IN THE MATTER of the Resource Management Act 1991

AND

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

AND

IN THE MATTER of proposed Plan Change 4 to the Canterbury Land and Water Regional Plan

REPORT AND RECOMMENDATIONS

OF THE

HEARING COMMISSIONERS

Date: 27 June 2016

Hearing Commissioners:

David F Sheppard
Rob van Voorthuysen
Edward Ellison

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Chapter One
The Proposed Plan Change and Submissions on it

Plan Change 4

[1] On 27 August 2015, the Canterbury Regional Council ('the CRC' or 'the Council', depending on the context), acting under section 65 of the Resource Management Act 1991 ('the RMA', or 'the Act') and clause 5 of Schedule 1 to that Act, publicly notified a proposed change (identified as Plan Change 4) to its partly operative Land and Water Regional Plan ('the LWRP' or 'the Plan'), and prescribed that the closing date of the period for lodging submissions on the plan change would be 12 October 2015. The Council also prescribed that the closing date of the period for lodging further submissions would be 16 November 2015.

[2] Subsequently the Council published an addendum to the summary of decisions requested by submissions, and prescribed that further submissions on the amendments requested by submissions the subject of the addendum were to be lodged by 2 December 2015.

[3] The LWRP was developed in response to the Canterbury Water Management Strategy ('the CWMS'), which set planning priorities for guiding the allocation of water to classes of use in first and second priorities; and also for restoring ecological health and functioning of water bodies in accordance with a planned timetable and targets.

[4] The contents of the plan change include amendments to provisions of the LWRP on inanga spawning sites and habitat; stormwater discharges; tangata whenua values; group and community drinking-water supplies; dewatering and drainage water; bores; surface water sampling and monitoring; vegetation and earthworks in lakes, rivers and riparian margins; discharge of floodwater; removal of fine sediment from rivers; gravel extraction; sediment-laden discharges; contaminated land; exclusion of livestock from waterways; sewage, wastewater and industrial and trade wastes; water takes and water supply strategies; groundwater and surface water limits; and a number of minor corrections.

Submissions on the plan change

[5] The CRC received 38 submissions on Plan Change 4, many of them requesting numerous amendments to the plan change. In accordance with clause 7 of Schedule 1, the Council gave public notice of those submissions, and invited further submissions. The Council received 19 further submissions supporting or opposing amendments requested in submissions on the plan change.

Hearing of submissions

[6] Acting under section 34A of the RMA, on 15 October 2015 the Council appointed us, the undersigned, as hearing commissioners to hear and make recommendations to it on the submissions on Plan Change 4; and delegated to us all its functions, powers and duties to hear and consider submissions on the plan change, including requiring and receiving reports as enabled by section 42A of the Act, and exercising powers conferred by sections 41B and 41C of it.

[7] We, the hearing commissioners, have required and received reports on the plan change and submissions under section 42A of the RMA, and have conducted public hearings of reports and of evidence and submissions of the 25 submitters who wished to be heard. Those hearings were conducted at Lincoln on five hearing days between 3 March 2016 and 17 March 2016. On 30 May 2016 we reconvened for the authors of the section 42A report to deliver their reply and answer our questions on it. We then proceeded to deliberate on the matters raised in the submissions.

[8] Most of the submissions on Plan Change 4 requested amendments to it, and gave reasons for making them. We are grateful for the numerous constructive improvements to the plan change proposed by the submitters and their expert and other witnesses. We are also grateful for successive detailed reports presented under section 42A of the Act. We acknowledge that the requested amendments, even those we do not recommend, and the related evidence, have substantially assisted us in reaching the recommendations to the Council that we make by this report.

This report

[9] In the main body of this report we state in narrative form our findings about requested amendments that may overstep the scope of the Council's authority to make them by its decisions on the submissions; we address in detail certain major issues raised by submissions; we consider the extent to which the plan change would give effect to relevant directions of applicable instruments, and its relation to other instruments; and as directed by section 32AA of the Act we also express our evaluation of the amendments to the plan change that we recommend.

[10] The decisions on the points raised in the submissions are set out in detail in Appendix A; in Appendix B there is the text of the plan change incorporating our recommended amendments; and in Appendix C we list the reports and other documents that we have referred to in addition to the submissions and evidence presented by the submitters.

[11] To keep from unnecessary duplication or repetition, we affirm that except to the extent that we expressly address the contents in this report, we adopt the advice and reasoning in the section 42A report, and the answers and replies given to us by its authors.

Chapter Two
Whether certain requested amendments are in scope

Introduction

[12] The procedure for making, considering and deciding submissions on proposed plans and plan changes under the RMA is prescribed in Schedule 1 of that Act. The main scheme of Schedule 1, in summary, is that a local authority notifies a proposed plan or plan change;[1] eligible people may make submissions (in the prescribed form[2]) on it, requesting decisions amending the notified plan or plan change;[3] the amendments requested are published;[4] eligible people may lodge further submissions in support of or opposition to amendment requests in a primary submission;[5] the local authority (or commissioners appointed by it[6]) holds a hearing of the submissions (unless none of them wishes to be heard);[7] the local authority (or its commissioners) consider the submissions together with evidence given at the hearing and other relevant matters; where commissioners have been appointed, they report to the local authority on the submissions and the hearings with their recommendations on how the submitters requested amendments should be decided; and the local authority is to give decisions on the provisions and matters raised in the submissions, having particular regard to a further evaluation, and accepting or rejecting them, and giving reasons and a further evaluation of the proposed plan or plan change.[8]

[13] The prescribed form for submissions on a proposed plan is Form 5 in Schedule 1 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.[9] That form contains the text: "I seek the following decision from the local authority:" followed by the direction "[*give precise details*]." Minor differences from the form are permissible if they have the same effect as the prescribed form, and are not misleading.[10]

[14] A decision may include necessary alterations consequential on a decision on a submission amending the plan or plan change, or other relevant matter arising from the submissions.[11] The local authority may also, without using the Schedule 1 process, amend the proposed plan or plan change to alter any information, where the alteration is of minor effect; and may correct any minor errors.[12]

[15] For the present purpose we note that, except in the circumstances described in the previous paragraph, the scope of the local authority's decisions on submissions is restricted to accepting, in full or in part, or rejecting amendments that are on the plan and were requested in primary submissions. The importance of that restriction is clear from the authorities, of which *General Distributors v Waipa District Council*, [13] and *Palmerston North City Council v Motor Machinists* [14] follow earlier High Court judgments,[15] and the latter applies the current version of Schedule 1. The importance is that all those likely to be

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[1] RMA, Sched 1, cl 5.
[2] RMA, Sched 1, cl 6(5).
[3] RMA, Sched 1, cl 6,
[4] RMA, Sched 1, cl 7.
[5] RMA, Sched 1, cl 8.
[6] RMA, s34A(2).
[7] RMA, Sched 1, cls 8B and 8C.
[8] RMA, Sched 1, cl 10.
[9] SR 2003/153.
[10] Resource Management (Forms, Fees and Procedure) Regulations 2003, Reg 4.
[11] RMA, Sched 1, cl 10(2)(b).
[12] RMA, Sched 1, cl 16.
[13] (2008) 15 ELRNZ 59, Wylie J.
[14] [2013] NZHC 1290, Kós J.
[15] *Countdown Properties (Northlands) v Dunedin City Council* [1994] NZRMA 145 (HC); *Royal Forest and Bird Protection Society v Southland Regional Council* [1997] NZRMA 408 (HC); and *Clearwater Resort v Christchurch City Council* (2003) HC Christchurch AP 34/02.

affected by or interested in the requested amendment have opportunity to participate by lodging a further submission in support or opposition.[16]

[16] In carrying out our commission from the CRC to make recommendations for decisions on the submissions on Plan Change 4, we have a responsibility of ensuring that decisions we recommend are within the scope of the Council's lawful powers to make. So in this chapter we address submitters' requests for amendments that may not be within the Council's powers to make in these classes:

(a) Where an amendment requested is not 'on' the plan change;

(b) Where an amendment requested subsequent to the lodging of primary submissions is not within the ambit of an amendment requested in a primary submission.

[17] We start by stating our understanding of the law applicable to deciding whether a requested amendment is on the plan change; and whether one is beyond the ambit of a primary submission.

[18] Whether an amendment requested in a submission is 'on' a plan change is determined by deciding whether it reasonably falls within the ambit of the plan change by addressing a change to the pre-existing status quo proposed by the plan change.[17] An indication that a requested amendment is not 'on' a plan change is where the subject matter has not been adequately addressed in the section 32 evaluation. Another consideration is whether there is a real risk that other people would be denied an effective opportunity to respond to additional changes in the plan change process.[18]

[19] Whether a requested amendment goes beyond what is reasonably and fairly raised in submissions on the plan change will usually be a question of degree to be judged by the terms of the plan change and of the content of the submissions.[19] The question should be approached in a realistic workable fashion, rather than from a perspective of legal nicety, and requires that the whole relief package detailed in submissions is considered;[20] and again whether people would be denied opportunity to effectively respond is relevant.[21]

[20] However, amendments to a plan change that would not extend it beyond what is reasonably and fairly to be understood from the content of submissions, nor prejudice anyone who failed to lodge a further submission on the original request may be made; as would amendments required for clarity and refinement of detail, if minor and not prejudicial.[22]

[21] We now address requested amendments that may be beyond the scope of the Council's authority to make, by applying those considerations.

ANZCO Foods and others

[22] The LWRP contains a definition of the term 'Community water supply'; and by Plan Change 4, the Council proposes amending that definition, partly to omit references to group drinking water supply, a term that is being abandoned.

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[16] *Clearwater Resort*, cited above, [69]; *Motor Machinists*, cited above, [77], [82].
[17] *Motor Machinists*, cited above, [80].
[18] *Motor Machinists*, cited above, [81], [82]; *Clearwater Resort*, cited above, [69].
[19] *General Distributors v Waipa District Council* (2008) 15 ELRNZ 59 [58].
[20] *General Distributors*, cited above, [59], [60].
[21] *General Distributors*, cited above, [62].
[22] *Oyster Bay Developments v Marlborough District Council* Env C C081/2009 [22],[23],[46].

[23] ANZCO Foods Ltd and other related companies[23] lodged a submission on Plan Change 4 by which they asked for certain further amendments to the definition.

[24] At the hearing of that submission, counsel for the submitters (Ms A C Dewar) addressed a concern that the submitters' amendment to the definition might elevate some commercial uses of water above others, resulting in equity issues between competing interests. Counsel offered two alternative amendments to alleviate that concern. One would re-frame the definition by describing two elements. The other would involve retaining the definition as it would be amended by the plan change, and adding a new rule defining conditions in which certain taking and using of groundwater associated with certain livestock processing would be classified as a restricted discretionary activity.

[25] Counsel acknowledged that there may be a 'scope issue' with the second alternative, but did not address that question in more detail.

[26] The first element of the first alternative is generally within the ambit of the amendment specifically requested in the submission, and does not give rise to a question of scope.

[27] The second element of the first alternative is not within the ambit of the amendment specifically requested. However, it is reasonably clear from the reasoning set out in the submission that the submitters wanted water taken for livestock processing to be treated as a primary use of water from a community water supply. The second element is a more specific refinement of that general reasoning.

[28] Approaching the question in the realistic workable fashion recommended by the High Court, we consider that a would-be further submitter would have been put on guard about the possibility of the Council amending the definition in the kind of specific way now requested. Therefore we find that the first alternative proposed by the submitters would be within what was reasonably and fairly raised in their submission, and so within the scope of the Council's authority.

[29] The general approach of the second alternative, inserting a new rule for taking and using groundwater for livestock processing in emergency conditions, is entirely different from amending a definition. However meritorious it may be, potential allocation of groundwater in emergency conditions is likely to be controversial. Those who may want to oppose it would be denied opportunity to effectively take part in a decision on a submission that did not foreshadow it. So we find that the second alternative would be outside the scope of the Council's authority in deciding the submissions on Plan Change 4.

Christchurch City Council

[30] The LWRP contains Schedule 17, which lists salmon and inanga spawning sites. Plan Change 4 would insert in the LWRP a definition of the term 'inanga spawning habitat'; and would amend Schedule 17 by adding a list of 71 known inanga spawning sites in certain rivers, streams, creeks and lagoons. The addition of that list is explained in the section 32 Report[24] and in the section 42A Report.[25]

[31] The Christchurch City Council ('City Council' or 'CCC') lodged a submission on Plan Change 4, by which it requested certain amendments. The submission noted that there may be anomalies between its data and data in Schedule 17. However the City Council's submission did not address the proposed definition of 'inanga spawning habitat'; nor did it request any specific alteration to the amendment to

[23] CMP Canterbury Ltd and Five Star Beef Ltd.
[24] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pp 26-37.
[25] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, pp 50-53.

Schedule 17 proposed by the plan change. Under the column heading 'Relief sought', the submission stated:

> If further investigations identify anomalies, amend Schedule 17 to ensure that all significant spawning sites within Christchurch and Banks Peninsula are identified correctly and consistently.

[32] The City Council also lodged a further submission in respect of Plan Change 4. The further submission included an item on a submission point[26] in one of the primary submissions by Fonterra Ltd. That submission point sought amendment to the proposed definition of 'Inanga Spawning Habitat.' The City Council's further submission asked (in respect of definitions and planning maps) for amendments to Plan Change 4:

> Amend to re-define inanga spawning habitat through a broader scientific understanding and field observation, as discussed in the accompanying Council attachment (Attachment 1).

[33] The attachment is a three-page document on Known inanga spawning sites (referring to LWRP Schedule 17); Inanga spawning habitat (referring to LWRP planning maps); and on Potential consequences of proposed changes. The document ended with this statement of decisions requested:

- Amend Schedule 17 to ensure consistency between CCC and ECan observed sites of inanga spawning within the Christchurch City boundaries.
- Amend to re define inanga spawning habitat through a broader scientific understanding and field observation, as discussed in above.

[34] Although the text of the attachment refers in some detail to certain spawning sites or habitat, the further submission did not itself, nor does the attachment, specify, or detail, any requested alteration to the amendment to Schedule 17 proposed by the plan change; nor did it specify any requested alteration to Schedule 17 at all.

[35] The City Council provided statements of evidence that it was to present at our hearing of its submission. They included an evidence statement by Dr B I Margetts, which addressed the accuracy of the known inanga spawning sites in the Christchurch City district proposed to be added to Schedule 17. The witness deposed that the City Council had recently mapped spawning sites within its district, and commented that the CCC and LWRP spawning sites should align.

[36] In her evidence statement, Dr Margetts referred to an Environment Canterbury technical report by Dr M Greer, and noted discrepancies in the location of known inanga eggs. She gave her opinion that the LWRP sites should be updated to be the same as the CCC sites, and identified eight specific corrections to the scheduled list.

[37] In a rebuttal evidence statement, Dr Margetts sought to refute a statement by the submitter Ellesmere Sustainable Agriculture Incorporated ('ESAI'). To that statement, the witness added that she was aware of inanga eggs having been observed in an area of the Heathcote River not included in the CCC spawning site maps. She asked that this site also be added to Schedule 17.

[38] At our hearing of the City Council's submission, its counsel (Mr B K Pizzey) addressed whether there is scope to make the changes to Schedule 17 that were proposed by Dr Margetts in her evidence. He argued that from the statement in the CCC submission of the relief sought (which we quoted above),

[26] Submission point identified as PC LWRP-240.

and the related entry in the summary of decisions requested, readers of them would have seen that the City Council sought to amend the mapping of inanga spawning sites.

[39] Mr Pizzey submitted that details of the changes sought by the City Council were contained in the appendix to its further submission. He acknowledged that a further submission cannot extend the scope of the original submission; and that the original submission had not sought changes to the schedule of known inanga spawning sites.[27] But he argued that the information attached to the further submission, while not a basis for jurisdiction to grant the relief, is part of the context for considering the City Council's original submission; and was further information available to any person who had followed submissions relevant to inanga spawning sites and habitats, enabling them to see precisely the relief that was being sought by the City Council on its original submission.[28]

[40] Counsel submitted that the City Council's original submission provides scope for making the changes sought in Dr Margetts' evidence.[29] He cited several court and tribunal decisions, and concluded that, ultimately, the question is one of procedural fairness: whether there was adequate notice to those who might seek to take an active part in the proceedings that the changes could result from the hearing of submissions.[30]

[41] Mr Pizzey contended that readers of the City Council's submission were on notice that it sought changes to the Schedule 17 list that were within its district. Counsel continued that it was clear that the submitter sought changes of detail to that list; and that any person with an interest in that list had an opportunity to join as a submitter in support or in opposition to Schedule 17 as notified. He argued that a reading of the summary of decisions requested, or of the City Council's submission, put them on notice that the City Council sought changes that could possibly affect their location of interest; and they had opportunity to join as a further submitter on the City Council's submission. Mr Pizzey concluded that there is no unfairness arising from the detail of the changes sought not being in the submission.[31]

[42] At our hearing of those submissions, we asked counsel whether, by the time the further submission was published, it was too late to lodge a submission or further submission. Counsel agreed that it was too late, unless leave was granted.

[43] We have considered the several court and tribunal decisions cited by Mr Pizzey. It is our understanding that the Judgment of Justice Wylie in *General Distributors v Waipa District Council* [32] is the most recent and highest authority directly in point; and that the even more recent Judgment of Justice Kós in *Palmerston North City Council v Motor Machinists* [33] endorses *General Distributors* and applies the same approach to the question of whether a submission is 'on' a plan change. To the extent that earlier decisions of courts or tribunals are inconsistent with *General Distributors*, we understand that the latter prevails and is binding on local authorities.

[44] So we consider Mr Pizzey's submissions by reference to the points made in *General Distributors*: approaching them in a realistic workable fashion, not from legal nicety, and as a question of degree:

1. Do the amendments requested go beyond what is reasonably and fairly raised on the whole relief package in submissions on the plan change? and

[27] Legal Submissions for the Christchurch City Council, 16 March 2016, para 14.
[28] Legal Submissions cited above, para 15.
[29] Legal Submissions cited above, para 19.
[30] Legal Submissions cited above, para 26, citing *Westfield v Hamilton CC* (2004) 10 ELRNZ 254 (HC) at 274.
[31] Legal Submissions cited above, paras 27-29.
[32] (2008) 15 ELRNZ 59 (HC).
[33] [2013] NZHC 1290 (HC).

2. Is there a real risk that other people would be denied an effective opportunity to respond?

[45] The CCC's primary submission raises identifying all significant spawning sites correctly and consistently, if further investigations identify anomalies. The principle of correctly identifying the sites is reasonable and sound. However the contingency of identifying anomalies leaves open a question of fairness, because it depends on investigations and assessments to be made in future.

[46] We are not persuaded by the City Council's submission that there was adequate notice to those who might seek to take an active part in the proceedings that the changes could result from the hearing of submissions.[34] The rules applicable to specific spawning sites and habitats listed in Schedule 17 result in limitations on activities on private land. Those limitations can be controversial, as shown in the submission by ESAI on which Dr Margetts gave rebuttal evidence. The submission does not give detail of requested amendments to the schedule. The specific amendments requested by the City Council at our hearing were not published until well after the time for lodging further submissions in opposition had elapsed. Counsel's implicit suggestion that leave might have been granted for a late submission in opposition does not address the point. Further, we are unaware of any provision for granting leave to extend the specific time limit prescribed by clause 7(1)(c) of Schedule 1 to the RMA.

[47] The primary submission gave, at best, a general indication that the City Council may want to ask for amendments to the identification of spawning sites in the Schedule. Whether it would want to do so was contingent on anomalies being identified by further investigations; and presumably, by subsequent assessments of those anomalies. Even if potential further submitters were put on notice that the City Council sought changes that "could possibly affect their location of interest," as suggested by counsel, that would be too vague to meet the need. People eligible to lodge further submissions were entitled to know, from the primary submission itself, precise details of the amendments to the plan change being requested.

[48] So we find, as a question of degree, that the absence of details of the sites in question in the primary submission realistically left a real risk that would-be further submitters would not be able to lodge further submissions in opposition to any resulting amendments to the list, whether corrections of descriptions of sites or habitats already listed, or even introductions of sites or habitats not identified in the Schedule in the notified plan change. The amendments proposed by Dr Margetts in her evidence, however well-justified scientifically, were not fairly raised on the whole relief package in the primary submission on the plan change.

[49] Therefore we do not accept the City Council's submissions on this point. We find that the Regional Council would not have lawful authority to make the amendments to Plan Change 4 that were not requested in the primary submission but proposed in Dr Margetts' subsequently published evidence. We decline to recommend that the Regional Council make those amendments by decision on the submissions on Plan Change 4.

[50] By its submission, the City Council also made a proposal in respect of Table S5B in Schedule 5 of the LWRP, where it considered that there is a value missing for total ammonia for 90% species protection. It proposed that this value be 1430 μg/L as per the ANZECC guidelines, or that Table 5C is used to calculate value based on pH.

[34] Legal Submissions cited above, para 26, citing *Westfield v Hamilton CC* (2004) 10 ELRNZ 254 (HC) at 274.

[51] As there is no corresponding entry in the 'Relief sought' column of the submission, it is not clear that this was intended to be a formal submission point, rather than a typically helpful suggestion to supply what may be an unintended omission from the Table. However, in case it is a submission point, we should address whether it is 'on' Plan Change 4.

[52] Counsel for the City Council did not address that question in his legal submissions, nor in a subsequent memorandum. Nor did Ms J G Keller, a consultant environmental planner who was called as an expert witness for the City Council.

[53] Plan Change 4 does not address any of the tables in Schedule 5. The only substantive amendment it proposes to that schedule is to amend the narrative text of the schedule by adding a parameter for defining a mixing zone for rivers and artificial watercourses with water flowing at all times.

[54] An amendment supplying a value for total ammonia for 90% species protection is not within the ambit of that proposed amendment; and the inclusion of that value would not have been assessed in the section 32 analysis and evaluation. Probably because the insertion of the proposed value was not entered in the list of relief sought, it was not entered in the summary of decisions requested. Not having been entered there may have diverted a would-be further submitter from becoming aware of it. The effects of the amendments proposed by Dr Margetts have not been adequately addressed in the section 32 evaluation.

[55] So we find that the requested amendment of Table S5B by inserting the proposed value for total ammonia is not 'on' Plan Change 4, and the Council would not have authority to make that amendment by accepting this submission point (if it is one).

Director-General of Conservation

[56] The Director-General of Conservation also lodged a submission on Plan Change 4. By the submission, the Director-General stated submissions and reasons on a number of points, and also detailed decisions sought.

[57] One of the Director-General's submission points related to the proposed addition to Schedule 17 of a list of inanga spawning sites. The Director-General's submission indicated support for that addition; and requested additions to it:

> 2. Add the threatened Canterbury mudfish (*Neochanna burrowsius*) from enclosed schedule 1 table 1 and map to schedule 17 as a threatened species deserving of inclusion on the schedule, and
>
> 3. Add the other two threatened native fish species lowland longjaw galaxias (*Galaxias cobitinis*) and bignosed galaxias (*Galaxias macronasus*) in table 2 and three for schedule into Schedule 17.

[58] Another submission point asked for amendments to the planning maps to show habitats of those fish species.

[59] The Director-General's submission contained Tables 1, 2 and 3 which listed (by catchments, locations, and map references) known locations of Canterbury mudfish, and the two species of galaxias respectively, in Canterbury; and also contained maps showing those locations of those species.

[60] A question arose of whether those requests to introduce protection of those additional species would be within the scope of the Council's authority in deciding submissions on Plan Change 4.[35]

[35] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, para 1.150.

[61] That question was addressed by counsel for the Director-General (Ms S Newell), in legal submissions presented at our hearing of the submission.[36] Counsel referred to two limbs of a test on whether a submission is on a plan change described in *Clearwater Resort v Christchurch City Council.* [37] The first limb is assessing the extent to which the amendments alter the pre-existing status quo, and the second is whether potentially interested parties have opportunity to participate. Counsel submitted that *Palmerston North City Council v Motor Machinists* [38] is of limited utility here, and does not assist when applying the principles of *Clearwater* to the current circumstances, because the plan change in question proposed to rezone specified parcels of land in a defined area.

[62] On the first limb, Ms Newell argued that Plan Change 4 is not restricted to a particular geographical area or confined issue, but is wide-ranging in its subject-matter, proposing amendments on a variety of issues. On the second limb, counsel submitted that the public notice of the plan change made clear that it dealt with a variety of issues and matters.

[63] Unlike *Clearwater*, *Motor Machinists* addressed the RMA as it currently is (having been amended in 2009).[39] It is true that the plan change in *Motor Machinists* proposed to rezone specified parcels of land in a defined area. Even so, the learned Judge analysed the cases, endorsed the bipartite approach in *Clearwater*, and declared the law in general about what is 'on' a plan change.[40] So we are not persuaded by Ms Newell's submissions, and look to the most recent authority, *Motor Machinists*, as the source of the law as it now is on this point.

[64] In his Judgment in *Motor Machinists*, while still examining in general when a submission is 'on' a plan change, Justice Kós identified two 'fundamentals': a comparative evaluation of efficiency, effectiveness and appropriateness of options; and robust, notified and informed public participation in the evaluative and determinative process.[41] On the first, the learned Judge observed that for a submission to be on a plan change, it has to address the proposed plan change itself, the alteration of the status quo brought about by that change.[42] It must reasonably be said to fall within the ambit of the plan change. If it raises matters that should have been addressed in the section 32 evaluation, he considered it would be unlikely to fall within that ambit; and if the management regime for a particular resource is not altered by the plan change, then a new management regime for that resource is unlikely to be 'on' the plan change.[43]

[65] On the second limb, Justice Kós remarked that to override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources; but there would be less risk of offending the second limb if the further change is merely consequential or incidental, and adequately assessed in the existing section 32 analysis.[44]

[66] We apply that general analysis of the law in question. On the first limb, we consider whether the Director-General's request for adding Canterbury mudfish and the two species of galaxias addresses the plan change itself, that is, the alteration of the status quo that would be brought about by Plan Change 4. The section 32 Report[45] contains explicit evaluation of the proposed measures for protection of

[36] Legal Submissions on behalf of the Director-General of Conservation, 29 February 2016.
[37] High Court, Christchurch, AP34/02 William Young J, 14 March 2003.
[38] [2013] NZHC 1290.
[39] See *Motor Machinists*, cited above, [47].
[40] *Motor Machinists*, cited above, Issue 1, [46] to [83].
[41] *Motor Machinists,* cited above, [76] and [77].
[42] *Motor Machinists,* cited above, [80].
[43] *Motor Machinists,* cited above, [81].
[44] *Motor Machinists,* cited above, [82], [83].
[45] Pages 26-37.

inanga spawning. But it does not extend to evaluation of measures for protection of the mudfish and galaxia species the subject of the Director-General's submission.

[67] Further, it is the management regime (or the absence of one) for the protection of inanga spawning sites and habitats that would be altered by Plan Change 4. The management regime (or the absence of one) for the protection of the mudfish and galaxia species would not be altered by the plan change. So in those respects we find that introducing a management regime for protection of those species is unlikely to fall within the ambit of Plan Change 4.

[68] On the second limb, we do not consider that the addition of the mudfish and galaxia species to the list in Schedule 17 would be merely consequential or incidental to the proposed entry in the schedule concerning inanga spawning. The mudfish and galaxia species are of course different from inanga, and their habitats occupy different environments.[46] Measures for their protection are not assessed in the existing section 32 evaluation.

[69] However we acknowledge that the Director-General's request to add these species to the Schedule 17 list was clearly stated in the primary submission, so the statutory opportunity for eligible people to lodge a further submission in opposition would not be denied.

[70] Considering the question overall, we conclude that the requested additions of the mudfish and galaxia species to the Schedule 17 list (and related maps) —however it may be warranted on the merits— would not simply affect the change to the management regime proposed by Plan Change 4 that is the subject of the existing section 32 analysis and evaluation. Those additions would be beyond the ambit of the plan change, and the Regional Council would not be entitled to introduce those amendments to the Plan by decision on the Director-General's submission.

[71] The LWRP contains Table 1a, stating Freshwater Outcomes for Canterbury Rivers, and Table 1b, stating Freshwater Outcomes for Canterbury Lakes. By Plan Change 4, the Council proposes amending those tables by inserting certain footnotes explaining how the tables are to be used.

[72] By the primary submission, the Director-General asked for certain amendments to Tables 1a and 1b. In respect of both, the request is:

> Define in the Land and Water Plan maps which areas of Crown Land riverbed and lake bed are within the natural state waterbody area.

[73] In respect of Table 1b, there was also this request:

> Delete '4' as the TLI indicator for Maori Lakes, Lake Emily and Georgina and replace with '3.5'.

[74] The authors of the section 42A Report raised a question whether those requested amendments are 'on' the plan change. Ms Newell did not address that question in her legal submissions. She relied on the evidence of Mr H R Familton, who is employed in the Department of Conservation as a Resource Management Planner. This witness did not address the question in the body of his evidence statement; nor did he include the amendments requested in the submission in his list of recommended changes to the plan change in Appendix 1 to his evidence. The amendments to Tables 1a and 1b were not addressed by the other witnesses for the Director-General either.

[46] Evidence of Dr N R Dunn,

[75] On the first requested amendment, the submission did not give details of the areas of Crown Land riverbed and lakebed that the submitter considers are within the natural state waterbody area and should be defined in the LWRP maps.

[76] On the first limb, we find that the requested amendment is not within the ambit of the plan change, which would not alter the status quo management regime for areas of Crown land riverbed and lake bed within the natural state waterbody area. Nor was it included in the section 32 evaluation. We also find that a person seeking to understand the intended effect of the amendment, to decide whether or not to lodge a further submission in support or opposition, would be unable to learn from the submission where or what the effect would be, and thereby would be denied an effective opportunity to do so.

[77] We now consider the second of the requested amendments to Table 1b, proposing altering the trophic level index ('TLI') indicator for certain lakes. The relevant entry in the table in the LWRP gives a TLI of 4 to maintain in natural state:

> Maori Lakes and Lakes Emily, Emma and Georgina

[78] Plan Change 4 proposes to amend that entry by omitting the reference to Lake Emma. It does not propose any alteration to the prescribed TLI of 4.

[79] There is no suggestion that the Director-General's proposal to reduce the TLI from 4 to 3.5 is in any way consequential on, or incidental to, the omission of Lake Emma from the lakes to which this entry applies. Rather, the Director-General is taking an opportunity of the process of omitting Lake Emma to propose reducing the TLI for the remaining lakes to 3.5.

[80] We do not imply any criticism of the Director-General for taking that opportunity. Nor do we reject the merits of reducing the TLI as proposed. We have formed no opinion on that. Our only purpose here is to ensure that we do not recommend to the Council a decision on a submission point that would be beyond its legal power to make in that way.

[81] The alteration to the status quo of the relevant management regime is omitting Lake Emma from the group of lakes to which the specified TLI is to apply. Altering the TLI itself would be outside the ambit of the plan change amendment of omitting Lake Emma from this item. Reducing the TLI is not the subject of the section 32 evaluation. It is not reasonably and fairly within the ambit of the plan change. So we conclude that the Director-General's submission point on Table 1b is not 'on' Plan Change 4.

[82] Therefore, we find that the amendments requested by the Director-General to Tables 1a and 1b are not 'on' Plan Change 4, and (whatever their merits) do not provide a sound basis for amendments to the plan change.

Ellesmere Sustainable Agriculture Incorporated

[83] The LWRP contains definitions of the terms 'drainage system' and 'drainage water'.

[84] By Plan Change 4, the Council proposed amendments to those definitions.

[85] By its submission on Plan Change 4, Ellesmere Sustainable Agriculture Incorporated ('ESAI') opposed the proposed amendments to those terms, and requested that the existing wording of them in the LWRP be retained.

[86] However at our hearing of the submission on 4 March 2016, its spokesperson, Mrs C Barnett, proposed re-worded definitions of those terms instead of the requested omission of the proposed amendments to them.[47]

[87] The reworded definitions requested would differ from those proposed by Plan Change 4 in some detailed respects, but they would not introduce any new element of substance.

[88] Without at this stage forming or expressing any opinion on whether they would be more appropriate than the amendments proposed by the plan change, having regard to the terms of the plan change and the whole relief package in the submission, we find that adopting the amendments requested at the hearing would not deny eligible people opportunity to respond, and are within the scope of what was raised in ESAI's submission. We consider those amendments on their merits.

Erralyn Farm

[89] Erralyn Farm Ltd (Erralyn) lodged a submission on Plan Change 4 by which it asked that proposed Policy 4.85A be deleted; that proposed Rules 5.68A, 5.163(9), 5.167(7), and 5.168(5) be deleted; and that the proposed amendments to the definition of 'earthworks' be deleted, so the definition remains in its operative form.

[90] At our hearing of the submission, Erralyn was represented by counsel (Ms G C Hamilton) and by Mr E A Begg, director of Erralyn, which owns a 270-hectare dairy farm on the right bank of the Rakaia River.

[91] In her submissions for Erralyn, Ms Hamilton explained reasons for revised amendments to the plan change which she presented in detail in Annexure A to her submissions. Because those amendments are not identical with the relief originally requested in the submission, we consider whether they are within the scope of the Council's authority to make by decision on the submission.

[92] We have scrutinised each of the revised amendments, and find that each of them is a refinement of a provision that Erralyn originally requested be deleted entirely. They would reduce the amendment from full deletion of the provision to restricting its effect. If adopted, they would involve the Council accepting the submission points in part.

[93] We are satisfied that, on a realistic workable approach, the revised amendments are, as a matter of degree, within the scope of what was reasonably and fairly raised in the whole of Erralyn's submission; and would not be prejudicial to any eligible person having opportunity to participate by further submission. We will consider the revised amendments on their merits.

Fish and Game

[94] Policy 4.31 of the LWRP relates to excluding livestock from water bodies. By Plan Change 4, the Council proposes amendments to that policy, specifically applying it to inanga and salmon spawning habitat, and to freshwater bathing sites. In respect of inanga spawning, the proposed amendments are explained and evaluated in the section 32 Report.[48] The amendment in regard to freshwater bathing sites would refine existing reference to excluding stock from swimming areas.

[95] In describing where the policy of excluding stock would apply, the plan change would delete reference to parts of waterways closely upstream of bathing and spawning areas, and replace it with reference to parts closely adjacent to them. That proposed amendment was a subject of a submission by North

[47] Statement of ESAI, 29 January 2016, paras 3.27, 3.29.
[48] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pp 26-42.

Canterbury Fish and Game and Central South Island Fish and Game ('Fish & Game') which opposed deleting the word 'upstream', and asked that it is retained.

[96] When presenting Fish & Game's submission at the hearing, witnesses for Fish & Game[49] gave evidence that stock disturbance upstream of a salmon spawning site can dislodge sediment and negatively impact spawning. They explained that spring-fed headwater streams, particularly, are less capable of self-cleaning from effects of heavy stock disturbance. So they proposed adding a further class of waterways to which the stock exclusion policy would apply, namely, "upstream of spring-fed salmon spawning sites in Schedule 17 for slope gradients up to 3 degrees."

[97] That amendment would differ from the amendment requested in Fish & Game's primary submission, namely, retaining the word 'upstream.' However the effect would be to confine the application of the policy to upstream areas.

[98] We consider that would be a minor refinement of detail, and we do not understand that it would be prejudicial to potential further submitters. So we find that the further amendment to Policy 4.31 proposed by Fish & Game's witnesses would be within the scope of the Council's authority in deciding the submission, and we will consider it on its merits.

[99] Rule 5.68 of the LWRP is for implementing Policy 4.31. The rule prescribes conditions in which use and disturbance of the bed of a lake or river by stock is a permitted activity. Of them, Condition 3 is:

> 3. The use or disturbance of the bed (including the banks) of a lake or river and any associated discharge to water that is not at a permanent stock crossing point does not result in:
>
> (a) …
>
> (b) …
>
> (c) cattle standing in any lake; and
>
> 4. …

[100] By Plan Change 4, the Council proposes amending Condition 3, so that, instead of item (c) reading "cattle standing in any lake", the condition would read:

> 3. cattle standing in any
>
> (1) lake located outside the Hill and High Country Area; and
>
> (2) lake located within a Lake Zone, as shown on the Planning Maps; and
>
> (3) lake classified as a High Naturalness Waterbody; and

[101] By its submission on the plan change, Fish & Game addressed that proposed amendment in two respects. First, they asked that item (c)(1) is amended to read:

> (1) lake located <u>within</u> the Hill or High Country Area

[49] Joint evidence by Scott Pearson and Angela Christensen.

[102] Secondly, Fish & Game asked that item (c) is amended by inserting, after the words "any lake", the words "or river".

[103] In the evidence given on behalf of Fish & Game at the hearing,[50] the witnesses proposed a somewhat different amendment to Condition 3, so that item (c) as currently in the LWRP would be retained, and a new item (d) would be added, as follows:

> ...
>
> (c) cattle standing in any lake; and
>
> (d) cattle standing in any river outside of the hill and high country, or any spring-fed river in the hill and high country with a slope gradient of up to 3 degrees.

[104] It is not clear to us how the two separate amendments to condition 3 requested by Fish & Game in their submission would stand together. However, that would be resolved by the amendment proposed at the hearing.

[105] Retaining item (c) unchanged as it stands currently in the LWRP would be consistent with their second request in their submission for "cattle standing in any lake or river". A potential further submitter could reasonably be expected to understand that an outcome of that submission might be "cattle standing in any lake".

[106] A potential further submitter could also reasonably be expected to take from the submission that it could result in listing cattle standing in any river. The amendment proposed by the witnesses is within the generality of that, but specifically refined to apply to certain classes of river.

[107] So we consider that the revised amendments proposed by Fish & Game's witnesses at the hearing are within the scope of what was raised in its submission; and as such, within the Council's authority in deciding the submission.

[108] Rule 5.168 of the LWRP classifies as a permitted activity use of land for earthworks within certain distances of beds of lakes or rivers or wetland boundaries in certain prescribed conditions.

[109] By Plan Change 4, the Council proposes various amendments to that rule, relating to discharge of sediment and suspended solids; in relation to inanga spawning habitat during spawning periods; and, from 5 September 2015, within the beds of certain rivers in relation to area and diversity of existing riparian vegetation. Relevantly, the plan change would amend Condition 3:

> 3. The activity does not occur adjacent to a significant spawning reach for salmon or an inanga spawning site ~~area~~ listed in Schedule 17 or in any inanga spawning habitat during the period of 1 January to 1 June inclusive; and

[110] By their submission on the plan change, Fish & Game asked that the condition be amended to:

> Include "upstream" as it relates to significant salmon spawning sites.

[111] The witnesses for Fish & Game recommended that Condition 3 be amended as follows:

[50] Joint evidence by Scott Pearson and Angela Christensen.

> The activity does not occur adjacent to or upstream of a significant salmon spawning reach or adjacent to an inanga spawning site listed in Schedule 17; or in any inanga spawning habitat during the period of 1 January to 1 June inclusive.

[112] However that amendment would not be within the ambit of, or 'on' the plan change, because the change would affect protection of inanga spawning, but would not alter the pre-existing status quo in respect of salmon spawning. The amendment was not addressed in the Section 32 evaluation.

[113] Therefore the Council would not have authority to make the amendment requested, and we decline to recommend it.

Fonterra

[114] Fonterra Limited ('Fonterra') lodged two submissions on Plan Change 4: one in respect of its dairy farming interests,[51] and the other in respect of its interests in processing milk. In this section of this report we refer to the submission in respect of its processing interests.

[115] The submission contains a Table 1 which sets out its specific concerns and relief sought. The table identifies many provisions of the plan change which Fonterra supported, in respect of which it asked that the provisions be retained as notified. In respect of another provision (Rule 5.96), the submission gives precise details of amendments to proposed Condition (f): either to delete that condition, or alternatively to adopt a proposed revision of it. Except as described in the next paragraph, the other requests in the submission are clearly detailed too.

[116] However an item in respect of provisions in the plan change on inanga spawning habitat, after stating its wish that certain parts of proposed Policies 4.86A and 4.86B are retained, continues:

> Fonterra seeks further amendment to the rules to address the concerns set out in its comments.

[117] We infer that the reference in that passage to comments relates to a passage of some 12 sentences, concluding with expressing a preference for "case-by-case examination of whether there is habitat for potential inanga spawning present and case-by-case assessments of practical risk mitigation."

[118] Further, the final item in Table 1 states, in the column headed 'Relief sought':

> Such other further amendments as are:
>
> - Consequential to Fonterra's Table 1 submissions; and/or
> - Required to give effect to the general submissions included in paragraphs 3.4 and 3.5 (the first part of Fonterra's submission)

[119] We quote paragraphs 3.4 and 3.5 in the first part of the submission:

> 3.4 It is emphasised that Table 1 is not intended to limit the scope of Fonterra's submissions on PC4. Fonterra seeks such relief as is necessary to give effect to the on-going implementation of its existing consents and the possible expansion of its sites (the example provided being Studholme) –as is discussed generally in paragraphs 2.1 to 2.12.
>
> 3.5 In particular, this includes clear and workable definitions, objectives, policies and rules that capture and enable all the discharges that arise from a dairy processing site.

[51] That submission was presented by Fonterra and Dairy NZ jointly.

[120] The authors of the section 42A Report questioned whether potential additional relief based on those paragraphs is sufficiently detailed or within scope.[52]

[121] However in the event, Fonterra did not seek amendments to Plan Change 4 other than those detailed in its submission, or in submissions by others on which it had lodged a further submission. Accordingly, the questions raised in the section 42A Report do not need to be considered further.

Forest & Bird

[122] The Royal Forest and Bird Protection Society of NZ Incorporated ('Forest & Bird') lodged a submission on Plan Change 4 by which it requested a number of amendments to the plan change. The submission describes some 35 amendments in sufficient detail that eligible people would be able to gauge the potential effect and decide whether or not to lodge a further submission in opposition. However there are several other requests for amendments of which precise details are not given, and people interested would not be able to ascertain from the submission what outcome Forest & Bird might propose at the hearing of it.

[123] At the hearing of Forest & Bird's submission its counsel (Ms E Toleman) presented legal submissions, and expert evidence by Ms K J McArthur, a consulting freshwater management consultant. By Appendix 1 to her submissions, counsel detailed changes to the plan change that Forest & Bird was asking for. Details of many of those changes had been given in the submission; but some had not. So we asked counsel to explain, in respect of each amendment requested at the hearing, how it is within the scope of amendments requested in primary submissions. Counsel asked for time to do that, and subsequently provided a detailed memorandum dated 21 March 2016 for that purpose.

[124] From that memorandum it is evident that most of the amendments sought by Forest & Bird at the hearing of its submission were raised by, or are within the ambit of, what was reasonably and fairly raised in Forest & Bird's submission. In respect of them, we accept Ms Toleman's submissions and need not address them further here. We will consider them on their merits.

[125] However, it is not evident that others of the amendments now requested by Forest & Bird were raised by, or are within the ambit of, what was reasonably and fairly raised in its submission or any other primary submission. We are obliged to consider those in detail to avoid recommending amendments that the Council does not have authority to make by decision on Forest & Bird's submissions.

Definition of 'inanga spawning habitat'

[126] By Plan Change 4 the Council proposed inserting in the LWRP this definition:

> Inanga spawning habitat means that part of the bed and banks of a lake, river, artificial watercourse, coastal lagoon or wetland that is between mean high water springs and mean low water neaps and is within the area identified as 'Inanga Spawning Habitat' in the Planning Maps.

[127] By its submission, Forest & Bird addressed that definition, and in the column 'Decision sought' asked:

> Retain, and also include definition for Inanga Spawning Sites.

[128] In her memorandum of 21 March 2016, counsel explained that this amendment is simply to clarify what was intended for the inanga provisions by the Council; that it does not represent a change in the intended application of the definition, but would remove a potential ambiguity from the definition. That

[52] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, para 1.152.

explanation refers to Ms Toleman's submissions drawing attention to discrepancies between the planning maps, mean high water springs, and the landward boundary of the coastal marine area ("CMA").

[129] For our present purpose of checking that amendments requested are within the scope of the Council's authority, we are not considering the merits of making the amendments requested. At this stage we assume that they are meritorious, and would provide desirable clarification.

[130] In deciding whether this amendment is fairly and reasonably within the ambit of the submission to retain the definition and add another, we take a realistic, workable approach; consider the terms of the plan change and the relevant content of the submission; and whether there is a real risk that other people would be denied opportunity to effectively respond in the Schedule 1 process.

[131] The relevant terms of the plan change are the proposed definition of the term 'inanga spawning habitat.' The relevant request in the submission asked for the definition to be retained, and that a definition of inanga spawning sites be added. The current request is for omitting part of the definition of inanga spawning habitat that specifies where the defined term is to apply. The phrase to be omitted is qualified by the preceding word "that", which in this context, would have a defining or restrictive effect. Amending the definition by omitting those words would substantially alter an element in that specification.

[132] If the area where the definition would apply is to be altered by the requested amendment, there may be people who would wish to have opportunity to support, or oppose, that alteration. However, because the alteration was not foreshadowed in Forest & Bird's submission (nor any other submission, as far as we know) there is a real risk that any such people who are eligible to do so would be denied opportunity to effectively respond by lodging a further submission under clause 8 of Schedule 1 to the RMA.

[133] From that application of the consideration process recommended by the High Court, we find that the amendment now requested by Forest & Bird to the proposed definition of 'inanga spawning habitat' is not at all within the scope or ambit of what was reasonably and fairly raised in its submission. Therefore we hold that the Council would not have authority to make that amendment by its decision on this submission; and accordingly we do not recommend it.

Definition of 'earthworks'

[134] The LWRP contains a definition of the term 'earthworks', which, as well as general descriptions, also contains a list of classes of activity that are excluded from the application of the definition. By Plan Change 4, the Council proposed amending the first of the classes of activity excluded:

> a. cultivation of the soil ~~for the establishment of crops or pasture~~ on production land established prior to 5 September 2015

[135] By its submission, Forest & Bird requested amendment of item 'a':

> so that effects of cultivation on water quality and biodiversity are addressed. If production land is going to remain in the earthworks definition it will need its own definition.

[136] That requested amendment was accompanied by a statement of reasons suggesting that the exclusion 'a' is too broad and not precise enough, and should not allow wide scale earthworks that may have adverse effects on biodiversity.

[137] At the hearing, Forest & Bird requested that item 'a' is amended in three respects: by not omitting the words "for the establishment of crops and pasture"; by adding after those words "except where the cultivation is in the beds or margins of waterbodies"; and by not adding the proposed words "on production land established prior to 5 September 2015." The outcome of those amendments would result in item 'a' reading:

> a. cultivation of the soil for the establishment of crops or pasture, except where the cultivation is in the beds or margins of waterbodies.

[138] In considering whether those amendments were reasonably and fairly raised in the submission, we note that the relevant terms of the plan change are to confine the application of the definition to production land established prior to 5 September 2016. The relevant request in the submission was to amend it so that effects of cultivation on water quality and biodiversity are addressed. The current request would remove the limit of application of the definition to production land established before the date mentioned; and would add an exception to the exception in respect of cultivation in the beds or margins of waterbodies. It is not evident that those amendments would address the effects of cultivation on water quality and biodiversity. At best it would do so only in respect of cultivation in the beds and margins of watercourses. Even so, taking the realistic and workable approach recommended, as a matter of degree we think that the current amendment is sufficiently close to what was requested in the submission that it would not be prejudicial to potential further submitters. Although marginal, we find that the current amendments are within the ambit of the submission.

Definition of 'vegetation clearance'

[139] The LWRP contains a definition of the term 'vegetation clearance' which, after a general description of activities included, also states (in clauses (a) to (e)) several classes of activity that are excepted. By Plan Change 4, the Council proposed certain amendments to the class of exception described in clause (a), and also proposed adding two other classes of exception, clauses (f) and (g).

[140] By its submission, Forest & Bird asked for amendments to the definition:

> Amend (a): so that effects on biodiversity are addressed.
>
> Delete (b), retain (f) and (g).
>
> Include vegetation alteration and disturbance in this definition.
>
> If production land is going to remain in the vegetation clearance definition it will need its own definition.

[141] The submission did not give precise details of the requested amendment to clause (a); nor of the amendment wanted in respect of 'vegetation alteration and disturbance'; nor of the definition requested of the term 'production land.'

[142] By Ms Toleman's legal submissions presented at our hearing of Forest & Bird's submission, Forest & Bird asked for amendments to the definition as follows:

> **Vegetation clearance** means removal of vegetation by physical, mechanical, chemical or other means but excludes:
>
> **a.** cultivation or harvesting **for the establishment** of crops or pasture, except where the cultivation is in the beds or margins of water bodies ~~on production land established prior to 5 September 2015~~.

b. clearance for the establishment or maintenance of utilities or structures, **except where the clearance is within inanga spawning habitat, or the bed of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia or Waitaki rivers.**

…

f clearance by, or on behalf of, the Canterbury Regional Council for the purpose of maintaining the flood-carrying capacity of a river; or

g exotic vegetation clearance by the Department of Conservation or Land Information New Zealand for the maintenance of public access.

[143] Those requested amendments differ from those requested in the submission in the following respects:

(a) The amendments requested to clause (a) would not evidently address effects on biodiversity; though not asked for in the submission, they would restore the words "for the establishment" proposed to be deleted by the plan change; and although not requested in the submission, they would omit the application of the clause to production land established prior to 5 September 2015 proposed by the plan change.
(b) The amendment now requested to clause (b) would exempt the exception of the application of the definition to certain areas, this not having been requested in the submission.
(c) The amendments requested in the submission for deleting clause (b), for including 'vegetation alteration and disturbance', are not specified. We presume that they are no longer pursued.

[144] In addressing whether the amendments now requested to clause (a) are within the ambit of what was reasonably and fairly raised in the submission, we have considered the submissions of counsel in her memorandum dated 21 March, which for scope for these amendments refers to pages 5 and 6 of the original submission.

[145] The subject matter of the decision sought on page 5 of the submission on amendments to clause (a) was amendments (unspecified) so that effects on biodiversity are addressed. The subject matter of the amendments to clause (a) now requested is retaining the words "for the establishment" proposed by the plan change to be deleted; and omitting the application of the clause to production land established prior to 5 September 2015 proposed by the plan change.

[146] It is not evident that either of those amendments would address effects on biodiversity. In our judgement, taking a realistic, workable approach and as a matter of degree, a would-be further submitter reading the decision sought entry in the submission could not have anticipated that it might result in retaining the words "for the establishment"; nor that it might result in omitting the application of the clause to production land established prior to 5 September 2015 proposed by the plan change.

[147] In addressing the amendments requested to clause (b), we note that the terms of the plan change proposes no amendment to clause (b) at all. In that Forest & Bird, by its submission (on page 5), asked that clause (b) be deleted, the submission did not address a change to the pre-existing status quo proposed by the plan change; and so we find it was not 'on' the plan change.

[148] Counsel for Forest & Bird submitted that the amendment would limit the submission point to only matters at issue in Plan Change 4, and would have more limited effect than the original submission.

[149] In that, at the hearing the submitter asked that this exception be amended to exempt clearance of vegetation within inanga spawning habitat or within the beds of certain rivers, this amendment was not

within what was reasonably and fairly raised by the submission (namely, deleting the clause). We have considered whether it might be treated as acceptance in part by limiting what was raised by the submission, in that the submission asked that the clause be deleted, and the submitter now asks for amendment so that the clause would not apply within that habitat and those riverbeds. However, because the submission request to delete clause (b) was not 'on' the plan change, we consider it is not available to support acceptance in part or by refinement of detail. Would-be further submitters were entitled to ignore the amendment request as invalid by not being 'on' the plan change.

[150] We have also considered whether the amendments to clause (a), or that to clause (b), might be within the Council's authority as necessary consequential alterations, or as minor alterations of information or correcting minor errors, that may be permitted by clauses 10(2)(b)(i) or 16(2) of Schedule 1. In reviewing the current amendments, we find that none of them qualifies in any of those respects.

[151] For those reasons, we find that the amendments to the definition of 'vegetation clearance' requested by Forest & Bird at the hearing of its submission are not within the Council's authority to make by decision on its submission; and so we decline to consider them on their merits.

Policy 4.31

[152] Policy 4.31 of the LWRP is for avoiding damage to, and sedimentation and disturbance of waterbodies, direct discharge of contaminants and degradation of aquatic ecosystems, in three classes of ways described in paragraphs (a) to (c).

[153] Plan Change 4 would amend that policy in three respects. First, it would extend where the policy would apply to include inanga and salmon spawning habitat. Secondly, it would amend paragraph (b) listing where stock are to be excluded from. Reference to swimming sites would refer to freshwater bathing sites listed in Schedule 6. Reference to salmon spawning sites would be extended to include inanga spawning sites, and to qualify both to those listed in Schedule 17. And reference to areas, bed and banks closely upstream of those areas would be amended to refer to those closely adjacent to those areas. Thirdly, the plan change would include a new paragraph (ba) excluding stock from inanga spawning habitat during the period of 1 January to 1 June.

[154] By its submission, Forest & Bird addressed the proposed amendment to paragraph (b) that would delete the reference to areas upstream of the bathing and spawning sites, and asked that it should extend to areas closely adjacent to and upstream of them.

[155] At the hearing, Forest & Bird did not pursue that amendment request. However, it did ask that the amendment extending paragraph (b) of the policy to inanga spawning sites be omitted.

[156] Counsel for Forest & Bird explained that this would be consistent with its submission that it would be more appropriate for the Plan to regulate activities in inanga habitat only, rather than both habitat and sites. Ms Toleman submitted that this represents a subset of the management approach that was supported in the original submission.

[157] We accept that the requested omission from paragraph (b) of the proposed reference to inanga spawning sites would be a necessary alteration consequential on a separate amendment request. If that separate request is accepted, then the current consequential amendment to paragraph (b) would be authorised by clause 10(2)(b)(i) of Schedule 1.

Policy 4.85A

[158] Plan Change 4 proposes inserting in the LWRP a new Policy 4.85A about preserving indigenous biodiversity, habitats of indigenous fauna and flora, and the natural character of braided river systems in certain ways described in paragraphs (a) and (b). That would be followed by an exemption for vegetation clearance for certain classes of purpose.

[159] By its submission, Forest & Bird asked for two substantive amendments to the proposed policy. One sought inserting reference to wetlands and coastal lagoons in paragraph (a). The other was:

> Either entirely remove the exemption at the end of (b), or include the words 'in which case the vegetation clearance will be kept to the minimum necessary'.

[160] In the reasons column of the submission there is a general assertion that the exemption is "too broad"; and that the exemption section "should be deleted, or it should be amended to make clear that these activities need to be managed to make clear that these activities also need to be managed so as to limit their adverse effect on biodiversity."

[161] At the hearing of its submission, Forest & Bird requested amendments to the proposed policy. One amendment would extend paragraph (a) to include wetlands and coastal lagoons. That was requested in the submission, and is plainly within the Council's authority to accept. We will consider that amendment on its merits.

[162] The other amendment to proposed Policy 4.85A requested by Forest & Bird at the hearing would omit from exemption "the operation, maintenance or repair of structures or network utilities". That amendment was not detailed in Forest & Bird's submission. However although we have found no reference anywhere in the submission to structures or network utilities, the requested amendment was foreshadowed by the general passages in the reasons column of the submission that we quoted above.

[163] Therefore, as a matter of degree, we judge that the proposed omission from the exemption of the stated classes of activities in respect of structures and network utilities was sufficiently raised in the submission, and it would not be prejudicial to potential further submitters for the Council to consider that amendment on its merits. Therefore we will do so.

Policies 4.86A and 4.86B

[164] Plan Change 4 proposes inserting in the LWRP new Policies 4.86A and 4.86B. Policy 4.86A is for protecting inanga spawning sites by, as a first priority, avoiding certain classes of activity; and where those activities cannot be avoided, using best practicable options to minimise all impacts. Policy 4.86B relates to protecting inanga spawning habitat by scheduling works to occur outside certain periods.

[165] By its submission on Policy 4.86A, Forest & Bird put forward that saying "first priority" effectively undermines the protection given; and the defined meaning of 'best practicable option' does not provide guidance on all likely disturbance activities that could affect inanga spawning sites. In the column headed 'Decision sought', Forest & Bird asked that the policy is amended to read:

> Inanga spawning sites are protected through avoiding activities within the beds and margins of lakes, rivers, hapua, wetlands, coastal lakes and lagoons that may damage inanga spawning sites.

[166] By its submission on Policy 4.86B, Forest & Bird asked that the phrase "where it is practicable" be deleted.

[167] At our hearing of Forest & Bird's submission, the submitter proposed that Policy 4.86A be combined with proposed Policy 4.86B, and provided a revised policy that would replace both policies, and address issues raised in submissions on them. The combined proposal would incorporate these alterations to the text of the proposed policies:

(a) It would apply to protecting inanga spawning habitat, not inanga spawning sites.
(b) It would omit reference to "a first priority'.
(c) It would omit reference to activities that "damage spawning sites" and replace it with "remove or reduce the suitability for spawning".
(d) It would omit the phrase "where these activities cannot be avoided, the use of best practicable option to minimise all impacts" and replace it with "including but not limited to reduction or removal of the areas of tidal inundation or vegetation suitable for spawning".
(e) It would omit "scheduling works to occur outside the inanga spawning period of 1 March to 1 June inclusive where it is practicable to do so, and by extending this period to 1 January to 1 June inclusive, where the works involve vegetation clearance or earthworks" and replace it with "must be scheduled outside the inanga spawning period of 1 January to 1 June inclusive".
(f) It would add "Some activities will not be appropriate at any time of the year in inanga habitat, given the damage they can cause."

[168] In considering whether those alterations would be within the scope of the Council's authority to make, we reiterate that at this stage we are not considering, on the merits, whether the proposed version of the policies or the requested amended and combined version, would be the most (or more) appropriate to achieve the objectives. At this stage we are considering whether the requested combined version is 'on' Plan Change 4; and if so, whether it goes beyond what is reasonably and fairly raised in submissions on the plan change.

[169] On item (a), Forest & Bird's submission identified that the plan change treats inanga spawning sites and inanga spawning habitat differently. It asks for a definition of 'inanga spawning sites'; and specifically says that it supports the general approach to protect both inanga spawning sites and habitat. It asked for a definition of inanga spawning sites, but did not give details of the definition it requested. But in the submissions presented at the hearing, Forest & Bird indicated preference for "focusing solely on habitat" "rather than having different provisions for sites and habitats"; but "if the Panel is minded to adopt provisions relating to both sites and habitats, Forest & Bird does not object to that, provided appropriate protections are adopted…"[53]

[170] We were not referred to, and are not aware of, any primary submission requesting or reasonably and fairly raising amending the plan change to treat inanga spawning sites and habitat together. However if sites are a subset of habitat, in that all sites are included in habitat, focusing policy on habitat would not be potentially prejudicial, but a refinement of detail for clarity.

[171] Item (b) reflects the specific point in the submission.

[172] Item (c) would be a refinement for clarity.

[173] Item (d) would reflect the explicit submission point questioning using "best practicable option" in Policy 4.86A, and propose a replacement provision.

[53] Submissions of counsel for Forest & Bird, 3 March 2016, paras 56c, 58, 59.

[174] On item (e), the proposed policy would extend the protection period to start from 1 January only for vegetation clearance and earthworks; and Forest & Bird's request at the hearing for the protection period to start on 1 January in respect of all activities is not foreshadowed in its primary submission. Neither in her submissions presented on 3 March 2016, nor in her memorandum of 21 March, did Ms Toleman address the scope for that particular amendment.

[175] The amendment referred to in item (e) would have the effect of potentially extending the opportunity costs of the policy. As the extension was not foreshadowed in the submissions, people who may have wanted to oppose it would be denied opportunity to effectively respond by further submission. So we find that the amendment in item (e) would extend beyond what is reasonably and fairly to be understood from the content of the submissions, and so it would be beyond the Council's authority to make by decision on Forest & Bird's submission.

[176] The addition referred to in Item (f) is uncertain about the activities to which it is to apply. A policy containing it would potentially extend beyond the policies proposed by the plan change, and would be likely to have opportunity costs on people who would otherwise carry on the activities to which it applies. As it was not foreshadowed in the submissions, it would be prejudicial for the Council to make that amendment by decision on the submission.

[177] In summary, having taken the realistic workable approach recommended, as matters of degree we find that the amendments requested in Items (e) and (f) would go beyond what is reasonably and fairly raised in submissions on the plan change. They are not consequential or incidental, but would potentially have opportunity costs on people who would be denied opportunity to effectively respond. We conclude that they are beyond the Council's authority to make by decision on Forest & Bird's submission; and we decline to address them on their merits.

Rule 5.163

[178] The LWRP contains Rule 5.163 which classifies as a permitted activity the introduction or planting of any plant, or removal or disturbance of existing vegetation in on or under the bed of a lake or river in certain stated conditions. Plan Change 4 would introduce several amendments to that rule. They include new provisions to protect the natural character and biodiversity values of the region's braided rivers.[54]

[179] In its submission,[55] Forest & Bird stated that it supported the amendments to this and certain other rules proposed by the plan change and asked that they be retained. Later in the same submission,[56] Forest & Bird asked for certain amendments to Conditions 2, 6, 8 and 9 of Rule 5.163. Later still in the submission,[57] it asked for an amendment to Condition 11. However the submission did not ask for any amendment to Condition 7.

[180] In presenting its submission at our hearing of it, Forest & Bird asked for two amendments to Condition 7 by inserting words shown in bold type underlined and by deleting words shown struck through as follows:

[54] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pg 42.
[55] Forest & Bird submission on Plan Change 4, p 3..
[56] Forest & Bird submission on Plan Change 4, pp 7, 8.
[57] Forest & Bird submission on Plan Change 4, p 11.

7. Vegetation clearance **or disturbance** does not occur in an ~~**inanga or**~~ salmon spawning site listed in Schedule 17, or undertaken in any inanga spawning habitat during the period of 1 January to 1 June inclusive.…

[181] In the memorandum of 21 March 2016, Ms Toleman submitted in respect of disturbance that the amendment sought would achieve a more limited result than the amendment originally sought to the definition of 'vegetation clearance', albeit by amending the rules rather than the definition. Counsel did not address, in that memorandum, the scope for the omission of the reference in Condition 7 to inanga.

[182] We accept that insertion of 'disturbance' in Condition 7 would achieve a more limited result than inserting it in the definition of 'vegetation clearance', and is within what is reasonably and fairly raised in Forest & Bird's submission. We consider that the suggested omission of 'inanga' may be treated as an alteration consequential on and incidental to the proposed addition to the condition of the reference to inanga spawning habitat.

[183] So we find that the amendments to Condition 7 that were not requested in Forest & Bird's primary submission are nevertheless within the scope of that was raised in the submission and may properly be considered on their merits.

Rules 5.167A and 5.169A

[184] The LWRP does not contain a Rule 5.167A; Plan Change 4 does not propose a rule so designated; nor did Forest & Bird's primary submission on the plan change ask for one. Likewise, the LWRP does not contain a Rule 5.169A; Plan Change 4 does not propose a rule so designated; nor did Forest & Bird's primary submission on the plan change ask for one. Even so, at our hearing of its submission, Forest & Bird asked for insertion of a Rule 5.167A, by which use of land for vegetation disturbance in certain places, and associated discharges of sediment in certain circumstances, would be a permitted activity provided a prescribed condition is met; and also for insertion of a Rule 5.169A, by which vegetation disturbance in certain places, and associated discharges of sediment in certain circumstances, would be a restricted discretionary activity; and would prescribe some six criteria on which discretion might be exercised.

[185] The ground of Ms Toleman's submissions that inserting these rules would be within the scope of the Council's authority was that Forest & Bird had sought deletion of exemption (b) of the definition of the term 'vegetation clearance'; and that would have implications for several rules managing earthworks, some of which were not at issue in Plan Change 4.[58] Counsel explained that the reason for new rules is that the existing rules do not already deal with vegetation disturbance; and suggested that the amendments would achieve more limited results, albeit by rules, rather than amending the definitions, and are therefore a subset of the original relief sought.[59] On Rule 5.169A, Ms Toleman contended that the rule is necessary because otherwise there would be no rule governing vegetation disturbance that does not meet the conditions of proposed Rule 5.167A.[60]

[186] We refer to clause 10(2)(b)(i) of Schedule 1 as authorising necessary amendments that are consequential or incidental. In applying that provision in considering whether a particular amendment may qualify as necessary, and consequential or incidental, we understand that we should be guided by the fundamentals of the Schedule 1 process identified by Justice Kós in *Motor Machinists*.[61] In respect of the new rules

[58] Memorandum of Counsel dated 21 March 2016, pg 6.
[59] Memorandum of Counsel dated 21 March 2016, pg 23.
[60] Memorandum of Counsel dated 21 March 2016, pg 28.
[61] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290, [75] – [77].

requested by Forest & Bird at the hearing, the element that is relevant is robust, notified and informed public participation in the determinative process. As the learned Judge said:[62]

> To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.
>
> Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis.

[187] Forest & Bird's primary submission did address the definitions of the terms 'earthworks' and 'vegetation clearance'. In doing so, the text of the submission specified amendments that were asked for, as described earlier in this chapter. The amendments requested do not include inserting new rules governing vegetation disturbance.

[188] Even if Forest & Bird's requested amendments to the definitions in question are made, it does not follow that the rules now requested can be made, however meritorious they may be. The conditions of necessity, and of being consequential, or incidental, involve judgments informed by the public participation fundamental.

[189] People whose interests in carrying on earthworks or vegetation clearance would have found nothing in Forest & Bird's submission that gave notice of proposed new rules governing those classes of activity. They would have had no draft text on which to focus a further submission. The extent to which the rules would be consequential on, or incidental to amendments to the definitions would at best be indirect, and scarcely predictable to lay people. The realistic, workable approach, and the precautionary approach, recommended by the High Court Judges, combine to indicate that inserting the rules requested by Forest & Bird not in its submission, but only at our hearing (when the time for lodging further submissions in opposition was long past) would disregard the element of robust, notified and informed public participation in the Schedule 1 process. So we find that Forest & Bird's requests for inserting its suggested Rules 5.167A and 5.169A are beyond the scope of the Council's authority in deciding the submission; and we decline to consider them on their merits.

Rule 5.167

[190] The LWRP contains Rule 5.167 which classifies the use of certain land in certain conditions for vegetation clearance as a permitted activity. By Plan Change 4, the Council proposed certain amendments to that rule, including the addition of Condition 6.

[191] By its submission, Forest & Bird requested two amendments to Condition 6,[63] and proposed revised wording for it. The submitter also requested two amendments to Condition 2A.[64]

[192] At our hearing of the Forest & Bird submission, counsel proposed amending Condition 4; and amending Condition 6; but made no request for amending Condition 2A. The requested amendment to Condition 6 is substantially similar to what was requested in the primary submission, referring to clearance in the riparian margins of the listed rivers, rather than clearance in the beds of those rivers. We assume that the amendments to Condition 2A in the primary submission have been abandoned. However as Forest & Bird's submission contained no request for inserting a new Condition 4, we are to consider whether

[62] *Motor Machinists*, cited above, [82], [83].
[63] Forest & Bird submission on Plan Change 4, p 8.
[64] Forest & Bird submission on Plan Change 4, p 11f.

the amendments to it requested at the hearing are within the scope of the Council's authority in deciding this submission.

[193] The substantive change to Condition 4 would be omitting the reference to the period of 1 January to 1 June inclusive when the condition is to apply. Counsel's submissions on the scope for that amendment relate more to the merits of the amendment than to whether, according to the applicable case law, the Council would have authority to make it. The effect would be to extend, from five months to 12 months, the period in each year in which clearance of vegetation in inanga spawning habitat is not to be undertaken. Those who may have wanted to oppose that extension would be denied opportunity effectively to do so. We find that this requested amendment would go beyond what is reasonably and fairly raised in the primary submission, and treat it as being out of the scope of the Council's authority.

[194] The only difference between the Condition 6 requested in the primary submission and that now requested is that the latter refers to clearance "in the riparian margins" of the listed rivers, instead of "in the bed" of them. As a question of degree, considering the whole relief package of the primary submission, and avoiding legal nicety, we consider that the difference would not prejudice anyone's response to the submission, and is within what was reasonably and fairly raised in it.

Rule 5.168

[195] The LWRP contains Rule 5.168, which classifies as a permitted activity using certain land for earthworks in stated conditions. By Plan Change 4, the Council proposed certain amendments to that rule.

[196] By its submission, Forest & Bird asked for amendments to proposed Conditions 2 and 5.

[197] At our hearing of the submission, Forest & Bird asked for amendments to Conditions 3 and 5. The requested amendment to Condition 5 would match the amendment requested in the primary submission, so no question of scope arises in that respect. The amendments to Condition 2 requested in the primary submission are not brought forward to the list of amendments presented at the hearing, so we assume that those amendments are no longer requested. The requested amendments to Condition 3 were not requested in Forest & Bird's primary submission, so we need to consider whether they are within the scope of the Council's authority to make by decision on the submission.

[198] The first requested amendment to Condition 3 is to omit the reference to an inanga spawning site. We consider that this amendment may be treated as an alteration consequential on and incidental to the proposed addition to the condition of the reference to inanga spawning habitat.

[199] The second requested amendment to Condition 3 is to omit from the proposed phrase about inanga spawning habitat, the words: "during the period of 1 January to 1 June inclusive." The effect of that would be to extend the effectiveness of the condition so that it is applicable at all times.

[200] Counsel for Forest & Bird contended that this is consistent with what was proposed by the Council for inanga sites, and which was supported in the original submission.[65] However, the amendment to Condition 3 proposed by the Council in Plan Change 4 relates to inanga spawning habitat, and in that respect it specifically proposed the limitation "during the period of 1 January to 1 June inclusive." Forest & Bird's submission did not question that, nor did it contain a request for those words to be omitted.

[201] The effect of omitting those words, as now requested by Forest & Bird, would potentially impose opportunity costs on those who would otherwise carry out earthworks. Any eligible person who may

[65] Memorandum of Counsel dated 21 March 2016, pg 26.

have wanted to oppose that extension would be denied opportunity effectively to do so. We find that this requested amendment would go beyond what is reasonably and fairly raised in the primary submission, and treat it as being out of the scope of the Council's authority.

Rule 5.169

[202] The LWRP contains Rule 5.169, which manages vegetation clearance and earthworks in defined areas by classifying them in certain conditions as restricted discretionary activities, and specifies criteria for exercise of the discretion. By Plan Change 4, the Council proposes certain amendments to the rule, mainly to extend its application to include associated discharge of sediment or sediment laden water which may enter surface water. There are also minor amendments to two of the criteria.

[203] By its submission on Rule 5.169, Forest & Bird requested a new rule classifying as non-complying activities vegetation clearance and earthworks in certain rivers and their margins.

[204] In her submission at our hearing of the submission, counsel made a submission that vegetation clearance and earthworks in the margin of alpine rivers should be non-complying, rather than restricted discretionary, to send "an appropriate signal that adverse effects on braided rivers and their values should be avoided."[66]

[205] Counsel presented an Appendix 1 to her submissions which detailed the changes Forest & Bird were seeking. Appendix 1 does not contain any indication of a change requested to Rule 5.169. Counsel's memorandum dated 23 March 2016 acknowledged that the Appendix did not set out a change sought to Rule 5.169, but observed that in the original submission and in her submissions Forest & Bird sought that those activities should be non-complying.

[206] While it is not entirely clear, we infer that the absence of an item in Forest & Bird's Appendix 1 was an unintended omission; and that although not giving draft text of the requested rule, it did not abandon the request.

[207] On that assumption, we find that there is scope for inserting a rule (or amendment to Rule 5.169) that does not extend substantially further than what was requested in Forest & Bird's primary submission.

Fulton Hogan

[208] By Plan Change 4, the Council proposed inserting in the LWRP a new Policy 4.85A on preserving indigenous biodiversity, habitats of indigenous fauna and flora, and the natural character of braided river systems; and also proposed certain amendments to Rule 5.163 which applies to vegetation in lakes and rivers.

[209] By its submission on the plan change, Fulton Hogan requested a certain amendment to proposed Policy 4.85A; and also several detailed amendments to Rule 5.163.

[210] The amendment to proposed Policy 4.85A requested in the submission was to insert in clause (b) the word 'indigenous'. At our hearing of the submission, evidence was given on behalf of the submitter by a consultant planner, Mr T A D Ensor. In that evidence, the witness referred to relevant content of the section 42A Report, and suggested a different amendment to clause (b) that would omit the words "for

[66] Submissions of counsel presented 3 March 2016, pg 35.

the purpose of pest management" and replace them with "of a species listed in the Biosecurity NZ Register of Unwanted Organisms or the Canterbury Pest Management Strategy."[67]

[211] In his evidence, Mr Ensor also recommended a further amendment to Rule 5.163. By its submission, Fulton Hogan had asked that Condition 9 of that rule be amended by inserting the word "indigenous" to modify the vegetation to which the condition would apply.

[212] In his evidence, Mr Ensor suggested inserting the word "indigenous", and adding "or exotic vegetation clearance greater than 500m^2." [68]

[213] We have considered the terms of the plan change and the whole relief package detailed in Fulton Hogan's submission. We find that the amendments suggested in Mr Ensor's evidence are refinements of detail of amendments requested in Fulton Hogan's submission. We consider that they would not be prejudicial to anyone eligible to respond by further submission. As matters of degree, we judge that they would not go beyond what was reasonably and fairly raised in Fulton Hogan's submission. We will consider them on their merits.

Hurunui Water Project

[214] By its submission on Plan Change 4, Hurunui Water Project also requested amendments to proposed Policy 4.85A. The first was in clause (a) which would commence "Preventing encroachment of activities…" The submitter asked that those words are replaced by "Managing the effects of activities encroaching…"

[215] The second amendment is in the last phrase of the policy. It seeks to insert in the list of exempt activities "structures associated with community irrigation/hydro schemes."

[216] At our hearing of the Hurunui Water Project's submission, evidence was given on its behalf by a consultant planner, Mr C A Hansen. In addition to supporting the first amendment mentioned (to clause (a)), the witness also suggested different amendments to the exemption clause, by inserting "including rehabilitation and off-set planting that may be part of a new activity"; by inserting "existing or new" before the word "structures"; and by replacing the words "network utilities" with "infrastructure".

[217] We need to consider whether the amendments to the exemption clause would be within the scope of the Council's authority to make by decision on the submission.

[218] We have considered the terms of the plan change and the whole relief package detailed in the submission. We find that the suggested insertion of the words "existing or new" and replacement of "infrastructure" for "network utilities" would be refinements of detail, not making substantial changes. Taking a realistic, workable approach, we find that they would not be prejudicial, and as matters of degree fall within what would reasonably have been understandable from the content of the submission.

[219] However, we do not consider the extension of the exemption to include rehabilitation and off-set planting that may be part of a new activity would be similarly acceptable. We understand that Hurunui Water Project would regard it as helpful for implementing its proposed works. But we find nothing in its submission that would give a potential further submitter any idea that the Council would be asked to extend the exemption clause in that way. We consider that this suggested amendment would go beyond

[67] Evidence-in-chief of Timothy Alistair Deans Ensor, 28/01/2016, para 28.
[68] Evidence-in-chief of Timothy Alistair Deans Ensor, 28/01/2016, para 32.

what might reasonably and fairly be understood as raised by the submission. We conclude that this amendment is beyond the scope of the Council's authority, and we do not consider it further.

Oil companies

[220] The LWRP contains Rule 5.187, which prescribes conditions in which the discharge of contaminants from a contaminated site onto or into land where the contaminants may enter water is classified a permitted activity.

[221] By Plan Change 4, the Council proposes several particular amendments to Rule 5.187 to clarify that the rule applies to 'passive' discharges from contaminated land onto or into land; to clarify that Condition 2 is met if both Schedule 8 groundwater quality limits and Schedule 5 surface water quality limits are met; to ensure that only discharges having acceptable levels of effect are permitted; and to ensure consistency of language of the rule with that of the definition of 'contaminated land.'

[222] By their submission, Z Energy, Mobil Oil and BP Oil ('the Oil Companies') requested further amendments to the text of the rule as proposed to be amended. Precise details of the further amendments requested were given in the submission. In particular, they would alter Condition 2 by qualifying reference to Schedule 8 limits to where there is a community groundwater protection zone; and by including reference for other groundwater to the New Zealand Drinking-water Standards.

[223] In presenting the submission at our hearing, the Oil Companies proposed, in addition to the amendments requested in the primary submission, an amendment to Schedule 8, which stipulates the groundwater limits referred to in Condition 2 of Rule 5.187. For contaminants other than those specifically listed, the limit for 'any sample' is specified as "<50% MAV", being the maximum acceptable value listed in the Drinking-water Standards. The Oil Companies asked that the limit quoted be amended so that it would read "50% MAV for 'sensitive' aquifers or MAV for 'non-sensitive' aquifers."

[224] The grounds for proposing that amendment to Schedule 8 were provided in expert evidence, but at this point we do not consider them. Rather, we have to consider first whether making that amendment is within the scope of the Council's authority in deciding a submission in which it was not raised. That question was addressed in submissions by counsel for the Oil Companies (Mr J G A Winchester and Ms A O J Sinclair).

[225] Counsel submitted that the Oil Companies' submission clearly indicated that it sought amendments to recognise the difference between passive discharges to sensitive and non-sensitive aquifers, and that the issues and concerns were clearly identified in the submission, consistent with the Environment Court's rationale in *Oyster Bay v Marlborough District Council*.[69] They contended that the amendment to Schedule 8 is both reasonable and foreseeable in light of the Oil Companies' wider submission on Rule 5.187; and that adopting a realistic and workable approach, no party could reasonably be said to be prejudiced by the specific relief now sought, as the submission clearly put the issue "in play". Counsel urged that the requested amendment to Schedule 8 is simply another way of achieving the same overall outcome identified in the submission.

[226] We address counsels' reference to the submission having clearly indicated that it sought amendments to recognise the difference between passive discharges to sensitive and non-sensitive aquifers. The Oil Companies' submission on Plan Change 4 mentions their previous submission on the LWRP having referred to distinction between a sensitive groundwater protection area and non-sensitive uses; and also refers to the intention of the hearing panel who decided the LWRP submission being to distinguish

[69] *Oyster Bay Developments v Marlborough District Council* Env C Christchurch C081/09.

between sensitive and non-sensitive land uses. We consider that those passages are not significant for the present purpose, as they refer to a submission on the LWRP, in the past. An eligible person considering whether to lodge a further submission on Plan Change 4 may have overlooked as irrelevant, references to what was past.

[227] The Oil Companies' submission on Plan Change 4 also contains this passage about sensitive and non-sensitive uses:

> …overall, the provision is too conservative for the management of passive discharges from contaminated land arising from legacy discharges and does not reflect the important distinction between sensitive and non-sensitive uses.[70]

[228] Although that passage indicates that the submitters consider that the amendments proposed to Rule 5.187 do not reflect the distinction referred to, it does not indicate that the submitters are asking for any amendment in that respect. We consider that this passage is not part of the "whole relief package detailed in the submission" of the kind referred to in *Shaw v Selwyn District Council*.[71] Adopting the approach of Justice Wylie in *General Distributors*,[72] it did not signal to the public that the limits in Schedule 8 might be altered in the way now suggested. Schedule 8 was not mentioned in the submission. So we are not persuaded by counsels' contention that the amendments now requested to Schedule 8 were foreseeable in light of the Oil Companies' submission on Rule 5.187.

[229] Keeping in mind that the plan change does not propose any amendment to Schedule 8, and taking a realistic, workable approach, we find that the amendments now suggested to Schedule 8 would deny eligible people opportunity to respond by further submission in opposition, and go beyond what is reasonably and fairly raised in the submission. Therefore however appropriate they may be, we should not recommend that the Council make those amendments by its decision on the Oil Companies' submission.

Poultry Industry and Egg Producers

[230] The LWRP contains a definition of the term "Animal effluent'. Plan Change 4 proposes amending that definition in two respects. A substantial amendment would create an exception, declaring that the term does not include incidental animal effluent present in livestock-processing waste streams. The other amendment is a clarification, and is not relevant for this purpose.

[231] By submission on Plan Change 4, Poultry Industry Association and Egg Producers Federation ('PIA & EPF') requested amendments to allow for discharge of poultry wash-down water to be a permitted activity. The submission asked "That the definition of 'Animal effluent' is reworded to exclude poultry washdown water from Section 2.9;" and detailed the amendment requested by proposing insertion in the second (exception) sentence of the definition the words "Poultry washdown water and". The submission also requested "Such other alternative relief to satisfy the concerns of the submitters."

[232] By a further submission, PIA & EPF stated their opposition to submissions asking that the definition of animal effluent be retained.

[233] At our hearing on 16 March 2016 of the PIA & EPF submission, evidence was given in support of it by Ms E-J Hayward. This witness gave her opinion that the comparative volumes of wash-down water generated by poultry farms and by dairy farms would best be addressed within the rules, but as only the

[70] Oil Companies' submission on Plan Change 4, pg 24.
[71] [2001] 2 NZLR 277 at [44].
[72] *General Distributors v Waipa District Council* (2008) 15 ELRNZ 59 at [62].

definition is proposed to be amended by Plan Change 4, a pragmatic approach would be to exclude poultry wash-down water of a very low volume as produced by poultry farms. In her evidence, Ms Hayward proposed an altered amendment to the definition, by inserting in the second (exception) sentence the words "Washwater with volume less than 500 m^3 within any 12 month period per farm and."

[234] We enquired how, in the context of Rule 5.6 of the LWRP, the requested amendment would achieve the intended effect of permitted status. We gave the submitters leave to consider that question and respond in writing.

[235] By a written statement of supplementary evidence dated 17 March Ms Hayward, having given further consideration to achieving the outcome sought by the submitters, recommended what she called a consequential amendment to Rule 5.35 which she considered would overcome the application of Rule 5.6 and, in addition to amending the definition of animal effluent, would achieve the intended permitted status for poultry wash-down water. The witness gave her opinion that those amendments would be in accordance with, and within the scope of, the alternative relief sought by the original submission.

[236] We now consider whether the revised amendments proposed by Ms Hayward are 'on' Plan Change 4.

[237] The relevant change to the status quo is the proposed second (exception) sentence in the definition of 'Animal effluent', declaring that the term does not include animal effluent present in livestock processing streams. Ms Hayward acknowledged that the suggested alteration of that amendment (to add an exception of poultry wash-water of less than 500 cubic metres per farm per year) would not alone achieve the submitters' purpose. It is the proposed amendment to Rule 5.35 that would, in combination with the altered amendment to the definition, achieve that purpose. So we consider whether the amendment to Rule 5.35 reasonably falls within the ambit of the plan change.

[238] Addressing the indicators recommended in case law, we start with the relevant passage in the section 32 Report,[73] and find that classifying discharge of poultry wash-water of less than 500 cubic metres per farm per year as a permitted activity is not addressed in that evaluation. Next we consider whether there is a real risk that other people would be denied an effective opportunity to respond to the requested amendment to Rule 5.35. The PIA & EPF primary submission does contain an indication that the submitters want discharge of poultry wash-down water to be a permitted activity. That may well have warned an alert would-be further submitter, until more careful study of the submission revealed that only an amendment to the definition was requested. The submission did not request amending any rule to classify such discharge as a permitted activity; and the "alternative relief" request is so general that it would not trigger a further submission in opposition to an amendment to an unspecified rule for permitted activity. A would-be further submitter would reasonably suppose that PIA & EPF were content with the effect of the existing rules in that regard.

[239] We also consider Ms Hayward's passing point that the proposed amendment to Rule 5.35 would be consequential (presumably on the amendment to the definition). We understand that this is how PIA & EPF and their advisers see it. However that is not how people eligible to lodge further submissions in opposition to amending Rule 5.35 would necessarily understand it. Again, they would have been entitled to suppose that what the submitters really wanted was amendment of the definition; and that the submitters were content with the application of existing rules in that regard.

[73] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pp 4, 8-10.

[240] To conclude, after reviewing the whole relief passage detailed in the PIA & EPF primary submission we find that the proposed amendment to Rule 5.35 has not been addressed (directly or more generally) in the section 32 evaluation; that there is a real risk of eligible further submitters not having opportunity to take part in the process; and that the proposed amendment to that rule does not reasonably fall within the ambit of, and is not 'on' the plan change. So we consider that the Council could not lawfully make that amendment by decision on this submission, and decline to recommend it.

[241] By comparison, the revised amendment to the definition, in that it further refines what was explicitly requested in the primary submission, is on the plan change, and within what was reasonably and fairly raised by the submission. It is not prejudicial to potential further submitters; and we will consider it on its merits.

Working Waters Trust

[242] By its submission on Plan Change 4, the Working Waters Trust proposed adding "another schedule containing a list of Canterbury mudfish sites, with habitat protection policies and regulations, particularly preventing the destruction of any ephemeral habitat when dry." However the submission did not give precise details of the Canterbury mudfish sites it wanted listed; nor did it detail the policies and regulations that it wanted.

[243] At our hearing of the submission, this submitter was represented by Miss S Allen, who specifically requested addition of a new schedule to Schedule 16 for identified Canterbury mudfish sites; and also requested the addition of planning maps with modelled Canterbury mudfish habitat. Miss Allen also proposed policies and rule for identified Canterbury mudfish sites that would be similar to inanga spawning sites regarding earthworks, vegetation clearance, fine sediment removal, water abstraction, and disturbance of bed by stock. Miss Allen remarked that the rules should apply year-round.

[244] Earlier in this chapter we addressed a submission by the Director-General of Conservation containing a similar request for inserting provisions for protection of Canterbury mudfish. We gave reasons for our conclusion that the Director-General's request in that respect was not 'on' Plan Change 4. For substantially the same reasons, we consider that the Working Waters Trust request in that respect is not 'on' the plan change either. For that reason, we should not make any recommendation to the Council for accepting the Working Waters Trust's requested provisions for that purpose. Plan Change 4 does not provide a suitable opportunity for doing so.

Chapter Three
Inanga spawning habitat and spawning sites

Introduction

[245] By Plan Change 4 the Council proposed an integrated set of new and amended provisions to address a significant lack of protection for both inanga spawning sites and areas with potential to provide 'inanga spawning habitat'. There were a number of submissions seeking either a reduction or increase in the restrictions placed on activities affecting these sites and areas. Other submissions identified a lack of clarity in the provisions in the way they treat inanga spawning habitat and known inanga spawning sites.

[246] Inanga are found in almost all freshwaters along the 600 kilometres of Canterbury coast that are accessible to juveniles migrating from the sea to coastal rivers, lowland streams, lakes, lagoons, wetlands, swamps and estuaries. Adult inanga spawn in tidally influenced, but low salinity, waterways on the tip of the saltwater wedge in exceptionally high (spring) tides, in the period between January and June. The tip of the saltwater wedge in steeper streams may be as little as a few metres from the open ocean, whereas on flatter streams it can extend upstream by up to 2 kilometres.[74]

[247] The life cycle and habitat preferences of inanga are adversely affected by multiple pressures involving the destruction and restriction of spawning habitats, such that the species is now classified as 'declining.'[75]

[248] The inanga fishery has for generations been an important seasonal mahinga kai resource for Ngāi Tahu whanau and hapū. Inanga is also the best known recreational and commercially valuable of the New Zealand whitebait species. Fishing for whitebait provides not only a traditional source of food and treasured pastime, it is also a commercial fishery.

[249] While the active harvesting of inanga may compound the effects of other pressures on the inanga fishery, "overall, the biggest threat to inanga is considered to be the destruction and restriction of their spawning habitat."[76]

The Council's planning duties for inanga spawning habitat and spawning sites

[250] To explain our approach to evaluating the issues raised by the submission points about inanga spawning habitat and inanga spawning sites, we note the duties specifically applying to the Council's planning functions in that respect.

[251] The RMA stipulates that those having functions and powers under that Act are to recognise and provide for certain matters of national importance, including preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins; protection of areas of significant habitats of indigenous fauna; and the relationship of Maori and their culture and traditions with their taonga.[77]

[252] The New Zealand Coastal Policy Statement ('NZCPS') is relevant, and provides policy direction relating to coastal processes and habitat where potential inanga spawning might occur. It promotes the adoption

[74] Section 42A Reply Report to Plan Change 4, para 5.13.
[75] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pg 49, *Goodman et al* 2014.
[76] Section 32 Evaluation Report for Plan Change 4 (Omnibus), Appendix B, Technical Report R15/100, pg 1.
[77] RMA, s6(a), 6(c) and 6(e), (f) and (g).

of a precautionary approach where information is incomplete, and avoidance of significant adverse effects on indigenous biological diversity.[78]

[253] The National Policy Statement for Fresh Water Management 2014 ('NPSFM'), in Objectives A1 and B1, seeks to safeguard the life-supporting capacity, ecosystem processes and indigenous species by sustainably managing the use and development of land, and the taking, using, damming, or diverting of fresh water.

[254] The Vision and Principles of the CWMS, to which the Council is to have particular regard in considering any regional plan,[79] include Primary Principle 2 and the regional approach, and the Supporting Principle 5 on indigenous biodiversity which we quote here:

> Supporting Principle 5: Indigenous flora and fauna and their habitats in rivers, streams, lakes, groundwater and wetlands are protected and valued

[255] The Canterbury Regional Policy Statement 2013 ('CRPS') contains objectives[80] and policies for giving effect to general directions in the RMA and the NPSFM 2011. The CRPS recognises that the ongoing habitat loss and modification as a result of land use and development remains a principal threat to ecosystems and indigenous biodiversity in lowland coastal areas of Canterbury.[81]

[256] Policy 7.3.3 of the CRPS requires that areas of significant indigenous vegetation and significant habitats, sites of significant cultural value, wetlands, lakes and lagoons/hāpua are identified and protected. This policy also seeks to promote, and where appropriate requires the protection of, Ngāi Tahu values.

[257] Policy 8.3.3 relates to management of activities in the coastal environment, and seeks to allow for a range of activities, or where this is not practicable, remedying or mitigating adverse effects of activities within the coastal environment, including effects on indigenous species, areas of significant indigenous vegetation and significant habitats of indigenous flora.

[258] Policy 9.3.5 relates to wetland maintenance and protection and seeks to ensure that natural, physical, cultural, amenity, recreational and historic values of Canterbury's ecologically significant wetlands are protected.

[259] Policy 10.3.2 specifically seeks to maintain and/or enhance margins and riparian zones that provide spawning or other significant habitats for at risk or threatened species such as inanga.

[260] Policy 10.3.4 aims to manage the use and removal of vegetation and bed material in river beds and their margins, provided its management does not adversely affect the in-stream and other values of the beds including habitat and associated systems.

[261] The LWRP primarily responds to the direction of the superior instruments and associated planning documents through Objective 3.8, which states:

> "The quality and quantity of water in fresh water bodies and their catchments is managed to safeguard the life-supporting capacity of ecosystems and ecosystem processes, including ensuring sufficient flow

[78] NZCPS 2010, Policies 1, 2, 3, 11(a) and (b), 21 and 23.
[79] Environment Canterbury (Transitional Governance Arrangements Act) 2016, s 24.
[80] CRPS 2013, Objectives 7.2.1, 7.2.2, 7.2.3, and 7.2.4.
[81] CRPS 2013, pg 105, Issue 9.1.1.

and quality of water to support the habitat and feeding, breeding, migratory and other behavioural requirements of indigenous species, nesting birds and where appropriate, trout and salmon".

[262] There are nine iwi resource management plans[82] relevant to the Canterbury coastal region recognised by the Iwi Authority.[83] Key objectives of the iwi plans include increased protection, maintenance and restoration of critical mahinga kai habitat and resource values of lakes, rivers, streams, wetlands, estuaries and riparian margins. The section 32 Evaluation Report for Plan Change 4 identifies relevant provisions for consideration in the plan change. [84]

[263] As a basis for our consideration of the submission points affecting the proposed inanga spawning habitat and inanga spawning site provisions of Plan Change 4, we analyse and collate the relevant directions of the superior instruments, and the objectives and policies of the LWRP with which the decisions on those points would need to be consistent. We also take into account and are informed by the respective iwi resource management plans relevant to the Canterbury region.

[264] Starting with the general, at all levels the Council is directed to the maintenance and enhancement of ecosystems and for maintaining indigenous biodiversity.[85]

[265] As set out above, the CRPS contains objectives and policies for identifying, maintaining and protecting inanga spawning habitat and inanga spawning sites.[86]

[266] We assume that the provisions identified in the preceding two paragraphs all are intended to be consistent with each other, and we identify passages from which we can understand how they are to be read and apply together.

[267] The CRPS Policy 7.3.3 contains a clause that states while Chapter 7 'deals specifically with fresh water environments, this should not be interpreted as restricting the application of Policy 7.3.3 to aquatic systems'. The principal reasons and explanation of the Policy continues 'the land surrounding and linking freshwater bodies also contribute to their values'. Policy 7.3.3 focuses on both the use of provisions in regional and district plans to identify and protect existing sites and areas with significant values in accordance with Part 2 of the RMA, and "on the ground" programmes, to restore or enhance sites or areas.

[268] Consequently, we find that the intent of the applicable instruments (the CWMS, the CRPS and the LWRP) is that maintaining, enhancing and protecting 'inanga spawning habitat' is a strong directive. That identification of inanga spawning habitat is fundamental to giving effect to the intent of this direction.

[82] Te Whakatau Kaupapa (1990); Te Runanga o NgāiTahu Freshwater Policy; Mahaanui Iwi Management Plan (2013); Iwi Management Plan of Kati Huirapa (1992); Te Taumutu Runanga Natural Resource Management Plan (2002); KaiTahu ki Otago –Natural Resource Management Plan (2005); Te Waihora Joint Management Plan –Mahere Tukutai o Te Waihora (2005); Te Runanga o NgāiTahu HSNO Statement (2008); and Te Poha o Tohu Raumati (2007).

[83] Te Runanga o NgāiTahu.

[84] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pp 28-29.

[85] RMA, s 30(1)(c) and (ga).

The Plan Change 4 Amendments

[269] Plan Change 4 would introduce a new definition for inanga spawning habitat that would apply in accord with proposed amendments or additions to policies and rules of the LWRP to provide protection to Schedule 17 inanga spawning sites and inanga spawning habitat areas.

[270] The section 32 Report identified three reasonably practicable options to protect potential inanga spawning sites:

Option (1) showed it would only protect four discrete sites in the Canterbury Region and would not give effect to the broader requirements in the superior documents to protect ecosystems.

Option (2) would include a definition of 'inanga spawning habitat'; amended policies and rules; planning maps identifying potential inanga spawning habitat; an update of Schedule 17 to protect 75 known inanga spawning sites[87] and modelled mapping of potential inanga spawning habitat.[88] The development and efficacy of this model is described in the section 32 Report.[89]

Option (3) would insert an additional 71 sites to the current list of known inanga spawning sites in Schedule 17 of the LWRP.

The section 32 Report records that tangata whenua were concerned that Option (3) would not provide sufficient protection as it was limited to only those particular sites listed in Schedule 17 and not to sites that either had not been identified or those sites that had potential for inanga spawning.[90]

[271] By proposing Plan Change 4 the Council considered that Option 2 would be the most appropriate option to achieve the LWRP Objectives-.

The relevant standing provisions of the LWRP that are not affected by Plan Change 4 conform with the intent of the superior instruments we have identified.[91] Relevantly, Plan Change 4 would:

- insert a new definition of Inanga Spawning Habitat;
- amend Policy 4.31 to include protection of inanga spawning habitat, and stock exclusion requirements;
- insert two new policies (4.86A and 4.86B) to provide different levels of protection respectively to Schedule 17 inanga spawning sites and inanga spawning habitat;
- amend particular conditions of permitted activity Rules 5.136 - 5.141, and permitted activity Rules 5.148, 5.151 and 5.152 to prohibit activities from being undertaken in any spawning habitat during the spawning period of 1 March to 1 June inclusive; and
- amend conditions of prohibited activity Rule 5.71, and permitted activity Rules 5.163, 5.167 and Rule 5.168, to extend the protection period in any inanga spawning habitat to between 1 January and 1 June inclusive where activities involve vegetation clearance or earthworks, so as to allow sufficient time for the regeneration of habitat.

[87] Four existing Schedule 17 sites and 71 inanga spawning sites to be added.
[88] Developed by use of a GIS model that predicts areas within which inanga spawning is likely to occur based on saltwater intrusion.
[89] Appendix B, *Predicting inanga/whitebait spawning habitat in Canterbury*, Report R15/100, Greer, Gray, Duff & Sykes, August 2015.
[90] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pg 32.
[91] LWRP, Objectives 3.19, 3.20, 3.21; and Policies 4.86, 4.89. 4.91 and 4.95(b).

[272] The submission points affecting the definition of 'inanga spawning habitat' are addressed in paragraphs A.1 to A.18 of the section 42A Report, and the report authors recommend that the proposed text of the definition by is amended by inserting the words "…permanently or intermittently flowing river or..." [92]

[273] In our questions[93] to the section 42A reporters, we noted that the Section 32 technical report recommended that ephemeral rivers should not be subject to the same rules as permanent and intermittent[94], and we inquired whether an ephemeral river is also an intermittent river. Dr Michael Greer, an ecologist with CRC, responded in writing that in the context of inanga spawning "intermittent" means that the river has base flow at times and only dries in a seasonal and predictable pattern. He continued that ephemeral streams are dry for most of the time, have no base flow and only flow after rain events.

[274] We consider the amendment recommended by the section 42A Report would assist in clarifying that ephemeral streams do not provide recognised inanga spawning habitat. The section 42A Reply Report also recommended a minor grammatical correction to the definition of Inanga Spawning Habitat'. We are satisfied with, and adopt as our own, the section 42A Report and reply recommendations and reasons in relation to those submissions on the definition of Inanga Spawning Habitat'.

[275] The section 42A Report recommended a new definition of "inanga spawning site" in response to the Trustpower[95] and Forest & Bird[96] submissions, to aid clarity in the way policies and rules would provide a greater level of protection to inanga spawning sites relative to inanga spawning habitat. We do not adopt those recommendations because, as we discuss shortly, we recommend the omission of any provisions relating to inanga spawning sites.

[276] The primary submission of Transpower[97] opposed the proposed plan change amendments to the 'Structures' Rules 5.135 and 5.139. In the decision sought column, the submitter requested that Rule 5.139(4) be amended so that an activity that is permitted to occur through Rule 5.135[98] throughout the year is not then constrained from undertaking necessary maintenance during the inanga spawning season under condition (4) of Rule 5.139. The submission points on Rule 5.139(4) are addressed in paragraphs A.73 of the section 42A Report; we adopt the recommendation and reasons as our own, and recommend that the proposed text of condition (4) of Rule 5.139 -would read (see Appendix B to this report for a precise attribution of the amendments):

> Except for bridges, culverts, pipes, ducts, cables and wires and their support structures the maintenance
> …

[277] The section 42A Report recommended a minor amendment to Schedule 17 on the submission point of Waitaki Irrigators Collective[99] that would omit from Schedule 17 an inanga spawning site listed as "Waitaki River, 140m north of the box..." We also do not adopt that recommendation because, as we discuss shortly, we recommend the omission of any provisions relating to inanga spawning sites.

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[92] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, pg 53.
[93] Responses to Commissioners' Questions, 3 March 2016, pg 3.
[94] Appendix B *Predicting inanga/whitebait spawning habitat in Canterbury*, Greer, Gray, Duff & Sykes, August 2015, section 4.3, pg 6.
[95] Submission point PC4 LWRP-78.
[96] Submission point PC4 LWRP-98.
[97] Submission point PC4 LWRP-160.
[98] The placement, alteration, reconstruction, or removal of pipes, ducts, cables or wires over a bed of a lake or river, whether attached to a structure or not….
[99] Submission point PC4 LWRP-258.

Section 42A Reply Report to Plan Change 4

[278] The majority of rules only restrict activities, such as establishment of structures and temporary discharges, that could have an adverse effect on adjacent inanga spawning sites. The rules restrict the activity during the inanga spawning season in potential inanga spawning habitat areas.

[279] The second tier of rules restrict activities such as vegetation removal and stock access that could destroy adjacent inanga spawning sites and extend the time period restriction to protect potential spawning habitat and allow regeneration of vegetation or habitat.

[280] The section 42A Reply Report authors advised us that some of the submitters' evidence raised valid questions regarding the clarity and interpretation of the provisions and the associated mapping. We agree.

[281] The section 42A Reply Report recommended deleting the inanga spawning sites listed in Schedule 17 together with the deletion of the definition of 'inanga spawning sites.' Such an amendment would require consequential changes to all inanga spawning provisions to omit any reference to inanga spawning sites. The provisions would then deal solely with the protection of inanga habitat. We consider it useful to assess that recommendation from the section 42A Reply Report here.

[282] In Chapter 2 of this report, we consider the submission of Ms Toleman, counsel for Forest & Bird,[100] that rather than having different provisions for inanga sites and habitats, the focus should solely be on habitat. This point was not raised in Forest & Bird's primary submission. However, one submission sought the deletion of the inanga spawning site provisions from Schedule 17.[101] Relevantly, we concluded in Chapter 2 that if sites are a subset of habitat, ie, all sites are included in habitat, focusing policy on habitat would not be potentially prejudicial, but a refinement of detail for clarity.

[283] Forest & Bird presented evidence from Ms K J McArthur,[102] that where information is available to accurately predict critical habitat factors, a predictive approach is more ecologically sound, and is likely to provide better species protection through wider habitat retention and better accounting for natural variability in the environment. Ms McArthur recommended that the provisions omit any reference to 'inanga spawning sites' and deal solely with 'inanga spawning habitat'. We find that evidence to be persuasive. Accordingly, we recommend the omission of 'inanga spawning sites' from Schedule 17 and consequently any reference to those sites in the policies and rules.

[284] The primary submission of Christchurch City Council requested:

> If further investigations identify anomalies, amend Schedule 17 to ensure all significant spawning sites within Christchurch and Banks Peninsula are identified correctly and consistently

[285] As reported in Chapter 2, we could not progress this submission point because to do so would be beyond the scope of the Regional Council's authority in deciding the submission. However Dr B I Margetts, an ecologist with Christchurch City Council, in response to commissioners' questions, confirmed that all identified inanga spawning sites within the Christchurch City boundaries are incorporated in the Plan Change 4 Planning Maps depicting inanga spawning habitat.[103] This provides

[100] Submissions for Forest & Bird, 3 March 2016, paras 57-61.
[101] Ellesmere Sustainable Agriculture Inc PC4 LWRP-190.
[102] Statement of Evidence, paras 34-36.
[103] Audio record of hearing, 'early afternoon', Wednesday 16 March 2016, 29.40.

further assurance that amending the provisions to deal solely with 'inanga spawning habitat' would give effect to the superior instruments.

[286] We now discuss some technical issues relating to the mapping of 'inanga spawning habitat'.

[287] The 'Executive Summary' of Technical Report R15/100[104] states one of the aims of the investigation into improving protection of inanga spawning habitat was "determining the effectiveness of replacing the current inanga spawning site list within Schedule 17 of the LWRP with the maps produced by the model and justifying the inclusion of the maps into the LWRP omnibus plan change".

[288] The Technical Report[105] further advised that effectiveness of the schedule system is 'extremely limited' as inanga surveys have not been completed in most waterways in the region. That use of Schedule 17 fails to protect the vast majority of inanga spawning habitat and only partially fulfils the Council's responsibility to protect the life supporting capacity of the environment. A fundamental flaw in the schedule-based approach is that it fails to provide protection to sites where spawning would occur but has not been observed. The Technical Report R15/100 concludes, "maps developed from this model could markedly improve the protection provided to this commercially and cultural valuable species."[106]

[289] The section 32 Evaluation Report for Plan Change 4 and accompanying technical report show the option of replacing Schedule 17 with the modelled mapping of inanga spawning habitat was a relevant part of the overall strategy of Plan Change 4. The merits of providing protection for potential inanga spawning habitat modelled by GIS mapping based on the saltwater wedge are superior to the discrete 20-metre diameter protection zone for the 75 listed sites spread across 20% of the total length of coast along which inanga are found in Canterbury.[107]

[290] We heard the submission of Mr H G Rennie, who considered that mapping of the inanga spawning habitat areas had been poorly implemented. He illustrated this by reference to aerial photos of his land adjacent to the Selwyn River, that showed the Planning Maps identifying the inanga spawning habitat zone extending beyond the 'boundaries of the river', over a 3 metre high stopbank, and over a 4m high hay-barn located on private land.

[291] The section 42A Reply Report acknowledged the difficulty of accurately mapping to an individual property scale and retaining in the process clear delineation of the edges of a waterbody. The Reply Report advised us that Council staff have made some adjustments to the mapping to remove obvious areas where the lines extend beyond inanga spawning habitat.[108]

[292] The definition of inanga spawning habitat, and therefore the relevant policies and rules, would only apply to areas that are tidally influenced, so the mapping, while predictive, would still require on the ground assessment to confirm the actual extent of the tidal saltwater wedge interface.

[293] While there were no primary submissions seeking clarification of the boundary between the 'inanga spawning habitat' on the planning maps and the location of the Coastal Marine Area (CMA), a number of submitters raised this as an issue in their evidence. The 42A Reply Report states that the wording in

[104] Section 32 Evaluation Report for Plan Change 4 (Omnibus), Appendix B, *Predicting Inanga/whitebait spawning habitat in Canterbury*, Greer, Gray, Duff & Sykes, August 2015, page (i).
[105] Section 32 Report, Appendix B, *Predicting Inanga/whitebait spawning habitat in Canterbury*, August 2015, pg 3.
[106] Section 32 Evaluation Report for PC 4, Appendix B, *Predicting Inanga/whitebait spawning habitat in Canterbury*, Greer, Gray, Duff & Sykes, August 2015, pg 9.
[107] Section 32 Evaluation Report for Plan Change 4 (Omnibus), Appendix B, *Predicting Inanga/whitebait spawning habitat in Canterbury*, Greer, Gray, Duff & Sykes, August 2015, section 4.3, pg 6.
[108] Section 42A Reply Report on Plan Change 4, para 5.12.

the definition of inanga spawning habitat 'mean high water springs and mean low water neaps' contributed to a number of submitters[109] interpreting this to mean the Coastal Marine Area. The section 42A Reply Report advised that the Council has made some adjustments to the mapping to remove obvious areas where the lines extend beyond inanga spawning habitat and removed any areas that are seaward of the coastal marine area boundary.

[294] Returning to the section 42A Reply Report recommendations, the amendments proposed would:

- Omit the definition of Inanga Spawning Sites. This would simplify the inanga spawning provisions and strengthen the focus on inanga spawning habitat, resulting in improved environmental outcomes
- Make a minor amendment to the definition of Inanga Spawning Habitat
- Omit Policy 4.86A, a consequence of focusing the provisions on inanga spawning habitat and omitting inanga spawning sites from Schedule 17 of the LWRP
- Amend condition (1) of Rule 5.71 by omitting reference to inanga listed in Schedule 17; and strengthening the protection for inanga spawning habitat by extending the period when activities are excluded to allow regeneration of vegetation and habitat
- Amend the following conditions of Rules 5.136(1), 5.137(4), 5.138(2), 5.139(4), 5.140(1), 5.141(2), Rule 5.167(4) by omitting reference to inanga spawning sites listed in Schedule 17.
- Amend Rule 5.148(9) by omitting reference in the condition to inanga spawning sites listed in Schedule 17; and extending the exclusion from 1 January to 1 June
- Amend the Planning Maps to delete 'Inanga Spawning Sites', and exclude 'Inanga Spawning Habitat' from any area within the Coastal Marine Area.

[295] We adopt as our own the section 42A Reply Report's recommendations in relation to the submissions on the provisions relating to inanga spawning habitat, except as outlined below.

[296] Consistent with our 'exception based' approach to this decision report, we now proceed to discuss other relevant provisions where we diverge from the recommendations in the section 42A Report and the section 42A Reply Report.

[297] Having reviewed the issues raised by the submissions and evidence we recommend a minor amendment to the definition of inanga spawning habitat to make clear that ephemeral streams are excluded. As outlined above, this is consistent with the CRC's technical advice to us.

[298] We also consider that an amendment (additional to those recommended by the officers) to Policy 4.86B is appropriate. We recommend that the policy refer to "… vegetation clearance, cultivation or earthworks …". The context for that finding stems from the provisions of the superior instruments relating to preserving the natural character of rivers, together with the statement in the section 32 Report that the biggest threat to the inanga species is considered to be the destruction and restriction of spawning habitats. Inanga spawning habitat is being constrained and reduced in part by land development, with resulting loss of natural character, ecosystem health and biodiversity values.[110]

[299] As a minor grammatical correction we recommend a generic amendment by omitting the word "undertaken", from Rules 5.71(1), 5.136(1), 5.137(4), 5.138(2), 5.140(1), 5.141(2), 5.163(9), 5.167(4).

[109] Legal Submissions for Forest & Bird, paras 6-24.
[110] The Introduction of the section on 'Inanga Spawning Sites', pg 26.

[300] We also recommend amending proposed Condition 4 of Rule 5.139 by inserting the word "undertaken" so that it reads "…river or undertaken within a Salmon…", and omitting the word "undertaken" where it occurs as follows "…or undertaken in and inanga…"

[301] To the extent that the amendments recommended above were not explicitly sought by submissions, we recommend them under clauses 10(2)(b) and 16(2) of Schedule 1 to the RMA.

[302] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and give effect to the superior instruments than not making them.

Chapter Four
Braided rivers

Introduction

[303] Plan Change 4 would insert in the LWRP a new Policy 4.85A that would include preserving the natural character of Canterbury's braided river systems. Although the proposal was generally supported, several submitters sought various amendments to it.

[304] The major rivers of the Canterbury Region (the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and Waitaki) are distinctive in that they rise in the Southern Alps, and when they reach the flatter Plains, they take a 'braided' form. This is a result of the physics of rivers flowing from steeper to flatter gradients over land that has been built up over ages by alluvial deposits. There are several other Canterbury rivers that also have a braided form.

[305] Since Canterbury was first settled about 800 years ago those rivers have continued to be highly valued as natural landscape features, as significant wildlife habitats, as sources of mahinga kai, as having cultural significance to NgāiTahu and others, for hydro-electricity potential, as sources of drinking water for people and animals and for irrigating agriculture, for sports fishing and other recreation.

The Council's planning duties for braided rivers

[306] To explain our approach to evaluating the issues raised by the submission points about the natural character of the braided rivers, we note the duties specifically applying to the Council's planning functions in that respect.

[307] The RMA stipulates that those having functions and powers under that Act are to recognise and provide for certain matters of national importance, including preservation of the natural character of rivers and their margins.[111]

[308] The NPSFM 2014 sets important objectives and policies in respect of freshwater resources generally, entrusting regional councils to make or change regional plans to implement those policies to attain those objectives according to the circumstances of freshwater resources in their regions. However the NPSFM does not itself include content specifically addressing the natural character of braided rivers.

[309] The Vision and Principles of the Canterbury Water Management Strategy, to which the Council is to have particular regard in considering any regional plan,[112] include supporting principle 4 on natural character, of which we quote relevant passages:

> The natural character (mauri) of Canterbury's rivers …is preserved and enhanced:
>
> - Natural flow regimes of rivers are maintained …
> - The dynamic processes of Canterbury's braided rivers define their character and are protected
>
> …

[310] The Canterbury Regional Policy Statement 2013 ('CRPS') contains objectives and policies for giving effect to general directions in the RMA and the NPSFM 2011. The CRPS recognises the extensive

[111] RMA, s 6(a).
[112] Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, s 63.

braided river systems,[113] and that in some of them the natural characteristics have been altered by large-scale hydro-electricity generation or irrigation schemes, or by cumulative effects of many small-scale activities.[114]

[311] Objective 7.2.1 of the CRPS starts with a general goal of sustainable management of the region's freshwater resources to enable people and communities to provide for their economic and social well-being through abstracting and/or using water for irrigation, hydro-electricity generation and other economic activities and for recreation and amenity values, and any economic and social activities. The objective then states three provisos which follow those in section 5(2)(a), (b) and (c) of the RMA. In particular proviso (2) includes that the natural character values of rivers and their margins are preserved and are protected from inappropriate use and development, and where appropriate restored and enhanced.

[312] Policies 7.3.1 and 7.3.2 in particular are for achieving that objective.

[313] Policy 7.3.1 applies to freshwater bodies in general. It starts with identifying the natural character values of fresh-water bodies and their margins. The policy then states three approaches in respect of them, followed by a qualifying clause. The three approaches are for preserving, maintaining, and improving natural character values in these categories: preserving them where there is a high state of natural character; maintaining them where they are modified but highly valued; and improving them where they have been degraded to unacceptable levels. The qualification on those approaches is this:

> "…unless modification of the natural character values of a fresh water body is provided for as part of an integrated solution to water management in a catchment in accordance with Policy 7.3.9, which addresses remedying and mitigating adverse effects on the environment and its natural character values."

[314] The principal reasons and explanation for that policy state that the policy of preserving the natural character of fresh water—

> "…is not intended to preclude all activities within the catchment, irrespective of their effects. Rather it requires activities to preserve the key elements which contribute to the natural character values of these fresh water bodies and protect these from inappropriate subdivision, use and development."

[315] In addition to Policy 7.3.1, Policy 7.3.2 is specifically applicable to braided rivers. This policy is to maintain the natural character of braided rivers by restricting damming of them in certain stated conditions. The principal reasons and explanation explain that in this policy, 'damming' refers to damming the full width of a river bed; and does not refer to directing the flow of a braid or channel as part of flood protection works.[115]

[316] Policy 7.3.9 of the CRPS is requiring integrated solutions to management of fresh water by comprehensive management plans that address the policies of the CRPS and relevant matters in Appendix 2.

[317] Objective 10.2.2 of the CRPS is to maintain the flood-carrying capacity of rivers. Policy 10.3.3 is among those for attaining this objective, and relates to managing flood control. We quote the relevant passage:

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[113] CRPS, pg 66, col 1.
[114] CRPS, pg 68, col 1.
[115] CRPS, pg 75, col 1.

To manage activities in river … beds and their banks and margins to:

(1) avoid or, where this is not practicable, to remedy or mitigate adverse effects on vegetation that controls flood flows or protects river banks … from erosion; and
(2) …

[318] Objective 7.2.3 (also addressing the value of fresh water itself) includes that the life-supporting capacity, ecosystem processes and indigenous species and their associated freshwater ecosystems are safeguarded.

[319] Relevantly, Policy 10.3.4 is for managing the use and removal of vegetation and bed material in river beds and their margins to ensure maintenance of flood-carrying capacity of rivers and erosion control and prevention.

[320] The LWRP contains the following objectives that are relevant:

3.19 Natural character values of freshwater bodies, including braided rivers and their margins wetlands, hāpua and coastal lagoons are protected

3.20 Gravel in riverbeds is extracted to maintain floodway capacity and to provide resources for building and construction and maintenance, while maintaining the natural character of braided rivers …

3.21 The diversion of water, erection, placement or failure of structures, the removal of gravel or other alteration of the bed of a …river or the removal of vegetation or natural defences against water does not exacerbate the risk of flooding or erosion of land or damage to structures.

[321] Policies of the LWRP for attaining those objectives include these:

4.86 Earthworks and structures in the beds or margins of … rivers … :

(a) maintain the character and channel characteristics of rivers including the variable channel characteristics of braided rivers;

…

(c) do not preclude any existing lawful access to the bed of the … river … for … flood control purposes except where necessary to protect public health and safety.

…

[322] Plan Change 4 proposes to introduce new Policies 4.85A, 4.95A and amend Policy 4.86 as follows:

4.85A Indigenous biodiversity, habitats of indigenous fauna and flora, and the natural character of Canterbury's braided river systems is preserved through:

(a) preventing encroachment of activities into the beds and margins of lakes, and rivers; and
(b) limiting vegetation clearance within the bed, banks and margins of lakes, rivers, wetlands or coastal lagoons

unless the vegetation clearance is for the purpose of pest management, habitat restoration, flood control purposes, the operation, maintenance or repair of structures or network utilities, or maintenance of public access.

4.86 ~~Earthworks, and structures~~ Activities that occur in the beds or margins of lakes, rivers, wetlands, hāpua, coastal lakes and, lagoons are managed or undertaken so that:

(a) ~~maintain~~ the character and channel characteristics of rivers including the variable channel

characteristics of braided rivers are ~~preserved~~;

(b) ~~protect~~ sites and areas of significant indigenous biodiversity values or of cultural significance to Ngāi Tahu are protected; and

(c) ~~do not preclude any~~ existing lawful access to the bed of the lake, river, wetland, hāpua, coastal lake, or lagoon for recreational, customary use, water intakes or supplies or flood control purposes, is not precluded, except where necessary to protect public health and safety.

4.95A Effective management of rivers for flood control purposes is enabled, and erosion of riverbeds, banks and structures from the effects of gravel extraction is minimised, by aligning the duration and volume limits in any resource consent granted for the extraction of gravel with those set out in the Canterbury Regional Gravel Management Strategy.

[323] As a basis for our consideration of the submission points affecting proposed Policy 4.85A, we analyse and collect the thrust of the relevant directions of the superior instruments, and the objectives and policies of the LWRP with which the decision on those points would need to be consistent.

[324] Starting with the general, at all levels the Council is directed to preserving the natural character of rivers and their margins.[116] Moving to the more particular, natural flow regimes of rivers are to be maintained.[117] More specifically, dynamic processes of braided rivers define their character and are to be protected, including by restricting damming.[118] Those directions are all consistent with regional councils' functions for giving effect to the RMA.[119]

[325] We have also found objectives and policies for maintaining flood-carrying capacity of rivers, and protecting banks from erosion, managing vegetation and moving bed material.[120]

[326] We assume that the provisions identified in the last two paragraphs all are intended to be consistent with each other, and we identify passages from which we can understand how they are to be read and apply together.

[327] The qualification clause of the CRPS Policy 7.3.1 about modification of natural character values applies to fresh water bodies in general; is not directed to braided rivers in particular; and expects that the integrated solutions address remedying and mitigating adverse effects on natural character values. The principal reasons and explanation of that policy expressly require the activities to "preserve" the key elements which contribute to the natural character values. Policy 7.3.9 directs that management plans are to address the policies of the RPS including addressing all the relevant matters set out in Appendix 2, paragraph 7 of which requires integrated solutions to identify natural character values of the fresh water bodies in the catchment. The methods for Policy 7.3.9 require regional plans to include provisions to manage natural character values; and these are described in the principal reasons and explanation as "fundamental".

[328] Objective 3.20 of the LWRP for extracting gravel from riverbeds is expressly qualified by the requirement of "maintaining the natural character of braided rivers." Policy 4.86 of the LWRP on earthworks and structures in rivers is subject to Condition (a) for maintaining the variable channel characteristics of braided rivers.

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[116] RMA, s6(a); CWMS SP4; CRPS Objective 7.2..1, proviso 2, and Policy 7.3.1.
[117] CWMS SP 4.
[118] CWMS, SP 4;and CRPS Policy 7.3.2.
[119] RMA, s 30(1)(e) and (g).
[120] CRPS Objective 10.2.2 and Policies 7.3.1, 10.3.3, and 10.3.4; and LWRP Objective 3.21 and Policies 4.86(c), 4.89, 4.91 and 4.95.

[329] Taking meaning from the passages we identified in the last two paragraphs, we find that the intent of the applicable instruments (the CWMS, the CRPS and the LWRP) is that maintaining the natural character of braided rivers, including their dynamic or variable braids and channels, and natural moving of bed material, is a fundamental priority; and that works for protection of river banks from erosion or flood control are subordinate to it.

[330] The relevant standing provisions of the LWRP that are not affected by Plan Change 4 conform with the intent we have identified.[121] Relevantly, Plan Change 4 would:

- Insert a new Policy 4.85A that would include preserving the natural character of Canterbury's braided river systems;
- Amend Policy 4.86 (clarifying the language); and
- Insert a new Policy 4.95A of enabling effective management of rivers for flood control purposes and minimising erosion of riverbeds, banks and structures from the effects of gravel extraction.

[331] The submission points affecting proposed Policy 4.85A are addressed in paragraphs H.34 to H.51 of the section 42A Report, leading to a recommendation of two amendments to the proposed text of the policy.[122] The section 42A Reply Report recommended replacing the word "maintained" in Policy 4.86(a) with "preserved". We consider that revised wording gives better effect to the superior instruments. The section 42A Reply Report also recommended a minor grammatical correction to Policy 4.95A.

[332] We are satisfied with and have adopted as our own the report's recommendations and reasons in relation to the submissions on Policies 4.85A, 4.86 and 4.95A as outlined above. Consistent with our 'exception based' approach to this decision report, we now proceed to discuss other relevant provisions where we diverge from the recommendations in the section 42A Report and the section 42A Reply Report.

Definitions

[333] Policy 4.85A(b) deals with 'vegetation clearance'. Plan Change 4 would amend clause (a) of that definition as follows:

> "cultivation or harvesting ~~for the establishment~~ of crops or pasture on production land established prior to 5 September 2015,"

[334] The section 42A Report recommended inserting the word 'forestry' prior to the word 'crops', attributing that amendment to the submission of Federated Farmers.[123] However, the Federated Farmers submission did not actually request that relief and so we decline to recommend it.

[335] Federated Farmers[124] opposed the proposed insertion of the words '… production land established prior to 5 September 2015' as they considered that amendment had the potential to create confusion and inadvertently capture farmland because there is no corresponding definition of 'production land' in the LWRP. We concur with that submission and consider that amending the definition in the way proposed by Plan Change 4 could have unintended consequences. We understand from the officers' answers to our questions that the date was included to protect the natural character of the margins of braided rivers from the further encroachment of pastoral farming activities. However, in response to

[121] LWRP Objectives 3.19; 3.20; 3.21; and Policies 4.86; 4.89; 4.91 and 4.95(b).
[122] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, pg 112.
[123] Submission point PC4 LWRP-399
[124] Ibid

the issue raised by Federated Farmers we consider that it would be preferable to omit the insertion set out above and ensure instead that Policy 4.85A is appropriately worded. We therefore recommend that clause (a) of the definition is amended in the manner sought by Federated Farmers. It would read:

> "cultivation for the establishment of, or harvesting of, crops or pasture"

[336] As a consequential amendment and for the sake of consistency, we recommend that clause (a) of the definition of 'earthworks' is similarly worded, noting that this was also sought by Federated Farmers.[125]

[337] The section 42A Report also recommended amendments to clause (b) of the definition of 'vegetation clearance'. However, in Chapter 2 of this decision report we concluded, in response to the legal submissions of Forest and Bird, that submissions requesting amendments to that clause are not 'on' the plan change and are therefore out of scope. We therefore decline to recommend any amendments to clause (b) of the definition.

[338] Plan Change 4 would also introduce new clauses (f) and (g) to the definition of 'vegetation clearance', dealing respectively with maintaining the flood-carrying capacity of rivers and enabling the clearance of exotic vegetation by government agencies. We find that those provisions appropriately give effect to the superior instruments. Several submitters sought minor amendments to those new clauses and we adopt as our own the section 42A Report's recommendations and reasons in relation to those submissions.

Policy 4.85A

[339] Having reviewed the issues raised by the submissions and evidence, we have concluded that some further amendments (additional to those recommended by the officers) to Policy 4.85A are appropriate. The context for our finding stems from the provisions of the superior instruments relating to preserving the natural character of rivers, together with the statement in the section 32 Report that the braided rivers within the Canterbury Region are being constrained and reduced in width by land development, with resulting loss of natural character, ecosystem health and biodiversity values.[126] The further amendments that we recommend are:

(i) clause (a) is amended to refer to activities encroaching "… onto… " the riverbed and not "… into…" the river bed;
(ii) the reference in clause (a) to "… beds and margins…" is expanded to "… beds, banks and margins …" so as to be consistent with the wording of clause (b);
(iii) the reference in clauses (a) and (b) to "… lakes and rivers …" is amended to "… lakes, braided rivers …" given the intended focus on braided river systems;
(iv) in response to the submission of Forest and Bird,[127] the term "… and associated wetlands and coastal lagoons …" is inserted into clause (a). This provides consistency with clause (b) and recognises that those ecosystems can form part of a braided river system;
(v) in clause (b) the term "… vegetation clearance … " is expanded to read "… vegetation clearance and cultivation … " in recognition of the fact the 'cultivation' is excluded from the definition of 'vegetation clearance', but the intent of Policy 4.85A is to preclude further encroachment of farming activities onto the braided river beds and such encroachment would necessarily be facilitated by cultivation of the cleared bed for the establishment of crops or pasture;

[125] Submission point PC4 LWRP-387
[126] The Introduction of the section on 'Vegetation in Riverbeds', page 42.
[127] PC4 LWRP-261

(vi) in clause (b) the words "… operation, maintenance or repair …" are expanded to "… operation, maintenance, upgrade or repair …", accepting in part the submission of Rangitata Diversion Race Management Limited.[128] We find that wording gives better effect to the overarching objective of the NPSREG and to CRPS Policy 5.3.9 Method (1)(a).[129]

[340] To the extent that the amendments outlined above were not explicitly sought by submissions, we recommend them under clauses 10(2)(b) and 16(2) of Schedule 1 to the RMA.

[341] The wording that we now recommend for Policy 4.85A is as follows(see Appendix B to this report for a precise attribution of the amendments):

> 4.85A Indigenous biodiversity, habitats of indigenous fauna and flora, and the natural character of Canterbury's braided river systems is preserved through:
>
> (a) preventing further encroachment of activities onto the beds, banks and margins of lakes, braided rivers and associated wetlands and coastal lagoons; and
>
> (b) limiting vegetation clearance and cultivation within the bed, banks and margins of lakes, braided rivers~~,~~ and associated wetlands and coastal lagoons, unless the vegetation clearance or cultivation is for the purpose of pest management, habitat restoration, flood control purposes, the operation, maintenance, upgrade or repair of structures or infrastructure, or maintenance of public access.

Rules 5.163, 5.167 and 5.168

[342] To give effect to Policy 4.85A, Plan Change 4 would make amendments to LWRP permitted activity rules dealing with 'Vegetation in Lake and River Beds' (Rule 5.163) and 'Earthworks and Vegetation Clearance in Riparian Areas' (Rules 5.167 and 5.168). Each of those rules would have an additional condition inserted requiring that from 5 September 2015 vegetation clearance (Rules 5.163(9) and 5.167(6)) or earthworks (Rule 5.168(5)) within named braided rivers do not result in a reduction in the area or diversity of existing riverbed vegetation.

[343] These proposed new conditions attracted a range of submissions. The issues raised included enabling the control of pest weed species or exotic species, not capturing the removal of existing crops and pasture, recognising and providing for the operation and maintenance of power scheme assets, enabling the upgrading of network utilities or significant infrastructure, and preventing all vegetation clearance in the named rivers.[130]

[344] These submissions were discussed in the section 42A Report and no amendments to the proposed new conditions were recommended.[131] We adopt as our own those recommendations and the reasons for them, except as outlined below.

[345] The section 42A Reply Report discussed these matters further, advising that given the definition of 'vegetation clearance', the management of vegetation for existing infrastructure would remain a permitted activity.[132] Nevertheless, to provide additional certainty, the officers recommended amending clause (b) of the definition of 'vegetation clearance' to include an additional exemption for infrastructure.

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[128] PC4 LWRP-365
[129] Statement of Evidence of Richard John Mathews, 29 January 2016.
[130] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, paragraphs H.64 to H.71, pages 106 and 107.
[131] Ibid, paragraphs H.85 to H.87, page 111.
[132] Paragraph 5.34.

However, we have already found that amendments to clause (b) of that definition are outside the scope of Plan Change 4.

[346] Accordingly, acknowledging the issues raised by the submitters and addressed by the officers, rather than amending the definition of 'vegetation clearance' we recommend instead amending the three conditions by adding the phrase "…unless the activity is for the purpose of the operation, maintenance, upgrade or repair of infrastructure". That would be consistent with our recommended amendments to Policy 4.85A and words to that effect were sought for Rule 163(9) by Meridian Energy Limited and Genesis Energy Limited.[133]

[347] We also recommend that Rules 5.163(9) and 5.167(6) are amended to refer to "… vegetation clearance or cultivation …" and Rule 5.168(5) is amended to refer to "… earthworks or cultivation …", because as we discussed in relation to Policy 4.85A, cultivation is excluded from the definitions of vegetation clearance and earthworks.

[348] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and the superior instruments than not making them.

[133] PC4 LWRP-10 and PC4 LWRP-25. The submitters sought the words "…renewable hydro-electricity generation asset or network utilities" but we find that the more general term "infrastructure" would give better effect to the superior instruments.

Chapter Five
Cattle in Lakes and Rivers

Introduction

[349] The LWRP contains Policy 4.31 concerning exclusion of livestock from water bodies. The purpose is for avoiding damage, sedimentation, direct discharge of contaminants, and degradation of aquatic systems. For that purpose, the policy is to exclude classes of livestock from certain water bodies detailed in the policy.

[350] To implement Policy 4.31, the LWRP contains Rules 5.68 to 5.71 which manage use and disturbance of certain water bodies by various classes of livestock.

[351] By Plan Change 4, the Council proposes to amend those provisions. It would amend Policy 4.31 by including freshwater bathing sites and inanga spawning habitat among the resources to which damage is to be avoided. The plan change would also insert amendments to Rules 5.68 to 5.71 in three respects. First, it would insert a new Rule 5.68A defining the extent of the banks and beds of braided rivers to which those rules are to apply, and also prescribing how they are to apply to artificial lakes. Secondly, the plan change would amend Condition 3 of Rule 5.68 to describe more particularly classes of lakes in which cattle standing would not be permitted. Thirdly, the plan change would amend Rule 5.71 by extending its application to inanga spawning habitat during months of the year when spawning occurs. (We address that proposed amendment in Chapter 3 of this report.)

[352] Ten submissions were received on Policy 4.31: One seeking deletion of the proposed amendments, one seeking the retention of the proposed amendments and eight seeking further amendments, largely focusing on inanga spawning sites. We address inanga spawning sites in Chapter 3 of this Report and so in this chapter we confine ourselves to the proposed deletion of the words 'upstream of' from Policy 4.31(b). Forest and Bird stated that the removal of the 'upstream' component could lessen the impact of the policy and Ngāi Tahu requested that stock should be excluded from 'closely upstream' areas as well as closely 'adjacent' areas. Fish & Game requested that the exclusion policy apply to any spring-fed river in the hill or high country with a slope gradient of up to 3 degrees.

[353] Thirteen submissions were lodged in respect of proposed Rule 5.68A: four in support of it; two in support in part; four opposing the new rule; three opposing it in part. Several of the submissions contained requests for other amendments. Issues raised by submissions on the proposed rule include the extent of the 50-metre setback on either side of braided rivers being excessive; loss of productive land due to exclusion stock; variable interpretation of the outer gravel margin; degraded artificial lakes the discharge to natural waterways; and interpretation of flood protection vegetation.

[354] Seven submissions were received on the proposed amendments to Condition 3 of Rule 5.68: two requesting that it be retained, and two opposing the amendment. One submitter (Ngai Tahu) opposed to the amendment stated that it would consider supporting exclusion of specific lakes from the application of the rule but those lakes should be identified and named. Another (Federated Farmers) asked that the restriction apply to natural lakes (to exclude farm ponds and farm dams). Another (Fish & Game) asked that the condition apply to cattle standing in any lake or river.

Section 42A Report

[355] By their report under section 42A of the Act, the officers recommended certain amendments in consideration of the submissions. In respect of submissions on Policy 4.31 they recommended no

further amendments. In respect of proposed Rule 5.68A they recommended amendments modifying the extent of the application of the rules in respect of outer gravel margins of braided rivers; and addressing where an artificial lake discharges directly into a water body. In respect of the proposed amendments to Condition 3 of Rule 5.68, they recommended in respect of cattle standing in certain lakes an exception for certain farm ponds that have no outlet to certain water bodies.

[356] We adopt the officers' recommendations of amendments to proposed Rule 5.68A and Condition 3 of Rule 5.68 for the reasons given by them. We now address amendments requested by submitters in respect of which we do not accept the officers' recommendations.

Proposed Policy 4.31(b)

[357] Having considered the evidence on the matter of Policy 4.31(b), we find that to adequately protect the listed resources from the damage caused by livestock the exclusion stated in clause (b) should apply to the listed resources and 'the waterbody bed and banks closely adjacent to and upstream of these areas' and we recommend an amendment accordingly. We consider that the 3-degree amendment proposed by Fish & Game needs further assessment of the nature and extent of its application in Canterbury prior to being considered fit for purpose in terms of section 32, so we do not recommend including it in Plan Change 4.

Proposed Rule 5.68A

[358] By its submission Waitaki Irrigators Collective asked for amendments to the definition of the outer edge of braided rivers in clause 1 of proposed Rule 5.68A in two respects. First, the submitter asked that the qualification of flood protection vegetation by the phrase "owned or controlled by the CRC" be omitted; and secondly, it asked that where (in subclause (2)) the rules extend to 50 metres on either side of the outer gravel margins, that value be replaced by 10 metres on either side of the margins.

[359] Having considered evidence given in support of that submission by Ms E Soal, Mr F Keeling, and Mr R Allan, we find that the exclusion of cattle standing within 50 metres of outer gravel margins would be excessive, and could result in perverse outcomes. We also accept the submitter's argument that qualifying reference to flood protection vegetation to that "owned or controlled by the CRC", while easier for administration, does not respond to any objective or policy.

[360] Mr H G Rennie also made a submission on proposed Rule 5.68A, by which he asked for certain amendments to proposed Rule 5.68A. In particular he contended that flood stopbanks should not be used to define a bed of a river, and outlined the considerations on which they are designed and located. We accept that those considerations do not bear on the natural features for which the proposed rule is to apply.

[361] Having considered the evidence given in support of those submissions, as well as the relevant content of the section 42A report, we have to decide what, on those submissions, we should recommend on the decisions requested by the submitters. In doing so, we face the options of accepting the requests, discarding them, or recommending an amendment that accepts them in part. We have considered the relevant superior instruments, taken into account the applicable iwi management plans, the vision and principles of the CWMS, and the Fish and Game management plans. Given the generality of those instruments and the confined scope of the proposed rule, we find in them no specific guidance for our present task. We have (as directed by section 68(3) of the RMA) considered whether the rule as it would be amended would have actual or potential effects (in particular any adverse effect) on the environment of the activity of depasturing cattle. The evidence does not support such a finding. We have assessed

anticipated benefits and costs (not readily quantifiable) of the options and the risk of acting or not acting, and have come to the conclusion that the most appropriate way of achieving the objectives and of implementing Policy 4.31 (as it is proposed to be amended) would be to amend the proposed rule so that it would read as follows (see Appendix B to this report for a precise attribution of the amendments):

> 5.68A For the purposes of Rules 5.68 to 5.71 of this Plan the bed (including the banks) of a braided river is limited to the wetted channels, any gravel islands, the gravel margins, and the outer edge of any flood protection vegetation or where no flood protection vegetation exists, the lesser of:
>
> 1. The distance from the outer gravel margin to land that was cultivated or was in crop or pasture prior to 5 September 2015; or
> 2. 10m landward of the outer gravel margin as measured, at any time, except that if a stopbank exists then the stopbank does not form part of the bed.
>
> 5.68B Rules 5.68 to 5.71 of this Plan do not apply to the bed (including the banks) of any artificial lake unless:
>
> 1. The artificial lake has been created as a result of the damming of a river; or
> 2. The artificial lake discharges directly into a river, lake or wetland.

[362] To the extent that those amendments do not fully meet the amendments requested in submissions on proposed Rule 5.68A, we recommend that those submission points are rejected.

Rule 5.68

[363] By their submission, Ngai Tahu advised that they would "consider supporting exclusion of specific lakes from the application of the rule but those lakes should be identified and named." However the submission did not identify the specific lakes in question.

[364] That lack of specificity about the lakes referred to precludes people interested from opposing the identification of any particular lake by further submission; and so we find that we cannot make any recommendation for accepting it.

[365] Federated Farmers' request that the restriction apply to natural lakes (to exclude farm ponds and farm dams) is, in substance, addressed by the section 42A report recommendation, which we are adopting.

[366] We now address Fish & Game's request that the condition apply to cattle standing in any lake or river, which was opposed by Federated Farmers. This was addressed in the Section 42A report, the authors offering their opinion that it would be too onerous and would require further analysis and assessment to achieve an appropriate balance between the need for certainty, protection of water quality, and economic costs and practicalities of excluding stock from hill and high-country rivers.[134]

[367] At our hearing of its submission, Fish & Game proposed a modification of their request so that the restriction would apply to cattle standing in any river outside hill or high country or in any spring-fed river in hill or high country with a slope gradient of up to 3 degrees.

[368] As that was not evaluated in the Section 32 Report, we could not recommend it without evidence to support an evaluation of our own on the benefits and costs of the amendment. Without implying criticism of Fish & Game's case, we consider that we do not have sufficient evidence to make such an evaluation ourselves. Therefore we recommend that this amendment request is not accepted.

[134] P Maw and M McCallum-Clark *Plan Change 4 Section 42A Report*, 18 December 2015. Paras L24-L37.

[369] Having considered the submissions on Condition 3(c) of Rule 5.68, we recommend the wording for that provision that is set out in the s42A Reply Report and adopt the reasons contained in that report.

[370] We asked the officers about the inconsistent wording in Rule 5.167(4) and Rule 5.168(3). In reply the officers advised that the use of the phrase "a significant spawning reach" in Rule 5.168(3) is in error and they recommended aligning that provision with the wording in Rule 5.167(4). We adopt that advice and under clause 16(2) of Schedule 1 we recommend an amendment accordingly.

Chapter Six
Stormwater Discharges

Introduction

[371] By Plan Change 4, the Council proposed a new Policy 4.16A for the LWRP, for operators of reticulated stormwater systems to implement methods to manage stormwater directed to their systems; and from 1 January 2025, network operators would account for, and be responsible for the quality and quantity of all stormwater discharged from their systems; and the Council would not issue any permit to discharge stormwater into a reticulated system.

[372] The section 32 Report for Plan Change 4 identified relevant contents of the CRPS; relevant objectives of the LWRP; and relevant provisions of iwi management plans.[135] The report identified two reasonably practicable options for managing stormwater, namely, the status quo, and amending the LWRP to ensure the Plan better reflects the effects of different types of stormwater discharge.

[373] Discussion in the section 32 Report of the amendment option shows that this option is intended to apply to stormwater conveyed by network utility operators within urban areas; that it would not apply to transfers or conveyance of stormwater from one system to another; that it is founded on a basis that "conveyance of stormwater from one system to another is not a discharge to the environment;" and that discharge into the final receiving environment (i.e groundwater or surface water) would be controlled by the CRC. Among other ways of implementing this option, the report recorded that the effect would be that from 1 January 2025, the CRC would cease issuing resource consents for discharge of stormwater into reticulated stormwater systems, and the onus would be on system operators to manage inputs into their systems.[136]

[374] The proposed insertion of Policy 4.16A was opposed by submissions of three territorial authorities: the Christchurch City Council; the Selwyn District Council; and the Waimakariri District Council, who asked that the new policy is omitted. The submissions of the Christchurch City Council and the Waimakariri District Council were opposed by further submissions by NgāiTahu and by Federated Farmers, who asked that the submissions by those territorial authorities be rejected. Although the further submission by the Oil Companies stated that they opposed the submissions of the Christchurch City Council in this respect, the narrative description of their reasons indicates that the Oil Companies generally supported the City Council's position of opposing the new Policy 4.16A.

[375] The opposition of those territorial authorities to the new policy was acknowledged in the section 42A Report, and the reporter recommended that in the absence of agreement with the CRC to the contrary, the new policy should be continued.[137]

Legal questions

[376] Among questions the hearing commissioners asked of the authors of the section 42A Report, we asked some about the concluding phrase of proposed Policy 4.16A "… and the CRC shall not issue any permit to discharge stormwater into a reticulated stormwater system…"

[135] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pp 50-52.
[136] Section 32 Evaluation Report for Plan Change 4 (Omnibus), pg 53.
[137] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, para B.36.

[377] Our first question on that was: Does a regional council have authority to grant or decline permits to discharge stormwater to a reticulated stormwater system?

[378] The authors of the report answered that it depends on the circumstances and requires a case-by-case assessment. [138]

[379] Our second question in this respect was: If [a regional council] does have authority to do so, can it escape responsibility for considering and deciding applications for permits by adopting a regional policy that it "shall not issue any permit"?

[380] The authors answered by citing legal authority for regional councils having responsibility for controlling discharges, and submitted that the Council can adopt such a policy provided it continues to control stormwater discharge in a manner that gives effect to the Act, and accords with section 66 and 67 of it, by controlling discharge at the point of entry to the final receiving environment. [139]

[381] Our third question asked: If a regional council does not have authority to grant or decline such permits, is the last phrase of Policy 4.16A effective or redundant?

[382] The authors responded that if the Council does not have authority to grant or decline permits to discharge stormwater to a reticulated system, the last phrase could be considered redundant. [140]

[383] We asked the authors further questions arising from those answers:

> Looking for a clarification as to why consent is required for a discharge into a piped network when not the situation in other authorities.
> It is a question of whether this is a discharge to 'water' as a discharge to a pipe not to 'water'. Clarify this.

[384] From the authors' full answer to that question, we quote these passages:

> … The Regional Council has no jurisdiction to regulate discharges in circumstances that do not fall under s 15(1).
>
> *Is a discharge into a pipe a discharge to 'water'?*
>
> It is submitted that the discharge of stormwater into a pipe falls within the definition of 'discharge' under the RMA. However it is not a 'discharge into water' under s 15(1)(a). The definition of 'water' expressly excludes a pipe. Only a discharge directly into water (as that term is defined in the RMA) falls under s15(1)(a). The case law is clear that intermediate discharge onto land, albeit that the discharge ultimately finds its way into water, does not come under s15(1)(a).[141] However, for the reasons set out further below, discharges in those circumstances could fall under s15(1)(b) as a discharge to *land* in circumstances which may result in that contaminant entering water. [142]
>
> *Can there be more than one point of discharge in relation to the same discharge?*

[138] Responses to Questions of Hearing Commissioners, pg 12.
[139] Responses to Questions of Hearing Commissioners, pg 13.
[140] Responses to Questions of Hearing Commissioners, pg 13.
[141] Citing *Auckland Regional Council v Bitumix* (1993) NZPTD 336 (DC) at 34.
[142] Reponses to Questions of Hearing Commissioners on Day 1, pg 6.

> The point of discharge has been judicially considered. It is the point at which the contaminant leaves the effective control of the discharger.[143]
>
> In a scenario where stormwater enters into a pipe (that is part of a reticulated stormwater system) on a residential property and that stormwater ultimately discharges from the reticulated stormwater system into a river or the sea, there is only one point of discharge that can be regulated. To regulate both the discharge into the pipe and the final discharge into water would involve an unlawful duplication as once the discharge is controlled (for example through consent) any further consent would be redundant. That is because the activity for which the further consent was being sought has already [been] approved. In the absence of obtaining a further consent, the person seeking the further consent could not be prosecuted as the existing consent would authorise the discharge.
>
> However the Regional Council has discretion to choose the point at which it regulates the discharge, provided that it only regulates one point of discharge. It can regulate the discharge at the top or the bottom of the system, or perhaps somewhere in between. If it regulates at the top, there is case law authority that a discharge into an underground pipe, which transports that discharge to a drain that flows to a river, is a discharge to land under s 15(1)(b). The underground pipe is a fixture which forms part of the land.[144] [145]

[385] Counsel for the Christchurch City Council (Mr B K Pizzey) agreed that water in a reticulated stormwater system is not 'water' for the purposes of the RMA; but submitted that discharge of stormwater containing contaminants into a reticulated stormwater system which discharges into a waterway can reasonably be regarded as a discharge into land that is governed by section 15(1)(b) of the RMA, as that is a discharge of contaminants into land in circumstances that may result in the contaminants entering water. He relied on a District Court judgment[146] to that effect. Counsel submitted that the Regional Council does have authority to use policies and rules to manage the discharge of contaminants into a reticulated stormwater system.

[386] Counsel for the Oil Companies (Mr JGA Winchester and Ms AOJ Sinclair) also submitted that the correct interpretation of section 15 is to treat discharging contaminants into a pipe as a discharge to land,[147] and cited additional case-law in support of that.[148]

[387] Having considered those submissions, we accept that passing contaminated stormwater into a piped entry to a reticulated stormwater system is a discharge of contaminant into land in circumstances that may result in the contaminant entering water. It follows by application of section 15(1)(b) of the RMA that, unless expressly allowed by an instrument of one of the classes listed in that subsection, or by a resource consent, a regional council has a duty to consider and decide applications for resource consents to do so, except if it transfers the duty to another public authority under section 33.

[388] We do not understand that this would involve any unlawful duplication of authority. Typically, stormwater containing contaminants would enter a reticulated system at a number of points; and what is ultimately discharged to the environment is a combination of stormwater from numerous sources and entry points. The quantity and quality of the stormwater ultimately discharged differs in detail from

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[143] *Kerikeri Properties v Northland Catchment Commission* (1977) 6 NZTPA 344 (TCPAB) at 348.

[144] *Manawatu Wanganui Regional Council v Thurston* (DC Palmerston North CRI-2007-054-2550, 20/02/2009 at [85]).

[145] Reponses to Questions of Hearing Commissioners on Day 1, pp 6, 7.

[146] *Auckland Regional Council v Bitumix* (1993) 3 NZPTD 336 (District Court, Otahuhu, Judge Willy).

[147] Supplementary Legal Submissions, 31 March 2016, para 2.7.

[148] *Minister of Conservation v South Taranaki District* Council (Planning Tribunal decision W16/1993); *Southland Regional Council v Southern Delight Ice-cream Company* (District Court, Invercargill, 15/09/95 CRN5025003972, Judge Sheppard); *Auckland Regional Council v AFFCO Allied Products* (District Court, Auckland 29/09/2000, CRN9048006616-9, Judge Whiting); *Cooks Beach Developments v Waikato Regional Council* (Env C A127/99); *Gisborne District Council v McKendry* (2005) 11 ELRNZ 458 at 463.

what enters the system at any single point. So to the extent that an initial entry of stormwater into a reticulated system is not expressly allowed by an instrument, application may be made to the consent authority for a resource consent to authorise it; and application may also be made to the consent authority for a resource consent to authorise the ultimate discharge (with its different quantity, quality and location) from the reticulated system to the environment.

[389] We now consider the proposed Policy 4.16A in the light of that legal position.

[390] The first part of the policy, for system operators to implement methods to manage stormwater directed to their systems, is not incompatible with the Regional Council's jurisdiction over resource consent applications for contaminants entering stormwater systems. Likewise, the second part of the policy (to apply from 1 January 2015) for operators to account for and be responsible for the quality and quantity of stormwater discharged from their systems, is not incompatible either.

[391] However, the last clause of the policy, asserting that from 1 January 2025 the Regional Council 'shall' not issue any permit to discharge stormwater into a reticulated system, would be incompatible with its duty to consider and decide applications for resource consents containing contaminants into stormwater systems. The Regional Council would have a public duty to consider and decide each such application according to law. Unless it transfers that duty to another public authority in accordance with section 33, we understand that in law it would not be free to refuse to consider each such application on its merits and according to law. So we find that there is a legal impediment to the third clause of the proposed policy.

The Plan Change 4 Amendments

[392] As described in the section 32 Report,[149] Plan Change 4 makes a number of amendments to the stormwater provisions of the LWRP.

[393] The definition of "reticulated stormwater system" would be amended so that it only applies to stormwater conveyed by network utility operators within urban areas and the phrase "more than one property" is to be removed from the definition. The intent is that the LWRP provisions relating to "reticulated stormwater systems" would not apply to rural drains and drainage systems or properties which share a stormwater system. The definition is also to be amended to remove reference to the transfer or conveyance of stormwater from one system to another. A new definition for "available reticulated stormwater system" would be inserted, with "available" meaning stormwater is able to be conveyed into the reticulated system under gravity.

[394] Policy 4.15(a) would be amended to ensure that where an available reticulated system exists, stormwater is to be discharged into that system and not to the local environment. To give effect to amended Policy 4.15(a), Rules 5.95 and 5.96 would be amended to not allow, as a permitted activity, the discharge of stormwater to land, surface water or groundwater where an available reticulated stormwater system exists.

[395] New Policy 4.16A would be inserted, which relates to reticulated stormwater system operators managing all discharges into these systems by 1 January 2025. Consequential amendments would be made to Rules 5.95A, 5.95, 5.96 and 5.97.

[149] Pages 53 and 54.

[396] Permitted activity Rules 5.95, 5.95A and 5.96 are to be amended to limit the number of sites that a non-reticulated stormwater system can serve. The intent is that discharges with the potential for more significant effects (as a result of the quantity of stormwater discharged) would be considered in a consent process under Rule 5.97.

[397] Rule 5.96 is to be amended to ensure that discharges from rural properties can be considered. Rule 5.96 would also be amended to refer to a 10% rather than a 2% Annual Exceedence Probability event, aligning with the design requirements of the Building Code.

[398] New Rules 5.94A, 5.94B and 5.94C are to be inserted for the discharge of "construction-phase stormwater", and a definition is to be inserted for that term. The definition of "stormwater" would be amended to exclude "construction-phase stormwater" and "drainage water", as these are now to be separately defined.

[399] The proposed amendments summarised above attracted a number of submissions and further submissions seeking a range of relief. The submissions were considered in the section 42A Report and the section 42A Reply Report, and recommendations were made in those reports as to whether the submissions should be accepted, accepted in part or rejected. We are satisfied with and have adopted as our own the Reports' recommendations and reasons in relation to all of the stormwater provisions amended by Plan Change 4 except as indicated in the next paragraph.

[400] Consistent with our 'exception based' approach to this decision report, we now proceed to discuss only those provisions where we diverge from the recommendations in the section 42A Report and the section 42A Reply Report.

- Policy 4.16A;
- Rule 5.94A;
- Rule 5.94B; and
- The sub-headings "Construction Phase Stormwater" and "Post Construction Phase Stormwater"

Policy 4.16A

[401] As we discussed under the "*Legal Questions*" part of this chapter, we have concluded that there is a legal impediment to the third clause of proposed Policy 4.16A. Accordingly, we recommend that Policy 4.16A be amended as follows (see Appendix B to this report for a precise attribution of the amendments):

> 4.16A Operators of reticulated stormwater systems implement methods to manage the quantity and quality of all stormwater directed to and conveyed by the reticulated stormwater system, and from 1 January 2025 network operators account for and are responsible for the quality and quantity of all stormwater discharged from that reticulated stormwater system.

[402] In recommending this amendment we are not concluding that it is inappropriate for the CRC to seek to have network operators control (by way of bylaw, land-use consent or other means) the contaminants entering reticulated stormwater systems, leaving the CRC to focus on the control of the discharges that ultimately emanate from those systems. We note that the CRC has just under ten years to come to such an arrangement with the network operators, perhaps by way of modifications to the documents titled "A Joint Christchurch City Council and Environment Canterbury Stormwater Management Protocol" or the "Memorandum of Understanding for Stormwater Discharges in Christchurch City Council" that

were helpfully appended to the evidence of Brian Norton, Senior Stormwater Planning Engineer (Growth) at Christchurch City Council.

Rule 5.94A

[403] Rule 5.94A is a permitted activity rule for "construction phase stormwater". Dr Alistair Humphrey, a Medical Officer of Health for Canterbury, presented evidence on behalf of the Community and Public Health Division of the Canterbury District Health Board. He advised that if the discharge is into an area where there is a drinking-water take, particularly for a surface water supply, the increase in turbidity may impact on the treatment processes in place for that water. Dr Humphrey recommended that a condition be added to Rule 5.94A requiring that the discharge does not occur within the stated set-back distances of a drinking water supply intake as specified in Schedule 1.

[404] We agree with Dr Humphrey's recommendation in principle, and note that it accords with the first-order priority afforded to community water supplies in the CWMS and gives effect to Policies 7.3.4(1)(d) and 18.3.1 of the CRPS. However, to be consistent with other rules in the LWRP, we recommend instead that the additional condition refers to the discharge not occurring within a Community Drinking-water Protection Zone as set out in Schedule 1.

Rule 5.94B and the sub-headings

[405] Plan Change 4 would insert sub-headings into the LWRP section dealing with "Stormwater". The sub-headings are "Reticulated Stormwater Systems", "Construction-phase Stormwater" and "Post Construction-phase Stormwater". While these sub-headings would be helpful, there are other distinctions within the Stormwater section that have potential to create confusion. The various rules deal with discharges of stormwater or construction-phase stormwater from reticulated systems (Rules 5.93 and 5.94), discharges of construction-phase stormwater directly to the receiving environment (Rule 5.94A), discharge of construction-phase stormwater into a reticulated system (Rule 5.94B), discharge of construction-phase stormwater directly into the receiving environment or into a reticulated system (Rule 5.94C), discharge of stormwater into a reticulated system (Rule 5.95A), and discharges of stormwater directly to the receiving environment other than from reticulated system (Rules 5.95, 5.96 and 5.97).

[406] In terms of the potential confusion that could result from the various rules, we heard from Mr Le Marquand, a resource-management practitioner giving evidence for the Oil Companies, who stated:[150]

> As currently worded there is a risk that any and every construction activity would lead to an ongoing obligation for a new post construction-phase stormwater discharge consent. This would be regardless of the scale of the construction activity and/or whether there is any net change to the nature and character of the discharge. This would mean that in the interim, a District Council, may or may not accept such discharge and if it does not then one would need to get consent in terms of 5.97. In my opinion, (and in the absence of scope in PC4 to address the default activity status for such discharges in Rule 5.97), this matter is best addressed by simply deleting the heading of "Post Construction Phase Stormwater" and replacing it with "Stormwater". This means the obligation would sit in parallel to, and not in sequence with, construction activities.

[407] We acknowledge the issue raised by Mr Le Marquand. However, to better recognise the distinctions we described above, we recommend that the sub-heading "Construction Phase Stormwater" is amended to read "Construction-phase stormwater not discharged from a reticulated stormwater system".

[150] Statement of Evidence of David Le Marquand for Z Energy Limited, Mobil Oil NZ Limited , BP Oil NZ Limited (The Oil Companies), 29 January 2015, paragraph 5.20.

Consequentially, we also recommend that the sub-heading "Post-Construction Phase Stormwater" is amended to read "Stormwater not discharged from a reticulated stormwater system". To the extent that the rewording of these sub-headings was not explicitly sought by submissions, we recommend it under clauses 10(2)(b) and 16(2) of Schedule 1 to the RMA.

[408] In their submission the Oil Companies sought omission of proposed Rule 5.94B. We consider that omitting that rule would reduce the potential for confusion when interpreting the various rules. Thereafter, we recommend that Rule 5.95A is relocated so that it precedes Rule 5.93 and be renumbered as Rule 5.93A, as it is more appropriately grouped with the sub-suite of rules dealing with reticulated stormwater systems. As a consequence of recommending the omission of Rule 5.94B, we recommend that what would be Rule 5.93A is amended to refer to "… stormwater or construction-phase stormwater …" so as to be consistent with the wording of subsequent rules, including Rule 5.93.

[409] Having recommended these amendments to notified Rule 5.95A, we also recommend, as a consequential amendment, the omission of the reference in Rule 5.94C to reticulated stormwater systems. The result of that amendment is that discharges into reticulated stormwater systems that do not comply with would be Rule 5.93A (because they do not have approval of the owner of the system) would be considered under Rule 5.97. Under that rule such discharges would continue to be discretionary activities outside the boundary of Christchurch City and non-complying activities within that boundary. This would enable the CRC to continue to control the consenting of sites that the territorial authorities consider to be[151] "challenging and critical", including contaminated sites, as the territorial authorities would be able to refuse consent for discharge from those sites into the reticulated stormwater systems under what would be Rule 5.93A. From the evidence, we understand this to be the outcome sought by the territorial authority submitters, and that it would also reflect the existing practice of the CRC.

[410] We also consequentially recommend that Rules 5.94A and 5.94C refer to "…other than into or from a reticulated stormwater system …" in order to be consistent with Rules 5.95 and 5.96. To the extent that such rewording was not explicitly sought by submissions, we recommend it under clauses 10(2)(b) and 16(2) of Schedule 1 to the RMA.

[411] We note that what would be Rule 5.93A would only permit discharges into reticulated stormwater systems prior to 1 January 2025 (as also would Rule 5.94B which we have recommended for omission). Consequently, thereafter all such discharges (which as we discussed under the "Legal Questions" part of this chapter will still require express authorisation under section 15(1)(b) of the RMA) would not be permitted and will require discretionary-activity resource consent under Rule 5.6. Ideally, there would be a permitted-activity rule dealing with discharges into reticulated systems after 1 January 2025, but Plan Change 4 does not propose such a rule.

[412] In that regard the Oil Companies sought omission of Rule 5.95A. To address the post-2025 conundrum outlined above, we recommend accepting the Oil Companies submission in part by deleting the 1 January 2025 date from what would be Rule 5.93A. We understand that this was also the outcome sought by the Christchurch City Council.[152]

[413] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed

[151] Statement of Evidence of Brian Norton for the Christchurch City Council, 29 January 2016, paragraph 24.
[152] Ibid, paragraph 29.

that adopting them would more fully serve the provisions of the Act and superior instruments than not making them.

Chapter Seven
Floodwaters

Introduction

[414] Plan Change 4 proposes a new definition of "floodwaters" being "surface water that has inundated a property as a result of the breaching or over-topping of the banks of a surface waterbody." Plan Change 4 would amend permitted activity Rule 5.142 which allows diversion of surface water runoff caused by flooding, provided that the activity is undertaken by or on behalf of a local authority in accordance with a flood protection plan prepared in accordance with the CRC's River Engineering Section Quality and Environmental Management System Manual. Plan Change 4 would delete the reference in Rule 5.142 to "diversion", inserting instead a reference to the "discharge of floodwaters". The requirement for the discharge having to be undertaken by a local authority in accordance with a flood protection plan would also be deleted. That requirement would be replaced with six new conditions relating to the allowable duration of the discharge, its effects, contaminants it may contain, and the source of the floodwater.

[415] Plan Change 4 also proposes a new discretionary activity Rule 5.142A to cater for activities that do not meet one or more of the new conditions of amended Rule 5.142. Finally, existing Rules 5.143 and 5.144 dealing with diversions and discharges would be deleted.

[416] The proposed amendments are intended to allow individual landowners more flexibility when discharging floodwater from their property to a waterbody than the existing provisions.[153] We agree that providing such flexibility is desirable.

[417] There were three submissions on the definition of floodwaters seeking respectively its retention, deletion and amendment. Rule 5.142 attracted four submissions, three of which sought the deletion of the Plan Change 4 amendments, and one sought the deletion of the new condition relating to the allowable duration of the discharge. The general theme of the submissions was that the six new conditions would be inappropriate, impractical and unenforceable.[154] We concur with those submissions insofar as they address the four new conditions relating to the allowable duration of the discharge, the contaminants it may contain and the source of the floodwater. Two submissions sought the deletion of Rule 5.142A. There were no submissions on the proposed deletion of Rules 5.143 and 5.144.

[418] In the Section 42A Reply Report the officers recommended reinstating the term "diversion" into Rule 5.142, together with deleting four of the rule's new conditions. The remaining conditions would address erosion and the stability of structures. The Reply Report also recommended reinstating the term "diversion" into Rule 5.142A.

[419] We consider that the officers' final recommended wording for Rules 5.142 and 5.142A is appropriate because, notwithstanding the definition of "diversion" within the LWRP,[155] by section 14(1)(2) of the RMA the diversion of floodwaters within a property must be expressly allowed. We also find it appropriate to have conditions addressing erosion and the stability of structures.

[420] However, we consider that Rule 5.142 would benefit from minor refinement to address the issues of practicality and enforceability raised by the submissions. In that regard we consider that both the

[153] Section 32 Evaluation Report for Plan Change 4 (Omnibus), page 15.
[154] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, paragraph H.94.
[155] The LWRP defines "diversion" as being the deflection of water from its natural course, but remaining within the bed or the banks of the water body, or artificial lake or artificial watercourse.

diversion and the discharge allowed by the rule should refer to the property in question. We also consider that the condition addressing erosion should refer to erosion of the property in question and the bed and banks of the receiving surface waterbody. We accordingly recommend further amendments to Rule 5.142 under clauses 10(2)(b) and 16(2) of Schedule 1 of the RMA.

[421] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and superior instruments than not making them.

Chapter Eight
Contaminated land (passive discharges)

Introduction

[422] Plan Change 4 proposed amendments to LWRP Policy 4.19 and Rules 5.187 and 5.188. The amendment to the policy would replace the phrase "contaminated sites" with "contaminated land" to ensure consistency within the LWRP, and to align with the definition of "contaminated land" in section 2.9 of the LWRP.[156]

[423] Rules 5.187 and 5.188 would be amended to clarify that they related to 'passive' discharges (the leaching of contaminants) from contaminated land onto or into land. The rules previously referred to discharges of contaminants onto or into land from contaminated sites. Condition 2 of Rule 5.187 would be amended to require a 'passive' discharge to meet the water quality standards and limits (respectively) of both LWRP Schedule 5 (surface water) and Schedule 8 (groundwater).[157]

[424] Condition 2 of the operative Rule 5.187 refers to a site investigation report identifying reasons for concluding that the Schedule 5 and Schedule 8 requirements are met. The site investigation report was described in Rule 5.185 which is a permitted-activity land-use rule allowing site investigations to assess the concentrations of hazardous substances that may be present in the soil. Plan Change 4 would not amend Rule 5.185, but would amend Condition 2 of Rule 5.187 by deleting the reference to the site investigation report and requiring instead that the 'passive' discharge does not result in a concentration of contaminants that would breach the two LWRP Schedules.

[425] There were three submissions on Rule 5.187 raising concerns about the ambiguity of the term[158] "passive discharges" and the implications of the amendments to Condition 2.[159] Concern was expressed that deletion of the reference to the site investigation report would require significant investment to provide for the drilling of groundwater monitoring bores and the testing of groundwater quality samples.

[426] There was only one submission on Rule 5.188, which sought retention of the Plan Change 4 amendments. Accordingly we do not discuss that rule further.

[427] The Section 42A Report agreed with the submitters that the costs of monitoring contaminated land for passive discharges, particularly where groundwater resources were involved, would likely be significant. However, the authors of the Report contended that the rule itself does not require any groundwater monitoring.[160] The Section 42A Reply Report continued to express concerns about relying on a site investigation report to "identify reasons for concluding" that the LWRP water quality standards and limits would be met.[161] That concern persisted notwithstanding the written answers provided by the officers to our questions advising that the MfE Guidelines referred to in Rule 5.185 require a site investigation and report which identifies the type, extent and level of contamination expected. [162]

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[156] Section 32 Evaluation Report for Plan Change 4 (Omnibus), page 4.
[157] Ibid, page 15.
[158] Trustpower Limited PC4 LWRP-87 sought a definition of "passive discharges" but did not provide any suggested wording in their original submission. The Trustpower evidence of Claire Hunter did not discuss passive discharges or Rule 5.187 and so we have concluded that the relief sought is no longer pursued and we do not discuss it further.
[159] Plan Change 4 (Omnibus) Section 42A Report 15 January 2016, page 131.
[160] Ibid. page 133.
[161] Section 42A Reply Report, page 24.
[162] Response to Commissioner's question DS30, page 24.

[428] At the hearing we heard from Mr David le Marquand, a resource-management consultant, and counsel Mr J G A Winchester, both appearing for the Oil Companies on this matter. In supplementary legal submission provided after the hearing, Mr Winchester submitted:

> Rule 5.187 as originally drafted provides a framework to enable and encourage the scope of those [site investigation] reports required to be provided to Council via Rule 5.185 to include an explicit assessment of the risk of passive discharges exceeding the permitted standards. In the absence of a [site investigation] report that specifically evaluates the risk of the discharge and compliance against the standards for such potential discharges, the Council may be a further step removed from being able to ascertain the likelihood of compliance being achieved. That was certainly the case before the Hearings Panel introduced Rule 5.187 via original decisions on the Land and Water Plan.
>
> Removal of the [site investigation] reporting process from Rule 5.187 may not necessarily provide the Council greater certainty or assurance in terms of permitted activity compliance of the standards, as it may not get the benefit of an assessment from a SQEP [Suitably Qualified Experienced Professional] in relation to those passive discharge standards.[163]

[429] We accept those submissions. Having considered the concerns expressed by the officers (a lack of certainty) and the submitters (additional monitoring costs) we find that the reference to a site investigation report should be reinstated in Condition 2, but that the condition should require the report to "demonstrate" that the requirements of LWRP Schedules 5 and 8 are met. We note that such wording was supported by the Oil Companies.[164] Additionally, we find that Condition 2 should include a reference to "either" a site investigation report or "water quality sampling" in recognition of the fact that in some circumstances it may be necessary to undertake water quality monitoring to demonstrate that the requirements of Schedules 5 and 8 are met.

[430] In making these findings we acknowledge the officers' concerns that the MfE guidelines dictating the nature of the site investigation report do not state a requisite level of competence for the practitioner completing the report, and consequently CRC staff do not consider that they can 'reject' any reports received.[165] We consider that our recommendation that Condition 2 requires the site investigation report to "demonstrate" that the requirements of Schedules 5 and 8 are met would better enable the CRC staff to 'reject' inadequate reports.

[431] On a further matter, one submitter[166] sought that Rule 5.187 be amended to require the identification of contaminants with subsequent actions, although no precise wording was provided and the submitter did not attend the hearing. In response we note that the Ministry for the Environment site investigation reporting guideline[167] requires the report to contain an outline of the contaminants commonly associated with each relevant land use. If water quality sampling is undertaken, the report has to contain a summary table of results for each analyte (contaminant) sampled, together with a site plan showing the extent of soil and/or groundwater contamination that exceeds relevant guideline values. The site investigation report has also to evaluate and recommend remedial actions and ongoing monitoring. We find that those requirements address the submitter's concerns, and we consider that no further amendments to Rule 5.187 are required in that regard.

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[163] Supplementary Legal Submissions on behalf of Z Energy Limited, Mobil Oil NZ Limited, BP Oil NZ Limited (The Oil Companies), 31 March 2016, paragraphs 3.4 and 3.5, page 8.

[164] Ibid, paragraph 3.1, page 7.

[165] Response to Commissioner's question DS33, page 26.

[166] J Demeter PC4 LWRP-398

[167] Contaminated Land Management Guidelines No. 1 Reporting on Contaminated Sites in New Zealand (Revised 2011), Ministry for the Environment, pages 8 to 15.

[432] Finally, we recommend re-ordering some of the wording of Condition 2 of Rule 5.187 to better clarify its intent without changing its meaning. To the extent that such rewording was not explicitly sought by submissions we recommend it under clauses 10(2)(b) and 16(2) of Schedule 1 to the RMA.

[433] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and superior instruments than not making them.

Chapter Nine
Evaluation and Recommendations

Evaluation duties

[434] In accordance with the RMA requirement for a local authority preparing an 'amending proposal' that would amend an operative plan, the CRC had prepared and published an evaluation report on Plan Change 4.[168]

[435] Section 32AA of the RMA requires a further evaluation of any changes that are made to the proposal after the initial evaluation report had been completed. By that provision the further evaluation may be the subject of a separate report, or referred to in the decision-making record.[169]

[436] Clause 10 of Schedule 1 to the RMA directs that a local authority's decision on submissions on a plan is to include such further evaluation, to which it is to have particular regard when making its decision.[170]

[437] We also note that an evaluation report is to contain a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects anticipated from implementation of the proposal.[171]

[438] A further evaluation that is referred to in the decision-making record is to contain sufficient detail to demonstrate that further evaluation has been duly undertaken.[172]

[439] If our recommendations are adopted by the CRC, this report (including its appendixes) is intended to form part of the Council's decision-making record. Therefore, in compliance with the direction in Schedule 1,[173] electing the second option in section 32AA(1)(d), we include in this report the further evaluation of the amendments we recommend to Plan Change 4.

[440] Therefore, in our consideration of the amendments to Plan Change 4 requested in the submissions (whether the recommendations are recorded in the main body of this report or in Appendix A) we have, to the extent practicable, examined and assessed the factors itemised in section 32 to the extent applicable. Where appropriate, we have referred to them in the detail commensurate with the relative scale and significance of the anticipated effects of implementing the amending proposal. In addition, when making our recommendations on the submissions, we have had particular regard to that further evaluation.

[441] Many of the submission points relate to particular provisions of the Plan Change that do not stand alone. Rather, they are contributing elements combined in an integrated body of provisions that is intended to operate as a coherent whole. To the extent that they do, we have also evaluated the whole by reference to the section 32 criteria.

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168 Section 32 Evaluation Report for Plan Change 4 (Omnibus) to the Canterbury Land and Water Regional Plan, 27 August 2015.
169 RMA, s 32AA(1)(d) and (2).
170 RMA, Schedule 1, cl 10(4)(aaa).
171 RMA, s 32(1)(c).
172 RMA, s32AA(1)(d)(ii).
173 RMA, Schedule 1, cl 10(2)(ab).

Reasonably practicable options

[442] In examining whether the amendments to the Plan Change are the most appropriate way to achieve the objectives, we have sought to identify other reasonable practicable options.[174]

[443] In doing that, we have confined ourselves to options presented in the submissions or the section 42A Report, and to combinations or refinements of them. However we have not cast around for other options of our own initiative. That would be beyond our function as hearing commissioners, and could deprive submitters of opportunity to comment on them.

Efficiency and effectiveness

[444] An assessment of the efficiency and effectiveness of amendments to the Plan Change has to involve identifying and assessing the benefits and costs of the anticipated effects of implementing them, including opportunities for economic growth and employment.[175]

[445] Further, if practicable, the assessment is to include quantifying those benefits and costs;[176] and assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[177] In those respects, too, we have confined our consideration of those matters to the evidence given to us by the Council and the submitters. In particular, it would be generally problematic for us to attempt quantify benefits and costs of amendments, the implementation of which may be anticipated to have environmental, social and cultural effects, in comparison with benefits and costs of economic effects that can be assessed in money's worth. So in those respects we have had to be content with assessments that are more broad and conceptual, rather than analytical and calculated.

Most appropriate option

[446] Examining reasonably practicable options, and assessing efficiency and effectiveness of amendments to the Plan Change, are elements in evaluating which is the most appropriate way to achieve the objectives. In that regard we apply the reasoning of the High Court in the Transmission Gully case,[178] that the evaluation is broad enough to include other relevant criteria. In the case of Plan Change 4, it should include the Council's duty to have the LWRP give effect to the higher-order instruments, the NPSFM and the CRPS.

Evaluation

[447] The officers' Reply presented to us included a detailed report to assist us to make a further evaluation on amendments to the Plan Change, on amendments for protection of inanga spawning; management of stormwater; and protection of drinking water; and management of floodwater.[179]

[448] We have considered that report, and except to the extent that in this report we explicitly address a particular topic, we accept it. Rather than composing our own, we adopt this as the report on further evaluation in respect of recommended amendments that is intended to be included in the decision-making record. It is included in the list of reports considered in Appendix C to this report. It is to be

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174 RMA s32(1)(b)(i).
175 RMA s 32(2)(a).
176 RMA, s 32(2)(b).
177 RMA, s 32(2)(c).
178 *Rational Transport Society v NZ Transport Agency* [2012] NZRMA 298 at [45] and [46].
179 P Maw and M McCallum-Clark: *Officers' Reply for Council Reply Hearing,* 29 April 2016 and Section 32AA Evaluation Report for Plan Change 4.

read in conjunction with our own assessments on individual amendments contained in the main body of this report and in Appendix A.

Conclusion and recommendations

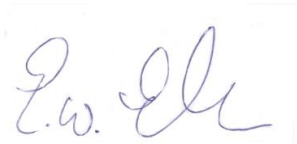
[449] We have considered and deliberated on the proposed Plan Change; the submissions lodged on it; and the reports, evidence and submissions made and given at our public hearings. We have had particular regard to the further evaluation of the amendments to the Plan Change that we are recommending; and to the vision and principles of the Canterbury Water Management Strategy set out in Part 1 of Schedule 1 to the Environment Canterbury (Transitional Governance Arrangements) Act 2016. The relevant matters we have considered, and our reasons for our recommendations, are summarised in the main body of this report and in Appendix A. On our evaluation of them, we are satisfied that those amendments are the most appropriate for achieving the objectives and for giving effect to the National Policy Statement on Freshwater Management 2014 and the Canterbury Regional Policy Statement 2013.

[450] **We therefore recommend the amendments to Plan Change 4 contained in the main body of the report and in Appendixes A and B.**

[451] The proposed plan change incorporating the recommended amendments, including necessary consequential alterations (marked in conventional ways) is in Appendix B. A list of the reports we have considered is in Appendix C.

DATED

David F Sheppard, QSO,, Hearing Commissioner (Chairman)



Edward Ellison, ONZM, Hearing Commissioner

Rob van Voorthuysen, Hearing Commissioner

Appendices

Appendix A – Schedule of Recommended Decisions

Appendix A to this recommendation is separately bound.

Appendix B – Proposed Plan Change 2 – Inclusive of Recommended Amendments

Appendix A to this recommendation is separately bound.

Appendix C – Reference Material

Appended to this document

Appendix C
Reference Material

1. Partially Operative Canterbury Land and Water Regional Plan
2. Vision and Principles of Canterbury Water Management Strategy – Strategic Framework (November 2009), extract from Schedule 1 to Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.
3. Canterbury Regional Policy Statement 2013.
4. National Policy Statement for Freshwater Management 2014.
5. Central South Island Sports Fish and Game Management Plan 2012-2022
6. New Zealand Coastal Policy Statement 2010
7. Section 32 Evaluation Report for Plan Change 4 (Omnibus) to the Canterbury Land and Water Regional Plan, 27 August 2015
8. Plan Change 4 (Omnibus) to the Partially Operative Canterbury Land and Water Regional Plan, Section 42A Report, Report Number R15/148, Including Errata of 15 January 2016
9. Plan Change 4 to the Canterbury Land and Water Regional Plan, Responses to Questions of Hearing Commissioners on Council s42A Report.
10. P Maw and M McCallum-Clark: *Officers' Reply for Council Reply Hearing,* 29 April 2016 (Section 42A Reply Report)
11. Section 32AA Evaluation Report for Plan Change 4 (Omnibus) to the Canterbury Land and Water Regional Plan (Undated).
12. Te Whakatau Kaupapa (1990);
13. Te Rūnanga o NgāiTahu Freshwater Policy;
14. Mahaanui Iwi Management Plan (2013);
15. Iwi Management Plan of Kati Huirapa (1992);
16. Te Taumutu Rūnanga Natural Resource Management Plan (2002);
17. Kai Tahu ki Otago –Natural Resource Management Plan (2005);
18. Te Waihora Joint Management Plan –Mahere Tukutai o Te Waihora (2005);
19. Te Rūnanga o Ngāi Tahu HSNO Statement (2008);
20. Te Pōhā o Tohu Raumati (2007).