

Tabled at Hearing

17/09/2014

**BEFORE THE CANTERBURY REGIONAL COUNCIL
AT CHRISTCHURCH**

IN THE MATTER

of Variation 1 to the proposed
Canterbury Land & Water Regional
Plan related to the Te Waihora/ Lake
Ellesmere catchment)

BETWEEN

CANTERBURY REGIONAL COUNCIL
Consent Authority

AND

**ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED**
Submitter

**LEGAL SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

17 September 2014

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MAY IT PLEASE THE HEARING COMMISSIONERS

1. Te Waihora is an internationally significant wetland. The catchment has also historically been a significant sport fishery and has high cultural value.
2. These values are recognised in the water conservation orders for Te Waihora/Lake Ellesmere (1990) and the Rakaia River 1998. The Ngai Tahu Claims Settlement Act 1998 recognises the outstanding cultural significance of Te Waihora.¹
3. While still high, these values are seriously degraded. In the past decade there has been a massive increase in dairying in the catchment. This has caused significant impacts on a wide range of values, including ecological and recreational values.
4. As a result of this expansion and past land use activities, the catchment is currently degraded and over-allocated,² with nitrogen of particular concern. The Central Plains Water scheme (CPW) will cause further degradation.
5. The NZCPS requires that coastal water is maintained and, where it is degraded, enhanced. The Freshwater NPS requires that Variation 1 safeguard life-supporting capacity and provide for ecological health, and where water quality is improved in over-allocated catchments.
6. Variation 1 fails to give effect to the New Zealand Coastal Policy Statement (NZCPS), the National Policy Statement for Freshwater Management 2014 (the Freshwater NPS) and the Canterbury Regional Policy Statement (CRPS). It does not provide for:
 - (a) the maintenance and enhancement of water quality in the Selwyn te Waihora catchment, including te Waihora / Lake Ellesmere;
 - (b) ecological health and, consequently, does not give effect to the Freshwater NPS.

¹ Variation 1 notified version page 4-2

² Variation 1 Page4-3

- (c) An improvement in water quality. Variation 1 does the opposite, providing for the further degradation of water quality and exacerbating the current over allocation through the provisions that enable CPW. This is contrary to the Freshwater NPS.
7. A critical issue in this case is whether the Commissioners have to give effect to the objectives and policies of the NZCPS, Freshwater NPS and the CRPS that require the enhancement of degraded coastal water and the avoidance of over-allocation, or whether an overall broad judgment can be exercised in this case, which would mean that it was not necessary to give effect to these policies.
8. Forest & Bird and Fish and Game consider that an overall broad judgment is not available in this case. The relevant policy statements contain objectives and policies which are framed in specific and unqualified ways. As in *King Salmon*, the policies are stated in such directive terms that the decision-maker has no option but to implement them³.
9. Consequently, Forest & Bird and Fish and Game consider that substantial change is required to Variation 1 for it to give effect to the higher level planning documents.

Evidence

10. Forest & Bird and Fish & Game are presenting a joint case seeking the same outcome.⁴ Evidence is called from:
- (a) Brett Stansfield – a freshwater ecologist who provides evidence on the values of the catchment and the impacts that the provisions of Variation 1 will have on those values;
- (b) Dr Alison Dewes – a farm advisor who gives evidence on farming systems and practises and the associated environmental implications associated with Variation 1;
- (c) Dr Jim Cook – a water quality scientist who provides evidence on the water quality, quantity and limits;

³ [129]

⁴ In these submissions, references to Forest and Bird include Fish and Game and vice versa

(d) Scott Pearson – a natural resource management advisor to Fish and Game whose evidence covers the recreational values of the catchment and the outcomes sought by Fish & Game and Forest & Bird.

(e) John Kent and Alan Fife –anglers who provide brief evidence on the values of the Selwyn te Waihora catchment as a sport fishery.

11. These submissions commence by considering the relevant statutory provisions and the recent Supreme Court decision in *King Salmon*. The requirement to give effect to the relevant regional policy statements is then discussed as well other relevant consideration such as the Canterbury Water Management Strategy and the section 42 report . Some particular issues are then discussed, including the requirements of sections 69(3) and 70(1), Central Plains Water and whether co-management of P and N is required. Finally, the changes to Variation 1 sought by Forest & Bird and Fish & Game are discussed.

The relevant statutory provisions

12. Under section 67(3), Variation 1 must give effect to any national policy statement, any New Zealand coastal policy statement and any regional policy statement. In this case the relevant national and regional documents that must be given effect to are the NZCPS, Freshwater NPS 2014 and the CRPS.

13. Under section 66(1), Variation 1 must be prepared in accordance with:

- (a) its functions under section 30; and
- (b) the provisions of Part 2; and
- (c) a direction given under section 25A(1); and
- (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
- (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
- (f) any regulations.

14. The difference in language between section 66(1) and section 67(3) is immediately obvious. The NZCPS, Freshwater NPS 2014 and the CRPS must be “given effect to”. In *King Salmon*, the Supreme Court held in relation to the requirement to give effect to the NZCPS that “give effect to” simply means implement, and is a “strong directive” creating a “firm obligation”.⁵ It is submitted that the Supreme Court’s interpretation applies equally to the requirement to give effect to the Freshwater NPS.
15. The section 32 report is subject to a lower requirement, particular regard must be had to it. The CWMS has limited statutory recognition. It follows that the provisions of the Freshwater NPS, NZCPS and CRPS are higher order documents which prevail over the section 32 report and the outcome of the Selwyn Waihora Zone Committee process.

KING SALMON

16. Perhaps the critical issue in this case is the extent to which the Commissioners:
- (a) Are required to give effect to the directive policies in the relevant planning NZCPS and the Freshwater NPS 2014 which require the maintenance and enhancement of degraded coastal water and the avoidance of over-allocation; or
 - (b) Can exercise an overall broad judgment, which might involve not giving effect to these policies.
17. It is submitted that based on the Supreme Court decision in *Environmental Defence Society v The New Zealand King Salmon Company Limited*,⁶ there is no scope for an overall broad judgment in this case. The NZCPS, the Freshwater NPS and CRPS must be given effect to.
18. *King Salmon* involved an appeal by the Environmental Defence Society from a Board of Inquiry decision on changes to the Marlborough Sounds Resource Management Plan. King Salmon had applied to change salmon farming from a prohibited to a discretionary activity in eight locations. The Board accepted that one of those locations, Papatua in Port Gore, was an area of outstanding natural

⁵ *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38, para 77

⁶ [2014] NZSC 38

character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS⁷ would not be complied with if the plan change was granted. Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS “as a whole”. The Board said that it was required to reach an “overall judgment” on King Salmon’s application in light of Part 2 of the RMA, and s 5 in particular.

19. EDS appealed to the High Court and ultimately the Supreme Court. EDS argued that this analysis was incorrect and that the Board’s finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon’s application in relation to Papatua had to be refused.
20. The Supreme Court considered that the correct way to approach a plan change was as follows:

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, “avoid” is a stronger direction than “take account of”. That said however, we accept that there may be instances where particular policies in the NZCPS “pull in different directions”. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

⁷ These policies require that adverse effect on outstanding natural landscapes and areas of outstanding natural character in the coastal environment are avoided.

21. In reaching that view, the Supreme Court made a number of relevant comments:

- (a) The Supreme Court was concerned about was the uncertainty in decision making that arose from the overall judgment approach. Specifically, the Supreme Court was concerned that decision makers were too readily finding conflict between policies. This was of concern because the presence of such conflict allowed the decision makers to make an “overall judgment”. This in turn created uncertainty as different decision makers could reach a different answer on the overall judgment. An example the Supreme Court referred to was that in one of the locations where a salmon farm had been granted consent by the Board of Enquiry, two years earlier the Environment Court had exercised its overall broad judgment and declined a mussel farm, which would have lesser effects than a salmon farm.⁸
- (b) That sustainable management includes protection as well as use and development and that the sustainable management policy of the RMA may require the protection of particular environments.⁹
- (c) When considering the interrelationship between section 66(1) and 67(3), the Supreme Court extended authority that a RPS is deemed to give effect to Part 2 as it has gone through the RMA process¹⁰ to the NZCPS, holding that the NZCPS was the substance of Part 2 in the coastal environment and treating its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.¹¹
- (d) The Supreme Court emphasised the hierarchy of planning documents with the NZCPS and National Policy Statements at the top. This hierarchy, combined with the conclusion that policy statements are deemed to give effect to section 5, led the Court to disagree with the view that the NZCPS

⁸ See paragraph 137

⁹ [23] ... the use of the word “protection” in the phrase “use, development and protection of natural and physical resources” and the use of the word “avoiding” in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management.

¹⁰ *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211

¹¹ Paragraph 30 and 33

is a document containing guidance or relevant considerations of differing weight.

22. Taking these considerations into account, the Supreme Court rejected an overall broad judgment in *King Salmon*. The Supreme Court concluded that, careful attention must be placed to the way in which policies are expressed. Words matter.¹²
23. The Supreme Court observed that a requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.
24. The Supreme Court also considered whether it was appropriate for reference to be made back to Part 2 when a matter was within the ambit of the NZCPS. The Court considered that it was not unless the national policy document was invalid, there was an inconsistency between the relevant objectives and policies or it did not cover the field.

Application of King Salmon to the Freshwater NPS

25. *King Salmon* was considered by the Board of Enquiry for the Tukituki catchment, chaired by Chisholm J, in relation to implementation of the Freshwater NPS.¹³ The Board's findings in that case are particularly relevant here as it related to a catchment based plan change relating to water quality. The Board of Enquiry applied *King Salmon* as requiring that directive policies in the Freshwater NPS be given effect to unless on a proper interpretation, there was a conflict with other objectives and policies:

[319]When the NPSFM came into effect its underlying concepts and principles were not altogether new. Many of the phrases used in the

¹² [128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher level of justification". This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

¹³ In that case, the Board was dealing with the Freshwater NPS 2011

National Policy Statement echo Part 2 of the RMA. To the extent, however, that the policies in the NPSFM are expressed in directive terms, those policies have to be given effect unless, on proper interpretation, other policies of the NPSFM create a conflict. If that situation arises Part 2 of the RMA, and its governing purpose of promoting sustainable management, informs the analysis as to which policy should prevail.

26. The Board did not see any conflict within the Freshwater NPS 2011.¹⁴

27. It is submitted that the Board's view that the *King Salmon* approach applies equally to the Freshwater NPS is correct:

- (a) The purpose of a national policy statement is to "state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act".¹⁵
- (b) As with the NZCPS, the Freshwater NPS has been through a detailed process to ensure that it achieves sustainable management.
- (c) Like the NZCPS policies under consideration in *King Salmon*, the water quality objectives of the Freshwater NPS are highly specific and unqualified. They require that water quality is improved in the region, the significant values of outstanding water bodies and wetlands are protected and water quality is improved in over-allocated water bodies.

OBLIGATION TO GIVE EFFECT TO NZCPS, FRESHWATER NPS AND CRPS

28. *King Salmon* requires a "thoroughgoing attempt"¹⁶ to reconcile policies and an assessment of whether some of the objectives and policies are so directive that a decision maker has no choice but to implement them. The NZCPS, Freshwater NPS and CRPS are the substance of Part 2, so the ultimate question is whether or not the plan change gives effect to those policy documents. There is no need to refer back to Part 2 itself. It is submitted the proper approach is therefore to:

- (a) Identify the relevant provisions of the NZCPS, Freshwater NPS, and Canterbury RPS that must be given effect to, placing careful attention to

¹⁴ [322]

¹⁵ Section 45(1)

¹⁶ *King Salmon*, paragraph 132

the way in which these policies are worded, with directive policies to be given greater weight.

- (b) If there are directive policies, consideration must be given to whether these are so directive that there is no choice but to implement them.
- (c) If there is a perceived conflict between the provisions, a careful consideration of these provisions has to be undertaken to determine if there is in fact a conflict. A finding that there is a conflict between provisions should not be reached lightly.
- (d) If there is a conflict this should be kept as narrow as possible, the assessment done based on the relevant policy statements, informed by Part 2.

29. When the approach set out above is adopted a common theme emerges from the NZCPS, the Freshwater NPS and the CRPS. There are directive objectives and policies that require the avoidance of further degradation of degraded coastal water, the protection of certain values and the improvement of water quality in over-allocated catchments. It is submitted that these policies are so directive that there is no choice but to implement them.

30. In this context it is critical that the loads proposed by Variation 1¹⁷ provide for a significant increase in the catchment load of N from current levels. This is not apparent from Variation 1 but has been the source of correspondence between Dr Dewes and CRC staff, who advised the following loads had been used to advise the variation.

Table 1: Loads used to advise the Variation (Melissa Robson, 12 Aug 2014).

	2011 (current) (tonnes)	2017 (tonnes)	2022 and beyond, to be met by 2037 (tonnes)
Total CPW (includes dairy support)	1500	1,944	1,741
Total non CPW	2910	3,366	2,970
Catchment agricultural total	4530	5,429	4,830

¹⁷ Evidence of Dr Alison Dewes, paragraph 4

31. Lag is also an important issue. When these matters are considered, Variation 1, somewhat optimistically notes that water quality is expected to get worse before it gets better.¹⁸ A more realistic assessment is that water quality is expected to get worse. Variation 1 provides for it to get worse and makes no provision for it to get better than it currently is.

New Zealand Coastal Policy Statement 2010

32. Variation 1 contains provisions which relate to and affect the coastal environment. The coastal environment is defined in Policy 1 of the NZCPS as , and this definition includes¹⁹ 'coastal lakes, lagoons ... and the margins of these'. Te Waihora is an intermittently open lagoon' or 'brackish lake'²⁰ recognised as a coastal lake in Variation 1.²¹

33. Te Waihora is therefore within the coastal environment²² and subject to provisions of the NZCPS. The wider coastal marine area is also the ultimate receiving environment for water from the Selwyn te Waihora catchment.

34. The NZCPS contains relevant provisions relating to water quality and indigenous biodiversity.

Water quality

35. Objective 1 of the NZCPS is particularly relevant to water quality in the coastal environment.

Objective 1

To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- *maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.*

¹⁸ Page 4-3

¹⁹ NZCPS Policy 1(2)(c)

²⁰ Evidence of Brett Stansfield , paragraphs 23

²¹ Table 11(b) places Te Waihora/Lake Ellesmere in the Management Unit 'Coastal Lakes'

²² Te Waihora is also recognized as being part of the coastal environment in the Te Waihora Joint Management Plan (2005) section 4.4 prepared by Te Rūnanga o Ngāi Tahu and Department of Conservation

36. Policy 21 is also particularly relevant:

Policy 21

Enhancement of water quality

Where the quality of water in the coastal environment has deteriorated so that it is having a significant adverse effect on ecosystems, natural habitats, or water based recreational activities, or is restricting existing uses, such as aquaculture, shellfish gathering, and cultural activities, give priority to improving that quality by:

- (a) identifying such areas of coastal water and water bodies and including them in plans;*
- (b) including provisions in plans to address improving water quality in the areas identified above;*

37. Te Waihora is the most polluted lake in New Zealand.²³ The current poor water quality in Te Waihora is having a significant adverse effect on the ecosystems and habitats of the lake.²⁴ In order to give effect to the NZCPS, it is submitted that Variation 1 must give priority to improving water quality in Te Waihora / Lake Ellesmere by including provisions to address improving water quality. Provisions which allow a decline in water quality in Te Waihora would not give effect to the NZCPS.

38. Variation 1 in its current form does not provide for the improvement of water quality – it in fact allows it to further decline. This is addressed by Mr Stansfield, whose evidence is that Variation 1 will provide for a further decline in the already degraded water quality in te Waihora / Lake Ellesmere.²⁵

39. Variation 1 does not does not give effect to Objective 1 and Policy 21 of the NZCPS.

Indigenous biodiversity

40. The NZCPS also contain provisions relating to indigenous biodiversity.

²³ Evidence of Brett Stansfield , paragraphs 14

²⁴ Evidence of Brett Stansfield , paragraphs 46 -54

²⁵ Rebuttal evidence of Brett Stansfield, paragraphs 10-11

Objective 1

To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- *maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;*
- *protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and*

41. Objective 1 is supported by Policy 11:

Policy 11: Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

a. avoid adverse effects of activities on:

- i. indigenous taxa that are listed as threatened⁵ or at risk in the New Zealand Threat Classification System lists;*
- ii. taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;*
- iii. indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;*
- iv. habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;*
- v. areas containing nationally significant examples of indigenous community types; and*
- vi. areas set aside for full or partial protection of indigenous biological diversity under other legislation; and*

42. Policy 11 is directive requiring the avoidance of certain effects. Avoid means “not allow” or “prevent the occurrence of”.²⁶ It is submitted that these objectives and policies have the effect of “what in ordinary speech would be a rule”²⁷ and “provide something in the nature of a bottom line”²⁸

²⁶ King Salmon at [96]

²⁷ King Salmon at [116]

²⁸ King Salmon at [132]

43. Mr Stansfield's evidence is that the Waihora triggers Policy 11(a)(i), (iii) and (v).²⁹ Consequently, there is a requirement to avoid adverse effects on the matters covered by these sub-policies. Mr Stansfield's evidence is that the increase in load associated with Variation 1 will result in adverse effects on the matters in Policy 11(a) (iii) and (v). This is contrary to Policy 11. The directive nature of this policy is obvious. These effects must be avoided.

The Freshwater NPS

44. The Freshwater NPS 2014 was gazetted on 4 July 2014, and replaced the earlier 2011 version.
45. Canterbury Regional Council has subsequently published a public notice delaying the implementation of Policies A1, A2, A3, B1, B2, B5, B6, CA1, CA2, CA3 and CA4 the Freshwater NPS. The limits contained in Variation 1 are now interim limits and that final limits in accordance with the Freshwater NPS 2014 will be implemented by 2025.³⁰
46. This raises the issue of how the interim targets are set. It is submitted that the Objectives of the Freshwater NPS, particularly A1 and A2 remain relevant and the limits in Variation 1 must be established in accordance with these objectives, which are largely unchanged from the 2011 version along with any relevant provisions of the CRPS.
47. The staged implementation removes the requirement for Variation 1 to set freshwater objectives and freshwater quality limits and environmental flows in accordance with Policies CA1-CA4 and or set freshwater quality limits.
48. However, Variation 1 proposes to set freshwater objectives and freshwater quality limits. In my submission, having proposed to set freshwater objectives and freshwater quality limits and environmental flows,

²⁹ Rebuttal evidence paragraph 15

³⁰ The public notice relevantly said:

Canterbury Regional Council's programme in the Selwyn Waihora catchment involves the setting of interim freshwater outcomes, limits and targets, along with environmental flows and/or levels. These are contained in Variation 1 and these interim provisions have been developed collaboratively through working with communities in partnership with Canterbury Water Management Zone Committees and Te Rūnanga o Ngāi Tahu.

A further stage of the programme in the Selwyn Waihora catchment will occur by 2025 when Section 11 of the proposed Land and Water Regional Plan is reviewed and the National Objectives Framework is applied within this catchment so that all the policies in the National Policy Statement for Freshwater Management 2014 are fully implemented in the Selwyn Waihora catchment by 31 December 2025

consistently with Policy 7.3.7 of the CRPS,³¹ this must be done to achieve the objectives of the Freshwater NPS and the objectives and policies of the CRPS.

Ecological health

49. An approach based on ecological health is required to give effect to the Freshwater NPS. Objective A1 provides:

***Objective A1:** To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water ... in sustainably managing the use and development of land, and of discharges of contaminants.*

50. The Freshwater NPS sets “ecosystem health” as a compulsory national value. It is defined as:

Ecosystem health – The freshwater management unit supports a healthy ecosystem appropriate to that freshwater body type (river, lake, wetland, or aquifer).

In a healthy freshwater ecosystem ecological processes are maintained, there is a range and diversity of indigenous flora and fauna, and there is resilience to change.

Matters to take into account for a healthy freshwater ecosystem include the management of adverse effects on flora and fauna of contaminants, changes in freshwater chemistry, excessive nutrients, algal blooms, high sediment levels, high temperatures, low oxygen, invasive species, and changes in flow regime. Other matters to take into account include the essential habitat needs of flora and fauna and the connections between water bodies. The health of flora and fauna may be indicated by measures of macroinvertebrates.

51. The Environment Court and the Tukituki Board of Enquiry have concluded that an approach based on ecological health is required to give effect to the Freshwater NPS. In reaching this view the Tukituki Board of Enquiry addressed the issue as follows:

[317] Irrespective of where submitters sat on the spectrum, there was a measure of agreement that land use is critical to the management of water quality. Mr van Voorthuysen put the issue succinctly when

³¹ Discussed below

he said, in response to a Horticulture NZ submission seeking specific provisions for the enhancement of primary production:

“... that is not the reason why water quality limits are set. Instead, to give effect to objective A1 and policy A1 of the NPSFM, water quality limits are set to safeguard aquatic ecosystems. Land use activities and primary production activities then need to be managed so that those limits are not exceeded.”

The Board agrees with that broad proposition. Management of nutrients in water is inextricably linked to the management of land use

52. The Tukituki Board of Enquiry confirmed this view later in the decision, earlier expressed by the Environment Court:

[359] The Board believes that an approach based on ecological health rather than toxicity is required to give effect to the NPSFM. Such an approach would also appear to be consistent with the approach of the Environment Court in Day v Manawatu Wanganui Regional Council.

53. The changes made to the Freshwater NPS in 2014 do not change this conclusion. Objective A1 is unchanged. The delayed implementation of Policy A1 is immaterial as this simply requires that freshwater objectives and freshwater quality limits are set. Variation 1 does this.
54. It is submitted that, in order to give effect to the Freshwater NPS, the limits proposed by Variation 1 must provide for ecological health.

Avoiding over allocation and improving water quality in over-allocated water bodies

55. Objective A2 provides:

Objective A2: *The overall quality of fresh water within a region is maintained or improved while:*

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

56. Over-allocation is defined in the Freshwater NPS as the situation where the resource:

a) has been allocated to users beyond a limit; or

b) is being used to a point where a freshwater objective is no longer being met

57. The Selwyn te Waihora catchment is overallocated for nitrogen. As noted in Variation1 itself:

The Selwyn Waihora catchment is not currently achieving all its freshwater objectives and water quality is anticipated to get worse before it gets better as a result of lag effects. The catchment is therefore over-allocated in accordance with the National Policy Statement: Freshwater Management 2011.

58. Variation 1 seeks to address this over-allocation through policies requiring the reduction in discharges of nitrogen over time and rules giving effect to these policies.

59. This situation is not changed as a result of the introduction of the revised Freshwater NPS in July 2014, particularly in light of its delayed implementation.

60. Given the Selwyn te Waihora catchment is currently overallocated for nitrogen, Objective A2 requires that Variation 1 must improve the quality of fresh water in the overallocated water bodies.

61. The limits/targets proposed in Variation 1 provides for an increase in nitrogen loss from farming, above current state. Analysis by Dr Jim Cooke shows that the nitrogen loads 'loss limits' in table 11(i) will likely result in increased concentrations of nitrogen in waterbodies. These nitrogen concentrations will increase beyond the current state. These nitrogen concentrations will not safeguard life-supporting capacity and ecosystem health. Dr Cooke's evidence is that N load and N concentrations in the Waihora Lake Ellesmere will increase in some waterbodies, with toxicity

“probably” met in the middle of the lake and elevated concentrations at the edge of the lake³² and nitrate toxicity likely be breached at Coes Ford.³³

62. The limits/targets proposed in Variation 1 will result in increased nitrogen concentrations beyond the current over-allocated state. Allowing increases in nitrogen concentrations in waterbodies which are over allocated do not improve water quality. Imposing water quality limits that provide for further degradation does not give effect to the Freshwater NPS and is directly contrary to Objective A2 of the Freshwater NPS.
63. Forest & Bird and Fish & Game have proposed limits (or targets, where currently exceeded) that will give effect to the Freshwater NPS objectives. This supported by the evidence of Mr Stansfield, Dr Dewes and Dr Cooke and Mr Pearson.
64. The provisions proposed by Forest & Bird and Fish and Game provide for the maintenance of water quality and its improvement over time, so as to achieve ecological health. This will give effect to the Freshwater NPS.

Protecting significant wetlands

65. Objective A2(a) and (b) of the Freshwater NPS requires that the significant values of outstanding water bodies and wetlands must be protected.³⁴ Te Waihora / Lake Ellesmere is recognised in Variation 1 as a nationally significant wetland for both wildlife and wildlife viewing³⁵. As noted above, Mr Stansfield’s evidence shows this lake to be internationally significant. The outstanding values of Te Waihora are recognised in the National Water Conservation Order³⁶ as habitat for wildlife, indigenous wetland vegetation and fish and significance in accordance with tikanga Māori for Ngāi Tahu history, mahinga kai and customary fisheries.
66. These outstanding and internationally significant values can also be considered to be ‘significant’ values in terms of the Freshwater NPS and

³² Evidence of Dr Jim Cooke, paragraph 12 and 30,

³³ Evidence of Dr Jim Cooke, paragraph 12 and 30

³⁴ Freshwater NPS Objective A2(b)

³⁵ Variation 1 notified version page 4-2

³⁶ National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990

must be protected. The limits and methods of Variation 1 do not protect these values. Water quality is expected to decline further, which will have additional adverse effects on the outstanding and wetland values of the Waihora.³⁷

CANTERBURY RPS

67. Variation 1 must give effect to the Canterbury Regional Policy Statement 2013 (CRPS). In my submission, on careful reading, the relevant objectives and policies are entirely consistent with the Freshwater NPS.

68. The CRPS contains four objectives which specifically relate to the management of fresh water.³⁸ Objective 7.2.1 reflects Objective A1 of the Freshwater NPS. Development is enabled where life supporting capacity, ecosystem processes, and indigenous species and their associated freshwater ecosystems, and mauri of the fresh water is safe-guarded.

69. Objective 7.2.2 seeks the maintenance of water quality where it is of a high standard and improvement of water quality in catchments where it is degraded and the restoration or enhancement of degraded fresh water

³⁷ Evidence of Brett Stansfield, paragraph 86, Rebuttal evidence of Mr Stansfield, paragraph 10

³⁸ **Objective 7.2.1 – sustainable management of fresh water**

The region's fresh water resources are sustainably managed to enable people and communities to provide for their economic and social well-being through abstracting and/or using water for irrigation, hydro-electric generation and other economic activities, and for in-stream recreational and amenity values, and any economic and social activities associated with those values, providing:

- (1) the life supporting capacity, ecosystem processes, and indigenous species and their associated freshwater ecosystems, and mauri of the fresh water is safe-guarded;*
- (2) the natural character values of wetlands, lakes and rivers and their margins are preserved and these areas are protected from inappropriate subdivision, use and development and where appropriate restored or enhanced; and,*
- (3) any actual or reasonably foreseeable requirements for reasonable domestic needs of individuals and for reasonable needs of individuals animals, for drinking water and customary uses, are provided for.*

Objective 7.2.2 – parallel process for managing fresh water

Abstraction of water and the development of water infrastructure in the region occurs in parallel with

- (1) improvements in the efficiency with which water is allocated for abstraction, the way it is abstracted and conveyed and its application or use;*
- (2) the maintenance of water quality where it is of a high standard and improvement of water quality in catchments where it is degraded*
- (3) the restoration or enhancement of degraded fresh water bodies and their surroundings.*

Objective 7.2.3 – protection of the intrinsic value of water bodies and their riparian zones

The overall quality of freshwater in the region is maintained or improved, and the life supporting capacity, ecosystem processes and indigenous species and their associated freshwater ecosystems are safeguarded.

Objective 7.2.4 – integrated management of fresh water resources

Fresh water is sustainably managed in an integrated way within and across catchments, between activities, and between agencies and people with interests in water management in the community, considering:

- (1) the Ngāi Tahu ethic of Ki Uta Ki Tai (from the mountains to the sea);*
- (2) the interconnectivity of surface and groundwater*
- (3) the effects of land uses and intensification of land uses on demand for water and water quality;*

bodies and their surroundings. This reflects and is entirely consistent with Objective A2 of the Freshwater NPS.

70. The same can be said for the policies. Critical policies include Policy 7.3.7 which mirrors the Freshwater NPS requirement that water quality standards are maintained, or where below the minimum standard improved and that over-allocation is avoided:

Policy 7.3.7 – Water quality and land uses

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.*

71. Policy 7.3.6³⁹ which provides for the establishment of minimum water quality standards, the maintenance of water quality above those standards and the avoidance of additional allocation.
72. Policy 7.3.12 provides for the precautionary approach to the allocation of water for abstraction, the damming or diversion of water, or the intensification of land uses or discharge of contaminants, in circumstances

³⁹ **Policy 7.3.6 Fresh water quality**

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) the values associated with maintaining life supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, and natural character of the water body;*
 - (b) any current and reasonably foreseeable requirement to use the water for individual, marae or community drinking water or stockwater supplies, customary uses or contact recreation;*
 - (c) the cultural significance of the fresh water body and any conditions or restrictions on the discharge of contaminants that may be necessary or appropriate to protect those values; and*
 - (d) any other current or reasonably foreseeable values or uses;*
- (2) to manage activities which may affect water quality (including land uses), singularly or cumulatively, to maintain water quality at or above the minimum standard set for that water body.*
- (3) where water quality is below the minimum water quality standard set for that water body, to avoid any additional allocation of water for abstraction from that water body and any additional discharge of contaminants to that water body, where any further abstraction or discharges, either singularly or cumulatively, may further adversely affect the water quality in that water body:*
 - (a) until the water quality standards for that water body are met; or*
 - (b) unless the activities are undertaken as part of an integrated solution to water management in the catchment in accordance with Policy 7.3.9, which provides for the redress of water quality within that water body within a specified timeframe*

where the effects of these activities on fresh water bodies, singularly or cumulatively, are unknown or uncertain

73. There is no conflict between the Freshwater NPS and the CRPS.
74. Variation 1 does not give effect to the CRPS. Water quality is not maintained and over-allocation is made worse. The provisions proposed by Forest & Bird and Fish & Game give effect to the CRPS. They provide for the maintenance of water quality and over-allocation is avoided over time, not made worse

Section 32

75. The Section 32 report is something that must be had particular regard to. The difficulty in this case is that the objectives of the CLWP are not yet settled, being the subject of appeal by a number of parties including Fish & Game. The Fish & Game appeal challenges the objectives.

Canterbury Water Management Strategy

76. In addition to the matters which are relevant under the RMA, the vision and principles of the Canterbury Water Management Strategy (CWMS) must be had regard to.⁴⁰ The status of the CWMS is addressed in the CRPS as follows:

Relationship between Canterbury Regional Policy Statement (CRPS) and CWMS

The CWMS is not a policy statement or plan prepared under the RMA, and it cannot override the provisions of the RMA or the statutory policy statements and plans prepared under that Act. However, the Council may have regard to other relevant strategies or plans in preparing the Regional Policy Statement and any regional plans and this could include Regional and Zone Implementation Plans.

77. The CWMS has three primary principles – sustainable management, regional approach and tangata whenua. The CWMS has deliberately set priorities within the primary principle of "sustainable management"⁴¹. The first order priorities include the environment, which aligns with the Freshwater NPS direction to safeguard the life-supporting capacity of freshwater.

⁴⁰ Section 63 Ecan Act

⁴¹ Canterbury Water Management Strategy, Strategic Framework – November 2009, page 21

78. Second order priorities identify instream (recreation, amenity) and out of stream (irrigation, renewable energy) values and uses which of course potentially conflict with one another.
79. Supporting principles are natural character, indigenous biodiversity, access, quality drinking water, recreational opportunities, and community and commercial use. A number of the second order priorities and supporting principles within the CWMS reflect section 6, 7 and 8 matters. However, some section 6 and 7 matters are absent from the CWMS⁴², or the weight ascribed to them⁴³ is different under the CWMS. The weight to be given to those matters should be subject to Councils' duty to prepare the plan in accordance with Part 2 and to give effect to the Freshwater NPS.
80. The vision of the CWMS is entirely consistent with those in the Freshwater NPS. Development is enabled provided it is environmentally sustainable.

"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."

81. The outcome of the CWMS for Variation 1 is the Zone Committee Solutions Package (ZCSP) for the Selwyn Waihora Zone Committee. This has been largely adopted by Variation 1.
82. Forest & Bird and Fish & Game do not accept that the zone committee included a fair representation of the community. It is dominated by primary sector and iwi representatives, as have been some of the parallel Zone Committee processes associated with limit setting. Unsurprisingly, the solutions package reflects outcomes sought by the farming community, further intensification in an over-allocated catchment in the short term with a promise of improvements in the future. The solutions package does not reflect the outcomes sought by the Freshwater NPS or the CRPS

⁴² For example, the requirement to have particular regard to the protection of the habitat of trout and salmon under section 7(h).

⁴³ For example, preservation of natural character and maintenance of public access are matters to be recognised and provided for under s6, but are supporting principles under the CWMS.

83. The ZCSP is also not consistent with the vision of the CWMS or the first and second order priorities. The framework is not environmentally sustainable as it will not reduce significant overallocation nor will it give priority to the environment as a first order principle. More weight is instead given to the economic viability of farms and the ability to increase nutrient allocations above moving the catchment back to a state of ecosystem health.
84. A key reason is that the Zone Committee has given undue weight to further irrigation development under an inflexible premise of maintaining both existing and new farm viability. The directions of the Freshwater NPS and CRPS have been largely ignored.
85. Forest & Bird and Fish & Game say the ZCSP should be given little weight and certainly less than the higher order policy statements.

The section 42A report

86. The section 42A report suggests that an overall broad judgment should be applied to whether Variation 1 meets the purpose of the Act. This overall broad judgment provides that the directive objectives and policies of the NZCPS and the Freshwater NPS are merely relevant considerations that the decision maker can decline to implement in the particular circumstances of this case. Indeed, Variation 1 provides for a departure from the directive policies of the NZCPS and Freshwater NPS.
87. It is submitted that this approach is contrary to the Supreme Court's clear findings in *King Salmon*. As noted above *King Salmon* requires that careful attention must be paid to the manner in which policies are worded.
88. The section 42A report, correctly in my submission, reaches the view that *"an overall judgment cannot be relied on to justify a departure from directive policies, particularly in the NZCPS (or by analogy from setting limits and targets as required by the NPSFM)"*.⁴⁴ A range of objectives and policies from a range of documents are then listed.

⁴⁴ Paragraph 7.45

89. At this point the section 42A report goes badly awry. Despite the Supreme Court direction that careful attention must be paid to the way in which policies are worded,⁴⁵ the section 42A report pays no attention to the wording of policies. What follows is simply a listing of various policies. Relevant directive policies are not included or not considered.
90. An example of this is that Variation 1 refers to te Waihora “*as a nationally significant wetland for both wildlife and wildlife viewing. It supports a rich biological environment including native and introduced species.*” Mr Stansfield’s uncontested evidence is that it is internationally significant. As a coastal lake, te Waihora is located in the coastal environment. However, no reference is made to Policy 21 of the NZCPS, which requires avoidance of certain effects on indigenous biodiversity.
91. The section 42A report simply makes a broad statement that the relevant provisions sometimes pull in different directions across its geographical area. No attempt is made to reconcile the policies. This is despite the very clear direction in *King Salmon*.
- [131] A danger of the “overall judgment” approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them.*
92. In my submission this is exactly the superficial approach that the Supreme Court was critical of in *King Salmon*, demonstrating a failure to pay careful attention to the way in which the relevant policies are worded.
93. A good example of this is the assessment of Policy 5.3.12 of the CRPS. A careful reading of this policy is that primary production is provided for where it does not contribute to significant cumulative adverse effects on water quality and quantity.
94. Policy 5.3.12 is entirely consistent with the objectives of the Freshwater NPS, which also seeks to avoid significant cumulative adverse effects. On the careful reading required by *King Salmon*, there is no tension.

⁴⁵ Paragraph 129 of *King Salmon*

95. The section 42A report also suggests that Objective A2 does not require immediate improvement in water quality. While this may or may not be correct, it is irrelevant and misleading . It suggests that Variation 1 is providing for a long term improvement in water quality. Variation 1 provides for the long term degradation of water quality by providing for further allocation in an over-allocated catchment. Variation 1 provides for the catchment load to increase from 4,530 tonnes currently to 5,429 tonnes by 2017 and 4,830 tonnes by 2037. This is a further 20% allocation of nitrogen in this over allocated catchment⁴⁶ in 2017. This further over allocation is reduced such that by 2037 it is approximately an 8% increase over current load. Forest & Bird and Fish & Game's evidence demonstrates that the increase catchment load will result in a decline in water quality.
96. The section 42A report justifies a failure to give effect to directive policies in the Freshwater NPS on the basis that there are no enabling policies in the Freshwater NPS and the lack of such policies allows reference to be made to Part 2.
97. First, it is submitted that this is incorrect. As set out in the preamble to the Freshwater NPS:
- This national policy statement sets out objectives and policies that direct local government to manage water in an integrated and sustainable way, while providing for economic growth within set water quantity and quality limits.*
98. The Freshwater NPS enables the use of water, it just makes clear that such use must be within sustainable water quality limits. It is not possible, under the overarching sustainable management purpose of the RMA, to *enable* use beyond sustainable limits in the long term. One example of an enabling policy of the Freshwater NPS is that degraded water bodies are not required to be instantly brought back to a level that achieves ecosystem health, rather methods are required to be included in the plan to achieve that outcome within a defined timeframe.

⁴⁶ Evidence of Alison Dewes, paragraph 20

99. Second, it is submitted that the s42 report's approach is contrary to *King Salmon*.

- (a) Even if there was an absence of enabling policies, this cannot provide a justification to depart from directive policies requiring protection of ecosystem health. *King Salmon* contemplated that an overall broad judgment might be appropriate where there was a conflict between policies, with that judgment limited to the areas of conflict between policies and undertaken with reference to the policy statement not Part 2.
- (b) The Freshwater NPS is deemed to give effect to Part 2 in the same way that regional policy statements and the NZCPS do.
- (c) This approach fundamentally undermines Freshwater NPS. If the absence of enabling policies allows the use of an overall broad judgment in this case, it would do so in every case. This could lead to the outcome where decision makers could choose not to implement directive policies in the Freshwater NPS based on the absence of enabling policies.

100. If the reasoning on the section 42A report is adopted, it can justify a failure to give effect to certain objectives and policies of the Freshwater NPS 2014. This is a finding that the absence of enabling policies within the Freshwater NPS provides a justification for not implementing the directive policies. This is effectively writing in policies that are not there and then allowing those unwritten policies to override the objectives and policies that are there.

SECTIONS 69(3) AND 70

101. Section 69(3) and 70 are relevant to Variation 1. Section 69(3) provides:

69 Rules relating to water quality

- (3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.*

102. In my submission, there is no jurisdiction to include the rules that provide for an increase in catchment load. The increase in load provided by Variation 1 will reduce water quality compared to the time of public notification. As discussed above it is submitted that the purpose of the Act for freshwater matters is set out in the Freshwater NPS. The increase is contrary to the Freshwater NPS, particularly the provisions regarding the maintenance of water quality, improvement of water quality in over-allocated catchments and protecting the significant values of wetlands.
103. Section 70(1) requires that the regional council must be satisfied that none of the effects set out in s70 (1)(c) to (g) will arise before it includes in a plan a regional rule for a permitted activity to discharge directly or indirectly to water. Of particular relevance is section 70(1)(d) relating to 'any conspicuous change in the colour or visual clarity' and (g) relating to 'any significant adverse effects on aquatic life'. These effects must be avoided whether they arise from a single activity or discharge, or the cumulative effects of many discharges.⁴⁷
104. Mr Stansfield explains that the current water quality in the rivers and lakes of the Selwyn te Waihora catchment is currently giving rise to these s70 effects.⁴⁸
105. Variation 1 includes one rule of particular relevance which must be considered in this section 70 context. Rule 11.5.16 permits the 'incidental' discharge of nutrients, sediment and microbial contaminants to land which may enter water, provided the land use is authorised by one of the farming land use rules in Variation 1.⁴⁹
106. In order for this rule to meet the tests of section 70 and to be considered lawful, the Commissioners must be satisfied that the conditions of the farming land use rules, will ensure that, in particular, there are no significant adverse effects on aquatic life. As outlined earlier, there is evidence that significant adverse effects on aquatic life are already occurring as a result of

⁴⁷ section 70(1) states 'as a result of the discharge of the contaminants (either by itself or in combination with the same, similar or other contaminants) [emphasis added]

⁴⁸ Rebuttal evidence of Brett Stansfield, paragraph 10-16

⁴⁹ Rules 11.5.6 to Rule 11.5.14

cumulative discharges of contaminants from farming land uses in the catchment.⁵⁰

107. The farming land use rules as proposed in Variation 1 allow an increase in the discharge of nitrogen from farming land uses within the catchment, and the proposed limits allow an increase in the loads and concentration of nitrogen. These cumulative effects will worsen the significant adverse effects on aquatic life already occurring in the catchment. This would be inconsistent with s70 RMA.

CENTRAL PLAINS WATER

108. CPW raises significant legal and substantive issues.

109. Variation 1 proposes to grandparent CPW by permitting intensification associated with CPW, with an allocation of 1944 tonnes of N per year given to the scheme in 2017.

110. Forest & Bird and Fish & Game consider that this allocation should not be granted. This allocation is one of the key reason why Variation 1 does not give effect to the NZCPS, Freshwater NPS and the CRPS.

111. It has been suggested that an allocation has already been made to CPW. It is submitted that this is not correct. In order to form part of the existing environment it is necessary for all consents to be required for the activity.

112. CPW has not been granted a land use consent so it does not have all the necessary consents for its scheme. As a result it does not form part of the existing environment and no allocation can be said to have been made.

113. It does not matter that effects considered by the discharge permit and those associated with land use consent are similar.

114. *Royal Forest & Bird Protection Society of New Zealand Incorporated v West Coast Regional Council and others*⁵¹ involved consideration of whether a coal mining licence held by Solid Energy that authorised land use, including

⁵⁰ Rebuttal evidence of Brett Stansfield, paragraph 10-16

⁵¹ 2013 NZEnvC 42

the removal of significant indigenous vegetation, formed part of the existing environment. The coal mining licence did not provide authorisation for water related matters and Solid Energy did not have the necessary water related consents.

115. The Environment Court found that the coal mining licence would form part of the existing environment if it all consents necessary to operate the mine had been obtained. As all necessary consents had not been obtained, it was not part of the existing environment. This decision was upheld on appeal.⁵²

116. CPW does not have land use consent for land intensification. The reason for this is that land use consent was not required at the time that CPW made its applications. This was considered in the CPW decision as follows:⁵³

CPW seeks consent for the use of water from both rivers for the purpose of irrigation. It is important to note that no consent is required for the land use activity of irrigation or for intensification of farming activity.

117. CPW did not seek a certificate of compliance for the land use associated with its scheme.

118. The CPW conditions anticipate that CPW will be the subject of any restrictions imposed by a sub-regional plan. Condition 35 of the CPW consents provides that the CPW consent must be varied to make it consistent with an operative regional plan including catchment wide NDA.

Within 6 months of a regional plan becoming operative that provides catchment wide NDA within the area to which the scheme supplies water, the consent holder shall apply to vary the conditions of consent that relate to nutrient discharges in a way that is consistent with the catchment wide NDA that are defined in the regional plan.

119. This condition anticipates Variation 1 and provides that it is subservient to it.

120. Consequently, intensification associated with CPW requires land use consent where, prior to the intensification, a Regional Plan comes into force with a

⁵² *Royal Forest & Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2013] NZRMA 275

⁵³ Joint Decision and Recommendation of Independent Commissioners, 28 May 2010, Part 7

rule requiring consent for such intensification. CPW does not form part of the existing environment and there is no legal obligation to provide CPW with an allocation. That this is the case is supported by

(a) If an allocation has been made, what is it?

(b) The fact that Variation 1 provides for a reduction in the allocation. The quantum of this reduction is a matter to be determined through Variation 1.

121. For these reasons, it is submitted that the question of whether Variation 1 should provide an allocation to CPW falls to be evaluated on its merits.

122. When this evaluation is made, it leads to the conclusion that no allocation should be granted to CPW; intensification associated with CPW should be treated in the same way as intensification for other farms.

123. The main reason for reaching this view is that the allocation provided to CPW is a key reason why water quality will decline and not improve in this over-allocated catchment. As such the provisions providing the allocation to CPW do not give effect to the NZCPS, the Freshwater NPS or the CRPS.

124. There are also significant equity issues associated with CPW. Much of the CPW scheme is proposed to occur on coarse stony soils, which are unsuitable for dairying.⁵⁴ Allowing dairying to occur on these soils will result in a significant increase in the catchment load of N, far outweighing any benefits from irrigation augmentation of surface and groundwater.⁵⁵

125. However, at the same time as providing a large allocation for CPW, existing farmers undertaking dairying operations on land which is more suitable for dairying will be required to significantly reduce the amount of N leached. This is in part to allow for development of unsuitable soils, which will result in significantly more N discharged per hectare than on suitable soils.

126. In addition to this inequity, new entrants under the CPW scheme are potentially put in a more favourable position than existing farmers.

⁵⁴ Evidence of Alison Dewes, paragraph 123

⁵⁵ Evidence of Jim Cooke. Paragraph 30

127. The provisions of Variation 1 that apply to farmers outside the CPW scheme require a reduction in the amount of N that is leached. These are set out in Policy 11.4.14; 30% for dairy farmers.
128. Under the provisions of Variation 1 and the pCLWP, discretionary consent will be required for land use after 1 January 2017, in order to be compliant with pCLWRP Rule 5.61 and Variation 1 Rules 11.5.14 and 11.5.15. It is uncertain and speculative how this consent would be considered.
129. CPW is being given a form of super grand-parenting, in that farmers covered by the CPW scheme are given long term nutrient allocation rights and these grand parented rights are provided on less efficient soils with significantly reduced assimilative capacity when compared to existing farmers in the lower catchment.
130. This super grand-parenting is provided, notwithstanding the CPW scheme is not yet operational and there are no guarantees it will reach full capacity. The allocation given to CPW means potentially meaning higher default discharges for those in the scheme below full capacity.
131. Dr Dewes uses the example of a Leeston dairy farmer farming on suitable soils. Under Variation 1, this farmer will be required to reduce N discharges from 58kg/ha/year to 40 kg/ha/year. This is a significant reduction, likely to come at some cost. This reduction is to allow for a new entrant on unsuitable soils to be able to discharge at a higher rate. In my submission, this proposed approach is inequitable and does not achieve sustainable management. Restricting existing farmers on suitable soils to provide for development on unsuitable soils is not an efficient use of the resource.
132. In the Tukituki decision, the Board of Inquiry rejected a grand-parenting approach (in favour of a Land Use Capability nitrogen leaching rates approach) on the following basis:

[427] Importantly LUC leaching rates eliminate the need for the currently proposed 'grandparenting' regime in POL TT4(1)(e) and (f) which is based on percentage increases in leaching rates. As noted in the Benson Report, such an approach could reward existing high

leaching land users. It also lacks any incentive to improve land use practises so that leaching is reduced. As the Board sees it, those features of POL TT4 as currently proposed are the opposite of what that policy is seeking to achieve. They are also incompatible with the NPSFM.

133. Not having taken advantage of the certificate of compliance route, CPW took the chance that the land use intensification aspect of its activity would require consent in future. The Plan should not seek to assist CPW when to do so would be inequitable, reward inefficient use, and be inconsistent with the Freshwater NPS.

Limits for phosphorous required

134. Variation 1 only proposes environmental limits for nitrogen, not for phosphorus beyond the Table (I) Limits for Lakes. Dr Cooke and Mr Stansfield consider whether river limits for phosphorous are also required and both conclude that they are.

135. The Tukituki Board of Enquiry considered this same question. It concluded that a dual nutrient approach was required for a number of reasons.⁵⁶ The relevant reasons included:

(a) the evidence that the catchment was nitrogen limited was equivocal *"to say the least"*⁵⁷.

(b) That there was a risk to downstream environments including estuarine and coastal environments and *"if nutrients were not properly managed upstream an adverse effect downstream is virtually inevitable"*.⁵⁸

136. These considerations apply equally here. There are strong indications that the streams that contribute to the Waihora are P limited.⁵⁹ This provides a strong basis for providing for dual nutrient management regime.

⁵⁶ Paragraph 348

⁵⁷ Paragraph 349

⁵⁸ Paragraph 363

⁵⁹ Evidence of Dr Jim Cooke, paragraph 53

137. There is also plainly a risk to downstream environments in the Selwyn te Waihora catchment, particularly te Waihora / Lake Ellesmere. This risk has been recognised by the imposition of P limits in the lake but, curiously, not in the tributaries that feed it.

138. This risk is addressed with experimental techniques such as alum dosing, whose effectiveness is uncertain, yet which have been assumed to be very effective in modelling and funded by the public.

139. Dual nutrient management is required in the Hurunui Waiau Regional Plan. It is submitted that the same considerations apply to the Selwyn te Waihora Catchment.

140. For all these reasons it is submitted that dual nutrient management is required to give effect to the NZCPS, the Freshwater NPS and the CRPS.

STATUTORY REQUIREMENTS OF VARIATION 1

141. It is submitted that the in order to give effect to the NZCPS and Freshwater NPS, as required by s 67(3), Variation 1 must:

- (a) address the activities in the catchment that ultimately affect water quality in the coastal environment, including te Waihora / Lake Ellesmere (NZCPS Objective 1);
- (b) enhance water quality in te Waihora / Lake Ellesmere, which has been degraded such that it is having significant adverse effects on ecology and habitat (NZCPS Objective 1 and Policy 21);
- (c) avoid certain effects on indigenous biodiversity (NZCPS Policy 11);
- (d) safeguard life supporting capacity, ecosystem processes and indigenous species and their associated ecosystem (Freshwater NPS Objective A1, A2 and Objective B1);
- (e) improve water quality in water bodies that have been over allocated and avoid further over-allocation of water quantity (Freshwater NPS Objective A2 and B2);

- (f) Improve and maximise the efficient allocation and efficient use of water (Freshwater NPS Objective B3).

142. It is submitted that Variation 1 does not give effect to these requirements:

- (a) the degraded coastal water in te Waihora / Lake Ellesmere will be further degraded, instead of being enhanced;
- (b) adverse effects on indigenous biodiversity identified in Policy 11(a) of the NZCPS are not avoided;
- (c) the freshwater objectives do not achieve the objectives of the Freshwater NPS, in particular they do not safeguard life supporting capacity and ecosystem processes;
- (d) the limits set will not achieves the objectives of the Freshwater NPS;
- (e) the limits and freshwater objectives set do not maintain current water quality;⁶⁰
- (f) the limits set do not maintain overall water quality⁶¹ or improve the quality of over allocated water bodies;⁶² and
- (g) The significant values of Te Waihora / Lake Ellesmere as an outstanding water body and wetland are not protected;⁶³ and
- (h) The significant current and future values of the native fishery and sports fishery are not protected for current and future generations.

CHANGES TO VARIATION 1 NECESSARY TO GIVE EFFECT TO NZCPS, FRESHWATER NPS 2014 AND RPS

143. It follows that significant changes are required to Variation 1 for it to give effect to the NZCPS, the Freshwater NPS and the CRPS. This is the position adopted by Forest & Bird and Fish & Game.

⁶⁰ as required by Objective A2

⁶¹ as required by Objective A2

⁶² as required by Objective A2(c)

⁶³ as required by Objective A2(a) and (b)

144. The provisions sought by Forest & Bird and Fish and Game have been provided to the Commissioners. The key changes sought by Fish and Game and Forest & Bird are that Variation 1 should:

- (a) set interim targets and limits for measured loads, concentrations, and QMCI for waterbodies at specific sites according to current state measurements and required improvement reductions, as detailed by Fish and Game/ Forest and Bird in the evidence in chief.
- (b) revise the current “limit for nitrogen losses” in Table 11(i) to account for any known modelling errors and to avoid the double counting of “Good Management Practice” reductions, under both Overseer and GMP.
- (c) adopt the revised Fish and Game/ Forest and Bird provisions or equivalent policies to ensure that reductions and outcomes set in Variation 1 are achieved in line with the required trajectory of change toward the interim targets at 2037 and limits 2050”. Taking into account the achievability of reductions as per 11.4.15 and 11.4.17A, (b) (iv).
- (d) provide that state of the environment monitoring is significantly improved to provide time series monitoring data for the waterbodies and specific locations recommended in revised provisions and evidence in chief; this monitoring will form a robust set of “current state” indicators by 2018 and allow ECan to populate Table 11(x) with data at this time.
- (e) provide for periodic catchment reviews as initiated by the provisions of 11.4.17A to ensure that the limits for nitrogen losses (modelled load) are adjusted for accuracy against the requirement to achieve outcomes in Tables 11(a) and 11(b) and the objectives and binding strategic policies for the pCLWRP.
- (f) only provide additional allocations for Central Plains Water or other land users above the current catchment limit for nitrogen loss or above individual property nitrogen baselines, if the requirements of Policy 11.4.14B are met. In all other cases, further allocations will not meet

permitted activity status and shall require full notification of any land use change or nutrient discharge consents.

145. These changes are set out in the revised provisions detailed in Scott Pearson's evidence in chief including his Appendix 1 and Appendix 5. A further revision taking into account rebuttal has also been provided.

CONCLUSION

146. Management of the Selwyn te Waihora catchment faces significant problems. The ecological, recreational values and the level of degradation are both very high. The description of the problem as wicked is apt.

147. The higher order planning documents provide the answer to these problems, setting the direction for water management in the catchment. The NZCPS and Freshwater CPS require that where water quality is degraded or over-allocated, water quality is to be improved. They also require the protection of certain biodiversity features and the values of outstanding water bodies and wetlands, of which te Waihora / Lake Ellesmere is both.

148. Unfortunately Variation 1 does not give effect to this direction, instead of providing for an improvement it provides for further degradation of water quality, biodiversity values and the outstanding features of te Waihora / Lake Ellesmere.

149. CPW poses something of a dilemma. Significant sums spent on the project and, not without some justification, it is argued that it would be unfair to prevent the project from going ahead now that it has obtained some of the consents that it requires. However, no allocation has yet been given and providing an allocation now would be contrary to the higher order planning documents which must be given effect to.

150. Forest & Bird and Fish and Game consider that significant changes are required before Variation 1 can give effect to the higher order planning documents as it is required to do.



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17 September 2014

