Tabled at Hearing 06/09/2016.

BEFORE INDEPENDENT HEARING COMMISSIONERS

UNDER	the Resource Management Act 1991
AND	the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010
IN THE MATTER	of Plan Change 5 to the Canterbury Land and Water Regional Plan

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LEGAL SUBMISSIONS OF COUNSEL FOR THE CANTERBURY REGIONAL COUNCIL

6 September 2016

WYNN WILLIAMS
LAWYERS
CHRISTCHURCH

Solicitor: P A C Maw
(philip.maw@wynnwilliams.co.nz)

Canterbury Regional Council's Solicitor
Level 5, Wynn Williams House,
47 Hereford Street,
P O Box 4341, DX WX11179,
CHRISTCHURCH 8140
Tel 0064 3 3797622
Fax 0064 3 3792467

MAY IT PLEASE THE PANEL

1 These submissions provide a brief update in relation to the appeals on Plan Change 2 and Plan Change 4 to the Canterbury Land and Water Regional Plan (**CLWRP**), as set out in my opening legal submissions dated 22 August 2016.

Plan Change 2

2 The appeal by Combined Canterbury Provinces, Federated Farmers of New Zealand Incorporated against Plan Change 2 to the CLWRP has now been resolved.

3 As set out in my opening submissions, the parties to that appeal filed a Joint Memorandum of Counsel dated 19 August 2016, which set out the proposed agreed basis for resolving the appeal.

4 Justice Nation considered the matter on the papers and issued judgment on 23 August 2016. The appeal was allowed to the extent that the Court ordered that the Council amend the definition of "deep groundwater" in Plan Change 2, as sought in the joint memorandum of counsel.

5 A copy of the judgment will be made available to the Panel.

Plan Change 4

6 The appeal period against the Council's decision on Plan Change 4 to the CLWRP closed on 22 August 2016.

7 In my opening submissions, I referred to the appeal lodged by Trustpower Limited.

8 Since my opening submissions were presented, further appeals have been lodged by the following appellants:

(a) Royal Forest and Bird Protection Society of New Zealand Incorporated; and

(b) ANZCO Foods Limited, CMP Canterbury Limited and Five Star Beef Limited.

9 Copies of these appeals will be made available to the Panel.

Dated this 6th day of September 2016

P. Maw

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P A C Maw
Counsel for Canterbury Regional Council

Tabled at Hearing 06/09/2016

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000145
[2016] NZHC 1965

BETWEEN	COMBINED CANTERBURY PROVINCES, FEDERATED FARMERS OF NEW ZEALAND INCORPORATED Appellant
AND	CANTERBURY REGIONAL COUNCIL Respondent

Hearing:	On the papers
Counsel:	P R Gardner for the Appellant P A C Maw for the Respondent V J Hamm, B G Williams, P D Anderson, C O Carranceja, J D Silcock and M A Baker-Galloway for other parties
Judgment:	23 August 2016

JUDGMENT OF NATION J

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[1] The appellant appealed against the decision of the respondent on submissions on Plan Charge 2 to the Canterbury Land and Water Regional Plan (PC2). The appeal applies to an alleged claimed error of law. The respondent Council has accepted there was an error of law. All parties have agreed to a settlement which would involve the allowing of the appeal and a change to Plan Charge 2. The Court has been asked to recognise the settlement.

[2] I am grateful for the comprehensive memorandum prepared by counsel for respondent and endorsed by counsel for all other parties.

[3] The memorandum informed me as to:

(a) the background to the issue before the Court;

(b) the relief sought by the appellant, Federated Farmers;

(c) the respondent Council's position in respect of the relevant matter; and

(d) the agreed position reached on the matter.

[4] On its appeal, Federated Farmers submitted the Council had made two errors of law. It has abandoned its appeal in respect of the first claimed error of law.

[5] The second error of law related to the Council's decision when it determined that a rule in the plan change should be revised to require a substitute groundwater well to be at least 103 metres deep unless an applicant's site specific investigation demonstrates that a lesser depth is appropriate. The rule is concerned with a requirement that would have to be met if a groundwater well was to be used in substitution for existing surface water takes and stream depleting groundwater takes.

[6] The Council has accepted there was an error of law in the decision it reached in that it was based on an irrelevant consideration, namely the average depth for "deep groundwater" wells of 97 metres to 103 metres in part of the area to which the restriction relates. The Council accepts that its decision should not have been based on that average depth. It should have been based on the evidence for the Council that a well screened deeper than 80 metres below ground level is a "deep" well and a groundwater take from a depth of 80 metres or more is not stream depleting.

[7] Through the allowing of the appeal and implementation of the settlement agreed to by the parties, I am asked to approve a variation which recognises this mistake was made and the implications of the relevant expert evidence.

[8] I accept the submission made for all parties that on the hearing of an appeal this Court can approve the proposed amendment to the definition of "deep groundwater" in PC2 under its power to substitute its decision for that of the Council, rather than remit the matter back to the Council.[1]

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[1] Rule 20.19(1)(a).

[9] I also accept the submissions of all parties through the memorandum that the amendment to PC2 as sought is appropriate given:

(a) the consent orders sought are within the scope of the appeal;

(b) the proposal to settle the appeal by making the proposed amendment represents a just, speedy and inexpensive way to determine this proceeding. In that regard, one of the fundamental purposes of the ECan Act (in particular by dispensing with merits appeals to the Environment Court in favour of appeals to this Court on points of law only) is to enable PC2 to be made operative as soon as possible in order to facilitate better water management of the water resources of the Lower Hinds/Hekeao Plains area;

(c) agreement has been reached on the resolution by all parties joined to the proceedings, representing a cross-section of the community;

(d) the proposed amendment is consistent with the purpose and principles of the RMA, including in particular, Part 2; and

(e) given the narrow scope of the relief jointly requested, it is not necessary for the matter to be remitted back to the Council for determination.

[10] I also acknowledge the parties recognition that consent orders via appeals may not always be appropriate where the appeal relates to a public law process and where there must be due consideration given to the wider public interest in the promulgation of planning instruments.[2] I accept the submission made for the parties that, given the breadth of participation in the appeal, the wider public interest is best served by giving effect to the consensus which has been achieved.

[11] Accordingly, and by consent, the appeal is allowed to the extent that this Court orders that the respondent amends Plan Charge 2 to the Canterbury Land and Water Plan as set out in appendix 1 to this order.

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2 *Meridian Energy Limited v Canterbury Regional Council* HC Christchurch CIV-2010-409-2604, 23 May 2011 at [11] per Whata J.

[12] There is no order as to costs.

Solicitors:
Wynn Williams, Christchurch
Buddle Findlay, Christchurch
Chapman Tripp, Christchurch
Holland Beckett, Tauranga
P R Gardner, Solicitor
Anderson Lloyd, Queenstown
P D Anderson, Royal Forest & Bird Protection Society of NZ.

Appendix 1 – Amendments to Plan Change 2

~~Single strike through~~ – proposed deletion to decision version of Plan Change 2.

Single underline – proposed additions to decision version of Plan Change 2.

1 Make the following amendment to the definition of "deep groundwater" in 13.1A:

Definition of "Deep groundwater"

"means groundwater that is abstracted from a depth of at least ~~103~~ 80m below ground level."

Tabled at Hearing 06/09/2016

IN THE HIGH COURT OF NEW ZEALAND

CHRISTCHURCH REGISTRY **CIV-2016-**

IN THE MATTER	of an appeal under section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010
BETWEEN	**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED,** an incorporated society having its registered office at Level 1, 90 Ghuznee Street, Wellington *Appellant*
AND	**CANTERBURY REGIONAL COUNCIL,** a regional authority under Schedule 2 of the Local Government Act 2002 *Respondent*

NOTICE OF APPEAL

22 August 2016

Royal Forest and Bird Protection Society of New Zealand Inc.
PO Box 2516
Christchurch 8140
Ph 03 9405524
Solicitor acting: Peter Anderson/Sally Gepp

To: **The Registrar of the High Court at Christchurch**

And to: **Canterbury Regional Council**

TAKE NOTICE that the Royal Forest and Bird Protection Society of New Zealand Incorporated (the Appellant) will appeal to the High Court against the decisions of the Canterbury Regional Council (the Respondent) on Plan Change 4 to the Canterbury Land and Water Regional Plan dated 29 July 2016, upon the grounds that the decisions are wrong in law.

DECISIONS OR PARTS OF DECISIONS APPEALED AGAINST

1. The Proposed Canterbury Land and Water Plan (the plan) contains objectives, policies and rules that manage land, water and biodiversity within the region in conjunction with other non-statutory methods.[1] Plan Change 4 changes the plan by, among other things, varying provisions relating to inanga spawning habitat and sites, earthworks and vegetation clearance.[2]

2. The Appellant appeals against decisions on Plan Change 4. The decisions were adopted by the Respondent on recommendations made by the Independent Commissioners appointed by the Respondent (the Commissioners).

ERRORS OF LAW

First alleged error of law – scope for amendment to definition of inanga spawning habitat

3. The Respondent decided it did not have scope to amend the definition of inanga spawning habitat by deleting the words "*is between mean high water springs and mean low water neaps*" as sought by the Appellant. In doing so the Respondent erred by:

    (a) applying the wrong legal test, in particular taking an unduly narrow and legalistic approach to the question of whether relief sought at the hearing was fairly and reasonably within the scope of submissions; and/or

[1] Page 27

[2] *This is fully described in paragraph [4] of the recommendation as follows "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."*

(b) failing to take into a account relevant consideration, specifically relevant parts of the submission that sought the protection of inanga spawning habitat and sites; and/or

(c) Took into account an irrelevant consideration when it considered other people might be prejudiced by the change sought to the definition.

Second alleged error of law – Scope for excluding inanga spawning habitat in CMA

4. The Commissioners recommended that changes be made to the planning maps, excluding areas identified as inanga spawning habitat that were within the coastal marine area (CMA).[3] The Commissioners acknowledged[4] that there were *"no submissions seeking clarification of the boundary between the "inanga spawning habitat" on the planning maps and the location of the Coastal Marine Area"*.

5. The Respondent, in making amendments to the planning maps to exclude inanga spawning habitat" from within the CMA, when there were no submissions seeking such amendments erred by:

   (a) applying the wrong legal test, specifically by considering it was entitled to make such amendment in the absence of a submission; and/or

   (b) failing to take into account relevant considerations, specifically:

      (i) there were no submissions seeking such amendment; and

      (ii) that the CMA boundary that its decision was based on was indicative only.

Third alleged error of law - Failure to give effect to NZCPS and Canterbury RPS

6. The Respondent is required to give effect to the New Zealand Coastal Policy Statement (NZCPS) and Canterbury Regional Policy Statement (CRPS).

7. In defining inanga spawning habitat as limited to areas between mean high water springs and mean low water neaps and thereby excluding areas of inanga spawning habitat between MHWS and MHWS10, the Respondent erred by failing to give effect to the:

[3] [294]-[295]
[4] [293]

(a) New Zealand Coastal Policy Statement, including Policy 11 which requires the avoidance of adverse effects on threatened or at risk species;

(b) Canterbury Regional Policy Statement, including Policies 7.3.3, 8.3.3, 9.5.5, 10.3.2 and 10.3.4.

Fourth error of law – Unreasonable/mistake of fact to limit inanga spawning habitat to below MHWS

8. The Respondent's decided to define inanga spawning habitat as only those areas below MHWS, when the mapping of the habitat was based on MHWS10. This:

   (a) excludes areas of inanga spawning habitat above MHWS but below MHWS10; and

   (b) creates confusion an uncertainty as it is not apparent which areas marked in the planning maps as inanga spawning habitat meet the definition of inanga spawning habitat.

9. The decision is unreasonable as no decision maker properly understanding their functions, would have made a decision to exclude areas where inanga might spawn from the definition of inanga spawning habitat. The decision contains an evident logical fallacy and is clearly unsupportable.

10. In the alternative, the decision is based on a mistake of fact, in that the Respondent mistakenly believed that the definition would cover all scheduled areas of inanga spawning habitat, when in fact it does not.

Fifth alleged error of law – scope for change to definition of "vegetation clearance"

11. The Respondent, in ruling that it did not have scope to amend the definition of vegetation clearance, as sought by the Appellant at the hearing, took an unduly narrow and legalistic approach to the question of whether relief sought at the hearing was fairly and reasonably within the scope of submissions.

12. In relation to the change sought to clause (a) of the definition of vegetation clearance, where the Appellant sought the addition of the words "*except where the cultivation is in the beds or margins of rivers or lakes*", the Respondent failed to take into account a relevant consideration, particularly that the Appellant had sought this amendment at the hearing in its submission.

13. In relation to the changes to clause (b) of the definition of vegetation clearance, the Respondent:

    (a) misinterpreted the law, when it decided that the Appellants original submission, which sought the deletion of (b), was not "on the plan change". In particular, the Respondent took an unduly narrow view of the matters that were the subject of the plan change

    (b) failed to take into account a relevant consideration, in particular, parts of the Appellant's submission that provided scope for the amendments sought at the hearing.

Sixth alleged error of law –Unreasonable failure in Rule 5.71 to implement Policy 4.31

14. Policy 4.31(b) as notified provided for the protection of listed resources, including inanga and spawning sites, from disturbance by stock. The Respondent decided 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'"*.

15. Rule 5.71 implements part of Policy 4.31. However, it provides no protection *"closely adjacent to and upstream"* from the listed resources.

16. The failure to provide such protection in Rule 5.71 or elsewhere in the rules is unreasonable, the result of an evident logical fallacy or clearly unsupportable.

QUESTIONS OF LAW

First alleged error of law – scope for amendment to definition of inanga spawning habitat

17. Did the Respondent, in ruling that it could not amend the definition of inanga spawning habitat as sought by the Appellant at the hearing, through deleting the words *"is between mean high water springs and mean low water neaps*:

    (a) apply the wrong legal test, by taking a unduly legalistic and narrow approach to the question of whether relief sought at the hearing was within scope? and/or

(b) fail to take into account a relevant consideration, specifically relevant parts of the Appellant's submission that sought the protection of inanga spawning habitat and sites? and/or

(c) take into account an irrelevant consideration, particularly that there were people who might have been prejudiced by the amendment sought.

Second alleged error of law – Scope for excluding inanga spawning habitat in CMA

18. Did the Respondent, in making amendments to the planning maps to exclude *"inanga spawning habitat"* from within the CMA, when there were no submissions seeking such amendment:

(a) apply the apply the wrong legal test, in particular considering that it could make such a change without a submission? and/or

(b) fail to take into account a relevant consideration, specifically that there were no submissions seeking such amendments?

Third alleged error of law - Failure to give effect to NZCPS and Canterbury RPS

19. In defining inanga spawning habitat as limited to areas between mean high water springs and mean low water neaps and thereby excluding areas of inanga spawning habitat between MHWS and MHWS10, did the Respondent fail to give effect to the:

(a) New Zealand Coastal Policy Statement including Policy 11?

(b) Canterbury Regional Policy Statement, including Policies 7.3.3, 8.3.3, 9.5.5, 10.3.2 and 10.3.4?

Fourth alleged error of law – Unreasonable to limit inanga spawning habitat to below MHWS

20. Was the Respondent's decision to limit areas of inanga spawning habitat to habitat between mean high water springs and man low water neaps:

(a) unreasonable? and /or

(b) the result of an evident logical fallacy? and/or

(c) clearly unsupportable? and/or

(d) based on a mistake of fact?

Fifth alleged error of law – scope for change to definition of "vegetation clearance"

21. Did the Respondent, in ruling that it did not have scope to amend the definition of vegetation clearance as sought by the Appellant at the hearing, apply the wrong legal test by taking an unduly legalistic and narrow approach to the question of whether relief sought at the hearing was within scope?

22. In relation to the change sought to clause (a) of the definition of vegetation clearance, where the Appellant sought the addition of the words "*except where the cultivation is in the beds or margins of rivers or lakes*", did the Respondent fail to take into account a relevant consideration, particularly that the Appellant had sought this amendment at the hearing?

23. In rejecting the changes the Appellant sought to (b) did the Respondent:

    (a) misinterpret the law, when it decided that the Appellants original submission, which sought the deletion of (b), was not "on the plan change". In particular, did the Respondent take an unduly narrow view of the matters that were the subject of the plan change?

    (b) fail to take into account a relevant consideration, in particular, parts of the Appellant's submission that provided scope for the amendments sought at the hearing.

Sixth alleged error of law –Rule 5.71 does not implement 4.31

24. Was the decision not to include in the rules any protection upstream of identified sites, the result of an evident logical fallacy or clearly unsupportable, when the Respondent expressly decided that such protection should apply?

GROUNDS OF APPEAL

First alleged error of law – scope for amendment to definition of inanga spawning habitat

25. In Plan Change 4 the Respondent 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'*". This included the

mapping of areas sites that were inanga spawning habitat and rules to protect such habitat from damaging activities.

26. The Appellant was a submitter on Plan Change 4, submitting in support of the provisions providing greater protection of inanga spawning habitat and sites including on the definition of inanga spawning habitat and the policies and rules that provided protection to inanga spawning habitat and inanga spawning sites. At the hearing, the Appellant sought the deletion of the words "*is between mean high water springs and mean low water neaps*".[5]

27. The Commissioners considered whether the changes that were not exactly the same as those identified in the original submission where within scope in great detail.[6] The Commissioners identified their approach to ascertaining whether relief was within the scope of submissions in [19] and [20] as considering the plan change and the submission and approached in a realistic workable fashion and not from the perspective of legal nicety with the question of whether people had the opportunity to effectively respond relevant.[7]

28. The Respondent took an unduly narrow view to the relevant part of the submission. The part of the submission that the Commissioners considered relevant was the retention of the definition.[8] There were other parts of the submission that are relevant. These include but are not limited to those set out below

[5] The deletion that was sought are the words underlined (a minor grammatical change was also sought).
Inanga Spawning Habitat: means that part of the beds 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' on the Planning Maps.

[6] [122]-[207]

[7] *[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. 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; and again whether people would be denied opportunity to effectively respond is relevant. [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.*

[8] [131]

4.86A	Support in part	The use of the phrase 'as a first priority' effectively undermines the protection given by the policy. Further, if avoidance cannot be avoided (the policy gives no guidance on what acceptable grounds for not being able to avoid), the 'best practicable' option can simply be used. 'Best practicable option' is defined in the LWRP, but the definition only relates to emissions of noise and contaminants. The definition does not provide guidance on all the likely disturbance activities that could affect inanga spawning sites.	Amend policy to read: "Inanga spawning sites are protected though avoiding activities within the beds and margins of lakes, rivers, hapua, wetlands, coastal lakes and lagoons that may damage inanga spawning sites."
4.86B	Support in part	Delete 'where it is practicable' as currently written it is meaningless. Support the extension of time for habitat rehabilitation.	Delete 'where it is practicable'.
Section 5 – Rules: 5.136, 5.137, 5.138, 5.139, 5.140, 5.141, 5.148, 5.151, 5.152	Support in part	F&B supports the general approach of these rules to protect both Inanga Spawning Sites and Habitat. However, the extended period (1 Jan - 1 June) should apply to all activities in Inanga Spawning Habitat, given the likely disturbance of that habitat and the need for it to recover before spawning occurs. Also note that Table 1 – Amendment Categories lists 5.152A as a changed rule in this Category. That appears to be an error; the change has been made to 5.152.	
5.163, 5.167, 5.168, 5.169, 5.170	Support	These rules provide appropriate protection for Inanga.	Retain
5.140A	Oppose	The exceptions relating to Inanga Spawning Sites and Habitat should apply to this activity.	Insert Inanga exceptions into this rule.

29. There is scope to make amendments based on submissions where the changes where such consequential changes flowed downwards from any amendment sought in the submissions as a whole.[9] The realistic working approach to interpreting

[9] *Campbell v Christchurch City Council* C40/2002, [20]
[20] The High Court's guidance in Countdown is, with respect, very useful on the issue as to whether a Council may make changes not sought in any submission. It appears that changes to a plan (at least at objective and policy level) work in two dimensions. First an

submissions includes consideration of whether the submissions as a whole fairly and reasonably raise some relief, expressly or by reasonable implication, about an identified issue.[10]

30. When adopting the appropriate realistic workable approach, the amendment sought which ensures that the inanga spawning habitat identified on the planning maps and intended to be protected, is protected, is fairly and reasonably within the scope of the Appellants submission, which supported the policies which provided for the protection of inanga spawning habitat.

31. The Respondent did not look at the submissions as a whole, instead narrowly focussing on part of the Appellant's submission. Nobody would have been prejudiced by the amendment proposed by Forest & Bird, as there was no change to the mapped areas of inanga spawning habitat. The change was to address an anomaly in the definition that is inconsistent with the mapping.

32. If the proper approach was adopted, the relief sought at the hearing was within the scope of the submission.

Second alleged error of law – scope for amendment to planning maps

33. The Respondent had the power to make amendments to Plan Change 4 that were fairly and reasonably within the scope of submissions. There was no submission seeking the exclusion of inanga spawning habitat from the CMA from the planning maps. The decision to exclude such sites was beyond scope.

Third alleged error of law – Failure to give effect to NZCPS and Canterbury RPS

34. Inanga are an 'at risk'/declining' native fish species. The NZCPS and Canterbury RPS provide a strong directive to maintaining, enhancing and protecting 'inanga

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amendment can be anywhere on the line between the proposed plan and the submission. Secondly, consequential changes can flow downwards from whatever point on the first line is chosen. This arises because a submission may be on any provision of a proposed Plan. Thus a submission may be only on an objective or policy. That raise the difficulty that, especially if:

(a) a submission seeks to negate or reverse an objective or policy stated in the proposed plan as notified; and

(b) the submission is successful (that is, it is accepted by the local authority)

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

[10] *Campbell v Christchurch City Council* C40/2002

Both of the High Court cases were concerned with what relief could be granted even if not expressly sought as such in a submission. There was no direct issue in those cases as to whether the relevant submissions were sufficiently clear in themselves. I hold that the same general test applies - does the submission as a whole fairly and reasonably raise some relief, expressly or by reasonable implication, about an identified issue.

spawning habitat'. This is supported by other provisions in the plan. Policy 11 of the NZCPS requires that adverse effects on threatened and at risk species are avoided. The Respondent correctly concluded that the identification of inanga spawning habitat is fundamental to giving effect to the intent of this direction.

35. The Respondent's modelling of inanga spawning habitat was based on mean high water spring 10 (MHWS10), which is the upper limit of 90% of all tides.[11] The definition of inanga spawning habitat includes a requirement that inanga spawning habitat be between mean high water springs and mean low water neaps, excludes areas of habitat where inanga could spawn, in particular between MHWS and MHWS10 and does not give effect to the NZCPS or the Canterbury RPS.

Fourth alleged error of law – Unreasonable to limit inanga spawning habitat to below MHWS

36. The section 32 report misinterprets the MHWS10 that the inanga habitat was modelled on as the "high spring tides". This is carried through to a reference to mean high water spring in the definition of inanga spawning habitat.[12]

37. This creates an anomaly in that the planning maps were developed using MWHS10 as the most landward that inanga spawning habitat will occur but the definition of inanga spawning habitat is limited to below MHWS. This anomaly fails to protect habitat that Plan Change 4 sought to protect and creates confusion and uncertainty. This is based on an evidence logical fallacy and is clearly unsupportable.

Fifth alleged error of law – scope for change to definition of "vegetation clearance"

38. Clause (a) of the definition of vegetation clearance provides an exemption for cultivation. The Appellants original submission sought that clause (a) be "*amended so that effects on biodiversity are addressed*".

39. Clause (b) of the definition of vegetation provides an exemption for the establishment and maintenance of utilities or structures. The Appellant's original submission sought the deletion of (b).

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[11] *Predicting inanga/whitebait spawning habitat in Canterbury*, part 2, page 4 - *The study by Mitchell & Eldon (1991) showed that inanga eggs are generally laid above the neap tide level during a spring tide cycle. Based on this this finding, we established that MHWS 10 (the upper limit of 90% of all tides) was the best MHWS level to use in the analyses.*

[12] *"To ensure that this does not result in unnecessary resource consenting, a new definition will be added to the LWRP which defines 'inanga spawning areas' as those areas identified on the planning maps and located between the spring high tide and the neap low tide water levels, within a river or artificial watercourse. The inclusion of this definition refines the provisions so that they only relate to areas where inanga have the ability to spawn."*

40. At the hearing, the Appellant provided more detail, proposing wording changes that:

    (a) would limit the exemption such that it would not apply in beds and margins of water bodies; [13] and

    (b) would limit the exemption such that it would not apply to in inanga spawning habitat or in identified rivers, specifically the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata or Waitaki rivers (the identified rivers).

41. The Respondent concluded that changes sought by the Appellant to the definition of vegetation clearance were out of scope.

42. The Respondent appears not to have understood that the Appellant sought the change to (a) relating to the addition of reference to the bed and banks of rivers. This change is not identified and assessed by the Respondent in the decision. However, less significant changes sought by the Appellant to (a) are identified and assessed. In ruling that all the Appellant's amendments to the definition of vegetation clearance were beyond scope, the Respondent has failed to take into account a relevant consideration, specifically that the Appellant sought the amendment.

43. Plan Change 4 did not seek to amend (b). The Appellants original submission sought the deletion of (b). The Respondent concluded that the Appellant's original submission seeking deletion of (b) was not "on the plan change". Plan Change 4 sought to amend the definition of vegetation clearance and therefore a submission on the definition of vegetation is on the plan change.

44. In any event, there are there are elements of (b) which are matters addressed by Plan Change 4. These relate to protection of inanga spawning habitat and the beds of the identified rivers. Insofar as the Appellant's submission seeks the exemption in (b) not apply in inanga spawning habitat and the beds of the identified rivers, it is on the plan change.

45. In the alternative, when deciding that the amendments sought to (b) were not within the scope of the Appellants submission, the Respondent an unduly narrow approach to the parts of the submission that were relevant. The Respondent focused

[13] The Appellant also sought other changes to the definition of that were ruled out of scope. This included the addition of the words "*for the establishment*" and the deletion of the words "*on production land prior to 5 September 2015*". These are not pursued as the former was to provide clarification and the latter change was in fact made by the Respondent, despite ruling it had no scope to do so based on the Forest & Bird submission.

only on the part of the submission that related to (b). There are other parts of the submission that are relevant.[14] These include the submission on Policy 4.86A set out above and:

5.163 5.164 5.165	Support in part	This rule manages both vegetation removal and disturbance, whish is appropriate. However, the vegetation clearance definition only refers to 'removal' of vegetation. As per our submission point above, the definition needs to include vegetation alteration and disturbance. Otherwise the Plan will be failing to manage a potentially significant adverse effect. Support change to 5.163(2). 5.163(6) is now too narrow, and will only manage the effects of removal. Both the definition (as submitted above) and the rules need to incorporate disturbance and damage to vegetation. 5.163 (8) – the rule needs to make clear on what basis those agencies would give the permission. Support intended protection of the rivers listed in 5.163(9), but this condition is far too broad and unworkable for a permitted activity. There is no way that this could be accurately assessed by a plan user, and conversely it would be almost impossible for the Council to monitor and enforce. Taken literally, any vegetation clearance will result in the reduction in at least the area, if not the diversity of existing riverbed vegetation. Support this activity being dealt with as a non-complying rule (as per 5.165). Further, a number of braided rivers, not only alpine rivers, provide habitat for endangered bird species. Their nests are often cryptic and breeding sites may not be obvious. More needs to be done to enhance nesting outcomes, including e.g. lupin removal, and controls on activities in these rivers. If this PC is not going to include provisions to protect braided rivers, the third option mentioned in the s32A report (top of pg 45) should be pursued without delay, and another PC proposed to give effect to it.	Retain words: 'and disturbance' in Introduction to rule. Retain 5.163(2). Amend (6) to manage both removal and alteration/disturbance. Amend (8) to include detail on basis for and required details of permission. Amend condition (9) to read: "From 5 September 2015, no vegetation clearance takes place in the bed of the Clarence, Waiau, Hurunui, Waimakariri, Rakaia, Rangitata, and the Waitaki rivers." Include provisions to protect all braided rivers used by endangered bird species.

46. These submissions seek protection for inanga spawning habitat and the beds of the identified rivers changes from activities including vegetation clearance. The amendments sought by the Appellant, which ensure that there is protection for these sites from vegetation clearance otherwise exempted from the definition of vegetation clearance, is fairly and reasonably within the scope of these submissions

[14] These include but are not limited to:

Sixth alleged error of law –Rule 5.71 does not implement Policy 4.31

47. Policy 4.31 relates to the exclusion of stock to provide protection for inanga and salmon spawning habitat. Forest & Bird lodged a further submission supporting a Fish & Game submission seeking amendment to provide for the protection of "*the waterbody bed and banks closely adjacent to and upstream of these areas*" in addition to the areas themselves. The Respondent accepted this submission.

48. Policy 4.31 is implemented in part by Rule 5.71. However, Rule 5.71 provides no protection to "*the waterbody bed and banks closely adjacent to and upstream of these areas*". There is an evident logical fallacy in amending Policy 4.31 on the basis that protection is needed for waterbody bed and banks closely adjacent to and upstream of these areas, but failing to provide any such protection in Rule 5.71 or elsewhere in the rules.

RELIEF SOUGHT

49. The Appellant seeks the following relief:

    (a) That the appeal is allowed.

    (b) A declaration that the Respondent erred in relation to the questions of law set out in this notice of appeal;

    (c) That the Respondent's decisions are quashed;

    (d) That the Respondent's is directed to reconsider Plan Change 4 in light of the High Court's findings on the matters set out above.

    (e) The costs of this appeal.

Dated 22 August 2016

Peter Anderson / Sally Gepp
Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc

Address for service
M: 0212866992
Email: p.anderson@forestandbird.org.nz
Post: PO Box 2516
Christchurch 8140

Tabled at Hearing 06/09/2016.

In the High Court of New Zealand
Christchurch Registry

CIV-2016- 409-725

Under	the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010
In the Matter of	an appeal under section 66 of the Act in relation to Plan Change 4 to the Canterbury Land and Water Regional Plan
Between	**ANZCO FOODS LIMITED, CMP CANTERBURY LIMITED AND FIVE STAR BEEF LIMITED** **Appellants**
Between	**CANTERBURY REGIONAL COUNCIL** a local authority constituted under the Local Government Act 2002 **Respondent**

Notice of Appeal under Section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management Act) 2010

Dated: 22 August 2016

Lane Neave
141 Cambridge Terrace
PO Box 2331
Christchurch
Solicitor Acting: Amanda Dewar
Email: amanda.dewar@laneneave.co.nz
Phone: 03 379 3720

lane neave.

To: The Registrar, High Court, Christchurch

And to: The Canterbury Regional Council, Christchurch

And to: Those parties who filed submissions and further submissions on the matter (to be served within five working days of this Notice of Appeal).

TAKE NOTICE that ANZCO Foods Limited, CMP Canterbury Limited and Five Star Beef Limited (**Appellants**) hereby appeal against the decision of the Canterbury Regional Council (**Respondent**) in relation to Plan Change 4 (**PC4**) to the Canterbury Land and Water Regional Plan (**Plan**), such decision being publicly notified on 30 July 2016 (**Decision**) **UPON THE GROUNDS** that the Decision is erroneous at law.

The Appellants lodged a submission and a further submission in respect of numerous Plan provisions including those with which this appeal is concerned.

Decision Appealed

1. **The Appellants appeal against parts of the Decision. In particular:**

   (a) Rule 5.92; and

   (b) The definition of "Community Water Supply".

Rule 5.92

Errors of Law

2. The Appellants allege the following error of law was made by the Respondent in the course of its decision-making:

   (a) The Respondent failed to take into account, in its section 32 analysis, relevant matters in deciding whether to retain Rule 5.92 as notified, as opposed to the relief put forward by the Appellants.

Questions of Law

3. The Appellants allege that the above error of law gives rise to the following questions of law:

(a) Did the Respondent fail to adequately assess the inefficiencies and ineffectiveness, in particular the duplication of costs, of retaining Rule 5.92 as notified?

(b) Did the Respondent err in rejecting the Appellants relief on the basis that it was not more effective and reasonably practicable option to achieve the objectives of the Plan than Rule 5.92 as notified?

(c) Did the Respondent err in concluding that the Appellants relief did not give effect to the superior instruments, being the Canterbury Regional Policy Statement and the National Policy Statement for Freshwater Management?

(d) As a consequence of failing to take into account relevant matters under section 32 of the Resource Management Act 1991 did the Respondent reach a decision on Rule 5.92 that was unreasonable?

Grounds for appeal

4. The Respondent failed to consider the duplication of process, and therefore cost, when retaining Rule 5.92 as notified which controls discharges of waste from industrial and trade processes. This is because the Appellants, and other parties, may also be controlled by up to 21 other discharge Rules relating to farming activities in the Plan, for which consent may also need to be sought. This is not an effective or efficient way to achieve the objectives of the Plan.

5. The concerns raised by the Appellants were in part recognised by the PC4 Council Officer and through his section 42A Report proposed an alternative note to be inserted under Rule 5.92 as follows:

> *Note: If operating under a resource consent granted pursuant to Rule 5.92 for the discharge of liquid waste from livestock processing, which includes limits on the amount of nutrients that may be discharged, no resource consent is required under Rules 5.41-5.64.*

6. However, the Respondent failed to adopt either the Appellants relief or the section 42A Report recommendation and instead rejected the relief sought by the Appellants for the following reasons:

"We are not persuaded that the amendment requested would be a more effective and reasonably practicable option for achieving the objectives of the LWRP, and for giving effect to the superior instruments."

7. There is no conflict with any superior instruments as a result of the relief requested by the Appellants. The Appellants will still be required to obtain appropriate Resource Consent for discharge activities resulting from their industrial and trade processes.

Relief sought

8. The Appellants seek:

(a) That the appeal be allowed;

(b) That Rule 5.92 be amended by the addition of the following note after the rule:

The discharge from activities such as livestock processors contains effluent from animals. If consent is required for these discharges Rules 5.91 and 5.92, then consent is not required under Rules 5.41 - 5.64 (nutrient discharges and incidental discharges) any applicable sub-regional nutrient and incidental nutrient discharge rule (including 11.5.6 - 11.5.17), and 5.65 - 5.67 (fertiliser use).

(c) As a consequential change of the requested relief, include the following definition for "farming activity":

Farming activity: means the activity of growing crops and/or raising livestock. This does not include livestock processing operations including their discharges to land.

(d) As an alternative to any or all of the relief sought at 7(b) through to 7(d), that the provision referred to be remitted back to the Respondent for reconsideration in light of the findings arising out of resolution of this appeal;

(e) Such further and other relief as may be appropriate to give effect to this appeal and meet the concerns of the Appellants;

(f) The costs and incidentals to these proceedings.

Definition of Community Water Supply

Errors of Law

9. The Appellants alleges the following error of law was made by the Respondent in the course of its decision-making:

   (a) The Respondent rejected the Appellants alternative relief to the definition of "Community Water Supply" and in doing so came to a conclusion that was not supported by any evidence.

Questions of Law

10. The Appellants alleges that the above error of law gives rise to the following question of law:

   (a) Did the Respondent unlawfully fail to provide relevant reasons for rejecting the Appellants alternative relief in accordance with clause 10 to the Schedule 1 of the Resource Management Act 1991?

Grounds for appeal

11. The Appellants refined the relief sought through its legal submissions at the hearing on PC4 through two alternative provisions.

12. The first alternative sought an amendment to the definition of "Community to Water Supply" to address particular emergency conditions (**First Alternative**).

13. The second alternative sought the introduction of a new rule to address the same emergency conditions (**Second Alternative**).

14. The Respondent stated in its written decision that the Second Alternative was out of scope of PC4.

15. The Respondent's written decision accepted that the First Alternative was within scope of PC4 but rejected the Appellants submission stating that:

> *"We are not persuaded that the amendment requested would be a more effective and reasonably practicable option for achieving the objectives of the LWRP, and for giving effect to the superior instruments."*

16. This was in error as the section 42A report did not discuss the First Alternative, nor was it able to, as the First Alternative was only presented at the PC4 hearing.

17. Accordingly, the Respondent did not provide valid reasons for rejecting the Appellants' submission on the definition of "Community Water Supply, and has reached a conclusion that was not supported by any evidence.

Relief sought

18. The Appellants seek:

(a) That the appeal be allowed;

(b) The definition of "Community Water Supply" be amended to read:

1. *means water primarily for community drinking-water supply, and includes that also used for institutional, industrial, processing, or stockwater purposes, or amenity irrigation use and fire-fighting activities; or*

2. *for livestock processing from a processing facility existing as at [date] during emergency conditions for an abstraction period not exceeding 6 months. For the purpose of this definition, emergency conditions means an event or condition such as drought or biosecurity risk that causes an unexpected increase in livestock being processed.*

(c) Or as a consequential and alternative relief to address the concerns raised by the Appellants, the introduction of the following rule:

Rule 5.X
The taking and use of groundwater that does not meet conditions 2 and 3 in Rule 5.128 and is associated with livestock processing from a processing facility existing as at [date] during emergency conditions[1] for an abstraction period not exceeding 6 months, is a restricted discretionary activity.

The exercise of discretion is restricted to the following matters:

1. *The rate, volume and duration of the take;*
2. *Whether the amount of water to be taken and used is reasonable for the proposed use;*
3. *The actual or potential adverse environmental effects the take has on any other authorised takes, including interference effects as set out in Schedule 12;*
4. *The availability and practicality of using alternative supplies of water; and*

5. *The protection of groundwater sources, including the prevention of backflow of water or contaminants.*

6. *The nature of the emergency conditions, their duration and the amount of additional water abstraction that is necessary.*

[1] *For the purpose of this rule emergency conditions means: an event such as a drought or a biosecurity risk which causes an unexpected increase in livestock being processed.*

(d) As an alternative to the relief sought that the matter be remitted back to the Respondent for reconsideration in light of the findings arising out of resolution of this appeal;

(e) Such further and other relief as may be appropriate to give effect to this appeal and meet the concerns of the Appellants;

(f) The costs and incidentals to these proceedings.

DATED at Christchurch this 22nd day of August 2016

Amanda Dewar
Counsel for the Appellants

This Notice of Appeal is filed by **AMANDA CAROLE DEWAR**, solicitor for the Appellants. The address for service of the Appellants is at the offices of Lane Neave, 141 Cambridge Terrace, Christchurch.

Documents for service may be left at that address for service or may be:

(a) posted to the solicitor at PO Box 2331, Christchurch 8140; or

(b) transmitted to the solicitor by facsimile to (03) 379 8370

(c) emailed to amanda.dewar@laneneave.co.nz