

Tabled at Hearing 14/03/2013

UNDER

**the Environment Canterbury (Temporary
Commissioners and Improved Water
Management) Act 2010 and the Resource
Management Act 1991**

AND

IN THE MATTER

**of the Proposed Canterbury Land and Water
Regional Plan**

BY

TRUSTPOWER LIMITED

Submitter

LEGAL SUBMISSIONS ON BEHALF OF TRUSTPOWER LIMITED

14 MARCH 2013

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1. INTRODUCTION

1.1 These submissions are on behalf of TrustPower Limited ("**TrustPower**") on the Proposed Canterbury Land and Water Regional Plan ("**Proposed Plan**").

1.2 TrustPower seeks that the regional plan developed through this process sustainably manages the natural and physical resources of the Canterbury Region, and, in so doing, recognises and provides for existing and consented infrastructure of national and regional significance, particularly that infrastructure relating to hydro-electricity generation, and the regional network of water storage and distribution facilities.

TrustPower

1.3 TrustPower is the fifth largest electricity generation company in New Zealand. Its core business is the generation and retailing of electricity.

1.4 TrustPower owns and operates a portfolio of 19 hydro-electric power schemes and two wind farms spread throughout New Zealand. In terms of its infrastructure under the jurisdiction of the Canterbury Regional Council ("**Council**"), TrustPower owns and operates the Coleridge Hydro-Electric Power Scheme ("**Coleridge HEPS**"), and the Montalto and Highbank Power Stations.¹

1.5 In addition to those assets, TrustPower is actively pursuing renewable electricity generation and water infrastructure opportunities throughout New Zealand. In particular, TrustPower is examining new development or enhancement opportunities as part of, or close to, its existing generation infrastructure. One such example is the Lake Coleridge Project, which is described by Mr Lilley in his evidence.² TrustPower recently obtained an amendment to the National Water Conservation (Rakaia River) Order 1988³ to enable the Lake Coleridge Project. The Lake Coleridge Project is a key component of the water supply

¹ Evidence of Mr Lilley at para 4.9.

² Evidence of Mr Lilley at paras 5.1 - 5.7.

³ Gazetted on 7 February 2013 as the National Water Conservation (Rakaia River) Amendment Order 2013.

infrastructure envisaged for Canterbury under the Canterbury Water Management Strategy ("CWMS")⁴ and, if developed, will provide:⁵

- (a) significant benefits to water supply and use in the Canterbury region through a more integrated regional approach;
- (b) hydro-electricity generation to meet peak load demand;
- (c) multiple use benefits for the water;
- (d) substantial economic benefits; and
- (e) a more reliable supply of water for irrigation which goes hand in hand with water use efficiency, resulting in less leaching from farms, and accordingly an improvement in groundwater quality.

Structure of submissions

- 1.6 These submissions will introduce the witnesses who will be giving evidence for TrustPower, before addressing the key legal issues raised in TrustPower's submission.

Witnesses

- 1.7 Three witnesses will be presenting evidence on behalf of TrustPower in this hearing:
- (a) **Mr Lilley** - corporate.⁶ Mr Lilley is Hydro Development Manager and Acting Environmental Manager at TrustPower. He is responsible for, amongst other things, the optimisation and enhancement of TrustPower's hydro-electric generation and irrigation assets and the development of new schemes. Mr Lilley will give an overview of TrustPower's electricity generation operations, particularly those in the Canterbury Region, and will describe TrustPower's interest in the Proposed Plan. Mr Lilley is also the primary TrustPower representative responsible for the technical aspects of the Lake Coleridge Project.

⁴ The Section 42A Report states at page 8 that: "Much of the CWMS, in the implementation sections, is based around water storage in the high country, and releasing of this water to create a more managed flow in rivers."

⁵ Recommendation of the Canterbury Regional Council Commissioners on TrustPower's application to amend the National Water Conservation (Rakaia River) Order 1988 at paras 178 - 180.

⁶ Evidence in Chief dated 4 February 2013.

- (b) **Dr Ryder** - aquatic ecology.⁷ Dr Ryder is a Director of Ryder Consulting Limited, an environmental consulting business. Dr Ryder has approximately 25 years' experience in freshwater ecology and water quality. Dr Ryder will discuss the water quality outcomes presented in the Proposed Plan and how they would apply to the Rakaia River and Lake Coleridge in relation to the operation of TrustPower's Coleridge HEPS.
- (c) **Mr Turner** - planning.⁸ Mr Turner is a senior resource management consultant at Mitchell Partnerships Limited. He has over 13 years' experience in the field of resource management planning. Mr Turner will address some of the key planning issues. Mr Turner has provided a detailed table attached to his evidence in chief summarising the relief sought by TrustPower, and the reasons for his support of that relief.

TrustPower's submission

- 1.8 TrustPower lodged a submission on the Proposed Plan on 5 October 2012 and a further submission on 14 November 2012 in which TrustPower set out in considerable detail all of the relief sought and the reasons for that relief. These legal submissions, and the evidence to be presented for TrustPower, will focus on the key concerns for TrustPower. The updated relief sought by TrustPower, after consideration of the Section 42A Report, is set out in Annexure A to Mr Turner's evidence dated 4 February 2013.

2. LEGAL ISSUES RELATING TO FRAMEWORK FOR STATUTORY ASSESSMENT

- 2.1 The Section 42A Report includes a detailed section addressing the relevant considerations for the Commissioners in considering the Proposed Plan.⁹ TrustPower generally endorses that discussion, except to the extent discussed below.

⁷ Evidence in Chief dated 4 February 2013.

⁸ Evidence in Chief dated 4 February 2013; Rebuttal Evidence dated 13 February 2013.

⁹ Section 42 Report, Section 1, pages 7 - 43.

Weight to be given to the Vision and Principles

2.2 Section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 ("ECan Act") requires that the Commissioners have particular regard to the vision and principles of the CWMS.

2.3 After a review of the caselaw on the meaning of "have particular regard to", the Reporting Officers then state:¹⁰

The Court said that the duty to have particular regard to a matter means the local authority (or the Court) must look into the matter raised, but may in its discretion reject it as insufficiently relevant or worthy of weight.

Given the process of community input and local authority commitment to the CWMS, the Vision and Principles of the CWMS must be seen as worthy of significant weight.

2.4 It is unclear whether the Reporting Officers are suggesting that the CWMS is a matter that should be "had particular regard to" and that it should not be rejected as being irrelevant or worthy of little weight (which TrustPower quite accepts), or whether they are suggesting that the CWMS is worthy of significant weight *over and above* the requirement to have particular regard to the CWMS. We cannot agree with the latter proposition for the reasons explained below:

- (a) In our submission, the collaborative nature of the development of the CWMS has resulted in Parliament requiring, pursuant to the ECan Act, that *particular regard* be given to its vision and principles.¹¹
- (b) As described in the evidence of Mr Turner, there are a range of considerations, including the direction provided by Part 2 of the RMA and the relevant national policy statements which must be given effect to.¹²
- (c) Giving *significant weight* to the vision and principles of the CWMS because of the "community input and local authority commitment to the CWMS" effectively double counts this factor,

¹⁰ Section 42A Report, page 32.

¹¹ Environment Canterbury (Temporary Commissioners and Improved Water Management) Bill — Explanatory Note; First Reading, Hon Dr Nick Smith (Minister for the Environment), 30 March 2010 - Hansard (30 March 2010) 661 NZPD 9929.

¹² Evidence in chief of Mr Turner at para 3.10.

and potentially rewrites section 63 of the ECan Act. That is inappropriate.

- (d) The vision and principles of the CWMS are just one part of that overall framework, and, while particular regard should be had to the vision and principles, no greater weight should be accorded to them. In particular, the vision and principles should not be elevated above other considerations which the Proposed Plan must give effect to.

Weighting of policies in the Proposed Plan vis-à-vis CWMS

2.5 The evidence¹³ of Ngāi Tahu and Fish & Game has suggested that the objectives relating to the use of freshwater resource should be subservient to those relating to environmental or cultural values, in order to enable the first order priorities of the CWMS. Both submitters appear to view the distinction in the CWMS between first and second order priorities as determinative.¹⁴

2.6 The Proposed Plan is clear that the Proposed Plan's objectives are to be read as a whole and no objective is to be read in isolation.¹⁵ TrustPower agrees with the Reporting Officer that the relative weight given to objectives will be determined by the circumstance of the application or the values of a catchment.¹⁶ As such, it would be inappropriate to afford certain objectives priority on a global basis, as sought by Ngāi Tahu and Fish & Game.

Giving effect to National Policy Statements

2.7 Under section 67(3)(a) of the RMA, the Proposed Plan is required to give effect to any relevant national policy statement. The Section 42A Report acknowledges that the National Policy Statement for Renewable Electricity Generation 2011 ("**NPSREG**") is a relevant national policy statement.¹⁷ Under the NPSREG, Canterbury Regional Council is required to recognise and provide for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities, together with associated infrastructure.¹⁸

¹³ Evidence of Ms McIntyre at paras 4.3 - 4.11; Evidence of Mr Percy at paras 39 - 40.

¹⁴ For example, see Evidence of Ms McIntyre at para 10.22.

¹⁵ Proposed Plan, section 2.1.

¹⁶ Section 42A Report, page 97.

¹⁷ Section 42A Report, page 25.

¹⁸ NPSREG, Policy E2.

- 2.8 However, the Section 32 Report¹⁹ appears to place reliance on a comment in the preamble of the NPSREG that:²⁰

This national policy statement does not apply to the allocation and prioritisation of freshwater as these are matters for regional councils to address in a catchment or regional context and may be subject to the development of national guidance in the future.

- 2.9 The Environment Court has recently considered the NPSREG and the significance of the excerpt above in the context of a proposed variation to the Waikato Regional Plan (variation 6) which was dealing expressly with the issue of water allocation. That division of the Environment Court held that the NPSREG was relevant to freshwater allocation decisions:²¹

It was submitted by some parties that the inclusion of this statement in the preamble precludes us from having regard to it when considering any of the contested issues to which it is relevant. However, we agree with Mr Cowper that the location of the above statement in the Preamble illustrates that it is not intended to act as a guide to decision-makers in respect to any freshwater allocation decisions they are making. Rather, the statement says that (amongst other things) the National Policy Statement should not be used to justify always giving hydro-electricity generation activities priority when making freshwater allocation decisions. It envisages that there may be circumstances when this will not be appropriate and should not occur.

However, the statement in the Preamble should not be read as excluding the ability of regional councils to make freshwater allocation decisions which reflect the importance of renewable energy activities. Even if we are wrong in this regard, we consider it necessary, as a cautionary approach, to consider the policy statement's provisions which reflect and give strong guidance to the relevant statutory provisions contained in Part 2 of the Act.

...

The provisions in the National Policy Statement for Renewable Electricity Generation provide a clear indication that the government sees renewable electricity generation as an essential need for the nation and which should be treated as of national significance.

- 2.10 With respect, TrustPower endorses that statement of the law.
- 2.11 TrustPower strongly disagrees with the Section 42A Report²² that the NPSREG is sufficiently given effect to in the current wording of the Proposed Plan, and that no new policies are recommended. While two objectives (Objective 3.15 and Objective 3.16) provide for hydro-

¹⁹ Section 32 Report, page 21.

²⁰ NPSREG, page 3.

²¹ *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at paras 58 - 59 and 62.

²² Section 42A Report, page 379.

electricity generation activities (although neither of these mention "renewable energy generation" specifically), the Proposed Plan lacks any policies or rules which seek to implement the direction provided by the NPSREG (except perhaps Policy 4.48, which is limited to existing hydro-electricity schemes). As set out in the evidence²³ of Mr Turner, TrustPower requests that two additional policies be incorporated into the Proposed Plan to give effect to the NPSREG, as required by section 67(3) of the RMA.

Giving effect to the RPS

- 2.12 There are some aspects of the Proposed Plan which, in TrustPower's view, import a protectionist approach to the management of water in the Canterbury Region by employing wording such as "avoidance of adverse effects", and "no more than negligible adverse effects".²⁴ In practical terms, this implies a requirement for "no adverse effects".
- 2.13 While TrustPower accepts that there can be justifiable resource management reasons for having policies which include such wording, that approach is not justifiable in these circumstances.
- 2.14 In particular, the RPS, which the Proposed Plan is required to give effect to under section 67(3) of the RMA, does not employ such a high threshold. For example:
- (a) The RPS contains a number of specific objectives that seek that the adverse effects of activities be avoided *where practicable*, and otherwise be remedied or mitigated.²⁵

²³ Evidence in chief of Mr Turner, section 12.

²⁴ For example, Policies 4.3, 4.10, 4.15, 4.43, 4.52 of the Proposed Plan.

²⁵ Evidence in chief of Mr Turner at para 10.6. See for example (emphasis added):

- RPS Policy 5.3.9 which seeks that the effects of regionally significant infrastructure on significant natural and physical resources and cultural values are avoided, and *where this is not practicable*, that they are remedied or mitigated;
- RPS Policy 5.3.11 which seeks that the effects of irrigation infrastructure on significant natural and physical resources and cultural values are avoided, and *where this is not practicable*, that they are remedied or mitigated;
- RPS Policy 7.3.5 which seeks that the effects of land uses on the flow of water in surface water bodies are *avoided, remedied or mitigated*;
- RPS Policy 7.3.7 which seeks that the effects of changes in land use on the quality of fresh water are *avoided, remedied or mitigated*;
- RPS Policy 10.3.3(1) which seeks to manage activities in river and lake beds such that effects are *avoided, or where is not practicable, remedied or mitigated*; and
- RPS Policy 16.3.5 which seeks that the effects of upgrading existing, and developing new, electricity generation infrastructure on significant natural and physical resources or cultural values are *avoided, or where this is not practicable, remedied, mitigated or offset*.

- (b) The RPS only requires that effects be avoided in respect of certain matters, for example sewerage, stormwater and potable water infrastructure,²⁶ development, operation and expansion of the transport system on significant natural and physical resources and cultural values.²⁷

2.15 The most restrictive policies in the RPS only seek that adverse effects on *significant* values be avoided where practicable – with flexibility being retained for the remediation or mitigation of adverse effects.²⁸ Accordingly, TrustPower submits that the Proposed Plan does not give effect to the RPS by imposing a more restrictive management regime than set out in the RPS. TrustPower seeks that the Proposed Plan is amended in the manner set out by Mr Turner²⁹ to appropriately give effect to the RPS in this regard.

3. LEGAL ISSUES RELATING TO PARTICULAR PROPOSED POLICIES AND RULES

3.1 From a legal perspective, TrustPower also wishes to comment on certain objectives, policies and rules in the Proposed Plan.

Policy 4.4 - Prioritisation of water allocation

3.2 Policy 4.4 states that water is to be managed through the setting of limits on a first and second priority basis.

3.3 In TrustPower's submission, in its current form Policy 4.4 inappropriately prioritises between competing objectives:

- (a) There can be no ambiguity regarding the relationship between objectives in the Proposed Plan. The Proposed Plan itself provides that the:³⁰

Objectives of this Plan must be read in their entirety and considered together. No single Objective has more importance than any other.

- (b) Similarly, with respect to the policies:³¹

²⁶

Policy 5.3.6 of the RPS.

²⁷

Policy 5.3.8 of the RPS.

²⁸

Evidence in chief of Mr Turner at para 10.7.

²⁹

Evidence in chief of Mr Turner at para 10.11, and Annexure A at page 6.

³⁰

See Section 2.1; introduction to Section 3 - Objectives.

³¹

See Section 2.2; introduction to Section 4 - Policies.

As with the objectives, the policies are intended to apply as a comprehensive suite, and must be read and considered together.

- (c) TrustPower has no objection to individual policies relating to different components of Part 2. (In other words, there is no concern about some policies focussing on social and economic wellbeing, other policies relating to cultural wellbeing, and yet further policies safeguarding the life-supporting capacity of water, for example.) However, TrustPower's concerns are that:
- (i) Policy 4.4 effectively prioritises objectives 3.3, 3.7, 3.8 and 3.14 over objectives 3.11 - 3.13 and 3.15 - 3.16. That is inappropriate and contradicts section 2.1 and the introduction to section 3 of the Proposed Plan (which expressly say that there is no such priority as between the objectives).
 - (ii) Policy 4.4 may be used to act as a tie-breaker in the event of competing policies being considered during a subsequent assessment process. In other words, in a resource consent process, where all applicable objectives and policies are relevant and considered together, Policy 4.4 may be argued to give priority to some policies at the expense of other policies. That is inappropriate and contradicts Section 2.2 and the introduction to Section 4 of the Proposed Plan. The proper approach is that all objectives and policies are assessed in the round, with the weight given to each objective and policy depending on the circumstances.³²
- (d) The Section 42A Report comments³³ that Policy 4.4 "primarily gives effect to the prioritisation in the CWMS principles". However, under the ECan Act, the Proposed Plan is required to give effect to the RPS, not the CWMS principles.
- (e) Turning to the RPS:

³²

This is reinforced by the final sentence on page 23 of the Section 42A Report. Section 42A Report, page 105.

³³

- (i) Policy 7.3.4 establishes a framework for the establishment of environmental flow and allocation regimes.
 - (ii) However, the environmental flow and allocation regimes are to be established "in accordance with all relevant policies, including but not limited to Policies 7.3.4, 7.3.10 and 7.3.11".³⁴
 - (iii) The methods following Policies 7.3.10 and 7.3.11³⁵ of the RPS recognise that environmental flow and allocation regimes may be necessary to provide for the harvesting and storage of water, as well as existing hydro-electricity generation and irrigation schemes.
 - (iv) That is, the RPS recognises that when establishing environmental flow and allocation regimes, all relevant provisions will need to be considered and weighed, relevant to the circumstances of the individual catchment.
- (f) Accordingly, in order to give effect to the RPS appropriately, and to avoid the current internal inconsistency, TrustPower requests that Policy 4.4 be amended in the manner outlined by Mr Turner in Annexure A to his evidence.³⁶

Policy 4.8 - Relevance of ZIPs

- 3.4 Policy 4.8 of the Proposed Plan states that the harvest and storage of water for irrigation or hydro-electricity generation schemes should contribute to, or not frustrate, the attainment of the priority outcomes in the relevant Zone Implementation Programme ("ZIP").³⁷
- 3.5 TrustPower has significant concerns with a policy of this nature:
- (a) Material incorporated by reference in a plan or proposed plan has legal effect as part of the plan or proposed plan.³⁸ As such,

³⁴

Method 1(a) to Policy 7.3.4.

³⁵

Method 1(a) to Policy 7.3.10 and Method 1 to Policy 7.3.11.

³⁶

Evidence in chief of Mr Turner at page 4 of Annexure A.

³⁷

As the Committee will be aware, each zone committee is responsible for co-ordinating the development and review of an implementation programme to address fresh water management issues for the region or their zone.

³⁸

RMA, Schedule 1, clause 30.

the reference in Policy 4.8 to the priority outcomes of the ZIPs gives the ZIPs and their policy outcomes de facto policy status.

- (b) However, the Courts have expressed concern with the inclusion by reference of external documents where that material has not been publicly scrutinised through an RMA process.³⁹
- (c) The ZIPs are simply zone-specific recommendations for water management to achieve the CWMS. While each zone committee has prepared and developed the ZIPs for their region with collaboration with key stakeholders and the community in public and stakeholder feedback meetings, the ZIPs are non-statutory documents that have not all been finalised,⁴⁰ and may be amended without consultation even after incorporation in the Proposed Plan
- (d) It is not possible to determine the appropriateness of Policy 4.8 without being able to review the ZIPs.
- (e) Even if the ZIPs could be reviewed and were considered appropriate, the form of Policy 4.8 would mean that any future ZIP (or amendment to a current ZIP) could become a de facto policy without any proper ability to participate in the formulation of that ZIP through a formal RMA process, and there would be no guarantee that any ZIP would be properly evaluated against the purpose of the RMA.
- (f) Mr Turner outlines additional concerns with Policy 4.8 in his evidence.⁴¹

3.6 Consequently, TrustPower submits that reference to the ZIPs and their priority outcomes be deleted from Policy 4.8.⁴² TrustPower seeks that

³⁹ *Intercontinental Hotel v Wellington Regional Council* EnvC Wellington W015/08, 14 March 2008 at paras 50 - 58.

⁴⁰ Section 32 Report, pages 27 - 28; and <http://ecan.govt.nz/get-involved/canterburywater/Pages/zip-summaries.aspx>.

⁴¹ Evidence in chief of Mr Turner at para 9.6. Mr Turner also considers Policy 4.8 to be inconsistent with the methods established in Chapter 7 of the RPS. None of the policies and methods in Chapters 5 (Land-use and Infrastructure), 7 (Fresh Water) and 15 (Soils) of the RPS suggest that the development or re-consenting of irrigation or hydro-electricity generation schemes should not frustrate the attainment of the priority outcomes of ZIPs.

⁴² Evidence in chief of Mr Turner at para 9.2.

Policy 4.8 be reworded to provide for the harvest and storage of water for irrigation and hydro-electricity generation activities.⁴³

- 3.7 As provided in the evidence of Mr Turner, the priority outcomes in individual ZIPs could be included in the Proposed Plan's objectives and policies applying to sub-regional sections if they are considered necessary to achieve the sustainable management purpose of the RMA.⁴⁴ However, that requires that the priority outcomes are properly tested through the lens of the RMA. Alternatively, Policy 4.8 could state.⁴⁵

4.8 The harvest and storage of water for irrigation or hydro-electricity generation schemes contribute to or do not frustrate the attainment of the regional concept for water harvest, storage and distribution set out in Schedule 16 or the priority outcomes expressed in the relevant ZIP that have been incorporated into Sections 5-16.

Policy 4.52

- 3.8 Ngāi Tahu has suggested that amendments be made to Policy 4.52 to restrict the transfer of water from one catchment or water body to another only in circumstances which are "acceptable to Ngāi Tahu".
- 3.9 Mr Turner has described the difficulties with that approach in his rebuttal statement.⁴⁶ There are also difficulties from a legal perspective. In particular, to limit transfers to only those *acceptable* to Ngāi Tahu effectively casts Ngāi Tahu as decision-maker. It is well established that the RMA does not provide iwi with a right of veto.⁴⁷ Accordingly, such a policy is inappropriate.

Rules 5.85, 5.88 and 5.90 - Relationship with Water Conservation Orders

- 3.10 Rules 5.85, 5.88 and 5.90 provide that the taking and using of water in various circumstances is a restricted discretionary activity. In each case, the rules as currently drafted state that the Council will restrict its discretion on applications made pursuant to this rule, to whether they comply with any relevant water conservation order ("WCO").

⁴³ The amendments sought are set out in Evidence in chief of Mr Turner at Annexure A at pages 4 - 5.

⁴⁴ Evidence in chief of Mr Turner at para 9.5.

⁴⁵ This seems to be the intention - ie promoted through future plan changes (refer to Section 32 Report at page 6).

⁴⁶ Rebuttal evidence of Mr Turner at paras 3.9 - 3.13.

⁴⁷ See, for example, *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 294 (CA).

- 3.11 However, under section 217(2)(a) of the RMA, a Council *shall not* grant a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of a WCO. Therefore, under the RMA, no discretion exists for the Council to grant a resource consent that does not comply with a WCO.⁴⁸
- 3.12 TrustPower therefore submits that this discretion be removed in favour of standards being placed on Rules 5.85, 5.88 and 5.90 requiring that the take and use of water complies with the minimum flow and allocation limits as set out in any relevant WCO. Unless the activity meets this standard, it should not be even considered for consent. This is a more appropriate form of rule than one (such as is proposed) which contains a statutory pre-requisite as simply one matter for discretion.

Rule 5.132

- 3.13 Rule 5.132 provides for the use and maintenance of a lawfully constructed dam as a controlled activity.
- 3.14 The section 42A Report explains that controlled activity status recognises that re consenting of such structures is unlikely to be declined.⁴⁹ Similarly, both the RPS and the Proposed Plan contemplate the continuation of existing hydro-electricity generation schemes.⁵⁰
- 3.15 TrustPower sought that Rule 5.132 be extended to provide for all activities associated with the ongoing operation of a lawfully established hydro-electricity generation scheme as a controlled activity; the reason being that all aspects of a hydro-electricity generation scheme would be considered together at the time of re consenting. While Rule 5.132 may assist with the use and maintenance of the dam, without all aspects having controlled activity status, the activity as a whole would still be considered as a discretionary or non-complying activity.⁵¹ That would defeat the purpose of having Rule 5.132.
- 3.16 The Reporting Officers justify not all activities associated with a hydro-electricity generation scheme being controlled activities on the basis that

⁴⁸ See, for example, *Wakatu Inc v Tasman District Council* [2012] NZRMA 363 at para 40.

⁴⁹ Section 42A Report, page 378.

⁵⁰ Policy 7.3.11 of the RPS; Section 1.2.6 and Policy 4.48 of the Proposed Plan

⁵¹ Evidence in chief of Mr Turner at paras 15.4 - 15.5; Section 42A Report, page 24.

"a flow regime may be contentious".⁵² However, assuming that some impact on the "natural" flow regime will always be allowed (which is a necessary corollary of the Council's acceptance that existing large dams will be reconcented), then the only question is the extent of the flow that can be dammed and what mitigation is required. All relevant matters can be assessed in the context of a controlled activity assessment.

- 3.17 Nor is there any justification for a more restrictive activity status on the basis of notification as there is no difference in the treatment of controlled and, say, restricted discretionary activities for the purposes of notification under the RMA or under the Proposed Plan.⁵³
- 3.18 Taking into account the costs and benefits, including the certainty provided by controlled activity status, TrustPower submits that it is entirely appropriate for Rule 5.132 to be extended in the manner suggested in Annexure A to Mr Turner's evidence.⁵⁴

4. CONCLUSION

- 4.1 TrustPower therefore respectfully submits that the Commissioners approve the Proposed Plan, subject to the amendments set out in Annexure A to Mr Turner's evidence.

Dated 14 March 2013

Daniel Minhinnick
Counsel for TrustPower Limited

⁵² Section 42A Report, page 378.

⁵³ While consideration is limited to those effects over which control is reserved (see RMA section 95D(c) and 95E(2)(b)), there is no requirement for controlled activities to be processed on a non-notified basis. Under section 95E(2)(c) the Canterbury Regional Council must also have regard to statutory acknowledgements made in accordance with specified acts, including the Ngāi Tahu Claims Settlement Act 1998. The Ngāi Tahu Claims Settlement Act 1998 includes a number of statutory acknowledgements, including for Whakamatau (Lake Coleridge).

⁵⁴ Evidence in chief of Mr Turner at pages 15-16 of Annexure A.

