Tabled at Hearing 12/12/2016.

Proposed Plan Change 5 Canterbury Land and Water Regional Plan (Nutrient Management & Waitaki)

Responses to the Questions of the Hearing Commissioners on the Section 42A Reply Report - 12 December 2016

Philip Maw (PM), Matthew McCallum-Clark (MMC), Devon Christensen (DC), Helen Shaw (HS), Melissa Robson (MR)

Paragraph	Question
General	**Does s 70 RMA apply to permitted activity land-use rules? (Proposed revision of Ngai Tahu requested rule in Winchester memo 20/20/16 paras 4.2f.)**

Response PM:

Section 70(1) requires that before a regional council includes a permitted activity rule in a regional plan that allows either:

a. the discharge of a contaminant or water into water; or

b. the discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,

the regional council must be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge:

c. The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

d. Any conspicuous change in the colour or visual clarity:

e. Any emission of objectionable odour:

f. The rendering of fresh water unsuitable for consumption by farm animals:

g. Any significant adverse effects on aquatic life.

Under the RMA, there is a presumption that the use of land is permitted, unless controls are specified in a national environmental standard, regional rule or district rule.[1] However, the reverse presumption applies in respect of the discharge of a contaminant into water, or onto or into land in circumstances which may result in that contaminant entering water, which must be expressly allowed in a planning document (e.g. as a permitted activity) or by a resource consent.[2]

Section 70(1) expressly refers to permitted activity rules allowing the discharge of a contaminant into water, or onto or into land in circumstances which may result in that contaminant entering water, which are activities

[1] RMA, s9.
[2] RMA, ss12,13, 14 and 15.

regulated by section 15 of the RMA. Section 70 does not refer to permitted activity rules regulating the use of land (as regulated under section 9 of the RMA). Further, there is a presumption that land use is permitted under the RMA unless otherwise stated. Accordingly, there does not always need to be a decision to "permit" land uses, in contrast to discharges, which is where section 70 is relevant in that it seeks to ensure certain effects are considered before a discharge is permitted it is submitted that section 70 does not apply to permitted activity land use rules. However, section 70 does apply to the incidental discharge rule (and any other permitted activity discharge rule in PC5).

General **Does NPSFM 'cover the field'? (F & B submsns Anderson refutes s42A)**

Response PM:

Counsel for Forest and Bird disagrees with the section 42A report conclusion that the NPSFM does not cover the field and submitted that the "*NPSFM covers the field with respect to freshwater management and must be given effect to in the development of PC5.*[3]

I agree that PC5 must give effect to the NPSFM in accordance with section 67(3)(a) of the RMA. The discussion in the section 42A report was in the context of the application of the Court's decision in *King Salmon* in relation to the NPSFM.[4]

As a result of the Supreme Court's decision, it is considered that resort to Part 2 in considering how a Council promoted change to a regional plan should give effect to the relevant higher order documents (i.e. NZCPS, national policy statements and RPS), is only relevant where:[5]

a. the policies in question do not "*cover the field and a decision-maker will have to consider whether Part 2 provides assistance in dealing with the matter(s) not covered*"; or

b. there is any uncertainty as to the meaning of particular policies.

The position of Counsel, as set out in the section 42A Report, is that the NPSFM does not cover the field in relation to <u>all</u> activities regulated by PC5 as it is not concerned with, for example, biodiversity, enabling activities that require water, and activities in relation to the use of land. Further, the NPSREG must also be given effect to and is directly relevant to some of the provisions in PC5 (particularly in the Waitaki sub-region)However, instead of being a situation where resort is had to Part 2 (as per *King Salmon*) in this case other superior documents provide guidance, particularly the RPS. It is submitted that between them, the superior documents (e.g. NPSFM, NPSREG, and RPS) do cover the field.

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[3] Legal Submissions on behalf of the Royal Forest and Bird Protection Society of New Zealand Inc dated 5 October 2016 at [16]-[22].

[4] See Section 42A Report dated at Appendix B, paragraphs 1.28-1.40

[5] *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38, at [88] and [90].

General **Are classifications of prohibited activities in PC 5 intra vires? (Is there a challenge/point of law?)**

Response PM:

The purpose of a regional plan is to assist a regional council to carry out its functions in order to achieve the purpose of the RMA.[6] To do that, a regional council may include rules in a regional plan to achieve the objectives and policies of the plan.[7]

Section 77A provides that a local authority may categorise activities as belonging to one of the classes of activity described in section 77A(2), which includes prohibited activities, and make rules in its plan or proposed plan for each class of activity (that apply to each activity within the class and for the purposes of that plan or proposed plan).[8] Further, Part 6 of the RMA outlines the resource consent process and provides that if an activity is described in a plan as a prohibited activity, then no application for resource consent may be made for the activity and the consent authority must not grant a consent for it.[9]

As such, the classification of activities as being prohibited in PC5 is intra vires. The question of whether an activity should be classified as a prohibited activity is a matter of appropriateness (which is discussed further below). However, it may be possible to formulate a valid question of law in respect a decision to classify an activity as a prohibited activity in a regional plan.

The Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*[10] held that a local authority can use prohibited activity status for activities where it concludes that that status was the most appropriate, having undertaken the processes required by the RMA. The Court considered that a local authority did not need to decide that an activity be forbidden in all circumstances before prohibited activity status is appropriate. The Court considered that the following circumstances may warrant prohibited activity status:[11]

a. *"Where the council takes a precautionary approach. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available…*

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

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[6] RMA, s63.
[7] RMA, s68.
[8] RMA, s 77A.
[9] RMA, s87A(6).
[10] *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562.
[11] *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562 at [34] and [36].

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

d. *Where it is necessary to allow an expression of social or cultural outcomes or expectations. Prohibited activity status may be appropriate for an activity such as nuclear power generation which is unacceptable given current social, political and cultural attitudes, even if it were possible that those attitudes may change during the term of the plan;*

e. *Where it is intended to restrict the allocation of resources, for example where a regional council wishes to restrict aquaculture to a designated area. It was suggested that, if prohibited activity status could not be used in this situation, regional councils would face pressure to allow marine farms outside the allocated area through non-complying activity consent applications;... and*

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

These situations were not given as an exhaustive list of when it would be appropriate to accord prohibited activity status to an activity, and they indicate that there is a wide range of possible situations in which prohibited activity status may be considered to be the most appropriate option.

The Environment Court in *Thacker v Christchurch City Council* endorsed the *Coromandel Watchdog* approach above, as to the appropriate test for imposition of prohibited activity status being whether or not that status is the most appropriate of the options available.

General

Are PC5 requirements for obtaining consent, using Overseer, registering with Portal legally justified? (Perriam –MfE guidelines; Matheson –not comply with est'd jurisprudence; Reid –qn of uncertainty; do any of these raise a qn of law?)

Response PM:

All of the above issues have the potential to give rise to (or be formulated as) a question of law.

The issues raised by the Hurunui SNA Group (Ms Perriam and Mr McFadden) are that PC5 has not met the requirements of the NPSFM and section 32 of the RMA, and has not followed MfE guidance on NPSFM or section 32.

In respect of the NPSFM, the statutory test is to give effect to that document. Guidance is just that and is of little relevance (if any) as to whether PC5 gives effect to the NPSFM. Further, it is submitted that there are a number of ways to carry out a section 32 evaluation (the MfE guidance being one example). As long as the statutory requirements in respect of a section 32 evaluation are met, a failure to follow the guidance is irrelevant. It is submitted, as set out in the section 42A Report, that PC5 does give effect to the NPSFM and has fulfilled the requirements of section 32 of the RMA.

Mr Matheson submitted on behalf of Fonterra that farming activities in PC5 should not be classified as prohibited activities as this would not be consistent with established jurisprudence in *Thacker*. The classification of an activity as a prohibited activity is a question of appropriateness and is discussed in response to the question above. As set out in that response, it is submitted that the classification of specified activities as prohibited activities is appropriate.

Mr Reid (counsel for Federated Farmers) submitted that the use of OVERSEER and the proxies raises issues of uncertainty and therefore are inappropriate to form the basis of classifying activities in PC5.

In order for a permitted activity rule to be legally valid, the standards, terms and conditions need to be stated with sufficient certainty so that compliance is able to be determined readily without reference to discretionary assessments. The Courts have determined over the years that any permitted activity rule must:

a. Be comprehensible to a reasonably informed, but not necessarily expert, person;[13]

b. Not reserve to a council the discretion to decide by subjective formulation whether a proposed activity is permitted or not;[14] and

c. Be sufficiently certain to be capable of objective ascertainment.[15]

In *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council*[16] the Court considered that tests that applied in the particular assessment criteria of a discretionary activity rule involved a subjective assessment on the part of the decision maker. However, the Court considered that any subjectiveness did not undermine the certainty of the rule, particularly as all such activities required consent, and compliance (or non-compliance) with the rule in question only determined the type of consent required (discretionary or noncomplying). The Court upheld the proposed rule as valid despite it giving the Council a subjective discretion to re-categorise the activity from discretionary to noncomplying, stating as follows:[17]

> *"Another aspect of this issue that needs to be considered is that the requirements for certainty of definition (while naturally always desirable) may be of diminishing significance for discretionary as opposed to permitted activities. It is crucial to a reader of a district plan to know whether:*
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> *(1) a land use activity is allowed because the plan does not interfere with normal property rights allowed or permitted so that no resource consent application is required; or*
>
> *(2) whether the activity falls into the broad category of activities requiring resource consents (i.e. controlled, discretionary or non-complying).*
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> *However, it does not matter quite so much (although notification is an issue) which of the three other resource consent categories an activity may fall into.*

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[13] *Re Application by Lower Hutt City Council* EnvC Wellington W046/2007, 31 May 2007 at [10].
[14] *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at [63]
[15] *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at at [64].
[16] *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council* EnvC C162/01, 20 September 2001
[17] *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council* EnvC C162/01, 20 September 2001 at [35]-[40].

A consent authority must always apply the right categorisation as at the date it considers and determines an application for resource consent.

The important distinction in the RMA is not the name of the categorisation under section 76(3), but its effects. Thus there is a primary distinction between activities which require resource consents and those which do not; a secondary one between those which do not require notification and those which are likely to; and a third between those (non-complying) that are required to meet one of the threshold tests in section 105(2A) of the Act and discretionary activities"

In finding that an element of subjectiveness (and therefore uncertainty) did not invalidate the proposed rule, the Court distinguished the proposed rule framework (where the activity required resource consent) from one that included permitted activity rules.

On that basis it is submitted that any uncertainty created by the use of OVERSEER and the proxies in PC5 is acceptable in the consenting framework, where a lower threshold of certainty is acceptable. PC5 does not seek to use OVERSEER (or the Farm Portal) as a regulatory tool in the permitted activity framework (apart from simply using the Farm Portal to provide information).

Further, OVERSEER is currently used in the LWRP (i.e the status quo) and has been accepted by the Environment Court as a regulatory tool in the planning framework.[18]

General **True interpretation of Policy 15B.4.24. (Ravensdown, Hansen evidence says 2 interpretations, is there a question of law on that?)**

Response PM:

Policy 15B.4.24 (as recommended in the Section 42A Reply Report, clean version shown and footnotes omitted) states:

"*Freshwater quality is maintained within the Hakataramea Freshwater Management Unit and the Greater Waikākahi Zone by:*

(a) *avoiding the granting of any resource consent that will allow nitrogen losses from farming activities to exceed the Baseline GMP Loss Rate, except where Policy 15B.4.13 applies; and*

(b) *from 2020, restricting nitrogen losses for the portion of the property within the Hakataramea River Zone to 90% of the Good Management Practice Loss Rate; and*

(c) *from 2026, restricting nitrogen losses for the portion of the property within the Greater Waikākahi Zone, to 90% of the Good Management Practice Loss Rate, if the annual median nitrate-nitrogen concentration for Waikākahi Stream set out in Table 15B(c) is exceeded; and*

(d) *requiring, in the Hakataramea Freshwater Management Unit and the Greater Waikakahi Zone, farming activities to operate at the Good Management Practice Loss Rate, where that loss rate is less than the Baseline GMP Loss rate.*"

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[18] *Carter Holt Harvey Ltd v Waikato Regional Council* EnvC Auckland A123/08 6 November 2008; *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

As set out in the Statement of Evidence of Christopher Adrian Hansen on behalf of Ravensdown, Ravensdown's concerns regarding Policy 15B.4.24 (as notified) was that it could be interpreted two ways:[19]

> *"One way to interpret the policy/rule requirements is that in the areas of the property where irrigation and/or winter grazing occurred (in the four years prior to July 2020) the farmer will need to know the GMP loss rate for those areas separately from the rest of the property, and apply the 90% of GMP loss rate to those areas only, and the remainder of the property is required to meet 100% GMP loss rate.*
>
> *The second way to interpret the policy/rules requirements is that once the farmer has used the Farm Portal to determine the GMP loss rate for the entire property, they simply have to meet 90% of that loss rate for the areas where irrigation and/or winter grazing occurred."*

It is submitted that the recommendation in the section 42A Reply Report removes any ambiguity as to the interpretation of Policy 15B.4.24. It is now clear that the 90% GMP loss rate applies to the entire portion of the property within the Hakataramea River zone or Greater Waikakahi zone and not just areas where irrigation and/or winter grazing has occurred..

General **Is requirement to register with Portal unlawful for breach of privacy? (Murchison para 38 –is there a question of law here?)**

Response PM:

The evidence of Ms Murchison at paragraph 38 addresses areas of irrigation, not the Farm Portal. However, there is a reference to the ability of the Council to gather information through the Farm Portal at paragraph 31 of her evidence:[20]

> *"I do not agree the Farm Portal operates in a way which is appropriate for a regulatory authority gathering information on compliance with rules that have the force of regulations in statue. People answer a series of questions about their farming operation, which essentially gives the regulator the data to enable them to check compliance with the plan rules. However people entering the Portal are not advised of this situation nor told what the rules are for permitted activities before they answer the questions."*

It is submitted that the requirement to register with the Portal is not unlawful for breach of privacy. The RMA requires a Council to collect certain information:[21]

> ..."*Every local authority shall gather such information...as is necessary to carry out effectively its functions under this Act...".*

The Council proposes to meet this obligation (in part) through the collection of information via the Farm Portal.

Not all information collected through the Farm Portal would be classed as 'personal information' for the purposes of the Privacy Act 1993, because some information will be in relation to companies and not individuals.[22] It is

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[19] Statement of Evidence of Christopher Adrian Hansen on behalf of Ravensdown Limited at 140-142.
[20] Statement of Evidence of Lynda Murchison on behalf of JG & LM Murchison (ID 67179), JKW Hoban & ors (ID 67198), 26 July 2016, at [31].
[21] Resource Management Act, section 35(1).
[22] Privacy Act 1993, section 2, definition of 'personal information'.

also submitted that there is no breach of privacy principles in collecting the information via the Farm Portal.[23] Further, registrants in the Farm Portal will be able to access and correct information they have provided, and the purposes for collecting the information are disclosed.[24]

The collection of information by a Council pursuant to permitted activity rules has been found to be appropriate by the Courts in a number of cases. In *Waikato Regional Council v Hillside Ltd,* the District Court was concerned with the unlawful discharge of effluent and breach of a permitted activity rule in the Waikato Regional Plan.[25] That rule provided that the discharge of effluent was a permitted activity subject to a number of conditions. One subpart of the rule provided:

> "*The discharger shall provide information to show how the requirements of conditions a) to g) are being met, if requested by the Waikato Regional Council.*"

In *Carter Holt Harvey Ltd v Waikato Regional Council,* the Environment Court amended Variation 6 of the Waikato Regional Plan.[26] For the purpose of certain rules that require consent, the rules require a range of information to be provided to Council so the application can be assessed. For example, the transfer of surface and groundwater take permits is a restricted discretionary activity. The advice note provides:

> "*Information requirements to enable the assessment of any application under this rule are as set out in Section 8.1.2.3 of this Plan.*"

Under Variation 6, the information to be provided under section 8.1.2.3 includes the proposed rate of take, the location of the new take site and a description of the purpose for which water is to be used.

The Council is the custodian of the information gathered via the Farm Portal. Information is held in accordance with the RMA, the Privacy Act 1993 and the Local Government Official Information and Meetings Act 1987. Balancing any LGOIMA request for Farm Portal information with an individual's right to privacy is discussed in the s42A report at paragraphs 6.74 to 6.79. Protection of an individual's privacy is one of the reasons information gathered via the Farm Portal may be withheld.

The Council has taken account of the Privacy Act 1993 and LGOIMA in addition to the requirements of the RMA when creating the Farm Portal. While this issue may give rise to a question of law, it is submitted that the requirement to register with the Farm Portal does not give rise to an error of law.

General **Is the requirement that a farm plan is prepared by person who is qualified lawful? (M Sparrow, para 8 –is there a qn of law here?)**

Response PM:

Paragraph 8 of M Sparrow's evidence provides:[27]

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[23] Privacy Act 1993, section 6.
[24] www.farmportal.ecan.govt.nz/FAQ 'What is ECan going to do with my data?'.
[25] *Waikato Regional Council v Hillside Ltd* DC Te Awamutu CRI-2008-019-500880, 20 July 2009.
[26] *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380.
[27] Statement of Evidence of Mary Sparrow, at [8].

> *"8. The problem that I have with these two parts of Policy 4.41A is that to signal that consideration the consent pathway for an application will be based on the qualifications of the person who prepared the report does not sit comfortably with a system based on the 'rule of law'. The qualifications of the person who prepared a report should not be the basis for determining how a consent will be considered by an authority responsible for the administration of a resource management plan.'*

Proposed Policy 4.41A states (as recommended in Section 42A Reply Report, clean version shown and footnotes omitted):

> *"The contribution that the preparation of accurate nutrient budgets and Farm Environment Plans make to the attainment of the water quality outcomes is recognised by:*
>
> *(a) requiring the preparation of nutrient budgets in accordance with the Overseer Best Practice Input Standards; and*
>
> *(b) applying to any nutrient budget that forms part of an application for resource consent a level of scrutiny that is proportionate to the qualifications, experience and performance of the person who prepared the budget; and*
>
> *(c) providing a controlled activity consent pathway for resource consent applications that have been prepared or reviewed by an Accredited Farm Consultant."*

Plan Change 5 does not require a farm plan to be prepared by a person who is qualified.

Rather, Plan Change 5 *incentivises* the preparation of FEP's and nutrient budgets by persons who meet the definition of an 'Accredited Farm Consultant'. Individuals may choose not to use an Accredited Farm Consultant to prepare an FEP, provided the FEP continues to meet the requirements of Part A of Schedule 7 to Plan Change 5. Any nutrient budget that is not prepared by an Accredited Farm Consultant will be scrutinised (but not discarded) proportionate to the qualifications, experience and performance of the person who prepared it (as per Policy 4.41A).

It is submitted that recognising the importance of accurate nutrient budgets in attaining water quality outcomes and incentivising the preparation of nutrient budgets and FEP's by Accredited Farm Consultants is appropriate.

General **Is biodiversity protection within the Regional Council's functions ? (Anderson submission, paras 4-12 –does a question of law arise from F & B submission or incidental?)**

Response PM:

Biodiversity protection is a function of a regional council under section 30 of the RMA: [28]

> *"Every regional council shall have the following functions for the purpose of giving effect to this Act in its region…the establishment, implementation and review of objectives, policies and methods for maintaining indigenous biological diversity"*

[28] Resource Management Act 1991, section 30(1)(ga).

Policy 15B.4.23 states (as recommended in Section 42A Reply Report, clean version shown and footnotes omitted):

> *"Without limiting the generality of the protection of all significant indigenous vegetation and significant habitats of indigenous fauna and their ecosystem functions, significant indigenous biodiversity is protected in the Haldon Zone and Mid Catchment Zone by:*
>
> *(a) the implementation of any relevant district council planning provisions that are notified and take legal effect after 13 February 2016 and that require the identification and protection of significant indigenous biodiversity; or*
>
> *(b) until such district council planning provisions are notified and take legal effect, requiring as part of any application for resource consent for a farming activity to exceed the nitrogen baseline, an assessment of environmental effects which identifies the indigenous biodiversity values present within the application area, identifies the sites of significant indigenous biodiversity; and demonstrates that no net loss of significant indigenous biodiversity will occur."*

The legal submissions presented by Mr Anderson supported the retention of Policy 15B.4.23 and others like it in Plan Change 5. The submissions also provided additional reasoning as to how the relevant policies and rules complied with the RMA, in light of the Regional Policy Statement division of responsibility for the maintenance of indigenous biological diversity.

A question of law could arise from the submission of Forest and Bird in respect of biodiversity protection. However, for the reasons set out in the section 42A Report, it is submitted that no error of law arises in respect of the insertion of Policy 15B.4.23 (and related rules 15B.5.18B and 15B.5.20) in PC5.[29] Further, the policies and rules proposed in PC5 do not cut across territorial authority controls, so an overlap which section 62 of the RMA was intended to avoid will not occur.[30]

General

Requested requirement a farm plan auditor have completed a course approved by Ngai Tahu. (Wd that be lawful? -Winchester submissions para 1.13f)

Response PM:

It is submitted that the addition to the definition of 'Accredited Farm Consultant' and 'Certified Farm Environment Plan Auditor' as requested by Te Rūnanga o Ngāi Tahu would be unlawful, and inappropriate.

The legal submissions presented for Ngāi Tahu stated:[31]

> *"1.13 Through its submission and evidence filed, Ngai Tahu is seeking to ensure that the Canterbury Regional Council in its decision making on PC5 to the CLWRP:*
>
> ...
>
> *(f) makes amendments to the definition of 'Certified Farm Environment Plan Auditor' to include completion of a course that addresses cultural competencies approved by Te Runanga o Ngai*

[29] Plan Change 5, section 42A report, paragraphs 22.28 to 22.41.
[30] *Property Rights in NZ Inc v Manawatu-Wanganui Regional Council* [2012] NZHC 1272 at [11].
[31] Legal Submissions on behalf of Ngāi Tahu dated 6 October 2016 at paragraph 1.13(f).

> *Tahu and with evidence of completing this course being supplied to the Regional Council;..."*

Ngāi Tahu sought relief as follows:[32]

> *"Add an additional requirement to the definition [of Accredited Farm Consultant and Certified Farm Environment Plan Auditor] as follows:*[33]
>
> > *Has completed a course approved by Te Runanga o Ngai Tahu and supplied to Environment Canterbury that addresses cultural competencies."*

The Council Officers considered the request and provided a response in the section 42A report as follows:

> *"While I support persons preparing and auditing FEP's having specific awareness of relevant values and sites of cultural importance to Ngai Tahu, I note that the submission by Ngai Tahu does not contain details about the course to which Ngai Tahu refer. The submitter may wish to expand on their submission at the hearing. I also understand that CRC has commenced and proposes to continue training on mahinga kai values for FEP Auditors, such that the submitter's concern may at least be partially resolved without inclusion of the addition."*[34]

A rule (including a definition) in a plan must be:

d. intra vires (i.e. within the scope of the RMA and within the powers given to councils under the RMA);

e. not contain an unlawful reservation of discretion;

f. certain; and

g. reasonable.

It is submitted that the addition to the definition proposed by Ngāi Tahu is unlawful as it is uncertain, involves a delegation of function to a third party and it also involves the exercise of a discretion of a third party. It is also submitted that the inclusion of the requested amendment is inappropriate as no details have been provided in relation to the course, any associated costs, capacity to provide the course, and no section 32 assessment has been carried out during the hearing process.[35] Accordingly, no submitters have had the opportunity to assess and comment on the proposed requirement (i.e. including their ability to comply with course requirements).

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[32] Ngāi Tahu submission at page 12.

[33] Updated wording set out in Ms Davidson's evidence at paragraph 5.17, being "*Has completed a course that addresses cultural competencies approved by Te Rūnanga o Ngāi Tahu and supplied evidence of this course to Environment Canterbury*."

[34] Plan Change 5, section 42A report, paragraph 8.80.

[35] The most details provided about any potential course are contained in the Statement of Evidence of Ms Davidson on behalf Ngāi Tahu dated 22 July 2016 at 5.12 to 5.18.

General **Assertions that Council's s32 evaluation was deficient. (eg FF -Reid submsns pp 4-8; Hurunui SNA submsn para 1.7; Ravensdown submsn para 2.2.3. Is there a qn of law that shd be addressed?)**

Response PM:

Forest & Bird's submission asserts that there is inadequate information regarding the monitoring and review of the various permitted activity rules in PC5. Specifically:[36]

> *"This is cost to community to support these activities. It is not stated how ECan will resource this. The regime proposed does not provide certainty that objectives and targets will be met, from individual property or from cumulative effects perspective, and has not adequately addressed the requirements of s70 RMA…*
>
> *Non-regulatory methods such as the Hakataramea River Management Plan mentioned in the s32A report page 10-4 should be identified within the LWRP to provide a full picture of the management needed to support achieving the water quality targets and the level of permitted activity provided for…"*

The permitted activity thresholds and the use of the Overseer Nutrient Budgets Model are discussed at pages 4-7 and 4-8 of the section 32 evaluation. Although in this evaluation the requirements of section 70 are not individually discussed, the section 32 evaluation comprehensively identifies the limitations associated with OVERSEER but also the continual improvements and refinements to the model. It also outlines the discussions that have occurred with the Policy Working Group.

Hurunui SNA Group & Rural Advocacy Network submitted that the section 32 evaluation is inadequate, as:[37]

> *"There has been insufficient cost/benefit analysis that quantifies the cost to landowners & the council of the compliance requirements & whether they will actually be efficient or effective for the cost outlaid. The opportunity cost of thousands of Overseer plans, management plans, auditing requirements etc is huge. This money could be better spent on achieving actions on the ground.*
>
> *There has been insufficient analysis of how effective [or not] Plan Change 5 will be in terms of landowner engagement & buy in which is critical to the success or other wise of Plan Change 5.*
>
> *With the Blue & Green zones there has been no issue analysis or scientific studies to justify the requirements on landowners in these zones.*
>
> *In general there appears an inherent presumption that regulation is required & effective. We submit that in relation to Plan Change 5 the opposite is true."*

Ravensdown has also submitted that the section 32 evaluation is deficient and have sought that the Council undertake a more thorough and robust evaluation of the costs and benefits of PC5.[38]

It is possible to challenge the adequacy of the Council's evaluation under section 32 as a question of law. However, it is submitted that the section 32 evaluation is adequate, and no error of law exists. Further, the Council is still required to undertake and publish a further evaluation under section 32AA.

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[36] Submission on PC5 by Forest & Bird NZ, paragraphs 11-12.
[37] Submission on PC5 by Hurunui SNA Group & Rural Advocacy Network, paragraphs 1.7.
[38] Submission on PC5 by Ravensdown Limited, paragraph 2.2.3.

General

As well as questions of scope arising from amendment requests by Beef & Lamb, Dairy NZ, Irrigation NZ, and Murchisons & Hoban et al which are addressed in the Reply report, does a question of scope arise from amendments requested by the following (or any other) submitters:

a. **Barrhill Chertsey Irrigatio**

b. **Bellfield Land**

c. **Canterbury Dist Health Bd**

d. **Dairy Holdings**

e. **D-G of Conservation**

f. **Egg & Poultry**

g. **Fed Farmers**

h. **Fish & Game**

i. **Fonterra**

j. **Forest & Bird**

k. **LWRMS**

l. **Meridian Energy**

m. **Ngai Tahu**

n. **Opha Water**

o. **RDRML**

p. **Waitaki Irrigators Collective**

Response PM:

The submissions made on PC5 on behalf of the above submitters have been reviewed in respect of the following issues of scope:

(a) Is the amendment on PC5?

(b) Are precise details provided?

(c) Is the amendment fairly and reasonably within the general scope of the submission?

The following responses to the questions above would result in there being scope to amend PC5 on the basis of that particular submission point:

- (a) yes, (b) yes; or
- (a) yes, (b) no, (c) yes.

If the answer to (a) was no (i.e. that the amendment is not "on" PC5) questions (b) and (c) have not been addressed as it is submitted that there is no jurisdiction to amendment PC5 in response to the amendment.

Question (c) was only required to be addressed where a requested amendment was on PC5, but precise details were not provided, meaning

there would only be scope to amend PC5 in respect of that submission point if there were details provided in the remainder of the submission.

The submissions are attached as **Appendix A**, with the responses to the questions of scope above annotated beside the amendments requested in the submission in the form of a tick (yes) or cross (no). The responses to each of the three scope issues are colour coded: red, blue and light blue (respectively).

3.19, 3.24 **Given that Policy 4.38A is worded in a very directive manner and decision-makers (say Council officers acting under delegated authority) might not always realise that under section 104 of the RMA they may reject that policy direction, would it be better if the policy read:**

> **"When .... activity, the consent authority should generally ~~must~~ not disregard any ...."**

Response PM:

No. The policy seeks to provide strong guidance to decision makers that for one type of consent application (namely the use of land for farming activities) the permitted baseline, in respect of adverse effects on water quality, should not be applied.

The policy is of particular importance given the shift to narrative thresholds for permitted activity status for the use of land for certain farming activities. Given that change, there is a risk that would be applicants' for resource consent for farming activities may seek to rely on an argument that they can carry out a high leaching intensive farming operation on part of their property as a permitted activity, and that estimated nutrient losses associated with that activity could provide a platform to justify an increase in nutrient losses from a new or more intensive farming operation on the property as a whole. This risk is also exacerbated given that the areas in the narrative thresholds are well above the minimum subdivision standards in the rural parts of the Canterbury Region.

Amending the policy to insert "should generally" would weaken the policy and a decision maker may afford it less weight compared to the recommended wording. While a decision maker retains the discretion to apply the permitted baseline under section 104. It is submitted that strong policy guidance is appropriate in relation to this policy.

4.26 **Appendix E (page 21 and 31) identifies an anomaly with the PC5 irrigation proxy whereby high amounts of irrigation are applied between soil PAW 40 and 70 or 80 due to the exception for travelling and sprayline irrigators. This in turn results in high modelled N losses. The anomaly is apparent in Figures 19 and 20 of that Appendix.**

1. **Should the PC5 irrigation proxy be amended to remove this anomaly?**

Response MR/MMC:

If the anomaly was to be removed and the modelling proxy for these irrigators and soils were consistent with the rest of modelling proxy this would bring the proxy into closer alignment with the narrative industry-agreed GMPs.

Currently the proxy differs from the narrative by supplying water over field capacity and resulting in drainage for these soils and irrigators.

The original modification was made as a pragmatic response to the ability of these irrigators to apply small amounts of water to address a concern raised by Irrigation NZ. If the inconsistency was removed this would mean that if an irrigator system has significant limitations to the minimum application depth it can apply, then it would be unlikely to be able to meet GMP on very light soils and another irrigator system capable of lower application rates may be required.

As the anomaly arises from a deliberate response to a genuine issue (reflecting the physical limitations of certain irrigation systems), the Officers' are of the opinion that the proxy should not be amended to remove the anomaly.

2. If so, what would the amendment be?

Response MR/MMC:

If the Panel was minded to remove the anomaly, two rows of the table in Method s28.4 of Schedule 28 would need to be amended, as follows:

Travelling irrigation systems	50% PAW_{60}	90% PAW_{60}	Where PAW_{60} is <8040mm: • Minimum application is 10mm (application rate unachievable with travelling irrigation system) change system to Linear or Centre Pivot. ~~Where the PAW_{60} is ≥40 mm and <80mm:~~ ~~• Application depth is 40mm~~ Where the PAW_{60} is ≥80 mm: • Maximum application is 40mm
Sprayline irrigation systems	50% PAW_{60}	90% PAW_{60}	Where the PAW_{60} is ≤8040mm: • Minimum application is 10mm (application rate unachievable with travelling irrigation system) change system to Linear or Centre Pivot. ~~Where the PAW_{60} is ≥40 mm and <80mm:~~ ~~• Application depth is 35mm~~ Where the PAW is ≥80 mm:

			• Maximum application is 65mm

4.35 **1. Is there clear and overt policy guidance to decision-makers to have regard to these circumstances when assessing consent applications?**

Response MMC:

No.

2. If not, would it improve the plan if such guidance was provided?

Response MMC:

Yes, but I would suspect to a limited extent. There may be situations where a departure is appropriate on a case-by-case basis, and this one of the reasons why a restricted discretionary activity status has been advanced in PC5. Mr Willis, at paragraph 11.12 of his evidence in chief, suggested wording of a policy to guide decision-making, if the Hearing Commissioners considered a policy was necessary. However, I note that Mr Willis appears dissatisfied with the suggested wording, in that it may be "challenging to implement"[39].

6.21 **1. Is it good planning practice to knowingly create inconsistent approaches within a regional plan to the same technical matter in different sub-regions?**

Response DC

Generally no, however, the architecture of the LWRP enables a departure from the general region-wide approach, or approach taken in other sub-regions, where an alternative approach is more appropriate for a specific area. Policy 4.9 states:

> *"Reviews of sub-region sections will:*
>
> *...*
>
> *(e) not make any changes to the Objectives or Policies 4.1-4.9 of this Plan, but may provide for policies, outcomes and limits that are specific to the catchments in the sub-region."*

I consider that the provision for catchment specific outcomes in Policy 4.9 can extend to the measurement of an outcome where appropriate. It is noted that an inconsistent approach has been applied in past plan changes to the LWRP. LWRP Table 1(a), Plan Change 1 and Plan Change 2 to the LWRP use a minimum QMCI score and Plan Change 3 (PC3) to the LWRP applies the '80% of occasions' monitoring statistic.

[39] At paragraph 11.13

2. Is there clear and overt policy guidance to decision-makers to have regard to "this type of natural variation at the time of setting consent conditions"?

Response DC/ HS

No. While paragraph 6.22 states that natural variation should be considered at the time of setting consent conditions, and the 80% statistic has been used in PC3, Shaw et al (2016) states that it is not appropriate for the QMCI to fall below the minimum score at any time. Therefore I do not consider it appropriate that policy direction should enable such variation to occur.

3. If not, would it improve the plan if such guidance was provided?

Response DC:

As stated above, it is not considered appropriate that resource consent conditions provide for natural variation to the extent that the outcome is only required to be met on 80% of occasions.

6.240 **Should recommended Rule 15B.5.14A have a condition that mirrors new Rule 15B.5.14 condition (5)?**

Response DC

Yes, Rule 15B.5.14A should also include a condition requiring a management plan in accordance with Schedule 7A.

6.266 **1. Should recommended Rule 15B.5.6(c)(i) refer to 18 February 2016 to be consistent with Rules 15B.5.6(b)(i) and 15B.5.6A(2)(a)?**

Response DC:

The date 13 February 2016 was amended to 18 February 2016 in Rule 15B.5.6(b)(i) and 15B.5.6A(2)(a) to provide for Glentanner Station's water permit which was included in the catchment modelling. However, this permit was granted days after 13 February 2016. While an amendment 15B.5.6(c)(i) would improve consistency within the planning provisions, the amendment is not necessary to address the issue associated with Glentanner Station's water permit. Additionally, while it is unlikely that such an amendment to15B.5.6(c)(i) would lead to any unintended consequences, an assessment has not yet been undertaken.

2. Should recommended Rule 15B.5.6(c)(iv) refer only to the conditions referred to in the preceding clause (iii) rather than referring generally to all conditions of the permit?

Response DC:

No I do not consider 15B.5.6(c)(iv) should be restricted to FEP conditions. Other consent conditions in the water permit restrict the type of farming activity that can occur on the property (see paragraphs 6.259 and 6.260 of the Reply Report). If the type of activity specified in consent conditions is changed, then there would be an increased risk that the water quality outcomes will not be met. This is because the farming activity that was originally consented was included in the catchment modelling and any change

to the farming activity (e.g. from sheep and beef to dairy farming) may not be accounted for.

6.289 **Regarding the restriction to 90% of the GMP Loss Rate, do recommended Rules 15B.5.15 MOC 11 and 12 and 15B.5.16 MOC 12 and 13 target "high emitters" as sought by the ZIPA or do they target all emitters located in the Hakataramea River Zone and Greater Waikakahi Zone?**

Response DC:

15B.5.15 MOC 11 and 12 and 15B.5.16 MOC 12 and 13 direct that all farming activities that require land use resource consent in the Hakataramea River Zone and Greater Waikākahi Zone are required to reduce down to 90% of the GMP Loss Rate. "High emitters" are indirectly targeted as they are required to make greater actual reductions by virtue of having higher nitrogen loss.

6.360 **The recommendation is inconsistent with the technical advice given on pages 35 to 36 of Appendix G.11.**

1. **Is the recommendation based solely on a perceived lack of scope?**

Response DC:

Yes.

2. **If there is lack of scope could the map be amended under RMA Schedule 1 Clause 16(2)?**

Response PM:

No. Clause 16(2) provides:

> "*16 Amendment of proposed policy statement or plan*
>
> ...
>
> *(2) A local authority may make an amendment, without using the process in this Schedule, to its proposed policy statement or plan to alter any information,* ***where such an alteration is of minor effect, or may correct any minor errors****."*
>
> [emphasis added]

Any amendment under clause 16(2) occurs without further formality or particular proceedings being required. A local authority has the discretion to determine whether an alteration is of minor effect, or whether the correction of minor effects is required. What amounts to "minor" will be a question of fact, and the likely effects of altering a public document without public input will need to be examined.

The test for "minor effect" is whether the amendment affects the rights (prejudicially or beneficially) of some members of the public, or whether it is merely neutral. Only if it is neutral may such an amendment be made under clause 16. The same test applies, as to whether the effect of an amendment

or correction will be neutral.[40] In *Re an Application by Christchurch City Council* the Court stated:

> *"In the case of alterations to information the alteration must have "minor effect". In the case of correction of errors the power extends only to minor errors. Of necessity therefore the power cannot extend to errors which are more than minor or changes to information supplied by the plan which will have an effect that is more than minor.*
>
> ...
>
> *An error is simply a mistake or inaccuracy which has crept into the plan. The obvious example is a spelling mistake or reference to a wrong paragraph number where there can be no doubt what number is intended.*
>
> *By definition slips in spelling and punctuation, cross referencing and the like will be minor in nature because their correction will not cause prejudice to any person or give rise to misunderstanding. Providing the draftsperson seeks only to clarify what is clearly intended by the document and does not in any way make a change to it which alters its meaning then the correction will be within Clause 16. Anything which makes alterations to the content of the document cannot be achieved "without further formality" by reliance on Clause 16."*

In respect of amendments to the zone boundary requested by Benmore Station, it is submitted that this is not of minor effect as it will change the rule regime that applies to the land (and it not merely neutral). Further, changing the zone boundary would not amount to a minor error. Accordingly, it is submitted that such an amendment could not be made under clause 16(2) of Schedule 1 of the RMA.

App G7, p24 Would a reduction in current loads by 19% and 23% respectively for the Greater Waikakahi and Whitneys Creek Zones provide for likely N losses under the permitted activity rules now recommended for those zones?

Response HS:

Yes.

The at-source load limits for the Greater Waikākahi Zone and Whitneys Creek Zone are calculated to be 336 tonnes and 411 tonnes N/year respectively under the new MGM calculations (page 24, Appendix G of Section 42A Report). If a reduction in nitrogen load of 19% and 23% is estimated due to a shift to GMP, this would result in a reduction in total catchment losses by 64 and 95 tonnes N/year for the Greater Waikākahi and Whitneys Creek respectively.

The calculations as summarised on Page 19 in Appendix G of in the Section 42A Report state that the PC5 permitted activity rules in the Greater Waikakahi zone would result in an increase in nitrogen loss of 14 tonnes/year. In Whitneys Creek, the increases in nitrogen loss due to the recommended permitted activity rule are 3 tonnes N.

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[40] *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 (EnvC) at 9-12.

6.191 **Re 1st bullet point, is the reference to inclusion of the definition of 'mahinga kai' from WCWARP in PC5 intended to assist in distinguishing enhancement of 'mahinga kai' from 'aquaculture' as reflected in Ms Davidsons revised rule in her memorandum of 20 October 2016 (para 4.4) where any reference to aquaculture has been deleted?**

Response DC:

No, the reference is intended to ensure that any definition of mahinga kai included in PC5 is not in conflict with the definition used in the Waitaki Catchment Water Allocation Regional Plan (WCWARP).

6.191 **Would 'enhancing' of mahinga kai (eg; native species such as eel or koura) that involved restoring water to a waterway or riparian land and not involve for example artificial feeding or use of nutrients require a discharge resource consent?**

Response DC:

Depending on the nature of the activity, restoration of a waterway may require a resource consent to take or divert water under the WCWARP. If the restoration of water relates to a simple reduction in the volume of water takes then resource consent would not be required.

I do not consider the enhancement of mahinga kai as described in the question would require a discharge resource consent under the LWRP or PC5, as it is unlikely that the discharge would contain contaminants and the activity would not be aquaculture as set out in the PC5 definitions.

Note. If the restoration of a waterway did involve the discharge of water that may contain contaminants, the activity would be assessed under LWRP Rules 5.99 and 5.100 and may require a discharge resource consent.

6.191 **The absence of a 'consent application or proposal' or detail on what is intended with the enhancement of mahinga kai makes it difficult to ascertain potential s.70 requirements, but potentially it could include augmenting flow in a waterway or flooding an area of riparian land and introducing native species such as eel or koura and protecting them from predators, fishers, or customary take for a time to allow enhancement to take place in that location, should or could the plan rules or absence of a specific rule for such a purpose prevent that possibility?**

Response DC:

Access to water for flow augmentation, would be considered under the WCWARP rather than the LWRP. It is likely that a resource consent would be required. I note the take and use of water for mahinga kai enhancement is specifically provided for in the WCWARP (Rule 2).

If the activity involved the discharge of contaminants, then the provisions within the LWRP would apply and a discharge consent may be required.

It should be noted that if the mahinga kai enhancement involves aquaculture or a farming activity, then the PC5 aquaculture or farming activity rules would apply. These rules could prevent mahinga kai enhancement depending on the nutrient allocation zone in which the activity is occurring and the

availability of nitrogen within the particular catchment (ie, aquaculture is restricted to the Haldon Zone and Valley and Tributaries Zone).

Activities such as "introducing native species such as eel or koura and protecting them from predators, fishers, or customary take" are authorised by other organisations (including the Department of Conservation, Ministry of Primary Industries and Fish and Game). I do not consider PC5 prevents these activities from occurring.

General

1. Is there any need for a new rule of the sort set out in Table 1 Item 17 of the RDRML submission?

Response MMC:

No.

2. If not , why not?

Response MMC:

At Item 17 of the original submission, RDRML seeks a new discretionary activity rule to authorise the use of land for any farming activity that occurs within the command area of an irrigation scheme.

No such rule is necessary as Rule 5.60 already authorises the use of land for a farming activity within an irrigation scheme or principal water supplier area as a permitted activity, provided that the irrigation scheme or principal water supplier holds a discharge permit that specifies the amount of nitrogen that may be leached.

The LWRP relies on discharge rules (specifically Rules 5.61 and 5.62) to manage adverse environmental effects associated with the loss of nutrients from farming activities within an irrigation scheme area. It is through these rules that an irrigation scheme can seek a resource consent "on behalf of its shareholders"[41].

These irrigation scheme rules are not changed by PC5. Including a new rule, as is sought by RDRML, would result in two different discretionary activity rules applying to the same activity, which would result in administrative difficulties.

[41] Words from RDRML's submission.