

Tabled at Hearing @ 14/03/2013

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IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Canterbury Land and
Water Regional Plan

LEGAL SUBMISSIONS ON BEHALF OF GENESIS ENERGY

(14 MARCH 2013)

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I. INTRODUCTION

1. Genesis Energy¹ owns and operates the Tekapo Power Scheme, a long established nationally significant physical resource.
2. Given its direct and significant interest in ensuring that the Proposed Canterbury Land and Water Regional Plan ("**Proposed LWRP**") meets the requirements of the Resource Management Act 1991 ("**RMA**"), Genesis Energy:
 - (a) Lodged a submission (5 October 2012) and further submissions (14 November 2012);
 - (b) Detailed proposed amendments to the Proposed LWRP in those submissions;
 - (c) Adduced the following evidence in support of its submissions and proposed amendments:
 - (i) Ms Tracey Hickman (Renewable Energy Manager – Genesis Energy) explains the Tekapo Power Scheme, Genesis Energy's engagement in Canterbury and describes the potential effects of the Proposed LWRP on the Tekapo Power Scheme.
 - (ii) Mr Lee Wilson (Director – Concept Consulting Group Limited) discusses relevant aspects of the New Zealand electricity market, future electricity demand and supply requirements, and renewable energy generation.
 - (iii) Dr Philip Mitchell (Managing Director of Mitchell Partnerships Limited) evaluates the relevant RMA framework and assesses the Proposed LWRP against that framework. He also sets out proposed amendments to the Proposed LWRP in order that it meets the requirements of the RMA.
3. In accordance with arrangements approved by the Hearing Commissioners, Ms Hickman and Mr Wilson will not be presenting their pre-circulated evidence, while Dr Mitchell will address his pre-circulated primary and reply evidence.

Overview of Genesis Energy position

4. Context is everything. As detailed in the Genesis Energy submissions and evidence:

¹ The trading entity for Genesis Power Limited.

- (a) Genesis Energy purchased the Tekapo Power Scheme on 1 June 2010 from Meridian Energy Limited.
- (b) The Tekapo Power Scheme:
- (i) Sits at the head of the Waitaki Valley and comprises two power stations (Tekapo A (25MW) and Tekapo B (160MW)), Lake Tekapo and its associated hydrological inflows, and the Tekapo canal;
 - (ii) Was commissioned:
 - (aa) Tekapo A – in 1951 (after some 13 years of construction);
 - (bb) Tekapo B – in 1977;
 and has been a part of the existing environment for many decades;
 - (iii) Operates pursuant to water related resource consents that expire in 2025.
 - (iv) Generates approximately 980 GWh per annum. Moreover, most of the water entering Lake Tekapo passes through all eight power stations in the Waitaki Power Scheme with the Lake Tekapo inflows contributing approximately 1,680 GWh per annum.
 - (v) Makes an important contribution to security of electricity supply, particularly in the South Island which is dependent on hydro-electricity generation. In addition, Tekapo A can connect directly to the local distribution network providing additional security of supply.
 - (vi) Along with the Waitaki Power Scheme, is crucial to the social, economic, and cultural wellbeing of the Canterbury region, South Island and New Zealand. This is reflected in the following extract from the Waitaki Catchment Water Allocation Board's decision on the Waitaki Catchment Water Allocation Regional Plan ("**Waitaki Plan**"):²

"66. ... **the Board found that the Waitaki Power Scheme is nationally significant**, and that potential exists for further hydro-electricity generation on the Lower Waitaki River. Accordingly, the Board has made

² Waitaki Catchment Water Allocation Regional Plan: Annexure 1 Decision and principal reasons for adopting the Plan provisions. Prepared by the Waitaki Catchment Water Allocation Board, September 2005 – paragraph 66.

appropriate amendments to the Plan which address the concerns raised. An allocation to hydro-electricity generation is not an endorsement by the Board that further hydro-electricity infrastructure can be constructed there. But as adverse effects of activities to which water is allocated may be able to be adequately avoided, remedied or mitigated, an allocation for hydro-electricity generation is appropriate." [Emphasis added]

At that time, the Waitaki Power Scheme included the Tekapo Power Scheme.

5. Any impediments to the manner in which the Tekapo Power Scheme is able to store water in, and take water from, Lake Tekapo and any additional requirements to provide minimum flows would have significant adverse effects on the sustainable management of this nationally significant physical resource as required by section 5 of the RMA.

II. STATUTORY FRAMEWORK

6. The Proposed LWRP must³ be prepared in accordance with:
 - (a) Council's section 30 functions and section 32 duty;
 - (b) The relevant requirements for regional plans contained in sections 63 - 70; and
 - (c) Part 2 of the RMA.
7. In addition, the Hearing Commissioners "must have particular regard to the vision and principles" of the Canterbury Water Management Strategy ("**CWMS**").⁴

III. LEGAL ISSUES

8. We address the following legal issues:
 - (a) Recognition of renewable electricity generation resources;
 - (b) Proposed Policy 4.4;
 - (c) Proposed controlled activity rule for re-consenting;

³ Section 66 of the RMA.

⁴ Section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 which provides:

"63 Additional relevant criteria

In considering any proposed regional policy statement or plan, ECan must have particular regard to the vision and principles of the CWMS in addition to the matters relevant under the RMA to its decisions made under clause 10(1) of Schedule 1 of that Act."

- (d) Proposed Rule 5.132;
- (e) Proposed Policies 4.41 and 4.52.

A. RECOGNITION OF RENEWABLE ELECTRICITY GENERATION RESOURCES

9. In essence, Genesis Energy seeks positive recognition for the Tekapo Power Scheme in the Proposed LWRP.
10. The Courts have long confirmed the essential place of electricity in New Zealand, for example:⁵

"Electricity is a vital resource in New Zealand. There can be no sustainable management of natural and physical resources without energy, of which electricity is a major component."
11. Moreover, the Proposed LWRP must give effect to the National Policy Statement for Renewable Electricity Generation ("**NPS REG**"). Relevant provisions include the Objective, and Policies A, B and E2.
12. The Waikato Regional Plan Variation 6 decision⁶ records:

"[55] The National Policy Statement for Renewable Electricity Generation came into force on 12 May 2011. This policy statement ensures a consistent approach to planning for renewable electricity generation in New Zealand by giving clear directions on the benefits of renewable electricity generation and requiring all councils to make provision for it in their plans.

[56] The statement emphasises as matters of national significance:

 - a) the need to develop, operate, maintain and upgrade renewable electricity generation activities throughout New Zealand; and
 - b) the benefits of renewable electricity generation.

...

[62] 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."
13. The provisions of the national policy statement reflect the New Zealand Energy Strategy 2011-2021 ("**NZES**")⁷ and New Zealand Energy Efficiency and Conservation Strategy 2011-2016 ("**NEECS**") (both released on 30 August 2011).⁸

⁵ *Genesis Power Limited v Franklin District Council* [2005] NZRMA 541 (EC) at page 556.

⁶ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380.

⁷ Ministry of Economic Development 2011 - *New Zealand Energy Strategy 2011-2021*.

⁸ These set out the Government's direction for energy and the role of energy in the New Zealand economy. The Government retains the aspirational target of 90% of electricity generation from renewable sources by 2025 (in an average hydrological year) providing this does not affect security of supply:

14. As noted by the Hearing Commissioners on the proposed Canterbury Regional Policy Statement 2011:⁹

"...the Tekapo and Waitaki hydro schemes... [and other specified infrastructure] have high national and/or regional significance too."

15. The Hearing Commissioners there considered¹⁰ that it would add prolixity and repetition to recognise main infrastructure at objectives, policies, explanation and methods levels in all relevant chapters of the RPS. Instead, it was decided to recommend recognition of various types and features of infrastructure at a generic level.

16. Genesis Energy seeks specific policy recognition for electricity generation.¹¹

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- The NZES contains the following statements in relation to renewable energy:

"Energy is more than just another commodity: it is an essential input to all sectors. New Zealand's economic competitiveness rests on its ability to respond positively to global energy risks and opportunities. ...

Renewable target for electricity generation

The government retains the aspirational, but achievable, target that 90 percent of electricity generation be from renewable sources by 2025 (in an average hydrological year) providing this does not affect security of supply.

New Zealand has an abundance of renewable resources for electricity generation. Renewables contributed more than 70 percent of electricity generation in 2010.

While providing low emissions electricity, our renewable choices help sustain our reputation as an environmentally responsible nation.

The economic competitiveness of new renewable electricity generation will be enhanced by a price on carbon. In the next decade the government expects to see more geothermal and wind generation in particular.

Achieving this target must not be at the expense of the security and reliability of our electricity supply. For the foreseeable future some fossil fuel generation will be required to support supply security."

- The New Zealand Energy Efficiency and Conservation Strategy (2011-2016) contains the following statements in relation to renewable energy:

"Renewable electricity

Some 70 percent of New Zealand's electricity is already generated from renewable sources of energy: hydro; geothermal; and wind. Consequently, our greenhouse gas emissions intensity for electricity generation is low compared to other countries.

A low-emissions electricity system provides New Zealand with a distinct energy advantage over our trading competitors. It also is a tangible demonstration of New Zealand's environmental responsibility and '100% Pure' New Zealand brand.

New Zealand is targeting 90 percent of electricity generation to be from renewable sources by 2025, providing electricity supply is secure. This target is aspirational but achievable, given New Zealand's untapped renewable energy potential, our expertise in renewable development, and our emissions trading scheme.

That said, the electricity system faces a number of challenges to the achievement of this goal. New projects face consenting restraints. Integrating intermittent renewable energy into the existing system creates system challenges. Some types of renewable energy is located in areas remote from the main grid, requiring transmission investment."

⁹ Report of the Hearing Commissioners on the Proposed Canterbury Regional Policy Statement 2011 (12 July 2012) - Section 7.13 (page 18).

¹⁰ At Section 7.13 (page 19).

¹¹ Refer paragraphs 5.7-5.13 and 5.27-5.28 (noting all references to Dr Mitchell's evidence in these footnotes is to his primary evidence). Dr Mitchell proposes the following new policies [red track

17. This approach is mandated by both a specific national policy statement and the regional policy statement. Thus, the 'resource management benefit' of the amendments sought by Genesis Energy is not elusive – it is a mandatory requirement under section 67(3) of the RMA.

B. PROPOSED STRATEGIC POLICY 4.4 – WATER PRIORITIES

18. In promulgating strategic policies for the Proposed LWRP, the context of particular catchments, especially nationally significant hydroelectricity schemes forming part of the existing environment, is important.
19. Section 5 of the RMA, the objective and policies¹² of the NPS REG and provisions of the RPS¹³ all confirm that significant weight is to be given to the nationally significant physical resources that are the hydro-electricity schemes in the Waitaki Catchment.
20. Dr Mitchell sets out Genesis Energy's proposed amendments to proposed Policy 4.4 to reflect these matters.¹⁴

changes reflect changes shown in the evidence of Dr Mitchell, with underline showing proposed additions and ~~strike through~~ showing proposed deletions]:

"Electricity Generation

4.XX The generation output of existing hydroelectricity generation schemes will be maintained, and their ongoing operation provided for.

4.XX The upgrading of existing and establishment of new electricity generation infrastructure is to be encouraged.

4.XX Activities, uses and developments that impact on the generation capacity from, and / or the maintenance and upgrading of consented and existing electricity generation infrastructure will be avoided."

"Abstraction of water

Policy 4.XX

The continuation of existing water takes, damming and diversions which involve substantial investment in infrastructure will be recognised and provided for."

Dr Mitchell proposes changes to Policy 4.48 to recognise the existing hydro-electricity generation. Refer paragraphs 5.9-5.13 and proposed amendment as follows [red track changes reflect changes shown in the evidence of Dr Mitchell, with underline showing proposed additions and ~~strike through~~ showing proposed deletions]:

"4.48 Existing hydro-generation and irrigation schemes are recognised as part of the existing environment. ~~In re-consenting the schemes, it is expected that there will be improvements in the efficiency of water use and conveyance assessed over the life of the consent and reductions in any adverse effects on flows and levels in water bodies in order to maximise the term of consent.~~"

¹² For example, the Objective, and Policies A, B and E2.

¹³ For example, Policies 7.3.11, 16.3.3, 16.3.5 and 5.3.9.

¹⁴ Refer paragraphs 5.14-5.20. Dr Mitchell proposes amendments to Policy 4.4 as follows [black track changes show those changes proposed by Council staff, with red track changes reflecting amendments proposed by Genesis Energy]:

"Policy 4.4

Water is managed through the setting of limits ~~will be set for each catchment which provide for a variety of catchment specific values including but not necessarily limited to the maintenance of~~ ~~to~~ maintain the life-supporting capacity of ecosystems, ~~support~~ support customary uses, ~~and provide for~~ community supplies and stock drinking water supplies, ~~as a first priority and to meet the needs of people and communities for~~ water for irrigation, hydro-electricity generation and other economic

21. Dr Mitchell also proposes amendments to reflect the 'priority based approach' in the event the Hearing Commissioners decide this is desirable.¹⁵
22. The catchment based approach is also relevant for the Waitaki Plan.
23. As recorded in section 2.9 of the Proposed LWRP, the Waitaki Plan is the regional plan for the Waitaki Catchment. Section 2.9 signals a future intention to include the Waitaki Plan in the Proposed LWRP.
24. Again, it is appropriate that the Proposed LWRP provide a framework to recognise the unique attributes of the Waitaki Catchment if and when that occurs.

C. CONTROLLED ACTIVITY STATUS

25. Genesis Energy seeks controlled activity status for re-consenting of the Tekapo Power Scheme as:
 - (a) It is a nationally significant physical resource that must be sustainably managed, and a long standing part of the existing environment.
 - (b) It will continue to operate beyond the life of the proposed regional plan (being consented for over a further 12 years).
 - (c) The controlled activity rule proposed by Genesis Energy retains control to council, including over matters such as the volume and rate of water abstraction, measures to address adverse effects, and water quality.
 - (d) Controlled activity status for similar nationally significant resources is common throughout the country, as noted in the evidence of Dr Mitchell.¹⁶
26. Under the Proposed LWRP, the 'bundling' principle would operate such that re-consenting of the Tekapo Power Scheme would be treated as discretionary or even non-complying.

activities and ~~to maintain river flows and lake levels needed for~~ recreational activities. ~~as a second priority.~~"

¹⁵ Refer paragraphs 5.21-5.26. Dr Mitchell proposes amendments as follows [black track changes show those changes proposed by Council staff, with red track changes reflecting amendments proposed by Genesis Energy]:

"4.XX Particular regard will be given to the vision and principles of the Canterbury Water Management Strategy."

4.8 The harvest and storage of water for new irrigation or new 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.

¹⁶ Mitchell – paragraph 6.5.

27. Dr Mitchell proposes to provide for re-consenting of the Tekapo Power Scheme as a controlled activity.¹⁷
28. This approach is available to the Hearing Commissioners as it would strike the right balance between public participation and other resource management values and would be the most appropriate means of exercising the rule making function having regard to the purpose of the RMA.¹⁸

D. PROPOSED RULE 5.132 – EXISTING STRUCTURES CONTROLLED ACTIVITIES

29. The background to the Tekapo Power Scheme structures is addressed by Dr Mitchell¹⁹.

¹⁷ As follows [red track changes reflect changes shown in the evidence of Dr Mitchell, with underline showing proposed additions and ~~strike through~~ showing proposed deletions]:

“Section 5 - Region-wide Rules

...

Existing Hydroelectricity Generation

Rule 5.XX

The lawfully established:

1. Take and use of water (including non-consumptive use);
2. Damming and diversion of water;
3. Discharge of water to water;
4. Discharge of contaminants to water; and
5. Use of structures associated with a hydro-electricity power scheme that existed on the date this regional plan becomes operative and is listed in Schedule XX, is a controlled activity provided the following conditions are met:

1. The consent application(s) replace existing consents.
 2. There is no increase to the existing volume or rate of take or diversion.
 3. There is no increase to the existing volume of discharge or the nature of contaminants.
- The Canterbury Regional Council reserves control over the following matters:

1. The volume and rate of water taken and the timing of the take;
2. Intake velocity and screening requirements;
3. The range, or rate of change of levels or flows of water;
4. Water levels and residual flows;
5. Compliance with minimum flow requirements;
6. Measures to avoid, remedy or mitigate any adverse effects on the following:
 - (a) tangata whenua values;
 - (b) lawfully established users of the river or stream;
 - (c) the operation on downstream sediment transport processes;
 - (d) aquatic ecosystems, areas of significant indigenous vegetation, significant habitats of indigenous fauna;
 - (e) outstanding natural features and natural character;
 - (f) amenity values (including recreation), and existing public access to and along the margins of rivers and lakes;
7. Measures to manage or provide for fish passage;
8. Measures to manage land stability and erosion;
9. Measures to control flooding;
10. Measures to improve technical efficiency in water use;
11. Contaminant concentrations and loading rates;
12. Measures required to comply with s107(1) RMA;
13. Maintenance and contingency requirements;
14. Monitoring and information requirements;
15. Duration of consent;
16. Review of consent conditions; and
17. Compliance monitoring.”

¹⁸ Compare *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 at [45] – [46] (HC).

¹⁹ Mitchell Evidence – paragraphs 2.9 and 7.1.

30. The effect of proposed Rule 5.132 and section 20A(2) of the RMA would be to require Genesis Energy to apply for resource consents for those structures (covered by this rule) within six months of the rule becoming operative.
31. Genesis Energy does not oppose the proposed activity status provided the timing of such consenting aligns with the expiry of the existing resource consents for the Tekapo Power Scheme. This approach would avoid unnecessary time and cost, and appears to be supported by Council staff.²⁰
32. Dr Mitchell proposes amendments to Rule 5.132 to this effect.²¹

E. PROPOSED ACTIVITY AND RESOURCE POLICIES 4.41 AND 4.52 – DAMMING AND DIVERSION OF WATER BODIES

33. The RMA does not prohibit adverse effects on the environment, including minor effects. Rather, they are to be avoided, remedied or mitigated under section 5(2)(c).
34. As confirmed by the High Court in the Project Hayes case:²²

"[112] Before leaving this cost benefit issue we should briefly comment on the Environment Court's approach to internalising costs. The Court found that costs in terms of landscape and various other matters had not been internalised to Meridian.

[113] With this concept of internalisation comes the notion that external costs arising from the private use of natural and physical resources should be internalised and reflected in the cost and benefit analysis. Externalities are those consequences, both beneficial and adverse, which flow from the use of the resources. Regulatory statutes controlling private use of land developed from the common law of nuisance, which has long understood and responded to the fact that private use of land can cause a nuisance to the neighbourhood. Reforms

²⁰ Refer s42A report – page 378.

²¹ Refer paragraph 7.1. Proposed changes are as follows [red track changes reflect proposed amendments shown in the evidence of Dr Mitchell, with underline showing proposed additions and ~~strike through~~ showing proposed deletions]:

"5.132 The use and maintenance of a structure in the bed of a river associated with a lawfully established ~~dam hydroelectricity power scheme~~ that existed on 1 November 2013 is a controlled activity, provided that if the dam is associated with a lawfully established hydroelectricity power scheme that existed on 1 November 2013 and provided that the resource consent which lawfully established the damming of water behind that dam on 1 November 2013 has expired or has been surrendered.

The CRC reserves control over the following matters:

1. The maintenance of, or improvement of, fish passage.
2. The risk of dam failure;
3. Whether and how fish are prevented from entering any intake structures;
4. Passage of flood waters.

5.XX Notwithstanding Rule 5.132, the use and maintenance of a dam associated with a lawfully established hydroelectricity power scheme that existed on 1 November 2013 is a permitted activity while the resource consent which lawfully established the damming of water behind the dam structure remains operative."

²² *Meridian Energy Limited v Central Otago District Council* [2011] 1 NZLR 482 (HC).

culminating in the RMA are discussed in this Court's decision *Wilson v Selwyn District Council*.

[114] The underlying purpose of internalising these externalities is to enable all the benefits and costs to be quantified so that a net benefit or net loss, as the case may be, can be calculated. The problem is that where all the benefits and costs are not the subject of market transactions there is no readily quantifiable financial sum reflecting the demand or price to be paid for such benefits or the imposition of detriments. To put dollars on them requires some sort of imputing of demand. Sometimes this can be achieved by way of surveys: "How much would you pay to visit a national park?" Sometimes it is not possible to put dollar terms on them.

[115] ... **We cannot accept that it was within the contemplation of the RMA that failure to fully internalise costs would carry the consequences that the Environment Court contemplated.** [Emphasis added]

35. Rather, adverse effects are to be avoided, remedied or mitigated:²³

"[72] We thus propose to consider the relevant evidential matters, make decisions on the facts, and then apply a balancing and weighting process to determine what best achieves the single purpose of the Act. In so doing, we are mindful of the fact that while adverse effects may involve Part II matters, it is still nonetheless proper for such effects to be mitigated, as opposed to being avoided or remedied under section 5(2)(c). As the Environment Court said in *Kemp v Queenstown Lakes District Council*:

[S]ome of the possible adverse effects related to national importance can be avoided or perhaps mitigated under section 5(2)(c). For example, the effects on the significant habitat for wrybills, banded dotterel and black fronted tern is only a potential effect and may be controlled by application of a monitoring condition with a review of the resource consent if the risk of harm is shown to exist and be significant."

36. As noted by the PCRPS Hearing Commissioners, consent authorities are not obliged to refuse consent that would conflict with a policy (noting reference to the *Roman Catholic Diocese of Auckland* case).²⁴ However, the proposed policies are not the most appropriate way to achieve the purpose of the Act in the Waitaki Catchment.
37. Dr Mitchell proposes amendments to proposed Policies 4.41 and 4.52 to reflect section 5(2)(c) while also maintaining the policy intent.²⁵

²³ *Ngāfi Rangi Trust v Manawatu-Wanganui Regional Council A67/2004* (EC).

²⁴ Report of the Hearing Commissioners on the Proposed Canterbury Regional Policy Statement 2011 (12 July 2012) - Section 7.5 (page 6).

²⁵ Refer Mitchell - paragraphs 9.1-9.6. Proposed amendments are as follows [red track changes reflecting proposed amendments shown in the evidence of Dr Mitchell, with underline showing proposed additions and ~~strike through~~ showing proposed deletions]:

"Policy 4.41

The damming or diversion of any alpine or hill-fed river will avoid adverse effects on the following values, and where that is not practicable, remedy or mitigate them does not adversely affect:

IV. CONCLUSION

38. The amendments proposed by Dr Mitchell would assist the Regional Council to carry out its functions, would be the most appropriate way to achieve the purpose of the Act and accord with Part 2 of the RMA .

Paul F Majurey / T L Hovell

Counsel for Genesis Energy
(14 March 2013)

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- (a) values of significance to Ngāi Tahu associated with the mainstem;
 - (b) the passage of floods and freshes needed to maintain river processes, ecosystem health and the removal of vegetation encroaching onto the bed of the mainstem;
 - (c) sediment transport within the river and to the coast;
 - (d) fish passage; and
 - (e) downstream water quality.

Policy 4.52

The discharge of water resulting from moving water from one catchment or water body to another will avoid adverse effects on the following values, and where that is not practicable, remedy or mitigate them in particular ~~does not:~~

- (a) ~~facilitate~~ the transfer of unwanted fish species, plant pests or unwanted organisms into catchments where they are not already present;
- (b) ~~does not have a more than a negligible adverse effect on~~ ~~adversely affect~~ Ngāi Tahu values;
- (c) ~~does not have a more than a negligible adverse effect on~~ ~~adversely affect~~ the natural character of the receiving water;
- (d) ~~does not adversely affect~~ existing drinking water treatment systems to ensure to the extent that they are still no longer able to effectively treat the water to achieve the standards set out in the Drinking-water Standards for New Zealand 2005; and
- (e) ~~does not have a more than a negligible adverse effect on~~ ~~adversely affect~~ fish migration."