**BEFORE THE INDEPENDENT HEARING COMMISSIONERS**

**Consent No RM16.093.01**
**Consent No RM18.345**

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

**AND**

**IN THE MATTER** of applications by Criffel Water Limited and Luggate Irrigation Company Limited/Lake McKay Station Limited for water permits

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# LEGAL SUBMISSIONS IN SUPPORT OF THE REPORTING OFFICERS FOR OTAGO REGIONAL COUNCIL
**22 October 2019**

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Otago Regional Council's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

Solicitor: L F de Latour
(lucy.delatour@wynnwilliams.co.nz)

WYNNWILLIAMS

**MAY IT PLEASE THE COMMISSIONERS**

1 These submissions address several matters raised in the evidence and written legal submissions of the two applicants, Criffel Water Limited (**Criffel**) and Luggate Irrigation Company Limited / Lake McKay Station Limited (**Luggate**) and the submitters.

2 It should be noted that these submissions do not address every matter raised in evidence and the submissions. The submissions are intended to provide assistance to the Reporting Officers and Hearing Commissioners regarding certain matters raised by the Applicants and submitters.

3 The key outstanding issues these submissions address are:

(a) The existing environment and Policy B7 of the National Policy Statement for Freshwater Management 2014 (amended in 2017) (**NPSFM**);

(b) The relevance of the *Lindis* decision;

(c) Other matters concerning the NPSFM, particularly 'over-allocation' and Objective B2; and

(d) Consent duration.

**The existing environment**

4 Counsel for the Applicants has suggested that a "no takes" environment is relevant to aspects of the Hearing Commissioners assessment (including for the purposes of section 104(3)(d)[1], and when assessing the NPSFM[2]).

5 It is accepted that Policy B7 is of limited relevance to these applications, given that the Policy has not been included in the Regional Plan: Water for Otago (**RPW**) and that it appears to apply more directly to new

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1 Legal submissions for Applicants' dated 18 October 2019, paragraph 14.

2 In particular, the applicants have suggested that Policy B7 of the NPSFM is relevant to how the existing environment should be assessed for the purposes of determining the two applications, at least insofar that the assessment of the NPSFM is concerned (see legal submissions for Applicants dated 18 October 2019, paragraph 20). This can be contrasted to the evidence of Ms Scott, for the applicants, which suggests that Policy B7 is not relevant to the applications. See evidence of Kate Scott for Applicants dated 8 October 2019, paragraph 57.

activities, rather than applications seeking resource consent to replace an expiring consent.

6 However, the Applicants' suggestion that Policy B7 of the NPSFM somehow means that the starting point for assessing the effects on the environment is not the *Ngati Rangi* environment, but the *status quo* environment (at least insofar that the NPSFM is concerned)[3] is not accepted:

(a) The High Court has confirmed that the existing environment cannot include, in the context of a renewal application, the effects caused by the activities for which the renewal consents are sought, unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist.[4] This is binding authority on what constitutes the "environment". Policy B7 is simply a policy that regard has to given to as part of the section 104 assessment.

(b) The prospect that the "environment" is different for the purposes of section 104(1)(a) and 104(1)(b) simply does not fit with section 104. The Hearing Commissioners task is to assess the actual and potential effects on the environment of allowing the activity (with the environment excluding the water currently authorised for abstraction by the deemed permits) and the relevant provisions of the NPSFM, applying their terms on their face. There is nothing in Policy B7 to suggest that all of the assessment of the objectives and policies in the NPSFM should be treated as if the existing abstractions will be treated as part of the environment when a water permit is being renewed.

(c) The *Ngati Rangi* approach remains appropriate for all aspects of the section 104 assessment on the applications before that Hearing Commissioners given that in a re-consenting process, new resource consents are granted rather than "renewals", and if the effects of activities authorised by expiring consents issued by a regional council always formed part of the environment, it would be difficult to regulate activities in the future.

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3 Legal submissions for Applicants' dated 18 October 2019, paragraph 21.

4 *Ngati Rangi Trust v Manawatu-Whangaui Regional Council* [2016] NZHC 2948 at [65].

(d) In particular, if a *status quo* flow regime where to be adopted as the "environment" for the purposes of assessing a replacement application under section 104, it is difficult to see how a replacement application could ever be determined to have an effect on the environment.

7 Further there is no case law that Counsel is aware of that suggests that the "environment" should be treated any differently for the purposes of section 95E (and therefore section 104(3)(d)). The Hearing Commissioners should not apply the *status quo* environment for the purpose of section 104(3)(d).

8 While it is submitted that the Hearing Commissioners need to approach the application of Policy B7 and the "status quo" flow regime to determining the environment (both in terms of section 104(3)(d) and the wider section 104 assessment) with caution, several points of the Applicants' submissions are accepted:

(a) Although a "no takes" environment should be the starting point, an effects assessment does not occur in isolation. The plan provisions will be highly relevant to that assessment, both for the purposes of section 104(3)(d) and the wider section 104 assessment.[5]

(b) Clearly the RMA, and subordinate planning instruments, including the RPW recognise and provide for continued abstraction.

(c) While *Ngati Rangi* has the effect of meaning that the existing deemed permits must not be considered as part of the environment for the purposes of assessing the effects of the applications (i.e. that level of abstraction cannot be treated as continuing into the future), this does not mean that the environment should be treated as if the effects of the existing deemed permits never existed (i.e. a return to a naturalised flow regime and what ecology would be present in that environment). For example, the submission by the Applicant that the Clutha and Roxburgh dams are part of the environment and that the environment only includes Longfin eels only in so far as they existing now, is fully accepted and endorsed. Indeed, any

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5 Legal submissions for Applicants' dated 18 October 2019, paragraph 12.

alternative treatment of the "environment" would in my submission be fanciful.

**The relevance of the *Lindis* decision**

9 The Environment Court's decision in *Lindis Catchment Group Inc v Otago Regional Council*[6] (the **Lindis decision**) concerned a plan change to the RPW to set a a minimum flow and "primary allocation" of water for the Lindis River in Schedule 2A and 2B of the RPW.

10 Given the decision concerned a plan change (and the related legal tests applicable to making decisions on the provisions of planning documents) I consider that its relevance to the section 104 decision under consideration in this case is limited. The subsequent decision on the associated direct referral will be of more relevance but has not yet been released by the Environment Court.

11 However, there are a couple of matters of broader relevance arising from the *Lindis* decision which I address as follows.

(a) Somewhat regrettably for the ORC, the decision higlights some deficiencies in the current planning framework. These include that the RPW is "out of date" with respect to newer provisions in the form of the NPSFM and Regional Policy Statement, that have to be given effect to by lower order planning documents, including the RPW.[7] The Court was was also critical of the approach taken by the RPW to managing allocation given that in most cases the primary allocation is simply set as the sum of all existing water takes in the catchment.[8] While the statutory context is different under section 104, these observations should be borne in mind in terms of how the Hearing Commissioners undertake their assessment under section 104, and the weight attributed to the different matters in section 104.

(b) The decision itself also highlights the difference in the task before a decision maker on a resource consent application, as compared to a decision on a planning document. In particular, in the context of Policy 6.4.2 of the RPW which defines the primary allocation of

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6 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166.

7 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166, at [117].

8 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166, at [3].

a catchment as the greater of the Schedule 2A limit (in this case 500L/s) and the consented allocation under Policy 6.4.2(b) (1024L/s) the decision emphasises the discretionary (or in this case restricted discretionary) nature of the resource consent application.[9] In my submission, given that the Schedule 2A limit within the RPW still has not been met, the application must be subject to considerable scrutiny. The decision also highlights that an application beyond the Schedule 2A limit, but less than the consented primary allocation limit in Policy 6.4.2 can still be declined by the Council.[10]

12 I also specifically consider the *Lindis* decision in the context of the application of Objective B2 of the NPSFM to these two applications as follows.

**The application of Objective B2 of the NPSFM and 'over-allocation'**

13 Ms Scott's evidence addresses the application of Objective B2 of the NPSFM to the applications. Her evidence suggests that given Luggate Creek has not proceeded through an FMU or limit setting process for the purposes of the NPSFM then there can be no "over-allocation" as the NPSFM has defined that term.[11]

14 The *Lindis* decision also suggests that because of the way the NPSFM defines over-allocation and the RPW's approach of defining the primary allocation limit under Policy 6.4.2 as the greater of the Schedule 2A limit and the consented allocation that there can be no over-allocation for the purposes of the NPSFM. The decision states:

> [180] As for Objective B2, which is to avoid over-allocation and phase out existing over-allocation, "over-allocation" and "limit" are defined as meaning:
>
> ***"Over-allocation"*** *is the situation where the resource:*
> *(a) has been allocated to users beyond a limit; or*
> *(b) is being used to a point where a freshwater objective is no longer being met.*
> *This applies to both water quantity and quality.*
>
> ***"Limit"*** *is the maximum amount of resource use available which allows a freshwater objective to be met.*
>
> There are no limits in the NPSFM in relation to water quantity, so it may refer to limits in subordinate regional plans. We consider the references in (a) and (b) of the definition of "over-allocation" are to objectives in both the NPSFM itself and in regional plans.

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9 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166, at [110].

10 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166, at [252].

11 Evidence of Kate Scott for Applicants dated 8 October 2019, paragraph 35.

> [181] In relation to the first definition of over-allocation, since a "limit" in the NPSFM includes a limit in a (regional) plan we need to consider the allocation limits in the ORP:W. As we have recorded, the way this works is that whether the (notional) limit is set at 1,200 1/s (under 900 MF option) or at 1,640 1/s (under the 550 MF option) the actual limit under Policy 6.4.2 will continue to be 3,248 1/s until all the existing permits expire - or are surrendered. As permits are surrendered the allocation limit will move down to, or at least close to, the limit set by this decision. Either way there is neither at present, nor is there likely to be in the reasonably foreseeable future, over-allocation (in the "beyond a limit" sense of the NPSFM) in the Lindis River's mainstem.

15 However, when analysing the proposed flow regime, the Court went on to state:

> [483] The 550 MF option reduces allocation and increases the volume of water instream. Mr Logan described this as "capturing the spirit of, if not the letter of, Objective B2." In respect of the first component of the definition of "over-allocation "in the NPSFM - " ... the resource a) has been allocated to users beyond a limit ... " - we consider the issue is the other way around. Because the limit in the ORP:W is so high - 3,777 1/s or thereabouts - the river has in recent years run dry in a number of places (notably in the Crossing reach) for protracted periods as a result of abstraction for irrigation. On any reasonable layperson's understanding that is over-allocation of the water but it is not in terms of the definition.

16 While the decision questions whether there can be “over-allocation” under the RPW framework, the Court nevertheless assessed the Plan Change against Objective B2.

17 In this case, given that Schedule 2A already contains an allocation limit, that has been through a Schedule 1 process (albeit before the NPSFM), and the Applicants are significantly reducing their consented primary allocation, it is clearly open to the Hearing Commissioners to find that the application will contribute to phasing out over-allocation for the purposes of Objective B2 of the NPSFM.

**Consent duration**

18 The issue of consent duration is a critical matter to be determined in making a decision on the two applications. The Reporting Officer’s will address consent duration further as part of the presentation of the section 42A report.

19 The Applicants’ submissions provide a detailed outline of the key case law applicable to the setting of a term of consent. This case law is not repeated for the purposes of these submissions, however, there are several matters that I consider need to be specifically addressed.

20 The first point concerns the fact that none of the cases referred to by the Applicants have been decisions made since the NPSFM came into effect.

21 The NPSFM requires ORC to review and amend its regional planning documents to the extent necessary to ensure that the objectives and policies of the NPSFM are given effect to. The requirements of the NPSFM represent a step change in the management of water in New Zealand.

22 As the evidence of Ms Bartlett for Te Rūnanga o Ōtākou, Kāti Huirapa Rūnanka Ki Puketeraki and Te Rūnanga o Moeraki highlights incorporation of Te Mana o te Wai under the NPSFM framework, along with the other NPSFM directions could well result in changes in the allocation framework for the Luggate catchment under ORC's progressive implementation programme.

23 The fact that there might be a future planning process undermined by granting a longer consent duration was clearly a matter that influenced the Court's decision in *Royal Forest and Bird Protection Soc of NZ Inc v Waikato Regional Council*.[12]

24 In *PVL Proteins* the Court also appeared to accept that changing "standards" might be a matter that influences the granting of a shorter duration consent. The Court stated:[13]

> [32] The Regional Council submitted that an activity that generates known and minor effects on the environment on a constant basis could generally be granted consent for a longer term, but that one which generates fluctuating or variable effects, or which depends on human intervention or management for maintaining satisfactory performance, or relies on standards that have altered in the past and may be expected to change again in future should generally be granted for a shorter term. We accept that in general those propositions might influence decisions on the term of discharge consents.

25 The Applicants' legal submissions suggest that any impending changes to the RPW as a result of the NPSFM are not a significant factor in determining the appropriate duration in this case given that there are review powers that accommodate those changes.[14]

26 However, there are some shortcomings in simply relying on a review condition, or the Council's powers under section 128(1)(b):

(a) The statutory framework when considering a review differs from that applicable to a renewal application affected by section 124 of

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12 *Royal Forest and Bird Protection Soc of NZ Inc v Waikato Regional Council* [2007] NZRMA 439 (EnvC) at [51]-[52].

13 *PVL Proteins Limited v Auckland Regional Council* A061/01 [2001] NZEnvC 220, at [32].

14 Legal submissions for Applicants' dated 18 October 2019, paragraph 92.

the RMA. The requirement to consider financial viability on a review under section 131, might constrain the additional controls that the Council can place on the consent, compared to if the application were considered afresh.

(b) Relying on a review might not always be appropriate or adequate; for example, a review cannot be initiated by parties other than the Council.[15]

(c) Historically, there has been some reluctance by Councils to initiate reviews to bring existing consents in line with new planning provisions, particularly, given that reviews under section 128(1)(b) are not cost recoverable for the Council. [16]

(d) Further, a review cannot consider the fundamental question as to whether the consent should be granted for a further term (given that it is limited to addressing the consent conditions and cannot have the effect of cancelling a consent except in limited circumstances). Notably in the *PVL* decision, the Environment Court imposed a duration of 14 years, rather than the 35 years sought by the Appellants (and the 10 years imposed by the Council at first instance).

27 The Applicants' reliance on review also does not address the uncertainty of the residential activities that form part of the Luggate application actually proceeding. Given that there are a range of water uses proposed to be provided for in one consent (as opposed to separate consents) this is not a situation where that allocation would otherwise lapse if the individual consent were never exercised. Even if future changes to the RPW never resulted in changes to the allocation limits or minimum flows the effect of a longer-term duration could result in this water remaining allocated, and not available for allocation to other parties, even in the event that this development never proceeds.

28 In terms of the costs associated with obtaining a new resource consent, this point in neutral. In *Manawatu District Council v Manawatu District Council*[17] the Court was required to consider the cost of reconsenting the

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15 *PVL Proteins Limited v Auckland Regional Council* A061/01 [2001] NZEnvC 220, at [31].

16 See section 36(1)(cb) of the RMA that limits the powers of a Council to recover the costs of a review where the review is undertaken under section 128(1)(b).

17 *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53.

Fielding wastewater treatment plant based on a consent duration of 10 years. There the Court acknowledged when considering whether a review could be relied upon instead, that these expenses might still be incurred at the time of any review of conditions of consent, even if a longer term consent was granted.[18] As noted above, there are costs for Councils from undertaking reviews that are not cost recoverable.

29 In relation to the value of investment of the Applicants' in relation to the existing activities there are a couple of points of note.

30 Section 104(2A) provides that:

> When considering an application affected by section 124…a consent authority must have regard to the value of the investment of the existing consent holder.

31 The section does not directly address whether the value of investment is concerned with the value of any existing investment, or the value of any investment that might be needed to bring the activity in line with the requirements of planning documents.

32 In this case, the question of the value of investment for the purposes of section 104(2A) should not be confused with the economic evidence regarding whether a certain consent duration will actually provide the financial return necessary for *new* irrigation development to proceed.[19]

33 While question of investment may be relevant to the wider question of consent duration, it is not a specific consideration under section 104(2A).

34 In relation to investment when assessing consent duration it is noted that granting a 10 year consent, in circumstances where significant investment exists and is required, both in terms of existing assets, and the need to bring assets "up to scratch" with current requirements is not unprecedented. In *Manawatu District Council v Manawatu District Council*[20] the District Council was facing expenditure (including future expenditure) in the order of $23 million to complete upgrades to the Fielding wastewater treatment plant. The Environment Court in that case upheld a decision to grant a 10 year term for the consent.[21]

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18 *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53, at [161].

19 See for example, Evidence of George Collier for Applicants dated 8 October 2019, paragraph 38.

20 *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53, at [159].

21 *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53, at [170].

35 Finally, it is re-iterated that section 123 of the RMA contains no presumption that a longer term, or 35 year consent will be granted. Indeed, the presumption in the Act if no term is specified in a water permit, is that the water permit be subject to only a 5 year term.

Dated this 22nd day of October 2019

**L F de Latour**

**Counsel for Otago Regional Council**