IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Environment Canterbury (Transitional Governance Arrangements Act) Act 2016

AND

IN THE MATTER of proposed Plan Change 7 to the Canterbury Land and Water Regional Plan and Plan Change 2 to the Waimakariri River Regional Plan

REPORT AND RECOMMENDATIONS

OF THE

HEARING COMMISSIONERS

Hearing Commissioners:

David F Sheppard, QSO (Chairman)
Robert van Voorthuysen
Raewyn Solomon

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Chapter One
Introduction

The Plan Changes

[1] This is a report to the Canterbury Regional Council (CRC) on changes proposed by it to two of its regional plans under the Resource Management Act 1991 (the RMA):

Proposed Change 7 to the Canterbury Land and Water Regional Plan; and

Proposed Change 2 to the Waimakariri River Regional Plan.

[2] The Canterbury Land and Water Regional Plan (CLWRP) was made following the Council approving the Canterbury Regional Policy Statement 2012. The purpose of the CLWRP is to assist the Council to carry out its functions in order to achieve the purpose of the RMA. It states objectives, and identifies policies and rules to achieve them.

[3] The CLWRP has major sections that apply throughout the Canterbury region. It also has specific policies and rules that apply to particular sub-region catchments. Since the Plan was approved, the Council has adopted six successive changes to it, largely to provide specific policies and rules in particular sub-region catchments, but some also amending region-wide provisions of the Plan.

[4] The Waimakariri River Regional Plan (WRRP) applies to the Waimakariri River catchment, and contains policies and rules for management of water quantity, activities in the bed of lakes and rivers, and water quality (point-source discharges). It partly overlaps Section 8 of the CLWRP and the Waimakariri Water Zone in the Canterbury Water Management Strategy (CWMS).

[5] Proposed Change 7 to the CLWRP (PC7) has three major parts.

[6] Part A would make amendments to certain region-wide sections of the Plan, and also to certain sub-region sections.

[7] Part B relates to the Orari-Temuka-Opihi-Pareora (OTOP) sub-region, and would insert new provisions for managing land use; for managing freshwater quality and quantity (including abstractions, allocation of freshwater, and minimising nutrient losses from farming activities); and for protecting of sites of cultural significance in that sub-region (including certain rock art sites (tuhituhi neherā) and waipuna (springs)). Part B would divide the sub-region into six freshwater management units (FMUs) as summarised in paragraphs 1.13 and 1.14 of the Section 42A Report (s42A Report).[1]

[8] Part C relates to the Waimakariri sub-region, and would make amendments to the existing CLWRP to manage effects on freshwater quality arising primarily from agricultural activities

[1] The s42A Report is referred to in paragraph 16 below.

and effects associates with abstraction of water. Those amendments are summarised in paragraphs 1.16 to 1.18 of the s42A Report.

[9] Proposed Change 2 to the WRRP (PC2) addresses the overlap by which certain land to which that plan applies is also in the Waimakariri sub-region (Section 8) of the CLWRP. By Change 2 that land would be removed from the area to which the WRRP applies, leaving it in the Waimakariri sub-region of the CLWRP. The scope of PC2 is limited to amendments necessary to do that or consequential on doing it. The amendments are summarised in paragraphs 1.19 to 1.22 of the s42A Report.

[10] On 20 July 2019 the Council published a detailed evaluation report of examinations and assessments required by section 32 of the RMA, on whether the provisions of PC7 and PC2 are the most appropriate in achieving the purposes of the plan changes and to relevant objectives already stated in the CLWRP and WRRP respectively. We refer to that as the Section 32 Report (s32 Report).

Notification and submissions

[11] PC7 and PC2 were publicly notified on 20 July 2019 for submissions to be lodged by 13 September 2019. Within that period 560 submissions were received on PC7 and 28 submissions were received on PC2. A summary of the decisions requested by the submissions was published on 18 November 2019, stipulating that further submissions might be lodged by 13 December 2019. Addenda to the summary were published on 4 December 2019 and 18 January 2020. Forty further submissions were received.

[12] On 29 August 2019 the Council, acting under section 34A of the RMA, appointed us, the undersigned, as hearing commissioners to hear, consider and make recommendations to it on the submissions on PC7 and PC2. For that purpose the Council also delegated to us all its functions, powers and duties to hear and consider submissions on the plan changes, including requiring and receiving reports as enabled by section 42A of the RMA, and exercising powers conferred by sections 41B and 41C of it.

[13] For the avoidance of doubt, we affirm that prior to our appointments we had no involvement in the preparation of either of the plan changes, and that throughout our performance of our duties we have been entirely independent of the Council, and all the submitters, and objective, in considering and making recommendation on the submissions.

Hearing of submissions

[14] By Minute 1 dated 3 March 2020 we gave notice of dates and venues for our public hearings of the plan changes and submissions on them. However due to the national emergency arising

from the COVID-19 pandemic, by Minute 3 dated 24 March 2020 we postponed the planned dates for the hearings.

[15] On 27 March 2020 a report prepared in terms of section 42A of the RMA was published. This had been prepared by officers and consultants of the Council, and provided information on the plan changes and addressed points raised in submissions for consideration at the hearings.

[16] Subsequently, further detailed material was added to the s42A Report. A list of the several documents that together make up the s42A Report is at Appendix C to this report. We refer to the original report and subsequent additions to it collectively as the s42A Report.

[17] By Minute 8 dated 5 August 2020 we announced dates and places we had adopted for hearing the submitters at Hornby and Timaru from 28 September to 4 December 2020. On 24 hearing days over that period we conducted public hearings of the reports, and of evidence and statements of the 124 submitters who wished to be heard (or their legal counsel). On 26 February 2021 we reconvened at Hornby for the authors of the s42A Report to deliver their reply to matters presented by submitters, and to answer our questions on it.

[18] During the hearings we asked questions of submitters and witnesses to enhance our understanding of the nature of their requests for amending the plan changes, the grounds for them, and their responses to requests made by other submitters and advice given in the s42A Report. We conducted the hearings with a minimum of formality to an extent that allowed for fairness to all submitters. A complete audio-visual record of the proceedings was made and published on the Council's website and on the YouTube platform.

[19] Following completion of the public hearings, we then proceeded to deliberate on the matters raised by the submissions, the s42A Report, the evidence and statements of submitters, and to form our recommendations on the decisions requested by the submissions.

[20] Most of the submissions had requested amendments to the plan changes, and gave reasons for those amendments. Many also constructively proposed specific improvements to the plan changes, developed by themselves or their advisers.

[21] We are grateful for all the requests and suggestions by submitters and their witnesses, and by the Canterbury Regional Council Reporting Officers (CRC Officers). We acknowledge that the requested and suggested amendments (including those that we do not recommend), and the evidence relating to them, substantially assisted us in our deliberations and in reaching the recommendations to the Council that we make by this report. The submissions and reports have all contributed to an effective and fair process for which Part 1 of Schedule 1 of the RMA provides.

This report

[22] In the main body of this report we state in narrative form our findings about the law applicable to the process, including applicable instruments; about the character of Ngāi Tahu values and interests, and expected outcomes; about issues raised by submitters including economic, social and other effects of proposed policies and rules; and about the scope of the Council's potential action by decisions on the submissions. We also consider the extent to which the plan changes, amended as we recommend, would give effect to relevant directions of higher order instruments, and in relation to other instruments. As directed by section 32AA of the RMA, we also state our evaluation of the amendments to the plan changes that we recommend.

[23] Appendix A (separately bound) contains our detailed recommendations for decisions on the points raised by the submissions. Appendix B (separately bound) shows the content of the plan changes incorporating the amendments to them that we recommend. Appendix C is a list of the reports and other documents that together make up the s42A Report; and other documents referred to in addition to the submissions and evidence presented by submitters.

[24] To avoid unnecessary duplication and repetition, we affirm that, except to the extent that we expressly address the contents in this report, we adopt the information, advice and reasoning in the s42A Report, and in the answers and replies given to us by its authors.

Chapter Two
The law applicable to the process for considering submission points

Introduction

[25] In this chapter we state our understanding of the provisions of the RMA that are applicable to the making, hearing and decision of submissions on the plan changes.

The purpose and principles of the RMA

[26] The basis for actions under the RMA is Part 2, which states its purpose and principles. The overall objective of the Act,[2] and the keystone of Part 2, is section 5(1), which states the purpose of the Act as being "to promote the sustainable management of natural and physical resources." The meaning of an Act is to be found from its text in the light of its purpose.[3]

[27] Section 5(2) describes the meaning to be given to the term 'sustainable management' in applying the purpose stated in section 5(1):

> In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, and at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment

[28] Section 5 contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources;[4] and protecting the environment from adverse effects of use and development is an aspect (though not the only one) of sustainable management.[5]

[29] Although section 5 is not itself an operative provision, where applicable the other sections of Part 2 (sections 6, 7 and 8) are operative at the level of general principles, directing those administering the RMA, and elaborating how section 5 is to be applied in the circumstances described in them.[6]

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[2] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38 at [151].
[3] Interpretation Act 1999, s 5(1).
[4] *Environmental Defence Society v NZ King Salmon* cited above, at [146].
[5] *Environmental Defence Society v NZ King Salmon* cited above, at [148].
[6] *Environmental Defence Society v NZ King Salmon* cited above, at [8], [149].

[30] Section 6 of the RMA identifies matters of national importance, and directs everyone exercising functions and powers under the Act to recognise and provide for them. Of the matters listed in section 6, the following may be relevant to Plan Changes 7 and 2, and the submissions on them:

- The preservation of the natural character of wetlands, lakes and rivers and their margins, and the protection of them from inappropriate use and development.
- The protection of outstanding natural features from inappropriate use and development.
- The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.
- The maintenance and enhancement of public access to and along lakes and rivers.
- The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga.
- The protection of protected customary rights.

[31] The word 'inappropriate' in section 6(a) and (b) should be interpreted "against the backdrop of what is sought to be protected or preserved."[7]

[32] Section 7 directs that, in achieving the purpose of the Act, all persons exercising functions and powers under it are to have particular regard to some eleven listed matters, many of which could be relevant to Plan Changes 7 and 2 and the submissions on them.

[33] Section 8 directs persons exercising functions and powers under the RMA to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[34] It is our understanding that this direction does not itself extend to principles of the Treaty that are not consistent with the scheme of the RMA, nor does it provide for allocating resources to Maori.[8] It does not impose a duty on functionaries to take into account past wrongs, or to be open to ways to restore imbalance.[9]

[35] Although Part 2 of the Act states the purpose of the Act and principles in elaboration of the purpose, where specific, unqualified prescriptions of a higher-order instrument by which Part 2 is given effect (the lawfulness and meaning of which are not in dispute, and which 'cover the field') apply, a decision-maker is not free to "refer back" to Part 2 to diminish the effect given to such a prescription.[10]

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[7] *Environmental Defence Society v NZ King Salmon* cited above, at [105].
[8] *Minhinnick v Minister of Corrections* EnvC A043/2004 at [323]-[346].
[9] *Waikanae Christian Camp v Kapiti Coast District Council* (HC Wellington 27/10/2004, Mackenzie J).
[10] *Environmental Defence Society v NZ King Salmon* cited above, at [80], [88].

[36] We apply that explanation in Chapter 5 of this report.

Functions of regional councils

[37] Section 30 of the RMA confers on regional councils certain functions for the purpose of giving effect to the Act. Of those functions, the following may be relevant to Plan Changes 7 and 2, and to deciding submissions on them:

- Establishing and implementing objectives, policies and methods to achieve integrated management of the natural and physical resources of the region;[11]
- Preparing objectives and policies in relation to any actual or potential effects of the use, development or protection of land which are of regional significance;[12]
- Control of the use of land for the purpose of soil conservation, maintenance and enhancement of the quality of water in water bodies; maintenance of the quantity of water in water bodies;[13]
- Control of the taking, use, damming, and diversion of water, and control of the quantity, level, and flow of water in any water body, including setting any maximum or minimum levels or flows of water, and control of the range, or rate of change, of levels or flows of water;[14]
- Control of discharge of contaminants into or onto land, or water and discharges of water into water;[15]
- If appropriate, establishment of rules in a regional plan to allocate the taking or use of water:[16]
- In relation to any bed of any water body, the control of the planting of any plant in, on, or under that land for the purpose of soil conservation, maintenance of enhancement of the quality of water in that water body; maintenance of the quantity of water in that water body;[17]
- Establishment, and implementation, of objectives, policies and methods for maintaining indigenous biological diversity:[18]

[11] RMA, s 30(1)(a).
[12] RMA, s 30(1)(b).
[13] RMA, s 30(1)(c).
[14] RMA, s 30(1)(e).
[15] RMA, s 30(1)(f).
[16] RMA, s 30(1)(fb).
[17] RMA, s 30(1)(g).
[18] RMA, s 30(1)(ga).

- Strategic integration of infrastructure with land use through objectives, policies and methods.[19]

[38] Section 30(4) contains directions about allocation of natural resources in regional plans under section 30(1)(fa) or (fb). The directions restrict allocating amounts of resources that have already been allocated;[20] regulate allocating a resource in anticipation of expiry of existing consents;[21] authorise allocating a resource among competing types of activities; [22] and limit allocating water if the allocation does not affect activities authorised by section 14(3)(b) to (e).[23]

Contents of regional plans

[39] Section 63(1) of the RMA states the purpose of a regional plan as being "to assist a regional council to carry out its functions in order to achieve the purpose of this Act."

[40] Section 65(1) enables a regional council to prepare a regional plan for any function specified in certain paragraphs of section 30(1);[24] and section 65(3) directs that a regional plan is to be prepared in accordance with Schedule 1.

[41] Section 66(1) requires that a regional council is to prepare a regional plan in accordance with its functions under section 30, the provisions of Part 2, its duty under section 32, and any regulations. Section 66(2) directs that, when preparing a regional plan, a regional council is to have regard to management plans and strategies prepared under other Acts, to the extent to which their content has a bearing on resource management issues of the region,[25] and to which the regional plan needs to be consistent with regional policy statements and plans of adjacent regional councils.[26] Section 66(2A) stipulates that when preparing a regional plan, a regional council is to take into account any relevant planning document recognised by an iwi authority, if lodged with the council, to the extent that its content has a bearing on the resource management issues of the region.

[42] Section 67(1) of the RMA stipulates that a regional plan is to state the objectives for the region; the policies to implement the objectives; and the rules (if any) to implement the policies. Section 67(2) lists other matters that may be stated in the plan. Section 67(3) requires that a regional plan is to give effect to any national policy statement; any New Zealand coastal policy statement; and any regional policy statement. Section 67(4) directs that a regional plan is not to be inconsistent with a water conservation order, or any other regional plan for the region. Section

[19] RMA, s 30(1)(gb).
[20] RMA, s 30(4)(a) and (b).
[21] RMA, s 30(c) and (d).
[22] RMA, s 30(e).
[23] RMA, s 30(4)(f).
[24] The functions specified in s 65(1) are those in paragraphs (c), (ca),(e, (f), (fa), (fb), (g) and (ga) of s 30(1).
[25] RMA, s 66(2)(c)(i).
[26] RMA, s 66(2)(d).

67(5) directs that if a council has allocated a natural resource under certain provisions of section 30, the regional plan is to record how it has done so.[27]

[43] Section 68 authorises regional councils to make rules in a regional plan for carrying out certain functions, and for achieving the objectives and policies of the plan; and prescribes that in making a rule, a regional council is to have regard to the actual or potential effect (particularly an adverse effect) on the environment of activities; and, relevantly, contains specific directions for rules relating to levels or flows or rates of use of water, and minimum standards of water quality.

[44] Section 69 prescribes contents for regional plan provisions on water quality, including prohibiting standards that may result in a reduction of the quality of water unless it is consistent with the purpose of the Act to do so.

[45] Section 70 applies to regional rules about discharges of contaminants. Section 70(1) states conditions for making rules that allow discharges as a permitted activity; and section 70(2) applies to rules that require adoption of a best practicable option.

[46] Section 58I requires local authorities to amend plans and changes (among other instruments), and to give effect to a national planning standard and take other action directed in such a standard.

[47] Where their subject-matter applies, we consider the application of those sections in addressing submissions on the plan changes.

Procedure for changing regional plans

[48] The procedure for changing a regional plan is that prescribed in Schedule 1 to the RMA, of which provisions of Part 1 are generally applicable.

[49] Clause 5(1) of Schedule 1 directs that a local authority which has prepared a proposed plan (which includes a change to a plan[28]) is to prepare an evaluation report in accordance with section 32, and have particular regard to that report when deciding whether to proceed with the plan.

[50] Clause 6 provides for making submissions *on* a proposed plan; clause 7 directs that the local authority is to give public notice of the availability of a summary of decisions requested by submitters, and of the opportunity to make further submissions; clause 8 provides for certain

[27] The provisions of section 30 referred to in s 67(5) are s 30(1)(fa), (fb) and s 30(4).
[28] RMA, s 43AAC(1)(a).

persons to make further submissions;[29] and clause 8B directs that the local authority is to hold a hearing into submissions.

[51] Clause 10 gives directions on the local authority giving decisions on the provisions and matters raised in submissions, with reasons for accepting or rejecting submission points.[30] Subclause 10(2) provides for the local authority's decision on submissions to make necessary consequential alterations arising from the submissions and any other relevant matter arising from them. Subclause 10(4) requires that the local authority's decision is to include a further evaluation in accordance with section 32AA;[31] and is to have particular regard to the further evaluation when making its decision.[32]

[52] Clause 16(2) provides for the local authority to make amendments to the plan change that "alter any information of minor effect" and to "correct any minor errors".

[53] Although the local authority has to give decisions on the matters raised in the submissions, subclause 10(3) provides that it is not required to give a decision that addresses each submission individually. So in the main text of this report we address main issues arising from submissions; and in Appendix A we group submissions according to specific provisions of the plan changes which they asked to be altered, and we identify what alterations (if any) we recommend be made by the Council. In those ways this report contains our recommended decisions on all submissions.

[54] Although not expressly stated in the Act, we understand that the consideration and decision on submissions is to proceed on the basis that there is no presumption in favour of provisions of the plan changes as proposed by the Council, nor any onus on submitters to show that contents of the plan changes are inappropriate.[33] Rather, the local authority's duty is to consider the submissions and evidence, and make its judgement on what are the most appropriate and suitable provisions of the plan changes in accordance with law.

Evaluation report

[55] Section 32 of the RMA prescribes requirements for preparing and publishing evaluation reports, including on an 'amending proposal'[34] that would amend a plan or change.[35] In particular, as

[29] Clause 8 provides that a further submission may be made by a person representing a relevant aspect of the public interest, or by a person who has an interest in the proposed plan greater than the general public has, or by the local authority itself. A further submission is limited to support of or opposition to a submission made under clause 6.

[30] RMA, Schedule 1, cl 10(1).

[31] RMA, Schedule 1, cl 10(ab).

[32] RMA, Schedule 1, cl 10(4)(aaa).

[33] *Wellington Club v Carson* [1972] NZLR 698 (SC), applied to the RMA in *Leith v Auckland City Council* [1995] NZRMA 400.

[34] The term 'amending proposal' is defined in RMA s32(3).

[35] The term 'change' is defined in RMA s 2(1) and s 43AA(a).

applicable to the plan changes in question, section 32 directs that an evaluation report is to examine whether the provisions are the most appropriate ways to achieve the relevant objectives by identifying other reasonably practicable options for doing so, assessing the efficiency and effectiveness of the provisions, and summarising the reasons for deciding on the provisions.[36] The report is to 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 proposals.[37]

[56] In assessing the efficiency and effectiveness of provisions, the assessment has to identify and assess the anticipated benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for economic growth and employment anticipated to be provided or reduced; the assessment has also, if practicable, to quantify the benefits and costs; and if there is uncertainty or insufficient information about the subject-matter of the provisions, has to assess the risk or acting or not acting.

[57] As Plan Changes 7 and 2 would amend operative plans (the CLWRP and the WRRP), but do not themselves contain objectives, examination of whether the provisions are most appropriate is directed to achieving the purposes of the plan changes, and to relevant objectives already stated in the plans.

[58] By section 32AA, a further evaluation is required for any change proposed since the original report was completed. Such a further evaluation does not have to be published as a separate report if it is referred to in the decision-making record in sufficient detail to demonstrate that it was undertaken in compliance with that section.[38]

[59] Section 80A of the RMA (as replaced by section 22 of the Resource Management Amendment Act 2020 –'the RMAA 2020') requires proposed freshwater planning instruments to give effect to the National Policy Statement for Freshwater Management 2020 (NPSFM 2020) to undergo a particular process by 31 December 2024. Although Plan Change 7 is a proposed freshwater planning instrument, it is our understanding that the process prescribed by section 80A does not apply to it because it was notified before commencement of the RMAA 2020.[39]

Canterbury Legislation

[60] As well as the general provisions of the RMA, there was also legislation specific to the Canterbury Region: the Environment Canterbury (Temporary Commissioners and Improved

[36] RMA, s32(1)(b).
[37] RMA, s32(1)(c).
[38] RMA, s32AA(1)(d)(i).
[39] RMA, Schd 12, Pt 3, cl 19.

Water Management) Act 2010 ("the 2010 Act") and the Environment Canterbury (Transitional Governance Arrangements) Act 2016 ("the 2016 Act").

[61] Relevantly, the 2010 Act empowered the Council to address issues relevant to the efficient, effective and sustainable management of freshwater in Canterbury. Section 63 directed that in considering any proposed plan, the Council was to have particular regard to the vision and principles of the CWMS as set out in Part 1 of Schedule 1 of that Act, in addition to the matters relevant under the RMA to its decisions made under clause 10(1) of Schedule 1 of the RMA. Section 4(2) declared that the inclusion of the vision and principles of the CWMS did not accord to the CWMS or its vision and principles any status in law other than as provided in that Act.

[62] In general, the 2016 Act repealed the 2010 Act. However transitional provisions in Schedule 1 to the 2016 Act directed that, during the transition period to 18 October 2019, the CRC was to have particular regard to the vision and principles of the CWMS as previously required by the 2010 Act.[40] The 2016 Act was repealed on 18 October 2018, but despite that, Part 3 and Schedules 1 to 3 continued as if not repealed, for the purpose of completing any decision (including any appeals) to which they apply that have not been completed before resumption day (19 October 2019), and for those purposes the transitional period is to be treated as if it had not ended.[41]

[63] Accordingly, we address the vision and principles of the CWMS among the higher-order and other instruments in Chapter 3 of this report.

Constraints on decision-making

[64] In summary, in deciding a submission point on the plan changes, the Council does not have an open choice simply according to what it considers right. It has to make decisions according to a multi-layered series of purposes and constraints, that follows the Schedule 1 process, and which:

- are within the ambit of one or more of certain of its functions conferred by section 30 of the RMA;
- are within the regional plan purpose of carrying out the functions to achieve the purpose of the RMA described in Part 2;
- result in plan provisions that are the most appropriate ways (assessed by compliant evaluations) to achieve the purposes of the plan change to achieve relevant objectives of the plans being changed;

[40] Environment Canterbury (Transitional Governance Arrangements) Act 2016 (repealed), Pt 3, s 24.
[41] Environment Canterbury (Transitional Governance Arrangements) Act 2016 (repealed), s 7.

- give effect to applicable high-order instruments, accord with any regulations, comply with directions in national planning standards, and be consistent with, or have particular regard, or regard to any other prescribed instruments, and the vision and principles of the CWMS;
- result in regional rules in the plans that comply with sections 68 to 70 of the RMA;
- are within the scope of submissions (as detailed in Chapter 4 of this report).

Chapter Three
The process for consideration of submission points

The Council's obligations in changing plans

[65] In the s42A Report, and especially in section 3 of Part 1, section 2 of Part 2, and Appendix B, attention is drawn to several important matters which the Council is obliged by law to do or observe in reaching its decisions on submissions, and in respect of making amendments to the proposed plan changes.

[66] We adopt those contents of the Section s42A Report which detail obligations of the Council in changing its regional plans, which we now summarise.

[67] In changing its regional plans, the Council has to do so in accordance with the relevant functions of regional councils conferred by section 30 of the RMA.[42]

[68] In changing its regional plans they are to be in accordance with, and are required to give effect to relevant to applicable higher-order instruments: any New Zealand coastal policy statement;[43] any national policy statement;[44] national planning standards;[45] and give effect to any regional policy statement.[46] We identify the relevant instruments below.

[69] In changing its regional plans, the Council has also to have regard to management plans and strategies prepared under other Acts to the extent that their content has a bearing on resource management issues of the region.[47]

[70] It has also to have regard to the extent to which the regional plans need to be consistent with regional policy statements and plans, and any proposed regional policy statements and plans of adjacent regional councils.[48]

[71] The Council has to ensure that its regional plans are not inconsistent with any water conservation order[49] or any other regional plan for the region.[50]

[42] RMA, s 66(1)(a).
[43] RMA, s 66(1)(ea); s 67(3)(b).
[44] RMA, s 66(1)(ea); s 67(3)(a).
[45] RMA, s 66(1)(ea); s 67(3)(ba).
[46] RMA, s 67(3)(b).
[47] RMA, s 66(2)(c)(i).
[48] RMA, s 66(2)(d). Those relevant are of the Otago, West Coast, and Marlborough regions.
[49] RMA, s 67(4)(a).
[50] RMA, s 67(4)(b).

[72] If the Council has under section 30 of the RMA allocated any natural resources, it has to record in a regional plan how it has done so.[51]

[73] The Council is not to have regard to trade competition or the effects of trade competition.[52]

[74] As mentioned in Chapter 2 of this report, in changing its regional plans, the Council is to have prepared, and to have particular regard to, an evaluation report in accordance with section 32 of the RMA. In preparing PC7 and PC2 the Council complied with that requirement as is recorded in the s32 Report. By section 32AA of the RMA, in considering and making its decisions on the amendments requested by submitters, a further evaluation is required for changes made or proposed since the s32 Report was completed. Therefore in the process of considering submissions and making recommendations the subject of this report, we have made examinations and assessments as required by section 32(3).

[75] Finally, by the Environment Canterbury (Transitional Governance Arrangements) Act 2016 (the ECan Act), the Council has responsibilities additional to those of regional councils in general. They relate to addressing issues relevant to the efficient, effective and sustainable management of freshwater in the Canterbury region. The Council is obliged to have particular regard to the vision and principles of the CWMS. These are explained and detailed in paragraphs 3.56 to 3.63 of the s42A Report, which we adopt as part of this report.

Contents of regional plans

[76] Sections 63 to 70 of the RMA address regional plans. Their purpose is to assist a regional council to carry out certain of its functions specified in section 30 to achieve the purpose of the Act. The purpose of the Act is described in section 5(1) as to promote the sustainable management of natural and physical resources; and the meaning of 'sustainable management' is defined in section 5(2).

[77] A regional plan has to state objectives for the region; the policies to implement the objectives; and may include rules to implement the policies. It may state the issues that the plan seeks to address; the methods, other than rules, for implementing the policies; the principal reasons for adopting the policies and methods; the environmental results expected from the policies and methods; the procedures for monitoring the efficiency and effectiveness of the policies and methods; and the processes for dealing with issues that cross local authority boundaries, or arise between territorial authorities, or arise between regions.

[78] A regional council may include rules in a regional plan for carrying out its functions under the RMA (other than section 30(1)(a) and (b)). In making a rule, a council is to have regard to the actual or potential effect on the environment of activities, including any adverse effect. There

[51] RMA, s 67(5). The CLWRP records its allocations in respect of mahinga kai.
[52] RMA, s 61(3).

are provisions in section 69 about rules relating to water quality, and in section 70 on rules about discharges.

NZ Coastal Policy Statement

[79] Of the higher order instruments to which regional plans are to give effect, we address first the New Zealand Coastal Policy Statement (NZCPS). This important instrument is referred to in paragraphs 9.3 and 9.4 of Appendix B to the s42A Report, where the CRC Officers conclude that as it would be changed by PC7 the CLWRP gives effect to the NZCPS. In considering relevant amendments to the plan changes requested by submitters, we keep in mind that the changes to the regional plans have to be in accordance with, and give effect to, the NZCPS.

National Policy Statements

[80] Appendix B to the s42A Report listed the applicable national policy statements:

a. National Policy Statement for Freshwater Management 2014 (as amended in 2017) (NPSFM 2017);

b. National Policy Statement on Electricity Transmission 2011 (NPSET);

c. National Policy Statement for Renewable Electricity Generation 2011 (NPSREG).

[81] On the NPSET, the Report notes that no submission or further submission sought amendment to better give effect to that instrument.

[82] On the NPSREG, the CRC Officers noted that it is particularly relevant to Part A of PC7, and to Part B as within the OTOP sub-region the Opuha Dam is located. The Officers note that the CLWRP already gives effect to the NPSREG, and express their opinion that PC7 would not reduce the extent to which it does.

[83] When the plan changes were notified, and when submissions on them were lodged, the NPS-FM 2017 was applicable to the plan changes and had to be given effect by them. Policy E1b stipulated that every regional council was to implement it so it is fully completed by 31 December 2025. However Policy E1ba ii provides that if it would be impracticable to complete implementation of a policy by that date, a regional council may extend the date to 31 December 2030.

[84] On 3 August 2020, the Governor-General approved a new National Policy Statement for Freshwater Management 2020, which came into force on 3 September 2020, and replaced the former NPSFM 2017. We refer to the replacement as the NPSFM 2020.

[85] The NPSFM 2017 contained provisions about the concept Te Mana o te Wai, including a policy of regional councils changing regional plans to consider and recognise that concept. In the s42A Report the CRC Officers remark that Parts B and C of Plan Change 7 had been developed over many years, a period during which understanding of Te Mana o te Wai had been evolving.

[86] Appendix B to the s42A Report on PC7 contains (from paragraphs 9.11 to 9.54) a detailed account of the relevant provisions of the NPSFM 2017. It explained that it had been impracticable for the Council to fully complete the prescriptive process for implementing those provisions by 31 December 2025; and that in accord with Policy E1 of the policy statement, it was following a progressive implementation programme for implementation by 31 December 2030. The CRC Officers concluded that the NPSFM 2017 was being given effect by Part A of Plan Change 7.

[87] In considering our recommendations to the Council on amendments to PC7 and PC2 requested in submissions, we keep in mind the obligation that the regional plans are in accordance with, and give effect to, the national policy statements.

Canterbury Regional Policy Statement

[88] The Canterbury Regional Policy Statement (CRPS) was made operative in January 2013. Relevantly, it states objectives and policies about fresh water, including objectives for managing fresh water and policies for implementing them. They include Policy 7.3.7 on water quality and land uses, in particular controlling changes in land use. Also Policy 5.3.12(3) is ensuring that rural land use intensification does not contribute to significant cumulative adverse effects on water quality and quantity. The CRPS also contains policies about ecosystems and indigenous biodiversity; and on beds of rivers and lakes, and their riparian zones.

[89] In considering our recommendations to the Council on relevant amendments to PC7 and PC2 requested in submissions, we bear in mind that those regional plans must give effect to the regional policy statement.

Canterbury Land and Water Regional Plan

[90] The Canterbury Land and Water Regional Plan, and successive changes to it, have been designed to give effect to the regional policy statement. In particular, Appendix 3 of the s32 Report for PC7 described how PC7 would give effect to relevant provisions of the regional policy statement.

[91] As PC7 is intended to make changes to the existing CLWRP, it is advisable to consider how those changes will fit with the Plan, to avoid conflict or inconsistency with contents that are intended to remain. In considering our recommendations to the Council on amendments to PC7 requested in submissions, we bear that in mind.

National Environmental Standards

[92] The national environmental standards then current are described in paragraphs 10.1 to 10.1 of Appendix B of the s42A Report. No submitter asserted that PC7 or PC2 fails to recognise any such standard.

[93] On 3 August 2020 the Governor-General, by Order in Council, made the Resource Management (National Environmental Standards for Freshwater) Regulations 2020, which came into force on 3 September 2020. Those regulations were amended by the Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2020, which came into force on 28 August 2020.

[94] The regulations prescribe standards for farming activities including feedlots, agricultural intensification, intensive winter grazing, application of synthetic nitrogen fertiliser to pastoral land, and for other activities that relate to freshwater, including reclamation of rivers, passage of fish affected by structures.

[95] In considering our recommendations on any relevant amendments to those plan changes requested by submitters, we keep in mind the Council's duties in respect of the current national environmental standards.

Management plans and strategies under other Acts

[96] Applicable management plans or strategies prepared under other Acts include sports fish and game birds management plans for Nelson/Marlborough, North Canterbury, and for the Central South Island, prepared under the Conservation Act 1987. The Council had regard to those plans in preparing PC7. In considering our recommendations on relevant amendments to those plan changes requested by submitters, we keep in mind the Council's duty to have regard to them.

Iwi planning documents

[97] Relevant planning documents recognised by Ngāi Tahu iwi are listed in paragraph 10.15 of Appendix B of the s42A Report. The Council has taken those documents into account in preparing PC7. We keep in mind its duty to do so in considering our recommendations on relevant amendments to those plan changes requested by submitters.

Water Conservation Orders

[98] Four water conservation orders apply within the Canterbury region. They are listed in paragraph 10.19 of Appendix B of the s42A Report. Of them, those that relate to the Rakaia, Rangitata and Ahuriri Rivers bear on the discharges that could reduce water quality below specified standards (after reasonable mixing). In the s42A Report the CRC Officers express the

opinion that PC7 is not inconsistent with those orders. In considering our recommendations on relevant amendments requested in submissions on the plan changes, we keep in mind that the plans are not to be inconsistent with them.

Canterbury Water Management Strategy

[99] In preparing a plan change, the Council is required to have regard to any management plan or strategy prepared under another Act, to the extent that their content has a bearing on resource management issues of the region.[53] That requirement calls for the Council to have regard to the CWMS, the vision and principles of which were adopted by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010. Section 63 of that Act directed that the Council is to have particular regard to the vision and principles of the CWMS, in addition to the matters relevant under the RMA to its decisions made under clause 10(1) of Schedule 1 of that Act. The CWMS is referred to in the CRPS, Chapter 7.

[100] As described in Appendix B of the s42A Report, that requirement was continued by the Environment Canterbury (Transitional Governance Arrangements) Act 2016.

[101] The vision and principles referred to are described in paragraphs 11.7 to 11.11 of Appendix B to the s42A Report, which also record how the Council had particular regard to the vision and principles in preparing PC7. As the Council will be required to continue to do so in making decisions on relevant submissions to amend the plan change, we have particular regard to them in making our recommendations in this report.

Procedure for dealing with submissions on plan changes

[102] In changing regional plans, the Council is required to follow the procedures prescribed by Part 1 of Schedule 1 of the RMA. That is the process which has led to notification of the proposed Plan Change 7 to the Canterbury Land and Water Regional Plan, and proposed Plan Change 2 to the Waimakariri River Regional Plan, the submissions on which are the subject of this report.

[103] As explained in Section 3 of Part 1 of the s42A Report, the Council has authority to amend to the proposed plan changes as notified to give effect to amendments requested in submissions. However the authority to amend the proposed plan changes is limited in some respects, which we describe in Chapter 4 of this report.

[104] In particular, the Council is limited to making amendments requested in submissions that are 'on' the plan change being amended. Also it is limited to amendments that are within the general scope of an original submission, the plan change as notified, or somewhere between them; and not so as to deprive anyone of opportunity to effectively respond to additional amendments.

[53] RMA, s 66(2)(c).

However, the Council is allowed to make amendments that are consequential on or incidental to amendments validly made, or for clarity or refinement of detail.[54]

[54] RMA, Sched 1, cl 10(2)(b).

Chapter Four
The scope of the Council's potential actions by decisions on submissions

Introduction

[105] The core of the submission process prescribed in Schedule 1 of the RMA is that the local authority publishes its plan proposal; anyone may make a submission proposing amendment to it; a summary of the proposed amendments is published; eligible persons can make further submissions opposing or supporting particular amendments proposed; and the local authority (or its delegate) hears the submitters and comes to reasoned decisions on the proposed amendments. That process is applicable to proposed changes to a plan.

[106] The Schedule 1 process has two major benefits. It can lead to amendments that improve the effectiveness and efficiency of the plan (or plan change) proposal; and in fairness to those whose interests may be adversely affected, it allows for them to oppose particular amendments and explain their reasons for opposition.

[107] In respect of Plan Changes 7 and 2, issues arose whether some submitters' proposals for amendment are within the scope of the Council's authority to make by decisions on submissions. In this chapter we consider the law on this topic, and how it is applicable to some of the amendments in question.

[108] These have been addressed in general in the s42A Report[55] and the Section s42A Reply Report (s42A Reply Report).[56] We accept the advice given there. Out of respect for submitters affected by recommendations that their submission points are out of scope, in this chapter we explain more fully the basis for those recommendations.

The law

[109] We referred to the relevant provisions of the RMA in Chapter 2 of this report.

[110] There have been many court decisions on questions of applying those provisions as in force from time to time. We understand that by the legal doctrine of precedent (*stare decisis*), decision-makers are to apply the core reasoning (*ratio decidendi*) of the most recent judgement of the highest court in a case that is in point, being an authoritative declaration of what the law is.

[111] Where there is such an authority, subsequent decisions of lower courts that are in point may be considered, and if persuasive may be followed if they are consistent with the text and purpose of the Act and the core reasoning of the binding authority of the higher court judgment.

[55] S42A report, March 2020, p16, paras 3.2-3.39.
[56] S42A Reply Report, p10-11, paras 2.2-2.6.

Classes of questions on scope

[112] We understand that there are three classes of case in which questions of the local authority's scope of decision-making may arise: (1) where the original submission does not state a specific proposed amendment to the plan change; (2) where an amendment proposed by a submitter is not 'on' the plan change; and (3) where an amendment being proposed is not within what was proposed in the original submission. We consider each of those classes.

Proposed amendments not specifically stated in the original submission

[113] Some submission points are stated in such general terms that it is not evident what specific amendment is being proposed.

[114] In some cases such a general submission point may explain a submitter's response to a plan change or to the local authority's approach to its planning functions. In those respects such a submission may inform the local authority and provide a background to considering submission points directed to more specific amendments.

[115] Even so, a general submission that does not state a specific amendment to the plan change does not conform with the process provided by Schedule 1. People eligible under clause 8 to lodge further submissions would not necessarily be able to identify whether their interest can be advanced by lodging a further submission supporting or opposing it. Without being more specifically directed, the local authority may not be able to accept or reject it, and give coherent reasons for doing so. It may not be able to carry out its duties under section 32 of identifying reasonably practicable options, evaluate their relative efficiency and effectiveness, and judge which is most appropriate.

[116] So by not conforming to the prescribed direction to give specific details of the decision requested, or using a different format to the same effect, such a general submission cannot lead to being included in the process the Act prescribes, or be a subject of a decision accepting it. For the decision process under clause 10, such a submission point should be rejected as beyond the scope of the local authority's authority.

Proposed amendments to be 'on' the plan change

[117] The authors of the s42A Report also addressed the requirement that a local authority only amend a plan change on a submitter's request if the amendment proposed is 'on' the plan change.[57]

[118] There is case law for that. So we decline to recommend that the Council make any amendment that is not 'on' the plan changes.

[57] S42A Report, p16-18, paras 3.8-3.22; p19, 3.28-3.31.

Amendments to be within what was proposed in submissions

[119] The third class, where an amendment is being requested that is not within what was proposed in an original submission, was also addressed in the s42A Report.[58]

[120] We agree with that advice, and consider that it would not be lawful for the Council, by decision on a submission, to amend a plan change in a way that is not within what was proposed in an original submission; and we decline to recommend such an amendment.

Specific proposed amendments out of scope

[121] Where submission points are questioned for being beyond the scope of the Council's power to make by decision on submissions, the basis for doing so is given in the s42A Report and/or the s42A Reply Report. We decline to recommend in this report any proposed amendment that is out of scope.

[122] There is a particular case in respect of which the submitter presented full legal submissions. That relates to Ngā Rūnanga's proposal for amendments to the CLWRP for protection of waipuna (springs) outside the OTOP sub-region. Out of respect for Ngā Rūnanga and the legal submissions presented in that respect we address that question in more detail in Chapter 7 of this report.

[123] Other particular cases where scope for proposed amendments requested by submitters was in issue are addressed in the Officers' Reply.[59] We agree with the CRC Officers' advice that the amendments in question are beyond the scope of the Council's power, and we do not recommend making them.

[124] However, having reviewed Appendix A to the s42A Reply Report, and in particular the submission points cited by the CRC Officers as providing scope for proposed amendments, we consider a number of the amendments put forward are not within the scope of submissions. We record our findings in relation to some of the more substantive proposed amendments below.

'Hort NZ Page 2' amendments

[125] In the s42A Report the CRC Officers recommended numerous amendments, including the deletion of whole policies, that in their words relied on the scope provided by page 2 of the primary submission of Horticulture New Zealand. We have examined that particular page of the submission and are not persuaded that it provides scope for the amendments recommended by the CRC Officers. Consequently, we do not recommend those amendments unless (having

[58] S42A Report, p17-18, paras 3.17-3.20.

[59] S42A Reply Report, p11-12, para 2.7; p12-13, paras 2.8-2.12; p90, para 19.3a; p121, para 31.8; and p139-140, para 38.4.

first concluded the amendments would improve the Plan) we can attribute them to a specific submission point that provides appropriate scope.

B Allocation Block for Groundwater (Waimakariri)

[126] The CRC Officers recommended inserting a new 'B' Allocation Block (for groundwater) into Table 8-4 of the Plan. We find there is no scope for that amendment, and accordingly do not recommend its inclusion.

Targeted Stream Augmentation (Waimakariri)

[127] The CRC Officers recommended amendments to Rule 8.5.18 to expand the scope of activities addressed by the rule. These amendments would allow for lawfully established groundwater or surface-water takes to be used for targeted stream augmentation. We find there is no scope for such an amendment and accordingly do not recommend its inclusion. In addition the CRC Officers recommended the inclusion of a new rule (Rule 8.5.20A) which would classify takes that do not comply with the allocation limits in condition 1 of 8.5.18 as a prohibited activity. Again we find no submitter expressly sought this amendment and accordingly do not recommend its inclusion.

Section 14 Introduction (OTOP)

[128] The CRC Officers recommended a range of amendments to the 'Introduction' to Section 14 of the Plan. In many instances these amendments were to omit paragraphs that describe the particular features or characteristics of the OTOP sub-region. We find no submitter sought those changes and accordingly recommend that those paragraphs be reinstated.

Chapter Five
Balancing values and effect of priorities

The first question

[129] In opening legal submissions for Waimakariri Irrigation Limited (WIL), its counsel (Mr B G Williams) submitted that all the Regional Council's decisions must be directed to delivering the purpose of the RMA, and that a particular focus for WIL in the context is economic efficiency, which has been recognised as forming a component of sustainable management, with the NPSFM 2020 framework being unlikely to 'cover the field' on those issues.[60]

[130] In counsel's presentation of the submissions, the Hearing Commissioners asked whether, under the NPSFM 2020 regime, including the obligatory hierarchy of priorities, a regional council can manage freshwater by a balance between the health and wellbeing of waterbodies and freshwater ecosystems as first priority over economic wellbeing as third priority. In that WIL submitted that decisions should be made for achieving the purpose of the RMA, we asked whether any of the three classes of exception identified in *King Salmon*[61] applies to relieve a regional council from the default obligation to give effect to the NPSFM 2020, excluding specific matters in Part 2 of the RMA.

[131] Mr Williams asked for time to provide a considered response, a request to which we agreed; and he provided his response in a memorandum of 2 December 2020.

Waimakariri Irrigation Limited's response

[132] In his memorandum, counsel referred to the hierarchy of priorities in the NPSFM 2020 and remarked that they appear largely inconsistent with the 'balancing approach' inherent in section 5.[62] He then referred to the report on a proposed version of the NPSFM 2020 by the Freshwater Independent Advisory Panel, which noted that the hierarchy may be vulnerable to significant legal challenge, in that the first priority sets an environmental 'bottom line' and provisions that explicitly allow for exceptions to that 'bottom line'.

[133] Mr Williams argued that including a single objective which provides for social and economic wellbeing as a third-ranking priority, and one single standalone very brief policy, is not sufficient to avoid the need for reference to Part 2 of the RMA. Counsel submitted that it cannot be said that this single policy 'ticks the box', that reliance on it risks a decision being made that conflicts with section 5(2); and that the NPSFM 2020 has not (and cannot have) gone to the extent of 'rewriting' the RMA, or taking economic and social wellbeing almost entirely out of

[60] Legal Submissions on behalf of WIL, 11 November 2020, p3-5, paras 12-13, 18.
[61] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38.
[62] Memorandum of counsel for WIL, 2 December 2020, p2-3, paras 10-16.

decision-making. He argued that it is still appropriate for decision-makers to refer back to Part 2 (for example) to avoid the potential for a perverse outcome which does not give effect to Part 2, and more generally to ensure their decisions cover the field.

[134] Counsel for WIL also submitted that there is uncertainty as to the meaning of particular provisions. He remarked that until the procedural requirements of the NPSFM 2020 have been followed, there is uncertainty as to exactly how the provisions of the NPSFM 2020 should and can be interpreted.[63]

[135] Mr Williams observed that the NPSFM 2020 places greater emphasis on Te Mana o te Wai, which requires a substantive change in how freshwater is viewed, and brings with it procedural obligations as to how it is to [be] implemented, with much greater emphasis on engagement and discussion between regional councils, communities, and tangata whenua. Counsel argued that until the engagement has occurred, it is not possible to reach a view as to how Te Mana o te Wai is to be applied. So counsel concluded that until then, the NPSFM 2020 must 'by necessary implication' be considered 'incomplete'; and references to Part 2 would be appropriate to 'bridge the gap' that currently exists in relation to the NPSFM 2020.

Other submitters' rejoinders

[136] Three other submitters (the Christchurch City Council, the Director-General of Conservation, and Ngā Rūnanga) responded with memoranda disputing WIL's submissions. As their grounds of opposition are generally aligned, rather than summarising each we give our summary of the main points of their submissions on the issue. They contended that resort to Part 2 for interpreting and applying the NPSFM 2020 and its hierarchy of priorities is not justified in that none of the classes of exception identified in the *King Salmon* case[64] is applicable.

[137] The first class of exception is where the high-order instrument is invalid. Neither WIL, nor any of the opposing submitters, contended that the NPSFM 2020 is invalid.

[138] The second class is where the high-order instrument does not "cover the field" of the proposed lower order instrument in issue. WIL contended that the NPSFM 2020 does not cover the field of the plan changes; and the opposing submitters all joined issue with that.

[139] They cited the majority judgment in *King Salmon* that higher-order instruments are assumed already to give substance to Part 2. And they referred to express provisions in respect of economic and social wellbeing in the NPSFM 2020, including in the fundamental concept of Te Mana o te Wai. They argued that to the extent the NPSFM 2020 does not give economic and social wellbeing the priority some sections of the community wanted does not justify concluding

[63] Memorandum of counsel for WIL, 2 December 2020, p5-6, paras 20-23.
[64] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38.

that it does not cover the field. Its prioritisation of those aspects of wellbeing does not amount to incompleteness, nor bypassing the NPSFM 2020 to resort to Part 2 itself.

[140] The third class of exception is uncertainty about the meaning of the higher-order instrument. The opposing submitters refuted WIL's submission that this exception is available, arguing that the meaning of the NPSFM 2020, including its objective and policies, is clear and unambiguous. They asserted that any uncertainty about how a regional council might implement it is not uncertainty of meaning of the NPS itself, as contemplated in the *King Salmon* case, and does not justify resorting to Part 2 to read down the contents of the NPS.

King Salmon

[141] Before we state our conclusion on these issues, we remind ourselves of what the Supreme Court declared in the *King Salmon* case. The Regional Council will not want a detailed analysis of that case. A brief description will suffice.

[142] The main issue was whether the 'overall judgement' approach to deciding contents of a change to a regional plan is permissible instead of application of a higher-order instrument (in that case the NZCPS). The majority of the Supreme Court rejected that, because of the prescriptive provisions of the higher order instrument, and the statutory obligation to give effect to them.

[143] However in giving their reasons, the majority identified three 'caveats'.[65] The first is, if there was an allegation about the lawfulness of the higher-order instrument. The second accepted that there may be instances where the higher-order instrument does not 'cover the field', and a decision-maker would have to consider whether Part 2 of the RMA provides assistance in dealing with matters not covered. The third is:

> "if there is uncertainty as to the meaning of particular provisions in the [higher-order instrument] reference to pt 2 may well be justified to assist in a purposive interpretation. However this is against the background that the policies in the [higher-order instrument] are intended to implement the objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies."

Consideration

[144] The NPSFM 2020 is a higher order instrument than the regional plans that are the subject of the proposed changes in question. It represents matters of national significance for achieving the purpose of the Act.[66] The Regional Council is obliged to prepare and change its regional plans in accordance with it; and its regional plans have to give effect to it.[67]

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[65] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [88].

[66] RMA, s 45(1); s 45A(1).

[67] RMA, s 66(1)(ea); s 67(3)(a).

[145] In doing so, by applying the Supreme Court's judgement in *King Salmon*, the Regional Council is not to use the 'overall judgement approach' except to the extent that any of the three 'caveats' or classes of exception applies.

[146] Counsel for WIL, in presenting its submission, argued that the Regional Council's decisions should be directed to delivering the purpose of the RMA by a balancing approach inherent in section 5. That would in effect be the 'overall judgement approach', which is not available unless one of the classes of exception applies.

[147] On the first class, invalidity, Mr Williams referred to a report by a freshwater advisory panel that certain contents of the draft NPSFM 2020 "may be vulnerable to significant legal challenge". Counsel did not himself present legal argument about the legal validity of the NPSFM 2020 as formally approved and in force.

[148] A report by an advisory panel is not itself authority for a legal proposition. The report in question was one of many sources of advice to, and opportunities to influence, the Ministers concerning the contents of the then-proposed NPSFM. As counsel for the Director-General of Conservation remarked, proposed provisions the subject of the advice in question are not contained in that form in the NPSFM 2020 as approved.

[149] Therefore, we do not accept that WIL's submission invoking a balancing approach in section 5 is available on the footing of legal invalidity of contents of the NPSFM 2020.

[150] WIL's submission that the NPSFM 2020 does not cover the field addressed in its submission on Plan Change 7 was directed to economic and social wellbeing. Having reviewed the NPSFM 2020 we notice, as mentioned by the submitters in opposition, that the higher-order instrument expressly and directly deals with social and economic wellbeing in directive language in sections 1.3(5)(c); 2.1(1) (c; and 2.2 Policy 15.

[151] We understand that WIL would prefer that greater priority or importance had been accorded by the NPSFM 2020 to economic and social wellbeing. But the opportunity to make submissions to that effect about the content of the proposed NPSFM has passed. The making of submissions on proposed Plan Change 7 does not provide a second opportunity to make submissions about the content of the NPSFM 2020. That instrument is now in force, and the Regional Council has to give effect to it.

[152] So the NPSFM 2020 does not fail to cover economic and social wellbeing, it is not incomplete in that respect, and it is to be assumed to give substance to Part 2. The second class of exception is not available.

[153] The third class of exception is uncertainty about the meaning of provisions in the higher-order instrument, which might be clarified by referring to Part 2. Counsel for WIL asserted that until the procedural requirements of the NPSFM 2020 about engagement with community and

tangata whenua have been followed, there is uncertainty about how the Te Mana o te Wai concept is to be understood and applied.

[154] We accept that how the concept is to be applied in detail in respect of a particular section of a waterbody may well depend to some extent on advice from tangata whenua. Even so, the passage of the majority judgment that we quoted above shows that this exception is not about application in particular circumstances. Rather the exception can arise when there is uncertainty about the meaning of a particular provision of the higher-order instrument itself, an uncertainty that is capable of being resolved by referring to Part 2.

[155] The purpose of referring to Part 2 would be to assist with clarifying the intended meaning of the uncertain provision in question. It would not be to anticipate how the provision would be applied in a particular case after engagement including by Policy 2 and section 3.2.

[156] Counsel for WIL did not identify any particular provision of the NPSFM 2020 which is uncertain in meaning. Although its provisions are of course general in nature, their intended meaning is clear enough to allow for engagement and involvement of tangata whenua.

[157] So the third class of exception, as described by the majority judgment, is not applicable.

Finding

[158] WIL did not establish that any of the three classes of exception described by the Supreme Court in the caveats identified in the majority judgment in the *King Salmon* case is applicable to the NPSFM 2020. So recourse to Part 2 for making an overall approach to interpreting and applying that instrument is not permissible. The 'balance' to be given between the various elements of the freshwater environment is to be that expressed and implied in the NPSFM 2020, without revising or altering the priorities stated.

The second question

[159] In legal submissions on behalf the submitter As One Incorporated, its counsel remarked that, as the NPSFM 2020 is subordinate legislation, it cannot amend provisions of the RMA. From that, counsel argued that providing for social, economic, and cultural wellbeing is not to be treated as subordinate to wellbeing of freshwater, in that providing for freshwater does not require removal of people's ability to provide for social, economic and cultural wellbeing where removal will not, or is not necessary to enable freshwater wellbeing.[68]

[160] In legal submissions for the Director-General of Conservation, his counsel proposed that the NPSFM 2020 gives substance to the provisions of Part 2 of the Act in relation to freshwater

[68] Legal Submissions on behalf of As One Incorporated, 16 November 2020, p18, paras 62-63.

management, so that in giving effect to the NPSFM 2020, a regional council will necessarily be acting 'in accordance' with Part 2 of the Act.[69]

[161] In the Officers' Reply Report, counsel for the CRC submitted that giving effect to the NPSFM 2020 includes that the health and wellbeing of waterbodies and freshwater systems must be prioritised first, before the second and third elements; and the first and second elements must be prioritised before the third. Counsel also submitted that it would not be appropriate to have recourse to Part 2 of the RMA, either on the basis of incompleteness or of uncertainty of the NPSFM 2020.[70]

[162] We do understand the concerns of members of As One Incorporated, and many other submitters, about the way, and the extent in which, provisions of PC7 would considerably constrain the ability of people and communities to provide for their social, economic and cultural wellbeing. We are grateful for their submissions and for the evidence they provided about that.

[163] We have considered the full and closely argued submissions of counsel for As One Incorporated, including where he addressed the relationship of the provisions of Part 2 of the Act about enabling provision for social, economic and cultural wellbeing, and the provisions of the NPSFM 2020 about the hierarchy of priorities.

[164] We accept counsel's starting point that as subordinate legislation, the NPSFM 2020 is not to be understood as amending the Act. The effect of the NPSFM 2020 is not to do that. Rather it is to state objectives and policies for matters of national significance relevant to achieving the purpose of the Act.[71] So (as counsel for the Director-General of Conservation submitted), the NPSFM 2020 gives substance to Part 2 of the Act in relation to freshwater management. In that the NPSFM 2020 does that (and covers the field without uncertainty), the Regional Council is to give effect to it without having recourse to Part 2 of the Act, not even to the enabling of people and communities to provide for social, economic and cultural wellbeing, which is of course encompassed by the terms of the NPSFM 2020 to the extent it does, including clause 2.2 Policy 15.

[165] The policies stated in clause 2.2 of the NPSFM 2020 for achieving the objective of the NPS in clause 2.1 are to be understood as compatible with the fundamental concept of Te Mana o te Wai stated in clause 1.3, and regional councils' duties in that regard under clause 3.2. In that way, Policy 15 (for instance) is subject to the hierarchy of priorities in clause 1.3(5). Provision for social, economic and cultural wellbeing is limited so as to allow Te Mana o te Wai being given full effect.

[69] Legal Submissions on behalf of the Director-General of Conservation, 28 September 2020, p10, para 27.
[70] S42A Reply Report, p17, para 2.33.
[71] RMA, s 45(1).

[166] In that the submissions for As One Incorporated urged otherwise, we do not accept that they are compatible with the *King Salmon* case.[72]

[72] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38.

Chapter Six
Ngāi Tahu values and interests and allocations of water for cultural and mahinga kai purposes

Introduction

[167] PC7 to the LWRP, as notified, proposed amendments to better recognise and provide for the values and interests of Ngāi Tahu and Papatipu Rūnanga. Changes included amendments to region-wide provisions to provide Council with discretion to consider actual and potential effects of proposed activities on sites of significance to Ngāi Tahu (including wāhi tapu and wāhi taonga), protect habitats of indigenous freshwater species, and to manage the effects of farming on springs (waipuna).

[168] Additional changes proposed as in Parts B and C of PC7 included new zones that cover culturally significant sites (e.g. rock art / tuhituhi neherā sites) and areas used for customary use (e.g. the Ashley Estuary / Te Aka Aka Zone and Mātaitai Protection Zone), provisions to protect the values of those areas and the rights and interests of mana whenua (including their role as kaitiaki), and allocation limits for freshwater resources. In this chapter we set out our findings and recommendations in relation to proposed allocations of surface water for cultural and mahinga kai purposes. In all other respects we adopt the recommendations and reasons of the CRC Officers in the s42A Report on submissions that address Maori cultural values and interests.

PC7 as notified

OTOP sub-region

[169] Part B of PC7 proposed to reserve an allocation of surface water from the Temuka River for cultural purposes. We understand the purpose of the proposed allocation (of 100 L/s from the 'A' Allocation Block in Table 14(l)) to be for enhancement of mahinga kai and associated tangata whenua values.

Waimakariri sub-region

[170] Part C of PC7 also proposed to reserve an allocation of surface water for mahinga kai purposes. Allocations for three rivers were proposed as set out in Table 8-3 and described below:

- Ashley River / Rakahuri, B and C allocation blocks of 182 L/s and 1253 L/s respectively,
- Cam River / Ruataniwha, an A allocation block of 175 L/s
- Silverstream River, an A allocation block of 205 L/s

[171] We understand[73] an 'A' allocation block for the Ashley River / Rakahuri was not included in Table 8-3 on the basis that consented abstraction already exceeds the A Allocation limit in Table 8-2 and thus the river is 'over-allocated'.[74]

[172] For the Cam / Ruataniwha and Silverstream rivers, we understand[75] 'A' allocation blocks were proposed to recognise the cultural significance of these rivers to iwi and justified on the basis that consented abstraction is below the allocation limits in the operative plan (the WRRP).[76] B and C Allocations (which typically can only be abstracted at higher flows) were not proposed due to these types of abstractions not being suitable for low-flow, spring-fed streams.

Submissions and evidence of Ngā Rūnanga

[173] At the hearing for PC7, counsel for Te Ngāi Tūāhuriri Rūnanga, Te Rūnanga o Ngāi Tahu and Te Rūnanga o Arowhenua (referred to collectively as Ngā Rūnanga) presented legal submissions setting out the legal framework[77] that applies to protect the rights and interests of iwi and hapū. Counsel submitted that despite this framework continued degradation of the environment has occurred with significant adverse effects on the ability of the environment to sustain mahinga kai, and consequently, the identity of Ngā Rūnanga.

[174] These matters were elaborated on further in the evidence of witnesses for Nga Rūnanga. Mr King[78] emphasised to us the connection between water, spiritual health and the need to protect resources for future generations. Mr Reuben[79] spoke of the need for higher minimum flows and lower allocations to protect habitat for taonga and mahinga kai species, and Dr Tau[80] emphasised that mahinga kai is central to identity and whanaungatanga.[81]

[175] Following Ngā Rūnanga's presentation we took the opportunity to clarify with each witness their position with regards to the proposed allocations of water for cultural and mahinga kai purposes. Mr Henry, witness for Te Rūnanga o Arowhenua, stated he did not support an allocation of 100 L/s from the Temuka River / Te Umu Kaha, on the basis that it was inadequate. Dr Tau and Ms McIntyre, witnesses for Ngāi Tūāhuriri, expressed their support for allocations for mahinga kai, including within over-allocated rivers in the Waimakariri sub-region (namely the Ashley River / Rakahuri and Courtenay stream).[82] We note this position is somewhat at

[73] Section 32 Report, p377.
[74] Ibid.
[75] Section 32 Report, p394.
[76] Section 32 Report, p388.
[77] E.g. the Resource Management Act 1991, the Ngāi Tahu Claims Settlement Act 1998.
[78] Witness for Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu .
[79] Witness for Ngāi Tūāhuriri Rūnanga.
[80] Witness for Ngāi Tūāhuriri Rūnanga.
[81] Summary of Evidence of Dr Tau on behalf of Ngāi Tūāhuriri Rūnanga, 25 November 2020, p3, para 12.
[82] Summary of Evidence, Rawiri Te Maire Tau, Ngāi Tūāhuriri Rūnanga, p5, para 26; Summary of Evidence, Sandra McIntyre, Ngāi Tūāhuriri Rūnanga, p5, para 12.

odds with the position stated in the primary submission[83] for Ngāi Tūāhuriri, which seeks an overall reduction in the surface water allocation limits in Tables 8-1 to 8-8, and the return of unutilised water to the environment to sustain cultural flows and subsequent allocation to cultural uses.

The CRC Officers' Response

Stacking of 'A' Allocation Blocks in Waimakariri

[176] As part of our consideration of the proposed allocation limits, we asked the CRC Officers to clarify the relationship between the two 'A' allocation blocks in Tables 8-2 and 8-3. The CRC Officers confirmed to us that the two 'A' allocations stack together as follows:

- For the Cam River, the 'A' Allocation Limit for mahinga kai enhancement purposes in Table 8-3 (175 L/s) stacks on top of the 'A' Allocation block in Table 8-2 (350 L/s) to produce a total allocation limit of 525 L/s.
- For the Silverstream River, the 'A' Allocation Limit for mahinga kai enhancement purposes in Table 8-3 (205L/s) stacks on top of the 'A' Allocation block in Table 8-2 (591 L/s) to produce a total allocation of 796 L/s.[84]

[177] Relevantly, we keep in mind the CRC Officers earlier advice to us that:

- abstractors from the Cam River / Ruataniwha would only be able to fully utilise their consents when flows in the river exceed 1525 L/s[85], a situation that occurs approximately 10% of the time;[86] and
- if subsequent applications to take water from the Cam River / Ruataniwha for mahinga kai purposes were granted and abstraction occurred (as opposed to the allocated water being left in the river), this could reduce reliability for existing consent holders; and
- the combined limits for the mahinga kai and other uses 'A' Allocation blocks for the Cam River / Ruataniwha (525 L/s) and Silverstream Rivers (796 L/s), exceed the recommended 'ecological' allocation limits for these rivers of 311 L/s and 479 L/s respectively.[87]

[83] Submission by Ngāi Tūāhuriri Rūnanga, p8.
[84] S32 Report, p396.
[85] This value represents a combination of the allocation limit (525L/s) and the minimum flow (1000L/s).
[86] S42A Reply Report, p135, para 34.1 – 34.2.
[87] S42A Reply Report, p135, para 34.3; S32 Report, p400.

[178] Despite this limitation on the merits of the mahinga kai allocations, the CRC Officers nevertheless recommended retaining the 'A' Allocation block mahinga kai allocations in Table 8-3 for both rivers.

OTOP

[179] For the Temuka / Te Umu Kaha River, the CRC Officers recommended[88] omitting the mahinga kai allocation in Table 14(l), on the basis that retaining it would further exacerbate the over-allocated status of the Temuka River / Te Umu Kaha. This advice was inconsistent with that outlined above for the Waimakariri Rivers.

Our consideration of the matter

[180] Having evaluated the submissions and evidence we consider it would be inappropriate for us to recommend new surface water mahinga kai allocation blocks for rivers that are already over-allocated. We also consider it would be inappropriate to include new mahinga kai allocations for rivers that are not fully allocated, but which are some distance from the recommended 'ecological' limits set out in the Council's s32 Report. To do so would not prioritise the health and well-being of waterbodies and freshwater ecosystems as required by Objective 2.1(a) of the NPSFM 2020. In saying that, we note that allocating water for mahinga kai purposes would be a 'third' priority under Objective 2.1(1) of the NPSFM 2020.

[181] Finally, we respond to the position put forward in evidence by Ms McIntyre[89], that including allocations for mahinga kai purposes would not necessarily result in water being abstracted from the river. We note that is a potential outcome, but there is no certainty of that eventuality. Any person could apply to the Council for resource consent to abstract and use water for mahinga kai purposes. We find it is not plausible to assume that the mahinga kai allocations (if they were provided for in the Plan) would mean 'additional' water remaining in the river, with the end result essentially resulting in an 'enhanced' minimum flow level. Instead, we must assume that the water is abstracted, thereby extending the amount of time that the river is maintained at (or below) its minimum flow level. That would not be consistent with the first priority of Objective 2,1(1) of the NPSFM 2020.

[182] For our reasons set out above, we do not recommend including allocations of surface water for mahinga kai and cultural purposes. Accordingly, for Part B of PC7 we recommend amendments to Policies 8.4.9 and 8.4.13, the omission of Rules 8.5.6 to 8.5.8 and Table 8-3. For Part C of PC7 we recommend amendments to Policy 14.4.3, the omission of Rules 14.5.1 to 14.5.3 and the cultural allocation limits in Table 14(l).

[88] S42A Report, p301, para 7.27.

[89] Witness for Ngāi Tūāhuriri, oral responses to questions.

Chapter Seven
Is there scope to extend waipuna protection?

Introduction

[183] We adopt the general advice given in the s42A Reply Report on the scope of the Council's authority to make amendments to the plan change.

[184] However, out of respect to Ngāi Tahu and to full legal submissions presented by their counsel, we state more fully our response to them on a particular question about scope. This is whether the Council is able, by decisions on submissions, to amend Plan Change 7 by making provisions for protection of waipuna (springs) beyond the OTOP sub-region, as requested in the submission by Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu ("the Arowhenua submission").

The OTOP sub-region

[185] In Chapter 1 of this report we noted the three major parts of PC7: Part A, proposing amendments to certain region-wide parts of the plan; Part B, proposing new provisions to apply in the OTOP sub-region; and Part C, proposing amendments to apply in the Waimakariri sub-region.

[186] Part B as notified proposed provisions to protect waipuna located in the OTOP sub-region. Neither Part A nor Part C propose provisions for protection of waipuna elsewhere. To the extent that the Arowhenua submission requests amendments to provisions proposed in Part B to apply within that sub-region, a question of scope does not arise.

[187] However the Arowhenua submission also requested provisions for protecting waipuna elsewhere in the Orari / Ōrāri and Pareora /Pureora catchments, beyond the OTOP sub-region.[90] In respect of those requests the authors of the s42A Report called in question whether the Council would have scope to make those amendments by decision on the submission, in that they are not "on" the plan change.

[188] In the Summary of Decisions Requested, those requested amendments were sorted to Part A. Each of the requests in question was the subject of one or more further submissions: four in support, the others in opposition. Those further submissions were lodged by Ellesmere Sustainable Agriculture Inc (ESAI); Opuha Water Ltd (OWL), and Central South Island Fish and Game.

[189] In presenting the case for those who had made the Arowhenua submission, their counsel disputed that those submission points would be out of scope by not being "on" the plan change. We now address their arguments.

[90] Submission by Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu, p4, para 27 and pp 25, 26.

The submitter's arguments

[190] Counsel for the submitters contended that there are two lines of case law that relate to the scope of submissions:

(a) The scope of a submission on a plan change or variation; and

(b) The scope of a submission on a full review of planning documents.

[191] In support of that proposition, they cited the *Clearwater*,[91] *Motor Machinists*[92] and *Turners & Growers*[93] cases applying to plan changes, and the *Albany North*[94] case applying to a full review. They submitted that in the context of a full review of a plan, the High Court had "departed from" the *Motor Machinists* approach, citing the *Albany North* case in which the Court endorsed the "reasonably and fairly raised" test set out in the *Countdown*[95] case. Counsel gave this summary:

> "In the case of a full plan review, the issue is whether the scope of a submission is broad enough to include a particular form of relief, whereas in the context of a plan change (such as in Motor Machinists and the related line of case law), the issue is whether the submission is 'on' the variation or plan change at all."[96]

Case law precedents on scope

[192] The authority for making submissions is clause 6(1) of Part 1 the Schedule 1 to the RMA:

> "Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority."

[193] The application of that subclause to a plan change is the result of section 65(5) of the RMA:

> "A regional plan may be changed in the manner set out in the relevant Part of Schedule 1."

[194] We do not find in the Act any indication that the provision of clause 6(1) for making a submission on a proposed plan differs in the case of a submission on a proposed plan change. Rather, the response to consideration of whether a submission is "on" a proposed instrument calls for application of that test to the particular facts, which may include whether the proposed instrument is a change to part of a plan or policy statement, or instead is a full review of a plan or policy statement.

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[91] *Clearwater Resort v Christchurch City Council* HC Christchurch AP34/02 14 March 2003 William Young J.

[92] *Palmerston North City Council v Motor Machinists* [2014] NZRMA 519.

[93] *Turners & Growers Horticulture v Far North District Council* [2017] NZHC 764; 20 ELRNZ 203.

[94] *Albany North Landowners v Auckland Council* [2017] NZHC 138.

[95] *Countdown Properties (Northlands) v Dunedin City* [1994] NZRMA 145; 1B ELRNZ 150 (HC).

[96] Legal Submissions on behalf of Te Ngāi Tūāhuriri Rūnanga et al, p27, para 116.

[195] In that counsel relied on the *Albany North* case, we bear in mind that the legal concept of precedent applies to judgments that are (a) not distinguishable; and (b) part of the *ratio decidendi*, not *obiter dicta*.

[196] It is clear from paragraph [129] of Justice Whata's judgment in the *Albany North* case that the Auckland Unitary Plan process he was considering "was far removed from the relatively discrete variation or plan change under examination in *Clearwater*, *Option 5*, and *Motor Machinists*", that there was no express limit to the areal extent, and that the s32 Report signalled potential for great change in respect of urban growth.

[197] As the learned Judge observed in the paragraph that followed, a plan change is a different context from a plan.

[198] In that regard, *Albany North* is distinguishable.[97] Even though some provisions of Plan Change 7 (in Part A) are to be region-wide in application, not geographically discrete, other provisions (in Parts B and C) are certainly limited in areal extent. Counsel did not cite any content of the s32 Report on Plan Change 7, or in the text of the notified plan change, as indicating potential for application of waipuna protection beyond the OTOP sub-region.

[199] We have not found any precedent in the other High Court judgments cited to question that decisions requested by submissions are to be limited to content that is "on" a proposed plan.

The meaning of whether a submission in 'on' the plan change?

[200] Relevant High Court judgments on what is 'on' a plan change guide us on how to decide this question.

[201] In the *Clearwater* case (a variation to a proposed plan to control activities within an airport noise contour) Justice William Young explained the process for deciding if a submission is "on" a variation in these two ways:

> "1. A submission can only fairly be regarded as 'on' a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
>
> "2 But if the effect of regarding a submission as 'on' a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly 'on' the variation."[98]

[202] His Honour added:

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[97] It is also distinguishable by being primarily under the Local Government (Auckland Transitional Provisions) Act 2010, not primarily under the RMA.

[98] *Clearwater Resort v Christchurch City Council* HC Christchurch 14 March 2003 AP34/02 at [66].

> "It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of 'left field', there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding (to the extent to which it proposes something completely novel) is 'on' the variation."[99]

[203] The *Motor Machinists* case[100] concerned a plan change. Justice Kós referred to the *Clearwater* test and said:

> "[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: The breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.
>
> [81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime in a district plan for that resource is unlikely to be 'on' the plan change. … Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s32 analysis is required to inform affected persons of the comparative merits of that change…
>
> [82] But that is subject then to the second limb of the Clearwater test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan changes process. … While further submissions by such persons are permitted, no equivalent of clause 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional sidewind would not be robust, sustainable management of natural resources…
>
> [83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by the further changes submitted."

[204] The *Albany North* case[101] was one of a full review, not a partial amendment to an extant plan. In that respect (as we already noted) it is distinguishable.

[205] Relevantly, Justice Whata used different language to describe two issues:

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[99] Ibid, at [69].

[100] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290; [2014] NZRMA 519.

[101] *Albany North Landowners v Auckland Council* [2017] NZHC 138.

> "[101] The question of scope raises two related issues: legality and fairness. Legality is concerned with whether the IHP has adhered to the statutory requirement to identify all recommendations that are outside the scope of submissions (at s 144(8) of the [Auckland Transitional Provisions] Act. The second issue of fairness is about whether affected persons have been deprived of the right to be heard."

[206] Later in his judgment, the learned Judge spoke of a need to:

> "[116] … ensure that all are sufficiently informed about what is proposed, otherwise 'the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness.'"

[207] On the distinction between the Motor Machinists case and Albany North, Justice Whata said:

> "[130] … Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.
>
> …
>
> "[132] … While it may be that some proposed changes are so far removed from the notified plan that they are out of scope … it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s32 evaluation.
>
> "[133] The important matter of protecting affected persons from submissional sidewinds raised by Kós J must be considered alongside the equally important consideration of enabling people and communities to provide for their wellbeing … via the submission process.
>
> …
>
> "[135] … an approach to consequential changes premised on a reasonably foreseen logical consequences test which accords with the longstanding *Countdown* 'reasonable and fairly raised' orthodoxy and adequately responds to natural justice concerns raised by William Young J in *Clearwater* and Kós J in *Motor Machinists."*

[208] On the second issue, (corresponding to the second limb of the *Clearwater* test), Justice Whata said:

> "[176] I prefer to approach the assessment employing a test based on what might be expected of a reasonable person in the community at large genuinely interested in the implications of the PAUP for him or her."

[209] In approaching the application of that test to certain submissions, the learned Judge said:

> "[256] … the issues raised by the WR submission were discrete, yet had the acute disenabling effect of relocating the viewshaft [from Dilworth Terrace] to cover the SHL site. Greater specificity was required in order to fairly put SHL on sufficient notice of the potential effect of the submission on it. It was neither reasonable nor fair to amend the viewshaft's location to directly affect the SHL site without at least affording SHL an opportunity to be heard."

[210] Counsel for Ngā Rūnanga also referred to the judgment of Justice Gilbert in the *Turners & Growers* case,[102] concerning the scope for amending a plan change at the request of a cross-appellant. The learned Judge noted that the plan change notified would affect only a limited class of person, but the submission would involve a radical extension to the reach of the rule. He said:

> "[25] If the Council had adopted these changes, anyone wishing to engage in non-rural industrial or commercial activities anywhere in this vast region would be directly affected. This could be a very large group. Those parties could well have been shown not to make a submission on the plan change having concluded it would not affect them. To adopt Kós J's expression, they may have been rendered 'speechless' if they had learned that 'by a submissional sidewind' the plan change had 'so morph[ed]' that they were no longer able to locate any non-rural industrial or commercial activity within 300 metres of their site boundaries as a result of changes to the Keeping of Animals rule having been made without notice to them and without giving them an opportunity to participate in the decision-making process.
>
> "[26] I therefore accept that … was not a submission 'on' the plan change."

Are the requested amendments to the plan change to extend the waipuna provisions within scope?

[211] We now apply the law as declared in those cases to the amendments requested by Ngā Rūnanga to make provisions beyond the limits of the OTOP sub-region for protection of waipuna.

[212] First we consider whether the amendments requested can fairly be regarded as addressing the extent to which Plan Change 7 would change the status quo. This is essentially the first limb (or step) of the *Clearwater* test, and the first issue of the two identified in *North Albany*.

[213] Then we will consider whether making those amendments would deprive those affected of a real opportunity for effective participation in the decision-making. This is essentially the second limb of the *Clearwater* test, and the second issue identified in *North Albany*.

[214] Because the outcome of consideration of the second question is said to go to whether the requested amendments are 'on' the plan change, we review the whole outcome by reference to that test.

Addressing the change to the status quo

[215] Applying the first step of the *Clearwater* test, we consider whether Ngā Rūnanga's submission points on waipuna address the extent to which the plan change would change the pre-existing status quo.

[216] The pre-existing status quo is that the CLWRP does not make provision for protecting certain classes of cultural importance, waipuna among others.

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[102] *Turners & Growers Horticulture v Far North District Council* [2017] NZHC 764.

[217] Plan Change 7 has three parts: A, B and C. Part A would make changes to the plan that would apply throughout the region; and also certain specific changes that would apply only in specific sub-regions (Selwyn Te Waihora, Hinds/Hekeao Plains, South Coastal Canterbury and Waitaki). Part B would make changes to the plan in respect of the Orari-Temuka-Opihi-Pareora sub-region; and Part C would make changes in the Waimakariri sub-region. The changes in respect of the OTOP sub-region (in Part B) include acknowledging that there are culturally important sites, including waipuna, in that sub-region. In that respect Part B would introduce two new policies to Section 14 of the Plan, the section that only applies to the OTOP sub-region.

[218] One of the new policies (Policy 14.4.5) is a policy of protecting Ngāi Tahu values associated with waipuna (among others). The other (Policy 14.4 16) is a policy of protecting Papatipu Rūnanga values associated with springs (waipuna) among others. This would be done by applying, within the OTOP sub-region, the region-wide provisions for exclusion of livestock from waterbodies to permanently or intermittently flowing springs (waipuna); and by excluding, within the Mātaitai Protection Zone, all farmed cattle, deer and pigs from any such spring.

[219] So those amendments to Part B are the relevant extent to which Plan Change 7 would change the existing status quo. Plan Change 7 as notified did not propose any other amendment to the Plan in respect of waipuna.

Do the relevant submission points address that change?

[220] The contents of Plan Change 7 that relate to waipuna are applicable in the OTOP sub-region. To the extent that Ngā Rūnanga's submission points would alter those provisions applicable in that sub-region, they address an extent to which the plan change would change the pre-existing status quo, and are 'on' the plan change. But to the extent that their submission points would alter section of the Regional Plan applicable beyond the OTOP sub-region, they do not address an extent to which the plan change would change the existing status quo, because it does not extend to altering the pre-existing provisions with reference to waipuna. So in taking the first step of the *Clearwater* test, the submission points are not 'on' the plan change.

Consequential alterations

[221] In the *Motor Machinists* case, Justice Kós observed that "incidental or consequential extensions of proposed zoning changes are permissible provided that no substantial further s32 analysis is required to inform persons of the comparative merits of that change."

[222] So we also consider whether the submission points in question might be considered to be 'on' the plan change as being consequential on, or incidental to, the submission points on the proposed alteration to provisions for protection of waipuna applicable within the OTOP sub-region.

[223] The authority for consequential amendments is clause 10(2)(b) of Schedule 1 to the RMA, which enables a local authority's decision to include matters relating to any consequential alterations necessary to the proposed plan arising from the submissions and any other matter relevant to the proposed plan arising from the submissions.

[224] It is our understanding that those provisions apply to alterations consequential on submissions that are compliant, by being 'on' the plan change, and relevant alterations arising from submissions that are so compliant. They do not extend to alterations consequential on or arising from submissions that are not compliant by not being 'on' the plan change, as within its ambit.

[225] In any event, provisions for protection of waipuna beyond the OTOP sub-region, however worthy, are not necessary in consequence of making alterations for protection of waipuna within the bounds of the sub-region, nor do they arise from them. They merely come to mind when the provisions applicable within the sub-region are addressed.

Does the section 32 evaluation deal with costs and benefits to private and public interests?

[226] In the *Motor Machinists* case, Justice Kós remarked that one way of analysing whether a submission is 'on' a plan change is to "…ask whether the submission raises matters that should have been addressed in the s32 evaluation and report."

[227] In the *North Albany* case Justice Whata noted as relevant that the section 32 report had signalled potential for great change in respect of urban growth.

[228] Following those examples, we have considered whether the section 32 report on Plan Change 7 contained any indication of potential extension of protection for waipuna beyond the OTOP sub-region, and any assessment of costs and benefits to private and public interests of doing so. We have found none.

Depriving participation opportunities

[229] The second limb of the *Clearwater* test (generally followed in substance in subsequent caselaw) is to consider whether the effect of accepting the submission would permit the planning instrument "…to be appreciably amended without real opportunity for participation by those potentially affected…"[103]

[230] Justice William Young suggested an example of a proposition that could be regarded as coming out of "left field" from which there might be little or no real scope for public participation.[104]

[103] *Clearwater Resort v Christchurch City Council* HC Christchurch AP 34/02 14 March 2003 at [66].
[104] *Clearwater Resort v Christchurch City Council* HC Christchurch AP 34/02 14 March 2003 at [69].

[231] In the *Motor Machinists* case, Justice Kós referred to a real risk of persons affected being denied an effective response, and remarked that "To override the reasonable interests of people and communities by a submissional sidewind would not be robust, sustainable management of natural resources…"[105]

[232] In the *North Albany* case, Justice Whata spoke of ensuring that "…all are sufficiently informed about what is proposed otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness…"[106] and a test of "… what might be expected of a reasonable person in the community at large genuinely interested in the implications of the [proposed plan change] for him or her."[107]

[233] In the *Turners and Growers* case, Justice Gilbert considered a radical extension of a rule affecting permitted land use, and people directly affected having concluded it would not affect them.

Pre-notification process

[234] An argument presented by counsel for Ngā Rūnanga related to pre-notification processes. They asserted that through a zone committee process Ngā Rūnanga had sought to extend the Mātaitai Protection Zone to protect waipuna from land and water use activities; and that the zone committee had recommended that the Regional Council work with Papatipu Rūnanga to develop provisions in statutory plans in respect of effects on rock art sites from the taking, use, damming, diversion or discharge of water, discharge of contaminants, and land use activities. They noted that the CRC had not accepted the recommendation.[108]

[235] Counsel then submitted that the Rūnanga's submissions could not result in unfairness because their concerns had been clear from the beginning of the public zone committee process.

[236] We do not accept that those matters would allow the Regional Council to amend Part A of the plan change by making provisions for protection of waipuna beyond the limits of the OTOP sub-region for these reasons.

[237] First, discussions for extending the Mātaitai Protection Zone in the informal zone committee process would not be an adequate substitute for the formal Schedule 1 public notification process leading to rights to make submissions.

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[105] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290; [2014] NZRMA 516 at [82].
[106] *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [116].
[107] *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [176].
[108] Legal Submissions on behalf of Te Ngāi Tūāhuriri Rūnanga et al, p27-28, para 122-124.

[238] In that regard, we adopt the opinion expressed by Justice Wylie in the *General Distributors* case[109] that what was discussed at the council hearing was irrelevant. We consider that what was discussed in the pre-notification zone committee process is even more irrelevant.

[239] Secondly, any zone committee recommendation that the regional council work with Papatipu Rūnanga to develop provisions in statutory plans in respect of effects on rock art sites would not be adequate notice to the public that Plan Change 7 might be amended to make provision for waipuna beyond the OTOP sub-region within which the zone committee was working. Nor would it assure an effective response to those who would oppose it.

[240] Thirdly, we consider that whether the amendments in question are within the scope of the Council's authority still has to be decided by whether they are "on" the plan change, in the sense of being within its ambit. We find that they are not.

Applying the second limb

[241] The persons who would be directly affected by the provisions requested by Ngā Rūnanga would mainly be owners and occupiers of land outside the OTOP sub-region and generally delineated on the maps attached to the submission. Accepting the submission would restrict their freedom to use land and water in accordance with the general provisions of the regional plan.

[242] There was nothing in the proposed plan change as notified, or in the section 32 report for it, to give them notice that land outside the OTOP sub-region would be the subject of such restrictions. We were not advised that they had been directly notified by the submitter.[110]

[243] In a strict sense those affected were not deprived of a right to be heard on the imposition of such restrictions in that, if they had become aware of the effect of that request in Ngā Rūnanga's submission, they could have lodged further submissions (in opposition or in support), and then taken part in our hearing of the submission.

[244] Three submitters did notice and understand the amendment requested by Ngā Rūnanga's original submission to the point of lodging further submissions in respect of it. Those submitters are not themselves individual owners or occupiers of land beyond the OTOP sub-region who might be directly affected (although one of them, Opuha Water Limited, owns land there for its own purposes). They are all experienced with planning processes and have professional advice on them.

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[109] *General Distributors v Waipa DC* (2008) 15 ELRNZ 59 at para [64].

[110] Cf *Turners & Growers Horticulture v Far North District Council* [2017] NZHC 764; 20 ELRNZ 203 at [25].

[245] Justice Whata observed, "a reasonable level of diligence is to be expected by landowners genuinely interested."[111]

[246] Even so, reasonable and diligent persons owning or occupying land outside the OTOP sub-region, though genuinely interested in whether proposed Plan Change would affect their interests in respect of springs on their properties, would readily find that such provisions were only proposed to apply to that OTOP sub-region. They should certainly have known that people could lodge submissions about the proposed provisions. But they could not be criticised for thinking that this opportunity would not extend to proposing new restrictions elsewhere in the Canterbury region. It would be disproportionate to describe them as lacking reasonable and genuine diligence if they concluded that their interests were not at stake, and turned their minds to other topics.

[247] In our opinions, extending the waipuna protection provisions so they would apply beyond the OTOP sub-region would 'come from left field' (in the sense of being unexpected or strange); it would be a "submissional sidewind".

[248] We do not criticise the people of Ngā Rūnanga, nor their professional advisers. Their genuineness is evident.

[249] Even so, without direct notice, Plan Change 7 is not a fair and reasonable opportunity for imposing restrictions for protecting waipuna to parts of the Canterbury Region beyond the OTOP sub-region.

[250] So we find that the submission point in question does not pass the second limb or step of the *Clearwater* test.

Outcome

[251] In conclusion, we do not accept Ngā Rūnanga's representations in this respect, and we find that Ngā Rūnanga's request for waipuna protection provisions applicable outside the OTOP sub-region does not pass either of the limbs or steps of the *Clearwater* tests, and is not 'on' Plan Change 7. Therefore we recommend that the Regional Council does not address on their merits the submissions on Plan Change 7 for extending application of the waipuna provisions beyond the OTOP sub-region, because they are beyond the scope of the Council's authority in deciding submissions on that plan change.

[111] *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [172].

Chapter Eight
Quality of freshwater

Statutory authority

[252] Plan Change 7 proposes measures for managing the quality of freshwater. We summarise the context for doing so, which is more fully detailed in the s42A Report.

[253] Section 30(1) of the RMA confers on regional councils functions of controlling use of land for the purpose of maintaining and enhancing the quality of water in waterbodies and ecosystems in them; and establishing rules to allocate capacity of water to assimilate the discharge of a contaminant. Those regional council functions are supported by s 15 of the RMA which restricts discharge of contaminants into water, or onto or into land in circumstances which may result in that or any other contaminant entering water (unless expressly allowed by certain instruments, including a regional rule).

[254] In making or amending a regional plan for those purposes, a regional council is directed to relevant contents of instruments of higher order than the regional plan. In the case of PC7 and PC2, the Regional Council "must give effect" to the NPSFM;[112] and to the CRPS;[113] it "must deal with and take into account" an iwi planning document;[114] and it "must have particular regard to" the vision and principles of the CWMS.[115]

Issue raised by submissions

[255] The submissions on PC7 reveal substantial issues relating to management of land use and water in respect of the regional council functions conferred by section 30. We understand that the Regional Council should resolve those issues by reference to relevant contents of those instruments, and if difference remains, by applying the degree of directiveness in the directions of the RMA and in the contents of the instruments themselves.[116]

[256] PC7 proposed specific measures for reducing nitrate nitrogen to stated concentration limits by certain dates. Those proposed measures were controversial among submitters. Ngā Rūnanga and other collectives and individuals submitted that the concentrations of those limits should be reduced and the limits required to be attained earlier. In addition, the Christchurch City Council and individual submitters sought even further reductions in groundwater resources north of the Waimakariri River, which is a primary source of aquifers from which the City drinking water network is drawn. The City Council submitted that a much lower target and limit should be set

[112] RMA, ss 66(1) and 67(3).
[113] RMA, s 65(6).
[114] RMA, s 66(2A).
[115] Environment Canterbury (Transitional Governance Arrangements) Act 2016 s 24.
[116] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38.

in order to protect the supply of high-quality drinking water, to avoid need for future treatment for removal of nitrates.

[257] Many other submitters, including collectives associated with the dairy farming industry, and numerous individual dairy farmers, opposed the proposed new measures in PC7, and also the further reductions and earlier time limits proposed by submitters referred to in the last paragraph. These submitters contended that those limits would not be achievable without seriously constraining farm production of milk, particularly in the Waimakariri Catchment. They submitted that such constraints would limit profitability of farming businesses, and adduced evidence tending to show it would result in failure of many dairy businesses with consequential social and economic harm to the sub-region.

Applicable RMA instruments

[258] In principle, resolution of such a major issue among submitters is to be achieved by reference to relevant contents of applicable RMA instruments higher in order than the CLWRP, namely those we identified in Chapter 3 of this report.

National Policy Statement

[259] Of the applicable higher order instruments, the strongest direction is contained in the national policy statements. The RMA prescribes that the regional council "must give effect to" them. In the NPSFM 2020 by clause 3.2(2) "every regional council must give effect to Te Mana o te Wai", and in doing so must carry out the classes of action stipulated in paragraphs (a) to (e) of that clause. Also, clause 4.1 stipulates that every local authority must give effect to the NPSFM 2020 as soon as reasonably practicable; and clause 3.3(2)(c) calls for long-term visions that set goals to be achieved in a timeframe that is both ambitious and reasonable (for example 30 years after commencement).

[260] The objective of the NPSFM 2020 is stated in clause 2.1:

> "… 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."

[261] Those priorities are also stated in clause 1.3(4) as a 'hierarchy of obligations in Te Mana o te Wai."

[262] The fundamental concept of Te Mana o te Wai is fully described in clause 1.3. We quote paragraph (1):

> "Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between water, the wider environment, and the community."

[263] Clause 2.2 of the NPSFM 2020 also states 15 policies for achieving the objective. It is not to belittle the importance of the others that we quote only Policy 1, Policy 3, Policy 5, Policy 9, Policy 12, Policy 13, and Policy 15:

> "Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.
>
> "Policy 3: 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.
>
> "Policy 5: Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.
>
> "Policy 9: The habitats of indigenous freshwater species are protected.
>
> "Policy 12: The national target (as set out in Appendix 3) for water quality improvement is achieved.
>
> "Policy 13: The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.
>
> "Policy 15: Communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with this National Policy Statement."

[264] The NPSFM 2020 was not in force when PC7 was notified, or during the period in which submissions on the plan change were prepared and lodged. However, it came into force on 3 September 2020, before the hearing of the submissions and evidence. On the basis of the s42A Report, we understand that to the extent it would be within the scope of the Regional Council's authority in making decisions on submissions under Part 1 of Schedule 1 of the RMA, it should act conformably and consistently with achieving the objective of the NPSFM 2020, and the policies for doing so.

Regional Policy Statement

[265] The Regional Council's obligation to "give effect to" certain instruments applies not only to the NPSFM: it has also to give effect to the CRPS. That was originally approved in 2012; and was amended 2013 and 2015. Relevant contents of this instrument are described in the s42A Report. We note that they include issues of significance to Ngāi Tahu (relevantly kaitiakitanga and, in

respect of management of fresh water, the philosophy of Ki Uta Ki Tai, avoiding discharges to water, and maintaining and where required enhancing water quality).[117] We also note a policy in respect of rural production of maintaining and enhancing natural and physical resources contributing to Canterbury's rural productive economy in areas valued for primary production, by (among other things) ensuring that rural land use intensification does not contribute to significant cumulative adverse effects on water quality.[118]

[266] Chapter 7 of the CRPS has substantial contents relating to fresh water. The first objective stated in that chapter addresses the important issues raised by submissions identified above. Relevantly it is that the region's fresh water resources are sustainably managed to enable people and communities to provide for their economic and social well-being through abstracting and/or using water for irrigation, providing the life-supporting capacity ecosystem processes, and indigenous species and their associated freshwater ecosystems and mauri of the fresh water is safeguarded, and any actual or reasonably foreseeable requirements for community and stockwater supplies and customary uses are provided for.[119] Relevant content of the next objective is that abstraction of water occurs in parallel with maintenance of water quality where it is of a high standard and improvement of water quality in catchments where it is degraded; and restoration or enhancement of degraded fresh water bodies.[120] The following objective is that the overall quality of freshwater is maintained or improved, and the life-supporting capacity, ecosystem processes and indigenous species and their associated ecosystems are safeguarded.[121] Similarly the next objective is that fresh water is sustainable managed in an integrated way considering (among other things) interconnectivity of surface water and groundwater, effects of land use and intensification of land uses on water quality, kaitiakitanga, and any net benefits of using water and water infrastructure and their significance to the region.[122]

[267] Chapter 7 contains several policies for achieving the objectives. Policy 7.3.6 is for appropriate minimum water quality standards for surface water and groundwater, considering (relevantly) life supporting capacity, ecosystem processes, indigenous species and natural character; requirements to use water for drinking water or stockwater supplies; cultural significance and restrictions on discharge of contaminants that may be necessary or appropriate to protect those values; and managing activities which may affect water quality (including land uses) to maintain water quality at or above the minimum standard set. That policy also provides, in respect of water that does not meet the standards, for avoiding additional allocation for abstraction and any additional discharge of contaminants that may further adversely affect the water quality unless part of an integrated managed solution under Policy 7.3.9.

[117] Canterbury Regional Policy Statement, Section 2.3 and Table 2.1.
[118] Canterbury Regional Policy Statement, Policy 5.3.12(3).
[119] Canterbury Regional Policy Statement, Objective 7.2.1.
[120] Canterbury Regional Policy Statement, Objective 7.2.2.
[121] Canterbury Regional Policy Statement, Objective 7.2.3.
[122] Canterbury Regional Policy Statement, Objective 7.2.4.

[268] Policy 7.3.7 is to avoid, remedy or mitigate adverse effects of changes of land uses on the quality of freshwater by controlling changes in land uses to ensure standards are maintained, or where already substandard, improved to the standard within an appropriate timeframe. Policy 7.3.12 is taking a precautionary approach (among other things) to intensification of land uses or discharge of contaminants where the effects on freshwater bodies are unknown or uncertain.

Iwi planning document

[269] In amending the CLWRP, the Regional Council is to deal with and take into account any relevant planning document recognised by an iwi authority. In that respect, the s42A Report quotes from the Mahaanui Iwi Management Plan which is to advocate for a stated order of priority for freshwater resource use. Although not using precisely the same language, those priorities are effectively the same as the obligatory priorities of Te Mana o te Wai. We consider that giving effect to the NPSFM 2020 and the CRPS would in substance also take into account the Mahaanui IMP.

Canterbury Water Management Strategy

[270] In amending the CLWRP, the Regional Council is to have particular regard to the vision and principles of the CWMS.[123]

[271] The vision is:

> "To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework."

[272] The fundamental principles are sustainable management, a regional approach, and kaitiakitanga. The supporting principles are natural character, indigenous biodiversity, access, quality drinking water, recreational and amenity opportunities, and community and commercial use.

Addressing the issue raised

[273] The submissions representing the farming industry certainly raise an important matter for their continuing with production of healthy food, and for the economic and social welfare of the community in which they do so. Many of them accept that some further constraint is justified and achievable (limits to be attained by 2030 and 2040), though they insisted that compliance with more stringent limits, or with earlier compliance dates, could not be achieved without risking business failures and consequential community harm.

[123] Environment Canterbury (Transitional Governance Arrangements) Act 2016 (repealed), s 7(2); and Sched 1, cl 7; and Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (repealed) s 63.

[274] The case for earlier and more stringent reductions in nitrate limits is also important. A main ground advanced for it was that nitrate-nitrogen is a contaminant in fresh water, which degrades its health and well-being and that of its freshwater ecosystems, consequentially making it unhealthy for customary uses for mahinga kai, for drinking water, and for swimming and other activities. Another important ground was that raised by the Christchurch City Council (and supported by other submitters) that more stringent constraints are needed to protect the deep groundwater abstracted and used in the City drinking water network without treatment.

[275] In that regard, we understand that compliance with the limits proposed by PC7 would render the water compliant with the NZ Drinking-Water Standard, but submitters considered that use of that water would expose the public to risk of colorectal cancer. There was some statistical evidence of such a possibility based on overseas studies that were cited, but we understand that neither the official NZ Standard, nor the WHO standard on which it was based, has been amended in response. The precautionary approach referred to in Policy 7.3.7 of the CRPS was invoked.

[276] We have reviewed in detail all the evidence and representations on these important matters.

[277] On the source of the Christchurch public water supply, we are not satisfied that the additional constraint on dairy farming in the Waimakariri catchment that would be necessary to attain the more stringent standard sought by the City Council would be justified by the evidence tending to show risk of cancer. Review of evidence on that subject and decision on any consequential amendment to the official standard is not within the remit of the Regional Council under the RMA. It is within the responsibility and skills of relevant public health authorities.

[278] The evidence tends to show that farming is a main source of nitrate nitrogen in freshwater, and especially where irrigation water is used. Many dairy farmers have already made significant and innovative alterations to their practices, at substantial cost, to mitigate loss of nitrate from where it may leach into water bodies. Even so, we accept that compliance with further reductions in nitrate limits would require incurring substantial costs, and forgoing profits, possibly compromising business survival. So greater constraints should only be imposed when well justified.

[279] We turn to the more general issue of nitrate-nitrogen as a contaminant in fresh water, degrading its health and well-being and those of its freshwater ecosystems, rendering it unhealthy for customary uses for mahinga kai, and public use for drinking water, for swimming and other activities. In these respects, we have to apply the strong directions of the higher-order instruments.

[280] The NPSFM 2020 and the CRPS (both of which have to be given effect) allow for the ability of people and communities to provide for their social and economic well-being.[124] In doing so, they are allowed for in contexts which are subordinate to health and well-being of water bodies and

[124] See NPSFM 2020 cl 2.1(c) and Policy 15; CRPS Policy 5.3.12(3); Objective 7.2.1.

ecosystems, and health needs such as drinking water.[125] We also take into account the Mahaanui IMP priorities, and we have particular regard to the vision and principles of the CWMS, both of which are consistent with that.

[281] Having reviewed those directions, we are satisfied that in amending its regional plan the Regional Council has first to have the plan change provide for the health and well-being of water bodies and ecosystems, and health needs such as drinking water; and only to extent that does not diminish providing for them, allow for activities for the social and economic well-being of people and communities, including those engaged in or dependent on farming.

[282] We also consider the time when standards, limits, and targets for providing for those values are to be effective. Clause 3.3(2)(c) of the NPSFM 2020 guides us in that regard. What is ambitious and reasonable depends on the circumstances: it may be challenging to attain, but not impossible. Farmers cannot expect the regime in which they work will remain unchanged.

[283] Having reviewed the evidence adduced by submitters we find that some of their aspirations for extended timeframes by which water quality targets would need to be achieved are scarcely ambitious; and that the revised dates recommended by the CRC Officers in the s42A Report for the Rangitata-Orton, Fairlie Basin, and Levels Plain High Nitrogen Concentration Areas are not impossible.

[284] So we commend those recommendations.

[125] See NPSFM 2020 cl 2.1, and Policy 15; CRPS Policy 5.3.12(3); Objective 7.2.1.

Chapter Nine
NPSFM 2020 – National Objectives Framework

Introduction

[285] In Chapter 2 of our Report we set out RMA instruments applicable to the plan changes. Of particular relevance is the National Policy Statement for Freshwater Management 2020 which states objectives, policies and directions relating to freshwater.

[286] As mentioned in that chapter, regional councils are required to 'give effect' to the NPSFM 2020 and to do it as soon as it is 'reasonably practicable' to do so.[126]

[287] However the extent to which it is 'reasonably practicable' for the plan changes to give effect to the NSPFM 2020 is confined by the scope of submissions. In this chapter we set out our specific findings in respect of alignment of the plan changes with the NSPFM 2020 National Objectives Framework (NOF).

National Objectives Framework (NOF)

[288] The NPSFM 2020, and the NPSFM 2017 it replaced, contain the National Objectives Framework (NOF) which sets out freshwater attributes regional councils must address when preparing freshwater planning instruments. While some aspects of the NOF have remained consistent, significant differences exist with respect to the number and type of attributes included, national bottom lines, attribute units, and processes and steps to be followed when implementing the NOF.

[289] The NSPFM 2020 directs regional councils to follow a prescribed process[127] that includes identification of freshwater management units and their values, defining target attribute states, flows, levels and setting of limits and action plans to achieve target attribute states. This process is informed by, and subsequent to, earlier steps in the process which requires discussion with communities and tangata whenua to determine how Te Mana o te Wai applies to waterbodies and ecosystems in the region and develop long-term visions for freshwater.[128]

The plan changes

[290] Plan Change 7 proposed changes to amend and include new freshwater outcomes and limits for a range of freshwater attributes. Part A of PC 7 proposed amendments to region-wide freshwater

[126] NPSFM 2020, Part 4.1(1).
[127] Part 3.7 of the NPSFM 2020.
[128] Part 3.2, 3.3 and 3.4 of the NPSFM 2020.

outcomes for rivers and lakes[129] and water quality limits[130] to improve alignment with attribute units used in the NPSFM 2017.[131] Relevantly, we understand Part A of PC7 was not developed to *implement* the NOF[132], as set out in Part CA of the NPSFM 2017, and therefore does not include limits or targets for attributes in Appendix 2. We understand that at the date the plan changes were notified, limit-setting processes to implement Part CA of the NPSFM 2017 were to occur in accordance with the Council's Progressive Implementation Programme.

[291] For Parts B and C of PC7, new freshwater outcomes, limits, and targets (and methods to achieve those outcomes, targets, and limits) for OTOP and Waimakariri sub-regions were proposed. These parts of the plan changes were developed to, amongst other things, 'give effect' to the NPSFM 2017 and prepared in accordance with the process prescribed in Part CA of the NPSFM 2017.

[292] We record, for completeness, Plan Change 2 to the WRRP which proposed a number of confined amendments to the Plan, none of which relate directly to the establishment or application of freshwater outcomes and limits.

National bottom lines and PC7 targets

[293] We were advised[133] by the CRC Officers that the volume and quality of freshwater in some waterbodies exceeded limits for sustainable management of the resource.

Waimakariri

[294] For the Waimakariri sub-region, water quality limits and targets for rivers and lakes[134] in PC7 as notified reflect either current state or freshwater outcomes sought by the community.[135] In over-allocated[136] waterbodies targets for nitrate-nitrogen (for rivers) and total nitrogen and total phosphorus (for lakes) apply, which are to be achieved at a defined point in time in the future. In all instances target values are either equal to, or better than, national bottom line values in the NPSFM 2017.

[129] PC7, s 4, Tables 1a and 1b.
[130] PC7, s 16, Schedule 8.
[131] S32 Report, p43.
[132] S42A Report, p587, para 9.53.
[133] S32 Report, p149-152 and p279-280.
[134] CLWRP, s 8, Tables 8-5 and 8-6.
[135] S32 Report, p320.
[136] As defined in the NSPFM 2017.

[295] During the course of the hearing we asked the CRC Officers to advise what scale of nitrogen loss reduction would be required from farmers in the Nitrate Priority Area to achieve the NPSFM 2020 national bottom line for nitrate (toxicity). They advised us that:[137]

- the number of stages of nitrogen reduction required to achieve the targets would increase (in some cases more than doubling)
- for some rivers, more than six stages of reduction would be required (with cumulative reductions of more than 100%) and target concentrations would be less than half the recorded concentrations.

[296] Following that advice the CRC Officers prepared their s42A Reply Report summarising their final recommendations on the plan changes. In it the CRC Officers recommended amendments to Table 8-9 to omit staged nitrogen loss reductions after 2040, and a change to increase the size of the first nitrogen loss reduction step for dairy (from 15% to 20%).[138] We accept those recommendations for the reasons they set out in their Report.

[297] The CRC Officers also recommended amendments to Table 8-5 to align the annual median and 95th percentile nitrate-nitrogen targets with the national bottom line value in the NPSFM 2020.[139] As acknowledged by the CRC Officers,[140] the methods proposed in Part C of PC7 will not be sufficient to achieve the new NPSFM 2020 national bottom line values and in many cases land use change is likely required.

[298] We consider that to be a serious and significant implication that warrants further discussion through a future planning process[141] to give full effect to the NSPFM 2020. That is not to say that we disagree with the targets proposed by the CRC Officers (in contrast we acknowledge they align with NPSFM 2020 bottom line values), but rather that the implications are of such significance we consider it would be inappropriate to impose them at this stage of the process without further conversation with communities and tangata whenua as to the methods that might be required and timeframes to achieve them. We find that such a process would be consistent with clause 3.7 of the NPSFM 2020 as it would allow for discussion on matters (including how Te Mana o te Wai applies to water bodies and freshwater ecosystems, long-term visions for FMUs, environmental outcomes and target attribute states) prior to the setting of limits and targets and methods and timeframes to achieve those limits and targets. Furthermore, it would enable a clear line of sight between the freshwater outcomes, plan targets and methods to achieve those outcomes and targets. For these reasons we recommend retaining the nitrate-nitrogen targets in Table 8-5 of PC7, as notified.

[137] Third set of Responses to Questions of Hearing Commissioners from the First Hearing Day – 9 November 2020.
[138] S42A Reply Report, para 39.47, p156.
[139] NPSFM 2020, Appendix 2A, Table 6.
[140] S42A Reply Report, para 39.47, p156.
[141] As required by RMA, s 80A(4)(b).

OTOP

[299] For completeness, we summarise our findings in respect of the water quality limits and targets for the OTOP sub-region. The CRC Officers did not recommend amendments to align the water quality limits and targets in Tables 14(c) and 14(d) with NPSFM 2020 national bottom line values, stating there was no scope to do so. We accept that advice and accordingly recommend these are retained as notified.

Attribute units

[300] Other differences between the NPSFM 2020 and the NPSFM 2017 include the type of attribute units[142] used to describe the extent, and transition point, between attribute bands and attribute states.

[301] Parts A, B and C of PC7 as notified proposed attribute units generally aligned with those in the NPSFM 2017. In their s42A and s42A Reply Reports, the CRC Officers recommended changes to some attribute units, for some attributes, in some parts of the plan change, to improve alignment with the NPSFM 2020.

[302] In reviewing their recommendations, we noted inconsistent use of attribute units for dissolved oxygen in Tables 8(b) and 14(b). For the OTOP sub-region the CRC Officers recommended[143] amending the attribute unit for dissolved oxygen in Table 14(b) from 'min saturation' (as a percentage) to 'minimum concentration' (in milligrams per litre mg/L)[144] but retaining the 'min saturation' as the attribute unit in Table 8(b).[145]

[303] At the Reply Hearing we enquired of the CRC Officers as to the reasons for use of different attribute units in different parts of the plan change. Mr Arthur, senior water quality and ecology scientist for the CRC, advised us that in his opinion there was no reason from a scientific perspective for the units in those tables to be inconsistent. We accept that advice and find it preferable that consistent attribute units are used throughout the freshwater outcome tables, where it is appropriate to do so.

[304] While we note 'minimum concentration (mg/L)' is used in the NPSFM 2020 to describe dissolved oxygen outcomes for lakes, we instead recommend 'minimum saturation' (as used in the notified plan change) is retained to reduce inconsistency in attribute units used in different parts of the Plan. We further note there is opportunity for the Council to align all attribute types and

[142] An example of an attribute unit is mg NO_3-N/L (milligrams nitrate-nitrogen per litre) which is used to describe the nitrate-nitrogen concentration thresholds for A, B, C and D bands.
[143] Section 42A Reply Report, Appendix A, Table 14(b)
[144] As a consequence of amending the description of the measurement point.
[145] Section 42A Reply Report, para 38.1, p139

attribute units in the Plan as part of a future planning process to give full effect to the NPSFM 2020.

Chapter Ten
Opihi Freshwater Management Unit

Context

[305] The Opihi FMU is very complex comprising the Opihi River and its tributaries, the Opuha River and its tributaries, Lake Opuha (a man-made lake used to augment downstream flows in the Opuha and Opihi Rivers) and multiple irrigation schemes, coupled with the complexities of the historical consenting regime applied to abstractions.

[306] There are four main types of water abstraction permits in the Opihi FMU (AA, BA, AN, BN) depending on whether the permit was granted prior to or after 30 July 1994 (before construction began on the Opuha Dam in 1995) and whether the consent holder holds shares in Opuha Water Limited (OWL) (or otherwise has an 'agreement' or 'other entitlement' to OWL water) as follows:

Shareholder arrangements	Permit granted PRIOR to 30 July 1994	Permit granted AFTER 30 July 1994
Opuha Water Ltd Shareholder	AA	BA
NOT Opuha Water Ltd Shareholder	AN	BN

[307] A substantive matter raised by some submitters was the extent to which PC7 should recognise existing shareholding arrangements. We agree with submitters OWL and Timaru DC that PC7 should recognise that shares in OWL are not the only means by which permit holders can be supplied with Opuha dam water. There are existing 'agreements and other entitlements', including for water released for community supply and 'carriage water'. On the evidence we do not consider that expanding the various permit definitions to reflect these arrangements will result in over allocation (as was suggested by the CRC Officers).

Allocation Blocks

[308] The allocation limits set by PC7 were based on the sum of existing authorised abstractions, reflecting CRC's view that the wider catchment is now "fully allocated" and that no more water should be made available for allocation.

[309] When considering the appropriateness of those limits we were assisted by the evidence of Ms Keri Johnston who undertook a detailed examination of PC7's proposed allocation limits for abstraction permits relative to CRC's 2019 Consent Inventory.[146] We also note that the Joint Witness Statement – Hydrology (JWS – Hydrology) dated 7 August 2020 included a table that set out the agreed (as between Ms Johnston, CRC Officers and members of the Adaptive

[146] EIC, K. Johnston, FAWP, p4, para 1.8.

Management Working Group – 'the AMWG') existing allocations for the various Opihi FMU waterbodies.[147]

[310] We agree with submitters[148] that PC7 should include a new table setting out the overall situation regarding the various allocation blocks for the Opihi FMU. The CRC Officers recommended a new Table 14(ua) to achieve that end, but we find that a more comprehensive representation is appropriate and we instead recommend that a new Table 14(ma) called "Opuha and Opihi Allocation Regime" is inserted into Section 14.6.2 immediately below the heading 'Opihi Freshwater Management Unit'. We base that table on the information in the Hydrology Joint Witness Statement.

[311] We also recommend the insertion of a new Table 14(mb) setting out allocation limits[149] for Milford Lagoon / Clandeboye.

[312] A consequence of that recommendation is the omission of allocation blocks from the numerous tables that follow.[150] Those tables will be confined to setting out minimum flows and partial restriction regimes.

Community supply takes

[313] We understand that community supply takes are not subject to any minimum flow, and as a first-order priority use,[151] they are not included in any allocation limit in PC7. Nevertheless, those takes exist and for the sake of completeness we find that the amount of water allocated to them should be set out in PC7. The evidence of Keri Johnston helpfully set out the current allocations for community supplies and we have included them in recommended new Table 14(ma).

Mainstem minimum flows

[314] The existing minimum flow regime for abstractions from the Opuha and Opihi River mainstems is complicated. In PC7 as notified these regimes are set out in Policy 14.4.36 and Tables 14(u), 14(v) [and 14(w)] and 14(y).

[315] We understand that key minimum flow parameters at Saleyards Bridge include:[152]

[147] JWS – Hydrology, para 19.
[148] Including OWL.
[149] Based on the JWS – Hydrology.
[150] Tables 14(m), 14(n), 14(p), 14(r), 14(t), 14(u) and 14(y).
[151] In the CLWRP.
[152] Webb, AMWG and s42A report.

- A flow of 2,000 L/s is required to maintain connectivity between Saleyards Bridge and the Temuka confluence;

- A flow of 2,500 L/s is sufficient to provide adequate habitat for a range of native and introduced fish species;

- The flow range that is likely to be acceptable to most species, providing 70% to 90% of maximum Weighted Usable Area (WUA), appears to be between 2,500 L/s and 4,500L/s; and

- Flows in excess of 6,000 L/s assist with maintaining an open river mouth.

[316] OWL is required by its existing consents to release enough water from the Opuha Dam to achieve the minimum flows set by the Opihi River Regional Plan (ORRP) for the Opihi River at Saleyards Bridge (SYB). The variable minimum flows at SYB (now included in PC7 Table 14(v)) reflect the natural hydrograph and seasonal flow variations for the river, with higher flows in spring and autumn and lower flows in summer and winter.

[317] The Table 14(v) minimum flows apply to AA and AB permits. In addition, we find that those permits are subject to additional restrictions:

- They must reduce abstraction by 50% when the level of Lake Opuha reaches 375 mRL;

- Under Policy 14.4.36(b) of PC7 as notified the AA permits are deemed to be AN permits when the level of Lake Opuha reaches 370 mRL and as such abstraction ceases when the modelled natural (unmodified) Opihi River flow (as determined by CRC) at SH1 reaches 2,500 L/s. PC7 proposes to increase that particular minimum flow to 2,600 L/s in 2022 (Table 14(u));

- Under Policy 14.4.36(b) of PC7 as notified the BA permits are deemed to be BN permits when the level of Lake Opuha reaches 370 mRL and are subject to the minimum flow restrictions in Table 14(y) based on the modelled Opihi River natural flow (as determined by CRC).

[318] Under Policy 14.4.36(c) of PC7 as notified AN permits would be subject to an Opihi River minimum flow at SH1 which again is not the actual flow, but the modelled natural flow determined by CRC. Pro rata restrictions commence at a modelled natural flow of 8,100 L/s and abstractions cease when the modelled natural flow reaches 2,500 L/s which, as noted above, is intended to increase to 2,600 L/s in 2022 (Table 14(u)).

[319] Under Policy 14.4.36(d) BN permits would be subject to a minimum flow at SH1 which is based on the actual flow in the Opihi River (Table 14(y)).

[320] Policy 14.4.36 is a crucial provision and we consider it needs to clearly set out the above regime. We agree with the CRC Officers that it should be retained, but we recommend amendments to simplify it and improve its clarity.

[321] Currently two minimum flow regimes apply at Saleyards Bridge, firstly one when Lake Opuha is above RL 375 and secondly one when it is below RL 375m but above RL 370m. We note that, unlike the tables for the tributary rivers, Table 14(v) as notified did not set out the existing minimum flow regime. We consider it should do so and note this was sought by AWMG in their suggested version of Table 14(v)(i).

[322] PC7 proposed that the current "Full Availability" minimum flow regime would apply from 2025 and that an increased minimum flow regime would apply in 2030.[153] This regime was set out in notified Tables 14(v) and (w).

[323] The AMWG submitted that an alternative "Full Availability" minimum flow regime should apply that had higher flows in January and February. The AMWG's amendments raised the minimum flows in these months to 4,500 L/s, an increase of 1,000 L/s in each month above current levels. That was supported by Central South Island Fish and Game (CSF&G).[154]

[324] The AMWG's evidence was that the proposed January and February 'Full Availability' minimum flows are predicted to provide better conditions for trout fishing than the PC7 2030 regime and higher minimum flows in the Opihi River mainstem will also increase the time the river mouth is open to the benefit of salmon angling. The AMWG regime has reduced minimum flows in March, April and October to compensate for the increased minimum flows proposed for January and February and again these were supported by Central South Island Fish and Game as they are at or above the flow required to maintain the mouth open 90% of the time, and will maintain fish passage throughout the river.

[325] Dr G Ryder[155] considered AMWG's monthly minimum flow regime provided adequate instream habitat in the Opuha and lower Opihi rivers for key species and life stages under low flow conditions. Dr Ryder advised that minimum flows have relatively little effect on the extent and duration of nuisance algae growths in the Opuha and lower Opihi rivers. Those growths are instead governed by the frequency and magnitude of floods and freshes and the algae accrual time (how long it takes for algae to grow).

[326] On the evidence we find that the AMWG's "Full Availability" minimum flow regime for Saleyards Bridge is preferable to the notified PC7 regime. It would achieve the key parameters outlined above and provide for the health and well-being of freshwater and ecosystems. We recommend that Table 14(v) is amended accordingly. We consider the "Full Availability"

[153] EIC, Dr Ryder, OWL / AMWG, p7, Table 2.
[154] EIC, M. Webb, CSF&G, p4, para 2.3.
[155] Witness for AMWG.

minimum flow regime should apply as soon as possible, given the benefits that would accrue from it and the fact that it was supported by OWL and other 'primary sector' submitters.

[327] We note that in the Reply Report the CRC Officers referred to the "Full Availability" regime as "Level 1" but we find that would be confusing for people in the catchment. We prefer the term "Full Availability". We find that the "Full Availability" regime should apply from 1 January 2022 so as to be consistent with the revised minimum flow for SH1 (Table 14(u)).

[328] PC7 proposed that the "Full Availability" minimum flow regime be increased in 2030. In that regard we note and agree with the evidence of Mark Webb that:

> "the minor positive and negative impacts to trout fishing and invertebrate habitat under the proposed PC7 2030 regime, from provision of 300 L/sec above the current ORRP, and proposed AMWG and PC7 2025 minimum flows in November and December, do not justify the loss of [Lake Opuha] storage. At that time of year retaining storage can be critical to maintaining Full Availability minimum river flows with higher sports fish habitat and fishing values later in summer and autumn."[156]

[329] We are also not persuaded that the higher 2030 minimum flows are required 'capture' increased minimum flows in the tributaries resulting from PC7 because, as stated by Mr Webb, increased minimum flows in the tributaries are not sustained by release of water from Lake Opuha, they are sustained by reduced abstraction.

[330] On the evidence we find that there is no need for an increased minimum flow regime at 2030 (as was included in PC7) and we agree with the Officer's Reply Report recommendation that notified Table 14(w) be omitted.

Alternative Management Regime

[331] We understand that the current minimum flow regime (as derived from the ORRP) has proved inadequate and in order to maintain reasonable minimum flows and Lake storage, CRC has had to rely on the issuing of Water Shortage Directions under s329 of the RMA. PC7 as notified set out a regime whereby reduced minimum flows and partial restrictions would apply to abstractions downstream of Saleyards Bridge if two or more thresholds relating to snow storage, Lake levels or Lake inflows were crossed (Table 14(x)). Should that situation arise then a different regime would apply (reduced minimum flows and 50% abstraction reductions) as set out in notified Tables 14(v) and 14(w). If the situation deteriorated further then 'Level 2' restrictions would apply (minimum flows reduced even further and 75% abstraction reductions imposed).

[332] The AMWG considered the notified framework to be simplistic and ineffective. Their key concern, as we understand it, was that water abstraction would be permitted to continue without

[156] EIC, M. Webb, AMWG, p14, para 5.17.

restriction until the level of water in Lake Opuha dropped to 375m, which equates to around 10% of Lake Opuha's storage.

[333] AMWG sought a number of modifications to the notified framework, including:[157]

- Retention of a three tier flow management regime (the s42A authors had recommended a two tier regime);
- Substantial modifications to the thresholds in Table 14(x) and policies, to enable entry into Level 1 and Level 2 flow regimes (in accordance with a modified Table 14(v)) on any day, reduced minimum flows to apply for a minimum of 14 days, and a strategy for exiting the regime based on Lake levels;
- An alternative partial restriction regime; and
- Express provision for stakeholder consultation and involvement in decisions by the operator of the Opuha Dam to enter/exit Level 1 and Level 2 flow regimes so that a range of subjective "secondary assessment factors" could be taken into account.

[334] Regarding the last item, AMWG sought to continue the historical role of the Opuha Environmental Flow and Release Advisory Group (OEFRAG) that was established under the ORRP. We understand that OEFRAG has been largely responsible for determining when Water Shortage Directions should be issued.

[335] In our view the 'adaptive management regime' included in PC7 was unusually complex. The submission of AMWG seeks to make it even more so. There is a lack of agreement on the appropriate nature of PC7 provisions for an 'adaptive management regime'. We are not persuaded that plan provisions should rely on the subjective assessment of a private group such as OEFRAG for their implementation. Plan provisions need be clear and certain on their face.

[336] Accordingly, we agree with a 'two tier' management regime (which we call "Full Availability" and "Level 1") recommended by the CRC Officers in the Reply Report for the reasons they cite. The resultant regime is set out in our recommended amendments to Table 14(v).

Tributary minimum flows

[337] PC7 includes a management regime for tributaries that flow into Lake Opuha (North Opuha and South Opuha rivers) and tributaries of the Opuha / Opihi river mainstem (Upper Opihi and Te Ana Wai rivers). Nearly 3,200 ha of the 16,000 ha OWL scheme area utilise water abstracted from one of those four tributary rivers.[158]

[157] EIC, J. Blakemore, AMWG, p7, para 3.6.
[158] EIC, R. O'Sullivan, OWL, p14, para 7.1.

[338] The tributary abstractions are subject to the mainstem minimum flows outlined above. They are also subject to separate minimum flows established for each tributary. As notified, PC7 set out current tributary minimum flows and increased minimum flows that would apply in two steps in 2025 and 2030. The 2025 minimum flows were recommended to the Zone Committee by the FAWP (Opihi Flow and Allocation Working Party) based on ecological and hydrological studies predominantly funded by OWL. The basis for the 2030 minimum flows was unclear to us and also to many, if not most, of the submitters who spoke at the hearing.

[339] We note from the evidence of Mark Webb, the Central South Island Fish and Game representative on FAWP, that Fish and Game supports the PC7 2025 minimum flow regime. Mr Webb did not support the 2030 increased minimum flows as they did not generally improve habitat for adult trout or trout fishing opportunities. Dr Ryder provided extensive evidence on the tributary minimum flow regime. He concluded that the 2025 minimum flows provided sufficient habitat for the fisheries and benthic invertebrate populations of those rivers. Recent fish and invertebrate surveys he had undertaken supported his conclusions. Conversely, the proposed 2030 minimum flows provided little additional ecological benefit.

[340] We find that the proposed 2025 minimum flows are appropriate, but we are not persuaded that the proposed 2030 minimum flows are required to give effect to the objectives of the LWRP or to Objective 2.1(1) of the NPSFM 2020. In other words, we are satisfied on the evidence that the 2025 minimum flows appropriately prioritise the health and well-being of the water bodies and their freshwater ecosystems.

[341] We recommend omitting the proposed 2030 minimum flows (Tables 14(o), 14(q) and 14(s)), noting that the need or otherwise for such higher minimum flows can be assessed when the LWRP is next reviewed or when CRC produces its new freshwater planning instrument prepared in accordance with Part 4 of Schedule 1 to the RMA.

[342] The s42A Report authors also recommended that the notified 2025 minimum flows be implemented now, primarily in response to submissions citing the need to better reflect Te Mana o te Wai as it is expressed in the NPSFM 2020. However, the evidence of Mr Porter and Dr Saunders demonstrated that implementing the 2025 minimum flows now will have significant financial and economic implications for farmers and the Mackenzie and Timaru districts. Some farms may become unsustainable or non-viable, particularly in the South Opuha, Upper Opihi and Te Ana Wai catchments.

[343] We note from the evidence that farmer shareholders in OWL have enjoyed a '95% reliability' of supply over the past 21 years.[159] We accept the submissions which suggest that time is required to make on-farm adaptations in response to the decreased irrigation reliability of supply that will result from the increased minimum flows. We are not persuaded that the 2025 minimum flows

[159] EIC, Including R. O'Sullivan, OWL, p5, para 2.10; p13, para 6.19; and p19, para 8.5.

should be implemented now, or that doing so is necessary to give effect to NPSFM 2020 Objective 2.1(1).

[344] For the South Opuha the evidence of Dr Ryder, Chad and Charlotte Steetskamp and Grant Porter provided on behalf of FAWP was that the minimum flows in December through to February at Monument Bridge should be retained at 500 L/s as the increases proposed by PC7 would have only marginal benefits for the health of only 6 km of the river, but would markedly reduce the ability to grow feed for stock and dramatically reduce farm gate income. We found that evidence to be persuasive, however no submitter sought that the minimum flows in Table 14(n) be changed and so we have no scope to amend the minimum flow as sought by those witnesses.

[345] In making the above findings, we note that Dr Ryder considered that sections of the tributary rivers that exhibited nutrient enrichment and occasional nuisance periphyton growths would be unlikely to be assisted by further increases in minimum flows, because nutrient levels are not flow related and nuisance periphyton growths are controlled largely by the frequency of freshes (or flushing flows). The level of abstractions from the tributary rivers do not significantly affect the size or frequency of flood events. Additionally, his evidence (based on field studies and modelling) was that increases in river water temperature are not significantly influenced by the size of the minimum flow, but rather by climate.

[346] We received comprehensive technical evidence on Coopers Creek (listed in Table 14(h) of PC7) on behalf of submitters Mark Mulligan, Ian Kerse and Neil Kingston. We have carefully considered their evidence but we are not persuaded that the relief they seek is appropriate. We prefer the assessment of the CRC Officers that is set out in the Reply Report and the amendments they recommended to Table 14(h).

Partial Restrictions

[347] PC7 proposed partial restrictions on abstractions which would require them to reduce as a river approaches its minimum flow, with the intent being to retain flow variability above the minimum flow and prevent a river 'flat lining' at the minimum flow.

[348] There are a range of partial restriction regimes already in place in the Opihi FMU. Affiliated consent holders are managed by a 'stepped' partial restriction regime based on flows measured at Saleyards Bridge on the mainstem of the Opihi River; whereas non-affiliated consent holders are managed by 'pro-rata' reductions on unmodified (for AN permits) or actual (for BN permits) flows at the State Highway 1 bridge. Surface water takes from the tributaries are managed by a tributary minimum flow and restriction regime as well as the Saleyards Bridge or State Highway 1 minimum flow and restriction regime. At any given point in time, the most conservative regime dictates the allowable level of abstraction.

[349] PC7 generally sought to introduce 'pro-rata' partial restrictions from 2025, which commence when the river flow is less than the sum of the relevant minimum flow plus the allocation block size. We find that regime to be suitable and recommend it accordingly.

[350] We understand that under a partial restriction regime, whether it be a stepped or pro-rata regime, abstractions must cease when the flow in the river drops below the minimum flow. We recommend amendments to PC7 to make that clear.

[351] From the evidence of Keri Johnston, we note that currently for AN and BN consents on tributary rivers, a minimum flow on the mainstem of the Opihi River at State Highway One (SH1) applies, as well as the appropriate tributary minimum flow. Pro-rata restrictions commence when the flow at SH1 is 8,100 L/s and abstractions must cease when the flow is less than 2,500 L/s. PC7 retains that regime but proposed to increase the minimum flow at which abstraction must cease to 2,600 L/s from 2022 (Table 14(u)). We recommend amendments to make that clear.

[352] We accept that for the North Opuha and Opihi Rivers, PC7 should specify that partial restrictions for AN permits commence when the flow is less than the minimum flow and the sum total of the AA, BA and AN allocations. However, we consider that same regime should not apply to AA and BA takes as this would result in these permits being subject to restrictions at unnecessarily high river flows. We recommend amendments to the notes below Tables 14(m) and 14(p) accordingly. However, we do not find that similar amendments are required for the Te Ana Wai River due to its very small AN allocation block of 9.4 L/s. We prefer this tailored approach to the relief sought by OWL which was to amend the definition of pro-rata restrictions in the Plan.

[353] We do however support pro rata restrictions replacing the stepped reductions for the Te Ana Wai in order to protect the ecological function of the environmental flow regime, as described by Mark Webb. We also note the evidence of Ryan O'Sullivan[160] that at least ten years is required to make the on-farm mitigations that would be necessary to enable abstractors to adapt to pro-rata restrictions. Consequently, having regard to these matters and Objective 1(a) of the NPSFM 2020, we find the change to pro-rata restrictions should be imposed from 2030 and not 2025 or 2035. We recommended an amendment to Table 14(r) accordingly.

Flushing flows

[354] Floods and freshes remove periphyton from the riverbed. The result of the Opuha dam stabilising the flow regime has been an increase in nuisance periphyton in the Opuha River. OWL has the ability to release flushing flows, however the flows required to remove nuisance periphyton are large. Small freshes of 20 to 30 m^3/s can be effective close to the dam and large

[160] EIC, R. O'Sullivan, para 58.

artificial freshes of 40 to 60 m^3/s are effective at managing didymo along the full length of the Opuha River.[161]

[355] PC7 as notified contained a prescriptive policy regarding the release of flushing flows from the Opuha dam. The CRC Officers and numerous submitters considered that to be inappropriately detailed and that a revised policy focusing on outcomes was preferable. Having said that, the outcomes must be achievable and we understand from the evidence that the most flushing flows can hope to achieve is a reduction in the duration and severity of nuisance periphyton blooms. On that basis we agree with revised Policy 14.4.35(d) as recommended in the s42A Reply Report.

Transfers

[356] OWL sought a number of amendments to enable the transfer of tributary takes to the Opuha Opihi mainstem. We are not persuaded that is necessary or appropriate given what we understand to be the fully allocated nature of the mainstem. We do agree however that Policy 14.4.40 should be amended to omit reference to such transfers resulting in a 'single permit'.

Water quality

[357] We discussed the quality of freshwater in general terms in Chapter 8 of this report. The evidence is that the water quality and aquatic ecology of the tributary rivers (North and South Opuha rivers, upper Opihi River and the Te Ana Wai River) is generally good. The most pressing ecological issues are increasing concentrations of nitrate-nitrogen which contribute to increased nuisance periphyton growths, including cyanobacteria.[162] Those issues are best managed by way of land use controls on farming activities. With regard to Tables 14(a) to 14(g) we largely agree with the recommendations of the CRC Officers as set out the Reply Report for the reasons they gave.

[161] EIC, R. Measures, AMWG, p8, para 3.5.
[162] EIC, Dr Ryder, FAWP p73, para 10.4.

Chapter Eleven
Temuka Freshwater Management Unit

Water allocation

[358] As set out in the evidence of Brent Schrider,[163] the Opihi River Regional Plan (ORRP) has been operative since September 2000, and for the Temuka catchment, it set allocation limits of 1600 L/s for an 'A' Block and 400 L/s for a 'B' Block with minimum flows at Manse Bridge. The B permits are less reliable than the A permits as they are subject to a higher minimum flow. However, the CRC has granted consents totalling 2,503 L/s for A permits and 784 L/s for B Permits.[164] This has led to the Council determining that the catchment is overallocated in terms of ecological and cultural values, and the resulting low flow impacts on recreational values.

[359] Under the ORRP regime there is currently no gap between the A and B blocks to allow for natural flow variation. The two allocations overlap, resulting in B allocation abstractions causing restrictions to be imposed on A allocation abstractors. The existing partial restrictions are not on a pro-rata basis or 'stepped' to prevent abstraction drawing flows below the minimum flow and there is potential for residual flows in the Temuka mainstem to reduce to zero.[165]

[360] Part B of PC7 proposed new environmental flow and allocation limits that would give effect to the freshwater outcomes sought by the Zone Committee as informed by the Temuka Catchment Working Party (TCWP). The new regime set out a stepped approach for increasing minimum flows, reducing allocation volumes and setting partial restrictions. These measures were intended to phase out over-allocation. In response to submissions raising the issue of Te Mana o te Wai, the CRC Officers in the s42A Report recommended advancing the dates for implementing stepped restrictions. They also recommended removing the T block (deep groundwater) and C Block allocations (high-flow water harvesting).

[361] We note CSF&G support the recommendations developed by the TCWP regarding a reduction in the size and distribution of the A and B allocation blocks, provision for a C allocation block, and monthly variable minimum flows.[166]

[362] The evidence of Grant Porter for TCWG demonstrated the financial hardship that the PC7 regime would cause to existing irrigation consent holders, as did the evidence of Brent Schrider. We acknowledge that reduced allocations and increased minimum flows will result in adverse economic effects for irrigators unless an alternative water source is available. Nevertheless, under NPSFM 2020 Objective (1)(a) the CRC must prioritise the health and well-being of the

[163] Chairperson of the Temuka Catchment Working Group (TCWG).
[164] Surface takes and stream depleting groundwater takes.
[165] Section 32 Report, page 244.
[166] EIC Webb for CSF&G, paragraph 6.9.

waterbody and its freshwater ecosystem above the ability of people and communities to provide for their social, economic, and cultural well-being.

[363] Relevantly, we note the helpful evidence of Brent Schrider who stated:[167]

> "While the reduction in allocation proposed is substantial for both A and B blocks, the water users recognise and accept this is necessary so long as they have alternative options and time for change given the economic impacts associated with the implementation of the proposed change."

[364] On that basis we consider that the reduced allocations and increased minimum flows should take effect in 2025 as notified. That will give the water users a short window of time to adapt to the new regime and implement alternative options.

[365] The CRC Officers recommended that Tables 14(i), 14(j)and 14(l) for the Temuka flow and allocation regime should be merged. We do not agree with that approach as in our view it is unnecessary and risks generating confusion. We prefer to retain separate tables as notified. We also consider that the "Current allocation limit" in revised Tables 14(i) and 14(j) should reflect the actual current allocations which we understand are 2,503 L/s for A permits and 784 L/s for B permits. The first reduction from existing actual allocations would then occur from 1 January 2025. The majority of existing consents in the Temuka FMU do not expire until 2030 or 2035 and so we understand that for reductions in existing allocations to occur, reviews under s128 of the RMA would need to be initiated by the CRC.

[366] In response to the submissions of Forest and Bird and DOC, we find that pro rata restrictions should be imposed from 2030 for A and B permits (Table 14(i) and 14(j)).

[367] In recognition of the issues raised by witnesses for the TCWP we consider that Table 14(k) establishing a high-flow (water harvesting) C Block should be retained.[168] We note that under our recommended Tables 14(i) and 14(j) the combined A and B block allocation will eventually reduce by 1,087 L/s (between now and 1 January 2030). To enable existing irrigators to have the option of harvesting and storing high flows to make up for that reduced allocation (and to offset reduced reliability as a result of the increased minimum flows) we find that the C Block should have an allocation volume of 1,087 L/s and that it should be available from 1 January 2022, which is three years before the first stepped reduction in allocation in Table 14(i). That will give existing irrigators time to develop alternative water storage options should they wish to do so.

[368] PC7 as notified established a T allocation block for Orari-Opihi Groundwater Allocation Zone (GAZ) in Table 14(zb). Ms Johnston explained:[169]

> "The purpose of the T allocation block was, even though the Orari-Opihi GAZ was not considered to be fully allocated, to carve off a piece of the remaining allocation of the GAZ for Temuka

[167] EIC, B. Schrider, TCWG, p6, para 31.
[168] The CRC Officers recommended its deletion at p272, para 5.27 of the s42A Report.
[169] EIC K. Johnston, Orakipaoa Water Users / Temuka Catchment Group Incorporated, p3, para 14.

> Catchment surface water and hydraulically connected groundwater consent holders; the intention being that they would be able to transfer their existing consented takes to deep groundwater, helping to alleviate the over-allocation in the Temuka Catchment and meet the allocation reduction targets proposed by the TCWP (and subsequently incorporated into PC7)."

[369] In the s42A Report the CRC Officers initially recommended removing the Table 14(zb) T allocation block for the Orari-Opihi groundwater allocation zone. However, in the Reply Report they recommended reinstating the T block and we agree with that for the reasons that they give.

[370] Fonterra has groundwater takes associated with its Clandeboye dairy factory and they expressed concern about replacing those take permits upon their expiry. Technical analysis based on pump tests confirmed that those takes are in the 'low' stream depleting category.[170] On that basis we foresee no impediment to Fonterra replacing those consents in 2032 given the evidence shows only around 42 million cubic metres per annum is currently allocated and we have accepted the CRC Officers' recommendation that the relevant A Allocation block in Table 14(zb) should be set at 64.22 million cubic metres per annum. That being the case, Policy 4.50 (which restricts the volume of water to be allocated to replacement water permits in over-allocated catchments) would not apply.

[371] However, we acknowledge and agree with the evidence of Neil Thomas that due to the time delay (lag) between a reduction in a 'moderately' stream-depleting groundwater take and the resultant impact on surface water flows, imposing minimum flow restrictions on 'moderately connected'[171] groundwater takes would not materially assist in managing effects resulting from low surface water flow conditions. We recommend it is made clear in the provisions that 'moderately connected' groundwater takes in the Orari-Opihi Zone are not subject to surface water minimum flows.

[170] EIC N. Thomas, Fonterra, p12, para 48.

[171] As defined by Schedule 9 of the CLWRP.

Chapter Twelve
Commercial Vegetable Growing

Introduction

[372] Part A of Plan Change 7 as notified by the CRC proposed a new framework for commercial vegetable growing (CVG). We understand[172] it was promulgated to overcome limitations in the operative region-wide nutrient management framework, as it relates to commercial vegetable growing. These include limitations in the ability of OVERSEER® to reliably estimate nitrogen losses from commercial vegetable growing, complexities and costs associated with the preparation of nutrient budgets, the need to rotate crops to new land to avoid soil-borne diseases and the associated challenges with finding land with sufficient nitrogen limit to accommodate the activity.

[373] The s32 Report includes detailed information on the notified framework for commercial vegetable growing. We summarise the core elements of that framework below.

- Commercial vegetable growing would be subject to a new policy and rule framework that manages actual and potential impacts of CVG activities on water quality while responding to the limitations described above.

- Opportunities for growers to rotate crops to new areas of land (so as to avoid soil-borne diseases) would be addressed through provisions that restrict CVG to a maximum area of land. The maximum area (referred to as the Baseline commercial vegetable growing area) would be the aggregate of the area of land, under the control or grower or enterprise, used for CVG during the 2009 – 2013 period. While similar to the nutrient management framework for farming activities in the operative LWRP,[173] a distinct point of difference is the use of a maximum area of land to define the limit[174] for a CVG operation, rather than nitrogen loss rates as estimated by OVERSEER®.

- New entrants to the market or growers proposing to expand the area of land used for CVG beyond the Baseline commercial vegetable growing area, would be required to demonstrate that nitrogen losses are equal, or less than, the lawful nitrogen loss rate applicable to the new location. Growers would have flexibility to propose[175] methods or models that most accurately estimate nitrogen losses from the activity.

[172] S32 Report, p106.
[173] As set out in the operative CLWRP.
[174] We note for completeness, the notified framework also incorporates use of numeric nitrogen limits for new or expansions to existing CVG operations.
[175] By way of consent application.

- Proposals for new or expanded CVG operations that would result in an increase in nitrogen loss (above the lawful nitrogen loss rate that applies to the new location) would be classified as prohibited.[176]

[374] Submissions on the CVG framework raised issue with a number of aspects including, area thresholds for permitted CVG activities, the time period used to establish the 'Baseline commercial vegetable growing area', activity classifications and consent pathways for authorisation of CVG.

[375] Consistent with our approach as set out in Chapter 1, we generally accept the CRC Officers' recommendations in relation to the amended CVG framework, except for those matters we address in this Chapter of our Report.

Permitted activity threshold for CVG

[376] PC7, as notified, proposed a permitted activity rule[177] for the discharge of nutrients from CVG on a property of 0.5 hectares or less. We understand this threshold was selected on the basis that it would accommodate small-scale operations at roadside stalls.[178]

[377] Submitters generally sought an increase to the maximum area of land permitted for CVG operations, with suggestions of between 4 ha and 10 ha[179] put forward. Reasons given for a higher area limit included that this would be more consistent with the permitted activity thresholds in the operative region-wide farming rules,[180] and contribute to a more equitable framework.

[378] At the hearing for PC7 we heard evidence from Mr Nation[181] on potential impacts on catchment nitrogen loads from increases in the permitted area limits for CVG. He advised us increases of between 0.006 to 0.025% could be expected for modelled catchments, with the largest increases in the Christchurch-West Melton sub-region.

[379] In their advice to us, the CRC Officers recommended[182] retaining a permitted activity limit of 0.5 ha on the basis that Mr Nation failed to take into account potential expansions of CVG activities onto soils other than LUC 1 and LUC 2 classes, and on the basis of the potential risk to LWRP freshwater outcomes, limits and targets from increased expansion. However, they also advised that if we were minded to consider an alternative area limit, this should be set at 5 ha of

[176] For completeness we note the CRC Officers recommended, in the s42A Reply Report (p76, para 14.26), deletion of the prohibited activity rule and replacement with a non-complying rule. We accept that recommendation for the reasons given in that report.
[177] Rule 5.42CA.
[178] Section 42A Report, p167, para 8.40
[179] E.g. Potatoes NZ, Hort NZ.
[180] HortNZ submission.
[181] Witness for HortNZ.
[182] Section 42A Reply Report, para 14.37, p78

CVG per property. This, they stated, would align with permitted standards in the National Environmental Standard for Freshwater for horticultural activities.[183]

[380] We accept the CRC Officers' advice[184] that Mr Nation's analysis did not consider the potential for increases in CVG on land beyond LUC 1 and 2 soils. However, we also note and accept their earlier advice to us that the overall area of land used for CVG has not changed significantly over the past ten years.[185]

[381] We therefore find that further increases in the area of land used for CVG, during the life of this Plan, are unlikely to be substantial. Further, while we note Mr Nation's analysis indicates some potential for increases in catchment nitrogen loads, that analysis is founded on work by Mr Ford and the Agribusiness group[186] which relies on the use of OVERSEER® to estimate nitrogen losses. As acknowledged by the CRC Officers and other witnesses[187], there are limitations in the ability of OVERSEER® to reliably estimate nitrogen loss rates from commercial vegetable growing. These limitations arise, in part, due to a paucity of science[188] to inform the model and for this reason, we hesitate to place too much weight on the predicted outcomes of that model. We note measured data presented by Dr Kirkwood[189], witness for Potatoes NZ, indicates nitrogen loss rates for some vegetables (i.e. potatoes) to be much lower.

[382] In respect of potential impacts on catchment loads in areas where region-wide provisions for farming apply, we note that a permitted activity limit of 5 ha of CVG per property would be more restrictive than permitted under the comparable region-wide 'farming' rules in the operative Plan.[190] Consequently, relative to that framework we find that an increase in the permitted activity threshold to 5 ha of CVG per property would not be likely to jeopardise the attainment of LWRP freshwater outcomes and limits.

[383] For all of the reasons outlined above, we recommend the permitted activity limit in Rule 5.42CA is amended to 5 ha of CVG per property.

Baseline GMP Loss Rates

[384] The CVG framework in PC7 as notified provides for growers to increase the area of land used for commercial vegetable growing, provided nitrogen losses do not exceed the lawful nitrogen loss rate applicable to the new location.

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[183] Section 42A Reply Report, para 14.39, p78
[184] Section 42A Reply Report, para 14.37, p78.
[185] Section 32 Report, p106.
[186] EIC, T. Nation, HortNZ, Appx 3, p12, para 3.
[187] Dr Roberts, witness for Ravensdown Ltd.
[188] EIC, Dr Roberts, Ravensdown, p3, footnote 5.
[189] EIC, Dr Kirkwood, Ravensdown, Attachment 1 - PNZ-79 Nitrate leaching below the root zone.
[190] The region-wide nutrient management rules permit farming (including CVG) on properties up to 10 hectares in size.

[385] In their advice to us, the CRC Officers recommended amendments to Policy 4.36A(b) and Rule 5.42CC to the effect that, where there is 'no applicable' nitrogen loss rate for the new location, growers are required to comply with the Baseline GMP Loss Rate.

[386] We understand the 'Baseline GMP Loss Rate' to be a concept introduced into the CLWRP as part of an earlier plan change,[191] and one which requires farmers to comply with nitrogen loss rates (for the 2009 – 2013 period) that approximate Good Management Practice. Relevantly, we note the concept applies throughout the region, except for areas subject to earlier plan changes as part of a limit-setting process under the NPSFM (namely Selwyn Te Waihora, Hinds and South Coastal Canterbury). In those areas, we understand the standards to reflect 'good management practice' and methods to approximate nitrogen losses under those standards to be different, and that the nitrogen loss reductions to achieve the limits and targets have been calibrated accordingly.

[387] For this reason, we consider it would be inappropriate for policies and rules that apply in these areas to include reference to the 'Baseline GMP Loss Rate' concept. We consider the addition of this phrase would create confusion for plan users as to the standards and nitrogen limits that apply. We are satisfied the phrase 'lawful nitrogen loss rate' (as used in PC7 as notified) is appropriate to accommodate all of the various good management practice concepts, nitrogen loss limits and standards accommodated into the Plan to date. For this reason, we do not recommend inclusion of the phrase 'Baseline GMP Loss Rate' into relevant policies and rules.

Consent pathways for CVG

[388] The CVG framework in PC7 as notified is a departure from the region-wide 'farming' rules in that it regulates a specific type of 'farming' – namely commercial vegetable growing.

[389] During the hearing on PC7 we heard from a number of submitters[192] with mixed land uses and diverse farming operations who incorporate vegetable growing as a component of farming operation. These land uses were often authorised by individual land use consents held by the landowner or lessee, or discharge permits held by irrigation schemes or principal water suppliers.

[390] In their advice to us,[193] the CRC Officers recommended amendments to provisions to clarify that additional permits for commercial vegetable growing would not be required where nutrient losses from CVG are accounted for and authorised under a farming land use consent or discharge permit. Accordingly, they recommended amendments to the notes that precede the nutrient management rules in s5 of the Plan, an amendment to Policy 4.36A and Rule 5.42CB.

[191] Plan Change 5 to the CLWRP.
[192] HortNZ, Pye Group.
[193] S42A Reply Report, p73-74, para 14.11-14.

[391] We agree with the CRC Officers that additional consents should not be required where nitrogen losses from CVG activities are already anticipated and authorised by a resource consent. However, we consider there are some challenges with the wording put forward by the Officers in respect of Note 2 that precedes Rule 5.41 in the Plan. For completeness we set out the Note below:

> Commercial vegetable growing shall be authorised by either Rules 5.42CA to 5.42CD or consented under the nutrient management Section 5 Rule 5.42CA to 5.42CD or consented under the nutrient management Section 5 Rule 5.43 to 5.49 or the sub-region nutrient management rules in Section 6 to 15 unless the commercial vegetable growing operation is irrigated with water from an irrigation scheme or principal water supplier.

[392] We consider the phrase 'commercial vegetable growing **shall** be authorised…' (emphasis added) imposes an obligation on the Council to approve CVG activities which we consider inappropriate given the range of activity classifications[194] accommodated in these frameworks. Further, we consider the exception at the end of the phrase implies that commercial vegetable growing activities are not required to be authorised if irrigated with water from an irrigation scheme or principal water supplier. We understand the intent to be that where an irrigation scheme or principal water supplier holds a permit that authorises the loss of nutrients, that an additional permit for commercial vegetable growing operation is not required. For these reasons, our recommended amendments in Appendix A include amended wording that we consider appropriately conveys the intent. We have also recommended complementary notes in sections 8, 11, 13, 14 and 15 of the Plan. Finally, we consider this note sufficient to describe the application of the various rule frameworks that apply, and accordingly consider the extensive amendments to Rule 5.42CB, as recommended by the CRC Officers, are not required.

[194] From permitted to prohibited

Chapter Thirteen
Pegasus Lake

[393] Pegasus Lake is a privately owned, artificial waterbody that was consented as part of the Pegasus Town development. PC7 introduced several new provisions relating to Pegasus Lake. It was proposed to include the Lake in Table 8b as an "artificial – other" lake (thereby imposing freshwater outcomes for ecological health, eutrophication, visual clarity and human health for recreation), to include it in Table 8-6 (imposing water quality targets for total phosphorus and total nitrogen and limits for ammoniacal nitrogen), and to include the Lake in the Schedule 6 list of freshwater bathing areas.

[394] The Todd Property Pegasus Town Limited submission on PC7 requested that the Lake be removed from Tables 8b and 8-6 and deleted from Schedule 6, emphasising that it was not designed as a freshwater bathing site and that resource consents for the Lake specified it as being suitable only for secondary contact recreation. We note that Todd Property submitted on PC7, but Templeton Pegasus Limited (TPL) purchased certain interests from Todd Pegasus in December 2019 and has adopted and succeeded the submission.

[395] Water in the Lake is sourced primarily from groundwater flowing in from its base and sides, supplemented by rainwater and treated stormwater discharges from the surrounding Pegasus Town commercial area. The quality of groundwater entering the Lake is driven by inland land-uses that are beyond the control of TPL to influence.

[396] From the evidence of TPL we understand that the Lake has a trend of deteriorating water quality. High nutrient levels in the influent groundwater generate algal growths in the Lake and it routinely experiences stratification, seasonal blooms of planktonic cyanobacteria and closures to the public. Due to its excessive nutrients and resultant high phytoplankton biomass, the Lake is currently classified as being hypertrophic. The Lake's algae blooms are also driven by other external factors including temperature, rainfall and possibly wind, all of which are similarly beyond the control of TPL.

[397] The evidence[195] of TPL was that the Lake's primary function was to control stormwater and its use for secondary (not primary) contact recreation was incidental to that function. Mr Webster advised that the 2006 consent decision for the Pegasus Town recorded that it was not expected that the long-term water quality in the Lake would be suitable for primary contact recreation. The Lake was expected to be slightly turbid, grey-green in colour, and to have microbial contamination. Lake water quality standards were deliberately not set at that time, in order to not "set (a future consent holder) up to fail".

[398] We note that the Lake is situated in the Ashley Estuary (Te Aka Aka) and Coastal Protection Zone. On that basis Counsel for TPL submitted that, following expiry of the existing resource

[195] EIC, A. Webster, General Counsel at Templeton Group.

consents, proposed Policy 8.4.28A could result in new consents for the same purpose (stormwater management) being declined. Counsel submitted that this would not be an appropriate outcome, and we agree.

[399] The CRC Officers advised that water quality limits and outcomes for Pegasus Lake had not been actively discussed during the Waimakariri ZIPA process.[196] The Officers also considered that meeting the Table 8-6 nutrient targets for the Lake might not actually result in meeting the Table 8b phytoplankton and TLI outcomes. Importantly, there was no pathway within PC7 for achieving the Table 8-6 nutrient targets, because their achievement would necessitate reducing land-based nutrient losses to groundwater from the Lake's inland source area.[197]

[400] Regarding the necessity to set water quality targets and limits for the Lake, we note that clause 3.8(2) of the NPSFM 2020 requires that every waterbody is located within an FMU. In this case Pegasus Lake is located in the Ashley River/Rakahuri FMU. However, we understand that CRC is only required to set limits at the FMU scale and it is not required to set limits (or targets) for each and every waterbody within an FMU.

[401] On the balance of evidence received we conclude that Pegasus Lake is more properly described as an artificial stormwater management waterbody, albeit a large one that is generally aesthetically pleasing and is sometimes (when water quality allows) used for secondary contact recreation. We are not persuaded that it is either necessary or appropriate to impose unachievable water quality outcomes, limits and targets for this artificial waterbody, particularly when it runs the risk that the stormwater management consents for Pegasus Town might not be able to be renewed when they expire.

[402] Accordingly, we recommend the omission of Pegasus Lake from Table 8b, Table 8-6 and Schedule 6.

[196] S42A Reply Report, p143, para 38.23.
[197] S42A Report, p480, para 8.65.

Chapter Fourteen
Hinds Coastal Strip

[403] PC7 introduced the "Hinds Coastal Strip Zone" (HCSZ) into "Section 13 Ashburton" of the LWRP with the intent being to better enable existing holders of surface takes or stream-depleting groundwater takes to transition to deep or non-stream-depleting groundwater within the Hinds catchment.

[404] We note provisions to encourage abstractors to swap[198] surface water and stream-depleting groundwater takes for deep groundwater takes were previously inserted into the LWRP through an earlier plan change process (Plan Change 2 to the LWRP).[199] That framework included a policy and rule pathway to enable existing consent holders to swap surface water takes for deep groundwater from an existing Table 13(f) T-block.[200] However, subsequent advice from the Hinds Drain Working Party (HDWP)[201] to the CRC, is that uptake of the enabling provisions has been limited due to deep groundwater bores having poor reliability due to the presence of sandy soils.

[405] In response, PC7 introduced a new definition of 'Hinds Coastal Strip Zone', new Policies 13.4.5A and 13.4.24, and a new Rule 13.5.30A. In addition, amendments were made to Rules 13.5.30[202] and 13.5.31, and Planning Map B-092 to add a new layer called 'Hinds Coastal Strip Zone'. Those provisions were supported by a number of submitters.[203]

[406] The effect of the PC7 amendments was to allow the concurrent use of existing surface water takes or stream-depleting groundwater takes and the new (or substituted) deep groundwater takes within the HCSZ. The proposed new policies acknowledged the difficulty of obtaining reliable deep groundwater and provided a 36-month transition period to enable consent holders to establish the reliability of the substitute deep groundwater take. The new provisions ensured that the total volume of water taken would be no greater than provided for by the existing surface water take or stream-depleting groundwater take.

[407] The s42A Report recommended deleting Policy 13.4.5A and amending Policy 13.4.24 to remove the 36-month transition period. It also recommended amending Rules 13.5.30A and 13.5.31 to

[198] The term 'swap' refers to the process of substituting (by way of resource consent) a surface water or stream-depleting groundwater take for a non-stream depleting groundwater take.
[199] S32 Report, p80.
[200] The T-Allocation limit and provisions for taking groundwater within this limit form part of the existing provisions and were introduced through Plan Change 2 to the CLWRP (Section 13, Hinds/Hekeao Plains catchment). The Section 42A Report notes that there is a large percentage of unallocated T Block groundwater in the Valetta and Mayfield Hinds GAZ (paragraph 16.25).
[201] A sub-committee of the Ashburton Water Management Zone Committee.
[202] Existing Rule 13.5.30 controlled the taking and use of groundwater within the Valetta and Mayfield-Hinds Groundwater Allocation Zones that would substitute an existing groundwater permit that had a direct, high or moderate stream depletion effect.
[203] Including HHWET, Hinds Drain Working Party and Federated Farmers.

provide a non-complying activity pathway if bore interference effects of the replacement 'deep' groundwater take were beyond the 'acceptable' threshold set out in Schedule 12, and the retention of a prohibited activity status for replacement groundwater takes with 'moderate' stream-depletion effects.

[408] In their Reply Report, based on what we understand to be opposition to the 36-month transition period, the CRC Officers recommended deleting Policy 13.4.24 and references to the HCSZ in Rule 13.5.30, specifically the deletion of Condition 6 and Matter of discretion 6. Consequential amendments were recommended to delete the definition of HCSZ and to omit the HCSZ layer from Map B-092.

[409] We are not persuaded this would be appropriate. Plan Change 2 to the LWRP confirmed that encouraging the transition of surface water takes or stream-depleting groundwater takes to deep groundwater takes was desirable, particularly given the availability of deep groundwater allocation in an existing T-block. Acknowledging the issue raised by the HDWP, regarding the sandy nature of the aquifer strata within which the deep groundwater is found, is therefore also desirable.

[410] While we agree that Policy 13.4.5A is superfluous and can be omitted, we recommend Policy 13.4.24 is retained. As a consequence of those recommendations, we recommend the HCSZ definition and HCSZ layer in Map B-092 is retained.

[411] We agree with the CRC Officers that it is appropriate that applications to take deep groundwater under Rule 13.5.30 that would have 'unacceptable' bore interference effects, as determined in accordance with Schedule 12, would be assessed as non-complying activities under Rule 13.5.30A, rather than as a restricted discretionary activity as sought by some submitters.[204] However, we find there is no need to further quantify what 'acceptable' means within Rule 13.5.30A itself, and consequently agree with submitters that the conditions of Rule 13.5.30A are omitted. We recommend accordingly.

[412] Regarding Rule 13.5.30, we find it would be an improvement to amend the rule's chapeau so that it clearly refers to "the taking and use of deep groundwater or groundwater with a low stream depletion effect" (with consequential amendments to the chapeaus of Rule 13.5.30A and 13.5.31 to achieve consistency of wording). That being the case, we find condition 5 of notified Rule 13.5.30 is no longer required and consequently recommend its omission. We also recommend amendments to matter of discretion 6 "to enable the CRC to consider the consistency of a proposal with Policy 13.4.24" when making a decision on a consent application. A consequence of these findings is that prohibited activity Rule 13.5.31 requires no further amendment other than to its chapeau. We recommend amendments accordingly.

[204] Including Mr Bubb from Aqualinc.

Chapter Fifteen
Stream depletion assessment methodology

Introduction

[413] As set out in the Council's s32 Report, Plan Change 7 to the LWRP proposes a new freshwater management framework for the OTOP and Waimakariri sub-regions. Once operative, freshwater in these sub-regions would be subject to the provisions of a single regional plan (the Canterbury Land and Water Regional Plan) and existing operative catchment plans[205] would cease to have legal effect.[206]

[414] We understand a significant difference between the freshwater management framework in the LWRP, and that of the operative catchment plans, is the methodology used to assess 'stream depletion effects'. We understand that:

- stream depletion assessments are used to indicate the extent of effect that pumping groundwater has on surface water flows;
- the extent of that effect varies according to the depth of take and the degree of hydraulic connectivity between groundwater and surface water; and
- where the effect of the take on surface water exceeds a specified threshold (expressed as a percentage of the pumping rate) groundwater takes are subject to restriction in accordance with minimum flow requirements for connected surface water bodies.

Differences in stream depletion assessment methodology

[415] Schedule 9 of the LWRP sets out how stream depletion effects are to be assessed and requires that these be determined by modelling the impact of continuous groundwater abstraction over a specified period. For groundwater takes to be classified as having 'moderate' or 'low' stream depletion effects, they are to be assessed by modelling steady, continuous groundwater pumping over a period of 150 days.

[416] For the Council's other operative catchment plans[207] that predate the LWRP, stream depletion effects are typically estimated by modelling the impact on surface water flows from pumping groundwater over a period of 30 days.

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[205] The Waimakariri River Regional Plan (WRRP), the Opihi River Regional Plan (ORRP) and the Pareora Catchment Environmental Flow and Water Allocation Regional Plan (PCEFWARP).
[206] S32 Report, p8 and p26-27.
[207] The WRRP, ORRP and PCEFWARP

[417] Although PC7 does not itself propose a method for assessing stream depletion effects, one of the consequences of the future revocation of existing catchment plans is that future stream depletion assessments in the OTOP and Waimakariri sub-regions would be determined in accordance with Schedule 9 [208] of the Plan.

Submitter concerns regarding a change in stream depletion assessment methodology

[418] The Council received a number of submissions[209] on PC7 requesting changes to Schedule 9 (or provisions in PC7 that implement Schedule 9) to allow stream depletion assessments in the OTOP sub-region to be estimated using a 30-day groundwater pumping period.

[419] We understand the primary concern with use of a 150-day period for assessing stream depletion effects is that it would result in some takes, previously assessed as non-stream depleting, being assessed as stream-depleting. That classification, and the associated consequences, would become apparent at the time of application for a replacement water permit, with abstractors subject to policies that require a reduction or cessation in take whenever the flow in the connected surface water body reduces below the minimum flow.

[420] During the hearing we heard evidence on the potential impacts of that change on groundwater reliability. Mr Lundie, a groundwater abstractor in the OTOP sub-region, provided evidence to demonstrate the impacts on his farming operation if PC7 were to proceed as notified. Those impacts would result in a 44%[210] reduction in the number of days irrigated. A further compounding issue for Mr Lundie was that a change in the classification of his take (from non-stream depleting to stream depleting), would also result in a future application to take groundwater being classified as a 'BN' permit under PC7. That outcome would result in even further restrictions,[211] applying whenever the recorded flow at the 'Cave' recorder site[212] falls below 2500L/s.

The CRC Officers' response

[421] During the hearing we asked the CRC Officers to consider and propose solutions to address the issues raised by Mr Lundie. In their s42A Reply Report the Officers set out potential pathways. These included, Mr Lundie applying to vary the annual volume on his existing consent or amending his consent to add a separate 150-day annual volume (which would have the effect of reducing any stream depletion effects below the threshold at which minimum flow restrictions

[208] A region-wide Schedule that forms part of the operative LWRP.
[209] e.g. Mr R Lundie, Rathkeale Farming Partnership.
[210] Submission by R. Lundie, p5.
[211] Reducing the number of irrigation days by 97%.
[212] Flow recorder site for the Te Ana Wai.

are imposed).[213] The Officers noted however, that these solutions would be likely to result in Mr Lundie not having sufficient volume to meet his irrigation demand in nine out of ten years.[214]

[422] The CRC Officers also responded to our request to provide wording for a bespoke rule[215] that would allow existing takes previously assessed as non-stream-depleting, to continue to be assessed as such under the PC7 framework. The Officers stated this outcome could be accommodated through an amendment to condition 1 of Rule 14.5.9 (as set out below), but were clear in their position that the amendment was not supported on the basis that a reduction in over-allocation is necessary and all opportunities to achieve that reduction should be taken.[216]

> 1. For stream depleting groundwater takes with a direct or high stream depletion effect, the take, in addition to all existing consented takes does not result in an exceedance of any minimum flow in Tables 14(h) to (za), except that this condition shall not apply to a take that was granted with moderate or low stream depletion effect under 30-day stream depletion assessments and is reclassified to direct or high under a 150-day stream depletion assessment; and

Our consideration of the matter

[423] We agree with the CRC Officers that methods to address over-allocation should be considered at every available opportunity. However, we are also mindful that when making a decision as to whether to realise (i.e. act on) that opportunity, an evaluation of the costs and benefits (including opportunities for economic growth that might be provided for or reduced) and the efficiency and effectiveness of the provisions in achieving the objectives, is required.[217]

[424] We find that requiring consent holders to make applications to the Council to individually vary their consents to address these issues would not be efficient. A more efficient method would be for PC7 to anticipate the issue, and if appropriate, implement a solution that responds accordingly.

[425] We also note, as acknowledged by the CRC Officers in their s42A Report,[218] that the magnitude of the impact on future reliability on existing consent holders was unknown at the time PC7 was promulgated. The evidence of Mr Lundie has helpfully exposed the scale of those impacts, and we find them to be significant.

[426] Importantly, this issue is not confined to Mr Lundie. In response to a question we posed to the CRC Officers at the hearing of the Reply Report, the Officers advised there are 22 consent holders in the Opihi catchment and 20 in the Temuka catchment who would be similarly

[213] S42A Reply Report, p119, para 30.24.
[214] S42A Reply Report, p119, para 30.24.
[215] As requested by Mr Lundie in his submission.
[216] Section 42A Reply Report, p119, para 30.26.
[217] RMA, s32AA.
[218] S42A Report, para 9.88, p320.

affected by Rule 14.5.9. That is not an insignificant number and reinforces our finding as to the significance of the issue and the need to address it.

[427] In considering whether to amend condition 1 of Rule 14.5.9, we are mindful of the very real consequences that would arise if we were not to make the change. Over 40 existing groundwater abstractors would either be subject to significant restrictions on abstraction, or in the alternative be classified[219] as a prohibited activity due to non-compliance with condition 1 of the Rule. We find that outcome to be undesirable and accordingly recommend an amendment to Rule 14.5.9. We also note, for completeness, that we consider the matters of discretion in Rule 14.5.9 appropriate to manage any adverse effects of the take. These matters include consideration of the rate, volume and timing of the take, actual and potential effects on surface water resources, and matters relating to over-allocation.

[428] In making our recommendations we have adopted similar wording to Rule 14.5.9 as set out by the CRC Officers in their s42A Reply Report, but made minor refinements to constrain the application of the rule and to ensure it appropriately reflects the stream depletion assessment method described in the ORRP.

[219] Under Rule 14.5.11.

Chapter Sixteen
Plantation Forests and Carbon Sinks

Introduction

[429] Part A of PC7 to the LWRP proposed amendments to region-wide provisions in the LWRP relating to plantation forests. These changes included amendments to the operative plan definition of 'plantation forest', the deletion of Rules 5.72, 5.73 and 5.74 (rules regulating the planting of plantation forests within flow-sensitive catchments), and the insertion of two new rules in replacement (Rules 5.189[220] and 5.190[221]).

[430] We understand from the s32 Report[222] that the intent of the proposed amendments was to reduce overlap with standards in the National Environmental Standard for Plantation Forestry (NES-PF), to provide greater clarity for the provisions that apply to plantation forestry activities, and to continue progress towards the LWRP's freshwater objectives.

Carbon Sinks

[431] One of the more substantive changes to the plantation forestry provisions proposed by Part A of PC7 is an amendment to the definition of term 'Plantation forest'. The definition of 'Plantation Forest' in the operative LWRP includes forests planted and managed for harvesting and production of timber, and forests planted and managed as a carbon sink. Part A of PC7 would effectively replace that definition with that used in the NES-PF, resulting in forests planted and managed as a carbon sink being omitted.

[432] Consequently, operative policies and rules regulating forestry would no longer apply to carbon sink forests in flow-sensitive catchments. In their subsequent advice to us[223] the CRC Officers advised that this was an unintended consequence, and they suggested reinstating operative Rules 5.72, 5.73 and 5.73, with modifications to limit their application to only forests planted and managed as a carbon sink.[224] They also advised us, however, there were no submissions seeking to reinstate these provisions.[225]

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[220] Permitted activity rule for plantation forestry activities also regulated by the NES-PF.
[221] Discretionary rule for plantation forestry activities also regulated by the NES-PF.
[222] S32 Report, p39.
[223] S42A Report, p74, para 3.4 and p76, para 3.18 together with Rules 5.190A and 5.190B in Appendix A to the S42A Reply Report.
[224] S42 Report, p77, para 3.20.
[225] S42 Report, p77, para 3.22.

Our consideration of the issue

[433] As set out in Chapter 4 of this Report, the Councils' power to make decisions on the plan changes is confined by the scope of submissions and the decisions sought in those submissions. Although we acknowledge that the amendments proposed by PC7 (as notified) may have unintended consequences, that would not enable the Council to amend the plan change in a way not requested in a submission. Having read the submissions we find that no submitter sought to reinstate the definition of 'plantation forestry' in the operative Plan.

[434] Further, although one submitter sought reinstatement of Rules 5.72 to 5.74, to do so without amending the definition of the term 'plantation forestry' would result in the Plan having internal inconsistency, while failing to be compatible with the NES-PF.

[435] For these reasons, we do not recommend the insertion of new rules, or reinstatement of operative rules, to manage the planting of carbon sink forests in flow sensitive catchments. We acknowledge that this may leave a 'gap' in the Plan with regard to the management of carbon sink forests. However, we also understand that, by law, the Council is required to prepare a future plan change to implement the NPSFM 2020 and to notify that change by 31 December 2024. That will provide an opportunity fill that 'gap' if the Council so desires.

Plantation forests

PC7 as notified

[436] As detailed at the start of this Chapter, PC7 as notified proposed a number of amendments to operative plan provisions to improve alignment with the NES-PF. Those changes included replacing operative rules for plantation forests within flow-sensitive catchments (Rules 5.72, 5.73 and 5.74) with a new suite of rules (Rules 5.189 and 5.190). A critical difference between the two frameworks is that the operative framework would classify new plantings within a flow-sensitive catchment as a controlled activity (subject to compliance with conditions relating to maximum area mean low flow),[226] while the PC7 framework would classify a failure to comply with the conditions of the proposed permitted activity rule as a discretionary activity.

[437] In the s32 Report the CRC Officers addressed the extent there is authority for the proposed rule framework to be more stringent that rules in the NES-PF. On this they advised that:

[226] Where compliance with conditions of the controlled activity rule are not met the activity is classified as restricted discretionary

- Regulation 6(1)(a) of the NES-PF provides for a rule in a plan to be more stringent than the regulations if the rule gives effect to an objective developed to give effect to the National Policy Statement for Freshwater Management;[227] and

- the Objectives in Section 3 of the LWRP as well as Policies 4.1 to 4.6 are considered freshwater objectives[228] for the Canterbury region; and

- the proposed framework (and conditions of the proposed rules) would manage effects not regulated by the NES-PF and that this is appropriate given these rules implemented objectives and policies in the LWRP.

Submissions and evidence, the CRC Officers response and our finding

[438] Submissions on the rule framework were lodged, including a joint submission by Rayonier New Zealand Limited and Port Blakely Limited. In their submission they opposed proposed Rules 5.189 and 5.190, and sought, amongst other things, a change to the activity classification for Rule 5.190 from discretionary to restricted discretionary. As we noted earlier, Rule 5.189 provides for a permitted activity. It has a range of conditions that would result in production forestry activities in certain sensitive locations (including flow sensitive catchments, inanga spawning habitat, salmon spawning habitat, Critical Habitat, wetlands and rock art areas) not qualifying as permitted activities. Production forestry activities in those sensitive areas would default to Rule 5.190.

[439] We recognise that applications under Rule 5.190 may affect a wide range of such sensitive locations, and have a variety of adverse effects on them, and on ecosystems and other values they support. In those circumstances, we are not persuaded that the consent authority should be restricted in what it may consider. Furthermore, we consider the Council should have the opportunity to refuse applications for resource consent, where appropriate. For this reason, we also do not recommend a controlled activity classification, as recommended to us by the CRC Officers.

[227] S32 Report, p56.
[228] Ibid.

Chapter Seventeen
Giving Effect to Superior and other Instruments

Content of Chapters 2 and 3

[440] In Chapter 2 of this report, we noted that section 67(3) of the RMA requires that a regional plan is to give effect to any New Zealand coastal policy statement, any national policy statement and any regional policy statement. In Chapter 3 we identified the following as applicable:

- The New Zealand Coastal Policy Statement 2010
- The National Policy Statement on Electricity Transmission 2011
- The National Policy Statement for Renewable Electricity Generation 2011
- The National Policy Statement for Freshwater Management 2020
- The Canterbury Regional Policy Statement 2013.

[441] In this chapter we consider the extent to which the CLWRP, incorporating PC7, and the WRRP incorporating PC2, as we recommend they be amended, would result in the Plan giving effect to those instruments.

The New Zealand Coastal Policy Statement

[442] The s42A Report noted[229] that the NZCPS applies to both the coastal marine area and the coastal environment; and that PC7 manages cumulative effects on water quality through management of land use.[230] The CRC Officers also noted that some of the freshwater resource that would benefit from PC7 is within the coastal environment, and gave the opinion that the NZCPS is given effect to by the plan change.[231]

[443] We accept that advice, and find that the plan changes, as we recommend they be amended, would continue to give effect to the NZCPS.

[229] S42A Report, p579, para 9.3.
[230] S42A Report, p579, para 9.4.
[231] S42A Report, p579, para 9.4.

NPSFM 2020

[444] At the time the plan changes were prepared and notified, the National Policy Statement for Freshwater Management 2014 (as amended in 2017) was in force. That instrument was replaced by the NPSFM 2020 which came into force on 3 September 2020.

[445] By Memorandum dated 31 August 2020, and by legal submissions dated 29 September 2020, counsel for the CRC submitted that, to the extent that there is scope to do so, the Council should, in deciding submissions on the plan changes, strive to give effect to the NPSFM 2020.

[446] We note that clause 4.1 of the NPSFM 2020 directs that every local authority must give effect to it as soon as reasonably practicable. Plainly action should not be deferred if it is available now and is not conditional on further processes.

[447] Counsel for the submitter As One Incorporated warned us of a practical constraint in making recommendations that would give effect to the NPSFM 2020 due to absence of a proper section 32 evaluation; and that we "cannot be satisfied" of the appropriateness of the measures recommended in the s42A Report.[232]

[448] We are of course grateful to counsel for this warning, and accept that in recommending any amendment to PC7 on the basis of giving effect to the NPSFM 2020, we should take care to ensure that it does not result in unfairness to submitters. Even so, the scope of a local authority's decisions on submissions is not limited to amendments specifically considered in the Section 32 evaluation. That is made before submissions are lodged.

[449] There is no unfairness or unreasonableness in the Council making an amendment that is within scope of a decision sought in an original submission but that was not specifically addressed in the section 32 evaluation. That is the reason why section 32AA requires a further evaluation. Likewise, there is no unfairness or unreasonableness in the Council making a decision within scope that also gives effect to the NPSFM 2020. That instrument is one to which the Plan now has to give effect to as soon as reasonably practicable.

[450] Therefore, we adopt the legal advice of counsel for the CRC and accept its correctness. In considering the submissions and evidence on them and preparing this report and making our recommendations on them, we have where practicable sought to apply applicable provisions of the NPSFM 2020. In making all our recommendations on specific submission points we have also been cautious to avoid unfairness to submitters and others who may be affected. The Council will be left with further processes and duties under that instrument that it will need to carry out independently of these plan changes.

[232] Opening Legal Submissions for As One Incorporated, 16 November 2020, paras 48-49.

[451] The result is that the Plan, incorporating the amendments that we recommend in this report, would substantially give effect to the NPSFM 2020 to the extent that can be done now.

NPSET

[452] As we mentioned in Chapter 3 of this report, no submission on the plan changes sought any decision to give further or better effect to the NPSET. We understand that the provisions of the Plan in that regard fulfil the Council's duty to give effect to that instrument.

NPSREG

[453] The Plan already gives effect to the NPSREG. Certain submissions were made by electricity generators seeking specific amendments to the plan changes. In considering those submissions and the evidence relating to them, we have kept in mind the need to avoid amendments that would reduce the extent that the Plan gives effect to it.

CRPS

[454] In Chapter 3 of this report we referred to the CRPS, which was revised in 2013. It was made to give effect, among other things, to the National Policy Statement on Freshwater Management 2011, an instrument that has been revised three times since. Even so, the CRPS contains substantial contents that are compatible with successive versions of the NPSFM, and reflect natural and physical resources of the Canterbury region, and its social, cultural and economic issues. Though worthy of review, the instrument is by no means redundant. So in considering the submissions and evidence on the plan changes, and forming our recommendations, we have sought to ensure that the Plan as we recommend it to be changed would give effect to the CRPS.

Iwi planning documents

[455] As mentioned in Chapter 3 of this report the Council, in changing its regional plan, has to take into account any relevant planning document recognised by an iwi authority. The relevant documents are listed in paragraph 10.19 of Appendix B of the s42A Report. Without diminishing the value of others of them, we find that the instrument with contents more relevant to PC7 and PC2 is the Mahaanui Iwi Management Plan 2013.[233]

[456] Those contents are congruent with the NPSFM 2020 (especially on Te Mana o te Wai); and with Chapter 4 of the CRPS. They are implemented by several measures throughout the Plan, including Section 1.3.1 and Schedules 17 to 23 of Section 16. Having (as mentioned in Chapter 3 of this Report) kept in mind the Council's duty to take into account relevant iwi planning

[233] Among others, see also sections 10.3, 11.3, 11.8 and 13.3; and various acknowledgements that, for Ngāi Tahu, freshwater is a taonga.

documents in forming our recommendations on the plan changes, we affirm that in amending the Plan to incorporate our recommendations it would take into account the documents concerned, especially the 2013 Mahaanui plan.

Management plans and strategies under other Acts

[457] In changing a regional plan the Council has also to have regard to management plans and strategies prepared under other Acts, to the extent that their content has a bearing on resource management issues of the region. In Chapter 3 of this report we identified as relevant, certain sports fish and game birds' management plans under the Conservation Act 1987, and the Vision and Principles of the CWMS.

[458] In regard to the sports fish and game birds management plans, we had the benefit of submissions from the North Canterbury and Central South Island Fish and Game Councils, and from the Director-General of Conservation. In forming our recommendations on the plan changes we have had regard to the contents of those plans.

[459] We have had particular regard to the Vision and Principles of the CWMS. Although that document was formulated prior to the National Policy Statement of Freshwater Management, it is in general conformity with the various versions of that instrument. However, the priorities for planning use of water in item 2 of the primary principles of the CWMS are not fully consistent with the obligatory hierarchy of priorities prescribed by the NPSFM 2020. Apart from that, the Vision and Principles remain a valuable guide at a high level of generality to applying the RMA to freshwater management in the Canterbury Region, and we have so treated them in preparing our recommendations on the submissions on the plan changes.

Chapter Eighteen
Evaluation and Recommendations

Evaluation duties

[460] In Chapter 1 of this report we recorded the making of the evaluation required by section 32 of the RMA in respect of the plan changes, the subject of the s32 Report.

[461] Having considered the submissions on the plan changes, we are making recommendations for amendments to them. In doing so, section 32AA of the RMA requires a further evaluation which may be referred to in the decision-making record.[234] Clause 10 of Schedule 1 of the RMA directs that a local authority's decision on submissions on a plan change is to include that further evaluation, to which it is to have particular regard when making its decision.[235]

[462] An evaluation report is to contain a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects anticipated from implementation of the proposal.[236]

[463] A further evaluation that is referred to in the decision-making record is to contain sufficient detail to demonstrate that further evaluation has been duly undertaken.[237]

[464] If our recommendations in this report are adopted by the Council, this report (including its appendixes) may form part of the Council's decision-making record. Therefore, in compliance with the direction in Schedule 1,[238] we include in this report our further evaluation of the amendments to the plan changes that we recommend.

[465] In considering the amendments to the plan changes requested in the submissions, and in formulating our recommendations on them (whether they are addressed in the main body of this report or in Appendix A to it) we have, to the extent practicable, examined and assessed the criteria itemised in section 32 as applicable. In doing so, we have:

- considered the extent to which the plan changes are the most appropriate way to achieve the purpose of the Act;
- identified and assessed the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from implementation of the provisions, including economic growth and employment, quantifying the benefits and costs where practicable,

[234] RMA, s32AA(1)(d) and (2).
[235] RMA, Schd 1, cl 10(4)(aaa).
[236] RMA, s32(1)(c.
[237] RMA, s32AA(1)(d)(ii).
[238] RMA, Schd 1, cl 10(2)(ab).

and where there is uncertain or insufficient information, assessing risks of acting or not acting;

- had regard to the Council's duty to have the plan changes give effect to relevant national policy statements (including the NPSFM 2020) and to the CRPS, and to be consistent with or have regard to other prescribed instruments as identified in Chapter 3 of this report; and

- had regard to the Council's duty to have the plan changes comply with directions in national environmental standards, and to only impose a level of restriction greater than that imposed by a national environmental standard where there is justification for doing so; and

- had particular regard to the vision and principles of the CWMS.

[466] In particular the evidence addressed the benefits of food production farming, and the economic, social, and cultural effects that may be anticipated from implementation of certain contents of the plan changes. The evidence tended to show considerable costs to food production farming from implementing them, including costs on economic growth and employment. The evidence also showed self-restraint by many farmers with aims of reducing adverse environmental effects of their farming activities.

[467] In evaluating that evidence, we recognise that the evaluation directed is not confined to assessing the benefits and costs. The evaluation has to include the duties prescribed by the Act and higher-order instruments (including the fundamentally important concept of Te Mana o te Wai), duties that require constraints on farming activities, which may extend beyond what farmers have already adopted, whether voluntarily or to conform with the Plan.

[468] Further, we find that the evaluation on benefits and costs cannot be made on economic grounds alone. Some benefits and costs of constraints on farming activities and some consequential social wellbeing may (with some generality) be quantified in money's worth. But it is not practicable, on the evidence presented, for us to quantify in that way benefits and costs to environmental, and cultural wellbeing. So in those respects we have made assessments that are broad and conceptual, rather than analytical and calculated.

[469] One of the ways in which the economic costs of implementing proposed measures can be mitigated is by postponing conformity with targets and limits until fixed future dates. In some cases, setting dates like that is not an open judgement, but is required to be both ambitious and reasonable.[239]

[470] Those limitations limit the detail with which we express our findings on our further evaluation, as indicated in the combination of the relevant contents of the main body of this report and of Appendix A. These provide sufficient detail to record our undertaking of the further evaluation. Many of the submission points on the plan changes relate to particular provisions of them that

[239] NPSFM 2020, cl 3.3(2).

do not stand alone, but are combined in integrated bodies of provisions that are intended to be understood, and implemented, as coherent groupings of measures. Where that is the case, we have also made further evaluations of the groupings by reference to the section 32 criteria.

Reasonably practicable options

[471] In examining whether amendments to the plan changes are the most appropriate ways to achieve the objectives of the Plan, we have sought to identify other reasonable and practicable options. In doing that we have confined our consideration to options presented in submissions or in the s42A Report, and to combinations or refinements of them. We have refrained from inventing options of our own, as that could result in unfairness to submitters.

Most appropriate options

[472] Our further evaluation involves finding what is the most appropriate way for the plan changes to achieve the objectives of the Plan. In that regard we apply the reasoning of the High Court in the Transmission Gully case[240] that the evaluation is broad enough to include other relevant criteria. In considering submissions on the plan changes, that includes the Council's duties to have the Plan give effect to the higher-order instruments, especially the NPSFM 2020 and the CRPS, and to have regard to the vision and principles of the CWMS.

Evaluation

[473] The s42A Report (including the Reply Report and the CRC Officers' responses to our questions on it) contained detailed advice to assist us in making our further evaluation on amendments to the plan changes in response to submissions, and submitters' evidence.

[474] We have considered that report, and except to extent that this report specifically addresses a particular topic, we accept the advice contained in it. With that exception, rather than duplicating those contents, we incorporate that report in this, and adopt its contents together with the reasons contained in the main body and Appendix A of this report, as the basis for our recommendations on the submissions on the plan changes.

[475] We affirm that in making our findings and recommendations on the submissions, we have founded them on those further evaluations.

Conclusion and recommendations

[476] We have considered and deliberated on the proposed plan changes; on the submissions lodged on them; and on the reports, evidence and submissions made and given at our public hearings.

[240] *Rational Transport Society v NZ Transport Agency* [2012] NZRMA 298 at [45] and [46].

In reaching our recommendations, we have conformed with all applicable provisions of the RMA; we have had particular regard to the further evaluation of the amendments to the plan changes that we are recommending, and to the vision and principles of the CWMS. The relevant matters we have considered, and our reasons, general and particular, for them are summarised in the main body of the report and in Appendix A. On our evaluations of them, we are satisfied that the amendments we recommend are the most appropriate for achieving the objectives of the Plan and for giving effect to relevant national policy statements and the CRPS.

[477] We therefore recommend the amendments to the plan changes contained in the main body of this report and in Appendixes A and B.

DATED 6 May 2021.

David F Sheppard, QSO Hearing Commissioner (Chairman)

Robert van Voorthuysen Hearing Commissioner

Raewyn Solomon Hearing Commissioner

Appendices

Appendix A – Schedule of Recommended Decisions

- *Part 1 – Recommended Decisions on PC7 to the CLWRP*
- *Part 2 – Recommended Decisions on PC2 to the WRRP*

Parts 1 and 2 of Schedule A are bound in separate volumes.

Appendix B – Proposed Plan Change – Inclusive of Recommended Amendments

- *Part 1 – Proposed Plan Change 7 to the CLWRP – Inclusive of Recommended Amendments*
- *Part 2 – Proposed Plan Change 2 to the WRRP – Inclusive of Recommended Amendments*
- *Part 3 – Proposed Plan Change 7 to the CLWRP Map Volume – Inclusive of Recommended amendments*
- *Part 4 – Proposed Plan Change 2 to the WRRP Map Volume*

Parts 1, 2, 3 and 4 of Schedule B are bound in separate volumes.

Appendix C – Reference Material

Appendix C is attached to this report.

Appendix C – Reference Material

1. National Policy Statement for Freshwater Management 2020
2. National Policy Statement for Freshwater Management 2014 (amended 2017)
3. New Zealand Coastal Policy Statement 2010
4. Canterbury Regional Policy Statement 2013
5. Canterbury Water Management Strategy – Strategic Framework – November 2009
6. Canterbury Regional Pest Management Plan 2018-2038
7. Sports Fish and Game Management Plan
8. Te Whakatau Kaupapa: Ngāi Tahu Resource Management Strategy for the Canterbury Region (1990).
9. Te Rūnanga o Ngāi Tahu Freshwater Policy (1999).
10. Te Poha o Tohu Raumati: Te Rūnanga o Kaikōura Environmental Management Plan 2009.
11. Iwi Management Plan of Kati Huirapa (1992).
12. Kāi Tahu Ki Otago – Natural Resource Management Plan (2005).
13. Te Taumutu Rūnanga Natural Resource Management Plan (2002).
14. Te Waihora Joint Management Plan – Mahere Tukutahi o Te Waihora (2005).
15. Te Rūnanga o Ngāi Tahu Hazardous Substances and New Organisms Statement (2008).
16. Mahaanui Iwi Management Plan (2013).
17. Section 32 Evaluation Report for Plan Change 7 (Omnibus, Orari-Temuka-Opihi-Pareora and Waimakariri) to the Canterbury Land and Water Regional Plan and Plan Change 2 to the Waimakariri River Regional Plan (published 20 July 2019)
18. Section 42 Report, including:
    (a) Section 42A Report: Plan change 7 to the Canterbury Land and Water Regional Plan; and Plan Change 2 to the Waimakariri River Regional Plan dated March 2020
    (b) Memorandum of legal advice regarding withdrawal of submission points by HortNZ dated 7 April 2020
    (c) Section 42A Report Errata Table dates 29 April 2020
    (d) Section 42A Report Appendix E Part 1 Officer Recommendations in Response to Submissions – Updated dated 29 April 2020
    (e) Submission Points Potentially Beyond the Scope of Plan Change 7 (undated)
    (f) Waimakariri Land and Water Solutions Programme Options and Solutions Assessment: Nitrate Management Errata (undated)
    (g) Officers' Response to Questions from the Hearing Panel – 28 May 2020 and 16 June 2020 (undated)
    (h) Update #2 to Appendix E Part 1 – Updated dated 26 June 2020
    (i) Explanatory Note to the Hearing Panel on Rules 5.189 to 5.190B (undated)
    (j) Section 42A Supplementary Report dated 26 June 2020
    (k) Officers' Response to Hearing Panel's question regarding Policy 4.102 (undated)
    (l) Joint Memorandum of Counsel on behalf of CRC, AMWG and OFAWP regarding Witness Caucusing

(m) Memorandum of Consolidated Officer Recommendations dated 10 July 2020
(n) Consolidated Officer Recommendations dated 10 July 2020
(o) Memorandum of Counsel on behalf of CRC regarding the Explanatory Note – Orari FMU Land Use Attributes dated 16 July 2020
(p) Memorandum of Counsel on behalf of CRC dated 16 September 2020
(q) Memorandum of Counsel on behalf of CRC in response to the Memorandum of Counsel filed on behalf of the Christchurch City Council dated 31 August 2020
(r) Memorandum of Counsel on behalf of CRC dated 23 September 2020
(s) Answers to Day 1 Questions dated 6 October 2020
(t) Second Set of Answers to Day 1 Questions dated 13 October 2020
(u) Assessment of Nitrogen Loss Reductions in the Waimakariri Sub-Region for Different Land Use and Nitrate-Nitrogen Limits dated 28 October 2020
(v) Third Set of Answers to Day 1 Questions dated 9 November 2020

19. Section 42A Reply Report dated February 2021
    (a) Officers' Responses to Questions from the Hearing Panel on the Reply Report dated 24 February 2021
    (b) Memorandum of Counsel on behalf of the CRC dated 5 March 2021