

IN THE MATTER of the Resource Management Act
1991
AND
IN THE MATTER of applications for resource
consents to take and use water in
the Upper Waitaki Catchments

**MEMORANDUM OF COUNSEL ON BEHALF OF CANTERBURY REGIONAL
COUNCIL**

19 April 2010

MAY IT PLEASE THE COMMISSIONERS

Background

1. Canterbury Regional Council ("Council") has been asked to respond to a question raised by the Commissioners on priority.
2. This question is the status of replacement applications in a priority queue.
3. In answering this question I have referred to the:
 - *Decision of Commissioner Skelton on Waitaki Catchment Priority Issues* dated 8 April 2008.
 - Second addendum to the 42A report of Dr Freeman.
4. The permits now under particular consideration are water permits to take and use water.
5. Priority issues arise from allocation limits in the Waitaki Catchment Water Allocation Regional Plan ("the Waitaki Plan") including instantaneous rates on specified water bodies and annual volumes attributable to specified uses.
6. A further issue has arisen in regard to the evidence relating to a proposed cap on nutrient loading in the Ahuriri Arm of the water body of Lake Benmore. This cap is not a plan limit. This is an effects based limit proposed in the report "*Cumulative water quality effects of nutrients from agricultural intensification in the Upper Waitaki catchment, August 2009*" authored by GHD Ltd ("the Report").
7. It is not a limit formalised in a plan so is not an allocation limit of the kind anticipated by s30(4) of the Resource Management Act 1991 ("the RMA").

8. The permits to take water have been listed by Dr Freeman (Addendum and Second Addendum S42A reports) in a priority order for water take applications based on notification and this was the subject of Commissioner Skelton's decision referred to above.
9. No recognition was made in that priority list as to whether or not any specified application was a renewal under s124 of the RMA.
10. The Waitaki Plan has a limited suite of objectives and policies relating to water quality issues in the Waitaki Catchment. It is primarily a water allocation plan.
11. Priority is recognised as relating to the order in which parties are entitled to a hearing. Also accepted in practice if possible, is an entitlement not to have the effects of later in time applications taken into consideration in the substantive decision-making, even if the matters are heard out of order.
12. The concept of a nutrient cap has I understand led to a further consideration of the subject of the priority order of the applications at this hearing.
13. My understanding is that the priority order is one based on access to water. It is the Commissioner Skelton list and I understand it was agreed or at least accepted as the relevant priority list.
14. I understand that Dr Freeman considers that the nutrient limit proposed by the applicants is exceeded by the sum of the nutrient loads from properties associated with the water permit applications. I further understand that Dr Freeman considers that sources of nutrients from other properties should be taken into account.
15. My understanding is that Dr Freeman's priority list is derived from that of Commissioner Skelton.

Issues arising

16. Whether or not replacement applications should be recognised as a distinct category of applications when they have not previously been recognised as different in the priority queue.
17. Whether or not the priority of replacement applications in the Commissioner Skelton list can and/or ought to be revisited.
18. Whether or not the priority order set down by Commissioner Skelton for water take applications, remains the relevant order for the hearing of all related applications, including use of water applications.
19. Whether the recognition of the nutrient cap as a limitation on potential grants of consent to use water, raises an issue of competition for a resource and a priority issue, given that it is not a statutory cap. Alternatively it may be a matter relating to cumulative effects of the activity addressed under s104 and to be dealt with, in each case, as applications are heard under an existing priority list.
20. Whether the present case law on priority should influence these proceedings.
21. Whether there are any issues of fairness either way (i.e. replacements v new applications) that should be taken into consideration.

Order of hearing

22. Matters do not have to be heard in the existing priority order provided the decision-maker takes account of the order in considering cumulative effects at the time of any decision-making.

23. That allows parties, with a later priority but less complex projects, to have their matters heard without having to be delayed in their hearing process. This is possible when the issue is for example reliability of supply rather than whether or not the resource is available at all.

Take and use priority list?

24. The existing list was a list for the applications to take water. A question arises whether this list is the relevant list for applications to use water. If the take and use applications were made simultaneously and processed together it is likely the list is the same for both. Other parties to this hearing involved with the processing of these applications can advise Commissioners for this hearing on that point.

Does the nutrient issue raise a preliminary issue or not?

25. The nutrient issue arises as a consequence of the activity to use water. It does not arise out of applications to discharge contaminants under s15 which are not controlled by the Waitaki plan.
26. My understanding is that the lake is a sink for nutrients in the catchment whatever their source. If nutrient loading was considered to trigger an issue of priority that warranted the revisiting of the present priority list, then any later applications already granted to discharge contaminants in the catchment, would present a further issue for consideration by Commissioners. Their effects, if any, would in combination with the present applications, result in cumulative effects for consideration in substantive decision-making. There would be no ability to retain the integrity of the priority issue as was done for the Ngai Tahu consent to take water from the Waimakariri

River. The outcome on priority with CPWT was provided for by way of conditions that anticipated both outcomes on priority.

27. The water take priority matters recently before the Courts have involved resources where the limits have been specified under a plan e.g. the *Waimakariri River Regional Plan in Central Plains Water Trust v Ngai Tahu Properties Limited [2008] NZRMA 200(CA)* or a conservation order e.g. *National Water Conservation (Rakaia River) Order 1988 in Central Plains Water Trust v Synlait Limited [2009] NZCA 609*. These cases involve plan or conservation order limits.
28. *Fleetwing Farms v Marlborough District Council [1997] NZRMA 385(CA)* concerned competition for the same coastal marine space for the establishment of a mussel farm. *Geotherm Group Limited v Waikato Regional Council [2004] NZRMA 1*, concerned competition for access to geothermal fluid from the same resource. Similarly as for *Fleetwing* there appears to be a physical limit rather than a plan limit.
29. Whether the issue at hand truly raises a priority matter is for this Panel to decide. In an Environment Court decision *Carter Holt Harvey Limited v Waikato Regional Council*, 6 November 2008 Whiting J (A123/08) made provision, in *Proposed Variation 5 to the Waikato Regional Council Plan*, for a regulatory regime for nitrogen arising from land uses and discharges in the Lake Taupo catchment. The intent was to maintain water quality of the lake in the long term. Clearly it is possible for nutrient levels in water bodies to give rise to priority issues regarding the ability to pollute, if a limit is established by way of a plan.
30. Whether or not the present instance is one where a priority issue arises, in the absence of a plan or an absolute physical limit, is one for this Panel to consider. If it is and the nutrient enrichment arises out of the use of water permits then the existing priority list may be the relevant priority list.

Alternatively it may raise a discussion of what is the priority order in the circumstances.

31. If there is no priority issue the matter of enrichment of the lake will still be addressed, as both an effect and cumulative effect of the activity of each applicant, as part of the s104 considerations in the substantive decision-making.
32. My understanding is that it is only the nutrient issue that has triggered further discussion on priority. If there is no inherent priority issue arising out of the nutrient issue, then that may dispose of the matter.
33. If not, then the issue is resurfacing on some other basis after appearing to have been agreed and settled for some time.
34. If the nutrient cap is a trigger for a revisiting of the priority list then two issues referred to above can be considered. They are:
 - (i) whether another test for priority ought to be applied: and
 - (ii) whether replacement consents should be treated differently other than being placed in the list based on the relevant test.

Present State of Priority Law

35. The law on priority has most recently been considered by the Court of Appeal in *CPWT v Synlait Limited [2009] NZCA 609*. The decision was given on 18 December 2009. Leave was given on 31 March 2010 for Synlait Limited to appeal that decision to the Supreme Court. The approved ground is "*how priority is determined as between competing applications under the Resource Management Act 1991 for a finite resource*".

36. In the most recent decision the Court specified the test as a “*first to file*” test. The Court of Appeal had previously decided on a “*first to file*” test by way of a majority decision on 19 March 2008 in *Central Plains Water Trust v Ngai Tahu Properties Limited*.
37. The matter of the test for priority was heard by the Supreme Court in *Ngai Tahu v CPWT* but the appeal was withdrawn before the decision was given. The options put before the Court included a “*first to file*” and a “*first ready for notification*” test. Other tests were being considered.
38. So the question of a test for priority is still before the Courts. Further the case law has developed around comparing the processing of specific applications and the Courts have left it open to conclude that in other circumstances other tests may be appropriate, or that priority gained may later be lost.
39. The High Court in *Geotherm* at paras [28] and [29] considered the degree of control that the applicant maintained over an application at the stages of processing, and when and how the processing of an application may be out of the control of the applicant. In that respect the Court appears to give weight to what is “fair” to applicants.

The Law on Replacement Consents

Resource Management Act

40. Section 124 provides a right to continue an activity under an existing consent while a new application is being processed. That right continues until such time as any appeals are determined. That is not a right to renewal of a resource consent.
41. An amendment to s104(2A) requires decision-makers to have regard (subject to Part 2) to the value of the investment of the existing consent holder, when considering an application

affected by s124. That amendment was inserted as from 10 August 2005. It only applies to applications made on or after that date.

42. More recent amendments to s124 include sections 124A, 124B and 124C. These sections, which took effect on 9 August 2008, and the relevant transitional provisions mean these sections do not apply to applications made before that date.
43. The effect of these provisions (s124A, s124B & s124C) is that an application made in accordance with s124 will be heard before another application that is competing with it for a limited resource. Further there is a clear non-derogation principle in regard to preserving the resource for the existing consent holder once the grant is made to that party.
44. In that instance it is clear that the limited resource is one where the parties cannot both carry out their respective activities to the extent allowed under the existing consent and anticipated by the new application.
45. An issue arises with section 124C as regards whether it takes effect between an application made after 9 August 2008 by a person who is not an existing consent holder and one of an existing consent holder which was in reliance on s124 but before 9 August 2008.
46. Unless existing consent holders are relying on s124, and are also able to bring themselves within the amendments to s124 i.e. 124A, 124B in relation to other applications to which 124C applies, then there is no priority basis under the RMA for having their applications heard before any other applicant already ahead of them on the current priority list.

Waitaki Catchment Water Allocation and Regional Plan

47. At Rule 2 page 46 the plan does reserve to a limited degree a benefit to replacement consents in regard to flow regimes only,


otherwise there is no acknowledgement of replacement consents.

Conclusions

48. The amendment to the RMA, that gave a priority position to applicants continuing under s124, does not apply to the existing consent holders. This is because their applications were made prior to August 2008. Therefore there is no specific provision under the RMA that gives a preference to applications that are in effect replacements.
49. The Waitaki Plan does not preserve the position of replacement applications except for environmental flows.
50. The law on priority is currently under appeal to the Supreme Court.
51. Commissioners would undoubtedly have to consider what is "fair" to all applicants and that will depend on the issues surrounding these applications. I am not in a position to develop that point.
52. If the stimulus for the renewal of the debate on priority is the nutrient cap for the lake, then a question for consideration is whether all relevant applications, including applications for discharge permits, have been included in the priority queue for purposes of evaluating cumulative effects. That is a matter I cannot assist on but other Council officers should be able to obtain the information.
53. A nutrient cap is clearly capable of triggering a limit on a resource such as a lake. That can result in competition between competing applications for land uses. Logically those competing applications could include applications to use water.
54. The issue of a whether or not the nutrient cap, triggers a preliminary priority issue in this instance, is one that is best

commented on by others familiar with the Report. They would need to consider how comprehensively it deals with the catchment and whether it fairly informs an allocation debate given that it is not a statutory document such as a plan.

Dated 19 April 2010

A handwritten signature in cursive script, appearing to read 'M C Dysart', is written over a horizontal dotted line.

M C Dysart

Counsel for Canterbury Regional Council