

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

AND

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

**REPORT AND RECOMMENDATIONS  
OF THE  
HEARING COMMISSIONERS  
ADOPTED BY COUNCIL AS ITS  
DECISION  
ON 5 DECEMBER 2013**

Hearing Commissioners:

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## ***1 Proposed Plan and Submissions***

- [1] On 11 August 2012 the Canterbury Regional Council (CRC), acting under section 65 of the Resource Management Act 1991 (the RMA) and clause 5 of Schedule 1 to that Act, publicly notified a proposed Land and Water Regional Plan (LWRP), and prescribed that the closing date of the period for lodging submissions on it would be 5 October 2012.
- [2] Acting under section 34A(1) of the RMA, the CRC appointed us, the undersigned, as hearing commissioners to hear and make recommendations to it of decisions on submissions on the LWRP; and delegated to us all the functions and powers set out in section 34A.
- [3] The CRC received 354 submissions on the LWRP, many of them requesting numerous alterations to it. In accordance with clause 7 of that schedule, on 31 October 2012 the CRC gave public notice of those submissions, from which it received 75 further submissions.
- [4] We, the hearing commissioners, have conducted public hearings of the reports made under section 42A of the Act, and of the evidence and submissions of the submitters who wished to be heard. Those hearings were conducted on 37 hearing days between 25 February and 13 August 2013, and were held at Lincoln, and on one day at Rapaki Marae.
- [5] We also viewed the Rakaia Gorge, the Coleridge and Highbank Power Stations, the Rangitata Diversion Race, and water storage ponds under construction at Arundel.
- [6] Most of the submissions identified improvements to the LWRP, and gave reasons for them. We are grateful for the numerous constructive suggestions by submitters and their expert and other witnesses. We are also grateful for the successive detailed reports by CRC officers. Even where we do not adopt suggested amendments, we acknowledge that the suggestions and related evidence have substantially assisted us in coming to our recommendations.
- [7] Having considered and deliberated on the proposed plan, the submissions lodged, reports, evidence and submissions, we have prepared this report containing our recommendations that the LWRP be amended as set out in Appendix 1. Our reasons for recommending those amendments, and other relevant matters we have considered, are contained in this report. The proposed plan showing the recommended amendments marked is Appendix 2. Necessary consequential alterations are incorporated in that Appendix. A list of reports that we have considered is in Appendix 3.

## 2 General Legal Context

[8] In this section of our report, we summarise the general legal context within which the CRC is to give its decisions on the LWRP provisions and matters raised in the submissions, and accepting or rejecting the amendments requested. In Section 4 of the report we address specific legal points raised in issue by submitters.

### 2.1 Purpose and principles of the RMA

[9] Part 2 of the RMA sets out the purpose and principles of general application in giving effect to the Act. That part is described as the ‘engine-room’ of the RMA, and (except when specifically excluded or limited) is intended to infuse the approach to its interpretation and implementation throughout.<sup>1</sup> There is a deliberate openness about the language, its meaning and connotations, which is intended to allow the application of policy in a general and broad way.<sup>2</sup>

[10] The purpose of the RMA is identified in section 5(1): “to promote the sustainable management of natural and physical resources.” The meaning of ‘sustainable management’ is given in section 5(2):

“In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while—

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”

[11] The meaning of ‘natural and physical resources’ is given in section 2(1). It includes “land, water, soil, minerals, energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures”.

[12] It is our understanding of the case law that none of the elements of sustainable management necessarily has precedence over any other of them. Rather, the Act has a single purpose, and whether a particular provision serves that purpose calls for an overall broad judgement of potentially conflicting considerations, the scale or degree of them, in terms of their relative significance or proportion in promoting the sustainable management of natural and physical resources.<sup>3</sup> So the enabling elements are not

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<sup>1</sup> *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106 (HC) [47]; *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 632 (HC).

<sup>2</sup> *NZ Rail v Marlborough District Council* [1994] NZRMA 70, 86 (HC).

<sup>3</sup> *Green & McCahill Properties v Auckland Regional Council* [1997] NZRMA 519 (HC).

absolute, or necessarily predominant. They must be able to co-exist with the purposes in paragraphs (a) to (c).<sup>4</sup>

[13] Section 6 of the RMA identifies matters of national importance, and directs all persons exercising functions and powers under the Act to recognise and provide for them. Relevantly, the matters listed include —

- The preservation of the natural character of wetlands, lakes and rivers and their margins, and the protection of them from inappropriate use and development (section 6(a));
- The protection of outstanding natural features from inappropriate use and development (section 6(b));
- The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (section 6(c));
- The maintenance and enhancement of public access to and along lakes and rivers (section 6(d));
- The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga (section 6(e)).

[14] The application of these factors, identified as having national significance, is to serve the Act's purpose of promoting sustainable management. They are not to be achieved at all costs. Protection is not an absolute concept, and a reasonable, rather than strict, assessment is called for.<sup>5</sup>

[15] Section 7 directs that in achieving the purpose of the Act, all persons exercising functions and powers under it are to have particular regard to some eleven listed matters, nearly all of which are relevant to considering the LWRP and submissions on it.

[16] Section 8, the final section of Part 2 of the Act, directs persons exercising functions and powers under it, to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). That does not extend to principles that are not consistent with the scheme of the RMA; nor does it provide for allocating resources to Māori.<sup>6</sup> It does not impose a duty on functionaries to take into account past wrongs, or be open to ways to restore imbalance.<sup>7</sup>

## 2.2 Sections 13 to 15

[17] Section 13(1) of the RMA restricts activities in the bed of any lake or river unless expressly allowed by a regional rule or a resource consent. Section 14 regulates taking, use, damming, or diverting water unless expressly allowed by a national environmental

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<sup>4</sup> *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 [5-215](not questioned on appeal: *Horticulture NZ v Manawatu RC* [2013] NZHC 2492.)

<sup>5</sup> *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA), 260.

<sup>6</sup> *Minhinnick v Minister of Corrections* Env C A043/2004.

<sup>7</sup> *Waikanae Christian Camp v Kapiti Coast District Council* (HC Wellington 27/10/2004 Mackenzie J).

standard, a regional rule or a resource consent; or the water is required to be taken for an individual's reasonable domestic needs or the reasonable needs of an individual's animals for drinking water and the taking does not, or is not likely to, have an adverse effect on the environment; or the water is required to be taken for fire fighting.

[18] Section 15(1) regulates discharge of contaminants into the environment. Relevantly, it prohibits discharge of any contaminant or water into water; discharge of any contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water, unless the discharge is expressly allowed by a national environmental standard or regional rule or resource consent. Section 15(2A) prohibits discharge of a contaminant into the air, or into or onto land in a manner that contravenes a regional rule unless the discharge is expressly allowed by a national environmental standard or a resource consent, or is allowed by section 20A.

[19] Section 2(1) of the RMA prescribes that the meaning of the term 'contaminant':

...includes any substance (including gases, odorous compounds, liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy or heat—

- (a) When discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or
- (b) When discharged onto or into land or into air, changes or is likely to change the physical, chemical or biological condition of the land or air onto or into which it is discharged."

## 2.3 Functions of regional councils

[20] Section 30 of the RMA lists the functions of regional councils for the purpose of giving effect to the Act in their regions. The following of those functions are relevant to the LWRP—

- Establishing and implementing objectives, policies and methods to achieve integrated management of the natural and physical resources of the region (section 30(1)(a));
- Preparing objectives and policies in relation to any actual or potential effects of the use, development or protection of land which are of regional significance (section 30(1)(b));
- Control of the use of land for the purpose of soil conservation; maintenance and enhancement of the quality of water in water bodies; maintenance of the quantity of water in water bodies; maintenance and enhancement of ecosystems in water bodies; avoidance or mitigation of natural hazards; prevention or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances (section 30(1)(c));
- Investigation of land for identifying and monitoring contaminated land (section 30(1)(ca));

- Control of the taking, use, damming, and diversion of water, and control of the quantity, level and flow of water in any water body, including setting any maximum or minimum levels or flows of water and control of the range, or rate of change, of levels or flows of water (section 30(1)(e));
- Control of discharges of contaminants into or onto land, air or water and discharges of water into water (section 30(1)(f));
- If appropriate, establishment of rules in a regional plan to allocate the taking or use of water (Section 30(1)(fa)(i));
- In relation to any bed of any water body, the control of the planting of any plant in, on, or under that land for the purpose of soil conservation, maintenance and enhancement of the quality of water in that water body; maintenance of the quantity of water in that water body; and avoidance or mitigation of natural hazards (section 30(1)(g));
- Establishment, and implementation, of objectives, policies and methods for maintaining indigenous biological diversity (section 30(1)(ga)); and
- Strategic integration of infrastructure with land use through objectives, policies and methods (section 30(1)(gb)).

[21] Section 30(4) contains directions about allocation of natural resources in regional plans under section 30(1)(fa) or (fb). The directions restrict allocating amounts of resources that have already been allocated (section 30(4)(a) and (b)); regulate allocating a resource in anticipation of expiry of existing consents (section 30(4)(c) and (d)); authorise allocating a resource among competing types of activities (section 30(4)(e)); and limiting allocating water if the allocation does not affect activities authorised by section 14(3)(b) to (e).

## 2.4 Contents of regional plans

[22] Section 63(1) of the RMA states that the purpose of regional plans “is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act.”

[23] Section 65(1) authorises a regional council to prepare a regional plan for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g) or (ga); and section 65(3) directs that a plan is to be prepared in accordance with Schedule 1.

[24] Section 66(1) stipulates that a regional council is to prepare a regional plan in accordance with its functions under section 30, the provisions of Part 2, its duty under section 32, and any regulations. Section 66(2) stipulates that when preparing a regional plan, the regional council is to have regard to management plans and strategies prepared under other Acts to the extent to which their content has a bearing on resource management issues of the region (section 66(2)(c)(i)). Section 66(2A) stipulates that when preparing a regional plan, a regional council is to take into account any relevant planning document recognised by an iwi authority, if lodged with the council, to the extent that its content has a bearing on the resource management issues of the region.



- [25] On the CRC's duty to prepare a regional plan in accordance with its functions under any regulations, we identify as a relevant regulation the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011<sup>8</sup>, made under the RMA. However, regulation 4 expressly states that those regulations deal with territorial authority functions under section 31 of that Act, and do not deal with regional council functions under section 30 of that Act. So those regulations are not directly applicable to preparing and deciding submissions on the LWRP. We understand that their relevance to those functions is confined to regional councils being aware of the application of the regulations to territorial authorities within the region.
- [26] On the CRC's duty to have regard to management plans under other Acts, we have regard to the Sports Fish and Game Birds Management Plans for North Canterbury and for the Central South Island under the Conservation Act 1987.
- [27] On the CRC's duty to take into account planning documents recognised by an iwi authority, we have identified the following that are recognised by Ngāi Tahu iwi:
- a) Te Whakatau Kaupapa: Ngāi Tahu Resource Management Strategy for the Canterbury Region (1990). This document pre-dates the RMA Act 1991, and was the first iwi management plan to be produced in NZ.
  - b) Te Rūnanga o Ngāi Tahu Freshwater Policy (1999) which applies to the whole of the Te Rūnanga o Ngāi Tahu rohe, an area which extends beyond Canterbury. This policy document reflects an holistic framework that seeks continuous improvement in water quality and quantity standards. This document includes objectives, policies and strategies on water management.
  - c) Kāi Tahu ki Otago Natural Resource Management Plan (2005) applies in the southern part of the Canterbury region south of the Waitaki River, touching on Lakes Waitaki, Aviemore and Benmore, and follows the Ahuriri River on its south side to its source. A section of this plan relates to the Waitaki Catchment, and identifies issues and stated policies that advocate a ki uta ki tai philosophy of integrated management.
  - d) Te Poha o Tohu Raumati: Te Rūnanga o Kaikoura Environmental Management Plan (2009), applies to the Canterbury region in that area north of Hurunui River and inland to the main divide. This plan was referred to in the evidence of Te Marino Lenihen as being one of the formal documents that represent the Ngāi Tahu values in water and land.
  - e) Mahaanui Iwi Management Plan (published February 2013), applies to those Canterbury Papatipu Rūnanga located east of the main divide and in the land area between the Hakatere/Ashburton and Hurunui Rivers, including Christchurch City and the Banks Peninsula. This iwi plan covers the takiwa of 6 of the 10 Papatipu Rūnanga located in Canterbury. It provides comprehensive detail on the

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<sup>8</sup> SR2011/361.

cultural values of the constituent Papatipu Rūnanga and reflects many of the aspirational aspects of the CWMS.

- [28] The LWRP refers (pages 1-10 as notified) to “a number of iwi management plans” in Canterbury and their function to facilitate the exercise by Ngāi Tahu of their rangatiratanga and associated kaitiakitanga. While the above plans were mentioned<sup>9</sup> in brief during the Ngāi Tahu evidence, we requested and received copies of the Te Rūnanga o Ngāi Tahu Freshwater Policy (1999) and the Mahaanui Iwi Management Plan (2013).
- [29] These two plans are complementary in nature, and the more recent plan reflects an increased level of specificity in respect of resource management issues in the Canterbury region or parts of it.
- [30] The respective iwi plans enunciate Ngāi Tahu cultural values, the asserted right to participate in the management of natural resources and advocate for continuous improvement in the quantity and quality of natural resources. The cultural values framework of the iwi management plans is closely replicated in section 1.3.1 of the LWRP.
- [31] The iwi management plans do not repeat the specificity required in the rules of a regional plan, rather they inform the integration of tangata whenua values and cultural objectives into the planning provisions of the LWRP.
- [32] Our task of assessing consistency of the LWRP with Ngāi Tahu cultural mores is assisted by the iwi resource management plans, a matter which we address further on in this report.
- [33] Section 67(1) of the RMA stipulates that a regional plan is to state the objectives for the region; the policies to implement the objectives; and the rules (if any) to implement the policies. Section 67(3) stipulates that a regional plan is to give effect to any national policy statement, and any regional policy statement. Section 67(4) stipulates that a regional plan is not to be inconsistent with a water conservation order, or any other regional plan for the region. Section 67(5) directs that if the council has allocated a natural resource under section 30(1)(fa) or (fb) and (4), the regional plan is to record how it has done so.
- [34] The requirement to give effect to those policy statements means that the plan has to give full compliance to them<sup>10</sup> and positively implement them.<sup>11</sup>

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<sup>9</sup> Including in the evidence of Te Marino Lenihen.

<sup>10</sup> *GUS Properties v Blenheim Borough SC*, Chch, M394/75, 24 May 1976.

<sup>11</sup> *Clevedon Cares v Manukau CC* [2010] NZEnvC 211 [50].

## 2.5 National policy statements

- [35] On the requirement that the regional plan give effect to any national policy statement, there are three national policy statements that have some bearing on the content of the LWRP:
- National Policy Statement on Electricity Transmission 2008<sup>12</sup>
  - National Policy Statement for Renewable Electricity Generation 2011<sup>13</sup>
  - National Policy Statement for Freshwater Management 2011.<sup>14</sup>
- [36] These national policy statements were invoked by some submitters. In considering the submissions and the recommendations that we make on them, we apply the requirement that the regional plan gives effect to those national policy statements.
- [37] The objective of the National Policy Statement on Electricity Transmission is to recognise the national significance of the electricity transmission network by facilitating the operation, maintenance, and upgrade of the existing network and the establishment of new transmission resources while managing the adverse environmental effects of the network and managing the adverse effects of other activities on the network. Policy 1 of the Statement directs decision-makers to recognise and provide for the benefits of sustainable, secure and efficient electricity transmission, including security of supply, efficient transfer of energy through reduction of transmission losses, facilitating new generation, and enhancing supply of electricity through removal of points of congestion. Other policies apply to managing the environmental effects of transmission. They include consideration of constraints imposed by technical and operational requirements, and of the extent to which adverse effects are avoided, remedied or mitigated by route, site and method selection; also planning and development of the transmission system reducing adverse effects in certain respects. Other important policies include avoiding reverse sensitivity effects on the network, and ensuring it is not compromised; and regional councils facilitating long-term planning for investment in transmission infrastructure and its integration with land uses.
- [38] The objective of the National Policy Statement on Renewable Energy Generation (NPSREG) is to recognise the national significance of renewable electricity generation, so that the proportion increases to meet or exceed the Government's target.
- [39] The relevant policies in the Statement include recognising benefits of renewable generation; acknowledging practical implications of meeting the target for it; acknowledging practical constraints; managing reverse sensitivity effects; incorporating provisions into regional plans; incorporating provisions for small and community distributed generation; providing for investigation and assessment of potential sites and sources. We summarise the policies that are more relevant to the LWRP.

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<sup>12</sup> *NZ Gazette*, 2008, p 1631,

<sup>13</sup> *NZ Gazette*, 2011, p 1180.

<sup>14</sup> *NZ Gazette*, 2011, p 1482.

- [40] Policy A identifies benefits to be recognised by decision-makers as maintaining or increasing generation capacity while avoiding, reducing or displacing greenhouse gas emissions; maintaining or increasing security of supply by diversifying type or location of generation; using renewable resources; the reversibility of adverse environmental effects of some generation technologies; and avoiding reliance on imported fuels for generation.
- [41] Policy B directs decision-makers to have particular regard to protection of assets, operational capacity, and continued availability of resources; cumulative effects of reductions in generation output; and need for significant development to meet or exceed the Government’s target.
- [42] Policy C directs decision-makers to have particular regard to the need to locate generation where the resource is available; to logistical or technical practicabilities of developing and operating generation; and to location of infrastructure (including among others the national grid) in relation to generation.
- [43] Policy E directs that regional plans are to provide for development, operation, maintenance and upgrading of renewable generation using solar, biomass, tidal wave and ocean current resources to the extent applicable to the region.
- [44] The National Policy Statement on Freshwater Management (NPSFM) contains separate objectives and policies in respect of water quality, water quantity, integrated management, tangata whenua roles and interests. There is also a separate policy on progressive implementation.
- [45] To give effect to the NPSFM, the LWRP has to:
- set freshwater quality limits for all freshwater bodies (Policy A1a);
  - establish methods to avoid over-allocation (Policy A1b);
  - in respect of water bodies that do not meet the freshwater objectives, specify targets and implement methods to assist improvement of water quality to meet the targets within a defined time (Policy A2);
  - set environmental flows for all freshwater bodies (Policy B1);
  - provide for efficient allocation of fresh water to activities within limits set to give effect to environmental flows (Policy B2);
  - set a defined timeframe and methods by which over-allocation has to be phased out (Policy B6).
- [46] The term “over-allocation” is given this meaning—
- 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.
  - c) This applies to both water quantity and quality.”
- [47] The CRC has to implement those policies within the timeframe set by Policy E1.

[48] The preamble states that setting enforceable quality and quantity limits is a key purpose and a fundamental step; and that the process for setting limits should be informed by the best available information and scientific and socio-economic knowledge.

## 2.6 Canterbury Regional Policy Statement 2013

[49] On the requirement that the LWRP give effect to any regional policy statement, we identify the Canterbury Regional Policy Statement 2013 (RPS), which was made operative on 15 January 2013. In considering the submissions and the recommendations that we make on them, we apply the requirement that the LWRP give effect to the RPS.

[50] To give effect to the RPS, the LWRP has (amongst other things) to:

- Establish and implement minimum water quality standards for surface water and groundwater (Policy 7.3.6(1));
- Where water quality is below the minimum water quality standard, avoid any additional allocation or abstraction, and any additional discharge of contaminants, that may further adversely affect the water quality (Policy 7.3.6(2));
- Control changes in land use to ensure water quality standards are maintained or imposed (Policy 7.3.7(2));
- Ensure the quantities of water allocated are no more than necessary for the proposed use (Policy 7.3.8(3));
- Recognise the importance of reliability in supply for irrigation (Policy 7.3.8(4));
- Where the effects on freshwater bodies, singularly or cumulatively, are unknown or uncertain, take a precautionary approach to allocation of water for abstraction, or intensification of land use or discharge of contaminants (Policy 7.3.12).

## 2.7 Water conservation orders

[51] In conforming with section 67(4) of the RMA, we identify water conservation orders in respect of the Ahuriri, Rakaia, and Rangitata Rivers and Te Waihora (Lake Ellesmere), with which the LWRP is not to be inconsistent.

## 2.8 Other regional plans

[52] Among other regional plans for the region to which the LWRP is not to be inconsistent, one that has relevance is the Waitaki Catchment Water Allocation Plan which applies to the part of the region in that catchment.

[53] There is also the Canterbury Natural Resources Regional Plan, though that is intended progressively to be replaced by the LWRP and by various sub-regional plans: the Opihi River, the Pareora Catchment Environmental Flow and Water Allocation, the Waimakariri River, and the Waipara Catchment Environmental Flow and Water Allocation Regional Plans. There is also the Hurunui and Waiau River Regional Plan,

though we understand that this plan is not yet operative, due to pending appeals to the High Court.

## 2.9 Other contents

- [54] Section 67(2) lists several other matters that may be stated in a regional plan. Relevantly, they include:
- The issues that the plan seeks to address (section 67(2)(a));
  - The methods, other than rules, for implementing the policies (section 67(2)(b));
  - The principal reasons for adopting the policies and methods (section 67(2)(c));
  - The environmental results expected from the policies and methods (section 67(2)(d));
  - The procedures for monitoring the efficiency and effectiveness of the policies and methods (section 67(2)(e));
  - The information to be included with an application for a resource consent (section 67(2)(g));
  - Any other information required for the purpose of the regional council's functions, powers, and duties under the Act (section 67(2)(h)).

## 2.10 Regional rules

- [55] Sections 68 to 70 of the RMA contain provisions about regional rules. By section 68(1), power to include rules in a regional plan is conferred on regional councils for carrying out functions under the Act (except those described in sections 30(1)(a) and (b)); and achieving the objectives and policies of the plan. Section 68(3) directs that in making a rule, a regional council is to have regard to the actual or potential effect on the environment of activities, including in particular any adverse effect. Section 68(5)(e) provides that a rule may require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.
- [56] Section 68(7) applies (among other cases) where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards or water quality. That subsection provides that the plan may state whether the rule is to affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and that holders of resource consents may comply with the terms of the rule in stages over specified periods. Section 68(11) authorises a rule to exempt contaminated land if it identifies how significant adverse effects are to be remedied or mitigated or reasonably likely to be avoided.
- [57] Section 69 applies to rules relating to water quality, including circumstances in which standards are inadequate and setting standards that are more stringent or specific. Section 69(3) also sets circumstances in which a regional council is not to set standards that may result in a reduction of the quality of water, unless it is consistent with the purpose of the Act.

- [58] Section 70(1) directs that before making a rule that allows as a permitted activity a discharge of contaminants into water or onto or into land in circumstances which may result in contaminant entering water, the regional council is to be satisfied that none of certain effects is likely to arise after reasonable mixing, including any conspicuous change in visual clarity, or the rendering of fresh water unsuitable for consumption by farm animals, or any significant adverse effects on aquatic life. Section 70(2) directs that before making a rule requiring adoption of the best practicable option to prevent or minimise adverse effect on the environment of any discharge of a contaminant, a regional council is to be satisfied that having regard to the nature of the discharge and the receiving environment, and other alternatives (including requiring observance of minimum quality standards), the rule requiring adoption of the best practicable option is the most efficient and effective means of preventing or minimising those adverse effects.
- [59] Section 2(1) of the RMA gives this meaning for the term ‘best practicable option’ in relation to a discharge of a contaminant:
- “... the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—
- (a) the nature of the discharge ... and the sensitivity of the receiving environment to adverse effects; and
  - (b) the financial implications, and the effects on the environment, of that option when compared with other options; and
  - (c) the current state of technical knowledge and the likelihood that the option can be successfully applied.”

## 2.11 Evaluation of plan contents

- [60] Section 32 of the RMA, relevantly, directs a local authority making a proposed plan to carry out an evaluation, both before it is publicly notified, and before making a decision on submissions. The evaluation is to examine the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and whether, having regard to their efficiency and effectiveness, the policies, rules and other methods are the most appropriate for achieving the objectives. For the purpose of those examinations, the evaluation is to take into account the benefits and costs of policies, rules or other methods; and also 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. The local authority is to publish a report summarising the evaluation and giving reasons.
- [61] We understand the case law on section 32 is that the most appropriate method does not need to be the superior method, but what on balance is the most appropriate when measured against the relevant objectives, appropriate meaning suitable; and that because objectives may interrelate and overlap, it is not necessary that each objective individually be the most appropriate way of achieving sustainable management of resources.<sup>15</sup>

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<sup>15</sup> *Rational Transport Soc v NZ Transport Agency* [2012] NZRMA 298 (HC).

[62] In compliance with section 32, the CRC carried out an evaluation of the LWRP before it was publicly notified, and duly published a report summarising it. A similar process is to be carried out before the CRC makes its decisions on the submissions.

## 2.12 Compliance with other statutes

Te Rūnanga o Ngāi Tahu

[63] The Te Rūnanga o Ngāi Tahu Act 1996 and the Ngāi Tahu Claims Settlement Act 1998 recognise that Ngāi Tahu Whanui are tangata whenua throughout Canterbury. That is particularly relevant in applying sections 6(e), 7(a) and 8 of the RMA; and also in giving effect to the RPS. Chapter 2 of the RPS identifies numerous issues of importance to Ngāi Tahu on the management of natural resources, and Chapter 4 describes processes for enhancing the relationship of Ngāi Tahu with the CRC.

[64] Due to those Acts, and the CRC's duties to take into account planning documents recognised by an iwi authority, and to give effect to the RPS, throughout this report we are influenced by that status of Ngāi Tahu, the importance of the LWRP in addressing issues identified in Chapter 2 of the RPS, and supporting the relationship described in Chapter 4 of it.

## 2.13 Improved water management in Canterbury

[65] By section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, in considering any proposed regional plan, the CRC (in that Act also called ECan) is to have regard to the vision and principles of the Canterbury Water Management Strategy (CWMS) in addition to the matters relevant under the RMA to its decisions made under clause 10 of Schedule 1 of that Act. By section 4(1) of the 2010 Act, the term 'vision and principles of the CWMS' means the text as reproduced in Part 1 of Schedule 1 of that Act, but does not include any amendments to that text. Section 4(2) of the 2010 Act states that the inclusion of the vision and principles of the CWMS in Part 1 of Schedule 1 does not accord to the CWMS or its vision or principles any status in law other than as provided in that Act.

[66] The text of the CWMS vision and principles reproduced in Part 1 of Schedule 1 of the 2010 Act includes a statement of the 'vision', of 'Fundamental principles', which include 'Primary principles' and 'Supporting principles'.

[67] The vision is:

"To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework."

[68] The primary principles include sustainable management, regional approach, and kaitiakitanga. The first requires that water be managed in accordance with sustainability



principles and be consistent with the RMA and the Local Government Act. The second primary principle provides that planning of natural water use is to be guided by first and second order priority considerations. Those in the first order are the environment, customary use, community supplies and stock water. Those in the second order are irrigation, renewable electricity generation, recreation, tourism, and amenity. The third primary principle is kaitiakitanga.

- [69] The supporting principles include natural character, indigenous biodiversity, access, quality drinking water, recreational and amenity opportunities, and community and commercial use.
- [70] In our consideration of the LWRP and the submissions on it, we therefore have regard to the vision and the principles reproduced in Part 1 of Schedule 1 of the 2010 Act accordingly.

## **2.14 Canterbury Earthquake Recovery**

- [71] Section 15 of the Canterbury Earthquake Recovery Act 2011 stipulates that a regional plan is not to be interpreted or applied in a way that is inconsistent with a Recovery Strategy under that Act. Section 23 of the 2011 Act also directs that a functionary exercising functions or powers under the RMA is not to make a decision or recommendation on an RMA document (including a proposed plan) that is inconsistent with any recovery plan gazetted under that Act.
- [72] No submitter asserted that any content of the LWRP is inconsistent with a recovery strategy or with a gazetted recovery plan under the 2011 Act, and we are not aware of any such inconsistency.

## **2.15 Process for submissions**

- [73] Part 1 of Schedule 1 of the RMA prescribes (among other things) the process for notifying a proposed plan and calling for submissions (clause 5); making submissions (clause 6); publicly notifying them and calling for further submissions (clauses 7 and 8); hearing submissions (clause 8B); and making of decisions on provisions and matters raised in submissions (clause 10). Clause 10(2) stipulates that the decision is to include the reasons for accepting or rejecting the submissions, and for that purpose may group them according to the provisions or matters to which they relate, and may include consequential alterations and other relevant matters. Clause 10(3) confirms that a local authority is not required to give a decision that addresses each submission individually.
- [74] By clause 16(2), a local authority is empowered to make amendments to alter information, where the alteration is of minor effect, and to correct minor errors.

### 3 Our Application of the Schedule 1 Process

- [75] The purpose of the submission process is for submitters to request alterations to the proposed plan; to state reasons for those alterations; to make representations and provide evidence to show that those alterations would be appropriate; or to show that alterations requested by another submitter would not be appropriate. In essence, this is intended to be a constructive process, designed to lead to improvements to the proposed plan. This submission process is not an appropriate opportunity for venting grievances about past actions, and we again acknowledge the many constructive proposals and supporting information we received from submitters.
- [76] Submissions on the LWRP were required to ‘give precise details’ of the alterations asked for.<sup>16</sup> A local authority is limited to considering submissions that are ‘on’ the LWRP. For a submission to be *on* the LWRP, it has to fall within the ambit of the content of the plan by addressing the content of the LWRP itself, that is, the alteration of the status quo that would be brought about by it.<sup>17</sup> Also, if there is a real risk than anyone directly, or potentially directly, affected by the amendments proposed in a submission would be denied an effective response to them, that would be a powerful consideration against finding that the submission is truly ‘on’ the proposed plan.<sup>18</sup> So the CRC’s authority to alter the LWRP is limited to making alterations that were reasonably and fairly raised by and within the ambit of the submissions,<sup>19</sup> approached in a realistic workable fashion,<sup>20</sup> and taking into account the whole relief package detailed in each submission.<sup>21</sup>
- [77] We have considered the submissions on the understanding that we should make no presumption in favour of the contents of the notified version of the LWRP;<sup>22</sup> nor place any onus on a submitter to show that any of the LWRP provisions are inappropriate. Rather, our duty is to consider the submissions and evidence to find what are the most appropriate and suitable provisions of the LWRP, in accordance with the law.
- [78] Explicit application in this report of all the numerous elements of the general legal framework we have identified in respect of each of the thousands of submission points on the LWRP would involve considerable repetition of content about similar points raised in many submissions. Such a method would be onerous and long-winded, and would not assist most readers to understand our reasons. So, as authorised by clause 10, in this report where practicable we group the provisions and matters to which submission points relate, and give reasons for accepting or rejecting the alterations requested. Where provisions in question form a suite of inter-related and overlapping

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<sup>16</sup> Resource Management (Forms, Fees, and Procedure) Regulations 2003, Forms 5 and 6.

<sup>17</sup> *Palmerston North City Council v Motor Mechanics* [2013] NZHC 1290, para [81].

<sup>18</sup> *Ibid*, para [83]; following *Clearwater Resort v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003, William Young J.

<sup>19</sup> *Countdown Properties v Dunedin City Council* [1994] NZRMA 145; 1B ELRNZ 150 (FC).

<sup>20</sup> *Royal Forest and Bird Protection Society v Southland Regional Council* [1997] NZRMA 408 (HC).

<sup>21</sup> *Shaw v Selwyn District Council* [2001] 2 NZLR 277; [2001] NZRMA 399 (HC).

<sup>22</sup> *Wellington Club v Carson* [1972] NZLR 698 (SC); applied to the RMA in *Leith v Auckland City Council* [1995] NZRMA 400.

provisions, we address any objectively ascertainable tests, and then deal with matters of assessment applicable to the suite of provisions as a whole. We consider the acceptability of detailed provisions in such a regime that are put in question by reference to the assessment we make of the regime as a whole.

- [79] In short we apply all the numerous elements and criteria of the general legal framework throughout, but do not in every case explicitly address each submission individually. Rather it is implicit that we have applied such of those elements and criteria as are applicable and relevant, both in this narrative part of our report, and in the detailed schedule of our recommendations in Appendix 1.

## ***4 Specific Legal Points Raised in Issue By Submitters***

### **4.1 Collaboration or Regulation?**

- [80] A question arose whether or not water quality and abstraction limits or standards and times for compliance should be included in the LWRP, or left to future agreed outcomes of collaborative processes involving affected stakeholders or industry-articulated good practice, and community-agreed timeframes, without ‘threat of regulation’.
- [81] Several submitters argued for negotiated agreements, claiming that rule-setting does not allow for a collaborative approach, or a feel of a community and affected industry stakeholders working together for a common good. Other submitters argued that regulation is necessary, at least as a backstop, because zone committees and stakeholders may tend to focus on short-term financial interests, rather than environmental outcomes sought by the broader public.
- [82] Underlying these differences there is a question of law: Is the CRC free to leave determination or setting of water quality and allocation limits and standards to collaborative processes of self-selected stakeholders (including industry collectives), or does the CRC have a duty itself to prescribe such limits or standards by a regional plan?
- [83] It is our understanding that the CRC has a duty at law itself to set such limits, standards, and times; and to do so by regional plan provisions made by the process prescribed in Schedule 1 of the RMA, to which the duties imposed by Part 2 on persons exercising functions and powers under the Act apply, and for achieving the purpose of the Act. We now explain how we reach that understanding.
- [84] Sections 13 to 15 of the RMA apply to activities for which water quality and allocation limits or standards may apply; and those sections contemplate that rules in a regional plan may apply to them.

- [85] The functions of regional councils listed in section 30(1) of the RMA include several that apply to water quality and allocation limits and standards.<sup>23</sup> To the extent that all of those functions of regional councils bear on limits or standards for water quality or abstraction, they are functions to be carried out by regional plan provisions. Section 66(2) directs that a regional council is to prepare a regional plan in accordance with its functions under section 30. In doing so, the regional plan has to give effect to any national policy statement and regional policy statement.
- [86] On water quality, Objective A2(c) of the National Policy Statement on Freshwater Management (NPSFM) is that the overall quality of fresh water is maintained or improved while (among other things) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated. Policies A1 and A2 require every regional council to set water quality limits and to establish methods to avoid over-allocation; and to specify targets and implement methods for improvement of water quality. Policy A3(b) is for regional councils to make rules for adopting the best practicable option for preventing or minimising discharge of contaminants.
- [87] On water quantity, Policy B1 of the NPSFM is that every regional council is to make a regional plan to set environment flows and/or levels for all bodies of fresh water (except ponds and naturally ephemeral water bodies) to give effect to the objectives in the statement. Policy B2 is that every regional council is to make a regional plan to provide for the efficient allocation of fresh water to activities, within the limits set to give effect to Policy B1.
- [88] On compliance times, Policy B6 is that every regional council is to set a defined timeframe and methods in regional plans by which over-allocation must be phased out; and Policy B7 is that every regional council is to amend regional plans to ensure the plans include a certain interim policy. Policy E1 is that every regional council is to implement a policy of the statement as promptly as is reasonable in the circumstances; and if it is impracticable for it to complete implementation of a policy fully by 31 December 2014, it may adopt a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2030.
- [89] In short, the NPSFM (to which a regional plan is required to give effect) expressly requires every regional council to make regional plan provisions setting water quality and allocation limits and standards, and compliance times.
- [90] The Canterbury RPS contains methods for implementing Policies 7.3.4, and 7.3.6 to 7.3.12, which include setting objectives, policies and methods in regional plans in relation to environmental flow regimes; establishing and implementing groundwater allocation

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<sup>23</sup> S 30(1)(c), (e), (f), (fa), (g) and (ga). The function of making regional rules for allocating the taking or use of water is subject to specific directions in section 30(4).

regimes; controlling the taking, use, damming and diversion of surface water or groundwater in accordance with environmental flow and water allocation regimes; setting water quality standards; controlling the discharge of contaminants into water or onto land where it may enter water to ensure achievement of water quality standards within a specific timeframe; establish water quality standards and, where appropriate, catchment contaminant load thresholds and controlling contaminants entering freshwater; providing for the adoption of management practices and techniques which manage the effects of land uses on fresh water; and managing activities which affect water quality, singularly or cumulatively; limit the amount of water allocated to any activity to what is reasonably demonstrated to be reasonable for the activity, and engage with water users to establish methodologies for doing so; allocating the taking or use of water to activities or areas; providing for harvesting and storage of water in environmental flow and water allocation regimes; recognising and providing for continuation of existing hydro-electricity and irrigation schemes and other existing water takes, uses, damming and diversions which involve substantial investment in infrastructure; and requiring efficiency improvements and reductions in adverse environmental effects.

- [91] In summary, the RPS (to which a regional plan is required to give effect) provides for setting in regional plans limits and standards for water quality and allocation.
- [92] The cumulative scope of the matters to be provided for in the LWRP to give effect to the national and regional policy statements is so extensive, that there is not opportunity for the CRC to leave setting of water quality and allocation limits and standards, and times for compliance, to collaborative processes of stakeholders (including industry collectives).
- [93] Of course before publicly notifying plan provisions setting water quality and allocation limits and standards a local authority is free to consult with the community (including local committees, and stakeholders in affected industries) to the extent that it judges right. However, it is our understanding of the law that although consultation or collaboration may be found by the CRC to be valuable, those processes cannot be determinative. The actual setting of those limits and standards and times for compliance are functions of the CRC itself. The CRC is obliged by law to implement them by rules (and perhaps other methods) in its regional plan. It is not free to renounce its duty to do so; nor is it free to commit itself to take any statutory action to produce any particular outcome (such as may be produced by collaboration), nor to allow its exercise of its duty to be dictated by zone committees or other persons or bodies representing stakeholders or participants in an industry affected. The only potentially relevant exception is the extent to which a local authority is allowed by section 34(1) to delegate to a committee of the local authority any of its functions, powers or duties under the Act.
- [94] Except to the extent duly delegated, the CRC has itself to comply with the duties imposed by Part 2 on all persons exercising functions and powers under the RMA; make the evaluation required by section 32; make its own judgements about what provisions would conform with the law and promote the sustainable management of natural and

physical resources; and follow the process prescribed by Schedule 1, including hearing and considering evidence adduced by submitters. That is why it is our understanding that submissions on the LWRP asking for the setting of such limits, standards and times not to be contained in a regional plan but left to agreed outcomes of collaborative processes without ‘threat of regulation’ cannot be accepted, as they would involve the CRC renouncing its duties at law.

- [95] On behalf of the Canterbury Primary Sector Policy Group, Dr L Hume argued that sub-regional sections of the proposed plan, developed by science-informed, catchment based, community process should not be able to be re-litigated in the LWRP process at the behest of parties who had been, or had had the opportunity to be, part of the original plan development process. We understood Dr Hume intended that a sub-regional section of the LWRP that has been developed in a collaborative community process, should be incorporated in the LWRP without the CRC making its own independent judgment that it would promote sustainable management, comply with the CRC’s duties under the Act, and without following the process prescribed in Schedule 1. If that is the intention, we do not accept that this would be consistent with the law. Whatever the value of a collaborative community process, it would not and could not replace the robustness and legitimacy of following the provisions of the RMA.

## 4.2 Recognising Specific Classes of Activity

- [96] Submitters involved in certain classes of activity sought that specific enterprises or infrastructure should be expressly recognised in the LWRP.
- [97] The following are examples: Māori cultural and customary activities and associated values; renewable electricity generation (particularly the Waitaki hydro system); use of fresh water for irrigation of crops and farm land; electricity transmission and distribution; state highways; airports; forestry; ports; fuel distribution; food production and processing; fish and game harvesting activities and associated values; extraction of minerals for production of aggregates; and recreation in certain conditions of rivers.
- [98] Recognition of and provision for some of those classes of activity is expressly mandated by or under the RMA.
- [99] A prominent example relates to Māori cultural and customary activities and associated values. By section 6(e), the relationship of Māori and their culture and traditions with certain resources is to be recognised and provided for as a matter of national importance; by section 7(a), particular regard is to be had to kaitiakitanga in relation to managing the use, development and protection of natural resources; and by section 66(2A)(a), regional councils have to deal with relevant planning documents recognised by an iwi authority.
- [100] Another example relates to renewable electricity generation. By section 7(j) of the RMA particular regard is to be had to the benefits to be derived from the use and development of renewable energy; by section 67(3)(a) a regional plan is to give effect to any national

policy statement; and Policy A of the NPSREG directs that decision-makers are to recognise and provide for the national significance of renewable electricity generation activities, including national, regional, and local benefits. In particular, Policy E2 of the NPSREG also directs that regional plans are to include provisions to provide for the development, operation etc of new and existing hydro-electricity generation activities to the extent applicable.

- [101] Another example applies to electricity transmission. Policy 6 of the National Policy Statement on Electricity Transmission 2008 (NPSET) directs that decision-makers are to recognise and provide for the national, regional and local benefits of sustainable, secure and efficient electricity transmission; and Policy 2 directs that they are to recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network.
- [102] In a different context, section 66(2)(c)(i) of the RMA directs that in preparing a regional plan, a regional council is to have regard to any management plans prepared under any other Act. That would include any relevant sports fish and game bird management plan prepared under the Conservation Act 1987. For example, the North Canterbury Sports Fish and Game Bird Management Plan includes a primary goal of protecting and enhancing the populations and habitats of fish and game; and the Central South Island Sports Fish and Game Bird Management Plan includes Objective 4 which is to promote through statutory processes protecting, maintaining and enhancing sports fish and game habitat.
- [103] In preparing the LWRP, the CRC has a duty to comply with the directions we have mentioned. Our recommendations respond to that duty, including recognising and providing for the relationship of Māori and their culture and traditions with certain resources, having particular regard to kaitiakitanga, and having regard to the Mahaanui Iwi Management Plan 2013 and the Ngāi Tahu Freshwater Policy; recognising and providing for the national significance of renewable electricity generation activities, and providing for the development, operation etc of new and existing hydro-electricity generation activities to the extent applicable; recognising and providing for the national, regional and local benefits of sustainable, secure and efficient electricity transmission and for the effective operation, maintenance, upgrading and development of the electricity transmission network; and protecting, maintaining and enhancing sports fish and game habitat.
- [104] Our recommendations include recognising and providing for those classes of activities in response to the CRC's duties by and under the Act. We do not make similar recommendations about other classes of activity (such as food production and processing) or infrastructure (such as for transportation of passengers and freight). It is not to be inferred that we regard them as less important. They are all important too. So are other classes of activity, including providing health, education, accident and emergency, and law and order services.

[105] Rather, we do not accept that including in the LWRP specific recognition of them would effectively assist the CRC to carry out its functions so as to achieve the purpose of the Act. The sole purpose of recommending express recognition of the Māori traditional relationships, of renewable electricity generation, of electricity transmission, and of sports fish and game habitat is so that the CRC's duties in those respects are complied with.

### **4.3 Should replacement water permits be controlled activities?**

[106] By their submissions, Genesis Energy, Rangitata Diversion Race Management, Meridian Energy, and Trustpower proposed that resource consents to replace expiring water permits for existing hydro-electricity generation and regionally significant infrastructure should be classified as controlled activities. Those requested amendments were opposed in further submissions by Fish and Game Councils and Ngā Rūnanga o Canterbury.

[107] In summary, the grounds presented for controlled activity status were:

- There is no express exclusion on water activities having controlled activity status, unlike section 68(2) which prohibits rules classifying certain coastal activities as permitted activities;
- The 35-year maximum consent term does not bar water permits being controlled activities;
- There being no right to consent renewal is not antithetical to water permits being controlled activities;
- Reconsenting of hydro dams is unlikely to be declined, and at time of reconsenting, all aspects of a hydro scheme would be considered together;
- Without all aspects having controlled activity status, the scheme as a whole would still be considered as a discretionary activity or non-complying activity, which would defeat the purpose of Rule 5.132;
- Even if a flow regime may be contentious, it should be assumed that some impact on the 'natural' flow regime will always be allowed, and the only questions would be the extent and mitigation which can be assessed in the context of controlled activity assessment;
- Classifying replacement permits for existing discharges associated with hydro generation other than as controlled activities would not appropriately recognise them as part of the existing environment and the national significance and benefit of its continued operation;
- Investment decisions rely on certainty, and it is important for ongoing development to have proportionate support which could potentially be undermined by lack of assurance underlying the re-consenting process;
- The CRC would retain control over volume and rate of water abstraction, measures to address adverse effects, and water quality;
- Controlled activity status for similar nationally significant resources is common;



- Controlled activity status would strike the right balance between public participation and other resource management values, and would be the most appropriate means of exercising the rule-making function having regard to the purpose of the RMA (citing *Westfield v Hamilton CC* [2004] NZRMA 556 HC.)

[108] We summarise the grounds of opposition:

- Although hydro generators have substantial capital investment in infrastructure which should be recognised and provided for, inefficient infrastructure which could be upgraded to ensure it is used more efficiently should not be protected indefinitely;
- ‘Re-consenting’ is not simply extending existing consents; the consent authority should be able to deal with an activity or use which has potentially significant adverse effects by a consent status that allows full discretion in decision-making;
- The RMA gives existing consented activities a degree of protection, and the proposed amendments would afford existing infrastructure additional protection above that, and elevate them above other values and environmental outcomes;
- Activities that have potential to have significant adverse effects on the environment should not be classified as controlled activities, because that would preclude a consent authority from making a full assessment of environmental effects and of potential improvements in efficient use of fresh water and in environmental performance by reference to the national policy statements on renewable energy generation and on freshwater management, the Canterbury RPS, the Vision and Principles of the CWMS, and objectives and policies of the LWRP, including those to address over-allocation;
- Classifying them as controlled activities would preclude the consent authority from considering whether continuation of existing activities is acceptable, and from declining consent where adverse environmental effects cannot be adequately avoided or mitigated by conditions.

[109] We need to resolve this issue raised by those submissions and further submissions to be able to make our recommendations to the CRC. Of the grounds presented for and against classifying the activities as controlled activities, some have to do with the merits of that classification, and others have to do with whether applying it would be consistent with the Act.

[110] We acknowledge that the basic physical infrastructure managed by the submitters (substantial dams and canals) is long established and has national and regional significance and value. We agree that in general it is unlikely that replacement consents for that infrastructure would not be granted, although conditions may be reviewed.

[111] The true issue relates to existing activities of using freshwater associated with the physical infrastructure: taking, using, damming, and diverting water; discharging water to water; and discharging contaminants to water. We also acknowledge that those activities

have been carried on lawfully over many decades, and replacement consents under the RMA may have been granted for them. Even so, the original schemes were authorised at times when all elements of sustainable management (as it is now understood) may not necessarily have been taken into account; and knowledge of effects and attitudes to them have developed and are likely to continue to develop. Consideration of applications for replacement consents has now to include the contents of the national policy statements on renewable energy generation and freshwater management; and the Canterbury RPS. That consideration has also to include the value of the existing consent-holder's investment.

- [112] In coming to our judgement on the main issue we have first to address Fish and Game's submission that classifying the activities as a controlled activity would afford them a status above what is attributed to them by the Act. That is a question of law, and we now address it as such.
- [113] We start by acknowledging that the Act does not expressly preclude classifying as controlled activities replacement of expiring water permits; and that section 68(9) is an instance where it expressly prohibits a particular classification of activities in certain circumstances. We also acknowledge that section 30(4)(d) enables rules that allocate all of a resource for an activity to the same type of activity.
- [114] Next we notice section 123, by paragraphs (a) and (b) of which certain classes of resource consent last for unlimited terms; and by paragraphs (c) and (d) others are granted for periods specified in the consents, but not exceeding 35 years. There was no dispute that applications for replacement consents for taking, using, damming, or diverting freshwater, or for discharging any contaminant or water into water, are among those to which section 123(d) applies. That stipulation has general application: replacement consents associated with operation of hydro generation (such as those operated by Genesis Energy, Meridian Energy and Trustpower) or regionally significant infrastructure (such as the Rangitata Diversion Race) are none of them exempt from it.
- [115] We understand the submitters' point that investment decisions rely on certainty, and that ongoing development could potentially be undermined by lack of assurance that replacement consents would be granted.
- [116] Even so, the effect of section 123 is that (unlike the classes of resource consent to which paragraphs (a) and (b) of that section apply) those the subject of these submissions can only be granted for fixed periods, not exceeding 35 years. On expiry of the term specified in each, application may be made for a further consent in place of the expiring one; and if granted, that replacement consent too can only be granted for a period that does not exceed 35 years. It is by those provisions that Parliament has addressed the balance between the benefit of certainty and the benefit of limiting certain classes of consent to specified periods. In respect of the classes of consent to which paragraphs (a) and (b) apply, it has accorded more certainty; and in respect of those to which paragraphs (c) and (d) apply (including those the subject of these submissions),

Parliament has chosen not to accord similar certainty. It has deliberately limited consents in those classes to specified and capped periods; and by section 104(2A) it has stipulated that in considering an application for a replacement consent, a consent authority is to have regard to the value of the investment of the existing consent holder.

- [117] The submitters propose that the replacement consents be classified as controlled activities. The attributes of controlled activities are provided by section 87A(2) of the RMA. Relevantly, by section 87A(2)(a) a consent authority is obliged to grant a resource consent for a controlled activity. (There are exceptions, but no submitter contended that they are relevant here.) Consistently, by section 104A(a) after considering an application for a resource consent for a controlled activity, a consent authority is obliged to grant the resource consent (unless it has insufficient information to determine whether or not the activity is a controlled activity).
- [118] So if the activities the subject of these submissions are made controlled activities, a consent authority's power would, as the further submitters contended, be restricted to amending terms and conditions of consent, and it would be obliged to grant a further consent for a specified period not exceeding 35 years.
- [119] Whether that was Parliament's intention is one of interpretation of the Act in accordance with the prescriptions in the Interpretation Act 1999: essentially purposive and dynamic (applying the purpose in changing circumstances).
- [120] In identifying the purpose of the section, we bear in mind that a consent authority has power under section 128 of the Act to review consent conditions in a range of circumstances, including (relevantly) when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality, etc. Although those powers are limited, they were amended as recently as 2009, so they can be taken as applying the purpose in changing circumstances.
- [121] The purpose of distinguishing classes of consent that are unlimited and those that can only be granted for specified periods does not appear to have been to allow the conditions to be revisited, because Parliament has already provided for that (to the extent that it has) by section 128. Nor is section 123 made without recognition of the value of the existing consent holder's investment, for that is addressed in section 104(2A).
- [122] Parliament having deliberately provided that consents of the classes the subject of these submissions do not have unlimited terms, but can only be granted for periods not exceeding 35 years, we infer that it must have intended that on expiry the question of a further term is to be open. Otherwise the distinction between the classes described in paragraphs (a) and (b), and those described in paragraphs (c) and (d) would be meaningless.

- [123] Counsel for Genesis Energy cited a High Court judgment (*Westfield v Hamilton CC*), but that does not influence our understanding of how this issue to be resolved. Although that case did include consideration of classifying a class of activity as a controlled activity, it did not relate to water or discharge permits, nor to replacement consents for them.
- [124] That submitter also submitted that controlled activity status for similar nationally significant resources is common. In response to our enquiry for details, counsel referred only to controlled activity status in the Waikato Regional Plan for re-consenting the Huntly Power Station. They acknowledged that the controlled activity status in that case had been agreed to by all parties and had not been the subject of argument or challenge in court.
- [125] With respect to all involved in that classification, as the point was not raised in issue, let alone argued, and as no reasoning following argument was given, the outcome there does not assist us to resolve the issue between the submitters on the LWRP.
- [126] Although in general it may be likely that a replacement consent would be granted (even if on altered conditions) for a further term, in increasing knowledge or changing climatic or economic circumstances it may not be responsible for a council to assume that a further consent would never be declined.
- [127] To conclude, although the Act does not expressly prohibit classifying replacement of expiring water permits as controlled activities, we have come to the understanding that to make the amendments proposed for controlled activity status would not be consistent with the scheme of the Act in respect of applications for replacement or water and discharge permits, even in association with hydroelectric generation and regionally significant infrastructure. So the merits arguments mentioned earlier for doing so do not prevail over that inconsistency. Therefore we do not recommend to the CRC the making of those amendments.

#### **4.4 Priority for allocation: First in, first served?**

- [128] By its submission, RDRML asked that the ‘first in, first served system of water allocation and the principle of non-derogation be enshrined within the LWRP’, and should apply to surface and groundwater abstractions; and asked for entrenching the ‘first in time’ and ‘last in, first out’ approaches to water allocation.
- [129] Counsel for that submitter remarked that section 30(4)(a) of the RMA does not authorise a rule to allocate, during the term of an existing resource consent, the amount of a resource that has already been allocated by the consent (subject to a section 128(1)(b) review) to sustain in-stream environmental values.
- [130] Another submitter, Meridian Energy, proposed that Policy 4.4 as notified should be deleted or amended to enable priorities for water allocation and use which have been determined at a catchment level in a zone collaboration process to be recognised in the

sub-regional sections of the LWRP, with their incorporation being tested through the rigour of a statutory RMA assessment. Applying that, Meridian Energy contended that, as hydro-electricity generation is afforded national significance by the NPSREG and national and regional significance by the RPS, that may be a higher priority in the Waitaki Catchment.

- [131] Counsel for Ngā Rūnanga observed that the issues in the Central Plains litigation had been whether the priority between competing applications to take water is to be determined by which was ready first for notification or first to file; and whether s91 had a bearing on priority by displacing a presumptive entitlement or prior right where further consents were required.
- [132] Counsel submitted that the principle should have much less importance when allocation regimes are devised in developing a regional plan. The theme of the RMA is to achieve the sustainable management of natural and physical resources. Matters of efficiency are relevant. Prior investment in infrastructure should not be entirely overlooked in setting allocation regimes, but when setting an allocation regime, it should be subject to the overarching goal of achieving integrated and sustainable management of the water resource, involving a wider enquiry than applying the first come, first served principle. Counsel also submitted that the formulation of a regional plan should be overlain by fairness for all existing and potential users, treating like with like.
- [133] Counsel for ANZCO Foods submitted that the Court of Appeal's judgment in the *Central Plains Water* case does not preclude a regional council in developing a regional plan from giving certain activities some advantages over other activities competing for the same resource, where considered appropriate.
- [134] It is our understanding that the 'first in, first served' practice for actions under the RMA (the subject of Court of Appeal judgments in the *Fleetwing Farms*<sup>24</sup> and *Central Plains Water*<sup>25</sup> cases) applies to priority of hearing applications for resource consents. That is a point of procedure, not affecting a substantive question of who has priority in abstracting water.
- [135] The amendment to the LWRP requested by RDRML would not have effect on the procedural point, nor would it need to, as the law on priority of hearings is established. Rather the amendment requested by this submitter would bear on priority of abstracting water from a source. The 'first in, first served' practice endorsed by those cases does not extend directly to priority to access a resource; those cases do not support provision in a regional plan that would accord priority to abstraction of water.
- [136] Although it does not use the 'first in, first served' language, the law on the substantive point of priority to abstract water is set out in the High Court judgment in the *Aoraki*

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<sup>24</sup> *Fleetwing Farms v Marlborough DC* [1997] 3 NZLR 257.

<sup>25</sup> *Central Plains Water Trust v Ngāi Tahu Properties* (2008) 14 ELRNZ 61; [2008] NZRMA 200.

*Water*<sup>26</sup> case, and in section 30(4) of the Act. Because the application of that is subject to section 68(7) of the Act, the amendment sought by RDRML does not adequately describe the limited extent of the right.

- [137] We accept the submissions of Ngā Rūnanga, of Meridian Energy, and of ANZCO Foods about the range of considerations that may be relevant in establishing an allocation regime. Although the value of existing infrastructure is among them, they extend well beyond a claim to priority based on being ‘first in’. As the Act authorises water permits only for specified and capped terms, being ‘first in’ cannot be the sole consideration for determining who may abstract beyond expiry of a current term.
- [138] Section 30(4), enacted following delivery of the judgment in the *Aoraki Water* case, stipulates that a rule to allocate a natural resource may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent (paragraph (a)); that nothing in paragraph (a) affects section 68(7); and that in allocating the resource in anticipation of the expiry of existing consents, a rule may allocate all the resource used for an activity to the same type of activity or allocate some for the same and the rest to any other type (paragraph (d)). Relevantly, section 68(7) applies to a regional rule relating to maximum or minimum levels or flows or rates of use of water. It enables a plan to state whether the rule affects exercise of existing resource consents for activities that contravene the rule; and that consent-holders may comply with the terms of the rule in stages or over specified periods.
- [139] We understand that the effect of the combination of those provisions limits any substantive priority a consent-holder may have to abstract water. The entitlement is potentially limited (1) by the term of the consent; and (2) short of that, may also be limited by a plan allocating that water or some of it to another type of activity; and (3) if exercise of a current consent would contravene maximum or minimum levels or flows or rates of use, unless compliant with staging or specified timing.
- [140] Consequently a consent-holder’s substantive ‘entitlement’ to abstract water (whether surface water or groundwater) is subject to expiry of the consent term; and is also subject to statutory actions that may further trammel the entitlement. As counsel for Ngā Rūnanga submitted, an existing water permit is subject to the overarching goal of achieving integrated and sustainable management of the water resource, extending beyond the benefits of an existing consent holder being ‘first in’.
- [141] Therefore the request in RDRML’s submission would go further than can be assured by law. Even if the LWRP is amended as requested, that would not preclude the CRC from exercising its powers in accordance with law.

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<sup>26</sup> *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268.

[142] The position of Meridian Energy is different, due to the application of the Waitaki Water Allocation Plan, and the significance afforded to hydro generation by the NPSREG, the RPS, by recommended Objective 3.3, and by recommended strategic Policy 4.5.

#### 4.5 Permitted activity conditional on approval

[143] Ngā Rūnanga ask for amendments by which certain permitted activities would be conditional on obtaining written approval from Ngāi Tahu. We enquired whether such a condition would be consistent with the permissive character of permitted activities. Counsel for Ngā Rūnanga responded that provision of documentary evidence of written approval in order to satisfy such a ‘condition’ would not involve a discretion on the part of the consent authority, citing *Bryant v Marlborough DC* [2008] NZRMA 485 HC [48]. Counsel argued it would simply enable a party to confirm it has met the requirements for the permitted activity; and this is more a matter of form than substance.

[144] The rule the subject of the relevant point in the *Bryant* case classified damming or diversion for flood control as a permitted activity in certain conditions. The condition in question required notification to the District Council, 10 working days ahead of the commencement of work. The High Court held that the rule in question did not reserve any discretion or any form of subjective judgment to the Council, and was not *ultra vires*.

[145] However, since the *Bryant* case, there has been a relevant amendment to the RMA. Previously section 77B(1) provided that if an activity is described in a plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan. But since the *Bryant* case, section 77B was repealed and replaced by section 87A with effect from 1 October 2009. In respect of permitted activities, subsection (1) generally repeats the wording of the former section 77B(1). But there is a relevant change. A resource consent is not required if the activity complies with the requirements, conditions, and *permissions*, if any, specified in the plan. The word ‘permission’ means the action of officially allowing someone to do something, consent, agreement, authorisation.

[146] There is nothing in section 87A to indicate that the use of the word ‘permissions’ in subsection (1) is limited to permission by the regional council. It is a change to the previous understanding of a permitted activity as not being subject to approval which could be withheld. Parliament has deliberately amended the description of permitted activity by inserting the word ‘permissions’.<sup>27</sup> So the effect of the 2009 amendment is to enable a local authority to make a permitted activity subject to having consent, agreement or authorisation of an identified person or body.

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<sup>27</sup> The commentary in the report of the Local Government and Environment Committee of the House of Representatives on the amendment Bill leading to that amendment does not specifically address that amendment.

- [147] The condition proposed by Ngā Rūnanga is not comparable with condition (a) the subject of the *Bryant* case, in that the permitted activity would be conditional on approval by Ngāi Tahu which they would have discretion to grant or refuse. The written document to be presented to the CRC would merely be evidence of their approval. However we understand that since the 2009 amendment, as a matter of law a requirement of approval by Ngāi Tahu would not be precluded as an acceptable condition of a permitted activity.

#### **4.6 Precedence of strategic policies over subregional sections**

- [148] The complexities inherent in the management of land and water resources of the region, the need to give effect to the NPSFM and the RPS, and to respond to the CWMS, have led to the LWRP having a tiered structure: region-wide provisions; and a framework for sub-regional planning by which integration of management of land and water use and development is to be addressed catchment by catchment. The region-wide provisions include objectives, policies and rules that are to apply throughout the region. Those policies include some that are identified as strategic policies, which apply generally to all activities and provide overall direction for integrated management of land and water in the region. Other policies are specific to particular activities and resources.
- [149] The LWRP also allows for each sub-regional section to contain additional policies and rules specific to the catchments to which it applies, to implement the region-wide objectives and strategic policies in the most appropriate way for those catchments. But those policies and rules are intended only to address issues of the sub-region that would not be adequately managed by the region-wide provisions, and still achieve the objectives. The sub-regional sections are not intended to be independent, but to be integral to the LWRP so that it remains a single, coherent and comprehensive instrument.
- [150] Many submitters raised points about the extent to which sub-regional policies and rules should replace region-wide policies and rules. Some asked that the region-wide provisions be the minimum from which sub-regional sections may deviate only to the extent that water quality and quantity are improved beyond that baseline level. Others asked that each sub-regional section should be able to depart from region-wide provisions to whatever extent is considered appropriate in the particular circumstances.
- [151] The original intention of region-wide limits was not to restrict the actual limits determined for a catchment. Rather, in determining outcomes and limits for a catchment, a local community is to consider analyses of social, biophysical, economic and cultural costs and benefits specific to it. Yet as a sub-regional section is to be integral to the LWRP as an RMA instrument, its contents have to be consistent with the region-wide objectives and strategic policies, and to demonstrably contribute to implementing them, to giving effect to applicable provisions of the NPSFM and the RPS, and to assisting the CRC to carry out its functions to achieve the sustainable management purpose of the Act.



[152] Therefore we recommend inserting a sentence at the start of Section 4 clarifying the precedence between policies in that section and in a sub-regional section on the same subject-matter.

#### **4.7 Prohibited Activity Status**

[153] There are a few instances of activities that are proposed to be classified as prohibited activities. Some of those classifications are questioned in submissions, asking that those activities be reclassified, usually as non-complying activities. A few submissions also contained requests for certain activities to be classified as prohibited activities.

##### **Activities proposed to be classified as prohibited**

[154] Relevantly, the LWRP would classify as prohibited activities:

- In red nutrient allocation zones and lake zones, use of land for a farming activity that does not comply with various rules regulating nitrogen losses where the calculated nitrogen loss would exceed the limit described as the nutrient baseline (recommended Rules 5.48 and 5.52);
- Discharge of sewage effluent etc., where it may enter a drinking water supply protection area (notified Rule 5.63);
- Use or disturbance of beds of certain parts of lakes and rivers by intensively farmed stock and associated discharge to water (recommended Rule 5.71);
- Discharge of untreated sewage where a contaminant may enter water except as a result of a spill, overflow or equipment failure (recommended Rule 5.88);
- Taking and use of surface water that is not a replacement of a lawfully established activity and that, in addition to all existing consented takes, does not comply with all environmental flow and allocation limits and rate of take and seasonal or annual volume limits (recommended Rule 5.125);
- Taking and use of groundwater that is not a replacement of a lawfully established activity and that, in addition to all existing consented surface water takes, does not result in exceedance of all environmental flow and allocation limits (recommended Rule 5.130);
- Damming of the main stems of certain rivers (notified Rules 6.5.1; 8.5.1; 14.5.3 and 15.5.2);
- Taking, diverting or use of surface water from certain rivers in contravention of minimum flows etc (recommended Rule 9.5.2);
- Taking and use of groundwater from certain sources that, in addition to existing consented takes, exceeds certain limits (notified Rules 9.5.5; 13.5.4 and 13.5.6).

##### **Submissions that question classifications as prohibited activities**

[155] A few submissions opposed classifying as a prohibited activity the taking of water from surface waters otherwise than in compliance with applicable limits and conditions; and asked for re-classification as a non-complying activity. A few also made similar requests

in respect of taking groundwater. One of those related specifically to taking from the Woolston/Heathcote Groundwater Zone 1, confining the requested amendment to new taking for excavation, construction and geotechnical testing. Another questioned prohibited status for discharges of sewage effluent etc., where it may enter a drinking water supply protection area, asking that it be a discretionary activity.

- [156] There were also submissions requesting that activities be reclassified as prohibited activities.
- [157] Some related to damming of the Clarence and Ashley Rivers. One asked that all damming of the Clarence River, and diversion of water from the main-stem of that river, are classified as prohibited activities; and also asked that all damming of the main stem of the Ashley River be prohibited. Another submitter also asked for an amendment to prohibit damming anywhere on the entire length of the main stem of the Ashley River.
- [158] Other requests for prohibited activity classification relate to new discharges of treated effluent to surface water or wetlands; to bores for hydrocarbon exploration and production (fracking); for plantation forests in areas of high naturalness; for gravel extraction and river maintenance in the vicinity of bird nesting colonies and in nesting periods between the end of August and the beginning of February; and for clearance or burning of indigenous vegetation in areas of high naturalness.
- [159] Another submitter contended that in the red nutrient allocation zone, all new or increased scale of activities should be a prohibited activity, citing section 70, the NPSFM, and Part 2 generally. This submitter also supported classification of additional abstraction from over-allocated catchments as a prohibited activity

### **Applicable law**

- [160] The meaning of a prohibited activity classification is given in section 87A(6) of the RMA:
- If an activity is described in this Act, regulations (including a national environmental standard) or a plan as a prohibited activity,—
- (a) No application for a resource consent may be made for the activity; and
- (b) The consent authority must not grant a consent for it.
- [161] Section 87A was enacted by the Resource Management (Simplifying and Streamlining) Amendment Act 2009, effective 1 October 2009.
- [162] Case law about the prohibited activity status pre-dated that. However the description inserted by the 2009 amendment is not relevantly different from the preceding description in section 77B(7). So the case law remains applicable to the current description.

[163] If a classification of prohibited activity is found inappropriate, a likely alternative (for comparative evaluation) would be classification as a non-complying activity, which is described in section 87A(5):

If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may—

- (a) decline the consent; or
- (b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

[164] The requirements of section 104D are contained in subsection (1) of that section:

Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

- (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
- (b) the application is for an activity that will not be contrary to the objectives and policies of —
  - (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
  - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
  - (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

[165] The leading authority on prohibited activity status is the judgment of the Court of Appeal in *Coromandel Watchdog of Hauraki v Chief Executive of the Ministry of Economic Development* given in 2007.<sup>28</sup> The Court considered that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status is the most appropriate status in various situations that it described. For this purpose it suffices to list them:

- Where the council takes a precautionary approach e.g. where it has insufficient information;
- Where the council takes a purposively staged approach;
- Where the council is ensuring comprehensive development;
- Where it is necessary to allow expression of social or cultural outcomes or expectations;

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<sup>28</sup> 13 ELRNZ 279.

- Where the council wishes to establish priorities other than on a ‘first in, first served’ basis.

### **Exceedance of water abstraction and nutrient emission limits**

[166] The opposition to prohibited activity classification for taking of surface water questioned whether prohibited activity is the most appropriate status of the options available; argued that it is impossible to foresee some potentially beneficial future water requirements; that setting the limits is somewhat arbitrary, and not a robust basis for a prohibited activity; and that it restricts development without allowing for advances in science, technology or economics, contrary to the CWMS. In respect of taking groundwater, submitters argued that there is insufficient evidence that groundwater allocation zones are over-allocated to justify prohibiting exceeding the limits; and asserted that only potential to cause further over-allocation should be considered a prohibited activity.

### **Basis for classifications**

- [167] Red nutrient allocation zones and Lake Zones have been identified as areas in which water quality outcomes are at risk.
- [168] Red zones are identified as generally over-allocated; and Lake Zones have been identified as particularly sensitive to increases in nutrients, as a number of lakes are already suffering from increased inflows of nutrients.
- [169] The farming activities that are prohibited are those that do not comply with other rules regulating farming activity, to which less constraining rules apply.
- [170] Some submitters contend that the quality and robustness of the scientific information underlying the Red and Lake Zones, the nutrient baseline, and the limits derived from them is insufficient to justify prohibition of exceedance of limits.

### **Review of prohibited classifications for exceeding nutrient and abstraction limits**

- [171] In that opposition is based on doubts over the quality and robustness of the science underlying the nutrient discharge limits, we accept that there is scope for further investigation, collection and analysis of data. We also accept that the region-wide limits, both on nutrient discharge and on water abstraction, imperfect as they may be, are intended to have interim effect. They are to be replaced by specific limits in sub-regional plans, following local collaboration, and by plan change processed in accordance with Schedule 1 of the Act.
- [172] The inclusion of limits in the LWRP is a response to the CRC’s duties under the Act, the NPSFM, and the RPS; and having regard to relevant iwi plans and to the CWMS.
- [173] On maintaining and improving the quality of water, Policy A1 of the NPSFM stipulates that a regional council is to make a regional plan setting freshwater quality limits, and to specify targets and implementation methods to assist in improvement of water quality.

- [174] On allocation of water for abstraction, Policies B1 and B2 of the NPSFM require a regional council to make regional plan provisions to provide for efficient allocation of fresh water to activities within limits (including environmental flows and/or levels). Policy B6 stipulates setting a defined timeframe and methods by which over-allocation is to be phased out to help ensure the total amount allocated is reduced to the level set.
- [175] Policy E1 sets timeframes for implementation of those duties.
- [176] The Canterbury RPS contains objectives and policies consistent with the NPSFM. In addition to those of more general character, it includes Policy 7.3.4(2) applying where the quantum of water allocated for abstraction is at or exceeds the maximum in an environmental flow and allocation regime. The policy is to avoid additional allocations; to set a timeframe for actions to effectively phase out over-allocation; and to effectively address any adverse effects of over-allocation in the interim. Policies 7.3.6 and 7.3.7 involve, among other measures, avoiding additional discharge of contaminants to water bodies that are below the quality standards; and identifying catchments where water quality may be adversely affected by application of nutrients or changes in land use, to improve to the standard within an appropriate timeframe.
- [177] The CRC has to take into account the iwi management plans mentioned above. We are satisfied that the NPS and RPS policies we have mentioned accord with the contents, at a higher level of generality, of those plans.
- [178] The CRC's statutory duty in respect of the CWMS is to have regard to its vision and principles. The supporting principles include environmental flow regimes where abstraction occurs; making restoration of natural character of degraded waterways a priority; land use not adversely impacting on natural water quality; and minimising discharges to waterways and not compromising water quality. The CRC intends that the LWRP should be consistent with, and provide means of enabling the implementation of, that Strategy.
- [179] The evaluation of rules is by section 32 to address criteria stated in those paragraphs. We start with section 32(4)(a), by which we take into account the benefits and costs of classifying the activities as prohibited activities. The benefits would be that consent authorities are precluded from consenting to exceedances of the limits that are set to protect the environmental flows and water quality etc. The costs are that individuals would not be able to obtain consents to exceed those limits. In our judgment the benefits prevail over the costs because the limits serve the general public interest in securing sustainable management of land and water resources, particularly the quality and quantity of fresh water; and though exceeding the limits may enhance the ability of people to provide for their economic wellbeing, that is primarily a private good.
- [180] As it is accepted that there is uncertain or insufficient information about the subject matter of the rules, we also take into account the risk of acting or not acting. The risk of

acting is that people may incur additional cost in complying with interim limits derived from uncertain or insufficient information; and the risk of not acting is that the CRC would be in default of its legal obligations to give effect to the instruments mentioned within the timeframes set, and the risk of environmental harm resulting from uncontrolled taking of water in over-allocated sources, and from excessive nutrients contaminating waterbodies that should be protected from that.

- [181] We have also to consider, in compliance with section 32(3)(b), whether the classification rules are, having regard to their efficiency and effectiveness, the most appropriate for achieving the objectives. That involves a comparison, and on the submissions in question the comparison is with classifying the activities in question as non-complying activities.
- [182] The classification rules in question would work to achieve nearly all the objectives in section 3 of the plan. The particular objectives include that land and water are managed as integrated natural resources; that fresh water is managed prudently as a shared resource; that the quality and quantity of water is managed to safeguard the life-supporting capacity of ecosystems and ecosystem processes; that water is available for sustainable abstraction, and an enabler of the economic and social wellbeing of the region; and that particular regard is given to community outcomes for water quality and quantity.
- [183] We accept that further improvements may be practicable, and may be desirable, in future. However to give effect to the NPSFM the LWRP has to be done now, in the current circumstances and on the information that is currently available. Not acting now to manage nutrient discharges would incur considerably greater probability of even further degradation of the environment, including the quality of fresh water, than would not imposing limits as required to comply with the duty of giving effect to the NPSFM and the RPS.
- [184] We also take into account that the regimes in which these classes of activities are to be prohibited are designed to apply less constraints where the objectives are still able to be achieved— on nutrient limits, see recommended Rules 5.41 to 5.47, and 5.49 to 5.51; and on abstraction allocations, see recommended Rules 5.123 and 5.124, and 5.128 and 5.129.
- [185] The comparison is with classifying exceedance of the limits in question as non-complying activities. An effect of reclassifying them in that way would be that instead of exceedances of the limits being absolutely prohibited, they could be authorised by resource consent if a consent authority considers in the particular case that the adverse effect on the environment would be minor, or not contrary to the objectives and policies of a plan.
- [186] There would be no assurance that cumulative effects of granting multiple consents each having minor adverse effects would be taken into account. The objectives and policies

may be contained in a plan that could be a ‘first generation’ one that predates the NPSFM; or a proposed plan that has not completed Schedule 1 processing.

- [187] In our judgment classifying the exceedances in question as non-complying activities would undermine the general application of the limits, and would give no certainty against environmental creep. It could not be a credible compliance with the CRC’s duties to give effect to the requirements of the NPSFM and CRPS identified above; nor would it be as effective in achieving the objectives in section 3 of the LWRP. In short, having had regard to the efficiency and effectiveness, we judge that classification of the exceedances as prohibited activities would be the most appropriate for achieving the objectives.
- [188] That would also respond to the CRC’s duties under section 7 to have particular regard to kaitiakitanga, to the intrinsic values of ecosystems, the maintenance and enhancement of the quality of the environment, and where applicable, to the protection of the habitats of trout and salmon. In the context of regimes that allow for abstraction of water and emission of nutrients within interim limits, and their replacement with limits to be derived from local collaboration and Schedule 1 processes, it would manage the resources in ways and at rates that would enable people and communities to provide for their economic and cultural wellbeing and for their health, while achieving the sustaining and safeguarding goals identified in section 5(2)(a) and (b), and avoiding adverse effects of those activities on the environment.
- [189] In conclusion, we recommend that the submissions asking for reclassification of exceedances of those limits as non-complying activities should be rejected.

### **Taking groundwater from the Woolston/Heathcote Groundwater zone 1**

- [190] We now address the submission seeking an exception to the prohibition of taking groundwater from this zone for new taking for excavation, construction and geotechnical testing (notified Rule 9.5.3). We accept that the groundwater in that zone deserves a high level of protection. Even so, we also accept that there could be exceptional cases in which minor activities within that class could be considered for dispensation from the general prohibition, provided consent authorities are satisfied about cumulative effects.
- [191] We accept the submission to the extent that it can be accommodated by making an amendment to section 9.6.2 of the LWRP relating to non-consumptive takes.
- [192] The other request for an exception to a prohibited activity relates to discharges of sewage effluent etc., where it may enter a drinking-water supply protection area, the submitter asking that this be a discretionary activity. The basis for the submission was that the drinking-water supply protection areas are not sufficiently identified.

- [193] We accept that questions of degree of risk could arise in exceptional cases, but we do not accept that discretionary activity status would be appropriate. Appropriate disposal of treated sewage effluent is important; but protection of public health from contaminated drinking water is a priority. However, we recommend a minor amendment to recommended Rule 5.85 to refer to a “Drinking-water Protection Zone” (a “Drinking-water supply protection area” as notified) to address the uncertainty issue raised.

#### **Additional prohibited activities requested**

- [194] Several submissions requested that activities be reclassified as prohibited activities.
- [195] We address the submissions relating to damming of rivers. Upper reaches of the Clarence River have high naturalness, outstanding natural features and landscapes, and it has outstanding wild and scenic values to the sea. It provides spawning areas for fish, and high habitat values. It is a worthy candidate for being protected from damming, and we are recommending that damming the mainstem is a prohibited activity (recommended Rule 6.5.1).
- [196] Diversion of any of the flow could also imperil those values, but we cannot exclude the possibility that a minor diversion could be permissible in exceptional circumstances, so we do not recommend accepting the submission that diversion also be a prohibited activity. Also, in the context of the LWRP, any ‘diversion’ activity is solely related to diversions of the flow within the bed of a river. Any activity involving the ‘diversion’ of water out of the bed is categorised as a ‘take’. By recommended Rule 5.123 taking within the allocation limits is a restricted discretionary activity, and it is prohibited by recommended Rule 5.125 if the taking exceeds the allocation limits. We find that to be appropriate.
- [197] Another submitter also asked for an amendment to prohibit damming anywhere on the entire length of the main stem of the Ashley River. We are recommending that damming is a prohibited activity on the Ashley River from the Ashley Gorge bridge to about 200 metres downstream of the confluence with the Townshend River as that reach has a high degree of naturalness and high visual amenity value (recommended Rule 8.5.1). But the rest of the Ashley is not of the same quality, and prohibiting damming through the whole course would not be justified. On the remainder of the Ashley River damming would either be a discretionary activity if it does not lead to a breach of any downstream minimum flows (recommended Rule 5.155), or otherwise a non-complying activity (recommended Rule 5.156). We find that to be appropriate.
- [198] Other requests for prohibited activity classification relate to new discharges of treated effluent to surface water or wetlands; to bores for hydrocarbon exploration and production (fracking); for plantation forests in areas of high naturalness; for gravel extraction and river maintenance in the vicinity of bird nesting colonies and in nesting periods between the end of August and the beginning of February; and for clearance or burning of indigenous vegetation in areas of high naturalness.



- [199] All of those activities deserve strict management, but we are not persuaded that prohibited activity status is justified in respect of any of them. That would preclude consent in exceptional cases after the close scrutiny that resource consenting of them would deserve, including consideration in the circumstances of every case of cumulative effects, detailed examination of degree of risk of adverse effects on the environment, and if granted, imposition and strict monitoring of conditions. Having regard to relative efficiency and effectiveness, we judge that the inflexibility of prohibited status would be disproportionate, and not the most appropriate measure for achieving the objectives or implementing the policies.
- [200] Another submitter contended that in red nutrient allocation zones, all new or increased scale of activities should be a prohibited activity, citing section 70, the NPSFM, and Part 2 generally. This submitter also supported classification of additional abstraction from over-allocated catchments as a prohibited activity.
- [201] The red nutrient allocation zones are areas in which water quality outcomes are not being met. That is the basis for prohibiting any increase in nitrogen leaching losses above the ‘nitrogen baseline’.
- [202] Activities that do not result in an increase in nitrogen leaching losses above the ‘nitrogen baseline’ limits still deserve regulation, and that is the point of recommended Rules 5.41 to 5.47. Given that recommended regime, we are not satisfied that extending the application of the prohibited activity Rule 5.48 would be justified. It would preclude further development of food production activities under a regime that has been developed in the Schedule 1 process, with a full cascade of controls from permitted activity to prohibited, according to ascertainable conditions. Even though the recommended regime may be capable of future improvement, it reflects the balanced character of sustainable management of resources, enabling provision for economic and cultural wellbeing, health and safety, while sustaining and safeguarding important aspects of the environment and avoiding, remedying and mitigating adverse effects on the environment.
- [203] To extend the prohibition to all new or increased activities would further constrain the provision enabled, in a way that would allow no flexibility for exceptional cases that do not exceed the limits set. Having regard to efficiency and effectiveness, and taking into account costs and benefits and risks of acting or not acting, we judge that the amendment requested would not be the most appropriate for achieving the objectives, so we recommend that it be rejected.

## ***5 Aspirational Objectives***

- [204] By section 67(1)(a) of the RMA, the Plan is required to state the objectives for the region. In doing so, it is required by section 67(3)(a) to give effect to the NPSFM. By Policies A1a and B1, that includes establishing freshwater objectives to give effect to the

objectives of the NPS. By section 67(3)(c) the Plan has also to give effect to the regional policy statement. By Policy 5.3.2 of the RPS, the CRC is to set out objectives to control the adverse effects of development on water bodies, including their value as sources of drinking water. By RPS Policies 5.3.5, 5.3.6, 5.3.8, 5.3.9, 5.3.10 and 5.3.11; and Policies 7.3.1, 7.3.2, 7.3.4, 7.3.5, 7.3.6, 7.3.7, 7.3.8, 7.3.10, 7.3.11, and 7.3.12 it is to set out objectives on a number of other topics.

- [205] In response to those duties the LWRP as notified contains, in Section 3, a number of objectives. Among submissions on those objectives, relevantly, that of the Christchurch City Council questioned whether some objectives can in practice be achieved.
- [206] In respect of notified Objective 3.9—  
**“The existing character values of alpine rivers are protected”**  
 —the City Council requested that it exclude urban water bodies, “...because there is little if any remaining natural values which can be protected in urban waterbodies.”
- [207] In respect of notified Objective 3.13—  
**“Those parts of lakes and rivers that are valued by the community for recreation are suitable for contact recreation.”**  
 —the City Council asked that parts within urban areas be excluded as it is “...[not] appropriate or possible for these watercourses to be managed for contact recreation.”
- [208] In respect of notified Objective 3.23—  
**“All activities operate at ‘good practice’ or better to protect the region’s fresh water resources from quality and quantity degradation.”**  
 —the City Council asked that this be amended to apply to existing activities only where practical, as it may not be possible to operate at good practice where, for example, there may be insufficient room for, or resources to allow for, retrofitting to this standard.
- [209] In response to other submissions we are recommending some amendments to the objectives. However we are not recommending the requested amendments to exclude their application to water bodies in urban areas.
- [210] We understand that the objectives are stated at a high order of generality, applying to the region as a whole, and for an indefinite period of time.
- [211] We are recommending a revised form of Objective 3.9 (now recommended Objective 3.19) which would read:  
**“Natural character values of freshwater bodies, including braided rivers and their margins, wetlands, hāpua, and coastal lagoons, are protected.”**
- [212] Where applicable the objective would recognise and provide for the relationship of Māori and their culture and traditions with their ancestral water, sites, and wāhi tapu (RMA section 6(e)); and would allow the exercise of kaitiakitanga (RMA section 7(a)) in respect of them. In part it gives effect Policies 7.3.1 and 7.3.2 of the RPS. One of the

methods of implementing Policy 7.3.1 involves local authorities in identifying natural character and areas for protection. So to the extent that freshwater bodies in Christchurch City possess natural character values, we consider that the objective of protecting those natural values would be appropriate.

[213] Objective 3.13 as notified is recommended to be Objective 3.15. Policy 7.3.6 of the RPS includes, among other things, appropriate standards for the quality of water for contact recreation. The methods involve local authorities in implementing that policy. We consider it appropriate for a regional plan that is to give effect to that policy to set an objective for the parts of lakes and rivers that are valued by the community for recreation are suitable for contact recreation. That does not imply that the City Council has to manage all lakes and rivers in the City to be suitable for contact recreation. Rather it sets a broad goal to be implemented by the policies. But the principal city of the region should not be immune from that general objective.

[214] On Objective 3.23 as notified (now recommended Objective 3.24), in response to another submission we are recommending the following wording:

“All activities operate at good environmental practice or better to optimise efficient resource use and protect the region’s fresh water resources from quality and quantity degradation.”

[215] Protecting freshwater from degradation, and using it efficiently, are underlying themes of the objectives of the RPS. Those objectives are to be achieved by Policies 7.3.6, 7.3.7, 7.3.8 and 7.3.9. We consider that as the LWRP is to give effect to the RPS, it is appropriate for it to set a regional objective in the terms of recommended Objective 3.23. We do not accept that activities in the City should be exempt from applying good environmental practice or better to protect its freshwater resources from degradation, and to optimise efficient use of its valued resources. That is a broad goal to be achieved by implementing policies.

[216] In conclusion, recommending amendments to the objectives in response to other submissions, we do not accept the submissions of the City Council for exclusion from the objectives in question.

## **6 Nutrient management**

[217] By sections 30(1)(c)(ii) and (iia) of the RMA, the CRC has the respective functions of “the maintenance and enhancement of the quality of water in water bodies and coastal water” and “the maintenance and enhancement of ecosystems in water bodies and coastal water”.

[218] RPS Policy 7.3.7 (Water quality and land uses) is “To avoid, remedy or mitigate adverse effects of changes in land uses on the quality of fresh water (surface or ground) by: (1) identifying catchments where water quality may be adversely affected, either singularly or

cumulatively, by increases in the application of nutrients to land or other changes in land use; and (2) controlling changes in land uses to ensure water quality standards are maintained or where water quality is already below the minimum standard for the water body, it is improved to the minimum standard within an appropriate timeframe.”

- [219] Under the Methods for RPS Policy 7.3.7, the CRC will “(1) Set out objectives and policies, and may include methods in regional plans to: (a) Establish water quality standards, and, where appropriate, catchment contaminant load thresholds and controlling contaminants entering fresh water within surface water catchments or groundwater zones. (b) Provide for the adoption of management practices and techniques (including the use of incentives) which manage the effects of land-uses on fresh water in both urban and rural environments. (c) Manage activities which affect water quality, singularly or cumulatively.”
- [220] We find that those RPS provisions provide clear direction on how the CRC’s section 30(1)(c)(ii) and (iii) RMA functions should be undertaken.
- [221] The RPS also addresses the importance of the rural economy and primary production land use. For example, RPS Objective 5.2.1 is “Development is located and designed so that it functions in a way that ... 2) enables people and communities, including future generations, to provide for their social, economic and cultural well-being and health and safety; and which: ... (e) enables rural activities that support the rural environment including primary production”.
- [222] Consequently, and not unexpectedly, it is necessary for us to balance the competing interests of maintaining and enhancing water quality with enabling primary production. The necessary balance is summarised in RPS Policy 5.3.12: “Maintain and enhance natural and physical resources contributing to Canterbury’s overall rural productive economy in areas which are valued for existing or foreseeable future primary production, by .... and, (3) ensuring that rural land use intensification does not contribute to significant cumulative adverse effects on water quality and quantity.”
- [223] We note that the outcome described by RPS Policy 5.3.12 is also consistent with the Vision of the CWMS.
- [224] The LWRP as notified contained policies (Policies 4.28 to 4.36) relating to Nutrient Discharges and Nutrient Zones and rules (Rules 5.39 to 5.51) relating to farming activities. Unsurprisingly, there were numerous submissions on those provisions. In response to those submissions, the officers recommended an initial revised policy and rule regime (Policies 4.27A to 4.33 and Rules 5.39 to 5.47) in the Group 2 Section 42A Report<sup>29</sup>. Subsequently in their Reply Section 42A Report the officers recommended a much simplified revised regime (Policies 4.34 to 4.41 and Rules 5.41 to 5.64).<sup>30</sup>

<sup>29</sup> Proposed Canterbury Land and Water Regional Plan, Section 42A Report – Volume 2 for Hearing Group 2, March 2013.

<sup>30</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013.

[225] We received a great deal of evidence from submitters on both the notified provisions and the initial revised policy and rule regime recommended by the officers. We have considered and weighed all of that evidence in coming to the findings that we set out below. However, given the sheer volume of material received and the wide range of divergent relief sought, we do not discuss or summarise the position of each individual submitter, or discuss the efficiency, effectiveness, benefits or costs of the specific relief sought by each individual submitter.

## 6.1 Nutrient Allocation Zones

[226] The LWRP delineated a number of “nutrient allocation zones” and classified those zones as either ‘red’ (“water quality outcomes not met”), ‘orange’ (water quality outcomes “at risk”), ‘green’ (“meets water quality outcomes”) or ‘blue’ (unclassified). The rationale for the nominated status of each zone was clearly set out in the Section 32 Report.<sup>31</sup>

[227] Submitters sought the reclassification of the Ashley - Waimakariri, Temuka, Waikakahi and Waipara zones (from ‘red’ to ‘orange’) and evidence was provided in support of those suggested reclassifications. The officers’ report discussed the submitter requests and recommended no change to the notified nutrient zone classifications. On balance we accept the officers’ recommendations for the reasons set out in the S42A Report.<sup>32</sup> In reaching that finding we are particularly mindful of the evidence and presentations of submitters who sought to have the Waipara River zone reclassified. We have carefully considered the evidence they presented at the Hearing, but we favour the advice of the officers which (abridged) was:

“...in this catchment ‘the environment’ has largely naturally used up the base nutrient allocation leading up to where effects levels occur. Any further nutrient intensive land use would only exacerbate the current state and extend the duration and intensity of unacceptable outcomes (such as nuisance periphyton and cyanobacteria mat growth) effects .... in previous decades the Waipara catchment had previously not shown such conspicuous nuisance growths. Therefore the current state is a result of both natural enrichment, and the currently developed state of land use intensification. Further nutrient allocations would increase the extent and duration of nuisance growths (and effects) by a further degree.”

[228] We return to the Waipara Zone discussion further on in this report.

## 6.2 Nutrient management regime

[229] As noted above, RPS Policy 7.3.7 directs the CRC to control land use in order to maintain water quality and improve it where it is degraded. This is entirely consistent

<sup>31</sup> Proposed Canterbury Land & Water Regional Plan, Section 32 Report, August 2012, Appendix 6: derivation of nutrient status zones, pages 83 to 93.

<sup>32</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, Appendix 1, first Memorandum from Adrian Meredith dated 8 July 2013 (comprising ten unnumbered pages), unnumbered page 3.

with NPSFM Objectives A1 and A2 and Policies A1 and A2. The LWRP has to give effect to the NPSFM and the RPS.

[230] The CRC's nutrient allocation zoning and classification process has established that there are large tracts of Canterbury where the CRC's freshwater objectives (namely the narrative objectives contained in section 3 of the LWRP together with the numerical 'outcomes' specified in Tables 1a and 1b) are either not being met now, or are at risk of not being met as a result of nutrients (nitrogen and phosphorus), sediment and faecal matter passing from primary production land-use activities into water bodies. In light of that, the issue that we need to address is not whether primary production land use should be controlled (it clearly needs to be), but rather what the most efficient and effective form of control is in order to achieve the LWRP's objectives (recognising that as with the RPS discussed above, the LWRP objectives relate to maintaining and enhancing water quality and to enabling social and economic activities, including primary production).

[231] This is what we now discuss.

[232] We commence by stating our view that the nutrient management policies (Policies 4.34 to 4.41), the section 9 RMA land-use rule regime (Rules 5.41 to 5.61), and the associated section 15 discharge permit regime (Rules 5.62 to 5.64) as finally recommended to us in the officers' report appropriately address many of the concerns expressed by submitters. We observe that the finally recommended regime draws heavily on the detailed submissions and evidence helpfully provided by submitters, including both those representing farming interests and those representing environmental or conservation interests. The final regime is described below, together with the way in which we find it addresses the issues raised by submitters.

[233] The regime involves:

- A Permitted Activity for small farming activities (those less than 5 ha in area) with a low leaching loss (less than 10 kgN/ha/year) in all nutrient allocation zones except the sensitive Lakes zone. This is an appropriate approach for farming activities that individually lose only a small amount of nutrients into the environment. We consider that the costs (direct costs to property owners and administrative costs to the CRC) of requiring farming activities at that scale to gain resource consents (as was sought by some submitters) would exceed the benefits of doing so.
- In 'red zones' a Permitted Activity for farming activities with moderate leaching losses (less than 20kgN/ha/year) provided that a nutrient budget is prepared (called a 'nutrient loss calculation') and nitrogen leaching does not increase relative to a 2009 to 2013 benchmark period (called the 'nitrogen baseline'). Not allowing any increase in leaching in the 'red zones' (where water quality outcomes are not being met) is fundamentally important for giving effect to NPSFM Policy

A2, a point made by several submitters. Specifying a five-year benchmark period would address the concerns of submitters regarding the need to accommodate year-to-year variation in leaching resulting from normal farming activities and climatic conditions. The revised approach to determining whether or not an ‘increase’ in leaching is occurring would address the concerns of submitters who contended that the notified provisions (an increase in leaching of 10% or more) would be either inappropriate or impractical. We have already noted the suitability of a Permitted Activity for farming activities losing only a small amount of nutrients into the environment. We find that the same holds for farming activities losing a moderate amount of nutrients, subject to the additional requirements of preparing a nutrient budget and not increasing leaching above the benchmark level.

- In ‘red zones’, prior to 2017, a Permitted Activity for farming activities with greater than moderate leaching losses provided that a nutrient budget is prepared and nitrogen leaching does not increase relative to the 2009 to 2013 benchmark period. After 2017 such farming activities would require consent as a Restricted Discretionary Activity, and they would be required to have prepared a Farm Environment Plan (FEP) in compliance with Schedule 7 of the LWRP. We consider it appropriate that the requirement to provide a FEP is accompanied by a requirement for a land use consent (as opposed to a Permitted Activity) for the reasons set out in the Lake Taupo<sup>33</sup> and Manawatu-Wanganui One Plan<sup>34</sup> Environment Court decisions that were drawn to our attention by several submitters. We are satisfied that the requirement to prepare a FEP and the commensurate adoption of individual farm scale ‘good management practices’ will result in some reduction in existing nutrient losses and some improvement in water quality because not all farms will currently be implementing ‘good management practices’. In other words, the ongoing degradation of water quality would be reduced, consistent with NPSFM Objective A2(c). Given the widespread preparation of FEPs that will occur in the near future we see no need to require arbitrary reductions in existing leaching (such as reductions of 20% a year for 5 years) as was sought by some submitters. The preparation of FEPs is an appropriate outcome pending the CRC’s consideration of the efficacy of more direct controls on nutrient loss at a sub-regional level, including the possible setting of catchment nutrient-load limits (as has occurred in the Hurunui Waiau River Regional Plan) and the possible associated setting of individual farm-scale nitrogen discharges allowances (NDA) based on catchment loads, as and when the sub-regional sections 6 to 15 of the LWRP are reviewed.
- In ‘red zones’ provision is made for a “farming enterprise” as a Discretionary Activity provided that nitrogen leaching does not increase relative to the 2009 to 2013 benchmark period and a FEP is prepared. A “farming enterprise” is defined as an “aggregation of parcels of land held in single or multiple ownership that constitutes a single operating unit for the purpose of nutrient management”. This

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<sup>33</sup> *Carter Holt Harvey v Waikato Regional Council* Decision A123/2008, paragraphs [111] to [146].

<sup>34</sup> *Day v Manawatu Wanganui Regional Council* [2012] NZEnvC 182, paragraphs [5-197] to [5-200]

would address the concerns of submitters regarding farming businesses that span more than one property, or involve multiple land leasing arrangements that may vary from year to year.

- After 2017 farming activities for which a compliant FEP has not been prepared would be a Non-Complying Activity. We support the use of Non-Complying activity status where a FEP has not been prepared, as that would appropriately indicate that farming at more than a minor scale without the restraint of an FEP is not to be condoned, and a strong exceptional case needs to be made in support of it.<sup>35</sup> We again note that the need for FEPs is also clearly signalled by recommended Policies 4.40 and 4.41.
- In ‘red zones’ any increase in leaching from properties larger than 5 ha would be a Prohibited Activity. This is important in terms of giving effect to NPSFM Policies A1 and A2. We have already discussed the use of Prohibited Activities in such circumstances and found them to be appropriate.
- In ‘orange zones’ a Permitted Activity for farming activities with moderate leaching losses provided that information required to prepare a nutrient budget (as specified in Schedule 7 Part D) is provided to CRC on request.
- In ‘orange zones’ a Permitted Activity for moderately sized farming activities (less than 50ha) with greater than moderate leaching losses provided that nitrogen leaching does not increase relative to the 2009 to 2013 benchmark period.
- In ‘orange zones’, prior to 2016, a Permitted Activity where the nitrogen leaching increases relative to the 2009 to 2013 benchmark period, provided that the increase is less than 5kgN/ha/year. We find that a ‘cap’ on increased leaching would be appropriate for zones where there is a risk of not achieving the LWRP’s objectives. After 1 January 2016 such farms would require consent as a Restricted Discretionary Activity and they would be required to produce a FEP. We consider that a modest increase in leaching to this extent would strike an appropriate balance between avoiding any over-allocation of the assimilative capacity of the receiving waters (thereby giving effect to NPSFM Policy A1(b)) while also enabling minor intensification and accommodating year to year variations in farming activity. We have already discussed the benefits of the FEP approach.
- In ‘orange zones’, any increase in leaching greater than 5kgN/ha/year (again relative to the 2009 to 2013 benchmark period) would require a land-use consent as a Discretionary Activity. In conjunction with recommended Policy 4.36(b), this appropriately indicates that such activities are not favoured, but it enables them to be considered on a case-by-case basis.
- In ‘green zones’ a Permitted Activity regime similar to that for ‘orange zones’, except that farming activities larger than 50ha would also be able to increase their leaching provided that the increase is less than 5kgN/ha/year. Otherwise increases in leaching would require land use consent as a Restricted Discretionary Activity if a FEP is prepared, and as a Non-Complying Activity if a FEP is not

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<sup>35</sup> *Carter Holt Harvey v Waikato Regional Council* A123/2008, paragraph 163.



prepared. We find that to be an appropriately permissive regime in zones where the water quality outcomes are currently being met and in advance of nutrient load limits possibly being set in sub-regional sections (sections 6 to 15 of the LWRP). We have already discussed the appropriateness of a Non-Complying Activity status where a FEP has not been prepared.

- In ‘lake zones’ a stricter regime would apply. All farming activities would require land use consent. Farming activities leaching less than 10kgN/ha/year would be Controlled Activities provided that nitrogen leaching does not increase relative to the 2009 to 2013 benchmark period and a FEP is prepared. Farming activities leaching more than 10kgN/ha/year would require land use consent as Restricted Discretionary Activities. This is appropriate as there may be occasion when those activities should be declined or alternatively required to significantly reduce their leaching. Farming activities without FEPs would be Non-Complying Activities, and any increase in leaching would be Prohibited. We have already stated why we consider those two latter activity classes to be appropriate.
- Farming activities that are part of established irrigation schemes (and water distribution schemes such as the Rangitata Diversion Race<sup>36</sup>) would be classified as Permitted Activities provided that the resource consents held by the scheme deal with nutrient discharges and leaching losses. New irrigation schemes would be able to seek scheme-wide nutrient discharge consents as a Discretionary Activity. Importantly, these rules address the concerns of submitters who sought to avoid the costs associated with duplicate consent requirements such as might arise where the resource consents granted for an irrigation scheme had already comprehensively addressed nutrient loss issues. It also aligns with the approach taken in the Hurunui Waiiau River Regional Plan.

[234] The ‘nutrient loss calculation’ and ‘nitrogen baseline’ are both to be modelled using the most recent version of Overseer. However, if a new version of Overseer is released then they are both to be recalculated using the new version. This overcomes the concerns of submitters regarding the changes in predicted leaching losses that can result when a new version of Overseer is released. We also note that the ‘nitrogen baseline’ incorporates dairy farms undergoing conversion prior to June 2013 (so they will be allowed to complete their conversions), which was a matter of concern to a number of submitters.

[235] The rule regime outlined above includes two nitrogen leaching thresholds (10 and 20 kgN/ha/year). We accept the submissions that Overseer is less suitable for assessing compliance with absolute thresholds (given its generally accepted range of uncertainty of  $\pm 30\%$ ) than it is for predicting relative changes in leaching. However, when we asked the CRC officers about that, they responded that the CRC is willing to accept that there would be “unders and overs” when farms are assessed against the thresholds, but given the region-wide nature of the proposed management regime those “unders and overs”

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<sup>36</sup> Entities such as the Rangitata Diversion Race Company Limited are to be defined as “a principal water supplier”

should average out at a nutrient allocation zone level. We acknowledge the issue of the uncertainty of Overseer predictions raised by submitters, but find that the risk of not acting (not using Overseer to assist with the management of nutrient losses in the way that CRC proposes) outweighs the costs that might be incurred by some farms which may be required to obtain land use consents as a result of uncertain Overseer predictions.

[236] FEPs are favoured as a primary course of action under recommended Policies 4.40 and 4.41, which we find to be appropriate. Under Schedule 7 a FEP can take one of two forms. It would either be prepared under an industry-prepared template (or in accordance with industry-prepared guidelines) which addresses the concerns of submitters who favoured the use of “audited self-management”, or it would follow the ‘recipe’ set out in Part B of the Schedule. In either case the FEPs would be subject to audit by someone who had not been involved in the preparation of the FEP. The FEPs would include nutrient budgets and would identify the most efficient and effective means of minimising nutrient losses to water (amongst other things). We find that the preparation and implementation of farm specific FEPs would be an effective and efficient way of minimising nutrient losses and achieving the objectives of the LWRP. The use of the FEP is more appropriate than a general imposition of relatively arbitrary leaching rate limits which may or may not be achievable by individual farmers in a cost-effective manner.<sup>37</sup> A FEP has the added advantage that other relevant matters, such as irrigation and soil management, would also be addressed at an individual farm scale. Those matters would assist with achieving the water quality objectives and outcomes specified in the LWRP. In particular, managing soil loss would also address phosphorus loss (as phosphorus binds to the soil), which was a matter of concern to some submitters (given the apparent focus of the LWRP on nitrogen leaching). Importantly, the FEP is also a method that is strongly supported by primary industry representative bodies including Federated Farmers, Dairy NZ, Fonterra Co-operative Group, Horticulture NZ and the NZ Deer Farmers Association. That support will assist with the effective and efficient implementation of the LWRP provisions that embody the preparations of FEPs.

[237] Given the overall suitability of the policy and rule regime finally recommended to us by the CRC officers (both in terms of giving effect to the NPSFM and the RPS and in accommodating many of the concerns expressed by submitters) we are recommending very few amendments to it. We recommend amending the wording of the conditions in the rules so that a FEP “has been prepared” rather than requiring that one “is prepared”. We consider that this would more proactively implement recommended Policies 4.40 and 4.41. We also recommend amending references to nutrient “leaching” or “discharges” to be inclusive of both terms for added clarity and certainty.

[238] We also record that, given our acceptance of the policy and rule regime finally recommended to us, we accept and adopt the reasons for that recommended regime as

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<sup>37</sup> For example a 20kgN/ha/year ‘target’ leaching rate sought by some submitters.

were set out in the Reply Section 42A Report<sup>38</sup>. Those reasons are additional or complementary to the ones that we have given above.

[239] From an overall broad judgement, we find that the recommended nutrient management provisions outlined above would be consistent with the functions that the CRC has under the Act. Those provisions would give effect to the NPSFM, the RPS, and the Objectives of the LWRP. They are also consistent with the vision and principles of the CWMS.

## **7 Qualification of water quality parameters**

[240] RPS Policy 7.3.6 (Fresh water quality) is: “In relation to water quality: (1) to establish and implement minimum water quality standards for surface water and groundwater resources in the region, which are appropriate for each water body considering ... [a range of criteria]”. Under Policy 7.3.6, Method 1(a) notes that in regional plans the CRC may “Set water quality standards for surface water and groundwater resources considering the matters set out in Policy 7.3.6(1)”.

[241] As finally recommended to us, the LWRP would contain a number of tables and schedules specifying water quality parameters. Tables 1a and 1b specify water quality “outcomes” for Canterbury rivers and lakes respectively. Submitters had expressed two general concerns with Table 1 as notified. First, that it should be recast as a suite of ‘limits’ or ‘standards’; and secondly, that it lacked specificity.

[242] Regarding the first matter, submitters generally suggested that re-casting Table 1 as a suite of ‘limits’ would be a more appropriate means of giving effect to NPSFM Objectives A1, A2 and Policy A1 and RPS Policy 7.3.6. In terms of the second matter, Dr R G Young (for example) advised us that Table 1a requires “... more specific information on the measurement statistics used to determine if these objectives have been met ...”<sup>39</sup>. Accordingly we asked many of the water quality scientists who gave evidence whether or not they agreed that such “statistical information” is required, and if so, what it should be. We received helpful responses from a number of those witnesses, affirming the need for such information, and advising us on its content.

[243] The LWRP as notified (and as finally recommended to us) also contains Schedule 5 which sets “receiving water standards” applying to point-source discharges after reasonable mixing. Schedule 5 also defines surface-water Mixing Zones. In their Reply, the CRC officers recommended a new Schedule 8 setting “Region-wide Water Quality Limits” for rivers, lakes and groundwater.

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<sup>38</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, “Nutrient Management” (pages 14 and 15), and “Rules 5.41 to 5.64 – Nutrient Management” (pages 28 to 30),

<sup>39</sup> Evidence in chief of Roger Graeme Young on behalf of Nelson/Marlborough, North Canterbury and Central South Island Fish and Game Councils, 4 February 2013, Paragraph 93.

- [244] The CRC officers also recommended that Table 1 should continue to be expressed as ‘outcomes’ (as opposed to ‘limits’ or ‘standards’), and that it should also continue to contain maximum values without any associated “statistical information”. They recommended that the more qualitative elements of Table 1c (lakes) be recast as a new strategic Policy 4.4, and the more quantitative elements of Table 1c be included in the new Schedule 8.
- [245] We accept the officer’s recommendations on the nature of Table 1 and the inclusion of new Schedule 8 for the reasons set out in the Section 42A Report.<sup>40</sup> In particular we note and accept the advice of Dr A Meredith who stated:
- “Therefore, while Table 1a could be adapted to generate an accompanying limits table or schedule this cannot be conducted easily or rapidly. Only a lowland stream nitrate-N toxicity limit is easily justified. I cannot recommend a comprehensive “rivers” limits table for the pCLWRP and suggest that for most ‘candidate limits’ this would be best generated collaboratively and cooperatively with communities in the sub regional plan process (as occurred for the Hurunui Waiau River Regional Plan).”<sup>41</sup>
- [246] Consequently we recommend that the LWRP contain Schedules 5 and 8, both of which set water quality limits. We find that, in the context of a region-wide regional plan that sets narrative freshwater objectives (section 3 of the pLWRP) and associated numerical ‘outcomes’ for those objectives (Table 1), those additional two schedules would give appropriate effect to NPSFM Objectives A1, A2 and Policy A1 and RPS Policy 7.3.6.
- [247] We also note that it is CRC’s intention that Sections 6 to 15 of the LWRP may contain specific water quality limits as a result of those sections being reviewed in the near future.<sup>42</sup> This would be consistent with Method 3(b) under Policy 7.3.6 of the RPS, which is for local authorities to “Seek and have regard to recommendations from the Regional Water Management Committee and Zone Water Management committees relating to: ... (b) Identifying fresh water bodies which require water quality standards to be reviewed in a regional plan.”
- [248] Turning now to the issue of the Table 1 “statistical information”, we prefer the evidence of the previously mentioned water quality scientists called by the submitters. We therefore recommend that Table 1 is amended to contain relevant “statistical information”. We recommend similar amendments to Schedule 5 to contain relevant “statistical information”, noting that Schedule 8 as recommended to us in the officers’ Reply already contains such information.
- [249] In making the amendments to Table 1 we note that while 24-hour continuous monitoring is ideal for dissolved oxygen and temperature, we understand that the CRC

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<sup>40</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, Appendix 1, second Memorandum from Adrian Meredith dated 8 July 2013 (comprising nine unnumbered pages)

<sup>41</sup> Ibid, (sixth page of nine unnumbered pages).

<sup>42</sup> Such as has already occurred in the proposed Hurunui Waiau River Regional Plan for example.

generally only undertakes daytime spot measurements on a monthly or quarterly basis for those parameters.<sup>43</sup> We therefore recommend inserting a direction that if only spot measurements are available, then they can be used to infer the likelihood of meeting the dissolved oxygen and temperature outcomes in Table 1. Similarly, we note that although monthly measurements are ideal for nuisance aquatic plants (periphyton and macrophytes), we understand that the CRC generally only undertakes quarterly monitoring of those parameters.<sup>44</sup> We therefore recommend providing for either monthly or quarterly monitoring.

[250] With regard to the specification of “statistical information” for Table 5A in Schedule 5, we recognise that the parameters in Table 5A are primarily intended to apply to point-source discharges. Consequently, we recommend providing some flexibility by specifying “daily, weekly, or monthly” sampling for some parameters, in the expectation that the appropriate selection of a monitoring frequency will occur on a case-by-case basis when discharge permits are granted. For other parameters we recommend specifying “any sample”, consistent with what the officers recommended in relation to similar parameters contained in the new Schedule 8.

[251] Lastly, we note that some submitters sought inclusion of additional parameters in Table 1, or the relocation (or duplication) of some parameters from Schedule 5 into Table 1. Having carefully considered the wide range of evidence on those matters, on balance we prefer the evaluation and recommendations of Dr Meredith as set out in the officer’s Reply.<sup>45</sup> Accordingly, the only additional Table 1a ‘outcome’ we recommend is one relating to cyanobacteria mats.

[252] In overall terms, we find that the approach to Table 1, Schedule 5 and Schedule 8 as outlined above is consistent with the responsibilities the CRC has under the Act, NPSFM, RPS, the Objectives of the LWRP and the vision and principles of the CWMS.

## **8 Water Quantity and Groundwater Limits**

[253] A significant increase in abstraction of groundwater for irrigation over the last twenty years, primarily on the Canterbury Plains, has resulted in groundwater levels becoming more variable, causing reduction in spring flows and over-allocation<sup>46</sup>.

[254] The NRRP responded to this issue by creating Groundwater Allocation Zones and by setting groundwater allocation limits. Where consent applicants were able to demonstrate that the limits could be exceeded, then permits to take water could be granted as non-complying activities. The notified LWRP adopted the NRRP Groundwater Allocation Zones (GAZ) and in a large part the relevant policies and

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<sup>43</sup> Supplementary Evidence of Shirley Ann Hayward Responding to Questions from the Group 1 Hearing, 1 May 2013, page 2, section 2.3

<sup>44</sup> Ibid, page 3, section 2.5(c)

<sup>45</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, Appendix 1, second Memorandum from Adrian Meredith dated 8 July 2013 (comprising nine unnumbered pages).

<sup>46</sup> Section.32 Report, Groundwater Zones and Allocation, page 101

rules<sup>47</sup>, but taking groundwater in excess of the limits set in the LWRP is classified as a prohibited rather than a non-complying activity. We understand that this is to prevent the ‘environmental creep’ that was evident under the previous regime.

- [255] Several submitters contested the prohibited activity classification of taking groundwater in excess of the limit for the zone, and sought non-complying activity status instead. They questioned the validity of the process by which the limits had been assessed.
- [256] The submitters referred to first, second and third order methodologies for assessing abstraction limits. They contended that robust and comprehensive research to establish third order limit-setting had not been undertaken for any of the groundwater allocation zones; and that first and second order assessments had been based on relatively coarse data and analysis, and are only fit for setting interim limits, not hard limits.
- [257] The submitters also relied on cases in which it had been found that there is more groundwater available in a zone than previously thought, so resource consents were granted to take water in excess of the limit set. Applications to take from the Chertsey, Ashburton-Lyndhurst, and Valetta zones were mentioned, in which additional groundwater had been found available from increased recharge due to new or expanded irrigation schemes, and efficiency gains in existing irrigation schemes.
- [258] Another submitter opposed uniform application of groundwater abstraction rules across the region; and there were also suggestions that groundwater recharge rates are likely to continue to increase further, as new and enlarged irrigation schemes are established.
- [259] The submitters argued that taking in excess of applicable zone limits should be classified as a non-complying activity, to allow applications to be considered on evidence of improved knowledge, which in turn could be used for revising the limits in future.
- [260] Fish and Game was opposed to additional groundwater abstractions from many of the groundwater assessment zones, arguing they had been subjected to over-allocation on a case-by-case basis for many years.
- [261] In considering the wider issues raised by the submitters (the appropriate nature of the LWRP groundwater allocation limits), we note that the NPSFM introduced as a key purpose the setting of limits and the phasing out of over-allocation, within agreed timeframes, on a catchment-by-catchment basis in an integrated and sustainable way (Policy B6).
- [262] The RPS gives effect to the NPSFM through a set of integrated objectives and policies to address issues including those on water quantity in the Canterbury region. Policy 7.3.4 requires the CRC to establish environmental flow and water allocation regimes to

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<sup>47</sup> Section.32 Report, Groundwater Zones and Allocation, page 102

manage the quantity of water in fresh water bodies and the effects of groundwater abstraction.

- [263] The LWRP conforms with the direction of the superior instruments, includes relevant elements of the NRRP, and introduces a sub-regional level (Sections 6 to 15) where groundwater allocation limits are set. We understand that a precautionary approach was taken when specifying the allocation limits in the LWRP<sup>48</sup>. The process of setting those limits did not take into account historic CRC decisions to grant applications for groundwater takes in excess of the interim allocation limits in the NRRP. This was on the basis that no ‘new’ allocation limits were identified through those resource consent hearings<sup>49</sup>.
- [264] The ECAN Act<sup>50</sup> requires us to have regard to the vision and principles of the CWMS. The CWMS has three primary principles which relate to sustainable management, regional approach and tangata whenua values. The CWMS has deliberately set priorities within the primary principle of “sustainable management”.
- [265] We have already discussed the appropriateness of retaining a Prohibited Activity status for any exceedance of the water allocation limits set in the LWRP. The additional issue raised by submitters is a claimed lack of robustness in the groundwater allocation limits. Be that as it may, they are still limits and in the context of the NPSFM they denote the “maximum amount of resource use available”. Reverting to a Non-Complying activity status for Rule 5.104 as notified (recommended Rule 5.130) could result in a continuation of problematic ‘environmental creep’, where applications to exceed the limits are repeatedly granted. That would defeat the purpose of the limits, and it would not give effect to the NPSFM. Such an ad hoc approach would also compromise the objectives of the LWRP, particularly those that seek to address the over-allocation of groundwater. For these reasons we favour the retention of Prohibited Activity status. Such a classification is appropriate and consistent with the LWRP’s objective of phasing out over-allocation of groundwater and addressing cumulative effects on a catchment wide basis
- [266] In the absence of more extensive information and analysis of integration of all factors required to achieve a “third order” approach to identifying limits in any catchment in the Canterbury region, we concur with the precautionary approach to setting “limits” in the LWRP, and avoiding exceeding them by prohibited activity status. If anyone is confident that technical evidence is available that would support exceeding a groundwater allocation limit, that could be tested by promoting a private plan change.

#### Christchurch-West Melton Groundwater Allocation Zone

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<sup>48</sup> S42A Report, Volume 4, Take and Use of Groundwater, page 40.

<sup>49</sup> Fenemor, S42A statement of evidence, 15 February, 2013, page 4

<sup>50</sup> Section 63, Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

- [267] The aggregates industry<sup>51</sup> submitted that declaring the Christchurch-West Melton Zone (chapter 9 of the LWRP) to be fully allocated<sup>52</sup> would not give effect to the NPSFM. It was argued that there is very little evidence of analysis that would justify a prohibited activity classification for that GAZ; and that the analysis that had been undertaken for that zone instead related to the difficulty in assessing what the total groundwater take actually is. We were told that there is little land suitable for quarrying available, and that prohibited activity status would result in aggregates being sourced from further afield at greater cost.
- [268] In response to the aggregate industry concerns, and as discussed later in this report, we recommend that non-consumptive takes under recommended Rules 5.131 and 5.132 be allowed in this Zone (see section 9.6.2 of the LWRP).

## ***9 Passive Discharges from Contaminated Land***

- [269] In the LWRP, contaminated land is defined as “land that has a hazardous substance in or on it that has a) significant adverse effects on the environment; or b) is reasonably likely to have significant adverse effects on the environment”.
- [270] By section 30(1)(ca) of the RMA, the CRC has the function of “the investigation of land for the purposes of identifying and monitoring contaminated land” and by section 30(1)(f) it has the function of “the control of discharges of contaminants into or onto land, air, or water and discharges of water into water”. We note, relevant to CRC’s section 30(1)(ca) function, that Rule 5.168 as notified (recommended Rule 5.185) would enable site investigations in accordance with relevant Ministry for the Environment guidelines.
- [271] Relevant to CRC’s section 30(1)(f) function, contaminated land by its nature may discharge contaminants into adjacent soil and water, and such discharges are commonly referred to as ‘passive discharges’. We heard from submitters that the LWRP does not make specific provision for ‘passive discharges’, and they are instead dealt with under the catch-all discretionary activity Rule 5.6. Submitters suggested that reliance on “Rule 5.6 is likely to impose further barriers to what is already a costly and complex activity by: confusing the selection of best practicable remediation options, stifling investment by industry in cleaning up sites, and imposing additional and unnecessary compliance costs”.<sup>53</sup> Those submitters sought the inclusion of a specific rule authorising ‘passive discharges’, including discharge standards<sup>54</sup> that would apply should site investigations identify that the land was contaminated.

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<sup>51</sup> Legal Counsel, Fulton & Hogan, Winstones Aggregates & Canterbury Aggregates Producers Group

<sup>52</sup> S32 report, August 2012, page 137

<sup>53</sup> James Court, Z Energy NZ Limited, BP Oil NZ Limited and Mobil Oil NZ Limited, 4 February 2013, paragraph 2.4.

<sup>54</sup> Based on the Drinking Water Standards for New Zealand (2005) or the Australian and New Zealand Guidelines for Fresh and Marine Water Quality (ANZECC) Guidelines (2000).



- [272] In their Reply, the CRC officers provided no specific reason for not including a ‘passive discharge’ rule other than the fact that “... the pLWRP was drafted with relatively minimum controls specifically on contaminated sites ...”.<sup>55</sup>
- [273] Chapter 17 of the RPS deals with contaminated land. Policy 17.3.3 states:
- “Where land has been identified as being contaminated, contaminants should only be allowed to remain in the ground if discharges of contaminants beyond the site to air, water or land will not result in significant risk to human health or the environment.”
- [274] Having considered the evidence, we find that the inclusion of a specific rule enabling ‘passive discharges’ subject to specified discharge standards would be a more appropriate, efficient and effective method of implementing CRC’s functions under section 30(1)(f) of the RMA and of giving effect to the RPS. We therefore recommend the inclusion of new Rules 5.187 and 5.188 that would sit within a section specifically titled “Contaminated Land”. New Rule 5.187 would allow ‘passive discharges’ as a Permitted Activity subject to limits for groundwater set in Schedule 8 of the LWRP, surface water quality standards set in Schedule 5 of the LWRP for 90 percent of species, and the avoidance of relevant effects listed in section 70(1) of the RMA. We consider that it is more appropriate to refer to the water quality limits set within the LWRP itself than to external standards. Recommended Rule 5.188 would categorise ‘passive discharges’ as Discretionary Activities if they do not meet the conditions of recommended Rule 5.817.
- [275] We find that such an approach is consistent with the responsibilities that the CRC has under the Act, the NPSFM, the RPS, the objectives of the LWRP and the vision and principles of the CWMS.

## ***10 Exclusion of Livestock from Water Bodies***

- [276] During the development of the policy framework of the NRRP (2011) there was lengthy region-wide discussion and debate about excluding livestock from the beds and banks of water bodies. The LWRP largely adopted the wording of the NRRP stock exclusion provisions, and addressed some of the clarity and certainty issues in the NRRP.
- [277] The purpose of recommended Policies 4.31 and 4.32 and Rules 5.68 – 5.71 of the LWRP is to establish limits to livestock access to water bodies and riparian margins to prevent disturbance of the beds of water bodies and sedimentation of their waters. These provisions drew a broad range of submissions, from those who sought a ‘no access’ regime to those who wanted a pragmatic relaxation of the rules.
- [278] A number of submitters also identified a lack of clarity and certainty in the stock exclusion provisions of the LWRP, including the definitions of wetlands and river beds.

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<sup>55</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, page 45.

This lack of specificity concerned farmers who would be subject to the restrictions, and those who wanted certainty about what is to be protected. For example, we were told that it is not uncommon for a Canterbury river to have undefined banks, and to include areas that are part of a settled farming operation.

- [279] In our view the amendments we are recommending to the definitions for ‘wetland,’ ‘bed’ and ‘intensively farmed stock’ assist with resolving the issues of clarity, certainty and instances of inconsistency. These, coupled with recommended re-ordering of the policies and rules into a cascade and logical sequence, would improve clarity.
- [280] Submitters told us that livestock exclusion is the single best management practice to improve aquatic ecology, and that any increased agricultural intensification would further degrade water bodies and beds. Fish & Game provided extensive evidence on in-stream values and habitat for trout and salmon spawning in the region. The adverse effects of stock access included stream bank erosion, sediment deposition, nutrient enrichment, an increase in pathogenic organisms, destruction of in-stream habitat, and pugging of wetlands. Submitters also focused on the classes of livestock, and the destructive effects that dairy cows, cattle and deer, for example, can have on water quality and beds and banks. These effects of animals crossing water-ways, contribute largely to the poor state of lowland rivers and waterways.
- [281] Submissions from the farming sector acknowledged the benefits of excluding livestock from active riverbeds, banks and water bodies in the region. But they raised questions of clarity, practicality and reasonableness of the rules. Fonterra<sup>56</sup> told us that the “Dairying and Clean Stream Accord 2003” is an initiative to accelerate the adoption of good management practice and the exclusion from waterways by 2012. Its successor “The Sustainable Dairying: Water Accord” covers all dairy farms, and commits to excluding livestock from 100 percent of the length of waterways wider than 1m and deeper than 30cm, and from drains present on dairy farms, by 31 May, 2017.
- [282] In our view those are laudable aims, but they do not supplant the need for provisions in the LWRP excluding livestock from water bodies. Rather, those industry initiatives can be considered as complementary to the LWRP’s regulatory regime.
- [283] The amended policies that we recommend would provide specificity about excluding livestock from lakes, rivers, beds, and protection of sensitive sites and community values. Recommended Policy 4.27 would limit activities and stock to dry riparian areas for weed control and managed river crossings. We also recommend some amendments to improve clarity.
- [284] Federated Farmers submitted that the Prohibited Activity rule (Rule 5.71 as finally recommended to us) would result in unreasonable and unintended consequences on properties, and that a Non-Complying classification would offer more flexibility. They

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<sup>56</sup> Cullen

argued that prohibiting stock access to water bodies, and restricting stock movement on extensive properties with light stocking rates in particular, would be impractical, costly and inefficient. Examples of the impracticalities and inefficiencies they raised include:

- stock exclusion on physically complex landscapes intersected by many springs, seepages, small streams and or braided and dry river beds;
- hill and high country farms that depend on stock being able to access water for drinking;
- movement of stock across rivers where no alternative exists;
- absolute exclusion imposing severe difficulties in some instances where stock could not be provided with drinking water in any other way;
- fencing off the water bodies to protect salmon spawning areas having significant costs, involving in some cases tens of kilometres of fencing;
- fences having visual impacts on natural landscape values;
- excluding sheep from water bodies negates the benefit of sheep grazing to control weed growth on riparian margins;
- expert reports not showing that the Upper Hurunui and Landslip Stream are significant enough salmon spawning sites to merit inclusion in Schedule 17.

[285] Section 13(1) of the RMA restricts activities in the bed of any lake or river unless expressly allowed by a regional rule or a resource consent.

[286] The NPSFM requires the establishment of enforceable limits and timeframes to achieve water quality standards and or improvements. Objective A1 is; “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 discharge of contaminants”.

[287] The RPS incorporates the policy direction of the NPSFM. The LWRP is required to give effect to the RPS. Objective 7.2.1 of the RPS seeks outcomes that provide for life-supporting capacity ecosystem processes, natural character values of wetlands, lakes and rivers and their margins, and any actual or reasonably foreseeable requirements for community and stock water and customary uses.

[288] It is a community expectation that intensively farmed stock will be excluded from the bed and banks of water bodies, recognising that there are shared environmental, social and cultural values that require protection. It is also evident that, subject to amendments to avoid impractical and unreasonable outcomes, farmers recognise and support the principle of excluding livestock from water bodies.

[289] On the evidence before us we are not persuaded that the Upper Hurunui and Landslip Stream hold significant salmon spawning values. We judge that listing those water bodies in Schedule 17 would not be justifiable.

[290] The revised rule framework finally recommended in the officers' report would achieve the improvement and clarity that submitters sought. We are persuaded that retention of Prohibited Activity for recommended Rule 5.71 (a combination of Rules 5.133 and 5.134 as notified) is consistent with the responsibilities CRC has under the Act, NPSFM, RPS, the Objectives of the LWRP and the vision and principles of the CWMS. Setting limits and avoiding environmental creep are key elements of the LWRP. The relaxation Federated Farmers were seeking is in part provided for by recommended Rule 5.70 for Non Complying Activities which would allow application for consents in stated conditions and criteria.

## **11 Flow sensitive catchments**

[291] A flow-sensitive catchment<sup>57</sup> is one in which

“... a river which is dependent on rainfall as its main source of flow, has limited ability to store water, and where evapotranspiration can be expected to exceed precipitation between December and April resulting in very low flows in summer and autumn compared with mean flows.”

[292] The LWRP as notified addressed those catchments in Policy 4.64 and Rules 5.109 to 5.111.<sup>58</sup> Addressing the issue of flow-sensitive catchments falls within the CRC's function under section 30(1)(c)(iii) of the RMA, which is to control of the use of land for the purpose of “the maintenance of the quantity of water in water bodies and coastal water”.

[293] The LWRP has to give effect to the RPS. RPS Issue 7.1.2(5) includes that “... in some catchments with low rainfall, the spread of exotic forestry can reduce rainfall run-off and affect river flows.” RPS Policy 7.3.5 responds to this issue by seeking to manage the “adverse effects of land uses on the flow of water in surface water bodies or the recharge of groundwater” by, among other things, “managing the planting or spread of exotic vegetation species in catchments where, either singularly or cumulatively, those species are or are likely to have significant adverse effects on flows in surface water bodies.”

[294] In submissions on the LWRP, although there appeared to be general support for the management of flow-sensitive catchments, some submitters preferred the management regime contained in the operative NRRP. In particular, concern was expressed regarding the greater number of flow-sensitive catchments listed in sections 6 to 15 of the LWRP, and the way in which the notified rules would manage those catchments.

[295] Dr B Cowie provided a useful summary of what we understand the main concerns to be. He advised that Rule 5.110 as notified (recommended Rule 5.73) dealing with smaller catchments would be a significant improvement on the equivalent NRRP provisions, as it is administratively simpler. However, he was concerned with the way larger

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<sup>57</sup> As finally recommended to us by the CRC officers in th31 July 2013 Reply version of the pCLWRP.

<sup>58</sup> Now recommended Policy 4.75 and Rules 5.72 to 5.74.

catchments would be managed under Rule 5.111 as notified (recommended Rule 5.74), and in particular that the “...arbitrary 15% allowance for new forest per property before consent is required cannot be effects based”.<sup>59</sup>

[296] Having considered the evidence, we are satisfied with the identification of flow-sensitive catchments in sections 6 to 15 of the LWRP for the reasons set out in the officers’ reports. However, we consider that reverting to a more effects-based management regime for larger catchments would be a more appropriate way of giving effect to the RPS. We therefore recommend amending Rule 5.74 so that in larger catchments the management regime is similar to that set out in condition 3 of Rule WQN28 of the operative NRRP. We find that such an approach would be consistent with the responsibilities the CRC has under the Act, the NPSFM, the RPS, the Objectives of the LWRP, and the vision and principles of the CWMS.

## **12 Gravel Extraction**

[297] Rule 5.124 of the LWRP as notified states that sections 124A to 124C do not apply to resource consents to extract gravel from the bed of a lake or rivers. That rule would mean that resource consent holders would not have priority when seeking replacement of their consents. It is in contention. Also, some submitters opposed the associated notified Rule 5.126 imposing a condition of gravel extraction as a permitted activity that the extraction is undertaken by or under authority of the CRC.

[298] The Aggregate Producers’ Group<sup>60</sup> submitted that a generic Canterbury-wide control of extracting gravel would substantially undermine the future certainty of extraction infrastructure, particularly in Central and North Canterbury. Investment in such infrastructure had been considerable, and its existence provides a degree of certainty for consent holders as the Christchurch rebuild gains momentum. We were told that aggregate maintenance contracts run for periods of five or more years, and it was argued that to remove the existing consent priority would substantially diminish business certainty.

[299] We were also told that the “duration based consent” has traditionally applied throughout the region and provides certainty to operators. It facilitates investment in infrastructure and machinery, and in development of access. Uncertainty would substantially increase costs for river-based abstraction and would cause operators to abandon the less certain river-based gravel resource for more extensive land-based gravel extraction.

[300] Counsel for the Aggregate Producers’ Group<sup>61</sup> submitted that section 124B(4) enables the CRC to address issues of inefficient use and banking of gravels when determining an application; and that the CRC could apply review provisions to manage issues of

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<sup>59</sup> Dr Cowie, Evidence for Rayonier New Zealand Limited dated 4 February 2013, paragraph 58.

<sup>60</sup> GM Willis, Regional Environmental Advisor for Fulton Hogan, 4 February EIC, para 78

<sup>61</sup> Ms J Walsh, counsel for Fulton Hogan Limited, Winstones Aggregates Limited, Canterbury Aggregates Producers Group, 8 April, para 96.

efficiency and “gravel banking” and minimise the risk that operators will look elsewhere and trigger an escalation in costs.

- [301] Submitters also made the following points;
- reservation of discretion is not effects-based and inequitable;
  - Rule 5.126 would enable CRC to extract any volume from any location and lacks a consideration of existing consents;
  - the rules do not prescribe limits on gravel extraction;
  - the requirement for an authorisation from the CRC would not fit the nature of a permitted activity;
  - the CRC and its Regional Engineer have other functions besides duties to the RMA, that to exercise approval when other obligations are also to be achieved is probably a conflict of interest;
  - Rule 5.126 should be deleted, and limits to extraction of gravel from river beds progressively established.
- [302] The NPSFM is relevant to management of gravel in that Objective C1 seeks to improve the integrated management of fresh water and the use and development of land in whole catchments, including the interactions between fresh water, land and associated ecosystems.
- [303] Policy 10.3.4 of the RPS provides direction for the integrated management, use and removal of vegetation and river bed material to maintain the flood-carrying capacity of rivers, protection of essential structures and the control and prevention of erosion. Such management is subject to not adversely affecting sensitive sites and values including habitat and associated ecosystems and the function of essential structures.
- [304] The Section 32 Report identified deficiencies of the CRC’s historical consenting process, including sporadic gravel extraction. This included consents not being activated and the rate of extraction not matching the build-up of gravel, a consequence of which may be an increase in flood hazards. We heard from the CRC officers how the ‘first in first served’ resource consent process is limited in achieving an integrated, region-wide strategic approach to gravel extraction and addressing cumulative effects, compounded by the dynamic nature of rivers and gravel movement.
- [305] The LWRP provides for river gravel extraction for flood management and erosion control purposes so as to better align consented and allocated volumes with actual extraction rates. Community benefits would arise from improved flood protection. Industry extractors would require fewer resource consents and would benefit from quicker access to sites for taking gravel, with potential cost savings.
- [306] The extraction of small or maintenance levels of gravel is permitted subject to conditions including limits, timing and duration. We heard from some submitters that the allowable extraction volumes in recommended Rule 5.148 would be too small, and smaller than

was provided for under the NRRP. We consider the recommended volumes to be appropriate with regard to the private use of a public resource, and also so as to guard against ‘environment creep’, which could occur should the significantly larger volumes sought by submitters be adopted. We judge the proposed conditions to be appropriate.

- [307] Rates of gravel extraction in excess of the minor volumes allowed under recommended Rule 5.148 could only be undertaken by the CRC or by “persons acting under the written authority of the CRC”. We understand that “the CRC” would in effect be the CRC’s Regional Engineer, who for flood control purposes would direct where gravel can be extracted. Abstraction permits would be issued on a ‘first come first served’ basis. This would fit with the CRC and Regional Engineer’s function of managing flood and erosion risks. The written authorisation is an efficient and effective means to administer that function, and should not be confused with a “written approval”.
- [308] Gravel extractors who do not meet the conditions of the permitted activity rules, or, who wish to extract gravel from an area not identified by the CRC for flood management purposes, would still have the option of applying for a discretionary activity resource consent under recommended Rule 5.159. This would be subject to showing that sufficient gravel is available at the alternative site.
- [309] We acknowledge submitter concerns that by recommended Rule 5.149, the CRC would have a discretion that would be relatively unfettered. However, the Canterbury Regional Gravel Management Strategy (2012) contains guiding principles to be achieved through a collaborative process with all partners, stakeholders and the community. For this reason we include conforming with this Strategy as a condition of recommended Rule 5.149. This would give a reasonable degree of certainty regarding how the gravel resource will be managed in the future.
- [310] The CRC is required to sustainably manage gravel extraction from rivers for natural hazard management purposes for community safety while allowing sustainable economic development without compromising cultural, social and environmental outcomes and values.
- [311] We judge that the amended provisions of the LWRP would best achieve the sustainable management of the gravel extraction from the bed of a lake or river.

### ***13 Waipara River Catchment***

- [312] A number of submitters sought to have the ‘red’ nutrient allocation zone status of the Waipara River catchment reclassified. The officers’ Reply<sup>62</sup> states that the nutrient allocation status had been based on water quality outcomes not being met; and that when assessed against nutrient sensitive values, it showed that;

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<sup>62</sup> Volume , Officers Reply, Appendix 1, Table 2, 5th page (unpaginated)

- (1) nuisance algal mats and filamentous algae are very prevalent; and
- (2) nutrient concentrations are elevated.

- [313] The officers' Reply states that the 'red' classification remains in order to achieve Table 1 outcomes, and this was arrived at without any explicit consideration of cause of degradation, natural or induced.
- [314] Submitters described the Waipara catchment as having two distinct geographic areas. The upper catchment consists of rain-fed tributaries, where groundwater is at great depth and yield is patchy. The predominant land uses are dry-land sheep and beef farming, exotic forestry and a small amount of viticulture – all low nutrient-leaching activities. Downstream of SH1, the Waipara River is fed by spring-fed tributaries, and has a larger, more stable, base flow. Groundwater is shallow and more accessible in the lower catchment, where there is substantially more irrigation. Land uses remain predominantly viticulture, sheep and beef with some horticulture.
- [315] Submitters told us that the CRC had produced many technical reports which showed that nutrient discharges are not the cause of periphyton growth in the catchment. We were told one such report<sup>63</sup> states: "Managing nutrient inputs into the river may provide only limited ability to reduce periphyton production because of the abundant source of naturally derived phosphorus". This same report goes on to suggest that while control of nitrogen inputs may help reduce the extent of prolific growths, managing adequate flows will be important for managing periphyton.
- [316] We were told the Waipara catchment has high natural soft-sedimentary geology and marine tertiary sediments that naturally leach elevated levels of phosphorus and other chemicals to both surface and groundwater. We were also told that high natural nutrient concentrations in waterways and low summer rainfall result in prolonged periods of low flow and warm water temperature that combine to generate higher levels of periphyton growth.
- [317] Individual farmers described the constraints of a dry climate in a catchment which has limited access to water for irrigation. As a result their land use typically excludes use of green feed crops and intensive stocking regimes. We were told the predominantly dry-land activity generates a modest level of nutrient loss to waterways. It was submitted that the 'red' status would unfairly penalise dry-land farming activities, as it would be impossible to comply with the nutrient rule provisions with any change in land use.
- [318] Individual farmers and primary sector submitters suggested that augmenting the Waipara River with Hurunui Water Project<sup>64</sup> water may improve the water quality of the Waipara River and assist in reclassifying the nutrient allocation status. Other submitters

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<sup>63</sup> Hayward et al (2003) Waipara River: Assessment of water quality and aquatic ecosystem monitoring 1999 to 2002, (Environment Canterbury Report no Uo3/11), page 36.

<sup>64</sup> Legal Counsel, S Watson, Project Manager, A Loeffen



considered the classification of the Waipara catchment fails to address location-specific variations, and the “broad sweep” overlooks the absence of a high level of nutrient-generating land uses.

- [319] In contrast we received submissions from a range of community, environmental and iwi sectors who support avoiding any further degradation of the life-supporting capacity of the region’s waterbodies.
- [320] The limits in the LWRP represent the CRC’s duty (as described earlier in this report) to give effect to the superior planning instruments of the Act, the NPSFM and the RPS. This duty includes having regard to the vision and principles of the CWMS and taking into account iwi management plans. The NPSFM is instructive in the matter of limits, and signals the shift toward controlling land uses that give rise to discharges to waterbodies, and the inappropriateness of increasing the nutrient loading any further in catchments where freshwater objectives are not being met.
- [321] As has been discussed under the “Nutrient Management” section of this report, the rationale for the nominated status of each nutrient allocation zone was set out in the Section 32 Report<sup>65</sup>. We acknowledge the challenge the ‘red’ status presents in a catchment where current land use may not be the predominant source of nutrient loss to water bodies, and the constraints this status might place on any proposed change in land use. However, we do not consider it is appropriate to alter the status of the catchment by making a distinction between farm generated nutrients and those that are leached naturally to waterways.
- [322] On balance we accept the reporting officers’ advice<sup>66</sup> where they state that:
- (a) the current state of the catchment is a result of both natural and the currently developed state of land use in the catchment; and
  - (b) the current state is a result of both natural enrichment, and the currently developed state of land intensification; and
  - (c) that further nutrient allocations would increase the extent and duration of nuisance growths (and effects) by a further degree.
- [323] We note that the region-wide rules controlling nutrient losses from farming activities are intended to have an interim application, and we recognise that there is scope for further investigation, collection of information and analysis at the sub-regional level. This process importantly provides for local community, iwi and industry collaboration to address at the sub-region level issues that may not be adequately managed by the region-wide provisions, including any augmentation proposals. That process may enable a

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<sup>65</sup> Proposed Canterbury Land & Water Regional Plan, Section 32 Report, August 2012, Appendix 6, derivation of nutrient status zones, pages 83 to 93.

<sup>66</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, Appendix 1, first Memorandum from Adrian Meredith dated 8 July 2013 (comprising ten unnumbered pages), unnumbered page 3.

reconsideration of the above matter within the continued expectation that the region-wide objectives are to be achieved and the strategic policies implemented.

- [324] Therefore we prefer the advice of the officers and recommend that the ‘red’ classification for the Waipara catchment nutrient allocation zone be retained in the LWRP.

## **14 Section 9 Christchurch – West Melton**

- [325] There were relatively few submissions on section 9 of the LWRP. The submissions were evaluated by the CRC officers initially in the Hearing Group 3 Section 42A Report<sup>67</sup> and again in the Reply Section 42A Report.<sup>68</sup> We have considered the evidence presented by submitters and the contents of the officers’ reports. In general, we agree with and adopt the officers’ recommendations with regard to the submissions. However, there are two matters where we prefer the evidence of the submitters.

- [326] We find that Policy 9.4.1(b) should be deleted as sought by the Christchurch City Council because, as noted by Ms Keller<sup>69</sup>, the matter of stormwater is already addressed by policies contained in Section 4 of the Plan and “... the policies within Section 4 relating to stormwater management are more detailed, provide much clearer direction and do not discuss use of the best practicable option.”

- [327] We find that Policy 9.4.1(e) should be amended as sought by the Oil Companies<sup>70</sup> to clarify that;

“... the focus for rehabilitation with inert fill related to gravel extraction sites”.

- [328] In addition, consistent with our view on prohibited activities described above, we recommend that Rule 9.6.2 should be amended as follows:

“In general, no additional water is to be allocated from the Christchurch West-Melton Groundwater Allocation Zone shown on the Planning Maps except for group or community water supply as set out in Rule 5.115 and non-consumptive taking and use as set out in Rules 5.131 and 5.132.”

## **15 Section 13 – Ashburton**

- [329] There were a number of submissions on section 13 of the LWRP, many of which focussed on the currently over-allocated status of the catchment and the proposed

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<sup>67</sup> Proposed Canterbury Land and Water Plan, Section 42A Report – Volume 3 for hearing Group 3, April 2013, pages 25 to 33.

<sup>68</sup> Proposed Canterbury Land and Water Plan, Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, pages 51 to 53.

<sup>69</sup> Evidence of Jeanine Gesine Keller, undated, page 5.

<sup>70</sup> Supplementary Statement of Evidence of David Le Marquand, hearing Group 3, 14 May 2013, page 4.

increase in the existing minimum flows. The submissions were evaluated by the CRC officers initially in the Hearing Group 3 Section 42A Report<sup>71</sup> and again in the Reply Section 42A Report.<sup>72</sup> We have considered the evidence presented by submitters and the contents of the officers' reports. In general, we agree with and adopt the officers' recommendations with regard to the submissions. However, there are several matters where we prefer the evidence of the submitters.

- [330] The first of those matters is that we recommend Policy 13.4.1 is further amended, as suggested by Federated Farmers<sup>73</sup>, to clarify that there needs to be an increase in the "... amount of water in the river that is available to meet the proposed increased minimum flows ...". We also recommend that the policy be amended, as initially suggested by the Ashburton District Council<sup>74</sup>, to state that the taking of water for community stock-water supply purposes should not exceed 2,900 L/s in total "as soon as possible". We have also retained a reference to a 2023 deadline (as recommended by the CRC officers) for achieving the target reduced abstraction rate. When we asked Ms Dewi Hall about that, she confirmed the appropriateness of the deadline.
- [331] Next we recommend that Policy 13.4.2 is further amended to state that replacement permits "may be granted" because, as stated in the submission of the Environmental Defence Society<sup>75</sup>, there "... is no guarantee under the RMA that a water permit will be replaced when it expires ...".
- [332] We also recommend that Policy 13.4.3 is further amended to specifically refer to the situation where "existing permits are sought to be replaced upon their expiry", because as stated in the submission of the Environmental Defence Society<sup>76</sup>, "The NPSFM requires the phase out of over-allocation. This can only occur by reducing the rate or volume of water which has been authorised."
- [333] In response to an issue raised by the Director-General of Conservation<sup>77</sup>, we recommend that Policy 13.4.5 is further amended to state with more certainty that deep groundwater takes are to be enabled only if the applicant holds and surrenders a surface take or stream depleting groundwater take of the same rate and volume as the proposed new deep groundwater take.
- [334] We recommend, too, that Policy 13.4.6 is further amended, as suggested by Federated Farmers<sup>78</sup>, to state that any water that is surrendered need only be left in the river (not

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<sup>71</sup> Proposed Canterbury Land and Water Plan, Section 42A Report – Volume 3 for hearing Group 3, April 2013, pages 42 to 57.

<sup>72</sup> Proposed Canterbury Land and Water Plan, Volume 4, Officer's Reply for the Council Reply Hearing, 1 August 2013, pages 57 to 58.

<sup>73</sup> Statement of Evidence on Behalf of Combined Canterbury provinces, Federated Farmers of New Zealand, hearing Group 3, C Allen and L Hume, 15 June 2013, page 4.

<sup>74</sup> Evidence of Sri Samantha Dewi Hall on behalf of Ashburton District Council, dated 13 May 2013, paragraphs 75 and 76.

<sup>75</sup> Submission of Environmental Defence Society, section 3.6(a), unnumbered page.

<sup>76</sup> Submission of Environmental Defence Society, section 3.6(b), unnumbered page.

<sup>77</sup> Rebuttal Evidence of Herbert Ross FAMILTON for Director-General of Conservation, dated 22 May 2013, paragraph 18. Mr FAMILTON suggested an explicit reference to s128 reviews which we do not find to be necessary, but we consider that some of his suggested wording clarifies the intent of the policy.

<sup>78</sup> Statement of Evidence on Behalf of Combined Canterbury Provinces, Federated Farmers of New Zealand, Hearing Group 3, C Allen and L Hume, 15 June 2013, page 6.

reallocated for abstraction) “... until such time as the catchment is no longer over-allocated.”

- [335] Another recommendation is to amend the time of year when the A permit minimum flows for the South Branch apply. Among the evidence we received on this matter we give greatest weight to the evidence of Dr Ryder<sup>79</sup> who, having reviewed a number of previous technical reports, concluded that

“... a higher minimum flow period expressed in the Plan for the South Ashburton (3,200 L/s October - April) is unnecessary to maintain the Ashburton salmonid fishery. A period of higher flow from February to April is adequate provided the frequency of floods and freshes is not significantly reduced.”

We therefore recommend that Table 12 be amended by altering the period that the 3,200 L/s flow applies to “February to April” (instead of October to April as notified). Consequently the 2,300 L/s minimum flow is to be amended to apply to the balance of the year.

- [336] Based on the submission of Dairy Holdings Limited, we recommend the Table 12 allocation limit for B permit takes from Taylor’s Stream above the South Branch Confluence is raised from 200 L/s as notified to 800 L/s. The reason for this amendment is that it “... would allow for the B-block take in process (CRC082614, 500 L/s) and for the ‘error’ to not include all existing B block takes in the B-allocation block ...”<sup>80</sup>

## **16 Part surrender on transfer of water permits in over-allocated catchments**

- [337] As notified, the LWRP provided by Rules 5.107 and 5.108 for transfer of water permits. Rule 5.107 would classify certain transfers as restricted discretionary activities on certain conditions. Of them, Condition 5 would apply in any catchment where surface water and/or groundwater allocation limits are exceeded. That condition of eligibility for a transfer to be considered as a restricted discretionary activity would stipulate that any transferred water is surrendered according to stated proportions. Rule 5.108 would classify as a non-complying activity a transfer of a water permit that does not comply with any condition of classification as a restricted discretionary activity.

- [338] Condition 5 is to implement Policy 4.73 (as notified), which applies to over-allocated surface-water catchments and groundwater zones. The policy is to enable transfers of water ‘moving’ to irrigation schemes, and in all other instances provided there is a partial surrender which is not re-allocated.

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<sup>79</sup> Statement of Evidence by Gregory Ian Ryder on behalf of Rangitata Diversion Race Management Limited (Hearing 3), May 2013, page 13, paragraph 6.2.

<sup>80</sup> Statement of Evidence of Bas Veendrick, 2013, page 18, paragraph 54.

[339] A number of submitters opposed Condition 5 in that it would require surrender of some of the amount of water that can be taken under the water permit to be transferred. One submitter (HydroTrader) also asserted that Rules 5.107 and 5.108, or at least Condition 5 of the former, are *ultra vires* the CRC. Several other submitters supported that assertion, and the legal submissions presented on it.

[340] If the rules, or at least Condition 5, are indeed *ultra vires*, there may be no need for us to consider whether they are justified on their merits; so we address the legal questions first.

### **16.1 Are Rules 5.107 and 5.108, or is Condition 5 of Rule 5.107, ultra vires the CRC?**

[341] Counsel for HydroTrader made two main submissions: that section 77A of the RMA does not confer on the CRC power to assign an activity status on transfer of water take consents; and that, even if it does, Condition 5 is *ultra vires* section 77A.

#### **Can transfer of a water permit be assigned to an activity class?**

[342] On the first main submission, that section 77A does not empower a council to assign an activity status to transfer of a water permit, counsel advanced these grounds:

1. Transferring a water permit is not an ‘activity’, which is the only thing to which, under section 77A(1)(a), activity status can be assigned.
2. Section 136(2)(b)(ii) does not contemplate a situation where no application can be made, leaving a question whether section 77A was intended to apply to transfers.
3. Section 87A only applies to something for which a resource consent is required, being an ‘activity’.
4. By section 136(4) an application for approval of a transfer is not an application for a resource consent, but is to be considered “as if ...an application for a resource consent”: A transfer does not authorise an ‘activity’ in the way a resource consent does.
5. As section 136(4)(b) does not apply sections 104A to 104D to consideration of applications for approval of transfers, there is no need to apply the full consequences of the various classes of activity described in section 87A.
6. The location of section 136 among the provisions of the RMA governing administrative acts concerning consents already granted indicates it is not intended to be among the activities for which resource consent is required.
7. Conditions authorised by section 108 do not typically lend themselves to the act of transferring a consent, but rather to an activity that would contravene sections 9 or 11 to 15 without a resource consent.

#### **Consideration of HydroTrader’s legal submissions on classifying transfers**

[343] Transfers of water permits are governed by section 136 of the RMA. Relevantly, section 136(2) enables a holder of a water permit (other than for damming or diverting water) to

transfer it to another person or another site if both are in the same catchment or aquifer, and either the transfer is expressly allowed by a regional plan, or it has been approved by the consent authority that granted the permit.

- [344] Section 136(4) applies to applications for the consent authority's approval. It stipulates that an application is to be considered in accordance with certain provisions that apply to resource-consent applications generally; and also that the consent authority is to 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.
- [345] We understand that in considering submissions on a proposed plan, a local authority should apply the law as declared by the courts. The Environment Court has held<sup>81</sup> that a regional plan may classify transfers of water permits as permitted activities or as restricted discretionary activities.
- [346] We have considered whether, on HydroTrader's submissions, the CRC should decline to apply the case law on the point. We understand that, in making provision for approval of water permits, instead of creating a new protocol for the purpose, Parliament chose to adapt the existing well-established protocol for resource-consent applications. As can occur when a process designed for one purpose is adapted for another, there may be instances where the 'fit' may be imperfect. A purposive interpretation may be appropriate in such cases.
- [347] A basis of Hydrotrader's submissions on this point is that transferring a water permit is not an 'activity' to which activity status (such as restricted discretionary) can be assigned.
- [348] We accept that transferring a permit is not a physical activity, and calling it an 'activity' is metaphorical or conceptual. Similarly the items in the list of activities in section 77A(2) (e.g. a permitted activity, a restricted discretionary activity etc) are not physical activities either. For identifying an activity, we cannot distinguish a transfer of a water permit from items in that list.
- [349] By section 136(5) where a transfer is approved (and is not for a limited period) the original permit (or the part transferred) is deemed to be cancelled, and the holder's interest (or part of it) to be transferred is deemed to be a new permit on such conditions as the consent authority determines. So although it is in the approval process that a consent authority is empowered to determine such conditions, they are not conditions of the approval as such, but conditions of the deemed new permit replacing that which is being transferred.
- [350] We infer that the purpose is twofold: for the consent authority to have opportunity to decide whether or not a proposed transfer deserves approval; and to review the

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<sup>81</sup> *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380 [456].

suitability for the changed circumstances (including new site) of the conditions of the water permit. Although various provisions for resource consent applications raised by HydroTrader may not fit precisely for the adapted context for approval of transfers of water permits, the provisions should be interpreted so as to serve the dual purpose by which approval may be granted or declined, and new conditions may be determined. That can be achieved by classifying transfers as, for instance, restricted discretionary activities.

[351] Therefore we are not persuaded by HydroTrader's submissions, and consider that the CRC should apply the Environment Court decision by which approval of transfers of water permits may be classified as a restricted discretionary activity.

### **Is Condition 5 ultra vires section 77A?**

[352] On HydroTrader's second main submission, that Condition 5 is *ultra vires* section 77A, counsel presented these points:

1. The Act restricts circumstances in which grants of consent can be reversed in whole or in part, as they are valuable economic rights.
2. A condition that is *ultra vires* section 108 is *ultra vires* section 77A.
3. Conditions under section 136(5) can only restrict the activity being authorised by the resource consent, such as taking water, and cannot restrict the transfer itself.
4. Section 87A preserves the terms and conditions that applied to a particular activity (taking water for example), when consent was granted, irrespective of subsequent rule changes.
5. Changes to consent conditions have to remain within the bounds of the original restrictions, terms and conditions.
6. A requirement to surrender 50% of the amount to be taken would frustrate or negate the grant, and is therefore not available under section 108, and cannot be required under section 77A.
7. The focus of section 136(4) and the need for approval is not the volume of the allocation, but the location where it is exercised. Wherever it is exercised does not alter the effect of the amount allocated, so it is not within the effects of the transfer.
8. The purpose of the surrender requirement is not a resource management purpose, but an ulterior one and would abrogate rights conferred by statute.

### **Consideration of HydroTrader's submissions that Condition 5 is ultra vires**

[353] We accept the general thrust of points 1, 2 and 3. On point 4, even if section 87A has the effect suggested (of which we are unsure), that would not restrict the separate power conferred by section 136(5).

[354] The latter, by paragraphs (a) and (b), makes separate provisions about conditions of deemed new water permits on transfer. Paragraph (a) applies to transfers to which subsection (3) applies, that is, where approval is not required. Paragraph (b) applies to

transfers to which subsection (4) applies, that is, transfers that are not expressly allowed by a regional plan, and for which consent authority approval is required. Paragraph (a) stipulates that a deemed new permit to which it applies is to be on the same conditions as the original permit. But paragraph (b) expressly empowers the consent authority to set such conditions of the deemed new permit as it determines.

- [355] The class of transfers addressed by HydroTrader's submissions is that to which section 136(4) applies. Section 136(5)(b) empowering the consent authority to set conditions of the deemed new permit is to be read in the context of section 136(4)(b)(ii) which directs the consent authority to have regard to the effects of the proposed transfer, including the effect of ceasing and changing the exercise of the permit in the current conditions of the site, and the effects of allowing the transfer. Reading those provisions together, the permissible scope of conditions determined for the deemed new permit is that stated generally in section 108, and the additional matters to which the consent authority is directed by section 136(4)(b)(ii) to have regard.
- [356] Although conditions of a deemed new permit to which subsection (3) applies is limited to the same conditions as the original permit, we have not found any indication or necessary implication that the scope of conditions set under paragraph (b) is restricted to the bounds of those of the original permit. Indeed, the purpose of the separate provision in paragraph (b) for transfers to which section 136(4) applies can only be to allow a broader scope of conditions than the original conditions. So we do not accept HydroTrader's points 4 and 5.
- [357] On point 6, it is the nature of conditions of resource consents that they restrict what otherwise would be allowed. The scheme of the Act allows questions of extent or degree on whether a particular condition is excessive or disproportionate to be reviewed on appeal. In the present context, partial surrender is a condition of a transfer being classified by notified Rule 5.107 as a restricted discretionary activity, and is not applied to a transfer treated as a non-complying activity by notified Rule 5.108 (recommended Rules 5.133 and 5.134 respectively). Submitters on the LWRP are entitled to question the appropriateness of those rules, including by raising questions of extent or degree of conditions of eligibility for transfers to be considered as restricted discretionary activities. But those questions are for consideration on their merits. We do not understand that they bear on HydroTrader's legal submission that Condition 5 of Rule 5.107 is *ultra vires* the CRC's powers under section 77A.
- [358] We are not persuaded by point 7. Condition 5 of notified Rule 5.107 only applies to transfers in catchments that are over-allocated. It is in those catchments that amounts of water taken may have significant effects.
- [359] The amount of a permit to take water that may be transferred to another site may bear on the effects of allowing the proposed transfer, including the effects of ceasing or changing its exercise under current conditions. We do not accept that the place where a permit to take water is exercised does not alter the effect of the amount allocated.



- [360] Nor do we accept point 8 that phasing out over-allocation of water taking is not a resource management purpose, but an ulterior one. Section 30 RMA identifies taking and allocation of water as functions of every regional council. The NPSFM (an instrument under the RMA to which the LWRP is to give effect) requires regional councils to phase out over-allocation, and to state criteria in regional plans for approval of transfers of water take permits.<sup>82</sup> The RPS (another instrument under the RMA to which the LWRP is also required to give effect) identifies that where a water resource is over-allocated, transfer mechanisms can promote the efficient use of water resources, especially where potential demand may exceed availability.<sup>83</sup> In fully allocated catchments, transfers need to be considered in a comprehensive and integrated manner.
- [361] Having considered the several points made in support of Hydrotrader's second submission on whether Condition 5 is *ultra vires*, we find that it is not supported, and we do not accept it.

## 16.2 Is Condition 5 inappropriate on its merits?

- [362] Having rejected HydroTrader's submissions that Condition 5 is *ultra vires*, we have to consider the submissions that it should be deleted or amended as inappropriate or excessive. Following the presentation of submissions and evidence, we consider the surrender of a portion of the water allocated should be addressed by making reduction in the rate or volume of taking, as may be required to assist with the phasing out of exceedance of limits, a matter to which exercise of discretion should be restricted. In that way some water in over-allocated catchments, particularly if not currently being used, or used efficiently, may be recovered. But the specific proportions stipulated in the notified version would no longer be prescribed.
- [363] We consider that such an amendment to the rule (recommended Rule 5.133) would be responsive to the CRC's duties in respect of over-allocation in giving effect to the NPSFM and the RPS. The extent of reduction would be assessed by the consent authority case by case. In our judgment amended in this way the rule would carry out the CRC's relevant functions under section 30; would be the most appropriate for achieving the objectives and implementing policies of the LWRP; and would show regard to actual and potential effects of taking water on the environment. The benefits and costs of taking water, and the risk of acting or not acting, would be taken into account by the consent authority's consideration of granting or withholding approval of a proposed transfer. We are satisfied that the recommended rule would show regard to the vision and principles of the CWMS, and would assist the CRC to carry out its functions in order to achieve the purpose of the Act, and would promote the sustainable management of the natural and physical resources involved. So we recommend that the submissions on notified Rule 5.107 and condition 5 are accepted to the extent that

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<sup>82</sup> Objectives B2, B3; Policies B3, B5, B6.

<sup>83</sup> See CRPS Issues 7.1.4 and 7.1.5; Policy 7.3.4(2).

condition 5 is omitted and that item 7 is added to the list of matters to which the exercise of discretion is restricted, as shown in the marked-up version of the LWRP in Appendix 2 to this report.

## ***17 Lapsing of resource consents***

[364] Some submissions questioned whether the LWRP can or should control the period for lapsing of unimplemented resource consents.

[365] Relevant parts of section 125 of the RMA provide:

(1) A resource consent lapses on the date specified in the consent or, if no date is specified, —

(a) 5 years after the date of commencement of the consent ...;

(1A) However, a consent does not lapse under subsection (1) if, before the consent lapses, —

(a) the consent is given effect to; or

(b) an application is made to the consent authority to extend the period after which the consent lapses, and the consent authority decides to grant an extension after taking into account—

(i) whether substantial progress or effort has been, and continues to be, made towards giving effect to the consent; and

(ii) ...

(iii) The effect of the extension on the policies and objectives of any plan

[366] The LWRP as notified addressed this in Policy 4.75 (now recommended Policy 7.73):

Resource consents to abstract water shall be given effect to within two years unless a longer lapse period is justified to give effect to the consent due to the scale or complexity of the activity. For the purpose of this policy, 'given effect to' requires the installation of infrastructure, water meter and use of the water as proposed.

[367] That policy drew a number of submissions. Some asked that this policy be deleted; and those requests were opposed by other submitters. Other submitters asked that the policy be amended to extend the presumptive period from 2 years. Most of them asked that the period be extended to 5 years. One asked that it be 3 years for individual consent-holders and 5 years for irrigation schemes.

[368] Other submitters opposed extending the presumptive lapsing period.

[369] We note that the lapsing period applicable to any permit to take water would not be set by the policy: It is to be specified by the consent authority in the circumstances of the particular case. The two-year period in the policy is only a general and presumptive period, and does not constrain the consent authority.

- [370] We accept that the scale and complexity of some major projects may indicate that 2 years may be insufficient to fully give effect to a permit to take water. Recommended Policy 4.73 would provide for that. A longer period may be specified by the consent authority in the circumstances.
- [371] If the period specified proves insufficient, the consent authority, after taking into account the criteria in subsection (1A), has power to grant an extension.
- [372] Having considered the cases made by submitters, we find that on balance the two-year lapse period in the notified policy should be amended to three years. In that regard we found the evidence of Dr Davoren<sup>84</sup> to be persuasive. He stated:

“Depending on grant date, even a relatively straight-forward system requiring minimal land clearance, building relocation or removal, fencing, mainline installation, irrigator delivery and assembly, commissioning and rectifying faults so that the *“use of the water as proposed”* would likely not be completed in two years. ... While I agree five years (as was previously the case) was too long (although I submitted it has been reasonable), in our experience a more realistic and practical lapse period would be three (3) years.”

## ***18 Giving effect to the NPSFM***

- [373] As already mentioned, the LWRP is required by section 67(3) to give effect to a national policy statement. Some submitters contended that the LWRP as notified would give effect to the NPSFM, and others argued that it would not.

### **18.1 NPSFM requirements**

- [374] To address that issue, we identify and summarise requirements of the NPSFM that are relevant to the LWRP.
- [375] Section A of the NPSFM relates to water quality.
- [376] By Policy A1, the LWRP has to do certain things to give effect to the NPS objectives, and having regard at least to the impacts of climate change, and the connection between water bodies. The things the Plan has to do are:
- (a) For all bodies of fresh water in the region—
    - (i) establish fresh water objectives
    - (ii) set fresh water quality limits
  - (b) Establish methods (including rules) to avoid over-allocation.
- [377] Policy A2 of the NPSFM applies where water bodies do not meet the freshwater objectives made under Policy A1. By this policy, the CRC is to specify targets and

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<sup>84</sup> Evidence of Dr Anthony Davoren, HydroServices Ltd, 4 February 2013, page 10, paragraphs 25 and 27.

implement methods to assist the improvement of water quality in water bodies to meet those targets within a defined timeframe.

- [378] Section B of the NPSFM relates to water quantity.
- [379] By Policy B1, the LWRP is to do certain things to give effect to the NPS objectives having regard to the impacts of climate change and the connection between water bodies. The things the Plan has to do, in respect of all bodies of fresh water in the region except ponds and naturally ephemeral water bodies, are:
- (a) Establish fresh water objectives
  - (b) Set environmental flows and/or levels.
- [380] By Policy B2, the LWRP is to provide for efficient allocation of fresh water to activities within the limits set to give effect to Policy B1.
- [381] By Policy B3 the LWRP is to state criteria by which applications for approval of transfers of water take permits are decided, and to improve and maximise the efficient allocation of water.
- [382] By Policy B4 the LWRP is to contain methods that encourage the efficient use of water.
- [383] By Policy B5 the LWRP is to ensure that decisions will not result in future over-allocation.
- [384] By Policy B6, the LWRP has to set a defined timeframe and methods by which over-allocation must be phased out, including reviewing water permits and consents.
- [385] Section E of the NPSFM relates to progressive implementation programmes.
- [386] By Policy E1, implementation of NPSFM Policies is to be fully completed by 31 December 2030; and where it cannot be completed fully by 31 December 2014, it may be implemented by a programme (adopted by 12 November 2012) of defined time-limited stages.
- [387] Those are the requirements of the NPSFM which some submitters contended that the LWRP as notified would fail to give effect to.
- [388] Of course the RMA process for hearing submissions is such that those submitters were addressing what they considered are deficiencies of the LWRP as notified. The Schedule 1 process is designed so that consideration of original submissions, further submissions, evidence, and reports under section 42A leads to identifying ways in which the proposed instrument as notified may be improved, and any deficiencies rectified. In accord with that process, and having considered multiple submissions points, substantial evidence, full legal submissions, and a detailed report under section 42A in reply, we are recommending many amendments to the LWRP. Consequently, it would be pointless

for us to consider the submitters' contentions as they relate to the contents of the LWRP that was notified. Instead we consider whether the LWRP as it would be amended by our recommendations would fail to give effect to the NPSFM in any of the respects identified by submitters. Those recommendations are readily seen in context in the marked-up version of the LWRP in Appendix 2.

## **18.2 Would the NPSFM requirements be given effect to?**

[389] We now briefly re-state each relevant requirement of the NPSFM, and summarise our consideration of whether the LWRP (as now recommended) would give effect to it.

### **Establish freshwater quality objectives for all bodies of fresh water (NPSFM Policy A1a)**

[390] The LWRP would contain objectives for the quality of water in all bodies of fresh water in the region: see recommended Objectives 3.8; 3.8A; 3.15; 3.16; 3.17; and 3.24; recommended Policies 4.3(a), (b), (c), and (d); 4.4(e); 4.5; 4.7; and Tables 1a and 1b.

### **Set freshwater quality limits for all bodies of fresh water (NPSFM Policy A1a)**

[391] Region-wide water quality limits are specified in Schedule 8; and water quality limits at catchment level are to be set in sub-regional sections 6 to 15. Schedule 5 sets "receiving water standards" that apply to discharges after reasonable mixing. Although Schedule 5 is not titled "limits", it would limit the extent of degradation that is permissible as a result of point-source discharges.

[392] In addition, the LWRP would indirectly set limits by specifying a 2009 to 2013 benchmark period for nitrogen losses from farming activities (defined in the Plan as the 'nitrogen baseline'), the application of which would vary according to different nutrient allocation zones. The loss (or leaching) of nitrogen beyond the nitrogen baseline would be a prohibited activity in red nutrient allocation zones, so the baseline is a form of limit for nitrogen leaching losses in those zones.

[393] In lake zones, the loss of nitrogen greater than the nitrogen baseline would also be a prohibited activity, so the baseline would also be a form of limit in those zones too.

[394] In orange zones, the loss of nitrogen greater than 5 kgN/ha/year more than the nitrogen baseline would be a non-complying activity, so the limit on leaching losses in those zones would be 5kgN/ha/year more than the nitrogen baseline.

[395] Green and light blue zones are not considered to be at risk from nitrogen losses from farming activities. In those zones the Plan would set thresholds on the amount of nitrogen loss (20 kg/ha/yr), and the rules prescribe consequences for a farming activity that has greater loss, according to size of the property, the amount of the excess, whether a Farm Environment Plan has been prepared, and consideration (on a restricted discretionary activity application) of various matters on which discretion would be exercised.

- [396] Some submitters on this topic appeared to expect inflexible (or ‘hard’) water quality limits in respect of every water body in the region. The NPSFM does not expressly require that; and it seems that no scientific basis is currently available to support inflexible limits. In particular we consider that it would be inappropriate to specify that the Table 1a and 1b numerical ‘outcomes’ are limits in terms of the NPSFM (as was sought by some submitters), for the reasons set out in the officer’s Reply Section 42A Report.<sup>85</sup>
- [397] The LWRP regime is justifiably inflexible in respect of nitrogen losses from farming activities in the red nutrient allocation zones and lake zones. In respect of other nutrient allocation zones, the activity classifications would allow for resource consents to be considered in the established way where thresholds would be exceeded, and would allow exceptions for small scale nitrogen losses above the thresholds.
- [398] The combined effect of the nitrogen baseline and nitrogen loss calculation (which determines the current leaching loss for a farming activity) with those provisions is to provide limits on farming activities according to nutrient allocation zones, and consequently for the water bodies into which they drain.

#### **Establish methods (including rules) to avoid over-allocation (NPSFM Policy A1b)**

- [399] The LWRP contains policies that give effect to NPSFM Policy A1(b). For example, Strategic Policy 4.2 states that “...the individual and cumulative effects of land uses, discharges .... will meet the water quality limits set in Sections 6 to 15 or Schedule 8 ....”. Policy 4.7 states that “Resource consents for new activities will generally not be granted if the granting would cause a water quality or quantity limit set in Schedule 8 or Sections 6 to 15 to be breached or further over-allocation to occur ...” The Plan as we recommend it be amended, would contain methods (land use and discharge rules for farming activities) as described in the previous paragraph to avoid over-allocation of the capacity of water bodies to assimilate contaminants such that the Table 1 outcomes are not met. In addition, the application of Schedule 5 to discharge consent applications will assist with achieving the Schedule 8 water quality limits.

#### **Specify targets for water bodies that do not meet freshwater objectives (NPSFM Policy A2)**

- [400] The water bodies in Canterbury that do not meet the freshwater objectives and the Table 1 outcomes are those in the red nutrient allocation zones. The LWRP as notified would not itself expressly identify targets as such for them. The intention is that targets for those water bodies are to be considered in local collaborative processes, and specified in sub-regional sections 6 to 15 of the Plan —see Sections 2.6 and 2.7, and Policy 4.9(c).

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<sup>85</sup> Volume 4, Officer’s Reply for the Council Reply Hearing, 1 August 2013, Appendix 1, first Memorandum from Adrian Meredith dated 8 July 2013 (comprising ten unnumbered pages).

[401] However, as we have noted previously, Schedule 8 sets water quality limits for rivers, lakes and groundwater. Insofar as those water quality limits might be exceeded in particular locations then the Schedule 8 numerics would instead serve as targets to be met over time. Under the combination of Strategic Policies 4.1 and 4.2 one would expect that such targets would need to be achieved by 31 December 2030 (assuming that the Schedule 8 water quality limits are set in order to assist with achieving the Table 1 outcomes).

**Implement methods to assist improvement to meet targets within defined timeframe (Policy A2)**

[402] The implementation methods to assist improvement of water quality in water bodies that do not meet the freshwater objectives and Table 1 outcomes are the rules applicable to the red nutrient allocation zones: recommended Rules 5.43 to 5.48. We discuss the efficacy of those rules in more detail in Section 6.2 of this report that deals with Nutrient Management. They are expected to be supported by development of the relevant sub-regional sections, as has already been done in the Hurunui Waiau River Regional Plan.

**Establish freshwater quantity objectives (Policy B1)**

[403] The LWRP would establish freshwater objectives by Objectives 3.2, 3.4, 3.6, 3.7, 3.8, 3.8A, 3.9, 3.10, 3.12, 3.13, 3.19, and 3.24; and Policies 4.1 to 4.8, 4.65 to 4.69, and 4.72.

**Set environmental flows and/or levels (Policy B1)**

[404] Specific environmental flows and levels are not set on a region-wide basis. Instead, to achieve the freshwater quantity objectives, the sub-regional sections of the LWRP set on a catchment basis include environmental flow and allocation limits (surface water allocable volumes and minimum flow abstraction cessation limits ) and groundwater limits (allocable volumes and groundwater levels). Further (or revised) limits are to be set in sub-regional sections 6 to 15, following local collaborative processes, as described in Sections 2.5 to 2.7; Policy 4.9.

**Provide for efficient allocation of fresh water to activities within limits set to give effect to Policy B1 (Policy B2)**

[405] The water allocation limits set in the LWRP were discussed under Policy B1. The Plan would not allocate water to particular end uses. However, it would give priority to group and community drinking-water supplies (Policy 4.49), replacement consents generally (Policy 4.50), and hydro-electricity and irrigation schemes in particular (Policy 4.51). Policy 4.67 would provide for "... the spatial and temporal sharing of allocated water between uses and users ...". These policies would be given effect to in the administration of recommended Rules 5.111 to 5.158. Other than that, applications to abstract water will be assessed on a 'first in, first served' basis, and such efficient allocation would be market driven, except where existing sub-regional plans (such as the Waitaki Catchment Water Allocation Regional Plan) provide otherwise. Further

allocation to particular end uses may occur on a catchment basis in sub-regional sections 6 to 15, following local collaborative processes —Policies 4.9 and 4.10.

### **State criteria for requests for approval of transfers to improve and maximise efficient allocation (Policy B3)**

- [406] Recommended Policies 4.70 and 4.71 would describe the ways in which proposals for transfers of water permits would be managed to improve efficiency of water use.
- [407] Recommended Rule 5.133 would state conditions on which approval of transfer of a water permit is classified as a restricted discretionary activity, and also state matters to which the exercise of discretion to grant or refuse approval will be restricted. Of those matters, several would bear on improving and maximising efficient allocation —items 2, 3, 4, 5, and 7.
- [408] Numerous other recommended provisions of the LWRP refer to the efficient use of water more generally, including Objectives 3.4, 3.9, 3.24; Policies 4.40, 4.50, 4.65 to 4.69, and Schedule 7.

### **Encourage efficient use of water (Policy B4)**

- [409] Recommended Objective 3.9 states “Abstracted water is shown to be necessary and reasonable for its intended use and any water that is abstracted is used efficiently “
- [410] At a general level recommended Policy 4.40 states “Farm environment plans are used as a primary means of identifying and delivering good environmental practice across a range of farm activities, including nutrient loss discharge management, efficient and effective use of water for irrigation ...”. Recommended Policy 4.50(b)(iii) states that where a catchment is over-allocated replacement consents need to demonstrate “ ... that the existing use of water is efficient and that the efficiency is enduring.”
- [411] At a specific level, under the heading of “Efficient Use of Water” recommended Policies 4.65 to 4.69 would provide direction on efficient use of water for irrigation takes, the spatial and temporal sharing of allocated water between uses and users and water conveyance systems.
- [412] These policies would be given effect to in the administration of recommended Rules 5.111 to 5.158.

### **Ensuring decisions avoid over-allocation (Policy B5)**

- [413] Recommended Objective 3.10 would specify that water is made available “... within the allocation limits or management regimes which are set in this Plan.” As we have noted, those limits may be set separately in sub-regional Sections 6 to 15. Recommended Strategic Policy 4.2 would state that “...the individual and cumulative effects of abstractions will meet the water quantity limits in Sections 6 to 15.” Recommended Strategic Policy 4.7 would state “Resource consents for new activities will generally not



be granted if the granting would cause a water quality or quantity limit set in Schedule 8 or Sections 6 to 15 to be breached or further over-allocation to occur ...”

- [414] Actions of decision-makers administering recommended Rules 5.111 to 5.158 would be guided by those strategic policies so as to avoid over-allocation. However, as a final and certain safeguard, any exceedance of the water allocation limits would be a Prohibited Activity (recommended Rules 5.125 for surface water and 5.130 for groundwater).

**Set defined timeframe and methods by which over-allocation phased out, including by consent reviews (Policy B6)**

- [415] Recommended Policy 4.50 describes ways in which over-allocation is to be managed. Although review of abstraction permits is not identified among them, recommended Policy 4.74 indicates conditions in which the power to review water permits is to be exercised.
- [416] The implementation of those policies, including defining of timeframes and methods, is left to the sub-regional sections 6 to 15 (see Sections 2.6 and 2.7); and Schedule 13 contains requirements for implementation of water allocation regimes. For example, recommended Policies 13.4.2 to 13.4.6 specifically address the issue of over-allocation in the Hakatere/Ashburton catchment. Those policies indicate how the over-allocation is to be addressed (for example by moving from surface takes to deep groundwater takes – recommended Policy 13.4.5). Table 12 indicates that the Hakatere/Ashburton over-allocation is to be phased out by 2033 (when the revised allocation limits are to apply).

**Meet time limits for implementation of NPSFM policies (Policy E1)**

- [417] On 1 November 2012, the CRC resolved to implement Policies A2 and B6 of the NPSFM in defined, time-limited stages. The Council accepts that the other policies in the NPSFM are to be implemented by the LWRP by 31 December 2014. The contents of the CRC’s Long Term Plan are consistent with preparation of sub-regional plans for certain sub-regions accordingly.

**Overall assessment of giving effect to the NPSFM**

- [418] We have given particular consideration to the extent to which the LWRP would give effect to the NPSFM. In coming to a conclusion on that topic, we have in mind that the CRC has also to give effect to the RPS; and to have particular regard to the vision and principles the CWMS. The NPSFM is general in nature, in that it applies throughout New Zealand. The RPS applies in the Canterbury Region, and responds to the natural and physical resources and the relative circumstances of social, economic and cultural well-being within it.
- [419] For this region, the RPS contains policies that indicate management of land and water resources and integration of solutions of issues affecting them being addressed by catchments or parts of the region, and by involving people and communities—see especially recommended Policies 7.3.9 and 7.3.13. The CWMS also places reliance on

local collaboration in respect of environmental limits, restoring ecological health and functioning to sustainable levels, and integrating management of water resources, all within the RMA regulatory framework. The RPS and CWMS in combination support the ways in which the LWRP would leave to sub-regional sections the development of additional targets, limits, timeframes, and methods suitable for the circumstances of each sub-region, but within the overall structure of the objectives and strategic policies of the LWRP. Outcomes of local collaboration would be tested by Schedule 1 process before being incorporated as sub-regional sections of the LWRP.

[420] In that context, we assess the LWRP as substantially giving effect to the NPSEFM by the provisions it currently contains (amended as we recommend), and by the sub-regional sections it provides for, which the CRC has committed to proceed with in terms of its long term plan.

### ***19 Evaluation of alternatives, benefits, costs etc***

[421] By section 32 of the RMA the CRC was required, before notifying the LWRP, to make an evaluation of it examining the matters listed in section 32(3) and taking into account the matters listed in section 32(4), and to publish a report summarising the evaluation and giving reasons.

[422] That evaluation was made, and a substantial report summarising the evaluation was duly published in August 2012.

[423] Before making decisions on the submissions on the LWRP, the CRC is also required to make a further evaluation<sup>86</sup>.

[424] In coming to our recommendations on the submissions, we have examined and evaluated the LWRP (as it would be amended by our recommendations) by reference to the same matters listed in section 32(3) and taking into account those listed in section 32(4). Where we recommend amending objectives, we have considered alternatives (particularly those requested in submissions) and found that, considered together, the objectives as they would be amended by our recommendations would be the most appropriate way to achieve the purpose of the Act. Where we recommend amending policies, rules, and other methods, we have found that each, amended in accordance with our recommendation, and in the context of the rest of the Plan with which it is inter-related<sup>87</sup>—

- taking into account the benefits and costs; and
- (where there is uncertain or insufficient information about the subject matter) the risks of acting or not acting; and
- having regard to its efficiency and effectiveness;

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<sup>86</sup> By section 2(2), and by clause 2 of the new 12<sup>th</sup> Schedule, of the Resource Management Amendment Act 2013, the replacement section 32 enacted by section 70 of that amendment Act is not applicable to this Plan

<sup>87</sup> *Contact Energy v Waikato RC* (2007) 14 ELRNZ 128 HC.

would be the most appropriate (in the sense of most suitable) for achieving the relevant objective and the purpose of the Act.<sup>88</sup>

- [425] In considering all the submissions and what recommendations we should make on them, we have kept in our minds the statutory purpose of promoting the sustainable management of natural and physical resources of the region, especially its land and water. We have found potential competition between using those resources in accord with the enabling provisions of section 5(2) of the RMA for social, economic and cultural wellbeing and health and safety, and sustaining the potential of the resources for future needs, for safeguarding the life-supporting capacity of them and of ecosystems, and for avoiding, remedying or mitigating adverse environmental effects. We have sought to resolve that competition in terms of relative significance or proportion for serving that statutory purpose. In that, we have been guided by the duties imposed on the CRC by applicable principles in other sections of Part 2 of the RMA.
- [426] In all of that our wish to explain our reasons has had to be tempered by the considerable number of points raised in many submissions. To keep this report to a practicable scale, we have selected main issues on which we give our reasons more fully in narrative form.
- [427] We know that all other issues raised were also important to those who submitted on them and who, in many cases, attended our hearings to explain them. Yet to address all submission points in that narrative way would be a protracted process, and would make this report disproportionately lengthy. So we give our reasons on them in more succinct form in the accompanying schedule of recommendations in Appendix 1, which is associated with a marked-up version of the LWRP as it would be amended by our recommendations in Appendix 2, so the effect of each recommendation can be seen in context.

## ***20 Conformity with Part 2 RMA***

- [428] Earlier in this report we summarised the purpose and principles stated in Part 2 of the RMA. We return to them, to explain our understanding that the LWRP, amended as we recommend, would serve the purpose of that Act of promoting the sustainable management of natural and physical resources.

### **20.1 Relevant matters of national importance**

- [429] Of the matters of national importance listed in section 6 for which the CRC is to recognise and provide for, five are relevant and applicable. In reviewing the recognition of and provision for them, we do so by reference to the LWRP as a whole, with its multitude of inter-related and overlapping objective, policies and rules.

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<sup>88</sup> *Rational Transport v NZ Transport Agency* [2012] NZRMA 298 HC.

- [430] The preservation of the natural character of wetlands, lakes and rivers and their margins, and the protection of them from inappropriate use and development, are responded to by recommended Objectives 3.2, and 3.15 to 3.19. Those objectives are to be achieved by recommended Strategic Policies 4.2, 4.3, 4.5 and 4.6, and by many recommended policies and rules, including recommended Rules 4.44 and 4.46.
- [431] The protection of outstanding natural features from inappropriate use and development is responded to in recommended Objectives 3.2, 3.8 and 3.19 in particular.
- [432] The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna is responded to in Objective 3.17 in particular, and in Objectives 3.8 and 3.24; and recommended Policies 4.85 to 4.87, and recommended rules to implement them.
- [433] The maintenance and enhancement of public access to and along lakes and rivers is not directly addressed in the objectives, but is indirectly provided for as a result of recommended Objectives 3.7 and 3.15; and recommended Policies 4.31, 4.44(h), 4.86(c), 4.88 and 4.95(b), and rules to implement them.
- [434] The relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu and other taonga is expressly addressed in recommended Objectives 3.1, and 3.2, and in many other objectives, policies and rules that include their values.

## 20.2 Matters to be had in particular regard

- [435] Of the matters listed in section 7 of the RMA to which the CRC is to have particular regard, the following are relevant and applicable.
- Kaitiakitanga would be facilitated by achieving recommended Objectives 3.1 and 3.2, as well as by other objectives and policies that are not explicitly related to it.
  - The ethic of stewardship pervades the LWRP, for example recommended Objectives 3.6 to 3.24.
- [436] The efficient use and development of natural and physical resources is addressed by recommended Objectives 3.3 to 3.10 and 3.24; by recommended strategic policies 4.2, 4.4, 4.5, 4.6, and 4.8; and by many other policies and rules.
- [437] The maintenance and enhancement of amenity values is responded to by recommended Objectives 3.2, 3.7, 3.8, 3.8A, 3.13, 3.14, 3.15, 3.18, 3.19, 3.20, 3.23 and 3.24; these are particularly supported by recommended strategic Policies 4.3, 4.5, and 4.6; and rules to implement them.

- [438] Intrinsic values of ecosystems are addressed in recommended Objectives 3.6 to 3.8, 3.14, 3.17, 3.18., 3.14, 3.17, 3.18, and 3.19; by recommended strategic Policy 4.5; and indirectly by sundry other recommended policies and rules.
- [439] The maintenance and enhancement of the quality of the environment underlies much of the LWRP, and is responded to by recommended Objectives 3.2, 3.6, 3.7, 3.8, 3.13 to 3.19, 3.23 and 3.24; and by recommended strategic Policies 4.1 to 4.6; as well as by other policies and rules to implement them.
- [440] Finite characteristics of natural and physical resources and protection of habitats of trout and salmon are also implicitly included in the objectives and policies referred to in the preceding summary.

### **20.3 Sustainable management of natural and physical resources**

- [441] A main theme of the LWRP is managing the use, development and protection of the natural and physical resources of the region in a way and at a rate that would enable people and communities to provide for their social, economic, and cultural well-being and their health and safety. That is evident from recommended Objectives 3.1 to 3.7, 3.10 to 3.13, and 3.20 to 3.24. It is noteworthy that recommended policies for nutrient management and for abstraction of water, and recommended rules for implementing those policies, are designed to serve enabling those activities.
- [442] Another main theme of the LWRP is directed to sustaining the potential of those resources to meet needs of future generations; safeguarding the life-supporting capacity of water, soil and ecosystems; and avoiding remedying, or mitigating adverse effects of activities on the environment. Those elements of sustainable management are reflected in recommended Objectives 3.1, 3.6, 3.7, 3.8, 3.9, 3.14 to 3.19, 3.23 and 3.24.
- [443] In those respects the LWRP does what is required of it: promote the sustainable management (as described) of the natural and physical resources of the region; and in doing so it conforms with the directions of sections 6 and 7.
- [444] The other requisite is that in responding to both those elements of Part 2, it does so to an extent that neither predominates over the other. The LWRP achieves that by managing the enabling so that (for instance) taking of water, and activities that lose nutrients to the environment, are neither unconstrained nor generally prohibited, but regulated so that activities for social, economic, and cultural wellbeing may reasonably continue. Correspondingly, management of resources to sustain their potential for future generations; to safeguard their life-supporting capacity; and to avoid, remedy, or mitigate adverse environmental effects are not given predominance, but neither are they relegated to lip-service. They are given their deserved influence.
- [445] Those observations lead to our considered judgement, having spent many months of hearing and considering numerous submission points and much evidence, that the

LWRP, amended as we recommend, would indeed serve its purpose of promoting sustainable management of the natural and physical land and water resources of the Canterbury region.

DATED *1st* November 2013



David F Sheppard, Hearing Commissioner (Chairman)



Edward Ellison, Hearing Commissioner



Rob van Voorthuysen, Hearing Commissioner

***Appendix 1: Schedule of Recommendations***

[separately bound]

***Appendix 2: Proposed Plan with recommended amendments marked***

[separately bound]

***Appendix 3: List of reports considered***

[follows this page]

### ***Appendix 3 - Reference Material***

1. Canterbury Water Management Strategy; Environment Canterbury (2009)
2. Mahaanui Iwi Management Plan (February 2013)
3. Te Poha o Tohu Raumati: Te Runanga o Kaikoura Environmental Management Plan (2009)
4. Te Runanga o Ngai Tahu Freshwater Policy (1999)
5. Te Whakatau Kaupapa: Ngai Tahu Resource Management Strategy for the Canterbury Region (1990)
6. Kai Tahu ki Otago Natural Resource Management Plan (2005)
7. Manawatu Wanganui Regional Council proposed One Plan, Chapter 16 Activities in Artificial Watercourses, Beds of Rivers and Lakes, and Damming
8. Potential Submission Regarding the Protection of Inanga Spawning Sites; Golder Associates
9. Audited Self-Management for Irrigation “How to Guide”; Mulgor Consulting Ltd, IB Consulting Ltd, draft April 2013
10. Audited Self-Management for Irrigation “Managing Water Quality and Quantity within Limits”; Mulgor Consulting Ltd, IB Consulting Ltd, March 2013
11. Review of proposed water quality objectives for rivers and lakes in the Canterbury Region; Canterbury Regional Council Report R09/16
12. Dairying and Clean Stream Accord; 2003
13. Sustainable Dairying: Water Accord; Dairy Environment Leadership Group, February 2013
14. New Zealand Environmental Code of Practice for Plantation Forestry (ECOP) – Benefits of Plantation Forestry. Part 2 Recognising Environmental Values (2007)
15. New Zealand Forest Road Engineering Manual (2012)
16. Example of a Rayonier and Matariki Forests Harvest Plan
17. Forest Management Certification Report from Rayonier
18. Practices to improve water quality drystock farms; prepared by Beef & Lamb NZ, Healthy Farms Healthy Rivers; Waikato Regional Council, May 2013
19. Land and Environment Plan Guidelines (various); Beef and Lamb NZ
20. Cultural Values of Te Runanga Arowhenua for the Orari Catchment; Tipa & Associates
21. Maximising water yield with indigenous non-forest vegetation: a New Zealand perspective; A Mark and J Dickinson 2007

22. Environmental Protection Authority decision on the use of four herbicides over water; December 2012
23. Hunter Downs Irrigation Scheme Resource Consent CRC071029
24. Hunter Downs Irrigation Scheme Management Plan draft May 2011
25. Hunter Downs Irrigation Farm Management Plan for Irrigated Land Use; May 2011
26. New Zealand Dairy Industry Audited Nutrient Management Scheme; DairyNZ
27. Overseer Nutrient Budget for an example farm; AgResearch and Fertiliser Industry Association of New Zealand, 2013
28. Bedded Pack Barns – Alternative Feeding Operations for Beef and Dairy Cattle; United States Department of Agriculture
29. Characterising dairy manures and slurries; AgResearch Envirolink tools report AGRX0901, October 2011
30. Canterbury Regional Pest Management Strategy 2011-2015; Canterbury Regional Council Report R11/23
31. Evaluating the use of 1080: Predators, poisons and silent forests; Parliamentary Commissioner for the Environment, June 2011
32. 1080 Application for Pest Control Within Canterbury; an AEE prepared by Golder Associates, March 2009
33. Uptake of 1080 by Watercress and Puha – Culturally Important Plants Used for Food; Lincoln University Wildlife Management Report No. 49
34. The effects of pollard baits containing sodium fluoroacetate (1080) on New Zealand freshwater crayfish; NIWA Client Report CHC2004-054
35. Aerobic transformation of 1080 in soil; Landcare Research 2011
36. Investigations of 1080 leaching and transport in the environment; NIWA Client Report 2012-035
37. The effects of 1080 on invertebrate communities and fish in West Coast streams; NIWA Client Report 2004-096
38. An updated review of the toxicology and ecotoxicology of sodium fluoroacetate (1080) in relation to its use as a pest control tool in New Zealand; Charles Eason et.al, New Zealand Journal of Ecology (2011)
39. Sodium fluoroacetate Pesticide Information Review; Dept Conservation unpublished report docdm-25427
40. Decision on Application for the Reassessment of a Hazardous Substance under Section 63 of the Hazardous Substances and New Organisms Act 1996: Sodium Fluoroacetate (1080) and Formulated Substances Containing 1080; ERMA NZ, 2008



41. Environmental Risk Management Authority Decision: to Manufacture Pindone Liquid Concentrate as a Vertebrate Toxic Agent for Rabbits; ERMA NZ, 2011
42. Issuing Permissions for the Use of Vertebrate Toxic Agents (VTAs): Guidelines for Public Health Units; Ministry of Health, revised edition 2010
43. Code of Practice for Commercial Vegetable Growing in the Horizons Region; Horticulture New Zealand, June 2010
44. New Zealand GAP; Horticulture New Zealand, 2009
45. A peer review of Overseer® in relation to modelling nutrient flows in arable crops; Foundation for Arable Research, January 2013
46. Coopers Creek Ecological Values and Flow Requirements; Golder Associates, February 2013
47. Review of the Spring-fed Coopers Creek, South Canterbury; Lincoln Ventures Ltd, May 2011
48. Fertiliser Manual (RB209); Department for Environment Food and Rural Affairs, June 2010
49. Heavy Water Dynamic Dust Suppressant; Reynolds Soil Technology
50. Non consumptive use of groundwater for ground source heat pumps; Central Heating NZ
51. The New Zealand Deer Farmers Landcare Manual 2012
52. Waipara River: Assessment of water quality and aquatic ecosystem monitoring 1999 -2002; Environment Canterbury Report No. U03/11, 2003
53. Canterbury Regional Gravel Management Strategy (2012)
54. Commissioners Recommendation Report on submissions on the Proposed Hurunui and Waiau River Regional Plan and Proposed Plan Change 3 to the Natural Resources Regional Plan.
55. Proposed Hurunui and Waiau River Regional Plan; Canterbury Regional Council, October 2011
56. Recovery Strategy for Greater Christchurch; Canterbury Earthquake Recovery Authority, 2012
57. Christchurch Central Recovery Plan; Canterbury Earthquake Recovery Authority, 2012
58. 22 February 2011 Christchurch earthquake - key findings and lessons learned; Transpower, June 2011
59. Guidelines for separation distances based on virus transport between on-site domestic wastewater systems and wells; ESR, 2010
60. Canterbury Regional Council Flood Protection and Drainage Bylaw (2013)

61. Canterbury Regional Council River Engineering Section Quality and Environmental Management System Manual (2010)
62. Canterbury Regional Council Erosion and Sediment Control Guidelines
63. Annual groundwater quality survey, spring 2009; Canterbury Regional Council Report No. R10/50, 2010
64. Canterbury Regional Council Long Term Plan 2012
65. Biosecurity NZ Register of Unwanted Organisms
66. A Guide to the Management of Cleanfills; Ministry for the Environment, 2012
67. Contaminated Land Management Guideline No. 1: Reporting on Contaminated Sites in New Zealand; Ministry for the Environment, 2011
68. Sports Fish and Game Bird Management Plans; Fish and Game
69. Farm Environment Plan focusing on ecological areas and an action plan for each area, Holmes Bay catchment, Banks Peninsula
70. Simons Pass Station – vegetation of Farm Block area under application for exemption from vegetation clearance rule; Professor David Norton University of Canterbury
71. Herd Home Cost –Benefits Economics of Investing in a Herd Home for Wintering ; S Parker
72. Case Study of a Nitrate Plume in South Australia (Pasture, mixed agriculture and forestry – south east of South Australia); CSIRO et al

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