

SUBMISSION ON BEHALF OF WAITAKI FIRST INCORPORATED

In the Matter of the Resource Management Act 1991, and

In the Matter of applications by Southdown Holdings Limited, Williamson Holdings Limited and Five Rivers Limited, and

In the Matter of Memorandum of Counsel for the above-named applicants dated 28 January 2010, and

In the Matter of the Fifteenth Minute of Commissioners dated 28 January 2010, and

In the Matter of a phone-call taken by Helen Brookes, Chairman of Waitaki First Incorporated from Mrs Ciana Cerri, Consents Hearing Officer, Environment Canterbury at 2.50p.m., on Wednesday 3 February 2010.

1. Introduction

Waitaki First Incorporated understands that

- Legal counsel for Southdown Holdings Limited, Williamson Holdings Limited and Five Rivers Limited has sought an urgent decision from the Panel of Commissioners appointed by Environment Canterbury to hear and decide on consent applications to take and use water in the Upper Waitaki Catchment;
 - the decision now sought by counsel for the above applicants would require the Commissioners to rescind or withdraw an earlier decision relating to consideration of a matter raised by Counsel for the above applicants under Section 103 of the RMA 1991; and
 - that the question the Commissioners have now sought the views of all parties to the above proceedings can be simply put as follows:
 - “whether the water take applications by Southdown Holdings, Williamson Holdings Limited and Fiver Rivers Limited can be determined, that is, Decided and that decision publicly released, prior to decisions on, and public release of that information relating to the discharge consent applications which have been called in by the Minister for the Environment.”
2. Waitaki First Incorporated strongly **opposes** any deviation by the Commissioners from the determination made following consideration of a RMA Section 103 issue and expressed at paragraph 37 of the Eighth Minute of Commissioners dated 6 November 2009 as follows:
- “Accordingly, in respect of the Section 103 matter we direct that:
 - (a) The effluent consent applications as identified at paragraph 18 above be formally joined to these proceedings; ...
 - (g) The effluent applications will be heard and determined immediately following the conclusion of the take applications” (emphasis added).
3. The underlined portion of the text cited above does not make clear whether the phrase “immediately following the conclusion of the take applications” relates only to the “hearing” of the take applications or encompasses also the Panel’s determinations on the take applications.
4. However, the timelines identified at paragraph 37(g) suggest that the Commissioners’ intention was that take applications will be heard, followed by hearing of the effluent applications and that no determinations will be made until all consent applications, be they to take water or discharge effluent, have been heard.
5. Furthermore, the 14th Minute of Commissioners clearly states “that the period of our deliberations will be extensive” (14th Minute, para 15).
6. It is plain that the decision by the Commissioners to direct that effluent discharge consent applications were to be heard alongside or “in tandem” with take applications was driven by the need for full information prior to determining either the take or discharge applications.

7. As the Commissioners put it
“the effluent applications ... are clearly and intimately related to the principal (water take) applications, such that it is necessary for us to hear and decide the applications together so that we can fully understand the effects of what is proposed on the environment.” (14th Minute, para 21, words in brackets and emphasis added).
8. Waitaki First Incorporated agrees.
9. The applications by the parties identified above to take water and discharge contaminants to ground in the form of diluted effluent are inextricably linked at all levels:
 - a. in principle, by the proposal to dilute effluent prior to discharge to ground;
 - b. formally, as identified by the Commissioners, by the wording of the applications relating to the discharge of effluent; and
 - c. in practice, by exercising any consent applications to discharge contaminants to ground, should such applications be granted.
10. The issue becomes whether the fact that the effluent applications have been “called in” and will be determined by a different process invalidates the Commissioners’ interpretation of the RMA Section 103 issue raised by the legal counsel for the above named applicants.
11. And further, whether the fact that the discharge applications will now be heard and determined by a review panel appointed by the Minister for the Environment will complicate, impinge on and/or influence the determination of the water take applications.
12. Waitaki First Incorporated considers the appropriate answer here is no, no and no.
13. While there will be differences at the process and procedure level between the two hearings, determinations by the review panel which are accepted by the Minister can only be appealed to the High Court on points of law, for example, and also differences in evidential arguments to the respective Panels. Each hearing will occur under the same statutory documents and, most significantly, the Minister has appointed three commissioners who are hearing and deciding on the 61 water take applications to the review panel which will hear and determine the discharge applications, in particular, the application to discharge effluent to land.
14. Waitaki First Incorporated considers that the inclusion of three commissioners on the review panel who are also hearing and deciding the take applications is tacit recognition by the Minister that the take and discharge of effluent applications lodged by the applicants above are inextricably linked and, that to gain a sound understanding of the effects of the proposals on the environment, requires oversight by the majority of commissioners-in-common to each Panel.

15. Against the background points above, Waitaki First Inc considers that the Commissioners need to be mindful of the consequences if their decision on the matter put before them dated 28 February 2010, by Mr Whata, is to over-ride or rescind the Hearing Panel's direction of 6 November 2009.
16. Such a determination would be tantamount to saying that interpretation of consent applications under RMA Section 103 is not solely a legal matter but must also take into account process and procedural issues and the make-up of hearing panels.
17. Such a step would, Waitaki First contends, call into question the soundness of decisions subsequently made by the same commissioners.
18. That is not a position Waitaki First considers commissioners should find themselves in.
19. Furthermore, counsel for the applicants lodged a request for the effluent applications to be referred directly to the Environment Court (see Memorandum of Counsel dated 22 December 2009).
20. The implication is that the applicants have accepted that it is appropriate that the take applications and the effluent discharge application be heard and determined by two separate panels under different procedures.
21. From the applicants' perspective then, the hearing of applications relating to the same proposal by two separate panels, which in the present case have a majority of commissioners-in-common, is not at issue.
22. Neither, Waitaki First would add, is there an issue relating to HEARING of take applications and effluent discharge applications separately, in space and time.
23. The issue is timelines relating to the determination of take and discharge of effluent applications.
24. There is a significant difference between hearing of applications and determination on whether to grant or refuse such applications and under what conditions.
25. Commissioners have observed that the period of their deliberations will be extensive (see 14th Minute, 23 December 2009).
26. We have yet to be informed as to timelines associated with the hearing and determination of the called-in consent applications.
27. Neither has the Panel of Commissioners hearing the take applications been specific about when decisions may be expected to be released on those applications.

28. If the time taken to determine take applications associated with the Lower Waitaki River and the release of determinations over time can be taken as a precedent, then it may be that the Upper Waitaki catchment hearing panel will choose to follow the same process, as would be its right.
29. In that situation granting the applicants' request for a determination on the take consents
"in order that the Applicants can assess how to proceed as soon as possible" (Memorandum of Counsel, 28 January 2010, para 3)
would amount to a non-event.
30. A related matter.
31. The 14th Minute of Commissioners of 23 December 2009 was circulated in response to correspondence from applicants and on behalf of applicants who submitted that
"it is procedurally unfair for ... (applicants) who are "renewal" applicants to be further compromised if those applicants continue to be grouped into the proposed effluent discharge consents ... (since) the renewal applicants were already compromised by being grouped into new takes" (14th Minute of Commissioners, 23 December 2009, paras 3 and 4)
32. Waitaki First Incorporated agrees.
33. For the purpose of hearing take applications, the issue has been resolved.
34. But the determination of renewal applications and the public release of decisions on these to the applicants, remains in the same basket with the determinations on all other applications, including those relating to the discharge of effluents, if indeed the Commissioners do not recant their earlier argument that
"the proposal before us is to take (in relation to these applications) water and to apply water mixed with effluent to the sites identified within each of the applications" (8th Minute of Commissioners, dated 6th November 2009, para 20).
35. Waitaki First Inc notes that at paragraph 7 of the 8th Minute of Commissioners the reason for grouping all take applications together was purely an "administrative decision" by Environment Canterbury.
36. At para 19, the Commissioners provide some comfort to "renewal applicants" by noting that the RMA extends certain rights to applicants who lodge "renewal" applications.
37. But, that really is not the point being made about renewal applicants being procedurally disadvantaged by being grouped with "new" take applications.

38. The issue is one of “timeliness” of determination.
39. Waitaki First Incorporated is aware that some of the applications to renew water rights relate to consents which expired as far back as 2000 and that the majority of renewal applications were put on hold when the Project Aqua consent applications were called-in in 2004.
40. We contend it is unacceptable that farmers who run significant businesses are required to wait to receive the assurance which they need that their application to renew an expired consent they currently act on and continue to irrigate with has indeed, been renewed, and equally importantly, the terms and conditions attached to the new consent.
41. We do not believe that other NZ businesses would be required to operate in a situation where income and expenditure budgets could not be based on secure knowledge that an essential element underpinning those budgets was not secure.
42. Hence, Waitaki First Incorporated urges that Commissioners review that point made at paragraph 17 “that it is not necessary to make orders that would separate “renewal” applications from new take applications, those Lodged by Fiver Rivers Ltd, Southdown Holdings Ltd and Williamson Holdings Ltd”.
43. A final point.
44. The Memorandum of Counsel and the 15th Minute of Commissioners, both dated 28 January 2010, attached to a covering letter dated 29 January 2010 was received by me as Chairperson of Waitaki First Incorporated on Monday 1st February 2010.
45. After reading the respective documents and noting that while the minute and Ecan’s covering letter both made provision for parties to comment on matters mentioned in the Memorandum and Minute in writing, there was no mention of the date by which submissions in writing were to be received.
46. Consequently, I rang Ecan and spoke to Mrs Ciana Cerri on that matter.
47. The information conveyed to me by Mrs Cerri was that the Commissioners were aware that the Memorandum and Minute dated 28 January 2010 were not posted to parties who do not have email until Friday 29 January 2010 and would not be received until the following Monday by such parties, especially those who are on rural delivery; that the Commissioners were understanding of the difficulties faced by Community based organisations run by volunteers under the above circumstances; and that if I could lodge a written submission by Friday (the 5th February 2010) that should be acceptable.

48. My response was to assure Mrs Cerri that I would do my best but given my present work load it may be that Waitaki First Incorporated's submission would be lodged during the coming weekend.
49. Today, Wednesday 3 February 2010 at approximately 2.50pm I received a phone call from Mrs Cerri informing me that in response to a Memorandum from Counsel for Fiver Rivers Ltd, Southdown Holdings Ltd and Williamson Holdings Ltd the Commissioners had issued a 16th Minute directing that written submissions be received by Environment Canterbury not by 1pm today, as applied for by Counsel for the applicants, but by 4pm today.
50. Please, please, please – it really is an impossible ask to require that volunteer organisations such as Waitaki First Incorporated meet timelines of that nature.
51. Hence, we request that while this submission from Waitaki First Incorporated will not be available to either commissioners or counsel for the applicants until the proceedings scheduled to commence at 9.30a.m. tomorrow open, Waitaki First Incorporated requests, with due respect, that the written submission on behalf of the organisation is taken into account when the Commissioners determine an appropriate course of action in response to counsel's memorandum on behalf of the aforementioned applicants that the committee
"make a determination on the Applicants' water right applications without resolution of the effluent applications" (Memorandum of Counsel, 28 January 2010, para 2).
52. Waitaki First Incorporated opposes decisions on the Applicants' water right applications being arrived at separately from determinations on the discharge of effluent applications.
53. We contend there are sound reasons why it is not appropriate to decide applications relating to the proposals separately.
54. Waitaki First Inc strongly supports the Commissioners' earlier ruling on the matter and the validity of the arguments on which the ruling is based.
55. Waitaki First Inc further recommends that the Commissioners review the earlier contention that it was considered to be unnecessary at that point to make orders that renewal applications be separated from new the applications and, in particular, the discharge applications lodged by the parties identified above.
56. Waitaki First Incorporated contends there are further sound reasons to support the view that renewal applications be not only heard but also determined and that information released prior to the release of decisions on "new" take applications.
57. In closing, Waitaki First Inc has further concerns that we have not received information relating to further water requirements should the take and discharge

applications lodged by Southdown Holdings Ltd, Five Rivers Ltd and Williamson Holdings Ltd be approved.

58. Additional water needs we have identified include, in particular

- water for stock drinking purposes; and
- water for dairy shed washdown, which under the Waitaki Catchment Water Allocation Regional Water Plan is classified as an industrial activity.

59. Thank you for considering the points made by this submission and the recommendations made.

Helen Brookes (Chairman)
On behalf of Waitaki First Incorporated
3 February 2010.