

BEFORE THE INDEPENDENT COMMISSIONERS

UNDER the Resource Management Act
1991

IN THE MATTER of the proposed Canterbury Land
and Water Regional Plan

**HEARING GROUP 2 LEGAL SUBMISSIONS ON BEHALF OF
NELSON/MARLBOROUGH, CENTRAL SOUTH ISLAND AND NORTH
CANTERBURY FISH AND GAME COUNCILS
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**ANDERSON LLOYD
LAWYERS
CHRISTCHURCH**

Solicitor: Maree Baker-Galloway

Level 10, Otago House
Cnr Moray & Princes Street,
Private Bag 1959,
DUNEDIN 9054
Tel 03 477 3973
Fax 03 477 3184

INTRODUCTION

1. In its legal submission on Hearing Group 1, Fish and Game, identified its primary aims for the pCLWRP as being a Plan that:
 - a. Safeguards life supporting capacity;
 - b. Protects natural character;
 - c. Identifies all wetlands as significant and protects them;
 - d. Includes schedules which clearly identifies important values of waterbodies;
 - e. Establishes numerical limits to protect these values;
 - f. Maintains water quality and water quantity (hydrology) where it is currently at a state sufficient to provide for these values; and
 - g. Where degraded or over-allocated improves water quality and addresses over-allocation.

2. In Hearing Group 1 we presented legal submissions and evidence primarily addressing points (a) – (e). In this hearing we present evidence in support of a regulatory framework that will give effect to points (f) and (g), while at the same time not stifling the agricultural industry. After I have set the scene, I will then detail the features of the framework proposed by Fish and Game, and explain why, in terms of the evidence and the law, we seek that you prefer Fish and Game's regime (or something like it) over that put up by ECan and other parties.

3. Canterbury has a strong agricultural history and agriculture plays a major role in Canterbury's and New Zealand's economy. Canterbury has 70% of New Zealand's irrigated land.¹ Canterbury farm systems are generally more intensive than the rest of New Zealand, with dairying featuring prominently and growing rapidly.² Dairying's more intensive systems rely on additional support land which leads to further

¹ Alison Dewes, Evidence in Chief, 2 April 2013, at [18] Dairying has increased in the region by 51.4% since 2005-2006.

² At [19]

intensification beyond that of traditional sheep and beef farming of land uses in catchments.³

4. While ecosystem health is still moderate to high in some of Canterbury's mountains, high country, and hill regions, intensification in these areas could result in significant adverse environmental effects if not properly managed.⁴ ECan's own technical reports and external research demonstrate that many of Canterbury's rivers and streams are declining in water quality and ecological health.⁵ In Dr Death's opinion Canterbury has some of the worst rivers in New Zealand in relation to ecological health and water quality.⁶
5. Fish and Game is concerned with the pCLWRP's approach to managing the externalities from pasture based agriculture (e.g. effluent/pathogen run off, erosion and soil loss, loss of wetland habitats and riparian vegetation, phosphate loss from land, and nitrate loss through the land and via run off). All of these externalities and others, when not properly managed, contribute to the degradation of Canterbury's waterbodies.
6. Allowing the status quo, both in terms of actual farming practices, and the regulatory framework that enables those practices to continue, will not result in an improvement in degraded waterbodies. Intensification, if not managed appropriately, will degrade Canterbury waterbodies further.⁷
7. It is not Fish and Game's intention to thwart advancement of agriculture in Canterbury, or any other industry. Fish and Game's intention is to ensure that water quality and quantity rules and policies are imposed to ensure outcomes for the current and future generations of Cantabrians that meet the requisite legal tests. Fish and Game submits that the framework it proposes is the type of

³ At [19]

⁴ Russell Death, Evidence in Chief, 2 April 2013, at [11]

⁵ At [18]

⁶ At [18]

⁷ At [34]

decisive and urgent action that is required to maintain or improve the ecosystem health of many of the region's waterways. While this framework differs from that as notified we do not consider it to be extreme. Instead it is a necessary approach that addresses the past failures of industry self-regulation to effectively maintain or enhance water quality in a number of intensely farmed areas.

8. Fish and Game acknowledge there is no quick fix and that water quality cannot be cleaned up overnight. Similarly however, action needs to be initiated now so that trends of ongoing decline in water are changed to trends of improvement. That is the fundamental aim of Fish and Game. We have used triggers such as 20kg/ha/year and set up a framework to encourage reduction of leaching above that at a rate of 20% per five years. The framework is such that it can be refined over time but in the meantime at least it is a meaningful start.
9. By way of contrast, Fish and Game's key concerns with the pCLWRP, in relation to Hearing Group 2, is that it establishes an "interim" regime that will be in place for an unknown period, that has material shortcomings:
 - a. It will allow for further degradation of water quality;
 - b. The farming permitted activity rules are unlawful and not enforceable because:
 - i. They will allow for ongoing degradation of water quality;
 - ii. They will breach s70(1); and
 - iii. They are uncertain, complex and subject to third party discretion.
 - c. The stock access rules are not adequate;
 - d. It was subject to an inadequate cost/benefit analysis;
 - e. It is based on inadequate information and has a weak evidential basis;
 - f. It does not give effect to the National Policy Statement on Fresh Water; and
 - g. It is not an appropriate application of the precautionary principle.

FURTHER DEGRADATION OF WATER QUALITY

10. The pCLWRP as notified and modified by the Section 42A report cannot be shown to improve degraded water quality, nor prevent further degradation. To date no party including ECan has called any evidence to illustrate that the regime recommended by ECan will improve degraded water quality, or maintain existing water quality. There is no evidential basis for such a finding. There is no attempt to predict the nature and volume of discharges permitted under the proposed regime, and no attempt to show that cumulatively allowing the likely discharges will meet the relevant legal tests in Part 2 of the RMA, section 70 and the NPSFW in particular. By way of contrast Fish and Game have proposed a regime that can be assessed and modelled with a sufficient degree of confidence to conclude it will meet the requisite legal tests.
11. Ecosystem health in many of Canterbury's lowland and urban waterbodies is extremely poor⁸ and appears to be getting worse.⁹ Failure to act decisively not only risks ecosystem health in waterbodies¹⁰ but also risks New Zealand's international environmental reputation.¹¹ It is recognised in the Section 32 Report that water quality is declining from diffuse sources (e.g. farming).¹² Despite this recognition the pCLWRP will allow in all zones at least a 10% increase in leaching from a baseline leaching rate. Additionally nowhere in the pCLWRP is it clear that farming activities, existing or new, are required to meet water quality limits.¹³
12. ECan's actions to date through the pCLWRP will not even safeguard the status quo, which is already in an unacceptable state. Not only

⁸ At [53]

⁹ At [18]

¹⁰ Roger Young, Evidence in Chief, 4 February 2013, at [14]

¹¹ New Zealand Freshwater Science Society – Media Statement: NZFSS - Key closing messages, 10 December 2012, www.freshwater.science.org.nz

¹² Section 32 Report pCLWRP, page 64

¹³ Phillip Percy, Evidence in Chief, 10 April 2013, at [67]

that, it will allow the state of the environment to worsen and potentially allow more investment in what is already unsustainable practices. For this fundamental reason Fish and Game is promoting a comprehensive suite of objectives, policies and rules to remedy this.

FISH AND GAME'S PROPOSED CHANGES

13. **Appendix 1** to these submissions cross references the proposed changes to the plan detailed in Mr Percy's evidence with identification of the basis for scope.
14. Fish and Game have proposed a complete package, and elements of it are fundamentally different to that as notified both structurally, and in terms of content. Fish and Game felt an obligation to put up a meaningful alternative that we consider could be effective, rather than simply criticising the plan as promoted by ECan and supported by other parties. It is hoped that in doing so Fish and Game's case is of assistance to you.

Policies

15. Fish and Game propose a set of Activity and Resource Policies that replace those put forward in the notified Plan. The notified Plan policies and related rules established a 'watching brief' planning approach that did little more than require the collection of information. The policies and associated rules that Fish and Game propose set out a structure for managing farming activities that is consistent with the objectives and strategic policies Fish and Game recommended in Hearing Group 1 evidence.
16. At the core of the new policies is Policy 4.29A which creates an explicit linkage between the management of farming activities and the achievement of the freshwater limits in Table 1. Policy 4.29B states in simple terms what the primary management mechanisms for farming activities will be – managing nitrogen discharges to a per hectare limit (so that the Table 1 limits are related to the property scale); and management of phosphorus, sediment and faecal discharges using good or best management practices.

17. Policies 4.29C to 4.29E specify the management approaches to be applied to farming activities in catchments based on catchment allocation status. This approach reflects the approach in the notified Plan, but the policies are redrafted to set out an explicit methodology. Policies 4.29D and 4.29E specify that in Orange (at risk) and Red (over-allocated) catchments, existing farming that leaches in excess of 20kg of Nitrogen per hectare per year should reduce the excess by 20% every 5 years. This reduction can be achieved either by on-farm changes or by nitrogen trading.
18. The provision for nitrogen trading in Fish and Game's provisions is not intended to be the primary nitrogen allocation and reduction mechanism. Trading has been included to offer an alternative way for farmers to achieve their nitrogen loss reductions at the lowest cost. Policy 4.29F has been included to provide specific decision-making guidance around trading.
19. Fish and Game generally supports the intent of the Plan to exclude stock from water bodies. However Fish and Game have proposed some more directive refinements to policy 4.26 to assist with decision-making on resource consents. Fish and Game do not support the narrow definition of stock to be excluded from water bodies, as recommended in the s42A report. Instead, the focus should be on types and classes of stock that create significant risk of bed and bank damage as well as faecal contamination. A refined definition of Intensive Stock has been proposed by Mr Percy, as has a new definition of Stock.
20. Acknowledging the geomorphological nature of some of the rivers within the Canterbury Region and the practical difficulties of excluding stock from parts of those rivers, Fish and Game has proposed rules that exclude certain stock from the active beds of rivers, with the term 'active bed' being defined. Provision has been made for stock to cross larger rivers where bridges or culverts are not able to be built.

Rules

21. Instead of third party auditing of Farm Environment Plans in a permitted activity framework, Fish and Game's proposed farming rules

require resource consents to be obtained for all existing and changed (or new) farming activities in Orange and Red catchments. Fish and Game's proposed farming rules use a similar set of tools to that as notified, with the addition of minimum practise standards, a maximum loss of N trigger, and in certain circumstances, a specified reduction in N leaching over a set time period. Fish and Game's framework retains use of ECan's Schedule 7 on Farm Environment Plans, but with a move away from non-council auditing. Some modifications to the schedule itself are proposed, including deleting section C which is redundant due to the move away from non-council auditing. Some rules refer to the entire package in Schedule 7¹⁴, and others cherry pick the key information requirements set out in Schedule 7 part C¹⁵.

22. Fish and Game's proposed farming rules explicitly combine common farming land use activities and their associated discharges under single rules. This provides for a 'one stop shop' for plan users when considering common farming activities. It also has the benefit of allowing all common land uses and discharges to be considered together under the same rule and consenting process.

Minimum practice standards

23. Minimum farming standards are proposed in provision 5.39A. The standards are listed in provision 5.39A, and also cross refer to standards contained in rules for stock exclusion,¹⁶ offal pits and associated discharges,¹⁷ stock crossing runoff,¹⁸ discharge of fertiliser,¹⁹ silage pits and associated discharges,²⁰ and discharge of

¹⁴ Example: Percy, above n13, Appendix 2, Rule 5.39A which sets out the standard conditions applying to several farming rules, page 4 - 47

¹⁵ Example: Percy, above n13, Appendix 2, Rule 5.39B, page 4 - 47

¹⁶ Percy, above n13, Appendix 2, rules 5.135 and 136, page 4 - 85

¹⁷ At Rule 5.29, Page 4 - 39

¹⁸ At Rule 5.35B, page 4 - 42

¹⁹ At Rules 5.52 and 53, page 4 - 59

animal effluent after storage and treatment²¹ The standards require that farming be undertaken in accordance with a Farm Environment Plan ("FEP").²² If an activity complies with the standard conditions in 5.39A and the associated rule conditions to which it cross refers, then one primary farming and discharge consent may be issued under 5.39, rather than a bundle of consents under the associated rules for the separate activities. The intention of this is to provide farmers with a streamlined option that they can chose to opt into, providing them with one consent for their farming and related discharges. The alternative option as set up by the plan as notified still remains, for a farmer to get separate consents for discharges from offal pits, stock crossing, fertiliser and so on. However assessing the cumulative effect of the non-point source discharges if consented in this manner is more problematic.

24. Compliance with these standard conditions, in conjunction with the implementation of the Farm Environment Plan and Overseer protocols is intended to ensure good farm management practices as a bottom line, in order to reduce nitrogen, phosphorus, sediment, and faecal contaminant losses from farms.

N leaching and reductions

25. Proposed table 1.1 sets the sustainable nitrogen loss maximum ("SNLM") at 20kg/ha/year.²³ This is a trigger²⁴ for the cascade of rules intended to incentivise farming practices that will lead to leaching rates that are ultimately sustainable, that result in enhancements of degraded water quality, and that protect water quality where it is currently at the right standard. The structure of the proposed rule

²⁰ At Rules 5.37 and 37A, page 4 - 45

²¹ At Rule 5.36, page 4-42 and 43

²² Which by definition then links to the Schedule 7 requirements

²³ Percy, above n13, Appendix 2, Page 4 - 46

²⁴ Percy, above n13, Or "reference point" in Mr Percy's terminology, at [19]

framework is such that an alternative figure or figures for identified catchments can be inserted into table 1.1 based on evidence such as Dr Cooke's modelling, or as investigations advance in specific catchments based on improved knowledge and the modelling in those catchments, so that the framework set up by Fish and Game can remain useful over time as understanding improves. In the meantime however, Fish and Game consider it to be a reasonable trigger to be used for immediate effect in cleaning up Canterbury's waterways while ensuring farming can continue to develop. A breach of the SNLM does not result in a prohibition on farming. If the maximum is breached, the cascade of rules sets up firstly a required rate of reduction of 20% of the amount of N over 20kg/ha/year each five years. If that rate of reduction can't be achieved, then the activity cascades to the next activity status. There is no prohibited activity rule at the end of the cascade, which is actually a more permissive position than that originally sought in Fish and Game's submission.

Changed

26. The definition of 'changed' in the context of the farming rules, as proposed in the notified Plan has some frailties when used in conjunction with permitted activities. For example, allowing a 10% increase in nitrogen loss as a permitted activity in an over-allocated catchment would not be consistent with achieving water quality improvements. However when used in combination with activities that require resource consent and where conditions are able to be imposed on resource consents those frailties are largely minimised. Fish and Game is therefore comfortable with the definition of 'changed' as notified, subject to some minor refinements.

Lake, Red and Orange Catchments

27. Because of the restrictions on valid permitted discharges under section 70 (1), Fish and Game propose no permitted activity rule authorising the discharges associated with existing farming in lake, red and orange catchments, as it is likely those discharges have cumulatively caused the breach of the section 70 (1) matters that is

now apparent throughout Canterbury. Instead, similar to the approach in the notified plan, Fish and Game propose that the use of land for farming in those over-allocated and at risk catchments be permitted up to the date specified in table 1.2 as long as the farmer records the farming information set out in Part C (previously D) of Schedule 7 and makes it available to ECan on request.²⁵ After the date specified in table 1.2 it is proposed farming and its related discharges in the red and orange catchments will require consent.

28. From the lead in date specified in table 1.2 existing farming discharges will need consent as a controlled activity²⁶ if the SNLM is met along with standard conditions²⁷.
29. Existing farming and associated discharges that cannot meet the SNLM or any of the standard conditions is a restricted discretionary activity²⁸ if it meets specified standards, and achieves N Leaching reduction from (2011/12) leaching rates of 20% of the amount leached over the SNLM each five years. Reductions may be achieved by trading.
30. Existing farming and associated discharges in catchments that do not comply with the above rules are non-complying.²⁹
31. New or changed farming and associated discharges in red catchments are non-complying³⁰.
32. Changed or new farming and associated discharges in orange catchments is a controlled activity³¹ if leaching at or below the SNLM, and if standard conditions³² are met.

²⁵ At Rule 5.39B, page 4 - 47

²⁶ At Rule 5.39C, page 4 - 48

²⁷ At 5.39A, page 4 - 47

²⁸ At Rule 5.39D, page 4 - 49

²⁹ At Rule 5.39E, page 4 - 50

³⁰ At Rule 5.39J, page 4 - 55

33. Changed or new farming and associated discharges in orange catchments that cannot meet the SNLM or standard conditions are a restricted discretionary activity³³ if they meet specified standards, and achieve the SNLM, which may be achieved by trading.
34. Changed or new farming and associated discharges in orange catchments that do not comply with the above rules are non-complying³⁴.

Blue and green catchments

35. Existing farming (land use only) is permitted³⁵ as long as farming information is recorded and provided to ECan on request.³⁶
36. Changed and new farming and associated discharges in blue and green catchments that comply with the SNLM and the standard conditions are controlled activities.³⁷
37. Changed and new farming and associated discharges that cannot achieve the SNLM or meet the standard conditions is a restricted discretionary activity³⁸ if the conditions specified in the rule are met. In contrast to the similar rules for lake, red and orange catchments, a set reduction rate is not specified in the rule, on the assumption that the

³¹ At Rule 5.39F, page 4 - 51

³² At 5.39A, page 4 - 47

³³ At Rule 5.39G, page 4 - 52

³⁴ At Rule 5.39L, page 4 - 54

³⁵ At Rule 5.39B, page 4 - 47

³⁶ So while the Memorandum – Synopsis of Fish and Game Farming Rules, 2 April, identified that existing farming in green and blue zones be brought into the consent framework, this position has since been retracted due to scope.

³⁷ Percy, above n13, Appendix 2, Rules 5.39F, page 4 - 51

³⁸ At Rules 5.39H, page 4 - 53

water quality in the green and blue catchments is not degraded to the extent that that level of specificity is justified to ensure enhancement.

38. Changed and new farming and associated discharges is non complying³⁹ if the rules above are not complied with.

Other related changes

39. Fish and Game proposes a number of other changes to policies and rules relating to fertiliser application, land drainage water, silage pits and composting and farm dumps which align them with the general farming provisions but which also ensure that they will be effective in contributing to the achievement of the objectives of the Plan and meeting the limits in Table 1.
40. Earthworks and vegetation clearance activities adjacent to water bodies are now proposed to be consented activities⁴⁰ (compared with permitted activities in the notified Plan). These activities pose a significant risk to water quality, aquatic ecosystems, the natural character of water bodies, and the ecosystem services that water body margins provide. The variable nature of earthworks and vegetation clearance activities and the variable characteristics of sites means that there is insufficient certainty to provide for those activities as permitted activities.

ECAN'S PERMITTED ACTIVITY RULES

41. The recommendation from the Section 42A report on Rules 5.39 – 5.51 in general makes farming a permitted activity. Broadly speaking the rules require, depending on the allocation status of the zone, a FEP to be prepared and implemented. There is also a requirement in many cases for a third party to audit the FEP and give the farm's performance against it a grade. In some instances of lower risk

³⁹ At Rule 5.39L, page 4 - 54

⁴⁰ At Rules 5.147 and 5.148

(depending on the zone and the nutrient risk of the farming activity) the only requirement is provision of information.

42. ECan's proposed permitted activity rules,⁴¹ do not comply with the requirements for enforceable permitted activity rules in terms of certainty, objectivity, and workability/simplicity. The use of 3rd party auditors who "grade" a FEP and a farm's performance, and the relationship of this to the rules is an additional flaw. The farming rules as amended by the Section 42A Report are not certain or comprehensible and require expert judgement.⁴² The Rules as amended require detailed information, and the application of expert subjective judgment to ensure that a particular FEP for a particular farm takes into account site specific variations.⁴³

The law on permitted activity rules

43. Under section 87A(1) if an activity is described in a proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the requirements, conditions, and permissions, if any, specified in the proposed plan.⁴⁴
44. For permitted activities it is necessary for any requirements, conditions and permissions to be stated with sufficient certainty such that compliance is able to be determined readily without reference to discretionary assessments.⁴⁵ The rule should be comprehensible to a

⁴¹ McCallum-Clarke M., pCLWRP Section 42A Report – Vol 2 for hearing Group 2, Report No. R13/11 Rules 5.39, 5.40, 5.41, 5.42, 5.44, and 5.50

⁴² Percy, above n13, at [43]

⁴³ At [43]

⁴⁴ Section 87A RMA

⁴⁵ *Carter Holt Harvey Ltd v Waikato Regional Council* ENC Auckland, A123/2008, 6 November 2008, at [116]

reasonably informed but not necessarily expert, reader.⁴⁶ A permitted rule may not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity.⁴⁷ A farmer must be able to determine whether their intended activity is permitted or not without reference to a decision to be made by any third party.⁴⁸ Fish and Game considers that the third party auditing as proposed by the Council essentially transfers the Council's consenting responsibilities to third parties, creates risk of inconsistent administration of the Plan, and empowers third party auditors with an element of discretion as to the application of permitted activity rules, thereby breaching these fundamental requirements of lawful permitted activity rules.

45. A permitted activity rule should be readily enforceable - where it is not certain, comprehensible or objectively framed, enforcement is difficult if not impossible.
46. The Court in the *One Plan* decision helpfully summarised the position relevant to this case at paragraphs [5-198] and [5-200] **attached** as appendix 2.
47. In *Purification Technologies Ltd v Taupo DC*⁴⁹ a rule that required a further consent or approval of the consent authority was held not to be a lawful permitted activity rule. While rule 5.40 as notified, and as amended by the Section 42A Report, simply require provision of information to qualify, others require that FEPs be prepared that meet very broad objectives, which arguably ultimately will need to be verified by the Council.

⁴⁶ *Re application by Lower Hutt City Council* ENvC Wellington, W046/07 31 May 2007 at [10], also submitted in *Carter Holt Harvey Ltd v Waikato Regional Council*, above n45, at [117]

⁴⁷ *Twisted World Ltd v Wellington City Council* ENvC Wellington, W024/2002 8 July 2002 at [63] *Ruddlesden v Kapiti Borough Council* (1986) 11 NZTPA 301, (1986) 6 NZAR 20 (HC) pg 27 also submitted in *Carter Holt Harvey Ltd v Waikato Regional Council*, above n45, at [117]

⁴⁸ *Gordon v Al-Sabak Investments Ltd* HC Wellington, CIV-2008-485-1191, 24 September 2008 at [25]

⁴⁹ *Purification Technologies Ltd v Taupo DC* [1995] NZRMA 211 at page 4

48. Furthermore, the Rules are meant to apply throughout the entire region including for red and lake zones. One of the FEP requirements is identifying and detailing the approach to managing environmental effects and risks associated with the farming activities⁵⁰ (this will include discharges). In relation to mitigating discharges from farming activities there is no, 'one size fits all' approach.⁵¹ In order to address this requirement in the FEP it will require the exercise of a potentially subjective discretion to identify site specific variations.⁵² This was pointed out in the *Waikato*⁵³ case where the Rules in question were originally intended to apply throughout an entire catchment. The Court identified that this would require discretion to recognise site specific variations.
49. The definition of permitted activity requires that conditions, if any, must be "specified" in the plan.⁵⁴ This is so the Rule can be consistently interpreted and implemented by lay people without reference to council officers,⁵⁵ or any other third parties.⁵⁶
50. The Section 42A Report version of Rules 5.41(2), 5.42 and 5.43 does not expressly provide for an assessment by the council. But the Rules do require expert assessment by an Auditor⁵⁷ of the FEP and

⁵⁰ McCallum-Clarke, above n41, Recommendation RS7, Part B – Farm environment Plan Default Content section 4 pg 136

⁵¹ Dewes, above n1, at [109]

⁵² Percy, above n13, at [43]

⁵³ *Carter Holt Harvey Ltd v Waikato Regional Council*, above n45, at [144]

⁵⁴ Section 87A(1) RMA and *Purification Technologies Ltd v Taupo DC*, above n49, page 212

⁵⁵ *Carter Holt Harvey Ltd v Waikato Regional Council*, above n45, at [120]

⁵⁶ *Gordon v Al-Sabak Investments Ltd* HC Wellington, above n48, at [25] also *Twisted World Ltd v Wellington City Council*, above n47, at [63] because here the Court does not make a distinction between a discretion reserved for the council or any other third party it only discusses one reserved in a plan

⁵⁷ Examples include in McCallum-Clark, above n41, Report Rules 5.41 sub clause 2 and Rule 5.42 sub clause 1 page 129

performance against it. In order to remain a permitted activity the farm's performance as measured against the FEP must receive an audit grade of "A-B" or better.

51. These features of ECan's permitted rules make them unlawful and unworkable due to lack of certainty, objectivity, enforceability and the fact reference to a third party's discretion is required.

Section 70

52. ECan's plan as notified and as modified in the section 42A report specifies permitted activities that will likely result in breach of section 70 test for permitted discharges rendering those rules unlawful for this reason also. Its allowance for certain additional "change in land use" under the definition as notified, and as amended, will allow for increased discharges, increased degradation and a further and additional breach of section 70.

53. Section 70(1) states

(1) *Before a regional council includes in a regional plan a rule that allows as a permitted activity –*

(a) *A discharge of a contaminant or water into water; or*

(b) *A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or other contaminant emanating as a result of natural processes from that contaminant) entering water,-*

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

(c) *The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:*

(d) *Any conspicuous change in the colour or visual clarity:*

(e) *The rendering of fresh water unsuitable for consumption by farm animals:*

(f) *Any significant adverse effect on aquatic life.*

54. For example Rule 5.41 as amended in the Section 42A Report specifically makes farming activities in red zones permitted. This includes associated discharges. As stated by Dr Death there is

considerable evidence that the ecological health and water quality of many of the waterbodies in Canterbury are poor and declining.⁵⁸ If the pCLWRP itself identifies these catchments as not meeting water quality outcomes and Dr Death says many of Canterbury rivers and streams (presumably many in red zones) have poor ecological health and are declining then any rules (such as Rule 5.41) that permits activities that are contributing to this water quality state individually or cumulatively will likely breach section 70(1)(g), rendering such rules unlawful.

55. The reasoning in the Section 32 Report⁵⁹ and the Section 42A Report⁶⁰ for making Rules 5.35 – 5.36 (stock holding areas and animal effluent) restricted discretionary and non-complying should equally apply to other forms of farming related discharges.⁶¹ Therefore, the cumulative effects of other farming discharges, permitted in Rules 5.39, 5.40, 5.41, 5.42, 5.44 and 5.50 as amended by the Section 42A Report,⁶² on freshwater bodies are likely to breach some of the section 70 requirements for a permitted discharge.
56. As was the situation in the *One Plan*⁶³, Fish and Game submits that there is no evidential basis on which to conclude that the requirements of section 70 could be met with the ECan regime, to the contrary, Fish and Game's evidence illustrates on the balance of probabilities that section 70 (1) (g) is likely to be breached.

⁵⁸ Death, above n4, at [18]

⁵⁹ Section 32Report pCLWRP pages 58 and 59

⁶⁰ McCallum-Clark, above n41, pages 35 - 46

⁶¹ Percy, above n13, at [50]

⁶² McCallum-Clark, above n41, pages 129 - 131

⁶³ See 4th last bullet point, quote appended as Appendix 1 to these submissions from paragraph 5-199, *Day v Manawatu Regional Council* [2012] NZEnvC 182

Definition of changed – in terms of land use

57. The pCLWRP and Section 42A Report have provided two distinct definitions of "changed" that are equally inadequate when it comes to preventing further degradation of water quality. The definition of "changed" in the pCLWRP, as notified, provides that a farming activity does not change unless there is an increase of more than 10% in the loss of nitrogen (and up to that 10% point the increase in intensity of effects of the farming related discharges are permitted activities).⁶⁴ The amended definition of "changed" found in the Section 42A Report relies on a greater than 10% increase in the annual average stock units carried on the property.⁶⁵ It is not possible to model the effects of this definition but it is submitted that this definition will allow for more intensification and a higher leaching rate than the 10% cap in the original definition.⁶⁶ ECan's regimes provide that farming and its associated activities can continue as permitted activities up to the point they trigger the "changed" classification.
58. Whether the cap is no more than a 10% increase in leaching of nitrogen, or a greater than 10% increase in stock units, there is a significant risk that both will result in degraded water quality if they are allowed for as permitted activities in over-allocated and at-risk catchments,⁶⁷ and therefore in many situations could cause a breach of section 70(1), and fail to give effect to the NPSFW.
59. In summary, ECan's permitted rules are likely to be unlawful as they breach section 70's requirements for permitted discharge rules.

Records

60. The Farming Rules either require that the farming activity information, or audit results, or both are provided to the ECan.

⁶⁴ pCLWRP, Chapter 2, page 5

⁶⁵ McCallum-Clark, above n41, page 82

⁶⁶ Jim Cooke, Evidence in Chief, 2 April 2013, at [50]

⁶⁷ At [50] and [52]

61. There is an indication here that the council could voluntarily maintain a data base of the data provided, since there is no express requirement. The Court in *Waikato*⁶⁸ while discussing a complicated permitted activity rule where the Council could voluntarily maintain a data base on nutrient discharges considered that the mandatory record keeping requirements under section 35 RMA that apply to a controlled activity were a more efficient and effective avenue than a permitted activity.
62. Fish and Game is also concerned that ECan does not have the will, or the resources, to collect the information required under the permitted framework in a manner that will give it the data required to inform implementation of its Plan. The operative NRRP contains a similar provision. Rule WQL20 requires certain farmers to record Overseer inputs and provide this to ECan on request. This information could have been very useful in consideration of this Plan. Fish and Game requested it from ECan only to be told the rule have never been enforced and that ECan did not intend to enforce it or collect the information.⁶⁹

Cost recovery

63. The permitted rules do not provide for, if ECan chose to monitor compliance, any cost recovery mechanism. This is appropriate given that section 36 does not provide charges for monitoring to be imposed on a permitted activity but does for a controlled activity.⁷⁰ However if ECan cannot afford to implement compliance monitoring then outcomes and performance is likely to suffer. In a similar situation the Court in *Waikato* considered that it was more efficient and effective to use the controlled activity status.⁷¹

⁶⁸ *Carter Holt Harvey Ltd v Waikato Regional Council*, above n45, at [137]

⁶⁹ Letters from Kim Drummond, Director Resource Management, ECan to Maree Baker-Galloway, dated 20 March 2013 and 21 February 2013

⁷⁰ *Carter Holt Harvey Ltd v Waikato Regional Council*, above n45, at [138]

⁷¹ At [140]

Conclusion on ECan's permitted rules

64. The permitted rule framework breaches a whole host of fundamental requirements relating to workability, the merits and lawfulness. Permitted discharges may in many instances result in a breach of section 70(1). There is a large amount of subjectivity involved in ensuring FEPs are prepared in accordance with Schedule 7 let alone those in instances where a rule requires that a particular grade be granted by a 3rd party auditor. The rules are not certain and objective or easily interpreted by a lay person. Quite simply they fail many of the tests for lawful, enforceable, permitted rules.

THE LAW AND FISH AND GAME'S PROPOSED RULES

65. Fish and Game considers that as a minimum, farming related discharges should be controlled activities (or more). As noted in the section above, even the rules proposed by ECan cannot qualify as permitted activities. Fish and Game's proposed rules would be even less suitable as permitted given the range of matters addressed and likely necessity for interaction between farmers and Council.
66. For example, Fish and Game's regime requires that dischargers show they meet specific leaching rates, as modelled by Overseer. ECan's rules contain no such requirement. There is mention of Overseer being used, but no requirement that compliance with a particular leaching standard be attained. Mr Willis' position in his rebuttal evidence (Paragraph 6.2(a)) that the 10% increase in N loss on top of the 2012-13 N loss rate creates an effective limit or attainment standard in the Plan. What Mr Willis neglects to observe is that the N loss rate plus 10% is only a trigger in the rules which simply requires either a resource consent to be obtained or a FEP to be prepared and implemented. However there is no apparent requirement in the Plan to maintain that same N loss rate. That is a fundamental difference between the two regimes and another key reason why a permitted activity rule framework is unsuitable.
67. Use of Overseer to specify that a particular leaching rate is achieved would not be appropriate in the permitted framework. In many existing

situations the assumptions required by the Overseer model⁷² will not be in place.⁷³ Overseer is dependent on input accuracy⁷⁴ and in order to use Overseer effectively it is essential that the data for it is collected and inputted by a qualified accredited nutrient advisor.⁷⁵ Inputs that are more farm specific will increase the relevance of the output from the Overseer model to a farm which will drive greater efficiency.⁷⁶ With the appropriate regulatory and implementation controls Overseer is suitable in a regulatory framework, just not in a permitted activity rule.

68. In a similar situation in the *Waikato* case⁷⁷ the Court concluded that the task required of any rule to properly control N leaching was far too complex and required considerable expert technical input such that it is was inappropriate as a permitted activity.⁷⁸
69. Similarly in the *One Plan* decision extract appended (Appendix 2), the statement of the court is of particular assistance with regards to the fact it is difficult to impartially and consistently demonstrate compliance with the Overseer model under the permitted activity regime; managing N leaching in particular requires more interaction between a farmer and a council than a permitted activity rule would allow.
70. It is also submitted that because of the need for monitoring, cost recovery, complexity, certainty in application and expert analysis that

⁷² Dewes, above n1, at [129] and [130]

⁷³ Percy, above n13, at [45]

⁷⁴ Dewes, above n1, at [132]

⁷⁵ At [138]

⁷⁶ At [135]

⁷⁷ *Carter Holt Harvey Ltd v Waikato Regional Council* 8, above n45, at [13]

⁷⁸ At [145]

Fish and Game's rules would fit more comfortably in a controlled activity setting.⁷⁹

71. The Environment Court⁸⁰ determined that there are in effect four tests to determine if an activity is a controlled activity referring to the old definition in section 77B(2) which is now scattered around the RMA in subsections 77B, 87A(2) and 104A. The Environment Court's statement amended accordingly to the current wording of the RMA is:
- a. The activity must be described⁸¹ in the plan as a controlled activity;
 - b. The application must contain enough information to determine whether the activity is a controlled activity under the plan;⁸²
 - c. The plan "...must specify ... the matters over which it has reserved control";⁸³ and
 - d. The activity must comply⁸⁴ with the "requirements, conditions, and permissions, if any, specified in the ... plan, or proposed plan."
72. Until 2005 there was always a primary requirement that controlled activities should be readily identifiable in advance under objective (non-discretionary) tests.⁸⁵ In contrast to now under section 104A(a) there is an indication that an applicant may not know whether their

⁷⁹ Percy, above n13, at [53]; *Day v Manawatu-Wanganui Regional Council* ENVC Wellington, [2012] NZEnvC 182 at [5-199] gave similar reasons for preferring a controlled activity status over permitted activity status for similar rules

⁸⁰ *Norton v Marlborough DC* ENVC Christchurch, C030/09, 25 May 2009, at [17]

⁸¹ RMA, Section 87A(2)

⁸² Section 104A(a)

⁸³ Sections 77B and 87A(b)

⁸⁴ Section 87A(2)(c)

⁸⁵ *Shotover Hamlet Investments Ltd v Queenstown Lakes DC* PT Wellington, W148/95, 23 November 1995

activity is a controlled activity until the Council has considered the information.

73. The reference to insufficient information to determine whether or not the activity is a controlled activity relates to information satisfying the Council that the requirements, conditions, and permissions, if any, can be complied with.⁸⁶ All activities will differ on the facts and an element of subjectivity is inevitable. It is a question of degree whether a provision involves too great an element of subjectivity and introduces an unacceptable level of discretion as to whether controlled activity status can be applied.
74. Fish and Game's proposal contains some restricted discretionary rules. Fish and Game has provided the suggested matters over which the council could restrict its discretion to in relation to those activities⁸⁷. The council's power to decline a resource consent is constrained to those matters over which discretion is restricted.⁸⁸ The activity still must comply with requirements in the RMA⁸⁹ and any application for a restricted discretionary activity must be considered under section 104C. Resource consent may be granted or refused, and if granted conditions may be imposed that relate to matters the council restricted its discretion to in the plan.
75. The council's restricted discretion is subject to Part II matters to a certain degree.⁹⁰ While Part II matters cannot act as additional grounds (to the matters council restricted its discretion to) for not granting consent or imposing conditions they can be taken into account when deciding to grant consent.^{91 92}

⁸⁶ *Norton v Marlborough DC*, above n82, at [23]

⁸⁷ RMA, section 77B

⁸⁸ Section 87A(3)

⁸⁹ Section 87A(3)(b)

⁹⁰ *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 at [38] - [39]

⁹¹ At [44] – [45]

76. Fish and Game's proposed rules in relation to farming activities also take on the form of hybrid rules, a combination of both land use and discharge rules. Hybrid rules were considered in the *Waikato* case. The Court in *Waikato* could see no reason why discharges could not be incorporated into a comprehensive "catch all" rule.⁹³
77. The Court refrained from making any definitive decision on the appropriate method for incorporating discharge rules within the variation at that time⁹⁴ but the rules that were finally formulated managed the nitrogen discharges from farming activities.⁹⁵ The format for Fish and Game's proposed rules discusses section 9 first then the associated section 15 discharges. It takes this approach because section 30(1)(c) says that regional councils can control the use of land for the purpose of dealing with water quality and quantity. For farming activities it is necessary to control the land use in order to control the water quality issues. The Fish and Game approach also incorporates the rule drafting format that was accepted by the Court in the One Plan.⁹⁶
78. As a starting point therefore, it is submitted that the most permissive status for farming related discharges in the pCLWRP should be controlled, and that Fish and Game's proposed rules in this regard meet the specific legal test for lawful controlled activity rules and there is no legal reason why these cannot be in the form of a hybrid rule.

⁹² *Ayrburn Farms Estates Ltd v Queenstown Lakes District Council* [2013] NZRMA 126 page 127 holdings paragraph 3

⁹³ *Carter Holt Harvey Ltd v Waikato Regional Council*, above n45, at [195]

⁹⁴ At [201]

⁹⁵ At 3.10.5 page 23 of the attached conditions

⁹⁶ *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 285 on chapter 13 to the One Plan

STOCK ACCESS RULES

79. The Court in *Day* said that keeping stock out of waterways is such a basic step in protecting waterways from effluent pollution that it must be regarded as an absolute requirement.⁹⁷ Additionally, in Dr Death's opinion stock exclusion is the single best management practise to improve aquatic ecology.⁹⁸
80. It appears that ECan has given partial effect⁹⁹ to Fish and Game's relief in its submission by way of an alternative method. ECan did this by altering the definition of "outdoor intensive farming". ECan also refined some policies and changed some rules.¹⁰⁰ These changes and others are an improvement but they are still not adequate.
81. Mr Percy has provided further amendments to the rules to help address the policy refinement by ECan, particularly with respect to the definition of "active bed" and issues around the practicality of stock and wide expansive river beds. The amendments are necessary because the RMA definition of bed includes a vast area of flood plain that may see little active flow of water.¹⁰¹ For practicable purposes bridging the entire bed of a river is not feasible. Mr Percy has suggested a change to the definition of "active bed"¹⁰² more in line with Dr Death's recommendations.¹⁰³
82. Ensuring that stock are excluded from the beds of rivers and lakes is also one way of ensuring the Overseer modelling is indicative of practise in reality. This is because Overseer operates on the assumption that good management practices are in place.¹⁰⁴ Dr

⁹⁷ *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [5 - 135]

⁹⁸ Death, above n4, at [96]

⁹⁹ McCallum-Clark, above n41, page 59

¹⁰⁰ At page 61, 66 and 67

¹⁰¹ RMA, section 2

¹⁰² Percy, above n13, at [70]

¹⁰³ Death, above n4, at [10]

¹⁰⁴ Percy, above n13, at [27]

Dewes sets out the assumptions of the Overseer model.¹⁰⁵ This includes assumptions that stock are excluded from waterbodies, that there are no direct discharges of contaminants to waterbodies, that there are no discharges from the base of effluent ponds and that all codes of practice are implemented in order to avoid adverse effects, etc.

VOLUNTARY MECHANISMS

83. Voluntary mechanisms which other parties assert would be more effective than a regulatory regime, such as the The Dairying and Clean Streams Accord for policing discharge practices to water are laudable. These are based on the premise that all stakeholders should be educated which will then lead to, hopefully, a voluntary programme for managing water. Voluntary approaches may work where an industry has a history demonstrating it can meet rules.¹⁰⁶ However, history suggests that voluntary programs do not suffice to deal with the problem entirely,¹⁰⁷ that being poor and still declining water quality.
84. The risk here is not from the innovators in the farming community but from those who do not take action until they need to¹⁰⁸ nor will voluntary approaches capture the worst polluters.¹⁰⁹ These operators put the whole industry at risk from unwanted media attention.¹¹⁰
85. Even if voluntary approaches are encouraged they should be reinforced with a regulatory regime that sets measurable standards and is enforceable.¹¹¹ This will capture those in the sector who do not

¹⁰⁵ Dewes, above n1, at [129] – [130]

¹⁰⁶ At [153]

¹⁰⁷ *Day v Manawatu-Wanganui Regional Council*, above n99, at [5-9] and Dewes, above n1, at [154], [156] and [157]

¹⁰⁸ Dewes, above n1, at [159]

¹⁰⁹ *Day v Manawatu-Wanganui Regional Council*, above n99, at [5-9]

¹¹⁰ Dewes, above n1, [159]

¹¹¹ *Day v Manawatu-Wanganui Regional Council*, above n99, at [5-9]

voluntarily change¹¹² to review their business and performance, and plan change.¹¹³

ALLOCATION ZONES

86. The criteria ECan used for categorising catchments as red, orange, green or blue were far from transparent or coherent, and appear to involve a large degree of subjectivity rather than reliance on objective thresholds and water quality data.¹¹⁴ According to Dr Death the limited technical information provided to him in his attempts to understand this process did not support the approach and allocation states in the pCLWRP.¹¹⁵
87. The information provided indicates that ECan should act in a precautionary way that prevents further degradation in **all** zones¹¹⁶ until ECan has in place a transparent state of the environment monitoring system that can illustrate where water quality is acceptable, where its assimilative capacity is fully utilised and where it is degraded, linking explicitly to the targets/limits set in Table 1(a).

PREDICTED EFFECTS

88. When considering what regime to impose, you will, in my submission, need to make findings on matters such as:
- a. What are the effects on the instream environment of maintaining the status quo, and what are the likely environmental effects of imposing alternative regulatory regimes;

¹¹² Dewes, above n1, at 160]

¹¹³ At [161]

¹¹⁴ Death, above n4, at [25]

¹¹⁵ At [25]

¹¹⁶ Percy, above n13, at [67]

- b. How will the alternative regulatory regimes impact upon people's ability to provide for their social, cultural and economic wellbeing.
- 89. Conclusions on these matters, based on evidence, are crucial to your subsequent application of the relevant legal tests to the facts. While in Hearing Group 1 there was not a wide range of matters actually contested in expert evidence, in Hearing Group 2 there is. Experts disagree on matters such as:
 - a. The scale of economic benefits to be gained from a permissive planning regime that allows intensification of dairying;
 - b. The effect on water quality of alternative regulatory regimes;
 - c. The cost to the farming industry of changing farm practices to reduce leaching and runoff of contaminants.
- 90. Disappointingly, other parties chose to withhold fundamental evidence on some of these points until the rebuttal was exchanged, despite the fact these matters are of central relevance to your determination. For example DairyNZ's witness Dr McCall's rebuttal is the first and only brief of evidence from this witness, and addresses matters such as his opinion on environmentally and economically sustainable nitrogen leaching reduction rates – which in the context of trying to improve water quality degraded by N leaching is central to the entire case. Similarly Irrigation NZ has lodged evidence from Andrew Curtis in the guise of rebuttal, which while dated 8 March, was submitted as rebuttal evidence (no HG2 evidence in chief submitted) addressing matters such as the cost of improving irrigation techniques to reduce leaching, and the use of Overseer.
- 91. Fish and Game are seeking that you prefer the evidence of Fish and Game's witnesses, and make the following findings:
 - a. The economic benefit of allowing significant intensification of agriculture, particularly dairying, is highly questionable. It is submitted that Dr Marsh's evidence on this point, that relies on data from DairyNZ's own research of dairy farm profitability, should be preferred. The size of the as yet unrealised irrigation opportunity is also not certain and there is no reliable evidence on predictions in this area. Proponents of allowing increased

irrigation have not laid on the table the true cost of establishing irrigation, including the cost of externalities.

- b. There are a range of mitigations that existing high leaching farms can implement over time, that will achieve a reduction of leaching in the realms of that proposed by Fish and Game. Dr Dewes is the only witness who has provided detailed, comprehensive evidence, based not only on her significant experience around New Zealand and understanding of the industry, but also on actual data from representative case study Canterbury farms, on the ability of farmers to not only significantly reduce leaching, but also to increase profitability and/or equity in their farm and reduce their risk profile. Her evidence shows that it is realistic and sustainable. Evidence of other witnesses such as Dr McCall and Mr Cullen do not have an evidential basis in similar case studies or data on which you can rely.
- c. Nitrogen leaching from farms needs to be brought down to a level that will ensure instream limits manage periphyton (rather than higher toxicity limits). There is no evidence that it is phosphorous rather than nitrogen that is limiting periphyton growth. Evidential weight is in favour of nitrogen being the limiting factor. Furthermore, where there may be doubt, the risk of imposing a permissive rather than conservative N target is such that a precautionary approach should be applied. At the end of the day, **all** of the contaminants of concern – N, P, sediment and pathogens need to be managed down at conservative levels if the relevant legal tests are to be met.
- d. Fish and Game have modelled the effects of current landuse and predicted intensification, under capped and uncapped scenarios in terms of N leaching. Given the paucity of information ECan and the industry generally had available to feed into the model, the modelling could be further refined, but for the purpose for this hearing, and for the purpose of implementing a regime that will start managing land uses and discharges, it provides a good evidential basis for the imposition of a 20kg/ha/year SNLM figure as a starting point, above which there is a consenting incentive to start reducing

over time. ECan has not done modelling of its regime, and neither have other parties. Dr Cooke's modelling provides you with a helpful evidential basis to make findings in support of a regulatory regime that will have immediate effect. As understanding of individual catchments' characteristics increases, a SNLM figure for that catchment can be easily added to the table and implemented through the rules. While there is some disagreement between the experts¹¹⁷ on technical matters such as attenuation coefficients and lag times, that does not detract from the nature of the findings you are being asked to make on this point.

- e. The figure of 20kg/ha/year is not being proposed as some sort of arbitrary cut-off above which farming must cease, contrary to other witnesses misunderstandings. It is being used in this basis to differentiate between high and low intensity farming, and to establish a useful activity classification trigger, and a target that will change the trajectory from increasing water quality degradation, to gradual improvement.
- f. If N leaching is managed and regulated with the use of Overseer, by default other contaminants of concern are also appropriately managed.
- g. It is impossible with the information supplied by ECan for Fish and Game's witnesses to assess the ability of the pCLWRP to safeguard the fishery and life supporting capacity of Canterbury Rivers.¹¹⁸ As pointed out above there is a large disconnect between the information used by ECan and the rules and policies in the pCLWRP.¹¹⁹
- h. There is no ability in the pCLWRP to link Table 1a, and the nutrient allocation zone approach or allocation states.¹²⁰

¹¹⁷ Primary Dr Cooke and Ms Hayward. While Mr Bryce rebuts Dr Cooke's evidence, his planning expertise do not extend to that of modelling N leaching scenarios.

¹¹⁸ Death, above n4, at [29]

¹¹⁹ At [12]

¹²⁰ At [23]

Because of this there is no link between actual water quality issues in Canterbury and management approaches.¹²¹ Nor are the zone allocation states in the pCLWRP capable of being linked with the State of Environment data.¹²²

- i. By way of contrast Fish and Game have provided an evidential basis that illustrates the efficacy of its proposed regime.

THE PRECAUTIONARY PRINCIPLE

92. Where uncertainty or ignorance exists concerning the nature or scope of environmental harm decision-makers should be cautious.¹²³ The RMA implicitly applies the 'precautionary approach', and utilises it as part of the overall broad judgement.¹²⁴ The precautionary principle is not strictly adhered to in the RMA because it is not a 'no-risk' statute;¹²⁵ instead it is a forward looking statute¹²⁶ which means that some risk is inevitable, and, to the extent that it is accompanied by development or progress which promotes sustainable management, is encouraged.

¹²¹ At [24]

¹²² At [24]

¹²³ See *Aquamarine v Southland Regional Council* ENC Christchurch C126/1997 page 144 (*Aquamarine*)

¹²⁴ *Shirley Primary School Christchurch CC* [1999] NZRMA 66 (*Shirley Primary*), at [223] adopted in *Clifford Bay Marine v Marlborough DC* ENvC C131/03 (*Clifford Bay Marine Farms*) at [67]

¹²⁵ *Shirley Primary*, above n126, at [114] *Clifford Bay Marine*, above n126, at [67] *Jackson Bay Mussel Farms Ltd v West Coast Regional Council* ENC Auckland, C77/2004 4 June 2004, at [131]

¹²⁶ *Shirley Primary School*, above n126, at [114] see also *Aquamarine*, above n125, at page 144 for a discussion on how the precautionary principle is not compatible with the definition of sustainable management

93. It is in this context that the Courts have utilised the precautionary principle as part of an overall judgement.¹²⁷ It emerges from the flexibility of the standard of proof applied by the Court in the weight given to evidence that has only been 'proved' to a low standard.¹²⁸
94. There is no technical data to support the water quality allocation states provided in the Nutrient zone map.¹²⁹ ECan rather than act in a permissive way that is likely to allow further degradation to waterbodies should adopt a precautionary approach in the context of the farming rules¹³⁰ until sufficient information and data are provided.

COSTS AND BENEFITS

95. The assessment of costs and benefits is relevant to the process requirement of section 32 and also evaluation of the extent to which people's ability to provide for their social, cultural and economic wellbeing is enabled.
96. The Court in *Day* was particularly mindful of section 32(4)(b):
- "... the risk of not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods."*¹³¹
97. The Court was conscious of the fact that there were things about the relationships between water quality and ecological health that are unknown.¹³² Additionally, the Court pointed out that experts hold different views on these relationships.¹³³ Much of this resonates in this hearing but what is not clear here is the body of evidence in relation to the section 32 analyses.

¹²⁷ *Clifford Bay Marine Farm*, above n126 at [67]

¹²⁸ At [67] referring to *Shirley Primary School*, above n126

¹²⁹ *Death*, above n4, at [13]

¹³⁰ *Percy*, above n13, at [65]

¹³¹ *Day v Manawatu-Wanganui Regional Council*, above n99, at [5-217]

¹³² At [5-127]

¹³³ At [5-127]

98. The section 32 evaluation should have taken into account the costs of poor water quality, and the benefits of good water quality however it does not, in a meaningful or helpful way. The section 32 analysis is incomplete since fundamental parts of the Plan will not be established for several years. The section 32 analysis is not realistic because it is impossible to assess the efficiency and effectiveness of a policy that has not been defined.
99. Benefits and costs include "*benefits and costs of any kind, whether monetary or non-monetary.*"¹³⁴ Costs to Dairy Farmers have been addressed by Dr Marsh and Mr Butcher. The non-monetary benefits from maintaining and enhancing, and safeguarding the life supporting capacity of, the waterways in the specified water management zones/catchments and the region are addressed primarily by Dr Marsh.
100. Non-monetary benefits of improved water quality present difficulties in that they have to be considered in the analysis under section 32 and the overall judgement exercise in making a decision under section 5 of the RMA but there is no one market mechanism by which they can be quantified. However, there are economic techniques that can be used to quantify non-monetary benefits: willingness to pay ("WTP") and willingness to accept ("WTA"). These techniques are addressed in the evidence of Dr Marsh. Dr Marsh's evidence in chief is to the effect that:
- a. If WTP is accepted as the appropriate measure of benefit, then the benefit of improved water quality would be well in excess of \$10 million per year;¹³⁵
 - b. Use of WTP to estimate benefits of improved water will underestimate benefits, since the appropriate measure of the benefits of improved water quality is the WTA measure;¹³⁶

¹³⁴ RMA, section 2

¹³⁵ Dan Marsh, Evidence in Chief, 2 April 2013, at [235]

¹³⁶ At [236]

- c. WTA is the most appropriate measure of benefit on the basis that residents of the Region have the right to sustainable management of natural resources including water that is not deteriorating in quality; and¹³⁷
 - d. If WTA is accepted as the appropriate measure of benefit, then the benefit of improved water quality would be \$35 million per annum¹³⁸
101. Generally speaking it is estimated that water quality under the Fish and Game proposal will improve whereas water quality under the pCLWRP scenario will further degrade. Dr Marsh's estimate, that the benefit of avoiding continued deterioration of water quality, under the Fish and Game proposal, exceeds \$35 million per annum, is very conservative.¹³⁹ Despite this and other factors¹⁴⁰ discussed in Dr Marsh's evidence in chief, \$35 million per annum is well in excess of the estimated upper bound of the cost of reducing N leaching which is \$21 million per annum.¹⁴¹
102. Water quality, under the regime proposed by ECan, will continue to deteriorate in all catchments for at least the next five years and beyond that its effectiveness is unknown because the regime is not specified.¹⁴² Dr Marsh uses the same approach for assessing the benefits of the Fish and Game proposal for the proposal from ECan. ECan's proposal will reduce the \$21 million estimated cost to farmers for reducing N leaching.¹⁴³ Dr Marsh points out that this reduction is still not enough to offset the cost (net loss of at least \$35 million per

¹³⁷ At [193] – [194]

¹³⁸ At [234] and [196] – [197]

¹³⁹ At [233]

¹⁴⁰ At [237]

¹⁴¹ At [64]

¹⁴² At [53b]

¹⁴³ At [67]

annum). Under the ECan proposal the benefits will not outweigh the costs to the residents of Canterbury.

103. It is Fish and Game's view that the ECan approach will not be effective in addressing water quality issues, whereas the Fish and Game approach will be. ECan's approach is likely to lead to water quality degradation. By comparison, Fish and Game's approach will prevent increases in discharges and will begin a trajectory of change to achieve reductions in discharges over time.

Witnesses

Dr Jim Cooke

Dr Alison Dewes

Dr Dan Marsh

Associate Professor Russell Death

Mr Phillip Percy

DATED this 9th day of May 2013



M A Baker-Galloway

Counsel for Fish and Game

Appendix 1 - Scope

Scope

Subject	Scope Provided
Policy 4.26	F&G submission at section 4 sub-section 4.26 pg 40 provides scope to incorporate the recommendations
Policy 4.28	F&G submission at section 4, sub-section 4.28 to 4.33 pg 40 provides scope to incorporate the recommendations
Policy 4.29	F&G submission at section 4- pg, sub-section 4.28 to 4.33 pg 40 provides scope to incorporate the recommendations
Policy 4.29 A	F&G's submission at section 4 sub-section 4.28 to 4.33, page 40 gives it a broad scope to incorporate the recommended changes. F&G submitted that management of nutrient loss is a key issue for this plan and detailed policy is required if the plan is to be effective. Additionally submitted in a general sense at [33.3].
Policy 4.29 B	F&G's submission at section 4, sub-section 4.28 to 4.33, page 40 gives it a broad scope to incorporate the recommended changes. F&G submitted that management of nutrient loss is a key issue for this plan and detailed policy is required if the plan is to be effective. Additionally submitted in a general sense at [33.3].
Policy 4.29 C	F&G's submission at section 4, sub-section 4.28 to 4.33, page 40 gives it a broad scope to incorporate the recommended changes. F&G submitted that management of nutrient loss is a key issue for this plan and detailed policy is required if the plan is to be effective. Additionally submitted in a general sense at [33.3].
Policy 4.29 D	F&G's submission at section 4, sub-section 4.28 to 4.33, page 40 gives it a broad scope to incorporate the recommended changes. F&G submitted that management of nutrient loss is a key issue for this plan and detailed policy is required if the plan is to be effective. Additionally submitted in a general sense at [33.3].

Policy 4.29 E	F&G's submission at section 4, sub-section 4.28 to 4.33, page 40 gives it a broad scope to incorporate the recommended changes. F&G submitted that management of nutrient loss is a key issue for this plan and detailed policy is required if the plan is to be effective. Additionally submitted in a general sense at [31.6] [33.3].
Policy 4.29 F	F&G's submission at section 4 sub-section 4.28 – 4.30, section 4 sub-section 4.34 – 4.38 pg 43 and [33.23] provides broad scope to make the recommended changes.
Policy 4.31, 4.32	F&G's submission at section 4, sub-section 4.28 to 4.33, page 40 provides scope to incorporate recommended changes. F&G submitted that management of nutrient loss is a key issue for this plan and detailed policy is required if the plan is to be effective. Additionally submitted in a general sense at [33.3].
Policy 4.33	F&G's submission at section 4, sub-section 4.28 to 4.33, page 40 provides scope to incorporate recommended changes.
Policy 4.34	F&G's submission at section 4 sub-section 4.34-4.38 pg 43 provides scope to incorporate recommended changes.
Policy 4.35	F&G's submission at section 4 sub-section 4.34-4.38 pg 43 provides scope to incorporate recommended changes.
Policy 4.36	F&G's submission at section 4 sub-section 4.34-4.38 pg 43 provides scope to incorporate recommended changes.
Policy 4.38	F&G's submission at section 4 sub-section 4.34-4.38 pg 43 provides scope to incorporate recommended changes.
Policy 4.64	F&G's submission at section 4 sub-section 4.64 pg 51 provides scope to incorporate recommended changes.
Rule 5.29	Although F&G did not specifically submit on Rule 5.29 F&G did make a further submissions on Federated Farmers submission on Rule 5.29 at pg 13 and this provides scope.

Rule 5.33	F&G's submission at section 5 sub-section 5.33 pg 63, and section 5 sub-section 5.35 pg 64 provides scope to incorporate recommended changes.
Rule 5.34, 5.34A	Although F&G did not specifically submit on Rule 5.34, F&G did submit that the discharge of animal effluent directly to water should be a prohibited activity at section 5 sub-section 5.35 pg 65. F&G did make a further submission on the Royal Forest and Bird submission on Rule 5.34 pg 31 and this provides scope.
Rule 5.35	F&G's submission on section 5 sub-section 5.33 pg 63 and section 5 sub-section 5.35 pg 64 provides scope to incorporate recommended changes.
Rule 5.36	Although F&G did not specifically submit on Rule 5.36 F&G's submission on section 5, pg 10 sub-section 5.35 pg 65 gives scope.
Rule 5.37	F&G's submission at section 5 sub-section 5.37 pg 66 provides scope to make recommended changes.
Rule 5.38	Although F&G did not specifically submit on Rule 5.38 F&G's submission on section 5 sub-section 5.39-5.51 pg 66 and section 5 sub-section 5.35 pg 64 - 65 gives scope.
Rule 5.39A-H	F&G's submission at section 5 sub-section 5.35 and 5.37 pgs 64 – 66, section 5 sub-section 5.39-5.51 pg 66, [33.23] and F&G's further submission on the Royal Forest and Bird submission on these rules pg 31 gives scope.
Rules 5.40-5.51	F&G's submission on section 5 sub-section 5.39-5.51 pg 66 and sub-section 5.35 pg 64 gives a broad scope to incorporate recommended changes.
Rule 5.52	F&G's submission on Section 5, sub-section 5.52 -5.54, pg 68 gives a broad scope to incorporate recommended changes.
Rule 5.53	F&G's submission on Section 5 sub-section 5.52 -5.54, pg 68 gives a broad scope to incorporate recommended changes.

Rule 5.55	F&G's submission on Section 5 sub-section 5.55 – 5.58, pg 69 gives a broad scope to incorporate recommended changes.
Rule 5.56, 5.57, 5.58	F&G's submission at section 5 sub-section 5.55 – 5.58 pg 69 provides broad scope to make recommended changes.
Rule 5.96	F&G's submission at section 5 sub-section 5.96 pg 72 – 73 provides broad scope to make recommended changes.
Rule 5.107	F&G's submission at section 5 sub-section 5.5.107 to 5.108 pg 76 provides broad scope to make recommended changes.
Rule 5.133, 5.134, 5.135, 5.136	F&G's submission at section 5 sub-section 5.133 to 5.137 pg 81 provides scope to make recommended changes.
Rule 5.147, 5.148, 5.149	F&G's submission at section 5 sub-section 5.147 to 5.149 pg 83 provides scope to make recommended changes.
Rule 5.150	F&G's submission at section 5 sub-section 5.150 to 5.154 pg 86 - 88 provides scope to make recommended changes.
Rule 5.152	F&G's submission at section 5 sub-section 5.150 to 5.154 pg 86 – 88 provides scope to make recommended changes.
Rule 5.153	F&G's submission at section 5 sub-section 5.150 to 5.154 pg 86 – 88 provides scope to make recommended changes.

Definitions

Subject	Scope
Intensive Stock	F&G's submission on Section 2, sub-section General on pg 15 and F&G's submission on Section 4, sub-section 4.26 pg 40 of F&G's original submission gives scope.
Active Bed	F&G's submission on Section 2, sub-section General on pg 15 and

	F&G's submission on Section 4, sub-section 4.26 pg 40 of F&G's original submission gives scope.
Earthworks	F&G's submission on Section 2, sub-section General on pg 15 and section 5, sub-section Rules 5.147 to 5.149, pg 83 - 86 of F&G's original submission gives scope.
Vegetation Clearance	F&G's submission on section 2 sub-section 2.10 pg 16 provides scope to make recommended changes.
Farm Environment Plan	F&G's submission on Section 2, sub-section General on pg 15 and Section 4 sub-sections 4.28 to 4.33, pg 40 of F&G's original submission gives scope.
Stock	F&G's submission on Section 2, sub-section General on pg 15 and F&G's submission on Section 4, sub-section 4.26 pg 40 of F&G's original submission gives scope.
Animal Effluent	F&G's submission on Section 2, sub-section General on pg 15 and Section 5 sub-section 5.33, pg 63 of F&G's original submission gives scope.
Solid Animal Waste	F&G's submission on Section 2, sub-section General on pg 15 and Section 5 sub-section 5.33, pg 63 of F&G's original submission gives scope.
Solid Vegetative Waste	F&G's submission on Section 2, sub-section General on pg 15 and Section 5 sub-section 5.33, pg 63 of F&G's original submission gives scope.
Farming	F&G's submission on Section 2, sub-section General on pg 15 and Section 5, sub-section 5.39 to 5.51 pg 66 of F&G's original submission gives scope.
Red Catchment	F&G's submission on Section 2, sub-section General on pg 15 and Section 5, sub-section 5.39 to 5.51 pg 66 of F&G's original submission gives scope.

Orange Catchment	F&G's submission on Section 2, sub-section General on pg 15 and Section 5, sub-section 5.39 to 5.51 pg 66 of F&G's original submission gives scope.
Green Catchment	F&G's submission on Section 2, sub-section General on pg 15 and Section 5, sub-section 5.39 to 5.51 pg 66 of F&G's original submission gives scope.
Blue Catchment	F&G's submission on Section 2, sub-section General on pg 15 and Section 5, sub-section 5.39 to 5.51 pg 66 of F&G's original submission gives scope.
Changed or new farming	F&G's submission on Section 2, sub-section General on pg 15 and Section 5, sub-section 5.39 to 5.51 pg 66 of F&G's original submission gives scope.

Appendix 4

Subject	Scope
Schedule 7	Fish and Game did not specifically submit on Schedule 7 however F&G's submission on Section 5 sub-section 5.39 to 5.51, pg 66 gives scope.

Appendix 2

Extract from *Day v Manawatu-Wanganui Regional Council* [2012]
 NZEnvC 182 summarising the Court's position on the permitted
 activities in the One Plan

[5-198]

Ms Barton discusses this issue at some length in her evidence. She says that with the exception of Mr Hansen and Mr Hartley, the planner called by Federated Farmers, the planners agreed in their conference that a permitted activity status was inappropriate, a view she continues to hold. In summary, the reasons for her view are, first, that it is difficult to impartially and consistently demonstrate compliance with the OVERSEER model under a permitted regime, because it requires a good degree of technical knowledge to run accurately. Secondly, without the accountability inherent in a resource consent regime, there will be very little interaction between the farmer and the Council about addressing nutrient management. Thirdly, a controlled activity allocates the cost of monitoring and compliance to the farmer, whereas under a permitted regime it would be borne entirely by the Council. Fourthly, the discharge of farm animal effluent onto or into land is a controlled activity under Rule 13-6 and it makes sense to align the two activities to streamline and integrate the consenting process. Fifthly, under the operative Land and Water Regional Plan (Rule 4 page 21) the discharges of agricultural effluent require a resource consent as a controlled activity. This establishes an expectation with respect to the management of nutrient leaching effects associated with dairy farming. The effects of the discharge of farm animal effluent (as controlled through Rule 13-6) are similar to the effects associated with dairy farming land uses (covered by Rule 13-1 and 13-1B). The integrity of the POP would come into question if one activity with similar effects requires consent and the other does not.

[5-199]

We accept these reasons arising from all of the material — evidence, joint statements and submissions - for not supporting a permitted activity rule:

- *Rule 13-1 proposes a one farm consent to manage all contaminant vectors (not just N) based on a systems approach to farm management commended by the Parliamentary Commissioner for the Environment.*
- *Managing N leaching (effectively) would require significantly more interaction between a local authority and farmer than a permitted activity would allow.*
- *There is limited transactional efficiency given the consent needed for discharges of effluent (an activity caught by Rule 13-1 as ancillary to dairy farming).*
- *The permitted activity rules proposed would only really work on a fixed and not a graduated step-down in N leaching.*

- *A consent provides much greater certainty for a farmer than permitted activity status (which could be changed at any time).*
- *Control of land use to achieve water quality outcomes of the commons is best achieved by a consent identifying the metes and bounds of the farming activity, with explicit conditions, available for inspection as a public record, and with monitoring (at the expense of the consent holder) and enforcement.*
- *A permitted activity rule would allow some farmers to leach up to the relevant threshold number without any control on management practices (with undesirable results).*
- *Mr Hansen acknowledged the benefits that having better on-farm information would have for future plan change decisions. Fonterra considered a controlled activity regime would deliver that information directly to the Council, allowing them to check and verify it within a resource consent process and a better approach.*
- *Section 70 requires that before a rule that allows, as a permitted activity, a discharge of a contaminant into water, or onto land in circumstances where it may enter water, can be included in a regional plan, the Court must be satisfied that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include, under s 70(1)(g), any significant adverse effects on aquatic life. There was no evidential basis on which we could conclude that the requirements of s 70 would be met.*
- *The application of the OVERSEER model means there will be a level of discretion and uncertainty which is not appropriate for a permitted activity rule.*
- *It would not allow an iterative process between farmers and the Council, including the careful record keeping and auditing of the OVERSEER inputs and assumptions needed to ensure sound environmental outcomes.*
- *While the Council may have powers to impose a targeted rate under other legislation, that does not substitute for the direct recovery of the Council's actual and reasonable costs under the RMA from those parties carrying out an activity with actual and potential effects on the environment.*

[5-200]

We find the logic of that line of thought compelling and agree that a controlled activity status would better give effect to the purpose of the Act. We do not accept the permitted activity rule put forward by Horticulture NZ in closing for similar reasons. We note that Fish and Game submitted that we have no scope to impose permitted activity status in any event, but we do not need to decide the point, given our decision that permitted activity status is not justified.