

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

**I TE KŌTI TAIAO O AOTEAROA
ŌTAUTAHI ROHE**

ENV-2020-CHC-128

UNDER the Resource Management Act 1991 (RMA)

IN THE MATTER of the Omnibus Plan Change - Plan Change 8 and Plan Change 1, being part of a proposal of national significance directed by the Minister for the Environment to be referred to the Environment Court under section 142(2)(b) of the RMA

AND

IN THE MATTER of an application under section 149T of the RMA

OTAGO REGIONAL COUNCIL

Applicant

**MEMORANDUM OF COUNSEL ON BEHALF OF THE OTAGO REGIONAL
COUNCIL
5 March 2021**

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MAY IT PLEASE THE COURT

- 1 On 1 March 2021, a Memorandum of Counsel was filed on behalf of the Otago Regional Council (**Council**) in respect of proposed Plan Change 8 (**PC8**) to the Regional Plan: Water for Otago (**Water Plan**) and proposed Plan Change 1 to the Regional Plan: Waste for Otago (**PC1**) in response to the directions in the Environment Court's Minute dated 15 February 2021.
- 2 In that Memorandum, counsel for the Council advised that the Council was considering whether Rules 13.5.1.8A and 13.5.1.8B of the Water Plan needed to be deleted, in light of the Resource Management (Stock Exclusion) Regulations 2020 (**Stock Exclusion Regulations**).¹
- 3 Further, the Council committed to providing a track change set of provisions incorporating all proposed amendments required in response to the National Policy Statement for Freshwater Management 2020 (**NPS-FM 2020**), Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**), and the Stock Exclusion Regulations, by 3pm, Friday 5 March 2021.²
- 4 The purpose of this Memorandum is to confirm the Council's position with respect to the Stock Exclusion Regulations and to provide the Court with a track change set of provisions (enclosed as **Appendix 1** to this Memorandum).

Stock Exclusion Regulations

- 5 As stated in the Memorandum of Counsel dated 1 March 2021, the Council wishes to avoid duplication of controls on stock access to water and considers that as this activity is now regulated under the Stock Exclusion Regulations, it is no longer necessary, or desirable, to control the activity in PC8 prior to the notification of a new land and water regional plan for Otago.
- 6 The Council has considered whether clause (a) of Rule 13.5.1.8A that is not sought to be amended by PC8 and Rule 13.5.1.8B also should be deleted.

¹ Memorandum of Counsel on behalf of Otago Regional Council dated 1 March 2021 at [9].

² Memorandum of Counsel on behalf of Otago Regional Council dated 1 March 2021 at [8].

- 7 The Stock Exclusion Regulations were made under section 360 of the Resource Management Act 1991 (**RMA**). Any inconsistency between plan provisions and the Stock Exclusion Regulations is addressed in section 360(2F) of the RMA, which provides that:

(2F) Regulations made under subsection (1)(hn) or (ho) may specify—

(a) that rules inconsistent with those regulations be withdrawn or amended—

(i) to the extent necessary to remove the inconsistency; and

(ii) as soon as practicable after the date on which the regulations come into force; but

(iii) without using any of the processes under Schedule 1 for changing a plan or proposed plan; and

(b) in relation to a rule made before the commencement of the regulations,—

(i) the extent to which a matter that the regulations apply to continues to have effect; or

(ii) the period for which a matter that the regulations apply to continues to have effect.

- 8 The Stock Exclusion Regulations were made under subsection (1)(hn), which provides that regulations may be made for the purpose of prescribing measures for the purpose of excluding stock from various water bodies.³
- 9 The ability to remove any rules that are considered inconsistent with the Stock Exclusion Regulations (without using the Schedule 1 process, as soon as practicable) must be expressly noted in the Stock Exclusion Regulations themselves.
- 10 Regulation 19 of the Stock Exclusion Regulations provides:

19 More stringent regional rule prevails over provision in these regulations

Despite section 68(2) of the Act,⁴ a more stringent rule in a regional plan prevails over a provision in these regulations that relates to the same matter.

³ RMA, s 360(1)(hn).

⁴ For completeness, we note that section 68(2) of the RMA provides that every rule has the force and effect of a regulation in force under the Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

- 11 The Stock Exclusion Regulations do not provide for the removal of rules in a plan that are inconsistent with the Stock Exclusion Regulations, without using a Schedule 1 RMA process.
- 12 Therefore, the removal of clause (a) of Rule 13.5.1.8A and 13.5.1.8B requires an assessment of the scope of PC8 and the submissions lodged. Whilst there may be scope within submissions to remove these provisions as a consequential amendment to the deletion of other provisions, the Council does not propose at this time to seek the deletion of provisions that were not proposed to be amended by PC8 as notified.
- 13 This means that in circumstances where the remaining rules in the Water Plan are more stringent than the Stock Exclusion Regulations, the rules in the Water Plan will prevail. Any remaining inconsistency will be dealt with as part of the new land and water regional plan for Otago.

Dated this 5th day of March 2021



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P A C Maw / M A Mehlhopt

Counsel for Otago Regional Council

**Appendix 1 – Amendments to Provisions in response to the NES-F and
Stock Exclusion Regulations**

Amendments to Provisions in response to the National Environmental Statement for Freshwater and the Stock Exclusion Regulations.

New Policy 7.D.9

Enable farming activities while reducing their adverse environmental effects by:

- ~~(a) Promoting the implementation of good management practices (or better) to reduce sediment and contaminant loss to water bodies; and~~
- ~~(b) Managing stock access to water bodies to:
 - ~~(i) Progressively exclude stock from lakes, wetlands, and continually flowing rivers; and~~
 - ~~(ii) Avoid significant adverse effects on water quality, bed and bank integrity and stability, Kai Tahu values, and river and riparian ecosystems and habitats; and¹~~~~
- ~~(c) Setting minimum standards for intensive grazing; and²~~
- ~~(d) Managing the risk of sediment run off from farming activities by:
 - ~~(i) Implementing setbacks from water bodies and establishing riparian margins, and~~
 - ~~(ii) Limiting areas and duration of exposed soil; and³~~~~
- ~~(e) Promoting the identification and management of critical source areas within individual properties, to reduce the risk of nutrient or microbial contamination and sediment run-off.⁴~~

Amended Rule 13.5.1.8A

The disturbance of the bed of any lake or river, or any Regionally Significant Wetland by livestock, excluding intentional driving of livestock, and any resulting discharge or deposition of bed material, is a *permitted* activity, providing it does not:

- ~~(a) It does not
 - ~~(i) Involve feeding out on that bed or wetland; or~~
 - ~~(b) Cause or induce noticeable slumping, pugging or erosion; or~~
 - ~~(c) Result in a visual change in colour or clarity of water; or~~
 - ~~(d) Damage fauna, or New Zealand native flora, in or on any Regionally Significant Wetland; and~~~~
- ~~(b) From 2022:
 - ~~(i) All dairy cattle and pigs are excluded from the beds of lakes, continually flowing rivers wider than 1 metre and Regionally Significant Wetlands; and~~
 - ~~(ii) where stock are excluded under (i), a setback of five metres from the beds of lakes, continually flowing rivers wider than 1 metre and Regionally Significant Wetlands is implemented.⁵~~~~

~~Note: 1. For the purposes of Rule 13.5.1.8A(b), a continually flowing river is considered to be wider than 1 metre if the river is wider than 1 metre at any point within the boundary of a landholding at its annual fullest flow without overtopping its banks.~~

~~2. For the purposes of Rule 13.5.1.8A(b)(ii), setbacks are measured from the edge of the wetted bed of a lake or river wider than 1 metre or Regionally Significant Wetland and are averaged across the landholding.⁶~~

¹ Submission 80042.17

² Submission 80042.18

³ Submission 80042.18

⁴ Submission 80042.18

⁵ Submission 80042.17

⁶ Submission 80042.17

New Definition:

~~**Dairy cattle** — Means cattle farmed for milk production and includes dairy cows, weaned and unweaned calves of dairy cows, and non milking dairy cattle such as youngstock and bulls.⁷~~

Advice Note: For regulations on stock exclusion from waterways refer to the Resource Management (Stock Exclusion) Regulations 2020.⁸

New Section 14.6

~~**14.6 — Rural land uses⁹**~~

~~**14.6.1 — Permitted activities: No resource consent required**~~

~~14.6.1.1 The use of land for intensive grazing is a **permitted** activity providing:~~

- ~~(a) — The total cumulative area of the landholding used for intensive grazing is the lesser of:
 - ~~(i) — 100 hectares; or~~
 - ~~(ii) — 10% of the total cumulative area of the landholding.~~~~
- ~~(b) — There is no intensive grazing in any critical source area; and~~
- ~~(c) — Stock are progressively grazed (break-fed or block-fed) from the top of a slope to the bottom of a slope; and~~
- ~~(d) — A vegetated strip of at least 10 metres is maintained between the intensively grazed area and any water body, and all stock are excluded from this strip during intensive grazing.¹⁰~~

~~**14.6.2 — Discretionary activities: Resource consent required**~~

~~14.6.2.1 Except as provided by Rule 14.6.1.1, the use of land for intensive grazing is a **discretionary** activity.¹¹~~

New Definition:

~~**Intensive grazing** — Means grazing of stock on forage crops (including brassica, beet and root vegetable crops), excluding pasture and cereal crops.¹²~~

Advice Note: For rules applying to the use of land on a farm for intensive winter grazing refer to the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 Subpart 3.¹³

⁷ Submission 80042.17

⁸ Submission 80042.17

⁹ Submission 80042.18

¹⁰ Submission 80042.18

¹¹ Submission 80042.18

¹² Submission 80042.18

¹³ Submission 80042.21