BEFORE THE ENVIRONMENT COURT

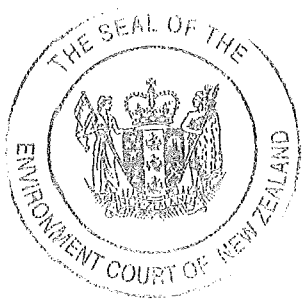
Decision No. [2014] NZEnvC 85

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under Clause 14 of the First Schedule to the Act
BETWEEN	NEW ZEALAND WINEGROWERS
	(ENV-2010-CHC-179)
	HORTICULTURE NEW ZEALAND
	(ENV-2010-CHC-184)
	Appellants
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner O Borlase
Hearing:	In Chambers at Christchurch
Date of Decision:	16 April 2014
Date of Issue:	16 April 2014

SECOND (INTERIM) DECISION

A: Under section 278 of the Resource Management Act 1991 and rule 1.15 District Court Rules 2009, the Environment Court makes the following corrections to the First Decision [2013] NZEnvC 7:



(1) *Noise insulation*

(a) The noise insulation rule set out in Order A(1)(1) is deleted and the following is substituted:

30.1.4.2.3 Noise Sensitive Activities

(a) Any new dwelling house, visitor accommodation or other habitable building located within 300 metres of any frost fan not within the same site shall be designed and constructed so that within the external building envelope surrounding any bedroom (when the windows are closed), airborne sound insulation meets the following single-number rating for airborne sound insulation, determined in accordance with AS/NZS ISO 717.1:2004 Acoustics — Rating of sound insulation in buildings and of building elements Part 1 — Airborne sound insulation:

Dwellings located less than 300m and more than 200m from the nearest frost fan	$D_{nT,w} + C_{tr50\text{-}3150\ Hz}$ 27
Dwellings located less than 200m and more than 100m from the nearest frost fan	$D_{nT,w} + C_{tr50\text{-}3150\ Hz}$ 32
Dwellings located less than 100m from the nearest frost fan	$D_{nT,w} + {}_{tr50\text{-}3150\ Hz}$ 37

(b) For the purposes of this rule, "external building envelope" means an envelope defined by the outermost physical parts of the building, normally the cladding and roof.

(c) Sub-clauses a) and b) of this rule shall also apply to any alteration of an existing dwelling house, visitor accommodation or other habitable building located within 300 metres of the closest frost fan selected for the purpose of sub-clause a) of this rule, where a new bedroom forms part of the alteration. For the avoidance of doubt only the new bedroom has to be treated in accordance with paragraphs a) and b) of this rule.

(d) For the purpose of this rule, "frost fan" includes any lawfully established frost fan, and includes a proposed frost fan for which a resource consent has been granted and "site" has the meaning of "single land holding".

(2) In paragraph [44] "McGechan J" is substituted for "McGeehan J".

(3) In paragraph [77] the closing bracket in the last sentence should be moved to the end of the sentence so that the words in brackets at the end of the sentence read:

> ... section 274 party (which wanted the rule to apply the NZ Standard 6802:2008 in its entirety, and wished the exception to be deleted).

B: Order B of [2013] NZEnvC 7 is confirmed as a final decision.

C: Under section 290 of the Resource Management Act 1991, the Marlborough District Council is directed to amend the Wairau/Awatere Resource Management Plan as follows:

(1) In relation to the "frost fan" rule 30.2.9.1.2, Order A1(3) is amended by deleting rule 30.2.9.1.2 in that order and substituting the following (deleted words struck through, viz. ~~struck through~~, added words underlined):

30.2.9.1.2

(a) Subject to (b), sound levels shall be measured in accordance with the provisions of NZS 6801:2008 Acoustics — Measurement of Environmental Sound and assessed in accordance with the provisions of NZS 6802:2008 Acoustics — Environmental Noise.

(b) Noise from a frost fan which has special audible characteristics such as tonality or impulsiveness, shall have a ~~5~~6 dB penalty added to the measured rating level before compliance with rule 30.2.9.1.2(a) is assessed; except that:

(i) where the Reference Method in the Standard is used to determine the penalty, the value of the penalty shall be a discrete value in the range 0.1 dB to 6.0 dB as determined by that method;

(ii) no penalty for special audible characteristics shall apply to a frost fan in the Awatere Catchment if the frost fan is greater than 1 kilometre from any existing dwellinghouse, visitor accommodation or other habitable building.

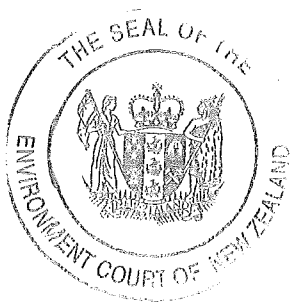
(2) In relation to frost fans which existed as at 24 September 2009 the Note proposed by Decision [2013] NZEnvC 7 to be added to rule 30.2.9.1.2 is deleted.

D: The amendments in Orders A and C apply equally (with any necessary changes) to the Marlborough Sounds Resource Management Plan and to rule 31.1.5.1 (Rural Residential Zone) and to 2.2.11.1 of Appendix K (Marlborough Ridge Zone) and for the avoidance of doubt, to the Rural 4 Zone of the Wairau Awatere Resource Management Plan (subject to an express exception for the Awatere catchment).

E: Leave is reserved for any party to make submissions on any apparent mistake or inconsistency in, or omission from, this Decision.

F: Subject to any submissions received under Order E (in which case this Order is suspended), the respondent, the Marlborough District Council, is to prepare, consult with the parties, and to lodge by **30 May 2014** a complete set of rule changes in two versions:

(a) the first with the changes required by this decision tracked; and



(b) the second with the changes included but not tracked, i.e. in the form to be inserted into the two Resource Management Plans

— for confirmation by the Court under sections 290 and 293 of the RMA.

G: Costs are reserved although applications are not encouraged since these are plan change proceedings on complex issues.

REASONS

Introduction

[1] These are appeals by New Zealand Winegrowers and Horticulture New Zealand against a decision of the Marlborough District Council on proposed Plan Changes 23 and 58 to the Marlborough Sounds Resource Management Plan and the Wairau/Awatere Resource Management Plan, respectively. The Plan Changes relate to the use of wind machines ("frost fans") for protection of grapes against frost.

[2] On 30 January 2013 the court issued an interim Decision[1] ("the First Decision"), directing the Marlborough District Council to amend the Wairau/Awatere Resource Management Plan ("WARMP") by substituting the rules it set out in relation to noise insulation[2], wind speed[3] and the frost fan rule in the Rural 3 (Wairau Plains) zone[4]. The signage rule[5] was deleted. The court made the same orders in respect of the Marlborough Sounds Resource Management Plan. Leave was reserved[6] for any party to apply to the court to amend the rules stated in the orders if there was any mistake or ambiguity in them[7].

[3] In Order B the court directed the Marlborough District Council to amend the Wairau/Awatere Resource Management Plan by adding the words "... or provided for" in Policy (12.2.2)2.1 so that it reads:

> Policy 2.1 To recognise that, activities permitted or provided for in rural areas may result in effects such as noise, dust, smell and traffic generation but that these will require mitigation where they have a significant adverse effect on the rural environment.

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1 [2013] NZEnvC 7.
2 Rule 30.1.4.2.3.
3 Rule 30.2.9.1.4.
4 Rule 30.2.9.1.2.
5 Rule 30.2.9.1.5.
6 [2013] NZEnvC 7 at Orders A5 and D.
7 Order [A](5).

There is no suggestion this should be changed in any way.

[4] In Order C the Marlborough District Council was directed under section 293 of the Act to prepare a change to the Wairau/Awatere Resource Management Plan in respect of the Rural Zone 4 frost fan rule in order to address the matters raised in part 6 of the Reasons in the First Decision.

[5] The purposes of this decision are to resolve the matters left open in the First Decision on the New Zealand Winegrowers' appeal, to correct any mistakes in that decision, to confirm the changes put forward by the Marlborough District Council under section 293 of the Act, and to make final orders in respect of the agreed outcomes in the Horticulture New Zealand appeal.

[6] In accordance with the leave reserved in the First Decision, the Registrar has received memoranda and other documents from the parties as follows:

- 5 February 2013 from Marlborough District Council;
- 11 February 2013 from Public Health Service;
- 27 February 2013 from Marlborough District Council;
- 15 March 2013from New Zealand Winegrowers;
- 18 March 2013 from M J Hyson on behalf of the Hyson family (section 274 party);
- 23 July 2013 from Public Health Service;
- 23 July 2013 from Marlborough District Council; and
- 1 August 2013 from New Zealand Winegrowers;
- 20 December 2013 from New Zealand Winegrowers with attached memorandum from its noise expert, Mr R Hay;
- 23 January 2014 from Marlborough District Council;
- 23 January 2014 from Nelson Marlborough Public Health Services with accompanying affidavit of Mr V C Goodwin dated 24 January 2014.

[7] The questions for the court are:

- what corrections need to be made to the First Decision?
- what penalties should be provided for special audible characteristics in the frost fan rule?
- should the rules include a note about existing use rights?
- should the Awatere catchment be treated differently?

Corrections to the First Decision

[8] In memoranda filed by the parties following the First Decision, one matter is raised as requiring correction, and there are two typographical errors which should be

corrected. We will correct the latter without further formality, but we should explain the confusion over rule 30.1.4.2.3 in the WARMP.

[9] The Nelson Marlborough Public Health Service ("NMPHS"), a section 274 party to this proceeding, pointed out that Order A(1), which concerns the noise insulation provisions for houses, differs from the rule content given at paragraph [79] of the First Decision. It also differs from the insulation clause found in the Third Joint Noise Witnesses' Statement dated 11 December 2012, produced at the direction of the court[8]. In addition, both Order A(1) and paragraph [79] of the First Decision omit the additional subclauses c) and d) which were set out on the last page of the Third Joint Noise Witnesses' Statement and also in the Additional Joint Witness Statement of the Planning witnesses. The NMPHS proposed that the court amends the First Decision by deleting the noise insulation rule as set out in Order A(1) and substituting the content of the rule set out at paragraph [79]. Further Order A(1) should, for avoidance of doubt, be further amended so as to include the omitted sub-clauses c) and d)[9].

[10] The Council did not oppose the amendments sought by the NMPHS.

[11] NZ Winegrowers, like NMPHS, noted the differences between the noise insulation rule set out in Order A(1) and that which is set out in the Joint Noise Witnesses' Statement and at paragraph [79] of the decision[10]. NZ Winegrowers noted that the court makes no reference to the omission of paragraphs c) and d) as proposed in the Joint Noise Witnesses' Statement and seeks clarification as to whether the omissions were intentional. The NZ Winegrowers' noise expert, Mr Hay, has advised NZ Winegrowers that he agrees with the amendments proposed at paragraph 5 of NMPHS's memorandum.

[12] With regard to the disparity between the rule 30.1.4.2.3 for sound insulation set out in Order A(1) and at paragraph [79] of the First Decision, the court acknowledges that this was unintentional and agrees with the suggestion of NMPHS that the rule set out in A(1) ought to be deleted and replaced with the version set out at paragraph [79] of the decision. As for the omission of paragraphs c) and d), the court did not intend its order to be read as omitting those. The Reasons were silent on the paragraph simply because they were not in issue at the hearing of the NZ Winegrowers' appeal. Accordingly, the corrections suggested by the NMPHS should be made.

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8 Memorandum on behalf of Public Health Service, Nelson Marlborough District Health Board, dated 11 February, at [3].

9 Memorandum on behalf of Public Health Service, Nelson Marlborough District Health Board, dated 11 February, at [5].

10 Memorandum of counsel for appellant, dated 15 March 2013 at [4].

The Frost Fan Rule: penalties for special audible characteristics

[13] A key issue in this proceeding is the rule concerning the erection and use of frost fans — rule 30.2.9 in the WARMP. The basic rule is misleadingly simple. It states:

> 30.2.9.1.1 Noise from a frost fan shall not exceed 55 dB LA_{eq} (15 min):
>
> (a) at a distance of 300 metres from the device; or
>
> (b) at any point within the notional boundary of any existing dwelling, visitor accommodation or other habitable building (other than on the property on which the frost fan is situated);
>
> — whichever is the least distance.

[14] The complications discussed in the First Decision are over how "special audible characteristics" should be taken into account when measuring noise from a frost fan. The court decided on the rule 30.2.9.1.2 proposed at Order A1(3) in the First Decision, although it considered there should be an exception for the Awatere Valley (and we consider this later).

[15] NMPHS submitted that the wording proposed by the court as subclause (2) to rule 30.2.9.1.2, concerning special audible characteristic ("SAC") adjustments, is inconsistent with the Reference Method as described in ISO 1996-2:2007 Annex C, the correct interpretation of NZS 6802:2008 section B4.5 and the evidence given at the hearing[11]. NMPHS states that this inconsistency could be remedied with the following amendments:

> (2) subject to (a) above noise from a frost fan which has special audible characteristics such as tonality or impulsiveness, shall have a 5~~-6~~ dB penalty added to the measured rating level before compliance with rule 30.2.9.1.2 is assessed; except if the Reference Method is used to determine the penalty, the value of the penalty shall be a discrete value in the range 0.1 dB to 6.0 dB as determined by the Reference Method.

[16] The reason behind the court's proposed order comes from paragraph [47] of the First Decision where the court addressed the methods of determining tonal SACs. After identifying some uncertainty about a mysterious adjustment "k2," in NZS 6802:2008 clause B4.5 we stated of the Standard:

> Still the intention is clear: for any measured derived level, if there are SACs (as determined by the earlier rules) then the derived level should be adjusted by 5 or 6 dB.

[11] Memorandum on behalf of Public Health Service, Nelson Marlborough District Health Board, dated 11 February at [23].

NMPHS submitted that the court has misunderstood the range of adjustments and this has implications for the amended proposed rules as shown in the First Decision[12].

[17] NMPHS suggested how the wording could be amended, giving detailed reasons for the problem it perceives with the court's wording and also finding support for its argument in the evidence of Mr Hunt and Mr Hay[13]. It submitted that the amended wording would clarify the value of any adjustment for tonal prominence when the Reference Method is used to determine the appropriate penalty for a tonal SAC. The NMPHS suggested the clear intention of the Standard is rather that for any measured derived level, if there are SACs (as determined by the earlier rules) then the derived level should be adjusted by 5 dB, except if determined by the Reference Method when the value of the adjustment is 0.1 dB to 6.0 dB according to the prominence of the tone.

[18] The Council did not oppose the amendments sought by the NMPHS.

[19] NZ Winegrowers, on advice from Mr Hay, agreed with what it said was the court's interpretation of the clause. It submitted that NMPHS is seeking to reopen matters already decided by the court. If the court was minded to revisit these issues then NZ Winegrowers sought the opportunity to provide further written submissions[14]. Leave was given and NZ Winegrowers responded in its memorandum of 20 December 2013, to which the MDC and NMPHS responded on 23 January 2014.

[20] The issue between the parties is partly over the interpretation of the New Zealand Standard. That is not a document over which we have any authority unless it is necessary to determine the correct interpretation to establish our jurisdiction (or not). That is hardly the case here.

[21] The First Decision recorded that the council's expert, Mr M J Hunt, considered that the NZ Standard applies an initial 5 dB penalty, if SACs exist but if further assessment is required then a discretionary 0 to 6 dB penalty is applied[15]. Mr Goodwin agrees with him[16]. Our reading of the Standard is that is the likely interpretation, and agrees with the Joint Statement by the three noise witnesses (Messrs Hunt, Hay and Goodwin) which stated[17]:

> We agree that objective assessment of tonality characteristics by the methods described in NZS 6802:2008 Appendix B4.3 and B4.4 is well established and is applicable in the case of frost fans.

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12 Memorandum on behalf of Public Health Service, Nelson Marlborough District Health Board, dated 11 February at [6].

13 Memorandum on behalf of Public Health Service, Nelson Marlborough District Health Board, dated 11 February at [10-22].

14 Memorandum of counsel for appellant, dated 15 March 2013, at [21].

15 Mr Hunt at para [49].

16 Mr V C Goodwin, Evidence-in-reply 3 September 2012 paras 9 to 15; Affidavit 24 January 2014.

17 Joint Witness Statement 25 October 2011 para 2.4.

[22] There is a simpler way through this. It is against the NZ Winegrowers' interests for the penalty to be (always) a minimum of 5 dB. So we do not need to resolve the issue its witness Mr Hay raised (and we think he is probably wrong anyway) as to the interpretation of the NZ Standard. All we need to do is ensure that the Standard can be applied as clearly as possible.

[23] Before settling the terms of the rule, there is another difficulty with it. Accepting the NMPHS addition, rule 30.2.9.1.2(2) would read:

> Rule 30.2.9.1.2(2)
> (2) subject to (1) above noise from a frost fan which has special audible characteristics such as tonality or impulsiveness, shall have a 5-~~6~~ dB penalty added to the measured rating level before compliance with rule 30.2.9.1.2(1) is assessed; except if the Reference Method is used to determine the penalty, the value of the penalty shall be a discrete value in the range 0.1 dB to 6.0 dB as determined by the Reference Method.

We are surprised that none of the witnesses or, especially, counsel has questioned the introductory words "subject to (1) above". Our understanding is that the second clause in rule 30.2.9.1.2 is to qualify the first, so if the introductory words — "subject to" — are to be placed anywhere it is in the first clause, not the second.

[24] Accordingly, we consider that the relevant part of rule 30.2.9.1.2 should read:

> 30.2.9.1.2
> (a) Subject to (b), sound levels shall be measured in accordance with the provisions of NZS 6801:2008 Acoustics — Measurement of Environmental Sound and assessed in accordance with the provisions of NZS 6802:2008 Acoustics — Environmental Noise.
>
> (b) Noise from a frost fan which has special audible characteristics such as tonality or impulsiveness, shall have a 5-~~6~~ dB penalty added to the measured rating level before compliance with rule 30.2.9.1.2(a) is assessed; except that:
>
> (i) where the Reference Method in the Standard is used to determine the penalty, the value of the penalty shall be a discrete value in the range 0.1 dB to 6.0 dB as determined that method;
>
> (ii) ...

That is a provisional determination for two reasons. First because we have not heard the parties on it, and secondly, because there is an issue as to the applicability of the rule as to penalties, in that part of the Rural 4 Zone which is within the Awatere River catchment. We turn to that shortly.

Existing fans (as at 24 September 2009)

[25] In Order A1(3) — which related to the Frost Fan rule — just discussed — the court also suggested that a Note be added to the rule in respect of legally established existing frost fans as follows:

> Note: pre-24 September 2009 Frost Fans
> Note that fans in place and able to be operated for frost control as at 23 September 2009 are likely to have existing rights provided they are operated in accordance with the now replaced rule. For convenience it is quoted here: …

[26] That suggestion flowed from various statements in the First Decision about existing use rights for existing fans:

> At [5]:
> As at 24 September 2009 there were about 1,000 frost fans in the district. It is common ground that these frost fans have existing use rights provided they comply with the rules in force up to 23 September 2009.
>
> At [20]:
> We have pointed out that the new rules only relate to new houses within 300 metres of existing frost fans, or to proposed new fans. The 1,000 or so frost fans in operation as at 24 September 2009 when PC58 was notified, all have existing use rights. The character, scale of, and intensity of the effects of each older frost fan must comply with the now replaced rules in the operative plan.
>
> At [61]:
> Further, older frost fans are covered by existing use rights provided they comply with the now revoked (for other purposes) rule.
>
> At [82]:
> We mentioned at the beginning of this decision that it will be fairly limited in application for some time, because most existing frost fans and their replacements are likely to be protected by existing use rights. We consider that the frost fan rule should have a note explaining that and will suggest amended wording accordingly.

In our view it is clear when the First Decision is read as a whole that the court was only referring to legally established existing fans.

[27] NMPHS referred to Order A(1)(3) in the First Decision, where the court restates rule 30.1.4.2.3. It submitted that, given the content of the preceding subclauses (1) and (3) on the same page which respectively refer to the 2009 and 1991 editions of NZS 6802, readers will be unaware which standard edition assessment method applies because it is not specified and particularly because subclause (3) of rule 30.1.4.2.3 expressly states that the 1991 edition does not apply[18].

[18] Memorandum on behalf of Public Health Service, Nelson Marlborough District Health Board, dated

[28] It was suggested by NMPHS that the court amends A(1)(3) as follows (additions underlined):

> **30.1.4.2.3 Wind machines for Frost Control <u>Wairau/Awatere Resource Management Plan Volume 2 Chapter 30</u>**
>
> Any wind machine used for frost control shall be so constructed and operated that any noise emission measured at a distance of 300 metres shall not exceed 60 dBA L10 provided that:
>
> (a) the wind machine will be allowed to operate during the frost danger period until the leaves of the plant are dry and the air temperature has reached 2°C;
>
> (b) the speed of the wind machine must be governed such that the top speed of the rotor does not exceed the speed of sound; and
>
> (c) the wind machine be located no closer than 500 metres to any residential zone, or within 100 metres of a dwelling house not located on the property.
>
> <u>Note ...: Note that noise from fans in place and able to be operated for frost control as at 23 September 2009 are measured using NZS 6801:1991 and assessed using NZS 6802:1991.</u>

[29] The Council did not agree that a further Note is necessary, as suggested by NMPHS. That is because existing fans are addressed through the compliance process rather than being subject to the rules[19]. Further, the Council expressed concern with the statement that existing frost fans are 'likely to have existing use rights'. Counsel for Council informed us that the existing abatement notice appeals have shown that the majority of frost fans covered by those notices do not enjoy existing use rights. Therefore while the Council would have no difficulty with a Note to the rules confirming that the new rules only apply to fans installed after 25 September 2009, it submitted that the Note need not provide any indications as to the likelihood that existing use rights may apply to those fans and/or the method of calculating noise for compliance purposes[20].

[30] NZ Winegrowers agreed with NMPHS that it would useful to clarify which version of the rules and NZS 6802 is used for fans predating 23 September 2009[21]. However, that is not an issue for these proceedings.

[31] NZ Winegrowers disagreed with the Council's position that the Note need not provide any indication as to the likelihood that existing use rights may apply to those fans and/or the method of calculating noise for compliance purposes. It submitted, rather optimistically, that this has already been determined by the court at paragraph [20] of the First Decision. NZ Winegrowers said that the Council gave no evidence that pre-September fans are being widely used in such a way that they would not have existing

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11 February, at [27].

19 Second memorandum of counsel for respondent dated 27 February 2013 at [5].

20 Second memorandum of counsel for respondent dated 27 February 2013 at [6].

21 Memorandum of counsel for appellant dated 15 March 2013 at [23].

use rights and there has not been widespread enforcement as might be expected if there was widespread non-compliance. The notation would only apply to complying fans in any event and given the uncertainty within the industry NZ Winegrowers submitted it is important to provide an acknowledgement that existing and complying frost fans will continue to have existing use rights[22].

[32] The court assumed that most existing winegrowers were acting within the existing (pre plan change rules) and is disturbed to read that at least the MDC considers that is not so. As we have said the passages from the First Decision quoted earlier, when read as a whole show that the court was only referring to existing use rights for frost fans which complied with their existing frost fan rules. The court did not, and could not, make any findings as to whether any existing frost fans were operating under section 10 use rights.

[33] We also bear in mind that, while the issue is not wholly clear, the onus[23] of proving existing use rights seems to be on the person claiming them. In all the circumstances we consider the Note about existing rights proposed by the First Decision should not be inserted into the plans.

The Awatere Valley

[34] In Order C of the First Decision, the court exercised its powers under section 293 of the Act to direct the Council to consult with the Awatere community and to prepare a change to the Wairau/Awatere Resource Management Plan in respect of the Rural Zone 4 frost fan rule as it applies to the Awatere Valley. By way of Minute dated 15 April 2013 the court clarified that consultation should be confined to the parties and landowners/occupiers interested in the Awatere catchment part of the Rural 4 Zone.

[35] The Council later filed a memorandum[24] explaining the results of the consultation and attaching the consultation report and two versions of the relevant rule changes. The first version reflects the rules as amended by the First Decision. The second version includes additional text that would implement the option raised by the court at Order C and paragraph [87] of the First Decision. The Council noted there is a relatively even split in preference for the two options. From the 69 questionnaires returned 53.6% indicated that the approach to not apply a penalty for special audible characteristics if there is no house within 1 km of the frost fan is appropriate. 46.4% indicated that the proposal is not appropriate and a 5-6 decibel penalty should still apply[25].

[36] The Council stated that its preference is that there are not separate rules relating to the Awatere rural community and so it prefers the first version of the rules. The Council considered there are sufficient distinguishing features relating to the Awatere rural

22 Memorandum of counsel for appellant dated 15 March 2013 at [25-28].
23 See section 139A and, in particular, section 139A(3) RMA.
24 Third memorandum of counsel for the respondent dated 23 July 2013.
25 "Proposed Rules for the Operation of New Frost Fans Awatere Valley Consultation Results" at p 1.

community. It pointed out there is also significant ease in administration and consistency if the same rules are applicable to all areas[26].

[37] Should the court adopt the second version, the Council noted that there is no existing mechanism in the plan that identifies the Awatere rural community as a geographic area because Rural 4 also applies to the Wairau Valley. If the second version was to be preferred by the court it would be necessary to produce a separate map/zone to clearly define the area that the amended rules are applicable to[27].

[38] Mr M J Hyson, a section 274 party to this proceeding, submitted that the difficulty with exempting Awatere Valley (from the rules which apply to Wairau Plains) is that others will want exemptions also, for example NZ Winegrowers seeks to extend the area that this covers[28]. He said there is no good reason to exempt Awatere as it is in this type of area that the population is most likely to increase[29]. Mr Hyson requested that the court review its decision to exempt some areas from the new rule regarding SAC noise from frost fans. Instead it is submitted that all regions should be given equal protection[30].

[39] The NMPHS advised caution in relying on survey results from a relatively small proportion of respondents and notes that the survey is conducted in undefined rather than a specific geographic area[31]. Nevertheless, NPS supported the Council's position that its preferred version is the first version[32]. It is submitted that the second version would undermine the administration of the Act and hinder enforcement action should that be necessary[33]. However NMPHS conceded that any ambiguity could be avoided by attaching a map showing what is meant by "Awatere Valley"[34].

[40] NZ Winegrowers submitted that the results of the consultation report do not present an unequivocal result and that, if anything, it indicates a preference for the rule that excludes the application of SACs within the Awatere Valley[35]. NZ Winegrowers argued that the Council's preference for administrative ease and consistency in relation to rule application must be assessed in light of the views of the community. On that basis NZ Winegrowers supported the second version of the rule[36].

[41] Under section 293 the approach favoured by the Council must be given considerable (if not determinative) weight. However, we consider that administrative

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26 Third memorandum of counsel for the respondent dated 23 July 2013.
27 Third memorandum of counsel for the respondent dated 23 July 2013 at [8-9].
28 Memorandum of M J Hyson dated 18 March 2013 at [3].
29 Memorandum of M J Hyson, dated 18 March 2013 at [11].
30 Memorandum of M J Hyson dated 18 March 2013 under Summary.
31 Memorandum on behalf of Public Health Service dated 23 July 2013, at [3].
32 Memorandum on behalf of Public Health Service dated 23 July 2013 at [4].
33 Memorandum on behalf of Public Health Service dated 23 July 2013 at [6].
34 Memorandum on behalf of Public Health Service dated 23 July 2013 at [8].
35 Memorandum of counsel for the appellant dated 1 August 2013 at [2].
36 Memorandum of counsel for the appellant dated 1 August 2013 at [3].

convenience should give way to fairness considerations here. Those future residents coming to the noise of frost fans in the Awatere are coming to the nuisance and should live with the consequences — or site their residences further from vineyards.

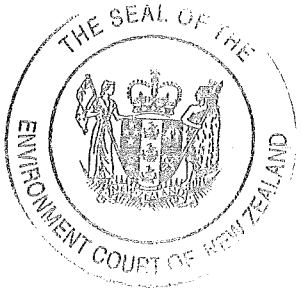
[42] Nor do we think there is any ambiguity over what the Awatere Valley is. Catchments are (with few exceptions) easily recognisable. We consider a separate rule for the Awatere catchment remains appropriate and will approve the Council's second version accordingly. A new map seems unnecessary, provided the rule refers to the Awatere catchment rather than the Awatere River.

[43] We accept that our First Decision treated the Wairau Plain erroneously as if it is all Rural 3. It is not. Mr Hyson pointed out that his property is Rural 4, and that most of the properties in the Wairau Valley affected by frost fans are also zoned Rural 4. The Rural 3 Zone rule should apply in this respect in all the Rural 4 Zone except for the Awatere catchment.

Further interim decision

[44] Since these issues are complex, and because we propose to amend rule 30.2.9.1.2 in a way not exactly sought by any party, we will issue a further Interim Decision and reserve leave for any party to make further submissions on the Orders A to D in this decision. Care will be needed also ensure that an equivalent of rule 30.2.9.1.2 as amended by the court also applies to the Rural 4 Zone (except in the Awatere catchment).

For the court



J R Jackson
Environment Judge

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