BEFORE THE CANTERBURY REGIONAL COUNCIL

UNDER THE	Resource Management Act 1991
AND	
IN THE MATTER	of application CRC190445 by the Christchurch City Council for a comprehensive resource consent to discharge stormwater from within the Christchurch City area and Banks Peninsula settlements on or into land, into water and into coastal environments.

OPENING LEGAL SUBMISSIONS FOR THE CHRISTCHURCH CITY COUNCIL

5 November 2018

TABLED AT HEARING

Application: ...CRC190445.....

.....CCC - C.S.NO6.....

Date: .....5/11/2018.....

CHRISTCHURCH CITY COUNCIL
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INTRODUCTION

1. This is an application by Christchurch City Council (Council) to the Canterbury Regional Council (CRC) for consent to discharge stormwater containing contaminants to land and water in Christchurch, at the coast, and in Banks Peninsula settlements.

2. The discharge will be from a comprehensively designed, maintained and in many places naturalised stormwater network.

3. The application is for the continued and the future discharge from the "network". The "network" includes rivers, streams, piped infrastructure and naturalised "drains". The application requires land based quality and quantity mitigation for all new network and retrofitting in established areas where reasonably practicable.

4. An amended set of proposed conditions and an amended Environmental Monitoring Programme (EMP) have been handed up with these submissions. Reference here is to those proposed conditions.

5. While there are still some matters where there is a difference of opinion between staff and consultants for the Council and the consent authority, Council staff understand that a high level of agreement has been reached on many important matters. The proposed changes to conditions also respond to some key concerns raised by submitters. I will in these submissions highlight some key developments regarding those proposed conditions.

Summary of the Council's case

6. The Council's discharge of stormwater to land and water is a critical service for the district that needs to continue. The Council has a statutory obligation to provide that service. The service is needed due to an unavoidable natural process – rain falling – in urban areas. The Council is planning for the growth of the Christchurch urban area into both greenfield and brownfield areas. Both rain, and growth, will continue to happen regardless of the decision on this resource consent application.

7. Integrated stormwater management in this area is needed to help plan and provide for that growth. The stormwater system for the whole area must be comprehensively planned in advance of changes in land use.

8. Urbanisation changes, and increases, peaks in quantity and in contaminants. However, the Council is committed to improving discharge (which has been critical in reaching agreement with Ngāi Tahu).

9. Much of the network is already in place in the existing city and Banks Peninsula settlements. The network is extensive and complex and is already an intrinsic part of both the urban and the natural environment.

10. The application is not for new activity. It consolidates existing resource consents into a single resource consent and introduces opportunities for retrofitting treatment where appropriate.

11. The quality of the city's waterways is already affected by 150 years of urbanisation. There must be a "real world" approach taken to identification of the receiving environment in which the effects of this discharge will be assessed. The existing state of those waterways, with the existing discharges into them, surrounded by existing urbanisation, is the receiving environment against the effects of this application are to be assessed.

12. There are many things impacting on water quality that are not under the Council's control, including: runoff from loess covered hillsides; nutrients in groundwater; existing contaminants in stream-bed sediments; dogs/birds and airborne contaminants; cars; existing roofs; and other direct discharges that will be controlled by the CRC.

13. A stormwater discharge consent cannot on its own achieve holistic aims for urban stormwater improvement. That requires societal change involving individuals changing their behaviours, other local government actions, other central government actions, and other economic, or regulatory, or societal drivers. All of those tools are part of the toolbox to achieve an overall objective (CRPS 7.2.3) of improving the quality of freshwater in the region, but it would be wrong, in my submission, to appraise this application on its own against a test of the degree to which it improved freshwater quality.

14. By setting out Contaminant Load Model targets, and monitoring, the Council is bound to reducing the load of those contaminants in the stormwater discharge. The city-wide mass approach taken for the Christchurch Contaminant Load Model (C-CLM), coupled with the stormwater management plans (SMPs), enables adaption of monitoring and responses, providing the ability for targeted reaction to hot spots. Mr Harrington will describe why the Council prefers this to catchment, sub-catchment or specific waterway targets[1].

15. The C-CLM is not intended to model actual results in receiving waterways. Critique of it for not being sufficiently precise to inform actual results of contaminants in waterways is attacking a straw target. What the C-CLM does do is provide a fixed, certain, enforceable way for the consent authority to hold the Council to account if the Council's stormwater treatment facilities are not built so as to achieve the predicted contaminant load reductions.

16. If new information comes to light that warrants change to the C-CLM, that can be done by a Variation under the Resource Management Act (Act).

17. As someone much wiser than me has said:

> *All models are wrong, but some are useful.*

18. This one is useful.

19. The core to the Council's obligations in the proposed conditions is in 20-24, where the Council now proposes the obligation to use *reasonably practicable measures*, rather than *reasonable endeavours*, to mitigate the effects of its activity. The extent of the mitigation will be measured against the attribute target levels in the schedules attached to the consent conditions. Everything else in the conditions is a tool to plan, implement, monitor, evaluate, review, respond or adapt in seeking to achieve those aims. This is an adaptive management framework (*refer diagram*).

20. The SMP conditions allow for adaptive management of tools and responses as and when required.

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[1] EiC 162-164.

21. Local, national and international experience shows that correlating discharges from stormwater networks to waterway ecological health is highly complex, site specific and highly variable[2]. Other stressors not related to stormwater discharges can adversely affect waterway health. The proposed conditions include detailed research and investigations to support an appropriate understanding of causes and effects.

22. Other work, separate from design and management of the stormwater infrastructure, is crucial to achieving overall environmental gains. The Council is committing to them in this application. These could include: other broad Council strategies; education; lobbying; changing roof types. Other tools available include District Plan changes and use of bylaws.

23. The Council's investment as a result of this proposed consent is substantial[3]: $1,081m over the next 10 years (for both stormwater management and land drainage)[4], being $415m for operations and maintenance and $666m for capital improvements[5]; and for just this financial year, over $39m operational and $35m capital expenditure on stormwater alone[6]. Plus funding a full time and part time expert position at Mahaanui and a recently appointed full time position at the Council for industrial audits. The Council does not have unlimited funds. Economic analysis shows that alternatives are not feasible[7].

24. Improvement of stormwater quality and quantity is by its nature a long term, long timeframe process. Gains do not happen overnight. They are gradual steps with many disparate inputs,and require actions by people other than the Council. A duration of any less than 25 years would be counter-productive. There are going to be no sudden changes in the discharges that warrant a shorter term.

25. Agreement with the Ngāi Tahu parties is significant and was little acknowledged in the s42A report. The Council agreed to seek a 25 year consent, some changes to consent conditions and funding some roles at Mahaanui as part of

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[2] Mr Cantrell's evidence.
[3] Note: Mr Adamson is making a correct to his evidence regarding the following figures.
[4] D Adamson EIC at 14.
[5] D Adamson EIC at 33.
[6] D Adamson EIC at 28.
[7] Mr Harris' EiC.

that agreement. There is no live issue regarding effects on mana whenua values. The Ngāi Tahu parties are not opposed to the application with the conditions proposed concerning mana whenua matters.

26. With regard to effects of the proposed activity on water quality, water quantity and mana whenua values:

- There is now almost complete agreement between the Council and CRC experts on the provisions proposed by the Council in the conditions and EMP. The sole exception is the view of Dr Bolton-Ritchie regarding one limited matter, being wet weather monitoring;

- There is no dispute regarding effects on mana whenua values;

- The Council's case is that the effects of the stormwater discharge on water quantity are being appropriately managed, mitigated and monitored through the proposed conditions. There are two limited areas of disagreement between the experts on this: one regarding the Brooklands area (which is no different from that decided in the Styx catchment 35 year consent in 2013); and the other about the number of monitoring points needed;

- The Council's understanding is that concerns of the s42A report writers concerning effects on groundwater have been resolved by Council accepting Mr Callander's recommended changes to the consent conditions.

27. Management of sediment (TSS) discharge during site development is a significant concern in the s42A report. The Council considers that the change that it now proposes in new conditions requiring development of a sediment discharge management plan (SDMP) should address those concerns. There remains a limited difference of opinion between two Council experts – Mr Norton and Mr Tipper – as to whether there ought to be a generic TSS limit set rather than just site-specific ones. The Council's position on this is as set out in the evidence of Mr Adamson and Mr Norton.

28. The Council proposed 10 industrial site audits per annum, the s42A report writers recommended more, and the Council now proposes 15 – together with all of the audits flowing from any transitional plan process for the sites being

authorised under this consent from 2025. The Council's position is that in the context of all of the other demands on the Council's limited resources, and of the gains already being made through this review process, 15 pa is reasonable.

29. There have been concerns raised in the s42A report and in submissions by some industry operators regarding excluding high risk sites and regarding the transitional arrangements and effects when some currently excluded high risk sites are authorised under this consent after 2025.

30. The context of that is important:

- There are similar provisions for the consent holder to exclude high risk sites in the interim global, South-west and Styx catchment consents;
- The Council proposed conditions to the effect that the exclusions would come to an end because there is a policy in the LWRP that seeks that they come to an end;
- The s42A report then expressed some reservations about the Council not still being able to exclude some high risk sites from authorisation under the consent.

31. The Council now proposes changes to conditions 2, 3 and 41. These provide for both the continuation of the ability to exclude some high risk sites and for greater certainty for industry about how that could occur.

Summary of the key remaining issues from submissions and s42A report

32. It is submitted that there are few significant disputed issues left to be resolved for this application.

Submitters

33. With regard to submitters:

- CIAL: No expert evidence. Proposed condition regarding investigating bird strike risk added;

- DoC: The Council has added express engagement with DoC to the requirements for development and review of SMPs due to DoC's unique statutory function. That should satisfy a key submission point. The Council does not propose conditions that require engagement with DoC when preparing Implementation Plans or when undertaking other actions;

- Some other submitters sought to be named as parties to be consulted with in the development of SMPs, and/or a public process for that[8]. The Council does not support that. The submitters have the opportunity to influence decision making on the objectives and content of SMPs now, through this hearing process, and will have the opportunity for engagement via the work of Community Boards and the Zone Committee;

- LPC: Expert evidence sought changes to the framework of conditions. This is primarily a matter of form rather than substance and is addressed in the Council's planning evidence;

- Transpower: No expert evidence. Seeks conditions that basically require the Council to act lawfully.

- Ministry of Education: Satisfied with a condition now proposed by the Council;

- Industry submitters regarding excluding sites that pose a high risk: the remaining issue is whether the changes proposed by the Council to conditions 2, 3 and 41 provide appropriate transparency and certainty regarding the process for excluding sites;

- Submitters on river water quality: no expert evidence. There is agreement between the Council and CRC experts on appropriate conditions;

- Submitters on water quantity matters (being from Brooklands, including Mr and Mrs Rodrigues): whether the effects, and the monitoring of effects, of the discharges of stormwater in the Styx catchment are being appropriately managed through the proposed conditions (being basically

[8] NZ Steel, for example.

the same conditions as were determined to be appropriate in the Styx catchment consent in 2013).

34. Other points arising from the submissions are addressed in detail in the Council's evidence.

35. Some industry submitters expressed frustration regarding the overlapping duties and functions of the CRC and the Council regarding stormwater management[9]. It is submitted that this is not an issue for this hearing to resolve. It is an unavoidable fact where there are overlapping functions under the RMA and LGA.

S42A Report Issues

36. It is submitted that the key remaining issues arising from the s42A report *may* concern (with the Council being unclear at this stage whether some of these remain issues in the eyes of the reporting officers):

- Drafting of the conditions for the transitional arrangements for the currently excluded sites;
- Conditions that provide an ability to continue to exclude some sites;
- Conditions regarding management of TSS discharges from site development;
- Number of industrial site audits each year;
- Whether the C-CLM can or should be fine tuned for local conditions or in other ways before the consent commences;
- Whether there should be more sites in the city for monitoring water levels in receiving waterways;
- Whether the conditions should require a Technical Advisory Panel, with that Panel having the ability to determine the content of SMPs,

[9] Ravensdown, NZ Steel.

Implementation Plan and other Council actions. The Council, unsurprisingly, does not propose to pass its decision making role under the Local Government Act to a Technical Advisory Panel in that manner; however, Mr Adamson's evidence supports a proposed additional condition requiring a transparent peer review process as part of the development and review of SMPs;

- The timing of review for both current and new SMPs. The Council has brought forward the proposed timing of review of two of the three existing SMPs. Having reviews of the SMPs at 5 year intervals rather than 10 years is, in the view of the Council, simply unmanageable and unnecessary. They are resource-heavy to develop and are long term plans that are to be implemented in long time scales[10]. They are living documents that can be reviewed through the certification process whenever needed;

- Duration of consent: The Council does not know whether the changes to the conditions now proposed by the Council and the agreements with the CRC reporting officers has resulted on any change to the reporting officer's recommendations. This proposed consent requires long term planning and massive infrastructure provision and resourcing. The application provides for adapting and changing management practices through SMPs and the Implementation Plan and has detailed cycles of monitoring, modelling, reporting, review. A duration of any less than 25 years – which is already the result of compromise with the Ngāi Tahu parties, and is less than the existing catchment consents that the Council proposes to surrender – is, in my submission, inappropriate. Relevant caselaw on this is described later in these submissions.

EVIDENCE BEING PRODUCED BY THE COUNCIL

37. Evidence that the Council will be producing will be given by:

    (a) Mr David Adamson, General Manager City Services at the Christchurch City Council. He provides a high level overview of the Council's objectives with this application, its commitment to improving water quality

[10] Mr Adamson EiC at 64-66; Mr Harrington rebuttal at 23.

and quantity, the resources being put into it, its relationship with the Council's Long Term Plan, and changes that the Council proposes to conditions to address s42A and DoC concerns. He also emphasises the importance of source control measures that are outside the Council's control. The letter and Deed concerning the position of the Ngāi Tahu parties is attached to his evidence.

(b) Ms Helen Beaumont, Head of Strategic Policy at the Council[11]. She outlines the Council's six values approach to waterways and its overall strategic approach to surface water management. This application can then be seen on the context of all the other related work being undertaken by the Council. She describes the strategic framework, Council policies and partnership with the CRC. Strategic vision documents are attached to her EiC.

(c) Mr Graham Harrington, senior surface water planner at the Council. Mr Harrington has been a lead Council officer in the development of this application and the Styx and South-west catchment consents. His evidence provides a background and overview of the application and responds to submissions in relation to water quantity issues. He focuses in particular on the Styx catchment and the water ponding issues caused by tidal flooding and high ground water at Earlham St[12].

(d) Brian Norton, senior stormwater planning engineer at the Council. Mr Norton describes the Council's stormwater network and what it is designed to do, how it works, the SMP programme, and high risk sites and their management both before and after 2025. He also discusses management of sediment discharges at site development stages.

(e) Dr Belinda Margetts, a waterways ecologist at the Council. She manages the Council's waterway ecology monitoring programme. She describes the effects on waterways of the proposed activity and the manner in which the proposed conditions of consent and EMP mitigate, monitor and

[11] She is currently on a temporary secondment away from this role but her evidence is delivered in this capacity.
[12] Mr Harrington EiC at 95.

respond to those effects. She describes the almost complete agreement between the Council and CRC experts on surface water quality matters.

(f) Peter Callander: a consultant hydrogeologist. Mr Callander's evidence concludes that effects on groundwater will be no more than minor[13]. The Council accepts and adopts his recommendations for some changes to proposed conditions to address matters arising from the s42A report.

(g) Dr Julia Valigore, specialist advisor at the Council who conducts audits of industrial sites. She describes the Council's industrial site audit process and its achievements. In presenting her evidence she will be supporting the Council's proposed amended condition providing for 15 audits per annum.

(h) Mark Pinner, City Streets Maintenance Manager at the Council. He describes the Council's programme for street sweeping. His evidence appends a NIWA report regarding the effectiveness of street sweeping for improving stormwater quality.

(i) Dale McEntee, resource consent compliance co-ordinator at the Council. The Interim (CRC090292), South-west (CRC120223) and Styx (CRC131249) consents are appended to his evidence. He describes the Council's compliance history and its compliance relationship management activities.

(j) Mark Tipper, a senior environmental advisor at the Council. He describes the Council's improving processes for erosion and sediment control and discusses (as does Mr Norton) the Council's proposed condition for management of TSS discharges during site development.

(k) Tom Parsons, consultant surface water engineer. Key topics are: the Council's investment in water quantity infrastructure; comparison of the infrastructure proposed in the application to other hypothetical options for infrastructure; changes since 2015 in relation to the Ōtākaro/Avon River SMP area; challenges of retrofitting stormwater quality mitigation in existing development areas; and developing flood models.

[13] EiC at 99.

(l) Eric van Nieuwkerk, senior hydrogeologist at Golder Associates. His evidence is about development of the C-CLM: what it is intended to do, and what it does. It provides modelled indications of the contaminant removal resulting from stormwater treatment. It is not intended to be used to precisely measure contaminant loads entering the receiving environment. It predicts reductions in annual mass loadings of contaminants and can be used to predict relative changes in average stormwater quality arising from treatment systems[14].

(m) Paul Kennedy, consultant environmental scientist. Mr Kennedy reviewed the content and development of the C-CLM by Golder Associates. His review is attached to the July 2018 application. He concludes that the model is fit for its purpose[15]. He also describes the importance of national source control management[16].

(n) Simon Harris, a consultant economist. His evidence addresses the costs, efficiency, affordability and benefits of the treatment option proposed in the application compared to several other options. He relates that assessment to the possible costs and benefits of source control.

(o) Clint Cantrell, a civil engineer and Sector Director at Tonkin and Taylor. He was engaged by the Council to provide a technical review of the application and proposed conditions. His evidence has a particular focus on targeting "hot spots" and what is and is not reasonably achievable through stormwater management and monitoring.

(p) Jane West, a consultant planner. Ms West's evidence will place the evidence in the framework of the statutory instruments under the Act and other relevant considerations. She will provide a comprehensive review for the assistance of the Commissioners.

(q) Craig Pauling, a planning consultant. Mr Pauling is unavailable until 13 November as he is on a course at Stanford University. His evidence describes engagement with Papatipu Rūnanga and the significance of the

[14] Mr van Nieuwkerk EiC, 54-55.
[15] Mr Kennedy EiC at 10.
[16] EiC at 14.

agreement with the Rūnanga. He considers that the agreement shows that the proposed consent with the proposed conditions is appropriate for manawhenua.

FURTHER DETAIL ABOUT THE APPLICATION

38. Recently issued existing catchment consents for the Styx and the South-West catchments are for 35 year terms. This application broadly adopts the same framework as the one that was determined for those consents. There are three key differences here: some SMPs are yet to be developed; there is a C-CLM; and transitional arrangements for currently excluded sites to be authorised under this consent.

Background to the application

39. Some years ago the Council started a process of obtaining catchment level consents based on an adaptive management, stormwater management plan framework. The Council and the CRC intended there to be separate resource consents for each catchment area covering all of the Christchurch City Council territory. It obtained two of those catchment level consents, first for the south-west area in 2012 and then for the Styx catchment in 2013. Both are for 35 year durations.

40. While seeking the catchment area consents the Council was, and is still, continuing to discharge in reliance on an interim global consent.

41. The councils then decided that it would be preferable to obtain a comprehensive consent for all of those catchments, while still using the same adaptive management, SMP framework. That is the purpose of this application.

42. The Council filed an application in 2015. It was publicly notified. Ngāi Tahu parties, and others, submitted in opposition. The CRC placed that application on hold to enable the two councils to consider possible amendments to the application.

43. Staff of the two councils engaged on that over several years. The Council also consulted with the Ngāi Tahu parties.

44. In 2018 the Council and CRC agreed that the application would be taken off hold. At around the same time, the Council entered an agreement with the Ngāi Tahu parties, recorded in the Deed appended to Mr Adamson's evidence.

45. In order to avoid any scope issues, the Council agreed with the consent authority that the amended application should be treated as a new application. The "new" application includes all of the information lodged with the original application in 2015 and the amendments lodged in 2018.

46. The Council's intent is that this consent replace all of the Council's existing discharge consents that overlap with it – including in particular the interim global consent and the Styx and South-West catchment consents.

47. Some key features of the application are now described.

Scope

48. Private discharges to land from non-residential hardstanding areas are outside scope.

49. Private discharges to land from roofs are within scope.

50. If private operators do not favour that overlap they are entitled to seek consent from the CRC for both of those activities.

51. This application is solely for a discharge permit. It is not for draining groundwater. It is not for the existence of flood ponding areas. The difference is important in relation to the issues arising in the submission and evidence for Mr and Mrs Rodrigues.

52. Maintenance and dredging of waterways in order to achieve flood management objectives is also not the subject of this discharge consent application. Maintenance, dredging and weed clearance is an operational and maintenance power of the both the CRC and the Council under other legislation. Any submitters' concerns regarding those matters must be raised and responded to in other forums – such as when annual plans are notified for submissions.

Excluded sites

53. As noted in an advice note in the proposed conditions, the existence of a resource consent under the RMA does not negate the need to have the authorisation of the Council under the LGA, as owner and operator of the stormwater network, for discharges into that network.

54. Currently, operators who seek to engage in new activity with changed discharge quality need to have the authorisation of the Council as operator of the stormwater network to discharge into the network. If the Council does not want that changed discharge to be authorised under the current consents, the operator needs to get their own consent from the CRC.

55. Also, in the interim and catchment consents there are conditions similar to conditions 2 and 41 of this proposed consent, that refer to industrial site audits and the exclusion of high risk sites. The Council has not yet acted on those conditions to seek to exclude existing high risk discharges through the industrial audit process.

56. As noted above, an issue raised by two submissions[17] is whether the proposed conditions adequately address the means of identification of high risk sites, either currently or through the transitional arrangements for the currently excluded sites.

57. If the high risk is a new activity, the Council can set appropriate standards through either the Council's consenting for the activity under the RMA (if the activity needs a resource consent under the District Plan), or in the Council's approval under the LGA for operators to discharge into the Council's network. For the LGA process, the Council will need to use a Bylaw.

58. If the high risk is from an existing activity, it is submitted that the Council's proposed changes to conditions 2, 3 and 41 address the concern. A change to a Bylaw could also be used.

59. The proposed transitional plan arrangements will address these issues for the currently excluded sites. There may be other tools considered by the councils.

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[17] Ravensdown, and the Oil Companies.

The Council and the CRC may, for example, consider a transfer of enforcement powers for excluded sites under s33 of the Act (referred to in Dr Valigore's evidence as a delegation).

60. There was a submitter concern regarding the proposed condition 14 that provided for the Implementation Plan to set maximum stormwater contaminant concentrations. The Council now proposed that that condition be deleted and site specific approvals under either a LGA Bylaw or any separate RMA consents needed from the Council be to means to set those limits.

61. A Bylaw under the LGA cannot be used to regulate discharges that go from private land through privately owned pipes into a waterway, as that is not Council infrastructure. Proposed changes to the consent conditions highlight that the Council may still seek to exclude that activity from the consent if it is high risk.

SMPs

62. The consent will enable the Council to develop and implement its catchment-level stormwater management plans (SMP). SMPs outline how the Council will construct and manage the stormwater network to integrate land and water resources. The LWRP encourages the preparation of SMPs as a means of achieving improved environmental outcomes through integrating land use, stormwater and infrastructure planning.

63. The proposed conditions of consent set out the objectives and required content of the SMPs, and a process for developing them that includes Zone Committee and Community Board input, peer review, and certification by the consent authority.

Endeavouring to achieve attribute target levels

64. A core obligation proposed in the consent conditions lodged with the application was to use "reasonable endeavours" to seek to achieve outcomes for water quality and quantity. There is a detailed proposed framework of monitoring and reporting intended to closely track achieving those outcomes.

65. The Council proposes some changes to the EMP, monitoring and reporting requirements to address concerns in the s42A and from some submitters.

66. The Council also now proposes that the obligation to use "reasonable endeavours" be one to adopt "reasonably practicable measures" to achieve those outcomes. This is close to the "all reasonably practicable measures" sought in the s42A report, is arguably a higher standard than "reasonable endeavours", but is one that the Council accepts as being appropriate and achievable. This has not been referred to in evidence for the Council but will be described by Mr Adamson.

67. The obligation in those conditions is to use reasonably practicable measures to strive to achieve the outcomes in the schedules attached to the consent. Failure to achieve them is not a breach of the consent unless reasonably practicable measures were not used. The monitoring, reporting and responding adaptive management framework of the proposed conditions ensure that there will be close attention to those endeavours.

68. One reason why the proposed water quality attribute target levels are targets, rather than fixed and required outcomes, is that there is imperfect understanding in the industry generally about the causative relationship between stormwater quality discharges and receiving environment outcomes. The Council proposes in condition 37 a feasibility investigation into that relationship, and actions flowing from that.

The C-CLM

69. Conditions 16-18 for the C-CLM set hard targets that if not reached in the model mean that the Council will be in breach of the consent.

70. The model is just that. A computer model. It models what the water quality treatment facilities achieve. When re-run at 5 yearly intervals it models how well the Council's infrastructure is reducing contaminant load on a city-wide basis.

71. Council also intends to use the model to help identify "hot spots" for the purposes of SMP development and review and for the Implementation Plan.

72. Models can of course be improved over time and the Council intends to improve this one. There are no conditions currently proposed that enable an amended model to take the place of the one specified in these conditions. The reason for that is the difficulty of framing consent conditions that both enable the Council to change the model and at the same time provide enforceable "hard targets".

"Source control" at industrial sites

73. The Council's experts and the s42A report writers are agreed that appropriate management of high risk industrial sites is a crucial part of seeking to achieve the water quality outcomes. The proposed conditions provide for ongoing industrial audits to achieve that. The Council now proposes a minimum of 15 audits pa.

74. There will be a separate audit programme recommended in the transition plan for the currently excluded sites that will be authorised under the consent after January 2025. The 15 pa is just for the sites that are already authorised under the proposed consent.

"Other actions" for matters that are outside the Council's control

75. As noted in both the s42A report and the Council's evidence, source control has a significant impact on environmental outcomes.

76. Mr Adamson describes the necessity of this "vital linked-up approach" between actions of the Council as consent holder and those of central government or others to achieve broader societal change[18].

77. The Council has little direct control over sources – i.e. public spaces, building materials, pets and ducks.

78. I submit that it would not be appropriate under the RMA to set standards or targets for this consent holder that cannot be achieved without source control changes that are outside the control of the consent holder. However, the Council proposes in conditions 37 and 38 to bind itself to actions that can help to achieve improvements in source control.

[18] D Adamson EiC at 34-35.

Collaboration between the Councils

79. The s42A report, the Council's evidence and the proposed conditions demonstrate that there has been a high level of collaboration in the preparation of this application over several years. Ongoing collaboration will be a crucial component of the success of the implementation of the consent.

80. A high degree of engagement and collaboration between the councils on stormwater and other matters already exists at governance level (Mayoral Forum and Councillors Forum), strategic and senior management level and operational level[19]. This is essential for achieving the best outcomes for stormwater management.

81. The joint stormwater management protocol between the two councils (Protocol)[20] is central to the development of previous catchment consents, SMPs, and this application.

82. The Water Issues Management Committee (WiM) and the Surface Water Action Team (SWAT) meetings further implement that collaborative approach[21].

83. The use of WiM is imbedded in the proposed conditions as a way to elevate issues regarding monitored receiving environment results and modelled outcomes. Ms Beaumont also notes that the Council supports a request from Mahaanui to become a member of WIM and that this will be resolved in November[22].

84. Collaboration between the councils will be crucial to success of the LWRP policy 4.16 direction that the Council take over responsibility for all discharges from its network. Collaboration will be needed in the transition of regulatory control, as can be seen in the Council's proposed condition 3 for those transitional arrangements.

85. Collaboration will be essential for the successful development and review of SMPs, as the certification process obviously runs most smoothly with that collaboration in the development of the documents.

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[19] D Adamson EiC at 75, H Beaumont EiC at 45-47.
[20] G Harrington EiC at 40.
[21] G Harrington EiC at 41-42.
[22] EiC at 48.

86. The consent conditions require collaboration between the CRC and the Council to determine what high risk industrial discharges will be acceptable or unacceptable. As Mr Norton[23] and Dr Margetts[24] point out, it requires an assessment of site specific factors. It cannot be determined at the "global" level of a specific consent condition.

87. Collaboration is already found in the MoU described in Mr Norton's evidence related to identification of high risk sites for possible ongoing exclusion from authorisation under the consent.

88. Collaboration between the councils is also seen in their jointly held intent to fund the full time water specialist position at Mahaanui.

89. The Protocol and the collaborative approach by CRC and the Council should be relied upon to assess and address any issues arising from the implementation of this consent.

ADAPTIVE MANAGEMENT

90. A recent High Court decision held that[25]

> *... the key to adaptive management is that it involves allowing an activity to be carried out so that its effects can be monitored and assessed and the activity modified or discontinued accordingly.*

91. Adaptive management uses a set of principles and monitored outcomes rather than a set of prescriptive inputs. This allows flexibility to adapt to monitoring outcomes and new technologies.

92. It is submitted that this application establishes the likely effects of the activity and provides a system of assessing outcomes and adapting methods to achieve the best environmental outcome. This is all done in a collaborative manner with the CRC through the systems established under the Protocol and in the WiM.

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[23] EiC at 133.
[24] EiC at 93.
[25] *The Taranaki-Whanganui Conservation Board & Ors v The Environmental Protection Authority & Anor* [2018] NZHC 2217 at [402].

93. The RMA does not define adaptive management. A definition of adaptive management from the Environment Court in the RMA context is[26]:

> *"... an on-going and cyclic process, with feedback loops so that management can improve over time... the key stages in the cycle are:*
>
> *Setting Objectives - the issue is identified and defined, and the resource information is reviewed. Hypotheses can then be developed about how the resource will respond to management. Once the objectives are set specific indicators of management success (or failure) can be identified.*
>
> *Design and planning - the preparation of management plans and programmes for managing the resource.*
>
> *Managing the resource - implementing management actions and methods.*
>
> *Monitoring - monitoring the effects of management on indicators.*
>
> *Evaluation - analysis of monitoring results in relation to objectives and the management programme i.e. are the objectives being achieved.*
>
> *Review and response - reviewing and refining the hypothesis, management plan and programme to better meet the objectives. There may also need to be adjustment of policies, programmes, and budgets ...*
>
> *After this stage the process starts again with design and planning."*

94. The Supreme Court, without purporting to define the concept of adaptive management, has summarised the starting point for consideration of adaptive management as follows (footnote omitted)[27]:

> *[125] As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and*

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[26] *Lower Waitaki River Management Society Inc v Canterbury Regional Council* EnvC C080/09.
[27] *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* (2014) 17 ELRNZ 520 (Supreme Court).

adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in Newcastle, adaptive management is not a "suck it and see" approach….

95. The Supreme Court has approved the following factors as appropriate for assessing whether a proposed adaptive management regime adequately deals with risk and uncertainty[28]:

    (a) There will be good baseline information about the receiving environment. The Court does not require the applicant to complete detailed design and research before lodging the application. "Baseline level" knowledge is what is required, which the proposal can build on as the consent is implemented[29];

    (b) The conditions provide for effective monitoring of adverse effects using appropriate indicators;

    (c) Thresholds are set to trigger remedial action before the effects become overly damaging; and

    (d) Effects that might arise can be remedied before they become irreversible.

96. The Environment Court has accepted that the adaptive management approach is appropriate for the following elements of resource consenting:

    (a) to monitor effects on the environment. A key principle is whether the proposed conditions can detect and remedy any effects before they become irreversible[30];

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[28] As above at [133].
[29] *Crest Energy v Northland Regional Council* [2011] NZEnvC 26 at [8], and *Clifford Bay.*
[30] In *Clifford Bay*, the Court was concerned with an application for a mussel farm in Clifford Bay, Marlborough, in a prime Hector's dolphin habitat. There were a range of risks with varying probabilities, such as a reduction in the size of the dolphins' habitat (virtually certain) and causing a lack of available food (very low risk). The Court cited that the ability in the conditions to limit expansion of the farm considerably if research suggested it were necessary as one of its main reasons for approving the consent, and accordingly also the appropriateness of the adaptive management approach. Other cases have also used this principle. See for example *Golden Bay* at [462], and *Oruawharo Marae Trust* at [92].

(b) requiring reporting of any discoveries about the relevant ecosystem, or other new information, so that the consent authority can ensure steps are taken before significant adverse effects result[31];

(c) implementing a co-regulatory approach between the applicant and the consent authority, which requires greater integration between the entity utilising a resource, the entity regulating that use, and the community[32];

(d) other mechanisms, such as agreed ecological guidelines, financial contributions, environmental audits, and the best practicable option[33].

97. Adaptive management is central to the operation of this proposed consent and it is submitted that this application meets all of the elements identified above.

Management plans

98. Use of management plans as part of an adaptive management approach, which leave the development of the management plan to a subsequent non-participatory process, is common and accepted by the courts.

99. The courts have held that management plan conditions must specify the objectives of the required management plan and the matters it must cover. It must not delegate key decisions to a later date, but may leave the management plan to be certified by a council officer or other person using their skill and experience[34].

100. The Environment Court has also held[35] that an objective in a management plan condition is capable of being set by evaluative, qualitative criteria in appropriate circumstances and not solely by quantitative criteria. The Court noted that qualitative objectives can be certified by appropriately qualified certifiers. It can be appropriate to provide flexibility in those evaluative, qualitative criteria to achieve the best possible environmental outcomes.

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[31] *Golden Bay Marine Farmers v Tasman District Council* EnvC W019/03 at [407].
[32] *Golden Bay Marine Farmers* at [408].
[33] See *Golden Bay* at [377] and Royden Somerville's Introductory Review at para (7) of IN7.
[34] *Mount Field Ltd v Queenstown Lakes DC* [2012] NZEnvC 262 at [76]–[83].
[35] *Northcote Point Heritage Preservation Soc Inc v Auckland Council* [2016] NZEnvC 248 at [50].

101. It is submitted that the Council's evidence establishes that the management plan process for SMPs and for SDMPs satisfies all of those criteria[36].

EXISTING ENVIRONMENT

102. In broad terms the existing (receiving) environment is the land, surface water, freshwater systems and coastal areas that receive stormwater runoff[37].

103. There is well-established case law on the identification of the receiving environment against which the effect of a proposed activity is to be assessed under the RMA. Justice Fogarty has summarised this approach as intending "*...a real world analysis in respect of resource consent applications*" [38]. That calls for a "real world", rather than an artificial, approach to assessing the state of the environment that will be receiving the effects of a proposed activity.[39]

104. In *Contact Energy Ltd v Waikato RC* [40] the applicant sought a new consent to replace an expiring consent.

105. The court held that when assessing the effects on the environment of allowing the proposed activity, it cannot ignore the fact that the consented effects were already part of the environment and were already affecting, and likely to continue to affect, the environment[41]:

> *[27] We also accept Mr Robinson's contention that it would not make sense to take a historical state of the environment as a reference point, and disregard later changes that have been made to the environment and which are irreversible. For those reasons we do not accept Mr Kember's submission that the environment should be treated as if existing lawful abstractions were discontinued. That would not represent the reality, and would lead to irrational artificiality in the process called for by section 104(l)(a) of the Act.*

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[36] Dr Margetts' EiC regarding the "mitigation toolbox"; Mr Cantrell's EiC regarding adaptive management; Mr Norton's EiC from 52 onwards; Ms West EiC at 13 and 21.
[37] Mr Norton EiC 8-18.
[38] *Shotover Park Ltd v Foodstuffs (South Island) Ltd* [2013] NZHC 1712 at [115].
[39] *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [64] adopting Fogarty's J's approach in *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, (2013) 17 ELRNZ 585 at [85].
[40] (2000) 6 ELRNZ 1
[41] P12

106. Provided with the s42A report is legal advice by Wynn Williams (WW memo) addressing the existing environment. The Council is generally in agreement with the summary of the case law and the conclusions reached in the WW memo.

107. The environment is to be considered as including the legacy effects of past lawful discharges.[42] The state of the receiving environment is the state of the receiving waters, at this point in time.

108. The existing environment includes the effects of lawful stormwater discharges. This includes discharges under existing stormwater discharge consents as well as those being lawfully exercised under section 124 of the RMA.

109. This is consistent with the WW memo. I note that, contrary to the section 42A report alluding to excluding discharges under the interim consents from the existing environment,[43] the exercising of the interim consent is lawful under section 124 of the RMA.

110. The existing environment does not include discharges from existing unlawful activities,[44] but it is submitted that there is no evidence or suggestion from the CRC of any unlawful activities. That is therefore irrelevant for this hearing.

111. It is accepted that in *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council,* for a *water take* consent, the High Court on appeal was unconvinced by the Environment Court's reasons for finding that the power scheme should be considered part of the existing environment, when assessing the effects of a replacement consent.

112. The High Court did not, however, oppose the assertion that unusual circumstances may in some cases mean that the existing environment should include ongoing effects of activities for which consent is due to expire. They noted the following principle from "the learned authors of *Environmental and Resource Management Law*":

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42 S42A report, Appendix 10, at para [3].

43 At paragraph 119.

44 S42A report, Appendix 10, at para [4].

the existing environment cannot include, in the context of a renewal application, the effects caused by the activities for which the renewal consents are sought, ***unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist.*** [my emphasis]

113. It is submitted that the Council's evidence demonstrates that it is not feasible to consider the environment as if the discharges have been discontinued. It would be fanciful and unrealistic to assess this application as if stormwater discharges will otherwise cease to occur.

114. This application is for a discharge. The Council cannot just "turn off the tap", or stop the activity. Rain is going to continue to fall on an expanding urbanised environment. Stormwater will continue to be discharged to the receiving environment. That is, in broad terms, the future environment. It is both fanciful and unrealistic to assess the existing environment as excluding stormwater discharges as the discharges:

- are anticipated and promoted by the LWRP;
- are via the Council's reticulated networks, which are an existing activity;
- have already been affecting most receiving environments for many decades; and
- are the result of an inevitable natural process and cannot feasibly be discontinued.

115. The section 42A report asserts that excluding existing consents from the existing environment "would follow the precautionary approach recommended in the Canterbury Regional Policy Statement (CRPS)".[45] However, the methods set out in the CRPS for achieving this policy relate to the writing of regional plans, investigation and monitoring programmes, facilitating research and information sharing, and having regard to recommendations from committees. These methods do not capture the proposed exclusion of an established and inevitable activity from the existing environment.

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45 At paragraph 117.

116. It is submitted that excluding ongoing discharges from the existing environment would detach the consent decisions from reality without doing anything to enable the gathering and use of new information about effects on fresh water, which is the objective of the precautionary approach as included in the CRPS.

STATUTORY ASSESSMENT OF THE APPLICATION

SECTION 104D

117. The application is for a non-complying activity due to the nature of the discharge, despite the LWRP facilitating and encouraging use of SMPs.

118. The section 104D "gateway" test applies for non-complying activity:

> *104D Particular restrictions for non-complying activities*
>
> *(1) Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—*
>
> *(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or*
>
> *(b) the application is for an activity that will not be contrary to the objectives and policies of—*
>
> *(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*
>
> *(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*
>
> *(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*
>
> *(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.*

119. The consent authority can grant consent only if satisfied that either the adverse effects on the environment are minor, or the activity is not contrary to the relevant operative and proposed regional plans.

Effects

(this discussion applies equally for s104 assessment and will not be there repeated)

120. "Minor" is not defined in the Act. However, it is a comparative word. "Minor" means less than major, but can be more than simply slight or minimal[46].

121. The Environment Court has held that when deciding whether adverse effects on the environment are more than minor, it is entitled to take into account the balancing effect of any positive effects (applying the definition of "effect" in section 2 of the Act), such as the importance of the activity for the wider community[47].

122. Other case law has held that whilst positive effects cannot be considered in calculating a "net adverse effect", the proper test is whether the adverse effects *taken as a whole*, and as proposed to be mitigated by consent conditions, are more than minor[48].

123. It is noted that the s42A report concluded that the adverse effects on freshwater and coastal water quality were more than minor, and that there was insufficient information to form a view regarding adverse effects on Ngā Rūnanga[49].

124. It is submitted that the Council's application and evidence establishes that when the receiving environment is properly identified, adverse effects of this proposed activity on the physical environment are properly assessed as no more than minor.

125. The Council's evidence demonstrates that the proposed conditions and monitoring will ensure that the effects on water quality are no more than minor. Dr Margetts describes the existing state of surface water quality and ecology[50]. She explains that implementation of the consent will overall improve the effects of contaminant discharges in stormwater[51].

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[46] *Bethwaite v Christchurch CC* C085/93 (PT).
[47] *Telecom NZ Ltd v Christchurch City Council*, W195/96, EnvC, 15 November 1996.
[48] *Stokes v Christchurch City Council* [1999] NZRMA 409 paragraph 76.
[49] S42A at 981.
[50] EiC 15-19.
[51] EiC at 59.

126. The evidence of Dr Margetts52, Mr Norton, Dr Valigore53 and Ms West54 address management of the quality of discharges and adverse effects in detail. Mr Callander's evidence is that the consent will have minor effects on groundwater qualities.

127. It is submitted that this evidence establishes that the officers' assessment of more than minor adverse effects is unfounded.

128. Moreover, the significant proposed changes to the consent conditions address most if not all of the concerns regarding management of construction phase discharges, transitional arrangements for high risk sites, and concerns raised by the CRC's two water quality specialists. Also, as noted by Dr Margetts, the changes that she recommends to the EMP and the consent conditions address all of the concerns raised by those reporting officers, save one concern regarding monitoring of wet weather discharges that is held by Dr Bolton-Ritchie but not held by Ms Stevenson (both for CRC).

129. The evidence of Dr Valigore describes the effectiveness of the industrial site audit programme for high risk sites55. That of Mr Tipper describes the improvements that the Council is making to its processes to improve management of TSS discharges at the time of site development56.

130. The consent sought involves a long term adaptive management approach over a 25 year duration. It is unrealistic to expect dramatic environmental improvements across the catchment overnight.

131. That basis for the officers' conclusion of "more than minor" adverse effects must, it is submitted, now be gone.

132. It is submitted that even without reference to Mr Pauling's evidence on behalf of the Council, there is sufficient evidence to conclude that the adverse effect of the proposed activity on Ngā Rūnanga is not more than minor. Ngā Rūnanga do not oppose the application. This is significant, in a context in which Ngā

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[52] Paragraphs 13 and 20 – 26 of her EiC.
[53] Paragraphs 38 and 45 of her EiC.
[54] Paragraphs 47-122 of EiC.
[55] EiC 15-21.
[56] EiC 29-64.

Rūnanga opposed the South-West catchment consent, opposed the Styx catchment consent, and opposed the original form of this application when notified in 2015.

133. It is submitted that reasonable conclusions on adverse effects can be drawn by inference from those facts, and from the content of the Mahaanui letter to CRC and the Deed appended to Mr Adamson's evidence. It is reasonable to conclude that Ngā Rūnanga do not oppose the application because changes to the application, in the context of the agreement recorded in the Deed, mean that the proposed conditions of consent appropriately address their concerns such that the adverse effects are not more than minor.

Objectives and policies

134. With regard to objectives and policies, the term "contrary" means "repugnant to" or "opposed to" the objectives and policies of the relevant operative and proposed regional plans, not merely that the activity is not consistent with them, or does not comply with them[57]. This requires an overall consideration of the purpose and scheme of the plan rather than a checklist of whether the non-complying activity fits exactly within the detailed provisions of the plan[58].

135. The officers' conclusion with regard to this aspect of the s104D gateway is somewhat ambiguous, but appears to conclude that the application as proposed in July 2018 is at most "inconsistent" with the objectives and policies of the LWRP, NRRP and RCEP and that if the changes recommended in the s42A are made, the application will be consistent with the objectives and policies[59]. On that assessment, regardless of assessment of adverse effects, the application passes the s104D gateway test.

136. Ms West's evidence on this is, it is submitted, clearer. She concludes that the proposed activity is not contrary to the objectives and policies. Accordingly, it is submitted that the proposed activity passes both elements of the "threshold" test.

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[57] *NZ Raii Ltd v Marlborough DC* [1994] NZRMA 70 (HC).
[58] *Elderslie Park Ltd v Timaru DC* [1995] NZRMA 433.
[59] S42A at 984.

SECTION 104 OF THE ACT

137. The relevant considerations for the exercise of discretion are set out in section 104 of the Act:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

(a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

(2A) When considering an application affected by section 124 or 165ZH(1)(c), the consent authority must have regard to the value of the investment of the existing consent holder.

(2B) When considering a resource consent application for an activity in an area within the scope of a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai

Moana) Act 2011, a consent authority must have regard to any resource management matters set out in that planning document.

(2C) Subsection (2B) applies until such time as the regional council, in the case of a consent authority that is a regional council, has completed its obligations in relation to its regional planning documents under section 93 of the Marine and Coastal Area (Takutai Moana) Act 2011.

(3) A consent authority must not,—

(a) when considering an application, have regard to—

(i) trade competition or the effects of trade competition; or

(ii) any effect on a person who has given written approval to the application:

(b) [Repealed]

(c) grant a resource consent contrary to—

(i) section 107, 107A, or 217:

(ii) an Order in Council in force under section 152:

(iii) any regulations:

(iv) wāhi tapu conditions included in a customary marine title order or agreement:

(v) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011:

(d) grant a resource consent if the application should have been notified and was not.

(4) A consent authority considering an application must ignore subsection (3)(a)(ii) if the person withdraws the approval in a written notice received by the consent authority before the date of the hearing, if there is one, or, if there is not, before the application is determined.

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

(7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant

for further information or reports resulted in further information or any report being available.

Positive effects

138. As is often the case, the focus of submissions and the s42A report, is on the adverse effects. While this focus is important, it is also important to consider the significant positive effects of the proposed activity, compared to the status quo, which include:

(a) Integrated management of stormwater by the SMP process will mitigate the effects of stormwater better than the ad hoc consenting approach that may otherwise occur;

(b) The flooding effects of the more frequent events will be mitigated better than the status quo;

(c) Treatment of existing industrial and residential discharges by retrofitting where possible, to improve water quality;

(d) Treatment of all new discharges to improve water quality;

(e) Improved monitoring of the receiving waters;

(f) Reduced consenting costs for developers by dealing only with CCC;

(g) The ability to provide for multiple values – drainage, ecology, landscape, recreation, culture and heritage – through SMPs; and

(h) The ability to improve outcomes through the flexibility of an adaptive management approach.

139. This integrated management of the natural and physical resource will have the significant positive effects of enabling the Council to discharge its infrastructure provision obligations under the Local Government Act 2002 in an effective and efficient manner[60].

[60] Ms Beaumont EiC at 52.

Conclusion on effects

140. Assessment of effects requires consideration of fact and degree, having regard to adaptive management opportunities, the aims of the objectives and policies of the relevant regional plans, and having regard to the effect of mitigating conditions. Both the s42A report (with limited exceptions regarding cultural effects and effects on surface and coastal water quality[61]) and Ms West's evidence[62] conclude that the actual and potential effects will be no more than minor and where relevant can be adequately mitigated.

141. It is submitted that the effects on the existing receiving environment as a result of implementation and operation of the consent will be minor. It is reasonable to place considerable weight on the beneficial effects of retrofitting and treatment.

S104(1)(b) plans and policy statements

142. Ms West's planning evidence will address this in detail. The evidence will show that this proposed discharge permit is consistent with the relevant regional plans.

National Policy Statement for Freshwater Management (NPS-FM)

143. The standards and targets in the LWRP already set higher water quality targets than those in the NPS-FM policy A6(b)[63] so little if any weight should be put on it.

New Zealand Coastal Policy Statement (NZCPS)

144. Ms West's planning assessment is that, based on the expert evidence, the proposed consent is consistent with the relevant objectives and policies of the NZCPS[64].

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[61] S42A paragraphs 609-645.
[62] Paragraph 122.
[63] Dr Margetts; and Ms West at 181.
[64] Ms West at 201.

Regional Policy Statement

145. The Council's evidence is that the application is consistent with the CRPS[65]. Ms West's assessment of the CRPS is for the sake of completeness, as the LWRP was prepared under the CRPS and gives effect to the CRPS, meaning that there is no need to refer to the higher instrument.

Land and Water Regional Plan (LWRP)

146. Ms West addresses relevant objectives and policies in detail. For the purposes of these opening submissions just policy 4.11 in Plan Change 5 to the LWRP, and policy 4.16, are discussed (both are appended to Ms West's EIC).

Policy 4.11

147. Policy 4.11 is relevant because the Christchurch-West Melton sub-regional part of the LWRP has not been developed. The decisions version of policy 4.11 is in three parts.

148. First, is that "*The setting and attainment of catchment specific water quality and quantity outcomes and limits is enabled through...*". That is the important starting point for assessment. The next two parts of the policy set out two ways to achieve that outcome. However, regardless of those two tools to achieve it, it is submitted that an activity cannot be contrary to the policy if it provides another way to achieve that outcome.

149. It is submitted that the proposed conditions of consent, through the "living" SMP documents and the targeting of "hot spots" enabled by the C-CLM model and the EMP, ensure that this consent will enable achieving catchment specific water quality outcomes. Moreover, the Council proposes changes to the conditions regarding reporting and review of SMPs to ensure that there is a close focus on those outcomes when the sub-regional section is developed.

150. Second is part (a), the first of the two means to achieve that outcome, which is to limit consent duration to 5 years. That is the part focussed on by the s42A

[65] Summarised by Ms West at 202-230.

report[66]; but as noted by Ms West's planning assessment there is also a part (b) which provides for longer durations for discharge permits for "principal water suppliers".

151. That focus on "principal water suppliers" is unsurprising, given that (as summarised in the CRC webpage) the purpose of Plan Change 5 was to manage the diffuse loss of nutrients from farming activities.

152. The Council is not a "principal water supplier" for the purposes of this application for stormwater discharges but it is an equivalent supplier of community-level water services. The policy envisages long term consents for large scale schemes. In that context, it is submitted that little weight should be placed on the reference in part (a) of the policy to 5 year consents.

153. The s42A report[67], in my submission correctly, notes that case law has determined that the term 'have regard to' requires the decision maker to give the matters genuine attention and thought; however, the decision maker is not necessarily required to accept those matters. The matters can be given weight as considered appropriate[68]. For the reasons set out above, in my submission little weight should be placed on this policy. This is relevant to the discussion of applicable principles for duration later in these submissions.

Policy 4.16

154. With regard to policy 4.16, this discussion largely adopts the description that was set out in answer to a request for further information in 2016.

155. Policy 4.16 requires that any reticulated stormwater system for any urban area is managed in accordance with a SMP that addresses the following matters:

> *"(a) the management of all discharges of stormwater into the stormwater system; and*
>
> *(b) for any reticulated stormwater system established after 11 August 2012, including any extension to any existing reticulated stormwater*

[66] 875-878, and regarding duration.
[67] At 1014.
[68] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38; *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.

system, the discharge of stormwater being subject to a land-based or designed treatment system, or wetland treatment prior to any discharge to a lake or river; and

(c) how any discharge of stormwater, treated or untreated, into water or onto land where it may enter water meets or will meet, the water quality outcomes and standards and limits for that waterbody set out in Table 1, Schedules 5 and 8 … and;

(d) the management of the discharge of stormwater from sites involving the use, storage or disposal of hazardous substances, and

(e) where the discharge is from an existing local authority network, demonstration of a commitment to progressively improve the quality of the discharge to meet condition (c) as soon as practicable but no later than 2025."

156. In my submission (and as is set out in both the s42A report and Ms West's evidence) the policy does not require the achievement of the water quality outcomes in part (c) within the timeframes specified in part (e). The policy requires "demonstration of a commitment to progressively improve the quality of the discharge", with the aim of the progressive improvement being to meet condition (c), no later than 2025.

157. The existing SMPs, I submit, meet the requirements of Policy 4.16. The SMPs that are still in the process of being developed will also need to demonstrate a commitment to progressively improve the quality of the discharge, and this has been provided for through proposed conditions.

158. The CSNDC discharge is from an existing local authority network, and it is proposed to maintain or progressively improve the quality of the discharge towards meeting the water quality outcomes. The SMPs will demonstrate the Council's commitment to progressively improve the quality of all of the discharges.

159. The s42A report interprets the policy and the NPS-FM in that way, as requiring demonstration of a commitment to progressive improvement by 2025, rather

than as requiring achieving the waterway outcomes – outcomes that cannot be achieved by improvement of stormwater quality alone – by 2025[69]. The Council agrees with that. However, it is submitted that the s42A report is wrong to then suggest that there is insufficient certainty about the Council's actions to conclude that the Council has demonstrated that commitment. The Council's proposed conditions and evidence – in particular, that of Mr Adamson, Ms Beaumont, Mr Norton, Dr Margetts and Mr Parsons - are submitted to provide certainty in that regard.

Summary on plans

160. It is submitted that the application is in accord with the objectives and policies of the relevant statutory planning documents. There is no material inconsistency that would warrant consent being declined or require the adoption of a different approach or imposition of additional conditions.

Section 104(1)(c) - other matters

161. Under s104(1)(c) the Commissioners may consider any other matter that is relevant and reasonably necessary to determine the application. Other relevant matters in this case are submitted to include:

    (a) Management strategies/plans for water management, as described in Ms Beaumont's evidence;

    (b) The Protocol and WIM processes; and

    (e) The Mahaanui Iwi Management Plan and Ngāi Tahu Freshwater Policy.

162. The Protocol has been described in these submissions, the s42A report and the evidence of Mr Harrington. The Council values the collaborative approach to managing this issue, which is of great importance to both the councils and the community. The WIM committee (with Council officers also investigating the possibility of Ngāi Tahu representation on the committee) will keep an overview of the implementation of the discharge consent, and serve as a backstop to resolve any issues that arise.

[69] S42A at 838.

163. Ngā Rūnanga are sufficiently satisfied by the resolution of issues through changes to the application and related matters described in the Deed that they do not oppose the application. That, and the related matters described in Mr Pauling's evidence, is evidence from which it is reasonable to infer that the outcome of the application will not be inconsistent with the iwi management plan and cultural values.

Section 105 and the consideration of alternatives

164. Section 105(1) of the Act requires the consent authority, when considering activities that would breach section 15, to also have regard to three specified matters:

> *(1) If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—*
>
> *(a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
>
> *(b) the applicant's reasons for the proposed choice; and*
>
> *(c) any possible alternative methods of discharge, including discharge into any other receiving environment.*

165. That section is addressed briefly in the officers' report and no issues are identified[70]. The Council agrees that no issues arise; however, for completeness, the consideration of alternatives is here assessed in a little more detail.

166. The reasons for the choices inherent in this application – including levels of water quality and monitoring mitigation, or discharge to water rather than to ground - are addressed throughout the Council's evidence, including in the evidence of Mr Adamson, Mr Parsons, Mr Callander, Dr Margetts, Mr Harris and Mr Norton.

167. Mr Harris's economic analysis describes the costs and benefits of several alternative treatment hypothetical scenarios that were developed by Mr Parsons

[70] S42A at 996-998.

and modelled by Mr van Nieuwkerk. It is submitted that those alternatives are simply unsustainable.

168. The Council considers that the proposed choice inherent in the application and in the proposed conditions provides the most appropriate overall option when all considerations are balanced.

169. Where the consideration of alternatives is relevant, there are a number of established tests used in case law[71]:

(a) the site or method should be a suitable one - it does not have to be the *most* suitable or the *only* suitable site; and

(b) alternative sites and methods should be practicable; and

(c) planning, or the RMA process, is not to be used for licensing purposes (ie directing the use of a particular resource or method); and

(d) provided the application is consistent with the sustainable management purpose of the Act, then little weight should be given to the question of alternatives.

170. In *Mahuta v Waikato Regional Council*,[72] the Court considered the adverse effects of waste from a dairy factory on the Waikato River. It held that it was not required to consider other alternatives under section 105 in circumstances where it was satisfied that the discharges would not have significant adverse effects on the water quality of the river. The Council's evidence in this case[73] is that the discharges will not have significant adverse effects on the receiving water quality.

171. In considering possible alternative methods, the High Court affirmed in the Project Hayes wind farm decision that a consent applicant is not required to

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[71] These principles are set out in *Trio Holdings v Marlborough District Council* [1997] NZRMA 97 and *Judge's Bay Residents Association v Auckland Regional Council* (A072/98).
[72] Decision A91/98. This approach has been affirmed since the enactment of s105 in *Progressive Enterprises Ltd v North Shore City Council* (W075/08).
[73] Dr Margetts at 13.

demonstrate that their proposal is the best use of resources out of available alternatives[74].

172. The Court has noted that its role is not to substitute its own judgement for that of the applicant, but to "*find whether the District Council gave adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge and made a reasoned choice*"[75].

173. Taking into account the limited obligation for the Council to consider alternatives which arises in terms of section 105, it is submitted that the Council gave adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge and made a reasoned choice. The issue of alternatives requires no further attention.

Section 107

174. Section 107 is concerned with protection of the quality of receiving waters. It provides:

107 Restriction on grant of certain discharge permits

(1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—

(a) the discharge of a contaminant or water into water; or

(b) a 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; or

(ba) the dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant,—

if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

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[74] *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482.
[75] *Tainui Hapu v Waikato Regional Council* (A063/2004) paragraph 148.

(c) the production of any 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.

(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—

(a) that exceptional circumstances justify the granting of the permit; or

(b) that the discharge is of a temporary nature; or

(c) that the discharge is associated with necessary maintenance work—

and that it is consistent with the purpose of this Act to do so.

(3) In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.

175. The s42A report suggests that there is uncertainty regarding whether section 107(1) may be contravened by the proposed discharge due to there being insufficient information regarding management of construction sites and HAIL sites[76]. The Council does not know whether that is still the officer's view following the proposed changes to the consent conditions but it is submitted that the proposed changes have reasonably addressed that concern.

176. The Council's evidence on s107 is from Dr Margetts and Ms West [77].

177. The s42A report goes on to recommend that if s107(1) is contravened, exceptional circumstances justify granting consent under s107(2) *only if* the issues for s107(1) regarding construction sites and HAIL sites are addressed[78].

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[76] S42A at 1001.

[77] Dr Margetts EiC at 53-54; Ms West at 156-162.

178. That reasoning, with respect, does not make sense. The provision for approving consent by reason of exceptional circumstances under s107(2) applies in circumstances where an application does not comply with s107(1).

179. It is accepted by the courts that "exceptional circumstances" under this subsection means "something out of the ordinary", both in terms of the significance and historical duration of the activity for which consent is sought and the consequences of refusing consent[79]. In *Te Rangatiratanga o Ngati Rangitihi Incorporated* the High Court held that whether or not exceptional circumstances exist is a factual question;[80] and that exceptional circumstances can be assessed on a cumulative basis (i.e. several circumstances that individually are not exceptional, may cumulatively amount to exceptional circumstances).[81]

180. Exceptional circumstances that warrant the grant of consent include those where the provision of infrastructure is of positive economic and social benefit. The High Court in *Te Rangatiratanga o Ngati Rangitihi Inc v Bay of Plenty RC* has confirmed the cumulative approach to the relevant factors[82].

181. For the reasons set out in Ms West's evidence, and further addressed in these submissions, if the Commissioners consider it necessary to identify special circumstances , then the exceptional circumstances include that the activity has positive importance for the continuation of stormwater infrastructure for the community, that the grant of consent will have better environmental results for the receiving waters than the ad hoc consenting that will result from declining consent, and the earthquake regeneration need for integrated management of new infrastructure and development.

DURATION OF CONSENT

182. The duration of a consent is a matter for the Commissioners' discretion under section 123(d) of the Act, with 35 years the maximum.

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[78] S42A at 1005.
[79] *Marr v Bay of Plenty RC* [2010] NZEnvC 347 and *Rotokawa Joint Venture Ltd v Waikato RC* EnvC A041/07.
[80] Ibid at, [72].
[81] Ibid at, [73].
[82] *Te Rangatiratanga o Ngati Rangitihi Inc v Bay of Plenty RC* (2010) 16 ELRNZ 312 (HC).

183. The s42A report does not make a clear recommendation on duration. It is submitted that if the Commissioners are minded to grant consent, then given the size of the network, the level of investment, the amount of time needed to determine whether the receiving environment objectives are being met, the adaptive management approach enabled by the SMP framework, the hot spot targeting enabled by high risk site audits and the EMP and the C-CLM, it is appropriate to grant consent for the maximum duration available under the RMA, being 35 years – and is equally appropriate to grant consent for the duration now sought by the Council as a result of the agreement with Ngā Rūnanga, being 25 years.

184. There is a reasonable body of case law regarding the matters that are relevant to the term of consent[83]. The s42A report refers to the same cases when describing relevant factors to consider for duration[84]. The courts have found that key factors include:

1. The actual and potential effects of the activity on the environment.

2. Relevant provisions of the applicable plans under the RMA.

3. The nature of the discharge.

4. The sensitivity of the receiving environment to adverse effects.

5. The applicant's reasons for the application.

6. Any possible alternative methods of discharge, including into another receiving environment.

7. Whether conditions can be imposed requiring adoption of the best practicable option.

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[83] *PVL Proteins Ltd v Auckland RC* EnvC A061/01, *Genesis Power Ltd v Manawatu-Wanganui RC* (2006) 12 ELRNZ 241; [2006] NZRMA 536 (HC). Upheld on appeal by the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA), followed in *Royal Forest and Bird Protection Soc of NZ Inc v Waikato RC* [2007] NZRMA 439 (EnvC).
[84] At 1008.

8. Uncertainty for the applicant if a short term is imposed, and the applicant's need for as much certainty as is consistent with sustainable management.

9. The value of the existing investment.

10. Whether a review condition is more appropriate than a short term to ensure that conditions remain relevant.

11. Whether there is any expected future change in the vicinity.

12. Whether there is uncertainty about the effectiveness of conditions to protect the environment.

13. Whether there is considerable public disquiet with the existing operation.

14. Whether adverse effects could vary or increase during the term.

15. When a re-evaluation of the consent is required.

185. In this case, the proposed consent is for a long-term project which is facilitated by the relevant plans, requires a long-term investment, contains scope for reviews together with other adaptive management responses, and has the safeguards provided by way of the Protocol and the collaborative approach with CRC. In that context a 25 year consent is appropriate.

186. It is submitted that the s42A report places excessive weight on policy 4.11 in plan change 5 to the LWRP when having regard to that as a relevant factor for duration. It is accepted that the court has found that a short duration can be considered reasonable where the impact of the resource consent duration could hinder the implementation of an integrated management plan (including a new plan), when at such time the re-evaluation of the consent from an RMA perspective is likely to be required [85] But if it is inevitable that a fresh consent will be granted, it is a waste of time and money to grant a short term consent [86]. Here, with the extent of resources put into this application and the extensive

[85] *Royal Forest and Bird Protection Society of New Zealand Inc v Waikato Regional Council* [2007] NZRMA 439 (EnvC), cited at 1015 of the s42A report.
[86] *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council* [2016] NZEnvC 59.

provision in the proposed conditions for adaptation and review following development of the sub-regional section, and the close involvement that the Council will be taking in that development of the sub-regional section, it is submitted that it cannot be appropriate for that future development of the sub-regional section of the LRWP to limit the duration of this consent.

PART 2 MATTERS AND DAVIDSON

187. The relevant matters in Part 2 of the Act are described in the s42A report and Ms West's evidence and are not repeated here.

188. As a result of the recent Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council*[87] there is improved clarity in case law regarding the extent to which Part 2 matters are relevant for resource consent applications. It will be appropriate and necessary to refer to Part 2 in some circumstances, including:

    (a) If higher order policies are equivocal and it is unclear from them whether consent should be granted or refused, or

    (b) If the relevant plan has not been competently prepared in accordance with Part 2, or if there is some doubt about that.

189. It is submitted that those circumstances do not apply here so resort to Part 2 to assist to determine this application is unnecessary.

190. However, again for the avoidance of doubt and as set out in Ms West's evidence, it is submitted that granting the consent will allow the Council to provide for the social, economic and cultural wellbeing and the health and safety of residents, while appropriately responding to the effects of that activity on the environment. It will allow the operation of a comprehensive stormwater network, providing for the long term growth of the community.

191. Overall, the proposal is consistent with the purpose and principles of the Act.

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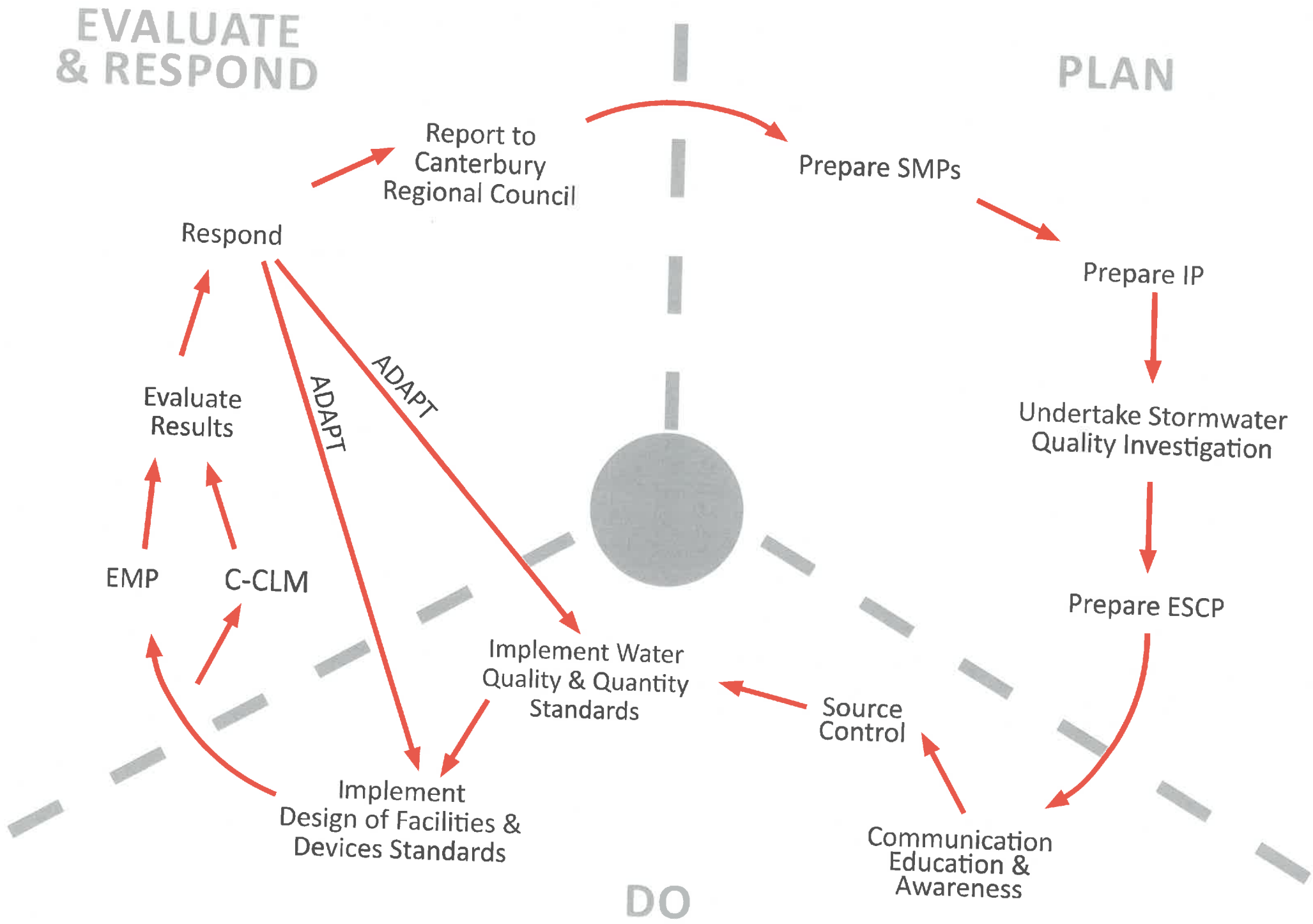
[87] [2018] NZCA 316.

CONCLUSION

192. The discharge activity proposed in the SMP framework will result in an improvement in the quality of existing stormwater discharges from existing development areas and will mitigate the effects of future residential and commercial development. It will also appropriately manage flood risk arising from those discharges. It is submitted that the effects of the proposal on the environment will be no more than minor. The proposed discharge is consistent with the provisions of the relevant statutory documents, including in particular the NPS-FM, RPS, RCEP and LWRP. The proposal is consistent with the sustainable management purpose and principles of the Act.

BK Pizzey

5 November 2018


EVALUATE & RESPOND
PLAN
DO
Report to Canterbury Regional Council
Prepare SMPs
Prepare IP
Undertake Stormwater Quality Investigation
Prepare ESCP
Communication Education & Awareness
Source Control
Implement Water Quality & Quantity Standards
Implement Design of Facilities & Devices Standards
EMP
C-CLM
Evaluate Results
Respond
ADAPT
ADAPT