Proposed
Hurunui and Waiau River Regional Plan;

And Proposed Plan Change 3 to the Canterbury Natural Resources Regional Plan

Section 42A Report
September 2012

Legal Submissions

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1. Introduction

1. This part of the section 42A report provides legal submissions. The relevant provisions of the Resource Management Act 1991 (the "RMA") and other statutory provisions are set out.

2. The legal submissions then address a number of legal matters which have arisen through the assessment of submissions.

2. Relevant RMA and other Statutory Provisions

2.1 Functions, Part 2 and duty under section 32

3. Section 66 of the RMA states that a regional council shall 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.

Part 2

4. The purpose of the RMA is set out in section 5 as being the sustainable management of natural and physical resources. The matters referred to in sections 6, 7 and 8 of the RMA inform the decision as to how sustainable management of resources is to be achieved.

5. One of the methods by which that purpose is to be achieved is by regional plans. Section 63(1) of the RMA provides that:

> *The purpose of the preparation, implementation, and administration 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.*

Functions – section 30

6. The relevant functions of Canterbury Regional Council ("CRC") under section 30 in relation to the Hurunui Waiau River Regional Plan ("HWRRP") are:

   a. The establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region (section 30(1)(a)).

   b. The preparation of 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)).

   c. The control of the use of land for the purpose of:

      i. The maintenance and enhancement of the quality of water in water bodies (section 30(1)(c)(ii)); and

      ii. The maintenance and enhancement of the quantity of water in water bodies (section 30(1)(c)(iii)).

   d. The control of the taking, use, damming and diversion of water, and the control of the quantity, level, and flow of water in any water body, including -

i. The setting of any maximum or minimum levels or flows of water (section 30(1)(e)(i)); and

ii. The control of the range, or rate of change, of levels or flows of water (section 30(1)(e)(ii)).

e. The control of discharge of contaminants into or onto land, air, or water and discharges of water into water (section 30(1)(f)).

f. If appropriate, the establishment of rules in a regional plan to allocate:

i. The taking or use of water (other than open coastal water)(section 30(1)(fa)(i)); and

ii. The capacity of water to assimilate a discharge of a contaminant (section 30(1)(fa)(iv)).

g. The establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity (section 30(1)(ga)).

Section 32

7. Under section 32 of the RMA, before notification and before making a decision under clause 10, an evaluation of the HWRRP must be carried out that examines:

a. The extent to which each objective is the most appropriate way to achieve the purpose of the RMA; and

b. Whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.

8. That evaluation must take into account:

a. The benefits and costs of policies, rules or other methods; and

b. 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.

9. As required by section 32, CRC carried out this analysis prior to notification of the HWRRP. However, a further analysis needs to be carried out before making a decision under clause 10.

2.2 Contents of regional plans

10. Section 67(1) sets out the required contents of regional plans. A regional plan must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.

11. Section 67(2) sets out what a regional plan may state:

a. the issues that the plan seeks to address; and

b. the methods, other than rules, for implementing the policies for the region; and

c. the principal reasons for adopting the policies and methods; and

d. the environmental results expected from the policies and methods; and

e. the procedures for monitoring the efficiency and effectiveness of the policies and methods; and

f. the processes for dealing with issues -

i. that cross local authority boundaries; or

ii. that arise between territorial authorities; or

iii. that arise between regions; and

g. the information to be included with an application for a resource consent; and

h. any other information required for the purpose of the regional council's functions, powers, and duties under this Act.

12. Section 67(5) provides that a regional plan must record how a regional council has allocated a natural resource under section 30(1)(fa) or (fb) and (4), if the council has done so. This has been recorded in the HWRRP.

13. Section 67(6) provides that a regional plan may incorporate material by reference under Part 3 of Schedule 1.

14. Under section 67(3), the HWRRP must give effect to any national policy statement. The relevant National Policy Statements for the HWRRP are the:

a. National Policy Statement for Freshwater Management ("NPSFM"); and the

b. National Policy Statement for Renewable Electricity Generation ("NPSREG").

15. Under section 67(3) the HWRRP must also give effect to the New Zealand Coastal Policy Statement and the operative Canterbury Regional Policy Statement.

Give Effect To

16. The "give effect to" relationship was discussed and applied by the Environment Court in *Clevedon Cares Inc v Manukau City Council*.[1] The Court was examining whether or not Plan Change 13 gave effect to the Auckland Regional Policy Statement provisions relating to "urban containment" and "integrated management". It said:

[50] Section 75(3) requires that the Plan Change "must give effect to" the operative Regional Policy Statement. We agree with Mr Allan, that with respect to Section 75(3) of the Act, the change in the test from

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

"not inconsistent with" to "must give effect to" is significant. The former test allowed a degree of neutrality. A plan change that did not offend the superior planning instrument could be acceptable. The current test requires a positive implementation of the superior instrument. As Baragwanath J said in Auckland Regional Council v Rodney District Council*:*

> *"This does not seem to prevent the District Plan taking a somewhat different perspective, although insofar as it would be inconsistent, it would be ultra vires. (The 2005 Amendment to Section 75, requiring a District Plan to 'give effect to' national policy statements, NZCPS and Regional Policy Statements, now allows less flexibility than its predecessor)."*

[51] The phrase "give effect to" is a strong direction. This is understandably so for two reasons:

[a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and

[b] The Regional Policy Statement, having passed through the Resource Management Act process, is deemed to give effect to Part 2 matters.

17. The Court contrasted the previous relationship of "must not be inconsistent with", which allowed a degree of neutrality, and simply required that the inferior planning instrument not offend the superior planning instrument, with the current test, which requires that the inferior instrument positively implement the superior instrument.

18. The Environment Court also noted that the High Court, in *Auckland Regional Council v Rodney District Council*, had commented on the consequences of an inferior instrument failing to meet the statutory test. Baragwanath J in that case stated that a district plan which was inconsistent with a regional policy statement would be ultra vires, that is, void and of no effect. On that basis, the current situation is that provisions of district plans which fail to give effect to a regional policy statement are ultra vires.

Inconsistency with any other regional plan

19. Section 67(4) provides that a regional plan must not be inconsistent with:

    a. a water conservation order; or

    b. any other regional plan for the region.

20. There are no water conservation orders currently in place on rivers within the area controlled by the HWRRP. Therefore, it is submitted that the HWRRP is not inconsistent with a water conservation order.

21. The HWRRP must not be inconsistent with any other regional plan for the region. Therefore, the HWRRP must not be inconsistent with the provisions of the Natural Resources Regional Plan ("NRRP") and any other operative regional plan. Part 1 of the HWRRP sets out the scope of the Plan, and the area to which it relates. It states that where an activity is expressly provided

for in the HWRRP, the provisions of the HWRRP apply. For all other activities, the provisions of the NRRP apply.

22. In these circumstances, consideration must be given as to whether the HWRRP is inconsistent with the provisions of the NRRP, where provisions of the NRRP continue to apply. The HWRRP seeks to manage the cumulative effects of land use on water quality through the control of land use pursuant to section 9 of the Act. The HWRRP does not seek to control point-source or non-point sources discharges under section 15 of the Act. Section 15 discharges continue to be controlled by the NRRP.

23. There is some overlap between the section 9 land use controls in the HWRRP, and the section 15 discharge rules contained in the NRRP. However it is submitted that the degree of overlap does not result in the HWRRP being inconsistent with the NRRP. For example, Rule WQL19 of the NRRP deals with the discharge of fertiliser to land where it may enter water, and Rule WQL21 of the NRRP deals with the discharge of a contaminant into water in a river, lake or wetland from livestock in, or near water. Those rules will continue to apply within the Nutrient Management Area identified on Map 4 of the HWRRP . The continued application of those rules is not considered to be inconsistent with the land use rules in the HWRRP that seek to control the cumulative effects of land use on water quality.

24. Some submitters have also questioned the appropriateness of managing the cumulative effects on water quality through the control of land under section 9(2) of the Act, rather than controlling discharges under section 15(1) of the Act. Section 30 of the Act sets out the functions of a regional council. Of particular relevance to this issue is section 30(1)(c)(ii) which expressly states that one of the functions of a regional council is to control the use of land for the purpose of the maintenance and enhancement of the quality of water in a water body. As such, it is submitted that it is appropriate for a regional council to control the use of land under section 9(2) of the Act to manage the cumulative effects of land use on water quality.

2.3 Regional Rules

25. Section 68(1) provides that a regional council may, for the purposes of carrying out its functions under the RMA (other than those described in paragraphs (a) and (b) of section 30(1)) and achieving the objectives and policies of the plan, include rules in a regional plan.

26. In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect (section 68(3)).

27. Section 68(5) provides that a rule may:

    a. apply throughout the region or part of the region;

    b. make different provision for different parts of the region or different classes of effects from an activity;

    c. apply all the time or for stated periods or seasons;

    d. be specific or general in its application; and

e. require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.

28. Section 68(7) provides that where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality, the plan may state:

a. Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and

b. That the holders of resource consents may comply with the terms of the rule; and

c. That the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

29. The HWRRP has done so, where appropriate.

2.4 Matters to have "regard to" or "particular regard to"

30. Section 66(2) provides that in addition to the requirements of section 67(3) and (4), when preparing a regional plan, the regional council shall have regard to:

a. any proposed regional policy statement in respect of the region (section 66(2)(a)); and

b. The Crown's interests… in the coastal marine area (section 66(2)(b)); and

c. any

i. Management plans and strategies prepared under other Acts (section 66(2)(c)(i));

ii. Relevant entry in the Historic Places Register (section 66(2)(c)(iia)); and

iii. Regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (section 66(2)(c)(iii));

to the extent that their content has a bearing on resource management issues of the region, and:

d. the extent to which the regional plan needs to be consistent with the regional policy statements and plans, or proposed regional policy statements and proposed plans, of adjacent regional councils (section 66(2)(d)).

Proposed Canterbury Regional Policy Statement

31. The Proposed Canterbury Regional Policy Statement ("proposed RPS") was notified on 18 June 2011. Submissions and further submissions were lodged on the proposed RPS and those submissions were heard by an independent hearing panel from 30 January to 16 March 2012. Decisions on the PRPS

were publicly notified on 21 July 2012. Under section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (the "ECan Act") persons who made submissions on the PRPS may only lodge an appeal to the High Court and on a question of law only.

32. The period for lodging appeals has closed, and 4 appeals were lodged to the High Court. These appeals were lodged by Federated Farmers of New Zealand Incorporated[2], Te Rūnanga o Ngāi Tahu, TrustPower Limited and Rangitata Diversion Race Management Limited. These appeals are limited to those provisions set out in **Appendix 1** to these legal submissions. The remainder of the provisions in the proposed RPS are now beyond challenge and the form that they are in now, is the form that they will be in when they are made operative. On that basis, full weight should be given to those provisions, as once the proposed RPS becomes operative, these are the provisions that the HWRRP will be required to give effect to under section 67(c) of the RMA.

33. Significant weight should also be given to those provisions which are the subject of the small number of appeals. In *Keystone Ridge Ltd v Auckland City Council* Justice O'Reagan held that the importance of the proposed plan [or policy statement] will depend on the extent to which it has proceeded through the objection and appeal process.[3] The Court accepted that the relevant criteria for determining the weight to be given to a proposed plan [or policy statement] was correctly identified at paragraph 45 by the Environment Court at first instance. Paragraph 45 says :

> *" … In considering the weight that we give to it we take into account the following principles which arise from the various cases:*
>
> - *The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.*
> - *The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:*
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> *(i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;*
>
> *(ii) circumstances of injustice;*
>
> *(iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.*
>
> - *In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council*

[2] A Notice of Abandonment of this appeal has been filed by Federated Farmers of New Zealand Incorporated.

[3] *Keystone Ridge Ltd v Auckland City Council*, HC Auckland AP24/01, 3 April 2001.

policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan."

34. Therefore, it is submitted that the relevant factors to consider are:

    a. The extent to which the proposed RPS has proceeded through the objection and appeal process;

    b. Exposure to testing and independent decision-making;

    c. Circumstances of injustice;

    d. The implementation of a coherent pattern; and

    e. A significant policy shift.

35. As set out above the proposed RPS has proceeded through the objection and decision making process to a point where only a small number of provisions are subject to appeal and these are on a question of law only. As such, it has been tested and has been the subject of independent decision-making by an independent hearing panel.

36. In relation to circumstances of injustice, this consideration is most significant where the new provisions show a significant shift in Council policy towards establishing new provisions that are more in accord with Part 2 of the Act. For the most part there has not been a significant shift in Council policy towards establishing new provisions that are more in accord with Part 2.

37. The factor of the implementation of a coherent pattern has rarely been invoked in its literal form, but does recognise that where one of the planning instruments is ambiguous or internally incoherent then it should be given less weight. The Court in *Keystone* expanded on this factor by considering not just internal coherence, but also coherence within the RMA itself. The proposed RPS is not ambiguous or internally incoherent and it is coherent with the RMA.

38. For these reasons, significant weight should be given to the proposed RPS.

Particular regard to be had to the Vision and Principles of the Canterbury Water Management Strategy

39. Section 63 of the ECan Act provides that, in considering any regional plan, a decision maker must have regard to the vision and principles of the Canterbury Water Management Strategy ("CWMS") as set out in Schedule 1, Part 1 of the ECan Act. This is in addition to the matters relevant under the RMA to its decision made under clause 10(1) of the First Schedule of the RMA.

40. In *Gill v Rotorua District Council,* it was held that the duty to have particular regard to matters under section 7 of the RMA "imposes a duty to be on enquiry", and that this is not merely a passive duty.[4]

41. The Planning Tribunal in *Marlborough Sounds District Council v Southern Ocean Seafoods Limited* quoted *Gill v Rotorua District Council*, but went on to hold that:[5]

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[4] *Gill v Rotorua District Council* (1993) 2 NZRMA 604 (PT).

> *"with respect in our view it goes further than the need to merely be on enquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion."*

42. The case of *Marlborough Ridge Ltd v Marlborough District Council* also examined the meaning of the phrase "have particular regard to" in section 7.[6] In doing so, the Court referred to the definition of "have regard to" in the case of *New Zealand Fishing Association v Ministry of Agriculture and Fisheries*, and did not differentiate between the phrases "have particular regard to" and "have regard to".[7]

43. In the *New Zealand Fishing Association* case, the Court held that "have regard to" does not equate to "give effect to". Matters to which regard must be had "may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at the outset by a closed mind so as to make the statutory process some idle exercise."

44. In *R v D*, Somers J stated that "have regard to" was not the same as "shall take into account".[8] This case was cited by the Planning Tribunal in *Donnithorne v Christchurch City*, where it was said that matters to which regard must be had are not requirements that must be met.[9]

45. In *Foodstuffs (South Island) Ltd v Christchurch City Council,* the phrase "have regard to" was again considered.[10] Both *New Zealand Fishing* Association and *New Zealand Co-operative Dairy Company Limited v Commerce Commission*[11] were cited as authority for the proposition that genuine consideration must be given to matters to which regard must be had, although having done this, there is no obligation to give effect to what has been considered.

46. The phrase, “have regard to” was considered by the High Court, in the context of section 104 of the RMA, in *Unison Networks Ltd v Hastings District Council.*[12] In that case, Potter J said the words meant that:

> *The matters must be given genuine attention and thought, and such weight as is considered to be appropriate, but the decision-maker is entitled to conclude that the matter is not of sufficient significance, either alone or together with other matters to outweigh other contrary*

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[5] *Marlborough Sounds District Council v Southern Ocean Seafoods Limited* [1995] NZRMA 220 and 336 (PT).

[6] *Marlborough Ridge Ltd v Marlborough District Council* (1997) 3 ELRNZ 483.

[7] *New Zealand Fishing Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).

[8] *R v D* [1976] 1 NZLR 436.

[9] *Donnithorne v Christchurch City* [1994] NZRMA 97 (PT).

[10] *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMZ 481.

[11] *New Zealand Co-operative Dairy Company Limited v Commerce Commission* [1992] 1 NZLR 601

[12] *Unison Networks Ltd v Hastings District Council* HC Wellington, CIV-2007-485-896, 11 December 2007.

considerations which it must take into account in accordance with its statutory function.

47. In *Man-O'War Station v Auckland RC and Auckland CC*, Venning J cited the above passage from *Unison* with approval.[13] His Honour noted Potter J's observation that it would be a nonsense to suggest the requirement "to have regard to" the Council's decision meant the Environment Court must observe or give effect to the decision. That, Venning J said, must be correct. However, he went on to say that he did not agree that that observation was intended to qualify or read down the requirement for genuine attention and thought to be given to the original decision.

48. His Honour said further:

> *There is no reason to take a different approach to the application of the words "must have regard to" as they appear in section 290A. The decision the subject of the appeal must be given genuine attention and thought and such weight as is considered appropriate. While the Environment Court is ultimately entitled to conclude the decision is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory functions, it must nevertheless carry out that exercise.*
>
> *I accept that s290A does not expressly require the Environment Court to give reasons should it depart from a decision on appeal but, as a matter of practice, the requirement to give genuine attention and thought to such a decision would usually require an explanation to be given should the Environment Court depart from the Council decision. In the present case the Environment Court has failed to give genuine attention and thought to the decision. It has erred in law in that regard.*

49. Finally, in *Long Bay-Okura Great Park Society Inc v North Shore City Council*, the Environment Court referred to Part 2 of the RMA as having a decreasing order of strength of direction from section 6 to section 8 and lastly section 7 (having "particular regard to").[14] The Court said that the duty to have particular regard to a matter means the local authority (or the Court) must look into the matter raised, but may in its discretion reject it as insufficiently relevant or worthy of weight.

50. It is submitted that given the process of community input and local authority commitment to the CWMS, the Vision and Principles of the CWMS are relevant and worthy of significant weight.

Regard to be had to Canterbury Water Management Strategy as a whole

51. As set out above, particular regard must be had to the vision and principles of the CWMS under the ECan Act. In relation to the remainder of the CWMS, whilst the CWMS is not a "strategy prepared under other Acts", in terms of section 61(2)(a)(i) of the RMA, and so is not a mandatory consideration under

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[13] *Man-O'War Station v Auckland RC and Auckland CC* [2011] NZRMA 235.

[14] *Long Bay-Okura Great Park Society Inc v North Shore City Council* EnvC Auckland A07/08, 16 July 2008.

that section, it may however, be a relevant consideration, in the decision-maker's discretion.

52. Applying the reasoning of *West Coast Regional Council v The Friends of Shearer Swamp*, the Hearing Panel is entitled to "have regard" to the rest of the CWMS.[15]

53. In the *Shearer Swamp* case, the West Coast Regional Council contended that the Environment Court had placed excessive weight on the national scarcity of wetlands and the national priorities of wetland management, as identified in non-statutory documents. Those documents appear to have included the NZ Biodiversity Strategy (2000) and the Statement of National Priorities for Protecting Rare and Threatened Indigenous Biodiversity on Private Land (2007).

54. This decision of the High Court confirmed the earlier Planning Tribunal decision in *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* the Tribunal commented that:[16]

> *"… We can find **no indication that the list in section 74(2) was intended to be exhaustive.** For a territorial authority to be precluded from having regard to the structure and general objectives, policies and rules of an operative district plan when preparing a change to it would seem so impractical a proposition that one would expect some positive indication of so unlikely an intention"*

55. The High Court held that the Environment Court was entitled to have regard to such non-binding national policy documents, as relevant background material, even if those documents did not have any status under the RMA.[17] The documents in question were found to be relevant and admissible, so the Environment Court had not erred in law in having regard to them.

56. It is submitted that the Hearing Panel should "have regard" to the rest of the CWMS because of the relevance of the content, because it has been endorsed by the Canterbury Regional Council and all 10 territorial authorities in the region, and because it was designed to be incorporated in the planning instruments of the region.

57. The CWMS is the outcome of extensive consultation and community participation aimed at reaching a consensus as to how to best manage the freshwater resource in Canterbury. In doing so, the Hearing Panel should not exclude the remainder of the CWMS from its consideration when making its decision on the HWRRP. Having regard to the CWMS does not imply that the HWRRP should necessarily incorporate, or give effect, to all of the content of it, but to the extent that its contents are the most appropriate way of achieving the objectives of the HWRRP and the purpose of the Act.

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

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

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

Hurunui Waiau Zone Implementation Programme

58. The Hurunui-Waiau Zone Committee and Hurunui Waiau Zone Implementation Programme ("ZIP") are part of implementing the CWMS in the Hurunui Waiau Zone. This ZIP recommends actions and approaches for collaborative and integrated water management solutions to achieve the CWMS vision and principles, targets and goals encompassing economic, social, cultural and environmental outcomes.

59. Like the CWMS, the ZIP is not a statutory plan under the RMA, however, it is a document that the Hearing Panel should have regard to for similar reasons to the CWMS.

60. The Committee has worked in a collaborative manner to develop recommendations for water management solutions. The ZIP represents a 'snapshot' of the position that the Zone Committee has reached with regard to recommendations after receiving and considering over 125 submissions to a draft of the ZIP, together with feedback from a number of meetings and communities of interest. As a result of this collaborative and consensus process, the ZIP sets out how the Hurunui-Waiau Community has decided it should provide for its own social, cultural and economic wellbeing, in respect of the freshwater resource in this catchment, in accordance with section 5 of the RMA.

3. Issues Raised in Submissions

3.1 Prohibited Activity Status

61. The Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief* Executive *of the Ministry of Economic Development*[18]considered the circumstances in which it is proper for a local authority to classify an activity as a "prohibited activity" when formulating its Plan in accordance with the RMA.

62. In that case, the Court of Appeal held that the Environment Court and the High Court had erred in finding that the Thames Coromandel District Council should not make mining a prohibited activity over a substantial portion of the Coromandel Peninsula. The test which had been used in the lower courts was that "unless it can definitively be said that in no circumstances should mining ever be allowed on a given piece of land a prohibited status is an inappropriate planning tool."

63. The Court of Appeal, at paragraphs 34 and 36 of the decision, held that a local authority could rationally conclude that prohibited activity status was the most appropriate status in the following situations:

    a. *Where the council takes a precautionary approach. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited*

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

activity. That would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available.

b. *Where the council takes a purposively staged approach. If the local authority wishes to prevent development in one area until another has been developed, prohibited activity status may be appropriate for the undeveloped area. It may be contemplated that development will be permitted in the undeveloped area if the pace of development in the other area is fast;*

c. *Where the council is ensuring comprehensive development. If the local authority wishes to ensure that new development should occur in a co-ordinated and interdependent manner, it may be appropriate to provide that any development which is premature or incompatible with the comprehensive development is a prohibited activity. In such a case, the particular type of development may become appropriate during the term of the plan, depending on the level and type of development in other areas;*

d. *Where it is necessary to allow an expression of social or culture outcomes or expectations (eg nuclear power generation);*

e. *Where it is intended to restrict the allocation of resources, for example where a regional council wishes to restrict aquaculture to a designated area;*

f. *Where the council wishes to establish priorities otherwise than on a "first in first served" basis, which is the basis on which resource consent applications are considered.*

64. The reasoning of the Court of Appeal was cited as being simple and correct in *Robinson Bay v Waitakere City Council (No 8)*[19]. Prohibited activity status was also explored in *Thacker v Christchurch City Council*[20]. The Environment Court recognised the certain cases detailed at paragraph [34] of the Coromandel Watchdog decision, but preferred to focus on the proposition that the appropriate test for an imposition of prohibited status is whether or not the allocation of that status is the most appropriate of the options available. This decision, can only be reached after undertaking the planning process required under the RMA; in particular, the need for a comparative evaluation under section 32.[21]

3.2 Non-derogation from Grant

65. Amuri Irrigation Company Limited ("AIC") (Submitter 83) seeks specific amendment to Objective 6 to include "ensuring that existing, lawfully established, takes, diversions, dams and discharges are not derogated."

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[19] *Robinson Bay v Waitakere City Council* (No 8) EnvC Auckland A003/09, 22 January 2009.

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

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

66. The principle of non-derogation from grant has been recognised by the Courts in relation to resource consents. However, it is clear from those cases, and the RMA itself, that the processes of producing plans and reviewing consents in accordance with planning requirements may result in detraction from existing users of resources under resource consents.

67. The leading case is *Aoraki Water Trust v Meridian Energy Limited*.[22] In that case, a full bench of the High Court was asked to make a declaration that existing water permits did not limit a regional council's powers and discretions under sections 104-104D of the Resource Management Act 1991 ("RMA") to grant water permits to others in respect of a specified (and over-allocated) water resource, and the High Court declined to make that declaration. It was held that the RMA sets out a comprehensive statutory management regime for water allocation and use, so that it effectively prescribes a licensing system. On that basis, the first in time to obtain a resource consent enjoys an exclusive right to the resource, having priority in terms of rights to use the resource. A number of provisions in Part 6 of the RMA elevate the status of a water permit from a bare licence to a licence plus a right to use the resource.

68. The principle of non-derogation from grant, which was expressed in the *Aoraki* case, applies to all legal relationships which confer a right in a property. The grantor of the right (in the case of resource consents, the consent authority) may not frustrate the purpose which the parties shared when they entered the relationship, unless expressly authorised by the relevant instrument to interfere with, diminish or derogate from the other's entitlement, or act inconsistently with the grant.

69. Thus, where a water resource is fully allocated in a physical sense to a permit holder, a consent authority cannot lawfully grant another party a permit to use the same resource, **unless specifically** empowered **to do so by the Act.** The High Court in *Aoraki* found that this express power exists:

    a. in section 68(7) of the RMA, which enables a regional council to include in a regional plan a rule relating to maximum or minimum levels of flows or rates of use of water; and

    b. in section 128(1)(b), which enables a regional council to review consent conditions once a regional rule under section 68(7) becomes operative; and

    c. in section 314(1)(f), which enables a consent authority to change or cancel a resource consent if information made available to the consent authority by the applicant contained inaccuracies, which materially influenced the decision to grant consent; and

    d. in section 329(1), which enables a regional council to apportion water where a regional council considers there is a serious temporary shortage in part or in the whole of its region.

70. None of these powers allow a consent authority to grant a consent to another party, which may have the effect of reducing the original consent. Each covers a specific situation where limitations may need to be imposed on the original consent for reasons other than granting water to another party.

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[22] *Aoraki Water Trust v Meridian Energy Limited*, [2005] 2 NZLR 268; (2005) 11 ELRNZ 207; [2005] NZRMA 251 (HC).

71. The relief sought by AIC would have the effect of elevating the principle of non-derogation from grant beyond what the Courts have previously recognised. During the *Aoraki* litigation, the Canterbury Regional Council was very careful to ensure that the Court recorded that derogation from grant can occur through the combination of the planning processes and a section 128 review. This was expressly held at paragraph 52 of the judgment:[23]

> *"[52] Statutory provisions which might arguably empower CRC to derogate from its grant or grants in Meridian's favour were identified. We agree with Messrs Kos and Whata and Ms Arthur that where Parliament has conferred power on a consent authority to interfere with an existing grant, it has acted expressly and for very limited purposes. Among those provisions are: the power to include in a regional plan a rule relating to maximum or minimal levels of flows or rates of use of water even though it may affect the exercise of existing consents (s 68(7)); a power to review conditions of a resource consent when a regional plan setting rules relating to maximum or minimal levels or flows or rates of use of water or minimum standards of water quality has been made operative and, in the regional council's opinion, it is appropriate to review the permit conditions in order to enable the levels, flows, rates or standards set by the rule to be met (s 128(1)(b)); a power to change or cancel a resource consent if, in the Environment Court's opinion, information made available to the consent authority by the applicant contains inaccuracies which materially influenced the decision to grant the consent (s 314(1)(f)); and a power to apportion water where a regional council considers that there is a serious temporary shortage in its region or any part of its region (s 329(1))."*

72. For these reasons, it is submitted that elevating the principal of non-derogation from grant beyond simply recognising that a consent authority cannot derogate from the grant of consent through the consent process itself, is not supported by case law.

73. In relation to the issue of setting minimum flows, the full Court in *Aoraki* specifically recognised that a Regional Council could include a rule in a regional plan relating to maximum or minimal levels of flows or rates of use of water even though it may affect the exercise of existing consents. This is because Parliament has expressly, and for a very limited purpose, conferred that power on a consent authority.

3.3 Transfer of Water Permits

74. Mr John Talbot (Submitter 1) considers that the first paragraph of the 'Efficient Use of Water' subsection appears to allow transfers between groundwater and surface water take consents, which he considers is ultra vires as section 136(2) does not provide for such a transfer. It is submitted that section 136(2) of the RMA does not preclude transfers between groundwater and surface water take consents

75. In any event, section 136(2)(b) only provides for a transfer of a water permit to another person on another site, or to another site, if both sites are in the

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[23] *Aoraki Water Trust v Meridian Energy Limited*, [2005] 2 NZLR 268; (2005) 11 ELRNZ 207; [2005] NZRMA 251 (HC).

same catchment or aquifer and the transfer is expressly allowed by a regional plan or has been approved by the consent authority that granted the permit on an application. Rule 12.1 of the HWRRP only provides for the transfer of a water permit to take or use surface water, whilst Rule 12.2 only provides for the transfer of a water permit to take or use groundwater, provided certain standards and terms are met. It is clear from these rules that the HWRRP does not intend to provide for transfers between groundwater and surface water take permits.

3.4 First in First Served

76. AIC (Submitter 83) seeks that Objective 3 be amended to include that water is allocated "on a first in, first served basis", as they consider that this is appropriate and efficient, and avoids difficulties with setting allocations for a particular use, and in their view recognises and responds to issues of priority and derogation.

77. AIC's concerns regarding derogation from grant have been addressed in section 3.2 above.

78. The *first in first served* principle has been developed by the Courts largely in response to questions regarding the priority of hearing competing consent applications. The issue of procedural fairness was at the heart of the concerns expressed in the series of cases culminating in *Fleetwing Farms Ltd v Marlborough DC* in the context of dealing with competing resource consent applications and how to determine priority.[24]

79. In *Fleetwing* the Court of Appeal held that the Environment Court must take account of any priorities at the early council stage relating to decisions appealed against. The legislative policy is that each application is to be processed and determined by a council according to a statutory timetable. Where there are competing applications in respect of the same resource before the council, the Act expresses a "*first come first served approach*", and the council must recognise the priority in time. The Court noted (obiter) that receipt and/or notification by the council is the critical time for determining priority in such a case.

80. The *first in first served* principle was considered again by the Court of Appeal in *Central Plains v Ngāi Tahu Properties Ltd* whereby the Court held that an application gains priority at the point it is filed, provided that it is not insubstantial or incomplete in terms of s 88(3) of the RMA.[25] Deferral of an application under s 91 while other consents are being sought (which, in that instance, took almost four years), was held to not constitute unreasonable delay and does not result in priority being lost.

81. The principle of *first in first served* was developed primarily in response to competing questions regarding the priority of hearing competing consent applications. It was not developed in relation to the allocation of water through regional plans. Decisions regarding the allocation of water, including the priority for allocation of water, are for the regional council to make when

[24] *Fleetwing Farms Ltd v Marlborough DC* [1997] 3 NZLR 257; [1997] NZRMA 385; (1997) 3 ELRNZ 249 (CA).

[25] *Central Plains Water Trust v Ngai Tahu Properties Ltd* (2008) 14 ELRNZ 61; [2008] NZRMA 200 (CA).

promulgating plans. It is submitted that it is appropriate for a regional council to consider whether certain uses have priority over other uses when establishing a planning framework for the management of freshwater, and that any such priorities are tested through the statutory process.

82. For these reasons it is submitted that is not appropriate to amend Objective 3 to make express reference to the principle. Rather, the principle will continue to operate in respect to determining priority for competing resource consent applications, which will be assessed on a case-by-case basis in accordance with the tests laid down by the Court. The principle has no place in the allocation of water in a regional plan.

3.5 Large scale storage – 'Mainstem'

83. In the HWRRP "mainstem" is defined as[26]:

> *Has the same meaning as that in the Proposed Regional Policy Statement 2011.*

84. In the proposed RPS "main stem" is defined as:

> *In relation to braided rivers refers to that stem of the river which flows to the sea, and applies from the source of that stem to the sea, but excludes any tributary.*

85. Tributary is not defined in the proposed RPS. Therefore, one must look at the plain and ordinary meaning of the word. The Oxford Dictionary defines "tributary" as "a river or stream flowing into a larger river or lake."

86. It is understood that the South Branch of the Hurunui River is smaller (lesser flow) than the North Branch. Therefore the South Branch of the Hurunui River is a tributary and the North Branch forms part of the mainstem of the river. Lake Sumner is located on the mainstem of the Hurunui River and as such could be considered to form part of the mainstem. However, Lake Sumner is a natural lake and Policy 7.3.2 in the proposed RPS deals with natural lakes and the mainstem of braided rivers separately.

87. Policy 7.3.2 of the proposed RPS seeks to maintain the natural character of braided rivers, and of natural lakes by:

> *(1) Subject to clause (3), by prohibiting the damming of each of the main-stem of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata and Waitaki rivers,*
>
> *…*
>
> *(3) In respect of every any natural lake by limiting any use of the lake for water storage so its level does not exceed or fall below the upper of lower levels of its natural operating range.*

88. Method 1(a) provides that the CRC will set objectives, policies and methods in regional plans to:

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[26] It is noted that it is recommended by Ms White in the Planning part of the section 42A report that the wording from the proposed RPS be inserted into the HWRRP so that the definition in the HWRRP reads *"In relation to braided rivers refers to that stem of the river which flows to the sea, and applies from the source of that stem to the sea, but excludes any tributary*."

a. Identify on a map the main stem of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata and Waitaki Rivers.

b. Prohibit damming on the main stem of braided rivers listed in this Policy.

c. …

d. Manage damming the outlet of any natural lake and require any damming keeps the lake within its natural operating range, unless it has already been modified.

e. Identify on a map all the natural lakes within the Region.

89. Lake Sumner is a natural lake, and in accordance with Policy 7.3.2, CRC would be required to identify it on a map. The CRC is also required to identify on a map the mainstem of the Hurunui River. Given that Policy 7.3.2 requires this separate mapping exercise, and provides for the prohibition of damming of the mainstem of the Hurunui but the limit of the use of a natural lake for water storage so its level does not exceed or fall below the upper of lower levels of its natural operating range, then Lake Sumner should be considered as a natural lake and not part of the mainstem of the Hurunui River. On that basis, whilst Policy 7.3.2 does not require the HWRRP to include objectives, policies and methods prohibiting the damming of Lake Sumner, the damming of the outlet must be managed and the lake must be kept within its natural operating range.

3.6 NPSFM

90. The Department of Conservation (Submitter 90) seeks that Policy 5.4 state a timeframe within which the limits are to be set (by 2017) rather than referring to these being set progressively.

91. Every regional council is required to implement Policy E1 of the NPSFM as promptly as is reasonable in the circumstances, and so it is fully completed by no later than 31 December 2030. Where a regional council is satisfied that it is impracticable for it to complete implementation of a policy fully by 31 December 2014, the council may implement it by a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2030. Any programme of time-limited stages is to be formally adopted by the council within 18 months of the date of gazetting of the NPSFM, and publicly notified.

92. The Implementation Guide for the NPSFM states that, where a staged implementation programme is adopted, the regional council must "develop a formal programme setting out the states and time frames, formally adopt the programme, and publicly notify that the programme has been adopted." This must be done before 12 November 2012.

93. Preparing and adopting the implementation programme needs to meet the obligations set out in the Local Government Act 2002 ("LGA2002"), as it involves resources and priorities and may be a significant part of the council work programme. Annual reporting is also required under Policy E1(e). The Implementation Guide notes that this could be done through the annual plan and annual report under the LGA2002. The implementation programme could be part of a council's Long Term Plan.

94. The Implementation Guide notes that implementation programmes will need to be flexible, and accepts that dates may change. For this reason, there are advantages in keeping the Implementation Programme separate from the HWRRP, so that timeframes can be adapted more easily. The implementation of the NPSFM itself, however, will likely require further changes to the HWRRP.

3.7 Utilisation of the OVERSEER Model

95. The utilisation of the OVERSEER Model was discussed by the Environment Court in the hearings on the Manawatu – Wanganui Regional Council Proposed One Plan Appeals.[27] The Court stated that:

> *It is a nutrient budget model from which farmers and their advisers can calculate both the inputs of nutrients by way of fertilisers, supplements and so on, and outputs by way of produce, nutrient transfers, gas emissions, leaching etc. It has been through several iterations since first developed – we were told that the sixth version is due for release very soon. It is a long-term equilibrium model which can predict nitrogen leaching, given a set of farming practices and average long-term rainfall. Its use in similar situations has been the subject of approving comment in earlier decisions of the Court – see eg Carter Holt Harvey Ltd v Waikato RC (A123/2008).*

96. In *Carter Holt Harvey* the Court stated:[28]

> *The OVERSEER model provides an estimate of the nitrogen leaching from the root zone of farming systems. This is an established model and its precision and accuracy have been confirmed by a considerable body of research. The long-term equilibrium approach of OVERSEER considers the impact of changes in land use or management approaches and expresses those impacts immediately in the newly calculated leaching rate. Thus any change in nitrogen inputs is immediately reflected as a change in outputs even though the actual leaching rates will trend up or down (depending on the changes made) over a period of years.*

97. In that case, all parties accepted that OVERSEER should be used to determine the nitrogen leaching rates for farming activities. As such, it is submitted that it is appropriate to use OVERSEER as a tool in the HWRRP.

3.8 Consent Duration

98. Under section 123 of the RMA a resource consent granted for the types of activities dealt with under the HWRRP may be granted for a term of up to 35 years.

99. Policy 9.1 of the HWRRP seeks:

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[27] *Day & ors v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

[28] *Carter Holt Harvey Ltd v Waikato Regional Council* EnvC Auckland A123/2008, 6 November 2008 at [55].

> *To limit the duration of any new resource consent (including the replacement of expired resource consents) to take, use or divert surface water or stream-depleting groundwater from within the Hurunui, Waiau and Jed river catchments to no later than 1 January 2025; and thereafter to no later than 1 January 2035; and to limit the duration of all new resource consents (including the replacement of expired resource consents) to not more than 10 years, ensuring that resource consents granted within 10 years of a common expiry date should expire on the immediately following expiry date.*

100. Under section 123 of the RMA a resource consent granted under the HWRRP may be granted for a term of up to 35 years. However, there is not an assumption within section 123 that a period of 35 years should be granted unless there is good reason to depart from that.[29] The RMA is clear that the presumptive period is five years and the maximum period for which consent can be granted is 35 years.[30] Therefore, section 123 provides a local authority with a discretion as to the duration of consent imposed.

101. The determination of the term of a consent was discussed in the case of *PVL Proteins Limited and anor v Auckland Regional Council*.[31] The Court stated:

> *Uncertainty for an application of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term. Likewise, review of conditions may be more effective than a shorter term to ensure conditions do not become outdated, irrelevant or inadequate.*
>
> *By comparison, expected future change in the vicinity has been regarded as indicating a shorter term. Another indication of a shorter term is uncertainty about the effectiveness of conditions to protect the environment (including where the applicant's past record of being unresponsive to effects on the environment and making relatively low capital expenditure on alleviation of environmental effects compared with expenditure on repairs and maintenance for profit). In addition, where the operation has given rise to considerable public disquiet, review of conditions may not be adequate, as it cannot be initiated by affected residents.*

102. It is submitted that Policy 9.1[32] is appropriate as it recognises security of investment, but at the same time, allows for an holistic review of remaining consents which provides for administrative efficiency which is an element of sustainable management in terms of the RMA, being managing the use of physical resources in a way and at a rate that recognises the various interests under the RMA.[33]

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[29] *Curador Trust v Northland Regional Council Environment Court* Whangarei A69/2006, 18 May 2006 at [26].

[30] *Curador Trust v Northland Regional Council Environment Court* Whangarei A69/2006, 18 May 2006 at [27].

[31] *PVL Proteins Limited and anor v Auckland Regional Council* Environment Court Auckland A61/2001, 3 July 2001.

[32] Together with amendments recommended by Ms White in the Planning part of the section 42A report.

[33] *Curador Trust v Northland Regional Council Environment Court* Whangarei A69/2006, 18 May 2006 at [32].

4. Case law on scope

103. Issues of scope often arise when considering relief sought by submitters. The following part of the Legal Submissions sets out the basis upon which decisions on the scope of submissions should be made.

104. In *Countdown Properties (Northlands) Limited v Dunedin City Council* the High Court stated:[34]

> *Councils customarily face multiple submissions often conflicting, often prepared by persons without professional help. We agree with the Tribunal that councils need scope to deal with the realities of the situation. To take a legalistic view that a council can only accept or reject the relief sought in any given submission is unreal.*

105. The High Court stated:

> *The local authority or tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions of the plan change….It will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.*

106. The Court concluded that:

> *…the local authority or Tribunal [now the Environment Court] must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them."*

107. The Environment Court in *Campbell v Christchurch City Council*[35] stated that there are three points particularly worth noting about *Countdown:*

(1) *that some of the modifications to the proposed plan change were not specifically sought as "relief" in a submission, but were contained in "grounds". Thus there is High Court authority for the proposition that one cannot rule out relief based on reasons in a submission. Countdown was followed by the Environment Court in re an Application by Vivid Holdings Ltd where the reasons for a reference were held to give guidance as to the real relief sought.*

(2) *It is "unreal" and legalistic to hold that a Council can only accept a relief sought in any given submission. In other words the local authority may amend its proposed plan in a way that is not sought by any submission - subject presumably to the constraints that the change must be fair and reasonable, and it must achieve the purpose of the RMA.*

(3) *The High Court also stated:*[36]

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[34] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 165.

[35] *Campbell v Christchurch City Council* [2002] NZRMA 352.

> *Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the 'reasonable appreciation' test to an independent or isolated test. The local authority of Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change.*

108. The Environment Court in *Campbell v Christchurch City Council* stated that:[37]

> *At first sight the High Court seems to have rather diminished (but not eliminated) the importance of giving notice to landowners and other interested persons of changes sought by submissions. There is, after all, no formal requirement for service under the RMA in respect of proposed plans. However as will be seen shortly there are in fact other safeguards for such other parties in the scheme of the Act which affect what is "fair" in the plan preparation process.*

109. The Environment Court in *Campbell* referred to the case of *Royal Forest and Bird Protection Society Inc v Southland District Council* where Pankhurst J stated:[38]

> *…it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

110. In *Campbell* the Environment Court found the High Court's guidance in Countdown, very useful on the issue as to whether a Council may make changes not sought in any submission. The Environment Court stated that:[39]

> *It appears that changes to a plan (at least at objective and policy level) work in two dimensions. First an amendment can be anywhere on the line between the proposed plan and the submission. Secondly, consequential changes can flow downwards from whatever point on the first line is chosen. This arises because a submission may be only on an objective or policy. That raises the difficulty that, especially if:*
>
> *(a) a submission seeks to negate or reverse an objective or policy stated in the proposed plan as notified; and*
>
> *(b) the submission is successful (that is, it is accepted by the local authority).*
>
> *- then there may be methods, and in particular, rules which are completely incompatible with the new objective or policy in the*

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[36] *Countdown Properties (Northlands) Limited v Dunedin City* Council [1994] NZRMA 145 at 166.

[37] *Campbell v Christchurch City Council* [2002] NZRMA 352 at [17].

[38] *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 at 413.

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

proposed plan as revised. It would make the task of implementing and achieving objectives and policies impossible if methods could not be consequentially amended even if no changes to them were expressly requested in a submission. The alternative - not to allow changes to rules - would leave a district plan all in pieces, with all coherence gone.

[21] The danger in the proposition that a change to an objective or policy may lead to changes in methods - including rules which are binding on individual citizens - is that citizens may then subsequently protest with some justification that they had no idea that a rule which binds them could result from a submission on an objective.

[22] In my view there are two answers to that. The simple, legalistic answer is that the operative date of a proposed plan is revised - with all consequential changes to rules included - needs to be notified and copies made available at public libraries and in the local authority's office. From that date every rule in a district plan has the force and effect of a regulation under the Act.

[23] The second answer, attempting to answer questions as to the fairness of the procedure, relies on the various methods of attempting to advise citizens of the changes that might result from the submission process.

111. The Court then went on to consider the procedure for the preparation (and change) of a district plan. The Court referred to the important continuing role of a submission in the preparation of a plan. In the context of the preparation of a Regional Policy Statement, a submission has the following role:

Clause 7	Public notice of a summary of all submissions must be given
Clause 8	Further submissions may be made by certain persons, supporting or opposing a primary submission made under Clause 6.
Clause 8B	A hearing into all the submissions must be held by the local authority (and a decision issued under clause 10).
Clause 14	Any person who made a submission may lodge a reference in the Environment Court "if that person referred to that provision or matter in that person's submission…"
Clause 16A	A local authority may initiate variations to a proposed policy statement.

112. In *Campbell* the Environment Court identified that the clause 7 summary is important and noted that for a person who is interested to know whether there are any submissions seeking changes to the provisions of a proposed plan that concern them, the clause 7 summary is where they start.[40]

113. The Environment Court also stated that Clause 14 needs to be emphasised since the scope of a reference is bounded by the submission(s) at one end

[40] *Campbell v Christchurch City Council* [2002] NZRMA 352 at [32].

and the notified plan at the other. In *Re Vivid Holdings Ltd* the Environment Court stated:[41]

> *… in order to start to establish jurisdiction a submitter must raise a relevant 'resource management issue' in its submission in a general way. Then any decision of the Council, or requested of the Environment Court in a reference, must be:*
>
> *(a) fairly and reasonably within the general scope of:*
>
> *(i) an original submission; or*
>
> *(ii) the proposed plan as notified; or*
>
> *(iii) somewhere in between*
>
> *provided that:*
>
> *(b) the summary of the relevant submissions was fair and accurate and not misleading.*

114. In *Campbell* the Environment Court concluded that as to whether a submission reasonably raises any particular relief the following factors need to be considered:

> *(1) the submission must identify what issue is involved (Vivid) and some change sought in the proposed plan.*
>
> *(2) the local authority needs to be able to rely on the submission as sufficiently informative for the local authority to summarise it accurately and fairly in a non-misleading way (Montgomery Spur (1998) 5 ELRNZ 227)*
>
> *(3) the submission should inform other persons what the submitter is seeking, but if it does not do so clearly, it is not automatically invalid.*
>
> *As to the fairness of the relief sought, there are four safeguards for the rights of landowners and the interest of other parties by giving them notice of what is proposed:*
>
> *(1) other parties' knowledge of what a submitter seeks comes first (usually) from the local authority's summary of submissions; and*
>
> *(2) if it becomes clear to a local authority - at any time before it reaches a decision on submissions - that the summary of submissions is not accurate about a submission then it can apply to the Environment Court for an enforcement order directing renotification. That was the responsible course taken by the local authority in re an Application by Banks Peninsula District Council C27/2002.*

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[41] *Re Vivid Holdings Limited* (1999) 5 ELRNZ 264 at [19].

(3) *if the local authority considers that a summary of a submission is accurate, and the submission should be accepted, but that consequential changes to rules or other methods are necessary, then it may promote (and notify) a variation under clause 16A of the First Schedule to the Act.*

(4) *if there is a reference that is based on a reasonable submission but it appears fairer to give further notification then the Environment Court has its section 293 powers to ensure by notification that persons not yet before the Court have an opportunity to be heard: Romily v Auckland City Council A95/96, re an Application by Vivid Holdings Ltd [1999] NZRMA 467.*

……..

P A C Maw / M A Abernethy

Counsel for the Canterbury Regional Council

APPENDIX 1

Proposed Canterbury Regional Policy Statement

Decisions have been notified on the proposed RPS and appeals have been lodged by:

1. Federated Farmers of New Zealand Incorporated[42];
2. Te Rūnanga o Ngāi Tahu;
3. TrustPower Limited; and
4. Rangitata Diversion Race Management Limited

These appeals relate to specific provisions in Chapters 5, 7, 9 and 16.

Chapter	Objective	Policy
5	5.2.1 (Location, design and function of development)	5.3.9 (Regionally significant infrastructure), 5.3.11 (Community-scale irrigation, stockwater and rural drainage infrastructure)
7	7.2.1 (Sustainable management of fresh water)	7.3.2 (Natural character of braided rivers and lakes) 7.3.4 (Water Quantity)
9		9.3.1 (Protecting Significant Natural Areas)
16	16.2.2 (Promote a diverse & secure supply of energy)	16.3.2 (Small and community scale distributed renewable electricity generation) 16.3.4 (Reliable and resilient electricity transmission network within Canterbury) 16.3.5 (Efficient, reliable and resilient electricity generation within Canterbury)

The remaining provisions in Chapters 5, 7, 9 and 16 and the remainder of the Chapters of the proposed RPS are now beyond appeal.

[42] A Notice of Abandonment of this appeal has been filed by Federated Farmers of New Zealand Incorporated.