

**IN THE ENVIRONMENT COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

ENV

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under clause 14 of the First Schedule to the Act

BETWEEN **TE RŪNANGA O NGĀI TAHU**
First Appellant

AND **TE RŪNANGA O MOERAKI**
Second Appellant

AND **KĀTI HUIRAPA RŪNAKA KI PUKETERAKI**
Third Appellant

AND **TE RŪNANGA O ŌTĀKOU**
Fourth Appellant

AND **HOKONUI RŪNANGA**
Fifth Appellant

AND **OTAGO REGIONAL COUNCIL**
Respondent

**NOTICE OF APPEAL TO ENVIRONMENT COURT AGAINST DECISION ON
PROPOSED PLAN CHANGE 6A**

Clause 14(1) Schedule 1 Resource Management Act 1991

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To: The Registrar
Environment Court
Christchurch

- 1 Te Rūnanga o Ngāi Tahu, Te rūnanga o Moeraki, Kāti Huirapa Rūnaka Ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga appeal against a decision of Otago Regional Council on the following Plan Change:

Proposed Plan Change 6A (Water Quality) to the Regional Plan: Water for Otago.

- 2 The Appellants made a submission on that Plan Change.
- 3 The Appellants are not trade competitors for the purposes of section 308D Resource Management Act 1991.
- 4 The Appellants received notice of the decision on 19 April 2013.
- 5 The decision was made by the Otago Regional Council.
- 6 The parts of the decision that the Appellants are appealing are:
 - a The decision or failure to make a decision upon the submission seeking to replace references to "water body" in the Plan Change with words that include artificial water bodies such as drains and water races.
 - b The decision or failure to make a decision upon the submission seeking that explicit reference is made in the Plan Change to Tāngata Whenua values, notably kaitiakitanga.
 - c The decision to amend objective 7.A.1 and the failure to contemplate artificial water bodies and to make explicit reference in the objective and policy framework to Tāngata Whenua values, notably kaitiakitanga in the amended objective.
 - d The decision to amend objective 7.A.2 and the failure to contemplate artificial water bodies and explicit reference in the amended objective to Tāngata Whenua values, notably kaitiakitanga.
 - e The decision or failure to make a decision upon the submission seeking to retain objective 7.A.3 as notified.

- f The decision to amend policy 7.B.1 and the decision or failure to make a decision upon the submission seeking to give effect to the National Policy Statement Fresh Water Management 2011 in the amended policy.
- g The decision to delete policy 7.B.2 (as notified) and the failure to make a decision upon the submission to retain policy 7.B.2.
- h The decision to adopt new policy 7.B.2
- i The decision to adopt new policy 7.B.3.
- j The decision to adopt new policy 7.D.2.
- k The decision to adopt new policy 7.D.3.
- l The decision to adopt new policies 7.D.4 and 7.D.5 and the failure to recognise Tāngata Whenua values and the relevance of the location of a discharge in those policies.
- m The decisions on rules 12.C.1.1 and 12.C.1.3.
- n The decision to prohibit public notification in rules 12.C.2.1, 12.C.2.2, 12.C.2.3 and 13.3.2.1.
- o The decision on rules 12.C.2.1, 12.C.2.2 and 12.C.2.3 and the failure to include effects upon Tāngata Whenua values as a matter the Respondent restricts its discretion to in rule 12.C.2.4.
- p The decision or failure to make a decision upon the submission seeking to amend rule 13.2.1.7 to specify minimum distance between structures on the bed of any lake or river.
- q The decision or failure to make a decision upon the submission seeking to amend rules 13.5.1.1 - 13.5.1.4 to reduce the distance to 100m downstream from a disturbance where there must be no conspicuous change in colour or visual clarity of a water body.
- r The decision or failure to make a decision upon the submission that rule 13.5A.0.1 be retained.

s The decisions that the values specified in Tables 15.2 and Schedule 16 will achieve the characteristics indicative of good water quality at Table 15.1.

7 The reasons for the appeal are as follows:

Background

- a The Ngāi Tahu Claims Settlement Act 1998 recognises Ngāi Tahu as Tāngata Whenua of the Takiwā of Ngāi Tahu Whānui. Ngāi Tahu holds rangatiratanga within the Takiwā. Ngāi Tahu Whānui is the collective of individuals that whakapapa from Waitaha, Ngāti Mamoe and the 5 primary hapū of Ngāi Tahu, namely Kāti Kurī, Ngāti Irakehu, Kāti Huirapa, Ngāi Tūāhuriri and Ngāi Te Ruahikihiki.
- b Te Rūnanga o Ngāi Tahu was created by the Te Rūnanga o Ngāi Tahu Act 1996. It is made up of representatives of each of the 18 Rūnanga in the Takiwā and represents the tribal collective, Ngāi Tahu Whānui.
- c The Crown (by the Respondent) and Ngāi Tahu are Treaty partners pursuant to the principles of Te Tiriti o Waitangi / the Treaty of Waitangi. The principles of Te Tiriti shall be taken into account pursuant to section 8 Resource Management Act.
- d Each Papatipu Rūnanga (traditional rūnanga) exercises rangatiratanga and kaitiakitanga within its own rohe through their whakapapa. Those Papatipu Rūnanga relevant to this appeal are Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka Ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (jointly “Nga Papatipu Rūnanga”).
- e The Takiwā of Te Rūnanga o Moeraki centres on Moeraki and extends from Waitaki to the Waihemo and inland to the Main Divide. The Takiwā of Kāti Huirapa ki Puketeraki centres on Karitane and extends from Waihemo to Purehuehu and includes an interest in Otepoti and the greater harbour of Otakou. The Takiwā extends inland to the Main Divide sharing an interest in the lakes and mountains to Wakatipu-waitai with Rūnanga to the south. The Takiwā of Te Rūnanga o Ōtākou centres on Otakou and extends from Purehuehu to Te Matau and inland and sharing an interest in the lakes and mountains to the western coast with Rūnanga to the north and to the south. The Takiwā of Hokonui Rūnanga centres on the Hokonui region and

includes a shared interest in the lake and mountains between Whakatipu-Waitai and Tawhititarere with other Murihiku Rūnanga and those located from Waihemo southwards.

- f Nga Papatipu Rūnanga have mana whenua and, as Kaitiaki, are responsible for exercising kaitiakitanga over natural and physical resources within their rohe. That kaitiakitanga is exercised as defined and provided for in the Resource Management Act and understood culturally by Nga Papatipu Rūnanga.

Fresh Water as Taonga

- g Water and the fresh water fishery are taonga to Ngāi Tahu and Nga Papatipu Rūnanga. Taonga are left by ancestors to sustain life and must in turn be available for future generations.
- h The Respondent failed to recognise and give appropriate weight to the relationship of Ngāi Tahu and Nga Papatipu Rūnanga with fresh water as taonga.
- i The Respondent failed to recognise the effect water quality has upon freshwater ecosystems and in particular taonga species such as eels (tuna), whitebait (inanga) and fresh water fish species, all of which are important mahinga kai species.
- j The Respondent failed to contemplate artificial water bodies as habitats for mahinga kai and their relationship with Otago's lakes, rivers wetlands and ground water.

Kāi Tahu Ki Otago Natural Resource Management Plan

- k The Ngāi Tahu Whānui prepared and lodged the Kāi Tahu Ki Otago Natural Resource Management Plan (the "NRMP") with the Respondent.
- l The Respondent must deal with and take into account the NRMP when changing its Regional Plan: Water for Otago, section 66(2A) Resource Management Act.
- m The Section 32 Report inadequately considered the NRMP.
- n The Respondent does not deal with the NRMP in its decision.

- o The Respondent failed to take the provisions of the NRMP into account in its decision.
- p Relevant parts of the NRMP the Respondent ought to have taken into account include objective 5.3.3 (Wai Maori General Objectives) and its supporting policies at 5.3.4 (Wai Maori General Policies), along with objective 5.5.3 (Mahika Kai and Biodiversity Objectives).

Objectives and Policies of the Plan Change

- q The Respondent generally failed to provide adequate reasons for its decisions on the notified objectives and policies.
- r Artificial water bodies are not contemplated in the objectives and policies. Artificial water bodies, such as drains and water races, should be contemplated because:
 - i Artificial water bodies are significant habitats for mahinga kai and therefore have cultural values;
 - ii Water bodies (as defined in the Act) and artificial water bodies tend to be hydraulically connected and water quality in the latter impacts upon the former. It is therefore unsound to fail to contemplate artificial water bodies when seeking to control both point and non-point source rural discharges to water.

Objectives 7.A.1 – 7.A.3

- s Changes to and additions to the objectives at 7.A.1 to 7.A.3 and consequential amendment to policies are inadequately and wrongly justified.
- t Objectives 7.A.1 and 7.A.2 are inadequate to achieve the objectives of National Policy Statement Fresh Water Management 2011, particular objectives A1 and A2.
- u The objectives fail to provide explicit reference to Tāngata Whenua cultural values and interests, including, significantly, kaitiakitanga, along with recognition of cultural values associated with water bodies.

Policy 7.B.2 (as notified)

- v By deleting policy 7.B.2 (as notified) the Respondent failed to recognise the relationship between contaminants discharged to land / Papatuanuku and diffuse discharges to water.

- w The Respondent wrongly found that this policy was inconsistent with policy 7.B.4 (7.B.3 as notified). Policy 7.B.2 recognised that discharges to land would only occur “where appropriate”. Policy 7.B.4 provides ample policy guidance to determine whether discharge to land would be “appropriate”, therefore there is no inconsistency justifying deletion of policy 7.B.2.

Policy 7.B.2 (Respondent’s decision)

- x The general approach in the Respondent’s decision to include policy 7.B.2 is supported by the Appellants. However as drafted it is inconsistent with policy 7.D.3, which is undesirable. The policy should be amended to be consistent with the prohibition in policy 7.D.3.

Policy 7.B.3

- y Policy 7.B.3 as imposed by the Respondent will not achieve the goal of the National Policy Statement Fresh Water Management to maintain water quality and where degraded improve it over time.

Policy 7.D.2

- z The general approach in the Respondent’s decision to amend policy 7.D.2 is supported by the Appellants, subject to their concerns as to the robustness of Schedule 16 (and its relationship to Schedule 15) pleaded below.

Policies 7.D.4 and 7.D.5

- aa Policies 7.D.4 and 7.D.5 fail to:
 - i Identify the location of the discharge as a relevant matter to have regard to when considering discharge consents;

 - ii Consider the effects of a discharge upon the cultural values pleaded above.

- bb Policies 7.D.4 and 7.D.5 are inefficiently drafted and ought to be combined into a single “process policy”.

Methods Adopted in Plan Change

- cc The Respondent has failed in both the policy framework and the methods adopted to adequately provide for consideration of cultural values. In particular the special relationship of Tāngata Whenua with water as taonga.

Rules 12.C.1.1 and 12.C.1.3

- dd The Respondent unnecessarily duplicates statutory criteria and language in its decision upon rule 12.C.1.1(d)(2)-(4).
- ee Rule 12.C.1.1 is wrongly decided because determining where “the discharge first enters water” is insufficiently certain to ensure consistent interpretation and implementation of a permitted activity rule.
- ff The relationship between rules 12.C.1.1 and 12.C.1.3 is inefficient because:
- i Rule 12.C.1.3 controls the discharge of nitrogen to ground water via leaching;
 - ii Rule 12.C.1.1(e) controls discharge of contaminants by overland flow;
 - iii The rules may lead to unnecessary and inefficient outcomes. For example, a resource user is complying with Schedule 16 limits and therefore does not otherwise require a restricted discretionary consent under rule 12.C.1.1. However the property is located within an Nitrogen Sensitive Zone identified on Map H1 and is exceeding 10kgN/ha/year ((a)(i)) and therefore requires consent under rule 12.C.1.3. Rule 12.C.1.1(e) would then require an additional resource consent (same activity status – restricted discretionary) under that rule also. This duplication serves no Resource Management purpose.

gg Failing to provide for the use of alternative systems to OVERSEER in rule 12.C.1.3 is inappropriate. OVERSEER is a proprietary system and reliance upon such a system is undesirable in a statutory and regulatory context because:

- i The Version 6.0 referred to in the Plan may well be replaced in the future by superior versions of OVERSEER. This could foreseeably lead to Version 6.0 not being available, which the Respondent would have no control over;
- ii The reference to a particular proprietary system in a regulatory plan means that there is no flexibility to adopt alternative systems that may be more efficient, more reliable, cheaper or simply better without going through a statutory process.

Preclusion of Public Notification

hh The preclusion of public notification at rules 12.C.2.1, 12.C.2.2, 12.C.2.3 and 13.3.2.1 is unsound because of the types of land uses discharge consents may authorise. For example a large dairy conversion may only require restricted discretionary discharge consents, but would otherwise justify public notification. Prohibiting public notification in the fashion decided by the Respondent fails to contemplate or acknowledge these circumstances and that overall the effects upon the environment may justify public notification.

Rules: Land Use on Lakes and River Beds – Chapter 13

- ii The Respondent erred at rule 13.2.1.7 in not finding that a minimum separation distance between crossings was necessary to ensure there is no incremental enclosures of rivers and tributaries that would affect the hydrological functioning, life supporting capacity, ecosystem processes and access to the water body.
- jj The Respondent erred in relation to rules 13.5.1.1 to 13.5.1.4 in allowing for conspicuous change in colour or visual clarity of the water body for a distance of 250 metres from a discharge. A distance of 100 metres would better give effect to the intent of policy 7.D.2 (in the decision) that mixing zones in water bodies be prohibited.

- kk The deletion of rule 13.5.1.8A fails to recognise the significance of and the relationship between Tāngata Whenua and wetlands. Damage to wetlands by stock is a concern and ought to be prohibited.

Schedules 15 and 16

- ll Schedule 15 is a policy tool designed to achieve the Respondent's obligations imposed by the National Policy Statement Fresh Water Management. It is not referred to in the rule regime directly. Schedule 16 is directly contemplated by the permitted activity rules.
- mm The primary reasoning behind the Plan Change was to adopt an effects-based approach to managing both point and non-point source rural discharges to water. The provisions and limits in Schedules 15 and 16 and their enacting rules achieve that effects-based approach but are insufficiently clear to ensure the rules will be consistently and robustly administered.
- nn The Respondent erred by assuming that by achieving the Schedule 16 quantitative standards, the qualitative and quantitative outcomes in Schedule 15 would follow. The Respondent erred in imposing the Schedule 16 values without receiving robust evidence that the policy outcomes in Schedule 15 would be achieved via the standards in Schedule 16.
- oo The Appellant is content with adoption of an 80th percentile value in Schedule 16. Nonetheless the discharge limits in Schedule 16 are based upon achievability and assimilation capacity of the receiving waters. When imposing those limits the Respondent did not receive evidence and therefore failed to properly consider whether those values would achieve the standards in Schedule 15. Therefore while adoption of the 80th percentile standard is positive, the Respondent's decision lacks certainty that the method is the most appropriate way to achieve the objectives.
- pp Schedules 15 and 16 fail to achieve continued improvement of all water bodies (including artificial) and the Respondent failed to acknowledge the need to enhance water quality generally.
- qq The nitrogen loadings at rule 12.C.1.3(a)(i) – (iii) will not achieve the outcomes at Schedule 15.

rr Water bodies meeting the Schedule 16 discharge limits will still require substantial dilution to achieve the Schedule 15 qualitative and quantitative standards.

General Reasons for Appeal

- ss The decision provides that the permitted activity standards in the Plan must be complied with by 1 April 2020, including policy 7.D.2 and rule 12.C.1.3. The lead-in period to achieve compliance is too long and may lead to continued degradation of some water bodies and catchments. An appropriate time period to comply with the requirements of that rule in order to give commercial and rural interests time to modify land use practices is five (5) years.
- tt The Respondent's decision does not represent the optimum planning solution in terms of the sustainable management of Otago's fresh water resource. The Respondent's decision fails to evaluate whether the objectives of the Plan Change achieve the purpose of the Resource Management Act and whether the policies, rules and other methods are the most appropriate way for achieving the objectives, section 32 Resource Management Act.
- uu The Respondent failed to make decisions upon the Appellant's submissions and further submissions. The Respondent has failed to properly make its decisions in accordance with clause 10 of the First Schedule to the Resource Management Act.
- vv The Plan Change is not the most appropriate means of achieving the purpose of the Act. Among other matters it fails to enable Tāngata Whenua to provide for their cultural wellbeing and to sustain the potential of the water in Otago to meet the reasonably foreseeable needs of future generations.
- ww The Respondent failed to give effect to the water quality provisions of the National Policy Statement for Fresh Water Management. In particular:
- i The Respondent failed to give effect to objective A1;

- ii The Respondent failed to give effect to objective A2 by failing to provide for robust methods (including but not limited to Schedules 15 and 16) to achieve that objective;
 - iii The Respondent failed to give effect to objective D1 by generally failing to recognise and reflect Tāngata Whenua cultural values when contaminants are discharged to fresh water or to land where they may enter fresh water;
 - iv The Respondent did not give effect to policy D1(c) by failing to reflect Tāngata Whenua values and interests in its decisions, as pleaded in this Appeal.
- xx The objectives do not generally achieve the purpose of the Act and specifically fail to take into account section 8. The Plan Change therefore fails to enable Tāngata Whenua to provide for their social, economic and cultural well-being, while providing for the matters at section 6(a) – (c).

8 The Appellants seek the following relief:

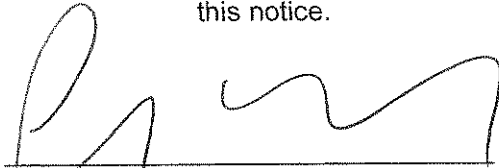
- a Amend references to “water body” and “lakes, rivers, streams, wetlands and groundwater” in the Plan Change to words that include artificial water bodies such as drains and water races.
- b Provide explicit reference where appropriate in the Plan Change to Tāngata Whenua values, notably kaitiakitanga (jointly with paragraph 8a the “general relief sought”).
- c Amend objectives 7.A.1, 7.A.2 and 7.A.3 to provide for the maintenance and enhancement of water quality in Otago’s artificial and natural fresh water bodies while recognising the need to support natural, cultural and human use values.
- d Amend policy 7.B.1 to apply to artificial as well as natural waterways and water bodies and to better reflect the qualitative and quantitative standards at Schedule 15.
- e The reinstatement of policy 7.B.2 (as notified) promoting the discharge of contaminants to land in preference to water where appropriate.
- f Amend policy 7.B.2 to be consistent with policy 7.D.3.

- g Amend policy 7.B.3 to give effect to the National Policy Statement for Fresh Water Management's directive that overall water quality should be maintained and where degraded improved over time.
- h Retain reference in policy 7.D.2 to Schedule 16, provided Schedule 16 standards can be shown to be scientifically robust, and consequential amendments policy 7.D.2 to give effect to general relief sought.
- i Amend policy 7.D.3 to contemplate artificial water bodies.
- j Delete policy 7.D.4 and 7.D.5 and combine into a single process policy to provide guidance when assessing applications for resource consent. Include reference to cultural values and the physical location of the discharge as matters to be considered when assessing applications for resource consent.
- k Amend rule 12.C.1.1 to remove uncertainty as to what is meant by "where the discharge first enters water", delete reference in rule to matters found in section 107 Resource Management Act, delete reference to rule 12.C.1.3, amend timeframes to comply with Schedule 16 discharge limits for water quality to 1 April 2018 and make any consequential amendments to give effect to the general relief sought.
- l Amend rule 12.C.1.3 to remove reference to OVERSEER and make consequential amendments to give effect to general relief sought. Reconsider and amend values of kgN/ha/year to achieve the "good water quality" standards and characteristics in Schedule 15.
- m Amend Maps H1 - H6 to cover the entire Otago Region including, if necessary, preparing new maps on the same or a similar scale to grant this relief.
- n Amend rules 12.C.2.1, 12.C.2.2, 12.C.2.3 and 13.3.2.1 by deleting prohibition upon public notification of applications for resource consent.
- o Amend rule 12.C.2.4 by adding an additional matter to which the Respondent has restricted its discretion under rules 12.C.2.1, 12.C.2.2 and 12.C.2.3 to include effects upon Tāngata Whenua values.
- p Amend rule 13.2.1.7 to specify a minimum distance between any two crossings or structures.

- q Amend rules 13.5.1.1 to 13.5.1.4 to reduce the distance within which conspicuous change in colour or visual clarity of the water body is allowed from 250 metres to 100 metres.
- r Reinstatement of rule 13.5.A.0.1.
- s Amend Schedules 15 and 16 to ensure that compliance with standards in Schedule 16 will achieve Schedule 15 results, give effect to National Policy Statement Fresh Water Management and generally achieve the purpose of the Resource Management Act.
- t Amend timeframes to comply with Schedule 16 discharge limits for water quality to 1 April 2018 in all relevant objectives, policies and rules.
- u Such other relief that this Court deems just.

9 The Appellants attach the following documents to this notice:

- a a copy of their submission and further submission;
- b a copy of the submissions the Appellants' further submission submitted upon;
- c a copy of the Plan Change as notified;
- d a copy of the Section 32 report
- e a copy of the Respondent's decision;
- f a list of names and addresses of persons to be served with a copy of this notice.



C.P. Thomsen

Solicitor for the Appellants

5 June 2013

Date

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Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the appellant's submission and (or or) the decision (or part of the decision) appealed. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch