

**BEFORE THE CANTERBURY REGIONAL COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of resource consent applications made by  
**VARIOUS PARTIES** to the  
**CANTERBURY REGIONAL COUNCIL**  
associated with the irrigation of 25,000ha  
of land in the Upper Waitaki Catchment.

---

**STATEMENT OF REBUTTAL EVIDENCE OF JOHN KYLE  
ON BEHALF OF MACKENZIE WATER RESEARCH LIMITED  
(5 November 2009)**

---

## **1. INTRODUCTION**

### **Qualifications and Experience**

1.1 My name is John Kyle. My qualifications and experience were set out in my evidence in chief on behalf of McKenzie Water Research Limited, dated 2 September 2009.

1.2 The purpose of this evidence is to briefly address matters arising through the Environment Canterbury section 42A reporting, and the various briefs of evidence that are relevant to my sphere of expertise, and which have been led on behalf of other applicants and/or submitters. In preparing this evidence, I have had specific regard to the following:

- The section 42A report prepared by Ms Penman.
- The section 42A report prepared by Dr Freeman.
- The section 42A reports prepared by the various technical experts engaged by the Canterbury Regional Council.
- The evidence by Mr Gimblett on behalf of Meridian Energy Limited.
- The evidence of Mr Batty on behalf of UWAG.

1.3 This statement is able to be brief, on the basis that many of the issues raised within the aforementioned documents have either already been dealt with in my evidence in chief, or in evidence prepared on behalf of Southdown Holdings, Five Rivers, and Killermont Station. Alternatively, I have had the opportunity to address the issues before the Hearing Panel in response to questions. On this basis I have simply adopted an approach whereby I highlight a particular issue and draw your attention to the relevant excerpt of my evidence, or I comment in brief.

## **2. ADDITIONAL CONSENT REQUIREMENTS**

2.1 Commencing at paragraph 75<sup>1</sup>, Ms Penman notes that additional consents may be required for the proposals before the Hearings Panel. Ms Penman notes that a raft of additional consents may be required, including:

---

<sup>1</sup> Page 12 of the Penman report

- District Council resource consents for land use activities associated with irrigation infrastructure.
  - Regional Council consents for damming, disturbing the bed or banks of a river or lake, discharging contaminants, and using land in a manner that result in contamination of water.
- 2.2 Ms Penman reflects on a prehearing meeting which was held in May 2009, where applicants noted that any land use consents if required, would be for infrastructure, and applications cannot sensibly be made for these until it is known what area of land the affected applicants will be able to irrigate in terms of any water permit issued. At paragraph 80, Ms Penman reflects the view of Commissioner Skelton about this state of affairs, and his agreement to proceeding with the subject hearings.
- 2.3 Ms Penman then makes some reference to her view about the affect of Rule WQL19 (NRRP), the interplay with Rule WQN26, and Rule WQL62<sup>2</sup>.
- 2.4 I note that Mr Gimblett in his evidence<sup>3</sup>, also addresses the use of land and the NRRP rules that might be applicable.
- 2.5 I have considered the matters raised within the aforementioned report and the evidence by Mr Gimblett. The Hearings Panel will recall that I dealt with this matter in my evidence in chief (MWRL), commencing at paragraph 2.19. The ensuing paragraphs included detailed assessment of whether the said rules are applicable or not. At paragraph 2.30, I concluded that the use of irrigation water in the manner and locations proposed by the MWRL participants, does not contravene any rule of NRRP such that a consent is required. I maintain this view.
- 2.6 The Hearings Panel will also recall that I dealt specifically with District Council consenting obligations when I appeared for Southdown Holdings, Five Rivers, and Killermont Station. The net result of that analysis showed that the majority of infrastructure necessary to irrigate was a permitted activity in terms of the Waitaki District Plan, unless the land identified was noted within the Plan as being outstanding in landscape terms. This set of circumstances is similar to

---

<sup>2</sup> See paragraphs 82-86 of the Penman report

<sup>3</sup> Paragraphs 54-71

the approach adopted within the MacKenzie District. Various individual irrigators have and will continue to provide advice to the Hearings Panel as to whether or not land to be irrigated is subject to such a landscape classification in the District Plan. As I understand the situation, the vast majority of irrigation proposals do not fall within land deemed to be outstanding in landscape terms. Irrigation infrastructure is therefore permitted in most cases in terms of the relevant District Plan.

### **3. THE RELEVANCE OF LANDSCAPE**

3.1 The extent to which landscape considerations fall to be considered as part of this process arises within the report by Dr Freeman<sup>4</sup>, and has been the subject of comment by various other witnesses at the hearing. Dr Freeman in particular goes into some detail as to the extent of relevance to be ascribed to landscape considerations. He finds that landscape considerations are broadly applicable, and he sets out an analysis as to why this might be so commencing at paragraph 39 of his report.

3.2 I addressed the extent to which I think landscape is relevant commencing at paragraph 3.72 of my evidence in chief on behalf of MWRL. The Hearings Panel will also recall that my perspective on the relevance of landscape to these proceedings was scrutinised in some detail when I appeared for Southdown Holdings and others in October 2009. In that analysis I walked the Hearings Panel through the various references to landscape considerations that emanate from the Waitaki Allocation Plan, and showed how these provisions in particular focus on landscape effects on the waterways themselves, rather than in a broader way. I maintain the view that this is the appropriate approach, particularly given that many of the land use elements of irrigation are in fact permitted by the District Plans. As I indicated when I last appeared, I accept that there is a “grey area” between the two jurisdictions; regional and district. However, the provisions of the WAP provide clear guidance about the extent of the landscape jurisdiction.

### **4. CONSENT DURATION**

4.1 The issue of consent duration is raised by Ms Penman commencing at paragraph 143 of her report. I also note that the Hearings Panel requested

---

<sup>4</sup> This occurs at various locations within his report, commencing at paragraph 29

that I consider the issue of duration when I presented my evidence in chief (MWRL). Ms Penman makes reference to chapter 1.3.5 of the Proposed NRRP. This sets out a number of matters that should be had regard to when considering the duration of any consent application to be granted. The Hearings Panel will now know that in general applications for replacement water permits have sought a duration of 35 years, while applications for new water permits are seeking duration until 30 April 2025, which is consistent with the expiry of Meridian Energy's consent for the Waitaki Power Scheme.

4.2 As I recall the question put to me when I delivered my evidence in chief, the issue of duration came up as one mechanism that might be employed for managing the risk of unforeseen adverse effects arising from the proposals if consented. As a general proposition, I accept that consent duration can be a management tool where there is a risk of unforeseen adverse effects arising in a given situation. However, the usefulness of this is somewhat offset by the fact that consents such as those at issue, are necessarily coupled with significant investment decisions in order to provide the necessary infrastructure to irrigate and ultimately farm the properties in question. On the basis that many of the new irrigators in particular will need to make a significant investment, it would be expected by such consent holders that the duration of the consent issued should be for as long as is possible.

4.3 When I appeared on behalf of Southdown Holdings and others, I submitted for your consideration an amended suite of conditions. One of the essential elements of these conditions relates to imposing an ability to ratchet back the consented water allocation in circumstances where predetermined environmental thresholds were ultimately exceeded<sup>5</sup>. The said conditions have been very deliberately drafted in order to best mitigate against the risk that something unforeseen occurs. In my view, the approach adopted within these conditions is sufficiently precautionary to offset any need to restrict the consent duration to a term which is considerably less than that sought.

## 5. BUNDLING

5.1 At paragraph 97, Dr Freeman addresses issues around bundling and cumulative effects. He notes that the significant majority of the applications in

---

<sup>5</sup> See for example the Ohau Downs (Water Use) conditions 37 to 45

question are discretionary activities. However, a significant number are non-complying. Dr Freeman notes that the case law on bundling primarily focuses on individual development proposals, rather than a number of geographically spread development proposals. However he suggests that because all off the application proposals give rise to the risk of cumulative effects, then there may be a case for considering all applications according to the strictest activity status that applies (non-complying). In my experience, applying an approach such as this is not conventional. Moreover, I can see no reason why such an approach should be applicable here. A given applicant should be able to rely on the activity status conferred by a Plan on its face. It would be unreasonable to think that those that have proceeded on the basis that an application is discretionary, would now somehow have to meet a higher test due to the non-complying status of other applicants in a given location, say on a neighbouring property for example. I do not support Dr Freeman's approach in this regard.

- 5.2 In any event, his approach is not necessary. The Water Quality Study and the management approach to be adopted is deliberately targeted at avoiding or mitigating any adverse cumulative effects that arise.

## **6. APPLICABILITY OF CONDITIONS TO ALL CONSENT HOLDERS**

- 6.1 Commencing at paragraph 3.4 of his evidence, Mr Batty expresses some concern about the proposed *“collective approach to assessment of the future cumulative effects of these particular applications.”* He notes that the applicant farms concerned are spread out over a considerable distance, and also vary in terms of scale, and in the nature of the farming activity being pursued. Many other properties and other land use activities therefore intervene. Management and land use activities on those other properties is also likely to have a potential to contribute effects upon the types of issues referred to. Yet there can be no assessment of the impact of, or control exercised over, those intervening activity areas when determining whether to consent, or to impose conditions of consent for the individual applications at issue here. In addition at paragraph 4.9, Mr Batty states that:

*“I consider that there are both practical and equity difficulties in that ‘node water quality approach’ and that while individual discharge points to waterbodies can be accurately monitored, non point discharges of nitrates etc can not be enforced for areas of land outside the current consenting process.”*

- 6.2 The proposed approach to conditions sets thresholds for elements such as nitrogen and phosphorous at defined nodes within any given catchment. Individual consented irrigators are assigned an allowance within the overall catchment with which they must comply. It is important to note that in setting these allowances some assumptions have been made about the likely existing and ongoing contribution to catchment nutrient enrichment that is made by land which is not subject to the current suite of consent applications<sup>6</sup>. As I understand the situation, a conservative view has been taken about the potential for this land to contribute to the overall nutrient budget within a given catchment. The thresholds set out within the conditions recognise this as a given input and set an additional assimilative capacity to be taken up by consent holders accordingly. In my view, acknowledgement of this approach should go toward reducing the practical difficulties that concern Mr Batty.
- 6.3 I understand that part of the UWAG case is to suggest that those applicants seeking to renew existing consents should be subject to a simpler regime of conditions than those suggested by me in the earlier part of the hearing. Part of the justification for this relates to the matter identified by Mr Batty and dealt with in this evidence in the preceding paragraph. I have considerable difficulty with this approach. In my opinion, the optimal outcome in terms of managing the cumulative effects of irrigation in the Upper Waitaki Basin would be for all consent holders to be subject to the same set of management responses. After all, a given re-consented activity presents just as great a threat to the crossing of prescribed thresholds as a newly consented activity. In fact there is a possibility that existing irrigation practices have the potential to cause a degree of harm that is disproportionate to the benefits obtained. In such circumstances it is my view that the consent holder in question should be compelled to adopt new forms of technology and methodologies that better avoid or mitigate the effects associated with nutrient run off in the catchment.
- 6.4 I also note if further intensification of land use is to occur on land not currently subject to a consent application, then in all likelihood this will entail an application for the allocation of water in order to irrigate. If such an application was to be forthcoming, then an opportunity would present itself to impose a

---

<sup>6</sup> See Appendix A - Study Methodology - Water Quality Study – Summary Report – GHD August 2009

similar array of conditions and obligations on that consent holder. Land use intensification not involving irrigation may also trigger the need for a consent via the not yet operative (and thus not yet applying) Rule WQL18 (and WQL59) of the Proposed NRRP.

6.5 At the time this rule comes into effect (assuming it does) then this would present the opportunity to impose a similar management regime as is proposed by MWRL here.

6.6 Mr Batty has also expressed concerns that the approach to conditions set out in my evidence in chief, and refined in my evidence for Southdown Holdings and others, lacks equity particularly for small scale irrigators. I have attempted to address this through the introduction of the concept of proportionality within the conditions<sup>7</sup>.

**J C KYLE**

**5 NOVEMBER 2009**

---

<sup>7</sup> See for example condition 36 of the Ohau Downs Water Use conditions.