

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

**IN THE MATTER**

applications for resource consents to take and use  
water in the Waitaki River Catchments

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**MEMORANDUM OF COUNSEL ON BEHALF OF SOUTHDOWN HOLDINGS  
LIMITED, WILLIAMSON HOLDINGS LIMITED AND FIVE RIVERS LIMITED**

**23 DECEMBER 2009**

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## MAY IT PLEASE THE COMMISSIONERS:

### Introduction

1. This memorandum is lodged on behalf of Southdown Holdings Limited, Williamson Holdings Limited and Five Rivers Limited ("**Applicants**").
2. A memorandum was filed by the Applicants on 22 December 2009 requesting direct referral of the effluent management applications.
3. The purpose of this memorandum is to fully set out the reasoning for the request that the Applicants' effluent applications be directly referred to the Environment Court for determination.
4. I have seen the Commissioners minute of 23 December 2009 raising concerns as to whether section 160 of the Resource Management Act (Simplifying and Streamlining) Amendment Act 2009 ("**Amendment Act**") means that section 87D of the RMA is only available to applications lodged on or after 1 October 2009.
5. In this memorandum I have addressed why there is no jurisdictional bar to the Commissioners considering this request.

### Reasons for the request

6. This request relates to the following applications:
  - Williamson Holdings Limited - CRC100227, CRC100475, CRC100478, CRC100479 & CRC101541;
  - Southdown Holdings Limited - CRC100224, CRC100480, CRC100481, CRC100482 & CRC101542; and
  - Five Rivers Limited - CRC100787, CRC100788, CRC100824, CRC100827 & CRC101540.
7. The reasons for the request are set out as follows:
  - The anticipated scale of the Council hearing proceedings means that it is more appropriate and efficient to allow the applications to be determined by the Environment Court. Over 4300 submissions have been received on the applications and five weeks has been scheduled for the Council hearing.

- The substantial costs associated with a Council hearing of this scale will be unreasonable and unrealistic for the Applicants to absorb especially when there is no guarantee that the water consents will be granted.
- Further, given the public significance of the applications, including the recent media attention, it would now seem appropriate for the Environment Court to determine the applications.
- I also maintain that it is not necessary to hear the water rights applications at the same time as the effluent applications as the Committee has sufficient information before it to understand the potential effects of irrigation. In particular, the Committee can safely assume that the exercise of the irrigation consents will require management from the Applicants of nutrients by way of condition of consent capable of being imposed by you, including in the form of the effluent management proposed in the Farm Environmental Management Plans.
- Finally I record my concerns, and my Applicants' concerns, with the conduct of Environment Canterbury in relation to the advice given to the public on its website. In particular (the entire website page is included at Appendix A):

**If you have concerns about these applications of these proposed farms from an animal welfare point of view, there are a number of things you can do apart from writing a submission.**

- You can write a letter to the editor of your local paper.
- You can write to your local MP or regional or city/district councillor (Local territorial councils are the ones who have the power to control land-based activities).
- You can write to the Minister of Agriculture, c/- Parliament Buildings, Wellington.
- You can also read this information on the Biosecurity New Zealand website:

<http://www.biosecurity.govt.nz/regs/animal-welfare>  
or

<http://www.biosecurity.govt.nz/animalwelfare/codes/dairy-cattle/index.htm#4>.

In my submission this is entirely inappropriate conduct for Environment Canterbury as an independent public body should not be encouraging, in any way, this type of public involvement. Further, a number of the submitters on the effluent applications are using the media as a vehicle for promoting their views and therefore it is more appropriate for the applications to be determined by the Environment Court.

- You have also seen the memorandum from Mr Chapman today on behalf of UWAG, which sets out further reasons for keeping the effluent applications and the water take applications separate.

### **Direct referral**

8. The recently introduced mechanism for direct referral is provided for in Section 87D of the Resource Management Act 1991 ("**RMA**") which states:

#### **87D Request for application to go directly to the Environment Court**

- (1) The applicant must request the relevant consent authority to allow the application to be determined by the Environment Court instead of the consent authority.
  - (2) The applicant must make the request in the period:
    - (a) starting on the day on which the application is made; and
    - (b) ending 5 working days after the date on which the period for submission on the application closes.
  - (3) The applicant must make the request electronically or in writing on the prescribed form.
9. The Applicants have satisfied the requirements of Section 87D(2) as the Applicants are making the request within the period starting on the day on which the application is made and 5 working days after the date on which the period for submissions on the application closes:
    - The Williamson Holdings Limited application was notified on 28 November 2009 and closes on 15 January 2010.
    - The Southdown Holdings Limited and Five River Limited's applications were notified on 21 November 2009 and closed on 18 December 2009.

10. While section 87D(3) requires the applicant to make the request on the prescribed form in the new Resource Management Regulations we have been advised by the Parliamentary Counsel Office that the new 2009 Regulations have not yet been released.

### **Decision**

11. Accordingly, for the reasons detailed above, the Applicants seek that the Committee makes a decision under s87E of the RMA to directly refer the applications to the Environment Court for determination.
12. If the Council is minded to agree to direct referral of the applications but does not consider s87E to be the right mechanism then the alternative would be for the Applicants to withdraw the applications and re-lodge.

### **Jurisdiction**

13. Concerns have been raised as to whether section 160 of Amendment Act means that section 87D of the RMA is only available to applications lodged on or after 1 October 2009.
14. One of the key aims of the Amendment Act was to streamline processes under the RMA. There are many applications that may have been lying on the books for years, and could benefit from the procedural changes to the RMA, which are designed to speed processes up.
15. Section 160 of the Amendment Act reads as follows:

#### **160 Applications and matters lodged before commencement**

(1) Subsection (3) applies to anything specified in subsection (2) that, immediately before the commencement of this section,—

(a) had been lodged with or initiated by a local authority or a Minister; but

(b) had not proceeded to the stage at which no further appeal was possible.

(2) The things referred to in subsection (1) are—

(a) an application for a resource consent (or anything treated by the principal Act as if it were an application for a resource consent);

[ ... ]

(3) The application or matter must be **determined** as if the amendments made by this Act had not been made.

[ ... ]

16. The use of the term "determined" in subsection 3 is important. This word makes it clear that Parliament intended section 160 to operate as a saving provision so as to protect existing applications from a change in the law. Therefore this section is only relevant to the determination of the application, not how it is processed.
17. The wording of section 160 can be compared to the wording of transitional provisions in the Resource Management Amendment Act 2003 ("**2003 Amendment Act**"). There instead of stating that the "application must be **determined**" as if the amendments had not been made, section 112 of the 2003 Amendment Act states that "the **continuation and completion** of that matter (including any rights of appeal) must be in accordance with the principal Act as if this Act had not been enacted"<sup>1</sup>
18. In summary section 160 of the Amendment Act does not preclude the operation of section 87D of the RMA, and there is no jurisdictional bar to the applicants' request being considered.

**Dated** 23 December 2009

**C N Whata**

Counsel for Mackenzie Water Research Limited

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<sup>1</sup> The analysis of the transitional provisions of the 2003 Amendment Act in *Matukituki Trust v Queenstown Lakes District Council* (CIV-2006-412-733, Fogarty J, 19 December 2006) and *New Zealand Nut Producers v Otago Regional Council* C99/2004 illustrates the difference in wording between the 2003 and 2009 Amendment Acts. However the Court in *Omokoroa Ratepayers Association Inc v Western Bay of Plenty District Council* A17/2004 reached a different conclusion and applied the Act as amended.

## Appendix A


## Mackenzie Basin Dairy Application


Advice and information for submitters to the Upper Waitaki three dairy effluent applications.


Environment Canterbury has a number of applications by three companies currently being notified relating to the management of dairy effluent on proposed dairy farms which propose to house dairy cows indoors for most of the year.

These farms are located between Lake Ohau and west of Omarama, Waitaki District.

These applications focus on the potential environmental impact of the storing and disposing of this effluent, which will be collected from the indoor sheds. You can read the full outline of each application online:

 [Upper Waitaki - Williamson Holdings Ltd - Supplementary submissions - application for effluent disposal \(pdf 3 MB\)](#)

 [Upper Waitaki - Five Rivers Ltd - Supplementary submissions - application for effluent disposal \(pdf 1 MB\)](#)

 [Upper Waitaki - Southdown Holdings Ltd - Supplementary submissions - application for effluent disposal \(pdf 2 MB\)](#)

The three companies making these applications are Five Rivers Limited, Southdown Holdings Limited and Williamson Holdings Limited.

The deadline for submissions for the first two applicants was 5pm, Friday, December 18 2009, Williamson Holdings had to be renotified, hence its submissions are open until January 15 2010.

If you wish to make a submission regarding the management of the animal effluent produced from the cows, please use the [online submission form](#) on our website:

- [Williamson Holdings Limited](#) - CRC100227, CRC100475, CRC100478, CRC100479 & CRC101541
- Five Rivers Limited - submissions closed
- Southdown Holdings Limited - submissions closed

Please ensure you reference the resource consent numbers you wish to submit on as part of your submission. (See tips below from the MfE website):

Visit the [Ministry for the Environment \(MfE\) website](#) for tips on how to make a submission.

**If you have concerns about these applications of these proposed farms from an animal welfare point of view, there are a number of things you can do apart from writing a submission.**

- You can write a letter to the editor of your local paper
- You can write to your local MP or regional or city/district councillor (Local territorial councils are the ones who have the power to control land-based activities).
- You can write to the Minister of Agriculture, c/- Parliament Buildings, Wellington

- You can also read this information on the Biosecurity New Zealand website:  
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