

**SPECIAL TRIBUNAL
BULLER WCO
FISH AND GAME APPLICATION**

IN THE MATTER of the Resource Management Act 1991
AND
IN THE MATTER Of an application to amend the Water
Conservation (Buller River) Order 2001
pursuant to section 216 of the Act
BY **NEW ZEALAND FISH AND GAME
COUNCIL and NELSON
MARLBOROUGH FISH AND GAME
COUNCIL**
Applicants

REPORT TO THE MINISTER FOR THE ENVIRONMENT

Introduction

1. This is the Report of the Special Tribunal on the application by New Zealand Fish and Game Council and Nelson-Marlborough Fish and Game Council ("Fish & Game"). Fish & Game applied under section 216 Resource Management Act 1991 ("RMA") for an amendment to the Water Conservation (Buller River) Order 2001 ("WCO"). This Report is made pursuant to section 208(1) RMA.
2. The Special Tribunal issued an Interim Decision dated 11th July 2007. The interim decision was that the WCO should be amended. During the intervening period between the Interim Decision and this Report the parties have had an opportunity to make submissions on the drafting of the amendments to the WCO. The Special Tribunal received submissions from five parties on the proposed amendments to the WCO. Those five parties were:
 - Fish and Game;
 - Director-General of Conservation;
 - New Zealand Energy Limited ("NZ Energy");

- Royal New Zealand Forest & Bird Protection Society of New Zealand Incorporated (“Forest & Bird”);
 - P and F Borlase.
3. The Special Tribunal by a Minute dated 4th of October 2007 recorded that there was a high level of agreement between the submitters on the proposed amendments and asked that they liaise among themselves to resolve any outstanding issues to their mutual satisfaction. We requested that Fish and Game as the applicant lead the process and submit proposed amendments to the WCO.
4. Counsel for Fish and Game filed a memorandum dated 26 October 2007 which had attached to it proposed amendments to the WCO. The memorandum recorded that:
- NZ Energy and P and F Borlase consented to the proposed amendments;
 - The Director-General of Conservation and Forest & Bird consented to the proposed amendments, but wished to note the need to avoid any inadvertent loss of protection for the recognised outstanding rafting characteristics of the Gowan River.
5. The concern raised by the Director-General of Conservation and Forest & Bird that there may be an inadvertent loss of the existing protection of the outstanding characteristic of the Gowan River for rafting is a new point raised with the Special Tribunal for the first time in counsel for Fish & Game’s memorandum dated 26 October 2007. The point having been raised, the Special Tribunal asked the Director-General and Forest & Bird to file submissions on the point and invited counsel for Fish & Game to file a further submission on the issues being raised.
6. We summarise the concern about loss of some of the existing protection for the rafting characteristics of the Gowan River as follows:
- Clause 8(3)(c) provides:
 - “(c) any change in flow permitted in the Gowan River, item 11 (sic) of Schedule 2, must not be:

(1) greater than 15% of the naturally occurring instantaneous flow whenever that flow is 9 cumecs or more; or

(2) greater than 5% of the naturally occurring instantaneous flow whenever that flow is less than 9 cumecs.”

- The Special Tribunal in its Interim Decision decided that clause 8(3)(c) of the WCO should be amended by adopting the minimum flow regime for the Gowan River proposed at the hearing by Fish & Game. This was that at instantaneous flows of or above 16 cumecs any change in flow must not be greater than 25% of the naturally occurring instantaneous flow, and that if the natural occurring instantaneous flow is less than 16 cumecs any change in flow must not be greater than 5% of the naturally occurring instantaneous flow. Contrary to Fish & Game's request the Special Tribunal decided there should not be any restriction when flows exceed 60 cumecs. This is the regime provided for in the amendments submitted by Counsel for Fish & Game in her memorandum dated 26 October 2007.
 - The concern now raised is that Fish & Game's proposal would allow the naturally occurring instantaneous flow of the river when it is equal to or exceeds 16 cumecs to be reduced by 25% rather than the 15% in the existing order and this would reduce the protection of the river for the outstanding characteristic of rafting.
7. The issue has come to light as a result of the Environment Court's decision (ENV C23/06, Decision number 102-2007, dated 3 August 2007) in which the Court concluded that the restriction limiting changes in flow to 15% when flows exceed 9 cumecs and 5% of the naturally occurring flows were less than 9 cumecs remains appropriate for the protection of the outstanding rafting characteristics of the Gowan River.
8. There are two points in issue:
- The restriction in relation to rafting is based on a naturally occurring instantaneous flow of 9 cumecs or more whereas the restriction proposed by the Special Tribunal in respect of other characteristics is based on a naturally occurring instantaneous flow of 16 cumecs or more;

- The Special Tribunal's proposed amendment would restrict any change in flow of the Gowan River to be not greater than 25% instead of the 15% of the naturally occurring instantaneous flow in the existing clause 8(c) now confirmed by the Environment Court.
9. Counsel for the Director-General of Conservation in her memorandum 22nd November 2007 submitted that in light of both the Environment Court's report and the Special Tribunal's Interim Decision, one possible solution would be to amend clause 8(3)(c) as follows:
- “(c) any change in flow permitted in the Gowan River, item 10 of Schedule 2, must not be:*
- (1) greater than 15% of the naturally occurring instantaneous flow whenever that flow is 16 cumecs or more; or*
- (2) greater than 5% of the naturally occurring instantaneous flow whenever that flow is less than 16 cumecs.”*
10. Ms Martin for Forest & Bird in her memorandum dated 23 November 2007 also submitted that clause 8(3)(c) should be amended to allow takes of 5% when the naturally occurring instantaneous flow is under 16 cumecs and 15% when the naturally occurring instantaneous flow is 16 cumecs or more.
11. Counsel for Fish & Game in her memorandum 4th of December 2007 supported the amendment to clause 8(3)(c) proposed by Counsel for the Director-General of Conservation. She said this amendment will protect the outstanding fishery by raising the “*minimum*” flow from 9 to 16 cumecs below which only 5% of the naturally occurring instantaneous flow may be taken and it will also continue to protect the outstanding rafting amenity by retaining the original restriction of 15% on takes from the river when it is flowing at or above 16 cumecs. This position is inconsistent with her memorandum dated 26 October 2007 which proposed amendments based on our Interim Decision.
12. The problem with the amendment to clause 8(3)(c) now proposed is that when the naturally occurring instantaneous flow is 16 cumecs or more the restriction of 25% proposed by Fish & Game, the applicant in these proceedings, would be reduced to 15% at a very late stage in the process and without notice to most of the other parties. We record that counsel for Fish & Game and the Director-

General of Conservation also submitted that any differences between the Reports of the Environment Court and the Special Tribunal may be better reconciled by the Minister of the next stage of this process.

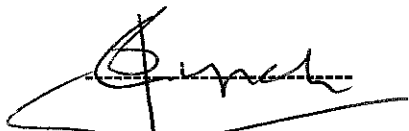
13. The Special Tribunal considers that it should take into account the protection for rafting in the existing clause 8(3)(c) confirmed by the recent report of the Environment Court, but the restriction on alterations to the flow of the Gowan River should not be more than is required to protect the outstanding characteristics recognised by the existing WCO and by the amendments recommended by the Special Tribunal.
14. On the information available to it, the Special Tribunal understands that the ability to use the Gowan River satisfactorily for rafting is reduced when the flow is less than 20 cumecs. Once the flow increases to 27 cumecs a 25% reduction will still leave 20.25 cumecs of flow in the river which is sufficient for the river to be used for rafting. On that basis the Special Tribunal recommends the following regime:
 - 5% restriction when the naturally occurring instantaneous flow is less than 16 cumecs;
 - 15% restriction when the naturally occurring instantaneous flow is 16 cumecs or more but less than 27 cumecs;
 - 25% restriction when the naturally occurring instantaneous flow is 27 cumecs or more.
15. Attached to this report are the following:
 - A copy of the WCO with our recommended amendments shown with *track changes*;
 - A clean copy of the proposed WCO incorporating the amendments recommended.
16. Counsel for Fish & Game in paragraph 4 of her memorandum 26 October 2007 set out comments on the proposed amendments. We adopt those comments, with the exception of the amendment proposed to clause 8(3)(c) since the proposed amendment has changed in light of the rafting issue.
17. We record the following comments on the proposed amendments to the WCO:

- (a) Amend clause 6(b) to correct an existing incorrect reference to clause 7 to the correct reference clause 11.
- (b) Clause 7(1)(a) is amended in accordance with Interim Decision.
- (c) Clause 8(3)(c) is amended in accordance with the reasons set out above.
- (d) Clause 9 is amended to correct a mistake in cross referencing.
- (e) Amendments to Clause 10 have been made to ensure it refers to the relevant schedules (both 1 and 2). Also the Director-General of Conservation suggested the addition of the wording "*for the avoidance of doubt reference to native fisheries includes eel fisheries*" for clarification.
- (f) Addition of new Clause 12(4) to give effect to the Interim Decision's finding that passage of eels through Matiri River must be protected in both directions.
- (g) Addition of a new matter 5A in Schedule 2 with the correct map reference for the Black Valley Stream.
- (h) Addition of new matters for protection in the Gowan River. The Special Tribunal held that the Gowan makes an outstanding contribution to the eel fishery (paragraph 85 of its Interim Decision).
- (i) Amendments to Schedule 3 to reflect the fact that it now refers to both Lake Matiri and Matiri River, and the features of the Matiri River that are to be protected are recorded as "*contribution to outstanding native fishery*."

18. One outstanding matter is that counsel for NZ Energy raised the question of costs. We received submissions on the issue. We agree with the submission on behalf of Forest & Bird that we do not have power to award costs.

19. We recommend that the WCO be amended in accordance with the documents attached to this Report.

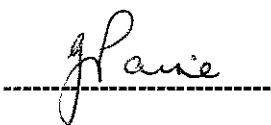
DATED this 20th day of December 2007.

A handwritten signature in black ink, appearing to read 'J B Lynch', written over a horizontal dashed line.

Mr J B Lynch
Chairman

A handwritten signature in black ink, appearing to read 'G Closs', written over a horizontal dashed line.

Dr G Closs

A handwritten signature in black ink, appearing to read 'G Paine', written over a horizontal dashed line.

Mrs G Paine