

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

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

**IN THE MATTER** of the Resource Management Act 1991 (the Act)

**AND**

**IN THE MATTER** of a proposal of national significance directed by the  
Minister for the Environment to be referred to the  
Environment Court under section 142 of the Act

**AND**

**IN THE MATTER** of waivers and directions under section 281 of the Act

**ENVIRONMENTAL PROTECTION AUTHORITY**

Applicant

---

**APPLICATION FOR WAIVER OF SERVICE REQUIREMENTS  
FOR PUBLIC NOTICE  
19 June 2020**

---



Solicitor Acting: Elliot Higbee

Email: [Elliot.Higbee@epa.govt.nz](mailto:Elliot.Higbee@epa.govt.nz)

Telephone: +64 4 474 5458

Private Bag 63002

Wellington, 6140

## APPLICATION FOR WAIVER OR DIRECTIONS

*Section 281, Resource Management Act 1991*

**To** The Registrar  
Environment Court  
Christchurch

### **A request to call in plan changes**

- 1 On 27 February 2020 the Otago Regional Council (**ORC**) requested that the Minister for the Environment, the Hon David Parker, consider using his powers under s 142(2) of the Resource management Act 1991 (**the Act**) to call in two proposed plan changes.
- 2 The two proposed plan changes relate to ORC's regional plan and are:
  - (a) Proposed Plan Change 7 – Water Permits (**PPC7**); and
  - (b) Plan Change 8 to the Regional Plan: Water for Otago – Discharge Management (PPC8); and Plan Change 1 to the Regional Plan: Waste for Otago – Dust Suppressants and Landfills (PPC1) (**the Omnibus Plan Change**).
- 3 On 8 April 2020, the Minister for the Environment exercised his powers under s 142(2)(b) and called in the two plan changes, having considered them to be parts of a proposal of national significance, and directed they be referred to the Environment Court for decision.

### **Progressing a call in and giving public notice**

- 4 Part 6AA of the Act applies to proposals of national significance and specifies at ss 149A to 149I a process for progressing the two plan changes (**the matters**) once the Minister has directed that they are referred to the Environment Court for a decision. The process requires the Environmental Protection Authority (**EPA**) to assist in processing these matters, including giving public notice of the Minister's direction under s 149C(1):

#### **149C EPA must give public notice of Minister's direction**

- (1) The EPA must give public notice of a direction the Minister makes under section 142(2) or 147(1)(a) or (b).

...

5 Public notice is defined at s 2AB:

**2AB Meaning of public notice**

- (1) If this Act requires a person to give public notice of something, the person must—
- (a) publish on an Internet site to which the public has free access a notice that—
    - (i) includes all the information that is required to be publicly notified; and
    - (ii) is in the prescribed form (if any); and
  - (b) publish a short summary of the notice, along with details of the Internet site where the notice can be accessed, in 1 or more newspapers circulating in the entire area likely to be affected by the matter to which the notice relates.
- (2) The notice and the short summary of the notice must be worded in a way that is clear and concise.

6 Subsection 149C(3) specifies requirements for the contents of the public notice of a Minister's direction.

7 Subsection 149C(4) imposes a specific additional service requirement when the EPA gives public notice of the Minister's direction:

- (4) When the EPA gives public notice under subsection (1), it must also serve a copy of the notice on—
- (a) each owner and occupier (other than an applicant) of any land to which the matter relates; and
  - (b) each owner and occupier of any land adjoining any land to which the matter relates; and
  - (c) if applicable, every person who has made a submission on the matter to the local authority.

**The issue with serving public notice**

8 The EPA has been working with the ORC to ascertain the practicable implications of fulfilling the s 149C(4) service requirement; the details of which are set out in the accompanying affidavit of Tom De Pelsemaeker (dated 19 June 2010).

9 The EPA submits that given the scope of the two plan changes, compliance with the service requirements of s 149C(4) are not able to be practicably or proportionately achieved.

### Waiver and directions as to service sought

10 The EPA seeks a partial waiver and directions under s 281(a)(v) of the RMA from the Environment Court as to the service requirements under s 149C(4). Section 281(a)(v) relevantly provides:

#### 281 Waivers and directions

- (1) A person may apply to the Environment Court to—
- (a) waive a requirement of this Act or another Act or a regulation about—
  - ...
  - (v) the persons on whom anything shall be served; or

11 The affidavit of Tom De Pelsemaeker sets out the background to the plan changes, and the proposal for service of the public notice on individuals in respect of each of these plan changes.

12 As a result, the EPA proposes to serve the following individuals with the public notice for PPC7:

- (a) All current deemed permit and water permit holders who were sent a copy of the public notice when the Council notified PPC7 to their notified address;
- (b) Any applicant with an application for a water permit being processed by the Council when public notice is given to their notified address for service;
- (c) Key stakeholders and statutory parties listed in **annexure F** of Tom De Pelsemaeker's affidavit (dated 19 June 2020) to their notified contact details; and
- (d) All 256 submitters on PPC7 to their notified address for service.

13 Similarly, it is proposed that the following individuals will be served with the public notice for the Omnibus Plan change:

- (a) All ratepayers in the Otago Regional Council Rural Water Quality Rating Database by postal delivery to their address;
- (b) Occupiers of properties in the Otago Regional Council Rural Water Quality Rating database by delivery to letterboxes at street and road addresses where rural delivery can be undertaken; and

(c) Key stakeholders and statutory parties listed in **annexure H** of Tom De Pelsemaeker’s affidavit (dated 19 June 2020) to their notified contact details.

14 Where the person to be served has previously provided an email address to the Council as a method of contact, that person will be served by email rather than post.

15 Further, Tom De Pelsemaeker’s affidavit at paragraphs [23] and [42] sets out the steps proposed to ensure the public notice is widely published in the region in accordance with s 2AB.

### **The EPA submission**

16 The EPA submits that despite the above proposal to serve specific individuals it is not possible to be sure that ss 149C(4)(a) and (b) have been complied with.<sup>1</sup>

17 The EPA submits that compliance with s 149C(4), particularly as it relates to “each owner and occupier ... of any land to which the matter relates”<sup>2</sup>, and “each owner and occupier of any land adjoining any land to which the matter relates”<sup>3</sup> is impracticable in the circumstances. Given the widespread effect of the proposed plan changes, and therefore the extent of land to which these changes relate it is simply not possible to fulfil the statutory requirement. Despite this, the EPA submits that the proposed individualised service, and publication of the public notice, are appropriate and substantially achieve the intent of s 149C(4).

18 The EPA submits that the key issue for determination in considering an application for waiver is whether granting the application will cause undue prejudice to any party.<sup>4</sup>

19 The EPA refers to the approach to “undue prejudice” in ***Re Auckland Council***<sup>5</sup> (footnotes omitted):

[38] The Court has on numerous occasions noted that the question of whether there would be undue prejudice means that there must be prejudice beyond what would necessarily follow in every case from the granting of a waiver. The qualifier “undue” connotes something more than what is merely incidental. It also connotes a prejudice that is unwarranted. It is often considered in light of the fundamental principles

---

<sup>1</sup> Subsection 149C(4)(c) solely relates to the 256 submitters on PPC7 and who are encompassed by the proposed service.

<sup>2</sup> s 149C(4)(a)

<sup>3</sup> s 149C(4)(b)

<sup>4</sup> See s 281(2) and ***Re Wairakei Pastoral Ltd*** [2020] NZEnC 63 at [16]

<sup>5</sup> [2017] NZEnvC 207 at [38]

that litigation should be conducted as expeditiously as practicable in the interests of justice and that certainty and finality are desirable goals of the litigation process. The Court will also take into account whether a waiver would adversely affect other interests of the parties, such as contractual commitments.

20 The EPA submits that the Court can be satisfied that no party will suffer undue prejudice for the following reasons:

- (a) the proposed service of the public notice upon individuals is appropriate in the circumstances;
- (b) the proposal for publication of the public notice is extensive<sup>6</sup>;
- (c) the combined effect of the proposed service and publication of the public notice are more extensive than that required under Schedule 1<sup>7</sup>;
- (d) PPC7 has already been publically notified and received submissions so it is a live matter in the community<sup>8</sup>;
- (e) the plan changes are matters of local media attention<sup>9</sup>;
- (f) a party disadvantaged by the waiver can at a later time pursue a similar waiver application, which the Court will consider on its own merits.<sup>10</sup>

21 On the above basis, the EPA seeks a waiver and directions of the s 149(C)(4) service requirements in respect of plan change PPC7, and the following direction as to service:

- (a) Public notice of PPC7 shall be served on:
  - (i) All current deemed permit and water permit holders who were sent a copy of the public notice when the Council notified PPC7 to their notified address;
  - (ii) Any applicant with an application for a water permit being processed by the Council when public notice is given to their notified address for service;

---

<sup>6</sup> See affidavit at paras 23(a) to (d) and 42(a) to (d)

<sup>7</sup> *ibid* at paras 32, 39, 42(e) to (g) and 46 to 49

<sup>8</sup> *ibid* at para 17 and 22

<sup>9</sup> *ibid*

<sup>10</sup> *Re Wairakei Pastoral Ltd* at [20]

- (iii) Key stakeholders and statutory parties listed in annexure F of Tom De Pelsemaeker's affidavit (dated 19 June 2020) to their notified contact details; and
  - (iv) All 256 submitters on PPC7 to their notified address for service.
- 22 Similarly, the EPA seeks a waiver of the s 149(C)(4) service requirements in respect of Omnibus plan change, and the following direction as to service:
- (a) Public notice of the Omnibus plan change shall be served on:
    - (i) All ratepayers in the Otago Regional Council Rural Water Quality Rating Database by postal delivery to their address;
    - (ii) Occupiers of properties in the Otago Regional Council Rural Water Quality Rating database by delivery to letterboxes at street and road addresses where rural delivery can be undertaken; and
    - (iii) Key stakeholders and statutory parties listed in annexure H of Tom De Pelsemaeker's affidavit (dated 19 June 2020) to their notified contact details.
- 23 A copy of these directions is attached to this application as **attachment 1**.

Dated this 19th day of June 2020



---

**E L Higbee**  
Counsel for the Applicant

**ATTACHMENT 1****Service**

1. Direct that the requirements of s 149(C)(4) are waived and that the Environmental Protection Authority shall undertake service of the relevant Public Notice of the Minister for the Environment's directions dated 8 April 2020 as follows:

**PPC7**

2. Public notice of PPC7 shall be served on:
  - a. All current deemed permit and water permit holders who were sent a copy of the public notice when the Council notified PPC7 to their notified address;
  - b. Any applicant with an application for a water permit being processed by the Council when public notice is given to their notified address for service;
  - c. Key stakeholders and statutory parties listed in annexure F of Tom De Pelsemaeker's affidavit (dated 19 June 2020) to their notified contact details;  
and
  - d. All 256 submitters on PPC7 to their notified address for service.

**Omnibus Plan Change**

3. Public notice of the Omnibus plan change shall be served on:
  - a. All ratepayers in the Otago Regional Council Rural Water Quality Rating Database by postal delivery to their address;
  - b. Occupiers of properties in the Otago Regional Council Rural Water Quality Rating database by delivery to letterboxes at street and road addresses where rural delivery can be undertaken; and
  - c. Key stakeholders and statutory parties listed in annexure H of Tom De Pelsemaeker's affidavit (dated 19 June 2020) to their notified contact details.
4. For completeness, service may be affected by email if the person to be served has previously provided an email address to the Council as a method of contact.