

**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, being part of a proposal of national significance directed by the Minister for the Environment to be referred to the Environment Court under s 142(2)(b) of the RMA

AND

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

BETWEEN **OTAGO REGIONAL COUNCIL**
Applicant

**LEGAL SUBMISSIONS ON BEHALF OF THE OTAGO REGIONAL COUNCIL
IN RELATION TO SCOPE FOR RELIEF SOUGHT BY WISE RESPONSE
SOCIETY INC
23 July 2021**

Judicial Officer: Judge Borthwick

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

WYNNWILLIAMS

Solicitor: P A C Maw / M A Mehlhopt
(philip.maw@wynnwilliams.co.nz /
michelle.mehlhopt@wynnwilliams.co.nz)

MAY IT PLEASE THE COURT:**Introduction**

- 1 These legal submissions are filed on behalf of the Otago Regional Council (**Council** or **ORC**) in relation to Plan Change 8 to the Regional Plan: Water for Otago (**PC8**).
- 2 At the pre-hearing conference on 14 July 2021, the Court directed the Council to file legal submissions addressing whether the relief sought in the submission of Wise Response Society Inc (**Wise Response**)¹ is within scope of PC8. The Court also directed the Council to address the submission of Mr Thompson.
- 3 The Council has had further discussions with Mr Thompson and the matters raised in his submission regarding soil health are being discussed separately with the Council. Counsel has asked Mr Thompson to confirm whether he will be pursuing these matters directly in relation to Plan Change 8. Accordingly, these have not been addressed further in the context of these legal submissions. If Mr Thompson does confirm that he does wish to pursue these matters, the Council will seek further directions regarding filing submissions setting out the relief it considers is outside of scope.
- 4 In relation to the submission of Wise Response, these legal submissions:
 - (a) First, address more generally the principles applying to scope, including the terminology used in section 149E(1) of the RMA regarding the need for a submission to be “about” the plan change; and
 - (b) The reasons why the Council considers that the proposed relief sought by Wise Response in relation to input control is outside of scope of PC8 because it is not “on” / “about” the plan change. The Council considers that the burden rests with Wise Response to establish that the relief sought is within the Court’s jurisdiction to grant.
- 5 These submissions address only the relief sought by Wise Response in relation to nutrient input control. For completeness, the Council notes

¹ Submission 80069.

that there may be other general submissions lodged on PC8 that have not been the subject of mediation that are not within scope of PC8. The Council wishes to reserve its position on scope in respect of these submissions until parties confirm if they want to pursue the relief sought.

Scope principles

- 6 In making a decision on PC8, the Environment Court must (relevantly):²
- (a) apply clause 10(1) to (3) of Schedule 1 as if it were a local authority; and
 - (b) may exercise the powers under section 293.
- 7 Clause 10 of Schedule 1 to the Act provides for the making of decisions on provisions and matters raised in submissions.
- 8 In giving its decision on the provisions of PC8 and any matters raised in submissions,³ the Court must be satisfied that there is scope to make any such amendments to PC8. In doing so, the Court must consider whether submissions received are "about" PC8.
- 9 Section 149E(1) of the RMA provides that, when a matter is called in under section 142(2) and publicly notified under section 149C, any person may make a submission "about" the matter to the Environmental Protection Authority (**EPA**).
- 10 Submissions on PC8 must be in the prescribed form.⁴ The form requires a submitter to give details of the specific provisions of PC8 that the submission relates to, and to give precise details of the decision which the submitter seeks from the Environment Court.⁵ Submissions must be "about" PC8.⁶ If a submission is not "about" PC8, the Environment Court does not have jurisdiction to consider it.

² RMA, s 149U(6)(a)-(b).

³ In accordance with clause 10(1) of Schedule 1 of the RMA.

⁴ RMA, s 149E(3).

⁵ Form 5 in the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

⁶ RMA, s 149E(1).

Submissions "about" PC8

- 11 The terminology used in section 149E(1) of the RMA for a submission to be "about" a matter is different to the terminology used in Schedule 1 of the RMA, which requires that submissions be "on" the proposed plan.⁷
- 12 When interpreting section 149E of the Act and the use of the term "about" as opposed to "on", it is appropriate to apply section 5 of the Interpretation Act 1999 to ascertain its meaning from its text and in the light of its purpose. The Cambridge Dictionary defines "about" as "on the subject of, or connected with".⁸ The Merriam-Webster Dictionary defines "about" as "with regard to; concerned with; fundamentally concerned with or directed toward".⁹ Counsel is not aware of any judicial comment which alters this definition.
- 13 Counsel considers that the requirement in section 149E of the Act for a submission to be "about" a matter should not be approached any differently from the approach developed in case law for determining whether a submission is "on" a proposed change to a planning document. This is for the following reasons:
- (a) First, the prepositions "about" and "on" are used interchangeably within sections 149E and 149F of the Act.¹⁰ The interchangeable use of the two prepositions implies that Parliament did not intend for the jurisdiction of a submission made pursuant to section 149E to be different to submissions made pursuant to Schedule 1.
- (b) Secondly, subsection 149E(10) requires any submissions made to the local authority "on" the matter before it is called in by the EPA

⁷ RMA, Sch 1, cl 6(1). The requirement for a submission to be "about" a matter is also used in section 49(1) of the RMA in relation to submissions about proposed national direction notified in accordance with section 48.

⁸ Cambridge Dictionary "About"
<<https://dictionary.cambridge.org/dictionary/english/about>>

⁹ Merriam-Webster Dictionary "About"
<<https://www.merriam-webster.com/dictionary/about>>

¹⁰ The preposition "on", instead of "about", is used in:

- (i) the heading of section 149E, which provides for the "EPA to receive submissions 'on' a matter if public notice of direction has been given";
- (ii) subsection 149E(3A), which provides direction concerning service on certain persons who made an electronic submission "on" a matter;
- (iii) subsection 149F(3), which provides for certain persons to make further submissions "on" a matter; and
- (iv) subsection 149F(4)(a), which provides that any further submission may only be in support or opposition to a submission made "on" a matter under section 149E.

be treated as having been made to the EPA under section 149E. The requirement to treat submissions made pursuant to Schedule 1 as having been made pursuant to Part 6AA of the Act suggests that the scope of relief able to be sought under either process is the same.

- (c) Thirdly, the Court is required under clause 10(1) of Schedule 1 to give a decision "on" the provisions of PC8 and matters raised in submissions. Accordingly, the Court has the same jurisdiction to make a decision on matters made pursuant to Part 6AA of the Act as a local authority does for a plan change promulgated pursuant to Schedule 1. The fact that the decision-making jurisdiction under both Part 6AA and Schedule 1 is the same further supports an interpretation that the approach to scope for either process is the same.

- 14 For the above reasons, counsel considers that, despite the difference in language, the scope of a submission made about a matter under section 149E of the Act is the same as the scope of a submission made on a planning document under Schedule 1. The usual principles of natural justice and public participation are applicable to all plan changes, regardless of the process by which the plan is changed.
- 15 Accordingly, the principles regarding scope established by case law in regards to Schedule 1 of the Act are applicable in the context of Part 6AA of the RMA. This case law is set out below.

Applicable case law: whether a submission is "on" a proposed change

- 16 The Courts have endorsed a bipartite approach when considering whether a submission is "on" a proposed change to a planning document. First, the submission must reasonably fall within the ambit of the proposed change by addressing a change to the status quo advanced by the proposed change. Secondly, the decision-maker should consider whether there is a real risk that persons potentially affected by the changes sought in a submission have been denied an effective opportunity to participate in the decision-making process.¹¹

¹¹ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [90], endorsing the approach of William Young J in *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003. See also *Mackenzie v Tasman District Council* [2018] NZHC 2304 for a more recent application of the test.

- 17 If a management regime in a planning document for a particular resource is unaltered by the proposed change, a submission seeking a new or different management regime for that resource is unlikely to be "on" the proposed change (unless the change is incidental or consequential, as discussed below).
- 18 If the effect of regarding a submission as being "on" a proposed change would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that will be a "powerful consideration" against finding that the submission was truly "on" the proposed change.¹²

Section 293 RMA

- 19 Section 293 of the RMA empowers the Court to direct changes to a proposed plan or plan which are not otherwise within its jurisdiction due to the scope of the appeal before it.¹³
- 20 The primary purpose of section 293 is to "provide the Court with a mechanism for expanding the nature and extent of the relief sought beyond the scope of the reference where appropriate".¹⁴ However, to do so, the relief must be "on" PC8.¹⁵
- 21 This power is not unlimited and must be used cautiously and sparingly.¹⁶ The section 293 process should not be seen as an alternative mechanism to avoid using a Schedule 1 process.¹⁷
- 22 If the court finds that the relief sought by Wise Response is not "on" or "about" PC8, the Court does not have jurisdiction under section 293 of the Act to direct changes to PC8 to implement the relief sought by Wise Response.

¹² *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [66].

¹³ *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616 at [120].

¹⁴ *Hamilton City Council v New Zealand Historic Places Trust/Pouhere Taonga* [2005] NZRMA 145 (HC) at [25].

¹⁵ *Auckland Council v Byerley Park Ltd* [2013] NZHC 3402 at [42].

¹⁶ *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616 at [121].

¹⁷ *CEP Services Matauwhi Ltd v Northland Regional Council* [2020] NZEnvC 202 at [14].

Relief sought by Wise Response

- 23 The submission of Wise Response seeks that:¹⁸
- Nutrient and other potential contaminants should be controlled as INPUTS to landuse systems rather than as effects. The input levels should be calculated to be at or less than the rate that that would generate significant adverse effects. Policies must require this and ensure that the approach is adequately resourced and monitored.
- 24 In addition to seeking that nutrient inputs be controlled, the submission also seeks that:
- (a) PC8 should specify land use practices that sequestrates carbon in the soil and specifically promotes healthy soil ecosystem function;¹⁹
 - (b) PC8 needs to form part of an integrated, holistic approach to land management;²⁰ and
 - (c) Freshwater Management Units should be extended to “catchment hubs” that examine “major global issues and threats (resource, economic, environmental, pandemic etc) and come up with community responses that address water quality issues along side the others”.²¹
- 25 Wise Response participated in mediation on the farming provisions referred to mediation (although its submission was treated by the Council as being a general submission on PC8).
- 26 In reliance on their first submission point, the Council understands that Wise Response proposes that an input control provision be added to Policy 7.D.9.²²
- 27 The Council considers that all the relief sought in the submission of Wise Response, and the relief sought in relation to Policy 7.D.9 in relation to input controls for nitrogen, is not “on” / “about” PC8 and is therefore outside of scope.

¹⁸ Submission 80069, first submission point.

¹⁹ Submission 80069, second submission point.

²⁰ Submission 80069, third submission point.

²¹ Submission 80069, fourth submission point.

²² See Memorandum from Wise Response for the Pre-hearing Conference for Plan Change 8 dated 9 July 2021.

- 28 The remainder of these submissions focuses on the relief sought by Wise Response in relation to Policy 7.D.9, given that this is the one policy that Wise Response have abstained from agreeing with.²³

No scope for relief sought by Wise Response

- 29 The Council does not consider that there is scope within PC8 to control nitrogen inputs.

Does not address a change to the status quo sought by PC8

- 30 PC8 is intended to be an interim planning and consenting framework to manage freshwater up until the time that new discharge and allocation limits are set in accordance with the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**). The intent of PC8, and Policy 7.D.9 in particular, is to signal the 'direction of travel' for ORC's management of the effects of farming activities in the future.²⁴
- 31 The scope of PC8 is limited to the management of particular activities that are known to have a significant adverse impact on water quality, rather than seeking to manage farming activities more generally. As set out in the section 32 report:²⁵

The overall purpose of PC8 is to strengthen the management of **particular activities** in order to, at a minimum, maintain water quality in Otago. It does this by strengthening the policy direction provided to decision-makers on resource consent applications for a range of discharges (including from stormwater and wastewater systems, and farming activities) and introducing new or amended provisions for managing **particular activities** with discharges that are known to have adverse effects on water quality (animal waste storage and application, intensive grazing, stock access to water, and earthworks).

(Emphasis added)

- 32 The confined scope of PC8 is also reflected in the key issues report made pursuant to section 149G(3) of the Act (**Key Issues Report**), which provides as follows:²⁶

6.1 PC8 proposes a shift away from the Water Plan's current approach to managing water quality as well as

²³ See Memorandum from Wise Response for the Pre-hearing Conference for Plan Change 8 dated 9 July 2021.

²⁴ Section 32 Report, at p 32.

²⁵ Section 32 Report, at p 14.

²⁶ Key Issues Report: Plan Change 8 to the Regional Plan: Water for Otago and Plan Change 1 to the Regional Plan: Waste for Otago (The Omnibus Plan Change) dated 9 October 2020.

setting out general expectations for farming practices in the longer term. **While not fully complying with the NPS-FM 2020, PC8 is intended to be an interim first step measure while the new LWRP is being developed.**

- 6.2 PC8 sets out to **manage activities that are known to be potential drivers of poor water quality** if not managed well, in order to achieve the water quality outcomes in Schedule 15. **The Plan Change focuses on some key good farming practices (GFP)** that can be used on farms to reduce land use impacts on water quality, particularly through managing nitrogen, phosphorous, sediment and faecal contaminants.

...

- 6.10 The intent of PC8 is to signal the direction of travel for ORC's management of the effects of farming activities in the future by introducing a new policy (7.D.9) promoting good farming practices through the management of rural discharges.

(Emphasis added)

- 33 The Key Issues Report clearly sets out the relationship between the confined nature of PC8 and the much broader scope of the land and water regional plan:²⁷

ORC has identified that the Water Plan's approach of managing contaminant discharges rather than the land use activities that lead to those discharges was not sufficient, and PC6AA (discussed above) has left a further gap in the planning framework for managing these discharges. **ORC is committed to notifying its new LWRP in 2023, but in the interim have identified specific activities which can have significant adverse effects on water quality but are not well managed under the current framework.** Environmental monitoring undertaken by ORC does not identify particular land uses which are contributing to water quality issues, but has found that water quality is generally poorer at sites on smaller, low elevation streams draining pastoral or urban catchments.

(Emphasis added)

- 34 In accordance with the intended scope of the plan change, PC8 identifies two specific farming practices which can have significant adverse effects on water quality but are not well-managed under the current Water Plan: intensive grazing and stock access to water.²⁸
- 35 The Council does not consider that the relief sought by Wise Response addresses a matter sought to be amended by the proposed change. It is submitted that there is a significant difference between regulating

²⁷ Key Issues Report at 5.21.

²⁸ Section 32 Report, at p 29.

specific farming practices which are known to have adverse effects on water quality, and the regulation of nitrogen loads on farms more generally. The relief sought by Wise Response has the potential to affect farming activities in a far more reaching way than PC8 anticipated.

36 The relief sought in the submission by Wise Response is general and does not relate to any of the specific provisions of PC8. As Kos J emphasised in *Motor Machinists*:²⁹

the focus of the submission must be on “the specific provisions of the proposal”. The form says that. Twice.

37 Although not determinative, the general nature of the relief sought is reflected in the submission’s classification as a “general” submission in the summary of submissions, as opposed to being related to a specific provision of PC8. Notably, no party lodged a further submission to the submission of Wise Response.

38 Further, given the broad nature of the relief sought by Wise Response, the Council has not turned (and is not able to turn) its mind to the effectiveness and efficiency of setting maximum nitrogen loads for individual farms in the context of PC8, as required by s 32(1)(b)(ii) of the Act.

39 It is important to consider the genesis of the approach to determining whether a submission is “on” a plan change. In *Clearwater*, William Young J identified three possible approaches:³⁰

- (a) A literal approach, “in terms of which anything which is expressed in the variation is open for challenge”;
- (b) An approach in which “on” is treated as meaning “in connection with”; and
- (c) An approach “which focuses on the extent to which the variation alters the proposed plan”.

William-Young J rejected the first two alternatives, and adopted the third. This remains the fundamental test of determining whether relief sought is within scope of the proposed change.

²⁹ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [38].

³⁰ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [59].

- 40 It is submitted that the relief sought in Wise Response's submission falls within the first alternative identified in *Clearwater*. It is not focussed on the specific farming practices sought to be addressed through PC8. Rather, it seeks to address broader issues of nitrogen loss from farming activities. Allowing the relief sought by Wise could arguably open the door for any measure to address the loss of contaminants from farming activities.
- 41 As the Environment Court found in *Halswater Holdings Ltd v Selwyn District Council*:³¹
- ...if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.
- 42 The Council acknowledges that the management of water quality requires an integrated approach to managing farm systems. However, it submits that PC8 is not the correct forum to deal with broader land management controls such as contaminant inputs. A fully integrated framework for addressing contaminant loss from farming systems in a holistic manner is more appropriately dealt with as part of the new land and water plan, which the Council is required to notify by December 2023, as opposed to being tacked on part-way through the PC8 process.

Natural justice issues

- 43 Given the relatively limited intended scope of PC8, the relief sought by Wise Response is not something that could reasonably have been foreseen by potentially affected persons at the time PC8 was notified. There is no indication in PC8 itself, the section 32 report nor the Key Issues Report that PC8 intends to regulate nitrogen inputs on-farm.
- 44 The relief sought by Wise Response has the potential to significantly impact the way that farmers manage their land and farming system. It is not appropriate that such changes come by way of 'submissional sidewind', without proper opportunity for participation by those affected. Rather, such changes are more appropriately dealt with through the land

³¹ *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC) at [41], cited in *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [61].

and water regional plan, where all potentially affected parties have the opportunity to effectively participate.

- 45 As signalled by a number of parties at the pre-hearing conference, if there is jurisdiction for the relief sought by Wise Response, the nature of the hearing on Policy 7.D.9 will differ significantly from that anticipated by parties. The Council is not aware of any other submission seeking the broader land management controls sought by Wise Response. The evidence required to assess the merit of Wise Response's proposed relief is different to the evidence and expertise that parties to PC8, including the Council, have relied on to-date.
- 46 The changes sought by Wise Response are more appropriately dealt with as part of the upcoming Land and Water Regional Plan, where they can be considered in a detailed and fulsome manner.
- 47 The Council submits that it is not taking an overly technical approach to scope in this case. The ability of the public to participate effectively in a process that affects them lies at the heart of the plan making process under the RMA. Regulating permissible nitrogen loads without the proper participation of those affected would be inconsistent with this important principle.

Conclusion

- 48 For the above reasons, the Council does not consider that the relief sought by Wise Response meets either limb of the *Clearwater* test.
- 49 Accordingly, it is submitted that the relief sought in both the submission of Wise Response, and the specific relief it seeks in relation to Policy 7.D.9, is not "on" or "about" PC8.
- 50 Given the relief sought is not "on" or "about" PC8, the Court does not have jurisdiction to grant the relief sought under clause 10 of Schedule 1.

Dated this 23rd day of July 2021



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L F de Latour / M A Mehlhopt

Counsel for Otago Regional Council