and the applicants' individual consultants will present a table showing the status of each application under the WAP.

63. Mr McIndoe has confirmed in his analysis of the existing and proposed abstractive volumes in the Upper Waitaki that all of the consents before the hearing come within the Table 5 annual allocation limits.

64. Pursuant to Rule 15 the taking of water for irrigation of farmland is a discretionary activity.

65. Some UWAG applicants do not meet the environmental flow regimes set out in Rule 2 Table 3 and therefore fall to be considered as a non-complying activity.

66. The specific issues raised by these exceedences will be specifically addressed in the evidence of:

    66.1 The consultant's report; and

66.2 The hydrological evidence of Mr Boraman/Mr de Joux and the resource management assessment of Mr Batty.

66.3 In general terms there is alignment between the status of the activity as recommended in the application and the 42A officer's report.

67. Having regard to the objects and policies of the WAP, irrigation of the upper basin cannot be regarded as "contrary" to the objects and policies having regard to:

67.1 The overall direction within the Waitaki Act to include objectives, policies and methods … to provide for …

(c) the allocation of water to activities, as appropriate; and

(d) the management of allocated water, including methods that provide for dealing with periods of time or seasons when the level or flow of water is low.

68. Objectives 2, 3, 4 and 5[5] and policies 12, 13, 15, 16, 18 and 19[6] direct consideration to the irrigation of agricultural and horticultural use of water and particularly the encouragement of:

68.1 Technical efficiency of water use;

68.2 Progressive upgrade of existing systems;

68.3 Consistency with PNRRP objectives;

68.4 The avoidance of waste.

69. Having regard to these matters it is submitted that on the evidence, to the extent that some applications may be classified as non-complying, that none of the applications are contrary to the objectives and policies of the Act and therefore the 104D(1)(b) test is satisfied.

70. On this basis, all applications will fall to be considered under the section 104 test.

71. The Officer's Report (Freeman) suggests that since some applications are non-complying that all the applications should be assessed on this basis. Any assertion that these applications are bundled and that the most restrictive status (non-complying) must be applied to all, is rejected. These applications are not related to a "single proposal". All take applications have been individually lodged, together with the

[5] WAP, page 14

[6] WAP page 31 ff

necessary regional land use or divert consents. Each relates to an entirely separate on-farm proposal which is not linked to another. Accordingly each must have its status determined separately.

The role of this Hearing

72. In questioning Mr Kyle for MWRL, Commissioner Rogers set out what he regarded as the three stage assessment process for the hearing as follows:

72.1 Gain an understanding of the existing environment;

72.2 Understand the type of effects that these applications give rise to;

72.3 Establish and test the methods proposed for the avoidance of effects.

73. UWAG accepts the above as a valid approach – but with the refinement of three more assessment tools:

73.1 Evaluate the positive effects associated with the proposals;

73.2 Apply a risk assessment in regard to each application as to the likelihood of one or more of the effects arising from the exercise of that consent.

73.3 Weigh all of your findings above as to the degree to which these applications achieve the purpose of the Act.

74. These three additional criteria are required for the following reasons:

74.1 The evidence of UWAG applicants will show that the area of irrigation relating to total farm area is small. However, the positive effects that arise from that operation have not been brought to the committee to date. The benefits of having viable, thriving farms, for overall catchment management need to be factored in. The weed and pest management undertaken by the Basin's farmers has not been evaluated by the officers in a regional context. Lastly the control of soil loss and the effects of erosion will be discussed by the UWAG witnesses.

74.2 While the officers may be able to focus their frame of reference on just the irrigation effects – the farmers cannot. Their case for irrigation is presented to you as a package for their overall farm management. In this respect these applications differ significantly from the lowland schemes which do focus on whole of farm irrigation proposals.

74.3 Apply the risk assessment: In my submission this will need careful consideration of each application. It is clear that each application contributes to the cumulative effect of nutrient discharges in the catchment – but in my submission not all applications need to rely on modelling.

74.4 Renewals, for example, have had their effects established by the baseline study. There is certainty that the levels of nutrient enrichment experienced by Lake Benmore at present is at acceptable levels.

74.5 Similarly, with all UWAG applicants where there is not to be a change in the farming regime you have much greater certainty of outcome. In terms of the ultimate decision this again needs to be factored in, in terms of whether to grant or decline consent and the conditions for that consent.

74.6 In my submission you cannot impose the worst case scenario on each applicant.

74.7 The focus of the Act is on you exercising a broad overall judgment of the activity proposed by consent. The evidence will show that in terms of sustainable management of the High Country that these applications are needed and support the overall purpose.

74.8 The WAP has recognised their function and encouraged them all to improve their water use – but has accepted that this catchment needs irrigation to balance the harsh climatic environment.

The MWRL Evidence – UWAG's position

75. UWAG accepts that irrespective of the status of the application all irrigation proposals cumulatively affect the nutrient loadings in the streams and lakes. Apart from the Tekapo subcatchment it is the lake values which require the most restrictive mitigation (Robson supplementary table provided on Thursday 24 September)

76. As a corollary UWAG has paid for the preparation of the GHD report and its presentation to this hearing.

77. UWAG is not producing any other evidence to support its own assessment of cumulative effects and adopts the evidence to the extent that it defines nodal thresholds.

78. UWAG does not take issue that the findings of the study require applicants to undertake mitigation. Some catchments are identified as requiring greater mitigation than others.

79. It is in this respect of the mitigation measures that UWAG has, and continues to have, issues with the study. More particularly, the findings of the study have attributed assimilative capacity back to the individual land owners on an irrigable land area basis.

80. The study's own analysis concludes that this is done for reasons of simplicity and that it is not the preferred method.

81. Put simply, this approach favours properties where there has been a very low rate of fertiliser application in the baseline Overseer study and does not reflect that those causing the production of higher N and P levels should be responsible for its mitigation.

82. The higher production inputs associated with dairying, cropping or deer for example, are not reflected in an "area-based" allocation mechanism. It is the effect of the magnitude of the change in nutrient inputs/outputs, whether arising from increased stocking rates, greater fertiliser application, or a change in the type of farming that triggers any nutrient enrichment issue – this is not always a factor of the irrigable area.

83. Notwithstanding these issues of fairness or equity between applicants, UWAG members are not coming to you today to advise that they cannot or will not meet an area based NDA threshold – to the contrary the consultants will show that they have taken that model and applied it to all properties and will, with mitigation, meet the thresholds.

84. That the UWAG applicants continue to assert that the allocative mechanism is unfair, is a matter which may continue to be the subject of ongoing dialogue between applicants at this hearing.

85. UWAG applicants are first up. We have not seen the FEMPs for any other applicants at this stage or the thresholds they are working to. It is hoped that there can be continuing dialogue between applicants during the course of this hearing to resolve inconsistencies of approach.

86. At its starkest level this issue only manifests itself in certain catchments – particularly the Ahuriri. In that environment, the issue is particularly evident with renewals – who have improved their method of irrigation over time; been applying fertiliser in accordance with good monitoring and farm management practices – but faced with significant, large scale new applications above them where the degree of intensity of farming operations is proposed to change radically.

87. In this regard the provisions of 124B and C may have been of assistance to that renewal but are not applicable in this instance.

88. Again, I emphasise that dialogue may lead me to address you further on this point – once all proposals are fully disclosed.

Duration of Consent

89. The applicants that are not renewals are required to hold MIC shares. These shares require an expiry date on all applications for consent to coincide with the Meridian consents in the Basin in 2025.

90. For those applicants that is their requested expiry date.

91. For the renewal consents the request is for a maximum term of 35 years – i.e. 2044.

92. It is submitted that:

92.1 Given these consents do not rely on predictions or modelling to establish their effects on the environment;

92.2 They are all making improvements to their system on renewal in accordance with Policy 15 and 19 of the WAP;

92.3 The high cost of applications; and

that a long term time timeframe for the grant is appropriate.

Priority Issues

93. The evidence of McIndoe establishes that all of these applications fall within the 275Mm³ WAP allocation.

94. As such UWAG has not advanced any argument that applicants should be assessed in priority order with assimilative capacity being accorded to the first in time application.

95. To the extent that this argument is raised by other applicants, our submissions are as follows:

95.1 The whole thrust of the WAP process was to move away from a first in time process and set specific allocation limits for various activities;

95.2 The notion that one applicant is entitled to take up available assimilative capacity in priority to others runs contrary to the principles on which priority decisions have been determined, ie priority affords the applicant "first dibs at a hearing" – priority is not about according priority to the resource[7];

95.3 All applicants are under a duty to mitigate the effects of their application on the environment;

95.4 Priority does not reflect the position of renewal applicants who were only required to apply 6 months prior to the expiry of their existing consent. One of the policy reasons behind the amendments to 124B and C was to recognise the inequity of "new" applicants leap frogging over renewals of existing consents.

[7] See Environment Court *Central Plains Water Trust v Synlait Limited*

Decision on priority

96. The Waitaki Act was passed in effect, to fast track the establishment of a regional water allocation plan. There were a large number of competing applications in the Waitaki including the resource consent applications lodged by Meridian for Project Aqua. The Waitaki Act established the WAB which heard submissions on the proposed plan and was tasked with producing a completed plan to assist with the processing of applications.

97. By way of decision dated 22 June 2007 Professor Skelton established different orders of priority than those earlier indicated to the applicants. The decision of 22 June found that notification had to be considered in the context of the WAP. Council staff considered each application in light of the WAP and made requests for further information pursuant to section 92 of the RMA. In many cases the requests were given a common date on which replies had to be received, this was 15 December 2006. Where people responded earlier, the earlier date became the notifiable date, otherwise if the response was provided on 15 December 2006 that became the date on which priority turned in the case of completing applications.

98. A request was made by Counsel for Williamson Holdings Limited that the decision to change the priority of applications be reconsidered and the original notifiable dates should apply. The issue was reconsidered at a public hearing on 25 and 26 October 2006 which was reconvened on 12 November 2007. The law on the issue of priority has been subject to a significant degree of scrutiny over the last few years. The decision issued by the Court of Appeal in *Central Plains v Ngāi Tahu Properties Limited* has not overturned the position established in the High Court decision *Geotherm Group Limited v Waitaki Regional Council* in relation to section 92 requests. The Council must be satisfied it has sufficient information for it and any potential submitters to understand the application. This has been described as the "ready for notification" test and establishes priority. The circumstances in relation to these applications were rather more complex as many of the applications had already been considered complete and notified prior to the Waitaki Act.

99. The new priority dates determined by the 22 June 2007 decision were based on the date the information requested in terms of the Waitaki Allocation Plan was received. This was a process which was beyond the control of the applicants. No party had been made aware that the provision of further information requested in relation to the Waitaki Plan could affect the order of priority already established. The Commissioner accepted the circumstances were such that the original priority dates should apply. The Waitaki Plan process was beyond the control of applicants and should not affect the order of priority already established. The Commissioner cancelled the 22 June decision and found the order of priority should be that established by the first notifiable dates.

Statements in support of existing irrigation/recognition for expansion of existing users

100. The Waitaki Act has recognised and provided for the renewal of existing consents in the catchment. Presumably this was to remove a degree of uncertainty for farmers facing a renewal of existing consents.

101. Policy 28 sets out that:

In considering whether to grant or refuse applications for replacement of existing consents, the consent authority will:

a. consider whether all reasonable attempts to meet the efficiency expectations of this Plan have been undertaken;

b. recognise the value of the investment of the existing consent holder; and

c. maintain the inclusion of the consent, if granted, in any allocation limits and priority bands on the water body concerned.

102. The policy expressly recognises that there is no right of renewal of a resource consent. But the policy recognises the significant investment of the farming properties in their water use and requires that account be taken of that investment.

103. The Water Allocation Board considered the potential for expansion of existing users, including irrigation works and held that it is to have regard to this aspect. (The WAB decision is annexed to the WAP as Annexure 1.) When considering the significance of previous rights the Board acknowledged that it was to have regard to the *existing natural and physical resources.*

104. Agricultural activities were one of many activities that were considered when determining allocation to activities. At paragraph [204] the Board considered that provision in the plan should be made to include an allowance for any likely expansion of current volumes drawn.

Nutrient management issues – management in other catchments: Taupo Decision

105. Nutrient management issues have been critical to the grant of consents in a number of collective groundwater consents in Canterbury and North Otago. Predominantly in relation to these takes Ecan has managed these issues by successively refining nitrate type conditions. However in the context of these

hearings the MWRL study identifies Lake Benmore as the critical node for assessment purposes and uses the assimilative capacity at that node as the benchmark for setting thresholds on farms. Applicants will be taking this further by providing to you a methodology to develop Farm Environmental Management Plans to be certified by the consent authority prior to implementation as a mode of meeting compliance.

106. As a cross check on this process the issues faced at Taupo and Rotorua with management of nutrients may provide a comparison to the management of Lake Benmore through this consenting process. The significant difference occurring in the Taupo catchment is that levels already are at a point where the effects of nutrient run off are unacceptable and their mandate is to control nutrient management from existing activities where no consent process was required.

107. Proposed Variation 5 to the Waikato Regional Plan (RVP5) is one of the first regional planning instruments that seek to impose an extensive comprehensive regulatory control on nitrogen discharges from rural land uses for the entire catchment.

108. The RVP5 has been appealed to the Environment Court (*Carter Holt Harvey Limited v Waikato Regional Council* A123/2008, Judge Whiting). A decision is still pending.

109. The following sets out the key rules established under RVP5:

109.1 Rule 3.10.5.3(a) imposes a "Nitrogen" cap on the farming activities. Farmers are restricted from discharging beyond the cap, or their nitrogen discharge allowance ("NDA"). The NDA for each farm is calculated from the amount of nitrogen historically leaching from each farm. The NDA is fixed by calculating the average amount of nitrogen leached from farming land between July 2001 and June 2005. Therefore land use will primarily dictate the NDA for each farm in the Taupo catchment.

109.2 Rule 3.10.5.3(f)-(i) sets up the parameters for the nitrogen trading scheme. Nitrogen discharge allowance trading enables land owners to change land use within the limits of the entire catchment.

110. Flexibility has been somewhat maintained through offsetting nitrogen in the Taupo catchment. The policy makes it clear that there is to be no net increase in Nitrogen leaching from land into the Lake. The only way to increase the benchmarked annual NDA on an individual farm is to buy or lease NDAs from other land owners in the catchment. The RVP5 very much contemplates that there will be no net increase in high nitrogen activities. In fact Issue 4 encourages land use changes to low nitrogen activities such as forestry, rural residential subdivision, and urban style development.

111. There are various standards that have been set out to determine whether a resource consent is needed for each particular activity. This is determined by the level of nitrogen leached. For example, low nitrogen leaching farming/non-farming activities are permitted activities whereas high nitrogen leaching farming activities are controlled.

112. Essentially the rules have been designed to limit any increase in nitrogen leaching in the absence of compensatory nitrogen leaching offsetting which are achieved through the nitrogen management plans compiled for each farm. This ensures that the nitrogen cap is not exceeded.

113. Whilst this plan grandfathers nutrient leaching from existing activities – any change of activity from sheep and beef farming to dairying or cropping which has more intensive nutrient loadings is the trigger point for consideration and consent. The plan does not grandfather nutrient loadings based on land area – but rather on the production of nutrient leaching associated with more intensive use.

114. The person seeking to develop more intensive on-farm activities is required to buy an allocation from someone who is reducing nutrient output. The Taupo catchment obviously encompasses a much wider "trading" catchment – than the sub-catchment approach in the MacKenzie.

Renewal consents

115. A number of UWAG applications are applications for the renewal of existing consents (Refer Appendix 2). When a resource consent is due to expire and a consent holder applies for a new consent for the same activity, section 124 of the RMA allows a consent holder to continue to exercise their existing consent until the new consent is granted or declined and all appeals determined, if the new application is lodged:

115.1 at least six months before the expiry of the original consent or

115.2 between three and six months before the expiry of the original consent and the council agrees to the applicant continuing to exercise their original consent.

116. All the UWAG applicants I am representing lodged their applications for renewal at least six months before the expiry of the original consent.

117. If these renewal applications were lodged now, they would fall to be considered under sections 124A to 124C of the Act, which came into effect from 9 August 2008. Sections 124A to 124C now provide a system whereby applications for new consents to replace existing consents will be given priority over other applications for the same resource.

118. Section 124B gives priority to the existing consent holder to have their new consent application determined ahead of other applicants for the same resource when the later application could not be fully exercised until the expiry of the existing consent. In determining the new application, the council must consider all relevant provisions of the RMA and also whether the existing consent holder:

118.1 uses the resource efficiently; and

118.2 uses good industry practice; and

118.3 has been served with an enforcement order that was not later cancelled or has been convicted for an offence under s338.

119. It is submitted that under section 104(1)(c) you can have regard to the approach to renewals the Act now takes.

120. The RMA recognises the investment made by applicants by way of the amendments to the RMA in August 2005 which introduced subsection (2A) to section 104. Section 104(2A) states:

When considering an application affected by section 124, the consent authority must have regard to the value of the investment of the existing consent holder.

121. As these activities have been continuing by virtue of section 124 the effects of these activities are already part of the environment. For the purpose of the assessments completed the effects of the renewal applications have already been taken into account.

122. Notwithstanding the fact the effects caused by the applications for renewal are already part of the environment the applicants are proposing significant improvements to their existing operations which will further mitigate the effects of these activities on the environment.

123. The renewal applicants before you have invested or will invest to improve the efficiency of their operations, for example by replacing border dyke irrigation systems with centre pivots. It is submitted this investment must be given considerable weight under section 104 as without it, consent holders have little incentive to improve the efficiency of their operations by investing in up to date systems or increasing efficiency.

124. It is submitted that the benefits arising from the introduction of more efficient means of irrigation and limiting the potential from nutrient leaching should accrue as a positive effect of that particular application. Indirectly this will improve nutrient management for the overall sub-catchment but, I submit,

that as each application is to be determined separately, those benefits must count in favour of a grant of that particular application. Consent conditions can tie the farmer in to make the improvements by setting time limits for the conversion of irrigation systems.

Landscape Issues

125. Submitters in opposition to these applications have raised the effects of the activity on the landscape as a relevant concern. You need to consider how relevant the landscape effects are to your determination of these applications, in light of the fact the applications are for water permits to take and use water.

126. You are effectively being asked to consider the effect of the greening of the Basin; no land use consent is required from the district council to allow the proposed irrigation to occur.

127. It is submitted you can take into account the effects of irrigation on the landscape but that these effects must be considered in context that the district plans have not attempted to control them. You may consider the changes in the landscape as even if not considered direct effects they are an inevitable and reasonably foreseeable consequence from the grant of these consents. *Cayford v Waikato Regional Council* A127/98.

128. The Court in *Cayford* referred to the *Aquamarine* case where the Court considered a resource consent applications for the taking of water for export by ship. The Environment Court held that potential adverse effects of the *passage of ships* and *discharges* from them were relevant, even though the passage of the ships (or their discharges) did not itself require consent under the Act. The Court in *Cayford* concluded that the movement of and discharges from tankers in Doubtful Sound were relevant considerations in *Aquamarine* because granting consents would lead inevitably to them and were reasonably foreseeable effects of allowing the activities.

129. It is submitted very little weight should be given to the effect described as the "greening" of the Basin. The three district plans (Waitaki, MacKenzie and Waimate) all permit farming and contemplate irrigation. Consent is required for the irrigation in outstanding natural landscapes under the Proposed Waitaki District Plan but in all other areas in the Waitaki and throughout the MacKenzie and Waimate Districts consent is not required.

130. The situation may be different where a District plan was silent on the issue. That is not the case here – where all councils have addressed the effects associated with irrigation development. Mr Craig in his evidence will address the current planning status of irrigation development.

131. You must place significant weight on the fact that these landscapes have already been modified by farming. The presence of structures associated with irrigation and the greening of the land in summer is entirely appropriate and necessary given the use to which the land is put and the nature of the weather experienced in this region.

The allocation of assimilative capacity

132. The cumulative water quality report conducted by GHG determined a catchment and subcatchment nutrient assimilative capacity. This has involved setting thresholds at nodes instream, ground water and at Lake Benmore. These nodes represent strategic points and are used for monitoring and modelling cumulative impacts of land use intensification.

133. The methodology that has been set up is to estimate whether a proposed activity in a specific subcatchment in the Upper Waitaki would be likely to exceed that subcatchment's assimilative capacity and by how much.

134. Accordingly, if a subcatchment is in excess of its assimilative capacity, a process of mitigation has been set up to address this – which is achieved by the implementation of the Farm Environmental Management Plans (FEMPs) for each farm.

135. The FEMPs are applied at the farm level to monitor that farm's nutrient losses. In many UWAG applications the farms are well within operating thresholds. In those situations the FEMP's are suggested to control good farming practice.

136. The proposed expansion of irrigation in the Upper Waitaki catchment will lead to higher nutrient losses from the Upper Waitaki Catchment. It therefore becomes important to assess the allocation of assimilative capacity and the method in which this allocation is to be set upon.

137. The method may be in accordance with irrigable areas, or in accordance with the production of nitrogen levels. It is submitted that the allocation approach that has been undertaken by the MWRL Study presents difficulties on a number of levels for the applicants we represent.

138. In the MWRL study the allocation mechanism of the assimilative capacity adopted is only one example of a number of allocation mechanisms possible in studies such as this.

139. Nutrient loss is directly correlated with that of land use – and it is on this basis that a per ha allocation method is rejected today. Land use intensification in our submission can be viewed on a continuum being

largely driven by the type of activity conducted on that farm and in some instances the way in which the farm is managed (such as the method of irrigation used).

140. The associated land use activity associated with each farm will control the level of nutrient discharge on that particular farm. This is in addition in some cases with the type of farm management practices, such as type of irrigation employed.

141. It is submitted that the WQS has used a relatively simple method of allocation in the subcatchments, which has potentially led to an inequality in the allocation of the assimilative capacity for each farming unit. Where the assimilative capacity in a subcatchment has been predicted to exceed the nutrient overburden – this has been divided equally between all areas of new irrigation and those areas renewing existing resource consents that drain into that particular node. Therefore the allocation has been dictated on the irrigable areas on those farms discharging within that particular node.

142. Based on this method of allocation if a particular land use on a farm for example, is dairy farming the historical nutrient discharge has been greater in the past. Therefore contributing to the baseline data and how much assimilative capacity is left in each subcatchment to allocate to farms.

142.1 In the case of the Ahuriri where the assimilative capacity is exceeded, some farms are essentially mitigating for the nutrient loss of which they have not contributed to.

142.2 The inequality in allocation of assimilative capacity is exemplified when the assimilative capacity is already breached, and mitigation measures need to be undertaken immediately to reduce it to the threshold.

142.3 It is on this logic and reasoning that the MWRL study has taken an overly simplified approach to the allocation within the catchment.

142.4 The approach that needs to be taken is more farm specific that reflects what is in reality occurring on each individual property.

143. However, this is not reflected in the approach that has been taken in the MWRL study. This essentially results in some farming units mitigating for the nutrient loss of other farms.

144. It is submitted that the method of allocation should not be divided on a per ha basis, but on the basis of productive use of the land. The productive use of the land represents the level of nutrient discharge of each farming unit.

145. By assessing allocation of assimilative capacity on the basis of productive land use to reflect the NDA for each farming unit, it is submitted that this method will be more representative and realistic of the nutrient discharge of each farming unit.

Enforceability of conditions regarding nodal issue

146. The approach that has been taken in regard to the enforceability conditions is that of an overall nodal approach. Annual monitoring of compliance with the nutrient discharge allowance is to be undertaken by the consent holder.

147. Difficulties arise in this method of monitoring in terms of enforcement of the conditions of the resource consent. For example, one farm unit may be discharging more than their NDA allowance in which case this will be picked up in the subcatchment monitoring. The breach of the nodal NDA will need to be pinpointed on Farm "X" – the offending property. This has the potential to cause issues for other farms in the catchment in addition to the consent authority's enforcement of the consent conditions.

148. It is submitted that the resource consent conditions regarding monitoring of the nutrient discharge allowance should be clear, they should be practical and enforceable essentially achieving their resource management purpose. This purpose being to manage the cumulative water quality of the Upper Waitaki catchment. This can largely be achieved by comprehensive onfarm compliance with the NDAs through the FEMPs.

149. The conditions should leave as little as possible to the exercise of any discretion at a later stage. It is submitted that by having a nodal monitoring approach uncertainty and implications are going to arise. Essentially, the issue lies with the pinpointing of who is in exceedence of their NDA, if the exceedences are detected at the nodal point.

150. The applicants' preference is for on farm management of total nutrient discharge, and annual auditing of their individual FEMPs. The MWRL study has indicated how much each farm has to mitigate to ensure that the assimilative capacity of each nodal point is not breached. The conditions of each consent need to be tailored for that specific farm.

151. In the Rakaia Selwyn groundwater zone hearing which involved 59 applicants to take water from this area a series of draft conditions were proposed in the hearing decision.

152. The following is a draft condition which appears in the hearing decision of February 2008 addressing issues in relation to nitrogen in the area:

"Nitrate Management"

(a) With the exception of the first period ending 30 June during which this consent is exercised, for each preceding 12 month period ending 30 June, an approved method shall be used to model the nitrate–nitrogen concentration in the soil drainage water below the plant root zone and a nutrient budget for the subject land;

(i) Where the model nitrate – nitrogen concentration in the soil drainage water exceeds 8 grams per cubic metre, a Nitrate Management Plan [which will be addressed in the FEMPs for the Upper Waitaki Farms] shall be prepared describing management practices that shall be implemented to minimise the loss of nitrate–nitrogen by leaching below the plant root zone.

(ii) A copy of the Nitrate Management Plan [FEMP] shall be provided to the Canterbury Regional Council, attention: RMA Compliance and Enforcement Manager, by 30 September each year.

(iii) The modelled nitrate–nitrogen concentration in the soil drainage water shall not exceed 16 grams per cubic metre for more than three consecutive years.

(b) A record of all measured input data and the calculations undertaken in accordance with clause (a) shall be:

(i) Prepared by 31 August each year;

(ii) Certified as an accurate record by a person who can demonstrate competency in agricultural management;

(iii) Maintained for the property for the duration of the consent; and

(iv) Provided to the Canterbury Regional Council, attention: RMA Compliance and Enforcement Manager, by 30 September each year, or upon request.

(c) Prior to or at the conclusion of each irrigation season a groundwater sample ("the Sample") will be taken from the shallowest bore on the property to which this consent applies; and

(d) The sample shall be analysed by a laboratory that is certified for that method of analysis the nitrate – nitrogen; and

(e) The results of this analysis shall be provided to the Canterbury Regional Council, attention: RMA Compliance and Enforcement Manager, within one month of the sample collection.

(f) For the purposes of this condition an "approved method" is

(i) 'Overseer' (AgResearch)

(ii) Soil Plant Atmosphere Model (SPASMO – HortResearch).

(iii) Any other method approved by Canterbury Regional Council.

(g) For the purpose of this condition, the subject land means the area that is irrigated between 1 July and 30 June of each year.

153. This Nitrate condition is only one example of that which ECan is using at the moment. As can be seen from the above condition it is very much site specific and applicable to ground water take. However, it is proposed that conditions akin to the above can be implemented and applied at a farm level as opposed to taking an overall nodal approach.

154. To be monitoring at both a farm level and a nodal level brings in uncertainties, duplication and cost. Uncertainty in the respect that if all farms are complying with their NDA then logically it follows the total allocation allowance at the node will not be breached. However, this is not the case as not all farms will be subject to comply with such conditions.

154.1 Nodal compliance will not address any lag periods arising from nutrient discharge. It may be that all the farms are complying but there is nevertheless an exceedence breach at the node. This raises the issue as to which farm will need to mitigate for the breach of the allocation allowance at the node. The question is whether this is allocated equally between each of the farms. Given that only 30-35% of all farms in the basin are applicants and that these applicants will be under FEMP compliance, it is more likely than not that nodal exceedences may arise from other farm activities rather than from this applicant group.

155. It is submitted that on farm monitoring should be favoured over monitoring at the node. This brings in the practicalities of the purpose of employing the FEMP approach and ensuring that when in breach of that FEMP the consent authority has control to enforce the conditions of the consent. It also reflects the reality that each farm will be different depending on the type of activity that is undertaken on that farm and their own tailored farming management practices.

Stockwater

156. The issue of whether resource consent is required for stockwater has been raised by Meridian and Ecan. Out of an abundance of caution some applicants have applied for stockwater while others have relied on the right preserved by section 14 of the RMA to take water for the reasonable needs of animals for drinking water.

157. Section 14 of the Act reads:

14 Restrictions relating to water

(1) No person may take, use, dam, or divert any-

(a) Water (other than open coastal water); or

(b) Heat or energy from water (other than open coastal water); or

(c) Heat or energy from the material surrounding any geothermal water-

unless the taking, use, damming, or diversion is allowed by subsection (3)

...

(3) A person is not prohibited by subsection (1) from taking, using, damming or diverting any water, heat, or energy if-

(a) The taking, use, damming

(b) In the case of fresh water, the water, heat, or energy is required to be taken or used for-

(i) An individual's reasonable domestic needs; or

(ii) The reasonable needs of an individual's animals for drinking water-

And the taking or use does not, or is not likely to, have an adverse effect on the environment; or

158. The taking of water for stockwater purposes does not require a resource consent and rule in regional plans cannot limit the amount of water that can be taken for this purpose.

159. The taking of water for an individual's animals drinking needs is not controlled by the WAP. The Waitaki Catchment Water Allocation Board's Decision stated at paragraph 73 – 75:

73 Some submitters did not appear to understand the relationship between the provisions of the Plan, including those for permitted activities, and those of section 14(3) of the RMA.

74 By section 14(3), the taking and using of freshwater for an individual's reasonable domestic needs, or for the reasonable needs of an individual's animals for drinking water, does not require consent if the taking or use does not, or is not likely to, have an adverse effect on the environment. Also, water for fire-fighting can be taken and used without resource consent.

75 The Plan cannot, and is not intended to, regulate the exercise of the rights conferred by section 14(3). Depending on the circumstances, taking water in conditions that are classified as permitted activities by the Plan may overlap with entitlements under section 14(3), or may be additional to them. An example may be providing for water taken for communal water supply systems, rather than for the individual's stock or domestic needs (to which section 14(3) applies).

Conclusion

160. These submissions are in the nature of opening submissions for all UWAG applicants. There may be matters of a specific legal nature relating to certain applications – these issues will be raised when the specifics of these applications are discussed in closing.

161. UWAG has not tabled a final set of conditions or final farm management plans. These matters will be worked through ad provided to all parties as the hearing progresses. UWAG is of the view that one suite of conditions is inappropriate.

162. There are variables between subcatchments, take points, and the "type" of consent applied for which will mean individual conditions will need to be worked through. When possible, UWAG will engage with the consent authority and submitters informally on the wording of conditions.

163. On the evidence presented it is submitted that all of the UWAG applicants can be granted – subject to conditions.

Dated 5 October 2009

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Ewan Chapman