



# A failed attempt at collaborative water planning: Selwyn Waihora Variation 1

Hamish G. RENNIE

*Associate Professor in Planning, Department of Environmental Management, Lincoln University, New Zealand*

## 1. INTRODUCTION

The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (the ECan Act) enabled the elected regional councillors to be replaced by commissioners (ECan Commissioners) appointed by and accountable to the Minister for the Environment and the Minister of Local Government. Among other special provisions, the ECan Act removed the ability to appeal regional plans or policy statements to the Environment Court. The extension in time of this Act from its original 2013 to 2016 before elections for the regional council are allowed (and even then some positions will remain appointed) has meant that those making decisions for the region on its plans have not been able to be held accountable by the ratepayers for their decisions and there is little likelihood that the responsible Ministers will be held accountable by the New Zealand public for the actions of the commissioners. This article contextualises and reports on one of the 13 sub-regional water plans underway to set environmental limits as part of implementing the Canterbury Water Management Strategy (CWMS).

## 2. DO APPOINTED COMMISSIONERS MAKE A DIFFERENCE?

There has been debate for some time as to whether the Environment Court, who are not elected or accountable to a region's population, should stand above the elected representatives on regional (or for that matter district) plans and policy. The debate has usually been in the context of the regional representatives being elected, not central government appointees, and therefore locally accountable. The difference is important because it is about whether local plans should be subject to the national or the regional interest and,

in either case, whether citizens should have recourse to the specialist Environment Court to address matters of substance in the plans, or such recourse should only be to the higher courts with concerns restricted to points of law.

Leaving aside the issue of recourse to the courts, it can be argued that the government has national environmental standards, national policy statements and regulations with which to press the national interest on local government, at least in the context of the Resource Management Act (RMA). It also has financial and other resources that it can offer local government and industries to facilitate gaining its national ends. In passing the ECan Act, it appears the government was convinced that it itself lacked the capability of achieving its ends through the other tools at its disposal and consequently it was most appropriate to suspend regional democracy. In particular, the government considered it appropriate that Canterbury Regional Council (ECan) and the Ministerial appointees should be unencumbered by the checks and balances provided by the Environment Court for every other regional or unitary council in regional planning processes.

It is difficult to compare the performance of the appointed ECan Commissioners with what might have been under an elected regional council with the same powers. However, the ECan Commissioners appear to have departed little from the course set by the former elected council in relation to water issues. For instance, the CWMS was developed by the elected regional and territorial councillors in Canterbury well before the ECan Act and has guided subsequent water planning in the region. Initially the CWMS was driven by a desire to identify 'new' water for intensification of land use, especially assisting conversion from dryland farming to dairying. The consultative process used in developing

it resulted in a much more broad-based approach that placed the environment ahead of intensified land use. The vision and principles of the CWMS were given statutory recognition through the ECan Act. Perhaps what the ECan Commissioners have added is a sense of haste and singularity of purpose for water planning.

### 3. CURRENT WATER PLANNING IN CANTERBURY

The CWMS has been largely implemented through the Zone Committees. These committees are not established on catchment or political boundaries, but on a blend of each. This makes some sense in a region where the surface flows are difficult to distinguish from and are intricately connected with groundwater. A regional Land and Water Plan has been produced that has region-wide rules, with individual chapters reserved for each zone. These chapters will remain blank until a variation or a plan change has been made to provide more detailed rules in each chapter that are specific to the biophysical and social characteristics of the zone.

The Zone Committees produce, through non-statutory planning processes, Zone Implementation Programmes (ZIPs). Each ZIP is then translated into a zone-based chapter of the Land and Water Plan (a regional plan) through the truncated statutory processes available in Canterbury. Essentially this process involves the Zone Committee, itself a joint committee of the territorial local authority and the regional council under the Local Government Act, putting a recommended plan to the ECan Commissioners. The commissioners then amend the recommendation as they see fit, notify a proposed plan and send it to an ECan Hearings Committee. The ECan Commissioners have appointed Independent Hearings Commissioners (IHCs) as their Hearings Committees. These IHCs hold hearings and then make recommendations to the ECan Commissioners who then approve the plan change. The plan or variation may only be appealed to the High Court and then only on points of law. This therefore removes the specialist Environment Court from the process.

Logically, in the absence of an Environment Court, it would seem incumbent on the commissioners to exercise a more rigorous approach to the review of IHC recommendations on regional plans than might be the norm for elected councils and that they might even reject parts of the plans. However, the ECan Commissioners' perspective, at least for the Selwyn Waihora Variation 1 (SWV1), seems to be that once the

recommendation of the IHCs had been received, the ECan Commissioners could only accept or reject a plan in whole, not in part, even if there may be problems with the recommendation<sup>1</sup>. It is unclear on what basis they hold this view; however, it may be on the basis that these are perceived by them to be the community's plans and on that basis should be upheld.

In summary, this whole process has been touted as collaborative and representing the will of the community because of the role played by the Zone Committees<sup>2</sup>. This overlooks the nature of those committees and the context within which they are operating.

Problems with the similarly produced Hurunui and Waiau River Regional Plan have led ECan to release an 'advice note' (in July 2015) indicating that ECan has adopted an interpretation of 'land use change' that means that it will not be giving priority to pursuing compliance of dryland farmers whose land use change reflects the advice note's definition of 'normal' dryland farming<sup>3</sup>. The need for this approach is to address the concern of dryland farmers who felt their needs had not been included in the plan and that they had not been represented in the collaborative process. ECan's pragmatic approach to solving the issue is indicative of faults in the plan that may have been avoided with either fuller community representation on the Zone Committee or an Environment Court process. In the remainder of this article I focus specifically on the first variation to the Land and Water Plan, SWV1 (which subsequently became Plan Change 1 to the Regional Land and Water Plan).

### 4. THE SELWYN WAIHORA ZONE

The Selwyn Waihora (SW) area (lying predominantly between the Waimakariri and Rakaia rivers and including all tributaries and waters flowing into the lake) is considered over-allocated and the lake has been described, possibly erroneously, as the most polluted in New Zealand (it is hyper-eutrophic, but it is also naturally eutrophic and the extent to which it is polluted above its natural eutrophic state has not been clearly identified). Politically, the area falls within the rapidly urbanising

1 ECan Commissioner Caygill in oral response to questions at a public meeting on 14 May 2015 in Lincoln (after SWV1 had been approved).

2 See: <http://ecan.govt.nz/publications/Reports/targets-report-cwms-2015.pdf>

3 See: [http://ecan.govt.nz/our-responsibilities/regional-plans/hwrrp/Pages/hwrrp\\_advice\\_note.aspx](http://ecan.govt.nz/our-responsibilities/regional-plans/hwrrp/Pages/hwrrp_advice_note.aspx)

Selwyn District and Christchurch City. The Central Plains Water Project involving, if fully developed, irrigation of 60,000 ha in the upper part of the catchment, was initiated and approved under plans made by the former elected regional council. The first 20,000 ha stage is under construction.

The 16 member Selwyn Waihora Zone Committee (SWZC) comprises three types of people. There are representatives of the six rūnanga with acknowledged interests in Lake Ellesmere/Te Waihora and these are chosen through marae-based processes. There is a representative from the elected members of each of Selwyn District Council and Christchurch City, and an ECan Commissioner. The ECan Commissioner of Ngāi Tahu descent, Don Couch, represented the commissioners for the period of the making of SWV1. Although not representing Ngāi Tahu on the SWZC, his published comments indicate he clearly saw his role as to ensure his interpretation of Ngāi Tahu's values would be part of the outcome<sup>4</sup>.

The remainder of the committee comprises 'community members' who were selected by a local authority selection panel. The community members are specifically not, nor do they describe themselves as, 'community representatives', but many perspectives that might be held within the community are represented to a greater or lesser degree, with perhaps the dairy farming interests predominant during the making of SWV1.

The preparation of the SWV1 was facilitated by significant research support. A year of community consultation, conducted by the Zone Committee, on nutrient limits was facilitated by the availability of scientists to answer questions. Dryland farming and not converting large areas to dairying were ruled out early, as was any scenario that did not include the Central Plains Water Project as it had already gained consent.

## 5. SELWYN WAIHORA VARIATION 1 (SWV1)

SWV1 attempts to implement the SWZIP through the regional land and water plan for the catchment of Lake Ellesmere/Te Waihora. Key features of SWV1 are the:

- nitrogen controls;
- phosphorus controls;

4 See: <http://www.stuff.co.nz/the-press/business/68674419/lake-ellesmere-cleanup-deal-explained> and David Painter, former Selwyn Zone Committee Member, letter to the Editor, The Press, 28 May 2015, p.A12

- cultural landscape overlays; and
- approach to equity.

Nitrogen tends to reach waterways through groundwater whereas phosphorus tends to travel through overland flows. The nitrogen controls are similar to those now being commonly employed and critiqued around rural New Zealand. They are based on managing individual farm discharges through input controls using Overseer™ as the modelling tool to guestimate the amount of nitrogen likely to be discharged from the farm to the waterways given particular climate, application methods, soil types, species types and stocking ratios, and crop and arable farming techniques.

A similar approach has been taken to phosphorus, but in this instance in the SWV1 only applies to Phosphorus Sediment Risk Areas (PSRAs). These have been identified based on assumptions of soil phosphorus uptake and soil maps to identify the occurrence of soils likely to be poorly able to absorb phosphorus and hence likely to lead to phosphorous being discharged indirectly into waterways through overland flow. These areas were not part of the ZIP that came from the Zone Committee and are among the contentious surprises in the final plan recommended by the IHC and were subject to High Court appeals that were settled out of court.

Two cultural values overlays, a lake cultural landscape around Lake Ellesmere/Te Waihora and a values management area, including 20m on either side of identified rivers, have been created and are largely combined into one overlay (the Cultural Landscape/Values Management Area [CLVMA]). The lake zone pragmatically adopts readily identifiable roads and the 1.8m contour as its usual boundary and this means that the zone extends a considerable distance from the lake itself. The most controversial aspect of the cultural zones are the restrictions on farming, which differ significantly for those landowners within the zones and those outside them, and the definition of the boundaries of the river values management area.

In the CLVMA, farmed cattle, farmed deer or farmed pigs are prohibited from the 'bed' and bank of rivers, drains (containing water) and the lake, and access to rivers for all other stock (e.g., sheep) would require resource consents as discretionary activities as soon as SWV1 became operative. There are some pragmatic exceptions for ephemeral streams.

To implement these controls, the IHCs effectively decided that all farms should be required to apply for

resource consents to continue their farm activities, but that these would be controlled activities and that among the conditions for consent would be an audited Farm Environment Plan that includes an Overseer™ model for the relevant land use.

Consequently, from the start of 2017, a consent to farm is required if the farm is larger than 10 ha and:

- the farm's nitrogen loss over the most recent four years is higher than 15kg/ha/yr; or
- the farm is in the CLVMA; or
- the farm is in the PSRA; or
- the farm is not implementing good management practices set out in a schedule and under preparation.

Moreover, farm environment plans are required if a farm is larger than 10 ha and:

- the farm's nitrogen loss over the most recent four years is higher than 15kg/ha/yr; or
- the farm is in the CLVMA; or
- the farm is in the PSRA<sup>5</sup>.

If it is outside the CLVMA and greater than 20ha in size then similar rules apply. Notably, those farmers who group together as 'irrigation schemes' will have certain advantages over others. This appears to favour corporate structures like Central Plains Water Ltd and attempts to incentivise the joining of such schemes.

The vast majority, in number, of rural land owners in the SWV1 area are lifestyle/smallholders and low emitters, and the CLVMA areas may catch many unawares. Moreover, no increase above a farm's nitrogen baseline, even if it is lower than the 15kg/ha/yr limit, was initially allowed for a farm in the CLVMA. The baseline is the level of discharge of nitrogen and phosphorus estimated to have occurred on average for the years 2009-2013.

In an interview on his retirement, Commissioner Couch claimed the 'inside scoop' was that the CLVMA was added at his insistence<sup>6</sup>. The Zone Committee, with its strong rūnanga representation, had not included the

CLVMA in its recommended plan and never approved it<sup>7</sup>. It was not something consulted on during the collaborative community engagement process. The outcomes appear quite inequitable in that they penalise low emitters while allowing high emitters to continue to operate at a much higher level. These outcomes are similar in nature to those experienced in Hurunui and appear justified primarily on the basis of not wishing to terminate the activities of high investment emitters whose consents had been so recently approved by the council.

Significant problems have also emerged through the definition of rivers and Lake Ellesmere/Te Waihora being based on the river bed definition used in the ECan Drainage Bylaw 2013. This means that the boundary of Lake Ellesmere/Te Waihora's lake bed may theoretically extend to the height that it would naturally overtop Kaitorete Spit, perhaps the 4m contour, and effectively cover an area extending well beyond the CLVMA, reaching some kilometres inland from the present lake in places.

The beds of rivers are defined, by reference to the Drainage Bylaw, as the outer toe of stop banks and flood control vegetation, which may be several hundreds of metres further from the 'bed' of a river as it is defined by the RMA. This raises significant issues for landowners who again may be entirely unaware of the new requirements and prohibitions on, for instance, sheep and cattle. It has also led to many questioning whether the definition is itself ultra vires, but ECan Commissioners have confirmed that it is not a priority to introduce a plan change to rectify these problems<sup>8</sup>.

## 6. TAKE HOME MESSAGES

It is quite probable that the year-long consultations over the nutrient limit setting created a level of trust in the Zone Committee and ECan that meant people did not look closely at the notified proposed SWV1. Without further research this is conjecture at this stage, but for whatever reason, there are a number of matters that were introduced by the ECan Commissioners or the IHCs that would normally be appealed to the Environment Court and probably resolved out of court through mediation. ECan staff and commissioners' public and

5 See: [http://ecan.govt.nz/publications/Plans/v1\\_farmer\\_QA\\_July\\_15\\_final.pdf](http://ecan.govt.nz/publications/Plans/v1_farmer_QA_July_15_final.pdf)

6 See: <http://www.stuff.co.nz/the-press/business/68674419/lake-ellesmere-cleanup-deal-explained> and David Painter, former Selwyn Zone Committee Member, letter to the Editor, The Press, 28 May 2015, p.A12

7 See: David Painter, former Selwyn Zone Committee Member, letter to the Editor, The Press, 28 May 2015, p.A12

8 Letter dated 24 July 2015 from ECan Commissioner Peter Skelton to Hamish Rennie.

steadfast denials of some of the implications of the definitions of the bed of a river until the day prior to appeals to the High Court closed, confusion over what is a point of law and what is a matter of substance, and the higher costs of High Court processes means that some of these issues can now only be resolved through council-initiated plan changes<sup>9</sup>. The consequence is that many landowners now face the costs of resource consent applications that are disproportionate to the scale of their operation and level of their adverse effects, if any, especially when compared with other landowners. The resultant overall improvement to the waterways will be minimal.

Despite these problems, SWV1 is a significant advance in addressing non-point source pollution of waterways. There are four key messages for legislators and planners:

1. The Zone Committee approaches in Canterbury are not truly community collaborative processes and the outcomes lack community legitimacy<sup>10</sup>.
2. If you are involved in a collaborative project, adopt a 'no surprises' approach, keep your collaborators informed of any changes that might be introduced through behind the scenes dealings before these are made public so that you retain their trust, and draw their attention to the need to consider making submissions on unexpected additions.
3. Removing the ability to appeal council decisions on plans to the Environment Court has significant disadvantages, especially if your decision-makers believe they have no option but to approve all of the recommendations of their hearings committee.
4. Be wary of using mechanisms and definitions for meeting the purposes of one Act to achieve the purposes of another.

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<sup>9</sup> Plan Change 4 ('Omnibus') to the Land and Water Plan is before IHCs at the time of writing and attempts to address some of these issues, but has also introduced new issues.

<sup>10</sup> See: Sinner J, Newton M, Duncan R 2015. "Representation and legitimacy in collaborative freshwater Planning". Prepared for the Ministry of Business Innovation and Employment, Contract CO9X1003. Cawthron Report No. 2787. 45p. plus appendix