

**BEFORE THE COMMISSIONERS APPOINTED BY
THE CANTERBURY REGIONAL COUNCIL**

IN THE MATTER of Proposed Plan Change 7 to the
Canterbury Land and Water
Regional Plan

SUBMITTER **MULLIGAN, M E & KERSE, I J &
KINGSTON N S**

Submitter 384

**SUBMISSIONS OF COUNSEL ON BEHALF OF MULLIGAN, M E &
KERSE, I J & KINGSTON N S**

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**SUBMISSIONS OF COUNSEL ON BEHALF OF MULLIGAN, M E &
KERSE, I J & KINGSTON N S**

May it please the Commissioners:

Introduction

1. These submissions are provided on behalf of Mr Mark Mulligan, Mr Ian Kerse and Mr Neil Kingston (the **Submitters**) who lodged original submission 384 (the **Submission**)¹ and further submissions on Proposed Plan Change 7 (Part B) (**PC7**) to the Canterbury Land and Water Regional Plan (**LWRP**).
2. The primary issue of concern for the Submitters is the appropriateness of a Coopers Creek minimum flow of 50 litres per second (**L/s**) at the monitoring site approximately 20 metres downstream of State Highway 72 (**SH72**). A map identifying the SH72 monitoring site is at Annexure 02 to the Submission.²
3. The Submitters have each prepared briefs of evidence outlining their respective farming operations, their involvement in the flow management regime at Upper Coopers Creek and discussion of the effect that the 50 L/s minimum flow.
4. The following expert evidence has been lodged in support of the Submission, including:
 - (a) Mr Ian McIndoe (Hydrology).
 - (b) Mr Matt Hickey (Ecology and Hydrology).
 - (c) Mr Hayden Craw (Economics).
 - (d) Ms Keri Johnston (Planning and Consents).
5. These legal submissions will cover the following:
 - (a) Statutory Considerations.

¹ Original Submission 384.

² Original Submission 384, Annexure 2 'Map identifying new "Upper Coopers Creek" sub-catchment and upper/lower reaches' at page 23.

- (b) National Policy Statement for Freshwater Management 2020 (**NPSFM-2020**).
 - (i) Environmental Flows and Levels.
 - (ii) Best Available Information.
 - (iii) NPSFM-2020 Policy.
- (c) Section 32 Evaluation Report.
- (d) Section 42A Report.
- (e) Conclusion.

Statutory Considerations

- 6. The key provisions relevant to the evaluation of the proposed plan are contained in sections 30, 32 63-70 of the RMA. A regional plan must be prepared and/or changed in accordance with the following matters set out in section 66 of the RMA:
 - (1) A regional council must prepare and change any regional plan in accordance with—
 - (a) its functions under section 30; and
 - (b) the provisions of Part 2; and
 - (c) a direction given under section 25A(1); and
 - (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
 - (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
 - (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
 - (f) any regulations.
- 7. The section 32 and 42A reports and the evidence was filed prior to the NPSFM-2020 becoming operative, therefore it has not previously been

addressed. It is submitted that the NPSFM2020 is relevant you're your evaluation of PC7 should seek to implement it to the extent you can. Counsel agree with the Submissions of Counsel for the Regional Council³ in this regard.

National Policy Statement for Freshwater Management 2020

8. The objective of the NPSFM-2020 is:⁴

...To ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems
- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

9. The relief sought by the Submitters engages with the first and third priorities and Policies 7, 9, 11, and 15 in particular. The Submitters acknowledge that the health and wellbeing of the waterbody must be provided for before providing for the productive economic use of the waterbody.

10. It is submitted that the evidence filed demonstrates that this is achieved by the relief sought whilst achieving a superior outcome with respect to the ability of people and communities to provide for their various well-beings.

11. The evidence of Mr Hickey and Mr McIndoe are relevant to the first priority and find that the ecological values of Upper Coopers Creek can be protected and improved upon without the imposition of the 50l/s minimum flow suggested in PC7.

12. The evidence of Mr Craw and the Submitters is relevant to the third limbs of the objective and finds that the Submitters are unlikely to be

³ Opening Legal Submission of Counsel for the Canterbury Regional Council at [15] – [47].

⁴ National Policy Statement for Freshwater Management 2020 at clause 2.1.

able to provide for their economic well-being with a minimum flow of 50 L/s at SH72 because of the marked increase in the coefficient of variability, causing uncertainty in feed production and a reduction in stocking rates even when seasonal water availability is good.

13. It is submitted that the Objective of the NPSFM is better served by using a maximum allocation regime in exchange for the minimum flow.
14. However, if the Hearing Panel considers that it is necessary for a minimum flow to be imposed on Upper Coopers Creek it is submitted that this should significantly lower than the proposed 50l/s. The evidence of Mr Hickey supports a 10 L/s minimum flow at the SH72 monitoring point if that is deemed necessary as a backstop.

Environmental Flows and Levels

15. The Submission seeks that the minimum flow at SH72 be removed and that abstractions be managed by way of maximum allocation volume. The relief sought in the submission also proposed a suite of provisions that would encourage implementation of the methods to support and enhance the habitat values within the Coopers Creek subcatchment.
16. It is submitted that it is not necessary to impose a minimum flow on every waterbody in an FMU. There is nothing in the NPSFM policy framework that directs this outcome and it is submitted that the relevant provisions can be better achieved by the relief proposed by the Submitters.
17. The NPSFM-2020 includes a requirement on regional councils to set environmental flows and levels “for each FMU,⁵ and may set different flows and levels for different parts of an FMU”.⁶

⁵ FMU is defined in the National Policy Statement on Freshwater Management 2020 at Clause 1.4 as “all or any part of a water body or water bodies, and their related catchments, that a regional council determines under clause 3.8 is an appropriate unit for freshwater management and accounting purposes; and part of an FMU means any part of an FMU including, but not limited to, a specific site, river reach, water body, or part of a water body”.

⁶ National Policy Statement on Freshwater Management 2020 at Clause 3.16(2).

18. The term “environmental flows and levels” is not defined in the NPSFM-2020 but is put into context by clause 3.16(2)
19. Provided there is at least one monitoring site within the FMU then there is no requirement within clause 3.16 to set a minimum flow in relation to every water body within that FMU. If ECan deemed it necessary to include a minimum flow for other waterbodies, then it would be exercising its discretion in relation to different parts of the FMU. This interpretation of clause 3.16(2) is supported by clause 3.8(4) which suggests that a single monitoring site can be representative of an FMU. The Orari FMU has 4 monitoring sites with Upper Coopers Creek being identified as an additional monitoring site in PC7. Counsel submits that the Upper Coopers Creek minimum flow notified in PC7 is not required to give effect to the NPSFM-2020.
20. The LWRP contains strategic provisions relevant to setting limits for managing water, including Strategic Policy 4.5, which reads:

Water is managed through the setting of limits to safeguard the life-supporting capacity of ecosystems, support customary uses, and provide for community drinking-water supplies and stock water, as a first priority and to meet the needs of people and communities for water for irrigation, hydro-electricity generation and other economic activities and to maintain river flows and lake levels needed for recreational activities, as a second priority.

[Emphasis added]

21. In relation to water take consents, Policy 4.61 requires that:
- Any abstraction of surface water or stream depleting groundwater with direct, high, or moderate depletion, is subject to conditions specifying:
- [...]
- (c) a minimum flow at which abstraction ceases in accordance with the relevant flow and allocation limits;
22. Counsel submits that where the relevant flow and allocation limits set by Table 14(h) and Table (zb) do not include a minimum flow then it is similarly not required to be imposed on conditions of consent.

23. As opposed to setting a minimum flow, the Submission seeks that abstractions within the defined Upper Coopers Creek Sub-Catchment be managed through a maximum allocation rate and volume only. This proposal will not affect allocation within the wider FMU as the Coopers Creek allocation is included within Table 14(zb).

Best Available Information

24. The NPSFM-2020 clause 1.6 states that it is a requirement to use “the best information available at the time is a requirement to use, if practicable, complete and scientifically robust data”.⁷ This is far more directive than what was contained in the preamble to the NPSFM-2017 which stated that “*The process for setting limits should be informed by the best available information and scientific and socio-economic knowledge*”.⁸
25. NPSFM-2020 Clause 1.6(3) provides more information on the use of the best available information, including that a person “*must not delay making decisions solely because of uncertainty about the quality or quantity of the information available*”.⁹
26. The history of determining a minimum flow for the Upper Coopers Creek Sub-catchment has been a long and arduous process for the submitters. A chronology of events is set out in **Appendix 1**. It started in 1999 with an Environment Court order setting a minimum flow of 50 L/s. At that time the Court acknowledged that better hydrological and ecological information was required and when it became available that ECan would consider exercising its power under section 128 to review the minimum flows imposed. Nothing was done by the Council, and the issue reared its head again during the LWRP review in 2012.
27. The Hearing Panel Questions dated 28 May sought a Supplementary Report comparing (in tabular form) the recommended minimum ecological flows set out in the various Memos in Appendix 1 of report

⁷ National Policy Statement for Freshwater Management 2020 at clause 1.6(1).

⁸ National Policy Statement for Freshwater Management 2014 (amended 2017) at Preamble.

⁹ National Policy Statement for Freshwater Management 2020 at clause 1.6(3).

R19/80 to the notified minimum flows for all OTOP rivers, which includes Upper Coopers Creek.¹⁰ In response, the Council officers confirmed that the information relied on in support of the 50 L/s minimum flow at Upper Coopers Creek was based on a report prepared by Golder Associates entitled “*Coopers Creek Ecological Values and Flow Requirements*” (2013)¹¹ (**Golder Associates Report**).

28. A report commissioned by ECan entitled “*Groundwater-surface water interaction in the Coopers Creek catchment*”,¹² Report No. R17/3 (**ECan Report**) similarly cites the Golder Associates Report in recommending a 50 L/s be imposed to protect the ecological values of Upper Coopers Creek.¹³
29. The Submitters have commissioned expert hydrology¹⁴ and ecology¹⁵ evidence in support of the Submission. The advice from Mr Hickey and Mr McIndoe informs the relief sought by the Submitters. The evidence is the most recent evaluation of the ecological values and hydrology of Upper Coopers Creek.
30. Mr McIndoe’s evidence also determines the 7DMALF relevant to Upper Coopers Creek which had not been assessed by ECan, or the Golder Associates Report. This appears to be a significant omission from the Council commissioned work and one that has likely perpetuated the issues created by the proposed minimum flow (which is approximately double 7DMALF).
31. Mr Hickey’s evaluation of the Golder Associates Report is outlined in his evidence at [13]-[27]. Mr Hickey’s conclusions as to the utility of the

¹⁰ Questions from the Hearing Panel dated 28 May 2020 referring to page 327 of the section 42A Report at 10.26.

¹¹ Coopers Creek Ecological Values and Flow Requirements, Golder Associates, July 2013.

¹² Groundwater-surface water interaction in the Coopers Creek catchment, Peaver, L., Kaelin, N., Durney, P. and Trewartha, M., Report No. R17/3 July 2017.

¹³ Groundwater-surface water interaction in the Coopers Creek catchment, Peaver, L., Kaelin, N., Durney, P. and Trewartha, M., Report No. R17/3 July 2017 at section 3.2 page 9.

¹⁴ Evidence of Ian McIndoe.

¹⁵ Evidence of Matt Hickey.

Golders Associate Report and the subsequent ECan Report is summarised at [26] and below:

The usefulness of the ecological report prepared by Golders was further limited by Ecan's hydrology investigation and reporting which was concluded some four years after the ecological study was prepared. Ideally the ecology work would follow the hydrology study. This would have allowed for a better understanding of longitudinal flows and the degree of hydrological alteration caused by the takes enabling a better analysis of the ecological effects.

32. The experts engaged by the Submitters have taken Mr Hickey's preferred approach which was to undertake the hydrology study (including the assessment of 7DMALF) first, prior to undertaking any site-visit, evaluation, and assessment of ecological values. Counsel submits that has produced a more complete and robust scientific understanding of the hydrological characteristics and ecological values of Upper Coopers Creek. It has also enabled a more robust assessment of the surface flow requirements to protect the ecological values identified.
33. Counsel submits that the expert evidence pre-circulated in support of the Submission should be relied on as the best available information when deciding the most appropriate flow management regime for Upper Coopers Creek.

Policy

34. The following section discusses relevant policies of the NPSFM-2020.
35. Policy 3 provides that "*Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments*". The Submission seeks to have Upper Coopers Creek managed as a discrete "sub-catchment". The discrete sub-catchment is identified in the Submission and at Figure 2 in the evidence of Mr McIndoe.

36. The principle reason for identifying a sub-catchment is that this section of Coopers Creek demonstrates hydrological characteristics distinct from the rest of Coopers Creek. Surface water flows at the Spring Heads of Upper Coopers Creek are constant, whereas flows in the Coopers Creek main channel are ephemeral and subject to intermittent drying.¹⁶ The flows from the Spring-fed section are effectively providing surface water flows that support the ecological values identified. However, the flow site is not located to be representative of the hydrology that drives the flows from the Spring-fed section.
37. The residual effects arising from the use of the water are addressed through a suite of policies that seek to promote cooperation between the water users in the sub-catchment (the Submitters), and to promote measures that will further improve the ecological values of Upper Coopers Creek as a minimum flow on its own will not do this.¹⁷
38. Policy 7 provides that “*the loss of river extent and values is avoided to the extent practicable*”. The evidence of Mr Hickey is that the cumulative reduction as a result of the existing water takes to the ‘wetted length’ is 150 metres or 12% in a very dry year as shown in Figure 20 with a with a flow of 69 L/s at Mulligans Weir.¹⁸ Mr Hickey goes further to say:

Because the majority of Coopers Creek flows at more than 10 l/s even when it is dry at SH 72 (Figure 16), drying is a relatively infrequent occurrence at SH 72 and the reduction in wetted length when it does dry is short (150m) in my opinion the risk to ecological values of the current level of abstraction is very low.

39. It is submitted that the regime promoted by the Submitters implements this Policy. Whilst it is not ‘enforced’ through a minimum flow, controlling the rate and volume of extraction will ensure that stream-depleting effects of the takes within the sub-catchment have been avoided to the extent practicable. As concluded by Mr Hickey¹⁹:

¹⁶ Evidence of Ian McIndoe at [15] and [29].

¹⁷ Evidence of Matt Hickey at [100]-[104].

¹⁸ Evidence of Matt Hickey at [87].

¹⁹ Evidence of Matt Hickey at [97]-[98]

Because the combined take from the Coopers Creek is low capping it would ensure the flow regime would closely mimic what would occur without taking.

...capping the combined abstraction based on actual use rather than trying to manage taking by a flow monitoring site in a naturally intermittent reach of river would be the most practical outcome for Coopers Creek.

40. It is submitted that the drafting of Policy 7 (particularly the phrase ‘to the extent practicable’) is a nod to the inherent ‘tensions’ between the priorities in the NPSFM-2020 Objective. It is an acknowledgement that enabling abstraction is likely (in some instances) to cause a loss in river extent, but that such losses may not compromise the health and wellbeing of the waterway.
41. What constitutes avoidance ‘to the extent practicable’ will necessarily turn on the facts of the specific case. However, it is submitted that the following matters will be relevant:
 - (a) The nature of the water body including whether it is prone to drying naturally.
 - (b) The sensitivity of the environment, including what values have been identified and what habitat preferences the identified species may have.
 - (c) The financial implications of the measures proposed; and
 - (d) the state of current technical knowledge. Where there is uncertainty about potential risks or effects a more conservative approach may be required.
42. The evidence of Mr McIndoe and Mr Hickey assists in considering (a), (b) and (d). Mr Craw’s evidence is relevant to understanding point (c).
43. Policy 9 requires that “*the habitats of indigenous freshwater species are protected*”. Mr Hickey’s assessment is that “*even at low flows (<10 L/s at SH72) there is adequate habitat (based on depth and velocity) for the native fish species present when considering their habitat*”

preferences".²⁰ That is the case even when there is no flow at the SH72 monitoring point given that the species of native fish found by Mr Hickey are very well adapted to low flow conditions and there is secure habitat available to them upstream.²¹ Therefore, it is submitted that the relief sought is consistent with Policy 9.

44. Policy 11 is that "*Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided*". The Submitters takes represent the entirety of abstractions within the Upper Coopers Creek sub-catchment. That has been reflected in the Consolidated Officer Recommendations dated 10 July 2020 at Table 14(h).
45. In relation to the question of allocation, a memorandum of counsel on behalf of the Canterbury Regional Council dated 23 September 2020 attaches a memorandum that updates the Hearing Panel on the resource consent inventory (**RCI**) prepared in respect of the OTOP zone. That memorandum outlines the updated approach to catchment accounting and methodology, including key differences in the methodologies. Notably, the Orari-Opihi Groundwater Allocation Zone is identified as 90.3% allocated. Therefore, there is no existing over-allocation to phase out. The limits included at Table 14(zb) will ensure that any future over-allocation is avoided.
46. Finally, policy 15 provides that "*communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with this National Policy Statement*". There is no guidance in the NPSFM-2020 as to whether there is a hierarchy between the policies. However, the drafting of policy 15 is consistent with the cascade of priorities in the objective to the NPSFM-2020. Counsel submits that on the basis that the Submission achieves policies 3, 7, 9 and 11 that the Hearing Panel is not constrained in terms of enabling the Submitters social, economic, and cultural well-being.

²⁰ Evidence of Matt Hickey at [84].

²¹ Evidence of Matt Hickey at [46]-[50]

47. It is submitted that the relief sought demonstrates a 'win-win' scenario, compared to the 'win-lose' scenario that arises from the notified provisions of PC7.

Section 32 Evaluation Report

48. An evaluation report prepared under section 32 of the Act must:²²
- (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
 - (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
 - (i) identifying other reasonably practicable options for achieving the objectives; and
 - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - (iii) summarising the reasons for deciding on the provisions; and
 - (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
49. It is understood that PC7 has been notified in response to the requirement set out in the NPSFM-2017 and in response to recommendations for regulatory action set out in the OTOP ZIPA. For the purposes of section 32(3) of the RMA PC7 is an amending proposal because it amends the existing regional plan. Therefore, an evaluation of the appropriateness of PC7 must consider the provisions of the existing LWRP (to the extent that they are relevant) and whether PC7 gives effect to its stated objectives.
50. In relation to Upper Coopers Creek,²³ the OTOP ZIPA recommended:
- (a) The Environmental Flow and Allocation Regime for the Orari River specified in Section 14 of the Land and Water Regional Plan is retained, subject to the following additions:

²² Resource Management Act 1991, section 32(1)(a)-(c).

²³ Note: "Coopers Creek at State Highway 72" and the term used in these submissions "Upper Coopers Creek" refer to the same catchment area.

- (i) Provision of an additional minimum flow monitoring site and allocation limit on Coopers Creek at State Highway 72;
 - (ii) [omitted]
- (b) Any new water permit or change to any existing water permit to abstract surface water or stream depleting groundwater, shall be subject to the environmental flow regime for the Orari Freshwater Management Unit as though it is operative.
- (c) [omitted]
51. The evidence of Ms Johnston reviews the extent to which the section 32 report considers the economic impacts on the Submitters. Ms Johnston's view is that the section 32 Report Author fails to have regard to the following key factors:
- (a) The extent to which reliability will be reduced as a result of the proposed minimum flow.²⁴
 - (b) Conditions on Messrs Kingston and Kerse's consents which delays the imposition of the minimum flow until 1 July 2021.²⁵
 - (c) That linking the Submitters abstractions to the Orari River was an interim measure until such time as the flow and allocation regime of Upper Coopers Creek was properly assessed.²⁶
52. The Submitters are acutely aware of the issues posed by a 50 L/s minimum flow and how that affects their ability to carry out their farming operations. The evidence of Mr McIndoe addresses this issue and assess the Submitters water takes against various minimum flow scenarios and in relation to two possible monitoring sites: the existing SH72 site and Mulligan's Weir.²⁷
53. Mr McIndoe's reliability assessment, in relation to the monitoring site at SH72 is set out in his evidence at Appendix 1. A comparison in reliability between the SH72 site and Mulligans Weir is provided for Mr

²⁴ Evidence of Keri Johnston at [42].

²⁵ Evidence of Keri Johnston at [44]-[45] and [50].

²⁶ Evidence of Keri Johnston at [47]

²⁷ Evidence of Ian McIndoe at [74].

Kerse's farm at Table's 5 and 6. Table 5 sets out the impact of the high minimum flow and pro rata restrictions on water availability²⁸.

54. Comparing Table 5 and 6 shows that reliability at Mulligan's Weir is better than at the SH72 monitoring site, although even at 7DMALF reliability is marginal.²⁹ This is unsurprising given that Mulligan's weir is upstream of the confluence of the Spring-fed section and the losing reach within the Coopers Creek Mainstem.
55. The Submitters wish improve the efficiency of the use of their water take by investing in additional spray infrastructure and storage ponds in some cases. However, that infrastructure comes at considerable expense and cannot be justified without the confidence that the investment would be realised through the ability to take water reliably.
56. As noted in the evidence of Mr Kingston, being subject to the unreliability of the 50 L/s minimum flow from 2008 to 2012 forced him to reduce his efficiency by watering as much as possible when water could be taken, with the knowledge that he would likely be subject to 100% restrictions for several weeks at a time.³⁰ This creates perverse incentives.
57. The evidence of Mr Craw evaluates the economic impact on the Submitters respective farming operations. Mr Craw's Appendix 1 (**Economic Report**) assesses model farming operations based on rainfall from an average year (based on rainfall records) and an average of 3 dry years (2015-2017) with no flow restrictions and under the proposed 50 L/s minimum flow scenario. The Economic Report assesses two farming systems: Dairy, and Dairy Support, which are reflective of the farming operations undertaken by the Submitters.
58. The Economic Report identifies that the proposed 50 L/s minimum flow will result in a significant reduction in effective farm surplus, which will also affect the asset value of the farms.

²⁸ Evidence of Ian McIndoe at [97]

²⁹ Evidence of Ian McIndoe at [111].

³⁰ Evidence of Neil Kingston at [13].

59. The other key impact of the proposed minimum flow is the significant increase in the coefficient of variability and the consequences of this on feed production. This means that the impact from a dry season on profitability is reduced and the frequency of a “dry year” is increased. Mr Craw discusses this at section 5.1.4 of the Economic Report and an excerpt is provided below:³¹

*...From a farming perspective, under the 50L/sec minimum flow model [the Submitters] would have to be very conservatively stocked going into the summer / autumn period as the potential feed deficit in those months would be extreme. As noted previously, this means **starting the season at a much lower initial start level and also knowing that there is likely to be a need to introduce additional feed.***

[Emphasis added]

60. The direct impact on the Submitters will be that they will need to reduce their farming operations to a scale that can reasonably withstand the impact of a “dry year” regardless of whether seasonal rainfall is above or below average (which of course cannot be known in advance). More importantly, the Submitters will be subject to far greater restrictions on the time that they can abstract groundwater regardless of the impact that will have on the ecological values of Upper Coopers Creek. The extent of restrictions on abstractions is raised in the Submission and depicted at Annexure 3.³² If the Submitters had been subject to the proposed minimum flow during the assessed period then they would have been restricted from taking water for at least 80% of 2014-2016.
61. The immediate effect of reducing profitability is that the Submitters will be unable to provide for their economic wellbeing. A comparison of unrestricted flows and flows subject to the 50 L/s minimum flow (with a dry and average season) are outlined at Mr Craw’s evidence at Appendix 1 section 5.2.3.

³¹ Evidence of Hayden Craw at Appendix 1 section 5.1.4.

³² Original Submission 384 at Annexure 03, page 24.

Section 42A Report

62. The Section 42A Report³³ consider the primary relief sought by the Submission from section 6.43 to 6.49. The Section 42A Report Authors accept one part of the Submission, which is to reduce the Allocation limit for A permits in Table 14(h) from 331 to 218. The reason for the amendment is set out in the evidence of Ms Johnston³⁴ where she undertakes a review of the resource consent inventory for Upper Coopers Creek. The total allocation for Upper Coopers Creek comprises only the Submitters water takes. The Hearing Panel can therefore be confident that all parties who will be taking water within the proposed sub-catchment are the Submitters.
63. In all other respects, the section 42A Report Authors does not recommend the relief sought by the Submission. The primary reason is that the submission is not supported by a specific assessment of the proposed flow regime on the ecological values of Upper Coopers Creek.³⁵
64. The section 42A Report Author also records that two of the Submitters consents (Messrs Kingston and Kerse) were varied to include conditions connecting flows to the Orari River as an interim measure until while ECan assessed whether Orari flows were an adequate proxy for low-flow conditions at Upper Coopers Creek. The ECan Report followed and concluded that the Orari River was not a suitable proxy. The Submitters agree. However, as discussed in these submissions, the Submitters do not accept the conclusions in the ECan Report that a 50 L/s minimum flow is appropriate for Upper Coopers Creek based on the Golder Associates Report.
65. The evidence of Mr Hickey (using the groundwater hydrology information produced in the evidence of Mr McIndoe) provides the specific assessment sought by the section 42A Report Authors and demonstrates the deficiencies of the Golder Associates Report. Mr

³³ Section 42A Report: Plan Change 7 to the Canterbury Land and Water Regional Plan, March 2020.

³⁴ Evidence of Keri Johnston at [32]-[41].

³⁵ Section 42A Report: Plan Change 7 to the Canterbury Land and Water Regional Plan, March 2020 at 6.49.

Hickey's evidence supports controlling flows by way of a maximum allocation rate and volume as opposed to a minimum flow at SH72. Mr Hickey also provides an opinion on a more appropriate minimum flow level, in the event that the Hearing Panel were of the view that this was required to protect the ecological values at Upper Coopers Creek. Mr Hickey concludes that a minimum flow of 10 Ls at the SH72 monitoring site would provide appropriate protection of the values, if required.³⁶

Conclusion

66. Counsel submits that the Submitters relief prioritises the health and wellbeing of Upper Coopers Creek and also provides for the Submitters economic wellbeing. PC7 (as notified) will likely achieve the former outcome at the expense of the latter.
67. The pre-circulated evidence demonstrates that the ecological values of Upper Coopers Creek can be maintained by managing abstractions via a maximum allocation rate and volume only. A minimum flow is not necessary. Ecological values can be further provided for through riparian management, weed removal etc which can be addressed through conditions of the Submitters resource consent when they come to be reviewed.
68. It is submitted that the relief sought is a superior outcome to that promoted by PC7 and which better serves the objectives of the NPSFM and the purpose of the Act.

Dated this 2nd day of November 2020

@USERSIGNATURE@

Bridget Irving / Simon Peirce

Counsel for Mulligan, M E & Kerse, I J & Kingston N S

³⁶ Evidence of Matt Hickey at [99].

Appendix 1: Chronology of flow management at Upper Coopers Creek

1. **July 1997:** Canterbury Regional Council (**ECan**) jointly grant consent to Messrs Kerse and Mulligan (and others) to take water from the Orari catchment. Messrs Kerse and Mulligan's takes were from bores in the Upper Coopers Creek catchment (**1997 Consent**).
2. **August 1998:** Central South Island Fish and Game Council file a Notice of Appeal to the Environment Court against the 1997 Consent seeking conditions be imposed that restrict water takes during periods of low flows (**Appeal**). The parties attend Environment Court assisted mediation in January 1998.³⁷
3. **June 1999:** the parties to the Appeal file a joint memorandum recording that:³⁸

The Canterbury Regional Council acknowledges that if, in the future, it obtains further and better hydrological and ecological data than it currently holds concerning the waterbodies in question in these consents, then it will consider exercising its power to review the conditions of these consents relating to minimum flow conditions.

4. **July 1999:** The Environment Court confirms that the 1997 Consent is allowed by consent subject to an additional condition 5 which provided for a minimum flow of 50 L/s at a monitoring point immediately downstream of the Arundel – Orari Bridget Highway (SH72), at or about map reference K37:719-865. Mr Kerse is then subject to minimum flow from July 1999 to 2012.³⁹
5. **2008:** Mr Kingston acquires property at 131 Peel Forest Road and becomes subject to 50 L/s minimum flow.⁴⁰
6. **2010:** A working group is established for the purpose of evaluating the flow and allocation regime for the Orari Catchment. Mr Mulligan was a

³⁷ Evidence of Keri Johnston at [14]

³⁸ Joint Memorandum of Counsel dated 23 June 1999 referred to at Central South Island Fish v Canterbury Regional Council C123/99 at [6].

³⁹ Evidence of Ian Kerse at [14].

⁴⁰ Evidence of Neil Kingston at [11].

consent holder in the Working Group.⁴¹ The minimum flow at Upper Coopers Creek was identified as an issue to be addressed because of its unreliability.⁴² The working group sought that ECan undertake further scientific work to find a more appropriate minimum flow for Coopers Creek.

7. **2011:** The Submitters (and others) form Orari Water Incorporated (OWI).⁴³ Mr Mulligan has remained the Chairman of OWI since its inception.
8. **2011-2013:** OWI and other form a steering group (under ECan's guidance) with the purpose of finding a balanced water regime for water takes in the Orari catchment, particularly Coopers Creek.⁴⁴
9. **August 2012:** Proposed Canterbury Land & Water Regional Plan publicly notified. The work requested as part of the Working Group to find a better flow management regime had not yet been done so, as an interim measure, the Submitters water takes are linked to minimum flows on the Orari River.⁴⁵ Mr Kerse volunteers to cut his rate of abstraction by more than half (from 76 L/s to 35 L/s) to ensure that he would not be subject to a 50 L/s minimum flow at the SH72 Bridge, which he had been until that time.⁴⁶
10. **February 2013:** Golder Associates prepares a report entitled "Coopers Creek Ecological Values and Flow Requirements" (**Golders Report**) which records that a 50 L/s minimum flow at the SH72 Bridge is an appropriate flow to protect the ecological values of Coopers Creek.
11. **August 2014:** National Policy Statement for Freshwater Management 2014 came into effect.
12. **July 2017:** ECan publish a Report entitled "Groundwater-surface water interaction in the Coopers Creek catchment" which found that the Orari River was not a suitable proxy for managing abstractions from Upper

⁴¹ Evidence of Keri Johnston at [13]-[14].

⁴² Evidence of Keri Johnston at [14].

⁴³ Evidence of Mark Mulligan at [11].

⁴⁴ Evidence of Mark Mulligan at [12].

⁴⁵ Evidence of Keri Johnston at [15]-[17].

⁴⁶ Evidence of Ian Kerse at [14]-[15].

Coopers Creek and that the Submitters current rates of abstraction has only a “minor effect” on surface water flows (**ECan Report**). The ECan Report also found that between 2013 to 2016 (the monitoring period) based on a 50 L/s minimum flow at SH72 that there would have been very limited periods where any abstractions would be allowed at all.⁴⁷ A diagram identifying the periods where abstractions would have been restricted is attached to the Submission as **Annexure 3**. It is noted that the Golders Report was not revisited following the ECan Report.

13. **September 2017:** National Policy Statement for Freshwater Management 2014 (amended 2017) came into effect (**NPSFM-2017**). The NPSFM-2017 required regional councils to amend regional plans to establish freshwater quality and quantity limits for identified freshwater management units and to establish methods to avoid over-allocation.
14. **December 2017:** The Orari-Temuka-Opihi-Pareora (**OTOP**) Zone Committee (**ZC**) publishes a Draft Zone Implementation Programme Addendum (**Draft ZIPA**) which recommended, based on the findings in the ECan Report that provision of an additional minimum flow monitoring site and allocation limit on Coopers Creek at SH72. A specific minimum flow at SH72 was not recommended.
15. **February 2018:** Counsel for the Submitters write to ECan outlining the issues with the hydrological models relied on in the Draft ZIPA and suggesting that there is an alternative approach that provides for reliable water takes and protects the ecological values of Upper Coopers Creek.
16. **December 2018:** the recommendation for a minimum flow at SH72 contained in the Draft ZIPA is adopted into a final version of the ZIPA (**OTOP ZIPA**).

⁴⁷ Evidence of Keri Johnston at [18].

17. **February 2019:** Mr Kerse's consent is varied to include a condition that further delays the imposition of a 50 L/s minimum flow at SH72 to 1 July 2021.⁴⁸
18. **June 2019:** Mr Kingston's consent is varied to include a condition that further delays the imposition of a 50 L/s minimum flow at SH72 to 1 July 2021.⁴⁹
19. **July 2019:** PC7 is notified and recommends a 50 L/s minimum flow at SH72.

⁴⁸ Evidence of Keri Johnston at [29].

⁴⁹ Evidence of Keri Johnston at [30].