

**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 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

JOINT MEMORANDUM

PC1 - CHAPTER 7 - LANDFILLS

11 February 2022

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MAY IT PLEASE THE COURT

Introduction

- 1 This joint memorandum relates to Chapter 7 of proposed Plan Change 1 to the Regional Plan: Waste for Otago (**PC1**) which was directed by the Minister for the Environment to be referred to the Environment Court, under section 142(2)(b) of the Resource Management Act 1991 (**RMA**), to give a decision on the provisions and matters raised in submissions.
- 2 PC1 proposes amendments to Chapter 7 to introduce a new policy, amend existing information requirements and assessment matters in relation to a rule and an existing appendix, to improve the policy direction and in relation to landfills and management practices by aligning with the best practice for the design, construction, and operation of landfills. A number of minor consequential amendments were also proposed by PC1 in relation to the proposed amendments to the policy and other provisions.
- 3 Proposed amendments to Chapter 7 of PC1 relate to the following provisions:
 - (a) New Policy 7.4.11;
 - (b) Amended 7.6.1.1 Information requirements;
 - (c) Amended 7.6.1.2 Assessment matters;
 - (d) Amended Appendix 2: Matters to be included in a Management Plan; and
 - (e) Consequential amendments to Issues 7.2.2 and 7.2.3, Objectives 7.3.1 and 7.3.2, Method 7.5.7, 7.6.6.1 and 7.6.7.1 Information requirements.
- 4 The parties participated in Court-assisted mediation on the provisions of Chapter 7 of PC1 on 29 November 2021. As a result of the mediation, agreement has been reached between the parties in attendance at mediation in relation to all of the above provisions of Chapter 7.
- 5 As a result of agreement at mediation an additional new policy, New Policy 7.4.11A, is proposed to be included in Chapter 7.
- 6 This joint memorandum is filed in support of the agreed provisions of Chapter 7.

Parties

- 7 There are 15 persons who gave notice of their intention to become a party to the PC1 proceedings under section 274 of the RMA. Of these 15 parties, 12 parties' submissions related to Chapter 7 of PC1. The remaining three section 274 parties' submissions only related to Chapter 6 of PC1. Nine of the 12 parties who submitted on Chapter 7 participated in mediation and signed the mediation agreement in relation to the provisions of Chapter 7. These parties are:
- (a) Big Stone Forests Limited;
 - (b) Director-General of Conservation Tumuaki Ahurei;
 - (c) Dunedin City Council;
 - (d) Dunedin International Airport Limited;
 - (e) Federated Farmers New Zealand – Otago and North Otago provinces;
 - (f) John Cocks (noting that Mr Cocks has advised that he has outstanding concerns);
 - (g) Ngāi Tahu Ki Murihiku (Te Ao Marama);
 - (h) Royal Forest and Bird Protection Society of New Zealand Incorporated; and
 - (i) Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kāi Tahu ki Otago).
- 8 The following two section 274 parties submitted on Chapter 7 and advised that they would abide the outcome of the mediation:
- (a) Otago Fish and Game Council and the Central South Island Fish and Game Council; and
 - (b) Matthew Sole.
- 9 The remaining party, Te Rūnanga o Ngāi Tahu, whose submission related to Chapter 7 advised that they would not be attending mediation but did not specifically advise that they would abide the outcome of mediation.

- 10 This memorandum has been signed by each of the section 274 parties who attended mediation and signed the mediation agreement (except Mr Cocks) and has been sent to all other section 274 parties who have an interest in Chapter 7 of PC1.
- 11 Mr Cocks has advised that, given the directions in the Court's Minute dated 20 January 2022, he will not sign the joint memorandum.

Environment Court's obligations in relation to call-in

- 12 Given the first instance nature of this matter, in order to assist the Court, the following section of this memorandum summarises the legal tests applicable to the Court's determination.
- 13 The relevant tests for the Court when considering this Plan Change are set out in section 149U(1) and (6) of the RMA. The Environment Court must:¹
- (a) apply clause 10(1) to (3) of Schedule 1 as if it were a local authority;
 - (b) may exercise the powers under section 293; and
 - (c) must apply sections 66 to 70, 77A, and 77D as if it were a regional council.
- 14 The Affidavit of Ms Dolina Lee dated 11 February 2022 includes a summary of the changes introduced by Chapter 7 of PC1 and a summary of submissions,² and a table of recommended decisions on submissions³ to assist the Court in making a decision on the provisions of Chapter 7 and matters raised in submissions under clause 10 of Schedule 1 of the RMA.⁴
- 15 The relevant legal requirements under section 66 to 70, 77A, 77D are set out in **Appendix 1** for the Court's reference.
- 16 In addition, the Court must:⁵

¹ RMA, s149U(6).

² Affidavit of Dolina Lee dated 11 February 2022 at paragraphs 32 to 45.

³ Affidavit of Dolina Lee dated 11 February 2022 at Annexure 5.

⁴ As required by RMA, sch 1, cl 10(1).

⁵ RMA, s149U(1).

- (a) have regard to the Minister's reasons for making a direction in relation to PC1; and
 - (b) consider any information provided to it by the EPA under section 149G.
- 17 The Minister's direction, which includes the reasons for making the direction in relation to PC1, is attached to the Affidavit of Ms Dolina Lee dated 11 February 2022 as Annexure 1.⁶
- 18 In accordance with the Act, the EPA has provided to the Environment Court:
- (a) The notified version of PC1;
 - (b) all information received by the EPA that relates to PC1, including the s32 report;
 - (c) the submissions received by the Council and the EPA on PC1, the summary of submissions report, and the summary of submissions and further submissions spreadsheet for PC1; and
 - (d) a report prepared by the Council on the key issues in relation to PC1.
- 19 Part 11 of the RMA applies to proceedings under section 149U, except if inconsistent with any provision of section 149U.

Explanation as to the agreement reached by parties

- 20 Changes to the provisions agreed between the parties is attached as Annexure 2 of the Affidavit of Ms Dolina Lee dated 11 February 2022 that accompanies this memorandum. Additions are shown in underline and deletions in strikethrough.
- 21 A summary of the proposed changes (including the rationale for the changes) is provided below and is also explained in detail in Ms Lee's affidavit.⁷
- 22 Parties at mediation agreed to changes to three of the provisions of Chapter 7 as notified, including:

⁶ Affidavit of Dolina Lee dated 11 February 2022 at Annexure 1.

⁷ Affidavit of Dolina Lee dated 11 February 2022 at paragraphs 46 to 59.

- (a) New Policy 7.4.11;
 - (b) 7.6.1.1 Information requirements; and
 - (c) 7.6.1.2 Assessment matters.
- 23 Parties also agreed to a new policy, New Policy 7.4.11A.
- 24 Further consequential amendments to notified provisions are proposed to:
- (a) Issue 7.2.2;
 - (b) Issue 7.2.3;
 - (c) Objective 7.3.1; and
 - (d) Objective 7.3.2.
- 25 The parties have agreed that all other changes to Chapter 7 proposed by PC1 should be the wording as notified.
- 26 Outlined below is a summary of the changes agreed at mediation to provisions of Chapter 7 as notified.

Changes agreed to New Policy 7.4.11

- 27 The Parties reached agreement on New Policy 7.4.11 which relates to the discharges from new and operating landfills. As a result of mediation, the parties agreed to amendments to the policy as notified as follows:
- (a) Changing the policy direction to “avoid significant adverse effects of discharges” and then otherwise “minimise” the adverse effects of the discharges from new and operating landfills.
 - (b) The discharges to be avoided and then otherwise minimised relate to those effects “outside a landfill footprint” with reference to “Figure 5-1 of the Waste Management Institute New Zealand’s Technical Guidelines for Disposal to Land August 2018”. This change was included to clarify that it is the effects that occur outside of the landfill footprint (i.e. where the waste is deposited) that this policy is concerned with, and not the discharges within this area of the landfill.

- (c) A minor change to subclause (a) of Policy 7.4.11 to distinguish between new landfills and operating and closed landfills when assessing what measures are applicable.
- (d) A correction to the cross-reference to the Waste “Management” (not “Minimisation”) Institute New Zealand’s Technical Guidelines for Disposal to Land (August 2018).

Proposed New Policy 7.4.11A

- 28 As a result of mediation, the parties reached agreement on New Policy 7.4.11A. This policy provides that the discharges at and from new and operating landfills within 13km of airports defined as Nationally Significant Infrastructure are to be assessed with regard to siting, class of landfill, and preparation and implementation of management plans, in order to prevent the landfill increasing the existing risk of bird strike. This policy addresses the impact that discharges at and from landfills can have on increasing the existing risk of bird strike. Additionally, an advice note is included to clarify the reference to “airports defined as Nationally Significant Infrastructure”.

Changes agreed to 7.6.1.1 Information requirements

- 29 The parties also agreed on a minor change to correct a reference to the Waste “Management” (not “Minimisation”) Institute New Zealand’s Technical Guidelines for Disposal to Land (August 2018).

Changes agreed to 7.6.1.2 Assessment matters

- 30 The parties reached agreement on ‘7.6.1.2 Assessment matters’ which decision makers must have regard to when considering any application made under Rule 7.6.1.
- 31 As a result of mediation, the parties agreed to amendments to the assessment matters as notified. The changes agreed are the inclusion of references to residential activities in two assessment matters. The changes clarify that residential activities are part of the environment when assessing the characteristics of the receiving environment, and that mitigation measures, safeguards, and contingency plans are to be undertaken to reduce actual and potential adverse environmental effects, including on residential activities.

Decision sought

- 32 Given the Court is required to make a decision on provisions and matters raised in submissions in relation to Chapter 7 of PC1, along with the other relevant legal tests outlined in the attached **Appendix 1**,⁸ the parties have not included a draft consent order as part of this joint memorandum.
- 33 However, for completeness, all parties are satisfied that all matters proposed for the Court's endorsement are within the scope of submissions, fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the RMA including, in particular, Part 2.
- 34 In terms of an assessment under section 32AA of the Act, the proposed amendments improve the clarity and consistency of the proposed plan change. For completeness a section 32AA assessment is included in the Affidavit of Ms Dolina Lee dated 11 February 2022 which accompanies this memorandum.⁹
- 35 For the reasons above, the parties therefore respectfully request that the Court approve the provisions of Chapter 7 of PC1 as agreed in mediation and included in the Affidavit of Dolina Lee dated 11 February 2022.¹⁰
- 36 No party has any issue as to costs.

Dated this 11th day of February 2022



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L F de Latour

Counsel for Otago Regional Council

⁸ RMA, s 149U(1) and (6).

⁹ Affidavit of Dolina Lee dated 11 February 2022 at Annexure 4.

¹⁰ Affidavit of Dolina Lee dated 11 February 2022 at Annexure 2.



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Appendix 1 - General Legal Requirements

- 1 This appendix sets out the general legal requirements under the RMA applicable to Chapter 7 of PC1.
- 2 Chapter 7 of PC1 must be prepared in accordance with the Council's functions under section 30¹¹ and the provisions of Part 2.¹² Following *King Salmon*, when assessing the plan change, a consideration of Part 2 is not required unless there is uncertainty, incompleteness or illegality in the objectives and policies of higher order documents to which the plan change is required to give effect to.¹³ Put simply, Part 2 cannot be relied on to avoid giving effect to a higher order direction. In the case of Chapter 7 of PC1, it is submitted that the relevant higher order statutory directions have been given effect to, to the extent practicable, as required applying the approach in *King Salmon*.
- 3 The "matters of national importance" set out in section 6 are intended to be addressed by Chapter 7 of PC1, as are the "other matters" set out in section 7.
- 4 Section 8 of the RMA requires the Council to "take into account" the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) when exercising functions and powers under the RMA in relation to managing the use, development and protection of natural and physical resources.
- 5 An analysis of the principles of Te Tiriti and how the principles of Te Tiriti o Waitangi have been taken into account in the development of Chapter 7 of PC1 is set out in the section 32 Report for Chapter 7 of PC1.¹⁴
- 6 Chapter 7 of PC1 must give effect to:¹⁵
 - (a) The New Zealand Coastal Policy Statement;
 - (b) Any applicable national policy statements, including of particular relevance, the National Policy Statement for Freshwater

¹¹ RMA, s66(1)(a).

¹² RMA, s66(1)(b).

¹³ *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [85].

¹⁴ Section 32 Evaluation Report dated 9 April 2020 at section 5.1.1.

¹⁵ RMA, s 67(3). Under s 67(3)(ba) a regional plan must give effect to a national planning standards. PC1 is not yet required to give effect to the national planning standards. ORC will give effect to the national planning standards through the development of the new LWRP.

Management 2020 (**NPSFM 2020**) (to the extent that there is scope to do so); and

(c) Any regional policy statement.

7 In Otago, there are currently two regional policy statements that are relevant to PC1:

(a) The Partially Operative Otago Regional Policy Statement 2019 (**PORPS 2019**); and

(b) Proposed Otago Regional Policy Statement 2021 (**PORPS 2021**).

8 When Chapter 7 of PC1 was notified, there were two relevant RPSs: the RPS 1998 which was partially operative and the PORPS 2019 which was also partially operative. The most relevant part of the PORPS 2019, Chapter 3, was not operative at the time that Chapter 7 of PC1 was notified. However, given that, at the time, Environment Court appeals on the PORPS 2019 were being resolved, the plan change was prepared to give effect to the PORPS 2019.

9 Following the resolution of all Environment Court appeals, all of the PORPS 2019 provisions were made operative on 15 March 2021 except provisions relating to the Port Otago High Court decision¹⁶ which were appealed to the Court of Appeal. On the same day, the RPS 1998 was revoked in full.

10 The Affidavit of Dolina Lee dated 11 February 2022 further discusses the weight to be given to the PORPS 2019 and PORPS 2021.¹⁷

11 Chapter 7 of PC1 must not be inconsistent with a water conservation order, of which there are two in Otago:

(a) Water Conservation (Kawarau) Order 1997; and

(b) Water Conservation (Mataura) Order 1997.

12 Chapter 7 of PC1 must also not be inconsistent with any other regional plan for the region, including:

(a) Regional Plan: Water for Otago (the Water Plan);

¹⁶ *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278.

¹⁷ Affidavit of Dolina Lee dated 11 February 2022 at paragraphs 87 to 92.

- (b) Regional Plan: Air for Otago (the Air Plan); and
 - (c) Regional Plan: Coast for Otago (the Coast Plan).
- 13 When preparing Chapter 7 of PC1, the Council must also:
- (a) Have regard to any proposed regional policy statement for the region;¹⁸
 - (b) Have regard to any relevant management plans and strategies under other Acts, any relevant entry on the New Zealand Heritage List/Rārangī Kōrero and to various freshwater regulations.¹⁹ The Otago Sports Fish and Game Management Plan 2015-2025 is a relevant management plan that has been given regard.²⁰
 - (c) Have regard to the consistency with any proposed or operative regional policy statements and plans of adjacent regional councils.²¹ The adjacent regional councils are Southland Regional Council, Canterbury Regional Council and West Coast Regional Council.
 - (d) Take into account any relevant planning document recognised by an iwi authority.²² The following iwi management plans are relevant to Chapter 7 of PC1:
 - (i) Kāi Tahu ki Otago Natural Resources Management Plan 2005;
 - (ii) Te Tangi a Taurira: Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008; and
 - (iii) Waitaki Iwi Management Plan 2019.
 - (e) Not have regard to trade competition.²³
- 14 “Have regard to” requires the decision maker to give genuine attention and thought to the matter.²⁴

¹⁸ RMA, s 66(2)(a).

¹⁹ RMA, s 66(2)(c).

²⁰ Section 32 Report for Plan Change 8 and Plan Change 1 at section 5.11.2.

²¹ RMA, s 66(2)(d).

²² RMA, s 66(2A)(a).

²³ RMA, s 66(3).

²⁴ *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].

- 15 “Take into account” requires that the decision maker must address the matter and record it has been addressed in the decision; but the weight of the matter is for the decision makers’ judgment in light of the evidence.²⁵
- 16 Chapter 7 of PC1 must be prepared in accordance with regulations.²⁶ There are no regulations relevant to Chapter 7 of PC1.

Objectives, policies and rules

- 17 A regional plan must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies²⁷ and may state other matters, including issues, reasons and expected environmental results.²⁸
- 18 The Court must be satisfied that the objective is the most appropriate way to achieve the purpose of the RMA.²⁹ The proposed policies and rules must be examined in accordance with section 32 as to whether they are the most appropriate way to achieve the objectives by:³⁰
- (a) Identifying other reasonably practicable options for achieving the objective;
 - (b) Assessing the efficiency and effectiveness of the provisions in achieving the objective, which must:³¹
 - (i) Identify the benefits and costs of the effects that are anticipated from implementing the provisions (and quantifying these where practicable), including opportunities to be provided or reduced) for economic growth and employment; and
 - (ii) Assess the risk of acting or not acting if there is uncertain or insufficient information about the subject of the provisions; and

²⁵ *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].

²⁶ RMA, s 66(1)(f).

²⁷ RMA, s 67(1).

²⁸ RMA, s 67(2).

²⁹ RMA, s 32(1)(a).

³⁰ RMA, s 32(1)(b).

³¹ RMA, s 32(2).

(iii) Summarising the reasons for deciding on the provisions.

- 19 In the context of Chapter 7 of PC1 as it is an amending proposal, the examination above must relate to:³²
- (a) The provisions and objective of Chapter 7 of PC1; and
 - (b) The objectives of the Regional Plan: Waste to the extent that those objectives –
 - (i) Are relevant to the objectives of PC1; and
 - (ii) Would remain if PC1 were to take effect.
- 20 In *Rational Transport Society Inc v New Zealand Transport Agency*, the High Court held that “most appropriate” means “most suitable”, but does not mean that it must be the superior method.³³ This assessment should not be undertaken in isolation, but an holistic approach to assessing the appropriateness of the provisions should be adopted.

³² RMA, s 32(3).

³³ *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298.