

BEFORE INDEPENDENT COMMISSIONERS

UNDER the Resource Management Act
1991

IN THE MATTER of The Proposed Canterbury
Land and Water Regional Plan

**LEGAL SUBMISSIONS OF COUNSEL FOR THE CANTERBURY
REGIONAL COUNCIL - REPLY**

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Introduction

1. Canterbury's water resources are vitally important to the region and to the nation. Lakes, rivers, streams and aquifers are used for hydro electricity generation, agricultural production and drinking water, as well as for a range of customary, recreational and amenity uses. In recent years Canterbury's water resources have been coming under pressure from increasing demands from these various uses. Aquatic health of lowland streams and groundwater quality has continued to decline, and the availability of water use by agriculture is becoming less reliable.¹
2. There is now a widely held view among stakeholders and the general public that continuing along the present path for managing water will lead to unacceptable environmental, social, cultural and economic outcomes.² The Canterbury Regional Council ("Council") has responded to this widely held view by promulgating the proposed Land and Water Regional Plan ("proposed Plan", and "pLWRP").
3. The pLWRP represents a paradigm shift in relation to the way that freshwater, and land use that affects water quality, is managed. This follows on from the development of the Canterbury Water Management Strategy ("CWMS"), which ushered in a collaborative and integrated management approach, seeking to maximise opportunities for the region's environment, economy and community. In particular, the CWMS identified that a shift was required from effects-based management of individual consents, to integrated management based on water management zones, and the management of cumulative effects of both water abstraction and land use intensification.
4. The complexities inherent in the management of land and water resources in Canterbury, the need for this proposed Plan to promote the sustainable management of those resources in terms of the Act and the need for this proposed Plan to assist the Council implement the vision and principles of the CWMS have created some unique

¹ Canterbury Water Management Strategy, at page 17.

² Ibid.

constraints and opportunities in respect of the form and content of the pLWRP. In light of these challenges, the Council has sought to put in place for the Canterbury Region, a robust planning framework for the management of water resources of the Region, both in terms of water quantity and water quality.

5. As part of the paradigm shift in relation to the way that freshwater is managed in the Canterbury Region, the Council has adopted a tiered approach to the architecture of the proposed plan. This comprises region-wide provisions, being those matters that apply across the entire region, together with a framework within which sub-regional planning can take place. It is intended that the sub-regional planning process will enable catchment specific solutions to catchment specific resource management issues.
6. The heart of the pLWRP is found in Section 3, which is a statement of the objectives. As far as possible, these objectives (as now recommended to be modified by the Council Officers) are not time bound. Rather, they are a clear statement of the future environment sought to be attained. It may take some time before all of the objectives are achieved, but in my submission that should be no impediment to including them in the proposed plan at this point in time. The objectives should also assist those making investment decisions in relation to the Region's resources, with clear guidance being provided as to the likely outcome of consent applications. This structure is deliberate.
7. The policies provide the road map as to how the objectives will be implemented. They have deliberately been written in a concise and direct style. This is to assist decision-makers using the plan as a consenting instrument. The policies seek to provide the pathway to implementation of the objectives of the proposed Plan. They also provide guidance to the sub-regional planning process while not unduly constraining communities from providing for their social, economic and cultural wellbeing.
8. Full use has also been made of the suite of activity classifications available under the Act, ranging from permitted to prohibited. As will be apparent from the marked up version of the pLWRP, the Council Officers have not shied away from using prohibited activity status

where they consider that to be the most appropriate activity classification. This is particularly so in relation to catchments that are over allocated from a water quantity or water quality perspective.

9. The Council has also deliberately drafted the Plan in a style that is accessible to the Canterbury community. Much has been made of the difficulties associated with interpreting and implementing the NRRP (most of which the pLWRP will replace). The concise drafting, and sparse use of language is intentional, and for this purpose. This also reflects a degree of pragmatism on the Council's behalf.
10. During the course of hearings on submissions a number of legal issues have arisen. These legal submissions in reply address those issues. In particular, Counsel addresses the following matters:
 - a. The legal framework within which decisions on the pLWRP are to be made;
 - b. Relevance of, and weight to be given to, the Canterbury Water Management Strategy ("CWMS");
 - c. Part 2 matters;
 - d. Water quality issues and the "nutrient management provisions";
 - e. Consent duration;
 - f. "life" of a plan in relation to objectives;
 - g. Scope;
 - h. Legal validity of rules;
 - i. Validity of water transfer rules;
 - j. Validity of Water User Groups;
 - k. Prohibited activities; and
 - l. Incorporation of documents by reference.

Legal Framework

11. In this part of my legal submissions, I provide a summary of the legal framework within which decisions on the pLWRP are to be made. The

summary set out below is largely consistent with that put forward by Counsel for Christchurch City Council, subject to minor amendments.

General requirements

12. A regional plan should be designed to *accord with*³, and assist the regional council *to carry out*, its functions⁴ so as to achieve the purpose of the Act⁵.
13. A rule in a regional plan must not be more lenient than a national environmental standard⁶.
14. When preparing its regional plan a regional council *must give effect* to any national policy statement or New Zealand Coastal Policy Statement⁷. Although not alone, of particular relevance to this Plan is the National Policy Statement for Freshwater Management 2011 ("NPSFM").
15. A regional plan must also record how a regional council has allocated a natural resource, if it has done so⁸.
16. When preparing its regional plan the regional council shall *give effect* to any operative regional policy statement⁹. The Canterbury Regional Policy Statement ("CRPS") is the operative policy statement for this purpose. The approach adopted by the Council when drafting the pLWRP was to not extensively cross-reference the provisions of the CRPS in the pLWRP. Rather, the two documents need to be read together. The Council Officers have, however, recommended in

³ Section 66(1) of the Act.

⁴ As described in section 30 of the Act.

⁵ Section 63(1) and 66(1).

⁶ Section 43B(3) of the Act.

⁷ Section 67(3) of the Act.

⁸ Section 67(5) of the Act.

⁹ Sections 65(6) and 67(3)(c) of the Act.

response to submissions regarding the need to better cross-reference the provisions of the CRPS, that the order of the Objectives in the pLWRP follow the order of the chapters in the CRPS.

17. The regional plan must not be inconsistent with¹⁰:
 - a. a water conservation order, or
 - b. any other regional plan for the region, or
 - c. a determination or reservation of the chief executive of the Ministry of Fisheries made under section 186E of the Fisheries Act 1996.

18. When preparing its regional plan the regional council must also:
 - a. *have regard to* any relevant management plans and strategies under other Acts, any relevant entry in the Historic Places Register and to various fisheries regulations¹¹; and
 - b. *have regard to* consistency with regional policy statements, plans and proposed regional policy statements and plans of adjacent regional councils¹²; and
 - c. *take into account* any relevant planning document recognised by an iwi authority¹³; and
 - d. recognise and provide for the management plan for the foreshore and seabed reserve located in its region¹⁴; and
 - e. not have regard to trade competition¹⁵.

19. The regional plan must be prepared *in accordance with* any regulation and any direction given by the Minister for the Environment¹⁶.

¹⁰ Section 67(4) of the Act.

¹¹ Section 66(2)(c) of the Act.

¹² Section 66(2)(d) of the Act.

¹³ Section 66 (2A)(a) of the Act.

¹⁴ Section 66(2A)(b) of the Act.

¹⁵ Section 66(3) of the Act.

20. The formal requirement is that a regional plan *must* also state¹⁷ its objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies and *may* state¹⁸ other matters, including issues, reasons, and expected environmental results.

Objectives - the section 32 test for objectives

21. Each proposed objective in a regional plan *is to be evaluated* by the extent to which it is the most appropriate way to achieve the purpose of the Act¹⁹.

Policies and methods (including rules) - the section 32 test for policies and rules

22. The policies are to *implement* the objectives, and the rules (if any) are to *implement* the policies²⁰.
23. Each proposed policy or method (including each rule) is to be examined, *having regard to its efficiency and effectiveness*, as to whether it is the most appropriate method for achieving the objectives of the regional plan²¹:
- a. taking into account²²:
 - i. the benefits and costs of the proposed policies and methods (including rules); and

¹⁶ Section 66(1) of the Act.

¹⁷ Section 67(1) of the Act.

¹⁸ Section 67(2) of the Act.

¹⁹ Section 32(3)(a) of the Act.

²⁰ Section 67(1) of the Act.

²¹ Section 32(3)(b) of the Act.

²² Section 32(4) of the Act.

- ii. the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods; and
 - b. if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances²³.
24. Various formulations have been used by the Courts when considering the meaning of “most appropriate” in the context of section 32 of the Act. In *Landcorp Ltd v Auckland Council*²⁴, the Environment Court held that:
- “There is no presumption that the terms of the proposed Plan Change are appropriate (or not) for achieving the requirements of Part 2. The Court is required simply to seek an optimum planning solution based on the information and options put before it”.*
25. In *Rational Transport Society Inc v New Zealand Transport Agency*²⁵ the High Court held that “most appropriate” means “most suitable”.
- Rules*
26. In making a rule the regional council must *have regard to* the actual or potential effect of activities on the environment²⁶.
27. There are special provisions for rules about protection of property from the effects of surface water, restricted coastal activities, flows or rates of use of water, some activities in the coastal marine area and contaminated land²⁷.

²³ Section 32(3A) of the Act.

²⁴ [2013] NZRMA 1, paragraph 59.

²⁵ High Court, Wellington, CIV-2011-485-002259, Gendall J, at paragraph 45.

²⁶ Section 68(3) of the Act.

²⁷ Section 68 of the Act.

28. There are special provisions that apply where a regional council provides in a plan that certain waters are to be managed for any purpose described in Schedule 3 of the Act and includes rules in the plan about the quality of water in those waters²⁸; and regarding climate change²⁹.
29. There are also special provisions which deal with permitted activity rules about discharges³⁰, including the need for the Council to be satisfied that any significant adverse effects on aquatic life are not likely to arise as a result of a permitted discharge of a contaminant.³¹

Other statutes

30. Finally the regional council is required to comply with other statutes.
31. A regional plan cannot be interpreted or applied in a way that is inconsistent with the Recovery Strategy³².
32. The preparation and decision on the proposed regional plan cannot be inconsistent with any recovery plan gazetted under the Canterbury Earthquake Recovery Act 2011³³.
33. The decision makers on this proposed regional plan must “*have particular regard to*” the vision and principles of the CWMS³⁴; and regard may also be had to the remainder of the CWMS, at the discretion of the decision maker, as a relevant consideration.

²⁸ Section 69 of the Act.

²⁹ Section 70A and 70B of the Act.

³⁰ Section 70 of the Act.

³¹ Section 70(1)(g) of the Act.

³² Section 15(1) of the Canterbury Earthquake Recovery Act 2011.

³³ Section 23 of the Canterbury Earthquake Recovery Act 2011.

³⁴ Section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

CWMS

34. A number of parties have made submissions on the weight to be given to the Vision and Principles of the CWMS, and whether any weight can or should be given to CWMS as a whole. Whilst you are required to have particular regard to the vision and principles of the CWMS, it is submitted that you may also have regard to the CWMS as a whole. The authority for this proposition is the decision of the High Court in *West Coast Regional Council v The Friends of Shearer Swamp*.³⁵ In that case, the West Coast Regional Council contended that the Environment Court had placed excessive weight on the national scarcity of wetlands and the national priorities of wetland management, as identified in non-statutory documents. Those documents appear to have included the NZ Biodiversity Strategy (2000) and the Statement of National Priorities for Protecting Rare and Threatened Indigenous Biodiversity on Private Land (2007).
35. This decision of the High Court confirmed the earlier Planning Tribunal decision in *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council*, where the Tribunal commented that:³⁶
- ... We can find no indication that the list in section 74(2) was intended to be exhaustive. For a territorial authority to be precluded from having regard to the structure and general objectives, policies and rules of an operative district plan when preparing a change to it would seem so impractical a proposition that one would expect some positive indication of so unlikely an intention.*
36. The High Court held that the Environment Court was entitled to have regard to such non-binding national policy documents, as relevant background material, even if those documents did not have any status under the RMA.³⁷ The documents in question were found to be

³⁵ *West Coast Regional Council v The Friends of Shearer Swamp* [2012] NZRMA 45.

³⁶ *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 1A ELRNZ 454; (1993) 2 NZRMA 497 at 73.

³⁷ *West Coast Regional Council v The Friends of Shearer Swamp* [2012] NZRMA 45 at [49].

relevant and admissible, so the Environment Court had not erred in law in having regard to them.

37. On that basis, it is submitted that you may have regard to the whole of the CWMS because of the relevance of the content. The CWMS, has been endorsed by the Council and all 10 territorial authorities in the region, and because it was designed to be implemented, at least in part, through the planning instruments of the region.
38. The CWMS is the outcome of extensive consultation and community participation aimed at reaching a consensus as to how to best manage the freshwater resources in Canterbury. As such, it provides valuable guidance about how the people and communities of Canterbury wish to see provision for their wellbeing and health and safety, through the management of the use, development and protection of resources, including water and land. Although there is no statutory requirement for the pLWRP to incorporate or give effect to the entire content of the CWMS, the document as a whole is an important component in determining the most appropriate way of achieving the purpose of the RMA.
39. It is submitted that the architecture of the proposed Plan, which sets freshwater quality objectives and general region-wide limits, whilst enabling refinement and greater specificity of those limits at a catchment-specific level, both gives effect to the NPSFM and is consistent with the approach envisaged by the CWMS.
40. Every regional council is required to implement the policies of the NPSFM as promptly as is reasonable in the circumstances, and so they are fully completed by no later than 31 December 2030.³⁸ Where a regional council is satisfied that it is impracticable for it to complete implementation of a policy fully by 31 December 2014, the council may implement it by a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2030. Any programme of time-limited stages is to be formally adopted by the council within 18 months of the date of gazetting of the NPSFM, and publicly notified.

³⁸ National Policy Statement for Freshwater Management 2011, Policy E1(b)

Part 2 Matters

41. Counsel for a number of submitters have made submissions on the meaning of Part 2 of the Act. Those matters are addressed below.

Section 5 - "while", "balance" and "broad overall judgment"

42. The Environment Court in *Winstone Aggregates Limited v Papakura District Council*³⁹ addressed the debate about the ambiguous meaning of the word "while" within the context of section 5(2), and whether it is used conservatively or loosely. In other words, whether "while" is used as a subordinating conjunction, or a co-ordinating conjunction.

43. The Court stated:⁴⁰

[17] If "while" is used as a subordinating conjunction meaning "if", or "as long as" then sustainable management can only occur if the matters in subsections (a) (b) and (c) are secured.

[18] If "while" is used as a co-ordinating conjunction meaning "at the same time as", then sustainable management can occur if the matters in subsections (a), (b) and (c) have equal value to, and therefore in any decision-making process are afforded the same weight as, the matters set out in the words preceding "while" and prefaced by the word "managing".

[19] In Peninsula Watchdog Group Inc v Waikato District Council [Decision No. A052/94], the Tribunal was invited to form an opinion on the word "while". Counsel in that case submitted that the correct interpretation to be given to the word "while" in s5(2) was that human values are conditional upon ecological values. The Tribunal declined to address the meaning of the word "while" in s5(2) and adopted the reasoning of Grieg J in NZ Rail v Marlborough District Council [(1994) NZRMA 70].

³⁹ *Winstone Aggregates Limited v Papakura District Council* EnvC Auckland A049/2002.

⁴⁰ *Winstone Aggregates Limited v Papakura District Council* EnvC Auckland A049/2002 at [17].

The Tribunal was of the view that the case should be decided on the basis of submissions, and the evidence before it, rather than an academic analysis of s5.

[20] *In the NZ Rail case, Grieg J held that:*

This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from, the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

44. The Environment Court in *North Shore City Council v Auckland Regional Council*⁴¹ considered in light of these remarks of Greig J, the method to be used in applying section 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in paragraphs (a), (b) and (c). The Court stated:⁴²

"To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject section 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court – formerly the Planning Tribunal) alluded to in the NZ Rail case."

⁴¹ *North Shore City Council v Auckland Regional Council* EnvC Auckland A086/96, 1 October 1996.

⁴² *North Shore City Council v Auckland Regional Council* EnvC Auckland A086/96, 1 October 1996 at 45.

45. The Court in the application of section 5 adopted the reasoning in *Trio Holdings Ltd v Marlborough District Council*⁴³ and held that:⁴⁴

The method of applying section 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.

46. The Environment Court in *Winstone Aggregates* further observed that:⁴⁵

[22] *The application of section 5(2)(c) cannot fulfil the overall purpose of sustainable management, if the section is interpreted in such a way as to give primacy to the ecological values over the management function. To do what would not always fulfil the purpose of sustainable management, but may in some cases. What is required is a consideration of all aspects of the case, and then a weighing of factors in order to evaluate which will best achieve the purpose and principles of the Act.*

[23] *One of the fundamental elements of sustainable management is controlling the adverse effects on the environment, which is provided for by section 5(2)(c), the key words being "avoid, remedy, or mitigate". In Mangakahia Maori Komiti v Northland Regional Council [Decision No. A107/95], it was held that "each paragraph of s5 is to be accorded full significance and applied accordingly in the circumstance of the particular case so that the promotion of the Act's purpose may be effectively achieved".*

⁴³ *Trio Holdings Ltd v Marlborough District Council* (1996) 2 ELRNZ 353.

⁴⁴ *North Shore City Council v Auckland Regional Council* EnvC Auckland A086/96, 1 October 1996 at 46.

⁴⁵ *Winstone Aggregates Limited v Papakura District Council* EnvC Auckland A049/2002 at [22]-[23].

47. In *Waimakariri Employment Park Ltd v Waimakariri District Council*, the Environment Court observed:⁴⁶

[155] ...Although it has been suggested in some circumstances that sections 5(2)(a), (b) and (c) represent a triple bottom line to sustainable management, an examination of the subsection in question indicates that in each case value judgments are necessary in order to conclude how the section applies.

48. Whilst it does not take the position any further, for completeness, the Environment Court in *Day v Manawatu-Wanganui Regional Council* stated:⁴⁷

There can be no doubt of course that enabling ... people and communities to provide for their ... economic ... wellbeing ... includes so enabling the farmers and communities of the region. But that part of the purpose is not absolute, or necessarily even predominant. It must be able to coexist with the purposes in subparas a), b) and c). For the reasons already traversed, unless effective and thorough steps are taken to manage N leaching from the region's farms, none of those three purposes will be met.

49. Ultimately, it is submitted that the overall judgment required when considering Part 2 matters involves an assessment and weighing of relevant facts, then a reweighing, or balancing of those factors, which ultimately comes to a conclusion. The Court put it this way in *Long Bay-Okura Great Park Society Inc v North Shore City Council*.⁴⁸

The scheme of Part 2 of the RMA includes various feedback or reiteration loops. They derive from the fact that section 5(2)(c) refers to "avoiding, remedying or mitigating adverse effects of activities on the environment ... "; and section 7(b) requires

⁴⁶ *Waimakariri Employment Park Ltd v Waimakariri District Council* EnvC Christchurch C66/2003, 27 May 2003 at [155].

⁴⁷ *Day v Manawatu-Wanganui Regional Council* [2012] EnvC 182 at [5-215].

⁴⁸ *Long Bay-Okura Great Park Society Inc v North Shore City Council* EnvC Auckland A078/2008, 16 July 2008 at [276].

“efficient use of ... resources”. We infer that in coming to a decision under the Act local authorities must identify all the relevant facts and factors, give weight to them under Part 2 (and any other relevant instruments) and come to a provisional view as to the outcome; then look at whether each of the predicted adverse effects are sufficiently avoided, remedied or mitigated, or over-zealously so and finally reweigh the factors and re-assess the overall outcome.

50. The weighing process, leading to a balanced judgment, has been recognised in the Court of Appeal in *Watercare Services Ltd v Minhinnick*, where the Court said:⁴⁹

“The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. In the end a balanced judgment has to be made.”

51. In accordance with the tests laid down by the Courts in relation to the interpretation of section 5, it is submitted, in summary, that:

- a. The word "while" is used as a co-ordinating conjunction. The matters set out in section 5(a) – (c) are not environmental bottom lines.
- b. When applying section 5 of the Act, a broad overall judgment is required. This involves the weighing of factors in order to evaluate which will best achieve the purpose and principles of the Act.
- c. In the end, a balanced judgment has to be made.

Avoid, remedy, mitigate

52. The words "avoid, remedy and mitigate" in section 5(c) have been viewed by the Courts as being of equal importance and accordingly they should not, on that basis, be read as a hierarchy.⁵⁰

⁴⁹ *Watercare Services Limited v Minhinnick* [1998] 1 NZLR 294 (CA) at 305.

⁵⁰ *Winstone Aggregates Ltd v Papakura District Council EnvC*, A049/02.

53. The Environment Court in *Winstone Aggregates* was of the view that while in the wording of the subsection the words "avoid, remedy, or mitigate" follow a continuum, the grammatical construction is such that the words are to be read conjunctively and with equal importance.

54. The Court considered that:⁵¹

...whether emphasis is given to avoidance, remedying or mitigation will depend on the facts of a particular case and the application of section 5 to those facts. A judgment is required to be made which "allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome." [North Shore City Council supra]

In some cases mitigation of an adverse effect is sufficient. In other cases avoidance may be required.

55. The Court then went on to discuss a number of examples where avoidance was required.⁵²

56. In *Waimakariri Employment Park Ltd v Waimakariri District Council* the Court stated:⁵³

In respect of subsection 5(2)(c), that clearly involves value judgments as to what potential adverse effects should be avoided, which should be remedied, and which should be mitigated and how.

57. The Environment Court in *Day v Manawatu-Wanganui Regional Council* found it acceptable and appropriate for a regional plan to state

⁵¹ *Winstone Aggregates Ltd v Papakura District Council* (Unreported, Environment Court EnvC, A049/02) at [25]-[26].

⁵² *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No. 2)* (1993) 2 NZRMA 574; *P H van den Brink (Karaka) Limited v Franklin District Council* [1997] NZRMA 552; *Hill v Matamata-Piako District Council* EnvC Auckland A65/99, 8 June 1999.

⁵³ *Waimakariri Employment Park Ltd v Waimakariri District Council* EnvC Christchurch C66/2003, 27 May 2003 at [157].

a preference for the way, in that case, effects on biodiversity should be dealt with, including by instituting a hierarchy.⁵⁴

58. This was also recognised in the Transmission Gully plan change decision⁵⁵ where the High Court considered whether the Board of Inquiry had erred in approving a policy framework which requires later decision makers to endeavour to avoid adverse effects to the extent practicable and to remedy or mitigate effects which cannot practicably be avoided. The High Court held that the Board balanced the Regional Freshwater Plan's objectives, evaluated different options, and decided what was most appropriate to achieve those objectives.⁵⁶

Sections 6, 7 and 8

59. As was held in *Long Bay-Okura Great Park Society Inc v North Shore City Council*.⁵⁷

It is well settled that a section 6-8 matter neither automatically nor necessarily 'vetoes' all other considerations (Minhinnick v Watercare Services limited) nor should it be achieved 'at all costs' (NZ Rail Limited v Marlborough District Council).

60. In that case the Environment Court referred to *McGuire v Hastings District Council* where Lord Cooke, giving the advice of the Privy Council, stated that sections 6 to 8 contain '...strong directions, to be

⁵⁴ *Day v Manawatu-Wanganui Regional Council* [2012] EnvC 182 at [3-64].

⁵⁵ *Rational Transport Society Inc v New Zealand Transport Authority* [2012] NZRMA 298 (HC).

⁵⁶ *Rational Transport Society Inc v New Zealand Transport Authority* [2012] NZRMA 298 (HC) at [55].

⁵⁷ *Long Bay-Okura Great Park Society Inc v North Shore City Council* EnvC Auckland A078/2008, 16 July 2008 at [275].

borne in mind at every stage of the planning process' – as to what is sustainable management.⁵⁸

61. The Council Officers have been conscious of the matters set out in Part 2 of the Act when preparing the Plan, considering submissions and evidence produced by submitters, and preparing their reply. They have sought to strike the appropriate balance between matters associated with environmental protection, and enabling communities to provide for their social, economic and cultural wellbeing.

Approach adopted in relation to managing effects on water quality

62. The problems associated with managing water within Canterbury are complex and multi-layered. The Council acknowledges that, in order to address concerns regarding water quality within the Region, a new approach is required. In relation to the nutrient management provisions, the Council has moved away from the existing planning regime for managing effects on water quality, which focussed primarily on managing discharges themselves, to a regime which controls the land uses which give rise to such discharges. Such an approach is available to the Council as one of the functions of a regional council under section 30 of the Act is the control of the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies (section 30(1)(c)(ii)).
63. One of the drivers for this shift towards controlling land uses which give rise to discharges is the NPSFM. The extent to which the pLWRP gives effect to the NPSFM is one of the principal issues in contention in relation to the pLWRP. A wide range of submissions have been made in relation to the NPSFM, at either ends of the spectrum. Some parties such as Fonterra, DairyNZ and RDRML consider that the pLWRP as notified does give effect to the NPSFM, whereas other parties such as Fish and Game and the Department of Conservation submit that it does not. Given the importance of the NPSFM, this issue warrants further consideration.

⁵⁸ *McGuire v Hastings District Council* [2001] NZRMA 557 at [21] (PC).

64. As set out in section 67(3) of the Act, a regional plan must give effect to any national policy statement. The phrase "give effect to" is a strong direction that requires a positive implementation of the superior instrument. The hierarchy of plans makes it important that objectives and policies at the superior level are given effect to at the inferior level. Any provisions of the pLWRP which did not give effect to the operative regional policy statement and any relevant national policy statement would be ultra vires.⁵⁹
65. The provisions of the NPSFM that apply to the water quality issues are Objective A1, Objective A2, Policy A1, Policy A2, Policy B6, Objective C1, Policy C1, and Policy E1. These provisions are addressed below.

Policies E1, A2, and B6

66. The timing for implementation of the Freshwater NPS is set out in Policy E1, which states the following:

"Policy E1

- a) *This policy applies to the implementation by a regional council of a policy of this national policy statement.*
- b) *Every regional council is to implement the policy as promptly as is reasonable in the circumstances, and so it is fully completed by no later than 31 December 2030.*
- c) *Where a regional council is satisfied that it is impracticable for it to complete implementation of a policy fully by 31 December 2014, the council may implement it by a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2030.*
- d) *Any programme of time-limited stages is to be formally adopted by the council within 18 months of the date of gazetting of this national policy statement, and publicly notified.*
- e) *Where a regional council has adopted a programme of staged implementation, it is to publicly report, in every year, on the extent to which the programme has been implemented."*

⁵⁹ *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.

67. In relation to Policy E1(c), (d), and (e) above, the Council decided by resolution dated 7 November 2012 to implement Policies A2 and B6 of the NPSFM in defined, time-limited stages. The time frame for adopting any further staging has expired as staged implementation had to be adopted within 18 months of gazetting of the NPSFM, which occurred on 12 May 2011. Policies A2 and B6 state the following:

“Policy A2

Where water bodies do not meet the freshwater objectives made pursuant to Policy A1, every regional council is to specify targets and implement methods (either or both regulatory and non-regulatory) to assist the improvement of water quality in the water bodies, to meet those targets, and within a defined timeframe.”

“Policy B6

By every regional council setting a defined timeframe and methods in regional plans by which over-allocation must be phased out, including by reviewing water permits and consents to help ensure the total amount of water allocated in the water body is reduced to the level set to give effect to Policy B1.”

68. Counsel notes that Policy A2 applies to water quality and Policy B6 applies to water quantity. As a result of the resolution, the Council accepts that all of the other policies in the NPSFM are to be implemented by means of the pLWRP by 31 December 2014, in accordance with Policy E1(c) of the Freshwater NPS. In that respect, Counsel notes that the Council's Long Term Plan states the following:

<i>Target</i>	<i>Notification</i>
<i>A Regional Land and Water Plan that <u>sets freshwater objectives</u>, <u>environmental flows</u> and <u>water quality limits</u> as required by the National Policy Statement on Freshwater Management [emphasis added]</i>	<i>2012/13</i>
<i>Sub-regional components of the Regional Land and Water Plan to set environmental flows in the Ashburton river, the Orari River and Waihao River</i>	<i>2012/13</i>
<i>A sub-regional chapter for integrated land and water management in the Selwyn-Waihora catchment</i>	<i>2012/13</i>
<i>A sub-regional chapter for integrated land and water management in Hinds River and Ashburton-Rangitata groundwater</i>	<i>2013/14</i>
<i>A sub-regional chapter for integrated land and water management for Wairewa/Lake Forsyth</i>	<i>2013/14</i>
<i>A sub-regional chapter for integrated land and water management in Coastal South Canterbury streams, and Morven</i>	<i>2013/14</i>

<i>Glenavy groundwater</i>	
<i>A sub-regional chapter for integrated land and water management in the Waitaki catchment</i>	<i>2014/15</i>
<i>A sub-regional chapter for integrated land and water management for rivers and groundwater in the Orari-Opihi-Pareora zone</i>	<i>2017/18</i>
<i>A sub-regional chapter for integrated land and water management for the Ashley River and Waimakariri zone groundwater</i>	<i>2017/18</i>

69. As can be seen from the table above, the Council's LTP envisages that freshwater objectives and quality limits will be included in the pLWRP and that integrated land and water management in various catchments will be included in the sub-regional catchment provisions in the pLWRP in a staged manner.

Objectives A1 and A2 and Policy A1

70. Objectives A1 and A2 and Policy A1 of the NPSFM are as follows:

Objective A1

To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the use and development of land, and of discharges of contaminants.

Objective A2

The overall quality of fresh water within a region is maintained or improved while:

- a) *protecting the quality of outstanding freshwater bodies*
- b) *protecting the significant values of wetlands and*
- c) *improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.*

Policy A1

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- a) *establish freshwater objectives and set freshwater quality limits for all bodies of fresh water in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:*
 - i) *the reasonably foreseeable impacts of climate change*
 - ii) *the connection between water bodies*
- b) *establish methods (including rules) to avoid over-allocation.*

71. A freshwater quality limit is defined in the NPSFM as meaning the following:

Limit *is the maximum amount of resource use available, which allows a freshwater objective to be met.*

(my emphasis)

72. In other words, limits are required to ensure that life-supporting capacity, etc., is safeguarded (Objective A1) and the overall quality of freshwater within a region is maintained or improved (Objective A2).

73. Over-allocation is defined in the NPSFM as follows:

Over-allocation *is the situation where the resource:*

- a) *has been allocated to users beyond a limit or*
- b) *is being used to a point where a freshwater objective is no longer being met.*

This applies to both water quantity and quality.

74. In light of my submissions above in relation to staging implementation, and the requirements of Policy A1, it is submitted that the pLWRP must by 31 December 2014:

- a. Include freshwater objectives and set freshwater quality limits for all water bodies in Canterbury to give effect to Objectives A1, A2, and C1 in the NPSFM; and
- b. Include methods, including rules, to avoid over-allocation in areas where there is not currently over-allocation.

Objective C1 and Policy C1

75. Objective C1 and Policy C1 state the following:

Objective C1

To improve integrated management of fresh water and the use and development of land in whole catchments, including the interactions between fresh water, land, associated ecosystems and the coastal environment.

Policy C1

By every regional council managing fresh water and land use and development in catchments in an integrated and sustainable way, so as to avoid, remedy or mitigate adverse effects, including cumulative effects.

76. It is submitted that the Objective C1 and Policy C1 are of particular importance when determining how to give effect to the NPSFM. This objective and policy relate to the integrated management of freshwater, and the use and development of land within catchments. In order to enable the integrated management of freshwater and development of land in whole catchments, it is submitted that the approach in the pan-regional pLWRP must result in a plan which has sufficient flexibility to enable the Council, through the sub-regional planning process, to manage water quality at a catchment level.

Council's approach to giving effect to the NPSFM

77. The pLWRP as notified adopted a two-staged approach in respect of the management of non-point source discharges arising from farming activities. The first stage sought to move all farming activities to "good practice", and then to move beyond "good practice" to achieve specified water quality outcomes at a catchment level in accordance

with sub-regional provisions which will be inserted into the Plan through the First Schedule plan change process under the Act.

78. Sections 2.5 to 2.6 of the notified pLWRP set out how the pLWRP proposed to give effect to the NPSFM. In summary, Section 2.5 of the notified version of the pLWRP notes that the:

- a. Objectives in Section 3 and Policy 4.1 of the pLWRP are the fresh water objectives for the purposes of the Freshwater NPS; and
- b. In-stream outcomes to achieve the PLWRP's objectives are set out in Table 1 to Policy 4.1 and that Policy 4.1 is an objective for the purposes of the Freshwater NPS.

79. In turn, Policy 4.1 stated the following:

"Lakes, rivers, wetlands and aquifers will meet the fresh water outcomes in Sections 6-15. If outcomes have not been established for a catchment, then each type of lake, river or aquifer will meet the outcomes set out in Table 1."

80. In notifying the pLWRP, the Council considered that it had, in good faith, complied with its obligations in respect to giving effect to the NPSFM. The Council considered that it had adopted the correct balance between setting objectives and limits and dealing with over-allocation in order to give effect to the NPSFM, whilst at the same time:

- a. Providing a framework for the integrated management of freshwater which enabled the sub-regional planning process to occur at a catchment level;
- b. To the extent possible under the RMA, implementing the Vision and Principles of the CWMS;
- c. Enabling people and communities to continue to provide for their social, economic, and cultural wellbeing.

81. There have been many submissions lodged in respect to this approach to managing water quality, particularly in relation to the setting of general water quality limits at a region-wide level, whilst enabling a framework for refining those limits and setting targets at a

local catchment level. In particular, some parties have submitted that the pLWRP fails to give effect to the NPSFM because:

- a. The freshwater objectives in Section 3 and Policy 4.1 do not give effect to the objectives in the NSPFM;
- b. The rules do not set explicit numerical limits for discharges of key contaminants; and
- c. The pLWRP does not include any targets for over-allocated catchments.

82. As set out above in the submissions on the legal framework, in order to give effect to the NPSFM, the pLWRP must, by 31 December 2014:

- a. Include freshwater objectives and set water quality limits for all water bodies in Canterbury to give effect to Objectives A1, A2 and C1; and
- b. Include methods, including rules, to avoid over-allocation in areas where there is not currently over-allocation.

83. In response to these submissions, together with the evidence given during the hearing of submissions, the Council Officers have recommended some changes to the Objectives and Policies, together with the Nutrient Management rules in the proposed Plan. It is submitted that these changes will better give effect to the NPSFM.

84. It is submitted that the Objectives in Section 3, together with Policies 4.1 to 4.4 and Table 1 as amended, form the freshwater objectives for the Canterbury Region. The *objectives* are both narrative and numeric, and set out the outcomes sought to be achieved across the Canterbury region.

85. Underpinning the approach to nutrient management, is the Map NAZ approach. This approach entails zoning various parts of the Canterbury Region into Nutrient Allocation Zones. The zones are as follows:

- a. Red – Water Quality Outcomes not met;
- b. Orange – water quality outcomes at risk;
- c. Lake Zones;

- d. Light Blue– unclassified; and
 - e. Green – water quality outcomes met;
86. The pLWRP, as now modified, sets limits in a number of different ways. These include region-wide controls over point-source discharges, such as:
- a. The rules that regulate point-source discharges, including:
 - i. Rules relating to stormwater discharges;
 - ii. Rules excluding stock from waterways;
 - iii. Rules requiring backflow prevention and sealing of well heads;
 - iv. Rules relating to sediment runoff.
87. Limits have also been set in relation to each of the Map NAZ zones in relation to diffuse source discharges, as follows.

Red Zones

88. The discharge of nutrients beyond the *nutrient baseline* is a prohibited activity. Therefore, existing nutrient baseline forms the freshwater quality limit in respect to water quality.

Orange Zones

89. The orange Zones are identified as being "at risk". Therefore, it is submitted that care needs to be taken in respect to how non-point source discharges are managed in this zone. The approach recommended by Council Officers in response to the submissions made regarding limit setting in this zone is as follows.
90. In relation to the maximum amount of Nitrogen which can be leached as a permitted activity, the rules permit 5kg/ha over the *nutrient baseline*. Discharges beyond this limit are classified as a non-complying activity. The *nutrient baseline* plus 5kg/ha approach sets out the maximum amount of resource use available in that zone.

91. The Council Officers are of the opinion that these limits will result in the freshwater objectives in the proposed Plan, and the freshwater objectives in the NPSFM being achieved.

Green and Light Blue zones

92. Those parts of the Canterbury Region which are zoned Green currently achieve the freshwater outcomes identified in the pLWRP. Those zones are not identified as being at risk. The Light Blue zones have not been classified, but comprise coastal land where the Council has not identified any freshwater quality issues associated with diffuse nutrient discharges. Further, there is limited scope for land-use intensification within this zone.
93. The rules package for both of these zones permits land use and associated discharges, but contain thresholds beyond which Farm Environment Plans are required through a consent regime. The Council Officers are of the opinion that permitting activities in accordance with these rules will not result in the freshwater outcomes set out in Table 1, nor the freshwater limits set out in Schedule 8 being exceeded.

Lake Zones

94. The rules package for the Lake Zones require all persons carrying on activities which result in the discharge of nutrients to apply for and obtain a resource consent for their FEP. Further, discharges beyond the current nutrient baseline are a prohibited activity and consent cannot be sought.

Limit setting required by the NPSFM and Part 2 of the Act

95. It is submitted that this approach to limit setting gives effect to the NPSFM in a way that achieves the purpose of the Act. It is submitted that Part 2 of the Act can be used by the Hearing Panel as an aid to interpreting the NPS, and determining how the Council should best to give effect to it.

96. NPS' are subordinate legislation in the context of the Act. When considering competing considerations, in this case, how to give effect to the NPSFM, it is submitted that the overall balancing of competing considerations required by Part 2 supports the approach to limit setting set out above. That is because the alternatives, which involve setting arbitrary limits not supported by scientific evidence, have the potential to unduly restrict persons from providing for their social and economic wellbeing. This may not amount to sustainable management of resources.
97. Given the infancy of the NPSFM, there is little judicial consideration of how limits should be set in a regional plan. There is, however, useful commentary in *Carter Holt Harvey v Waikato Regional Council* (Variation 6 to the Waikato Regional Plan) that touches on the balancing exercise required when considering competing considerations. The following passage is insightful:⁶⁰

*[73] We do not agree with either of these contentions. First, a reading of the objective in Variation 6 reveals that the matters contained in it are broader than the focus of the Policy Statement. **Such matters as: the community need to meet the existing and future needs of domestic and municipal supply; the recognition of the contribution to social and economic wellbeing of existing takes; and the need to protect electricity generation are all matters outside the ambit of the Policy Statement, which focuses on allocation in the context of protecting water quality. The matters outside the focus of the Policy Statement are also relevant resource matters which need to be considered when determining the sustainable use of the resource. The proposed Policy 2AB is a practical way of recognising that the objectives and policies of the Variation extend beyond the scope of the National Policy Statement.***

(my emphasis)

98. Helpful guidance can also be found in decisions which consider how other NPS' are to be given effect to.

⁶⁰ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380 at [73].

99. The case of *Day v Manawatu-Wanganui Regional Council* provides some guidance that giving effect to a National Policy Statement (in this case the NPS for Renewable Electricity Generation 2011 "NPSREG") may be weighed against other factors, including giving effect to the provisions in Part 2 of the RMA. The Court considered whether Policy 7.7 in the proposed One Plan ("POP") conflicted with the NPSREG. The Court found that the POP, when viewed as a whole, gave effect to the NPSREG. The matters under the NPSREG were given the appropriate weight, but these also had to be weighed against other competing factors, such as the provisions in section 6(b) regarding the protection of outstanding natural features and landscapes from inappropriate use and development.
100. The NPSREG was also considered by the Court in *Carter Holt Harvey v Waikato Regional Council*. In that case, the Court effectively balanced the statutory directions contained in the NPSREG with the purpose of the RMA. Thus the allocation of nearly all the water in part of the Waikato River for electricity generation, would not give effect to section 5 of the Act, notwithstanding the NPSREG.⁶¹

[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.

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

[215] We acknowledge the importance of electricity to New Zealand. We acknowledge the strong statutory directions that

⁶¹ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380.

*emphasise the importance of renewable energy and effects of climate change. We also acknowledge the strong directions contained in the relevant statutory instruments, particularly the National Policy Statement on Renewable Energy. **However, to effectively lockup the entire variable flow above 3.6% of Qs in the Waikato River between the Taupo control gates and Lake Karapiro for electricity generation, would not give effect to Section 5 of the Act. The 3.6% is close to being fully allocated. Once it is allocated, no water would be effectively available for any consumptive use. We are satisfied, after a careful consideration of the evidence, and a balancing of the relevant statutory directions, that this would not be an efficient use of the resource.***

(my emphasis)

101. It is clear from these cases that decision-makers, when deciding on how to give effect to various NPS', must weigh competing considerations and come to a conclusion that gives effect to the purpose of the RMA. In the present context, it is submitted that the approach to limit setting set out above is appropriate, and amounts to a sustainable use of resources given:
- a. The current level of scientific understanding around limit setting;
 - b. The need to provide for the social and economic wellbeing of the community, including existing resource users;
 - c. The need to manage the communities expectations around water quality;
 - d. The competing considerations regarding the efficient use of resources across the region; and
 - e. The overall purpose of the Act.

Consent Duration

102. Questions have been raised as to the degree to which the proposed Plan can prescribe versus give guidance in relation to consent duration in given situations. There is a concern that it may fetter the

Council's discretion when making a decision on the duration of a resource consent.

103. As set out in the Section 42A Report Volume 1 for the Group 1 Hearing,⁶² the Environment Court cases on Variations 5 and 6⁶³ to the Waikato Regional Plan provide examples of where policies dealing with consent duration have been upheld.
104. In the Variation 6 decision, the Court (in the context of policies dealing with non-complying activities) examined the definition of 'policy' and relied on the Court of Appeal decision of *Auckland Regional Council v North Shore City Council* where the Court of Appeal found that a policy was a 'course of action', and as such may be either flexible or inflexible, broad or narrow.⁶⁴ The Court of Appeal rejected the contention that a policy cannot include something highly specific.
105. The Environment Court in the Variation 6 decision, found that the strength of Policies 9A and 9B in that case was such that the starting presumption is appropriately against the grant of non-complying activities, but each case must be assessed on its individual merits based on the evidence presented to the decision-maker at the time. It was held that Policies 9A and 9B both guide decision-makers considering non-complying activities. This was based on the premise that under section 104(1)(b)(vi) of the Act, decision-makers need only "have regard to" the provisions contained in regional plans. They do not have to "recognise and provide for," "have particular regard to" or "give effect" to the policy. It is quite open for the decision-maker to

⁶² Section 42A Report Volume 1, Group 1 Hearing at 39.

⁶³ *Carter Holt Harvey Limited v Waikato Regional Council* EnvC Auckland A123/2008, 6 November 2008; *Carter Holt Harvey Limited v Waikato Regional Council* [2011] NZEnvC 163 (Variation 5); *Carter Holt Harvey Limited v Waikato Regional Council* [2011] NZEnvC 380 (Variation 6).

⁶⁴ *Carter Holt Harvey Limited v Waikato Regional Council* [2011] NZEnvC 380 at [335] citing *Auckland Regional Council v North Shore City Council* (1995) 1B ELRNZ 426 at 433; [1995] 3 NZLR 18; [1995] NZRMA 424.

afford less weight to some policies than others when evaluating an application.⁶⁵

106. On that basis, whilst a policy in a plan can be highly specific and directive, ultimately when considering the duration of a resource consent, a decision-maker is still afforded the discretion under section 104(1)(b)(vi) as to what weight to place on a particular policy. Therefore, in the context of a policy dealing with consent duration, a highly prescriptive policy will not fetter the exercise of the discretion of a decision-maker. It is a matter to "have regard to" when evaluating an application.
107. Finally, Policy 4.75 in the Officer's final recommendations seeks that particular resource consents will 'generally be subject to a 5 year duration.' In the *Variation 6* decision, the Court referred to the definition in of 'generally' in the Concise Oxford Dictionary as follows:⁶⁶
1. *Usually; in most cases*
 2. *In a general sense; without regard to particulars of exceptions...;*
 3. *For the most part extensively...;*
 4. *In most respects... .*

108. The Court stated that:⁶⁷

...it is commonly understood that the word provides guidance to decision-makers that the policy should not be blindly applied in a blanket fashion to all consent applications.

109. In my submission, it is clear, therefore, that Policy 4.75 does not fetter the exercise of discretion of a decision-maker.

⁶⁵ *Carter Holt Harvey Limited v Waikato Regional Council (Variation No. 6 to the proposed Waikato Regional Plan)* [2011] NZEnvC 380 at [339].

⁶⁶ *Carter Holt Harvey Limited v Waikato Regional Council (Variation No. 6 to the proposed Waikato Regional Plan)* [2011] NZEnvC 380 at [337].

⁶⁷ *Carter Holt Harvey Limited v Waikato Regional Council (Variation No. 6 to the proposed Waikato Regional Plan)* [2011] NZEnvC 380 at [337].

'Life' of the plan in relation to objectives

110. The Christchurch City Council has raised concerns about the aspirational nature of some of the objectives in the proposed Plan. Counsel for Christchurch City Council has submitted that an objective is not the most appropriate way to achieve the purpose of the Act if the objective cannot be achieved in the life of the regional plan.
111. The first question that arises from this is, what is the 'life' of a regional plan?
112. It is submitted that a plan is a living document and has no defined life.
113. Prior to the 2009 amendments to the RMA, a Regional Council was required to commence a full review of its regional plan, every ten years after the plan became operative. On that basis one could have considered the life of a plan to be ten years. However, that in itself is an artificial 'life' as the life of a plan did not terminate after ten years. Even though a plan was reviewed, it still continued to be operative until a new replacement plan had been through the notification, submission, hearing and appeal process and was made operative. Therefore the life of a plan could have been 15 or even 20 years.
114. The 2009 amendments to the review provisions in the RMA brought in the concept of a rolling review whereby individual provisions of the plan are required to be reviewed every ten years rather than the entire plan⁶⁸. This is to reflect the living nature of plans whereby they are often subject to changes. As with the previous position, provisions in a plan may remain operative for much longer than ten years due to the First Schedule process that needs to be followed. It may be that following the review, the particular provision is still the most appropriate, in order to achieve the purpose of the Act and therefore it may remain.
115. On that basis it is impossible to promulgate an objective on the basis of what can be achieved in the life of the regional plan, as no one can say what the life of that regional plan will be.

⁶⁸ Section 79 of the Act.

116. When promulgating an objective, one's focus should not be on an artificial life of a plan, but on what needs to be achieved through the resolution of a particular issue that must be resolved to promote the purpose of the RMA. The focus is thus on what is required to achieve the sustainable management of natural and physical resources. What is required may need to be achieved in a particular timeframe, but it may not.

Scope

117. The basis upon which decisions on the scope of submissions should be made was set out at section 1.4.12 of Volume 1 of the Section 42A report for the Group 1 Hearing. It is not intended to repeat this here, but rather identify for the Hearing Panel the boundaries of what is "within scope".
118. In order to establish whether there is jurisdiction to make an amendment to the proposed Plan, the Hearing Panel must ask itself:⁶⁹
- a. Has a submitter raised a relevant 'resource management issue' in its submission? This may be in a specific or a general way.
 - b. Is the change contemplated by the Hearing Panel fairly and reasonably within the general scope of:
 - i. An original submission; or
 - ii. The proposed Plan as notified; or
 - iii. Somewhere in between.
 - c. Was the summary of the relevant submissions fair and accurate and not misleading?
119. Whether an amendment goes beyond what is reasonably and fairly raised in submissions will usually be a question of degree to be judged

⁶⁹ Re Vivid Holdings Ltd (1999) 5 ELRNZ 264 at [19].

by the terms of the plan and the content of submissions.⁷⁰ This should be approached in a realistic workable fashion rather than from the perspective of legal nicety, and requires that the whole relief package detailed in submissions be considered.⁷¹

120. An amendment can be anywhere on the line between the proposed plan and the submission.⁷² Consequential changes can flow downwards from whatever point on the first line is chosen.⁷³ The Council Officers have been presented with a wide range of submissions in relation to some of the issues addressed in the pLWRP. Those submissions seek a wide range of relief. The Council Officers have considered the submissions as a whole, and have often come to a conclusion which sits somewhere in between the Plan as notified, and the original submissions.
121. Justice Wylie in *General Distributors Ltd v Waipa District Council* stated:⁷⁴

[63] In my view Councils should be cautious in making amendments to plan changes which have not been sought by any submitter, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change. I doubt that that conclusion should be too readily reached...

⁷⁰ *Oyster Bay Developments Limited v Marlborough District Council* EnvC Blenheim C081/2009, 22 September 2009 at [22] citing *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [58].

⁷¹ *Oyster Bay Developments Limited v Marlborough District Council* EnvC Blenheim C081/2009, 22 September 2009 at [22] citing *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [59]-[60].

⁷² *Campbell v Christchurch City Council* [2002] NZRMA 352 at [20].

⁷³ *Campbell v Christchurch City Council* [2002] NZRMA 352 at [20].

⁷⁴ *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [63]-[64].

[64] *It is ultimately a question of degree, and perhaps even of impression, but in my view the Environment Court erred when it found that the explanation contained in the consent documentation was sufficiently connected to the plan change and the submissions to warrant its approval. There is nothing in either the change or the submissions to establish that connection. Moreover, I cannot see that the reworded explanation is an "iterative extension" of matters discussed at the council hearing as suggested by the Environment Court. Even if it were, I do not consider that this permitted the amendments approved by the Environment Court. Notwithstanding an obiter passage in Countdown Properties at pp 172-173, p 167 which might suggest to the contrary, in my view what is discussed at the council hearing is irrelevant when considering whether or not there is jurisdiction to approve an amendment to a plan change. Rather it is the terms of the proposed change and the content of submissions filed which delimit the Environment Court's jurisdiction...*

122. The Environment Court in *Oyster Bay Developments Ltd v Marlborough District Council* applied the law as Justice Wylie declared it to be in *General Distributors* and recognised that alterations to a plan change that would not broaden the plan change beyond the limits of what was originally requested, nor extend it beyond what is reasonably and fairly to be understood from the content of submissions; or prejudice anyone who failed to lodge a submission on the original request are within jurisdiction.⁷⁵
123. In that decision, the Environment Court allowed amendments to the plan change that were required for clarity and refinement of detail. These alterations were considered to be minor and unprejudicial.
124. The Council Officers have approached the issue of scope on this basis. They have also noted the submission(s) which give scope for changes which they now recommend be made to the pLWRP.

⁷⁵ *Oyster Bay Developments Limited v Marlborough District Council* EnvC Blenheim C081/2009, 22 September 2009 at [36].

125. The Council Officers have also made a number of changes to clarify or correct minor errors. They have done so on the basis that such alterations are considered to be minor and unprejudicial. General scope for these changes has been found, in some instances, in submissions seeking clarification of the drafting of particular provisions⁷⁶. In other situations, the Council Officers have suggested that the Hearing Panel may recommend that the Council use its powers under Clause 16(2) of the First Schedule to the Act to make changes which are of minor effect, or which may correct any minor errors.

Legal Validity of Rules

126. The nutrient management rules in the plan contain a number of permitted activity rules in relation to farming activities.⁷⁷ For a permitted activity no resource consent is required if the activity complies with any standards, terms or conditions specified in the plan. In order for those rules to be legally valid, the standards, terms and conditions need to be stated with sufficient certainty such that compliance is able to be determined readily without reference to discretionary assessments.
127. In accordance with the legal tests laid down by the Courts over the years, it is submitted that a permitted activity rule must:
- a. Be comprehensible to a reasonably informed, but not necessarily expert, person;⁷⁸
 - b. Not reserve to a council the discretion to decide by subjective formulation whether a proposed activity is permitted or not;⁷⁹
and

⁷⁶ For example, the submission of Mr H Thorpe (submitter 59).

⁷⁷ For example, the rules that require Farm Environment Plans.

⁷⁸ *Re Application by Lower Hutt City Council* EnvC Wellington W046/2007, 31 May 2007 at [10].

- c. Be sufficiently certain to be capable of objective ascertainment.⁸⁰
128. It is acknowledged that the proposed permitted activity rules in the notified version of the pLWRP which relied on the auditing of Farm Environment Plans by independent auditors may not meet the tests for a valid permitted activity rule. In order to address this issue, the Council Officers have recommended that activities which require the preparation and auditing of Farm Environment Plans should be classified as restricted discretionary activities. By requiring consents for activities requiring Farm Environment Plans, the issues associated with certainty have now been addressed.

Transfers of Water Permits

129. Hydrotrader seeks that:
- a. Rules 5.107 and 5.108 should be deleted on the basis that they are ultra vires; or
 - b. If (a) is rejected, that Condition 5 of Rule 5.107 be deleted.
130. Hydrotrader's relief is based on the submission that:
- a. Section 77A of the RMA does not confer the power to assign an activity status on the transfer of a water take consent on the Council; and
 - b. Even if it does, the condition [Condition 5 of Rule 5.107] that triggers non-complying activity status is ultra vires section 77A.
131. The two questions addressed in these submissions are:
- a. Can the Council assign an activity status on the transfer of a water permit?
 - b. If so, can the Council impose a condition requiring a consent holder to surrender part of his / her consent?

⁷⁹ *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at [63].

⁸⁰ *Ibid*, [64].

132. Rules 5.107 and 5.108 of the pLWRP provide for the transfer of water permits:

5.107 The temporary or permanent transfer, in whole or in part, (other than to the new owner of the site to which the take and use of the water relates and where the location of the take and use of water does not change) of a water permit to take or use surface water or groundwater, is a restricted discretionary activity, provided the following conditions are met:

...

5. In a catchment where the surface water and/or groundwater allocation limits set out in Rule 5.96 or Sections 6-15 are exceeded any transferred water is surrendered in the following proportions:

- (a) 0% in the case of transferring surface water to an irrigation scheme or principal water supplier which includes a storage component;*
- (b) 25% in the case of transferring surface water from down-plains to up-plains;*
- (c) 25% in the case of transferring groundwater from up-plains to down-plains; and*
- (d) 50% in all other cases.*

5.108 The temporary or permanent transfer, in whole or in part, of a water permit to take or use surface water or groundwater that does not meet one or more of the conditions of Rule 5.107 is a non-complying activity.

Can the Council assign an activity status on the transfer of a water permit?

133. Section 136 of the RMA sets out the provisions relating to the transferability of water permits. Regional councils can facilitate the transfer of water take permits (or the interest in water take permits) from site to site. Section 136 sets out that a transfer of a water permit may be expressly provided for in a regional plan, if no such provision

is made in the regional plan, then permit transfers are to be considered by Council through the process set out in section 136(4) of the RMA. Relevantly, section 136(2) provides:

- (2) *A holder of a water permit granted other than for damming or diverting water may transfer the whole or any part of the holder's interest in the permit—*
- ...
- (b) *To another person on another site, or to another site, if both sites are in the same catchment (either upstream or downstream), aquifer, or geothermal field, and the transfer—*
- (i) *Is expressly allowed by a regional plan; or*
- (ii) *Has been approved by the consent authority that granted the permit on an application under subsection (4)*
- (3) *A transfer under any of subsections (1), (2)(a), and (2)(b)(i) shall have no effect until written notice of the transfer is received by the consent authority that granted the permit.*
- (4) *An application under subsection (2)(b)(ii)—*
- (a) *Shall be in the prescribed form and be lodged jointly by the holder of the water permit and the person to whom the interest in the water permit will transfer; and*
- (b) *Shall be considered in accordance with sections [39 to 42A,] 88 to 115, 120, and 121 as if—*
- (i) *The application for a transfer were an application for a resource consent; and*
- (ii) *The consent holder were an applicant for a resource consent,—*
- except that, and in addition to the matters set out in section 104, the consent authority shall have regard to the effects of the proposed transfer, including the effect of ceasing or changing the exercise of the permit under*

its current conditions, and the effects of allowing the transfer.

(5) *Where the transfer of the whole or part of the holder's interest in a water permit is notified under subsection (3), or approved under subsection (2)(b)(ii), [and is not for a limited period,] the original permit, or that part of the permit transferred, shall be deemed to be cancelled and the interest or part transferred shall be deemed to be a new permit—*

(a) *On the same conditions as the original permit (where subsection (3) applies); or*

(b) *On such conditions as the consent authority determines under subsection (4) (where that subsection applies).*

134. The scheme provided by section 136 suggests that a transfer under subsection (2)(b)(i) occurs only by way of a permitted activity rule in a regional plan providing for such a transfer, with the regional council taking a passive role in the transfer. In comparison, a transfer under subsection (2)(b)(ii) occurs only where an application to the regional council is granted, where the council has an active role in the transfer. It is possible that an application under subsection (2)(b)(ii) may be pursuant to further rules in a regional plan governing the application process.
135. The words "*expressly allowed*" in subsection (2)(b)(i) suggest that this is by way of permitted activity status in a regional plan, thus allowing (i.e. permitting) the transfer to occur. This interpretation is reinforced by the workability of the section. Therefore, at the very least, a permitted activity status can be assigned to the transfer of a water permit. This could indicate that further activity statuses are also available.
136. Subsection (3) provides that a transfer under subsection (2)(b)(i) has no effect until written notice is received by the consent authority. This provides that the consent authority does not have any discretion as to whether the transfer is granted; instead the consent authority has a mere administrative role in receiving notice of the transfer. Furthermore, a transfer under subsection (2)(b)(i) is deemed to be a new permit on the same conditions as the original permit (subsection (5)(a)). As such, the consent authority does not have the ability to

revise permit conditions where a transfer is pursuant to subsection (2)(b)(i).

137. If a plan does not *expressly allow* for the transfer of a water permit under subsection (2)(b)(i), an applicant may still apply to the consent authority for a transfer pursuant to subsection (2)(b)(ii). This situation could occur either where the plan does not contain a permitted activity transfer provision, or where the proposed transfer will not comply with the permitted activity conditions.
138. A consent authority has a more active role in relation to a transfer under subsection (2)(b)(ii). Subsection (2)(b)(ii) provides that the transfer has been approved by the consent authority on an application under subsection (4). Subsection (4) sets out that an application shall be considered as if it is an application for resource consent. In addition to the matters for consideration in section 104, the consent authority must have regard to the effects of the proposed transfer. A transfer application under subsection (2)(b)(ii) is not guaranteed to be granted.
139. Where a transfer under subsection (2)(b)(ii) is approved, a new water permit is deemed to be granted, and the former permit cancelled. However, a transfer under subsection (2)(b)(ii) may be on such conditions as determined by the consent authority. This gives the consent authority scope to review the conditions of the water permit.
140. If an activity status was not prescribed to a water permit transfer and a transfer application was made under section 136(4), Counsel for Hydrotrader submitted that the application would be for an innominate activity, assessed as a discretionary activity pursuant to section 87B of the Act. Section 87B expressly refers to an application for a resource consent "*for an activity*". Therefore, if the application was to be treated as an innominate activity pursuant to section 87B, then it is submitted that an application to transfer a water permit is an *activity* under the Act as the application is deemed to be an application for a resource consent in accordance with section 136(4)(b)(i).
141. There is nothing in section 136 which suggests that an application under subsection (2)(b)(ii) could not be pursuant to further rules in the plan (for example under restricted discretionary or discretionary activity rules).

142. Further, section 68(1) of the Act, states that a regional council may, for the purpose of carrying out its functions under the Act (other than those described in paragraphs (a) and (b) of section 30(1)), include rules in a regional plan. Section 30 of the Act lists the functions of regional councils for the purpose of giving effect to the Act in its region:

(h) *Any other functions specified in this Act.*

143. One of the Regional Council's functions under section 136 of the Act is the consideration of the transfer of water permits. As such, it is further submitted that the Council has the power to make a rule for the purpose of that function. In my submission, interpreting the Act in a way which enable a Council to make a rule for a particular purpose, but restraining the Council from classifying the activity controlled by the rule as a particular class of activity, would lead to an absurdity.

144. In a recent decision, the Environment Court expressly endorsed the use of permitted and restricted discretionary activity status to enable water permit transfers. In *Carter Holt Harvey v Waikato Regional Council*⁸¹, a variation to the relevant Regional Plan addressed water transfers where previously there were no rules in the plan expressly allowing a transfer. Variation 6 introduced a permitted activity rule for the transfer of water permits, subject to a number of conditions. The plan change also introduced a restricted discretionary and non-complying transfer rule. The Court stated:

[456] We are satisfied that in the interests of efficiency, it is appropriate to have rules enabling the transfer of water permits. We are also satisfied that the Council has struck an appropriate balance by enabling transfers, either by way of permitted or restricted discretionary activity status, but at the same time ensuring that any potential adverse effects on the Waikato River are avoided, remedied or mitigated.

145. The Environment Court confirmed the provisions of Variation 6 in February 2012 and the variation became operative on 10 April 2012.

⁸¹ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380

146. For all these reasons, it is submitted that the Council has the power to make rules which control the transfer of water permits, and to apply an activity status to those rules.

Can the Council impose a condition requiring a consent holder to surrender part of his / her consent?

147. If the Council can assign an activity status to the transfer of a water permit, Hydrotrader submits that Condition 5 of Rule 5.107 should be deleted as it is ultra vires.
148. Rule 5.107 is a restricted discretionary water transfer rule. Condition 5 requires a proportion of allocated water to be surrendered where a transfer occurs in a catchment that exceeds allocation limits.
149. A regional plan must give effect to the NPSFW (s 67(3)(a)). The NPSFW provides objectives and policies in relation to the management of freshwater quantity. The relevant objectives and policies are:

Objective B2

To avoid any further over-allocation of fresh water and phase out existing over-allocation.

Objective B3

To improve and maximise the efficient allocation and efficient use of water.

Policy B1

By every regional council making or changing regional plans to the extent needed to ensure the plans establish freshwater objectives and set environmental flows and/or levels for all bodies of fresh water in its region (except ponds and naturally ephemeral water bodies) to give effect to the objectives in this national policy statement, having regard to at least the following:

- (a) the reasonably foreseeable impacts of climate change*
- (b) the connection between water bodies.*

Policy B2

By every regional council making or changing regional plans to the extent needed to provide for the efficient allocation of fresh water to activities, within the limits set to give effect to Policy B1.

Policy B3

By every regional council making or changing regional plans to the extent needed to ensure the plans state criteria by which applications for approval of transfers of water take permits are to be decided, including to improve and maximise the efficient allocation of water.

Policy B4

By every regional council identifying methods in regional plans to encourage the efficient use of water.

Policy B5

By every regional council ensuring that no decision will likely result in future over-allocation – including managing fresh water so that the aggregate of all amounts of fresh water in a water body that are authorised to be taken, used, dammed or diverted – does not over-allocate the water in the water body.

Policy B6

By every regional council setting a defined timeframe and methods in regional plans by which over-allocation must be phased out, including by reviewing water permits and consents to help ensure the total amount of water allocated in the water body is reduced to the level set to give effect to Policy B1.

(my emphasis)

150. The above objectives and policies of the NPSFM make it clear that the over-allocation of water resources is something that the Council must address. Policy B3 demonstrates that transfer of water permits is one way by which a regional council can improve and maximise the efficient allocation of water. In line with the NPSFM, Condition 5 requires the surrender of allocated water only in over-allocated

catchments. Further, non-compliance with Condition 5 of Rule 5.107 will still allow for a transfer application, which may be granted, but as a non-complying activity. If a plan does not provide transfer provisions, section 136 only provides that an application for a transfer can be made, it does not provide that such application must be granted. Under section 136, the consent authority may grant the application, and this grant may be on different conditions to that of the original consent.

151. A regional plan must also give effect to a regional policy statement (section 67(3)(c)). The CRPS provides water quantity measures. Issue 7.1.4 and the explanation provide:

Issue 7.1.4 — The benefits of and demand to abstract and use fresh water for economic well-being and the costs and effects of meeting this demand and realising benefits.

...

Both the National Policy Statement and the Canterbury Water Management Strategy include specific reference to the transfer of water permits as a means to improve and maximise the efficient allocation of water.

Section 136 of the RMA provides for the transfer of water permits under certain circumstances and subject to certain requirements, including expressly allowing for it in a regional plan. Where a water resource is close to or fully allocated, transfer mechanisms can promote the efficient use of water resources, especially where potential demand may exceed availability of water for utilisation. In the case of fully allocated catchments, transfers will need to be considered in a comprehensive and integrated manner.

152. Issue 7.1.5 – Inefficient allocation and use of water explains "both the National Policy Statement on Freshwater Management and the Canterbury Water Management Strategy include specific reference to the transfer of water permits as a means to improve and maximise the efficient allocation of water."
153. Policy 7.3.4(2) provides:

Where the quantum of water allocated for abstraction from a water body is at or exceeds the maximum amount provided for in an environmental flow and water allocation regime:

- (a) avoid any additional allocation of water for abstraction or any other action which would result in further over-allocation; and*
- (b) set a timeframe for identifying and undertaking actions to effectively phase out over-allocation; and*
- (c) effectively addresses any adverse effects of over allocation in the interim.*

154. The principal reasons and explanation to Policy 7.3.4 clarify that "[f]or the purposes of Policy 7.3.4(2)(a), the renewal of water permits are not considered to be additional allocation which would result in further over-allocation". It is likely that a transfer of a water permit would also not be considered an additional allocation which would result in over-allocation; however, transfer provisions can be a way of improving efficient allocation.
155. Method (g) to Policy 7.3.8 provides that the Council will "[s]et the conditions and circumstances for the transfer of water permits to take or divert water within a water body and avoiding any transfers that would be inconsistent with Policy 7.3.4."
156. Method (3)(a) to Policy 7.3.13 provides:
- (3) Provide procedures and mechanisms to facilitate stewardship and self-management of water resources within the conditions set by a regional plan or resource consent, including:*
 - (a) localised transfer of water allocations between consent holders, subject to safeguards to prevent unintended consequences for the environment or other users;*
157. The CRPS makes it clear that in over-allocated catchments, the transfer of water permits will be an important mechanism in addressing efficient allocation. Therefore, it may be appropriate that transfer provisions aim to phase out over-allocation by requiring a partial surrender of water allocated by the original permit. While Condition 5 *requires* applicants to surrender a proportion of allocated

water, this just classifies the activity as restricted discretionary. An applicant could still seek consent for a non-complying activity without surrendering any portion of their allocation.

158. Part of Hydrotrader's argument is based on the submission that Condition 5 is ultra vires because the partial surrender of a consent is potentially invalid under section 108 and therefore not available under section 77A(1)(c).
159. Section 108 provides that a resource consent can be granted on any condition that the consent authority considers appropriate. However, this power is not unlimited and is subject to common law principles.
160. The *Newbury* tests provide that the power to impose conditions on a planning consent is not unlimited. To be valid at law, a condition must:⁸²
 - a. Be for a resource management purpose, not an ulterior one;
 - b. Fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and
 - c. Not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it.
161. Hydrotrader submits that Condition 5 is not for a resource management purpose rather that it is for an ulterior purpose. This submission seems to relate to the first limb of the *Newbury* tests. If the purpose behind requiring the partial surrender of the original consent is to address the over-allocation of water resources, in line with the NPSFM, CRPS and the overall purpose of sustainable management, it could be said that the rule is for a resource management purpose.
162. Hydrotrader submits that a consent condition review cannot be used to cancel a consent or restrict the consent in such a way that it becomes unpractical to exercise it. This is not directly applicable to the current situation, which relates to the transfer of a consent. Section 136(5)(b) makes it clear that the "new" consent can be on such conditions as the

⁸² *Newbury DC v Secretary of State for the Environment, Newbury DC v International Synthetic Rubber Co Ltd* [1981] AC 578; [1980] 1 All ER 731 (HL).

consent authority determines. However, section 128 allows the regional council to review water permits when a regional plan is made operative in order to enable levels / standards etc set by rules to be met. Without discussing this further, this could be another way in which the Council addresses over-allocation of water resources.

163. Hydrotrader submits that the surrender of 50% of the consent as required by Condition 5(d) would frustrate or negate the original grant of the consent. Hydrotrader cites *Ravensdown Growing Media Ltd v Southland Regional Council* EnvC C194/2000, 5 December 2000 as authority for the proposition that a condition that negates the grant cannot be validly imposed. In *Ravensdown*, an air discharge permit had a condition that there would be no emissions of wind borne peat beyond the boundary of the subject site. It is easy to see why imposing such a condition would frustrate the grant of the consent. In that case, a zero tolerance limit, while undertaking the consented activity, would be impossible to achieve.
164. The requirement to surrender a certain amount of allocated water only affects the status of the transfer; it does not affect the original grant of the consent. The original grant of consent does not include the right to transfer that water to any other use within a catchment. Section 136(5)(b) sets out that the transferred consent can be granted on any conditions that the consent authority thinks appropriate. Further, section 136(4) makes it clear that the consent authority must have regard to the effects of the proposed transfer; however, these matters are in addition to the matters in section 104.
165. It is submitted that requiring the surrender of part of the allocated water would not negate the grant of the original consent, as the applicant could still apply to transfer of the permit without surrendering any allocation (albeit as a non-complying activity). If an application to transfer a permit was declined, with or without the surrender of water, the original permit would still be in effect, with the original amount of allocated water available. As Condition 5 only affects the activity status of the transfer, it cannot be said that it frustrates the original consent. There may be certain situations where it is appropriate for permits in over-allocated catchments to be transferred without any surrender of water. However, the pLWRP suggests that this scenario will be the exception, rather than the norm, hence the non-complying

activity status. It is submitted that this approach gives effect to the NPSFM and the CRPS.

Water Users Groups

166. The LWRP enables Water Users Groups ("WUG") to determine allocation when flows are above a certain level. The Commissioners have asked whether this is an unlawful delegation of the Council's functions. At the outset, it is submitted that provided the persons taking water have been granted a water permit allocating the taking of water, or the sharing of water if they are part of a water users group, then there has been no delegation of the Council's functions in respect of allocating water.

167. The LWRP defines a WUG as follows:

means a group of users with existing authorisations to take water, voluntarily grouped together to collectively manage the water resource allocated to them, primarily during times of restriction.

168. The RMA sets out the functions duties and powers of regional councils, and provides for the delegations of these. Under section 30 of the RMA, the Council's functions include:

(e) *The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—*

(i) *The setting of any maximum or minimum levels or flows of water:*

(ii) *The control of the range, or rate of change, of levels or flows of water:*

(fa) *if appropriate, the establishment of rules in a regional plan to allocate any of the following:*

(i) *the taking or use of water (other than open coastal water):*

169. The Council may only delegate its functions pursuant to section 34 of the RMA. The Council may delegate its functions to (amongst others) "a committee of the local authority established in accordance with the

Local Government Act 2002". A WUG does not come within this definition.

170. If a WUG is allowed to distribute the allocation amounts as between themselves, beyond the allocations provided in the resource consents held by the members of the WUG, this would amount to an unlawful delegation of the Council's functions. However, if the distribution of the allocation as between members of the WUG was consistent with the conditions of any water permit granted by the Council, then it is submitted that no unlawful delegations has taken place.
171. It is submitted that, provided the original water permit granted by the Council contains a condition relating to a WUG, then no unlawful delegation occurs. Typically, such conditions allow the individual to subsequently form a WUG with other individuals, who also have a water permit, which includes a similar condition. Such a condition means that the Council is effectively allocating the subsequent redistribution of water at the time that the individual's consent is first granted. Thus, where an individual's consent contains a condition to form part of a WUG, the redistribution of water under a WUG is not an unlawful delegation of the Council's powers. Where an individual's consent does not contain a condition allowing the permit holder to join a WUG, it would be an unlawful delegation if the holder joined a WUG.
172. An example of such a condition is:⁸³

The taking of water in terms of this permit ... shall:

- (a) *Cease whenever the flow...falls below 5,000 litres per second.*
- (b) *Reduce pro rata to the flow available for allocation above the minimum flow as shown...whenever the flow...as estimated by the Canterbury Regional Council falls below 6,000 litres per second.*

PROVIDED THAT IF

⁸³ This is an example of the type of condition typically applied to water permits. This is condition 4 of consent CRC136643.

- (i) *The consent holder and the Canterbury Regional Council agree that the consent holder is part of a water sharing agreement (the Agreement) which restricts abstraction... in accordance with the minimum flow of condition (a); and*
- (ii) *The Canterbury Regional Council RMA Compliance and Enforcement Manager has given the consent holder notice in writing that the terms of the Agreement are acceptable to Council;*

THEN the taking of water in accordance with the Agreement shall be deemed to be in compliance with conditions (a) and (b).

173. This condition foresees the redistribution of water between a WUG, but in compliance with the permit conditions. The condition also retains the final discretion with the Council. Paragraph (ii) requires the Council's acceptance of the terms of the sharing agreement between a WUG.

174. A consent confirmed by Judge Jackson in the Environment Court contained a similar condition. In *Central South Island Fish and Game Council v Canterbury Regional Council* the condition provided that:⁸⁴

- (b) *The taking of water in terms of these permits shall be reduced to half the allocated volume whenever the flow in the Ohapi Creek at Brown Road (at or about map reference K38:812-619), as estimated by the Canterbury Regional Council, falls below:*
 - (i) *1000 l/s at any time between 1 October in any year and 31 January in the following year, and*
 - (ii) *1100 l/s at any time between 1 February and 30 September in any year.*

⁸⁴ *Central South Island Fish and Game Council v Canterbury Regional Council* EnvC Christchurch C153/99, 10 September 1999.

PROVIDED THAT whenever the Canterbury Regional Council, in consultation with a Water Users Group which represents all water users who are subject to this condition, has determined upon a water sharing regime ("the regime ") which maintains a flow in the Ohapi Creek at Brown Road (at or about map reference K38:812-619), as estimated by the Canterbury Regional Council, of at least:

- (i) 570 l/s at any time between 1 October in any year and 31 January in the following year, and*
- (ii) 730 l/s at any time between 1 February and 30 September in any year.*

then the taking of water by individual consent holders in accordance with that regime shall be deemed to be in compliance with condition 2(b).

175. In *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380, the Environment Court also approved Variation 6 to the Waikato Regional Plan which contained provisions relating to water sharing.⁸⁵ This demonstrates the use of WUGs in other Regional Plans.
176. For these reasons, it is submitted that the allocation of water between members of Water Users Groups, provided those are authorised by conditions of water permits granted by the Council, does not amount to an unlawful delegation of the Council's functions.

Prohibited Activities

177. A number of parties have made submissions regarding the use of prohibited activity status for certain activities. For example:
- a. The Christchurch City Council has submitted that prohibited activity status is not the most appropriate classification in relation to the wastewater overflows to rivers in Christchurch cities;

⁸⁵ For example, see Policy 21, Method 3.3.4.10 and Standard 3.3.4.27 of the Waikato Regional Plan.

- b. The RDR have submitted that there is a lack of discussion of whether prohibited activity status is the most appropriate of the options available and that it is necessary for the Commissioners to carry out a more detailed section 32 evaluation; and
 - c. The Aggregate Group have submitted that an alternative activity status (or exclusion from a prohibited classification) ought to apply for aggregate related activities.
178. The Court of Appeal in *Coromandel Watchdog of Hauraki Inc. v Chief Executive of the Ministry of Economic Development* considered the circumstances in which it is proper for a local authority to classify an activity as a "prohibited activity" when formulating its Plan in accordance with the RMA.⁸⁶ The Court of Appeal held that the Environment Court and the High Court had erred in finding that Thames Coromandel District Council should not make mining a prohibited activity over a substantial portion of the Coromandel Peninsula.
179. The test which had been used in the lower Courts was that "*unless it can definitively said that in no circumstances should mining ever be allowed on a given piece of land a prohibited status is an appropriate planning tool.*"⁸⁷ The Court of Appeal considered that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status was the most appropriate status in the following situations:-
- a. Where the Council takes a precautionary approach. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time

⁸⁶ *Coromandel Watchdog of Hauraki Inc. v Chief Executive of the Ministry of Economic Development* (2007) 13 ELRNZ 279.

⁸⁷ *Coromandel Watchdog of Hauraki Inc. v Chief Executive of the Ministry of Economic Development* (2007) 13 ELRNZ 279 at [4].

during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available. The Court gave an example of a plan in which mining was a prohibited activity, but prospecting was not. The objective of this was to ensure that the decision on whether, and on what terms, mining should be permitted would be made only when the information derived from prospecting about the extent of the mineral resource could be evaluated;

- b. Where the Council takes a purposively staged approach. If the local authority wishes to prevent development in one area until another has been developed, prohibited activity status may be appropriate for the undeveloped area. It may be contemplated that development will be permitted in the undeveloped area, if the pace of development in the other area is fast;
- c. Where the Council is ensuring comprehensive development. If the local authority wishes to ensure that new development should occur in a co-ordinated and interdependent manner, it may be appropriate to provide that any development which is premature or incompatible with the comprehensive development is a prohibited activity. In such a case, the particular type of development may become appropriate during the term of the plan, depending on the level and type of development in other areas;
- d. Where it is necessary to allow an expression of social or cultural outcomes or expectations (e.g. nuclear power generation);
- e. Where it is intended to restrict the allocation of resources, for example where a regional council wishes to restrict aquaculture to a designated area; and
- f. Where the Council wishes to establish priorities otherwise than on a "first in first served" basis, which is the basis on which resource consent applications are considered.

180. The reasoning of the Court of Appeal was cited as being simple and correct in *Robinson Bay v Waitakere City Council (No 8)*.⁸⁸
181. Prohibited activity status was also explored in *Thacker v Christchurch City Council* where the Environment Court recognised the certain situations detailed in the *Coromandel Watchdog* decision, but preferred to focus on the proposition that the appropriate test for an imposition of prohibited status is whether or not the allocation of that status is the most appropriate of the options available.⁸⁹ This decision, can only be reached after undertaking the planning process required under the RMA; in particular, the need for a comparative evaluation under Section 32.⁹⁰
182. Adding further strength to the use of prohibited activity status for resource allocation in over-allocated catchments, is the NPSFM. The NPSFM provides a clear direction in relation to avoiding further over-allocation in relation to both water quantity and water quality.
183. The pLWRP includes a number of prohibited activities. On each occasion, the Council Officers have considered and applied the legal test in relation to the use of that activity status, and consider it to be the most appropriate of the options available.

Incorporation of Documents by Reference

184. Rayonier New Zealand Limited seek to have a number of technical documents incorporated by reference into the pLWRP. It also seeks to have an "updating" clause added in relation to these documents such that if the document is revised or updated, the plan is automatically updated to refer to the revised/updated version of the document.

⁸⁸ *Robinson Bay v Waitakere City Council (No 8)* EnvC Auckland 1003/09, 22 January 2009.

⁸⁹ *Thacker v Christchurch City Council* EnvC Christchurch C026/09, 6 May 2009.

⁹⁰ *Thacker v Christchurch City Council* EnvC Christchurch C026/09, 6 May 2009 at [50].

185. Whilst parties may seek to have documents incorporated by reference if they sought such inclusion in their submission, it is submitted that the Plan cannot include a provision which automatically includes any amendments to, or replacement of, material incorporated by reference.

186. Clause 31 of the First Schedule to the Act states that:

An amendment to, or replacement of, material incorporated by reference in a plan or proposed plan has legal effect as part of the plan or proposed plan only if—

- (a) a variation that has merged in and become part of the proposed plan under Part 1 states that the amendment or replacement has that effect; or*
- (b) an approved change made to the plan under Part 1 states that the amendment or replacement has that effect.*

187. Therefore, any amendment to, or replacement of, material incorporated by reference, only has legal effect if it has been the subject to a variation or approved change to the Plan. The material cannot be automatically updated. In my submission, given the public participatory nature of the Act, it is important that parties be given an opportunity to comment on documents that have the potential to affect them. Parties would be precluded from having this opportunity if material incorporated by reference was able to automatically update.

DATED this 1st day of August 2013



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P A C Maw

Counsel for the Canterbury Regional Council