

BEFORE THE INDEPENDENT HEARINGS PANEL

IN THE MATTER OF of the Resource Management Act 1991 (“**RMA**”)

AND of proposed Plan Change 9 to the Hawke’s Bay Regional Council Regional Resource Management Plan, publicly notified under clause 5, Schedule 1 of the RMA

LEGAL SUBMISSIONS FOR MR APPLE NEW ZEALAND LIMITED

9 June 2021

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MAY IT PLEASE THE COURT:

Introduction

1. These legal submissions are made on behalf of Mr Apple New Zealand Limited (“**Mr Apple**”) in respect of the Proposed Tūtaekurī, Ahuriri, Ngaruroro and Karamū (“**TANK**”) Proposed Plan Change 9 (“**PC9**”) to the Hawke’s Bay Regional Council’s Regional Resource Management Plan (“**RRMP**”).
2. Mr Apple is the country’s largest company involved in all stages of apple production, from growing through to marketing. It is a major employer in the Hawke’s Bay, with three packhouses, 15 orchard sectors with over 50- locations throughout the Heretaunga Plains and Ruataniwha Plains. The company employs over 400 permanent staff, and has a seasonal labour peak of over 2,200 people.
3. Mr Apple wishes to continue to develop its market, but in order to do so it needs a consistent (ie reliable) and sufficient water supply, and sufficient duration of consents (or confidence in replacement consents) for investment certainty.
4. As Mr Richard Hill will explain further, in respect of Mr Apple’s business:
 - (a) Orchards require longevity of investment. Apples are not a short term cash-crop, as it takes significant upfront investment and six to 10 years, depending on the apple variety, before a new orchard is in full and consistent production.
 - (b) Mr Apple’s business is driven by the economies of scale that large volumes gives it. Its integrated business operations have been sized to cater for the expected volume and any significant reduction in that volume (ie through loss of water) will have negative effects across its entire business.
 - (c) Mr Apple has a particular focus on the quality of its apples, particularly the apple’s colour, size and shape for the expanding Asian markets. These characteristics are highly susceptible to impacts from water shortages or restrictions.
 - (d) Significant risk of disruptions (such as frost, hail, water stress) to the growing cycle already exist, which may result in the total loss of crops, in which case all the seasonal costs incurred will not be recovered.
 - (e) Loss of water in one year will have impacts not only on that year’s crop, but also on the subsequent year (or even years).
 - (f) Loss of water is therefore a very significant and potentially business-ending cumulative risk, on top of all existing risks.

Scope of submissions

5. These legal submissions do not address the entirety of the legal framework and legal tests that the Panel is to apply. That has, and will be, amply covered by others. There is unlikely to be any significant

debate on the general framework and tests – but rather, their specific application.

6. Mr Apple is a member of Horticulture NZ (“**Hort NZ**”), and adopts and supports the Hort NZ evidence, and will adopt and support its submissions when given. Mr Apple’s “case” can be seen as one that is supporting that of Hort NZ, focusing on specific matters and giving evidence on the particular issues that Mr Apple faces. That evidence can be considered as something of a specific example or case study.
7. Mr Apple’s submissions and evidence today focus on issues of water quantity, or allocation.

Giving effect to the NPSFM 2020

8. Much has been made already of the quandary arising from the coming into force of the NPSFM 2020 part-way through the PC9 process.
9. HBRC says at [4.8]:

... where scope exists in PPC9 and in submissions for changes that would help PPC9 to give effect to the NPS-FM 2020, those changes *can* be made.
10. I would say: “... those changes *must* be made”, given that “give effect to” means “implement”.¹
11. EDS goes further at [24], stating:

PC9 must give effect to the NPSFM 2020 [*within scope*] regardless of the content and extent of submissions.
12. EDS then submits:

If PC9 does not give effect [*after any necessary amendment*] to the NPSFM 2020, within the scope of PC9, then it must be withdrawn or declined.
13. For at least some submitters, the withdrawal or decline of PC9 appears to be a cleaner (or at least preferred) option,² as it would allow a more compliant NPSFM 2020 plan change to be promoted (across the region) in one step; rather than having PC9 partially give effect to the NPSFM 2020, and then be revisited later. There seems to be limited concern for there being any regulatory or planning “gap” in the meantime.³
14. If this is correct, then there would be a compelling case for taking a breather and addressing how to give effect to the NPSFM in a comprehensive one-step process, rather than in a potentially awkward two-step way.

¹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593, at [77].

² Noting the difference between withdrawal, and decline, both in terms of delegation and consequences (ie a withdrawal brings the process to an end [putting aside judicial review], while a decline remains subject to rights of appeal to the Environment Court).

³ NKII submissions at [28].

15. On the other hand, making progress towards giving (full) effect to the NPSFM 2020 would logically seem to be a good thing. Significant effort has been put into the PC9 process (and the precursor TANK “collaborative” process), and it would be a shame to see everything restarted at some point relatively soon in the future (given the 2024 requirement).
16. On balance, unless the Panel were overwhelmingly convinced that PC9 could not (even with amendment) give effect to the NPSFM 2020 (within its scope), then it should proceed to approve it (with any appropriate amendments) and make the best of the opportunity before it in the pathway towards giving effect to the NPSFM 2020.

Over-allocation

17. Policy 11 of the NPSFM states:

Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.

18. “Over-allocation” is defined as:

In relation to both the quantity and quality of freshwater, is the situation where:

- (a) resource use exceeds a limit; or
- (b) if limits have not been set, an FMU or part of an FMU is degraded or degrading

19. “Limit” means “either a limit on resource use or a take limit”, while “degraded” and “degrading” means:

degraded, in relation to an FMU or part of an FMU, means that as a result of something other than a naturally occurring process:

- (a) a site or sites in the FMU or part of the FMU to which a target attribute state applies:
 - (i) is below a national bottom line; or
 - (ii) is not achieving or is not likely to achieve a target attribute state; or
- (b) the FMU or part of the FMU is not achieving or is not likely to achieve an environmental flow and level set for it; or
- (c) the FMU or part of the FMU is less able (when compared to 7 September 2017) to provide for any value identified for it under the NOF.

degrading, in relation to an FMU or part of an FMU, means that any site or sites to which a target attribute state applies is experiencing, or is likely to experience, a deteriorating trend (as assessed under clause 3.19)

20. A number of points can be made:

- (a) Over-allocation is a particular state of degradation, or a trend towards that state, for a FMU. You must be satisfied on the evidence before you that this “prerequisite exists” before

intervening to phase out existing and avoid future overallocation.

- (b) There is no time frame given for the phasing out of over-allocation. While the NPSFM is required to be given effect to by 2024, that does not mean that any over-allocation must be “solved” by 2024. The timing of any measures must be proportionate, taking into account all relevant considerations including economic well-being under s5 of the RMA, as well as efficiency under s7(b).
 - (c) Importantly, the avoid directive only takes operative effect once any over-allocation is phased out. There is no immediate requirement to “avoid” over-allocation.
 - (d) As for efficiency, while not defined, the NPSFM 2020 at [3.28](1)(b) refers to the “efficient allocation of water” as including “economic, technical, and dynamic efficiency”. In other words, it cannot just be about reducing water use. This is an important issue that should be kept in mind at all times. This is consistent with the “primary” or at least first stated part of Policy 11, which is to allocate and use freshwater *efficiently*.
21. Putting all this together, in my submission, Policy 11 is not as “directive” as others might suggest. In other words, there is some flexibility or discretion as to how Policy 11 is to be achieved in the circumstances. This is important for resolving the final form of the rules, and, in particular whether prohibited status is required under TANK Rule 12 where compliance with TANK Rule 11 cannot be achieved.

Actual and Reasonable use: an about turn

22. The critical concept underpinning the phasing out of any over-allocation, and then avoiding future over-allocation, is that of “Actual and Reasonable” use.
23. One means of deriving the “Actual and Reasonable” use as originally proposed was the *maximum* annual amount used in the preceding 10-year period.⁴ In the original s42A report, the *maximum* annual amount was proposed to be replaced by an *average annual* amount, supposedly as a “consequential” change.
24. The addendum s42A report now proposes to revert back to the “maximum annual amount”. While that provides some comfort, as emphasised by the chair, the s42A reports (and other evidence of HBRC) is simply a matter for the Panel’s consideration. Accordingly, Mr Apple wishes to cover off that any change to an “average annual amount” is completely unworkable and unreasonable:
- (a) Consenting an average amount will simply fail to provide enough water in a dry year – risking crop loss that year, as well as in subsequent years (as the effects of insufficient water in one year are often felt in subsequent years).

⁴ Originally the 10-year period preceding 1 August 2017, now proposed to be 2 May 2020.

- (b) For Mr Apple, such an approach would drive a change in its business model – rather than striving for maximum efficiency and productivity, which can only be achieved with reliable access to sufficient water, it would look to other models that would be less impacted by lack of water in dry years.
 - (c) It would be catastrophic for Mr Apple’s current business model and its achievement of high returns on its investment (ie its economic efficiency).
25. There is also a real question as to whether a potential change to “average annual amount” is within the Panel’s jurisdiction as:
- (a) there does not seem to have been any submission seeking it; and
 - (b) given the catastrophic impact of such a change, it cannot be considered a “consequential” amendment.
26. On a related issue of determining “Actual and Reasonable” use, Mr Apple continues to seek flexibility in the application of the IRRICALC model, or an equivalent. The latter appears inherent in the drafting. In respect of “flexibility in the application”, Mr Apple recognises that any model needs to be applied robustly. However, there must be room for any particular applicant, because of (say) their particular circumstances, including crop type, efficiencies in practices, specific data on actual soil profiles, etc, to apply a model with scientifically supported modifications.
27. This is even more important if the “lesser of” either the *maximum* annual amount used in the preceding 10-year period or the model outputs remains. Where there is clear evidence of actual use, and that it is efficient, then that should be the preferred basis of determining “Actual and Reasonable” use. Very few operators nowadays waste water. Overwatering is often counterproductive, and also ignores the cost of water – even if that is “just” pumping costs. Accordingly, where there is sufficient evidence of actual use, that means should be preferred as the mechanism for determining “Actual and Reasonable” use.

Joint and global management, transfers etc

28. At the highest level, Mr Apple manages all of its orchards as one “group”. For example, it makes decisions about what varieties to plant where based on its orchards as a whole. At a more fine grained level, where Mr Apple has a number of orchards adjoining or close to each other, water is often, at a practical level “shared”, across such orchards depending on where it is most needed. To the extent this is not allowed by existing consents, Mr Apple would ordinarily seek “joint or global” replacement consents to enable this flexibility. If Mr Apple acquired land that was consented for uses other than apple orcharding, this could also ordinarily be incorporated in a global application.
29. However, this approach may not, in practice, be facilitated under TANK Rule 11. The incorporation of a change in use as part of the “global” application might not be covered, as a first point. It is then also unclear how the “Actual and Reasonable” use would be applied to a global application. Would each former individual consent be assessed for its

“Actual and Reasonable” use, and then a summation approach be applied? Or would there be an averaging? In addition, would such a “global” approach also be considered a “transfer” of allocation, requiring assessment under the transfer provisions? These matters may simply require clarification. It might be useful, to assist in understanding how the provisions are intended to work, for officers to provide a range of worked examples. At the very least, this would allay fears that the rule might not operate as intended (or reveal if it is intended to operate differently than anticipated).

30. The issue is further intensified, as TANK Rule 12 prohibits any application for a resource consent that does not meet the requirements of Rule 11. This precludes the making of an application that might not strictly comply, but which might be of significant merit in encouraging efficient and effective use of water across wider landholdings.
31. On that basis, a change to Rule 12 is sought to enable consent to be sought as a non-complying activity. The gateway tests and the policy direction (such as TANK Policies 36, 37, and 38) are sufficient to prevent inappropriate allocation of water.
32. The issue of transfers,⁵ as a “straightforward” transfer of some or all of a consent within the same catchment and water quantity area, appears more workable, but needs to be tested fully to ensure that there are no “fishhooks” in how it the regime would be administered in practice.
33. All of the above is subject to the “Actual and Reasonable” use issue addressed above – ie that in the “shrinking” of water allocation arising through a replacement consent (including joint or global) or transfer process, Mr Apple’s relief to determining “Actual and Reasonable” use identified above needs to be achieved.

Root protection

34. It is understood that TANK Rules 7 and 8 are intended to allow, for existing takes, up to 20m³ per day to protect root stock.
35. While that provides some measure of protection, for Mr Apple, it is something of a Clayton’s measure, in terms of its business operations and model. It will not prevent the loss of a crop, and there will still be lag effects in the following year (or years).
36. On that basis, while not opposed, the rootstock protection provisions should not be considered a panacea for apple orchards in dry years.

Conclusion/ summary

37. In my submission:
 - (a) PC9 must give effect to the NPSFM 2020, and must be amended, within scope, to do so. If, even with amendment, PC9 does not give effect to the NPSFM 2020 (ie it cannot give effect to the NPSFM 2020), then it must be declined or withdrawn.

⁵ Refer Rule 62a and 62b.

- (b) Policy 11 of the NPSFM 2020 is not as directive as others might suggest. The Council has a fair degree of latitude (or discretion) to determine how to give effect to it.
- (c) Critical in the implementation and operation of PC9 is the definition of “Actual and Reasonable” use. If using 10-year records, the allocation must be tied to *maximum* annual use. If using a model, there must be room for context specific factors to be factored into the model.
- (d) Policy 11 of the NPSFM 2020 does not require prohibited status for joint or global consent applications that do not meet TANK Rule 11 to be prohibited, as part of a strategy towards phasing out over-allocation. Rule 12 should be amended to allow non-complying consents to be sought. There needs to be sufficient flexibility to allow innovation and a group management approach, which could generate greater efficiencies than meeting Rule 11 as currently stated.
- (e) TANK Rules 7 and 8 relating to root stock protection are supported but provide little real protection from a commercial business perspective.
- (f) Rules 62a and 62b relating to transfer appear to be appropriate but need careful consideration.

DATED 9 June 2021



James Gardner-Hopkins
Counsel for Mr Apple

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AND of proposed Plan Change 9 to the Hawke’s Bay Regional Council Regional Resource Management Plan, publicly notified under clause 5, Schedule 1 of the RMA

**SUMMARY OF EVIDENCE OF MR RICHARD HILL
FOR MR APPLE NEW ZEALAND LIMITED**

9 June 2021

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Introduction

1. My name is Richard Geoffrey Hill.
2. I am the Chief Operating Officer for the orchards at Mr Apple NZ Ltd.
3. I have been in this position or a similar position with Mr Apple for over 30 years as the company developed in area, production and complexity with the amalgamation of Grocorp Pacific Ltd and HB Apples Ltd.
4. During this time, my main role has been to develop the orchards from a production point of view from what was a collection of orchards to a fully integrated apple business growing, packing and marketing over 5 million cartons with around 4 million of this coming from our own leased and owned orchards.

Mr Apple

5. Mr Apple is Hawkes Bays' largest vertically integrated Apple company and employs over 2,200 people during peak harvest and packing.
6. The fruit is produced in 15 orchard sectors with over 50 separate orchard locations.
7. The 15 sectors vary in size from 60 hectares to over 120 hectares with the total area being around 1200 net planted hectares.
8. The orchards are spread throughout the Heretaunga plains and on the Ruataniwha plains in Central Hawkes Bay on a whole range of soils from very light to very heavy.

Irrigation management

9. Irrigation management is very much influenced by variety, tree size, rootstock, crop load, growing system and soil type.
10. Over the years irrigation and water efficiency has improved as we have gone from high volume hand shift pipes, high volume travelling irrigators and overhead sprinklers to under tree sprinklers specifically designed for the tree spacing and soil type, and under tree drippers. These systems target the water to the effective root zone to make it more effective.
11. Irrigation strategy is tailored to the variety, soil type and time of the year in terms of the fruit development to get maximum yield and quality. All blocks are monitored weekly by measuring neutron probes which are placed strategically throughout all orchards. These probes tell us the amount of water in the soil profile down to one-meter depth and can show on a weekly basis where the water is being used from and how the applied water is entering the profile. This tells us how much water to apply effectively and over what time period.
12. We are firm believers in the principles of sustainability for water use and the mitigation of adverse effects where these are practical and realistic. As someone who was bought up in this area when water pressure to our house was from our artesian well with no pump and a local orchard was

irrigated by overhead sprinklers using the same artesian pressure to 50 years later after several changes we now have a house pump with a 6 meter dropper on a new well and the same local orchard now has a pump supplying under tree sprinklers. It is important to get efficient use out of the aquifer for all involved and not set arbitrary limits at the wrong time.

Plan Change 9

13. We are certainly working for efficient use of water and are generally in agreement with the big picture recommendations that have come out of the Tank process that have evolved into Plan Change 9. As with most things the devil is in the detail and it is important to get the balance and time and length of implementation right.
14. We understand the importance of getting the future water issues solved but need to make sure this does not affect the viability and efficiency of our business going forward.
15. In this regard we have some particular points to add to the support of other submitters that are more relevant to us but apply to all apple growers to some extent.

Focal points

16. For Mr Apple, our average yield is more than 1000 cartons per hectare higher than the national average and with new young blocks being significantly higher than existing blocks. High yielding trees are more easily drought stressed than lower yielding ones and with higher yields it is most imperative to manage the inputs to a greater degree. This particularly applies to water management. Higher yields are important to stay competitive
17. Security of supply, flexibility of use, and maintenance of volume are the three most important requirements to keep us viable and continuing to invest in future crops. The cost of bringing an apple crop to harvest is significant and would not be repeated if it failed due to lack of water.
18. We know that a lack of water effects the existing crop by effecting size, sunburn and quality but it also effects next year's crop by effecting bud development and flower initialisation. Even if the fruit was not saleable it would still need to be picked at a loss knowing that next year's crop was also affected.
19. Mr Apple, along with many other apple growers, are in the process of redeveloping their orchards to become more labour and yield efficient. Labour is 60% of our current growing cost and the redevelopment change is to remove large older trees and replace these with many more smaller trees at a closer spacing. With good management these smaller trees can be more labour and yield efficient.
20. The smaller more efficient trees have a smaller root ball and less depth of rooting making them more subject to drought stress and needing to be irrigated more often. They are usually on different rootstocks which are inherently less drought tolerant. There are more risks with higher yields and smaller trees, but we must do this to continue to improve our

efficiency and financial performance. Any changes in the watering regime must take account of this process of change.

21. Mr Apple runs their 15 orchard sectors and over 50 orchard locations as one orchard. By this I mean we make efficiency decisions as a group for the use of labour, variety mix and in practice most things we do are what is best for the overall group.
22. Whereas initially each orchard was set up to be an individual and able to run by itself there is now significant further efficiency to be gained by operating and thinking as one big orchard. Not all orchards have all varieties and as we redevelop, we go for larger areas of the one variety and grow varieties where they are most suited. Water use needs to reflect this situation and have flexibility of use. Often, we have amalgamated consents to give flexibility and efficiency to water use and this needs to continue and be expanded where it is practical and reasonable.
23. Where irrigation volume does become limited during the season, this needs to be well documented in advance and there should be stages of reduction rather than all or nothing. Reducing from 100% down to the required amount should be done in stages of say 10-20% at a time and with a base amount available to keep trees alive.
24. In the past Mr Apple has grown grapes, stone fruit and kiwi fruit and vegetables with each of these crops having different water needs and timing of use. There must be flexibility for this to continue as who knows the future in detail. We must be prepared to change to survive and it is imperative that our water use can change with these crops and situations to keep us viable.

Richard Hill
8 June 2021



TANK Hearing – 9th June 2021

Introduction



Richard Geoffrey Hill

- Chief Operating Officer – Orchards, Mr Apple New Zealand Limited
- 30+ years with the company
- Focused on developing the production of the orchards



The Company



Mr Apple New Zealand Limited

- New Zealand's largest vertically integrated apple company
- Employs over 2,200 people (400 permanent positions)
- 4 million cartons (18kg) produced from owned/leased orchards
- 15 orchard sectors; over 50 locations throughout Heretaunga Plains and Ruataniwha Plains
- 1,200 planted hectares, ranging in size from 60 to over 120ha
- Soil types ranging from very light to very heavy
- 3 packhouses, 3 major coolstores and an head office/export division exporting over 5.2m cartons
- 50% shares in Profruit (juice factory)



Irrigation



Management

- Influenced by variety, tree size, rootstock, crop load, growing system and soil type
- Under tree sprinklers and under tree drippers (permanent irrigation)
- Root zone targeted for maximum efficiency

Strategy

- Tailored to the variety, soil type, time of year
- Focused on maximising yield and quality
- Weekly monitoring of neutron probes (1m depth profile) guides application levels



Important focus

- Changes must not affect viability and efficiency of businesses
- High yields are important to the viability of a business and water management is key:
 - High yielding trees are more easily drought stressed – important to manage the inputs carefully
- Security of supply, flexibility of use and maintenance of volume are key
- Lack of water equals:
 - Existing crop size, sunburn and quality
 - Next years crop bud development and flower initialisation



The Future



Redevelopment

- Focused on being more labour and yield efficient
 - Redevelopment focus on smaller trees at a closer spacing
- Smaller root ball, less depth of rooting
 - More subject to drought stress, irrigation crucial
- Higher yields and smaller trees are critical for improved efficiency and financial gain



The Future



Management

- 15 orchard groups run as one large orchard
- Efficiency gains and risk mitigation in labour supply, variety mix and an overall focus on the group
- Grow varieties where they are best suited

Management Needs

- Amalgamated consents give flexibility and efficiency to water use
 - Continuation and expansion of this is critical
- Irrigation volumes require advance notice and stages of reduction rather than all or nothing (10-20% at a time)
- Base amounts for tree validity is important



The Future



Multiple Crop Potential

- Historically have grown grapes, stonefruit, kiwifruit and vegetables
 - Differing water needs and timing
- To future proof Hawke's Bay, this flexibility is needed into the future, who knows what the future will bring!

In Summary

- Without the security of water supply we would not risk taking our business into the future

