

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application pursuant to Section 201 for a Water Conservation Order on the Hurunui River.

**STATEMENT OF SUPPLEMENTARY AND REBUTTAL EVIDENCE OF SALLY MARX ON
BEHALF OF NORTH CANTERBURY FISH AND GAME COUNCIL
Dated 16 April 2009**

1. I prepared a first statement of evidence dated 4 March 2009, in respect of Fish and Game's application for a Water Conservation Order on the Hurunui. I confirm the detail of my experience and qualifications set out therein.
2. In this statement of evidence I address points raised by the Tribunal relevant to my area of expertise.
3. I also set out my comments in rebuttal in respect of the evidence of:
 - Chris Hansen – for Hurunui Water Project Ltd and Mainpower Ltd
 - Vaughan Keesing – for Hurunui Water Project Ltd and Mainpower Ltd
 - Sarah Dawson – for Hurunui District Council
 - Bruce Yates - for Hurunui District Council
 - Lynda Murchison – for Environment Canterbury
 - Philip Mitchell – for Meridian Energy Ltd

Points Raised by the Special Tribunal

4. The Tribunal sought guidance as to whether they are required to have regard to the National Policy Statement (NPS) on Renewable Electricity Generation.
5. The Ministry for the Environment's website states that the Board of Inquiry publicly notified the proposed NPS in September 2008. The submission period has closed. The Board commences its inquiry by hearing evidence from 23 April 2009. Hearings of submissions are scheduled to run until July 2009. In terms of status therefore, the NPS is in a 'proposed' state.
6. Section 207 (c) RMA states that a special tribunal shall have regard to: "The relevant provisions of every national policy statement, New Zealand coastal policy statement, regional policy statement, regional plan, district plan, and any **proposed plan**" [emphasis added]. It appears that this clause requires consideration of only **plans** that are proposed, not policy statements.
7. It is therefore my opinion that the provisions of the Proposed NPS on Renewable Electricity Generation do not have to be given regard to by the Tribunal. In my evidence-in-chief in respect of the proposed NPS on Freshwater Management I stated that that NPS should not be afforded any formal weight, but discussed it simply by way of background.

Chris Hansen, evidence dated 30 March 2009

8. At paragraph 31, Mr Hansen quotes aspects of section 199(2) RMA focusing on the wording that a WCO may, but does not have to, provide for certain aspects. He goes on to say that in his opinion there is “no requirement for a WCO to address these matters meaning other planning mechanisms are legitimately able to provide for these matters”.
9. I do not agree that these two issues are linked. I agree that there is no requirement for a WCO to address these matters, but consider that the wording is more a statement of the scope that a WCO may address. It is not a statement with regard to the legitimacy of other planning mechanisms. Those planning mechanisms are available under other sections of the RMA, and can be used to provide for a wide range of matters. However it remains my opinion that the other planning mechanisms available for the Hurunui River do not adequately provide for the matters that the WCO application is seeking to address, are subject to a different legal test, and are for a different statutory purpose.
10. At paragraphs 54 and 55, Mr Hansen comments that it appears that the Applicants are seeking to protect the river due to potential development threats rather than for the values that the river actually possesses, and that he has difficulty with a WCO being used with this intent.
11. I rely on evidence presented by other specialists for the Applicants on the values of the Hurunui system. That evidence demonstrates that the values are worthy of a very high level of protection. I believe that it is increasingly apparent, when examining the NRRP process, including the recommendations of ECan officers, that other planning mechanisms are unlikely to afford the level of protection sought by the Applicants, and that therefore an alternative process is justified, if the legal threshold is met, regardless of any real or potential threat of development. Legal Counsel for the Applicants has commented on case law to the effect that while a proven threat is not a prerequisite for granting a WCO, such a threat makes the need for a WCO even greater.
12. At paragraph 56, Mr Hansen lists a number of documents that he states “should be had regard to when considering the proposed WCO”. The list includes five documents that I agree the Tribunal is required to have regard to (the Regional Policy Statement, the proposed NRRP, Variation 1 to the NRRP (Chapter 5 Water Quantity), Variation 8 to the NRRP, and the Hurunui District Plan).
13. However his list also includes four other documents that I disagree that the Tribunal is required to have regard to. In paragraph 6 (of this Supplementary Evidence) I have quoted the requirements of section 207(c). There is no requirement for the Tribunal to have regard to the Proposed NPS for Freshwater Management, the Hurunui River Management Plan, the Canterbury Strategic Water Study, or the Draft Hurunui LTCCP.
14. At paragraphs 58-69, Mr Hansen goes on to address the role of the proposed NPS for Freshwater Management, but I note that he acknowledges (at paragraph 58) that little weight can be placed on the proposed NPS due to the stage which it is at.
15. At paragraph 63 Mr Hansen draws attention to the fact that the proposed NPS requires Regional Policy Statements to require regional plans to set standards and flow levels. In other words, the NPS leaves the detail to regional plans. It is my

opinion that the NRRP's signals for protection of the Hurunui River system are inadequate and inappropriate in the context of the values of the river system.

16. At paragraphs 70 and 71, Mr Hansen addresses the NPS for Renewable Energy (sic) Generation. He comments on the importance of the NPS and comments that the NPS states that a nationally consistent approach to balance the competing values is to be implemented.
17. First I note that Mr Hansen assigns an incorrect status to this document. As previously clarified for the Tribunal, the NPS is only proposed. Submissions have closed but hearings have not yet commenced. As previously stated, under section 207 RMA, the Tribunal is not required to have regard to a proposed national policy statement.
18. Despite this lack of status, I also note that the RMA does not require WCOs to be subject to Part 2 of the Act (and the balancing process) where inconsistencies exist.
19. I also note in this particular context that there are currently no amendments proposed to relevant sections of the RMA dealing with the consideration of WCOs.
20. At paragraph 93, Mr Hansen comments on the ECan Officers Report recommendation that the natural state and high naturalness classifications be combined to make one category of high naturalness. He goes on to say that he considers this confirms the Regional Council's view that the waters in the Hurunui River are not in a natural state.
21. I do not agree with this interpretation. The Officers Report states that the reasons for combining the classifications were because it was hard to distinguish between the two categories. The change in classification applies to all water bodies previously described as either natural state or high naturalness, including those in upper catchments or National Parks. I consider it is simplistic to assert that the changes demonstrate that ECan does not believe the Hurunui River is in a natural state. Taking this argument to its logical conclusion would result in a statement that ECan does not believe pristine headwater rivers are in a natural state.
22. At paragraph 93, Mr Hansen comments on the role of Variation 8 to the NRRP and its ability to achieve similar outcomes to the WCO. In particular he comments on the ability of the proposed flow regime to safe-guard the life-supporting capacity for trout. I defer to the evidence of other witnesses for the Applicants, particularly Mr Hawker's and Dr Young's. However I understand that while the life-supporting capacity for trout may be safe-guarded, the proposed flow regime would still allow for significant changes to the natural flow regime if imposed in the Upper Hurunui waters and have an adverse effect on the habitat and recreational experience, for both angling and whitewater activities.
23. At paragraph 108, Mr Hansen comments on the role of the Hurunui District Plan in controlling land use, and states that the Plan adds another level of protection that the WCO cannot provide. In my evidence-in-chief I have commented that the District Plan cannot protect the values that the WCO seeks to protect. I agree however with Mr Hansen that the District Plan can add another level of protection – it is just that it cannot provide the necessary protection on its own. If a WCO is put in place on the Hurunui River system it will not curtail the District Plan from adding that additional level of protection.

24. At paragraph 112, Mr Hansen comments on the Hurunui District Council's Draft LTCCP and the statements the Council makes with regard to opposing the application for the WCO. I have commented previously on the weight that should be given to this document. Notwithstanding this lack of status, I note that Mr Hansen states that in his view the draft LTCCP "reflects the needs of the community" and "provides a clear indication of what the community considers is its needs". I note that the LTCCP is not Council policy, and in fact submissions do not close until 24 April 2009. I question how Mr Hansen can support his statement in light of the stage the draft LTCCP is at. Further, I note that current Council policy as stated in the operative District Plan is that one of the methods to implement Policy 18.4 is to investigate, in conjunction with other management agencies, methods to provide long-term protection for the Hurunui River (including its lakes and tributaries) above its confluence with the Mandamus River. The Explanation specifically states that the Council supports the concept of providing long-term protection to the conservation values of the Hurunui River, its lakes and tributaries.
25. In his conclusion at paragraph 166, Mr Hansen states that he concludes "that there are sufficient planning mechanisms already in place, which would provide the level of protection that the Proposed WCO seeks to achieve". As Mr Hansen's evidence does not compare the specific provisions of the most relevant planning mechanism (the NRRP) with what the WCO is seeking, his conclusion is unsupported. My evidence-in-chief provides this comparison for the Tribunal, and shows that there are significant differences.

Vaughan Keesing, evidence dated 23 March 2009

26. At paragraph 19, Dr Keesing states that the proposed WCO initially covers all waterways of the Hurunui River catchment above the Mandamus confluence, and then the main stem of the lower Hurunui to the sea outlet. He then goes on to state "However, later in the application the applicants set aside as to not to be included Lakes Mary, Marion and Raupo Lagoon and the tributaries feeding into these water bodies."
27. This is incorrect. Dr Keesing may have erroneously come to this conclusion from focusing on paragraphs 43 and 44 of Appendix B to the application (on page 22, under the heading "Section 199 (2) (b) (i) Outstanding as habitat for terrestrial or aquatic organisms"). These paragraphs state that "The upper Hurunui Waters in their natural state afford outstanding habitat for brown trout. These waters include all Upper Hurunui Waters, except Lake Marion, Lake Mary and Raupo Lagoon (and their tributaries). The Applicants seek preservation of the outstanding brown trout habitat afforded by these waters in their natural state."
28. The effect of these paragraphs is to exclude Lake Marion, Lake Mary and Raupo Lagoon (and their tributaries) from consideration as being outstanding as a habitat for brown trout only. It does not necessarily exclude them from being considered outstanding in relation to the other aspects of section 199 (as set out in the other section headings on pages 21-37 of the application):
- as a habitat for terrestrial or other aquatic organisms
 - for amenity or intrinsic values
 - for wild, scenic or other natural characteristics
 - for characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.
29. Table 7 of Appendix B of the application document (page 40) makes it quite clear that Lakes Marion and Mary, and Raupo Lagoon are covered by the application.

Sarah Dawson, evidence dated 23 March 2009

30. Ms Dawson's evidence places considerable emphasis on the provisions of the Regional Policy Statement and the proposed NRRP, and the fact that these planning documents provide the mechanism for the Regional Council to recognise and weigh the importance of use and development of the region's resources as well as safeguarding or protecting the characteristics and values of those resources.
31. I do not disagree with this. However, I understand that other witnesses for the Applicants consider that the values of parts of the Hurunui River system are either outstanding or contribute to that outstanding nature, and I note that the RMA provides for an additional mechanism to be brought into play in such situations. Second, I reiterate my view that while the planning mechanisms may be available to Environment Canterbury to give a higher level of protection, to reflect those outstanding values, current indications are that effecting this level of protection is not at all certain, and that there is significant pressure being brought to bear to lower that protection through the recommendations of the Officers, submissions, and potential amendments to the RMA.
32. At paragraphs 4.1 - 4.15, Ms Dawson explains the provisions of the operative Hurunui District Plan. She does acknowledge that the activities sought to be controlled in terms of this application for a WCO are not within the resource management responsibilities of the Hurunui District Council. However, she places considerable emphasis on the fact that the Plan recognises the outstanding, significant or important values of the Hurunui catchment and its water bodies, and that there are considerable provisions in the District Plan that control the adverse affects of land use activities on those values.
33. I do not disagree with her assessment. I acknowledge the complementary role of the District Plan in managing effects that may adversely impact on the intrinsic and landscape values of the river system. However, it is my view that reliance on the District Plan provisions alone, or in combination with the proposed provisions of the NRRP, will not result in an appropriate level of protection of the values identified by the Applicant's other witnesses.
34. At paragraph 8.7 Ms Dawson states that a more integrated and comprehensive decision on water use options would be made through the policy and plan making processes currently underway.
35. I acknowledge that a different decision-making process would occur, including a different consideration of Part 2 matters. However, the fact remains that the RMA does make provision for applications for and the granting of WCOs for water bodies which meet the threshold tests under section 199. Those WCOs as granted can then be integrated into the NRRP, in the same way as the Rakaia and Rangitata WCOs have been.
36. At paragraph 9.2, Ms Dawson states that she believes the WCO is inconsistent with the central focus of the relevant statutory documents which she considers "is integrated and sustainable management, weighing the needs of instream and out-of-stream values and uses, within the context of Part 2 of the RMA".
37. I consider that there are two aspects that can be considered here. I disagree that the proposed WCO is inconsistent with the central focus of the statutory documents. I believe it is generally in accord with many of the objectives and policies of both

Environment Canterbury's and the Hurunui District Council's plans, in that it seeks to recognise the Hurunui River system's values that are of significance nationally and regionally. However in terms of weighing competing needs within the context of Part 2 of the RMA, I note that the RMA makes specific provision for two separate processes to be followed. It is therefore not inappropriate that the current application is inconsistent with the approach being followed in those statutory documents.

38. Finally, I note that Ms Dawson, at paragraph 9.4 states that it is highly likely that the provisions of an application for a WCO would be more restrictive than the provisions of a proposed plan.
39. I agree with this assessment, and reiterate that based on the values identified by other witnesses for the Applicants, this is the outcome sought by the Applicants.
40. While this application could be seen to be a "pre-emptive strike" to increase the level of protection, this is under a process that is legitimately available under the RMA to protect the values that meet the threshold test. I note that Ms Dawson, at paragraph 10.7, acknowledges this point. This is a relevant consideration also in considering the weight to be given to the points Mr Copeland makes in his evidence on behalf of the Hurunui District Council (at paragraphs 5.4, 5.5 and 5.6).

Bruce Yates, evidence dated 23 March 2009

41. At paragraph 30, Mr Yates expresses concern that if the WCO is put in place it could result in difficulties in consenting the takes for five existing community or rural water schemes that utilise water from the Hurunui River catchment.
42. Mr Yates' evidence provides the following information on the sources of the takes:
 - Kaiwara Rural Water Scheme: shallow bores adjacent to the Hurunui River approximately 2.5km upstream from the SH1 bridge;
 - Blythe Rural Water Scheme: shallow well on the Hurunui River Flats between SH1 and the coast;
 - Hurunui No1 Water Supply Network: shallow river gallery on the Hurunui River approximately 1km downstream from the SH1 bridge;
 - Peaks Water Supply Network: shallow bore, below the Mandamus River confluence;
 - Hawarden/Waikari Urban Water: shallow river gallery on the Waitohi River at Bakers Ford.
43. I note that all of these takes are in the "Lower Hurunui Waters" as described in the application, for which no restrictions on changes in flow regime are sought. They also do not involve structures that dam the mainstem Hurunui River. Leaving aside any preferences sought by other submitters, none of these takes would therefore be affected by the proposed WCO as sought by the Applicants. The issue of whether the takes could be consented (in terms of take of water and intake structures similar to the existing) would therefore not be affected by the WCO. Any intake structure would however be required to comply with the fish screen criteria sought by the Applicants.

Lynda Murchison, evidence dated 23 March 2009

44. At paragraphs 4.11 to 4.17, Ms Murchison, on behalf of Environment Canterbury, draws attention to the fact that the Transitional Regional Plan (TRP) makes provision for some water takes, uses, diversions and damming as permitted activities and that the WCO application seeks to prevent these activities.

45. The General Authorisation for the Damming of Rivers and Streams (pages 34-35 TRP) provides for the damming of waterways as a permitted activity in specific circumstances and subject to conditions. The circumstances are:
- Damming of intermittently-flowing waterways;
 - To allow the construction of drop structures for riverbed erosion control;
 - The use of floodgates for control of floods or tidal events;
46. I acknowledge that, subject to the exclusions specified in the Draft Order, the application could have the effect of making some of these activities prohibited, particularly in the upper Hurunui catchment, and on the mainstem of the lower Hurunui River. While I acknowledge that there may be effects on individual activities, this process is no different from, for example, a regional plan becoming operative and making those activities prohibited. The application has been publicly notified, and opportunities have been provided for submissions, albeit that the process is different from a regional planning process. However I do acknowledge that in its proposed form the NRRP is seeking to maintain permitted activity status for some damming, which the WCO would restrict. Leaving that point aside, I reiterate that there is the potential for some currently permitted activities to have an adverse effect on the values of the Hurunui River system that the Applicants consider worthy of protection.
47. The General Authorisation for the Abstraction of Natural Water (page 13 of the TRP) provides for several abstractions as permitted activities as follows:
- Abstractions that do not exceed 10 cubic metres per day, per property;
 - Abstractions from the Hurunui River not exceeding 100 cubic metres per day, per property, downstream of the Mandamus water level recorder site;
 - Abstraction of water from the distribution system by members of the Balmoral Irrigation Scheme (Amuri Irrigation Company).
48. With regard to the above provisions I note the following:
- 10 cubic metres per day, per property is the quantity generally estimated for a daily water supply for an individual domestic dwelling. The Draft Order provides an exclusion for reasonable domestic needs, plus stockwater.
 - No restrictions are sought by the Applicants as part of the WCO on water takes downstream from the Mandamus confluence. I understand that the flow recorder is approximately 1km upstream of the confluence. Therefore the only potential effect from the WCO would be a restriction on any existing takes (should there in fact be any in this short segment of river) up to 100 cubic metres per day, per property (but not restricting takes for reasonable domestic needs, plus stockwater).
 - The general authorisation relating to the Balmoral Irrigation Scheme relates to the take of water from the distribution system (not the river, such diversion being authorised by way of consent). The proposed WCO would therefore have no material effect on the permitted activity status provided by the general authorisation. Further, I note that the Balmoral Irrigation Scheme intake is below the Mandamus River confluence, and accordingly would not be restricted by the proposed WCO as sought by the Applicants (apart from being subject to the fish screen requirements).
49. Based on the above analysis, I consider that the likelihood of the proposed WCO imposing significant restrictions on activities that are currently permitted by way of the TRP is small.

50. I note that at Paragraph 5.3 of her evidence, Ms Murchison largely agrees with my opinion that there are inconsistencies and discord within the provisions of the proposed NRRP. However, Ms Murchison disagrees that a WCO is necessary to overcome the difficulties with these provisions. She notes (in paragraph 5.5) that being classed as a “natural state” or “high naturalness” water body within the proposed NRRP does not mean that a water body is necessarily worthy of protection through a WCO.
51. I agree with her statement. However, I do believe that there may be cases where natural state or high naturalness water bodies possess the values that meet the tests of Section 207 of the RMA and that protection of those via a WCO is appropriate. Other witnesses for the Applicants have addressed the values of the Hurunui River in this context.
52. Second, at paragraph 5.6 Ms Murchison places emphasis on the fact that issues arising from submissions and different opinions can be resolved through decisions and appeal processes. I accept that the process allows for resolution. However, it is not possible to second-guess at this stage what those decisions may be, and whether the outcomes sought by the Applicant to protect the Hurunui’s values may be effected. In this regard, I again note two points – the recommendations of the Officer Report that weaken the protection given to the Hurunui, and the proposed amendments to the RMA which potentially lower the threshold tests, as well as remove the default of public notification of consent applications.
53. At paragraph 7.5 Ms Murchison notes that in my evidence-in-chief I do not include all the exemptions that ECan has suggested. During presentation of my evidence I clarified for the Tribunal that the exemptions were as listed in Clause 10 of the Draft Order tabled by the Applicants’ legal Counsel, plus provision for uses associated with activities of the Department of Conservation. In other words, the exemptions are (paraphrased):
- An individual’s reasonable domestic needs;
 - Reasonable needs of an individual’s animals for drinking water;
 - Fire-fighting;
 - Research and protection or enhancement of fisheries and wildlife habitat;
 - Construction, removal, maintenance or protection of roads, fords, bridges or the maintenance or protection of any network utility operation;
 - Protection of human health;
 - Minor uses associated with conservation purposes for the management of land administered by the Department of Conservation.
54. The following exemptions suggested by ECan have been excluded from the draft Order on the basis that there is potential for adverse effects to be generated that would compromise the values that the Applicants consider worthy of protection. The exclusions are provision for:
- Construction and maintenance of soil conservation and river protection works;
 - Water for washdown and other services to support farming or other activities;
 - Micro-hydroelectricity generation to serve an adjoining property.
55. At paragraph 7.7 Ms Murchison implies that I oppose the regional council imposing an environmental flow regime through a regional plan. To clarify for the Tribunal, my statement at paragraph 10.4 of my evidence-in-chief is that I do not see a need for the WCO to include a provision specifically stating that an environmental flow regime may be imposed on the Hurunui River through a regional plan.

Herb Familton, evidence dated 23 March 2009

56. At paragraphs 5.17 and 5.18 Mr Familton draws attention to the prohibited activity status set in Rule WQN12 of the proposed NRRP for taking and diverting water where the water is fully allocated.
57. I reiterate that while this rule goes some way to meeting the Applicants' desires, it still potentially allows for considerable changes in flow to result from abstractions within the allocation regime. This is not the outcome sought by the Applicants to protect the values of the Hurunui River system.
58. At paragraph 5.19 Mr Familton states that it is his view that the provisions in the proposed NRRP for the A and B allocation blocks proposed in Variation 8 best allow for the needs of the community and of primary and secondary industry to be met. I acknowledge that this is Mr Familton's opinion. However I reiterate that no Officer's Report has yet been released on Variation 8 or the issues considered at hearing. The extent to which it may in fact meet the needs of the community is untested.
59. I reiterate that the Applicants are not seeking flow regime restrictions on the lower Hurunui River, and acknowledge Mr Familton's statement in paragraph 5.22 that Fish and Game New Zealand do not fundamentally oppose the provision of allocation blocks for the Lower Hurunui downstream of the Mandamus River.

Philip Mitchell, evidence dated 31 March 2009

60. At paragraph 63, Dr Mitchell comments on the effect of the changes to the proposed NRRP recommended by the Officer Report. He states: "... I am aware that the officer's report on Policy WQN1 did recommend a slightly amended framework combining Policy WQN1 and Policy WQN2, which affords the Hurunui River above the Mandamus confluence strategic protection akin to that provided by Policy WQN1...".
61. I disagree with this comment. As noted in my evidence-in-chief, I believe Policy WQN1 in its notified form provided for retention in natural state of the following water bodies:
- the mainstem of the Hurunui River (ie north branch) and its tributaries upstream of Lake Sumner (which would include Lake Marion);
 - the upper reaches of the South Branch and its tributaries above and including Stony Stream;
 - the upper reaches of the North Esk River and its tributaries above and including Lucy Stream.
62. The changes recommended by the Officer's Report would retain the same protection for some of the reaches of the Upper Hurunui system but, significantly, would 'downgrade' the former natural state water bodies to high naturalness state. Changed Policy WQN1 (1) contains the words "worthy of a high level of protection" which I consider is different from the intent of the previous wording of "retain river flows or lake levels in their natural state".
63. I therefore disagree with Dr Mitchell's comment that the recommended changes would afford any additional strategic protection to any of the Upper Hurunui water bodies. This is borne out by my analysis (in my evidence-in-chief) of the changes to the activity status that would result if the Officer's Report recommendations on the Rules were to be upheld (ie deletion of the prohibited activity status for high naturalness water bodies and the imposition of non-complying activity status for

damming on all waterways (mainstem, tributaries and lakes) upstream of the Mandamus confluence).

Conclusion

64. In conclusion, I make the following points:

- I reiterate that in my opinion, the application is not inconsistent with the general policy intent of the proposed NRRP, or the operative Hurunui District Plan.
- I believe however that neither of those plans either singly or in combination is (respectively) likely or able to deliver the outcome sought by the Applicants to protect the values of the Hurunui River system.
- There is no requirement for the Tribunal to take proposed national policy statements, the Canterbury Strategic Water Study, the Hurunui River Management Plan, or the Hurunui LTCCP into account in their consideration of the application.
- The Applicants are not seeking any restrictions that would directly limit the ability of the Hurunui District Council to re-consent its current water schemes.
- The WCO process is a legitimate process under the RMA to give protection to water bodies that meet the threshold tests with regard to values. It provides opportunity for public input to the process, as evidenced by the large number of submissions received on the application. The majority of these submissions are in support of the application.
- The WCO process provides certainty of outcome for long-term protection of outstanding values.

Sally Marx

16 April 2009