

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Environment Canterbury (Temporary
Commissioners and Improved Water Management) Act 2010

AND

IN THE MATTER of proposed Variation 1 to the proposed
Canterbury Land and Water Regional Plan

**REPORT AND RECOMMENDATIONS
OF THE
HEARING COMMISSIONERS
ADOPTED BY COUNCIL AS ITS DECISION
ON 23 APRIL 2015**

Hearing Commissioners:

David F Sheppard
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Appendix A: Schedule of Recommended Decisions

[Separately bound]

**Appendix B: Proposed Variation 1 Inclusive of Recommended
Amendments**

[Separately bound]

Appendix C Reference Material

Chapter One

The Proposed Variation and Submissions on it

1.1 Introduction

- [1] On 24 February 2014 the Canterbury Regional Council ('the CRC' or 'the Council', depending on the context), acting under section 65 of the Resource Management Act 1991 ('the RMA') and clause 5 of Schedule 1 to that Act, publicly notified a proposed variation (identified as Variation 1) to its proposed Land and Water Regional Plan ('the LWRP'), and prescribed that the closing date of the period for lodging submissions on the variation would be 24 March 2014.
- [2] The LWRP was developed in response to the Canterbury Water Management Strategy, which set planning priorities for guiding the allocation of water to classes of use in first and second order priorities. The Strategy recommended appointment of committees for various zones of the Canterbury Region, to prepare programmes for implementing the Strategy for addressing fresh water issues in each zone.
- [3] The LWRP contains sub-regional sections for those zones, and provides for additional detailed provisions for each of them to be inserted by variation or change in accordance with the process prescribed in Part 1 of Schedule 1 of the Act.
- [4] Variation 1 applies to one of the zones of the Canterbury Region, being the Selwyn Te Waihora sub-region. Following extensive consultation and collaboration with stakeholders, the Zone Committee for that zone recommended a solutions package with regulatory and non-regulatory content. Variation 1 is derived from the regulatory recommendations in the solutions package. Valuable as they will be, the non-regulatory measures are not appropriate for insertion in a planning instrument under the RMA.
- [5] Variation 1 expresses a vision of restoring the mauri of Te Waihora (Lake Ellesmere), while maintaining the prosperous land-based economy and thriving communities. The variation would insert in Section 11 of the LWRP content identifying water management and land-use issues arising in that sub-region, and major responses to them in the forms of policies and rules and other methods for implementing them.
- [6] Acting under section 34A(1) of the RMA, on 1 May 2014 the CRC appointed us, the undersigned, as hearing commissioners to hear and make recommendations to it of decisions on submissions on Variation 1; and delegated to us all the functions, powers and duties of the CRC to hear and consider submissions on Variation 1, including requiring and receiving reports in terms of section 42A of the RMA, and exercising powers conferred by sections 41B and 41C of it.
- [7] The CRC received 118 submissions on Variation 1, many of them requesting numerous amendments to it. In accordance with clause 7 of Schedule 1, on 24 May 2014 the CRC gave public notice of those submissions,¹ from which it received 63 further submissions supporting or opposing amendments requested by submissions on the variation.

¹ In respect of two submissions that had been inadvertently omitted from that notice, subsequent notices were given on 14 June 2014 and 27 June 2014 respectively.

- [8] We, the hearing commissioners, have conducted public hearings of the reports made under section 42A of the RMA, and of the evidence and submissions of the submitters who wished to be heard. Those hearings were conducted on 12 hearing days between 16 September and 27 November 2014, and were held at Lincoln.
- [9] To assist us to understand the context of the submissions, on 15 September we viewed the Waimakariri River (north of Darfield); the Malvern Hills; the Hororata Plains; the Te Piritā locality; the Selwyn River (Waikirikiri) (at Coes Ford) and a tributary; the Waianiwanīwa River; the Halswell River; the Irwell River; the Kaituna River; Rolleston, and the industrial area to the west of it; Leeston; the south-west part of Banks Peninsula; Taumutu and Muriwai; and Te Waihora (Lake Ellesmere).
- [10] Most of the submissions requested amendments to Variation 1, and gave reasons for making them. We are grateful for the numerous constructive improvements suggested by submitters and their expert and other witnesses. We are also grateful for the successive detailed reports by officers of the CRC. We acknowledge that the suggested amendments, even those we do not adopt, and the related evidence have substantially helped us in coming to our recommendations.
- [11] As Variation 1 would substitute some provisions of the LWRP on which certain submissions were lodged, we have applied clause 16B of Schedule 1 of the RMA by treating those submissions as deemed to be submissions on the variation.
- [12] Having considered and deliberated on the proposed variation, the submissions lodged, and the reports, evidence and submissions made and given at the public hearings, we have prepared this report containing our recommendations that Variation 1 be amended as set out in Appendix 1. Our reasons for recommending those amendments, and the other relevant matters we have considered, are summarised in this report.

1.2 Geography

- [13] The Selwyn/Te Waihora Catchment drains the flanks of the Southern Alps west of Christchurch and flows east to Lake Ellesmere/Te Waihora, a coastal lake which discharges into the South Pacific Ocean. Two alpine rivers set the hydrological border of the catchment: the Waimakariri to the north and the Rakaia River to the south. The Selwyn Te Waihora sub-region has an area of 272,000 hectares, of which 30,000 ha (11%) is hill country and 210,000 (77%) is flat terrain. The balance of the catchment comprises Te Waihora (Lake Ellesmere) and urban areas.
- [14] The rivers and streams in the upper part of the catchment flow down from the hills and are mainly driven by overland flow and shallow sub-surface flow. These waterways rapidly lose water to the ground as they flow over the plains, and naturally go dry in places. The only river that spans the plain is the Selwyn River (Waikirikiri), however the upper and the lower reaches of that river only ‘connect’ during high flow events, which occur frequently.
- [15] The high country is sparsely populated, mainly consisting of hill and mountain ranges and narrow river valleys. Most of the high country is grassland, including some tussock lands and small areas of native forest. The plains are where most of the population live, and form an expanse of low-lying, flat and comparatively dry grassland. The Selwyn River (Waikirikiri) flows from the hills to

the plains. Its tributaries include the Waianiwhi River, the Hororata River and the Hawkins River.²

[16] The significance of the Selwyn/Te Waihora catchment is described in detail elsewhere in this report. In short:

1. Te Waihora (Lake Ellesmere) and its surrounds have high cultural significance;
2. Parts of the catchment have degraded water quality, including a high trophic level index in Te Waihora (Lake Ellesmere) ;
3. There is poor ecological health (as measured by macroinvertebrate monitoring) in rivers and streams elsewhere in the catchment; and
4. Agriculture is the mainstay of the economy.³

1.3 Significance of the Selwyn/Te Waihora Catchment to Ngai Tahu

[17] In Chapters 1.3 to 1.5 that follow we describe in some detail the traditional and contemporary significance of the Selwyn / Te Waihora Catchment to Ngai Tahu. The material is sourced from the section 42A Report⁴ and the evidence presented by Ngai Tahu to the Variation 1 hearing. We consider that this level of detail is appropriate for these reasons. First, because of the role that Ngai Tahu has in managing the lake, and the wider cultural importance of Te Waihora (Lake Ellesmere) to Ngai Tahu generally. Secondly, because Objective D1 and Policy D1 of the National Policy Statement for Freshwater Management 2014 (NPSFM 2014 or NPSFM) direct us to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water and its associated ecosystems. Thirdly, because the Council has to give effect to those NPSFM directives when considering the submissions and further submissions on the provisions of Variation 1 that relate to Ngai Tahu values and interests, including Policies 11.4.2 to 11.4.5 and the extent and management implications of the newly established Cultural Landscape/Values Management Area.

[18] As described in the section 42A Report:

Te Waihora is a tribal taonga of outstanding cultural significance. The lake represents a major mahinga kai and an important source of mana for Ngai Tahu. The rich mahinga kai resources of the lake brought 67 generations of successive tribal peoples of Waitaha, Ngati Mamoe and Ngai Tahu to settle in this place, and they remain at the heart of their relationship with the lake today. The significance of the lake in respect of Ngai Tahu history, mahinga kai and customary fisheries as an outstanding value which warrants protection, is confirmed by the National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990, as amended in 2011.⁵

[19] In terms of the cultural and spiritual beliefs of Ngai Tahu, the creation of Te Waihora (Lake Ellesmere) is rooted in the creation traditions of Te Waipounamu and the works of the atua or demi-god, Tu Te Rakiwhanoa, who reshaped the stranded canoe of his father Aoraki, to make a place fit for humans to live in. He pressed his heel down on the wreckage (the coast) and made the indentation which became the lake. Ngai Tahu tradition relates how he formed Banks Peninsula by raking the rubble from the island into the promontory and forming it as a giant breakwater. Tu Te Rakiwhanoa is one of the mythical kaitiaki or guardians of the whole region, his mauri (life force) is believed to reside amongst those at Whakamatakiuru near Taumutu.

² Summarised from Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, sections 1.1 to 1.29, pages 1 to 7.

³ Ibid, section 7.2.

⁴ The section 42A Report is referred to in detail in Appendix C.

⁵ Ibid, section 2.1, page 11.

- [20] Human occupation and use of Te Waihora (Lake Ellesmere) can be traced back to the arrival of the first peoples in Te Waipounamu, generally referred to as Waitaha. Waitaha is used to denote people of a particular whakapapa (genealogy) who descend from Waitaha, who himself was a descendant of Rakaihautu. Rakaihautu was the leader of the great voyaging waka, Uruao, which arrived upon the shores of Te Waipounamu at Whakatu (Nelson) in ancient times. Ngai Tahu tradition places him and his people as the first human settlers in Te Waipounamu. When Rakaihautu landed the Uruao waka at Whakatu, he divided the new arrivals into two groups; his son Rakihouia taking one party to explore the coastline, and himself leading another party to explore the inland.
- [21] Ngai Tahu tradition considers Rakaihautu led his travel party through the interior of Te Waipounamu using his famous ko (a long Polynesian digging stick), named Tuwhakaroria, to strike the land and create the freshwater lakes of Te Waipounamu, including that of Te Waihora. Hence another name for Te Waihora is Te Kete Ika a Rakaihautu, which means 'the food basket of Rakaihautu'. Te Waihora and Wairewa were the last lakes that Rakaihautu is said to have created.
- [22] The inshore coastline of Te Waihora was named Ka Poupou o Rakihouia. While Rakaihautu was travelling through the inland of the island, his son Rakihouia voyaged southwards in Uruao along the eastern coastline of Te Waipounamu from Whakatu, assessing a whole range of food resources referred to in the Ngai Tahu traditions. Looming large in the story of that voyage is the catching of eels at the mouths of various rivers. From that comes one of the traditional names of the Canterbury sea-board Ka Poupou a Rakihouia (the eel weirs of Rakihouia). The name refers to the posts or poupou put in by Rakihouia when constructing his eel weirs.⁶

1.4 Ngai Tahu – Occupation and Use of Te Waihora

- [23] Te Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth) were central elements in the original Ngai Tahu settlement traditions and occupations of Canterbury. The traditional histories are a descriptive inventory of the resource wealth of the region. They refer to the eels and other fish abounding in the rivers and streams and to eels, patiki, mohoau (big black flounders) and other species as being particularly abundant in Te Waihora. These food resources and the surrounding settlements of Te Waihora are a major factor in the migration and occupying traditions of Ngai Tahu.
- [24] Te Ruahikihiki claimed ownership of Taumutu, and his descendants today are collectively known as Ngai Te Ruahikihiki. He established the pa or Orariki at Taumutu where the old Maori church, Hone Wetere now stands. His son Moki, often referred to as Moki II, established his pa where the Taumutu marae now stands, and that pa is referred to as Te Pa o Moki. Te Ruahikihiki also established settlements at Taumutu and in the Te Waihora area, especially the southern part of the lake. That was the putahi or traditional heartland of that particular section of the Ngai Tahu tribe. Taumutu was always the major centre of permanent occupation at Te Waihora, while most other places around the lake tended to be seasonal resource gathering points. Te Ruahikihiki is one of the five primary hapu or sub-tribes of Ngai Tahu today.⁷

1.5 Ngai Tahu Treaty of Waitangi Claim

- [25] Following the signing of the Treaty of Waitangi in 1840, Ngai Tahu began entering in a series of land sale deeds with the Crown. Under the land purchases the Crown guaranteed Ngai Tahu that

⁶ Statement of Evidence of Sir Tipene Gerard O'Regan, section 2.

⁷ Statement of Evidence of Sir Tipene Gerard O'Regan, section 3.

lands needed for settlement and mahinga kai would be set aside. However in reality, Ngai Tahu found themselves either landless or confined to tiny plots of land for cultivation and livestock only. Mahinga kai was now on land being opened up to Pakeha settlers, and significant resources were being depleted or were gradually being destroyed. Loss of mahinga kai meant Ngai Tahu could no longer feed themselves and trade as they had done in their traditional way.

- [26] In 1848 Te Waihora (Lake Ellesmere) was part of the Canterbury Purchase (otherwise known as Kemp's Purchase). Under the terms of the Kemp Deed, Ngai Tahu was promised that all mahinga kai areas would be set aside. The Crown subsequently determined that mahinga kai sites were restricted to those areas currently under cultivation, such as gardens and eel weirs. As a result Ngai Tahu lost ownership and control of and access to virtually all of their traditional food gathering areas within the Canterbury region including Te Waihora.
- [27] In 1986 the Ngai Tahu Maori Trust Board lodged a claim with the Waitangi Tribunal concerning Treaty and land purchase deed breaches. In the Ngai Tahu Claim, the loss of authority over and the degradation of Te Waihora was an important part of the grievance. At one of the Waitangi Tribunal hearings held at Ngati Moki Marae, the Tribunal was presented with evidence about the significance of Te Waihora as a food source to Ngai Tahu, and the adverse impacts that the drainage and degradation of the lake had on Ngai Tahu's ability to gather food from their traditional food basket.
- [28] The Tribunal recommended that Te Waihora be returned to Ngai Tahu, and commented that this was to be accompanied by significant and committed Crown action to restore Te Waihora as a tribal food resource. Subsequent negotiations with the Crown eventually resulted in Ngai Tahu reaching agreement by which several significant food gathering areas were returned to Ngai Tahu, including the lake-bed of Te Waihora (Lake Ellesmere).⁸

1.6 Selwyn/Te Waihora Zone Committee Composition

- [29] The Selwyn/Te Waihora Zone Committee appointed under the Canterbury Water Management Strategy prepared the Zone Implementation Programme and the Zone Committee Solutions Package which form the basis for Variation 1 as notified. Seven Ngai Tahu Papatipu Runanga have interests in the Selwyn/Te Waihora Zone. Six of these are represented on the Zone Committee.⁹ Te Taumutu is the acknowledged Kaitiaki Runanga for Te Waihora.
- [30] The four Banks Peninsula Runanga: Ngati Wheke (based at Rapaki), Koukourarata (Port Levy), Onuku (Akaroa) and Wairewa (based at Little River) also have an interest in Te Waihora. Ngai Tuahuriri and Te Taumutu Runanga also have interests up to the Main Divide. Arowhenua Runanga, based in Temuka, share an interest in the Upper Rakaia but do not sit on the Selwyn/Te Waihora Zone Committee.
- [31] These Runanga all have kaitiaki responsibilities. Kaitiakitanga is the concept of stewardship, and is expressed through actions to protect natural resources including the involvement of Runanga in the decision-making and management of those resources.

1.7 Ngai Tahu Values and Interests

- [32] Having reviewed the historical and traditional matters in the preceding Chapter 1.2 to 1.5, we understand that water is central to Ngai Tahu resource management philosophy of ki uta ki tai –

⁸ Section 1.4 is paraphrased from the Statement of Evidence of Sir Tipene O'Regan, 16 October 2014, page 14.

⁹ The make-up and purpose of the Zone Committee are explained more fully in Chapter Two of this Recommendation Report.

from the mountains to the sea. This requires a holistic view of the world. We also understand that for Ngai Tahu, water is a taonga left by the ancestors to provide and sustain life. It is evident that all the waterways and their associated tributaries, wetlands and springs in the Te Waihora (Lake Ellesmere) Catchment are considered significant resources of cultural, spiritual and historical importance.

- [33] Significant cultural sites with the catchment include: Te Waihora (Lake Ellesmere), Muriwai (Coopers Lagoon), Waikirikiri (Selwyn River), the Kaituna River, the Rakaia and Waimakariri braided rivers and their upper catchment wetlands and lakes, and the Rakaia River mouth. The ability to gather and share food is a cornerstone of Ngai Tahu society, tradition and mana, and is reliant on healthy ecosystems, on water that is fit for human consumption and that is able to support mahinga kai species. More generally, all spring-fed streams, lowland streams and wetlands are of cultural significance, as are areas of mahinga kai and any remaining indigenous biodiversity. Amongst these areas are more specific wahi tapu and wahi taonga sites.¹⁰
- [34] We have borne these Ngai Tahu values and interests in mind when assessing the submissions and further submissions on Variation 1 and amendments sought to the provisions as notified.

¹⁰ Section 42A Report, July 2014, paragraphs 1.30 and 2.3; and Report Number R14/17; February 2014, section 2.2.

Chapter Two

The General Legal Context

[35] In Chapter Two of this report we state our understanding of the general legal context in which the CRC is to give its decisions on the submissions on the variation (including those on the LWRP provisions that would be substituted) and matters raised in the submissions and evidence; and accepting or rejecting the amendments requested. In Chapter Three we address questions on the validity of certain submissions on the variation; and in Chapter Four specific legal points raised by submitters.

2.1 The purpose and principles of the RMA

[36] Part 2 of the RMA states the purpose and principles of general application in applying and giving effect to the RMA.

[37] The RMA's overall objective is set out in section 5.¹¹ Its purpose is identified in section 5(1) as “to promote the sustainable management of natural and physical resources.” In doing this, sustainable management is to be given the meaning stated in section 5(2):

In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being 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.

[38] Section 5 contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources;¹² and protecting the environment from adverse effects of use and development is an aspect (though not the only aspect) of sustainable management.¹³

[39] Although section 5 is not itself an operative provision,¹⁴ where applicable the other sections of Part 2 (sections 6, 7 and 8) are operative, albeit at the level of general principles, directing those administering the RMA, and elaborating¹⁵ how section 5 is to be applied in the circumstances described in them.

[40] Section 6 of the RMA identifies matters of national importance, and directs all persons exercising functions and powers under the Act to recognise and provide for them. Of them, those relevant to Variation 1 include:

- The preservation of the natural character of wetlands, lakes and rivers and their margins, and the protection of them from inappropriate use and development.¹⁶
- The protection of outstanding natural features from inappropriate use and development.¹⁷

¹¹ *Environmental Defence Society v NZ King Salmon and ors* [2014] NZSC 38 [151].

¹² *Environmental Defence Society v NZ King Salmon*, cited above, [146].

¹³ *Environmental Defence Society v NZ King Salmon*, cited above, [148].

¹⁴ *Environmental Defence Society v NZ King Salmon*, cited above, [151].

¹⁵ *Environmental Defence Society v NZ King Salmon*, cited above, [25], [149].

¹⁶ RMA s 6(a).

¹⁷ RMA s 6(b).

- The protection of areas of indigenous vegetation and significant habitats of indigenous fauna.¹⁸
- The maintenance and enhancement of public access to and along lakes and rivers.¹⁹
- The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga.²⁰
- The protection of protected customary rights.²¹

- [41] The word ‘inappropriate’ in section 6(a), (b) and (f) should be interpreted “against the backdrop of what is sought to be protected or preserved.”²²
- [42] The application of these matters, which are described as having national significance, is to serve the Act’s purpose of promoting sustainable management. They are not to be achieved at all costs. Protection is not an absolute concept, and a reasonable, rather than strict, assessment is called for.²³
- [43] 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, nearly all of which could be relevant to Variation 1 and the submissions on it.
- [44] Section 8, the final section in Part 2 of the Act, directs persons exercising functions and powers under it to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
- [45] We understand that this direction does not extend to principles that are not consistent with the scheme of the RMA, nor does it provide for allocating resources to Māori.²⁴ It does not impose a duty on functionaries to take into account past wrongs, or to be open to ways to restore imbalance.²⁵
- [46] Although Part 2 states the purpose of the Act and principles in elaboration of the purpose, where specific, unqualified prescriptions of a superior instrument by which Part 2 is given effect (the lawfulness and the meaning of which are not disputed, and which ‘cover the field’) apply, a decision-maker is not free to ‘refer back’ to Part 2²⁶ to diminish the effect given to such a prescription.

2.2 Section 9

- [47] As its title indicates, the LWRP is directed to management of land and water resources in Canterbury. The principal provision of the RMA enabling management of the use of land is section 9, of which subsections (2) and (3) are relevant:

9 Restrictions on use of land

...

- (2) No person may use land in a manner that contravenes a regional rule unless the use—
- (a) is expressly allowed by a resource consent; or
 - (b) is an activity allowed by section 20A.

¹⁸ RMA s 6(c).

¹⁹ RMA s 6(d).

²⁰ Section 6(e).

²¹ RMA, s 6(g).

²² *Environmental Defence Society v NZ King Salmon*, cited above, [105].

²³ *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA) 260.

²⁴ *Minhinnick v Minister of Corrections* EnvC A043/2004.

²⁵ *Waikanae Christian Camp v Kapiti Coast District Council* (HC Wellington 27/10/2004 Mackenzie J).

²⁶ *Environmental Defence Society v NZ King Salmon*, cited above, [80], [88].

- (3) No person may use land in a manner that contravenes a district rule unless the use—
- (a) is expressly allowed by a resource consent; or
 - (b) is allowed by section 10; or
 - (c) is an activity allowed by section 10A.
- ...

[48] Because in this respect section 9 differs from sections 13 to 15 on management of water, we note that the scheme of subsections 9(2) and (3) is that use of land is regulated only to the extent that it contravenes a regional or district rule, and subject to the exceptions where the use is expressly allowed by a resource consent, or by applicable provisions for existing activities or uses (sections 20A, 10, and 10A respectively).

2.3 Sections 13 to 15

[49] Section 13(1) of the RMA restricts activities in the bed of any lake or river unless expressly allowed by a regional rule or a resource consent. Section 14 regulates taking, use, damming, or diverting water unless expressly allowed by a national environmental standard, a regional rule or a resource consent; or the water is required to be taken for an individual's reasonable domestic needs or the reasonable needs of an individual's animals for drinking water and the taking does not, or is not likely to, have an adverse effect on the environment; or the water is required to be taken for fire-fighting.

[50] Section 15(1) regulates discharge of contaminants into the environment. Relevantly, it prohibits discharge of any contaminant or water into water; discharge of any contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water, unless the discharge is expressly allowed by a national environmental standard or regional rule or resource consent. Section 15(2A) prohibits discharge of a contaminant into the air, or into or onto land in a manner that contravenes a regional rule unless the discharge is expressly allowed by a national environmental standard or a resource consent, or is allowed by section 20A.

[51] Section 2(1) of the RMA prescribes that the meaning of the term 'contaminant':

- ...includes any substance (including gases, odorous compounds, liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy or heat—
- (a) When discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or
 - (b) When discharged onto or into land or into air, changes or is likely to change the physical, chemical or biological condition of the land or air onto or into which it is discharged.

2.4 Functions of regional councils

[52] Section 30 of the RMA lists the functions of regional councils for the purpose of giving effect to the Act in their regions. The following of those functions are relevant to Variation 1—

- Establishing and implementing objectives, policies and methods to achieve integrated management of the natural and physical resources of the region;²⁷
- 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;²⁸

²⁷ RMA s 30(1)(a).

- 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; maintenance and enhancement of ecosystems in water bodies; avoidance or mitigation of natural hazards; prevention or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances;²⁹
- Investigation of land for identifying and monitoring contaminated land;³⁰
- 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;³¹
- Control of discharges of contaminants into or onto land, air or water and discharges of water into water;³²
- If appropriate, establishment of rules in a regional plan to allocate the taking or use of water;³³
- 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 and enhancement of the quality of water in that water body; maintenance of the quantity of water in that water body; and avoidance or mitigation of natural hazards;³⁴
- Establishment, and implementation, of objectives, policies and methods for maintaining indigenous biological diversity;³⁵ and
- Strategic integration of infrastructure with land use through objectives, policies and methods.³⁶

[53] 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 (section 30(4)(a) and (b)); regulate allocating a resource in anticipation of expiry of existing consents (section 30(4)(c) and (d)); authorise allocating a resource among competing types of activities (section 30(4)(e)); and limiting allocating water if the allocation does not affect activities authorised by section 14(3)(b) to (e).

2.5 Contents of regional plans

[54] Section 63(1) of the RMA states that the purpose of a regional plan “is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act.”

[55] Section 65(1) authorises a regional council to prepare a regional plan for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g) or (ga); and section 65(3) directs that a plan is to be prepared in accordance with Schedule 1. From the omission from that list of section 30(1)(gb), we infer that a regional plan should not apply to the strategic integration of infrastructure with land use.

[56] Section 66(1) stipulates 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

²⁸ RMA s 30(1)(b).

²⁹ RMA s 30(1)(c).

³⁰ RMA s 30(1)(ca).

³¹ RMA s 30(1)(e).

³² RMA s 30(1)(f).

³³ RMA s 30(1)(fa)(i).

³⁴ RMA s 30(1)(g).

³⁵ RMA s 30(1)(ga).

³⁶ RMA s 30(1)(gb).

regulations. Section 66(2) stipulates that when preparing a regional plan, the 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 (section 66(2)(c)(i)). 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.

- [57] On the CRC's duty to prepare a regional plan in accordance with its functions under any regulations, we identify the following regulations made under the RMA:
- Resource Management (National Environmental Standard for Sources of Human Drinking Water) Regulations 2007
 - Resource Management (Measurement and Reporting of Water Takes) Regulations 2010
 - Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011³⁷
- [58] On the 2007 regulations, regulation 8 contains certain directions on granting water permits or discharge permits. Regulation 9 prohibits regional councils from making permitted activity regional rules where the activities have potential to affect a registered drinking-water supply that provides no fewer than 501 people with drinking water for not less than 60 days in each year. Regulation 10 prohibits regional councils from making permitted activities various activities that could adversely affect the quality of drinking water by health quality criteria or aesthetic determinants exceeding guideline values. Regulation 13 enables a local authority to make rules that are more stringent than the drinking-water national environmental standard.
- [59] The 2010 regulations contain certain stipulations about measuring water taken. However they do not apply directly to the contents of regional plans, although they may override regional plans, for example, in relation to the provision of information.
- [60] On the 2011 regulations, regulation 4 expressly states that those regulations deal with territorial authority functions under section 31 of that Act, and do not deal with regional council functions under section 30 of that Act. So those regulations are not directly applicable to preparing and deciding submissions on the LWRP, or on Variation 1 to it. We understand that their relevance to those functions is confined to regional councils being aware of the application of the regulations to territorial authorities within the region.
- [61] The submissions on Variation 1 did not raise any issue of non-compliance with these regulations, and we are not aware of any respect in which the variation fails to comply with any of them.
- [62] On the Council's duty to have regard to management plans under other Acts, we have regard to the Sports Fish and Game Birds Management Plans for North Canterbury and for the Central South Island under the Conservation Act 1987.
- [63] On the Council's duty to take into account planning documents recognised by an iwi authority, we have identified the following that are recognised by Ngāi Tahu iwi:
- Te Whakatau Kaupapa: Ngāi Tahu Resource Management Strategy for the Canterbury Region (1990). (This document pre-dates the RMA.)

³⁷ SR 2011/361.

- Te Rūnanga o Ngāi Tahu Freshwater Policy (1999), which applies to the whole of the Te Rūnanga o Ngāi Tahu rohe, an area which extends beyond Canterbury. This policy document reflects a holistic framework that seeks continuous improvement in water quality and quantity standards. This document includes objectives, policies and strategies on water management.
 - Mahaanui Iwi Management Plan (published February 2013), applies to those Canterbury Papatipu Rūnanga located east of the main divide and in the land area between the Hakatere/Ashburton and Hurunui Rivers, including the Selwyn/Te Waihora catchment. It provides comprehensive detail on the cultural values of the constituent Papatipu Rūnanga, and reflects many of the aspirational aspects of the Canterbury Water Management Strategy.³⁸
- [64] These documents are not as specific in language as regional rules are expected to be. Rather, they state Ngāi Tahu cultural values; seek integration of tangata whenua values and cultural objectives into the planning provisions of the LWRP; and assert the right of Ngāi Tahu to participate in the management of natural resources and advocate for continuous improvement in the quantity and quality of natural resources. The cultural values framework of the iwi management plans is responded to in section 1.3.1 of the LWRP, which would not be affected by Variation 1.
- [65] Our task, when considering submissions on Variation 1, of assessing consistency of Variation 1 with Ngāi Tahu cultural mores is assisted by these iwi documents, which we address in Chapters 6, 8, 10, 11 and 12 of this report.
- [66] 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(3) stipulates that a regional plan is to give effect to any national policy statement, and any regional policy statement. Section 67(4) stipulates that a regional plan is not to be inconsistent with a water conservation order, or any other regional plan for the region. Section 67(5) directs that if a council has allocated a natural resource under section 30(1)(fa) or (fb) and (4), the regional plan is to record how it has done so.
- [67] On the requirement that the regional plan give effect to any national policy statement, there are two national policy statements that have particular bearing on the content of the Variation 1:
- New Zealand Coastal Policy Statement 2010:³⁹
 - National Policy Statement for Freshwater Management 2014.⁴⁰
- [68] We identify relevant provisions of those instruments in paragraphs 97 to 147 of this report.
- [69] The requirement to give effect to those policy statements means that Variation 1 has to give full compliance to them⁴¹ and positively implement them.⁴²
- [70] On the requirement that the regional plan give effect to a regional policy statement, we identify as applicable the **Canterbury Regional Policy Statement 2013** ('the CRPS'). In particular Chapter Two of the CRPS identifies issues of regional significance to Ngāi Tahu; Chapter Four contains provision for Ngāi Tahu and their relationship with resources; Chapter Five relates to land use and infrastructure, Chapter Seven relates to fresh water; Chapter Eight to the coastal

³⁸ The Canterbury Water Management Strategy is described in paras 153 to 163 of this report.

³⁹ NZ Gazette, 4 November 2010.

⁴⁰ NZ Gazette, 4 July 2014.

⁴¹ *GUS Properties v Blenheim Borough* (SC Christchurch M394/75 24 May 1976).

⁴² *Clevedon Cares v Manukau City Council* [2010] NZEnvC 211 [50].

environment; Chapter Nine to ecosystems and biodiversity; Chapter Ten to beds of rivers and lakes and their riparian zones; and Chapter Fifteen to soils. To the extent relevant to submissions on Variation 1, we consider giving effect to the CRPS in sections of this report that deal with various resource use, development and protection topics.

- [71] On the stipulation that the regional plan is not to be inconsistent with a water conservation order, we identify as relevant to Variation 1 the **Lake Ellesmere (Te Waihora) Water Conservation Order** 1990, as amended in 2011 (the WCO). This declares that Lake Ellesmere (Te Waihora) has or contributes to the following amenity or intrinsic values that warrant protection:
- habitat for wildlife, indigenous wetland vegetation and fish: and
 - significance in accordance with tikanga Māori in respect of Ngāi Tahu history, mahinga kai and customary fisheries.
- [72] The WCO also restricts lake opening and closing, and granting resource consents (including water permits) in certain circumstances.
- [73] The **National Water Conservation (Rakaia River) Order** 1988 declares that the Rakaia River and its tributaries include an outstanding natural characteristic in the form of a braided river, and outstanding wildlife habitat, outstanding fisheries, outstanding recreational, angling, and jet-boating features. The Conservation Order requires retaining natural waters in a natural state and contains a separate flow regime for the Rakaia River.
- [74] As no submitter directly asserted otherwise, we find that the submissions on Variation 1 do not raise any issue that the variation would be inconsistent with that water conservation order.
- [75] On the stipulation that the regional plan is not to be inconsistent with any other regional plan for the region, the only regional plan (other than the LWRP itself) having relevant subject-matter is the **Canterbury Regional Coastal Environment Plan** 2005. That plan is mainly directed to the coastal marine area, to which the LWRP and Variation 1 do not extend. Some of its policies refer to the ‘coastal environment’, the extent of which is not defined in the plan.
- [76] Chapter Three of the Coastal Environment Plan identifies as issues the need to maintain the water levels of Lake Ellesmere – Te Waihora through mouth openings; of water quality associated with discharge of lake water to the sea; and reduction in water quality and ecosystem integrity of coastal lakes, lagoons and estuaries. Chapter Five identifies as issues adverse effects of human activity on the coastal environment; particularly on the life-supporting capacity of coastal ecosystems, outstanding landscapes and natural features, natural character, amenity values, and areas of significance to tangata whenua. Chapter Six relates to the natural character and appropriate use of the coastal environment. It identifies Kaitorete Spit and Coopers Lagoon/Muriwai coastline as areas of significant natural value; and contains policies for avoiding, remedying or mitigating adverse effects; and of encouraging restoration or rehabilitation of them in certain circumstances and conditions.
- [77] No submission on Variation 1 directly raised an issue of inconsistency with the Regional Coastal Environment Plan, and from our consideration of its contents, none is evident.
- [78] Section 68 of the RMA empowers regional councils to make rules in a regional plan for carrying out certain functions and for achieving the objectives and policies of the plan; prescribes that in making a rule, a regional council is to have regard to the actual or potential effect (particularly any

adverse effect) on the environment of activities; and, relevantly, contains specific prescriptions for rules relating to levels or flows or rates of use of water, and minimum standards of water quality. Section 69 directs 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. Section 70 applies to regional rules about discharges. Section 70(1) applies to rules that allow discharges as a permitted activity; and section 70(2) applies to rules that require adoption of the best practicable option.

- [79] We keep those duties in mind in addressing submissions on Variation 1 on subject-matter to which those sections apply.
- [80] The procedure for making a variation of a proposed plan is that prescribed in Part 1 of Schedule 1 of the RMA.⁴³ Relevantly, clause 5(1) directs that a local authority that has prepared a proposed plan (a term that includes a variation to a proposed plan⁴⁴) is to prepare an evaluation report for the proposed plan in accordance with section 32, and have particular regard to that report when deciding whether to proceed with the statement or plan.
- [81] 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 the opportunity to make further submissions; clause 8 provides for certain persons to make further submissions;⁴⁵ clause 8B provides that the local authority is to hold a hearing into submissions; clause 10 gives directions on giving a decision on the provisions and matters raised in submissions,⁴⁶ with reasons for accepting or rejecting them;⁴⁷ it is to include a further evaluation of the proposed plan in accordance with section 32AA;⁴⁸ and is to have particular regard to the further evaluation when making its decision.⁴⁹
- [82] Section 32 of the RMA prescribes requirements for preparing and publishing evaluation reports, including an 'amending proposal' that would amend a proposed plan. In particular as applied to Variation 1, section 32 directs that an evaluation report is to examine whether its provisions are the most appropriate way to achieve the relevant objectives by identifying other reasonably practicable options for doing so; assessing the efficiency and effectiveness of the provisions in doing so; and summarising the reasons for deciding on the provisions.⁵⁰ The 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.⁵¹
- [83] 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, including 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

⁴³ RMA Schedule 1 cl 16A(2).

⁴⁴ RMA s43AAC(1)(a).

⁴⁵ 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 under cl 6.

⁴⁶ RMA Schedule 1 cl 10(1).

⁴⁷ RMA Schedule 1 cl 10(2).

⁴⁸ RMA Schedule 1 cl 10(2)(ab).

⁴⁹ RMA Schedule 1 cl 10(4)(aaa).

⁵⁰ RMA s 32(1)(b).

⁵¹ RMA s 32(1)(c).

is uncertain or insufficient information about the subject matter of the provisions, has to assess the risk of acting or not acting.⁵²

- [84] As Variation 1 would amend a proposed plan (the LWRP), but does not itself contain objectives, the examination whether the provisions are the most appropriate is directed to achieving the purpose of the variation;⁵³ and to relevant and continuing objectives of the LWRP.⁵⁴
- [85] By section 32AA, a further evaluation is required for any changes proposed since the original evaluation report was completed. That further evaluation does not need 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.⁵⁵
- [86] Section 136 provides for transfers of holders' interests in water permits, and for regulation of transfers to other sites.

2.6 Other Acts

- [87] There are other Acts that apply directly or indirectly to the CRC's decision on Variation 1 and deciding submissions on it.

Te Runanga o Ngāi Tahu Act 1996 and Ngāi Tahu Claims Settlement Act 1998

- [88] These Acts recognise Ngāi Tahu Whānui as tangata whenua for Canterbury. This is relevant in applying sections 6(e), 7(a) and 8 of the RMA, and in giving effect to relevant sections of the CRPS.

Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

- [89] This Act empowers the CRC (among other matters) to address issues relevant to the efficient, effective, and sustainable management of fresh water in Canterbury. Section 63 applies to consideration of Variation 1 and directs that, in considering any proposed plan, the Council is to have particular regard to the vision and principles of the Canterbury Water Management Strategy, as set out in Part 1 of Schedule 1 of the 2010 Act, in addition to the matters relevant under the RMA to its decisions made under clause 10(1) of Schedule 1 of the RMA. By section 4(1) of that Act the term **vision and principles of the CWMS** means the text of the vision and principles included in the CWMS as reproduced in Part 1 of Schedule 1, and the status and preparation of which are described in Part 2 of Schedule 1, but does not include any amendments to that text. Section 4(2) declares that the inclusion of the vision and principles of the CWMS in Part 1 of Schedule 1 does not accord to the CWMS or its vision and principles any status in law other than as provided in that Act.
- [90] The text of the CWMS vision and principles reproduced in Part 1 of Schedule 1 of the 2010 Act includes a statement of the **vision**, and also states **fundamental principles**, including primary principles and supporting principles.
- [91] We address the Strategy and its vision and principles in Chapters 10, 11 and 12 of this report.

⁵² RMA s 32(2).

⁵³ RMA s 32(6)(b).

⁵⁴ RMA s 32(3).

⁵⁵ RMA s32AA(1)(d)(ii).

Canterbury Earthquake Recovery Act 2011

- [92] This Act authorised the making of the Recovery Strategy for Greater Christchurch;⁵⁶ the Land Use Recovery Plan;⁵⁷ and the Christchurch Central Recovery Plan.
- [93] The Recovery Strategy applies to an area of certain districts, including the Selwyn District. The Act stipulates that the Strategy is to be read together with and forms part of an RMA document (including a proposed regional plan and a proposed variation of it); prevails where there is any inconsistency between it and an RMA document; and that an RMA document is not to be interpreted or applied in a way that is inconsistent with it.⁵⁸
- [94] Also an RMA document is not to be inconsistent with the Land Use Recovery Plan or the Christchurch Central Recovery Plan.
- [95] No submission on Variation 1 raised an issue of inconsistency with the Recovery Strategy or with any Recovery Plan under the 2011 Act; and from our consideration of its contents, none is evident.

2.7 National Policy Statements

- [96] In considering the submissions on Variation 1 and the recommendations that we make on them, we apply the requirement that the LWRP is to give effect to national and regional policy statements.⁵⁹ Those are strong directives, creating a firm obligation,⁶⁰ and require positive implementation.
- [97] The **New Zealand Coastal Policy Statement** (NZCPS) has several specific objectives. Of them, Objectives 1 and 6 are particularly relevant to Variation 1.
- [98] Objective 1 is to safeguard the integrity, form, functioning and resilience of the coastal environment, and sustain its ecosystems, including [in] estuaries and [on] land. It specifically refers to maintaining and enhancing natural biological and physical processes in the coastal environment, recognising their dynamic, complex and interdependent nature; and protecting representative or significant natural ecosystems and maintaining the diversity of indigenous coastal flora and fauna.
- [99] Objective 6 is to enable people and communities to provide for their social, economic and cultural wellbeing and their health and safety through use and development. Relevantly, this objective includes recognising:
- that protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits.
 - that protection of habitats of living marine organisms contributes to the social, economic and cultural wellbeing of people and communities.

⁵⁶ Approved 1 June 2012.

⁵⁷ Gazetted 6 December 2013.

⁵⁸ Canterbury Earthquake Recovery Act 2011 s 15.

⁵⁹ RMA, s 67(3).

⁶⁰ *Environmental Defence Society v NZ King Salmon*, cited above, [77].

- [100] The NZCPS also states policies in order to achieve the purpose of the RMA in relation to the coastal environment.⁶¹ It acknowledges that the extent and characteristics of the coastal environment vary from locality to locality, and identifies that it includes, among other things:
- areas where coastal processes influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these;⁶²
 - coastal vegetation and the habitat of coastal species including migratory birds;⁶³
 - elements and features that contribute to the natural character, landscape, visual qualities or amenity values;⁶⁴
 - items of cultural or historic heritage ... on the coast.⁶⁵
- [101] Many of the policies of the NZCPS are relevant to the content of the LWRP and of Variation 1. In selecting the following as particularly applicable, we do not overlook that others are also relevant, and that the instrument deserves to be read as a whole. We have done that.
- [102] Policy 2, on the place of tangata whenua in the coastal environment, includes:
- recognising that they have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;⁶⁶
 - involving tangata whenua in preparation of regional plans by effective consultation in accordance with tikanga Māori;⁶⁷
 - incorporating mātaurangi Māori in regional plans;⁶⁸
 - taking into account any relevant iwi resource management plan or other recognised and relevant document;⁶⁹
 - providing for opportunities for tangata whenua to exercise kaitiakitanga over waters, lands and fisheries in the coastal environment, including in respect of their taonga;⁷⁰
 - recognising the importance of Māori cultural and heritage values.⁷¹
- [103] Policy 3 is adopting a precautionary approach to activities whose effects on the coastal environment are uncertain, unknown or little understood but potentially significantly adverse. It directs particular use of that approach to resources potentially vulnerable to effects from climate change.⁷²
- [104] Policy 4 is also relevant to Variation 1. It is to provide for integrated management of natural and physical resources in the coastal environment and activities that affect it. It directs co-ordinated management of activities in the coastal environment, including, relevantly, land use activities that are likely to affect water quality in the coastal environment, and significant adverse cumulative effects.⁷³

⁶¹ RMA, section 56.

⁶² NZCPS Policy 1(2)(c).

⁶³ NZCPS Policy 1(2)(e).

⁶⁴ NZCPS Policy 1(2)(f).

⁶⁵ NZCPS Policy 1(2)(g).

⁶⁶ NZCPS Policy 2(a).

⁶⁷ NZCPS Policy 2(b).

⁶⁸ NZCPS Policy 2(c).

⁶⁹ NZCPS Policy 2(e).

⁷⁰ NZCPS Policy 2(f).

⁷¹ NZCPS Policy 2(g).

⁷² NZCPS Policy 3(2).

⁷³ NZCPS Policy 4(a).

- [105] Policy 7(2) is to identify in regional plans coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects, and include provisions to manage those effects, including setting thresholds or acceptable limits to change.
- [106] Policy 11 is to protect indigenous biological diversity in the coastal environment. The policy includes avoiding adverse effects of activities on various classes of vulnerable taxa and species; and avoiding significant adverse effects on certain other classes.
- [107] Policies 13 and 14 relate to preservation and restoration of the natural character of the coastal environment, including regional plan provisions for them.⁷⁴
- [108] Policy 15 includes protecting natural features and natural landscapes from inappropriate use, and also involves regional plan provisions.⁷⁵
- [109] Policy 21 is directed to where the quality of water in the coastal environment has deteriorated so that it is having a significant adverse effect on ecosystems, natural habitats, or water-based recreational activities, or is restricting existing uses, such as shellfish gathering and cultural activities. The policy involves giving priority to improving the water quality. It identifies, among other methods, restoring water quality to at least a state that can support ecosystems and natural habitats; requiring that stock are excluded from water bodies and riparian margins in the coastal environment within a prescribed time-frame; and engaging with tangata whenua to identify where they have particular interests or values, and remedying or mitigating adverse effects on them.
- [110] Policy 23 is directed to discharge of contaminants to water in the coastal environment. Relevantly it calls for particular regard to the sensitivity of the receiving environment; the nature of the contaminants discharged; the risks to the environment if limits on concentrations are exceeded; the capacity of the receiving environment to assimilate the contaminants; and minimising adverse effects on the life-supporting capacity of the water. The policy also addresses restricting discharges of human sewage to water in the coastal environment, including by reference to tangata whenua values.
- [111] The **National Policy Statement for Freshwater Management 2014** (the 2014 NPSFM) came into force on 1 August 2014, after Variation 1 had been prepared and publicly notified, and after the periods for lodging submissions and further submissions on it had expired. The variation had been prepared to give effect to the previous National Policy Statement on Freshwater Management 2011 (the 2011 NPSFM), which was revoked from the date of entry into effect of the 2014 NPSFM.⁷⁶ Although the objectives of the 2014 NPSFM are largely the same as those of the 2011 statement, some of the policies of the 2014 NPSFM are different. So the CRC will need to revise the LWRP (including any content that may be inserted by Variation 1) to ensure that it will give effect to the 2014 NPSFM. Meanwhile, our consideration of the submissions in this respect has to be focused on the extent to which it enables the LWRP to give effect to the 2014 NPSFM, mainly the provisions of it that are substantially in common with those of the 2011 NPSFM for which it was prepared.
- [112] The 2014 NPSFM contains a preamble; a section on reviewing implementation and effectiveness of the NPSFM in achieving the purpose of the RMA; a section on the national significance of fresh water and Te Mana o te Wai; a section on interpretation of terms used; Section A containing objectives and policies on water quality; Section B containing objectives and policies

⁷⁴ NZCPS Policy 13(1)(d); Policy 14(b).

⁷⁵ NZCPS Policy 15(d).

⁷⁶ Order in Council made 30 June 2014 published in the *NZ Gazette* 4 July 2014.

on water quantity; Section C containing an objective and policies on integrated management; Section CA containing an objective and policies on a national objectives framework; Section CB containing an objective and a policy on monitoring plans; Section CC containing an objective and policies on accounting for freshwater takes and contaminants; section D stating an objective and a policy on tangata whenua roles and interests; Section E stating a policy on progressive implementation programmes; Appendix 1 on national values and uses for fresh water; Appendix 2 containing attribute tables; Appendix 3, being a placeholder for future content (not yet inserted) on existing infrastructure for the purpose of Policy CA3(b); and Appendix 4, being a placeholder for future content (not yet inserted) on freshwater management units and periods of time for transition under Policy CA4.

- [113] For the present purpose, we address particularly the preamble, the section on Te Mana o te Wai, and Sections A, B, C, CA, D and E. Section CB on monitoring, and Section CC on accounting for freshwater takes and contaminants, relate to the executive responsibility of regional councils, and do not bear on the contents of regional plans.
- [114] In what follows we summarise the contents of those other sections to assist the reader to follow the process we have followed. However, applying those sections requires reference to the full texts of those sections in the context of the entire instrument, and that is what we have done.
- [115] **The preamble** discusses the value of freshwater resources and their importance; and states a need for national direction for this management, reflecting catchment-level variations and demands, and that growth is achieved with a lower environmental footprint.
- [116] The preamble notes that the NPS sets national ‘bottom lines’ for ecosystem health and human health for recreation, and minimum acceptable standards for other national values; and that it recognises a range of iwi and community interests in freshwater including environmental, social, economic and cultural values. Freshwater objectives for a range of tangata whenua values are to recognise Te Mana o te Wai, and it is noted that iwi and hapū see freshwater as supporting a healthy ecosystem and human health. The preamble stipulates that overall, within a region freshwater quality is to be maintained and improved.
- [117] The preamble explains that national ‘bottom lines’ are not standards that have to be achieved immediately, but where freshwater management units are below the ‘bottom line’, they need to be improved over time, it being for communities and iwi to determine the pathway and timeframe for doing so. Adjustment timeframes are to be based on the economic effects of the speed of change, and improvements in freshwater quality may take generations depending on the characteristics of each freshwater management unit.
- [118] The section on **Te Mana o te Wai** notes that a range of community and tangata whenua values may collectively recognise the national significance of fresh water and Te Mana o te Wai as a whole; and the aggregation of community and tangata whenua values and the ability of freshwater to provide for them over time recognises the national significance of fresh water and Te Mana o te Wai.
- [119] **Section A** relates to water quality, and has two objectives. Objective A1 is to safeguard both the life-supporting capacity, ecosystem processes and indigenous species, including their associated ecosystems, of freshwater; and the health of people and communities at least as affected by secondary contact with fresh water. Those are to be safeguarded in sustainably managing the use and development of land, and of discharge of contaminants. Objective A2 is that the overall quality of fresh water in a region is maintained or improved while protecting significant values of

outstanding water bodies, protecting the significant values of wetlands, and improving the quality of fresh water in water bodies that have been degraded by being over-allocated.

- [120] For implementing those objectives there are four policies, and they contain directions to regional councils for their regional plans.
- [121] Policy A1 directs that regional plans are to establish freshwater objectives in accordance with Policies CA1-CA4 and freshwater quality limits for all freshwater management units having regard to reasonably foreseeable impacts of climate change, the connection between water bodies and the connections between freshwater bodies and coastal water. They are also to establish methods to avoid over-allocation.
- [122] Policy A2 applies where freshwater units do not meet the freshwater objectives made under Policy A1. The council is to specify targets and implement methods in a way that considers the sources of contaminants recorded under Policy CC1, to assist improvement of water quality to meet the targets within a defined timeframe.
- [123] Relevantly, Policy A3 is regional councils, where permissible, making rules requiring adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in the contaminant or any resulting contaminant entering fresh water.
- [124] Policy A4 directs certain interim policies for considering applications for discharges of contaminants. The policy described in paragraph 1 is to apply to applications lodged after the 2011 NPSFM took effect; and the policy described in paragraph 2 is to apply to applications lodged after the 2014 NPSFM took effect.
- [125] **Section B** relates to water quantity, and has four objectives. Objective B1 applies in sustainably managing the taking, using, damming, or diverting of fresh water. The objective is to safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water. Objective B2 is to avoid any further over-allocation of fresh water and phase out existing over-allocation. Objective B3 is to improve and maximise the efficient allocation and efficient use of water. And Objective B4 is to protect significant values of wetlands and of outstanding freshwater bodies.
- [126] Of the seven policies for implementing those objectives, all except Policy B5 require provisions in regional plans. Policy B5 applies to decisions allocating water, and is not directly relevant to the content of Variation 1 to the LWRP.
- [127] Policy B1 directs that regional plans establish freshwater objectives in accordance with Policies CA1-CA4 and set out environmental flows and/or levels for all freshwater management units in the region (except ponds and naturally ephemeral water bodies) to give effect to the NPSFM objectives, having regard at least to the reasonable foreseeable impacts of climate change; the connection between water bodies; and the connections between freshwater bodies and coastal water.
- [128] Policy B2 is that regional plans provide, to the extent needed, for efficient allocation of fresh water to activities within the limits set to give effect to Policy B1.
- [129] Policy B3 is that regional plans state criteria, to the extent needed, for deciding transfers of water take permits, including to improve and maximise efficient allocation of water.

- [130] Policy B4 is regional councils identifying methods in regional plans to encourage efficient use of water.
- [131] Policy B6 is regional councils setting defined timeframes and methods for phasing out over-allocation, including reviewing water permits and consents, to ensure the total amount of water allocated in a freshwater management unit is reduced to a level set to give effect to Policy B1.
- [132] Policy B7 directs regional councils to include in regional plans a certain transitional policy about considering certain applications that will apply until changes to give effect to Policies B1, B2 and B6 have become operative.
- [133] **Section C** relates to integrated management; and Objective C1 is to improve integrated management of fresh water and the use and development of land in whole catchments, including interactions between fresh water, land, associated ecosystems and the coastal environment.
- [134] Policy C1 is regional councils managing fresh water and land use and development in catchments in an integrated and sustainable way, so as to avoid, remedy, or mitigate adverse effects, including cumulative effects.
- [135] Policy C2 relates to contents of regional policy statements, so is not applicable to Variation 1 to the LWRP.
- [136] **Section CA** relates to a national objectives framework; Objective CA1 being providing an approach to establish freshwater objectives for national values and any other values, that is nationally consistent, and recognises regional and local circumstances.
- [137] Policy CA1 is regional councils identifying freshwater management units for all freshwater bodies in their regions.
- [138] Policy CA2 details the process for developing freshwater objectives for all freshwater management units. The process involves including compulsory values and other appropriate values having regard to local and regional circumstances, for which relevant attributes are provided in Appendix 2, and other attributes relevant for each value identified. The policy also lists several matters to be considered at all relevant points in the process.
- [139] Policy CA3 is that freshwater objectives for compulsory values are generally set at or above the national bottom lines for all freshwater management units. There is an exception for where the existing quality of a freshwater unit is already below the bottom line and the regional council considers it appropriate to set the objective below the bottom line because it is caused by natural occurring processes, or existing infrastructure listed in Appendix 3 contributes to its quality.
- [140] Policy CA4 allows a freshwater objective to be set below a bottom line on a transitional basis in terms of Appendix 4.
- [141] Appendixes 3 and 4 are currently empty.
- [142] **Sections CB** and **CC** relates to monitoring plans, and to accounting for freshwater takes and contaminants respectively. They are not relevant to the content of Variation 1.
- [143] **Section D** relates to tangata whenua roles and interests. Objective D1 is to provide for involvement of iwi and hapū, and ensure that tangata whenua values and interests are identified and reflected in the management of fresh water and associated ecosystems and decision-making regarding freshwater, including on how all other objectives of the NPSFM are given effect to.

- [144] Policy D1 is local authorities taking reasonable steps to involve iwi and hapū in the management of freshwater and ecosystems; working with them to identify tangata whenua values and interests; and reflecting those values and interests in management and decision-making.
- [145] **Section E** relates to implementation of NPSFM policies. Policy E1 gives a general direction that regional councils are to implement the policies as promptly as is reasonable and so they are fully completed by 31 December 2025.⁷⁷ However a council may extend the completion date to 31 December 2030 if it considers meeting the 2025 date would result in lower quality planning, or it would be impracticable to complete implementation by then.⁷⁸ Also, by Policy E1(ba), if a council is satisfied it is impracticable to complete implementation fully by 31 December 2015, it may implement a programme of defined time-limited stages by which it is to be completed by 31 December 2025, or 31 December 2030 if Policy E1(ba) applies. Policy E1 also prescribes adoption, publication and reporting of staged implementation programmes.
- [146] **Appendix A** identifies compulsory national values (health and mauri of water and the people); additional national values (health and mauri of the environment; of mahinga kai/food gathering and fisheries; mahi māra/cultivation; wai tapu/sacred waters; wai Māori/municipal and domestic water supply; Āu Putea/economic or commercial development; and he ara haere/ navigation).
- [147] **Appendix B** is a detailed table of attributes for ecosystem health and for human health for recreation.

2.8 Proposed Land and Water Regional Plan

- [148] The LWRP, which Variation 1 would vary, was prepared to implement relevant parts of the Canterbury Regional Policy Statement. Following public notification, some 354 submissions were lodged with the CRC, many of them requesting numerous alterations to the plan. Hearing commissioners appointed by the CRC heard and considered the submissions and evidence on them, and made a report with recommendations for amendments to the plan. The CRC received the hearing commissioners' report, and adopted its recommendations. Several submitters lodged appeals to the High Court on points of law. Those appeals have not yet been heard, so the plan cannot yet be made operative, and meanwhile retains its status as 'proposed.'
- [149] It would not be appropriate for us to presume that as an outcome of any of those appeals any further amendment to the proposed LWRP will, or will not, be made. Therefore, in the following, we refer to the proposed LWRP as amended by the CRC's decision adopting the hearing commissioners' recommendations.
- [150] The LWRP sets objectives which state comprehensive outcomes for the use and development of the land and water resources of the Canterbury region. It also contains strategic and other policies for achieving those objectives; and rules for implementing the policies. They include general policies for nutrient management and for abstraction of water, and rules for implementing those policies.
- [151] The objectives and strategic policies form freshwater objectives for the whole region, including outcomes (both numeric and descriptive) and limits for the region generally. As outlined in Chapter One of this report, the scheme of the LWRP is that specific freshwater outcomes and limits to be applicable to various catchments are included in 'sub-region sections' of the plan by variation or change. The relationship between the general policies and those specific to a

⁷⁷ NPSFM 2014 Policy E1(b).

⁷⁸ NPSFM 2014 Policy E1(ba)

particular sub-region is described by section 4, which prescribes that where the plan contains policies on the same subject-matter both in section 4 and in a sub-regional section, in general those in the sub-regional section are to take precedence. The exceptions are that the strategic policies in Policies 4.2 to 4.10 take precedence; and that Policy 4.1 is to take precedence unless catchment-specific outcomes are specified in a sub-regional section.

- [152] Variation 1 is an example of that process. It would amend section 11 of the LWRP, which relates to the Selwyn-Te Waihora part of the region. It would also make consequential amendments to two region-wide rules in section 5; and amendments to section 9 (which applies to the Christchurch-West Melton sub-region), in respect of the West Melton special zone which straddles the boundary of the two sub-regions.

2.9 Canterbury Water Management Strategy

- [153] We have already mentioned the direction in section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 that particular regard is to be given to the vision and principles of the Canterbury Water Management Strategy (CWMS) set out in Part 1 of Schedule 1 of that Act.

- [154] The preparation of the CWMS was supervised by a multi-stakeholder steering group under the overall leadership of the Canterbury Mayoral Forum. It followed recognition that a shift was needed from effects-based management of individual consents to integrated management based on water management zones and management of cumulative effects of both water abstraction and land-use intensification.

- [155] The vision stated there 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.

- [156] The primary principles include sustainable management, a regional approach, and kaitiakitanga. The first is stated to require that water is managed in accordance with sustainability principles and to be consistent with the RMA and the Local Government Act. The second primary principle provides that the planning of natural water use is to be guided by first and second order priority considerations. Those in the first order are the environment, customary use, community supplies, and stock water. Those in the second order are irrigation, renewable electricity generation, recreation, tourism, and amenity. Several additional points relate to that primary principle. The third primary principle, kaitiakitanga, is explained as follows:

The exercise of kaitiakitanga by Ngai Tahu applies to all water and lakes, rivers, hapua, waterways and wetlands, and shall be carried out in accordance with tikanga Maori.

- [157] The supporting principles include natural character, indigenous biodiversity, access, quality of drinking water, recreational and amenity opportunities, and community and commercial use. These are all important, too.
- [158] In order to give effect to the vision and principles of the Strategy, collaborative zone committees were set up to facilitate community engagement and (by consensus where possible) to identify community-informed outcomes.
- [159] The Selwyn Waihora Zone Committee comprises representatives of the Christchurch City Council, the Selwyn District Council and the CRC, together with seven appointed community

members and six rūnanga representatives. It engaged with a range of organisations and communities; and after an expert workshop, developed recommendations for a Zone Implementation Programme (ZIP). That identified nine priority outcomes, and more-defined specific outcomes from which progress might be measured.

[160] The zone committee also recommended that the CRC should work through the zone committee to set water quality limits in accordance with the NPSFM; and the CRC asked the zone committee for water management solutions (consistent with the fundamental principles of the CWMS) for setting environmental flows for surface streams, rivers and groundwater; and also for catchment load limits for nutrients. The zone committee's response was a 'solutions package' (contained in a document called the 'Selwyn Waihora ZIP Addendum'). The overall goal of the solutions package is to improve cultural and environmental outcomes in the Selwyn Waihora catchment, while maintaining farm viability and economic growth. It states these values:

- The lake —Te Waihora— and its margins are a taonga for Ngāi Tahu. This reflects the importance of the lake to Ngāi Tahu culture, history and identity, and the concentration of mahinga kai, wāhi tapu and wāhi Taonga.
- Agriculture, underpinned by reliable water supply, is a significant contributor to the local and regional economies.

[161] The key pathways for achieving the zone committee's solutions package are these:

- Lake rehabilitation by addressing phosphorus in the lake-bed sediments, and improved management of the lake level.
- Farming at better than 'good management practice' nitrogen losses, including nitrogen discharge allowances; mandatory farm environment plans; excluding livestock from waterways; improved management of drains; removal of sediment from some waterways; enhancement of wetlands; and effective riparian margins.
- Allocation of water to deliver ecological and cultural flows; and associated prohibition on new water takes, reduction in allocated volumes and restriction on transfers of water permits.
- Recognising that the Central Plains Water irrigation scheme is designed to use alpine water to irrigate farmland in place of taking groundwater, potentially resulting in aquifer recharge and improved flows lower in the catchment.
- Managing the catchment to recognise its cultural importance to Ngāi Tahu by managing land-use activities that could affect restoration of the mauri and mahinga kai value of Te Waihora, and that Waikekewai and Taumutu are wai tapu.

[162] The CRC endorsed and largely used the ZIP Addendum as the basis for the Selwyn Waihora sub-regional section of the LWRP. However the obligation imposed by section 63 of the 2010 Act is confined to having particular regard to the vision and principles of the CWMS as reproduced in that Act. There is no requirement at law for the LWRP or Variation 1 to incorporate, or give effect to, the solutions package or the ZIP Addendum.

[163] Even so, it was submitted that it is necessary to have regard to the CWMS as a whole, and to the zone committee process under it, to give effect to the vision and principles and to the NPSFM. We address that question in Chapters 6, 7, 10, 11 and 12 of this report.

2.10 Consideration process

[164] In this chapter we have identified from the legislation several duties to be carried out by a regional council in the course of deciding whether to accept or reject a submission on a variation. As a guide for our consideration of the submissions on Variation 1, we have summarised and compiled them in the following list:

1. From primary submissions on the variation, identify an *issue* about an amendment to it.
2. Check whether the issue is within the scope of the Council's authority to amend the variation.
3. From the variation and the decisions requested by submissions, identify options for addressing that issue by amending the variation, and discard those that are not reasonably practicable.
4. For each reasonably practicable option, assess the extent to which adopting that option would, more fully than not making that amendment —
 - Give effect to the NZCPS (where applicable), the NPSFM, and the CRPS, particularly all directives in prescriptive terms, and where none of them covers the field, applicable contents of Part 2 of the RMA.
 - Be inconsistent with the WCO or other relevant regional plans e.g. coastal environment plan
 - Take into account applicable iwi management planning documents.
 - Have particular regard to the extent to which it would serve the vision and principles of the CWMS.
5. Have regard to applicable Sports Fish and Game Birds management plans.
6. If a requested amendment is to a rule, have regard to whether the rule, as it would be amended, would have any actual or potential effect on the environment of activities, including in particular, any adverse effect (as directed by section 68(3)).
7. If a requested amendment is to a provision allocating amounts of natural resources, ensure the amendment would not result in the provision exceeding limits prescribed by section 30(4).
8. Assess the relative efficiency and effectiveness of each option to achieve the relevant objectives by:
 - identifying and assessing the anticipated benefits and costs (quantifying them if practicable) of the environmental, economic, social and cultural effects (including opportunities for economic growth and employment anticipated to be provided or reduced); and
 - if there is uncertain or insufficient information about the subject matter, assessing the risk of acting or not acting.
9. Identify the relevant objectives.
10. Select which of the options is the most appropriate way of achieving the relevant objectives.

Chapter Three

Validity of Submissions

- [165] Questions arose about the validity of certain of the submissions lodged in response to public notification of Variation 1, in these respects:
- Submissions lodged after expiry of the period stipulated;
 - Submissions not requesting any decision amending the variation;
 - The subject matter of certain submissions not being ‘on’ the variation;
 - Submissions claiming to ‘reserve the right’ to ask at the hearing for further or other relief;
 - Further submissions that extend beyond supporting or opposing a primary submission; and
 - Whether certain submissions are within the scope of the variation.

3.1 Late submissions

- [166] Clause 5(1) of Schedule 1 of the RMA directs public notification of variations to proposed regional plans; clause 5(1C) directs a regional council to send a copy of the public notice to any person who is likely to be directly affected by the proposed policy statement or plan; and clause 5(2)(d) directs that public notice under clause 5(1) is to state the closing date for submissions. By clause 5(3)(b), in the case of a variation to a proposed plan, the closing date for submissions is to be at least 20 working days after public notification.
- [167] As mentioned in paragraph 1 of this report, Variation 1 was publicly notified on 24 February 2014 and the public notice stated the closing date for submissions would be 24 March 2014. That was 20 working days after public notification.
- [168] Two submissions were lodged after 24 March.⁷⁹ One of them⁸⁰ was withdrawn on 26 August 2014. The other was lodged on 4 April, which was nine working days late.
- [169] Clause 1(2) of Schedule 1 of the RMA provides that where any time limit is set in that schedule, a local authority may extend it under section 37.
- [170] Section 37(1) prescribes that a local authority may, in any particular case, extend a time period specified in the Act; and section 37A(1) prescribes that a local authority is not to extend a time limit or waive compliance with a time limit unless it has taken into account the interests of any person who, in its opinion, may be directly affected by the extension or waiver; and the interests of the community in achieving adequate assessment of the effects of a proposal; and its duty under section 21 to avoid unreasonable delay.
- [171] As the submission was lodged only nine days late, we consider that no person would be directly affected adversely by waiving the late compliance with the closing date; that the interests of the community in achieving adequate assessment of the effects of the variation would be served by waiving that compliance so the content of the submission may be considered by us in preparing this report and recommendations on the variation; and that waiver of late lodging by nine days would not substantially affect the CRC’s duty to avoid unreasonable delay.

⁷⁹ Submission 59 by *L&M Coal Whitecliffs Limited* and another; and Submission 89 by *D A Rankin*.

⁸⁰ Submission 59.

- [172] For those reasons we waive the late compliance with the closing date for lodging submissions on Variation 1 in respect of Submission 89 by D A Rankin.

3.2 Submissions not requesting amendment of Variation 1

- [173] By clause 6(5) of Schedule 1 of the RMA, a submission is to be in the prescribed form. Forms for submissions are prescribed by the Resource Management (Forms, Fees, and Procedure) Regulations 2003. Regulation 6 prescribes that for submissions on a publicly notified proposal for a plan variation under Clause 6 of Schedule 1 of the RMA, Form 5 is to be generally followed. Regulation 4 of those regulations provides that use of a form is not invalid only because it contains minor differences from a form prescribed “as long as the form that is used has the same effect as the prescribed form and is not misleading.”
- [174] Form 5 provides for a statement in a submission of the specific provisions of the proposal that the submission relates to, with the direction “*give details.*” The form then provides for a statement of the submission, directing inclusion of whether the submitter supports or opposes the specific provisions or wishes to have them amended, with reasons for those views. Next, the form provides for the submitter to state what decision is sought from the local authority, directing that the submitter “*give precise details.*”
- [175] Three of the submissions on Variation 1 do not state what decision is sought from the CRC.
- [176] The submission by Mr G Carter does not identify any specific provision of the variation that it relates to; nor whether the submitter supports or opposes it, or wants it amended; nor does it state what decision is sought from the CRC. The submission by J Norris is more informative, in that it implies a subject-matter of a water race that the submitter fears may be replaced by a pipe, and a concern about water shortage. Even so, this submission does not have the same effect as the prescribed form, in that it does not identify a provision of the variation that is supported or opposed or the submitter wants amended; nor does it state what decision is requested. The submission by A Somerville states that the submitter is badly affected by flooding due to a blocked drain, and a neighbour should be forced to clear the drain. However, the subject of submissions is Variation 1, not blockage of a specific drain. The submission does not identify any specific provision of the variation that it relates to; nor whether the submitter supports or opposes any provision, or wants it amended; nor does it state what decision is sought from the CRC in respect of the variation.
- [177] Regrettably, we do not see how it would be within the scope of our authority to make any recommendation to the CRC in respect of the content of Variation 1 in response to any of those submissions. So we recommend that each of them is rejected as informal.

3.3 Submissions that are not “on the variation”

- [178] Clause 6(1) of Schedule 1 of the RMA provides that once a proposed plan (including a variation) is publicly notified under clause 5, a person described in sub-clauses (2) to (4) may make a submission “on it” to the relevant local authority.
- [179] There has been judicial consideration of when a submission is “on” a proposed instrument: the leading authorities are the High Court judgments in *Clearwater Resort*⁸¹ and *Motor Machinists*.⁸²

⁸¹ *Clearwater Resort v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003, William Young J.

⁸² *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290, Kós J.

[180] In *Clearwater Resort*, Justice William Young held that a submission could 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”; and that—

...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”, that will be a “powerful consideration” against finding that the submission was truly “on” the variation. It is important that “all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate.”⁸³

[181] The Judge added that “a submission proposing something completely novel” would be a strong factor against finding the submission to be on the variation.⁸⁴

[182] In *Motor Mechanics*, the Court applied *Clearwater Resort*. Justice Kós fully explained his reasons in these passages:

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those “directly affected”, by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under clauses 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.⁸⁵

Later, the Judge said:

[79] ...Permitting the public to enlarge significantly the subject matter and resources to be addressed through the Schedule 1 plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.⁸⁶

[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 s 32 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 for that resource is unlikely to be “on” the plan change. That is one of the lessons from the *Halswater* decision. 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 s 32 analysis is required to inform affected persons of the comparative

⁸³ *Clearwater Resort*, cited above, [69].

⁸⁴ *Clearwater Resort* was applied by Ronald Young J in *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144 28 September 2009.

⁸⁵ *Motor Mechanics*, ante, [77].

⁸⁶ *Ibid*, [79].

merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submission.

[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 change process. As I have said already, the 2009 changes to Schedule 1, clause 8, do not avert that risk. 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 side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[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 s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

...

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater v Christchurch City Council* in analysing whether a submission made under Schedule 1, clause 6(1) of the Act is “on” a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*, inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council* and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council*.

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 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 is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be “on” the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks 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 opportunity to respond to those additional changes in the plan change process.

- [183] To reject a submission point because it is not “on” a variation deserves careful consideration. That is why we consider the authorities, and fully note the reasoning in the recent High Court judgment in *Motor Machinists*, which explains how the law is to be applied.
- [184] In written submissions dated 22 September 2014, Royal Forest and Bird Protection Society of NZ (Forest & Bird) and North Canterbury Fish and Game Council (Fish & Game)⁸⁷ submitted that it is not necessary for precise details of the relief sought (or indeed for any relief) to be contained in a submission. Those submitters did not refer to any of the High Court judgments we have reviewed above. Rather they cited earlier High Court judgments in *Countdown Properties*⁸⁸ and in *Forest and Bird Southland*.⁸⁹ They also cited Environment Court decisions in *Campbell v Christchurch City Council*⁹⁰ and in *Groome v West Coast Regional Council*.⁹¹
- [185] To the extent that the earlier High Court judgments in *Countdown Properties* and *Forest and Bird Southland* are inconsistent with the consistent approach of the later judgments in the same Court in *Clearwater Resort* and *Motor Machinists*, we understand it is the duty of local authorities to apply the approach in the later judgments. An additional reason for doing so is that Schedule 1 of the Act has been amended since the judgments in *Countdown Properties* and *Forest and Bird Southland* were given, although the amendment may not be material to deciding whether a submission is on a change or variation.⁹²
- [186] In the hierarchy of courts, the High Court is superior to the Environment Court. So, to the extent that the Environment Court’s reasoning in *Campbell v Christchurch City Council* and *Groome v West Coast Regional Council* is incompatible with the approach consistently taken in the more recent High Court judgments, we understand it is the duty of local authorities to apply the latter in preference to earlier Environment Court decisions.
- [187] We acknowledge that the sufficiency of a submission needs to be judged individually. However we doubt that the authorities support the general proposition of Fish & Game and Forest & Bird that it is not necessary for precise details of the relief sought (or indeed for any relief) to be contained in a submission. That could involve a real risk that people directly or potentially directly affected by amendments requested, being unaware of them, are denied an effective opportunity in the process to respond to them.

3.4 Submissions reserving ‘the right’ to ask at the hearing for further or other relief

- [188] Several submissions responding to Variation 1 did not give details of amendments requested, but stated that the submitter “reserved the right” to ask at the hearing for further or other relief.
- [189] The scheme of the RMA in this respect is that provision for making submissions on a proposed plan is designed for a submitter to ask in a submission for specified amendments to the plan. The prescribed form for submissions directs the submitter to “give precise details” of the decision

⁸⁷ Central South Island Fish and Game Council lodged a separate submission. Where in this report we refer to Fish & Game, we mean North Canterbury Fish and Game Council, not Central South Island Fish and Game Council.

⁸⁸ *Countdown Properties (Northlands) v Dunedin City Council* [1994] NZRMA 145 HC.

⁸⁹ *Royal Forest & Bird Protection Society v Southland Regional Council* (citation not given, but presumably [1997] NZRMA 408 HC).

⁹⁰ Citation not given, possibly [2002] NZRMA 352.

⁹¹ Environment Court C73/09.

⁹² *Environmental Defence Society v Otorohanga District Council* [2014] NZEnvC 70 at [16].

requested.⁹³ The local authority is to accept or reject a submission; its decision is to include reasons; and it may include consequential alterations.⁹⁴

- [190] The submissions in question did not meet the expectations from the prescribed form that the submissions give details of specific provisions of the variation that the submission relates to; nor the expectation that they state whether the submitter supports or opposes provisions or wishes to have them amended; nor that they give precise details of the decisions requested from the local authority.
- [191] Regulation 4 of the Resource Management (Forms, Fees and Procedure) Regulations 2003 prescribes that use of a form is not invalid only because it contains minor differences from a prescribed form, as long as the form that is used has the same effect as the prescribed form, and is not misleading.
- [192] However a form of submission that does not tell a reader what provision of the variation it relates to, nor whether the submission supports, opposes, or wishes an amendment to the variation; nor tell what decision is requested, does not qualify as having “the same effect” as the prescribed form.
- [193] Section 37(2)(b) of the RMA applies where a person is required to provide information and the information is inaccurate or omitted. It authorises a local authority to direct that the omission or inaccuracy be rectified.
- [194] As mentioned above, by clause 7(1) of Schedule 1 of the RMA, the CRC had a duty to give public notice of a summary of the decisions requested. As explained in the recent High Court judgments, that is a critical part of the process, because it is from that summary that a person who might lodge a further submission (under clause 8) and take part in the hearing, can discover if there is a submission on a topic of interest.⁹⁵
- [195] A submission that does not state what decision is requested, but reserves a statement of that to the hearing, deprives would-be further submitters of that critical information. We do not think that such a submission is reserving “the right” to do so, because as far as we are aware, there is no right to do so. Rather, a submitter’s right is to lodge a submission that complies with the prescribed form, or a submission that has the same effect as using the prescribed form by providing in the submission itself the information that a compliant submission would.
- [196] A submission that reserves to the hearing a statement of the provision that is the object of the submission, and a statement of the decision requested, does not itself provide that information. The local authority has no relevant information to include in the summary of decisions requested. If rectifying the omission of that information is left until the hearing, that would defeat the purpose of the public notification of a summary of the decisions requested; and it would deprive potential further submitters of the opportunity the Act gives them.
- [197] The greatest tolerance that might be allowed a submitter whose submission that does not identify the amendment requested, is to allow the submitter to adopt an amendment requested by another, compliant submission, or to request a further amendment that is truly and predictably consequential or incidental to an amendment in a compliant submission that is being accepted. That course may be useful for a submitter who would not qualify under clause 8 to make a

⁹³ Resource Management (Forms, Fees and Procedure) Regulations 2001, Schedule 1, Form 5.

⁹⁴ RMA Schedule 1, cl 10.

⁹⁵ See also *Environmental Defence Society v Otorohanga District Council*, cited above, at [11].

further submission. Except in those ways, a local authority is not entitled to consider amendments requested at a hearing but not detailed in a submission.

3.5 Further submissions that extend beyond the scope of a primary submission

- [198] By clause 8(2) of Schedule 1 of the RMA, a further submission must be limited to a matter in support of or in opposition to the relevant submission made under clause 6. It follows that a further submission under clause 8 is not to be used to ask for an amendment beyond the scope of the primary submission to which it relates.⁹⁶ In deciding to allow a further submission, a local authority does not have authority to amend a variation to any greater extent than was asked for in the primary submission to which it relates.⁹⁷

3.6 Would amending LWRP Rule 5.7 be within the scope of submissions on Variation 1?

- [199] The submission of Ngāi Tahu⁹⁸ asked (among other amendments) that Rule 5.7 of the LWRP be amended.
- [200] Although Variation 1 would amend the LWRP in several respects, it does not propose amending Rule 5.7.
- [201] When at the hearing we asked about that, Ngāi Tahu's Senior Environmental Advisor, Ms C F Begley, accepted that Rule 5.7 is not within the scope of Variation 1. Counsel for Ngāi Tahu did not make any submission to the contrary.
- [202] Therefore we do not consider further that submission point in Ngāi Tahu's submission about amending Rule 5.7.

3.7 Is amending Table (e) within the scope of submissions on Variation 1?

- [203] A different question on scope arises from a request in a submission by Irrigation New Zealand about amending Table (e) of Variation 1.
- [204] Table (e) would be inserted in the LWRP by Variation 1, and would set annual allocation limits for certain water allocation zones within the Selwyn Waihora sub-region to which the variation is to apply.
- [205] Irrigation New Zealand lodged a submission in respect of Variation 1, addressing some 24 points on which it requested amendments to the variation. In particular, the submission stated that it opposed Tables 11(e) to 11(h), and asked that they be deleted; it added "Alternative table to be provided at the hearings."
- [206] By its submission, Forest & Bird asked to reserve its position on the data contained within Tables (c) to (k); and asked that limits set out in Tables 11 (c), (d) and (e) are able to be reviewed within 5 years to ensure they continue to be appropriate.
- [207] By its submission, Fish & Game stated that the allocation limits in Tables 11(c), 11(d) and 11(e) may not be appropriate, need further assessment as to their appropriateness in achieving the intent of the policy, and may require improvement in order to achieve the intent of the policies.

⁹⁶ *Offenberger v Masterton District Council* W053/96 (PT).

⁹⁷ Cf *Telecom v Waikato District Council* Env C A074/97.

⁹⁸ A submission was lodged by 5 papatipu rūnanga and Te Rūnanga o Ngāi Tahu. Another submission was lodged by Taumutu Rūnanga Society. A joint case was presented on both submissions. As their counsel did, we refer to the submitters collectively as Ngāi Tahu.

- [208] However at the hearing of their submissions, Forest & Bird and Fish & Game jointly adopted revised relief recommended by their witness Mr Scott Pearson, being Appendix 5 to his evidence (in a further revision taking into account rebuttal). That appendix does not include any request in respect of Table 11(e), from which we infer that those submitters abandoned their original submission point in respect of that table.
- [209] By their submissions, Dunsandel Groundwater Users Association and Erralyn Farm Limited and Krysette Limited asked for various amendments to Variation 1, but did not refer to Table 11(e). Erralyn Farm Limited and Krysette Limited lodged a further submission in which, among other things, they stated that they opposed in full the submission of Fish & Game because it seeks a more onerous planning framework, particularly with regard to nutrient management, and the changes sought jeopardise the continued rural productivity of this sub-regional area.
- [210] At the hearing on 14 October 2014 of the submissions by Irrigation New Zealand, Dunsandel Groundwater Users Association and Erralyn Farm Limited & Krysette, counsel for all of those submitters presented a schedule of amendments to the variation sought by them all.⁹⁹ The schedule contains an amended version of Table 11(e) by which the annual limits for the various allocation zones in Table 11(e) as notified would remain applicable only as “A Block Allocation Limit and Targets without CPW irrigation”; and for the Selwyn-Waimakariri and Rakaia-Selwyn Allocation Zones, new limits would be inserted for “B Block Allocation Limits and Targets without CPW irrigation”; “A Block Allocation Limit and Targets upon full commissioning of Stage 1 CPW”; and “A Block Allocation Limit and Targets upon full commissioning of Stage 1 CPW”.
- [211] Counsel addressed the question whether making that amendment would be within the scope of the Council’s authority. She referred to *General Distributors*¹⁰⁰ and summarised the essential test as being whether all are sufficiently informed about what is proposed.¹⁰¹ Counsel submitted that we have to be satisfied that the relief now particularised was reasonably and fairly raised in the submission;¹⁰² that this is a question of degree and perhaps even of impression,¹⁰³ to be approached in a realistic and workable fashion;¹⁰⁴ and within the whole relief package detailed in the submissions.¹⁰⁵ Counsel also submitted that recourse may be had to the entire submission.¹⁰⁶
- [212] Seeking to apply those points, counsel argued that the Irrigation NZ submission as a whole showed concern for availability and reliability of irrigation water, and that a challenge to the limits would only make sense if its request was to increase them. She also relied on a passage in the submission on Policy 11.4.22 that, because of increased recharge from new irrigated land and introduction of alpine water to replace groundwater, no further reduction in allocation is required; and if further reduction is shown to be still required, an alternative enabling regime will be provided. Counsel argued that all parties were sufficiently informed of Irrigation NZ’s desire for higher limits.
- [213] We accept that *General Distributors* is relevant authority for decisions on the scope of a local authority’s jurisdiction to amend an instrument by decision on a submission. However that case

⁹⁹ Revised Appendix A to submissions by A C Limmer.

¹⁰⁰ *General Distributors v Waipa District Council* (2008) 15 ELRNZ 59, Wylie J.

¹⁰¹ Citing *General Distributors* at [55].

¹⁰² Citing the same paragraph in *General Distributors*.

¹⁰³ Citing *General Distributors* at [64].

¹⁰⁴ Citing *General Distributors* at [59].

¹⁰⁵ Citing *General Distributors* at [60].

¹⁰⁶ Submitting this is implicit in *General Distributors* at [61].

preceded the 2009 amendments to the RMA.¹⁰⁷ *Motor Machinists* was about a related point, whether a submission is “on” a plan change. Even so, the part of the judgment in that case, on the risk of potential further submitters being denied an effective response to enlarging an issue is also helpful, and it related to provisions of the Act that incorporate the 2009 amendments.

- [214] The relevant issue in *General Distributors* was whether or not the Environment Court had jurisdiction to amend a district plan in a way that had not been proposed in a plan change as notified (namely amending an explanation), and which had not been expressly sought by any submitter or cross-submitter.¹⁰⁸ Justice Wylie found that the submission as a whole did not contain anything which approximates the wording or the approach contained in the proposed explanation; and that it could not be said that the change to the explanation fell fairly and reasonably within the scope of the submission.¹⁰⁹ Expressing his opinion that what had been discussed at the Council hearing was irrelevant in considering jurisdiction to amend a plan change, the Judge said it is the terms of the proposed change and the content of the submission filed which delimit the jurisdiction.¹¹⁰ In that case the Court concluded that the Environment Court had not had jurisdiction as a matter of law to approve the amendment to the explanation.¹¹¹
- [215] Although the issue in *Motor Machinists* was whether a submission was “on” a plan change, we remind ourselves of the reasoning which we have quoted above at [182]. Like Justice Wylie in *General Distributors*,¹¹² Justice Kós in *Motor Machinists*, in explaining the second limb in *Clearwater Resort*, called for a precautionary approach to jurisdiction.¹¹³ Like him¹¹⁴, Justice Kós stated the criterion of people being denied an effective response in the process to additional amendments.¹¹⁵
- [216] With the assistance of those authorities, we return to the Irrigation New Zealand submission. We accept that a reader of it would be on notice that the submitter might present at the hearing of the submission an alternative Table 11(e) to replace that in the notified variation, and that it might contain less onerous limits. We are less persuaded by counsel’s reference to a passage on Policy 11.4.22 elsewhere in the submission. We think it plausible that a person reading the Summary of Decisions Requested would not recognise that as relating to Table 11(e), and may well be unaware that this policy might be amended.
- [217] Even if a would-be further submitter noticed the claimed relevance of that passage as well, such a person would not have been given notice that the submitter would ask for a replacement Table 11(e) that is as far-reaching as that presented to us by counsel. The submission did not foreshadow separate limits for certain allocation zones according to allocation blocks and with or without CPW irrigation. It did not foreshadow introducing some as targets. It gave no hint of the scale of numerical limits or targets that would be contained in the replacement table.
- [218] We accept that deciding on jurisdiction to make a requested amendment may involve a question of degree or impression, to be approached in a realistic and workable fashion. In this case of Irrigation New Zealand’s submission, which is only eight pages long, it is also practicable to

¹⁰⁷ Resource Management (Simplifying and Streamlining) Amendment Act 2009.

¹⁰⁸ *General Distributors*, cited above, at [32].

¹⁰⁹ *General Distributors*, cited above, at [61].

¹¹⁰ *General Distributors*, cited above, at [64].

¹¹¹ *General Distributors*, cited above, at [65].

¹¹² *General Distributors*, cited above, at [63].

¹¹³ *Motor Machinists*, cited above, at [82] and [91](c).

¹¹⁴ *General Distributors*, cited above, at [62].

¹¹⁵ *Motor Machinists*, cited above, at [82].

consider the amendment in the context of the submission as a whole. (That may not be practicable in the case of submissions that are more extensive.)

- [219] We find that the replacement table would extend substantially beyond simple substitution of limits in the table notified. We consider that replacing Table 11(e) with that suggested at the hearing could deprive people of an informed opportunity to make an effective response to it. Adopting the cautionary approach commended by the High Court, we hold that the suggested amendment would be beyond the scope of the Council's jurisdiction to consider it on its merits.

3.8 Is Horticulture NZ's proposal for reduction of nutrient losses within the scope of submissions?

- [220] Variation 1 would insert several policies (11.4.6 to 11.4.17) for managing land use to improve water quality. In particular, Policy 11.4.14 (b) would apply from 1 January 2022 where a property's nitrogen loss calculation is greater than 15 kg of nitrogen per hectare per annum. The policy applicable in those circumstances is that certain further percentage reductions in nitrogen loss rates would be made. Differing percentages of reductions are stipulated for various classes of farming activities, ranging from 30% for dairy to 5% for fruit, viticulture or vegetables.
- [221] This policy needs to be read with the following Policy 11.4.15, which is to apply where the reductions required in Policy 11.4.14(b) are unable to be achieved by 2022. In those circumstances, any extension of time to achieve the reductions is to be considered having regard to stated criteria.
- [222] Horticulture New Zealand (Hort NZ) lodged a submission on Variation 1, which related to numerous provisions of the variation. Among them Item 4.4 related to Policy 11.4.14, on which Hort NZ stated it sought deletion of Policy 11.4.14(b) "until such time as the GMPNPLR¹¹⁶ have undergone a s32 analysis and a First Schedule plan change process." On the decision sought, the submission stated:
- Delete Policy 11.4.14, or amend the policy to take into account revised assessments that are developed through the process to better reflect the impact on jobs and economic development opportunities.
- [223] In a further submission, Hort NZ supported a number of submissions requesting that Policy 11.4.14 be deleted, or amended by omitting or amending clause (b); and it opposed several submissions requesting that the policy be retained.
- [224] The 'corporate' witness for Hort NZ was Mr C M Keenan, its Manager, Natural Resources and Environment. Mr Keenan gave substantial evidence in chief. In addition he presented rebuttal evidence, in which he responded to evidence from some 13 expert witnesses.
- [225] In particular, Mr Keenan addressed differing opinions of Dr L Hume, Mr S Pearson, and Mr G M Willis on methods of managing nitrogen loss allowances to phase out over-allocation. (This was referred to by some as a "claw-back": we do not find that an accurate or appropriate description.)
- [226] In that regard, Mr Keenan gave his opinion that the most equitable method would be 'grand-parenting' some discharge in transition, followed by a move to an equal allocation of nutrient losses across similar production land after a period of time. He considered that 2022 would be

¹¹⁶ Good Management Practice Nitrogen and Phosphorus Loss Rates.

the appropriate time by which farmers are to achieve a minimum of good practice, including auditing of farm plans and use of trained, independent certifiers.

- [227] Mr Keenan proposed the variation of numeric values for discharge allowances to be equalised over time, and he produced a simplified graphical representation of how that would work, and a table of proposed leaching rates for classes of emitters in several periods up to 2060.
- [228] Counsel for Hort NZ fairly acknowledged that there is an issue of scope about this suggested amendment, and described it as a signal in what is essentially an interim regime as a flag for possible future changes. Counsel did not offer an analysis of the case-law on scope, or address how it might be applied to support making the suggested amendment to Variation 1.
- [229] At this stage, our consideration is confined to the question of scope— whether the Council would be entitled to amend the variation to incorporate such a method. Consideration of this question does not imply any lack of appreciation for Mr Keenan’s constructive suggestion, nor any opinion about its merits. It is simply that if the Council would not be entitled to make that amendment, we should not direct our recommendations towards it.
- [230] It is not suggested that the original submission requested the amendment now explained by Mr Keenan. Nor would it be useful for us to have recourse to the entire submission to see whether it was reasonably and fairly raised in it. Mr Keenan developed the amendment in the light of the evidence lodged later by other experts to which he was responding. Further, the submission is 22 pages long, and raised no fewer than 38 points on which decisions were requested.¹¹⁷ It would not be realistic to suppose that a would-be further submitter would search through the entire document for additional statements of the amendment in respect of Policy 11.4.14.
- [231] In addition, the amendment now proposed is not a simple amendment as implied by the requested decision, taking into account revised assessments to better reflect impact on jobs and economic opportunities. Rather it is a new two-stage approach, involving numerous rates of permitted nutrient losses for classes of emitters over several periods. These could not have been understood, even in general terms, from reading the submission; nor can the benefits and costs be assessed or evaluated, even now. Nor is Mr Keenan’s suggestion merely consequential on, or incidental to, acceptance of a compliant submission point.
- [232] In short, despite our appreciation of Mr Keenan’s suggestion, we find that to adopt it would deprive people potentially directly affected of an effective opportunity to respond to it in the Schedule 1 process, and we hold that it is outside the scope of the Council’s jurisdiction in deciding submissions on Variation 1.

3.9 Are other amendments requested by Forest & Bird and Fish & Game within scope?

- [233] Forest & Bird and Fish & Game presented a joint case at the hearing of their submissions.
- [234] By its submission, Forest & Bird asked for certain provisions in Variation 1 to be retained; and requested some 13 amendments to the variation. Most of the requested amendments were helpfully detailed; but there are some exceptions.
- [235] On Policies 11.4.18-20 Forest & Bird asked “Provide clarity around how these policies will be enabled and the role Council will have.” On Policies 11.4.21-29, its submission said:

¹¹⁷ Our reference to the length of the submission and to the number of points raised is not to be understood as criticism. We are grateful for the fullness of Hort NZ’s contribution to the improvement of the variation.

These policies are generally supported but seek that limits set out in Tables (c) (d) (e) where referred to are able to be reviewed within 5 years as per Forest and Bird's submissions above to ensure they continue to be appropriate and action can be taken if it is shown not to be the case.

[236] On Tables (c) to (k), the submission said:

Forest & Bird would like to reserve its position on the data contained within the Tables until it has had time to consider them in some detail and seek advice on the extent to which it can rely on them protecting the significant natural values within the Catchment.

[237] By its submission, Fish & Game raised some 24 specific points. In several of them it supported the provision of the variation referred to, and requested that it be retained as worded. In six of them it asked that the provision be amended and gave detail of the amendment requested. However in ten points of its submission¹¹⁸ it asked for amendment to provisions of the variation without giving details of the requested amendment. Nor did it indicate in more general terms the scope of the amendment, such as by indicating the range, or the scale, or even the order of magnitude, of alternative targets or limits or other quantitative or qualitative values.

[238] As described in paragraph 246 of this report, at the hearing, Forest & Bird and Fish & Game offered a schedule of revised amendments they were jointly asking for. Counsel submitted that the outcomes the submitters are seeking were fairly within the scope of their submissions.¹¹⁹ The Chairman responded that in respect of each one, the hearing commissioners would need to address that question, as we could not be persuaded merely on counsel's assertion. Counsel replied that he had not gone through and identified each change with respect to a submission lodged by any party, it may be that he would have to do that, but could not do it right then.¹²⁰

[239] Counsel later proposed that he would provide us with a memorandum that would set out the jurisdiction for those changes.¹²¹

[240] Following a break in proceedings, the Chairman stated that the commissioners were willing to accept a proposed substitute Appendix 5 (a revision of the changes to Variation 1 requested by the submitters) on the condition that they would provide a revised version which identified the source in a primary submission of each of the amendments requested.¹²² At the end of his response to that, counsel said "we will, next Monday, we will get you a revised version."

[241] We subsequently received a memorandum on behalf of Fish & Game and Forest & Bird dated 22 September, accompanied by a revised version of Appendix 5 to the evidence of Mr S Pearson (a witness on behalf of Fish & Game).

[242] The memorandum contains submissions:

- That the amendments to Variation 1 sought by those submitters relate to issues that are expressly or by reasonable implication raised in the submissions of Forest & Bird and Fish & Game and other submitters (para 7):
- That nobody could reasonably have been misled about the outcomes sought by Forest & Bird and Fish & Game (para 15):

¹¹⁸ Paras 4, 5, 6, 8, 9, 10, 16, 18, 22 and 23 of Fish & Game's submission.

¹¹⁹ Transcript of proceedings 17 September 2014, page 4.

¹²⁰ Transcript pages 4, 5.

¹²¹ Transcript, page 28.

¹²² Transcript, page 30.

- That the tables in Variation 1 form part of the policies, and consequential changes can be made to lower order provisions, including rules, to give effect to changes sought in policies where these are necessary to ensure Variation 1 retains its coherence (para 19):
- The submissions lodged by Forest & Bird, Fish & Game, Doug Rankin/Whitewater and the Medical Officer of Health expressly or by reasonable implication raised the issue that the limits and targets are too lenient and stricter targets/limits are required (para 20):
- That it is necessary to consider the submissions as a whole (para 22):
- That the submissions as a whole raise issues relating to reduced limits/targets; consequences of not meeting new leaching rates in CPW; phosphorus; and increased monitoring and review (para 42).

[243] Those submissions are general in nature. Neither the memorandum, nor the revised version of Appendix 5 that accompanied it, gives particulars of which amendment requested in which of those submissions (or in any other primary submission on the variation) is relied on for each amendment shown in Mr Pearson's Appendix 5.

[244] In effect, the memorandum leaves it to the hearing commissioners, in respect of each of the numerous amendments sought by Forest & Bird and Fish & Game, to search through all of those four submissions for any requested amendment that reasonably and fairly might raise, expressly or by necessary implication, the amendment being considered. There would be a risk that in the process, we may not notice a particular amendment request that Fish & Game or Forest & Bird may consider a source. That was a risk the commissioners had sought to avoid, by reminding counsel that they could not be persuaded merely on his assertion, and giving him opportunity to provide a document identifying in a primary submission a source for each of the amendments requested in Mr Pearson's revised Appendix 5.

[245] As the memorandum and revised schedule of requested amendments do not inform the hearing commissioners of the sources relied on by the submitters, they do not fulfil their purpose.

[246] We summarise the major requested amendments to the variation listed in the revised schedule:

- a) Inserting a new Policy 11.4.14A for further 20% reductions in nitrogen loss rates from 1 January 3037.
- b) Inserting a new Policy 11.4.14B setting conditions for increasing nitrogen loss above the nitrogen baseline.
- c) Inserting a new Policy 11.4.17A about progressive reviews of targets and limits.
- d) Amending Rule 11.5.9 by inserting additional Conditions 1A to 1C re Good Management Practice Nitrogen and Phosphorus Loss Rates.
- e) Inserting a new Rule 11.5.9A classifying as discretionary activity farming that does not comply with Rule 11.5.9 if certain conditions are met.
- f) Amending Rule 11.5.10 by replacing Condition 2 with a condition of compliance with Rule 11.5.9A.
- g) Amending Rule 11.5.11 by adding to the conditions in other rules on failure to comply with which farming is classified as a non-complying activity.
- h) Deleting Rules 11.5.14 and 11.5.15.
- i) Inserting a new Table 11(x) stating certain water quality targets and limits for the Selwyn River at Coes Ford including nitrogen and phosphorus loads and QCMI index entries.
- j) Amending entries in Table 11(a) for maximum temperatures and amending recreation suitability descriptors.
- k) Amending entries in Table 11(b) for eutrophic and microbiological indicators.

- l) Amending details in Table 11(c).
- m) Amending Table 11(i) including inserting entries of targets to be met by certain times.
- n) Deleting Table 11(k) and replacing it with a new table with targets for rivers and lakes by 2037 and by 2050.

- [247] We now have to apply the law as stated in *General Distributors*¹²³ and *Motor Machinists*.¹²⁴ In respect of each requested amendment in the revised schedule, we have to consider two main questions. The first is whether that amendment was reasonably and fairly raised within the submission. That has to be considered in a realistic and workable way. The second main question is whether making the amendment to the variation now requested would result in a person being denied an effective response in the process, as contributing to a loss of opportunity for an eligible person to lodge a further submission in support or opposition to the amendment.
- [248] We regret that we do not have indications from the submitters or counsel of where they consider these amendments were raised in the submissions of Forest & Bird, Fish & Game, Doug Rankin/Whitewater or Canterbury Medical Officer of Health. We have read through the submissions again. There are assertions in general terms, sometimes expressed in terms of possibility (such as “Further examination ... may indicate the set level in kilograms should be lowered”); and sometimes in terms of future specification (such as “Fish and Game ... may suggest alternative indicator levels”).
- [249] The amendments requested in the revised schedule may or may not be justified in themselves. However if adopted they would be likely to have adverse economic effects and to reduce economic growth. Taking the recommended realistic and workable approach, we doubt whether people whose businesses might be adversely affected would have had any idea from the summary of decisions requested, or even from reading the submissions themselves, that the Council would be asked to make the amendments now requested. We find that requests for them were not reasonably or fairly raised in the submissions.
- [250] Further, people whose property or business interests could directly be adversely affected, and people representing relevant aspects of the public interest, may well have wanted to make further submissions on these amendments. However without clearer notice of them in the primary submissions, and some information about the extent of environmental, economic, social and cultural benefits and costs, such people have not had fair opportunity to exercise their rights to lodge further submissions. In the absence of any indication by the submitters of clear notice in a primary submission, we find that the requested amendments are beyond the scope of the Council’s jurisdiction.

3.10 Would requested amendments to LWRP Schedule 13 be within the scope of Variation 1?

- [251] Schedule 13 of the LWRP lists separate requirements for implementing allocation regimes for surface water and groundwater.
- [252] Variation 1 proposes an amendment to Schedule 13 by inserting, in respect of the Selwyn Waihora catchment, two additional requirements in respect of combined groundwater and surface water regimes.

¹²³ *General Distributors v Waipa District Council* (2008) 15 ELRNZ 59 Wylie J.

¹²⁴ *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 Kós J.

- [253] By its submission on the variation, Bowden Environmental asked that the change to Schedule 13 is deleted; and for provision for an effective allocation of 85 percent of the consented allocation. It also asked that the CRC is required to audit the allocation of all current consents prior to implementing any new allocation regime.
- [254] By its submission, Ellesmere Irrigation Society also asked that the proposed changes to Schedule 13 are deleted; and for “any consequential amendments.”
- [255] To the extent that those submissions request deletion of the amendments to Schedule 13 proposed by Variation 1, they are submissions “on” the variation, and can be considered on their merits.
- [256] However insofar as Bowden Environmental requested provision in Schedule 13 “for an effective allocation of 85 percent of the consented allocation,” that would be an amendment to the LWRP itself; and it would be outside the alteration to the status quo entailed in the variation, and beyond its ambit.
- [257] The amendment requested in that respect is stated in the primary submission. However that is not a document that would necessarily be read by people who found nothing in the variation that they opposed. To amend the LWRP in a respect beyond the ambit of the variation could deprive such people of participation in the process.
- [258] So we find that in this respect Bowden Environmental’s submission is not “on” the variation; and we hold that it is outside the scope of these proceedings.
- [259] We now refer to Bowden Environmental’s request that the CRC is required to audit the allocation of all current consents prior to implementing any new allocation regime. We do understand why that request was made. However it refers to an executive responsibility of the CRC in administering the LWRP. It does not seek an amendment to the variation; nor would provision for such an audit be appropriate content of the LWRP. We find that this request is also beyond the scope of these proceedings.
- [260] Finally we refer to Ellesmere Irrigation Society’s request for “any consequential amendments.”
- [261] Where a local authority amends a planning instrument in accord with the Schedule 1 process, it may need to make consequential amendments as well. That is provided for in clause 10(2)(b)(i). Suggestions of specific consequential amendments can assist decision-makers. However this submitter did not suggest any specific amendment to the variation that might properly be made consequential on its request for deletion of the proposed amendment to Schedule 13; and we are not aware of any. So we make no recommendation to the CRC for acceptance of this submission point by Ellesmere Irrigation Society.

Chapter Four

Legal Issues Raised By Submitters

[262] In this chapter, we address several legal issues raised by the submissions.

4.1 Is an overall broad judgement appropriate in giving effect to higher order instruments?

Section 42A report

[263] The report prepared for the hearing commissioners under section 42A of the RMA referred to the Supreme Court judgment in *King Salmon*;¹²⁵ and advised that a Part 2 judgment must still be applied in assessing the provisions of Variation 1 against the relevant statutory tests, including section 32.¹²⁶ The report stated that the previously accepted overall judgment approach and Part 2 still have validity in considering how a council-promoted variation to a regional plan should give effect to the NZCPS, the NPSFM and the CRPS.¹²⁷

[264] The authors of the report advised that the Supreme Court had been clear that there will still be situations where it is necessary to “go back to” Part 2, including if the policies in question do not ‘cover the field’; or where there is uncertainty about the meaning of particular policies of the superior instrument;¹²⁸ but that cannot be relied on to justify a departure from directive policies.¹²⁹

[265] In support, the authors distinguished the purpose of a New Zealand coastal policy statement “to state policies in order to achieve the purpose of this Act”¹³⁰ from the purpose of a national policy statement “to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.”¹³¹ They remarked that national policy statements are not ends in themselves, but contain relevant matters to be had regard to (along with other Part 2 matters).¹³²

[266] The authors also observed that section 32 requires the objectives of a plan to be evaluated as to whether they are the most appropriate way to achieve the purpose of the Act, so Part 2 is an implicit part of the section 32 analysis.¹³³

[267] Further, they remarked that the NPSFM does not ‘cover the field’, as (unlike the NZCPS (eg Policy 6)):

it is not concerned with enabling activities that require water, that being left to other national policy statements, or to an overall judgment.¹³⁴

¹²⁵ *Environmental Defence Society v NZ King Salmon*, [2014] NZSC 38; [2014] 1 NZLR 593.

¹²⁶ S 42A report, para 7.50.

¹²⁷ S 42A report, para 7.31.

¹²⁸ S 42A report para 7.44.

¹²⁹ S 42A report, para 7.45.

¹³⁰ RMA, s 56.

¹³¹ RMA, s 45.

¹³² S 42A report, para 7.45d.

¹³³ S 42A report, para 7.45f.

¹³⁴ S 42A report, para 7.46.

- [268] The authors of the report also observed that (unlike in a private plan change) in Variation 1 the Council is required to give effect to provisions of the NZCPS, applicable national policy statements, and the CRPS across ‘a wide geographical spectrum’, in which those provisions sometimes compete or pull in different directions depending on geographical location, and cannot be reconciled to ensure strict compliance with all directions in all locations within the catchment.¹³⁵ Examples were given by reference to provisions of the CRPS.¹³⁶

Submissions

- [269] On 30 September 2014, further submissions on this topic were offered by Mr P A C Maw, counsel for the CRC, in the context of responding to our question about the relationship between section 67 (in the light of *King Salmon*) and the new requirements of section 32. Counsel submitted that an overall judgment approach (which would include economic considerations) cannot be relied on to justify a departure from directive policies in higher order directions;¹³⁷ that Part 2 and section 32 are highly relevant to the overall assessment of the provisions of Variation 1 in *how* they give effect to higher order directions;¹³⁸ and that the provisions of Variation 1 have to be assessed in terms of whether they are the most appropriate to achieve the objectives of the LWRP, but while also bearing in mind the requirement to give effect to superior instruments, including the NPSFM.¹³⁹
- [270] Ms A C Limmer, counsel for Canterbury Aggregate Producers Group, submitted that the Council has a broad overall judgment in applying the superior instruments in deciding submissions on Variation 1. Counsel concurred with the section 42A report that the NPSFM does not ‘cover the field’, in that (in contrast with Objective 6 and Policy 8 of the NZCPS in issue in *King Salmon*¹⁴⁰) it is not concerned with enabling activities.
- [271] Ms Limmer argued that in the context of avoiding further over-allocation as directed by Objective B2 of the NPSFM, allowing a relatively small allocation with extremely confined effect on the environment where the benefits of taking it would be very substantial would be sustainable management of the water resource.
- [272] Counsel also observed that Objective B2 is devoid of any effects assessment, and that in *King Salmon* the Supreme Court had considered relevant allowing for minor or transitory effects.¹⁴¹
- [273] Counsel also sought to distinguish *King Salmon* from Variation 1, in that the NZCPS provision in issue in that case had fallen squarely within the concept of sustainable management and the matters of national significance in section 6(a) and (b); but the NPSFM Objective B2 does not mirror any particular provision of Part 2, or any other part of the Act.
- [274] Ms H Atkins, counsel for Horticulture New Zealand, adopted the advice on this topic in the section 42A report; and in particular submitted that the policy framework of the NPSFM is not in the same directive language as the NZCPS. Counsel acknowledged that Objective B2 is clearly directive on avoiding further over-allocation, but contended that it is less directive on avoiding existing over-allocation, in allowing time for it to be phased out. Ms Atkins acknowledged that even if directive requirements of national instruments cause economic hardship, recourse to

¹³⁵ S 42A report, para 7.47.

¹³⁶ S 42A report, paras 7.48f.

¹³⁷ Memorandum of counsel for the CRC, para 4.

¹³⁸ Memorandum of counsel for the CRC, para 6.

¹³⁹ Memorandum of counsel for the CRC, para 18.

¹⁴⁰ *Environmental Defence Society v NZ King Salmon*, cited above.

¹⁴¹ *Environmental Defence Society v NZ King Salmon*, cited above, at [145].

section 5 or section 32 cannot be used as a way of backing out of the requirement; but observed that under the NPSFM, timing is part of the process.

- [275] Ms Atkins acknowledged that the Council has to set limits and timeframes now to ensure the long-term environmental benefits to Te Waihora and the catchment are achieved, but not to the absolute detriment of social, cultural and economic well-being of people and communities.
- [276] However Mr P Anderson, counsel for Forest & Bird and Fish & Game, submitted that there is no scope for an overall broad judgment in this case, as the NZCPS, the NPSFM and the CRPS contain objectives and policies framed in specific, unqualified and directive terms, so that a decision-maker has no option but to implement them.¹⁴² Counsel adopted a passage in the section 42A report, to the effect that an overall broad judgment cannot be relied on to justify a departure from directive policies in the NZCPS or from setting limits and targets required by the NPSFM. He also drew to our attention that Policy 5.3.12 of the CRPS directs that primary production is provided for where it does not contribute to significant cumulative adverse effects on water quality and quantity, this being consistent, not in tension, with the NPSFM.
- [277] Mr K Smith, counsel for Ngāi Tahu, relying on *King Salmon* and the Tukituki report¹⁴³, submitted that the Council has to implement the NPSFM objectives, policies and methods. In response to a commissioner's question to Ms C F Begley, a planning witness for Ngāi Tahu, the witness gave her opinion that the NPSFM 'covers the field'; and acknowledged that sustainable management in use and development has to have a component of economic and cultural elements.

Hearing commissioners' consideration

- [278] As mentioned in Chapter Two of this report, section 67(3) of the RMA stipulates that a regional plan is to give effect to any national policy statement, and any regional policy statement. Section 55(2B) stipulates that a local authority has to make all amendments to a proposed plan or variation that are required to give effect to any provision in a national policy statement that affects it.
- [279] The effect of those provisions on the overall broad judgment practice derived from the High Court judgment in *NZ Rail v Marlborough District Council*¹⁴⁴ was explained by the Supreme Court in *King Salmon*.¹⁴⁵ In summary, it is that where a higher order instrument (eg a national or regional policy statement) uses specific and imperative language directing local authorities acting under the RMA then, unless one or more of the exceptions¹⁴⁶ applies, that direction is to be applied in the terms in which it is expressed. It is not permissible for the local authority to have recourse to the contents of Part 2 to make an overall broad judgment that does not give full effect to the superior instrument, or that minimises the significance of the specific direction.
- [280] One exception to that general principle is where the legal validity of the superior instrument or a relevant provision of it is in dispute. That question would have to be resolved before knowing if giving effect to the instrument would be achieving the purpose of the Act. A second exception is where the superior instrument does not completely 'cover the field'. In such a case a local authority may need to find assistance elsewhere in dealing with matters not covered. A third

¹⁴² Citing *Environmental Defence Society v NZ King Salmon*, above, at [129], [130]; and a Report by a Board of Inquiry for the Tukituki Catchment at [319]. Counsel informed us that this part of the Report is not at issue in a current appeal pending in the High Court.

¹⁴³ Tukituki Catchment Proposal Board of Inquiry Final Report and Decisions dated 18 June 2014.

¹⁴⁴ [1994] NZRMA 70 HC.

¹⁴⁵ *Environmental Defence Society v NZ King Salmon*, above.

¹⁴⁶ *King Salmon*, at [88], where they are called *caveats*.

exception is where the meaning of a particular provision of the superior instrument is uncertain. In that case, reference to Part 2 may be justified to make a purposive interpretation.

- [281] The Court recognised that there may be infrequent instances where policies compete, or pull in different directions. In such a case, close attention should be paid to the way in which those policies are expressed, and to reconciling them. Only if, after that analysis, the conflict remains is there justification for having one policy prevail over another.¹⁴⁷
- [282] We have to resolve the differences among the submitters on whether, and to what extent, recourse may be had to Part 2 in determining the extent to which imperative directions in the superior instruments are to be implemented. To do that we need to consider several questions derived from *King Salmon* in respect of each of those instruments.

NZCPS

- [283] The NZCPS applies to Variation 1 in the part of the Selwyn Te Waihora catchment that is above the coastal marine area but in the coastal environment. Policy 1(2)(c) indicates that the coastal environment includes areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, coastal wetlands, and the margins of these.
- [284] The only evidence before us about the extent of the coastal environment in the catchment is a draft report for the CRC prepared by the well-respected landscape architecture firm Boffa Miskell in May 2012. That report is directed to defining and mapping the Canterbury Coastal Environment, guided by Policy 1 of the NZCPS. It is a draft, and we understand it has not been adopted by the CRC. However we had evidence that the draft report has been made available to territorial authorities for use in district planning,¹⁴⁸ and we are not aware of any basis for a reservation about the acceptability of its content.
- [285] The report is relevant, and to a professional standard. In the absence of other evidence, we consider it is a reasonable basis for our findings.
- [286] On that report we find that, of the part of the region to which Variation 1 would apply, the coastal environment within the meaning of the NZCPS extends inland from the landward boundary of the coastal marine area:
- a) across Kaitorete Spit and Te Waihora (Lake Ellesmere) to its margins, as shown on the map on page 175 of the draft report;
 - b) across the coastal dunes and Muriwai (Coopers Lagoon) and its margins, as shown on the map on page 179 of the draft report.
- [287] Next we consider whether the NZCPS contains specific directions that are imperative in terms and applicable to the part of the catchment to which Variation 1 would apply. In Chapter Two of this report we summarised the relevant provisions of that instrument. Many of the policies of the NZCPS, though important, are general in terms. Having regard to the confined nature of the coastal environment in the catchment, we identify the following as relevant to the issues over Variation 1.
- [288] Policy 7 applies to preparation of regional plans. Clause (2) gives this direction:

¹⁴⁷ *King Salmon* at [129]-[131].

¹⁴⁸ Evidence of M McCallum-Clark, 17 October 2014.

(2) Identify in regional ... plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards, or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[289] Policy 11 is for protecting indigenous biodiversity in the coastal environment, and clause (a) directs avoiding adverse effects of activities on (among other things) habitats of indigenous species that are at the limits of their range or are naturally rare. Policy 14 is for promoting restoration or rehabilitation of the natural character of the coastal environment. It includes several methods, of which the following may be relevant:

...

b) providing policies, rules and other methods directed at restoration or rehabilitation in ... plans.

[290] Policy 15 is to protect the natural features and natural landscapes of the coastal environment from inappropriate subdivision, use and development. The policy contains certain directions, of which these are relevant:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

including by:

...

(d) ensuring that ... plans map, or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[291] Policy 21 applies where the quality of water in the coastal environment has deteriorated so that it is having a significant adverse effect on ecosystems, natural habitats, or water based recreational activities, or is restricting existing uses, such as aquaculture, shellfish gathering and cultural activities. The policy is to give priority to improving that quality in certain ways. Relevant among them are:

(b) including provisions in plans to address improving water quality ...;

(c) where practicable, restoring water quality to at least a state that can support such activities and ecosystems and natural habitats;

(d) requiring that stock are excluded from ... waterbodies and riparian margins in the coastal environment, within a prescribed time frame;

(e) engaging with tangata whenua to identify areas of coastal waters where they have particular interest, for example in cultural sites, wāhi tapu, other taonga, and values such as mauri, and remedying, or where remediation is not practicable, mitigating adverse effects on these areas and values.

[292] Policy 23 contains several clauses about managing discharges to water in the coastal environment. Of them, the following are directive and relevant:

1) In managing discharges to water in the coastal environment, have particular regard to:

(a) the sensitivity of the receiving environment;

(b) the nature of the contaminants to be discharged, the particular concentration of contaminants needed to achieve the required water quality in the receiving environment, and the risks if that concentration of contaminants is exceeded; and

(c) the capacity of the receiving environment to assimilate the contaminants; and

(d) avoid significant adverse effects on ecosystems and habitats after reasonable mixing;

- (e) use the smallest mixing zone necessary to achieve the required water quality in the receiving environment; and
- (f) minimise adverse effects on the life-supporting capacity of water within a mixing zone.

[293] There are also clauses about managing discharges of human sewage and of stormwater.

[294] As far as we know, none of those policies of the NZCPS is in question for invalidity; nor is uncertainty in question so as to require purposive interpretation; nor is there a question that it competes or pulls in different directions, so as to require reconciliation. However we find that the NZCPS does not ‘cover the field’ of Variation 1, in that:

- (a) despite Objective 6 of enabling people and communities to provide for their wellbeing health and safety through subdivision, use and development, the NZCPS policies are restricting, rather than enabling;
- (b) the NZCPS applies only to the part of the Selwyn Te Waihora Catchment that is within the coastal environment.

[295] The Canterbury Coastal Environment Plan 2005 applies to that part of the region, and Variation 1 would not revoke or amend that plan.

NPSFM

[296] The NPSFM applies generally, including to the Selwyn Te Waihora catchment the subject of Variation 1. In Chapter Two of this report we summarised the relevant provisions of this instrument. Its policies contain directions in imperative language, though they are mostly general rather than specific.

[297] We identify Policies A1, A2, A3b), B1, B2, B3, B4, B6, and C1 as applicable and relevant to Variation 1.

[298] There was no submission that those provisions are invalid at law; nor that they are uncertain; and we are not aware of any ground for findings that they are. We have considered whether the NPSFM ‘covers the field’ of the LWRP and Variation 1. Although it primarily relates to management of fresh water resources, it extends to integrated management of fresh water and the use and development of land, including the interactions between fresh water, land, associated ecosystems and the coastal environment.¹⁴⁹ Even so, the NPSFM, while regulating the use of fresh water, does not contain provisions on the use of fresh water resources in a way, or at a rate, which enables people and communities to provide for their social, economic or cultural wellbeing, and for their health and safety; nor does it directly address matters identified in section 6 as matters of national importance, such as natural character; outstanding natural features and landscapes; and areas of significant indigenous vegetation and significant habitats of indigenous fauna. So despite Ms Begley’s opinion, we find that the NPSFM does not ‘cover the field’.

[299] We have considered the submissions based on Objective B2, that it is devoid of any effects assessment, does not mirror any particular provision of Part 2 of the RMA, and is less directive by allowing time for avoiding existing over-allocation. The statutory directions are to give effect to the national policy statement. Except where its validity or certainty is disputed, the duty to give effect to it is to be performed by reference to its terms, whether or not they include an effects assessment, or do or do not mirror particular provisions in Part 2, and although an objective, allows time for achievement.

¹⁴⁹ NPSFM, Objective C1.

CRPS

- [300] The LWRP (as it would be varied by Variation 1) has also to give effect to the CRPS. The CRPS is a substantial instrument, containing numerous policies. Even limiting this to those directly relevant to Variation 1, we need to identify many that include imperative or directive terms.
- [301] Policy 5.3.11 is enabling and avoiding development constraining community scale irrigation, stock-water and rural drainage infrastructure.
- [302] Policy 5.3.12 is enabling activities in rural areas, and avoiding development which forecloses primary production, and does not contribute to significant cumulative adverse effects on water quality and quantity.
- [303] Policy 7.3.1 is preserving high natural character values, maintaining highly valued though modified natural character values, unless modification is part of an integrated solution to water management.
- [304] Policy 7.3.3 is promoting, and where appropriate requiring the protection, restoration and improvement of lakes, rivers, wetlands, and their riparian zones and associated Ngāi Tahu values, and requiring maintenance and promoting enhancement of indigenous biodiversity and riparian zones.
- [305] Policy 7.3.4 is managing abstraction of surface water and groundwater by environmental flows and water allocation regimes; and where over-allocated, avoiding any additional allocation of water that would result in further over-allocation; and setting a timeframe for undertaking actions to effectively phase out over-allocation.
- [306] Policy 7.3.5 is avoiding adverse effects of land uses on flow or recharge by controlling diversion of rainfall run-off and changes in land uses that will adversely affect the quantity or rate of flow or recharge.
- [307] Policy 7.3.6 is implementing minimum water quality standards, and where water quality is below them, avoiding any additional allocation of water and any additional discharge of contaminants that may further adversely affect the water quality until the standards are met; unless part of an integrated water management solution in accordance with Policy 7.3.9.
- [308] Policy 7.3.7 is avoiding adverse effects of changes in land uses on the quality of fresh water by controlling changes in land uses to ensure water quality standards are maintained or if substandard, improved within an appropriate timeframe.
- [309] Policy 7.3.8 includes ensuring quantities of water allocated is no more than necessary for proposed use; recognising the importance of reliability in supply for irrigation; and promoting integrated management and use of freshwater resources.
- [310] Policy 7.3.9 is requiring integrated freshwater management solutions by comprehensive management plans which address the CRPS policies.
- [311] Policy 7.3.10 is recognising potential benefits of harvesting and storing surface water for improving reliability and efficiency; increasing the area of irrigated land; reducing pressure on water bodies in low flow periods.

- [312] Policy 7.3.11 is providing for continuation of hydro generation, irrigation and other activities involving substantial infrastructure investment; but requiring efficiency in water use, and reductions in adverse environmental effects where appropriate.
- [313] Policy 7.3.12 is taking a precautionary approach to allocation of water for abstraction, damming or diversion of water, or intensification of land uses or discharges of contaminants where the effects on fresh water bodies are unknown or uncertain.
- [314] Policy 8.3.3 includes avoiding, or where that is not practicable, remedying or mitigating adverse effects within the coastal environment on the life-supporting capacity and/or mauri of coastal ecosystems, and the natural processes that sustain them; on indigenous species, areas of significant indigenous vegetation and significant habitats of indigenous fauna; on natural character outstanding natural features and outstanding natural landscapes; on amenity cultural and recreational values; and on coastal areas of cultural significance identified in consultation with Ngāi Tahu.
- [315] Policy 8.3.4 is preserving and restoring the natural character of the coastal environment and includes protecting outstanding natural features and landscapes from inappropriate use and development; and protecting and enhancing indigenous ecosystems and associated ecological processes.
- [316] Policy 8.3.7 largely applies to improving the quality of degraded coastal waters, but one of the associated methods contemplates contents of regional plans applying outside the coastal marine area to provide for the inter-relationships between water quality in a water catchment and the quality of coastal water.¹⁵⁰
- [317] Policy 9.3.5 includes ensuring that natural, physical, and cultural values of Canterbury's ecologically significant wetlands are protected; and protecting adjoining areas of indigenous vegetation outside such a wetland which are necessary for its ecological functioning.
- [318] Policy 10.3.2 is preserving the natural character of river and lake beds and their margins and protecting them from inappropriate use and development.
- [319] Of those policies of the CRPS, most of them are expressed in imperative terms; but some of them, though important, are not: namely Policies 7.3.9, 7.3.10, 7.3.11, 7.3.12 and 8.3.7. No submitter raised, or referred to, any dispute about the legal validity of any of the policies of the CRPS, nor any uncertainty about the meaning of any of them. Unlike the NZCPS and the NPSFM, we consider that the CRPS does cover the field. The scope of this instrument as a whole is comprehensive. Policies 5.3.11 and 5.3.12 are enabling; as is Policy 7.3.10. We find that having recourse to Part 2 to minimise or offset the significance of any of the CRPS policies would not be justified on the ground that the CRPS does not cover the field.
- [320] We have to consider whether any of the directions in the superior instruments we have identified pull in different directions. The authors of the Section 42A report advised that the provisions of the superior instruments sometimes pull in different directions depending on the geographical location, and cannot be reconciled to ensure strict compliance with all statutory directions in all locations within the catchment. They gave examples from certain policies of the CRPS.

¹⁵⁰ Policy 6.2 of the RCEP seeks that adverse effects of use and development of land on certain identified areas are avoided, remedied or mitigated, but it is uncertain how far the coastal environment to which that policy applies extends.

- [321] With that in mind we have reviewed the identified policies. As just mentioned, we note that Policies 5.3.11, 5.3.12 and 7.3.10 of the CRPS are enabling, while most of the others are restricting or limiting activities. We accept that within the Selwyn Te Waihora sub-region, there are some differences in soils, microclimates and other features within which Variation 1 has to give effect to the higher order instruments.
- [322] We have considered the policies of the CRPS referred to in this report. Policy 5.3.12(3) is for ensuring land-use intensification does not contribute to significant cumulative adverse effects on water quality or quantity; Policy 7.3.7(2) is controlling changes in land use to ensure water quality standards are maintained or improved; and Policy 7.3.12 is taking a precautionary approach to intensification of land use or discharge of contaminants where the effects on fresh water, singularly or cumulatively, are unknown or uncertain.
- [323] We consider that these policies do not compete or pull in different directions. Rather, we understand them as indicating limits to changes or intensification in land use. So, changes (including intensification) are not to extend so far as to contribute to significant adverse effects on water quality; nor extend so far that water quality standards are not maintained; nor extend so far that the effects on fresh water, singularly or cumulatively, are unknown or uncertain. Further, the language of those policies is sufficiently general that it does not preclude them being applied in geographically different parts of the catchment.
- [324] We do not perceive any difference, let alone conflict, between the policies of the superior instruments (including the CRPS) so as to require us to make the further analysis of the language used to reconcile any perceived tension between them.
- [325] We acknowledge the submission that unlike a NZCPS, national policy statements are not ends in themselves, but contain matters to be had regard to along with other Part 2 matters. We have considered the difference in language in statements of the purposes of coastal policy statements and of national policy statements. We do not see that the difference is significant for the purpose of providing a sound basis for distinguishing *King Salmon*, or for failing to apply the law as declared in it.
- [326] We also acknowledge that section 32(1)(a) requires examination of the extent to which the objectives of a proposal are the most appropriate way to achieve the purpose of the Act. However, Variation 1 does not state objectives. Even if it did, examination of the extent to which they are the most appropriate way to achieve the purpose of the Act could not justify failing to comply with the statutory requirements to give effect to the superior instruments. Even if a proposal that faithfully gives effect to them is found not to be the most appropriate way to achieve the purpose of the Act, that would be a judgement of degree to which regard is to be paid, but it would not excuse neglecting to give effect to the superior instruments.
- [327] Although we have not found that the NZCPS and the NPSFM cover the field, we have found that the CRPS does. So where no direction is to be found in applicable policies of the NZCPS or the NPSFM, the Council still has guidance from the more extensive CRPS, to which it is also obliged to give effect. It follows that the Council would not—even in the course of the familiar practice of making an overall broad judgement—be free to have recourse to the higher order contents of Part 2 to justify provisions in the variation that do not give full effect to directions of the higher order instruments, or that minimise their significance.

4.2 Is requiring part surrender of allocation on transfer of water permit lawful?

Effect of the variation

- [328] Variation 1 would insert in the LWRP a Policy 11.4.22 for restricting transfer of water permits within the Rakaia-Selwyn and Selwyn-Waimakariri water allocation zones. The purpose of the policy is to minimise cumulative effects on flows in hill-fed lowland and spring-fed plains rivers from the use of allocated but unused water. The restriction on transfers would operate in two ways. Irrigation scheme shareholders within the Irrigation Scheme Area shown on the planning maps would not be permitted to transfer their permits to take and use groundwater. In all other cases, 50 percent of any transferred water would be required to be surrendered.
- [329] The variation would also insert proposed Rules 11.5.37 and 11.5.39. Rule 11.5.37 would classify as a restricted discretionary activity a temporary or permanent transfer, in whole or in part, of a water permit to take or use surface water or groundwater within the Selwyn Waihora catchment, on certain conditions. There is an exception for transfers to new owners of a site.
- [330] Of the conditions of eligibility for consideration as a restricted discretionary activity, Conditions 3 and 4 are relevant. Condition 3 would stipulate attributes of transfers of permits to take groundwater, relating to where the point of take is in the same allocation zone; the bore interference effects being acceptable; that the transfer is not from a shareholder in an irrigation scheme; and in respect of stream-depleting groundwater takes, the transfer is within the same surface-water catchment, the take complies with the minimum flow and restriction regime, and the stream-depletion effect is no greater in the transferred location than in the original location. Condition 4 applies if the transfer is in the Rakaia-Selwyn or Selwyn-Waimakariri Allocation zones, and stipulates that 50 percent of the volume of transferred water is surrendered.
- [331] Rule 11.5.39 prescribes that a transfer, in whole or in part, of a water permit to take or use surface water or groundwater in the Selwyn Waihora sub-region that does not meet the terms of one of the conditions of Rule 11.5.37 or Rule 11.5.38 is a prohibited activity.

Submission by HydroTrader

- [332] A submission on Variation 1 was lodged by Hydro Trader Ltd (Hydro Trader). The submission relates to Policy 11.4.22; Rule 11.5.37, in particular Conditions 3 and 4; Rule 11.5.39; and “any other provisions that are affected by or rely on the above provisions”.
- [333] By its submission, Hydro Trader submitted that the CRC lacks power to impose a condition requiring surrender of part of an existing allocation on transfer; that it lacks power to make transfer of water a prohibited activity, including when such a condition is breached. It also submitted that the CRC had failed in its obligations under section 32 to establish that the policy and rules are the most appropriate means of giving effect to the purposes of the Act and the applicable national and regional planning documents.
- [334] In its submission, HydroTrader argued that a condition requiring surrender of allocation is not available under section 77A of the RMA, as it would not be available under section 108; and also that it reduces an existing grant in a way that is provided for in a consent review under section 128 or cancellation under section 126. It also argued that section 136 only provides for rules that either permit a water transfer or enable an application for transfer to be made.
- [335] Hydro Trader asked that Policy 11.4.22 be amended by deleting the restrictions in question and replacing them with a policy for imposing appropriate conditions to avoid increases in water

usage that will have adverse effect on flows on hill-fed lowland and spring-fed plains rivers. (Precise details of the replacement policy were not given.) The submitter asked that Rule 11.5.37 be amended by deleting Conditions 3 and 4, and that Rule 11.5.39 be deleted. Alternatively it asked that Rule 11.5.39 be amended by altering the classification from prohibited activity to discretionary activity. Further, it asked for consequential relief, but did not specify what.

Relevant content of section 42A report

- [336] HydroTrader's submission was addressed in the report for the hearing commissioners under section 42A. By that report, the authors drew attention to a difference between subparagraphs (i) and (ii) of section 136(2); and suggested that the reference in subparagraph (i) to a transfer being 'expressly allowed' implies that permitted activity status can be assigned to transfer of a water permit; and inferred that another activity status is also available. They also argued that if a transfer is not a permitted activity under subparagraph (i), an application may be made under subparagraph (ii), relating to approval under subsection (4), which states that an application is to be considered as if it is a resource consent application, and the consent authority is to have regard to the effects of the transfer. There can be no assurance that a transfer application under subparagraph (ii) will be granted; but if it is, the grant may be on such conditions as the consent authority determines. That would give the consent authority scope to review the conditions of the water permit being transferred.
- [337] The authors of the section 42A Report also submitted that by section 68(1) of the Act, a local authority has power to make rules for its functions under the Act, and one of a regional council's functions is consideration of transfers of water permits; so the CRC has power to make a rule for that purpose. They cited an Environment Court decision: *Carter Holt Harvey v Waikato Regional Council*.¹⁵¹
- [338] On Hydro Trader's challenge to Rule 11.3.39 making transfers a prohibited activity in certain circumstances, the authors observed that nothing in section 136(2)(b) prevents classifying a transfer as a prohibited activity; and argued that if a local authority can classify a transfer as a discretionary activity, then it must also be legally possible to classify it as a prohibited activity.
- [339] (The authors also addressed the Court of Appeal judgment in *Coromandel Watchdog of Hauraki v Chief Executive of Economic Development*¹⁵² on the circumstances in which prohibited activity status would be appropriate. However we are concerned here with the question of law whether the CRC has legal power to classify transfers of water permits as a prohibited activity. The question of merits whether it is appropriate to do so only arises if the question of law is resolved in the affirmative.)
- [340] On the lawfulness of the surrender condition, the authors advised (on the authority of the House of Lords in the case of *Newbury District Council v Secretary of State for the Environment*¹⁵³) that to be valid at law, a condition has to be for a resource-management purpose, not an ulterior one; has to fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and has not to be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it. They submitted that the part surrender condition is for a resource management purpose, being to address over-allocation of water resources, in line with the NPSFM, the CRPS, and the overall purpose of sustainable

¹⁵¹ [2011] NZEnvC 380.

¹⁵² [2008] 1 NZLR 562; (2007) 13 ELRNZ 279; [2008] NZRMA 77.

¹⁵³ [1981] AC 578; [1980] 1 All ER 731 HL.

management. They observed that the requirement for surrender would only affect the status of the transfer, and does not affect the original grant of the water permit, which does not itself include any right of transfer. Further, the surrender condition would not negate the original grant, as an applicant is not compelled to transfer the permit, and without the transfer the original permit would remain for its full volume.

- [341] On the prohibited-activity status that would be prescribed by Rule 11.5.39, the authors of the section 42A report submitted that the rule would give effect to the NPSFM objective¹⁵⁴ of avoiding any further over-allocation; and the policy¹⁵⁵ of plans stating criteria for deciding transfer applications, including to improve and maximise efficient allocation of water. They also submitted that the rule would give effect to the CRPS, particularly Issues 7.1.4 and 7.1.5; and for addressing those issues, Policies 7.3.4, 7.3.8 (especially Method (g)), and 7.3.13 (especially Method (3)(a)).

Hydro Trader legal contentions

- [342] Counsel for Hydro Trader, Mr H van der Wal, submitted that the Environment Court decision in *Carter Holt Harvey* is not authority for classifying transfers of water permits in a class more stringent than discretionary, and certainly not as prohibited activity, because in that case the ability to classify other than permitted or discretionary had not been in issue before the Court, which had not considered the consequences of the failure of section 136 to make provision for transfer at all. Counsel disputed that the full range of activity statuses is available in respect of transfers of water permits; and contended that section 136 provides for two possibilities: permitted activity, and where consent is required; but does not provided for the third possibility where consent cannot be granted.

Hearing commissioners' consideration

- [343] This section of our report concerns legal issues raised by the submissions. Arising from Hydro Trader's submission there are two such issues. The first is whether the CRC has power to set a certain condition of eligibility for considering transfer of a water permit as a restricted discretionary activity. The condition is surrender of 50 percent of the volume of water authorised by the permit to be taken. The second issue is whether the Council has power to classify as a prohibited activity transfers of water permits that do not comply with one of the conditions of Rule 11.5.17, or Rule 11.5.38.
- [344] We have already noted that section 136 of the RMA provides for transfers of water permits, and we start with the text of relevant parts of that section:

136 Transferability of water permits

...

(2) A holder of a water permit granted other than for damming or diverting water may transfer the whole or any part of the holder's interest in the permit—

(a) to any owner or occupier of the site in respect of which the permit is granted; or

(b) to another person on another site, or to another site, if both sites are in the same catchment (either upstream or downstream), aquifer, or geothermal field, and the transfer—

(i) is expressly allowed by a regional plan; or

(ii) has been approved by the consent authority that granted the permit on an application under subsection (4).

(2A) A transfer under subsection (1) or subsection (2) may be for a limited period.

¹⁵⁴ NPSFM 2014 Objective B2.

¹⁵⁵ NPSFM 2014, Policy B3.

(3) A transfer under any of subsections (1), (2)(a), and (2)(b)(i) shall have no effect until written notice of the transfer is received by the consent authority that granted the permit.

(4) An application under subsection (2)(b)(ii)—

(a) shall be in the prescribed form and be lodged jointly by the holder of the water permit and the person to whom the interest in the water permit will transfer; and

(b) shall be considered in accordance with sections 39 to 42A, 88 to 115, 120, and 121 as if—

(i) the application for a transfer were an application for a resource consent; and

(ii) the consent holder were an applicant for a resource consent,—

except that, and in addition to the matters set out in section 104, the consent authority shall have regard to the effects of the proposed transfer, including the effect of ceasing or changing the exercise of the permit under its current conditions, and the effects of allowing the transfer.

(5) Where the transfer of the whole or part of the holder's interest in a water permit is notified under subsection (3), or approved under subsection (2)(b)(ii), and is not for a limited period, the original permit, or that part of the permit transferred, shall be deemed to be cancelled and the interest or part transferred shall be deemed to be a new permit—

(a) on the same conditions as the original permit (where subsection (3) applies); or

(b) on such conditions as the consent authority determines under subsection (4) (where that subsection applies).

[345] We start with subsection (2), which provides for transfer of a water permit in two classes of case: where the location at which the permit is to be exercised is not to be changed (paragraph (a)); and where the location is to be changed, but to another site in the same catchment or aquifer (paragraph (b)).

[346] The rules proposed in Variation 1 that Hydro Trader is challenging would apply where the location is to be changed, and that is the subject of Hydro Trader's submission.

[347] Subsection (2) sets alternative conditions for a transfer to another site in the same catchment or aquifer: if the transfer is expressly allowed by the regional plan (subparagraph (i)); or if, on an application under subsection (4), the transfer has been approved by the consent authority that granted the permit (subparagraph (ii)).

[348] Subsection (4) gives procedural directions for applications to the consent authority for approval of transfers to another site. Relevantly, it prescribes that the application is to be considered in accordance with certain sections of the Act "as if the application were an application for a resource consent".

[349] We consider that language is significant. It recognises that an application for approval of a transfer is not a resource-consent application. Instead of providing specific procedure for consideration of applications for transfers, it adopts for that purpose the existing procedure for consideration of resource-consent applications. Transfer applications are to be considered in accordance with the relevant sections in the same way that they would if they were resource-consent applications, though they are not.

[350] Subsection (2)(b) provides for a regional plan to expressly allow for transfers of water permits (subparagraph (i)); and if, or to the extent that, it does not, provides for transfers to be approved by the consent authority (subparagraph (ii)). That contemplates that the regional plan might expressly allow transfers in a certain class of circumstances, and not in others (for which specific consideration is to be given by the consent authority in accordance with the cited sections, as if a resource-consent application). Of the sections cited, some direct consideration of the type of activity (controlled, restricted, discretionary or non-complying).

[351] It is consistent with providing for applications for transfers of water permits to be considered in accordance with those sections 'as if' for a resource consent, that a regional plan provide for

circumstances in which transfer applications are to be considered ‘as if’ in one of those classes or types of activity. We understand that to be the intent of proposed Rule 11.5.37. (The intention may have been clearer if, instead of saying “is a restricted discretionary activity” the rule said “as if it is a restricted discretionary activity”; but that is plainly what was intended). We accept that by section 68(1), a local authority has power to make rules for its functions under the Act, and that the functions of a regional council include acting as consent authority to consider applications under section 136(4) for approval of transfers of water permits.

- [352] So the question of law raised by Hydro Trader is really whether the CRC has power to define the circumstances in which transfer applications are to be considered as if they were restricted discretionary activities. Seen in that context, clauses 3 and 4 are conditions of eligibility for transfers to be considered as if restricted discretionary activities. We do not accept that they are themselves conditions of a grant of approval of a transfer under subsection (4). Nor do we accept that the rule is an exercise of the power conferred by section 77A to categorise classes of activities. Correctly understood in its context, the rule does not do that. Rather, it states the conditions in which applications for approval of transfers of water permits are to be considered in accordance with the relevant sections of the Act as if they were restricted discretionary activities.
- [353] Nor do we accept Hydro Trader’s contention that the rule would reduce existing grants in a way that is provided for by section 128 on a consent review, or by section 126 on cancellation of a consent. Rather, the effect is that if a consent holder surrenders 50 percent of the volume that may be taken, and if the other conditions are also met, an application for approval of a transfer could then be considered as if it is for a restricted discretionary activity. If the transfer is not approved, the permit remains in effect on its terms.
- [354] We have considered Hydro Trader’s submission that section 136 only provides for rules that either permit a transfer, or enable an application for approval to be made; and that the full range of activity types is not available. That proposition does not allow for the provisions in subsection (4)(b) for a transfer application to be considered in accordance with the cited sections of the Act as if a resource-consent application. Those sections include differing consideration of an application according to the type of activity class.
- [355] We also acknowledge the reference in the section 42A Report to tests for the lawfulness of planning conditions set by the House of Lords in the *Newbury* case.¹⁵⁶ That authority relates to conditions of planning permits or consents. It does not directly apply to rules in a plan describing conditions in which an application is eligible to be considered as having particular planning status. Further, there is no room for doubt that the conditions of Rule 11.5.37 challenged by Hydro Trader are for a resource-management purpose. To what extent they are fair and reasonable is, in this context, better considered on the merits and evaluated in the way provided for by section 32. We address that in Chapter 8.7 of this report.
- [356] In summary, we find that the CRC has power to make rules for managing transfers of water permits; and that, correctly understood, Rule 11.5.37 is within the Council’s powers. We do not accept Hydro Trader’s submission that it is unlawful.
- [357] We now turn to the other question of law raised by HydroTrader: whether the CRC has power to classify as a prohibited activity transfers of water permits that do not comply with one of the conditions of Rule 11.5.37, or Rule 11.5.38.

¹⁵⁶ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731 HL.

- [358] Like Rule 11.5.37, Rule 11.5.39 is worded as classifying non-compliant transfers; and like Rule 11.5.37, the wording does not exactly represent the intent. The intent would be more clearly understood if, instead of the rule ending with the phrase “is a prohibited activity”, it ended “must not be approved, as if it were a prohibited activity.”
- [359] Treating the rule in that way, we note the statements in the section 42A report that the conditions of Rules 11.5.37 and 11.5.38 are designed to give effect to the NPSFM objective of avoiding further over-allocation, and to the NPSFM policy of plans stating criteria for deciding transfer applications, including to improve and maximise efficient allocation of water; and also to give effect to certain provisions of the CRPS, in particular (where water is over-allocated) avoiding any additional allocation or any other action that would result in further over-allocation (Policy 7.3.4(2)(a)); setting conditions and circumstances for the transfer of water permits and avoiding any transfers that would be inconsistent with Policy 7.3.4 (Policy 7.3.8 Method (g)); and localising transfer of water allocations between consent holders subject to safeguards to prevent unintended consequences (Policy 7.3.13, Method (3)(a)).
- [360] On a purposive interpretation, a regional council’s responsibility to manage transfers of water permits must be broad enough to allow it to define classes of circumstances in which, to fulfil its duties to give effect to the NPSFM and the CRPS, transfers will not be approved. Where it intends that in certain circumstances transfers will not be approved, it is more transparent, efficient and effective for that intention to be published in a rule, rather than left for individual applications being made and refused.
- [361] We acknowledge that a submitter would be entitled to challenge whether non-compliant transfers should never be able to be approved (as if a prohibited activity); or should only be approved in exceptional cases (as if a non-complying activity). But those are questions of planning merits, not questions of law.¹⁵⁷
- [362] On the question of law, we are not persuaded by HydroTrader’s submission that the Council lacks power to prohibit transfers of water where the conditions of the preceding rules are not met. We understand that power to manage can embrace power to prohibit in certain stated circumstances. We find that the Council does not lack power at law to make a rule managing transfers of water permits that effectively precludes approval in certain stated classes of circumstance.

4.3 Is Rule 11.5.12 contrary to the scheme and purpose of the RMA?

- [363] Variation 1 proposes Rule 11.5.12 by which—

The use of land for a farming activity or farming enterprise that does not comply with condition 2 of Rule 11.5.7, condition 3 of rule 11.5.9, or condition 2 of Rule 11.5.10 is a prohibited activity.

Submissions on Rule 11.5.12

- [364] By its submission, Dairy NZ requested that Rule 11.5.12 is combined with Rule 11.5.11 so that farming activity that does not comply with conditions of a restricted discretionary activity is a non-complying activity; and a new policy inserted limiting activities that exceed the nitrogen baseline to exceptional cases.

¹⁵⁷ We address the planning merits in Chapter 8.7 of this report.

- [365] By section 3 of their submission on the Variation, North Canterbury Province of Federated Farmers (Federated Farmers) stated that they opposed Policies 11.4.12 to 11.4.16 and Rules 11.5.6 to 11.5.13, and gave reasons for that opposition. Those reasons did not directly address Rule 11.5.12, nor did they, in section 3, request any amendment to that rule.
- [366] By section 4 of the submission, Federated Farmers stated that they opposed the definition of nitrogen baseline coupled with prohibited-activity status for increases above the baseline under Rule 11.5.12. In that section of the submission, they stated their reasons for opposing the nitrogen baseline, and gave a replacement definition for that term, and amendments they sought to Rules 11.5.6(2), 11.5.7(1) and 11.5.8(1); but did not request any amendment to Rule 11.5.12.
- [367] Federated Farmers also lodged a further submission by which they opposed some points, and supported other points, in submissions lodged by others. It contained two entries that involve Rule 11.5.12.
- [368] First, Federated Farmers stated its “support in part” of Dairy NZ’s submission which sought that Rule 11.5.12 is combined with Rule 11.5.11 so non-compliant farming activity would be a non-complying activity.
- [369] Secondly, Federated Farmers stated its opposition to a submission by Fish & Game which asked that Rule 11.5.12 is retained.
- [370] By its submission on the variation, Synlait Farms stated that it opposed Rule 11.5.12 in part, in that it considered the rule appropriate for farms that clearly contribute nitrogen to Te Waihora/Lake Ellesmere, but not for farms that do not clearly link to the lake.
- [371] By their submissions, Forest & Bird, The Crossing, and New Zealand King Salmon stated that they support Rule 11.5.12 being retained.
- [372] In his submissions, counsel for Dairy NZ did not specifically refer to the submission point on Rule 11.5.12, from which we infer that it was not intended to present it as a question of law. However counsel for Federated Farmers (Mr D Van Mierlo), in his submissions, contended that to the extent that it would have the effect of making lawfully established and operating farming enterprises prohibited activities, it is inappropriate, unjustified, and contrary to the scheme and purpose of the Act. We infer that is intended to raise a point of law.
- [373] Counsel relied on the judgment of the Court of Appeal in the *Coromandel Watchdog* case,¹⁵⁸ quoting an unidentified passage from it, which we have located as paragraph [45]:
- ... if a local authority has sufficient information to undertake the evaluation of an activity which is to be dealt with in its district plan at the time is being formulated it is not an appropriate use of the prohibited activity classification to defer the undertaking of the evaluation required by the Act until a particular application to undertake the activity occurs. That can be contrasted with the precautionary approach, where the local authority forms the view that it has insufficient information about an aspect of an activity, but further information may become available during the term of the plan.
- [374] In respect of Rule 11.5.12, Mr Van Mierlo submitted that the Council currently has sufficient information to assess the effects of discharges that would be caused by continuation of existing farming activities in the baseline period; and argued there is no effects-based reason why the Council could not, now, assess the effects of consenting to continuing farming activities

¹⁵⁸ *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473.

undertaken during the baseline period, even though they might, from time to time, exceed the baseline; and should not give them prohibited activity status to defer consideration of the effects until a specific proposal comes before it.¹⁵⁹

Hearing Commissioners' Consideration

- [375] In considering counsel's submissions, we keep in mind that Variation 1 is intended to insert in the LWRP provisions for application in the Selwyn Te Waihora sub-region. The LWRP itself contains rules on nutrient management that are applicable to the whole region, except to the extent that they are replaced by rules for a particular sub-region. The region-wide rules on nutrient management include Rule 5.48, which corresponds with the sub-region Rule 11.5.12, and like it, classifies non-compliant farming activity as a prohibited activity. So the proposed use in Rule 11.5.12 of the prohibited activity classification is consistent with the scheme of the LWRP; although we accept that it would be permissible to have a different classification in the sub-region, such as non-complying activity (as requested by Dairy NZ, and supported by Federated Farmers).
- [376] However, we are not persuaded by Mr Van Mierlo's submission that it is not lawful for the Council to classify non-compliant farming activities as prohibited activities. It is not clear to us whether the prescription in paragraph [45] of *Coromandel Watchdog* is exhaustive of the circumstances in which activities may be so classified. But even if it is, Federated Farmers provided no basis for us to find that the Council is using this classification to defer evaluating farming activity.
- [377] The Selwyn Waihora Zone Committee 'ZIP Addendum'¹⁶⁰ provided community advice on which Variation 1 was based. In that document, the Zone Committee identified that to achieve improving the quality of water in Te Waihora, there is a need for substantial decrease in the nitrogen load derived from existing land use; and recognised a lag of many years in the impact of that use. In carrying forward relevant recommendations of that committee, Variation 1 adopts recommendations for actions that include restricting the losses of nitrogen from agricultural activities in the catchment. The variation proposes several policies for doing that,¹⁶¹ policies that are to be implemented by Rules 11.5.6 to 11.5.13. Those rules would allocate progressively more demanding activity classes to farming activities according to compliance with stated conditions. In particular, Rule 11.5.7 would set conditions in which farming is a permitted activity; Rule 11.5.9 would set conditions in which it is a restricted discretionary activity; and Rule 11.5.10 would set conditions in which it is a discretionary activity. It is only in respect of farming that does not comply with certain of those conditions that Rule 11.5.12 would classify it as a prohibited activity. The conditions identified are related to regulating farming so as to reduce, or at least not increase, nitrogen losses to the environment.
- [378] This is a serious set of policies and rules to address a grave environmental issue. Classifying non-compliant farming as a prohibited activity may be compared with classifying it as a non-complying activity (as certain submitters request). The relevant point of difference is to avoid risk of multiple resource consents granted as non-complying activities resulting in cumulative effects that undermine achievement of the objectives, and giving effect to the higher-order instruments.

¹⁵⁹ Citing *Coromandel Watchdog*, cited above, at [40].

¹⁶⁰ The ZIP Addendum is explained in Chapter Two of this report.

¹⁶¹ Variation 1, Policies 11.4.12 to 11.4.17.

- [379] Returning to the passage in paragraph [45] of the *Coromandel Watchdog* judgment relied on by Federated Farmers, the classification in Rule 11.5.12 is not deferring evaluating farming until a particular application is made: it is avoiding specific applications in circumstances where the conditions of eligibility for making a resource-consent application are not present or complied with.
- [380] Therefore we do not accept Federated Farmers submission that Rule 11.5.12 is unlawful by prohibiting a class of activity so as to defer evaluation of that activity until a specific application occurs.
- [381] That consideration is confined to the question of law. We return to Rule 11.5.12 in Appendix A of this report to consider submissions on the appropriateness, as distinct from the lawfulness, of the classification.

4.4 Cultural Landscape/Values Management Area

Provisions of Variation 1

- [382] Variation 1 would insert Policies 11.4.3 and 11.4.4 for establishing and managing a Cultural Landscape/Values Management Area (CLVMA) that encompasses Te Waihora (Lake Ellesmere), its margins, wetlands springs and tributaries. Two purposes are identified. One is to recognise the nature, concentration, networks and significance to Ngāi Tahu of sites and values within the Area. The other purpose is to provide for the relationship of Ngāi Tahu with Te Waihora (Lake Ellesmere).
- [383] Policy 11.4.4 relates to managing the CLVMA. It is managing the Area as one integrated freshwater mahinga kai system with outstanding values; protecting mahinga kai, wāhi tapu and wāhi taonga; restoring the health of Te Waihora (Lake Ellesmere); and recognising the cultural and ecological sensitivity of the Area to discharges and the taking and use of fresh water.
- [384] The maps in the Selwyn Waihora Map Series that would be inserted by Variation 1 identify the Area by distinctive colour.
- [385] The variation would insert rules to implement those policies. Rules 11.5.1 to 11.5.5 would amend certain rules of the LWRP by inserting additional conditions and matters of discretion restricting adverse effects on mahinga kai, wāhi tapu or wāhi taonga within the Area.
- [386] Condition 4 of Rule 11.5.7; Condition 2 of Rule 11.5.8; Condition 1 of Rule 11.5.27; Condition 1 of Rule 11.5.28; Condition 1 of Rule 11.5.43 and Condition 6 of Rule 11.5.44 would also operate to protect those features within the Area; as would Table 11(n); and a new subclause (1) of clause 2 in Part B of Schedule 7.
- [387] In general those provisions accord with the wishes of the community expressed through the Selwyn Waihora Zone Committee's recommendations, particularly Section 3.¹⁶²

Submissions

- [388] A submission opposing the CLVMA and related provisions was lodged by the Ellesmere Irrigation Society. That submission asserted that the extent of the Area is of concern; that the rules and policies would substantially hinder farming operations; and asked that the area be

¹⁶² Selwyn Waihora ZIP Addendum, October 2013.

reduced to within 10 metres of the Te Waihora (Lake Ellesmere) lake edge and the edge of Muriwai (Coopers Lagoon).

- [389] The Society presented submissions at the hearing of its submission. In those submissions, it asserted that the Cultural Landscape/Values Management Area had not been discussed with the wider community, and the Society had not had been able to provide feedback on the Area to the Zone Committee, nor in consultation with Ngāi Tahu.
- [390] The Society also submitted that decisions on submissions do not rely on the number of supporting submissions and the number opposing; but rely on careful and dutiful consideration of the matters and whether they meet the provisions of the Act, including enabling people and communities to provide for their social, economic and cultural well-being and for their health and safety.
- [391] An additional point was raised about the part of the section 42A Report on this topic. In that regard, the Society asserted that the report had been based on a technical memorandum about the River Zone 20-metre margin by Ms D Jolly who, they claimed, had acted for Te Taumutu Rūnanga (a submitter on Variation 1) during the development process; and had provided a perspective in relation to the submissions on the CLVMA. The Society argued that this was a conflict of interest, and asked that the recommendation in the section 42A Report based on that technical memorandum should be withdrawn.
- [392] Lake Ellesmere Dairy Farmers Group also lodged a submission in opposition to the CLVMA. However they did not raise any legal points of law, their submission being confined to their opposition to the CLVMA and related provisions on the merits.
- [393] By its submission, Te Taumutu Rūnanga supported recognition of the specific sensitivity of the CLVMA as a receiving environment; and requested that the CLVMA provisions (including rules) are retained. The Runanga's submission asked that Farm Environment Plans (FEPs) for the CLVMA are required to include details on how land use/farm practices recognise and provide for "living with a lake"; and offered to work with Environment Canterbury to develop annual audits of FEPs in the CLVMA.
- [394] A submission by other Rūnanga (Ngāi Tahu) supported the CLVMA in concept. Ms L M W Murchison, a witness called on behalf of Ngāi Tahu, confirmed that Ms Jolly, a consultant working on behalf of Te Taumutu Rūnanga, had checked the provisions for the CLVMA.
- [395] Another witness called on behalf of Ngāi Tahu, Ms C F Begley (a qualified and experienced planner) gave opinion evidence concerning the CLVMA. Helpful as it is, that evidence is relevant to the merits of the CLVMA, including its extent and the related provisions; but it does not bear on the legal questions raised by the Ellesmere Irrigation Society.

Consideration by Hearing Commissioners

- [396] In this chapter of our report, we confine ourselves to the legal questions raised about the process by which the CLVMA provisions were included in Variation 1 as notified, and the reliance placed on Ms Jolly's technical memorandum in the section 42A Report. The merits of the CLVMA provisions and the extent of the Area are addressed in Chapter 9.2 of this report.
- [397] We are grateful to the Ellesmere Irrigation Society for reminding us that decisions on submissions should not be based on the number of supporting submissions and the number opposing; but on careful and dutiful consideration of the matters and whether they meet the

provisions of the Act, including enabling people and communities to provide for their social, economic and cultural well-being and for their health and safety. It is our intention to make our recommendations on the submissions on Variation 1 on that basis.

- [398] By clause 3 of Schedule 1 of the RMA, a local authority preparing a planning instrument is required to do so in consultation with certain people referred to in that clause. It may consult anyone else.
- [399] Worthy as it may be, the Ellesmere Irrigation Society is not in any class or persons referred to in clause 3. The CRC was free to choose to consult the Society, but was not obliged to do so.
- [400] Therefore we find that, if the Society, or the wider community, was not consulted by the CRC in relation to the CLVMA, its extent, and associated provisions in Variation 1, that does not raise a point of law or lead to any legal vulnerability in those provisions of the variation.
- [401] The report prepared for us under section 42A appends the technical memorandum by Ms Jolly referred to by the Society in their submissions. It explains the author's understanding of the justification for the CLVMA; for the boundaries of the Area; and gives her opinions on the consequences of reducing the Lake Zone to within 10 metres of the lake margin and the River Zone to 10 metres, with reasons.
- [402] If it is the case that Ms Jolly had previously given advice to Te Taumutu Rūnanga during the development process, and that she had provided a perspective in relation to the submissions on the CLVMA, that does not appear to us to disqualify her from giving her advice on those topics to the CRC or to ourselves as hearing commissioners. The author having given advice on those topics to another submitter is no reason for "withdrawing" the related section in the section 42A Report. To the contrary, publication of her advice by appending it to the report assists the hearing commissioners, and also serves the aim of transparency of the basis of the report.
- [403] In summary, we do not accept that the provisions in the variation about the CLVMA are invalid either for want of consultation with the Ellesmere Irrigation Society; or for the publication in the section 42A Report of the technical memorandum by a person who had given advice to another submitter.

4.5 The relevance of the resource consents held by CPW

Provisions of Variation 1

- [404] The nutrient management provisions of Variation 1 would, by a combination of Rule 11.5.14 and Table 11(j), provide property irrigated with water from the Central Plains Water (CPW) irrigation scheme (and authorised discharges) an aggregate allowance (ie a permitted activity) of 1944 tonnes of nitrogen losses per year from 1 January 2017, and 1742 tonnes per year from 1 January 2022.

Submissions

- [405] Neither Forest & Bird's submission on Variation 1, nor Fish & Game's submission on it, requested deleting or amending Rule 11.5.14, nor Table 11(j). Neither Forest & Bird's further submission nor Fish & Game's further submission supported or opposed a submission requesting deleting or amending that rule or table.

Legal question raised

- [406] Even so, at the hearing of their submissions counsel for Forest & Bird and Fish & Game (Mr Anderson) questioned the allocation for CPW, on the basis that it is not part of the existing environment, since CPW has not yet been granted a land-use consent. In answer to a question about that, counsel argued that CPW will require a discretionary consent after 1 January 2017,¹⁶³ and as it does not yet have all necessary consents the scheme does not form part of the existing environment and no allocation can be said to have been made. Counsel relied on an Environment Court decision¹⁶⁴ in which it was held that a coal-mining licence was not part of the existing environment as all necessary consents had not been obtained. Counsel advised that the Environment Court decision had been upheld on appeal.¹⁶⁵
- [407] Mr Anderson also contended that, as a result of Condition 35 of the consents that had been granted to CPW, the conditions of consent relating to nutrient discharge are to be varied to be consistent with catchment-wide NDA¹⁶⁶ defined in the regional plan. He argued that this condition anticipated Variation 1 and is subservient to it; so that the CPW scheme is not part of the existing environment and there is no legal obligation to provide CPW with an allocation.
- [408] In response, counsel for CPW (Mr B G Williams) submitted that the Council is obliged to treat the irrigation scheme as forming part of the existing environment. He cited the judgment of the Court of Appeal in *Queenstown Lakes DC v Hawthorn*¹⁶⁷ and, acknowledging that it and other cases applying it¹⁶⁸ concerned resource consents, not plan changes, relied on an Environment Court decision on a plan change case, *Milford Centre v Auckland Council*¹⁶⁹ in which the *Hawthorn* approach was applied.
- [409] Relying on that case, Mr Williams submitted that for the purpose of Variation 1, the environment includes what exists currently and as it will be modified by the consents granted to CPW. He contended that there is no doubt about the existence of the CPW irrigation scheme, or about the consents granted being given effect to, as construction of Stage 1 had been ongoing since March 2014, and delivery of irrigation water being due to commence in September 2015.
- [410] CPW presented evidence by Ms S Goodfellow and Mr D Crombie on which we find that CPW holds all the core consents (granted in early 2012) necessary for the construction, operation and maintenance of the irrigation scheme¹⁷⁰ (a \$400 million project, excluding on-farm costs); that construction of Stage 1 (a total of 20,000 hectares) commenced in March 2014, and delivery of water is scheduled to start on 1 September 2015; and Stages 2+ (a further 40,000 hectares, to be subject of a prospectus to be issued in mid-2015) are to be developed between 2015 and 2020.
- [411] Counsel for the CRC also referred us to another High Court judgment on this point: *Shotover Park v Queenstown Lakes DC*.¹⁷¹ In that judgment, Justice Fogarty confirmed that where some of the land the subject of a plan change is already the subject of resource consents likely to be implemented, the planning authority has to write a plan which accommodates the presence of

¹⁶³ Record of proceedings, 17 September 2014.

¹⁶⁴ *Royal Forest & Bird Protection Society v West Coast Regional Council* [2013] NZEnvC 42.

¹⁶⁵ *Royal Forest & Bird Protection Society v Buller Coal* [2013] NZRMA 275.

¹⁶⁶ The meaning of NDA in that context was not explained.

¹⁶⁷ [2006] NZRMA 424 (CA).

¹⁶⁸ *Royal Forest & Bird Protection Society v Buller DC* [2013] NZHC 1346; and *Save Kapiti v NZ Transport Agency* [2013] NZHC 2104 at [17]-[19].

¹⁶⁹ [2014] NZEnvC 23 at [119]-[120].

¹⁷⁰ Copies of those consents were produced in evidence. The witnesses acknowledged that there may be further minor or ancillary consents required for Stage 2, once final design is completed.

¹⁷¹ [2013] NZHC 1712.

that activity.¹⁷² The Judge also remarked that in deciding a plan for the future, there is nothing in the Act intended to constrain forward-looking thinking;¹⁷³ and the likely-to-be-implemented test is intended to be a real-world analysis.¹⁷⁴

Hearing Commissioners' Consideration

- [412] It is not clear to us how Mr Anderson's submissions fit in the cases he was presenting for submitters who had not requested deleting or amending Rule 11.5.14 or Table 11(j). However we address his submissions out of caution.
- [413] On the evidence we find that CPW holds a bundle of consents that authorise the irrigation scheme. It is not apparent to us that the CPW irrigation scheme requires separate land-use consent that has not yet been granted. But even if it does, the approach commended by Justice Fogarty in *Shotover Park* is applicable.
- [414] The CPW irrigation scheme is authorised by resource consents granted only 3 years ago, and substantial physical works are currently being carried out to implement the first stage to implement them. Unless there is a supervening hindrance, the LWRP and Variation 1 should be forward-looking and accommodate the scheme. A real-world view is that for the LWRP to perform its function, it has to recognise the scheme that has already been authorised and commenced.
- [415] Therefore we do not accept the submissions presented by Mr Anderson on behalf of Forest & Bird and Fish & Game that the CPW irrigation scheme is not part of the existing environment to be recognised in Variation 1.

¹⁷² *Shotover Park v Queenstown Lakes DC*, [2013] NZHC 1712 (HC), [112].

¹⁷³ *Shotover Park*, cited above, [116].

¹⁷⁴ *Shotover Park*, cited above, [117].

Chapter Five

Practicality of Approach to Submissions

- [416] At the conclusion of Chapter Two of this report, we described our intended process for considering amendments to Variation 1 based on the duties set out in the legislation. However, our consideration does not occur in a vacuum. In particular, we have received comprehensive advice from the Council officers in the form of legal submissions and reports prepared under section 42A of the Act comprising both technical analysis and planning advice. The section 42A planning reports recommended whether submission points should be rejected or accepted, with reasons; and specific recommended amendments to the notified Variation were included for our consideration. In addition, the officers prepared an initial section 32 Evaluation Report in February 2014; and as part of their Reply to us they prepared an Evaluation Report under section 32AA of the Act.¹⁷⁵ The Section 32AA Evaluation Report contained an evaluation of and justification for the officer's recommended amendments to the notified provisions of Variation 1 in response to submissions.
- [417] To avoid repetition, where we consider the officer's final recommendations¹⁷⁶ on the issues raised by submissions to be appropriate, including their evaluation under section 32AA of the Act, we simply note that we accept the officers' recommendations for the reasons set out in the relevant section 42A report(s) and the 32AA Evaluation Report. This is primarily recorded in Appendix A of this Decision.
- [418] The consequence of this is that our evaluative narrative in Chapters Six to Ten of this report is largely confined to those issues raised by submitters where we do not accept the recommendations of the officers, or have accepted their recommendations in principle, but have then ourselves recommended amendments to the notified provisions of Variation 1 that are materially different from those recommended by the reporting officers.

¹⁷⁵ Officers' Reply For Council Reply Hearing, Part 4 – Evaluation under Section 32AA, M McCallum-Clark, November 2014.

¹⁷⁶ As set in the Officer's Reply: Part 1 – Legal Submissions; Part 2 – Evaluation and Technical Memoranda; and Part 3 – Reply Recommendation Tracked Change Variation 1.

Chapter Six

Nutrient Management

6.1 Over-allocation

- [419] Variation 1 proceeds on the basis that the catchment of Te Waihora (Lake Ellesmere) is over-allocated with regard to water quality. This is discussed in the Introduction to Section 11 as proposed in the Variation and which contains the ZIP Addendum 2013 actions to reduce legacy phosphorus in Te Waihora (Lake Ellesmere) by 50 percent, to restrict the agricultural nitrogen load losses from the catchment, and to achieve a 50 percent reduction in the catchment phosphorus load. Section 11 goes on to state that the Selwyn Te Waihora sub-region is not currently achieving all its 'freshwater objectives' and water quality is anticipated to get worse before it gets better as a result of lag effects from historical land-use intensification. As a result the catchment is considered to be over-allocated in terms of the definition of that term in the NPSFM 2014.
- [420] There was no serious challenge to that proposition and we accept that the Selwyn Te Waihora sub-region is over-allocated from a water quality perspective. By Objective A2(c) of the NPSFM 2014, the quality of the degraded water that has led to that over-allocation has to be improved. This requirement has under-pinned our consideration of the water quality issues raised by submitters.

6.2 Nitrogen baseline

- [421] As noted in the initial Section 42A Report,¹⁷⁷ some submitters¹⁷⁸ sought to make changes to the region-wide definition of 'nitrogen baseline'. We accept the officers' advice that changes to the region-wide definitions contained in section 2.9 of the LWRP are outside the scope of Variation 1.
- [422] However, NZ Pork noted that Variation 1 contains a definition of "baseline land use". That is the land use that occurred during the nitrogen baseline period of 1 July 2009 to 30 June 2013. NZ Pork requested that the definition of "baseline land use" be amended to allow for development that occurred during the nitrogen baseline period. They suggested that this could be done by "... ensuring that the definition treats any new or changed activity established during the baseline period as fully operational."¹⁷⁹
- [423] We note that the definition of "nitrogen baseline" in the LWRP states that where a building consent and effluent discharge consent have been granted for a new or upgraded dairy milking shed in the period 01 July 2009 – 30 June 2013, then the determination of the discharge of nitrogen below the root zone of that land is to assume that the dairy farming activity is operational.
- [424] The type of amendment to Variation 1 suggested by NZ Pork is reasonably practical and would be consistent with the approach within the LWRP to the "nitrogen baseline". The amendment would ensure that opportunities for economic growth and employment resulting from authorised

¹⁷⁷ Para 7.166(c), page 101.

¹⁷⁸ Including Beef + Lamb New Zealand.

¹⁷⁹ Statement of Evidence of A Murrell, NZ Pork Industry Board, para 15, page 6.

development that occurred during the nitrogen baseline period are not reduced. That would in turn give effect to Objective 3.5 of the LWRP.

- [425] On balance we consider that Variation 1 can be improved by amending the definition of “baseline land use” to include discharge permits granted in the period 01 July 2009 – 30 June 2013 that have imposed nitrogen loss limits on the land.
- [426] Proportionate to the scale and significance of this change, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make that change or not; have identified that the change is reasonably practicable; and have assessed that adopting it would more fully serve the provisions of the Act and subordinate instruments than not making it, including the extent of additional opportunities for economic growth and employment.

6.3 Non-regulatory actions

- [427] The Section 42A Report described how the water quality and quantity limits proposed in Variation 1 on their own cannot achieve the priority outcomes set in the Selwyn-Waihora Zone Implementation Programme (ZIP) and ZIP Addendum, and that a suite of complementary non-regulatory actions is also needed.¹⁸⁰ Those non-regulatory actions can be broadly described as catchment interventions, lake interventions, monitoring and infrastructure development.
- [428] Policy 11.4.1 of Variation 1 as notified set out, in broad terms, the proposed regulatory approach to the management of water abstractions and discharges of contaminants within the sub-region. Fonterra’s submission noted that it is likely that the non-regulatory measures would be more crucial than the regulatory limits proposed in the Variation to achieve the outcomes sought for Te Waihora (Lake Ellesmere). Fonterra sought a new method of committing the Council to the non-regulatory methods.¹⁸¹ In his evidence to the hearing Mr G M Willis, a planning witness for Fonterra and Dairy NZ, advised us that the most appropriate means of doing that would be to amend Policy 11.4.1.¹⁸²
- [429] We accept that non-regulatory measures would be at least as important as regulatory measures to achieve the intended outcome for the lake. However the LWRP is a regulatory instrument, and we consider a specific commitment to non-regulatory measures is not appropriate content for it. Decisions on implementing non-regulatory measures are within the Council’s executive responsibilities. So we recommend accepting Fonterra’s submission in part, by amending Policy 11.4.1 to include a reference to non-regulatory actions.
- [430] That would give effect to NPSFM Policy A2, which requires the Council to implement methods either or both regulatory and non-regulatory. It would also give effect to CRPS Policy 7.3.9 and its Method (3)(b), and would be an appropriate way of achieving LWRP Objectives 3.12 and 3.16.
- [431] In proportion to the scale and significance of this change, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us (being whether to make that change or not); we have identified that the change is reasonably practicable; and we have assessed that adopting it would more fully serve the provisions of the Act and subordinate

¹⁸⁰ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 5.1, page 37.

¹⁸¹ Submission from Fonterra Co-operative Group Ltd, page 38.

¹⁸² Statement of Evidence of G M Willis, para 196, page 31.

instruments than not making it, including the extent of additional opportunities for economic growth and employment.

6.4 Farming enterprises

[432] A 'farming enterprise' is defined in the LWRP as:

... an aggregation of parcels of land held in single or multiple ownership (whether or not held in common ownership) that constitutes a single operating unit for the purpose of nutrient management.

[433] Variation 1 addresses farming enterprises in Policy 11.4.16 and Rules 11.5.10 to 11.5.13. In particular, by Rule 11.5.10 the use of land for a farming enterprise is a discretionary activity, provided a farm environment plan (FEP) has been prepared for the land and the nitrogen lost from the land does not exceed the 'nitrogen baseline'. The section 42A Report explained that Rule 11.5.10 would closely follow the format of the LWRP provisions for farming enterprises. The intent was to enable some development by balancing of nitrogen losses between the farming enterprises' properties to achieve a neutral position overall.¹⁸³

[434] Several submissions were received on Rule 11.5.10. We accept the recommendations contained in the section 42A Report regarding the points raised by those submissions.¹⁸⁴ However, we consider that Rule 11.5.10 should be reworded so that its meaning is clearer, by incorporating the wording from the definition of 'farming enterprise' into the body of the rule. This clarification would not have any actual or potential effect on the environment (in terms of the freshwater outcomes specified in Table 11(a) for example), but it would avoid the risk of the rule being interpreted inconsistently, so future transaction costs would be reduced. That in turn would assist with achieving LWRP Objective 3.24.

[435] Dairy Holdings Limited submitted that Variation 1 should make it clear that on the exit of a property from a farm enterprise that property should either keep its increased nitrogen loss allowance resulting from being part of the farming enterprise; or alternatively comply with a lower (i.e. less than its baseline land use) allowance, due to increases having occurred on other properties that are part of the farming enterprise. On exit, the allocation applying to an individual property would be for the members of the farming enterprise to determine.¹⁸⁵ Dairy Holdings Limited accordingly proposed wording for a new policy, submitting that it could be achieved as a consequential amendment to its primary relief (for example, in relation to its proposed new Rule 11.5.10A).¹⁸⁶

[436] We consider that including an additional policy along the lines proposed by Dairy Holdings Limited would be an improvement to the Variation. It is foreseeable that a property forming part of a farming enterprise may, in future, no longer be part of that enterprise. Specifying how that is to occur, in relation to allowable nitrogen losses from that property, would be efficient and effective. It would assist with achieving LWRP Objectives 3.5, 3.8 and 3.12. Without such a policy, there would be a risk that costs and benefits attributable to allowable nitrogen losses might be unfairly distributed when a property is no longer part of the enterprise. We therefore recommend the inclusion of a new Policy 11.4.15A. However, we have amended the wording proposed by Dairy Holdings Limited, so that the policy is both clear and certain.

¹⁸³ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 11.310, page 207.

¹⁸⁴ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; sections 11.304 to 11.317, pages 205 to 207.

¹⁸⁵ Memorandum of counsel on behalf of Dairy Holdings Limited; 26 November 2014; para 4.

¹⁸⁶ Ibid, para 7.

- [437] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

6.5 Industrial and trade discharges

- [438] Variation 1 addresses the discharge of wastewater, liquid waste or sludge waste from an industrial or trade process into or onto land. The relevant provisions are Policies 11.4.10 and 11.4.11, Rules 11.5.25 and 11.45.26 and Table 11(i). Submissions on these provisions were addressed in the section 42A Report¹⁸⁷ and the section 42A Reply.¹⁸⁸ We accept the recommendations in the section 42A Reply Report, noting that they generally involve a return to the provisions as notified. We now discuss two minor exceptions to that approach.
- [439] While accepting the section 42A Report's recommended rewording of Policy 11.4.11, we further recommend that it be clarified that the comparative 'yardstick' for the loss of nitrogen from the land is the authorised discharge that was occurring prior to the discharge of wastewater that Policy 11.4.11 seeks to enable.
- [440] We also recommend that the Table 11(i) catchment target for nitrogen losses from industrial or trade processes is amended to reflect the submissions of Fonterra and Synlait regarding the amount of nitrogen losses that are already authorised from their industrial activities. The reporting officers advised us that this amendment would result in the Table 11(i) figure changing from 106 tonnes/year to 152.4 tonnes per year.¹⁸⁹
- [441] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

6.6 Irrigation schemes

- [442] Variation 1 addresses nitrogen losses from irrigation schemes. The more relevant provisions are Policy 11.4.17, Rules 11.5.14 and 11.5.15 and Table 11(j). The application of these provisions (insofar as they reference Table 11(j)) is limited to Central Plains Water Limited (CPW) as the only irrigation scheme listed in Table 11(j).
- [443] The Selwyn Waihora ZIP Addendum's solutions package relies on the CPW irrigation scheme proceeding. We understand that CPW will eventually introduce 300 million cubic metres per year of alpine water into the catchment, enabling irrigation with alpine water of about 30,000 hectares of land currently irrigated with groundwater, and irrigation, similar in size to the area of land that is not currently irrigated. This is expected to result in:

¹⁸⁷ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; sections 11.265 to 11.303, pages 198 to 203.

¹⁸⁸ Officers' Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, sections 4.35 to 4.42, pages 16 to 17.

¹⁸⁹ Officers' Reply for Council Reply Hearing – Memorandum dated 24/11/14.

- (a) increased volumes of water in aquifers;
- (b) increased flows in lowland streams; and
- (c) an increased volume of water within the catchment that will dilute nitrogen concentrations in Lake Ellesmere/Te Waihora.¹⁹⁰

- [444] Submissions on the irrigation scheme provisions were addressed in the section 42A Report¹⁹¹ and the section 42A Reply Report.¹⁹² The section 42A Report made no specific recommendations on the submissions. The section 42A Reply Report recommended a replacement Policy 11.4.17, to the effect that the CPW load includes all nitrogen leaching from properties partly or fully supplied with CPW irrigation water. We accept that recommendation in part, subject to our further assessment below regarding the application of Table 11(j).
- [445] The main thrust of the submissions and evidence from CPW was that the nitrogen load provided for CPW in Table 11(j) is incorrect. In its submission, CPW stated, that “Central Plains is concerned that the allocations as set out in the proposed variation are incorrect and/or unreasonable” and requested that “the allocations be corrected to remove any errors and to ensure that they are reasonable...”¹⁹³
- [446] Table 11(j) as notified included the nitrogen load for both new irrigation and existing irrigation within the scheme area. CPW’s view was that Table 11(j) should only provide for new irrigation (namely for the conversion of dry land farming) and that “... existing irrigation within the Scheme area would be treated just the same as any other existing irrigation within the Selwyn Waihora Zone.”¹⁹⁴ Having considered the evidence, we are persuaded by that. We find that ‘new irrigation’ should be defined as irrigation occurring for the first time after 1 January 2015.
- [447] Restricting the application of Table 11(j) to new irrigation would simplify the provisions and avoid the problem of determining how much nitrogen load should be provided for existing irrigated land. That is an important consideration, as the allowable nitrogen loss from existing irrigated land has yet to be fully determined. By Policies 11.4.13 and 11.4.14, that nitrogen loss is to be based on the achievement of ‘good management practice’ by 2017, to be followed by a further reduction in nitrogen losses by 2022. That further reduction would vary by land use but average around 14% across the sub-region. This was highlighted to us by the section 42A Reply Report which confirmed that the Council’s leaching loss estimates underpinning Table 11(j) had been based on an assumption that the minimum rate of loss from farms would be 15 kgN/ha/year, while new irrigation had been assumed to be “operating better than GMP [good management practice]”.¹⁹⁵
- [448] If Table 11(j) is amended to apply only to new irrigation, the amounts entered in the table need to be re-assessed to provide a volume of nitrogen load for the anticipated new irrigation with CPW water.
- [449] In her evidence, Ms Goodfellow explained that the nitrogen load that CPW considers to be appropriate had been determined by them in two ways. First, by SOURCE modelling work

¹⁹⁰ Statement of Evidence, S Goodfellow, para 49.1 and 49.2, page 11.

¹⁹¹ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; sections 11.174 to 11.202, pages 179 to 183.

¹⁹² Officers’ Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, sections 4.25 to 4.28, pages 14 and 15.

¹⁹³ Submission of CPW on Variation 1, Annexure 2, Tables.

¹⁹⁴ Statement of Evidence, S Goodfellow, para 95, page 20.

¹⁹⁵ Officer’s Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, Appendix F, Figure 1, page 25.

undertaken by Jacobs, and secondly by Overseer modelling work undertaken by Mr S Ford (and other experts engaged by Central Plains).¹⁹⁶ It was evident to us that CPW preferred the nitrogen load calculated by Mr Ford.

- [450] During the presentation of her evidence to us, Ms Goodfellow explained how, based on the work undertaken by Mr Ford, CPW had assessed an allowable nitrogen load for new irrigation as 979 tonnes per year. This was based on an assumed average leaching rate of 36.21 kgN/ha/year over 27,000 hectares of land, so that 621 tonnes per year is allocated for existing dry land farming (at an average leaching rate of 23 kgN/ha/year) and 358 tonnes per year is allocated for additional nitrogen leaching that would result from the new irrigation (equating to an additional 13.25 kgN/ha/year).
- [451] We find the assessment of 979 tonnes per year to be appropriate. We note that the equivalent figure generated by Environment Canterbury is 902 tonnes per year. The difference is only 77 tonnes per year. Given the reliance of the Selwyn Waihora ZIP Addendum's solutions package on the CPW scheme proceeding, on the evidence provided by CPW we find that the risk of not acting outweighs the risk of the nitrogen load determined by CPW being too liberal.
- [452] We also note that enabling the CPW scheme to proceed (by ensuring the amended Table 11(j) nitrogen load is sufficient) would assist with achieving many of the LWRP's objectives, including Objectives 3.3, 3.4, 3.5, 3.7, 3.8, 3.10 and 3.11.
- [453] We therefore recommend that Table 11(j) is amended to refer only to land that was not irrigated prior to 1 January 2015, and that the allowable nitrogen load for that land is set at 979 tonnes per year. That allowance would apply immediately, and so the reference to the date of '1 January 2017' in the second column of Table 11(j) would be omitted.
- [454] A consequential issue arises as to what allowable nitrogen load should be set for that newly irrigated land in 2022. Having reviewed the evidence, we are not confident that a 2022 load can be set with any degree of precision at this stage. The evidence before us contains insufficient information on that matter. This is particularly so given the implications of Policies 11.4.13 and 11.4.14 as discussed above. Setting the 2022 load at a level that is too low could preclude opportunities for economic growth and employment (and frustrate the environmental benefits outlined in Selwyn Waihora ZIP Addendum's solutions package as briefly summarised at the start of this section); and setting the 2022 load at a level that is too high could result in further degradation of water quality. That would not give effect to NPSFM 2014 Policy A2. Consequently, we judge that the 2022 load should be set by plan change later, after more information about the nitrogen losses has become available.
- [455] Given this departure from the notified provisions, it would be helpful if Table 11(j) prescribes how land currently irrigated with groundwater should be managed once it receives alpine water from the CPW scheme. Having reviewed the evidence, we recommend the following prescription:

Rules 11.5.6 to 11.5.13, and the values in Table 11(i), continue to apply to irrigation of land that was irrigated (other than solely by effluent) prior to 1 January 2015, even if the land is subsequently irrigated (wholly or partly) with water supplied from an irrigation scheme. The limits in Table 11(j) do not apply to that land.

¹⁹⁶ Statement of Evidence, S Goodfellow, para 13.4, page 2.

[456] Having determined an appropriate response to the submissions on Table 11(j), we note that consequential amendments are required to Policy 11.4.17 and Rules 11.5.9, 11.5.9A, 11.5.10 and 11.5.15. The consequential amendments clarify that the first three rules only apply to land that was not irrigated prior to 1 January 2015 if that land is not subsequently supplied with water from an irrigation scheme described in Table 11(j). A similar consequential amendment would be required to Rule 11.5.15 to clarify how land that was irrigated prior to 1 January 2015 is to be managed if it is subsequently irrigated with water from a Table 11(j) irrigation scheme. We recommend adding to that rule the following note:

Rules 11.5.6 to 11.5.13, and the values in Table 11(i), continue to apply to irrigation of land that was irrigated (other than solely by effluent) prior to 1 January 2015, even if the land is subsequently irrigated (wholly or partly) with water supplied from an irrigation scheme. The limits in Table 11(j) do not apply to that land.

[457] In addition, we recommend consequential amendments to Rules 11.5.16 and 11.5.17, and inserting a new Rule 11.5.15A for clarifying the relationship between the rules relating to irrigation schemes and the rules relating to incidental discharges.

[458] Variation 1 as notified classifies the discharge of nitrogen, phosphorus, sediment and microbial contaminants onto or into land in circumstances that may enter water as a discretionary activity provided the conditions of the rule are met. Condition 1 of the rule requires that the applicant is an irrigation scheme. Where the conditions of the rule are not met, the activity is classified as non-complying under Rule 11.5.17.

[459] Rule 11.5.17, as notified, is positioned under the heading “Incidental Discharges of Nutrients, Sediment and Microbial Contaminants”. We note that the rules relating to incidental discharges of nutrients, sediment and microbial contaminants are included in Variation 1 for the purpose of authorising ancillary discharges associated with the use of land for a farming activity described in Rules 11.5.6 to 11.5.14.

[460] We consider a more appropriate location for rules relating to the discharge of nutrients, sediment and microbial contaminants associated with an irrigation scheme, is underneath the heading “Irrigation Schemes”. We therefore recommend the insertion of a new rule, 11.5.15A, which classifies the discharge of nutrients, sediment and microbial contaminants associated with an irrigation scheme as a non-complying activity, where the conditions of Rule 11.5.15 are not met. In addition, we recommend changes to Rule 11.5.17 to omit references to Rule 11.5.16. These amendments will, in our view, improve the clarity and certainty of the provisions, without altering the original intent of the rules.

[461] Having regard to section 32(1)(c) of the RMA and to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

6.7 Phosphorus Sediment Risk Area

[462] Variation 1 addresses the loss of phosphorus from land use activities within the catchment. Part of the approach taken by the Council includes the delineation of a Phosphorus Sediment Risk Area on the Variation’s planning maps. There was no serious opposition to this approach in the

submissions. Nevertheless, there are two matters that require our consideration in relation to Rule 11.5.8(2) and Policy 11.4.13.

- [463] In response to a submission from Federated Farmers, the section 42A Reply Report recommended amending Rule 11.5.8 by adding a new clause (2) to that rule, the effect of which would be to exclude properties located in the Phosphorus Sediment Risk Area east of State Highway 1 from permitted activity status. The Reply noted that “These areas to the east of State Highway 1 are generally well connected to lowland waterbodies, either through drainage networks, lowland streams and waterbodies and through surface water runoff.”¹⁹⁷ Properties falling within the exclusion would default to Rule 11.5.9, which provides for those properties as controlled activities, provided that (amongst other things) a Farm Environment Plan has been prepared in accordance with Schedule 7.
- [464] However, the Federated Farmers submission¹⁹⁸ did not seek that the application of the Phosphorus Sediment Risk Area be restricted to that occurring east of State Highway 1. In his evidence, Mr M Bennett advised that “... my opinion is that requirements to prepare and implement a Farm Environment Plan should be limited to situations where they can be beneficially applied”. That included “in areas identified as at elevated risk of sediment and phosphorus loss.”¹⁹⁹ Consistent with that submission and evidence, we find that the exclusion in Rule 11.5.8 should apply to the entire Phosphorus Sediment Risk Area and not just to part of it. Accordingly, we recommend that the words “to the east of State Highway 1” be omitted from Rule 11.5.8(2).
- [465] In response to that same Federated Farmers submission, the section 42A Reply Report also recommended amending Policy 11.4.13(a) by including reference to locations where “there is a higher risk of phosphorus loss as shown in the planning maps”. We find that to be a necessary consequential amendment resulting from the change to Rule 11.5.8. However, we recommend that the wording be amended to read “the property is situated partly or wholly within a Phosphorus Sediment Risk Area as shown in the planning maps”. That is more consistent with the wording of Rule 11.5.8 and the additional wording recommended to be added to Schedule 7 Part B.
- [466] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

6.8 Permitted Activity Loss Limit

- [467] In Variation 1 as notified, Policy 11.4.13(b) referred to “Good Management Practice Nitrogen and Phosphorus Loss Rates”. In response to a number of submissions, the section 42A Reply Report stated:

¹⁹⁷ Officer's Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, section 4.6, page 11.

¹⁹⁸ North Canterbury Province of Federated Farmers of New Zealand, clause 3.3, page 6.

¹⁹⁹ Statement of Evidence, Mr M Bennett on behalf of the North Canterbury Province of Federated Farmers of New Zealand, 29 August 2014, para 70.

It is acknowledged that referring to a yet to be developed concept in the Variation (such as the Matrix of Good Management (MGM) project referred to during the hearing) is fraught with difficulty, particularly given that a future plan change is required to introduce such a framework into the pLWRP.²⁰⁰

- [468] We agree, and note that the officers' advice in that regard is consistent with the evidence provided by a number of primary producer witnesses, including that of Mr G M Willis for Fonterra and Dairy NZ. The section 42A Reply Report recommended that Policy 11.4.13(b) refer instead to "good management practice".
- [469] In his opinion evidence, Mr Willis supported the deletion of the term "Good Management Practice Nitrogen and Phosphorus Loss Rates" and recommended the alternative wording "achieve a rate of nitrogen and phosphorus loss that is consistent with good management practice for the farming activity taking into account the circumstances applicable to each property."²⁰¹ We are satisfied that the wording proposed by Mr Willis generally provides a greater precision of meaning than that recommended to us by the officers, and is therefore an improvement to the Variation.
- [470] However, we queried the meaning of the phrase "the circumstances applicable to each property". In response, Mr Willis provided further specific wording setting out a number of criteria that would be used to assess "the circumstances applicable to each property".²⁰² We are grateful for Mr Willis's assistance and having considered his supplementary evidence, we recommend that Policy 11.4.13(b) be expanded to include a requirement to take into account the type of farming activity, the drainage characteristics of the soil, the climatic conditions and topography of the property, the type of irrigation system used (if any), whether the practices set out in Schedule 24 have been fully adopted, the nitrogen baseline for the property and the level of any enduring reductions in nitrogen loss already achieved relative to that baseline.
- [471] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

6.9 2022 Nitrogen Loss Reductions

- [472] In Variation 1 as notified, Policy 11.4.14 required further nitrogen loss reductions (beyond good management practice) to be achieved by 1 January 2022. The section 42A Report advised:

The technical reporting on the path to achieve the nitrogen target, along with the Zone Committee part of this Section 42A Report, identify that there is a need to establish, at a farm level, what good management practice is, ensure all farms are achieving good management practice, and then reduce nitrogen discharges someway between good management practice and the maximum feasible mitigation. While this is a significant paraphrasing of the technical and Zone Committee process, it underlies a significant part of the policy positioning of nutrient management in Variation 1, and has been subject to a very significant number of submissions.²⁰³

²⁰⁰ Officers' Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, section 4.22, page 13.

²⁰¹ Statement of Evidence, G M Willis, 29 August 2014, para 81, page 17.

²⁰² Statement of Supplementary Evidence, G M Willis, 11 November 2014, para 8, page 2.

²⁰³ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 11.165, page 177.

- [473] Accordingly, the section 42A Reply Report recommended that Policy 11.4.15(b) is amended to clarify that the further reductions are intended to achieve nitrogen loss rates that are in the order of those half-way between good management practice and maximum feasible mitigation. We endorse that recommendation for the reasons set out in the section 42A Report.
- [474] Policy 11.4.15 provides criteria to guide the consideration of extensions to the 2022 target date specified in Policy 11.4.14. A number of submitters, including Fonterra and Dairy NZ, suggested that the criteria contained in the policy could be clearer. We agree. In his evidence Mr Willis set out a number of factors that he thought ought to be considered.²⁰⁴ We are grateful for Mr Willis's assistance, and having considered his evidence we recommend that Policy 11.4.15 be expanded to include a consideration of the nitrogen baseline and any enduring nitrogen loss rate reduction already achieved from that baseline, together with the capital and operational costs of making nitrogen loss rate reductions and the benefit of spreading that investment over time.
- [475] We agree with Mr Willis that the recommended additional "... specificity such as indicated above, would be more helpful in a consenting context that [sic] the three generic matters currently listed in the Policy 11.4.15".²⁰⁵
- [476] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

6.10 Monitoring and Review Policy

- [477] A number of submitters²⁰⁶ sought additional policy provisions relating to the ongoing monitoring and review of Variation 1, particularly the allowable on-farm nitrogen loss rates and catchment nitrogen target limits. For example, Fish and Game sought a new Policy 11.4.17A that is "... designed to provide for effective tracking of catchment wide performance in achieving the nutrient limits and outcomes set in the revised Variation 1."²⁰⁷
- [478] The section 42A Report did not recommend any additional policy provisions arising from these submissions. In the Reply Report, counsel for the Council submitted that "A requirement of the kind sought by submitters could potentially be viewed as an unlawful fetter on the Council's freedom to choose how and when to exercise inherently discretionary statutory powers."²⁰⁸ The statutory powers referred to are these powers and duties relating to the monitoring and the review of plans as set out in sections 35 and 79 of the RMA. However, in answer to a query from ourselves, counsel for the Council advised that the Council is not opposed to general policy provisions relating to plan monitoring and review, but rather to provisions that purported to require the Council to undertake specific actions by specified dates.
- [479] Relevant to this matter we note in particular the evidence of Mr Willis and Mr Pearson. Mr Willis advised that "Although considerable work has been done in monitoring and modelling there is still much that is unknown about the contributions of contaminants and the interactions

²⁰⁴ Statement of Evidence, G Willis, 29 August 2014, para 116, page 21.

²⁰⁵ Ibid, para 117, page 21.

²⁰⁶ Including North Canterbury Fish and Game Council, Fonterra Co-operative Group Ltd, and Te Runanga O Ngai Tahu.

²⁰⁷ Statement of Evidence, S Pearson, para 133.

²⁰⁸ Officers' Reply – Part 1 – Legal Submissions For Council Reply Hearing, November 2014, para 85(c),

between ground water and surface water.”²⁰⁹ Mr Pearson concluded that “A big factor in the success of this sub-region section of the pLWRP is the delivery of regular and accurate environmental data.”²¹⁰

- [480] Having considered the evidence we are persuaded that some additional policy guidance on plan monitoring and review is warranted. This will assist in achieving the Objectives of the LWRP and will (in part) assist with giving effect to Objective CB1 and Policy CB1 of the NPSFM. However, we accept that any additional policy should not impose binding requirements on the Council. On balance we recommend additional wording as follows:

Current information, monitoring and review

11.4.37 Making decisions on the best available current information, including monitoring and periodic review of the effectiveness of the water quality limits and targets.

- [481] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

6.11 Schedule 24

- [482] Variation 1 introduced a new “Schedule 24 – Farm Practices” into the LWRP. The section 42A Report described the background to Schedule 24 as follows:

Variation 1, through the Zone Committee and consultation process, settled on a position of setting out a range of good practice activities in Schedule 24, and reliance on farm environment plans. This is under a permitted activity framework for farms with nitrogen losses of less than 15kg/ha/pa, and a consent framework for farms over that threshold. The analysis and reasons for the framework are set out in the section 32 report.²¹¹

- [483] Clause (a)(i) of Schedule 24 under the heading “Nutrient Management” required the preparation of a nutrient budget using Overseer and that the budget be reviewed annually. As noted in the section 42A Report, Ravensdown and Ballance Agri-Nutrients sought clarification of the meaning of “reviewed annually” and what it applied to. Other submitters, including the Fertiliser Association of NZ, questioned the need to review nutrient budgets annually.²¹²

- [484] In his evidence on this matter, Mr Chris Hansen appearing for Ravensdown said:

My understanding is that the fertiliser industry in general opposes the annual production of Nutrient Budgets, as the OVERSEER TM model provides for long term equilibrium and average farm system outputs. It is therefore not necessary to produce annual nutrient budget, unless there has been a significant farm system change. To require annual nutrient budgets without significant farm system changes, provides little additional environmental benefit, but adds unnecessary burden on farmers, council staff and service industries.²¹³

- [485] On this same subject, Mr M Keaney (giving evidence for Ballance Agri-Nutrients) said:

²⁰⁹ Statement of Evidence, G M Willis, para 49.15, page 10.

²¹⁰ Statement of Evidence, S Pearson, para 150.

²¹¹ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 11.260, page 195.

²¹² Ibid, sections 11.244 and 11.245, page 193.

²¹³ Statement of Evidence, C Hansen, 29 August 2014, para 109, page 27.

... once a nutrient budget has been reviewed and input data confirmed as being correct for the farm system in question, there is no need, from a scientific perspective, to conduct a further review, unless there has been a material change to farm system(s) employed on the site. Under this situation there should be no requirement for a review or an update to the nutrient budget for at least three years. This accords with the submission by FANZ on this point. While the timeframe for review will ultimately be subject to changes to input data and farm systems, in my opinion, this three year period is appropriate.²¹⁴

- [486] We accept the evidence of Mr Hansen and Mr Keaney on this matter. Accordingly, we recommend that clause (a) of Schedule 24 is amended so that an annual nutrient budget is prepared when there is a material change in the farming land use on a property. In the absence of a material change, the nutrient budget need only be prepared once every three years. However, in order to ensure the ongoing validity of the nutrient budget, we recommend that the input data used to prepare it is reviewed annually.
- [487] Limiting the need to prepare annual nutrient budgets in this way is a reasonably practicable and effective option that avoids unnecessary costs. The amendments we have recommended to clause (a) of Schedule 24 would also improve the manner in which the variation gives effect to Objectives 3.5 and 3.24 of the LWRP.
- [488] There is one other minor matter regarding Schedule 24. Mr G M Willis recommended that we correct the reference in Schedule 24(e)(ii) from “Dairy NZ Farm Dairy Effluent Design Standard [2013]” to read instead “guideline ‘A Farmer’s Guide To Managing Farm Dairy Effluent – A Good Practice Guide For Land Application Systems, Version 1 – Feb 2013’”.²¹⁵ We accept that this correction will improve the Variation and we recommend it accordingly.
- [489] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

²¹⁴ Statement of Evidence, M Keaney, 29 August, paras 5.7 and 5.8, pages 8 and 9.

²¹⁵ Statement of Evidence, G M Willis, page 39.

Chapter Seven

Water Quantity, Flows and Allocation

7.1 Over-allocation

- [490] Variation 1 proceeds on the basis that the catchment of Te Waihora (Lake Ellesmere) is over-allocated with regard to water quantity. The section 42A Report advised that “The catchment is currently divided into two Groundwater Allocation Zones and the limits are significantly exceeded (by approximately 35%) in each zone.”²¹⁶ The Report went on to advise that Variation 1 established “Revised Allocation Zones to account for natural differences in the movement and availability of water within the catchment (including creation of a Little Rakaia Zone) and to provide a structure that allows surface and groundwater to be allocated as a ‘one resource’ and help avoid further over-allocation.” Existing authorised takes in the new Selwyn-Waimakariri and Rakaia-Selwyn combined surface and groundwater allocation zones significantly exceed the new allocation limits by 27% and 64% respectively.²¹⁷
- [491] The issue of over-allocation is discussed in the introductory text of Section 11 of the proposed Variation which contains the ZIP Addendum 2013 actions to introduce consented alpine water to the catchment for additional irrigation development; the replacement of groundwater takes; and the enablement of stream augmentation and/or managed aquifer recharge; to set water allocation limits; to deliver ecological and cultural flows; to prohibit new takes in over-allocated water management zones; and to reduce the volume of water allocated.
- [492] Section 11 goes on to state that the Selwyn Te Waihora sub-region is not currently achieving all its ‘freshwater objectives’ and that Variation 1 establishes environmental flow regimes and allocation limits for surface and groundwater in the catchment and the rules to phase out over-allocation of water in accordance with Policy B6 of the NPSFM 2014.
- [493] There was no serious challenge to the proposition that the Selwyn Te Waihora catchment is over-allocated, although some submitters noted that winter groundwater levels had not declined in the aquifers in recent years.²¹⁸ On reviewing the evidence before us, we accept that from a water quantity perspective the Selwyn Te Waihora Catchment is over-allocated. Under Objective B2 of the NPSFM 2014 any further over-allocation must be avoided and existing over-allocation must be phased out. These directives have under-pinned our consideration of the water quantity issues raised by submitters.

7.2 Reasonable Use

- [494] Variation 1 as notified embodied the concept of the “demonstrated use” of water. This concept is described in Method 1 of Schedule 10 of the LWRP as determining irrigation demand based on “Records of past use, moderated to ensure the annual volume is sufficient to meet demand conditions that occur in nine out of ten years for a system with an irrigation application efficiency of 80%”.

²¹⁶ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 13.3, page 231.

²¹⁷ Ibid, sections 13.7 and 13.8, page 232.

²¹⁸ Including J Talbot for Bowden Environmental.

[495] This contrasts with the concept of “reasonable use” described in Method 2 of Schedule 10 of the LWRP as determining irrigation demand to meet conditions that occur in nine out of ten years for a system with an irrigation application efficiency of 80% based on the “use of a model that has been field validated and shown to reliably predict annual irrigation volume within an accuracy of 15%.”

[496] The concept of “demonstrated use” was incorporated directly into Policy 11.4.23 (the reallocation of water to existing consent holders) and implicitly into provisions that required the calculation of an annual volume of irrigation water (Policy 11.4.25, Rules 11.5.32 and 11.5.33) by restricting the calculation of that volume to Method 1 of Schedule 10.

[497] As noted in the section 42A Report:

Many submitters, including Irrigation NZ, Bowden Environmental, Ellesmere Irrigation Society Inc, request that “demonstrated use” is not used as a re-allocation mechanism and is replaced with the term “reasonable use” which is defined and reflects water requirements to meet demand in a dry season. Several submitters state that recent usage is not a good indicator of the need to have a reserve for drought years as this may not be evident from short-term usage analysis.²¹⁹

[498] The section 42A Report went on to say:

... as noted by many submitters, allocation based only on ‘demonstrated use’ is not sound. It is therefore recommended that the term be replaced with ‘reasonable use’ and that Policy 11.4.23 is specifically tied to Schedule 10 (Reasonable Use Test). It is however, an essential part of the solution for addressing over allocation that annual volumes are based on Method 1 in Schedule 10 which takes account of records of past use, though moderated to meet demand conditions in dry years.²²⁰

[499] Having considered the evidence on this matter we agree that “demonstrated use” should be replaced by “reasonable use”. However, with regard to the recommended focus on Method 1 of Schedule 10, we prefer the evidence of Mr A Curtis for Irrigation New Zealand. Mr Curtis stated:

A robust allocation methodology must be able to account for:

- (a) the irrigated production system(s);
- (b) the irrigation system(s) type;
- (c) the soil type(s);
- (d) the climate and its variation over time;
- (e) a given reliability; and
- (f) a given technical efficiency.

In my experience it is complex to do this from records of past use. For example how is this practically performed for a cropping enterprise that grows multiple crops in a rotation over a farm with multiple soil types In my opinion limiting the allocation methodology in schedule 10 to method 1 will be problematic. It is widely accepted internationally that the best mechanism for setting a fair and equitable allocation volume is through using a water balance model as is allowed for in method 2.²²¹

[500] Consequently we recommend that references in the Variation 1 provisions to Schedule 10 are not limited to Method 1 of that Schedule. In other words, we recommend that the full range of methods set out in Schedule 10 be made available when determining the appropriate annual volume of irrigation water to be allocated to applicants.

²¹⁹ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 13.73, page 244.

²²⁰ Ibid, section 13.99, page 248.

²²¹ Statement of Evidence of A Curtis, 29 August 2014, paras 33 and 35.

- [501] The next issue that we need to address is the allocation of water to non-irrigation takes, particularly takes associated with industrial and trade activities. We received a number of submissions and supporting evidence from industrial and trade water users, including ANZCO Foods Limited and Fonterra Co-operative Group Limited. Those submitters explained the nature of their water use and the measures they took to use that water efficiently. Having considered these submissions and the answers the submitters' witnesses gave to our questions, we recommend that an additional clause is added to Policy 11.4.23 that deals with non-irrigation takes or what we call "other takes". This additional clause would provide that despite Policy 4.50(b)(i), an amount of water should be allocated to these "other takes" that is reasonable and demonstrates the efficient use of water for the particular end use.
- [502] This in turn necessitates consequential amendments to Rule 11.5.32 (inserting a new condition 5A that mirrors recommended Policy 11.4.23 and amending matter of discretion 2 to refer to the efficient use of water) and Rule 11.5.33 (amending matter of discretion 2 to also refer to the efficient use of water).
- [503] Our recommended changes in relation to "reasonable use" are a reasonably practicable and effective option that more fully gives effect to Objectives 3.9 and 3.24 of the LWRP. The changes also give effect to Policy B2 (the efficient allocation of fresh water to activities) and Policy B4 (methods to encourage the efficient use of water) of the NPSFM 2014.
- [504] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

7.3 Enabling Aquifer Recharge

- [505] When summarising the Zone Committee's Solutions Package, the section 42A Report noted how the use of "alpine" water from the Rakaia and Waimakariri Rivers for irrigation would provide an opportunity for managed aquifer recharge, in particular the use of targeted stream augmentation to improve lowland stream flows.²²²
- [506] Policy 11.4.20 of Variation 1 is to enable managed aquifer recharge and targeted stream augmentation to assist with improvements to lowland stream flows. The section 42A Report advised that most of the submissions on this policy were in support, although some submitters sought amendments to it. In particular, Nga Rūnanga and Te Rūnanga o Ngāi Tahu sought to insert a number of new conditions in the policy. The officers recommended accepting most of those new conditions.²²³ We endorse that recommendation, but consider that recommended new condition (b) could be improved by referring to avoiding adverse effects on the "availability, quality and safety of human drinking water" generally, as opposed to limiting that requirement to "community drinking water supplies".
- [507] We consider that change would give effect to Objective 3.6 of the LWRP as well as Objective 3.8A.

²²² Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 4.80D, page 34.

²²³ Ibid, Recommendation R11.4.20, page 237.

- [508] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

7.4 Transfers

- [509] Variation 1 deals with the transfer of water take permits. As stated in the section 42A Report:

Policy 11.4.22 restricts the transfer of water permits in water allocation zones where the combined allocation of groundwater and surface water exceed the allocation limit. The purpose of the policy is to help address over-allocation and achieve the Zone Committee outcome of healthy lowland streams. The NPSFM requires regional councils to phase out over-allocation and state criteria for transfers of water permits. The RPS also identifies methods and timeframes for reducing over-allocation need to be set in Policy 7.3.4(2).²²⁴

- [510] Policy 11.4.22 is given effect to by Rules 11.5.37 to 11.5.39.
- [511] As we noted in Chapter Four of this Recommendation Report, the Variation 1 provisions impose restrictions on the transfer of water permits in two ways. Irrigation scheme shareholders within the Irrigation Scheme Area shown on the planning maps would not be permitted to transfer their permits to take and use groundwater. In all other cases, 50 percent of any transferred water would be required to be surrendered. Chapter Four concluded that the CRC has power to make rules for managing transfers of water permits, and the Council does not lack power at law to make a rule managing transfers of water permits that effectively precludes approval in certain stated classes of circumstance.
- [512] There is one further merits issue (over and above those dealt with appropriately in the section 42A Reports) relevant to these provisions that we wish to address.
- [513] In response to submissions, the section 42A Report recommended that an exception be made for a community water supply to the general requirement to surrender 50 percent of any transferred water. We endorse that recommendation. However, we also heard from a number of submitters regarding the transfer of water associated with industrial and trade processes. For example, Mr I Goldschmidt for Fonterra Co-operative Group Limited stated:

Fonterra supports the approach Environment Canterbury is taking to reduce water allocation through clawing some water back when it is transferred. However Fonterra considers there are limited circumstances where a transfer could generate a positive benefit, negating the need to surrender water.""Fonterra requests some further wording to be added to Policy 11.4.22 and Rule 11.5.37 to ensure that if water is to be transferred and it can be shown that the water used will result in a neutral or positive water balance then it should be able to be transferred without a percentage of the take being surrendered.²²⁵

- [514] Mr P Callander then explained how:

... the current Fonterra Darfield operation produces additional water (over and above that which is abstracted), primarily because the milk processing plant generates condensate water via the milk

²²⁴ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 14.3, page 302.

²²⁵ Statement of Evidence of I Goldschmidt, Fonterra Co-operative Group Limited, paras 59 and 60, pages 13 and 14.

evaporation process. This water is irrigated to land resulting in extra drainage back to the aquifer and a net gain for the groundwater resource.²²⁶

- [515] We are satisfied on the evidence that in situations such as those described by the Fonterra witnesses, there should be no restriction on the volume of water able to be transferred. Accordingly, we recommend that clause (c) of Policy 11.4.22 is amended so that it comprises two parts. The first part would deal with a community water supply, and the second would deal with situations where the transferred water is or will, following transfer, be used for an industrial or trade process and result in a neutral or positive water balance.
- [516] These amendments would necessitate consequential amendments to Rules 11.5.37 and 11.5.38. On the former rule we recommend that condition 4 is revised so that it mirrors our recommended new format for Policy 11.4.22. For Rule 11.5.38, we recommend the inclusion of a new clause (2) that deals with industrial or trade processes as described above.
- [517] We find that the amendments we recommend would give better effect to Objectives 3.8A, 3.9, 3.11 and 3.13 of the LWRP. The amendments would also give effect to Objectives B2 (insofar as further over-allocation is avoided) and B3 and Policies B2, B3 and B4 of the NPSFM 2014.
- [518] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

7.5 Little Rakaia Allocation Zone Limit

- [519] Variation 1 as notified contained Table 11(e) – Combined Surface water and Groundwater Allocation Limits for Selwyn-Waimakariri, Rakaia-Selwyn and Little Rakaia combined Surface and Groundwater Allocation Zones.
- [520] The allocation limit for the Little Rakaia Allocation Zone in Variation 1 as notified, was limited to 85.9 million cubic metres per year. The limit of 85.9 million cubic metres per year was arrived at by adding together the annual volumes for all consented surface-water and groundwater takes within the Little Rakaia Zone, the boundary of which extended to the south bank of the Rakaia River.
- [521] Variation 1 does not set flow and allocation regimes for the Rakaia River. Instead the allocation regime for the Rakaia River is set by the National Water Conservation (Rakaia River) Order 1988. By its submission, Trustpower sought amendments to the introductory paragraph of Section 11 and changes to Rules 11.5.32, 11.4.34, 11.4.35 and 11.5.36 to remove references to the Little Rakaia Allocation Zone, and consequential amendments arising from the submission and relief sought.
- [522] We find that some of the amendments sought by Trustpower Limited would clarify the relationship between the provisions of Variation 1 and those of the National Water Conservation (Rakaia River) Order 1988.

²²⁶ Statement of Evidence of P Callander, Fonterra Co-operative Group Limited, para 6, pages 1 and 2.

- [523] We also note that an amendment to the planning maps is required to realign the boundary of the Little Rakaia Allocation Zone with the northern boundary of the Rakaia River. This amendment is necessary because the allocation regime in Variation 1 does not apply to any land subject to the provisions of the National Water Conservation (Rakaia River) Order 1988. A consequential amendment stemming from the change to the planning maps is a reduction in the allocation limit shown in Table 11(e). Using the same methodology as used to establish the as-notified limit, we recommend adjusting the Table 11(e) allocation limit from 85.9 million cubic metres per year to 67.0 million cubic metres per year.

7.6 Minimum Flows

- [524] The section 42A Report described how the Zone Committee's integrated solutions package included "Introducing revised minimum flows from 2025 to protect ecological and cultural values in rivers and streams once a healthy water balance is restored and flows have improved."²²⁷ We are satisfied on the evidence that such an approach is appropriate.
- [525] In Variation 1 as notified, Policy 11.4.28 required the new minimum flows (as set in Table 11(c)) to be included on new and replacement consents from 2025. In their submission on this policy the North Canterbury Fish and Game Council stated:
- Fish and Game does not support this policy due to the exclusion of existing consent holders until the time of consent expiry. The clear over-allocation of water takes in the Selwyn Waihora Catchment must be addressed sooner, in order to ensure sufficient flows that meet the life supporting capacity and ecosystem function of these water bodies; along with the protection of cultural health, in-stream amenity and recreation values, and the protection of trout and salmon habitat.²²⁸
- [526] Fish and Game sought an amendment to Policy 11.4.28 accordingly.
- [527] In response to the issue raised by Fish and Game we agree that all existing surface water take permits should be subject to the new minimum flows from 2025. That would provide ten years of lead time for other elements of the Zone Committee's solution package to be implemented, such as the introduction of alpine water by way of CPW irrigation, managed aquifer recharge and the targeted augmentation of stream flows.²²⁹ We understand from the evidence that those measures would improve existing stream flows, thereby mitigating the impacts of the new minimum flows on abstractors.
- [528] Accordingly, we recommend that Policy 11.4.28 is revised so that the minimum flow and partial restrictions in Tables 11(c) and 11(d) would apply to existing consents by way of consent review in 2025 or upon consent renewal for consents expiring prior to 31 December 2025.
- [529] As a consequential change, we also recommend that the reference in Policy 11.4.28 to "new and replacement consents" is amended to "resource consents for surface water takes and stream-depleting groundwater takes". This additional specificity would, in our view, improve the clarity and certainty of the provisions.

²²⁷ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 13.7, page 232.

²²⁸ Submission of North Canterbury Fish and Game Council, para 11.0, pages 8 and 9.

²²⁹ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 13.9, page 233.

- [530] We consider that the amendments we recommend would give better effect to Objectives 3.7 and 3.8 of the LWRP, while still also giving effect to Objectives 3.10 and 3.11 of the LWRP. The amendments would also give effect to Objective B1 and Policy B1 of the NPSFM 2014.
- [531] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

7.7 Non-consumptive Use

- [532] Variation 1 as notified contained Policy 11.4.30 which sought to enable existing consent holders to take groundwater in specified circumstances. By way of explanation to this policy the section 42A Report advised:

Introducing higher minimum flows in 2025 gives abstractors that do have access to reliable surface water (notably the Halswell and LII rivers) time to adjust their farming systems and take advantage of Policy 11.4.30. This enables existing resource consent holders to take deeper groundwater where an existing consent to take surface water or stream depleting groundwater is surrendered.²³⁰

- [533] We are satisfied on the evidence that such an approach is appropriate, and we also endorse the recommended changes to the policy in the section 42A Report, noting that those changes provide additional clarity without altering the original intent of the policy.
- [534] In Chapter 7.4 of this Recommendation Report we discussed the issue of transfers to industrial or trade processes where the use of the transferred water results in a neutral or positive water balance. On a related matter, we heard from a number of industrial or trade process submitters how their existing groundwater takes resulted in a neutral or positive water balance. In such situations, it was suggested that new groundwater takes for such uses should also be enabled, notwithstanding the acknowledged over-allocation of the catchment.
- [535] For example, Mr B Willis appearing for the Canterbury Aggregate Producers Group advised us that in relation to quarries:
- ... Water use typically involves a degree of consumptive use (for example, to service administration buildings, for dust suppression and/or to establish screen plantings), and for aggregate washings, where much of the water is recycled and, ultimately, returned to ground (i.e. non-consumptive use).²³¹
- [536] In his evidence, Mr T Ensor advised us that “The pLWRP provides for non-consumptive takes of water through Rules 5.126, 5.127, 5.131 and 5.132” and that in his view “The introductory statement to the *“Taking and Use Surface Water and Take and Use Groundwater”* rules in Variation 1 provides clarification that Rules 5.126, 5.127, 5.131 and 5.132 apply within the Selwyn Te Waihora Zone.”²³²
- [537] We accept the evidence of Mr Ensor on that matter, but note that the “introductory statement” he refers to precedes Rules 11.5.32 to 11.5.36 dealing with the Taking and Use Surface Water and

²³⁰ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 13.134, page 253.

²³¹ Statement of Evidence of B Willis, Canterbury Aggregate Producers Group, 29 August 2014, para 22, page 5.

²³² Statement of Evidence of T Ensor, Canterbury Aggregate Producers Group, 29 August 2014, paras 48 and 50, pages 11 and 12.

Take and Use Groundwater. In that regard, we find that greater clarity and certainty would be provided if Policy 11.4.30 itself referred to non-consumptive takes, as that policy enables the granting of new groundwater take permits in the Selwyn - Te Waihora Catchment. Accordingly, we recommend that a new clause be added to Policy 11.4.30 that would enable new non-consumptive groundwater takes where the use of the water results in a neutral or positive water balance.

- [538] We consider that the amendments we recommend would give better effect to Objectives 3.10 and 3.11 of the LWRP. The amendments would also give effect to Objective B3 and Policy B2 of the NPSFM 2014.
- [539] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

7.8 Halswell / Huritini Flooding

- [540] Variation 1 as notified contained Policies 9.4.9 and 11.4.34 which sought to prevent any increase in inundation of land in the Halswell River/Huritini catchment resulting from the discharge of any stormwater to surface water. There was no opposition to that approach. However, the Christchurch City Council sought that the policy be amended to exclude inundation arising from stormwater treatment facilities, including retention and detention basins and wetlands.²³³ We consider that to be a sensible improvement.
- [541] Accordingly, we recommend that Policies 9.4.9 and 11.4.34 are amended to exclude inundation that is caused by or results from a stormwater treatment system. We note that Rules 9.5.12 and 11.5.29 already provide for stormwater discharges in the Halswell River/Huritini Catchment as discretionary activities.²³⁴ We also note that Christchurch City Council did not seek any amendments to those rules.
- [542] Additionally, in order to give effect to Policies 9.4.9 and 11.5.29, where those policies now refer to “drainage water”, we recommend the addition of three new rules. Rules 9.5.12A and 11.5.21A would add a condition to permitted Rule 5.77, while Rule 9.5.12B would add a condition to permitted activity Rule 5.75. The effect of each of these additional conditions would be that any discharge of water that may contain contaminants from sub-surface or surface drains into surface water is not a permitted activity within the Halswell River/Huritini Catchment. We note that Rule 11.5.21 as notified already effectively implements Policy 11.5.29 and therefore no further amendments to this rule are required.
- [543] We find that the amendments we recommend would give better effect to Objective 3.3 of the LWRP.
- [544] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably

²³³ Statement of Evidence of J Keller, Christchurch City Council, 29 August 2014, para 3.2, page 4.

²³⁴ Provided that the discharge is not authorised by a consented stormwater management plan and the discharge did not occur before 5 December 2013.

practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

7.9 In-stream Damming

- [545] Variation 1 as notified contained Policy 11.4.31 which sought to prohibit in-stream damming of the full flow of the main stem of the Selwyn River/Waikirikiriri and the Waiāniwaniwa River above its confluence with the Selwyn River/Waikirikiriri. The section 42A Report advised that:

Policies 11.4.31 and 11.4.32 give effect to the Zone Committee's recommendations on areas where water storage should be avoided and on constraints or 'red flags' to be addressed where water storage is enabled, having considered the outcomes of a report providing an assessment of potential water storage areas against CWMS and other key targets.²³⁵

- [546] We understand from the evidence that the Waiāniwaniwa River catchment is a significant habitat for Canterbury mudfish that are classified as "Threatened - Nationally Critical".²³⁶ The next higher classification is Extinct. There can be no doubt that protection of the significant habitat of these indigenous fauna is a RMA s6(c) matter.

- [547] The section 42A Report noted that both the Director-General of Conservation and the Royal Forest and Bird Protection Society requested that Policy 11.4.31 be amended "... to include tributaries of the Waiāniwaniwa River so as to give proper effect to Part II RMA."²³⁷ The North Canterbury Fish and Game Council sought to separately prohibit in-stream damming on the main stem of the Waiāniwaniwa River.

- [548] In relation to this matter Dr N R Dunn advised us:

The Selwyn River catchment contains 27% of known (extinct and extant) Canterbury mudfish habitat fragments (O'Brien & Dunn 2012). In this sense the Selwyn catchment can be considered of high importance for this species.

Ten Canterbury mudfish habitat fragments are recognised in the Waiāniwaniwa River catchment above Homebush Road in both the main stem and tributary streams totally [sic] an estimated 1.8 and 2 ha of habitat respectively (O'Brien & Dunn 2012).

O'Brien & Dunn (2012) ranked the status of subpopulations based on abundance and population structure data. These analyses showed that Waiāniwaniwa tributary populations are ranked similarly to the main stem population.

Thus, Waiāniwaniwa River tributaries should be afforded the same level of protection, i.e. prohibition from damming, as the main stem. This is required as these tributaries may be viewed as desirable, for smaller scale water storage options, than that previously proposed on the main stem.²³⁸

- [549] We find Dr Dunn's evidence to be persuasive. Accordingly, we recommend that Policy 11.4.31 is amended to prohibit in-stream damming on the mainstem and permanently flowing tributaries of the Waiāniwaniwa River. We recommend the use of the phrase "permanently flowing tributaries" as Dr Dunn also advised that the mudfish habitat comprised "... still or very slow-

²³⁵ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 15.2.7, page 325.

²³⁶ Statement of Evidence of N R Dunn for Director-General of Conservation, 28 August 2014, para 8 and 9.

²³⁷ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, section 15.9, page 326.

²³⁸ Statement of Evidence of N R Dunn for Director-General of Conservation, 28 August 2014, paras 14 to 17.

flowing, meandering, swampy streams with deep pools, seepage streams, spring streams, scour holes and stockwater races.”²³⁹ We understand that this precludes ephemeral streams.

- [550] Further to the above matters, the Malvern Hills Protection Society sought that Policy 11.4.31 and Rule 11.5.42 both include the tributaries of the Selwyn/Waikirikiriri River. Ms R Snoyink advised that “The tributaries of most of the upper Selwyn/Waikirikiriri are some of the last areas of significant habitat for the acutely threatened, currently classified ‘nationally endangered’ Canterbury mudfish (*Neochanna burrowsius*).”²⁴⁰ In her oral comments to us, Ms Snoyink proposed that the prohibition on damming be restricted to the north branch of the Selwyn/Waikirikiriri.
- [551] As with the evidence of Dr Dunn, we find the evidence of Ms Snoyink to be persuasive on this matter. Accordingly, we also recommend that Policy 11.4.31 be amended to refer to the main stem north branch and tributaries of the Selwyn River/Waikirikiriri.
- [552] Our recommended amendments to Policy 11.4.31 require consequential amendments to Rule 11.5.42.
- [553] We find that the amendments we recommend for Policy 11.4.31 and Rule 11.5.42 would give better effect to Objective 3.17 of the LWRP. The amendments would also give effect to Objective B1 of the NPSFM 2014.
- [554] There is one further issue that we wish to address in relation to these provisions. As we have discussed, Rule 11.5.42 addresses the damming of the mainstem of the Selwyn River/Waikirikiriri. Mr M England in evidence for the Selwyn District Council advised us that:
- The Council submitted on this rule to ensure that its water intake structures such as that on the Selwyn River is not captured within the definition of damming. The consequences are significant as the activity status would be a prohibited activity and this may affect the future ability to provide community water supplies and would have immediate effects on the ability to supply stock water.²⁴¹
- [555] Mr England suggested that the issue raised by the Selwyn District Council could be addressed by providing an exclusion for existing intake structures. We acknowledge the issue raised by the District Council and agree with the practical solution proposed by Mr England. Accordingly, we recommend that Rule 11.5.42 be amended so that it only relates to any damming that commenced after 1 February 2014.
- [556] We find that the amendment we recommend for Rule 11.5.42 in response to the submission of the Selwyn District Council would give better effect to Objectives 3.8A and 3.11 of the LWRP, while still giving effect to Objective 3.17 of the LWRP. The amendment would also give effect to Objectives B1 and B3 of the NPSFM 2014.
- [557] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

²³⁹ Ibid, para 13.

²⁴⁰ Statement of Evidence of R Snoyink, Malvern Hills Protection Society, paras 36 and 39.

²⁴¹ Statement of Evidence of M England, Selwyn District Council, 29 August 2014, para 53, page 12.

Chapter Eight

Prohibited Activities

8.1 Introduction

- [558] In this section of this Recommendation Report, we address issues raised by submitters over classification of certain activities as prohibited.
- [559] By section 77A of the RMA a planning authority has power to classify activities in six classes, of which a prohibited activity is one. The attributes of a prohibited activity, prescribed by section 87A(6) of the Act, are that no application may be made for a resource consent for the activity, and a consent authority is not to grant consent for it.
- [560] In Variation 1 the Council would make only sparing use of prohibited activities. In general, it does so in two kinds of case. The first is to protect important environmental values and measures, such as allocations for taking fresh water and for nutrient loss to the environment, and damming certain stretches of rivers and streams. The second kind is for activities that do not comply with conditions in which activities would be ascribed less stringent classifications.
- [561] Some submitters opposed prohibited activity classification as being unduly onerous in precluding activities having economic and social benefits and only minor adverse effects on the environment. Other submitters supported classifying certain activities as prohibited activities. Also, some submitters requested that certain activities ascribed less stringent classes should be classified as prohibited activities.
- [562] Our consideration of all those issues has to be guided by the need for the LWRP to give effect to directions of higher order instruments; to applying the standards prescribed by section 32; and to applying the declaration by the Court of Appeal in the *Coromandel Watchdog* case²⁴² on how the power to apply the prohibited activity classification is to be employed.

8.2 Policy 11.4.31 and Rule 11.5.42

- [563] By Variation 1, Policy 11.4.31 would prohibit in-stream damming of the full flow on the main stem of certain stretches of river;²⁴³ and Rule 11.5.42 would classify damming them as prohibited activities.²⁴⁴
- [564] Control of damming of water is among the functions of a regional council;²⁴⁵ as is implementation of methods for maintaining indigenous biological diversity.²⁴⁶
- [565] The policy and rule were supported by some submitters, two of whom sought that the prohibition on damming be extended. The reasons for support included taking into account certain planning documents recognised by the iwi authority;²⁴⁷ and that the Waianiwanawa

²⁴² *Coromandel Watchdog of Hauraki v Chief Executive of Economic Development* [2007] NZCA 473; [2008] 1 NZLR 562; [2008] NZRMA 77; (2007) 13 ELRNZ 279 (CA).

²⁴³ Namely the Selwyn River/Waikiriki, and the Waiāniwaniwa River above its confluence with the Selwyn River/Waikiriki.

²⁴⁴ In response to submissions by others, we are recommending amendments to the definition of the stretches of those rivers to which the policy and rule would apply.

²⁴⁵ RMA s 30(1)(e).

²⁴⁶ RMA s 30(1)(ga).

²⁴⁷ See RMA s 66(2A)(a).

catchment is a significant and possibly the only sustainable habitat for Canterbury mudfish that nationally are classified as critically endangered.

- [566] The policy and rule were opposed by other submitters. A main ground of opposition to the prohibition was that the Central Plains Water irrigation scheme may in future require large-scale water storage, and the Waianawaniwa Valley might be the only viable option for storage in the Selwyn/Te Waihora sub-region.
- [567] Evidence tending to support the prohibition was given on behalf of the Malvern Hills Protection Society by Ms R Snoyink and Ms N Hughes. Their evidence described the Society's concern that damming would threaten important instream ecology, features of historical significance, landscape and heritage landscape; recreation and amenity values, as well as important habitats of Canterbury mudfish. They doubted whether large-scale water storage would deliver anticipated environmental benefits.
- [568] That evidence was supported by expert witnesses for the Director-General of Conservation.
- [569] Dr N R Dunn gave evidence that Canterbury mudfish are ranked as 'Threatened –Nationally Critical', are conservation-dependant, range-restricted and sparse; and that habitat loss is the greatest threat to their long-term persistence. Dr Dunn also testified that ten Canterbury mudfish habitat fragments are recognised in the Waianawaniwa River catchment in the main stem, and also tributary streams.
- [570] Mr G R Deavoll gave his opinion that the proposed prohibition of damming would go some way towards ensuring the mudfish habitat could remain significant in supporting an abundant and stable mudfish population. He considered that large-scale damming or water storage would inundate a large part of the mudfish habitat, an effect that could not be mitigated by biodiversity offset.
- [571] We accept the evidence of those witnesses for the Director-General.
- [572] Evidence tending to challenge the prohibition on damming was presented by CPW.
- [573] Mr I McIndoe, a professional soil and water engineer, gave his opinion that additional water storage will be required for future Stages 2 and 3 of the Central Plains irrigation scheme to provide a reliable supply. He considered it would be helpful if the LWRP allows for a range of options. He also gave his reasons for his finding that development of the full irrigation scheme (including Stages 2 and 3, serving approximately 30,000 hectares) is necessary for a material increase in groundwater and improved lowland stream flows.
- [574] Mr D Crombie (chief executive) and Ms S Goodfellow (general manager environment) for CPW explained the development of the irrigation scheme and the importance of continuing to Stages 2 and 3; and Dr C M Saunders, an agricultural economist, gave her assessment that by 2020 the direct, indirect and induced effects of an additional 30,000 hectares of irrigated land on the Canterbury economy would be \$268.38 million, and a total of 849 full-time equivalent jobs in the region. Mr H J Peacock testified that dams can be designed to provide for fish passage, to mitigate risk of failure, to create enhanced landscape amenity and ecology, and recreational opportunities; and gave his opinion that damming should be a discretionary activity.
- [575] We accept that if CPW is able to establish enough water storage to expand its irrigation scheme to an additional 30,000 hectares, there would be opportunities for substantial economic and employment growth in the order estimated by Dr Saunders. We also accept Mr Peacock's

evidence that some potential adverse effects of damming for additional storage could be mitigated as he described.

- [576] Even so, storing water by impounding behind a dam can also have adverse effects on the environment including significant habitats of significant fauna, such as Canterbury mudfish, instream ecology more generally, public access along the rivers, the relationship of Maori and their culture and traditions with the water of the river impounded, and historic heritage. We accept the evidence given on behalf of the Director-General of Conservation and the Malvern Hills Protection Society that some of those adverse effects on the environment would not be able to be mitigated adequately.
- [577] The options placed before us are classifying the damming in question as a prohibited activity or as a discretionary activity. In examining which is the most appropriate for achieving the objectives of the LWRP, appropriateness should be tested by the extent to which effect would be given to provisions in the CRPS.
- [578] We have identified some 25 provisions of the CRPS that bear on damming rivers for storage of irrigation water. Some of them overlap with others, and some qualify others. We have scrutinised them to understand how, as elements in the same document, they are intended to contribute to a coherent instrument.
- [579] Several of the provisions of the CRPS are supportive, in general, of damming of rivers for storage of irrigation water. They promote enabling people and communities to provide for their economic and social well-being by using water for irrigation. They recognise the importance of reliability in supply for irrigation; of enabling regionally significant infrastructure; of potential benefits of storing surface water for that purpose; and of increasing the irrigated land area.²⁴⁸
- [580] However those supportive or enabling provisions in the Regional Policy Statement are qualified by others that abate or limit them by reference to promoting sustainable management of the natural and physical resources affected. They stipulate that the life-supporting capacity, ecosystem processes and indigenous species and their associated freshwater ecosystems, and the mauri of fresh water are to be safeguarded; that natural character values of rivers and their margins are to be preserved, and protected from inappropriate development; all significant values are to be protected; adverse effects on significant natural and physical resources and cultural values are to be avoided or mitigated; and adverse effects on the environment are to be appropriately managed. They also prescribe that the decline in the quality and quantity of Canterbury's ecosystems and indigenous biodiversity is halted; that significant habitats of indigenous fauna are identified, and their values and ecosystem functions protected, so as to ensure that there is no loss of indigenous biodiversity or values; and that priorities for protection of habitats of threatened or at-risk indigenous species, such as Canterbury mudfish, are recognised. In addition they provide for maintaining public and Ngai Tahu access to and along rivers; the natural character of river beds and their margins are preserved; and cultural and heritage values are protected from inappropriate development.²⁴⁹
- [581] It is our understanding that the supportive or enabling provisions and the abating or limiting provisions are to be read together as elements of a coherent instrument by treating the first as

²⁴⁸ CRPS Policies 5.3.2 and 5.3.9; Objectives 7.2.1 and 7.2.4; Policies 7.3.8(4) and 7.3.10.

²⁴⁹ CRPS Objective 5.2.2(1); Policies 5.3.2;5.3.9;5.3.11; Objectives 7.2.1;7.2.3;7.2.4; Policies 7.3.1; 7.3.5; 7.3.12; Objectives 9.2.1 and 9.2.3; Policies 9.3.1;9.3.2; Objectives 10.2.1;10.3.2;10.2.4; Policies 10.3.2; 10.3.5 and 12.2.2.

being of general application, and the second as identifying circumstances in which the general supportive or enabling provisions are excepted, or from which they are restricted.

- [582] The objectives of the LWRP that may be achieved by regulating damming of rivers are Objectives 3.8 (safeguard the life-supporting capacity of ecosystems and ecosystem processes, including sufficient flow to support habitat of indigenous species); 3.16 (freshwater bodies to be maintained in a healthy state, including through hydrological processes); 3.17 (significant indigenous biodiversity values of rivers are protected); and 3.19 (natural character values of freshwater bodies are protected).
- [583] Those objectives are to be achieved by the policies, including Policy 4.3(g) (variability of flow, including floods and freshes, is maintained); Policy 4.5 (water is managed to safeguard the life-supporting capacity of ecosystems etc. as a first priority); and Policy 4.46 by which adverse effects of in-stream damming are to be avoided as a first priority, and where adverse effects are unable to be avoided they are to be remedied or mitigated. Rules regulating damming of rivers in the region generally are Rules 5.154 to 5.158.
- [584] Referring to the classes of situation in which the Court of Appeal, in the *Coromandel Watchdog* case,²⁵⁰ accepted that classification as a prohibited activity may be considered, we find that the restraints referred to above qualify as being intended to restrict the allocation of resources; to establish priorities other than on a ‘first come, first served’ basis; and to take a precautionary approach.
- [585] We accept that the prohibited activity category is not to be used as a blanket tool to deter a class of activity;²⁵¹ and that a proper use is to apply it to activities that are beyond question undesirable for a particular zone, or limited on grounds of serious risk to property or the environment.²⁵²
- [586] In our opinion, prohibiting the damming of the specific stretches of river in question would not be a ‘blanket tool’ to deter damming, but would preclude that activity in stretches where it would have a serious risk of harm to the environment, and to maintaining indigenous biological diversity, as described in the expert evidence for the Director-General of Conservation.
- [587] The only options placed before us are that damming the rivers is classified as a discretionary activity, and that it is classified as a prohibited activity.²⁵³ The distinction between those classes is that resource consent may be granted on an ad-hoc application for a discretionary activity;²⁵⁴ and resource consent may not be granted for a prohibited activity.²⁵⁵
- [588] We consider that classifying damming the rivers in question as a discretionary activity would be less effective in achieving the objectives and implementing the policies than would classifying them as a prohibited activity, because a consent authority considering a discretionary activity application may come to a view that adverse environmental effects of the damming would be outweighed by the economic and employment benefits of storage of irrigation water. But granting consent to damming would not be effective in implementing the policies we have identified, and would not achieve the objectives identified. By comparison, classification as a

²⁵⁰ *Coromandel Watchdog of Hauraki v Chief Executive of Economic Development*, cited above, at [34] and [40].

²⁵¹ *Coromandel Watchdog*, cited above.

²⁵² *Francks v Canterbury Regional Council* [2005] NZRMA 97, 110-113.

²⁵³ In response to our question, counsel for CPW rejected an option of classifying this damming as a non-complying activity.

²⁵⁴ RMA, ss 87A(4) and 104B.

²⁵⁵ RMA s 87A(6).

prohibited activity would plainly and effectively preclude damming, and directly achieve the objectives.

- [589] We consider that classifying damming the stretches of river as a discretionary activity would be less efficient than classifying them as a prohibited activity because it would indicate that consent to damming might be granted, and encourage incurring the expense of applications which are unlikely to be granted due to adverse effects of the damming on the environment, and incompatibility of the grant with the objectives and policies of the CRPS and the LWRP. By comparison, classifying damming of those stretches as a prohibited activity would, as we have stated, directly achieve the objectives and implement the policies of those instruments.
- [590] In comparing the benefits and costs of the options, Dr Saunders' evidence tends to show substantial economic and employment benefits from expanded irrigation for which considerable water storage would be critical. On the evidence before us, the costs of the damming, in terms of adverse effects on the environment, and on maintaining indigenous biodiversity, cannot practicably be quantified in money's worth. However the value to the community of that environment, and indigenous biodiversity, is indicated by the objectives and policies of the CRPS that we have referred to, which in turn are ways of giving effect to relevant principles in Part 2 of the RMA.
- [591] Counsel for CPW submitted that there are only limited options for viable scheme-based storage in the Selwyn Waihora sub-region, and that the stretches where damming is proposed to be prohibited are the only sites that provide realistic opportunities for the storage required.²⁵⁶ However the evidence placed before us is not persuasive on that point, and does not establish that they are the only realistic opportunities. Even if it did, Mr Peacock's evidence does not assure us that water storage dams in those stretches could be designed and developed in such a way as to avoid the adverse environmental effects that the CRPS indicates are to be avoided.
- [592] To conclude, we are satisfied that classifying damming the stretches of river in question as a prohibited activity is permissible and a more effective and efficient way of achieving the objectives and implementing the policies of the CRPS and LWRP than classifying it as a discretionary activity.
- [593] Except to the extent that, in response to other submission points, we recommend other amendments to them, we recommend that Policy 11.4.31 and Rule 11.5.42 retain the classification of damming as a prohibited activity.

8.3 Rule 11.5.12

- [594] By its submission, North Canterbury Federated Farmers (Federated Farmers) stated its opposition to Rule 11.5.12 classifying as a prohibited activity farming activities that exceed a nitrogen baseline. That submission point was related to Federated Farmers' request for amending the definition of the nitrogen baseline, because it would be calculated on an average of past nitrogen losses.²⁵⁷
- [595] We are recommending amending the rules governing nutrient management by which conditions would be set in which the maximum, rather than the average, nitrogen loss in the baseline years would be used, and conditions in which discretionary activity class would be applicable, rather

²⁵⁶ Submissions by B G Williams, 13 October 2014, paras 31.2 & 35.

²⁵⁷ Submission by D van Mierlo presented 18/09/2014, paras 99-105.

than prohibited activity class.²⁵⁸ Likewise, our recommended amendments would allow, as conditions of eligibility of a farming enterprise as a discretionary activity, aggregation of calculated nitrogen losses of the constituent parcels.²⁵⁹ Only farming that does not meet the conditions for consideration as a discretionary activity would be classified as prohibited.²⁶⁰

- [596] So the result of amendments we are recommending would respond to the questioned effects of calculating nitrogen baselines by averaging; and the basis of Federated Farmers' opposition to classifying prohibited activities would be met. Consequently, although Federated Farmers' case for questioning the prohibition would be met, the prohibited activity classification in Rule 11.5.12 would remain applicable to activities that do not comply with the amended conditions of eligibility for discretionary activity status. The application of prohibited activity status to those non-compliant cases would apply to giving effect to Policies A1, A2, and A3 of the NPSFM for achieving Objectives A1 and A2 of that instrument. It would also apply to giving effect to Policies 7.3.6 and 7.3.7 of the CRPS for achieving Objectives 7.2.1, 7.2.2, 7.2.3 and 7.2.4 of that instrument.
- [597] We consider that a potential option of classifying excessive nitrogen loss as a non-complying activity would not be a practicable way of giving effect to those higher-order instruments, because that would allow, on case-specific applications, for consenting to excess nitrogen entering the environment where a consent authority considered the conditions in section 104D are met. The cumulative effect of case-specific consents like that would undermine achievement of the objectives of the LWRP, as well as failing to give effect to the higher-order instruments.
- [598] Having considered the non-complying activity option, we find that it would not be practicable, efficient or effective. There is no evidence before us by which precluded opportunities for economic growth and/or employment from excessive nutrient loss to the environment (including fresh water) could be quantified, or compared with the environmental, economic, social and cultural adverse effects resulting from that loss.
- [599] Therefore we are recommending that Rule 11.5.12 (amended in response to other submission points) retain its classification of prohibited activity.

8.4 Policy 11.4.17 and Rule 11.5.13

- [600] By its submission, Ravensdown requested amending Rule 11.5.13 to classify the land use as a non-complying activity. Rule 11.5.13 would make the use of land for a farming activity or farming enterprise where the nitrogen loss calculation for the property is greater than 80 kg per hectare per annum a prohibited activity from 1 January 2037. The submitter stated that the prohibitive status would be overly restrictive, unnecessary and inappropriate. For the same reasons that we identified in relation to Rule 11.5.12 (giving effect to the NPSFM and the CRPS, the potential for the cumulative adverse effects of case-specific non-complying consents to undermine the achievement of the objectives of the LWRP, and lack of evidence regarding how Rule 11.5.13 might preclude opportunities for economic growth and/or employment) we recommend that Rule 11.5.13 (amended in response to other submission points) retain its classification of prohibited activity.
- [601] In making that recommendation, we adopt the reasoning of the section 42A Report that the limit set in this "... policy and rule represents the present knowledge of maximum feasible mitigation

²⁵⁸ See recommended Rule 11.5.9A.

²⁵⁹ See recommended amendments to Rule 11.5.10.

²⁶⁰ See recommended amendments to Rule 11.5.12.

on the most permeable soils in the sub-regional area. It is recommended to be retained, on the basis that it sets a long-term indication of the management required to meet the nitrogen loss target.”²⁶¹

8.5 Policy 11.4.21

- [602] Policy 11.4.21 would be for managing groundwater and surface water as a single resource. That policy was supported by several submitters, and opposed by others.
- [603] By its submission, Ngai Tahu proposed replacement policies. One of them, identified as Policy 3, would prohibit allocation of surface water or groundwater that may, either separately or cumulatively, result in certain allocations of water being exceeded. That requested amendment to the Variation was opposed by some submitters.
- [604] The authors of the section 42A Report supported requested Policy 3, as it would make it clear that there is to be no further allocation of surface water or groundwater by which a limit set by the LWRP would be exceeded. The authors observed that the proposed policy would be consistent with the defined meaning of ‘limit’ in the NPSFM; and that it would support the requirements of the NPSFM to reduce existing over-allocation, and prevent further over-allocation.
- [605] We find that the proposed Policy 3 would be within the Council’s functions provided for by section 30(1)(e) of the RMA. We accept that requested Policy 3 would give effect to Policy B5 of the NPSFM for implementing Objective B2; and also to Policies 7.3.4(2) and 7.3.12 of the CRPS for implementing Objectives 7.2.1 and 7.3.4 of that instrument.
- [606] We consider that the prohibition in requested Policy 3 would be within the scope of the classes identified in the *Coromandel Watchdog* case²⁶² of being intended to restrict allocation of resources, and being necessary to allow an expression of social and cultural outcomes and expectations.
- [607] It was argued that the need to give effect to the superior instruments could be implemented by classifying excessive taking as a non-complying activity.
- [608] We do not accept that. The non-complying activity class allows for consenting to activities if the adverse effects on the environment would be minor, or if the activity would not be contrary to the objectives and policies of the relevant plan or proposed plan.²⁶³ However the higher order instruments do not allow for such exceptions, and it would be misleading, and inconsistent with section 104D(1), to classify excessive allocation of water in a way that it might be consented to, even if that occurred on an ad hoc basis on case-specific applications.
- [609] We have identified the option of classification as a non-complying activity. That would not be practicable, efficient or effective, for the reason just outlined. There is no evidence before us on which we could find that potential economic or employment benefits of permitted excessive abstraction of fresh water could outweigh the need to avoid over-allocation, because of the unquantifiable but considerable environmental, social and cultural adverse effects that result from over-allocation.

²⁶¹ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, para 11.326, page 208.

²⁶² *Coromandel Watchdog of Hauraki v Chief Executive of Economic Development*, cited above, at [34] (d) and (e).

²⁶³ See RMA s 104D(1).

- [610] Therefore we recommend inserting Policy 11.4.21A in response to Ngai Tahu's submission point.

8.6 Rule 11.5.36

- [611] Rule 11.5.36 would classify as a prohibited activity the taking of water that does not meet certain conditions of Rules 11.5.32 or 11.5.33, or Rule 11.5.34. Relevantly, the conditions of Rules 11.5.32 and 11.5.33 referred to relate to exceedance of allocation limits; continuation of expiring permits; rates of taking; and stream depletion effects. Rule 11.5.34 relates to taking water for augmenting groundwater to increase stream flows.
- [612] By their submission, Canterbury Aggregate Producers Group opposed the classification in Rule 11.5.36, and asked that it be amended by reclassifying the non-compliant taking of water as a non-complying activity instead of a prohibited activity.
- [613] In presenting that submission, counsel for Canterbury Aggregate Producers (Ms A Limmer) remarked that aggregate production requires only relatively small amounts of water; that this use of water is largely non-consumptive; and that there are economic and societal benefits from producing aggregate close to demand.²⁶⁴ Counsel acknowledged that providing for new takes in an over-allocated catchment would not give effect to directions in the NPSFM as required by the law declared by the Supreme Court in *King Salmon*.²⁶⁵ She submitted that there is an element of discretion available to the Council, primarily because the amount of water required for aggregate production is small, and because it can deliver substantial benefits; so the effect of making a limited exception would be confined.²⁶⁶ Ms Limmer referred to the language of Objective B2 of the NPSFM: "To avoid any further over-allocation of fresh water"; observed that it does not mirror any provision in the RMA; contended that the NPSFM, not enabling activities, does not 'cover the field'; and argued that to 'avoid' is a step short of prohibiting, but sets a presumption that over-allocation will be inappropriate. Counsel also emphasised the value to the regional economy of local aggregate production, as recognised in the LWRP.²⁶⁷ She urged provision, at least, for temporary taking of water for quarrying in transition from one location to another.
- [614] We accept the submission about the value of local aggregate production. But we do not accept that enabling granting of permits to take water in an over-allocated catchment to be used for that purpose, would give effect to Objective B2 of the NPSFM. Nor would it give effect to Policy B5 of that instrument, nor to Policy 7.3.4(2)(a) of the CRPS. In our opinion, *prohibiting* would avoid over-allocation, and *enabling* would not.
- [615] However, in response to this and other submissions, we are recommending amendments to some rules governing taking fresh water, which may assist aggregate producers. In particular we refer to a recommended amendment to Condition 4 of Rule 11.5.37; to recommended Rule 11.5.37A; and to recommended amendments to Rule 11.5.38.
- [616] Returning to the prohibited activity classification in Rule 11.5.36, we are satisfied that it is permissible; and is a more effective and efficient way of achieving the objectives and implementing the policies of the higher order instruments and of the LWRP than making an exception for taking water for aggregate production as a non-complying activity.

²⁶⁴ Submissions by A Limmer, 14 October 2014, para 4.

²⁶⁵ *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593 (SC).

²⁶⁶ Submissions by A Limmer, 14 October 2014, paras 11-14.

²⁶⁷ Proposed LWRP, Policy 4.9.3.

[617] It is not practicable, on the evidence before us, to quantify in money's worth the protection of the environment in the catchment from further over-allocation. We recognise that the restriction can impose some expense on aggregate producers; but we cannot, on the evidence, quantify that expense either. However, that expense would be mitigated by the other amendments we are recommending.

[618] So we recommend that the classification of prohibited activity in Rule 11.5.36 be retained.

8.7 Rule 11.5.39

[619] In Chapter 4.2 of this report, we summarised the submission by HydroTrader asking (as alternative relief) for Rule 11.5.39 to be amended by altering the classification of transfers not complying with a condition of the two preceding rules from prohibited activity to non-complying activity.

[620] In Chapter 4.2 we gave our reasoning for rejecting HydroTrader's submission that at law this classification exceeded the Council's power. That leaves us with the duty of addressing whether, on the merits, the more appropriate classification would be non-complying activity or prohibited activity. In paragraph [341] of this report we summarised the officers' advice on that question.

[621] Counsel for HydroTrader relied on the evidence of Dr A Davoren; and argued that a review under sections 68, 128 and 130 of the RMA would be a more appropriate means of reducing over-allocation of water. That witness questioned the sufficiency of evidence supporting the effectiveness of the proposed rule, compared with classifying transfers of permits to take water as discretionary activities.

[622] Neither HydroTrader's submission, nor any other submission on Variation 1, asked the Council to classify these transfers as discretionary activities. So we hold that the Council does not have authority to do that, and therefore for the purpose of section 32(1)(b) it is not a reasonably practicable option. The question for us to address in this regard is whether the more appropriate classification of non-compliant transfers by Rule 11.5.39 would be as if it is a non-complying activity, or as if it is a prohibited activity.

[623] In comparing the relative efficiency of those options (for the purpose of section 32(1)(b)), we find that on the evidence before us the generality of the circumstances in which potential transfers that do not meet the conditions of Rules 11.5.37 or 11.5.38²⁶⁸ is such that the benefits and costs of the anticipated effects cannot practicably be identified, quantified or assessed; nor can any resulting opportunities for anticipated economic growth or employment.

[624] To compare the relative effectiveness of the options, we note that the non-complying option would allow for ad-hoc consents to be granted where one of the conditions described in section 104D is fulfilled. In summary, those conditions are that adverse environmental effects will be minor (section 104D(1)(a)); or that the activity will not be contrary to relevant objectives and policies. By comparison, the prohibited activity option would preclude approval of transfers that do not meet the conditions of the preceding rules.

[625] We assess that a potential for allowing such transfers that have even minor adverse effects on the environment (even though it may be contrary to a relevant objective or policy) would be a less

²⁶⁸ Consequential on another submission we are recommending insertion of a new Rule 11.5.37A; and amendment of Rule 11.5.39 so it would apply to transfers that do not meet the conditions of Rules 11.5.37, 11.5.37A, or 11.5.38.

effective measure for contributing to reducing over-allocation of water to give effect to the superior instruments, than would precluding such transfers even if they have only minor effects.

- [626] For the purpose of section 32(2)(c), we find that there is uncertainty or insufficient information about the circumstances of such potential transfers and their environmental effects; and we judge that the risk of not prohibiting those which do not comply with one of the conditions of the preceding two rules would fall short of giving effect to the relevant policies of the NPSFM and the CRPS on over-allocation of water. Therefore we assess that the option requested by HydroTrader (non-complying activity) would not be more appropriate than would the option proposed by the Council (prohibited activity). So we recommend that in this respect HydroTrader's submission is rejected; and that Rule 11.5.39 retain its precluding of transfers that do not comply with the conditions of the preceding rules as if they were a prohibited activity.

Chapter Nine

Sundry Other Issues

9.1 Overall Vision or Objective

[627] Variation 1 as notified contained in the introductory text to Section 11 an overall ‘vision’ for the Te Waihora/Lake Ellesmere catchment being “To restore the mauri of Te Waihora while maintaining the prosperous land-based economy and thriving communities.” We note that this ‘vision’ was contained in the Zone Implementation Programme Addendum, and in the context of that document it was described as being a ‘long-term goal’ and the “Zone Committee’s aspiration”.²⁶⁹

[628] As noted in the section 42A Report “A number of submitters including Federated Farmers, Horticulture NZ, Beef + Lamb NZ and Nga Rūnanga and Te Rūnanga o Ngāi Tahu requested a new objective.” The section 42A Report went on to state:

Federated Farmers support the Zone Committee’s long term goal for the catchment but opposes the absence of an objective for the catchment. Federated Farmers states that an objective is required to give statutory status to the catchment vision and to provide justification for the policies and rules in the section. Federated Farmers requests the following wording:

“The mauri of Te Waihora and its tributaries is restored while maintaining a prosperous land-based economy and thriving communities in the Selwyn Te Waihora Catchment”.

Nga Rūnanga and Te Rūnanga o Ngāi Tahu and Beef + Lamb NZ request the same wording as Federated Farmers.²⁷⁰

[629] In response to the issue raised by the submitters the section 42A Report advised:

While an objective may give greater emphasis to the specific outcomes for this sub-regional area, the structure of the pLWRP has been deliberately set up to rely on the region-wide objectives and strategic policies. This is clearly stated in Policy 4.10:

4.10 Reviews of sub-regional sections will not make any changes to the Objectives or Policies 4.1-4.10 of this Plan, except that catchment-specific outcomes and limits may be developed to implement the objectives and policies of this Plan.

On this basis, no additional objective, specific to this sub-regional section of the pLWRP is recommended.²⁷¹

[630] In the section 42A Reply Report, Mr M McCallum-Clark stated “... I remain of the view that it is neither the intent of Policy 4.10 of the pLWRP nor is it [the vision] a necessary objective, as is discussed in the Section 42A Report prepared for the hearing.”²⁷²

[631] We received evidence on this matter from a number of witnesses. For example, Ms C F Begley for Te Rūnanga o Ngāi Tahu stated:

The vision statement is consistent with the significance of Te Waihora to Ngāi Tahu and why the quality of the lake has been given such prominence. The problem I have with the vision statement is that it lacks

²⁶⁹ Selwyn Waihora ZIP Addendum, October 2013, section 1.2, page 5.

²⁷⁰ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, sections 9.37 to 9.38, page 133.

²⁷¹ Ibid, sections 9.40 and 9.41, page 133.

²⁷² Officer’s Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, section 2.2, page 5.

planning weight. As a vision statement it is not clear that the ideas it encapsulates are capable of being given effect to, as would be the case with an objective. If the Variation continues to contain a vision statement, rather than an objective, it is difficult to say what weight it will be given in a resource consent application or enforcement proceeding.

In reality, what is being expressed as the vision statement is something that is better as an objective, because that is what it is seeking to achieve. In my opinion it is better to capture this statement as an objective. Its importance is then clearly marked. It places into context everything else that is in this chapter and gives basis for subsequent policies and rules.²⁷³

- [632] Dr R J Wilcock, an expert on land-use effects on water quality and good dairy farming management, gave evidence addressing improving the water quality of Te Waihora. He gave his finding that the annual average trophic level index for the lake is not directly related to catchment land uses; and that reducing inputs of nitrogen and phosphorus would likely take a very long time (decades) to affect water clarity; and in any event the water quality will continue to change.
- [634] We accept Dr Wilcock's evidence, and regard the Vision as aspirational, rather than a realistic objective in the sense that term is used in the RMA for an element in regional plans.²⁷⁴
- [635] We have given careful consideration to the requests for an additional objective that mirrors the wording of the 'vision' articulated in the Zone Implementation Programme Addendum. On balance we are not persuaded that the inclusion of such an objective is appropriate.
- [636] First, we are not persuaded that an additional objective is required in terms of providing guidance to Section 11 of the LWRP. In our view the objectives already contained in Section 3 of the LWRP sufficiently 'cover the field' insofar as they traverse all of the matters covered by the policies and rules in Section 11. That view was reinforced by our consideration of the specific matters addressed in Chapters Six and Seven of this Recommendation Report.
- [637] Secondly, objectives in regulatory instruments (such as Variation 1) need to be clear and unambiguous. The 'vision' articulated in the Zone Implementation Programme Addendum and repeated in the Variation is too uncertain for use in a regulatory context, including in resource consent applications or enforcement proceedings referred to by Ms Begley. The 'vision' contains subjective terms that are open to differing interpretations, including "mauri" (which is not defined in the CRPS, the LWRP or Variation 1), "thriving" and "prosperous".
- [638] Thirdly, the achievement of the Vision relies not only on the regulatory provisions of Variation 1, but also on a range of non-regulatory measures. As noted in the section 42A Report:
- Broadly, these can be described as catchment interventions, lake interventions, monitoring and infrastructure development. While many of these actions can be supported or enabled in the pLWRP or the provisions of Variation 1 – for example through the stock exclusion rules and the requirements for farm environment plans – the ability to meet the outcomes will depend on substantial public and private investment.²⁷⁵
- [639] As Variation 1 does not contain these non-regulatory methods, we doubt it would be helpful to insert into the variation an objective that relies (even in part) on their successful delivery.
- [640] Finally, on balance we accept the reporting officers' advice that Policy 4.10 does not contemplate new objectives being inserted into the sub-region sections of the LWRP. However, without

²⁷³ Statement of Evidence of CF Begley, Te Rūnanga o Ngāi Tahu, 29 August 2014, paras 26 and 27, page 7.

²⁷⁴ Compare the approach taken in different circumstances in *Ngati Kahungunu v Hawkes Bay RC* [2015] NZEnvC 50 at [78].

²⁷⁵ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 5.1, page 36.

belittling the value of the ‘vision’, we are not satisfied on the merits that the inclusion of the new objective sought by the submitters would be the most appropriate way to achieve the purpose of the RMA.

9.2 Cultural Landscape Values Management Area

[641] As we discussed in sections 1.3 to 1.7 of this report, Te Waihora (Lake Ellesmere) and its margins and associated wetlands are recognised by Ngai Tahu as a cultural landscape of particular importance, reflecting the Ngai Tahu culture, history and identity, the concentration of mahinga kai, wahi tapu and wahi taonga values and the need to manage the lake environment in a holistic manner. The original name for Te Waihora was Te Kete Ika a Rakaihautu (the fish basket of Rakaihautu) which speaks of the once rich and bountiful resources of the lake.

[642] In the development of the ZIP Addendum, the Zone Committee discussed how to give effect to kaitiakitanga in the catchment, protect mahinga kai, wahi tapu, and wahi taonga values. The committee encouraged Runanga representatives and Te Runanga o Ngai Tahu (TRoNT) staff, to identify specific actions that could be included in the ZIP Addendum, and be given effect to in policies and rules of Variation 1.²⁷⁶ We understand that the ZIP Addendum preparation process resulted in the inclusion of a Cultural Landscape/ Values Management Area (CLVMA) with corresponding rules to protect Ngai Tahu values.²⁷⁷ This policy²⁷⁸ and rule²⁷⁹ framework was then incorporated into Variation 1.

[643] In this regard the section 42A Report advised:

The provisions contained in Variation 1 reflect Ngai Tahu values in the management of the Selwyn Te Waihora sub-regional area. The policy regime and rule framework of Variation 1, in relation to the Cultural Landscape/Values Management Area, provide for a management regime that reflects the values of Ngāi Tahu and the values, policy and outcomes of the Mahaanui Iwi Management Plan 2013.²⁸⁰

[644] The section 42A Report also noted the support for this approach in the superior instruments, namely Objective D1 and Policy D1 of the NPSFM 2014, and Objectives 10.2.1 and 7.2.3 and Policies 10.3.1 and 10.3.2 of the RPS.²⁸¹

[645] We accept that recognising Te Waihora as a Ngai Tahu cultural landscape means that activities that may affect the lake, and the relationship of Ngai Tahu to it, are to be managed in a way that reflects the sensitivity of the lake to those activities and the degree of risk to particular values. It also means that land-use activities can be assessed for consistency with Ngai Tahu objectives to restore the mauri and mahinga kai value of the lake.

Waikekewai and Taumutu Creek are of high cultural significance to Te Taumutu Runanga. The waterways are recognised as wahi tapu (sacred place). Particular concerns are that there is not enough water to sustain mauri (life force) and cultural health, and that it is inappropriate to be abstracting water for irrigation from the catchment because of the wahi tapu associations.

Te Taumutu Runanga and Ellesmere Irrigation Society have agreed to a Joint Position Statement for the Waikekewai catchment. The position recognises the wahi tapu status of the catchment, and prohibits

²⁷⁶ Section 42A Report para 4.72.

²⁷⁷ Section 42A Report para 4.73.

²⁷⁸ Policies 11.4.2, 11.4.3, 11.4.4, 11.4.5 and 11.4.9.

²⁷⁹ Rules 11.5.1 to 11.5.5, 11.5.27 and 11.5.28.

²⁸⁰ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, para 12.6, page 213.

²⁸¹ Ibid, paras 12.2 and 12.7, pages 213 and 214.

surface water and stream-depleting groundwater takes. The statement enables existing takes to move to a deeper non-stream depleting groundwater source.²⁸²

- [646] The specific submissions on the policies and rules relating to the CLVMA were summarised and discussed in the initial section 42A Report.²⁸³ That Report recommended an amendment to Policy 11.4.5, but that the provisions otherwise be retained without amendment. The section 42A Reply Report then discussed the evidence presented by the submitters. In particular, the suggestion of the Ellesmere Irrigation Society that the CLVMA be reduced to a narrow band around the lake, along with the “silent file” areas identified in the Selwyn District Plan.²⁸⁴ The section 42A Reply Report recommended rejecting the Ellesmere Irrigation Society’s suggested approach, because:

Silent file sites are deliberately a considerably larger area than the specific find spot, and the area identified is usually of varying cultural significance. Further, the criteria for identifying the sites in the context of a District Plan are likely to be different to the identification of a cultural landscape in a Regional Plan context.²⁸⁵

- [647] Having considered the evidence on this matter, we adopt the officers’ recommendation.
- [648] With respect to the concerns of submitters regarding the impacts of the CLVMA on drains, the Reply Report advised “It is acknowledged that there are difficulties of managing drains and the responsibilities of upstream and downstream people through whose property a drain passes.”²⁸⁶ This led the officers to recommend the omission of Rules 11.5.21 and 11.5.28. Having considered the evidence on that matter, we also adopt those recommendations.
- [649] In addition to the specific matters addressed above, we note that the submissions and further submissions on the provisions relating to the Cultural Landscape/Values Management Area ask for various deletions and amendments. We have reviewed the provisions in the light of all those requests, with a view to accepting all that would (having regard to the effectiveness and efficiency of the body of those provisions), be most appropriate for achieving the objectives of the LRWP (taking into account the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions and risks of acting or not acting), and contribute to a coherent body of provisions that would assist the CRC to carry out its functions in attaining the purpose of the RMA. In the result, we recommend retaining the lineal extent of the Cultural Landscape/Values Management Area as notified (as shown on maps SW-09, SW-10, SW-12 and SW-13; now maps V1-09, V1-10, V1-12 and V1-13). We recommend some amendments to the related policies and rules, primarily as was recommended to us by the section 42A Report. Without tediously listing each submission point, we consider that those we do not recommend would not contribute to making the Cultural Landscape/Values Management Area provisions a coherent measure that would assist the CRC as intended. The amendments we recommend are evident in the marked-up version of the Plan in Appendix B to this Recommendation Report.

²⁸² Zip Addendum Commentary para 2.10.

²⁸³ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, paras 12.14 to 12.24 for the policies and 12.25 to 12.43 for the rules.

²⁸⁴ Officers’ Reply For Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, sections 5.2 to 5.5, page 18.

²⁸⁵ Ibid, section 5.5, page 18.

²⁸⁶ Ibid, section 5.9, page 19.

9.3 Kaitorete Spit

[650] As we discussed in Chapter Seven of this Recommendation Report, Variation 1 established new combined surface water and groundwater allocation zones; namely the Selwyn-Waimakariri, Rakaia-Selwyn and Little Rakaia Zones (Table 11(e)). Variation 1 also established the Kaituna Groundwater Allocation Zone (Table 11(f)) with an allocation limit of 2.1 million m³ per year. Kaitorete Spit, a thin strip of land running between Lake Ellesmere/Te Waihora and the Canterbury Bight, is included in the Selwyn-Waimakariri Groundwater Allocation Zone (SWGAZ). This was opposed by the submitter HydroServices Ltd.

[651] Dr A Davoren, appearing for HydroServices Ltd, stated:

Water chemistry, geology, bore log stratigraphy, water temperature and lack of direct connection evidence exists to show that at least groundwater at the north eastern end of Kaitorete Spit is sourced from the basalt aquifer system of Kaituna, Prices, Greylees and other Banks Peninsula valleys. This area is hydro-geologically distinct and evidence of this has been available since prior to the decision to include Kaitorete Spit in the Selwyn-Waimakariri Combined Surface and Groundwater Allocation Zone. ...²⁸⁷

[652] Dr Davoren suggested that at least some of the Kaitorete Spit should instead be included in the Kaituna Groundwater Allocation Zone, and that the allocation volume for the Kaituna Zone should be increased to approximately 11 million m³ per year.²⁸⁸

[653] Dr Davoren was concerned that the inclusion of the entire Kaitorete Spit in the SWGAZ would mean that no new groundwater takes could be abstracted from the Kaitorete Spit as the SWGAZ is currently over-allocated, and hence new takes would not be allowed under Rule 11.5.32.²⁸⁹ Dr Davoren advised us that he was currently acting for a groundwater take applicant on the Kaitorete Spit.

[654] The issue raised by HydroServices Ltd was addressed in the section 42A Reply Report by way of a technical memorandum from Dr H Williams. Dr Williams opposed the relief sought by HydroServices Ltd because in his view:

Whilst some of the groundwater passing beneath the spit on its way to the ocean may be sourced from the Rakaia-Selwyn WMZ, most of it is likely sourced from the Selwyn-Waimakariri WMZ, and only a very small amount from the south-eastern part of the Banks Peninsula. The water quality data indicate a similarity between the groundwater typical of the Canterbury Plains and that beneath the spit. Furthermore, there is a number of confining aquitard layers of silt and clay developed near the coast, between the gravel aquifers (e.g. Brown & Weeber 1992) that serve to reduce upwards flow of groundwater from the fractured Banks Peninsula volcanic strata into the plains aquifer system. the confined groundwater beneath the Kaitorete Spit is largely connected to both the Selwyn-Waimakariri WMZ and the Rakaia-Selwyn WMZ.²⁹⁰

[655] Dr Williams did "... not support an enlargement of the Kaituna WMZ to include a portion of the Kaitorete Spit because the contribution to groundwater from Banks Peninsula is likely very small and has not been sufficiently quantified."²⁹¹

[656] With regard to the suggestion from HydroServices that the allocation volume for the Kaituna Groundwater Allocation Zone be significantly increased, Dr Williams stated:

²⁸⁷ Statement of Evidence of Dr A Davoren, HydroServices Ltd, para 16, page 5.

²⁸⁸ Ibid, para 22, page 6.

²⁸⁹ Ibid, para 15.d), page 5.

²⁹⁰ Officers' Reply For Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, Appendix F, Issues 1, items 1 and 2, pages 35 and 36.

²⁹¹ Ibid, items 3 and 4, pages 35 and 36.

I understand that the current allocation and use of combined surface water and groundwater is already cause for concern regarding the breaching of existing minimum flow targets. Therefore, on a technical basis I can find no reason to agree with Dr Davoren regarding his proposal to increase the water allocation.²⁹²

- [657] Having considered the issues raised by HydroServices Ltd and the evidence of Dr Davoren and Dr Williams, we are not persuaded to recommend the amendments sought by HydroServices Ltd. As we noted in Chapter Seven of this report, the Selwyn Te Waihora groundwater resource is already over-allocated. In that context, significantly increasing the groundwater allocation for the Kaituna Groundwater Allocation Zone from 2.1 million m³ per year to 11 million m³ per year (an increase of more than 500%) would risk significant adverse environmental effects arising.
- [658] We are also conscious that Kaitorete Spit is situated in the coastal environment, and as we noted in Chapter Two of this report, Policy 3 of the NZCPS is adopting a precautionary approach to activities whose effects on the coastal environment are uncertain, unknown or little understood but potentially significantly adverse.
- [659] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make the amendments sought or not; and have assessed that recommending they be made would not better serve the provisions of the Act and subordinate instruments than retaining the notified provisions.

9.4 West Melton Special Zone

- [660] Variation 1 includes amendments to some provisions in Section 9 of the LWRP which covers the Christchurch – West Melton Zone of the CWMS. As discussed in the section 42A Report:

In the West Melton Special Zone, conditions have historically been added to resource consents to manage groundwater abstraction and well interference effects in the Zone. ...the West Melton Special Zone has existed for many years and has been implemented partly through the Transitional Regional Plan and more recently through CRC's resource consent processing practice. In effect, formalising the West Melton Special Zone in the pLWRP gives statutory weight to the Zone and the inherent groundwater restrictions.²⁹³

- [661] The I & CM McIndoe Partnership submitted on Section 9, and sought the deletion of all policies, rules and definitions referring to the Christchurch – West Melton Zone. That relief was initially opposed in the Section 42A Report.²⁹⁴ However, the section 42A Reply Report revisited the issues raised by the I & CM McIndoe Partnership and the evidence presented by Mr I McIndoe at the hearing. In the Reply Report Mr C Hansen, the CRC's Team Leader Groundwater Quality, advised:

Mr. McIndoe considers that climate is the main driver of groundwater level fluctuations in the area. Abstraction effects are minor. Therefore, if bores penetrate the aquifer adequately so that they do not go dry under natural groundwater level fluctuations, additional pumping interference effects will not cause them to go dry.

Mr. McIndoe also argues that long-term decline in groundwater levels is best managed by allocation limits rather than trigger levels, and that at any rate, there is no evidence of a long-term decline in groundwater

²⁹² Ibid, issue 2, item 1, page 36.

²⁹³ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; sections 19.1 and 19.4, page 347.

²⁹⁴ Ibid, section 19.7, page 348.

levels in the West Melton Special Zone. He says that there is nothing special about the zone compared to other parts of the Canterbury Plains, so it does not warrant a special management regime.²⁹⁵

[662] Mr Hansen discussed the technical issues raised by Mr McIndoe and concluded:

... it is my opinion that removing the special zone rules would probably not cause difficulties for other groundwater users. This is because groundwater levels in the area have never been low enough to trigger significant reductions in pumping, and they're unlikely to be lower in the future. Therefore, groundwater users wouldn't notice any change if the trigger level restrictions were removed.²⁹⁶

[663] With regard to increasing the permitted abstraction rate from 10 m³ per day to 100 m³ per day for properties of greater than 20 ha within the West Melton Special Zone (which would be one result of removing the trigger level restrictions), Mr Hansen advised:

A daily rate 100 m³ per day equates to a continuous rate of about 1.2 litres per second, which is a relatively low rate compared to many irrigation abstractions. With a minimum property size of 20 ha, these takes should be spaced far enough apart so that even the cumulative drawdown effect of several neighbouring takes would be low. In addition, much of the development in the area involves the subdivision of larger blocks into lifestyle blocks of less than 20 ha, and these blocks would still need resource consents to abstract more than 10 m³ per day. It is likely, therefore, that raising the permitted take threshold to 100 m³ per day would not result in enough additional abstraction to change the risk for most wells.²⁹⁷

[664] The authors of the section 42A Reply Report then recommended deleting the West Melton Special Groundwater Zone in its entirety.²⁹⁸

[665] We have carefully considered the issues raised by the submitter and the evidence of Mr McIndoe and Mr Hansen. We find that the risk of adverse effects arising for existing wells from the recommended deletion of the West Melton Special Groundwater Zone is low. Conversely, the retention of the West Melton Special Groundwater Zone would impose unnecessary economic and social costs on resource users in the area. In that regard, Mr McIndoe advised us:

As an irrigator, I could be 100% restricted even though my pumping has no adverse effect on shallow bores and even though restricting my take would be of no benefit to shallow bores. That is of great concern to me. I can farm through partial restrictions, but having no water at all for long periods is difficult to deal with. Unlike surface water, which can recover very quickly, groundwater levels continue to fall until substantial recharge, usually in winter, restores them.²⁹⁹

[666] Accepting that, we concur with the section 42A Reply Report's recommendation, and we recommend the deletion of the West Melton Special Groundwater Zone in its entirety. This would give better effect to Objectives 3.5, 3.10 and 3.11 of the LWRP while still giving effect to Objective 3.13 of the LWRP. Our recommendation would also give better effect to Objective B3 of the NPSFM 2014.

[667] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the

²⁹⁵ Officer's Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, Appendix F, page 4.

²⁹⁶ Ibid, page 4.

²⁹⁷ Ibid, page 7.

²⁹⁸ Officer's Reply for Council Reply Hearing, Part 2 – Evaluation and Technical Memoranda, November 2014, section 9.5, page 31.

²⁹⁹ Statement of Evidence of I McIndoe, 30 September 2014, para 70, page 13.

Act and subordinate instruments than not making them, including the extent of additional opportunities for economic growth and employment.

- [668] Finally, although we have adopted the recommendation of the reporting officers, we have dealt with this matter in the narrative body of this report (rather than dealing with it in Appendix A) because the deletion of the West Melton Special Groundwater Zone in its entirety is a substantial amendment to Variation 1 as notified.

Chapter Ten

Giving Effect to Superior Instruments

- [669] In Chapter Two of this Recommendation Report we noted that a regional plan has to give effect to national policy statements and regional policy statements; and that the following are applicable: The New Zealand Coastal Policy Statement 2010; the National Policy Statement Freshwater Management 2014; and the Canterbury Regional Policy Statement 2013. In Chapter Four of the Report, we identified provisions of those instruments that are relevant to Variation 1.
- [670] In this chapter, we consider the extent to which Variation 1, as recommended to be amended, would give effect to those instruments.

10.1 New Zealand Coastal Policy Statement 2010

- [671] In Chapter Four we noted that the NZCPS applies in the part of the Selwyn Te Waihora sub-region that is above the coastal marine area but in the coastal environment, which we find extends inland across Kaitorete Spit and Te Waihora (Lake Ellesmere) to its margins; and across the coastal dunes and Muriwai (Cooper's Lagoon) and its margins, as shown on the Boffa Miskell maps. Those parts of the sub-region to which Variation 1 applies are important, but occupy only a small part of it.
- [672] In the same chapter we identified specific directions of the NZCPS that are imperative in terms and applicable to that part of the catchment: Policies 7; 14(b); 15(a), (b), (d) and (e); 21(b), (c), (d) and (e); and 23(1).
- [673] As noted in Chapter Four, NZCPS Policy 7 directs that a regional plan is to identify coastal processes, resources or values under threat or at significant risk from adverse cumulative effects; manage those effects; and where practicable set thresholds or specify acceptable limits to change to assist in determining when activities causing such effects are to be avoided.
- [674] Variation 1 identifies the waters of Te Waihora (Lake Ellesmere) as being under threat or at significant risk, and decreased flows in waterways, and elevated nitrate concentrations as affecting its health. Most of those effects arise outside the coastal environment. The Variation seeks to manage them by a suite of interrelated policies (particularly 11.4.1 to 11.4.32); and rules (especially 11.5.6 to 11.5.17; 11.5.32 to 11.5.45 and supporting Schedules 7, 10, 13 and 24). Those measures are modifications for the circumstances of the sub-region of the more general provision of the LWRP. They are also related to the freshwater outcomes described in Variation 1's section 11.6; the flow and the environmental flow and allocation regime and water quality targets and limits in section 11.7; and the provisions for Te Waihora Cultural Landscape/Values Management Area.
- [675] Policy 14(b) of the NZCPS is for policies, rules and other methods for restoration and rehabilitation. The Vision and related policies and rules are specifically aimed at restoration and rehabilitation of the health of Te Waihora.
- [676] NZCPS Policy 15 clause (a), (b), (d) and (e) are for avoiding adverse effects of activities on outstanding and other natural features and outstanding and other natural landscapes in the coastal environment; for objectives, policies and rules where identified as being needed.

- [677] In this respect we note that Variation 1 is to operate in conjunction with the general provisions of the LWRP. In combination, they are to operate in ways that carry out that policy. In Variation 1, the policies rules and other provisions identified above are designed to do so.
- [678] Policy 21 of the NZCPS is for managing water in the coastal environment with deteriorated quality, for restoring it, for excluding stock, and for remedying and mitigating adverse effects on areas of coastal waters where they have a particular interest. Strictly the Selwyn Te Waihora sub-region does not extend to coastal waters. However the LWRP and Variation 1 in combination certainly apply to manage and restore the deteriorated quality of the waters of Te Waihora; for excluding livestock from waterways; and for remedying and mitigating adverse effects on areas where Ngai Tahu have a particular interest. The specific provisions of Variation 1 are the policies, rules and other measures mentioned above.
- [679] Policy 23 of the NZCPS is for managing discharges to water in the coastal environment. Again it is the combination of the LWRP and Variation 1 that is responsive to those issues. Specifically in Variation 1 we refer to Policies 11.4.1 to 11.4.20; and Rules 11.5.1; 11.5.2; 11.5.6 to 11.5.17; 11.5.22 to 11.5.29; and 11.5.44 and 11.5.45.
- [680] Having considered the directive provisions of the NZCPS that are applicable to Variation 1, we consider that, in combination with the general region-wide provisions of the LWRP, in relation to the Selwyn/Te Waihora sub-region, the Variation substantially gives effect to the NZCPS.
- [681] In making this finding we have had regard to the legal submissions of counsel for the Royal Forest and Bird Protection Society of NZ Incorporated (Mr P Anderson).³⁰⁰ However, our evaluation of all of the expert evidence before us (not just the evidence of Mr Stansfield as referred to by counsel) has resulted in us reaching a different conclusion than that urged by counsel on the NZCPS matters he referred to.

10.2 NPSFM 2014

- [682] As already mentioned, Variation 1 is required by section 67(3) of the RMA to give effect to a national policy statement. Variation 1 was prepared on the basis that it was required to give effect to the NPSFM 2011. However, the NPSFM 2011 no longer has any legal effect. Consequently, to the extent practicable, we need to consider the provisions of the NPSFM 2014 when formulating our recommendations on the submissions and further submissions.³⁰¹
- [683] Some submitters contended that Variation 1 as notified would give effect to the NPSFM 2014, and others argued that it would not. To address that issue, we have first to identify and summarise requirements of the NPSFM 2014 that are relevant to Variation 1. We did this in Chapter 2.7 of this Recommendation Report, noting that we need to address the preamble, the section on Te Mana o te Wai, and Sections A, B, C, CA, D and E. Section CB on monitoring and Section CC on accounting for freshwater takes and contaminants relate to the executive responsibility of regional councils, and do not bear on the contents of Variation 1.
- [684] The RMA process for hearing submissions is such that submitters were addressing what they considered are deficiencies in Variation 1 as notified. The Schedule 1 process is designed so that consideration of original submissions, further submissions, evidence, and reports under section 42A leads to identifying ways in which the proposed instrument as notified may be improved, and any deficiencies rectified. In accordance with that process, and having considered multiple

³⁰⁰ Submissions by P Anderson, 17 September 2014, paras 32 to 43.

³⁰¹ Supplementary Legal Submissions of Counsel for the Canterbury Regional Council, 16 September 2014, para 7, page 2.

submissions points, substantial evidence, full legal submissions, and reports under section 42A in reply, we are recommending many amendments to Variation 1. Consequently, it would be pointless for us to consider the submitters' contentions as they relate to the contents of Variation 1 that was notified. Instead we consider whether Variation 1 as it would be amended by our recommendations would fail to give effect to the NPSFM in any of the respects identified by submitters. Those recommendations are readily seen in context in the marked-up version of Variation 1 in Appendix B.

Do the NPSFM 2014 requirements need to be fully given effect to?

- [685] First, we note that Policies CA1 to CA4 of the NPSFM establish a prescriptive process for establishing freshwater objectives in numerical terms with reference to the numerical attribute states listed in Appendix 2 of the NPSFM. On that matter counsel for CRC advised us that:

The freshwater objectives for Variation 1 have not been set using this exact process because at the time the Variation was developed the process did not exist. Although the exact process required by policies CA1 – CA4 was not followed, the process undertaken by the Zone Committee was very similar." "... it is impracticable for Canterbury Regional Council to fully complete implementation of the NPSFM 2014 by 31 December 2015.

To address this, the Council resolved to notify a progressive implementation programme under Policy E1 for the Selwyn Te Waihora catchment.

While the Council has publicly notified an implementation programme that means Policies A1, A2, A3, B1, B2, B5, B6, CA1, CA2, CA3 and CA4 do not have to be fully implemented until 2015, the freshwater objectives, limits, environmental flows and targets proposed by Variation 1 are still a critical aspect of Variation 1.

The Council considers that Policies A1, A2, A3, B1, B2, B5, B6 are partially being given effect to by Variation 1, but that they will not be able to be fully implemented until the process under Policies CA1 to CA4 has been completed.³⁰²

- [686] We accept that advice. We note, however, that Variation 1 has to give effect to Objectives A1 and A2,³⁰³ Objectives B1 to B4, Policies B3 and B4, Objective C1 and Policies C1 and C2, Objective D1 and Policy D1. We have undertaken our assessment on that basis.
- [687] We now address each relevant requirement of the NPSFM 2014, and summarise our consideration of whether Variation 1 (as now recommended) would give effect to it. We have considered the relevant parts of the NPSFM Preamble in making our assessments. To assist readers we very briefly paraphrase the objective or policy in the bold headings below.

Safeguarding life-supporting capacity and the health of people and communities (Objective A1)

- [688] Policy 11.4.1 of Variation 1 is to:

Manage water abstraction and discharges of contaminants within the entire Selwyn Te Waihora catchment to avoid, remedy or mitigate adverse cumulative effects on the water quality of Te Waihora/Lake Ellesmere, streams and shallow groundwater; and flow of water in springs and tributaries flowing into Te Waihora/Lake Ellesmere and achieve, in combination with non-regulatory actions, the freshwater objectives and outcomes for the sub-regional area.

³⁰² Supplementary Legal Submissions of Counsel for the Canterbury Regional Council, 16 September 2014, paras 27, 29 and 30, 35 and 41, pages 6 to 8.

³⁰³ In that regard we concur with the submissions of counsel for the Royal Forest and Bird Protection Society, dated 17 September 2014, para 46.

This policy provides the overall direction for the more detailed provisions that follow.

- [689] Section 11.6 of Variation 1 titled “Fresh Water Outcomes” establishes ‘freshwater outcomes’ for specified management units in rivers (Table 11(a)) and lakes (Table 11(b)). These ‘freshwater outcomes’ are also ‘freshwater objectives’ in terms of the NPSFM. The NPSFM defines a freshwater objective as “an intended environmental outcome in a freshwater management unit”.
- [690] The freshwater outcomes established by Variation 1 specifically include “ecological health indicators” and “microbiological indicators”, the latter being designed to protect the health of people. Variation 1 also manages discharges and the use of land in order to achieve the Table 11(i) to Table 11(m) limits and targets.
- [691] We consider that Variation 1 gives effect to NPSFM Objective A1.

Improving the overall quality of fresh water (Objective A2)

- [692] The freshwater outcomes described above have been established (in part) to protect the significant wetland values of Lake Ellesmere(Te Waihora) together with its tributary rivers and streams. The freshwater outcomes for rivers (Table 11(a)) and lakes (Table 11(b)) together with the numerical targets set in Tables 11(i), 11(j), 11(k) and 11(m) will, over time, improve the degraded water quality of the lake and its tributary rivers and streams.
- [693] Variation 1 also establishes a Cultural Landscape/Values Management Area (Policies 11.4.3 and 11.4.4) that encompasses Te Waihora, its margins, wetlands, springs and tributaries, the purpose of which is (in part) to restore (or improve) the health of Lake Ellesmere(Te Waihora. We discuss the CLVMA in more detail in Chapters 4.4 and 9.2 of this Recommendation Report.
- [694] Under Policies 11.4.13 and 11.4.14, nitrogen and phosphorus losses from farming activities and farming enterprises are first (by 2017) to meet good management practice for the property’s ‘baseline land use’ and thereafter (by 2020) reduce further to achieve loss rates that are at least half-way between good management practice and maximum feasible mitigation. Policy 11.4.14 sets out likely required percentage reductions in nitrogen leaching (from a good management practice starting point) for a range of particular farming activities. This reduction in allowable nitrogen loss will, over time, improve surface and groundwater quality in the catchment.
- [695] We note that Table 11(j) (as recommended by us) establishes a nitrogen loss limit for CPW-supplied land that was not irrigated prior to 1 January 2015. That allows for an increase in nitrogen loss from that existing now. However, that is an inevitable result of the CPW irrigation scheme being a fully consented scheme that now forms part of the background environment (as discussed in Chapter 4.5 of this Recommendation Report). Also, Table 11(j) envisages a lower allowable loss limit for that CPW-supplied land being set for 2022 by way of plan change. That 2022 loss limit would assist with phasing out the over-allocation specifically occasioned by the CPW farms.
- [696] Consequently, after having regard to the limits placed on nitrogen losses from farms, together with the limits and targets set in Tables 11(i), 11(j), 11(k) and 11(m), we do not accept the submissions of Royal Forest and Bird that the water quality limits imposed by Variation 1 are “... directly contrary to Objective A2 of the Freshwater NPS.”³⁰⁴

- [697] We consider that Variation 1 gives effect to NPSFM Objective A2.

³⁰⁴ Legal Submissions on behalf of Royal Forest and Bird Protection Society, dated 17 September 2014, para 62.

Establish fresh water objectives (Policy A1)

- [698] We note that Policy A1 does not need to be fully complied with until 2025. Nevertheless, Variation 1 sets some limits and targets that will assist with achieving Objectives A1 and A2. We discussed the setting of the Variation 1 ‘freshwater outcomes’ or ‘freshwater objectives’ under NPSFM Objective A1 above.
- [699] Section 11.7.3 of Variation 1 titled “Water Quality Limits and Targets” sets “Catchment Target Limits for Nitrogen Losses from Farming Activities, Community Sewerage Systems and Industrial or Trade Processes” (Table 11(i)); “Irrigation Scheme Nitrogen Limits” (Table 11(j)); nitrate toxicity limits for rivers (Table 11(k)); “Limits for Lakes” comprising trophic lake index, total phosphorus, total nitrogen and chlorophyll a; and “Limits for Groundwater” comprising nitrate-nitrogen, *E.coli* and other contaminants (Table 11(m)).
- [700] In addition, for farms not part of a Table 11(j) irrigation scheme, Variation 1 indirectly sets limits by specifying a 2009 to 2013 baseline land use period for nitrogen losses from farming activities (defined in Variation 1 as “baseline land use”). This “baseline land use” concept is used in the LWRP definition of “nitrogen baseline”. The loss (or leaching) of nitrogen beyond the nitrogen loss associated with the “baseline land use” would be a prohibited activity under Rule 11.5.12, so the baseline land use is also a form of limit for nitrogen leaching losses in the catchment.
- [701] As noted above, for farms that are part of CPW, Table 11(j) (as we are recommending it be amended) would set allowable nitrogen loss limits for newly irrigated land serviced by CPW. This would also be a form of limit for nitrogen leaching losses in the catchment. Finally, Policy 11.4.16 establishes (for 2037) a maximum allowable nitrogen leaching rate of 80 kg N per hectare per annum for all farms.
- [702] Some submitters on this topic appeared to expect inflexible (or ‘hard’) water-quality limits in respect of every water body in the catchment.³⁰⁵ While the NPSFM 2014 does now contain “Attribute Tables” that enable councils to set numerical limits or targets in regional plans, we are not satisfied that there is a sufficient evidential basis before us regarding the ‘hard limits’ proposed by some submitters and how they related to the NPSFM “Attribute Tables”. In particular we consider that it would be inappropriate to specify that the Table 11(a) and 11(b) numerical ‘outcomes’ are limits or targets in terms of the NPSFM in advance of the CRC’s deliberate implementation of Policies CA1 to CA4.
- [703] In terms of Policy A1b), we note that the loss (or leaching) of nitrogen beyond the nitrogen loss associated with a non-CPW serviced farm’s ‘baseline land use’ would be a prohibited activity under Rule 11.5.12. This will assist with avoiding further over-allocation in terms of water quality.

Specify targets and implement methods (Policy A2)

- [704] We note that Policy A2 does not need to be fully complied with until 2025. Nevertheless, the freshwater outcomes, limits and targets established by Variation 1 consider contaminants from both agricultural land use, industrial and trade processes and wastewater treatment systems.

Best practicable option (Policy A3)

- [705] Policy A3a) is not applicable to the preparation of regional plans.

³⁰⁵ For example the North Canterbury Fish and Game Council, as set out in Appendix 5 to the Statement of Evidence of S Pearson.

[706] With regard to Policy A3b), Variation 1 contains Policy 11.4.7 and Rule 11.5.22 (community wastewater discharges) and Policy 11.4.10 and Rule 11.5.25 (industrial and trade discharges) which specify the use of the best practicable option. We consider that Variation 1 gives effect to NPSFM Policy A3b).

Safeguarding life-supporting capacity (Objective B1)

[707] Policy 11.4.21 is to:

Manage groundwater and surface water together as a single resource, to ensure, in combination with the introduction of alpine water into the catchment, flows in the Waikirikiri/Selwyn River and lowland streams are improved and the allocation limits and targets in Table 11(e) are met.

[708] This policy provides the overall direction for the more detailed provisions that follow.

[709] Section 11.7.1 of Variation 1 titled “Environmental Flow Regime” establishes a “Minimum Flows and Partial Restriction Regime” for water take permits (Table 11(c) and Table 11(d)). This regime introduces revised minimum flows from 2025 specifically to protect ecological and cultural values in rivers and streams, once a healthy water balance is restored and stream flows have improved.³⁰⁶ The minimum flows also apply to groundwater takes with a direct or high degree of stream depletion effect (Rule 11.5.32 condition 3). Under Policy 11.4.28 (as recommended to be amended) the new minimum flows are to be applied to all existing consents on or before 2025, even if the existing consents do not expire for some time after that.

[710] Section 11.7.2 of Variation 1 titled “Groundwater and Surface Water Allocation Limits” establishes Combined Surface Water and Groundwater Allocation Limits for Selwyn-Waimakariri, Rakaia-Selwyn and Little Rakaia Combined Surface and Groundwater Allocation Zones (Table 11(e)), Kaituna Groundwater Allocation Zone Limits (Table 11(f)), and Surface Water Allocation Limits (Table 11(g)).

[711] The revised Groundwater Allocation Zones account for natural differences in the movement and availability of water within the catchment and allow surface and groundwater to be allocated as a ‘one resource’, thereby assisting with the avoidance of further over-allocation. The allocation limits have been calculated to retain low flows of 80 to 90% of the natural 7 day MALF in the lowland streams, taking into account the addition of alpine water to the catchment and retirement of a portion of groundwater takes.³⁰⁷

[712] We consider that Variation 1 gives effect to NPSFM Objective B1.

Avoiding over-allocation and phasing out existing over-allocation (Objective B2)

[713] Any exceedance of the Variation 1 Table 11(e) to Table 11(g) water allocation limits is a prohibited activity under Policy 11.4.21A and Rule 11.5.36. This will avoid further over-allocation.

[714] In terms of reducing the existing over-allocation, Variation 1 assumes that existing groundwater takes will be surrendered as some existing irrigators transition to the use of CPW supplied water. To ensure that occurs, condition 3(c) of Rule 11.5.37 would preclude the transfer of an irrigation

³⁰⁶ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, section 13.7, page 237.

³⁰⁷ Ibid.

water permit from a person who holds shares in an Irrigation Scheme in the Irrigation Scheme Area. Such transfers are prohibited under Rule 11.5.39.

[715] We consider that Variation 1 gives effect to NPSFM Objective B2.

Efficient use of water (Objective B3)

[716] Under Variation 1 Policy 11.4.23 the volume of an irrigation take is to be calculated in accordance with Schedule 10, which provides three methods for determining the seasonal irrigation demand. Under that same policy (as recommended to be amended), other takes, despite LWRP Policy 4.50(b)(i), are to be allocated an amount of water that is reasonable and demonstrates efficient use of water for the particular end use.

[717] We consider that Variation 1 gives effect to NPSFM Objective B3.

Protect significant values of wetlands (Objective B4)

[718] Variation 1 Policy 11.4.18 is to enable lake restoration activities that re-establish aquatic plants and lake margin wetlands, and remove phosphorus from lake bed sediments. Policy 11.4.19 is to enable catchment restoration activities that protect spring-heads, protect, establish or enhance plant riparian margins, create restore or enhance wetlands, and target removal of macrophytes or fine sediment from waterways. These policies are specifically targeted at wetland protection and restoration. They underpin the more detailed provisions that follow.

[719] The Groundwater and Surface Water Allocation Limits (Table 11(e), Table 11(f) and Table 11(g)) together with the “Minimum Flows and Partial Restriction Regime” for water take permits (Table 11(c) and Table 11(d)) of Variation 1 will, in time, result in more water entering Te Waihora (Lake Ellesmere) during the dry summer months.

[720] As we noted in relation to Objective A2, Variation 1 establishes a Cultural Landscape/Values Management Area (Policies 11.4.3 and 11.4.4) that encompasses Te Waihora, its margins, wetlands, springs and tributaries, the purpose of which is (in part) to restore the health of Te Waihora (Lake Ellesmere).

[721] Furthermore, unless it is associated with the artificial opening of a hāpua, lagoon or coastal lake to the sea (which are restricted discretionary activities under Rule 11.5.32), a take from a wetland or hāpua is a non-complying activity under Rule 11.5.35. Non-complying activities are those that are generally not to be condoned and a strong case is required in support of them.

[722] We consider that Variation 1 gives effect to NPSFM Objective B4.

Establish freshwater quantity objectives and set environmental flows and/or levels (Policy B1)

[723] We note that Policy B1 does not need to be fully complied with until 2025. Nevertheless, see our discussion under Objective A1 (the same freshwater outcomes apply to water quantity) and Objectives B1 and B2 regarding the setting of water quantity limits and targets.

Provide for efficient allocation of fresh water to activities within limits set to give effect to Policy B1 (Policy B2)

[724] We note that Policy B2 does not need to be fully complied with until 2025. Nevertheless, the water allocation limits established by Variation 1 were discussed under Objective B1. Variation 1 does not allocate water to particular end uses. However, it gives priority to community drinking-

water supplies and industrial or trade processes that achieve a positive or neutral water balance (Policy 11.4.22) and deep groundwater takes that replace surface takes or stream depleting shallow groundwater takes (Policy 11.4.30). Other than that, applications to abstract water will be assessed on a 'first in, first served' basis (assuming that the allocation limits are not exceeded), and efficient allocation would be market driven.

Transfers (Policy B3)

[725] Variation 1 establishes policies (11.4.22 and 11.4.25) and rules (11.5.37 to 11.5.39) dealing with transfers. We consider that Variation 1 gives effect to NPSFM Policy B3.

Encourage efficient use of water (Policy B4)

[726] See our discussion under Objective B3. We consider that Variation 1 gives effect to NPSFM Policy B4.

Ensuring decisions avoid over-allocation (Policy B5)

[727] We note that Policy B5 does not need to be fully complied with until 2025. Nevertheless see our discussion under Objective B2.

Set defined timeframe and methods by which over-allocation phased out, including by consent reviews (Policy B6)

[728] As discussed above, under CRC's progressive implementation programme, a policy and rule framework designed to achieve the full phasing out of existing over-allocation is to be introduced prior to 2025. The timeframe by which the actual over-allocation is to be phased out is not specified by the NPSFM, and so it could be at any date in the future,³⁰⁸ with the selected date being set by way of a Schedule 1 process prior to 2025.

Integrated management (Objective C1)

[729] Variation 1 contains policies and rules dealing with water quality, water quantity and land use. In particular, Policies 11.4.6 to 11.4.17 deal with managing land use to improve water quality. The land-use activities include farming activities, industrial and trade processes and community sewerage systems.

[730] We consider that Variation 1 gives effect to NPSFM Objective C1.

Integrated management (Policy C1)

[731] See our discussion under Objective C1. We consider that Variation 1 gives effect to NPSFM Policy C1.

[732] Policy C2 applies to regional policy statements, and so is not relevant here.

Involvement of iwi and hapu (Objective D1)

[733] Objective D1 is largely procedural, and is more relevant to the plan formulation process than to our recommendations on submissions and further submissions. However, we note that Policies 11.4.2 to 11.4.4 deal with the importance of the entire catchment to Ngāi Tahu, and the establishment of a Cultural Landscape/Values Management Area (CVLMA) that encompasses Te

³⁰⁸ Memorandum of Counsel for the Canterbury Regional Council in Response to Questions, 19 September 2014, para 19, page 4.

Waihora, its margins, wetlands, springs and tributaries. A number of rules dealing with on-site wastewater, offal and farm rubbish pits, stock holding areas and animal effluent, silage pits and compost, farming activities, stock exclusion, industrial and trade waste, stormwater, and vegetation removal incorporate specific reference to the CLVMA.

[734] We consider that Variation 1 gives effect to NPSFM Objective C1 and Mana o te Wai.

Involvement of iwi and hapu (Policy D1)

[735] See our discussion under Objective D1. We consider that Variation 1 gives effect to NPSFM Policy D1.

Progressive implementation programme (Policy E1).

[736] We discussed the CRC's progressive implementation programme at the beginning of this part of our Recommendation Report.

Overall assessment of giving effect to the NPSFM

[737] We have given particular consideration to the extent to which Variation 1 would give effect to the NPSFM. In coming to a conclusion on that topic, we have in mind that the CRC has also to give effect to the CRPS; and to have particular regard to the vision and principles of the CWMS. The NPSFM is general in nature, in that it applies throughout New Zealand. The CRPS applies in the Canterbury Region, and responds to the natural and physical resources and the relative circumstances of social, economic and cultural well-being within it.

[738] For this region, the CRPS contains policies that indicate management of land and water resources and integration of solutions of issues affecting them being addressed by catchments or parts of the region, and by involving people and communities—see especially Policies 7.3.9 and 7.3.13. The CWMS also places reliance on local collaboration in respect of environmental limits, restoring ecological health and functioning to sustainable levels, and integrating management of water resources, all within the RMA regulatory framework. The CRPS and CWMS in combination support the ways in which Variation 1 has established targets, limits, timeframes, and methods in partial fulfilment of the NPSFM 2014. Outcomes of local collaboration underpinning the further implementation of the NPSFM 2014 by 2025 would be tested by the Schedule 1 process before being incorporated into this section of the LWRP.

[739] In that context, we assess Variation 1 as substantially giving effect to the NPSFM by the provisions it currently contains (amended as we recommend).

10.3 Canterbury Regional Policy Statement 2013

[740] On the requirement that Variation 1 give effect to any regional policy statement, we identify the Canterbury Regional Policy Statement 2013 (CRPS), which was made operative on 15 January 2013. In considering the submissions and further submissions and the recommendations that we make on them, we apply the requirement that Variation 1 gives effect to the CRPS.

[741] To give effect to the CRPS, Variation 1 has (amongst other things) to:

- Enable development including regionally significant infrastructure³⁰⁹ (Policy 5.3.2);

³⁰⁹ "Regionally significant infrastructure" is defined in the CRPS as including "established community-scale irrigation and stockwater infrastructure".

- Enable sewerage, stormwater and potable water infrastructure to be developed and used provided adverse effects are avoid, mitigated or controlled (Policy 5.3.6((2);
- Enable established and consented community-scale irrigation to be operated, maintained and upgraded provided adverse effects are avoid, mitigated or controlled (Policy 5.3.11((2);
- Ensure that rural land use intensification does not contribute to significant cumulative adverse effects on water quality and quantity (Policy 5.3.12((3);
- Promote, and where appropriate require the protection, restoration and improvement of lakes, rivers, wetlands and their riparian zones and associated Ngāi Tahu values (Policy 7.3.3);
- Manage the abstraction of surface water and groundwater by establishing environmental flow regimes and water allocation regimes (Policy 7.3.4(1)) and where the quantum of water allocated for abstraction from a water body is at or exceeds the maximum amount provided for in an environmental flow and water allocation regime, avoid any additional allocation of water for abstraction and set a timeframe for identifying and undertaking actions to effectively phase out over-allocation (Policy 7.3.4(2));
- Establish and implement minimum water quality standards for surface water and groundwater (Policy 7.3.6(1));
- Where water quality is below the minimum water quality standard, avoid any additional allocation or abstraction, and any additional discharge of contaminants, that may further adversely affect the water quality (Policy 7.3.6(2));
- Control changes in land use to ensure water quality standards are maintained or imposed (Policy 7.3.7(2));
- Ensure the quantities of water allocated are no more than necessary for the proposed use (Policy 7.3.8(3));
- Recognise the importance of reliability in supply for irrigation (Policy 7.3.8(4));
- Where the effects on freshwater bodies, singularly or cumulatively, are unknown or uncertain, take a precautionary approach to allocation of water for abstraction, or intensification of land use or discharge of contaminants (Policy 7.3.12);
- Preserve and restore the natural character of the coastal environment by protecting and enhancing indigenous ecosystems and associated ecological processes (Policy 8.3.4(2));
- Improve the quality of Canterbury's coastal waters in areas where degraded water quality has significant adverse effects on natural, cultural, amenity and recreational values (Policy 8.3.7);
- Ensure that the natural, physical, cultural, amenity, recreational and historic heritage values of Canterbury's ecologically significant wetlands are protected (Policy 9.3.5(2));
- Provide for activities in river and lake beds and their riparian zones, including the planting and removal of vegetation and the removal of bed material, while ensuring that significant bed and riparian zone values are maintained or enhanced and adverse effects are avoided, remedied or mitigated (Policy 10.3.1); and
- Ensure that land-uses and land management practices avoid significant long-term adverse effects on soil quality, and to remedy or mitigate significant soil degradation where it has occurred, or is occurring (Policy 15.3.1(1)).

[742] The section 42A Report discussed the need for Variation 1 to give effect to the CRPS. It stated:

It is also relevant that in the case of Variation 1, and for any catchment-wide regional plan, (as opposed to a site specific private plan change application) the Council is required to give effect to NZCPS, NPS and RPS provisions across a wide geographical spectrum. These provisions sometimes compete or pull in different directions depending on the geographical location and cannot be reconciled to ensure strict compliance with all statutory directions in all locations within the catchment.

For example, the RPS directs the maintenance and enhancement of natural and physical resources contributing to Canterbury's overall rural productive economy in areas which are valued for existing or foreseeable future primary production by ensuring that rural land use intensification does not contribute to significant cumulative adverse effects on water quality and quantity (Policy 5.3.12). The explanation to the policy confirms that "The rural productive base of Canterbury is essential to the economic, cultural and social well-being of its people and communities. Enabling the use of natural and physical resources to maintain the rural productive base is a foreseeable need of future generations."

The RPS also contains a range of objectives and policies relating to water quality. For example, it directs that changes in land use are controlled to ensure water quality standards are maintained or improved (Policy 7.3.7(2)) and that where the effects on freshwater bodies, singularly or cumulatively, are unknown or uncertain, take a precautionary approach to the intensification of land use or discharge of contaminants (Policy 7.3.12).

Overall, the Council considers that it has complied with the directive nature of the relevant higher order policies, but that a Part 2 judgment must still be applied in assessing the provisions in Variation 1 against the relevant statutory tests, including section 32.³¹⁰

- [743] Throughout the remainder of the section 42A Report that dealt with the issues raised by submissions, the officers identified how (in their opinion) the notified provisions of Variation 1, and the changes to those provisions that they recommended, gave effect to the CRPS. We do not cross-reference those parts of the section 42A Report here as they are too numerous. However, we appreciate the officers' advice and we have had regard to it.
- [744] We have also carefully considered the advice contained in the submissions and further submissions, legal submissions and evidence regarding the extent to which Variation 1 gives effect to the CRPS, where it was considered (by some submitters) to be deficient in that regard, and how it might be improved (in their view) to give better effect to the CRPS. Again, we do not cross-reference that advice here as the individual references are too numerous.
- [745] However, we record that we have considered the relevant CRPS provisions (particularly those we described above) when assessing the submissions and further submissions and whether or not to recommend amendments to Variation 1 as a result of those submissions. This includes our own assessment of the recommended amendments contained in the S42A Report, together with the legal submissions and evidence provided by submitters. We conclude that the amendments to Variation 1 which we have finally recommended, both individually and collectively, give effect to the CRPS as is required by section 67(3) of the RMA.

³¹⁰ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, sections 7.48 to 7.50, pages 77 and 78.

Chapter Eleven

Relation to Other Instruments

11.1 National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990

[746] As we noted in Chapter Two of this Recommendation Report, section 67(4) of the RMA stipulates that a regional plan is not to be inconsistent with a water conservation order. We understand that 'to not be inconsistent with' allows a degree of neutrality and simply requires that Variation 1 does not offend the superior instrument.³¹¹

[747] In this case the National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990 is particularly relevant. That Conservation Order states:

3 Outstanding features

It is hereby declared that Te Waihora/Lake Ellesmere has or contributes to the following outstanding amenity or intrinsic values which warrant protection:

- (a) habitat for wildlife, indigenous wetland vegetation and fish; and
- (b) significance in accordance with tikanga Māori in respect of Ngāi Tahu history, mahinga kai and customary fisheries.

[748] The Conservation Order imposes restrictions on allowing Te Waihora (Lake Ellesmere) to be artificially opened to the sea or artificially closed from the sea.³¹² The damming, stopbanking, polderisation, or drainage of any part of Te Waihora (Lake Ellesmere) where the lake bed is below 1.20 m.s.l. in elevation is not allowed.³¹³ Resource consents cannot be granted in respect of the waters of Te Waihora (Lake Ellesmere) if their effect would be that the provisions of the Conservation Order could not be observed without those provisions being changed or varied.³¹⁴ However, consents may be granted for research into and enhancement of, habitat for wildlife, indigenous wetland vegetation and fish, and significance in accordance with tikanga Māori in respect of Ngāi Tahu history, mahinga kai and customary fisheries.³¹⁵

[749] The section 42A Report advised that Variation 1 is consistent with the Conservation Order.³¹⁶ Although some witnesses advised that in recommending amendments to the Variation 1 provisions they had considered the need to ensure consistency with the Conservation Order,³¹⁷ we did not receive any substantive evidence to the contrary. We note that the legal submissions for the Royal Forest and Bird Protection Society stated that the limits and methods contained in Variation 1 did not protect the values recognised in the Conservation Order.³¹⁸ However, we find that counsel's claim in that regard was not substantiated by the evidence we received.

[750] Having carefully reviewed the provisions of Variation 1 ourselves (including the amendments recommended in the Section 42A Reports that we endorse together with the additional changes

³¹¹ *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.

³¹² Section 4.

³¹³ Section 5.

³¹⁴ Section 6.

³¹⁵ *Ibid.*

³¹⁶ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014, section 7.134, page 96.

³¹⁷ See for example the Statement of Evidence of C F Begley, Te Rūnanga o Ngāi Tahu, 29 August 2014, para 8, page 3.

³¹⁸ Legal Submissions on behalf of the Royal Forest and Bird Protection Society of New Zealand Incorporated, 17 September 2014, para 66.

we recommend) we are satisfied that Variation 1 is not inconsistent with the National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990.

- [751] In that regard, we note that the Cultural Landscape/Values Management Area established by Variation 1 and the rules associated with it actually provide additional protection for the outstanding amenity and intrinsic values identified in section 3 of the Conservation Order. We discuss that further in Chapter 10.3 of this Recommendation Report.

11.2 Iwi Management Plans

- [752] The Te Rūnanga o Ngāi Tahu Act 1996 and the Ngāi Tahu Claims Settlement Act 1998 recognise that Ngāi Tahu Whānui are tangata whenua throughout Canterbury. That is particularly relevant in applying sections 6(e), 7(a) and 8 of the RMA; and also in giving effect to the CRPS. Chapter Two of the CRPS identifies numerous issues of importance to Ngāi Tahu on the management of natural resources, and Chapter Four describes processes for enhancing the relationship of Ngāi Tahu with the CRC.
- [753] Due to those Acts, and the CRC's duties to take into account planning documents recognised by an iwi authority, and for the LWRP to give effect to the CRPS, throughout this report we are influenced by that status of Ngāi Tahu, the importance of Variation 1 to the LWRP in addressing issues identified in Chapter Two of the CRPS, and supporting the relationship described in Chapter Four of it.
- [754] On the CRC's duty to take into account planning documents recognised by an iwi authority, we have identified the following that are recognised by Ngāi Tahu iwi:
- a) Te Whakatau Kaupapa: Ngāi Tahu Resource Management Strategy for the Canterbury Region (1990). This document pre-dates the RMA Act 1991, and was the first iwi management plan to be produced in NZ.
 - b) Te Rūnanga o Ngāi Tahu Freshwater Policy (1999) which applies to the whole of the Te Rūnanga o Ngāi Tahu rohe, an area which extends beyond Canterbury. This policy document reflects an holistic framework that seeks continuous improvement in water quality and quantity standards. This document includes objectives, policies and strategies on water management.
 - c) Mahaanui Iwi Management Plan (published February 2013), applies to those Canterbury Papatipu Rūnanga located east of the main divide and in the land area between the Hakatere/Ashburton and Hurunui Rivers, including Christchurch City and the Banks Peninsula. This iwi plan covers the takiwā of 6 of the 10 Papatipu Rūnanga located in Canterbury. It provides comprehensive detail on the cultural values of the constituent Papatipu Rūnanga and reflects many of the aspirational aspects of the CWMS.
- [755] Te Rūnanga o Ngāi Tahu Freshwater Policy (1999) and Mahaanui Iwi Management Plan (2013) are complementary in nature, and the more recent plan reflects an increased level of specificity in respect of resource management issues in the Canterbury region or parts of it. The respective iwi plans enunciate Ngāi Tahu cultural values, the asserted right to participate in the management of natural resources and advocate for continuous improvement in the quantity and quality of natural resources. The iwi management plans do not repeat the specificity required in the rules of a regional plan, rather they inform the integration of tangata whenua values and cultural objectives into the planning provisions of Variation 1 to the LWRP.

- [756] In preparing Variation 1 of the LWRP, the CRC has a duty to comply with the directions we have mentioned. Our recommendations respond to that duty, including recognising and providing for the relationship of Māori and their culture and traditions with certain resources, having particular regard to kaitiakitanga, and having regard to the Mahaanui Iwi Management Plan 2013 and the Ngāi Tahu Freshwater Policy.
- [757] We have reviewed the Ngāi Tahu/Nga Runanga and Te Taumutu Runanga submissions and have been well informed of Ngāi Tahu history and their relationship with the natural resources of the area. In forming our views we have relied on expert evidence, particularly that of Ms C Begley; Dr R J Wilcock and Dr A I McKerchar. In addition we received relevant cultural and historical evidence from Sir Tipene O'Regan, Mrs M Jones, Ms E Brown, and Ms LMW Murchison.
- [758] With the assistance of that evidence we have been able to take into account relevant content of the iwi management plans throughout our deliberations and in making our recommendations in this report.

11.3 Consistency with the LWRP

- [759] In Chapter Two of this report, we noted that section 67(4)(b) of the RMA directs that a regional plan is not to be inconsistent with any other regional plan for the region. We also stated that the only regional plan (other than the LWRP itself) having relevant subject-matter is the Canterbury Regional Coastal Environment Plan.
- [760] We address consistency of Variation 1 with the Coastal Environment Plan later in this chapter. In this section we consider whether the Variation is inconsistent with the LWRP itself.
- [761] In a later passage of Chapter Two we summarised relevant provisions of the LWRP, in particular the objectives, strategic and other policies, including freshwater outcomes and limits for the region generally. As described in Chapters One and Two above, the scheme of the LWRP is that freshwater outcomes and limits specific to various catchments are to be included in 'sub-region sections' of the Plan by variation or change.
- [762] Variation 1 is an example of that process. It would amend Section 11 of the LWRP, which is the sub-region section having specific application to the Selwyn Te Waihora part of the region.³¹⁹
- [763] The amendments to Section 11 of the LWRP that would be made by Variation 1 are designed to complete that section with policies, rules and other provisions specific to that sub-region, prescribing freshwater outcomes and limits for it. In that way, we find that the Variation is complementary to the LWRP, is expressly contemplated by it, and is not inconsistent with it.

11.4 Canterbury Water Management Strategy

- [764] As we discussed in Chapter Two of this Recommendation Report, by section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, we are to have regard to the vision and principles of the Canterbury Water Management Strategy (CWMS). The text of the CWMS vision and principles reproduced in Part 1 of Schedule 1 of the 2010 Act includes a statement of the 'vision', of 'Fundamental principles', which include 'Primary principles' and 'Supporting principles'.
- [765] The 'vision' is:

³¹⁹ Variation 1 would also make amendments to two region-wide rules in Section 5 of the LWRP; and amendments to Section 9 which applies to the West Melton special zone that straddles the boundary of the Selwyn Te Waihora sub-region and another sub-region.

"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."

- [766] The primary principles include sustainable management, regional approach, and kaitiakitanga. The first requires that water be managed in accordance with sustainability principles and be consistent with the RMA and the Local Government Act. The second primary principle provides that planning of natural water use is to be guided by first and second order priority considerations. Those in the first order are the environment, customary use, community supplies and stock water. Those in the second order are irrigation, renewable electricity generation, recreation, tourism, and amenity. The third primary principle is kaitiakitanga.
- [767] The supporting principles include natural character, indigenous biodiversity, access, quality drinking water, recreational and amenity opportunities, and community and commercial use.
- [768] The Section 42A Report advised that implementation of the CWMS in the Selwyn Te Waihora Catchment occurred through the Selwyn Waihora Zone Committee. It went on to describe that terms of reference for the Zone Committee (which required it to develop a Zone Implementation Programme) were developed, and that the Committee engaged in an extensive collaborative process to reach its recommended 'Zone Committee Solutions Package' which formed the basis for Variation 1 as notified³²⁰.
- [769] While we appreciate the endeavours of the Zone Committee, our assessment of submissions and further submissions has led us to adopt a large number of amendments recommended by the CRC's reporting officers. We are also recommending further amendments that are in addition to, or differ from, those recommended to us by those officers. Collectively these amendments more fully serve the provisions of the Act and superior instruments than the notified provisions. Nevertheless, in its recommended amended form, Variation 1 retains a large part of the fundamental elements of the 'Zone Committee Solutions Package'. Consequently, we have no reason to believe that Variation 1 does not still implement the CWMS.
- [770] Furthermore, when considering the options for amending Variation 1 in response to the submissions and further submissions on it, we had particular regard to the vision and the principles reproduced in Part 1 of Schedule 1 of the 2010 Act. We consider that our recommended amendments, individually and collectively, are consistent with that vision and those principles.

11.5 Sports Fish and Game Bird Management Plans

- [771] As we noted in Chapter Two of this Recommendation Report, section 66(2)(c)(i) of the RMA stipulates that when preparing or changing any regional plan, the regional council is 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. We understand that this includes the North Canterbury Fish and Game Plan Management Plan 2010 - 2020 and potentially the Central South Island Fish and Game Council Sports Fish and Game Management Plan 2012 - 2022. Both Plans have been prepared under the Conservation Act 1987.

³²⁰ Variation 1 to the Proposed Land and Water Regional Plan Section 42A Report; Report Number R14/63; July 2014; section 3.15, page 18 and section 4.11, page 21.

- [772] We understand that ‘to have regard to’ means that the provisions of the Plans must be given genuine attention and thought, and afforded such weight as is considered to be appropriate, but the direction provided by them may in the end be rejected, or accepted only in part.³²¹
- [773] We received little if any guidance on this matter from Fish and Game themselves. Mr Pearson, who gave ‘planning’ evidence for Fish and Game, did not mention the Sports Fish and Game Bird Management Plans. Fish and Game adopted the legal submissions of the Royal Forest and Bird Protection Society of New Zealand. However, those legal submissions do not mention the Sports Fish and Game Bird Management Plans. Accordingly we have reviewed the provisions of these two management plans ourselves.
- [774] The North Canterbury Fish and Game Plan Management Plan 2010 - 2020 fully encompasses the area covered by Variation 1. The Plan’s southern border follows the southern side of the Rakaia River and its northern border is north of the Waiau River. The Plan contains ‘management objectives’, and separate objectives for ‘partnership with Ngai Tahu’, ‘habitat’, ‘sportsfish’, ‘game birds’, recreational activities’ and ‘management’. Most of these ‘objectives’ are process focused, setting out how Fish and Game will liaise with other agencies or manage the activities of fishers and hunters. The Plan describes “Lake Ellesmere / Te Waihora and tributaries” as a high-priority habitat and lists relevant management issues as public access, abstraction, water quality and land use impacts. We note that the latter three issues are explicitly dealt with in Variation 1.
- [775] From our examination of the Plan it appears that the most relevant provision is Management Objective 2, which is “To monitor, protect and enhance the populations and habitats of fish and game.”³²² Insofar as that objective relates to fish and game habitats, we consider that the provisions of Variation 1 appropriately seek to protect and enhance those habitats.
- [776] The Central South Island Fish and Game Council Sports Fish and Game Management Plan 2012 - 2022 is of little relevance to Variation 1. The area it covers commences at the southern catchment boundary of the Rakaia River. This is outside the area covered by Variation 1. Consequently, we do not address this Plan further.
- [777] After having regard to the provisions of the North Canterbury Fish and Game Plan Management Plan 2010 - 2020 we find it is not necessary for us to revisit any of our recommendations on the submissions and further submissions received on Variation 1.

11.6 Consistency with Canterbury Coastal Environment Regional Plan

- [778] In this section we consider whether Variation 1 (incorporating our recommended amendments to it) would be inconsistent with the Canterbury Coastal Environment Regional Plan.
- [779] We summarised relevant provisions of the Coastal Environment Plan in Chapter Two of this report, and stated our finding that no submission on Variation 1 directly raised an issue of inconsistency with that Plan.
- [780] We have compared the contents of Variation 1 (incorporating our recommended amendments to it) with the Coastal Environment Plan, and have found no respect in which they are inconsistent. Rather, the Variation would make more detailed provisions for restoring the health of Lake

³²¹ *Man-O-War Station v Auckland RC and Auckland CC* [2011] NZRMA 235 and *New Zealand Fishing Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).

³²² Page 6 of the Plan. The more specific ‘habitat objectives’ (objectives 4.1 to 4.4 on page 13 of the Plan) are all process focussed.

Ellesmere (Te Waihora) and associated water bodies, and the part of the coastal environment to which it would apply.

Chapter Twelve

Evaluation and Recommendations

12.1 Evaluation duties

- [781] In Chapter Two of this report, we noted the requirements of the RMA for a local authority preparing an ‘amending proposal’ that would amend a proposed plan. Pursuant to those requirements, the CRC had prepared and published an evaluation report on Variation 1. Some submitters were critical of the scope of the evaluation described in that report.
- [782] Section 32AA of the RMA requires a further evaluation of any changes that are made to the proposal after the initial evaluation report had been completed. By that provision the further evaluation may be the subject of a separate report, or referred to in the decision-making record.³²³
- [783] In Chapter Two we also noted the provisions of clause 10 of Schedule 1 of the RMA, which directs that a local authority’s decision on submissions on a plan is to include such further evaluation, to which it is to have particular regard when making its decision.³²⁴
- [784] We also note that 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.³²⁵
- [785] On a further evaluation that is referred to in the decision-making record, it is to contain sufficient detail to demonstrate that further evaluation has been duly undertaken.³²⁶
- [786] If our recommendations are adopted by the CRC, this report (including its appendixes) is intended to form part of the Council’s decision-making record. Therefore, in compliance with the direction in Schedule 1,³²⁷ electing the second option in section 32AA(1)(d), we include in this report the further evaluation of the changes we are recommending to Variation 1.
- [787] Therefore, in our consideration of the amendments to Variation 1 requested in the submissions (whether the recommendations are recorded in the main body of this report or in Appendix A) we have, to the extent and in the detail practicable, examined and assessed the factors itemised in section 32 to the extent applicable. Where appropriate, we have alluded to them in the detail commensurate with the relative scale and significance of the anticipated effects of implementing the amending proposal. In addition, when making our recommendations on the submissions, we have had particular regard to that further evaluation.
- [788] Many of the submission points relate to particular provisions of the Variation that do not stand alone. Rather, they are contributing elements combined in an integrated body of provisions that is intended to operate as a coherent whole. To the extent that they do, we have also evaluated the whole by reference to the section 32 criteria.

³²³ RMA, s 32AA(1)(d) and (2).

³²⁴ RMA, Schedule 1, cl 10(4)(aaa).

³²⁵ RMA, s 32(1)(c).

³²⁶ RMA, s32AA(1)(d)(ii).

³²⁷ RMA, Schedule 1, cl 10(2)(ab).

Reasonably practicable options

- [789] In examining whether the amendments to the Variation are the most appropriate way to achieve the objectives, we have sought to identify other reasonable practicable options.³²⁸
- [790] In doing that, we have confined ourselves to options presented in the submissions or the section 42A Report, and to combinations or refinements of them. We have refrained from searching for other options of our own initiative, that being beyond our function as hearing commissioners, and risking depriving submitters of opportunity to respond.

Efficiency and effectiveness

- [791] An assessment of the efficiency and effectiveness of amendments to the Variation has to involve identifying and assessing the benefits and costs of the anticipated effects of implementing them, including opportunities for economic growth and employment.³²⁹
- [792] Further, if practicable, the assessment is to include quantifying those benefits and costs;³³⁰ and assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.³³¹ In those respects, too, we have confined our consideration of those matters to the evidence given us by the Council and the submitters. In particular, quantifying benefits and costs of amendments, the implementation of which may be anticipated to have environmental, social and cultural effects, to be compared with benefits and costs of economic effects that can be assessed in money's worth, is generally problematic. So in those respects we have had to be content with assessments that are more conceptual and general, than analytical and calculated.

Most appropriate option

- [793] Examination of reasonably practicable options, and assessment of efficiency and effectiveness of amendments to the Variation, are elements in evaluating which is the most appropriate way to achieve the objectives. In that regard we apply the reasoning of the High Court in the Transmission Gully case,³³² that the evaluation is broad enough to include other relevant criteria. In the case of Variation 1, it should include the Council's duty to have the LWRP give effect to the superior instruments, especially the NPSFM and the CRPS.

12.2 Evaluation

- [794] The officers' Reply presented to us by the Council included a detailed report to assist us to make a further evaluation on groups of inter-related amendments to the Variation, on amendments on cultural values, nutrient management, water quantity allocation, transfer of water permits, and in respect of the West Melton Special Zone.³³³
- [795] We have considered that report and accept it. Rather than composing our own, we adopt this as the report on further evaluation in respect of recommended amendments that is to be included in the decision-making record. It is included in the list of reports considered in Appendix C to this report. It is to be read in conjunction with our own assessments on individual amendments contained in the main body of this report and in Appendix A.

³²⁸ RMA s32(1)(b)(i).

³²⁹ RMA s 32(2)(a).

³³⁰ RMA, s 32(2)(b).

³³¹ RMA, s 32(2)(c).

³³² *Rational Transport Society v NZ Transport Agency* [2012] NZRMA 298 at [45] and [46].

³³³ Officers' Reply for Council Reply Hearing, Part 4 –Evaluation under Section 32AA, November 2014.

12.3 Conclusion and recommendations

- [796] We have considered and deliberated on the proposed Variation; the submissions lodged on it; and the reports, evidence and submissions made and given at our public hearings. We have had particular regard to the further evaluation of the amendments to the Variation that we are recommending; and to the vision and principles of the Canterbury Water Management Strategy set out in Part 1 of Schedule 1 of the Environment Canterbury (Temporary Commissioners and Water Management) Act 2010. The relevant matters we have considered, and our reasons for our recommendations are summarised in the main body of this Recommendation Report and in Appendix A. On our evaluation of them we are satisfied that those amendments are the most appropriate for achieving the objectives and for giving effect to the New Zealand Coastal Policy Statement 2010, the National Policy Statement on Freshwater Management 2014, and the Canterbury Regional Policy Statement 2013.
- [797] **We therefore recommend the amendments to Variation 1 contained in the main body of the report and in Appendix A.**
- [798] The proposed variation incorporating the recommended amendments, including necessary consequential alterations (marked in conventional ways) is Appendix B. A list of the reports we have considered is in Appendix C.

DATED 21 April 2015.

David F Sheppard, Hearing Commissioner (Chairman)



Rob van Voorthuysen, Hearing Commissioner



Raewyn Solomon, Hearing Commissioner.



Appendix C

Reference Material

- 1 New Zealand Coastal Policy Statement 2010. New Zealand Government.
- 2 Canterbury Coastal Environment Regional Plan, 2005.
- 3 Canterbury Regional Policy Statement 2013, Environment Canterbury
- 4 Canterbury Water Management Strategy, Environment Canterbury (2009)
- 5 Proposed Canterbury Land and Water Regional Plan Decisions Version, December 2013
- 6 Selwyn Waihora Zone Implementation Programme 2011, Environment Canterbury
- 7 Selwyn Waihora Zone Implementation Programme Addendum 2013, Environment
Canterbury
- 8 Mahaanui Iwi Management Plan (February 2013)
- 9 Te Runanga o Ngai Tahu Freshwater Policy (1999)
- 10 Canterbury Regional Council Flood Protection and Drainage Bylaw (2013)
- 11 North Canterbury Fish and Game Management Plan 2010-2020, North Canterbury Fish and
Game Council.
- 12 Sports Fish and Game Bird Management Plan 2012-2022, Central South Island Fish and
Game Council
- 13 Proposed Variation 1 Section 32 Evaluation Report. February 2014.
- 14 National Policy Statement for Freshwater Management 2014, New Zealand Government
- 15 Te Waihora/Lake Ellesmere Catchment Flow Review; Ecological Values and Flow
Requirements. ECan Report R11/124.
- 16 Technical review of the effectiveness of the existing groundwater management regime
operation in the West Melton Special Zone. ECan Report R11/125.
- 17 An equal-allocation method for allocation of a total nutrient load within a nutrient
management zone. ECan Report R12/36.
- 18 Selwyn Waihora limit setting process: An overview of current status in 2012 ECan Report
E12/45

- 19 Selwyn Waihora limit setting process: An overview of Scenarios 1 and 2 ECan Report E12/53
- 20 Selwyn Waihora limit setting process: An overview of Solutions Package 2 plus boltons ECan Report E 12/70
- 21 Selwyn Waihora limit setting process: An overview of Scenario 3 ECan Report E12/64
- 22 A Review of critical lake opening periods, habitats and locations for fish in the Te Waihora/Lake Ellesmere Catchment. ECan Report R12/122.
- 23 Te Waihora/Lake Ellesmere Catchment Flow Review, Ecological Values and Flow Recommendations at Minimum Flow Sites. ECan Report R12/123.
- 24 Low flows; Guidance for Design of Allocation in the Selwyn/Te Waihora catchment. ECan Report R12/124.
- 25 Selwyn-Waihora Catchment. Estimating nitrogen and phosphorus contributions to water from discharges of sewage effluent from community sewerage systems, and milk processing wastewater. ECan Report R13/8.
- 26 The effect of vegetation change on water yield for two flow-sensitive catchments in Canterbury: Phase 6. ECan Report R13/98.
- 27 Consequences of Options for Surface Water Allocation Limits –Kaituna Zone. ECan Report R13/110.
- 28 Te Waihora/Lake Ellesmere: Water quality remediation and ecosystem reparation opportunities (Updated December 2013). ECan Report R13/111.
- 29 Selwyn-Te Waihora Land and Water Planning; Summary of Riparian Buffers as Mitigation for Streams. Report R13/112.
- 30 Te Waihora/Lake Ellesmere Catchment. Functional Significance and Sensitivity of Groundwater Fauna. Ecan Report R13/113.
- 31 Selwyn-Te Waihora Land and Water Planning; Managing Groundwater Replenishment Using Managed Aquifer Recharge (MAR). ECan Report R13/114.
- 32 Selwyn Waihora Streams: Economic Impact of Minimum Flow Proposals. ECan Report R13/115.

- 33 Cultural Values, Flow & Water Management Issues for the Waimakariri/Selwyn-Te Waihora Catchments. Ecan Report R13/116.
- 34 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Surface Water Quantity. ECan Report R14/8
- 35 Integrated Surface and Groundwater Management –Preferred Approach. Selwyn Waihora subregional section of the proposed Land and Water Regional Plan. ECan Report R14/9.
- 36 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Ecology. ECan Report R14/10.
- 37 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Groundwater Quality. ECan Report R14/11
- 38 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Economic Impact. ECan Report R14/12.
- 39 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Surface Water Quality and Ecology in Lowland Streams. ECan Report R14/13.
- 40 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Te Waihora/Lake Ellesmere. ECan Report R14/14
- 41 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Overview Report. ECan Report R14/15.
- 42 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Groundwater Quantity. ECan Report R 14/16

- 43 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Cultural Impact Assessment. ECan Report R14/17.
- 44 Technical Report to support water quality and water quantity limit setting process in Selwyn Waihora Catchment, Predicting consequences of future scenarios: Social Impact Assessment. ECan Report R14/18.
- 45 Estimating nitrate-nitrogen leaching rates under rural land uses in Canterbury (updated). Ecan Report R14/19.
- 46 Selwyn Waihora limit setting process: An overview of Solutions Package 1 ECan Report E14/39
- 47 Review of climate change modelling for Selwyn/Te Waihora plan. D Leftley, 16 January 2012.
- 48 Selwyn-Waihora Zone. Notes on Groundwater Quality. C Hanson, 15 March 2012.
- 49 Water Transfer Claw Back in Over-Allocated Catchments. Case Study: Rakaia Selwyn and Selwyn Waimakariri Groundwater Allocation Zones. Sarah Hunt, 14 June 2012.
- 50 Source of nitrate in the groundwater beneath the Central Plains. C Hanson, 26 October 2012.
- 51 Guidance on Allocation Decision Making Selwyn Te Waihora. Simon Harris, November 2012.
- 52 Information to support Zone Committee discussions on allocation 19 January 2013.
- 53 Water Transfers. A Picken, 12 February 2013.
- 54 Selwyn Waihora Catchment Nitrogen Limits. C McKenzie, 14 February 2013.
- 55 Summary of methods and rationale for the water allocation proposed in Selwyn/Waihora. D Clark, 13 March 2013.
- 56 Options for providing ecological and cultural flows sooner and/or with less reliance on CPWL. A Picken and T Woods, May 2013.
- 57 Technical memorandum: adaptive management (updated version). K Crisley, A Picken, B painter and K Taylor, 14 June 2013.

- 58 Selwyn River/Waikirikiriki and the Silverstream tributary: Summer Water Quality Investigation 2012-2013. Kimberley Robinson, July 2013.
- 59 Applying the ‘natural capital’ approach to nutrient allocation the Selwyn-Waihora Zone in Canterbury. L Lilburne, A Mackay, G Mercer, I Lynn and D Wheeler, Landcare Research for Ministry for the Environment., July 2013.
- 60 Groundwater management in the West Melton Special Zone. A Picken, July 2013.
- 61 Preliminary assessment of Selwyn-Waihora potential water storage areas against CWMS and other key targets. October 2013.
- 62 Selwyn-Waihora Zone: Targeted Stream Augmentation Project Update, Draft Discussion Document, 18 November 2013.
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