IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA97/2017
[2018] NZCA 316

BETWEEN	R J DAVIDSON FAMILY TRUST Appellant
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Hearing:	22 and 23 November 2017
Court:	Cooper, Asher and Brown JJ
Counsel:	J D K Gardner-Hopkins and B S Carruthers for Appellant J W Maassen, N Jessen and M W G Riordan for First Respondent J C Ironside for Kenepuru and Central Sounds Residents Association Inc and Friends of Nelson Haven and Tasman Bay Inc as Interested Parties
Judgment:	21 August 2018 at 1 pm

JUDGMENT OF THE COURT

A The questions of law are answered as follows:

Question:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer:

Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.

Question:

(b) If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer:

No.

B The appeal is dismissed.

C Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] This case concerns an important issue about the role of pt 2 of the Resource Management Act 1991 (the Act), in the consideration by consent authorities of applications for resource consent. It raises what is meant by the words "subject to Part 2" in s 104(1) of the Act.

[2] Section 104(1) sets out the matters which a consent authority must have regard to. They include any actual and potential effects on the environment of allowing the

activity, and any relevant provisions of various planning documents which are listed in s 104(1)(b). The consent authority is directed to have regard to these matters "subject to Part 2".

[3] There are four sections in pt 2 of the Act. The first is s 5 which states the purpose of the Act and sets out a definition of "sustainable management". Section 6 sets out matters of national importance which are to be recognised and provided for by all persons exercising functions and powers under the Act. Section 7 sets out another list of matters to which persons exercising functions and powers are to have "particular regard". Finally, s 8 requires functionaries under the Act to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). It is clear that pt 2 is of central importance to the scheme of the Act.

[4] It is also necessary to consider the extent to which the reasoning of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, a case involving an application for a plan change, should be applied in the case of applications for resource consent.[1]

[5] In form, the appeal is a second appeal with the leave of this Court against a determination of the High Court.[2] This Court granted leave to pursue two questions on the second appeal.[3] Before setting those questions out it will be appropriate to give some background.

A proposed mussel farm

[6] The appellant applied to the respondent for resource consent to establish and operate a mussel farm adjacent to and surrounding the southern end of an unnamed promontory jutting out into the northern end of Beatrix Bay in Pelorus Sounds. The proposed farm would be in two separate blocks: one, lying to the southeast of the promontory, 5.166 hectares in area, and the other lying to the southwest, comprising 2.206 hectares, having a total area of 7.372 hectares. The farm would

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1 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

2 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227 [High Court judgment].

3 *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194.

consist of a number of lines with an anchor at each end, and a single warp rising to the surface. At the surface would be a "backbone" with dropper lines extending to approximately 12 metres depth (not to the sea floor). Each structure set would be spaced 12 to 20 metres apart. In addition to mussels, the application sought to cultivate scallops, oysters and algae.[4]

Environment Court decision

[7] The application was heard by an independent commissioner, retired Environment Court Judge Kenderdine on 21 May 2014, and in accordance with her decision, the application was declined by the Council on 2 July 2014. The appellant then appealed to the Environment Court. Two incorporated societies, Kenepuru and Central Sounds Residents Association Inc, and Friends of Nelson Haven and Tasman Bay Inc, who had lodged submissions on the application, joined in the Environment Court appeal under s 274 of the Act, in support of the Council's decision.[5]

[8] The site of the proposed farm was within the Coastal Marine Zone 2 in the Marlborough Sounds Resource Management Plan (the Sounds Plan). In that zone, marine farms are provided for (within 50–200 m of the shore) as discretionary activities. Because the proposed farm would extend beyond 200 m from the shore, the activity required consent as a non-complying activity under r 35.5 of the Sounds Plan.

[9] The Sounds Plan, which became operative on 28 February 2003 is a combined district, regional and regional coastal plan. Relevant provisions of the Sounds Plan were reviewed by the Environment Court in its judgment, which confirmed the Council's decision.[6] Those provisions dealt with natural character, indigenous vegetation and habitats of indigenous fauna, landscape and public access. The site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. The King Shag is a Nationally Endangered species in

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4 This description of the application is taken from the Environment Court's decision, *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [5] [Environment Court decision].

5 Those societies appeared as parties in this Court ("the interested parties").

6 Environment Court decision, above n 4, at [137]–[153].

the *New Zealand Threat Classification System* published by the Department of Conservation, with a stable population of between 250–1,000 mature individuals.[7]

[10] The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

[11] Having reviewed the relevant objectives and policies, the Environment Court expressed doubt that the Sounds Plan could be said to fully implement pt 2 of the Act, identifying in particular the risk of extinction of the King Shag, an event of low probability but high potential impact.[8] The potential adverse effects on King Shags was one of the main factual issues considered by the Environment Court.

[12] The New Zealand Coastal Policy Statement 2010 (NZCPS) was also relevant to the application. It was important, because at the time of the Environment Court decision, the NZCPS had not been implemented in the Sounds Plan.[9] The Environment Court identified as particularly relevant provisions in the NZCPS Policies 6(2) and 8(b) (aquaculture), 11 (indigenous biodiversity), 13 (preservation of natural character), and 15 (natural features and natural landscapes).

[13] Having identified the relevant provisions of the Sounds Plan and the NZCPS, the Environment Court turned to a comprehensive consideration of the effects of the proposal. It found:

(a) The proposal was unlikely to add any adverse cumulative effects to the water in Beatrix Bay that were more than minimal in the context of larger "natural" variations. However, whether there would be changes to the food web in a way that affected the King Shags was unknown.[10]

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7 At [97].
8 At [153].
9 At [155].
10 At [184].

(b) There were unlikely to be adverse effects on the rocky reef system adjacent to the proposed farm.[11]

(c) There would only be very minor (if any) independent or cumulative effects on the intertidal zone.[12]

(d) There would be adverse effects on King Shag habitat, adverse effects on the populations of New Zealand King Shags and their prey and a low probability (very unlikely but possible) that the King Shag would become extinct as a result of the application.[13] The Court however considered it could not assess these effects against the effects of other major environmental "stressors" (pastoral farming, exotic forestry, deforestation, dredging and trawling as well as river flood events and oscillations in weather patterns).[14]

(e) The proposal would compromise the integrity of the adjacent promontory from a visual/aesthetic/natural character perspective: this would be a significant adverse effect.[15]

(f) The cumulative effect, on top of the accumulated effects of the other mussel farms in the area would be significant. This would be contrary to Policy 13(1)(b) of the NZCPS.[16] Policy 13(1)(b) of the NZCPS requires significant adverse effects to be avoided so as to preserve the natural character of the coastal environment and protect it from inappropriate use and development.

(g) There would be no more than minor adverse effects on navigational safety.[17]

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11 At [189].
12 At [190]–[192].
13 At [206].
14 At [207].
15 At [225].
16 At [233].
17 At [239].

(h) Adverse effects on fishing and access were likely to be minor.[18]

(i) While noting it had received "minimal evidence" on the issue of economic effects, the Court accepted there would be a "producer surplus and consumer surplus which would give benefits to society".[19] It was also prepared to take into account social benefits of employment, but it could not make any quantitative comparison of net benefits of the proposed marine farm with the net benefits of the status quo.[20]

[14] As the application required consent for a non-complying activity the Environment Court could only grant consent if either s 104D(1)(a) or (b) applied. These so called "gateway tests" provide respectively that a consent authority may grant a non-complying activity consent only if it is satisfied that either the adverse effects of the activity on the environment will be minor or the application is for an activity that will not be contrary to the objectives and policies of a relevant plan. On the basis of its consideration of the proposal's effects the Court was satisfied that there would be significant adverse effects on the environment. This meant it could only contemplate granting consent if the application could be brought within s 104D(1)(b). On this issue, the Court was satisfied that the application could not be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although that was what it described as a "close-run judgment".[21]

[15] The Court therefore turned to consider the merits of the application having regard to the statutory considerations set out in s 104(1) of the Act. At the outset, the Court addressed the words "subject to Part 2" which precede the list of matters to which the Council must have regard set out in paragraphs (a) to (c) of the subsection. The Court considered that the decision in *King Salmon* had the effect that in the absence of invalidity, incomplete coverage or uncertainty of meaning in the "intervening statutory documents", there is no need to look at pt 2 of the Act.[22] It held:

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18 At [243].
19 At [244].
20 At [244]–[245].
21 At [249].
22 At [259].

> [260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of Part 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.
>
> (Footnotes omitted.)

[16] The last sentence in that extract from the Environment Court's decision had a footnote reference to *King Salmon* at [137]–[138], to which we will refer below.

[17] Turning (as required by s 104(1)(a)) to the actual and potential effects of allowing the activity the Court gave this summary of its findings which took into account other identified "stressors" in the area:[23]

> (1) likely net social (financial and employment) benefits;
>
> (2) a likely significant adverse effect on the natural feature which is the promontory;
>
> (3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
>
> (4) likely adverse cumulative effects on the amenity of users of the Bay;
>
> (5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
>
> (6) very likely a reduction in feeding habitat of New Zealand King Shags;
>
> (7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
>
> (8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

[18] Considering the proposal in terms of the relevant policies in the Sounds Plan, the Court concluded that "on balance" resource consent should be refused on the basis that the proposal would inappropriately reduce the habitat of King Shags, contrary to

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23 At [269].

a key policy requiring adverse effects to be avoided on areas of significant ecological value.[24]

[19] The Court then turned to the NZCPS, recording its view that the site was not in an appropriate area having regard to adverse effects on King Shag habitat which could not be avoided as directed by Policy 11.[25] The Court also relied on the precautionary approach contained in Policy 3 of the NZCPS. Its discussion of this aspect of the case concluded with the words: "[n]o party argued that the NZCPS was uncertain or incomplete so there is no need to apply the "subject to Part 2" qualification in s 104 RMA."[26]

[20] Weighing the proposal under the Sounds Plan and the NZCPS, the Court judged that the "undoubted benefits" were outweighed by the costs it would impose on the environment. It noted in particular that the proposal did not avoid or sufficiently mitigate:[27]

> (1) the direct minor effect of changing a small volume of the habitat of King Shag;
>
> (2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;
>
> (3) the more than minor adverse effects on the landscape feature of the northern promontory; and
>
> (4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

High Court judgment

[21] The appellant's appeal to the High Court raised four questions. For present purposes, we only need to be concerned with the first which asked whether

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24 At [274].

25 Policy 11 of the NZCPS seeks to protect indigenous biological diversity in the coastal environment, including amongst other things by avoiding adverse effects of activities on indigenous taxa that are listed as threatened, and on the habitats of indigenous species.

26 Environment Court decision, above n 4, at [287].

27 At [282].

the Environment Court erred in failing to apply pt 2 of the Act in considering the application for resource consent under s 104.

[22] Cull J noted the Supreme Court's conclusion in *King Salmon* that the NZCPS gave substance to the principles in pt 2 of the Act in relation to New Zealand's coastal environment.[28] She also referred to the discussion of s 5 in *King Salmon*, noting the Supreme Court's observation that it was not intended to be an "operative provision" under which particular planning decisions are made.[29]

[23] The Judge considered that the Supreme Court had rejected the "overall judgment" approach in relation to the "implementation of the NZCPS in particular", as the approach would be "inconsistent with the elaborate process required before a national coastal policy statement can be issued …".[30] The Judge then held that the reasoning in *King Salmon* applied to s 104(1), because the relevant provisions of the planning documents, including the NZCPS had already given substance to the principles in pt 2 of the Act.[31] She considered *King Salmon* applied equally to s 104 considerations as it does to a plan change.[32] She also accepted a broad submission that had been made to her by the respondent that it would be inconsistent with the scheme of the Act and *King Salmon* to allow regional or district plans "to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications".[33]

[24] Dealing with a specific argument that the Environment Court had erred by not applying ss 5(2) and 7(b) of the Act, the Judge pointed out that even if the Environment Court had paid specific attention to pt 2, it was not clear that the enabling provisions of pt 2 would have been given pre-eminent consideration.[34] In any event, the Environment Court had taken into account the likely net social benefits in assessing the effects of the proposal.[35] It had also found that issues under s 7(b), which requires decision makers under the Act to have particular regard to the efficient

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28 High Court judgment, above n 2, at [73].
29 At [74], referring to *King Salmon*, above n 1, at [151].
30 At [75], referring to *King Salmon*, above n 1, at [136] and [137].
31 At [76].
32 At [78].
33 At [77].
34 At [85]. The Judge was contrasting the "enabling" aspects of the definition of sustainable management in s 5(2) with protective provisions in s 5 and elsewhere in pt 2.
35 At [86].

use and development of natural and physical resources, was largely irrelevant because it did not deal with the protection of resources. Finally, the Judge concluded that the appellant had not identified any deficiency in the relevant planning instruments such as would justify resort to pt 2 in accordance with *King Salmon*.[36]

The appeal to this Court

[25] This Court granted leave to appeal on the following questions of law:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

(b) If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

[26] The balance of this judgment will address the first question. As will become clear, the terms of the answer we give to the first question effectively dictate the answer to the second.

First question — consideration of Part 2 of the Act

Appellant's submissions

[27] Mr Gardner-Hopkins for the appellant presented a comprehensive argument based on the text and purpose of s 104(1), its legislative history and the wider scheme of the Act. He submitted that the approach taken in *King Salmon* to plan changes should not apply in the case of applications for resource consents. Rather, in considering resource consent applications, pt 2 of the Act must be considered as well as the statutory documents referred to in s 104(1), and in the case of conflict pt 2 will prevail.

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[36] At [88].

[28] Counsel noted that the words "subject to Part 2" have often been construed, in the context of cases involving resource consents, as enabling or requiring reference to the provisions in pt 2 of the Act. Cases where such references have been made include decisions of this Court, including *Queenstown Lakes District Council v Hawthorn Estate Ltd* in which it was said:[37]

> [50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:
>
> > … Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to …

[29] The words "[s]ubject to Part II" in the statute as it then was were subsequently relocated in subs (1) but that does not detract from the argument. In addition, in *Central Plains Water Trust v Synlait Ltd* this Court said:[38]

> Section 104(1) requires the consent authority inter alia to comply with the overarching provisions of Part 2. Among the matters to which the authority is required by Part 2 to have particular regard is the efficient use of natural and physical resources (s 7(b)). That theme (1) consideration is of very great importance. It is recognised not only by the RMA but increasingly within the general principles of law which provide a context for adjudication.

[30] In addition, Mr Gardner-Hopkins was able to refer to various High Court judgments taking the same approach.[39] Numerous Environment Court decisions could also be quoted for the same proposition.

[31] Counsel noted that the expression "subject to Part 2" also occurs in s 171(1) of the Act in the context of considering notices of requirement. The drafting of s 171(1) follows a similar pattern to that of s 104(1), requiring consideration, "subject to Part 2", of the effects on the environment of allowing the requirement, as well as the

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37 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

38 *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 at [92(a)].

39 *Wilson v Selwyn District Council* [2005] NZRMA 76 (HC) at [79]; *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 at [67] and [72]; and *Auckland City Council v John Woolley Trust* [2008] NZRMA 260.

provisions of any relevant policy statement or plan. Section 171 was considered by the Privy Council in *McGuire v Hastings District Court*.[40] Writing for the Board, Lord Cooke discussed the various provisions in pt 2 of the Act before noting that s 171 is expressly made subject to pt 2, including ss 6, 7 and 8. He wrote: "[t]his means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict."[41]

[32] Similar observations were made in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council*.[42] And in another case involving a requirement, Brown J took the same approach, distinguishing *King Salmon* on the basis that the relevant statutory provisions discussed in the latter did not include the phrase "subject to Part 2".[43]

[33] Mr Gardner-Hopkins traced the history of s 104 noting that as originally enacted, pt 2 was listed as one of the matters to which a consent authority was to have regard; it was the seventh in a list that began by referring to any relevant rules of a plan or proposed plan, then mentioned relevant policies or objectives of such plans, then national policy statements, the NZCPS and regional policy statements as well as other matters. That drafting approach led the Full Court of the High Court to observe that although the section directed the consent authority to have regard to pt 2, it was "but one in a list of such matters and is given no special prominence".[44]

[34] It was shortly after that the Act was amended, placing the words "subject to Part 2" near the beginning of the section. The Ministry for the Environment produced a departmental report on the Resource Management Act Amendment Bill, in April 1993. The report was provided for the Chairman of the Planning and Development Select Committee, to assist its consideration of the Bill. At page 62, the observation was made:

> The main change to section 104 was the rewriting of section 104(4). This was done to clarify that Part [2] was not one of a list of matters that had to be had

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40 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.
41 At [22].
42 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [68].
43 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375 at [117].
44 *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84 (HC) at 89.

> regard to but was an overriding matter, as it is with the whole Act including the next section, 105, where decisions are made on applications.

[35] Consistent with this, when introducing the Resource Management Act Amendment Bill 1993, the Minister for the Environment said:[45]

> Part [2] of the Resource Management Act sets out its purpose and the key principles of the Act. It is fundamental, and applies to all persons whenever exercising any powers and functions under the Act. The current references in the Act in Part [2] are being interpreted as downgrading the status of Part [2]. Amendments in this Bill restore the purpose and principles to their proper over-arching position.

[36] Mr Gardner-Hopkins supplemented these arguments by reference to the fact that under sch 4 of the Act, every application for resource consent must include an assessment of the activity "against the matters set out in Part 2". This was not a requirement of the legislation as originally enacted, but the result of s 125 of the Resource Management Amendment Act 2013. Once again, it is relevant to note the explanation given in the departmental report on what was then the Resource Management Reform Bill 2012. That document referred to the proposed new sch 4 as requiring applications to consider provisions of the Act and other planning documents relevant at the decision-making stage of the application process. There was a specific reference to pt 2 of the Act as well as any relevant documents listed in s 104(1)(b) including the district or regional plan and any relevant national environmental standards.[46]

[37] Later in that document, it was observed:[47]

> Part 2, which sets out the purpose and principles of the RMA, is the part against which decisions under section 104 are made. Ultimately, all decisions on resource consents must demonstrably contribute towards the purpose of the Act.

[38] This reform found its way into the forms provided in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. A new Form 9, the prescribed form for an application for resource consent states, in paragraph eight: "I

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45 (15 December 1992) 532 NZPD 13179.

46 Ministry for the Environment *Departmental Report on the Resource Management Reform Bill 2012* (April 2013).

47 At 82.

attach an assessment of the proposed activity against the matters set out in Part 2 of the Resource Management Act 1991." This form was required to be used from 3 March 2015.[48] The Supreme Court's decision in *King Salmon* had been delivered over 10 months earlier on 17 April 2014.

[39] In the balance of his submission, Mr Gardner-Hopkins addressed various arguments as to why the Supreme Court's decision in *King Salmon* should be confined to cases involving plan changes, the context in which the decision arose.

[40] Here, he emphasised the different statutory framework, discussed by the Supreme Court, including s 67(3) of the Act, under which a regional plan must "give effect to", amongst other things, any NZCPS.[49] He also referred to the Supreme Court's conclusion that by giving effect to the NZCPS, the Council would necessarily be acting "in accordance with" pt 2, obviating any need for that part to be referred to again. Caveats to this were invalidity, incomplete coverage or uncertainty; in those instances, reference to pt 2 might be justified and provide assistance, as opposed to pt 2 being referred to as a matter of course. Mr Gardner-Hopkins argued that there was nothing in *King Salmon* that suggested the Supreme Court intended its decision would be applied to resource consent applications as well as plan changes. Mr Gardner-Hopkins also endeavoured to confine the Supreme Court's observations about s 5 and the other provisions in pt 2 not being "operative" provisions to the plan and plan change context. He submitted that the language of s 104(1) and its direct reference to pt 2 must give the latter something of an "operative" role and function. On the approach taken in *McGuire*, pt 2 might override the other matters required to be considered in s 104(1) in the case of conflict.

[41] In the present case, Mr Gardner-Hopkins submitted that the Environment Court erred by not having regard to pt 2, wrongly regarding itself as precluded from doing so by *King Salmon*. The High Court had wrongly concluded the reasoning in *King Salmon* precluded resort to pt 2 because the relevant provisions of the

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[48] See Regulation 7 of the Resource Management (Forms, Fees and Procedure) Amendment Regulations 2014.

[49] Section 67(3)(b).

planning documents including the NZCPS had already applied pt 2. Although the Environment Court had referred to s 7(b), it had found it largely irrelevant, and the High Court was not justified in concluding that the Environment Court would have arrived at the same outcome had it applied pt 2 as a whole, including those aspects of it that were enabling. Instead, the Environment Court had regarded the issues as effectively determined by the relevant plan and NZCPS provisions it discussed. This was to elevate the planning documents above pt 2, instead of affording the latter its "overarching" significance.

Respondent's submissions

[42] For the respondent, Mr Maassen submitted that the Environment Court was bound to apply the NZCPS by reason of its correct assessment that the NZCPS was neither uncertain nor incomplete and, consequently, there was no reason to apply the "subject to Part 2" qualification in s 104. The clear outcomes mandated by the NZCPS were faithful expressions with greater particularity of the requirements of pt 2 on indigenous biodiversity, which was the kernel of the case. In advancing this argument, Mr Maassen contended that the Environment Court had not purported to shut out resort to pt 2 in an appropriate case; however, in view of its findings on the NZCPS there was no need to consider pt 2. To the extent that the Environment Court had also implied that pt 2 should not be considered where the provisions of the regional coastal plan were clear, Mr Maassen disagreed. Depending on the circumstances of the case, there could be a valid contention that the provisions were deficient in meeting the objectives in pt 2. That was not the case here, because the outcomes sought to be achieved by the Sounds Plan were harmonious with the relevant policies in the NZCPS.

[43] Mr Maassen argued that the words "subject to Part 2" in s 104(1) did not authorise case-by-case resort to pt 2 in the context of resource consent applications, uninfluenced by clear directions of the planning documents. In this respect, he submitted the Act contemplates "planning" as opposed to "ad hoc" decision-making. The public are entitled to expect that planning strategies will be implemented and to organise their lives and make investment decisions based on those strategies; decisions

made under s 104 should be informed by the policy of the relevant planning documents.

[44] In argument, Mr Maassen's position was clarified to the extent that in accordance with the reasoning in *McGuire*, he accepted pt 2 must be considered, and would override the provisions of planning instruments in the event of a conflict. As he put it, there must be no barriers to a decision-maker's access to pt 2. However, a conclusion that the provisions of a relevant policy statement or plan were comprehensive in achieving the outcomes contemplated by pt 2 would not constitute such a barrier. He placed some weight on observations made by Fogarty J in *Wilson v Selwyn District Council*.[50] Fogarty J said:

> [79] Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part [2], to have regard to it, "shall have regard". The qualifier "subject to Part [2]", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose of one or more of the provisions in Part [2], in the context of the application for this resource consent.

[45] In accordance with this approach, Mr Maassen submitted that the appropriate starting point is the proposition that the plans fulfil their purpose in achieving pt 2, but the consent authority could form a reasoned opinion upon scrutiny that the relevant provision does not pursue the purpose or one or more of the provisions of pt 2 in the context of the application for the particular resource consent. Mr Maassen argued such an approach was consistent with *King Salmon* because of the starting assumption that plans were fulfilling their intended purpose.

Analysis

[46] Section 104(1) provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

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[50] *Wilson v Selwyn District Council*, above n 39. Fogarty J's interpretation of "the environment" in that case was reversed by this Court in *Queenstown Lakes District Council v Hawthorn Estate Ltd*, above n 37, but this Court did not criticise what was said at [79].

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

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

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

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

(vi) a plan or proposed plan; and

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

…

[47] For the reasons addressed by Mr Gardner-Hopkins summarised above[51] we are satisfied that the position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of pt 2 when it is appropriate to do so. As Mr Gardner-Hopkins demonstrated, the change made in 1993 was plainly designed to preserve the preeminent role of pt 2, containing as it does the statement of the Act's purpose and principles. As we understand it, there was in the end no contest between the present parties about the consent authority's ability to refer to pt 2 in an appropriate case.[52]

[48] That conclusion also follows from the provisions in pt 2 itself. Sections 5–8 of the Act provide:

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51 At [27]–[38].

52 Although we did not call on the interested parties orally at the hearing, their written submissions were to the same effect.

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(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.

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights:

(h) the management of significant risks from natural hazards.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) *[Repealed]*

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[49] The Supreme Court observed in *King Salmon* that s 5 was not intended to be an "operative provision", in the sense that particular planning decisions are not made under it.[53] It went on to observe that the hierarchy of planning documents in the Act was intended to:[54]

> … flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant.

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53 *King Salmon*, above n 1, at [151].
54 At [151].

[50] These statements of the law are of course binding on this Court and, with respect, an accurate description of the relationship between the planning documents and pt 2. In summary, the structure of the Act requires pt 2 to have a direct influence on the content of the planning documents. While other provisions express the machinery by which that process is achieved, they are underpinned by pt 2. Thus, to give just one example, s 63(1) of the Act states that the purpose of the preparation, implementation, and administration of regional plans is to assist a regional Council to carry out any of its functions in order to achieve the purpose of the Act. So there is a direct link to s 5 where the purpose of the Act is set out.[55]

[51] In the case of applications for resource consent however, it cannot be assumed that particular proposals will reflect the outcomes envisaged by pt 2. Such applications are not the consequence of the planning processes envisaged by pt 4 of the Act for the making of planning documents. Further, the planning documents may not furnish a clear answer as to whether consent should be granted or declined. And while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt 2.

[52] In any event, as can be seen from the provisions of pt 2 set out above, each of ss 6, 7 and 8 begins with an instruction, which is to be carried out "[i]n achieving the purpose of this Act", thus giving s 5 a particular role. Further, in each case the instruction is given to "all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources". We consider those instructions must be complied with in an appropriate way in disposing of any application for a resource consent, and indeed it is untenable to suggest to the contrary. That conclusion would apply even without the words "subject to Part 2" in s 104(1); but they underline the conclusion. As the Privy Council said in *McGuire* ss 6, 7 and 8 constitute "strong directions, to be borne in mind at every stage of the planning process".[56] While it is true, as the Supreme Court in *King Salmon* observed, that s 5 is not a provision under which particular planning decisions are

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55 To similar effect is s 59 which enacts that the purpose of a regional policy statement is to "achieve the purpose of the Act" in various stated ways; and s 72 which states the purpose of district plans in the same language that is used for regional plans, thus embracing the purpose of the Act.

56 *McGuire v Hastings District Council*, above n 40, at [21].

made, the reference to pt 2 in s 104(1) enlivens ss 5–8 in the case of applications for resource consent.

[53] The real question is whether the ability to consider pt 2 in the context of resource consents is subject to any limitations of a kind contemplated by *King Salmon* in the case of changes to a regional coastal plan. The answer to that question must begin with an analysis of what was decided in *King Salmon*.

[54] At the outset, it may be noted that *King Salmon* concerns the same plan, the Sounds Plan, with which we are concerned in the current appeal. It should also be noted that the judgment was written on the assumption that because no party had challenged the NZCPS there was acceptance that it conformed with the Act's requirements, and with pt 2 in particular.[57] That assumption remains appropriate.

[55] The second point to note is that what was in issue on the appeal determined by the Supreme Court was a proposed change to the Sounds Plan to accommodate a salmon farm at Papatua in Port Gore. The Board of Inquiry appointed to determine the plan change at first instance determined that the area affected was of "outstanding natural character and landscape value." If implemented, the proposal would have very high adverse visual effects. The directions in Policy 13(1)(a) and Policy 15(1)(a) of the NZCPS would not be given effect to.[58] Those policies are respectively:

> 1. To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> > a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character …
> >
> > …
>
> 1. To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> > a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment …

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57 *King Salmon*, above n 1, at [33].
58 At [19].

[56] Notwithstanding its conclusions on these issues, in applying s 5, the Board considered that the appropriateness of the area for aquaculture, specifically for salmon farming, weighed heavily in favour of granting consent. Consequently, the proposed zone would be appropriate.[59]

[57] The Supreme Court in *King Salmon* held that the relevant directions in Policies 13 and 15 of the NZCPS had the overall purpose of preserving the natural character of the coastal environment, and protecting it from inappropriate use and development. If an affected area was "outstanding", such adverse effects were required to be avoided. In less sensitive areas, the requirement was to avoid "*significant* adverse effects".[60] "Avoid" was to be interpreted as meaning "not allow" or "prevent the occurrence of".[61]

[58] The Court noted that under s 67(3) of the Act, a regional plan must give effect to any national policy statement, any NZCPS and any regional policy statement. To "give effect" was to implement, and this was a matter of "firm obligation".[62]

[59] It is clear that the Court considered the NZCPS would not be given effect to if the plan were changed as proposed, because of the Board of Inquiry's finding that implementing the change would result in significant adverse effects on areas with outstanding natural character and landscape. And, as this Court observed in *Man O'War Station Ltd v Auckland Council*, the "overall judgment" approach was rejected because of the prescriptive nature of the relevant provisions in Policies 13 and 15 of the NZCPS and the statutory obligation to give effect to them.[63] The policies were specific and clear in what they prohibited. As the Supreme Court in *King Salmon* said:[64]

> [The Board] considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a),

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59 At [19].
60 At [62] (emphasis added).
61 At [62].
62 At [77].
63 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121 at [56]–[57].
64 *King Salmon*, above n 1, at [153].

> the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. … The policies give effect to the protective element of sustainable management.

And following that:

> [154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

[60] There were other relevant aspects of the statutory context that underpinned the Supreme Court's approach. These included s 58(a) of the Act which empowered the Minister, by means of the NZCPS, to set national priorities in relation to the preservation of the natural character of the coastal environment.[65] This was clearly fundamental to what we consider to be a contextual rejection of the "overall judgment" approach.[66] For example, the Court said:[67]

> The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one.

[61] The Court applied a similar analysis to s 58(d), (f) and (gb), which enabled the Minister to include in an NZCPS objectives and policies concerning the Crown's interests in the coastal marine area, the implementation of New Zealand's international obligations affecting the coastal environment and the protection of protected rights.

[62] We note also the Court's discussion of s 58(e) of the Act, which provides that an NZCPS may state objectives or policies about matters to be included in regional coastal plans for the preservation of the natural character of the coastal environment. That may include "the activities that are required to be specified as restricted coastal activities" because of their "significant or irreversible adverse effects" or because they relate to areas with "significant" conservation value. The Court observed:[68]

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65 The discussion of the provisions of s 58 here and in the following paragraphs reflect its form prior to the enactment of the Resource Legislation Amendment Act 2017.

66 At [118]–[121].

67 At [118].

68 At [121].

> The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[63] In this context, the Court also mentioned ss 55 and 57. It noted that s 55(2) relevantly provided that if a national policy statement so directs, a regional council must amend a regional policy statement or regional plan to include specific objectives or policies to give effect to matters specified in a national policy statement. Section 55(3), which provides that a regional council must also take "any other action that is specified in the national policy statement" and other related provisions made clear a regional council's obligation to give effect to the NZCPS and the role of the NZCPS as what the Court described as a "mechanism for Ministerial control".[69]

[64] Significantly the Court also addressed applications for private plan changes. The ability to make such applications was held not to support adoption of an "overall judgment" approach, essentially because the decision-maker would always have to take into account the region wide perspective that the NZCPS required.[70]

[65] The Court referred to "additional factors" that supported rejection of the "overall judgment" approach "in relation to the implementation of the NZCPS." This included the general point that it would be inconsistent with the elaborate process required before an NZCPS can be issued, and secondly the uncertainty that would be created by adoption of the "overall judgment" approach.[71]

[66] We see these various passages in the judgment as part of the Court's rejection of the "overall judgment" approach in the context of plan provisions implementing the NZCPS. Given the particular factual and statutory context addressed by the Supreme Court, we do not consider it can properly be said the Court intended to prohibit consideration of pt 2 by a consent authority in the context of resource consent applications. There are a number of additional reasons which support this conclusion.

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69 At [125].
70 At [135].
71 At [136].

[67] First, the Court made no reference to s 104 of the Act nor to the words "subject to Part 2". If what it said was intended to be of general application across the board, affecting not only plan provisions under pt 4 of the Act, but also resource consents under pt 6, we think it inevitable that the Court would have said so. We say that especially because of the frequency with which pt 2 has historically been referred to in decision-making on resource consent applications. The "overall judgment" approach has also frequently been applied in the context of resource consent applications. If the Supreme Court's intention had been to reject that approach it would be very surprising that it did not say so. We think the point is obvious from the preceding discussion, but note in any event that in its discussion of whether the Board had been correct to utilise the "overall judgment" approach the Court's reasoning was expressly tied to the "plan change context under consideration". It was in that context that the Court said the "overall judgment" approach would not recognise environmental bottom lines.[72]

[68] Secondly, we do not consider that what the Supreme Court said at [137]–[138] indicates it intended its reasoning to be generally applicable, including to resource consents, as the Environment Court considered was the case. The Supreme Court's observation at the outset of [137] that the "overall judgment" approach creates uncertainty is certainly of a general nature, but the context is established by what immediately follows:[73]

> The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes.

[69] We accept that the Court went on to refer to Environment Court decisions allowing appeals from the District Council with the result that renewal applications for marine farms in the Marlborough Sounds were declined. It contrasted this with the Board's decision in the case before it, as an illustration of the uncertainties that arise. We consider this was simply underlining the possibility of different outcomes

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72 At [108].
73 At [137].

where an overall judgment is applied. This is a long way from establishing that the Court intended to proscribe an "overall judgment" approach in the case of resource consent applications generally.

[70] Thirdly, resource consents fall to be addressed under s 104(1) and, as we have demonstrated, the statutory language plainly contemplates direct consideration of pt 2 matters. The Act's general provisions dealing with resource consents do not respond to the same or similar reasoning to that which led the Supreme Court to reject the "overall judgment" approach in *King Salmon*. There is no equivalent in the resource consent setting to the range of provisions that the Supreme Court was able to refer in the context of the NZCPS, designed to ensure its provisions were implemented: the various matters of obligation discussed above. Nor can there be the same assurance outside the NZCPS setting that plans made by local authorities will inevitably reflect the provisions of pt 2 of the Act. That is of course the outcome desired and anticipated, but it will not necessarily be achieved.

[71] Where the NZCPS is engaged, any resource consent application will necessarily be assessed having regard to its provisions. This follows from s 104(1)(b)(iv). In such cases there will also be consideration under the relevant regional coastal plan. We think it inevitable that *King Salmon* would be applied in such cases. The way in which that would occur would vary. Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act's requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS, and (notionally) by the provisions of the regional coastal plan giving effect to the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal.

[72] On the other hand, if a proposal were affected by different policies so that it was unclear from the NZCPS itself as to whether consent should be granted or refused, the consent authority would be in the position where it had to exercise a judgment. It would need to have regard to the regional coastal plan, but in these circumstances, we do not see any reason why the consent authority should not consider pt 2 for such assistance as it might provide. As we see it, *King Salmon* would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the NZCPS, and second the application under consideration is for a resource consent, not a plan change.

[73] We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans. In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".[74]

[74] It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

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[74] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25].

[75] If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[76] We prefer to put the position as we have in the preceding paragraphs rather than adopting the expression "invalidity, incomplete coverage or uncertainty" which was employed by the Supreme Court in *King Salmon* when defining circumstances in which resort to pt 2 could be either necessary or helpful in order to interpret the NZCPS.[75] While that language was appropriate in the context of the NZCPS, we think more flexibility may be required in the case of other kinds of plan prepared without the need to comply with ministerial directions.

[77] As we have seen, the High Court Judge apparently considered that the reasoning in *King Salmon* applied with equal force to resource consent applications as to plan changes. She appears to have proceeded on the basis that consent authorities will not be permitted to consider the provisions of pt 2 in evaluating resource consent applications, unless the plan is deficient in some respect. For the reasons we have given, we do not consider that is correct, and it is contrary to what was said by the Privy Council in *McGuire* describing ss 6, 7 and 8 as "strong directions, to be borne in mind at every stage of the planning process".[76]

[78] However, in the circumstances of this case the error is not significant and the Judge was clearly correct when she held that it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to pt 2 in deciding resource consent applications.

[79] In the present case, as has been seen, the Environment Court based its decision to dismiss the appeal on the impact of the proposal on the habitat of King Shags, adverse effects on landscape and the natural character of Beatrix Bay. In terms of

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75 *King Salmon*, above n 1, at [90].
76 *McGuire v Hastings District Council*, above n 40, at [21].

the NZCPS, the site was inappropriate having regard to the adverse effect on King Shag habitat which could not be avoided, contrary to Policy 11. As has been seen, in terms of the Sounds Plan, the site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. Associated policies drew attention to the likely adverse effects of proposals on feeding habitat, the probability of a decrease in numbers of King Shags, the probability of adverse effects occurring and the probability of adverse effects being avoided, remedied or mitigated. The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

[80] The Environment Court's decision was clearly justified having regard to the NZCPS and the Sounds Plan. It took the approach, justified by *King Salmon*, that there was no need to apply the "subject to Part 2" qualification in s 104(1) because there was no suggestion that the NZCPS was uncertain or incomplete.[77] It also decided "on balance" that the proposal should be rejected if considered solely in terms of the Sounds Plan.[78] Although it had earlier said the Sounds Plan did not fully implement pt 2 of the Act, this was referring in particular to the risk of extinction of King Shags, a matter clearly dealt with in the NZCPS in any event.[79]

[81] We do not discern any error in this approach. If there had been reference to pt 2, it could not have justified a decision that departed from what the NZCPS required. In our view, while the Court might properly have considered pt 2 more extensively than its passing reference to s 7(b), the thrust of the relevant NZCPS policies and the Sounds Plan could not properly have been put on one side calling pt 2 in aid.

[82] Having regard to the foregoing discussion we agree with Cull J's conclusion that it would be inconsistent with the scheme of the Act to allow regional or district plans to be "rendered ineffective" by general recourse to pt 2 in deciding resource consent applications, providing the plans have been properly prepared in

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77 Environment Court decision, above n 4, at [287].
78 At [274].
79 At [153].

accordance with pt 2. We do not consider however that *King Salmon* prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome. That was so in the present case because of both the NZCPS and the Sounds Plan.

Result

[83] These conclusions lead us to answer the questions posed as follows:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer: Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.[80]

(b) If the first answer is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer: No.

[84] The appeal is dismissed.

[85] Normally we deal with costs on the basis of submissions made by the parties at the conclusion of the hearing. In this case, although we heard the parties at that stage we consider that it will be appropriate for brief submissions to be filed having regard to the outcome of the appeal. We invite submissions accordingly. They should

[80] We note that the Environment Court could have relied on pt 2 to fill the gap left by the shortcomings it had identified in the provisions of the Sounds Plan dealing with King Shags, but there was no need to do so having regard to the provisions of the NZCPS that it applied.

deal not only with the substantive appeal but also costs on the application for leave to appeal which was opposed by the respondent.

[86] Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

Solicitors:
Russell McVeagh, Auckland for Appellant
Cooper Rapley Lawyers, Palmerston North for Respondent
Ironside Law Ltd, Nelson for Interested Parties

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 25/2021
[2024] NZSC 26

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCOPORATED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing:	16–18 November 2021
Further submissions:	11–12 May 2022
Court:	Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ
Counsel:	S R Gepp, M C Wright and P D Anderson for Appellant V E Casey KC, V S Evitt and J W E Parker for Respondent G C Lanning and C J Ryan for Auckland Council as Interested Party R B Enright for Ngāti Whātua Ōrākei Whai Māia Limited as Interested Party P F Majurey and D T K Ketu for Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust as Interested Parties
Judgment:	11 April 2024

JUDGMENT OF THE COURT

A The appeal is allowed.

B The matter is remitted to the Board of Inquiry for reconsideration in line with the terms of this judgment.

C Costs are reserved.

REASONS

Winkelmann CJ, Ellen France and Williams JJ [1]
Glazebrook J [183]
William Young J [367]

WINKELMANN CJ, ELLEN FRANCE AND WILLIAMS JJ
(Given by Williams J)

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Introduction

The East West Link

[1] The New Zealand Transport Agency | Waka Kotahi (Waka Kotahi) builds and maintains Aotearoa's state highways. This appeal relates to Waka Kotahi's proposal to construct the East West Link (EWL), a new four-lane arterial road in Auckland connecting State Highway 1 (SH 1) at Penrose/Mt Wellington to State Highway 20 (SH 20) at Onehunga. It is intended to run along the northern shore of the Māngere Inlet, at the north-eastern corner of the Manukau Harbour (the Harbour).

[2] Important context for this proposal is that Auckland is a rapidly growing city. When Waka Kotahi filed the necessary applications and notices for the EWL in December 2016, the accompanying *East West Link: Assessment of Effects on the Environment* (AEE) report estimated Auckland's population at 1.4 million.[1] By 30 June 2021 that estimate had increased to 1.72 million according to the Auckland Council website, an increase of 23 per cent.[2] This growth must be accommodated within Auckland's location along a narrow isthmus set between the Waitematā and Manukau Harbours. Geography has two important implications for the EWL. First, Auckland's perimeter is dominated by coastline, much of which is ecologically vulnerable. Second, this means that options for enhancing Auckland's road network to meet present and future needs are physically constrained. This appeal is primarily about the way in which the objectives and policies of the Auckland Unitary

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1 *East West Link: Assessment of Effects on the Environment* (NZ Transport Agency | Waka Kotahi, December 2016) [AEE] at 10.

2 Auckland Council | Te Kaunihera o Tāmaki Makaurau "Te taupori o Tāmaki Makaurau | Auckland's population" Auckland Plan 2050 <www.aucklandcouncil.govt.nz>.

Plan (AUP) and those of the New Zealand Coastal Policy Statement (NZCPS) navigate this acute tension between urban intensification and coastal protection.[3]

[3] In 2015, the industrial and manufacturing area encompassing Onehunga, Penrose, Mt Wellington and Ōtāhuhu provided 10 per cent of Auckland's employment with an estimated workforce of over 68,000.[4] The area contributed some $4.7 billion annually in 2012, or 7.5 per cent of Auckland's gross domestic product. It is also the main transport hub for the upper North Island. Key factors in that respect are that it is close to Auckland International Airport, transected by the country's main rail corridor and contains three inland ports. Construction of a more efficient link through this area connecting SH 1 and SH 20 has been a priority project in Auckland's spatial plan for some time.[5]

[4] The Board of Inquiry (the Board) summarised the EWL's expected benefits as follows:[6]

(a) improved and more reliable travel time;

(b) accessibility that supports business growth and economic prosperity;

(c) improved safety and connected communities; and

(d) the provision of environmental improvements and social/community opportunities to the local area.

[5] But as Powell J noted in the High Court, while the northern shore of the Manukau Harbour has been heavily modified, the Māngere Inlet (the Inlet) remains ecologically significant, particularly, but not only, as a habitat and food source for

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3 Auckland Unitary Plan: Operative in Part [AUP]; and "New Zealand Coastal Policy Statement 2010" (4 November 2010) 148 *New Zealand Gazette* 3710 [NZCPS]. Any references to the AUP in these reasons refer to the version provided to us by the parties to the appeal. Some parts of the AUP were not included in the excerpts submitted by the parties, but any changes to these parts since the date of the Board decision are not material for the purposes of this appeal.

4 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal: Volume 1 of 3 – Report and Decision* (21 December 2017) [Board decision] at [242]; and AEE, above n 1, at 207–208.

5 Board decision, above n 4, at [12]–[14].

6 At [11].

shorebirds and relatively rare or threatened migratory seabirds.[7] The Board recorded the relevant evidence in the following terms:[8]

> [465] It is also uncontested that the inter-tidal areas of the Inlet are a feeding and roosting area for various shore birds. Dr Bull noted that:
>
> > *"A diverse assemblage of species were recorded foraging on the Māngere Inlet intertidal mudflats and included NZ pied oystercatcher (At Risk), bar-tailed godwit (At Risk), pied stilt (At Risk), lesser knot (Threatened), wrybill (Threatened), northern NZ dotterel (Threatened), royal spoonbill (At Risk), white-faced heron (Not Threatened), red-billed gull (Threatened) and black-backed gull (Not Threatened)."*
>
> [466] The significance of the Inlet for those species was confirmed by Dr Lovegrove, who identified its particular significance as a key feeding and roosting site and departure point for the endemic wrybill plover (*Nationally Vulnerable*). He stated that the wrybill has a global population of c5,000 birds, with up to 1,200 of these having been reported in the Māngere Inlet. This was corroborated by Dr Bull.

[6] Further, a portion of the proposal area above the shoreline contains relatively rare survivor lava shrubland and raupō wetland as well as mangrove to saltmarsh to freshwater wetland gradients. Primary areas of focus in terms of likely adverse effects include:

(a) permanent loss and compromise of wading bird and shorebird habitats (roosting and feeding areas) along the Inlet shoreline due to reclamation, construction of boardwalks and the placement of piers supporting a viaduct to span the Anns Creek Estuary; and

(b) permanent loss of, or other adverse impacts on, lava shrubland and raupō, and on gradient complexes around Anns Creek above the north-eastern corner of the Inlet.

[7] These impacts will occur in areas that are identified and protected by objectives, policies and rules in the AUP. As Powell J noted, the likely environmental effects of the project are such that, from the outset, it has been controversial.[9]

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7 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 (Powell J) [HC judgment] at [4].

8 Board decision, above n 4 (footnotes omitted, emphasis in original).

9 HC judgment, above n 7, at [4].

[8] In response to some of the concerns expressed, Waka Kotahi proposed a package of compensatory, offset and improvement measures that it submits avoids, remedies or mitigates adverse effects. Waka Kotahi also submitted that the project's ecological cost would effectively be counterbalanced by its ecological benefits. For example, the "almost ruler-straight"[10] northern shoreline of the Inlet would be recontoured to provide an alignment that is at least reminiscent of the original shoreline; stormwater for the entire 611 ha catchment would be redirected for treatment through a newly constructed wetland complex before discharge into the Inlet; and groundwater contaminated with leachate from three local landfills would be diverted by a new bund and treated.

[9] Further, as mitigatory and offset measures, Waka Kotahi proposed to:

(a) buy Ngā Rango e Rua o Tainui, a privately owned island of about 0.33 ha located in the centre of the Inlet, to establish alternative shorebird roosting sites there;

(b) provide other new roost structures in the Inlet and further protection for seabird habitat elsewhere in the Harbour;

(c) carry out 30 ha of ecological restoration and habitat enhancement in the project area, including provision of replacement raupō planting for the area to be lost; and

(d) undertake pest control and enhancement measures for threatened or at risk avifauna at sites in the South Island with particular focus on the wrybill plover population.

Required approvals

[10] Because Auckland Council is a unitary authority,[11] all approvals required for the project are subject to the objectives, policies and rules of the AUP. The AUP is a combined planning document comprising Auckland's regional policy statement,

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10 Board decision, above n 4, at [474].
11 Local Government (Auckland Council) Act 2009, s 6.

regional coastal plan, regional plan and district plan. For clarity, where we intend to refer specifically to the provisions of one or other of the policy statement or plans within the AUP, we will include those references in brackets—for example, AUP(rps) or AUP(plans). As to the latter, we generally use the plural plans to cover all three embedded plans—regional coastal, regional and district. We will use the generic form AUP when intending to refer to the entire document.

[11] The EWL requires approvals for a combination of notices of requirement (NORs) and resource consents to facilitate the following works:

(a) a new four-lane arterial road between the existing SH 20 Neilson Street Interchange in Onehunga and SH 1 at Mt Wellington, and connection of the new arterial road to SH 1 via two new ramps south of the Mt Wellington Interchange;

(b) the widening of SH 1 and an upgrade of the Princes Street Interchange;

(c) reconfiguration of the Neilson Street Interchange and surrounding roads, including a trench on the southern side of the Interchange, with a local bridge connecting Onehunga Harbour Road to Onehunga Wharf;

(d) new commuter and recreational cycle paths alongside the EWL, and a new pedestrian and cycle connection across Ōtāhuhu Creek;

(e) new local road connections to and from the EWL main alignment and associated roading improvements;

(f) grade-separation at the intersection with Great South Road/Sylvia Park Road;

(g) reclamation of 18.4 ha along the northern foreshore of the Māngere Inlet to construct:

(i) parts of the EWL main alignment;

(ii) stormwater treatment areas;

(iii) headlands to form a naturalised coastal edge; and

(iv) recreational space; and

(h) a bund to intercept contaminated runoff from three historic landfills before it enters the Māngere Inlet.

Notices of requirement

[12] There are two NORs proposed for inclusion as designations in the district plan provisions of the AUP: the first for the construction, operation, and maintenance of the EWL between Onehunga and Ōtāhuhu, and the second to alter the SH 1 designation to accommodate the EWL.

[13] NORs are governed by Part 8 of the Resource Management Act 1991 (RMA). Waka Kotahi is a network utility operator and requiring authority in terms of s 166.[12] This gives it a kind of priority status. It can notify the Council that works or proposed works for which it has responsibility should be included in the relevant district plan. This is done by a NOR.[13] In the ordinary course of events, on receipt of a NOR, the responsible council may inquire into it and recommend to the requiring authority that it confirm, modify or withdraw the NOR, or that conditions be imposed.[14] The requiring authority then makes its own decision on the NOR. It may accept or reject the council's recommendation, but its decision is subject to a right of appeal on the merits to the Environment Court.[15] When a NOR is included as a designation in the district plan, its terms take effect as rules in that plan, effectively rendering the

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12 Resource Management (Approval of New Zealand Transport Agency as Requiring Authority) Order 1992, cl 2; "Resource Management (Approval of Transit New Zealand as Requiring Authority) Notice 1994" (3 March 1994) *New Zealand Gazette* No 1994-go1500; "Resource Management (Approval of NZ Transport Agency as a Requiring Authority) Notice 2015" (19 November 2015) *New Zealand Gazette* No 2015-go6742; and "The Resource Management (Approval of New Zealand Transport Agency as a Requiring Authority) Notice 2023" (18 September 2023) *New Zealand Gazette* No 2023-go4371.

13 Resource Management Act 1991 [RMA], s 168(2). See also s 166 definition of "designation".

14 Section 171(2).

15 Sections 172 and 174.

designated works permitted activities for which land use consents under s 9(3) are not required.[16] Section 171 relevantly provides:

> **171 Recommendation by territorial authority**
>
> …
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
>
> (a) any relevant provisions of—
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (1B) The effects to be considered under subsection (1) may include any positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority.
>
> …

[16] Sections 175(2)(a) and 176(1)(a). See also s 9(3) as to the requirement for resource consents.

Resource consents

[14] In part because of its intended location in the coastal marine area (CMA), significant aspects of the EWL fall under Auckland Council's separate regional council jurisdiction.[17] The NORs cannot authorise those aspects, as NORs only immunise a public work from the need to obtain consents to contravene a rule in a district plan—that is, a rule promulgated by Auckland Council acting in its capacity as a territorial authority.[18] Resource consents are still required under ss 9(2), 12, 13, 14 and 15 as these relate to contravention of regional or regional coastal plan rules rather than district plan rules. They are also required for contravention of any district plan rule which is not expressly covered by a NOR.[19] Twenty-four resource consents must be obtained. These comprise:

(a) four coastal permits in relation to construction activities including reclamations, deposition, waste disposal and placement of structures in the CMA;

(b) six water permits for works in water courses and associated drainage and diversion activities;

(c) five discharge permits for discharges of contaminants into air or onto land or water, and discharges of stormwater;

(d) one land use consent for end purpose activities on the proposed foreshore reclamation land;

(e) one land use consent for the operation of a temporary concrete batching plant; and

(f) seven land use consents relating to works on existing contaminated soil, other earthworks, vegetation alteration and removal, siting of new

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17 Section 30.
18 Sections 9(3), 175(2)(a) and 176(1)(a).
19 Section 9(3).

network infrastructure, and construction of new impervious road surfaces.

[15] Some of the foregoing activities, and all of the contentious ones in terms of effects, are non-complying under the AUP(plans) in terms of s 87A(5) of the RMA. As the AUP usefully explains, activities are accorded non-complying activity status where greater scrutiny of the proposed activity is required. This may be because, for example, the activity is not anticipated in the place proposed, it is likely to have significant adverse effects on the existing environment, the environment is particularly vulnerable or, more generally, the activity is less likely to be considered appropriate in that place.[20]

[16] It is common ground that, for consenting purposes, the proposal's scale and complexity meant the appropriate approach was to bundle all relevant activities into a notional single activity to be classified as non-complying.

[17] To obtain the necessary resource consents, the EWL must be evaluated against the list of relevant considerations in s 104, the controlling provision for all resource consent applications whatever their activity status. Though by no means identical, the considerations under s 104 are similar to those for NORs under s 171.

[18] Since the EWL is a non-complying activity, it must also pass through one or other of the two gateways in s 104D. Both ss 104 and 104D require the consent authority to have regard to the proposal's environmental effects and to the relevant provisions of any applicable plans. But s 104D adds a second, more focused filter. It provides that consent for a non-complying activity may only be granted if either its adverse effects on the environment will be no more than minor or the activity itself is not contrary to the objectives and policies of the relevant plan.

[19] Section 104D relevantly provides:

104D Particular restrictions for non-complying activities

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[20] AUP, Policy A1.7.5.

(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; …

…

[20] If the s 104D gateway test is satisfied, the applications must then be considered in the ordinary way under s 104. Section 104 relevantly provides as follows:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to–

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

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

(b) any relevant provisions of—

…

(iv) a New Zealand coastal policy statement:

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

(vi) a plan or proposed plan; and

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

…

Inquiry process

[21] The applications relevant to the EWL were filed with the Environmental Protection Agency pursuant to s 145 of the RMA. Following the Agency's recommendation, the Minister for the Environment and the Minister of Conservation considered the EWL to be a proposal of national significance for the purpose of Part 6AA. The Ministers appointed a Board of Inquiry under s 149J to consider the proposal. The effect of this "call in" under Part 6AA is to foreshorten the applicable appellate pathways. Appeals are only on a question of law and must be brought in the High Court.[21] In general terms, the Board of Inquiry replaces Auckland Council as consent authority but, unlike the Council, it has the power of final decision on the NORs.[22] The Board, for the purposes of inquiry into the EWL, comprised four members including a retired High Court judge acting as Chair.

[22] A total of 689 submissions were received following notification of the proposal, including a submission in support of the proposal by Auckland Council. According to the Board, 85 per cent of the submissions opposed the proposal. The scale of the proposal meant inquiry procedures were purpose designed. They involved prehearing expert conferencing and ongoing evidence exchange. Conferencing was separated into 24 subheadings and, as the needs of the process evolved, continued into the hearing process itself. The Board sat for 49 days over a period of some 12 weeks and in due course issued a decision comprising 356 pages, excluding two volumes of appendices and consent conditions.

Decisions under appeal

The Board

[23] The Board found that, although the proposal would have more than minor adverse effects on the environment, it was not contrary to the objectives and policies

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21 Section 149V.

22 Section 149P(4)(b). Contrast s 171(2).

of the AUP for the purposes of the s 104D gateway. On that issue, the Board framed its conclusion in this way:[23]

> [664] While the Proposal is concluded to be contrary to a small number of policies or subclauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the [AUP(plans)] with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s 104D purposes against the Proposal as a whole.

[24] The Board's conclusion as to the need for the EWL was in these terms:[24]

> … the Board is satisfied that "an EWL" servicing the Onehunga-Southdown industrial area, would be a highway of strategic and national importance. The evidence satisfies it that such a highway is long overdue and is urgently needed to provide better freight transport links to an area of national and regional significance.

[25] The Board then concluded that the adverse effects of the proposal, though in some areas significant,[25] could be avoided where possible and adequately remedied or mitigated in all other instances.[26] This meant that, with some modifications, the resource consents could be granted under s 104 and the designations confirmed under s 171.[27]

High Court

[26] In the High Court, Powell J confirmed the Board's decision. As to the s 104D threshold, he found that:[28]

> … when the relevant objectives and policies of the AUP are properly reconciled it is apparent that the AUP provides a specific, albeit narrow, framework for the consideration of infrastructure proposals rather than automatically excluding them at the s 104D stage. … I conclude that when the relevant chapters are properly construed the AUP was never intended to categorically block infrastructure projects such as the proposed EWL at the s 104D stage as to do so would preclude the very analysis envisaged in chapter E26 [which contains the relevant AUP infrastructure policies].

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23 Board decision, above n 4.
24 At [266].
25 See for example at [471].
26 At [1391].
27 At [1398].
28 HC judgment, above n 7, at [68].

[27] In relation to the substantive decisions under ss 104 and 171, the appellant argued in the High Court that the AUP policies directed the Board to avoid adverse effects on vulnerable areas and the proposal could not satisfy that requirement.[29] Further, if, contrary to that submission, it was accepted that the objectives and policies of the AUP could accommodate the proposal, then the AUP was inconsistent with the NZCPS which required such effects to be avoided, and the NZCPS is the predominant document and must be applied.[30] The Judge rejected these arguments. He concluded:

> [86] By any measure, I am satisfied that the Board has had as it was required to do regard/particular regard to the NZCPS in the course of its consideration of the proposed EWL. Having done so it was therefore entirely open to the Board to reject, as it did, the submission made on behalf of Ngāti Whātua and Forest and Bird that the specific wording of the NZCPS somehow trumped the provisions of the AUP, and, likewise, for the Board to instead prefer the relevant provisions of the AUP to the extent that these differed from the NZCPS.

The issues

[28] There are three broad categories in which issues arise for determination.

One: the s 104D gateway

[29] At the Board hearing, Waka Kotahi and Auckland Council accepted that the adverse environmental effects of the EWL will be more than minor.[31] The Board therefore had to be satisfied for the purposes of s 104D(1)(b) that the activity "will not be contrary to the objectives and policies" of the AUP(plans).

[30] As noted, the Board and the High Court accepted that the EWL could pass through this gateway, although for different reasons. The Board found that the s 104D(1)(b) test permits an overall assessment of the relevant AUP(plans) objectives and policies, such that a measure of internal inconsistency did not necessarily mean the EWL was contrary to them.[32] The High Court, on the other hand, found that although the EWL was contrary to certain protective objectives and policies, they

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29 At [9] and [21]–[23].
30 At [9] and [72].
31 Board decision, above n 4, at [615].
32 At [662]–[664].

could, on careful analysis, be reconciled with infrastructure objectives and policies, leaving a "specific, albeit narrow, framework" through which the EWL could pass.[33]

[31] The issues under s 104D are:

(a) Is locating major infrastructure in vulnerable coastal environments inconsistent with the AUP(plans)'s indigenous biodiversity "avoid" policies?[34]

(b) If yes to (a), can such a proposal nonetheless *not* be contrary to the AUP(plans)'s objectives and policies for the purposes of s 104D?

(c) If yes to (b), is there an inconsistency between the NZCPS and the AUP(plans) such that the relevant "avoid" policy in the NZCPS should effectively prevail?

Two: ss 104 and 171 and the effect of the NZCPS

[32] This issue arises if the proposal passes through the s 104D gateway. It relates to the Board's merits assessment of the resource consent applications under s 104 and the NORs under s 171. "Regard" (under s 104) or "particular regard" (under s 171) must be had to any applicable objectives and policies promulgated under the RMA. At the risk of belabouring the point, this cascade of RMA instruments operates at national level (relevantly in this case in the NZCPS); at regional level in regional policy statements, regional plans and regional coastal plans; and at local level in district plans. But, in the case of Auckland, its policy statements and plans are consolidated into the single AUP.

[33] As will be seen, on the view we take of the AUP's objectives and policies, the real focus under this issue is the effect of the requirement to have regard/particular regard to the relevant avoid policy in the NZCPS. Does this duty mean consent authorities must give effect to that policy? This issue is therefore similar, but not

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33 HC judgment, above n 7, at [68].

34 We use the term "avoid policies" throughout these reasons to refer to those policies in the AUP and NZCPS that require the avoidance of adverse environmental effects. See our discussion below at [72] and following.

identical, to issue (c) above at [31]. To avoid unnecessary repetition, we will address them together.

Three: offsets, compensation and the "bucket approach"

[34] Section 104(1)(ab) allowed the Board to take account of proposed measures which were likely to "offset or compensate" expected adverse effects by providing a countervailing positive effect.[35] Waka Kotahi proposed various offsets to compensate for the project's harms, including habitat loss due to the proposed reclamation and other shoreline and terrestrial works.

[35] The first issue under this heading is whether offsets can be deployed to "avoid" specific adverse effects expressly required by an applicable plan or policy statement to be avoided. A second issue is whether compensatory measures deployed in accordance with Waka Kotahi's "bucket approach" can, by balancing different effects, render the proposal consistent overall with relevant objectives and policies. These category three issues are logically relevant to issue categories one and two above.

Mana whenua issues

[36] For completeness, we note that Ngāti Whātua Ōrākei Whai Māia Ltd (Ngāti Whātua Ōrākei) raised mana whenua issues before us, in support of the appeal by Royal Forest and Bird Protection Society of New Zealand Inc (Royal Forest and Bird). However, we accept the submission of Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust that these issues were not part of the appeal to the High Court and that it is therefore inappropriate to deal with them.[36]

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35 Section 171(1B) is of similar effect with regard to notices of requirement. We note there is an issue regarding when these provisions entered into force, but we agree it is not material in this case for the reasons Glazebrook J gives below at [229], n 256.

36 See also the reasons of Glazebrook J below at [186], n 181 and William Young J at [372].

Policies and objectives relevant to this case

[37] There are three applicable layers of objectives and policies: those in the NZCPS, the AUP(rps) and the AUP(plans). The AUP(plans) is a particular focus of the s 104D issue because of the terms of s 104D(1)(b), and the NZCPS is a focus in the ss 104/171 issue, but all objectives and policies are either directly or indirectly relevant to both of these issues.

[38] Throughout this cascade there is tension between providing for development that meets community need and protecting vulnerable elements of the environment from such development. This is unsurprising. It is the tension built into the definition of sustainable management in s 5(2). It is particularly acute in Auckland and the AUP's provisions accurately reflect that extra dimension.

[39] To avoid repetition, we will summarise the effect of all relevant objectives and policies in a single preliminary section, before turning to address the three issue categories.

Policies in the NZCPS

Avoiding adverse effects on indigenous biodiversity

[40] Sections 62(3) and 67(3) provide that the AUP must give effect to the NZCPS. It must therefore be expected that the policies of the NZCPS will be reflected in the more place- and subject-specific provisions of the AUP. Further, ss 104(1)(b)(iv) and 171(1)(a)(ii) require consent authorities to consider the NZCPS directly. The NZCPS is therefore an important and powerful driver of decision-making under the RMA.

[41] Policy 11 of the NZCPS is central to this appeal. It provides as follows:[37]

> To protect indigenous biological diversity in the coastal environment:
>
> (a) avoid adverse effects of activities on:
>
> (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

[37] Footnotes omitted.

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

(iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;

(v) areas containing nationally significant examples of indigenous community types; and

(vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

(i) areas of predominantly indigenous vegetation in the coastal environment;

(ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

(v) habitats, including areas and routes, important to migratory species; and

(vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[42] As can be seen, Policy 11 is strongly worded, especially in paragraph (a) in relation to the protection of rare or threatened indigenous ecology, habitats and taxa. It directs that relevant adverse effects on indigenous biodiversity must be avoided.

Infrastructure and development

[43] Policy 6 of the NZCPS relates to development generally in the coastal environment and Policy 10 relates to reclamation specifically. Policy 6 relevantly provides:

> (1) In relation to the coastal environment:
>
> (a) recognise that the provision of infrastructure [is] … important to the social, economic and cultural well-being of people and communities;
>
> (b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;
>
> …
>
> (2) Additionally, in relation to the coastal marine area:
>
> …
>
> (c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;
>
> (d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there; …
>
> …

[44] Infrastructure is expressly supported and future planning around infrastructure is encouraged. A key qualifying criterion for a CMA location is "functional need", meaning "the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment".[38] Where there is such a need, the directive is to provide for the activity in "appropriate places". As will be seen, the AUP takes a more expansive approach by accepting that "operational need" may also suffice; "operational need" refers to "the need for a

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[38] Ministry for the Environment | Manatū Mō Te Taiao *National Planning Standards* (November 2019) at 58. For example, most structures to support shipping activities must be located in a marine environment.

proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints".[39]

[45] Policy 10 of the NZCPS relates specifically to reclamation. It relevantly provides:

> (1) Avoid reclamation of land in the coastal marine area, unless:
>
> (a) land outside the coastal marine area is not available for the proposed activity;
>
> (b) the activity which requires reclamation can only occur in or adjacent to the coastal marine area;
>
> (c) there are no practicable alternative methods of providing the activity; and
>
> (d) the reclamation will provide significant regional or national benefit.
>
> …
>
> (3) In considering proposed reclamations, have particular regard to the extent to which the reclamation and intended purpose would provide for the efficient operation of infrastructure, including … coastal roads …
>
> …

[46] This policy contains important elements which, it will be seen, are replicated in the AUP. They are central to resolving this appeal. Reclamation is to be avoided and will only be supported exceptionally, if three elements are met. First, it must be the case that there is no practicable alternative method of solving the transport problem.[40] Second, it must be that the proposed solution "can only occur" in (or adjacent to) the CMA.[41] Third, the proposed solution must bring significant regional or national benefit. In the present case, these elements mean Waka Kotahi must demonstrate there is no practicable method of solving the transport problem other than building a new road, there is no alternative to an alignment requiring reclamation, and

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[39] At 62. For example, if terrestrial locations would displace a community or be prohibitively expensive, an operational need to locate a structure or activity in the marine environment may be established.

[40] We take the term "activity" in Policy 10(1)(c) to be a reference, in this case, to transportation. Of course, it is possible to read "activity" narrowly so that it applies only to the road but this seems inconsistent with the very broad language of the policy, construing it purposively.

[41] This may include, as we shall see, circumstances in which the absence of alternatives to a CMA location is because there is no available land outside that area: NZCPS, Policy 10(1)(a).

the EWL will bring significant regional or national benefit. For completeness, we note that reclamation for infrastructure generally (and coastal roading specifically) is identified as a subcategory by Policy 10(3) and given a measure of priority in the assessment.

Objectives and policies in the AUP

[47] At the AUP level, relevant objectives and policies "recognise" the importance of maintaining a roading network that meets the economic and social needs of Auckland's growing population.[42] Other objectives and policies, equally relevant, direct decision makers to "avoid" adverse effects on vulnerable indigenous avifauna, vegetation and ecosystems.[43] The AUP navigates that tension by acknowledging that it may be necessary in exceptional circumstances to "recognise" that some level of infrastructure may need to be located in vulnerable environments where adverse effects must be "avoided". For instance, in their explanation and principal reasons for adopting the infrastructure objectives and policies in the RPS section of the AUP, the drafters explained:[44]

> Infrastructure can have adverse effects on the environment, including on sites and areas specifically identified for their high values as well as on neighbouring activities. Sometimes infrastructure must be located in sensitive areas because of the location of development and to achieve appropriate degrees of efficiency. *Managing the reciprocal effects of infrastructure on more sensitive areas … is required as Auckland grows and intensifies*. Conflicts or incompatibilities between adjoining land uses need to be avoided as far as practicable or mitigated where avoidance is not practicable, in order to protect valued parts of the environment while ensuring that the operation of infrastructure is not unreasonably compromised.

AUP(rps) biodiversity overlay policies

[48] After the NZCPS, the next document in the RMA hierarchy is the AUP(rps) which forms chapter B of the AUP. The AUP(rps) must give effect to the NZCPS and, in turn, the AUP(plans) must give effect to the AUP(rps). Included in the AUP(rps) are protective indigenous biodiversity policies and specific infrastructure and coastal development policies.

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42 AUP, Policy E26.2.2(1) and (14)–(15).
43 See for example Policy D9.3(9).
44 Policy B3.5 (emphasis added).

[49] Policy B7.2.2 is the protection side. It provides the criteria for selecting marine and terrestrial locations marked for special protection. These are called Significant Ecological Areas (SEAs). They are listed in schs 3 and 4 of the AUP. They operate as overlays on the operative underlying zones and impose additional protective controls.[45] These overlays are central to the appeal. They are one side of the infrastructure vs coastal environment tension that, as noted, is built into the AUP. The scale of the tension across the region is reflected in the fact that 71.5 per cent of Auckland's urban area abuts a SEA marine overlay. Policy B7.2.2 provides as follows:

> **B7.2.2. Policies**
>
> (1) Identify and evaluate areas of indigenous vegetation and the habitats of indigenous fauna in terrestrial and freshwater environments considering the following factors in terms of the descriptors contained in Schedule 3 Significant Ecological Areas – Terrestrial Schedule:
>
> (a) representativeness;
>
> (b) stepping stones, migration pathways and buffers;
>
> (c) threat status and rarity;
>
> (d) uniqueness or distinctiveness; and
>
> (e) diversity.
>
> (2) Include an area of indigenous vegetation or a habitat of indigenous fauna in terrestrial or freshwater environments in the Schedule 3 of Significant Ecological Areas – Terrestrial Schedule if the area or habitat is significant.
>
> (3) Identify and evaluate areas of significant indigenous vegetation, and the significant habitats of indigenous fauna, in the coastal marine area considering the following factors in terms of the descriptors contained in Schedule 4 Significant Ecological Areas – Marine Schedule:
>
> (a) recognised international or national significance;
>
> (b) threat status and rarity;
>
> (c) uniqueness or distinctiveness;
>
> (d) diversity;
>
> (e) stepping stones, buffers and migration pathways; and
>
> (f) representativeness.

[45] Policy B7.2.2(5).

(4) Include an area of indigenous vegetation or a habitat of indigenous fauna in the coastal marine area in the Schedule 4 Significant Ecological Areas – Marine Schedule if the area or habitat is significant.

(5) Avoid adverse effects on areas listed in the Schedule 3 of Significant Ecological Areas – Terrestrial Schedule and Schedule 4 Significant Ecological Areas – Marine Schedule.

[50] The key control is the requirement at B7.2.2(5) that adverse effects in the SEAs must be avoided. This reflects the language of NZCPS Policy 11.

Infrastructure and development policies in the AUP(rps)

[51] The development and infrastructure side is contained in Policies B3 and B8. Policies B3.2.2(3) and (6), for example, relevantly provide:

(3) Provide for the locational requirements of infrastructure by recognising that it can have a functional or operational need to be located in areas with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character.

…

(6) Enable the development, operation, maintenance and upgrading of infrastructure in areas with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character while ensuring that the adverse effects on the values of such areas are avoided where practicable or otherwise remedied or mitigated.

[52] These acknowledge that there will be occasions where infrastructure may need to be sited in overlay areas. If that is the case, proposals must ensure that adverse effects on protected environmental values are avoided where practicable, or otherwise remedied or mitigated.

[53] Policy B8.3.2 provides for development (including reclamation) in the coastal environment. B8.3.2(3) and (9) relevantly provide:

(3) Provide for use and development in the coastal marine area that:

(a) have a functional need which requires the use of the natural and physical resources of the coastal marine area;

(b) are for the public benefit or public recreation that cannot practicably be located outside the coastal marine area; [or]

(c) have an operational need making a location in the coastal marine area appropriate and that cannot practicably be located outside the coastal marine area; …

…

Reclamation

(9) Avoid reclamation of land in the coastal marine area unless all of the following apply:

(a) land outside the coastal marine area is not available for the proposed activity;

(b) the activity which requires reclamation can only occur in or adjacent to the coastal marine area;

(c) there are no practicable alternative methods of providing for the activity; and

(d) the reclamation will provide significant regional or national benefit.

[54] According to these policies, development may be acceptable in the CMA, subject to strict criteria. Specifically, there must be a functional need for such location. If functional need cannot be established, there must be no practicable alternative to a CMA location and additional requirements must also be met: either the development is for the public benefit or public recreation, or there is an operational need making location in the CMA appropriate. Note, as presaged, the addition of "operational" alongside functional need to locate in the CMA. This extends the qualifying criterion in NZCPS Policy 6(2)(d) which "generally" permits only functional need. We address the significance of this issue below.[46] Reading the NZCPS and AUP together, we understand operational need as only exceptionally justifying the location of a development in the CMA. Finally, reclamation is specifically mentioned, alongside additional criteria lifted from NZCPS Policy 10. It is to be avoided unless there is no other practicable method of solving the problem (in this case, the transport problem), the proposed solution "can only occur" in (or adjacent to) the CMA,[47] and the reclamation will provide significant regional or national benefit.

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[46] See below at [112].
[47] See above at [46].

The AUP(plans) introduction

[55] The approach of the AUP(plans) to the development vs protection tension is reflected in the protective overlay policies in D9.3, the infrastructure objectives and policies in E26.2, and the coastal activity policies in F2.2.3, especially as the last mentioned relates to reclamation. There are other relevant AUP(plans) objectives and policies, but these three are at the heart of the contest and provide what is needed for a proper assessment of the AUP's approach to this conundrum.

AUP(plans) biodiversity and SEA overlays

[56] Chapter D incorporates all overlay categories. Generally speaking, they contain special protections over and above those in the underlying zones, for the protective purposes expressed in the overlay categories. These categories include, for example, historic heritage, built environment and mana whenua overlays.

[57] D9 contains the objectives and policies that populate the vulnerable environment or biodiversity overlays referred to as SEAs. In the CMA they are designated SEA-M (for marine), while land-based SEAs are designated SEA-T (for terrestrial).[48] In this case, the proposal area is within, or adjacent to, both SEA-M and SEA-T overlays.

[58] Marine overlays are then split into two categories: SEA-M1, which broadly relates to particularly vulnerable marine environments, threatened or rare species and the like; and SEA-M2, which relates more generally to indigenous species, ecosystems and habitats with characteristics deserving of a level of protection.[49] The protective policies are stronger for the former.[50] The proposal area contains both M1 and M2 overlays.

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48 AUP, Policy D9.1.1–D9.1.2.
49 Policy D9.1.2.
50 See for example Policy D9.3(13)–(14) and (16).

[59] D9 contains strong avoid policies which push back against the infrastructure and coastal activity policies. The overlays take their lead from NZCPS Policy 11 and AUP(rps) B7. Relevant D9 objectives and policies are as follows:

> **D9.2. Objectives [rcp/rp/dp]**
>
> (1) Areas of significant indigenous biodiversity value in terrestrial, freshwater, and coastal marine areas are protected from the adverse effects of subdivision, use and development.
>
> (2) Indigenous biodiversity values of significant ecological areas are enhanced.
>
> …
>
> **D9.3. Policies [rcp/rp/dp]**
>
> *Managing effects on significant ecological areas – terrestrial and marine*
>
> (1) Manage the effects of activities on the indigenous biodiversity values of areas identified as significant ecological areas by:
>
> (a) avoiding adverse effects on indigenous biodiversity in the coastal environment to the extent stated in Policies D9.3(9) and (10);
>
> (b) avoiding other adverse effects as far as practicable, and where avoidance is not practicable, minimising adverse effects on the identified values;
>
> …
>
> (8) Manage the adverse effects from the use, maintenance, upgrade and development of infrastructure in accordance with the policies above, recognising that it is not always practicable to locate and design infrastructure to avoid significant ecological areas.
>
> *Protecting significant ecological areas in the coastal environment*
>
> (9) Avoid activities in the coastal environment where they will result in any of the following:
>
> (a) non-transitory or more than minor adverse effects on:
>
> (i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);
>
> (ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;
>
> (iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;

(iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or

(v) areas set aside for full or partial protection of indigenous biodiversity under other legislation, including the West Coast North Island Marine Mammal Sanctuary.

(b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes; or

(c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area.

(10) Avoid (while giving effect to Policy D9.3(9) above) activities in the coastal environment which result in significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities, on:

(a) areas of predominantly indigenous vegetation;

(b) habitats that are important during the vulnerable life stages of indigenous species;

(c) indigenous ecosystems and habitats that are found only in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(d) habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes including fish spawning, pupping and nursery areas;

(e) habitats, including areas and routes, important to migratory species;

(f) ecological corridors, and areas important for linking or maintaining biological values; or

(g) water quality such that the natural ecological functioning of the area is adversely affected.

(11) In addition to Policies D9.3(9) and (10), avoid subdivision, use and development in the coastal environment where it will result in any of the following:

(a) the permanent use or occupation of the foreshore and seabed to the extent that the values, function or processes associated with any Significant Ecological Area – Marine is significantly reduced;

(b) any change to physical processes that would destroy, modify, or damage any natural feature or values identified for a

Significant Ecological Area – Marine in more than a minor way; or

(c) fragmentation of the values of a Significant Ecological Area – Marine to the extent that its physical integrity is lost.

…

(13) In addition to Policies D9.3(9) and (10), avoid structures in Significant Ecological Areas – Marine 1 (SEA-M1) except where a structure is necessary for any of the following purposes:

…

(d) to benefit the regional and national community, including structures for significant infrastructure where there is no reasonable or practicable alternative location on land, or elsewhere in the coastal marine area outside of a Significant Ecological Area – Marine 1(SEA-M1).

…

[60] For present purposes, the key provisions in relation to the SEA-M overlays are D9.3(9) and (10). Paragraph (9) generally corresponds to the higher vulnerability SEA-M1 overlays. It directs that "non-transitory or more than minor adverse effects" on the habitats of rare indigenous species, and threatened or rare indigenous ecosystems and vegetation must be avoided,[51] as must "regular or sustained disturbance" of migratory birds' roosting, nesting and feeding areas where it is likely this would "noticeably reduce" their use.[52] Paragraph (10) generally relates to the SEA-M2 overlays which cover less vulnerable locations. It directs that in certain circumstances, "significant adverse effects" must be avoided on the indigenous species, ecosystems and habitats within the overlay.

[61] Significantly, D9.3(9) and (10) were added following settlement of an appeal to the High Court by Royal Forest and Bird.[53] Whata J accepted the, by then, agreed view of the parties that Policy B7.2.2(5), requiring adverse effects to be avoided in the SEAs, had not been given proper effect in the original terms of D9.3.[54] He also

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51 Policy D9.3(9)(a).
52 Policy D9.3(9)(b).
53 *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 980, (2017) 20 ELRNZ 390.
54 At [36] and [39].

accepted that NZCPS Policy 11 required the addition of (9) and (10).[55] Policy 11(a)[56] maps broadly onto the new D9.3(9) and the locations to be selected for SEA-M1 overlays, and Policy 11(b)[57] maps generally onto D9.3(10) and the locations to be selected for SEA-M2 overlays.

[62] On the other hand, it must also be noted that D9.3(13)(d) contemplates, as an exception, the location of structures for significant infrastructure in SEA-M1 overlays. Once again, the strict requirements are that such structures are necessary to benefit the regional and national community and there are no practicable alternative locations outside SEA-M1 overlays.[58] Also significant for present purposes is D9.3(8), which addresses the tension point in a tentative fashion. It affirms the importance of managing adverse effects in SEAs in a way that avoids these effects, while recognising that it is not always practicable to locate and design infrastructure to avoid SEAs.

[63] At this stage, it is appropriate to note the key distinction between our approach to the construction of the relevant polices and that taken by Glazebrook J. Our interpretation of the policies in D9.3 illustrates this difference. Glazebrook J considers that D9.3(8) and (13) are not exceptions to D9.3(9) and (10). Instead, she considers D9.3(9) and (10) to be paramount.[59] In our view, that construction of the D9.3 policies is incorrect. As we say with reference to authorities at [79]–[80] below, the relevant policies must be read "as a whole" in order to get at the true intent of the drafter. This means the internal relationships between policies in D9.3 and their connection, in turn, with related policies such as those in F2 and E26 must be understood. Taking this approach, D9.3(8), (9) and (10) are meant to be read together as a cohesive whole.[60] It must be remembered that when D9.3(8) was drafted, D9.3(9) and (10) did not exist. The latter were inserted by consent in the High Court in a case in which the effect of D9.3(8) and its relationship with D9.3(9) and (10) were not in

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55 At [36]–[403], [49], [56] and 404–409.

56 Regarding the avoidance of adverse effects on threatened, rare or at risk taxa, ecosystems, vegetation types and habitats.

57 Regarding the avoidance of significant adverse effects on indigenous vegetation, habitats, ecosystems and species.

58 We note, for completeness, that Policy D9.3(13)(d) uses the phrase "no *reasonable* or practicable alternative location" (emphasis added). However, we take "reasonable" to mean the same as "practicable" when the AUP is read in line with the NZCPS.

59 Below at [264].

60 See the reasons of Glazebrook J below at [264].

issue.[61] Of equal importance is the fact that D9.3(8) covers the same ground as D9.3(13)(d), the policy that captures the circumstances in which "significant infrastructure" may be located within SEA-M1s. That policy would be neutralised if it was entirely subject to D9.3(9), this because infrastructure of any significance is likely to have adverse effects which cross the threshold in D9.3(9). It is necessary, and plainly intended, that the D9.3, F2 and E26 policies be read together; otherwise, what could "no practicable alternative location" possibly mean?

AUP(plans) infrastructure objectives and policies

[64] The relevant objectives of the AUP(plans) in relation to infrastructure are as follows:

> **E26.2.1. Objectives [rp/dp]**
>
> (1) The benefits of infrastructure are recognised.
>
> …
>
> (3) Safe, efficient and secure infrastructure is enabled, to service the needs of existing and authorised proposed subdivision, use and development.
>
> (4) Development, operation, maintenance, repair, replacement, renewal, upgrading and removal of infrastructure is enabled.
>
> …
>
> (9) The adverse effects of infrastructure are avoided, remedied or mitigated.

[65] The relevant policies are as follows:

> **E26.2.2. Policies [rp/dp]**
>
> (1) Recognise the social, economic, cultural and environmental benefits that infrastructure provides, including:
>
> (a) enabling enhancement of the quality of life and standard of living for people and communities;
>
> …
>
> (c) enabling the functioning of businesses;
>
> (d) enabling economic growth;

[61] See above at [61].

(e) enabling growth and development;

(f) protecting and enhancing the environment;

(g) enabling the transportation of freight, goods, people; and

…

(2) Provide for the development, operation, maintenance, repair, upgrade and removal of infrastructure throughout Auckland by recognising:

(a) functional and operational needs;

(b) location, route and design needs and constraints;

…

(d) the benefits of infrastructure to communities [within] Auckland and beyond;

…

Adverse effects of infrastructure

(4) Require the development, operation, maintenance, repair, upgrading and removal of infrastructure to avoid, remedy or mitigate adverse effects, including, on the:

…

(d) environment from temporary and ongoing discharges; and

(e) values for which a site has been scheduled or incorporated in an overlay.

(5) Consider the following matters when assessing the effects of infrastructure:

(a) the degree to which the environment has already been modified;

(b) the nature, duration, timing and frequency of the adverse effects;

(c) the impact on the network and levels of service if the work is not undertaken;

(d) the need for the infrastructure in the context of the wider network; and

(e) the benefits provided by the infrastructure to the communities within Auckland and beyond.

(6) Consider the following matters where new infrastructure or major upgrades to infrastructure are proposed within areas that have been scheduled in the Plan in relation to natural heritage, Mana Whenua,

natural resources, coastal environment, historic heritage and special character:

(a) the economic, cultural and social benefits derived from infrastructure and the adverse effects of not providing the infrastructure;

(b) whether the infrastructure has a functional or operational need to be located in or traverse the proposed location;

…

(d) whether there are any practicable alternative locations, routes or designs, which would avoid, or reduce adverse effects on the values of those places, while having regard to E26.2.2(6)[(a)–(c)];

(e) the extent of existing adverse effects and potential cumulative adverse effects;

(f) how the proposed infrastructure contributes to the strategic form or function, or enables the planned growth and intensification, of Auckland;

(g) the type, scale and extent of adverse effects on the identified values of the area or feature, taking into account:

(i) scheduled sites and places of significance and value to Mana Whenua;

(ii) significant public open space areas, including harbours;

…

(v) natural ecosystems and habitats; and

(vi) the extent to which the proposed infrastructure or upgrade can avoid adverse effects on the values of the area, and where these adverse effects cannot practicably be avoided, then the extent to which adverse effects on the values of the area can be appropriately remedied or mitigated.

(h) whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.

[66] These policies and objectives acknowledge the importance of infrastructure for Auckland's growth, development and quality of life. They also acknowledge that infrastructure can have significant adverse effects on communities and the environment. One mechanism the AUP(plans) uses to address development-related

adverse effects is the SEA overlays already discussed. These are the focus of the policies in E26.2.2(6).

[67] E26.2.2(6) requires consideration of a number of constraining factors before a proposal located in a SEA can be supported. Once again, and critically in terms of this appeal, they include the requirement to show functional or operational need to locate within a SEA and that there are no practicable alternative locations.[62] This policy also cross-references the higher order documents, thereby requiring consideration of whether the overlay area is subject to any avoid policy in the NZCPS or the AUP(rps).[63]

AUP(plans) reclamation policies

[68] Chapter F of the AUP(plans) relates to coastal zone activities and contains policies in relation to reclamations. As the proposal involves relatively significant reclamations, these policies are relevant. In general terms, reclamations are to be avoided in the CMA except in exceptional circumstances:

> **F2.2.3. Policies [rcp]**
>
> (1) Avoid reclamation and drainage in the coastal marine area except where all of the following apply:
>
> (a) the reclamation will provide significant regional or national benefit;
>
> (b) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;
>
> (c) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.
>
> (2) Where reclamation or drainage is proposed that affects an overlay, manage effects in accordance with the overlay policies.
>
> (3) Provide for reclamation and works that are necessary to carry out any of the following:
>
> …

---

62 AUP, Policy E26.2.2(6)(b) and (d).
63 Policy E26.2.2(6)(h).

(e) enable the construction and/or efficient operation of infrastructure, including but not limited to, ports, airports, roads, pipelines, electricity transmission, railways, ferry terminals, and electricity generation; or

(f) create or enhance habitat for indigenous species where degraded areas of the coastal environment require restoration or rehabilitation.

…

(6) Consider where the adverse effects of drainage or reclamation cannot be completely avoided, remediated or mitigated on site, compensating for those adverse effects by additional or enhanced public access or public facilities or environmental enhancement or restoration.

[69] Consistently with the infrastructure policies, and again, critically in terms of this appeal, the effect of F2.2.3 is that reclamations will be allowed if the regional or national benefit is significant, there are no practicable alternatives to reclamation in a CMA, and the area to be reclaimed is the minimum necessary.[64] Again, the overlay policies are referenced; a significant policy directive at F2.2.3(2) is that the effects of reclamation within SEAs must be managed in accordance with the relevant overlay policies, which in this case, as noted, are in D9. On the other hand, reclamation is enabled ("provide for") where it supports the usual forms of infrastructure,[65] and there is an acknowledgement that it may be necessary to consider options short of avoidance.[66] Whether the specific reference to D9 is intended to override support for infrastructure and the options for remediation and mitigation (rather than avoidance) is a matter for further consideration.

[70] The activity status table at rule F2.19.1 reflects this approach of allowing exceptions to avoid policies for significant infrastructure in a revealing way. The table is part of the AUP(plans) and gives effect to F2.2.2 and F2.2.3 by inserting rules that apply specifically to the SEA-Ms governed by D9. In SEA-M1 overlays, reclamation is generally prohibited—meaning consent cannot even be applied for—*unless* it falls into one of the exceptions listed in the activity table. Leaving to one side exceptions relating to existing reclamations and the provision of public access (the scale of which

64 Policy F2.2.3(1).
65 Policy F2.2.3(3)(e).
66 Policy F2.2.3(6).

would necessarily be minor), the activity table classifies infrastructural reclamation as a non-complying activity, regardless of scale.

[71] In other words, and this is crucial to the structure of the regime overall, infrastructural reclamation is contemplated as an exception to the firm requirement to avoid adverse impacts of development in SEA-M1 overlays, even where it is more than minor in scale. It might be said that more than minor infrastructural reclamation is not the same as reclamation with more than minor adverse effects, but, realistically, there is likely to be a high degree of overlap between the two concepts. In a sense, this rule contains the rub that is at the centre of the present appeal.

Why avoid policies are so important

[72] So, taking their lead from s 5 itself, the NZCPS and AUP both set up the same tension between recognising and providing for the needs of communities while, at the same time, avoiding adverse effects on the vulnerable environments in which those communities live. Within this frame, directive policies, such as policies requiring particular environmental impacts to be avoided, have greater potency than other non- or less directive policies. This Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*) explains why, so it is appropriate to refer to it at this juncture.[67]

[73] *King Salmon* involved a plan change under Part 5 rather than a resource consent. At issue was a proposal to make specific provision in the Marlborough Sounds Resource Management Plan for aquaculture in a coastal area with significant landscape values.[68] Policy 8 of the NZCPS provides that lower order documents should recognise the significant contribution of aquaculture to the wellbeing of people and communities. On the other hand, NZCPS Policies 13 (preservation of natural character) and 15 (protection of natural features and

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67 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

68 The plan change as originally proposed made provision for eight discrete sites, but the appeal related to only one of them. The consent application that followed in relation to the appeal site was addressed by this Court in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.

landscapes) direct that adverse effects on outstanding natural character, features and landscapes must be avoided.

[74] The Board of Inquiry in *King Salmon* used a technique referred to as "overall judgment", under which NZCPS policies found to be in tension could be re-weighted according to the priorities of the particular region. This meant a "recognise" policy could carry more weight than an "avoid" policy according to local preference.

[75] The majority in this Court found an overall judgment approach was not permitted. "Avoid", it held, carried its ordinary meaning of "not allow" or "prevent the occurrence of",[69] and avoid policies directed an outcome for which provision had to be made in lower order documents. It was not sufficient for councils merely to take that into account when promulgating their own plans. Rather, the Court found, the requirement that lower order plans must "give effect" to the NZCPS was a strong directive which lower order plans were obliged to implement.[70] This suggested, the Court considered, an obligation to avoid inappropriate development "might be thought to provide something in the nature of an 'environmental bottom line'" for lower order policy statements and plans.[71] That said, Policies 13 and 15 did not prohibit development. Their focus was the avoidance of *inappropriate* development.

[76] On the other side of the scale, Policy 8(a) encourages recognition of the importance of aquaculture by enabling its location in "appropriate places". Thus, the Court found, "inappropriate" could do the work of reconciling apparently conflicting policies.[72] Nonetheless, the primary point is that avoid policies have particular potency in the hierarchy of NZCPS policies with implications all the way down the RMA cascade.

[77] *King Salmon* is relevant in two ways. The first is that, generally speaking, directive policies will take priority over other policies wherever they appear in the hierarchy. The fact that the focus in *King Salmon* was the NZCPS is not particularly material to the application of this principle. Experience so far suggests that where

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69 *King Salmon*, above n 67, at [96] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
70 At [77] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and RMA, s 67(3)(b).
71 *King Salmon*, above n 67, at [103] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
72 At [98]–[105] and [126] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

directive policies appear in lower order documents, they have taken their cue from the NZCPS anyway. The second aspect is that the specific language of directive policies is important. It will provide the best guidance on how policies that are in tension may be reconciled. In *King Salmon*, "inappropriate" did that work.

[78] But, as we suggest in the next section, there is also one important issue that *King Salmon* does not address.

A fair appraisal of the AUP read as a whole

[79] Sections 104(1)(b)(v) and (vi), and 171(1)(a)(iii) and (iv), require regard/particular regard be had to any "relevant provisions" of the AUP. Section 104D(1)(b)(i) asks whether the proposal is contrary to "the objectives and policies" of the relevant plan. In considering the correct approach to s 104D, the Court of Appeal in *Dye v Auckland Regional Council* explained that "a fair appraisal of the objectives and policies read as a whole" is required.[73] In other words, isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the drafters must be avoided. The approach will be the same under ss 104 and 171.

[80] That does not mean all objectives and policies can simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened. Rather, attention must be paid to relevant objectives and policies both on their own terms and as they relate to one another in the overall policy statement or plan. As the Environment Court noted in *Akaroa Civic Trust v Christchurch City Council*, the interpretive exercise must acknowledge that some policies will, in context, be more important than others.[74] The way in which inevitable tensions between policies are identified and worked through in the documents must be grappled with. As *King Salmon* held, the mere presence of tension does not open up an unfettered discretion to choose between unequal policies.[75] On the other hand, the presence of tension between stronger and weaker policies will not always be resolved

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73 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25] per Gault, Keith and Tipping JJ.

74 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [74] per Judge Jackson.

75 *King Salmon*, above n 67, at [129]–[130] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

in favour of the stronger. Ecosystems are complex and dynamic, as is the impact of human communities located within them. Fact and context will be important in determining how tensions between policies will be resolved.

[81] With the foregoing in mind, we begin with a fair appraisal of the AUP(plans) objectives and policies as relevant to this case:

(a) The strong "avoid" language in D9.3, mandated by B7.2.2(5), means that constructing major infrastructure in SEA overlays will almost always be contrary to the objectives and policies of the AUP(plans), in terms of s 104D, if adverse effects breach applicable thresholds for the relevant SEA—in particular, the non-transitory or more than minor effects and significant adverse effects thresholds. We say almost always because, as we have summarised, there are narrowly defined exceptions built into the framework.

(b) The fact that the High Court added D9.3(9) and (10) to bring the AUP(plans) into line with the AUP(rps) and NZCPS suggests that avoid policies in D9 will override the infrastructure focused "recognise and provide for" policies in E26 in almost all cases. This is particularly apparent in light of the express reference to the relevance of AUP(rps) and NZCPS avoid policies in E26.2.2(6)(h).

(c) Furthermore—and despite the enabling reclamation and infrastructure policies in F2.2.3, B3 and B8—significant reclamation in SEA-Ms is likely to be contrary to the general coastal zone activity policies in chapter F, given the express reference in F2.2.3(2) to managing effects within overlays in accordance with the requirements of relevant overlays.

[82] Picking up on the point we make at (a), the difficult question that must be resolved in this appeal is how wide the gap in the avoid policies is. If the adverse effects thresholds in D9.3(9) and (10) are hard lines that may not be exceeded in any circumstances, that gap is very narrow indeed. Any development in SEAs that

contravenes them, including infrastructural development, will not just be inconsistent with the particular avoid policy; it will be contrary to the objectives and policies of the AUP(plans) overall in terms of s 104D. This is first because the tension between protection of Auckland's vulnerable coastal environments and provision for better infrastructure is an essential feature of the AUP and cannot be ignored. If relevant policies clearly resolve this tension in favour of "avoid", that outcome also reflects the intention of the AUP(plans) objectives and policies "read as a whole". Second, the D9.3(9) and (10) thresholds might be seen to do the work that "inappropriate" development did in *King Salmon*. That would require the softer "recognise" and "provide" standards in E26 to give way to the directive "avoid" whenever those thresholds are breached, these being "something in the nature of a bottom line".[76]

[83] If that were the correct approach, the EWL would likely be contrary to the AUP(plans) objectives and policies given the uncontested finding that the EWL's adverse effects will be more than minor, including, clearly, in the SEAs.

[84] But that analysis is too rigid to be applied to the AUP policies and the challenges of the Auckland environment. *King Salmon* dealt with a very different scenario to the one before the Court in this case. The proposed plan change in that case would have reclassified aquaculture in "avoid" areas from prohibited to discretionary and included policies to ensure consent for new marine farms would ultimately be obtained. It would have turned a flat ban into a permissive regime, in obvious disregard of avoid policies. This Court's firm stance against such a proposal is not surprising.

[85] The EWL context is different in material ways. First, infrastructure is a public good. In terms of the first part of the s 5(2) definition of sustainable management, adequate infrastructure is a precondition to any community's well-being, health and safety, not least that of the country's largest commercial entrepôt. While E26 and F2.2.3 both cross-reference the SEAs, it must not be overlooked that E26.2.2(6) and F2.2.3(3) and (6) also highlight infrastructure's importance. There is also cross-recognition of infrastructure in the avoid policies themselves. D9.3(13)(d)

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[76] At [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ, although these comments in *King Salmon* were made in the context of different policies in the NZCPS.

accepts that there may be a need for structures associated with "significant infrastructure" even in the most sensitive SEA-M1 areas and D9.3(8) acknowledges that sometimes avoiding adverse effects will be impossible.

[86] Second, unlike the plan change in *King Salmon,* the AUP does not just choose development over avoidance, thumbing its nose, as it were, at the NZCPS avoid policies. In the AUP, the circumstances in which an exception might be made are carefully circumscribed and narrow. For example, the "no other practicable alternative" requirement was not addressed in *King Salmon*, still less in the context of a public good proposal.

[87] Third, the underlying drivers in Auckland are very different to those in play in *King Salmon.* Given the pressures of population growth in Auckland and the deployment of SEAs along 71.5 per cent of its coastlines, it ought to be unsurprising that necessary infrastructure, even at scale, that is unable to locate anywhere but in overlays, will not necessarily be contrary to the objectives and policies of the AUP(plans). In fact, it would be surprising if such provision were not made in some carefully defined way. In other words, there is very good reason to interpret the AUP in a manner that contemplates some narrow exceptions to "avoid".

[88] We have therefore come to the view that the carefully calibrated relationship between E26, F2 and D9 suggests that, mindful of *King Salmon*, the AUP has attempted to "thread the needle" between the two extremes of banning all development in SEAs and permitting it as a fully discretionary activity.[77]

[89] As noted, the activity rules in F2.19.1 classify infrastructural reclamation as non-complying in the SEA-M overlays, regardless of its scale. On the other hand, all new *non*-infrastructural reclamation of any significant scale is generally prohibited. So, the gap, such as it is, provides only for infrastructure. Non-complying status ensures that even then, approval will be obtained only in truly exceptional circumstances.

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[77] We note that this phrase was employed for a different purpose by the Board: see Board decision, above n 4, at [223]. Whereas the Board used "threading a needle" in reference to the difficulty of finding a workable alignment for the EWL, we use it in a conceptual sense, to articulate the difficulty of navigating the exceptions pathway in the AUP's policies and objectives.

[90] Once again, this rule reflects the same exceptions-based approach found in E26.2.2(6)(b), (d) and (f), and D9.3(8) and (13)(d). The fit is not a particularly comfortable one, but that is understandable, even unavoidable. The issues present inherently uncomfortable choices in Auckland's difficult context. They must be worked through with the benefit of a real application and tangible facts.

[91] To conclude then, the particular AUP objectives and policies engaged in this case are carefully designed so that it will be very difficult, but not impossible, to obtain approval to locate significant infrastructure requiring reclamation in a SEA. There will be close scrutiny of any proposal. First, it must be a necessary, and not just a desirable, solution. The AUP frames the necessity of a solution in terms of requirements relating to functional or operational need, benefit to the regional and national community, and lack of practicable alternative locations and solutions.[78] In effect, this means the circumstances of the case leave no real choice. This is a very high bar. Second, adverse effects that cannot be avoided must be remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard. Third, the benefits of the solution must plainly justify the environmental cost of granting consent; if, despite all best efforts, the values that will be unavoidably compromised are simply too significant, those values will—indeed, must—prevail.

A fair appraisal of the NZCPS read as a whole

[92] Section 104D(1)(b)'s exclusive focus on plans does not mean the NZCPS can be ignored when applying the gateway test. As noted, lower order plans must "give effect" to the NZCPS.[79] If at all possible, therefore, the AUP(plans) must be construed as having that result. After the RMA itself, the NZCPS is the primary document in the hierarchy, so if it is not possible to reconcile the NZCPS with the AUP(plans), that raises the prospect that the latter is unlawful to that extent.[80] The Court in *King Salmon* considered it "inconceivable" that regional councils would,

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78 AUP, Policies B8.3.2(3), B8.3.2(9), D9.3(13)(d), E26.2.2(2), E26.2.2(6) and F2.2.3(1). See also Policies B3.2.2(3) and D9.3(8).

79 RMA, ss 67(3) and 75(3). See also s 43AA as to regional coastal plans.

80 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 [*RJ Davidson*] at [71] per Cooper, Asher and Brown JJ.

by resort to their own "overall judgment", be free to prepare policy statements and plans that were inconsistent with the national policy choices reflected in the NZCPS.[81] So, analysis of the AUP(plans) for the purposes of the s 104D(1)(b) gateway must be undertaken with one eye on the NZCPS.

[93] Further, if the gateway is cleared, ss 104(1)(b)(iv) and 171(1)(a)(ii) make any "relevant provisions" of the NZCPS mandatory relevant considerations. As with construing the objectives and policies of plans, the appropriate approach is to undertake a fair appraisal of the NZCPS, read as a whole.

Recap on NZCPS policies

[94] As discussed, three NZCPS policies are relevant to the EWL: Policy 6 on development in the coastal environment; Policy 10 on reclamation; and Policy 11 on indigenous biodiversity.

[95] Policy 6 provides that lower order policy statements and plans should recognise the importance of infrastructure to the wellbeing of communities, and should consider the need to prepare for future growth in a way that does not compromise "other values of the coastal environment".[82] Locating development in the CMA may be acceptable if there is a functional need for it.[83] If not, development should "generally" not be located there.[84] In the context of this case, reclamation in the CMA is, by virtue of Policy 10, to be avoided except (in summary) where there is no practicable alternative method of solving the transport problem, there is no alternative to an alignment requiring reclamation, and the reclamation-based solution will bring significant regional or national benefit. Infrastructure is specifically identified for consideration within this exceptions category.

[96] On the other side of the equation, indigenous biodiversity in the coastal environment is protected by Policy 11. Adverse effects (without further qualification) on threatened, rare or at risk indigenous taxa, ecosystems, vegetation types and

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81 *King Salmon*, above n 67, at [118] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
82 NZCPS, Policy 6(1)(a)–(b).
83 Policy 6(2)(c).
84 Policy 6(2)(d).

habitats must be avoided.[85] Significant adverse effects on coastal indigenous vegetation, habitats, ecosystems and species must also be avoided.[86] This policy is strong and directive in the same way that Policies 13 and 15 were in *King Salmon*. But, for obvious reasons, it was not drafted with Auckland's particular challenges in mind.

[97] In light of this, Waka Kotahi and Auckland Council then take a different tack to clear the hurdle presented by Policy 11. They argue that the directive potency of Policy 11 is diluted by the fact that ss 104 and 171 require only that consent authorities have regard or particular regard to it. This, it is argued, is materially different to the "give effect" standard applicable to plan preparation in Part 5; the standard at issue in *King Salmon*.

[98] In what follows, we address that argument, but the more important question we turn to now is whether, on a fair appraisal basis, the NZCPS can accommodate the AUP's exceptions to the SEA avoid policies. In other words, is the AUP consistent with the NZCPS objectives and policies?

Can the NZCPS avoid policies tolerate the AUP exceptions?

[99] Waka Kotahi argued that "have regard to" introduces flexibility into the application of directive policies in a way that "give effect to" would not permit. We do not agree that ss 104 and 171 have this effect, for reasons we will come to, but we do agree that, in principle, flexibility in the application of Policy 11 does not inevitably subvert it. On the contrary, despite Policy 11 being rule-like and containing something in the nature of a bottom line, there will still be room for deserving exceptions that do not subvert the policy's purpose. In short, wriggle room is built into the policy layers of the system.

[100] This argument is not new. As Lord Reid said in *British Oxygen Co Ltd v Minister of Technology*, there is often no practical difference between a policy and a rule.[87] Through long application or careful drafting, a policy can evolve into

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85 Policy 11(a).
86 Policy 11(b).
87 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL) at 625.

something so precise that it might as well be a rule. "There can," his Lordship considered, "be no objection to that, *provided the authority is always willing to listen to anyone with something new to say*".[88] That proviso is now a cornerstone principle of administrative law.[89] It is also important for the practical application of the NZCPS, this notwithstanding that the NZCPS is a statutory scheme of objectives and policies expressly designed to constrain the exercise of otherwise open-ended discretions.[90]

[101] The interpretive approach required here must reconcile the fact that policies mean what they say with the fact that they are still policies. A residual discretion to prevent outcomes plainly inconsistent with the purpose of the RMA must be preserved in order to ensure that, when applied to difficult cases, the policies do not subvert that purpose. Seen this way, recognising a residual discretion will ensure the policy will not be implemented unlawfully.[91] We turn now to applying this interpretive approach.

[102] As this Court explained in *King Salmon*, albeit in the context of the requirement that regional plans "give effect to" the NZCPS,[92] there will be more and less directive policies.[93] This will depend in part on the level of generality or abstraction with which the given policy is framed:

> [80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more

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88 At 625 (emphasis added).

89 See for example *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [118]–[119]; *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [39] and [45]; and *Practical Shooting Institute (NZ) Inc v Commissioner of Police* [1992] 1 NZLR 709 (HC). See generally Richard Moules *Environmental Judicial Review* (Hart Publishing, Oxford, 2011) at 197; and Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [15.76].

90 Compare in an analogous context *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041 at [131] per Elias CJ, Glazebrook and Arnold JJ; and *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995 at 13–16, as examples of engagement with legislatively mandated policies. The RMA context is, of course, different in important ways, including that policies are promulgated following a national public hearing process, followed by a report and recommendations to the Minister of Conservation, and there is a statutory direction that the policies must give effect to Part 2.

91 *King Salmon*, above n 67, at [88].

92 RMA, s 67(3)(b).

93 *King Salmon*, above n 67, at [127].

> prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[103] Some directive policies in the NZCPS are very specific as to subject matter and concrete as to intended effect. For example, Policies 19(3), 21(d), 22(2), 23(2)(a) and 29 are, with great clarity, expressed, in whole or in part, as rules:

(a) "*Only* impose a restriction on public walking … where such a restriction is necessary";[94]

(b) [G]ive priority to improving [water] quality by … *requiring* that stock are excluded from the coastal marine area … within a prescribed time frame";[95]

(c) "*Require* that … development will not result in a significant increase in sedimentation in the coastal marine area";[96]

(d) "*[D]o not allow* … discharge of human sewage directly to water in the coastal environment without treatment";[97] and

(e) "Local authorities are *directed* under sections 55 and 57 of the Act to amend documents … to give effect to this policy … without using the process in Schedule 1 of the Act".[98]

[104] There is not much wriggle room in this kind of language. To frame the point in Lord Reid's terms, there is unlikely to be much new that could usefully be said to justify departing from these policies—although, in an area as complex as coastal management, one should never say never.

[105] Policy 11 is different. It is directive to be sure, in a way that Policies 6 and 10 are not. And, like Policies 13 and 15, it has "the effect of what in ordinary speech

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94 NZCPS, Policy 19(3) (Walking access) (emphasis added).
95 Policy 21(d) (Enhancement of water quality) (emphasis added).
96 Policy 22(2) (Sedimentation) (emphasis added).
97 Policy 23(2)(a) (Discharge of contaminants) (emphasis added).
98 Policy 29(2) (Restricted Coastal Activities) (emphasis added).

would be a rule".[99] But its subject matter (biodiversity in indigenous ecosystems, habitats and taxa) is set at a high level of generality and applying its thresholds (adverse or significant adverse effects) to particular cases may involve fine judgments. In other words, while Policy 11 is designed to avoid adverse effects, it is not intended to produce perverse outcomes in pursuit of that high level purpose. Rather, its broad terms mean it does—indeed, must—leave room for deserving exceptions, even if, in almost all cases, its effect is clearly "not allow" or "prevent the occurrence of".[100] These exceptions are necessary for the broad language of the policy to work as intended in the innumerable places and circumstances to which it must be applied, and without producing outcomes plainly at odds with Part 2. The residual discretion is simply a mechanism to ensure that the policies are applied in accordance with the purpose of the RMA.

[106] In *RJ Davidson Family Trust v Marlborough District Council* (*RJ Davidson*) Cooper J (as he then was), writing for the Court, addressed the role of the NZCPS in s 104.[101] The narrow issue was whether the express subordination of s 104 to Part 2 of the Act meant the NZCPS could be ignored if the circumstances of the case meant that Part 2 and the NZCPS were at odds. The Court rejected that suggestion. Within its domain, the Court said, the NZCPS is the embodiment of Part 2's requirements. Logically then, the subordination of s 104 to Part 2 could not be invoked "for the purpose of subverting a clearly relevant restriction in the NZCPS".[102]

[107] We agree with respect. It would be strange indeed if choices made in a scheme at the apex of the hierarchy of RMA decision-making and designed, through judicial inquiry and assessment, to fulfil the requirements of Part 2, could then, relying on Part 2 considerations, be routinely overridden. That would be to introduce uncertainty and complexity into decision-making, when the NZCPS process was designed, at great public and private cost, to produce consistency and clarity.

[108] For the same reasons, we take the view that the "have regard/particular regard" standards in ss 104 and 171 cannot be invoked to produce outcomes that *subvert*

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99 *King Salmon*, above n 67, at [116].
100 At [93].
101 *RJ Davidson*, above n 80.
102 *RJ Davidson*, above n 80, at [71].

applicable NZCPS policies. In this respect we differ from the reasoning of William Young J[103] and the statutory interpretation suggested by Waka Kotahi. Taking a purposive approach, the careful and strong language of the objectives and policies matters as much as the softer form of direction employed in ss 104 and 171. In addition to the reasons traversed, the argued for diluting effect would apply not only to objectives and policies but also to regulations and rules, since regard must be had to all three.[104] Plainly, regulations and rules are not intended to be mere considerations. They are intended to bind.

[109] But, relevantly for the purposes of this discussion, there is a corollary to Cooper J's rejection of the proposition that "have regard to" and Part 2 could authorise consent authorities to subvert relevant policies in their decision-making. The corollary is that a genuine, on-the-merits exception, by its nature, will not *subvert* a general policy, even a directive one. On the contrary, true exceptions can protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes. There is a fundamental difference between allowing consent authorities to routinely undermine important policy choices in the NZCPS (as rejected in *RJ Davidson*), and permitting true exceptions that will not subvert them. Of course, the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified. Policies 19, 21–23 and 29 may be seen to fall into that kind of category. But Policy 11 does not.

[110] That is why the broad subject matter of Policy 11 admits of exceptions. A certain level of flexibility will assist in achieving its purpose and avoiding unintended outcomes at the margin that are inconsistent with Part 2 and the terms of Policy 11 itself.[105] To put it another way, Policy 11 has a powerful shaping effect on all lower order decision-making, but "avoid" does not exclude a margin for necessary exceptions where, in the factual context, relevant policies are not subverted and sustainable management clearly demands it.

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103 See below at [369], [385] and [390]–[395].

104 RMA, s 104(1)(b). See also s 171(1)(a), although because a designation is a form of rule change, the point has less potency in that context. Also note that although s 171(1)(a) does not reference regulations, that is because the effect of a designation is only to immunise the public work from compliance with any relevant district rule. Other applicable controls will apply (or not) according to their terms. See the reasons of Glazebrook J below at [222].

105 See also *RJ Davidson*, above n 80, at [76] in the context of plans.

[111] Whether the EWL is such an exception requires an assessment of the whole proposal, including its benefits and adverse effects and its remedial or mitigatory aspects, bearing in mind that, as with any exception to the application of a strong policy, the case to be made out is a difficult one.

[112] Finally, there is one matter of detail that we presaged in the main summary of the relevant objectives and policies that may be conveniently addressed here. It is that, unlike AUP B8 and F2, NZCPS Policy 6 generally supports reclamation only where a functional need to locate in the CMA is established.[106] It provides that activities without a functional need should "generally" not be located in the CMA.[107] The AUP on the other hand, accepts that operational need may suffice. As we have noted, we do not view this difference as problematic.[108] The effect of Policy 6 in this regard is not hard edged. Rather, infrastructure "generally" should not be located in the CMA for operational reasons. This wording, too, contemplates deserving exceptions.

Overall conclusion so far

[113] We conclude, therefore, for present purposes at least, that large scale infrastructure located in the CMA is not, by definition and without regard to circumstance, prohibited by the objectives and policies of the AUP or the NZCPS. Such infrastructure is therefore not inevitably contrary to the objectives and policies of the AUP(plans) for the purposes of the s 104D(1)(b) gateway, nor is it necessarily inconsistent with the NZCPS- or AUP-related requirements of ss 104 and 171. We now turn to determine whether the Board and the High Court correctly construed the confined nature of the infrastructure exception and applied the correct requirements to the proposal.

Application of objectives and policies to the EWL

[114] With apologies for the foregoing long, but in the end necessary, dissertation on the meaning and effect of the applicable objectives and policies, we turn now to consider the way in which the Board and Powell J applied them to the EWL.

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106 NZCPS, Policy 6(2)(c).
107 Policy 6(2)(d).
108 See the discussion of functional and operational need above at [44].

The facts briefly recapped

[115] As noted at the outset, the AUP objectives and policies reflect the tension between the vulnerability of Auckland's long coastline and the demands of a fast growing population. In a sense, the Onehunga–Penrose/Mt Wellington area is emblematic of the problem: it is a significant industrial, manufacturing and transport hub for Auckland and the upper North Island; it is bounded on one side by the Manukau Harbour; and its main transport routes are increasingly stressed by vehicle movements to, from and through the area, particularly heavy vehicle movements. On the other hand, the EWL's proposed alignment will result in adverse effects on avifauna values in SEA-M1 and SEA-M2 overlays and on flora in SEA-T overlays.[109]

[116] In addition to the economic and social benefits of improved transport infrastructure, Waka Kotahi also identified ancillary ecological benefits such as the partial recontouring of the shoreline along the EWL alignment, stormwater treatment for the surrounding 611 ha catchment and bunding to intercept leachate-contaminated groundwater. Separate offset and compensation measures include providing substitute roosting sites (in part through the purchase of a small island in the Inlet); 30 ha of ecological restoration and enhancement in the project area; and management and enhancement measures at relevant South Island sites occupied by at risk or threatened avifauna that also occupy the Inlet.

The policies briefly recapped

[117] The propositions that we consider provide the necessary framework are:

(a) NZCPS Policy 11 contains a strong direction against locating major infrastructure in the CMA, but, when read in context,[110] it does not impose a blanket prohibition on relevant adverse effects within SEAs and so permits exceptions which do not subvert the policy and are otherwise consistent with the purpose of the RMA and the other provisions of Part 2;

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109 See above at [6] and [58].

110 This aligns with what we consider to be the correct interpretive approach: see above at [63] and [79]–[80].

(b) AUP(rps) B3 and B8 acknowledge that infrastructure may be located within SEAs, and the "avoid" language in B7 is not a blanket prohibition and so permits exceptions;

(c) AUP(plans) confirms, in E26 and F2, the circumstances in which exceptions may be made, subject to adequate remedial or mitigatory steps and the wider ss 104 and 171 considerations; and

(d) AUP(plans) Policies D9.3(8) and (13)(b) acknowledge the possibility that there may be exceptions.

A summary of the exceptions pathway

[118] Though expressed in different ways, the relevant NZCPS and AUP policies in essence require a proponent seeking to locate significant infrastructure requiring reclamation in a SEA to show that three elements are met:[111]

(a) it is a necessary—and not just a desirable—solution by reference to functional or operational need, the regional or national benefit obtained,[112] and the absence of any practicable alternative locations or solutions;

(b) adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard; and

(c) the benefits of the solution plainly justify the environmental cost of granting consent.

[119] In other words, given the potential environmental cost, necessity must be established but it may not be enough. The consent authority will also need to satisfy

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111 Compare above at [91].

112 We note, for completeness, that AUP(plans) Policy D9.3(13)(d) phrases this requirement as "regional *and* national" benefit in relation to development in SEA-M1 overlays (emphasis added). This may have been to emphasise the particularly vulnerable nature of the overlay environment.

itself that the proposal provides for environmental offset and compensation packages that both minimise and make up for the damage the proposal will do in the SEA. These packages will necessarily be exceptional as even then, the consent authority will still need to be satisfied that any remaining harm is justified. For the purposes of clarity, if a proposal satisfies the requirements of this exceptions pathway in the AUP, we consider it will be a genuine exception to NZCPS Policy 11 which does not subvert its objectives; the proposal will have "thread[ed] the needle" appropriately.[113] As stated above, this pathway is particular to the specific circumstances of this case, although particular considerations within it may be relevant in similar cases.

[120] In her reasons, Glazebrook J says that our analysis subverts *King Salmon*'s bottom line approach to the NZCPS avoid policies and that we will render redundant the *Port Otago Ltd v Environmental Defence Society Inc* methodology for resolving unavoidable conflicts between directive policies.[114] We have explained that the facts in *King Salmon* were materially different to those in the present case. It would be wrong to treat the distinctive context of Auckland and the EWL as irrelevant; this would risk subverting the purpose of the RMA.[115]

[121] Two further points. First, as we have already noted, the Court in *King Salmon* acknowledged that the prescriptive power of a policy will depend not only on the directive verb it employs, but also on the level of abstraction and generality of its subject matter.[116] In other words, the fact that Policy 11 uses "avoid" is not solely determinative of its prescriptive power. Second, it must be kept in mind that the issue in *King Salmon* was whether, in the context of a "give effect to" duty, the use of "avoid" should control the outcome or just be one mandatory relevant factor among many. There was no consideration of, nor any need to consider, the more difficult cases in the area between these extremes. Those cases fall for consideration now. The EWL is one such case. It provides an opportunity, in accordance with the common law method, to further refine prior broadly framed authoritative propositions of law by applying them to materially different circumstances.

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113 See above at [88].

114 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205; and see the reasons of Glazebrook J below at [330].

115 See above at [99] and following.

116 *King Salmon*, above n 67, at [80].

[122] *Port Otago* is not sidelined by our approach. The task set for the Court in *Port Otago* was to resolve conflicts between equally powerful directive policies. Its methodology is directed at finding a workable compromise between them. Waka Kotahi's task is far more difficult. The starting point for the EWL is that it may not be built because Policy 11 may not be compromised. But there is a rider. Policy 11 should not be interpreted in a way that produces perverse outcomes plainly inconsistent with sustainable management. So, for example, if in the absence of practicable alternatives, abandoning the EWL will pose a genuine risk of injury to the regional or national economy, then Policy 11's "bottom line" should not stand in the way—that is, not without very good reason. That leads to the final step of analysis in the exceptions pathway: if on a proper appraisal of the adverse environmental effects, those effects still outweigh the adverse impact on human communities, then the SEA values must be protected.

[123] It may assist to put the foregoing into more concrete regulatory terms. In the *Port Otago* case, where there was a conflict between directive policies, the Regional Coastal Plan could have given some port activities discretionary or even restricted discretionary activity status[117] in areas subject to avoid policies, if they satisfied regional policies drafted to give effect to the *Port Otago* methodology. By contrast, achieving any status more permissive than non-complying would be impossible for roading infrastructure on any scale in the Māngere Inlet. This is because in the case of the EWL, there is no contest between equally powerful directive policies and *Port Otago* does not apply.

[124] Glazebrook J also says that there is no justification for the creation of a "freestanding" exception to the NZCPS bottom lines as *King Salmon* has already established what they should be. But the *King Salmon* exceptions merely confirm that invalid, uncertain or inapplicable policies cannot have directive effect.[118] By contrast, the exception being discussed here is a merits-based one, by reference to the purpose of the RMA. Further, Glazebrook J does not discount the possibility that the facts of the case may themselves justify an exception to "avoid", even where there is no

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117 RMA, ss 77A(2)(c)–(d) and 87A(3)–(4).

118 We do not comment on the Treaty of Waitangi-based procedural exception referred to in *King Salmon*, above n 67, at [88].

conflict with another directive policy.[119] Our point is that the no alternative-based policies in the AUP provide a framework for assessing when these facts arise.

[125] At a broader level, Glazebrook J's concern appears to be that exceptions of any kind will erode the directive effect of avoid policies and open the floodgates. We do not share that concern. As we have emphasised, the threshold for approval of infrastructure is high and so will be truly exceptional, and even then the avoid policies will continue to powerfully constrain decision makers throughout the approval process. Rather, our concern is that interpreting avoid policies as imposing a no-exceptions ban on infrastructure in the CMA brings with it a risk of undermining the RMA's purpose. It is impossible to predict every circumstance to which a generally framed avoid policy will be applied. For example, if an avoid policy were interpreted and applied in a manner that exposed a coastal community to inundation or erosion, there would have to be a question about whether that interpretation is consistent with sustainable management. These are the difficult cases. It seems unlikely that those who promulgated the NZCPS chose environmental protection over, say, the safety of an existing settlement by using avoid language—and that this choice would be the embodiment of sustainable management. Potential exceptions like this will be truly rare, but there can be no doubt that it is necessary to construe avoid policies so as to allow for them.[120]

[126] The AUP contains just such an exceptions pathway. Its sole purpose is to ensure that applying avoid language to general objects, such as those referred to in Policy 11, does not generate outcomes so plainly contrary to s 5 as to be perverse. And, again, the pathway is plan-driven, residual and narrow; it is based on proven necessity and absence of alternatives. It will not be enough that the project is a good idea—even a very good idea—or that a failure to approve the project would be very inconvenient for the community that expects to benefit from it. This is not, on any view, a step back to overall judgment. Nor will the floodgates open.

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119 Below at [238] and [249]–[250]. Accepting that there is such a possibility is difficult to reconcile with the strict application of *King Salmon* by Glazebrook J.

120 We say potential, because, even if there was no choice but to build the seawall or undertake the reclamation required to protect the settlement, it would still need to be the case that the benefits plainly justify the environmental cost.

[127] We turn now to consider in more detail the reasons why the Board and the High Court both accepted, though for different reasons, that the EWL met the relevant policies.

The Board's reasons

[128] The Board's summary of its s 104D conclusions was in these terms:[121]

> [662] … In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the [Waka Kotahi] Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.
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> [663] On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the [AUP] when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with noncomplying status but has also recognised the broader planning assessments of Ms Rickard and Mr Gouge. The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.
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> [664] While the Proposal is concluded to be contrary to a small number of policies or subclauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the [AUP] with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s 104D purposes against the Proposal as a whole.

[129] In its final section, entitled "Overall Judgment", the Board slightly reframed these conclusions. It accepted that some activities within the EWL, particularly the reclamations, were contrary to the AUP(plans) avoid policies, but this was outweighed by the effect of the policies overall, the ecologically compromised state of the Inlet and the lack of a practicable alternative to the proposed coastal location.[122] It therefore "squeeze[d] through" the s 104D(1)(b) gateway.[123]

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121 Footnotes omitted.
122 At [1364].
123 At [1364].

[130] Turning then to the further consideration of objectives and policies under ss 104 and 171, the Board found that there was "no specific incongruity" between the NZCPS and AUP and so focused attention on the latter with passing reference to the NZCPS as and when necessary.[124] In relation to the AUP objectives and policies, the Board found that at a conceptual level, the EWL was necessary and brought national benefit:[125]

> … [T]he Board is satisfied that "an EWL" servicing the Onehunga-Southdown industrial area, would be a highway of strategic and national importance. The evidence satisfies it that such a highway is long overdue and is urgently needed to provide better freight transport links to an area of national and regional significance.

[131] The Board found further that its coastal alignment was operationally necessary:[126]

> [699] … The Board agrees with Mr Brown [who gave planning evidence for Ngāti Whātua Ōrākei] that, "*[T]he route is there by choice, not functional necessity*". …
>
> [700] While the Board agrees with Mr Brown that there is not a functional need for the road to be located within the CMA, on the basis of the Board's finding in relation to the route selection, there is an operational need for it to be located within the CMA. …

[132] The focus in relation to the availability of practicable alternatives was on the reclamation aspects of the EWL. The Board found as follows:

> [623] In the context of its consideration of the [AUP(plans)] provisions most relevant to the proposed reclamations, it is critical for the Board to be satisfied that the EWL alignment is indeed the option that provides the most enduring transport benefits to the extent that those benefits are necessary and that there are no "practicable alternatives" to achieve that outcome.
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> [624] Mr Burns [counsel for Onehunga Enhancement Society and others], when addressing the Board on Policy F2.2.3(1)(b) submitted:
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> > "[T]he test is not whether this is the best, or cheapest, option for [Waka Kotahi]'s road, or whether it is justified by transport outcomes, but simply whether there are any practicable ways of putting the road somewhere else.["]
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> [625] The Board disagrees. The analysis undertaken by Mr A Murray, which contributed to the balancing of all factors in choosing the proposed

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124 At [680]; and, as to reclamation, at [685].
125 At [266].
126 Emphasis in original, footnote omitted.

> alignment, must be relevant to whether there is a practicable alternative. It is not appropriate, under the detailed and integrated option selection process undertaken, to apply such a simplified interpretation of "practicable alternative" i.e. whether any road can be located elsewhere, regardless of how inferior its transport, walking and cycling, or public transport benefits may be.
>
> [626] For these reasons, the Board is indeed satisfied that there is no "practicable alternative" to the route [Waka Kotahi] proposes. The Board reaches this conclusion simply because it is satisfied that [Waka Kotahi]'s scrutiny of alternative routes did not produce any enduring transport solution other than the selected route.

[133] In the context of its application of Policy F2.2.3(1), the Board noted it was:[127]

> … satisfied with [Waka Kotahi]'s evidence on the assessment of alternatives and enduring transport benefits conferred by the chosen alignment. Therefore, it finds that there are no "practicable alternative" ways of providing for the objectives of the Proposal in a manner that avoids the proposed reclamations and coastal occupation.

[134] It is appropriate to mention two extra aspects of s 171 that are relevant at this point. They are the requirements of s 171(1)(b)(ii) and (c) which provide as follows:

> …
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> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
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> …
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> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
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> …
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> (ii) it is likely that the work will have a significant adverse effect on the environment; and
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> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
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> …

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127 At [627(b)].

[135] These provisions also require the Board to consider whether Waka Kotahi adequately assessed alternative routes and the necessity for the work in terms of achieving its objective. The Board summarised the evaluation process adopted by Waka Kotahi as follows:

> [1309] The evaluation process was designed to arrive at a preferred corridor for the EWL and then a preferred alignment within that corridor. Some 16 corridor options were created to form a long list. From that long list, six short list corridor options were identified (Options A to F), which were then considered in greater detail. Both the long list options and the short list options were subjected to an MCA, which assessment used an 11-point scoring method. Two of the options (Options E and F) were identified as conferring the most enduring transport benefits. The MCA weighed a large number of factors (reflected in the scoring system), which included road safety, construction, performance against the Proposal's objectives, natural environment, cultural and heritage factors, operational factors, and social and economic factors.
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> [1310] [Waka Kotahi]'s chosen alternative for a corridor was Option F, inside which the fine details of the NoR alignment fit.

[136] As to reasonable necessity, the Board's conclusion was in the following terms:[128]

> … [T]he evidence demonstrates the EWL is long overdue and is urgently needed to provide better freight transport links in and to an area of national and regional significance.

[137] Having accepted that the necessity, practicable alternative and benefit standards had all been satisfied, the Board then turned to the EWL's adverse effects. The Board acknowledged that there would be permanent loss of feeding and roosting areas for shorebirds including those of threatened and at risk species. While it accepted these effects were significant, there would be no loss of habitat "sufficiently rare" to impact on overall species population or on their continued presence in the area.[129] On the other hand, the Board was satisfied that the integrated approach adopted by Waka Kotahi in relation to mitigation, compensation and offsets provided a material counterbalance to those adverse effects. It concluded in the following terms:[130]

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128 At [1329].
129 At [605].
130 At [614].

> Overall, the Board accepts the integrated approach to the consideration of ecological effects, mitigation and offsets in relation to the Proposal. The range of effects and the scale of the Proposal facilitates this approach and provides greater flexibility to offset effects that cannot be adequately mitigated, provided that the scale of effects themselves is acceptable. In this case, the Board finds that the magnitude, scale and intensity of effects is acceptable in the context of the mitigation and offsets proposed, and by a margin that has improved throughout the Hearing. While there will be direct adverse effects on rare and threatened species, those effects will not compromise the viability of those populations or ecosystem types. However, an outcome that at least balances the ecological effects through mitigation and offset benefits is an appropriate requirement. The Board finds that such an outcome will be achieved through the deletion of the sub-tidal dredging, modification or deletion of headlands, and implementation of the additional ecological mitigation and offsets proposed.

The High Court decision

[138] As the appeal before Powell J was on questions of law only, and his focus was primarily on s 104D, this decision can be addressed in more summary terms. Relying on the submissions of Royal Forest and Bird, the Judge accepted that "there is nothing within D9 that remotely contemplates a project on the scale of the proposed EWL within an overlay area".[131] The Judge also accepted that F2 on reclamation was subject to the strong avoid policies in D9 and so the EWL was as contrary to F2 as it was to D9.[132] In these respects he disagreed with the Board.

[139] But infrastructure, he considered, was intended to be treated differently to other forms of development in the coastal environment. E26, when read alongside the Auckland-wide perspective of chapter A, "specifically envisages that it will sometimes be necessary to locate infrastructure within an overlay area, notwithstanding the apparently mandatory nature of the protections contained in chapter D9".[133] The Judge described this as a "specific, albeit narrow, framework for the consideration of infrastructure proposals rather than automatically excluding them at the s 104D stage".[134]

[140] Having established that, overall, the objectives and policies of the AUP(plans) did not set themselves against the EWL, the Judge then concluded that at consent/NOR

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131 HC judgment, above n 7, at [41].
132 At [48].
133 At [60].
134 At [68].

stage, the discretion available to the Board was somewhat wider. In particular, and in contrast to the position in *King Salmon,* the Board was not required to "give effect" to the NZCPS.[135] Rather, it needed only to satisfy the softer regard/particular regard standards under ss 104 and 171 in respect of the listed considerations—in particular, the NZCPS.[136] The requirement was merely to "give genuine attention and thought" to the NZCPS, rather than a duty to accept its requirements.[137] The Judge concluded that "[b]y any measure" the Board had met that softer standard.[138]

Analysis

[141] We do not entirely agree with the approach of the Board. We consider the approach taken by Powell J was much closer to the mark, subject to one crucial exception that we have already presaged and will explain below.

The framework

[142] The exceptional circumstances referred to in the policies are, all other factors being equal, as we have set out above. Briefly, these circumstances are that the proposal must be necessary in the ways specified in the policies, any adverse effects that cannot be avoided must be minimised, and any remaining environmental harm must be plainly justified by the proposal's benefits.[139] These are high thresholds not easily cleared. This must be so because strong "avoid" language is consistently employed from the top to the bottom of the RMA cascade. The direction to "avoid" must be complied with unless those exceptional circumstances are established, as required by the objectives and policies of the AUP.

[143] There is no escaping the fact that this exercise demands much of decision makers. Where proposals demonstrate genuine potential to engage the exceptions to avoid policies, community need will generally be significant as will be the impact on vulnerable environments, ecosystems or species. Determining whether the environmental cost is justified will usually require the decision maker to make difficult

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135 At [82].
136 At [82] and [86].
137 At [83].
138 At [86].
139 See above at [91] and [118].

choices between incommensurables. This task must be confronted directly and with real care; decision makers must be transparent and honest about any trade-offs they are making. Reasons adequate to the gravity of the task must be given. This considered approach is necessary because any departure from the starting point that adverse effects must be "avoided" is, by definition, exceptional. A less rigorous approach would risk consent authorities inadvertently slipping back into the territory of "overall judgment".

A regression to overall judgment

[144] We accept Royal Forest and Bird's argument that the Board and the High Court did not correctly construe and apply the objectives and policies of the AUP and NZCPS, although we have come to that view for different reasons. We do not accept Royal Forest and Bird's primary argument that infrastructure at the scale of the EWL in the CMA would, by definition, always breach—or, to use the term in *RJ Davidson*, subvert—the objectives and policies of the NZCPS and AUP.[140] But we do accept that the Board failed properly to understand just how narrow the pathway to approval was intended to be. Instead, the Board, in substance, took the overall judgment approach rejected in *King Salmon*.

[145] It is sufficient to refer briefly to three instances where it did so. First, the Board acknowledged the "very significant weight" to be attributed to NZCPS directive policies, but did not consider itself bound by them:[141]

> However, as already noted, the Board is required by s 104 to "have regard to" and s171 "to have particular regard" only (not to "give effect to") the NZCPS. It is required to consider that instrument alongside other factors made relevant by those sections in making a balanced judgment taking account of all such factors.

[146] Second, the Board relied on s 5 to support its preferred overall judgment approach:[142]

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140 *RJ Davidson*, above n 80, at [71].

141 Board decision, above n 4, at [175]. See above at [107]–[108], in relation to the effect of ss 104 and 171.

142 Board decision, above n 4, at [358].

> Obviously, at the end of any RMA consideration, a decision-maker would be wise to ensure that his or her decision is consistent with the s 5 purpose. That is almost certainly why an overall judgment is necessary.

[147] Third, although in the context of a discussion of issues of relevance to mana whenua, the Board repeated in expansive terms its preferred approach to the contest between RMA considerations:[143]

> Overall, in the context of the above discussion, the Board finds that, consistent with the overall judgment, the Proposal will enable people and communities to provide for their social, cultural and economic wellbeing (or at least contribute to that effect). Despite the potential adverse effects of the Proposal on the coastal environment, and Te Hōpua a Rangi in particular, this can be achieved while avoiding, remedying or mitigating the Proposal's adverse effects as required under s 5(2)(c).

[148] These misapplications of ss 5, 104 and 171 compounded three important errors in the Board's approach to assessing the evidence before it. We turn to those now.

Conflating s 171 and the AUP policies

[149] The Board's assessment was complicated by the fact that s 171 contains parallel considerations that are similar to, but not the same as, those in the objectives and policies. In particular, s 171 required the Board to be satisfied that the EWL is "reasonably necessary" for achieving Waka Kotahi's objectives and that alternatives had been adequately considered. These requirements are designed to encourage robust decision making in relation to investment in infrastructure, but, unlike the AUP policies, they do not require the proponent to overcome a strong presumption against project approval. It appears that the Board relied on Waka Kotahi's s 171(1)(b) and (c) assessments, and in particular its option selection process, to satisfy itself that both the requirements of s 171 and the stricter requirements of the AUP policies were met.

[150] This led the Board to adopt a hybrid analysis that tied the standards in s 171 and the AUP together in a single assessment. For example, the Board acknowledged that Waka Kotahi chose a foreshore alignment because it would provide "the most enduring transport benefit".[144] This was the standard Waka Kotahi applied to select

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143 At [779].
144 Board decision, above n 4, at [622].

its final option under s 171. The Board appears then to have transposed this standard to its application of the AUP policies. It described its approach in these terms:

> [623] In the context of its consideration of the [AUP(plans)] provisions most relevant to the proposed reclamations, it is critical for the Board to be satisfied that the EWL alignment is indeed the option that provides the most enduring transport benefits to the extent that those benefits are necessary and that there are no "practicable alternatives" to achieve that outcome.
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> …
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> [626] … [T]he Board is indeed satisfied that there is no "practicable alternative" to the route [Waka Kotahi] proposes. The Board reaches this conclusion simply because it is satisfied that [Waka Kotahi]'s scrutiny of alternative routes did not produce any enduring transport solution other than the selected route.

[151] This suggests that the Board took "the most enduring transport benefit" as the yardstick against which to assess whether alternative methods or alignments to the EWL were practicable. Put another way, if an option did not achieve the most enduring benefit, it could not be a practicable alternative. This is not the approach mandated by the policies. Rather, the policies require the Board to be satisfied that Waka Kotahi selected a practicable solution to the problem that also has the least adverse effects in SEAs. How enduring or otherwise an alternative may be will, of course, be very relevant to assessing its practicability, but a less enduring alternative that produces better environmental outcomes may still be practicable enough for the purposes of the policies. In other words, in any contest between perfect endurance and environmental protection, the policies require the latter to be prioritised and the former to be compromised to the extent possible.

[152] To be clear, we agree with the Board that "no practicable alternative" does not require Waka Kotahi to establish that it is physically impossible to locate the EWL anywhere except in the SEA.[145] Such a standard could never be satisfied. Practicable alternatives are those that are reasonably available. For example, an inland option may be practicable unless it is, for some practical reason, either incapable of solving the problem that must be solved, or unreasonably expensive in light of the environmental benefit of avoiding the SEA.

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145 At [625].

[153] That said, the best option and the only practicable option will not always, and perhaps only rarely, be the same thing. The powerful shaping effect of "avoid" requires a scrupulously disciplined approach to determining whether it is appropriate to make an exception. The starting point must be that the answer is no. It is apparent that the Board did not take this approach.

[154] The Board may have failed to recognise that, unlike the relevant policies, s 171 is process-based; the Board needed only be satisfied that Waka Kotahi had given "adequate consideration" to alternatives and that the proposal was "reasonably necessary" to achieve the objectives Waka Kotahi wished to pursue. It is, as the Board itself noted, the process not the result that is the focus under s 171.[146] When it comes to the policies, however, the Board is required to reach its own view on the availability of practicable alternatives and, in turn, the necessity of the proposal. We acknowledge, of course, that the Board did purport to come to its own view, as William Young J notes,[147] but it relied on evidence collated to serve the more limited and less focused purposes of s 171 rather than those provided in the policies. This had downstream effects, as we now explain.

[155] Waka Kotahi's s 171 assessment relating to the EWL involved consideration of a wide range of relevant factors. These included:[148]

(a) performance against project objectives;

(b) road safety;

(c) construction;

(d) operation;

(e) social and economic;

(f) natural environment; and

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146 At [1306].
147 Below at [418].
148 AEE, above n 1, at 134.

(g) culture and heritage.

[156] Significant contextual factors were then added to the mix to avoid what Waka Kotahi described as "the averaging and aggregating" effect of a "Multi Criteria Analysis process". Those factors were as follows:[149]

- Limiting land acquisition from industrial activities where such take would adversely impact on the viability of such areas;
- Limiting effects on the safe and efficient access to businesses along the Church–Neilson Streets corridor;
- Providing transport outcomes that will not compromise the land use plans of the Auckland Council (in particular the intention to support industrial land uses in Onehunga and Penrose);
- Limiting conflicts between freight vehicles and buses;
- Limiting impact on travel times for through traffic on SH1 and SH20; and
- Providing appropriate social, cultural and environmental outcomes.

[157] Six of the original 16 alignment options were shortlisted against these criteria, primarily for reasons related to likely benefits compared to financial cost.[150] Although environmental considerations were included in both lists of criteria, there was no suggestion that they be accorded any particular weight as against social and economic needs, let alone that environmental considerations were key. In the end, Waka Kotahi selected the option that it considered produced the "most enduring transport benefit". The Board accepted that Waka Kotahi's approach was appropriate:[151]

> As discussed in chapter 15.12 of this Report [the alternatives analysis under s 171], the Board is satisfied with [Waka Kotahi]'s evidence on the assessment of alternatives and enduring transport benefits conferred by the chosen alignment. Therefore, it finds that there are no "practicable alternative" ways of providing for the objectives of the Proposal in a manner that avoids the proposed reclamations and coastal occupation. The Board accepts that in refining the EWL alignment, [Waka Kotahi] has sought to balance a range of effects, including ecological, business disruption, cultural and social.

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149 At 119.
150 At 120. Option E referred to greater environmental impacts.
151 Board decision, above n 4, at [627(b)].

[158] This summary, too, replicated the overall judgment approach, which, as we have noted, was rejected in *King Salmon*. It was also inconsistent with the requirements of the AUP policies which, again, had been developed in light of that judgment. Put simply, the focus in F2, E26 and D9 is more hard-edged, with clear weightings in favour of protecting the SEAs. This reflects, and was plainly intended to reflect, the potency of the avoid policies and the fact that the EWL could obtain approval only in exceptional circumstances. By contrast, the unstructured approach the Board endorsed concealed trade-offs between environmental outcomes and other considerations. An AUP-driven exceptions approach would have prevented this and may not have permitted the trade-offs to be made at all.

[159] Relatedly, on the evidence before us, it seems to be the case that the assessment of alternatives under s 171 involved only a new road, with the debate being around alignment. Part D of the AEE contained a summary of Waka Kotahi's consideration of alternatives. The introduction to that Part advised that alternative methods of achieving Waka Kotahi's objectives would be outlined, but if that was intended to encompass options other than a road, none were offered.[152] Once again, given the strength of the avoid policies, the assessment ought, we might have thought, to have included any potential alternative methods which alone, or in combination with less intrusive roading options, might have resolved the transport problem without significant impact in the SEAs.[153] It is not for us to suggest what any alternative method or combination of methods might be, but it is perhaps telling that no material of that kind was provided to or sought by the Board.[154] It calls into question the evidential basis upon which the Board could find that the EWL was, indeed, necessary.

[160] We accept, of course, that despite the shortcomings in Waka Kotahi's selection process, the Board could still have rectified matters by engaging with evidence that

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152 AEE, above n 1, at 111.

153 The AEE referred to different options for managing discharges to the environment and for managing location-specific effects, but they all proceeded on the basis of the EWL alignment as proposed.

154 We note that the Board did consider the possibility of public transport providing an alternative solution, but rejected that suggestion as "fanciful": Board decision, above n 4, at [253]. It noted that the situation in the area would continue to deteriorate well before public transport could solve any relevant congestion issues: at [262] and [1357]. That may well be the case, but the Board did not consider, for example, whether public transport might have formed part of a suite of responses to the problem. Such consideration would have been more consistent with the strict requirements of the exceptions pathway.

plugged the gap (if there was such evidence),[155] identifying where specific trade-offs were to be made and explaining why making them was consistent with the AUP pathway as we have summarised it. But it did not. Instead, the Board asserted in conclusory terms that the EWL was a necessary solution to the transport problems in the Onehunga–Penrose/Mt Wellington area. And it asserted in equally conclusory terms that there was no practicable alternative to locating the EWL within SEAs.

[161] To complete the picture, we note that the Board also offered an alternative pathway through the policies as follows:[156]

> [628] As a result, the Board finds that the Proposal is generally consistent with, and not contrary to, Policy F2.2.3(1) [reclamation to be avoided] of the [AUP(plans)]. In the event that Parties maintain a different interpretation regarding the F2.2.3(1)(b) [no practicable alternative to reclamation] … this is but one sub-clause of the policy. Notwithstanding the inclusive wording of the policy that requires that all sub-clauses apply, the Board has also considered the degree to which the Proposal is consistent with the policy in conjunction with its overall balanced assessment.

[162] This too is inconsistent with the AUP policies. As we have said, the exceptions framing in the AUP policies is at the core of its approach to development in the CMA. The requirement that there be no practicable alternative to a SEA location is a key component of that approach. Adopting an "overall balanced assessment" to facilitate avoiding its effect is not permitted.[157] Indeed, as already noted, this approach was rejected in *King Salmon.*

Acceptable adverse environmental effects

[163] As we have noted, the selection process under s 171 was likely to have concealed trade-offs made with environmental outcomes. This was compounded by the Board separating its assessment of adverse environmental effects from its discussion of option selection. That was understandable, as there was a great deal of evidence to work through, but the risk was that the Board would lose an opportunity to discipline its option selection by reference to specific environmental effects that could have been avoided.

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155 We were not provided with a full record of the evidence and so are unable to assess whether such evidence did, in fact, exist.

156 To similar effect, see at [662]–[663].

157 See above at [107]–[108] and [145], in relation to the effect of ss 104 and 171.

[164] For example, the evidence was that a "diverse assemblage" of at risk and threatened species foraged in the inter-tidal areas of the Māngere Inlet.[158] Among them is the wrybill, a threatened species with a global population of around 5,000 birds, of which up to 1,200 forage in the Inlet.[159] Along the northern shoreline of the Inlet, the primary feeding and roosting areas for these (and other) birds is in the SEAs affected by the proposal.[160] The Board accepted:[161]

> … that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant. On the basis of the evidence, however, the Board concludes that the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. Therefore, provided that appropriate and adequate mitigation and offsets are implemented, the Board finds that the effects of the proposed reclamations and coastal structures are acceptable when considered against the objectives and benefits of the works that necessitate those activities.

[165] Missing from this analysis is whether there was a practicable alternative or alternatives to avoid the permanent loss of feeding and roosting areas in the Inlet that might still have been capable of solving the transport problem. This is the test required to be met by Policy F2.2.3(1)(b).[162] It cannot be known whether the impacts described are indeed "acceptable" as the Board found if there has not been a proper assessment of options that might have avoided them. The justifying comparator is not just the EWL's benefits. It includes also the possibility of a less harmful solution to the transport problem. The Board's assessment was in much broader brushstrokes. It only rarely engaged at the level of detail commensurate with the presumptive starting point that locating a proposal of this scale in SEAs is most unlikely to be approved.

[166] Even if we were to accept the Board's framing of the issue, its approach was internally inconsistent. It accepted that the proposal breached Policy D9.3(9)(a)(ii), (b) and (c) yet concluded that it was not inconsistent with the objectives and policies of the AUP (again, on an overall judgment approach).[163] The Board relied on a factual

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158 Board decision, above n 4, at [465].
159 At [465]–[466].
160 At [467].
161 At [471].
162 As we have noted, this was the test which the Board considered could be bypassed either by the distorting effect of "the most enduring transport benefit" standard or on the basis that this was only one of many policies: see above at [151] and [161]–[162].
163 Board decision, above n 4, at [471], [645]–[648] and [662]–[663].

finding that affected birds that currently feed in the SEAs could opt to feed elsewhere opportunistically.

[167] It is difficult to follow the Board's reasoning here.[164] It would depend on an underlying understanding that feeding and roosting areas for the threatened or at risk species were in such plentiful supply outside the SEA that the loss of those inside the overlay would have minor or transitory effects only. If that were the case, it is hard to understand why the affected area of the Inlet is a SEA at all. There is a second problem. The policies protect both habitat and species independently within the SEA-M1. In other words, if the policies value habitat in its own right, it cannot be right that the significance of habitat loss is only measured against the consequences for a species feeding there.[165]

Conclusion on the Board's approach

[168] To sum up, the Board misinterpreted the "have regard to" standard in ss 104 and 171, misused the s 171 options selection process to serve the stricter requirements of the AUP policies, and decoupled the consideration of adverse effects from the assessment of practicable alternatives. These missteps left the door open for the Board to regress to an overall judgment approach by which it could undervalue the avoid policies and overvalue the pro-infrastructure policies. Consequently, the Board started from a more neutral starting point than that required by the AUP. In the result, the Board failed to engage properly with the central premise of the AUP, which is that the EWL is presumptively inconsistent with and contrary to relevant objectives and policies and should not be approved except in narrowly defined exceptional circumstances.

The High Court and "have regard"

[169] Turning to the High Court, as noted, we consider Powell J's construction was more consistent with the requirements of the NZCPS and AUP. However, he erred in his application of the duties to have regard/particular regard to relevant objectives and

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[164] See the reasons of Glazebrook J below at [319]–[321].

[165] The *habitats* of fauna are a matter of national importance which must be provided for: RMA, s 6(c).

policies. Again, those duties do not invest consent authorities with a broad discretion to "give genuine attention and thought"[166] to directive policies, only to then refuse to apply them.[167] That would contradict what we have already described as the consistently strong "avoid" language employed from top to bottom in the RMA hierarchy of objectives and policies. It would also be to waste the significant resources invested by public and private stakeholders in the processes by which those objectives and policies are settled.

[170] Inevitably, therefore, the matter must be referred back to the Board for further consideration on the proper basis.

A final comment

[171] William Young J rightly comments that the foregoing analysis does not fully reflect the way the appeal was originally framed by the parties.[168] As we have said, Royal Forest and Bird took the high ground, arguing that infrastructure at the scale of the EWL could never obtain consent in light of the policies of the NZCPS and AUP. On the other hand, Waka Kotahi and Auckland Council supported the Board's reasons, albeit accepting that avoid policies were highly important. Understandably, neither side argued for the narrow exceptions framework which we consider correctly reflects the text and intention of the NZCPS and AUP. That middle position was, however, raised with the parties in the hearing, as William Young J recognises.[169] It was discussed at some length.

[172] We have found that the Board's reasons contained errors of construction that led it to take, in substance, an overall judgment approach to its task of interpreting and applying the NZCPS and AUP policies. These errors included misconstruing the effect of the requirement to "have regard to" relevant policies and misunderstanding the role that s 5 plays when consent applications and proposed designations fall to be assessed against those policies. These matters were central to the appeal and fully ventilated before us. Even if we had not interpreted the policies in a manner that provided an

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166 HC judgment, above n 7, at [83].
167 *King Salmon*, above n 67, at [127]–[131]; and *RJ Davidson*, above n 80, at [73].
168 Below at [421].
169 Below at [421(b)].

exceptions pathway, the errors that led to the Board's overall judgment approach remain; either way, the Board's decision cannot stand. Following full argument as to the meaning of the relevant RMA provisions and policies, we have interpreted them—even if not in the way the parties would have. Ultimately, the framing of the appeal cannot prevent the Court from drawing the conclusions it considers to be correct according to law.

Offsets, compensation and the bucket approach

[173] In light of our conclusion that the NZCPS and AUP permit limited exceptions to their respective avoid policies, this category of issues takes on less significance, so we need address it only briefly. The arguments relate to ss 104(1)(ab) and 171(1B) which, in broadly similar terms, require consent authorities to take into account measures proposed or agreed to by the applicant or requiring authority that will have positive environmental effects to offset or compensate for adverse effects. The issue is not whether offsets can, more broadly, be considered under ss 104 and 171 (an issue which is definitively settled by these provisions) but the more specific issue of whether offsets can be used to satisfy avoid policies.

[174] The first issue is whether proposed offsets are capable of assisting a proposal to satisfy avoid policies it would not otherwise satisfy. This arises in the context of special measures proposed by Waka Kotahi to replace habitat that will be lost due to reclamations and to provide habitat support elsewhere in the country which, according the evidence, will benefit the Māngere Inlet's shorebird population.

[175] The appellant argues that offsets are not capable of satisfying avoid policies. Waka Kotahi argues that they can.

[176] In our view, this is a question of fact and degree measured against the terms of the relevant avoid policy. For example, an activity that would otherwise have more than transitory effects on the vulnerable habitat of a threatened species may nonetheless not breach NZCPS Policy 11(a) if those adverse effects are offset in net terms. Whether the impact of the offset must be in situ or can be deployed elsewhere will be very much context specific. It will, we imagine, depend on the environmental element or value that must be protected and the nature of the adverse effect that is to

be offset. Unlike Glazebrook J, who largely treats these as questions of construction,[170] we consider that they are matters of evidence, and probably largely expert evidence, to be carefully assessed by the fact finder. The relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies; it is whether the relevant adverse effect can be avoided in fact. If the contention in the evidence is that adverse effects at the level identified in the relevant policy (locality, population, ecosystem and so forth) can be avoided through offsets applied elsewhere, that will be a matter to be assessed by the fact finder.

[177] The second issue relates to what the experts agreed was Waka Kotahi's "integrated ecosystem approach" to the consideration of ecological effects.[171] The scale of the EWL meant it was both necessary and preferable to take a holistic approach in which some unavoidable adverse effects could be balanced against benefits to other elements or values within the affected ecosystem. This is essentially the compensation aspect of ss 104(1)(ab) and 171(1B). The Board found that this "bucket approach", as it was unattractively described, was consistent with the requirements of ss 104 and 171.

[178] Royal Forest and Bird submitted that this was incorrect, at least as applied to avoid policies. This must be correct, for the reasons already discussed, at least insofar as avoid policies are concerned. It is plainly not correct to suggest that unrelated environmental benefits could be offered up to avoid other adverse environmental effects. In reality, it appears that the Board, while purporting to apply avoid policies, accepted that they could be breached, provided the breach was acceptable in light of other compensatory measures, all considered by means of an overall judgment. This was impermissible. It short-circuited the requirement to establish, in a disciplined assessment, whether the relevant exceptional circumstances existed in which "avoid" duties need not apply.

[179] But that does not mean the bucket approach is irrelevant. Rather, if exceptional circumstances can be established, then compensatory benefits will be very much in play. At that point, a bucket approach may be useful. In other words, to be clear, the

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170 Below at [229], n 255, and [311], n 372.
171 Board decision, above n 4, at [581(a)].

bucket approach does not provide a way to circumvent the avoid policies; it may only assist at the stage that the avoid policies have been satisfied or necessity has been demonstrated to the requisite level to engage the exceptions pathway.

Summary of conclusions

[180] To summarise, our conclusions are as follows:

(a) Locating major infrastructure in SEAs is not necessarily contrary to the AUP(plans) objectives and policies for the purpose of s 104D, nor inconsistent with them for the purposes of ss 104 and 171, but the Board and the High Court failed to identify and apply the correct assessment standards.

(b) Locating major infrastructure in environments protected by Policy 11 of the NZCPS is not necessarily inconsistent with that policy for the purposes of ss 104, 104D and 171, but the Board and the High Court failed to identify and apply the correct assessment standards.

(c) Offsets can be deployed to address avoid policies, but whether they achieve the desired outcome is a question of fact measured against the terms of the relevant policy.

(d) The bucket approach cannot be used to evade the effect of avoid policies, but any beneficial effects will be relevant if the AUP's exceptions pathway for infrastructure is available.

(e) Permanent loss of feeding and roosting areas in the affected SEA is likely to be inconsistent with relevant avoid policies, but whether that is so is ultimately a question of fact.

Disposition

[181] The appeal is allowed. The matter is remitted to the Board of Inquiry for reconsideration in line with the terms of this judgment.

[182] Costs are reserved. If costs cannot be agreed, the parties should file memoranda on costs on or before 9 May 2024.

GLAZEBROOK J

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Introduction

[183] I write separately because, although I agree with Winkelmann CJ, Ellen France and Williams JJ (the majority) that the appeal should be allowed, I do so for different reasons.

[184] The project at issue is a proposed East West Link (EWL), a new four-lane arterial road to connect State Highway 20 in Onehunga with State Highway 1 (SH 1) in Penrose/Mt Wellington. It was designated as a proposal of national significance and referred to a board of inquiry (the Board) established pursuant to s 149J of the Resource Management Act 1991 (RMA).[172] The relevant applications were largely approved by the Board, thereby enabling the proposed EWL to proceed.[173] The Board's decision was upheld by the High Court.[174] The appeal to this Court is from the decision of the High Court.[175]

[185] Broadly, this appeal concerns how provisions in the New Zealand Coastal Policy Statement (NZCPS)[176] and the Auckland Unitary Plan (AUP)[177] requiring protection of the coastal environment interact with provisions relating to the provision of infrastructure and the effect of these planning documents at the resource consent level. The most significant cases I will consider are this Court's decisions in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (*King Salmon*)[178] and *Port Otago v Environmental Defence Society Inc* (*Port Otago*).[179] I will also comment on the Court of Appeal's decision in *RJ Davidson Family Trust v Marlborough District Council* (*RJ Davidson*).[180]

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172 The Board was chaired by Dr John Priestley CNZM, KC (a retired High Court judge). The other members were Alan Bickers MNZM, JP (the Deputy Chairperson), Michael Parsonson and Sheena Tepania.

173 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal: Volume 1 of 3 – Report and Decision* (21 December 2017) [Board decision].

174 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 (Powell J) [HC judgment].

175 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZSC 52 (O'Regan, Ellen France and Williams JJ). In this appeal Ngāti Whātua Ōrākei Whai Māia Ltd (Ngāti Whātua Ōrākei) generally supports the position of the Royal Forest and Bird Protection Society of New Zealand | Te Reo o te Taiao [Royal Forest and Bird]. Auckland Council | Te Kaunihera o Tāmaki Makaurau [Auckland Council] generally supports New Zealand Transport Agency | Waka Kotahi [Waka Kotahi], as do Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust.

176 "New Zealand Coastal Policy Statement 2010" (4 November 2010) 148 *New Zealand Gazette* 3710 [NZCPS].

177 Auckland Unitary Plan: Operative in Part [AUP]. I refer to the AUP as it was in the version provided to us by the parties. Some parts of the AUP were not part of the excerpts submitted by the parties, but any changes to these parts since the date of the Board decision are not material for the purposes of this appeal.

178 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*]. Elias CJ, McGrath, Glazebrook and Arnold JJ were in the majority with William Young J dissenting.

179 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205 [*Port Otago*].

180 *RJ Davidson Family Trust v Marlborough District* Council [2018] NZCA 316, [2018] 3 NZLR 283 [*RJ Davidson*].

[186] I start by giving some background and analysing the relevant legal principles. Against that context, I discuss the correct interpretation of the relevant planning documents, (the NZCPS and the AUP), and outline the errors of interpretation made by the Board and the High Court. I then examine the errors made by the Board and the High Court in their assessment of the EWL arising out of their erroneous interpretation of the planning documents. After this, I discuss Waka Kotahi's notice to support the High Court decision on other grounds and offer some comments on the reasons of the majority and William Young J. Finally, I summarise my conclusions and the reasons I would allow the appeal.[181]

Background

[187] The EWL involves a range of activities but, for the purposes of the 24 resource consents required, they were bundled and treated as "non-complying activities".[182] This means that they had to pass the threshold test in s 104D of the RMA, as well as the more substantive assessment in s 104. Two notices of requirement are also necessary. The first is for the construction, operation and maintenance of the EWL (and associated works) between Onehunga and Ōtāhuhu. The second is to alter the SH 1 designation to accommodate the EWL.

[188] The route of the EWL was selected after an extensive process involving stakeholder consultation and was evaluated according to a number of criteria, including transport, social and health outcomes, "constructability" and the natural environment.[183]

[189] The design of the EWL incorporates stormwater treatment for an adjacent 611 ha of developed urban catchment in the Onehunga-Penrose area, as well as leachate management from adjacent landfills.[184] It also encompasses new commuter

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181 I do not deal with the cultural and Treaty issues raised by Ngāti Whātua Ōrākei. I accept the submission of Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust that these issues were not part of the appeal to the High Court and that it is therefore inappropriate to deal with them.

182 Board Decision, above n 173, at [32] and [128]. See below at [233].

183 Louise Allwood and others *East West Link: Assessment of Effects on the Environment* (NZ Transport Agency | Waka Kotahi, December 2016) [AEE] at [8.0]–[8.4.5]. First a preferred corridor evaluation process was undertaken and then a preferred alignment within the preferred corridor was identified: at [8.0]. The assessment methodology is summarised at 113, figure 8-1.

184 Board Decision, above n 173, at [9].

and recreational cycle paths connecting the Onehunga, Penrose and Sylvia Park communities, and a new pedestrian and cycle connection across Ōtāhuhu Creek.[185]

[190] Works for the proposed EWL that are relevant to this appeal include reclamation of 18.4 ha of the Māngere Inlet, as well as dredging and works associated with the construction of a viaduct at Anns Creek.[186]

[191] Although the northern shore of the Manukau Harbour has already been heavily modified, both the Māngere Inlet and the adjacent land subject to the proposed EWL nonetheless remain ecologically significant.[187] Anns Creek East contains sensitive and unique ecological values with lava shrubland habitats, threatened plant habitats and gradients between mangroves to saltmarsh to freshwater wetland.[188] The project area is also home to roosting and feeding areas for various native bird species, which may be affected by the project.[189]

[192] The New Zealand Transport Agency | Waka Kotahi (Waka Kotahi)[190] put forward a package of offset, remediation and mitigation measures to address the negative environmental effects of the EWL.

[193] The application documents set out four expected benefits of the EWL which broadly include: improved and more reliable travel times; accessibility that supports businesses for growth and economic prosperity; improved safety and connected communities; and enabling and providing environmental improvements and social/community opportunities to the local area.[191]

The law

[194] I begin this section with a discussion of *King Salmon*, before moving to this Court's recent decision in *Port Otago*. I then explain why *King Salmon* applies to

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185 At [6(d)].
186 At [444].
187 HC judgment, above n 174, at [4].
188 Board Decision, above n 173, at [592].
189 At [465]–[471].
190 Waka Kotahi is the name that was used in oral submissions.
191 AEE, above n 183, at [3.4].

resource consents. After this, I offer a brief analysis of the role of offsets in meeting environmental protection policies before setting out the proper approach to s 104D.

King Salmon

[195] *King Salmon* concerned an application to change salmon farming in a number of locations from a prohibited activity to a discretionary activity in the Marlborough Sounds Resource Management Plan.[192] It was held that, as the proposed salmon farm would have significant adverse effects on the area's outstanding natural attributes (contrary to the relevant NZCPS policies requiring the avoidance of certain types of environmental harm), the plan change application should have been declined.[193]

[196] This Court held that environmental protection is "a core element of sustainable management" as defined in s 5 of the RMA.[194] This means that environmental protection by requiring avoidance of the adverse effects of development is within the concept of sustainable management and that it is "a response legitimately available to those performing functions under the RMA".[195]

[197] The Court rejected the "overall judgment"[196] approach to resource management.[197] This had become the accepted approach and involved making "an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources" under s 5 of the RMA.[198] As this Court said in *Port Otago*, that approach tended to lead to the discounting of environmental values.[199] I comment that a key point in this regard is that instrumental considerations (for example, efficiency or financial gain) are not straightforwardly commensurable with environmental values.[200] Species, ecosystems, habitats, vegetation types and important environmental features are generally characterised by

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192 *King Salmon*, above n 178, at [1] per Elias CJ, McGrath, Glazebrook and Arnold JJ. By the time of the appeal to this Court only one location was still at issue.
193 At [153]–[154] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
194 At [24(d)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
195 At [150] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
196 For a description of the approach, see at [38]–[43] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
197 At [106]–[154] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
198 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 347.
199 *Port Otago*, above n 179, at [81].
200 At [80].

their intrinsic value, whereas economic considerations are generally characterised by their instrumental value. Consequentialist calculus cannot be easily applied where intangible environmental values are concerned.

[198] This Court in *King Salmon* instead endorsed an "environmental bottom line" approach.[201] This approach entails that the safeguards in s 5(2)(a)–(c) relating to the protection of the environment all have to be met before the purpose of the RMA is fulfilled.[202] A further feature of this approach is that decision making is "not about achieving a balance between benefits occurring from an activity and its adverse effects".[203]

[199] The definition of sustainable management should be read as an integrated whole. The Court interpreted the word "while" in the definition in s 5(2), before subparas (a), (b) and (c), as meaning "at the same time as".[204] This means that the environmental principles in subparas (a), (b) and (c) must be observed in the course of the management referred to in the opening part of the definition. As such, the Court stated that the relevant avoidance policies in that case "provide something in the nature of a bottom line".[205]

[200] The Court said that, given the reasonably elaborate process involved before an NZCPS is issued, it is implausible that Parliament intended that the ultimate determinant of a plan change application would be Part 2 of the RMA[206] (through an overall judgment approach) and not the NZCPS itself.[207] It also considered that it was contrary to the legislative scheme to hold that the NZCPS could be treated as

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201 *King Salmon*, above n 178, at [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

202 *Shell Oil New Zealand Ltd v Auckland City Council* PT W8/94, 2 February 1994 at 10 as cited in *King Salmon*, above n 178, at [38] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

203 *Campbell v Southland District Council* PT W114/94, 14 December 1994 at 66 as cited in *King Salmon*, above n 178, at [38] per Elias CJ, McGrath, Glazebrook and Arnold JJ. I therefore disagree with the majority's description of s 5(2) as involving a "tension" between meeting community need and protecting vulnerable elements of the environment: above at [38].

204 *King Salmon*, above n 178, at [24(c)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

205 At [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ. As I discuss later, both the majority's reasons and the reasons of William Young J undermine these choices made in the RMA, NZCPS and AUP. See further below at [328]–[329], [335] and [337].

206 Section 5 of the Resource Management Act [RMA] is contained in Part 2.

207 *King Salmon*, above n 178, at [86(a)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

"a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment".[208]

[201] Further, as the Court pointed out, any regional plan must give effect to any national policy statement and any NZCPS.[209] The Court held that "give effect to" means "implement" and that it is a "strong directive, creating a firm obligation on the part of those subject to it".[210] The NZCPS is "an instrument at the top of the hierarchy".[211] As such, the NZCPS can require that particular parts of the coastal environment be protected from adverse effects.

[202] The Court commented that the overall judgment approach creates uncertainty. As it said, "[t]he notion of giving effect to the NZCPS 'in the round' or 'as a whole' is not one that is easy either to understand or to apply".[212]

[203] This Court in *King Salmon* acknowledged that there may be occasions where particular policies in the NZCPS "pull in different directions" but said that this is not likely to occur frequently, "given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording".[213] A close attention to the wording of the policies may mean an apparent conflict dissolves. The Court considered that differences in expression matter and commented that a danger of the overall judgment approach is that is it likely to minimise the significance of these differences in expression.[214]

[204] The Court acknowledged a number of exceptions and qualifications to its "in principle" finding[215] that a decision maker would be acting "in accordance with" Part 2 of the RMA by giving effect to the NZCPS.[216] First, before this approach can be taken, there must be no issue as to the validity of the NZCPS or any part of it.

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208 At [142] per Elias CJ, McGrath, Glazebrook and Arnold JJ. Both the approach of the majority and that of William Young J (summarised at [324]–[327]) are contrary to *King Salmon* and are therefore contrary to the legislative scheme: see below at [328]–[341].
209 RMA, s 67(3)(a)–(b).
210 *King Salmon*, above n 178, at [77] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
211 At [152] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
212 At [137] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
213 At [129] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
214 At [127] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
215 At [85] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
216 At [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

Second, where the NZCPS does not "cover the field", a decision maker will have to consider "whether Part 2 provides assistance in dealing with the matter(s) not covered".[217] Third, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi, which has procedural as well as substantive aspects, is also an exception. Finally, if there is uncertainty as to the meaning of particular policies in the NZCPS, Part 2 may aid in a purposive interpretation.[218]

[205] In all cases, including where these exceptions and qualifications apply, decision makers should also, as well as referring to Part 2, refer to the objectives and policies in the NZCPS and downstream documents where relevant. Reference to the objectives and policies of these planning documents will often be sufficient to resolve issues, ambiguities or conflicts, given that these documents already reflect Part 2.[219]

Port Otago

[206] A possible conflict between policies in the NZCPS was at issue in *Port Otago.* The appeal concerned the relationship between NZCPS Policy 9 (the ports policy) and the NZCPS avoidance policies.[220] This Court held that there was a conflict between the ports policy and the avoidance polices as all were directive.

[207] The Court stated that, while it was preferable that any conflicts be dealt with at the regional policy and plan level,[221] the ability of regional planning instruments to anticipate all conflicts was limited, such that some conflicts would have to be resolved at the resource consent level.[222]

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217 At [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

218 There was no mention by the Court of any other exceptions, and certainly no mention of a general exception of the nature the majority finds in the present case (summarised below at [325]–[326]). Nor was there any mention of the more open-ended exception found in the reasons of William Young J summarised below at [327]. This is unsurprising given that environmental bottom lines are set through s 5(2)(a)–(c) of the RMA and the avoidance policies in the NZCPS: see below at [329]. See also my comments on the majority's view of *RJ Davidson* below at [224], n 247.

219 At [90] per Elias CJ, McGrath, Glazebrook and Arnold JJ. The paragraph cited refers to the NZCPS as reflecting Part 2. The same analysis must apply to downstream planning documents.

220 *Port Otago*, above n 179, at [71]. In *Port Otago* the avoidance policies at issue were Policies 11, 13, 15 and 16.

221 At [72].

222 At [73].

[208] Before a conflict "with regard to any particular project" is identified, a decision maker (which must include a decision maker at resource consent level), must be satisfied that:[223]

> (a) the project is required to ensure the safe and efficient operation of the ports in question (and not merely desirable);
>
> (b) assuming the project is required, all options to deal with the safety or efficiency needs of the ports have been considered and evaluated. Where possible, the option chosen should be one that will not breach the relevant avoidance policies. Whether the avoidance policies will be breached must be considered in light of the discussion above on what is meant by "avoidance"; including whether conditions can be imposed that avoid material harm; and
>
> (c) if a breach of the avoidance policies cannot be averted, any conflict between the policies has been kept as narrow as possible so that any breach of any of the avoidance policies is only to the extent required to provide for the safe and efficient operation of the ports.

[209] The Court outlined the approach to take where there is, after due analysis (on the basis of (a)–(c) above), a conflict between directive policies in the NZCPS.[224] Before doing this, the Court said:[225]

> [75] As there is not sufficient information before us to attempt any detailed reconciliation between the ports policy and the avoidance policies, we provide only *general guidance as to how a decision-maker at the resource consent level* might approach the reconciliation between the ports policy and the avoidance policies.

[210] Importantly, the Court said there can be no presumption that one directive policy will always prevail over another. Even where a decision maker is satisfied that the conditions set out above are met, this does not mean that a resource consent will necessarily be granted.[226] The appropriate balance between avoidance policies and other directive policies must be weighed in a "structured analysis" which reflects the particular circumstances and the values inherent in the policies and objectives in the NZCPS (and any other relevant plans or statements).[227]

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223 At [76] (footnotes omitted).
224 At [76]–[84].
225 Emphasis added.
226 At [77].
227 At [78].

[211] This structured analysis is not the same as an overall judgment approach. While the *Port Otago* structured analysis still requires judgements to be made, "they are disciplined, through the analytical framework [provided in *Port Otago*], to focus on how to identify and resolve potential conflicts among the NZCPS directive policies".[228]

[212] I comment that the process outlined above is explicitly said to apply to resource consents as well as plan changes. As stated above, the Court made clear that some conflicts may be left to the resource consent level. As such, when the Court set out to explain how potential conflicts should be approached "with regard to *any particular project*"[229] this clearly applies to the resolution of conflicts at the resource consent level.

Resource consents and King Salmon

[213] Waka Kotahi submits that *King Salmon* does not apply to resource consents. I reject that submission. *King Salmon*, and in particular the rejection of the overall judgment approach, applies to resource consent decisions.[230] If it did not, then one might have expected *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* (*Sustain Our Sounds*) to say so, given that it was released at the same time and dealt with both plan changes and consents.[231]

[214] It is true, as Waka Kotahi submits, that the issue in *King Salmon* was the validity of a proposed plan change. The Court based its decision, however, on an analysis of the definition of sustainable management in Part 2.[232] As ss 104 and 171 are subject to Part 2, *King Salmon* necessarily applies to those sections where there are avoidance policies in the relevant planning documents.

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228 At [81].

229 Emphasis added.

230 Prior to *King Salmon,* the overall judgment approach had been applied not just in the context of plan changes but also in assessing resource consent applications. See for example Kenneth Palmer "Resource Management Act 1991" in Derek Nolan (ed) *Environmental and Resource Management Law* (3rd ed, LexisNexis, Wellington, 2005) at [3.24]–[3.25]. Indeed, the Court in *King Salmon* said, at [39] per Elias CJ, McGrath, Glazebrook and Arnold JJ, that this approach appears to have had its origins in a resource consent case: *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

231 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 [*Sustain our Sounds*] at [5].

232 See above at [196]–[198].

[215] There would be little point in the long and elaborate planning process, which at each stage should give effect to Part 2, and which becomes more specific as to substance and locality as it progresses, if the relevant policy statements and plans could be side-lined at resource consent level where actual projects in particular localities are being assessed.[233]

[216] Waka Kotahi suggests that a decision maker must give genuine consideration to avoidance policies as strong policy guidance but can choose to prioritise other policy considerations. Arguably therefore it does not advocate a return to the pure overall judgment approach rejected by the Court in *King Salmon* but suggests a somewhat modified approach.

[217] The issues identified in *King Salmon* also apply to Waka Kotahi's proposed approach. It would undermine the structured nature of the planning process and would lead to uncertainty. The danger of not taking a regional approach clearly remains. If consents for individual projects can be given in protected areas of ecological value or for projects affecting ecological diversity on a "piecemeal basis"[234] at the resource consent level, it is hard to see how the protection of these areas and values could have any stability.

[218] I reject Waka Kotahi's submission that the setting of environmental bottom lines is not compatible with s 5 of the RMA. Protection of the environment is an element of sustainable management,[235] and the NZCPS may make legitimate policy choices favouring the avoidance of adverse effects,[236] including by requiring absolute protection.[237] Further, a policy in a New Zealand coastal policy statement may have the effect of what in ordinary speech, as against the specialist RMA definition, would be called a "rule".[238]

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233 The danger identified in *King Salmon*, above n 178, at [139]–[140] per Elias CJ, McGrath, Glazebrook and Arnold JJ, that spot zoning plan change applications potentially undermine the required regional planning approach, applies with even more force with regard to applications for resource consents because decision makers will be considering individual projects rather than taking the strategic, region-wide approach required for plan changes.

234 At [140] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

235 At [24(d)] and [150] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

236 At [152] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

237 At [118] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

238 At [116] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and see also *Port Otago*, above n 179, at [62].

[219] I am of course conscious, as Waka Kotahi stressed, that s 104(1) sets out a list of factors a consent authority must "have regard to", including the actual and potential effects of the project and relevant provisions of statements and plans. Section 171(1) states that a territorial authority must "have particular regard to" various matters including relevant provisions of statements and plans.

[220] It is not surprising that ss 104(1) and 171(1) are worded in this manner. Consent authorities must decide on particular projects in particular localities and against a background where relevant statements or plans may not exist or are only in draft form. Clearly the actual effects of the particular projects must be considered. Further, what is being considered at consent level is at a more specific level than even a district plan, and therefore is unlikely to be covered specifically in relevant statements or plans, which in any event may not "cover the field", even in terms of general guidance.[239]

[221] Against the background of the scheme of the RMA, however, s 104(1) does not, by virtue of recourse to Part 2 or otherwise, allow a consent authority to override the provisions of those statements or plans that *do* cover the field and are directly relevant.

[222] Further support for this approach comes from looking at s 104(1)(b) as a whole. Included in the list, along with national policy statements, the NZCPS, regional policy statements, and plans, are national environmental standards[240] and "other regulations".[241] Both national environment standards and other regulations are binding.[242] As such, if "have regard to" in s 104(1)(b) merely meant "consider as strong policy directives" then national environmental standards or other regulations which must be complied with would not be included in the list.[243]

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239 *King Salmon*, above n 178, at [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
240 Section 104(1)(b)(i).
241 Section 104(1)(b)(ii).
242 Regulations are binding by their nature, and national environmental standards are regulations per RMA, s 43(1).
243 See also the reasons of the majority above at [108], where the same conclusion seems to be reached.

[223] *King Salmon* held, on the basis of an analysis of s 5, that environmental protection through avoidance policies is consistent with sustainable management.[244] As a consequence, requiring the avoidance policies in the NZCPS to be followed does not involve ignoring Part 2. As the Court noted, the NZCPS is the mechanism by which Part 2 is given effect in relation to the coastal environment.[245] The lower-order statements and plans must give effect to the choices made higher up the chain and thus necessarily also give effect to Part 2. Each step in the hierarchy (to be valid) will reflect the choices higher in the hierarchy and by necessity Part 2.

[224] It is not open to decision makers at resource consent level to undermine the choices made in planning documents of favouring environmental protection through avoidance policies if directly applicable to the relevant project. As the Court of Appeal said in *RJ Davidson*, "resort to [Part 2] for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon*".[246] A relevant plan provision is "not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side".[247]

[225] I agree. The approach suggested by Waka Kotahi of treating the avoidance policies as merely constituting strong policy guidance is not valid. It does not accord with the statutory scheme, purpose or wording. Nor does it accord with the wording and purpose of the relevant policies and it would effectively entail overruling *King Salmon*, at least in part. This would be inappropriate, given that *King Salmon* is

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244 See above at [196] and [218].

245 *King Salmon*, above n 178, at [86(b)] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

246 *RJ Davidson*, above n 180, at [71]. I note that, in places, the Court of Appeal in *RJ Davidson* might appear to be maintaining an overall judgment approach in the context of consents (see for example at [67] and [69]). I accept the submission made by Royal Forest and Bird that the Court of Appeal was, however, using "overall judgment" merely to mean that there could be recourse to Part 2.

247 At [73]. Royal Forest and Bird makes a similar point in its submissions: that an avoidance policy is not properly had regard to if it is merely considered and set aside. I agree. I also disagree with the majority that there is a corollary to the reasoning in *RJ Davidson* whereby exceptions to avoidance policies can be permitted: above at [109]. Simply put, no reference to an exception of this kind is found anywhere in the Court of Appeal's discussion and, if such an exception logically followed as a "corollary" from the Court of Appeal's decision, one would have expected the Court of Appeal to say so explicitly and clearly.

a recent decision of this Court and no plausible, let alone compelling, reason has been put forward for overruling it.[248]

[226] In summary, and for all of the above reasons, *King Salmon* applies to resource consent decisions. For similar reasons it also applies to s 171. If anything, the case for *King Salmon* is further strengthened with regard to s 171 by the fact that territorial authorities are directed to "have *particular* regard" to relevant provisions of relevant plans and policy statements.[249]

Role of offsets[250]

[227] As noted above, Waka Kotahi put forward a package of offset, remediation and mitigation measures to address the negative environmental effects of the EWL. The issue therefore is whether as a matter of law these measures could potentially satisfy the avoidance policies in the NZCPS and AUP.

[228] The term "avoid", as used in the NZCPS, has its ordinary meaning of "not allow" or "prevent the occurrence of".[251] The avoidance policies in the NZCPS must, however, be interpreted in light of what is sought to be protected, including the relevant values and areas.[252] Any adverse effects must also be material or significant, depending on whether the avoidance policies are "qualified" or "unqualified" in the sense outlined below.[253] Mitigation, remediation and adaptive management may as a matter of law operate to bring the harm down to less than material or significant (as the case may be).[254]

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248 These comments also apply to the reasons of the majority above at [78]–[91] and [99]–[112]; and the reasons of William Young J below at [380]–[398].

249 RMA, s 171(1)(a) (emphasis added).

250 In this section I am talking only about environmental offsets, as opposed to economic or social offsets, which provide a non-environmental benefit.

251 *King Salmon*, above n 178, at [96] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

252 *Port Otago*, above n 179, at [68]. And interpretation of the policies is a matter of law.

253 See below at [244].

254 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [252] and [261] per Glazebrook J, [292]–[293] per Williams J, and [309]–[311] and [318]–[319] per Winkelmann CJ. In *Port Otago* this Court held that, while decided in a different statutory context, the comments in *Trans-Tasman* were "nonetheless applicable to the NZCPS": *Port Otago*, above n 179, at [65].

[229] I accept that offsets may also as a matter of law mean avoidance policies can be met if they bring down the harm to less than material or significant (as the case may be).[255] The harm could only be so reduced if the offsets relate to the values protected by the particular avoidance policies and usually would require them to operate at the point of impact of the proposed activity. Otherwise, the offset would not be capable of reducing the harm protected by the values to the requisite levels.[256]

[230] Offsetting also usually includes a level of uncertainty about its effectiveness in countering the environmental harm at issue. In determining whether offsets can reduce harm to a less than material or significant (as the case may be) level, the decision maker must therefore as a matter of law take a precautionary approach, considering the extent of the risk to the protected value, the importance of the activity, the degree of uncertainty and the extent to which any offset will reduce risk and uncertainty (including the risk of non- or partial compliance).[257]

[231] This precautionary approach is mandated by NZCPS Policy 3. It is reinforced by the concern in the NZCPS Preamble regarding "a lack of understanding about some coastal processes and the effects of activities on them". In the AUP, it is similarly pointed out that the coastal marine area "has not been comprehensively surveyed" for

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255 I therefore reject Royal Forest and Bird's submission that offsets cannot function to avoid adverse effects. Whether offsets do or do not bring harm down to less than material or significant (the test required by law) is a matter of fact, but determining what values are protected (and therefore what is required to bring the harm down to the requisite levels) will depend on the construction of the relevant avoidance policy, the interpretation of which is a matter of law. A precautionary approach is also required as a matter of law. I therefore do not agree with the comments of the majority above at [176].

256 These requirements are only relevant to whether offsets can bring harm down to less than material or significant for the purpose of meeting avoidance policies. Offsets generally are able to be taken into account in resource consent and notice of requirement decisions: see ss 104(1)(ab) and 171(1B) of the RMA. Both of these sections were inserted by the Resource Legislation Amendment Act 2017. That Act was not in effect at the time of the EWL proposal. The relevant sections came into force on 18 October 2017. Prior to this amendment, offsets had usually been dealt with under s 104(1)(c), which provides for consideration of "any other matter the consent authority considers relevant and reasonably necessary to determine the application" (or its predecessor, s 104(1)(i)). See for example *J F Investments Ltd v Queenstown Lakes District Council* NZEnvC Christchurch C48/2006, 27 April 2006 at [42]; and *Director-General of Conservation v The Wairoa District Council* NZEnvC Wellington W81/2007, 19 September 2007 at [42]. Offsets had also sometimes been dealt with as mitigation: see for example *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [463].

257 See *Sustain Our Sounds*, above n 231, at [129]. This approach was affirmed in *Port Otago*, above n 179, at [67]. *Sustain our Sounds* specified that a precautionary approach was needed for adaptive management, but the Court said that the factors at [129] would determine if prohibition "rather than an adaptive management *or other approach*" would be required (emphasis added). The principles expressed in *Sustain our Sounds* are therefore also relevant to offsets.

the purpose of identifying significant marine communities and habitats and that the D9 overlay "under-represents the significant marine communities and habitats present in the sub-tidal areas of the region".[258] The AUP explicitly states that "[a] precautionary approach is therefore required to manage effects in the coastal environment."[259]

[232] As a practical example as to why caution is necessary, I note that one witness before the Board, Dr Bishop, referred in his evidence to a failed attempt at saltmarsh restoration undertaken at Ambury Park in the 1990s.[260]

Section 104D

[233] As noted above, the activities requiring resource consent were bundled and treated as non-complying. This means that the threshold in s 104D must be applied. The parties are agreed that the effects of the EWL proposal are more than minor. It follows that it does not pass the first test in s 104D(1)(a).[261] The critical issue therefore is whether it will be contrary to the objectives and policies of the AUP, in terms of s 104D(1)(b).

[234] The leading authority on this issue appears to be *Dye v Auckland Regional Council*.[262] In that case, the Court of Appeal noted that, in the case of a non-complying activity, positive support for the activity cannot be expected to be contained in the plan.[263] The question is whether the activity is contrary to the objectives and policies of the plan, properly constructed.[264]

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258 AUP, above n 177, at F2.1.

259 At F2.1.

260 Board decision, above n 173, at [602]. Dr Craig Douglas Bishop is a terrestrial ecologist employed by Auckland Council, called by the Council as an expert witness. In this case Dr Bishop argued that the restoration by Waka Kotahi would require considerable adaptive management, and that trials in degraded areas unaffected by construction should be undertaken to gain more experience and certainty. The Board rejected this suggestion, noting at [603] that the ecosystem restoration plan at issue in this case had a greater chance of success than the Ambury Park restoration because the current Waka Kotahi "proposal is to restore and enhance an existing ecosystem rather than creating a new ecosystem" (footnote omitted).

261 Board decision, above n 173, at [615].

262 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA). That this is treated as the leading case is perhaps a bit odd as the Court in that case was assessing whether there were errors of law in the Environment Court's decision, as the High Court had found, rather than setting a general test. Indeed, the comments on a general approach are very sparse.

263 At [14].

264 At [14] and [23].

The Court of Appeal decided that the Environment Court's view of the plan in that case (effectively allowing for the possibility of development in the relevant area) was open to it "on a fair appraisal of the objectives and policies read as a whole".[265]

[235] Assuming the *Dye* approach is appropriate, I accept the submission of Royal Forest and Bird that the "fair appraisal" must be reached on the basis of the language of the policies themselves, rather than on the basis of an overall judgment. This means that a fair appraisal in terms of *Dye* must take into account (in accordance with *King Salmon*) any avoidance policies that have the effect of what in ordinary parlance would be called rules and which set environmental bottom lines.[266] There were no such avoidance policies at issue in *Dye.* Further, the Court of Appeal in *Dye* said that it did not need to consider what the situation would be if the objectives and policies of a plan were inconsistent with or contrary to the terms of a higher-order planning document or the provisions of Part 2.[267]

[236] Regarding the meaning of the phrase "contrary to" in s 104D, *New Zealand Rail Ltd v Marlborough District Council* defined "contrary to" as meaning "opposed to in nature, different to or opposite" and "repugnant and antagonistic".[268] It also said that contrary must mean "something more than just non-complying".[269] I agree that something more than being non-complying is required, but I am not sure that it is helpful to provide synonyms for the term "contrary to" as the words have an ordinary meaning that can be applied.

[237] The issue remains as to the basis of the assessment under s 104D(1)(b). I see s 104D as a threshold. The assessment of whether the threshold is passed does not take place in the abstract but in the context of the particular project at issue. What is required is a holistic assessment of whether, on the basis of the proper interpretation of the plan as a whole, the particular project could (not would) be granted the relevant resource consents. This is a preliminary assessment only. Whether or not the consents

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265 At [25].
266 See above at [198] and [218].
267 *Dye v Auckland Regional Council*, above n 262, at [24].
268 *New Zealand Rail Ltd v Marlborough District Council*, above n 230, at 80.
269 At 80.

would be granted if the threshold is passed would depend on the outcome of the full analysis under s 104.

[238] Where there are avoidance policies at issue, the preliminary s 104D(1)(b) analysis would require an assessment of the level of seriousness of any breaches of the avoidance policies and a preliminary consideration of any other environmental effects. It would also require a consideration of whether there might be a conflict between directive policies in the sense outlined in *Port Otago*, either on the basis of the language or (possibly) on the facts. It would only be in circumstances where, after such assessment and on a proper interpretation of the relevant plan, a consent clearly could not be granted that a project would fail the s 104D(1)(b) threshold. Treating s 104D as a threshold in this manner seems to me to be consistent with the approach in *Dye*.

[239] Given that the errors of law I identify below made by both the High Court and the Board, including interpretation errors relating to the AUP, apply equally to the threshold question under s 104D as they do to ss 104 and 171, I do not intend to discuss the position under s 104D and its relationship to s 104 in any more detail.

Interpretation of the relevant provisions of the NZCPS

[240] I begin with this analysis of the NZCPS because it is the document that was at issue in *King Salmon* and is above the AUP in the planning hierarchy. The AUP must give effect to it.[270]

[241] The NZCPS has a range of policies that favour infrastructure but also recognise possible environmental effects. Those relevant to this appeal are Policies 6 and 7 (collectively referred to in these reasons as the infrastructure provisions).[271] Policy 6(1)(a) recognises the importance of infrastructure.[272] Policy 6(2)(c) directs

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[270] RMA, s 67(3)(b).

[271] Policy 7 directs decision makers, in preparing regional policy statements, to consider where and how to provide for future development, and to identify areas of the coastal environment where particular activities and forms of subdivision, use and development are inappropriate or may be inappropriate without consideration of effects through a resource consent application or similar process.

[272] Policy 6(1)(b) also recognises the importance of infrastructure, but specifically in connection to population growth.

decision makers to "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 6(2)(d) states that "activities that do not have a functional need for location in the coastal marine area generally should not be located there".

[242] The term "functional need" is defined in the National Planning Standards 2019 as "the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment".[273] This definition is consistent with the term's natural meaning.

[243] Policy 10 deals with reclamation. It provides that reclamations should not occur unless certain conditions are met: that land outside the coastal marine area is not available for the proposed activity; that the activity which requires reclamation can only occur in or adjacent to the coastal marine area; that there are no practicable alternative methods of providing the activity; and that the reclamation will provide significant regional or national benefit. I classify Policy 10 as a hybrid provision. By this I mean that it serves both to enable and constrain development, rather than being a pure avoidance policy or empowering provision. Although it says that reclamations should be avoided, this is subject to an exception where certain criteria are met. These criteria are, however, necessary but not sufficient conditions for reclamation to take place within the coastal marine area.

[244] Policies 11 (Indigenous biological diversity (biodiversity)), 13 (Preservation of natural character) and 15 (Natural features and natural landscapes) are avoidance policies. These policies are directed at protecting particular, specified environmental values. It is also helpful to divide the operative components of these policies into "qualified" and "unqualified" avoidance policies. "Unqualified" avoidance policies are those which merely specify that certain adverse effects should be avoided.

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273 Ministry for the Environment | Manatū Mō Te Taiao *National Planning Standards* (Wellington, November 2019) [National Planning Standards] at 58. See also Ministry for the Environment | Manatū Mō Te Taiao *National Policy Statement for Freshwater Management 2020* (25 January 2024), cl 3.21(1); and Ministry for the Environment | Manatū Mō Te Taiao *National Policy Statement for Indigenous Biodiversity* (7 July 2023) [National Policy Statement for Indigenous Biodiversity], cl 1.6(1). For a recent discussion of the functional need test see *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629 at [38]–[60]. As we had no argument on the point, I make no comment on whether the discussion in that case is correct or not.

"Qualified" avoidance policies require a higher threshold of harm before an adverse effect is required to be avoided (for example, "avoid *significant* adverse effects"). Particularly important for this appeal is Policy 11(a), an unqualified avoidance policy, and Policy 11(b), a qualified avoidance policy, relating to the avoidance of adverse effects and significant adverse effects (respectively) on various indigenous biodiversity values.

[245] The relationship between the infrastructure provisions and the avoidance policies is relevant to this appeal and, in particular, whether the infrastructure provisions can be equated to Policy 8 (Aquaculture) (the aquaculture policy), which was held in *King Salmon* to be subject to the directive avoidance policies on the basis of the different language used.[274] The alternative is that the infrastructure policies are themselves directive and a conflict arises with the directive avoidance policies, as was the case with the ports policy at issue in *Port Otago*.[275]

[246] A core feature of the *Port Otago* decision that the ports policy was directive was the fact that this Court found the word "requires" to be a key verb in the NZCPS ports policy.[276] There is no similar directive wording in the provisions dealing with infrastructure or reclamation. To the contrary, the wording of the infrastructure provisions equates with the aquaculture policy wording at issue in *King Salmon*.[277]

[247] Turning to the hybrid Policy 10 relating to reclamation, although it says that reclamations should be avoided, this is subject to an exception where certain criteria are met. But the Policy does not *require* reclamation to occur if the criteria are met. Whether reclamations should occur, even when those criteria are met, has to be considered against the background of the statement at the beginning of Policy 10(1) that reclamation of land should be avoided. Policy 10 is not therefore a directive policy in conflict with the specific avoidance policies in Policy 11. Rather, it too is subject to the avoidance policies. I do not consider that the mention of the "efficient operation of infrastructure" in Policy 10(3) changes that position.

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274 *King Salmon*, above n 178, at [126]–[132] per Elias CJ, McGrath, Glazebrook and Arnold JJ.
275 *Port Otago*, above n 179, at [69]–[71].
276 At [69].
277 As pointed out by the High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 at [113] and [121].

[248] This means that, except possibly in the limited circumstances I now discuss, the infrastructure and reclamation policies in the NZCPS are subject to the avoidance policies.

[249] It was recognised in *Port Otago* that there was already an established network of ports and that ports by their nature had a (functional) need to be located in the coastal marine area.[278] I do not therefore totally rule out the possibility that *Port Otago* contemplates that a conflict could arise on the facts, even where it does not arise on the wording of the particular policies considered in the abstract. If this is the case, then this would mean that, despite there being no directive wording in the infrastructure policy, a conflict could arise on the facts where there is a functional need for essential infrastructure to be located in the coastal marine area and the only possible location for that infrastructure conflicts with the avoidance policies. If such a conflict were contemplated by *Port Otago*, a structured analysis would apply to the resolution of this conflict.[279]

[250] I do not need to decide if *Port Otago* contemplates a conflict on the facts, however, because the Board's finding was that there was no functional need for the EWL to be located in the coastal marine area.[280] It appears also that there were other available corridors and routes. This means that there could be no relevant conflict on the facts even if *Port Otago* contemplates that this might occur. There is therefore no need to discuss this point any further.

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278 *Port Otago*, above n 179, at [70].

279 The majority relies on the word "generally" in Policy 6(2)(d) to find that the NZCPS contemplates an exception for operational need in some circumstances: above at [112]. The majority says, however, that operational need should only exceptionally justify the location of a development in the coastal marine area: above at [54]. I agree, but this does not mean that the NZCPS contemplates operational need justifying the infrastructure in the coastal marine area where this would be contrary to the directive avoidance policies unless there is a conflict between policies. On the basis of *Port Otago*, a conflict can only arise where there is a directive element in the wording of both policies or, if *Port Otago* contemplates this, a conflict in fact where there is a functional need for the infrastructure to be located in the coastal marine area, as was the case for ports, and where it can only be located in an area subject to the avoidance policies. For a definition of operational need, see below at [272]. I do not accept that my recognition of a possible exception on the facts (if indeed such can exist) conflicts with the strict approach in *King Salmon* (see above at [124], n 119) given that it would not be a freestanding exception but one that would recognise a possible conflict between policies in terms of *Port Otago*.

280 Board decision, above n 173, at [700]. See below at [292].

Interpretation of the relevant chapters of the AUP

[251] The AUP includes a regional policy statement,[281] a regional coastal plan,[282] a regional plan[283] and a district plan.[284] It applies to all of Auckland except the Hauraki Gulf islands.[285] The AUP has 14 chapters. Chapter A is the introductory chapter. The regional policy statement is found in chapter B. Chapter D contains overlays that apply a higher level of protection to certain scheduled areas. These overlays generally align with the NZCPS avoidance policies. Chapter E applies Auckland-wide. It has a number of sections. The most important for this appeal is E26 which deals with infrastructure, including roads. Chapter F contains the regional coastal plan. F2 deals with the General Coastal Marine Zone and governs activities within it, including reclamations.

[252] The Board interpreted the biodiversity and reclamation policies in the AUP "on balance against all relevant provisions",[286] finding that the EWL achieved a level of consistency with the planning framework that was commensurate with its overall benefits.[287] The High Court held that, properly construed, the AUP provides a narrow "framework for the consideration of infrastructure proposals rather than automatically excluding them".[288]

[253] I start my analysis with a discussion of the applicable interpretation principles. I then examine the relationship between the NZCPS and the AUP before moving to the proper interpretation of the AUP. I start with chapters D and F and then turn to chapter E, before discussing the interpretation errors made by the Board and the High Court.

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281 See RMA, ss 59–62.
282 See s 64.
283 See ss 63–70.
284 See ss 72–77.
285 AUP, above n 177, at A1.2.
286 Board decision, above n 173, at [694].
287 At [731].
288 HC judgment, above n 174, at [68]. The High Court's discussion and parts of the Board's discussion of the consistency of the EWL with the AUP took place in the context of the discussion of s 104D. I deal with these in the context of s 104 as I see s 104D as a threshold.

Interpretation principles

[254] The AUP is a lower-order planning document and must give effect to the NZCPS.[289] This means that the AUP should be interpreted in a manner that would make it valid (that is, giving effect to the NZCPS) if possible.[290]

[255] In *Port Otago*, this Court set out the principles for interpreting the NZCPS, essentially derived from *King Salmon*.[291] These principles are equally applicable to interpreting the provisions of lower-order planning documents, with, as noted above, the additional requirement of consistency with higher-order documents.

[256] The Court, reiterating points made in *King Salmon*, said that conflicts between provisions are likely to be rare if the provisions are properly construed, even where they appear to be pulling in different directions. Any apparent conflict between provisions may dissolve if careful attention is paid to the way in which they are expressed.[292] Apparent inconsistencies between provisions can often be reconciled through a close regard to the scheme and purpose of the document in question,[293] reading down one of the provisions,[294] and applying interpretation rules such as the rule that general provisions do not derogate from specific ones.[295] Where provisions conflict, an interpretation that gives both meaning would normally be preferred.[296] If a conflict remains it should be resolved according to the structured analysis set out in *Port Otago*.

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289 See above at [198]–[201]. These requirements apply across the different lower-order documents in the RMA cascade: see s 67(3)(b) (regional plans), s 75(3)(b) (district plans) and s 62(3) (regional policy statements). The RMA also introduces requirements for proposed lower-order documents to be modified so that they will give effect to higher-order documents: s 73(4) contains requirements for a local authority to amend a proposed district plan to give effect to a regional policy statement, and a similar requirement applies to proposed regional plans under s 65(6).

290 See generally Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at 231–232.

291 *Port Otago*, above n 179, at [60]–[63].

292 *King Salmon*, above n 178, at [129] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and *Port Otago*, above n 179, at [63].

293 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 607–612. Though the principles discussed in this text relate to legislation, they are also applicable to the interpretation of the AUP.

294 At 607.

295 At 609–610.

296 At 607–612.

Relationship of the NZCPS and AUP

[257] The Board considered that there was "no specific incongruity" between the NZCPS and the AUP.[297] Any differences between the NZCPS and the AUP were "an anticipated and appropriate particularisation between the national and regional level documents".[298] It therefore made its assessment based on the AUP provisions.[299] The High Court was of the view that the Board was entitled to give effect to the AUP where the NZCPS differs from the AUP.[300]

[258] As in any case of moving from the general to the specific, the AUP contains more detailed provisions that are not carbon copies of the provisions in the NZCPS. As long as these more detailed provisions represent a legitimate application of the NZCPS to Auckland's specific circumstances, then decision makers should of course apply the AUP provisions. However, if the High Court was suggesting that decision makers are entitled to prefer and apply provisions in the AUP that clearly conflict with the provisions of the NZCPS, this is not correct.[301]

[259] In this case no party has challenged the validity of the AUP. If there are, however, provisions in the AUP that do, properly interpreted, conflict with the NZCPS, then the Board should not have applied them.

Chapter D

[260] As noted above, chapter D contains overlays which apply a higher level of protection to certain Significant Ecological Areas (SEA).[302] The most relevant part of chapter D for this appeal is D9 (Significant Ecological Areas Overlay). Broadly, D9.3(9) contains unqualified avoidance policies, including D9.3(9)(a) which directs avoidance of a range of adverse effects on biodiversity (that are "non-transitory or

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297 Board decision, above n 173, at [680].

298 At [680].

299 At [680]. The Board went on to outline how the NZCPS is reflected in various provisions of the AUP: at [681]–[690].

300 HC judgment, above n 174, at [84].

301 In this I agree with the submission of Royal Forest and Bird.

302 The AUP uses overlays to recognise, manage and protect particular values associated with an area or resource. Significant Ecological Areas – Terrestrial (SEA-T) and Significant Ecological Areas – Marine (SEA-M) are overlays which protect areas of important ecological value on land and in marine areas respectively.

more than minor"). D9.3(10) is similar but contains qualified avoidance policies requiring the avoidance of "significant adverse effects".

[261] Waka Kotahi puts forward several arguments, based on an analysis of certain words and phrases, as to why D9.3(9) and (10) are not directive. I have considered those arguments but do not accept them. Viewed overall and in context, the words and phrases referred to by Waka Kotahi either support or do not detract from the directive character of D9.3(9) and (10).

[262] For example, it is submitted by Waka Kotahi that in certain circumstances the policies in D9.3(9) and (10) are qualified, as indicated by the use of the word "while" in D9.3(6) (rather than a stronger phrase like "subject to"). I do not accept this argument.[303] The full phrase is "[w]hile also *applying*".[304] Properly read, the phrase therefore directs that D9.3(9) and (10) be applied, and adds an additional requirement: to avoid "as far as practicable the removal of vegetation and loss of biodiversity". In other words, D9.3(9) and (10) should be applied *concurrently* with the requirement to avoid, as far as practicable, the removal of vegetation and the loss of biodiversity.

[263] I also consider that the majority is wrong to rely on D9.3(8) and D9.3(13) as establishing a tension in D9.[305] Strictly speaking, D9.3(8) applies to those policies "above" and so it does not apply to (9) or (10). It may apply to D9.3(1)(a) which directs the management of effects to the extent stated in (9) and (10) but the phrase "[m]anage … in accordance with" in D9.3(8) can and should be read as requiring the application of directive avoidance policies when they are present. D9.3(13) is worded "[i]n addition to Policies D9.3(9) and (10), avoid structures in Significant Ecological Areas – Marine 1 …". The phrase "in addition to" means that D9.3(13) cannot be read as qualifying (9) or (10) in any way.[306] It is, rather, an *independent* avoidance policy governing structures, to which D9.3(13)(d) is an exception. D9.3(13)(d) has no direct

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303 A similar argument based on the word "while", applied to the definition of sustainable management in RMA, s 5, was advanced and rejected in *King Salmon*, above n 178, at [24(c)] per Elias CJ, McGrath, Glazebrook and Arnold JJ. See above at [199].

304 Emphasis added.

305 Above at [62]. D9.3(9) and (10) were inserted by the High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 980, (2017) 20 ELRNZ 390 to give effect to NZCPS Policy 11: at [47]–[49] and 404–409.

306 The phrase "[i]n addition to Policies D9.3(9) and (10), avoid" was inserted at the beginning of the provision at the same time as (9) and (10) were added: at 410–411.

relation to the avoidance policies at issue in this appeal.[307] Reading the provisions as a whole therefore supports my interpretation.[308]

[264] In any event, a construction of D9.3(9) and (10) that made them less than directive would be contrary to the NZCPS. Such a construction would not be in line with the interpretation principle set out above requiring the AUP to be read as complying with the requirement to give effect to the NZCPS.[309] This means that the avoidance policies in D9.3(9) and (10) must be interpreted as being directive and properly mirroring the avoidance policies in the NZCPS, as adapted to conditions in the Auckland area.[310]

Chapter F

[265] Chapter F of the AUP applies to coastal areas. F2.1 provides that the purpose of the chapter is to provide for use and development in the coastal marine area and, in particular, those forms of use and development that have a functional or operational need to be undertaken in the coastal marine area, while achieving a range of social, cultural and environmental objectives.

[266] F2.1 also provides that, if an activity is proposed in an overlay area, then the provisions of the overlay will also apply. This statement in F2.1 is key to the interpretation of F2, as was recognised by the High Court.[311] As the High Court

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307 This interpretation is supported by the fact that D9.3(13) is, on its face, an avoidance policy of broader scope than D9.3(9) and (10). It directs the total avoidance of structures in SEA-M1 (subject to certain exceptions), without any qualification that structures need have adverse effects. This emphasises the fact that D9.3(13) is an avoidance policy of broader scope (providing broad protections against structures in the coastal marine area) which sits alongside D9.3(9) and (10), and is subject to its own internal exceptions which are necessitated by its broader scope.

308 Contrary to the view of the majority above at [63]. I comment that the fact that D9.3(8) and (13) were present in the AUP before D9.3(9) and (10) were added in fact cuts against the majority's view. D9.3 (9) and (10) were inserted to give effect to directive avoidance policies in the NZCPS and the provisions should be read as achieving that purpose to the extent possible. To allow existing provisions to qualify D9.3(9) and (10) would thwart that purpose and is in fact contrary to the wording of those policies as I explain. It is significant in the case of D9.3(13) that it was amended at the same time as the insertion of D9.3(9) and (10) to clarify the relationship between them.

309 See above at [254]–[256].

310 The meaning of "avoid" is discussed above at [228].

311 HC judgment, above n 174, at [46].

pointed out, F2.1 means that all relevant provisions in F2 are subject to D9 where there is a relevant overlay.[312]

[267] F2.2.3 relating to reclamations is also a key policy in this appeal. F2.2.3(1) provides that reclamation and drainage in the coastal marine must be avoided except in certain circumstances, including where the reclamation will provide significant regional or national benefit and where there are no practicable alternative ways of providing for the activity. F2.2.3(1) is limited not only by F2.1 (which provides that overlays apply) but also by F2.2.3(2) which provides that, where reclamation affects an overlay, decision makers should "manage effects in accordance with the overlay policies". In other words, if an overlay applies, then adverse effects or significant adverse effects (as the case may be) must be avoided.[313]

[268] I also note that the conditions for reclamation to occur in F2.2.3 do not exactly mirror those in the NZCPS Policy 10 in that the vital requirement in Policy 10(1)(b), that "the activity which requires reclamation can only occur in or adjacent to the coastal marine area", is missing. Further, the requirement that land outside the coastal marine area not be available for the proposed activity is also missing.[314] F2.2.3 must be read consistently with the NZCPS. This means the arguably watered-down "no practicable alternative ways" requirement must be read as incorporating those two requirements.

[269] Nor does F2.2.3 appropriately mirror the regional policy statement contained in AUP chapter B. B8.3.2(9) mirrors the test in NZCPS Policy 10. It includes the requirement that (a) land outside the coastal marine area is not available for the proposed activity and (b) the activity which requires reclamation can only occur in or

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312 At [46]–[48].

313 The reasons of the majority (above at [69]) take insufficient account of this provision's strength. F2.2.3(2) was added at the same time that D9.3(9) and (10) were added: *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council*, above n 305, at 422. The provision replaced F2.2.3(1)(d), which had required significant adverse effects on D17 and D21 overlays to be avoided or mitigated. This change was in response to Royal Forest and Bird's submission that the old provision could be read as limiting the avoidance of adverse effects to the D17 and D21 overlays: at [23]. As such, F2.2.3(2) should be read as being intended to give effect to these newly inserted provisions, which were themselves an attempt to give effect to Policy 11.

314 I accept that the requirements of Policy 10 must still be interpreted in a real-world context. Some possible alternatives may be available in the sense of being logically possible, but so infeasible that they are impossible in any real sense. I note, however, that this is still a higher standard than operational need.

adjacent to the coastal marine area.[315] This must also colour the interpretation of F2.2.3.[316]

[270] To summarise, two important points emerge from a correct interpretation of F2. First, on a proper reading of the AUP, F2 is entirely subject to the avoidance policies in D9 where there is a relevant overlay. Secondly, the F2.2.3 test for reclamation (even in areas not covered by overlays) must be read as incorporating the more stringent NZCPS test in Policy 10 to avoid inconsistency with the NZCPS.[317]

Chapter E

[271] Chapter E applies Auckland-wide. Most relevant to this appeal is E26 (Infrastructure).[318] E15 (Vegetation management and biodiversity), E18 (Natural character of the coastal environment) and E19 (Natural features and natural landscapes in the coastal environment) are also of relevance.

[272] E26.2.2 sets out various policies which govern how decision makers should assess the development of infrastructure. E26.2.2(2) requires that decision makers

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315 The majority finds that the regional policy statement envisages occasions where infrastructure will be located in overlay areas, and that decision makers in these situations must ensure projects avoid adverse effects where practicable and otherwise remedy or mitigate them: above at [52]; and see also AUP, above n 177, B3.2.2(3) and (6). But, as far as the coastal marine area is at issue, such an interpretation (provided that the relevant adverse effects are more than minor or transitory, or are significant, as the case may be) would be contrary to the NZCPS and *King Salmon*. In any event, it is contrary to the proper interpretation of chapters D, E and F in the regional coastal plan sections of the AUP. These chapters contain the operative provisions derived from the regional policy statement.

316 RMA, s 67(3)(c).

317 In coming to a different view of F2, the majority places key reliance on the activity table in F2.19.1 which it argues "contains the rub": above at [71]. But designating more than minor reclamation in SEA overlays as non-complying is not the same as permitting the overriding of avoidance policies. The avoidance policies in the NZCPS are environmental bottom lines that must be reflected in lower-order documents. In any event, there is not an inevitable correspondence between an activity occurring in a SEA and an activity breaching an avoidance policy. The majority rightly notes that a more than minor reclamation (allowed by F2.19.1) is also likely to be a reclamation with more than minor adverse effects. Even if this is correct, a more than minor reclamation will not necessarily be a reclamation which leads to the adverse effects prohibited by D9.3(9) or a reclamation rising to the threshold of having "significant" adverse effects, as contemplated by D9.3(10). A reclamation might, for example, not materially affect the values protected by D9.3(9) and have more than minor but less than significant adverse effects on the values protected by D9.3(10). In a situation like this, the adverse effects of the reclamation could be remedied or mitigated per D9.3(10) and it would not be prohibited by the avoidance policies. This means that to apply D9.3(9) and (10) as bottom lines is not inconsistent with F2.19.1. Nor would it make F2.19.1 powerless.

318 I note that E26 is not part of the regional coastal plan.

provide for the "development, operation, maintenance, repair, upgrade and removal of infrastructure" by recognising various considerations. These include "functional and operational needs"[319] and "location, route and design needs and constraints". Functional need[320] is distinct from "operational need" which is "the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints".[321]

[273] E26.2.2(4) requires the development, operation, maintenance, repair, upgrading and removal of infrastructure to "avoid, remedy or mitigate" adverse effects, including "values for which a site has been scheduled or incorporated in an overlay".[322] E26.2.2(5) directs that decision makers consider various matters when assessing the effects of infrastructure, including factors which pertain to the adverse effects and factors which pertain to the benefits of the infrastructure.

[274] E26.2.2(6) sets out a number of matters that must be considered where new infrastructure (like the EWL) or major upgrades to existing infrastructure are proposed

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319 The inclusion in the AUP of "operational need" as well as "functional need" was explained by the AUP Independent Hearings Panel in July 2016: Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 008 Coastal environment* (22 July 2016) at [3.1]–[3.2]. The Panel said that the NZCPS places "places a clear emphasis on providing for activities in the coastal marine area that have a functional need to locate there, and generally not providing for activities that do not": at [3.2]. The Panel, however, expressed concern "that some infrastructure, including roads, cables and pipelines, might have to be routed for considerable extra distances to go around inlets or harbours when they could more efficiently cross the coastal marine area": at [3.2]. It said that: "While these activities did not have a *functional* need to be in the coastal marine area, there may be very good *operational* and/or efficiency reasons why it would be appropriate to enable these activities to be in the coastal marine area": at [3.2] (emphasis added). It seems that the Panel thought its approach was supported by the National Policy Statement on Electricity Transmission, which provides that decision makers must consider constraints on environmental protection measures (including avoidance) imposed by the technical and operational requirements of the network: "National Policy Statement on Electricity Transmission" (13 March 2008) 58 *New Zealand Gazette* 1631, Policy 3. But the use of operational need as a justification for development in the AUP goes further than just providing for electricity transmission.

320 For a definition of functional need see above at [242].

321 National Planning Standards, above n 273, at 62. See also National Policy Statement for Indigenous Biodiversity, above n 273, cl 1.6(1). I comment that the NZCPS does not contemplate operational need as a matter-of-course justification for activity in the coastal marine area. Specifically, Policy 6(2)(d) of the NZCPS directs that decision makers "recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there". There may therefore be a disconnect between the AUP and the NZCPS in this regard, but this is not of any moment in this case given the conclusion below that E26 is subject to D9.

322 Since I find that E26 is subject to the avoidance policies in D9, I would interpret E26.2.2(4) as allowing adverse effects to be remedied or mitigated insofar as this renders harm less than material or significant (as the case may be).

within areas scheduled in the plan in relation to "natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character". This includes:

> (h) whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.

[275] Although it is set out in a list of matters to "consider", I accept the submission of Royal Forest and Bird that the verb "must" in E26.2.2(6)(h) can and should be interpreted as recognising the directive character of the NZCPS avoidance policies and the provisions of the AUP, including D9, that apply them.

[276] In *Port Otago* this Court held that to recognise something is required is to accept that it is mandatory.[323] Analogously, to "consider" if adverse effects "must be avoided pursuant" to a statement, standard or plan implies that the relevant avoidance policy in the statement, standard or plan has mandatory effect. The thing a decision maker must "consider" is not whether or not it should choose to obey the avoidance policy. Rather, it is whether any avoidance policy applies and, therefore, "must" be obeyed.

[277] This means that E26.2.2(6)(h) would operate to require the avoidance of adverse effects or significant adverse effects (as the case may be) of infrastructure in the overlay areas. Any other interpretation would mean there was not the required consistency with the NZCPS.[324]

[278] That E26 must be read subject to chapter D is even clearer where infrastructure requires reclamation, as in the case of the EWL. I have already held that F2 is subject to overlay avoidance policies like those contained in D9. The combination of F2 and D9 will trump E26 because F2 and the overlay avoidance policies apply at a greater level of specificity: E26 deals generally with infrastructure but F2 comes into play

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323 *Port Otago*, above n 179, at [69].

324 It would also mean that the general provisions enabling infrastructure would override the directive nature of the specific provisions in D9 and mean they have no effect. This would not align with the general interpretation principles whereby specific provisions usually prevail over more general ones and the principle that, where provisions conflict, an attempt should be made to give as much meaning as possible to both provisions: Carter, above n 293, at 607–609.

when this infrastructure requires reclamation within an overlay. This combined operation of F2 and D9 is also largely consistent with the NZCPS. But in any event, consistency between E26 and the NZCPS is achieved by E26.2.2(6)(h) making E26 subject to D9.

[279] That E26 is subject to the avoidance policies and the overlays in D9 is reinforced by the existence of E15, E18 and E19, which are in the same chapter as E26 and which also apply Auckland-wide. They are protective of environmental values. Both E18 and E19 deal in large part with activities which occur adjacent to, or otherwise affect, values in scheduled areas. They thus reinforce the importance of the scheduled areas.

Errors in interpretation of reclamation provisions

[280] Turning first to reclamation, the Board gave an incorrect summary of F2.2.3 as merely requiring a decision maker to "consider" the relevant provisions of D9,[325] when in fact F2.2.3(2) requires effects to be managed in accordance with any overlays. In any event, the High Court was correct to hold that F2.1 means the whole of F2, including the reclamation policies, must be read as being subject to overlays. Contrary to the position taken by the Board, the High Court was correct when it held that there was nothing in F2 that purports to authorise a project on the scale of the EWL where that project is contrary to the policies in D9.[326]

[281] The Board also erred in its interpretation of F2.2.3(1) when it stated that F2.2.3(1)(b) was just one subclause among others, and that it was sufficient to reach a decision based on a cumulative assessment of the AUP as a whole.[327] As the Board itself acknowledges, F2.2.3(1) is worded inclusively: it is plainly a conjunctive test which governs when reclamations will be permissible. This interpretation also follows from the corresponding structure of NZCPS Policy 10(1). It was not open to the Board to hold that the question of practicable alternatives was just one consideration amongst others.[328] It was a necessary gateway, without which reclamation had to be avoided.

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325 Board decision, above n 173, at [629].
326 HC judgment, above n 174, at [48]
327 Board decision, above n 173, at [628].
328 See also the reasons of the majority above at [161]–[162].

[282] In any event, as I note above, to the extent possible F2.2.3 must be read consistently with the NZCPS and regional policy statement requirements that the activity requiring reclamation can only occur in or adjacent to the coastal marine area and that land outside the coastal marine area is not available for the proposed activity, and the requirement that there is "no practicable alternative" must be read accordingly.

[283] The Board considered that the AUP appropriately particularises the NZCPS, taking account of the particular circumstances in the region. It commented that the narrowness of the Auckland isthmus and the concentrated industrial area the EWL is designed to serve made the planning process akin to "threading a needle".[329] I do not agree with that reasoning. While these geographical factors are relevant to the application of any criteria for reclamation (for example whether an activity requiring reclamation can only occur in the coastal region), they cannot justify watering down the NZCPS reclamation test.[330]

A window for infrastructure?

[284] For the reasons discussed above, the Board erred in failing to find that E26 is subject to D9 and F2.[331] I note that some provisions in E26 may suggest a contrasting process of assessment which directs decision makers to undertake a fundamentally different kind of inquiry to the one envisaged by D9. But this contrasting process cannot displace D9. In addition, I note, as discussed above, that E26.2.2(6)(h) in any event operates to require the avoidance of adverse effects or significant adverse effects (as the case may be) in line with the NZCPS.[332]

[285] Despite being correct in its analysis of the relationship between chapter D and F2, the High Court considered that E26 is something of a code for infrastructure requiring a "careful and balanced look at the merits" of individual infrastructure proposals and that this provides a window for the approval of projects even if they do not meet F2 or D9.[333] For the reasons I have already explained, I consider that the

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329 Board decision, above n 173, at [223].
330 The majority makes a similar error: above at [84].
331 See above at [271]–[279].
332 See above at [275]–[277].
333 HC judgment, above n 174, at [66]–[68].

High Court erred when it effectively held that the enabling policies in E26 are able to override both D9 and F2. The High Court's analysis also ignores E26.2.2(6)(h).

[286] I therefore do not accept the submission of Waka Kotahi that the more general enabling provisions in E26 are able to override the more specific directive ones, albeit they are coloured by them. I do not consider that this approach would create only a "narrow window" for the avoidance provisions to be overridden. Getting through the alleged "narrow window" would only require there to be mitigation and offset measures and for the specific requirements of the enabling provisions to be met. As submitted by Royal Forest and Bird, any competently prepared application for resource consent should be able to achieve those requirements. I also accept the submission that every region has regionally significant projects and accommodating these by overriding the avoidance policies would mean the exception would risk becoming the rule.[334]

[287] At the risk of being trite, if Waka Kotahi's submission is accepted, the "narrow window" would be wide enough to allow in this case a four-lane highway to be driven through areas protected for their high environmental value and, what is more, a four-lane highway that has no functional need to be located in the coastal marine area and where alternative routes were available.[335]

[288] The High Court placed some reliance for its interpretation on chapter A. Chapter A provides no assistance. I accept that it refers to growth, development and protection, but this simply reflects the statutory definition of sustainable management. It does not prioritise growth and development over protection. As this Court held in *King Salmon*, protection of the environment is an element of sustainable management and protection of the environment through avoidance policies is a legitimate choice made by the NZCPS.[336] This choice must be, and is, reflected in the AUP.

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334 I accept that the exception found by the majority is narrower than the approach proposed by Waka Kotahi. It is, however, of uncertain scope as discussed further below.

335 See above at [250]; and below at [291].

336 See above at [196].

Summary of interpretation errors

[289] In summary with regard to the avoidance policies, I conclude that the Board and the High Court erred in law when they failed to hold that E26 and F2 are subject to D9. The Board, and to a lesser extent the High Court, failed to take into account the explicit provisions in the AUP making it clear that the avoidance policies prevail. That the NZCPS avoidance policies must be applied under E26 is made explicit by E26.2.2(6)(h). In the case of reclamation, chapter D will overarch the inquiry, given the effect of F2.2.3(2) and F2.1. The High Court was correct when it concluded that D9, F2 and E15 all stand together to require the application of the avoidance policies contained in D9.[337] The High Court erred in its reliance on chapter A to allow development contrary to the avoidance policies. There is no window, narrow or otherwise, that allows infrastructure to breach the environmental bottom lines set in both the NZCPS and the AUP.

Effect of interpretation errors

[290] These interpretive errors affected the Board's and the High Court's analyses under ss 104D, 104 and 171. A consequence was that the Board and the High Court did not undertake a proper factual assessment of whether the measures proposed by Waka Kotahi (including offsets) brought the harm down to levels that met the avoidance policies, as discussed further below.

[291] With regard to the proposed reclamations more generally, including outside overlay areas, the Board and High Court erred when they did not interpret the "no practicable alternative" requirement in accordance with the other relevant criteria for reclamation in NZCPS Policy 10(1): that the activity can only occur in the coastal marine area and that land outside the coastal marine area is not available. The Board also erred when it said that the "no practicable alternative" requirement was just one requirement amongst others and that it could be considered as part of a cumulative assessment rather than needing to be directly and separately applied.[338]

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337 HC judgment, above n 174, at [48]–[53].
338 Above at [281].

[292] On the basis of the Board's findings, the requirements for reclamation in NZCPS Policy 10(1) appear not to have been met. The Board accepted that there was no functional need for the EWL to be located in the coastal marine area but only an operational need.[339] It also accepted that the selected "route is there by choice, not functional necessity".[340] This means therefore that the EWL does not meet the NZCPS and regional policy statement criterion of an activity only being able to occur in or adjacent to the coastal marine area. Nor does it meet the requirement of land outside the coastal marine area not being available.[341]

[293] I do accept that the reclamation was accompanied by environmental protection measures that would not have occurred absent the project.[342] While some of these measures might be available offsets to meet the avoidance policies,[343] they would not turn what is at most an operational need for the EWL into a functional need. The protective measures would also not meet the requirement that the project could only be situated in the coastal marine area and certainly could not have any bearing on the requirement that land outside the coastal area not be available.

Assessment of the EWL

[294] I now examine how the Board and the High Court assessed the EWL in light of the avoidance policies in the NZCPS and the AUP.

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339 Board Decision, above n 173, at [700].

340 At [699]. The Board said that Waka Kotahi had selected its preferred route after a detailed consideration of the pros and cons of different options: at [699] and [1321]. According to the Board, the chosen route provides the most enduring transport benefits: at [254], [627(b)] and [1359]. The Board also noted at [627(b)] that "[i]f unencumbered by topography or development, it is intuitive that there will be a practical alternative landward route suitable for the provision of a road". It went on to say, however, that possible landward routes are "fully developed with industrial, commercial and residential land uses".

341 The "no practicable alternative" requirement in F2.2.3 must be read as including these requirements. The majority seems to transfer the elements of Policy 10 into its exception (see the summary above at [118]) and conclude that this justifies overriding the avoidance policies. This is problematic first because Policy 10 (and F2.2.3 in the AUP) only applies to reclamations and secondly because the conditions in Policy 10 do not empower development in contravention of avoidance policies (they are *necessary but not sufficient*). For the latter point see above at [243] and [247]. Policy 10, properly interpreted, is in any event subject to the avoidance policies, and F2.2.3 is explicitly made subject to the overlays in chapter D: above at [247] and [267].

342 See above at [192] and [227]–[232]; and below at [311]–[315].

343 As discussed later, see below at [314].

The decisions below

[295] The Board said that it was clear from *King Salmon* that the directive policies in the NZCPS are entitled to "very significant weight" (and that it had given them such weight).[344] However, it said that s 104 only required the Board to have regard (or "particular regard" in the context of s 171) to the NZCPS, rather than requiring it to give effect to the NZCPS.[345] There were other factors to consider and the Board was required to make "a *balanced judgment* taking account of all such factors".[346] The Board considered that, despite "aspects of inconsistency", the proposed EWL "achieves a level of consistency with the planning framework *commensurate with the overall benefits of the Proposal*".[347] The Board's overall conclusion was expressed in terms of the proposal's compliance with Part 2 but with no specific mention of the avoidance policies.[348]

[296] As noted above, Waka Kotahi proposes a package of ecological mitigation and offsets to address all ecological effects of the EWL. The approach was described by the Board as follows:[349]

> The approach taken was to assess a bucket of effects across the areas of ecology and develop a bucket of mitigation and offset, as it is not possible to propose like-for-like mitigation for effects such as permanent loss of marine habitat.

[297] The Board noted that there was agreement by experts that the "integrated ecosystem approach to effects, mitigation and offset is appropriate".[350] The experts were also agreed that the mitigation and offsets proposed were finely balanced and contingent on successful implementation of all measures.[351] In general, the Board approved of that approach provided the scale of effects was acceptable. It considered that "an outcome that at least balances the ecological effects through mitigation and

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344 Board decision, above n 173, at [175].
345 At [175].
346 At [175] (emphasis added). It spoke in similar terms about the avoidance policies contained in the AUP: at [694] (emphasis added). As noted earlier, the Board was of the view that the AUP appropriately reflected the NZCPS.
347 At [731] (emphasis added). The Board, at [1301], made a similar point in relation to s 171.
348 At [1396]–[1397].
349 At [578] quoting evidence given by Dr Sharon Betty De Luca, a senior ecologist at Boffa Miskell Ltd specialising in marine ecology who was called as an expert witness by Waka Kotahi.
350 At [581(a)].
351 At [581(b)].

offset benefits is an appropriate requirement".[352] This had been achieved "through the deletion of the sub-tidal dredging, modification or deletion of headlands, and implementation of the additional ecological mitigation and offsets proposed".[353]

[298] The Board accepted that there would be "direct adverse effects on rare and threatened species" but that these would not "compromise the viability of those populations or ecosystem types".[354]

[299] In terms of avifauna the Board acknowledged that "because the direct impact of the reclamation is permanent and cannot be avoided, offsets are the primary means of addressing effects on shorebirds".[355] The offsets highlighted by the Board included the enhancement of South Island breeding sites for bird species affected by the EWL, the restoration of saltmarsh and lava shrubland ecosystems and the restoration of Ngā Rango e Rua o Tainui Island as a roosting site,[356] as well as "research into recolonisation of inter-tidal soft and hard food sources for foraging birds".[357] The Board was satisfied that "the potential impacts that the Proposal will have on shore birds can be adequately mitigated and offset, with some modification of the design and construction methodology".[358] These changes would make the mitigation and offset package less finely balanced.

[300] Regarding Anns Creek East, the Board noted the evidence that the viaduct had been designed to be located in the more modified northern edges of the creek and that the location of piers would be designed to avoid sensitive areas of lava shrubland. The Board found that the road alignment across Anns Creek East had, "to the extent practicable, avoided the rare and threatened ecosystems".[359] The same evidence noted that there would be significant effects during construction of the viaducts and ongoing

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352 At [614].
353 At [614].
354 At [614].
355 At [584].
356 At [584] and [592].
357 At [600]. The Board was satisfied that appropriate modification had been made to the avifauna research conditions to require Waka Kotahi to deliver the research outcomes and that, even if recolonisation was not successful, contribution to the body of scientific knowledge is a satisfactory offset benefit of the research: at [601] and [606].
358 At [605].
359 At [706].

operational effects, including shading, rain shadowing and invasion of weeds.[360] The Board was, however, satisfied that the effects of the construction activity and the shading caused by the viaducts that had not been avoided would be adequately mitigated or offset.[361]

[301] The High Court did not deal specifically with many of the issues above but it did uphold the Board's decision.

Errors in the Board's approach

[302] First, the Board erred by not treating the avoidance policies as binding in accordance with *King Salmon.* As discussed above, *King Salmon* applies to resource consents and sets environmental bottom lines.

[303] Secondly, the Board erred when it said that the EWL was consistent with the planning framework to an extent that was "commensurate with the overall benefits of the Proposal".[362] This remark is important, as it highlights the Board's view that the more benefits the EWL delivered, the more it could be allowed to be inconsistent with the planning framework. This is not the correct approach. A greater level of non-environmental benefit (for example, benefits to infrastructure) will not override breaches of avoidance policies. If this were the case, the status of avoidance policies as environmental bottom lines would be eroded.

[304] A corollary of the above error is that the Board relied on the benefits of the proposal, and Part 2 generally, to water down the choices made in the NZCPS and AUP requiring the avoidance of adverse effects (either under qualified or unqualified avoidance policies). To rely on Part 2 to subvert avoidance policies contained in planning documents is to violate Part 2 itself by ignoring the fact that environmental protection through directive avoidance policies is an aspect of sustainable management and therefore a legitimate choice in planning documents.[363]

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360 At [592].
361 At [611].
362 At [731]; and see above at [252] and [295].
363 *RJ Davidson*, above n 180, at [71]; and see above at [224].

[305] The Board appears to have taken an overall judgment approach. This is clear from the Board's references to the need to *balance* various considerations in its reasoning, as highlighted above.[364] *King Salmon* held that the overall judgment approach is no longer valid where there are directive avoidance policies.[365] The Board did say that it accorded particular weight to the avoidance policies.[366] However, this too is not the proper approach. In the context of the AUP the directive avoidance policies operate as environmental bottom lines. They are therefore not policies merely to be accorded significant weight and balanced against the benefits of the project generally.

[306] The Board's erroneous view of its role and the law led to its third error. Its task was to assess whether the requisite avoidance policies, construed in light of the values they are designed to protect, could be complied with. In the case of the protected areas this meant assessing whether the adverse effects on the values protected were less than material or less than significant (as the case may be) because of the proposed mitigation or other relevant measures (such as offsets discussed below). It did not do this, largely because of the bucket approach taken, to which I now turn.[367]

Bucket approach

[307] Waka Kotahi confirmed at the hearing that the integrated bucket approach taken by the Board did not just include the values at issue in this appeal but all the other ecological issues that are not at issue in the appeal. This meant in the metaphorical "bucket" there was consideration of mitigation and offsets relating to, for example, lizards, freshwater issues and relating to coastal issues more generally.[368]

[308] This is important. If, within the bucket, harms to a bird species are balanced, for example, against measures of general benefit to the environment (but which do

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364 See above at [252], [295] and [297].
365 See above at [195]–[205] and [213]–[226].
366 Board decision, above n 173, at [662].
367 The Board also assessed negative and positive effects on an aggregate population-level basis. This caused it to err in its assessment of the necessary threshold for adverse effects on avifauna, which I discuss below in the context of Waka Kotahi's notice to support the decision on other grounds: see below at [317].
368 Counsel for Waka Kotahi said, in answer to a question at the hearing, that this did not mean, however, that lizards were traded off against birds, but did not explain why.

nothing to help that bird species), then the latter, while providing environmental benefits of another kind, cannot operate to bring harm down to less than material or significant in line with the avoidance policies.[369] It was not open to the Board to engage in a trade-off of this kind to the extent it balanced breaches of the avoidance policies against benefits to other environmental values.[370]

[309] I also comment that, depending on the ecological effects included in the bucket, the bucket approach could operate to obscure the significance of environmental effects and therefore lead to discounting them, even where avoidance policies are not at issue. Environmental values are not necessarily commensurable with each other. Assessing them in the round could lead decision makers to treat harm to important environmental values as having been effectively compensated for by benefits to less important values.

[310] I am not to be taken as suggesting that an integrated approach to the assessment of environmental benefits and harms is unnecessary or inappropriate. Underlying any integrated approach, however, there must be transparency in terms of identifying all environmental values at issue, assessing the extent to which they are affected (taking account of any mitigation, remediation or offset measures) and also assessing the importance of each environmental value affected.[371] Where avoidance policies are at issue, it must be clear that these have not been breached. Otherwise, any balancing will breach the environmental bottom lines set by the avoidance policies. At the risk of labouring the point, such transparency was lacking in the assessment undertaken by the Board in this case. In particular, the Board did not assess whether the proposed offset measures brought the harm down to less than material or significant (as the case may be).

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369 See above at [229].

370 There is some indication in the Board decision that it may have been doing this. In its decision, above n 173, at [578], the Board quotes an example of the bucket approach given by Dr De Luca. The example given is that, although permanent loss of marine habitat will occur due to the project, measures will be undertaken to enhance freshwater ecological values. This was to be done even though impacts on freshwater ecological values were not particularly significant. In this example, it seems that two different kinds of ecosystem (freshwater and saltwater) are being traded off against each other.

371 I accept that the different effects of the EWL on various ecological values were worked through in the evidence, but I must limit the analysis to the approach taken by the Board in explaining its decision.

Offsets in this case

[311] Failure to avoid adverse effects in contravention of avoidance policies will be an error of law. This is because the NZCPS sets those policies as environmental bottom lines. It is appropriate therefore to make some comments on whether the offsets proposed by Waka Kotahi were capable in law of meeting the avoidance policies, meaning bringing harm down to less than material or significant (as the case may be). Whether they in fact did so, properly assessed, I accept is a question of fact.[372]

[312] In the case of avoidance policies that apply to indigenous flora and fauna, like those in NZCPS Policy 11 and chapter D of the AUP, it seems clear that these policies are intended to protect particularly vulnerable values or populations at the point of impact of the harm. As such, for the benefits from offsets to bring the harm down to a less than material level, I consider that they must apply to the particular local values or populations at the point of impact, rather than the values or populations more generally.

[313] Because of the bucket approach taken and the Board's broader reliance on the overall judgment approach, the Board did not analyse the extent to which particular offsets met the avoidance policies. This means that I can make no definitive finding on whether the proposed offsets at issue meant that the avoidance policies were met.

[314] I accept, however, that some of the offsets proposed by Waka Kotahi might be capable of operating to bring harm down to less than material or significant, provided there was the proper level of caution applied to the assessment. These include the restoration of saltmarsh and lava shrubland ecosystems and restoration of Ngā Rango e Rua o Tainui Island as a roosting site. The enhancement of South Island breeding

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[372] See the reasons of the majority above at [176]. I note that the majority states that "[t]he relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies": above at [176]. While I agree that a fact-centred approach is necessary, some consideration of whether a given offset measure is available at law to meet an avoidance policy is totally unavoidable, as I discuss above at [229]. To give an obvious example, if a given avoidance policy (properly constructed) was intended to protect birds, then offsets which only benefitted lizards could not (as a matter of law) satisfy that avoidance policy. Similarly, if a given offset delivers some benefit to an ecological value protected by an avoidance policy but cannot bring the harm down to less than material or significant (as the case may be), it cannot meet the avoidance policies.

sites may be capable of meeting the avoidance policies, in light of Waka Kotahi's submission that it would have a direct effect on the birds in the relevant area covered by the EWL.

[315] On the other hand, the research into the recolonisation of food sources for foraging birds could have no direct and tangible effect on the values protected by the avoidance policies. Even if the research showed that "successful mitigation could be achieved on the ground",[373] further measures would be needed to apply the results of the research. This is not to discount the benefits of research, or to suggest that it was not relevant to the ss 104/171 analysis. The research just could not be taken into account in any assessment of whether the avoidance policies had been met, as it was not capable of bringing down harm to the requisite levels.

Notice to support the decision on other grounds

[316] In its notice to support the decision on other grounds, Waka Kotahi submits that the High Court erred when it concluded that there was an inconsistency in the Board's reasoning concerning the impact on avifauna.

[317] The Board accepted that the coastal works would mean "there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant."[374] The Board said, however, that the works would not impact on the overall population of those species or their presence in the Māngere Inlet or adjacent coastal areas. The birds would opportunistically feed elsewhere.[375] Provided there was adequate mitigation and offsets, the effects of the reclamation and coastal structures were acceptable in light of the benefits of the EWL.[376]

[318] The High Court considered that such a finding could not be sustained in light of the Board's finding that there would be a permanent loss of feeding and roosting areas and that these effects were significant.[377] But the High Court considered that

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373 Board decision, above n 173, at [606].
374 At [471].
375 At [645].
376 At [471].
377 At [471].

this error was not material, given that the "ultimate issue" was whether the EWL was "contrary to the objectives and policies of the AUP" (taken as a whole) rather than whether there were failures to comply with particular provisions in D9.[378]

[319] I do not accept Waka Kotahi's submission that the High Court erred when it concluded that the Board's findings on avifauna are inconsistent. The fact that birds may "opportunistically" feed elsewhere and that there would be no effect at the population level (whether local or otherwise) does not alter the fact that there would be a loss of feeding grounds that the AUP had considered merited protection.

[320] If area A is a habitat of local population B, it is hard to see how a significant impact on A would not have at least a more than minor impact on B. This seems to follow from the nature of a habitat as a location serving the needs of a local population. The only way to counter this proposition is to hold, as the Board did, that there will not be a significant impact because population B will opportunistically feed elsewhere.[379] But permanent habitat loss necessitating opportunistic feeding is a more than minor impact on a local population: the local birdlife has been forced to alter its feeding pattern in a material way.[380]

[321] I also note that D9.1 refers to loss of biodiversity *and* habitats. This indicates that the protection of habitats is important in itself in the context of the AUP. Further, the protection of habitats of fauna is listed as a matter of national importance under s 6(c) of the RMA. Also, to the extent that any opportunistic feeding would take place outside of the birds' current feeding grounds, this may not be subject to overlay protections. Whatever new feeding areas the birds might acquire could potentially be removed by a development which is allowed under the AUP. Fundamentally, it cannot

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378 HC judgment, above n 174, at [43]. See the discussion of the errors in this approach to the avoidance policies above at [285]–[288] and the errors made by the Board as a result of this approach: see above at [302]–[306].

379 William Young J considers that the fact "the birds will feed and roost elsewhere in the vicinity" is a plausible reason to find that negative effects on habitat will not themselves equate to adverse effects on bird species or local populations: below at [402]. But the majority has sympathy with the view of Powell J, finding it would be difficult to find that effects were not more than minor unless feeding and roosting areas outside the overlay were in such plentiful supply as to render any adverse effects minor or transitory only: above at [167].

380 I see the approach of William Young J as undercutting the precautionary principles identified in Policy 3 of the NZCPS. It would also more generally inhibit efforts to tackle the range of issues facing the coastal marine area identified in the NZCPS preamble.

be that the ability to feed in non-protected areas is sufficient reason for allowing development in protected areas. This undercuts the very reason that overlay areas exist.[381]

[322] I accept the submission of Royal Forest and Bird that the error I discuss above was material to the Board's decision, contrary to the finding of the High Court.[382] This is because the conclusion on avifauna was a material factor in the Board's overall finding that the EWL was not contrary to the AUP.

Comments on the reasons of the majority and William Young J

[323] In this section I offer some comments on the reasons of the majority and William Young J. I first summarise the potential exception to the avoidance policies found to exist by the majority and the wider exception proposed by William Young J. I then assess the extent to which these exceptions are inconsistent with prior caselaw and in particular with *King Salmon* and *Port Otago,* before critiquing the reasons the majority puts forward for its exception. After that, I deal with issues relating to the scope of the exceptions and the lack of certainty, and finally discuss the majority's reasons for allowing the appeal.

The exceptions found by the majority and William Young J

[324] The majority and William Young J hold that the avoidance policies do not create environmental bottom lines. Rather, as the majority puts it, "wriggle room is built into the policy layers of the system".[383]

[325] In summary, the majority finds that significant infrastructure requiring reclamation may be located in a SEA if:[384]

> (a) it is a necessary—and not just a desirable—solution by reference to functional or operational need, the regional or national benefit

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381 See also the reasons of the majority above at [166]–[167].

382 Given this conclusion, I do not need to comment on the other points raised in Waka Kotahi's notice to support on other grounds which are in any event effectively covered in my discussion related to the interpretation of the NZCPS and the AUP above.

383 Above at [99].

384 Above at [118] (footnote omitted). In laying out these requirements the majority draws on various criteria which occur across the AUP and, in particular, with regard to reclamation. The majority's view seems to be that there is an underlying agreement across the AUP on a narrow pathway for

obtained, and the absence of any practicable alternative locations or solutions;

(b) adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard; and

(c) the benefits of the solution plainly justify the environmental cost of granting consent.

[326] The majority explains that the proposal must "provid[e] for environmental offset and compensation packages that both minimise and make up for the damage the proposal will do in the SEA".[385] In addition, "the consent authority will still need to be satisfied that any remaining harm is justified".[386] Policy 11 of the NZCPS will, it says, continue to have a "powerful shaping effect" on lower-order documents.[387] The majority emphasises that it will "be very difficult, but not impossible" for a proposal to fit within this exception.[388]

[327] William Young J also finds that there is flexibility in the avoidance policies.[389] In his view, this follows from their function, the fact that they do not require activities to be prohibited (as against non-complying) and the differences in statutory wording in ss 104D, 104 and 171[390] compared to the plan change provisions at issue in *King Salmon*. His is a much more open-ended flexibility compared to the pathway laid out by the majority.

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major infrastructure. While certain phrases do occur across the AUP, these are each in their own context. They cannot be extracted and generalised into one cumulative exception and must be understood in light of the fact that, on a proper interpretation of the AUP, the infrastructure provisions in E26 and the reclamation provisions in F2 are all subject to chapter D. There is no unitary pathway in the AUP for major infrastructure.

385 Above at [119].

386 Above at [119].

387 Above at [110]. This point is similar to Waka Kotahi's submission (discussed above at [216] and [225]) that avoidance policies ought to be treated only as "strong policy directives", which as I have noted would involve overruling *King Salmon*. See in particular the comments of this Court in *King Salmon*, above n 178, rejecting the view that the NZCPS merely provided guidance or set out relevant considerations of different weight: at [128]. Neither the majority nor William Young J put forward any plausible reason to override such a recent decision of this Court.

388 Above at [91]. See also, for example, above at [111], [143]–[144] and [168].

389 Below at [380]–[395].

390 For my discussion on the differences in statutory wording see above at [219]–[222]; and see also the reasons of the majority above at [108]. I do not accept the majority's description at [121] of their exception as merely "further refinement". *King Salmon* held that the avoidance policies in the NZCPS can and should "control the outcome" as environmental bottom lines. It did not contemplate any "area between these extremes". To add such an exception is contrary to *King Salmon.*

Inconsistency with prior caselaw

[328] The approaches of the majority and William Young J are contrary to *King Salmon* for all of the reasons I set out above when assessing Waka Kotahi's submissions on this issue.[391] To summarise, they fail to recognise the NZCPS avoidance policies as environmental bottom lines (as they were held to be in *King Salmon*).[392] There would be little point in the elaborate planning process if the environmental bottom lines set in higher-order documents could be effectively set aside at resource consent level, whether with difficulty or not.[393]

[329] *King Salmon* already outlines a number of exceptions and qualifications.[394] If there were a freestanding exception of the kind the majority contemplates then one would have expected it to have been included in *King Salmon*, and it was not. It is unsurprising that the majority's proposed exception was not one of the exceptions or qualifications outlined in *King Salmon*.[395] This is because it would undermine the environmental bottom line approach taken in the NZCPS and upheld in *King Salmon*.[396]

[330] The exceptions found by the majority and by William Young J are also contrary to *Port Otago*: not just contrary to the particular approach in *Port Otago*, but to the entire rationale that underpinned the decision. While the general nature and importance of ports was considered in *Port Otago* and was highly important,[397] this consideration occurred in conjunction with a careful focus on the issue of whether the

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391 Above at [213]–[226].

392 Above at [198], [218] and [303].

393 Above at [200] and [215]. The majority attempts to distinguish *King Salmon* by referencing the fact that the plan change in that case was more wide-ranging than the consents and notices of requirement sought in this case (above at [84]) and by pointing to the unique circumstances of Auckland (above at [87]). The decision in *King Salmon* did not turn on either of these contextual factors. Neither the precise magnitude of the plan changes, nor the particular geographical features of the Marlborough Sounds had any relevance to the general principles *King Salmon* set out. Such contextual features can only affect the *application* of these principles. With particular regard to the unique context of Auckland, neither the fact that it is undergoing population growth nor the fact that a large percentage of its coastline is covered in SEAs can affect the application of *King Salmon*. The mere fact that a city is large (or growing) does not diminish the need for environmental protection. In fact, if anything it increases the need to preserve the environment.

394 Above at [204].

395 *King Salmon*, above n 178, at [88] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and see above at [204].

396 The same comment applies even more strongly to the more open-ended exception William Young J proposes.

397 *Port Otago*, above n 179, at [70]; and see above at [249].

verb "requires" in the ports policy was directive[398] and a structured analysis to resolve any conflict.[399]

[331] There would simply have been no need for the structured and careful process in *Port Otago* if it had been possible to apply a freestanding exception of the type that the majority suggests or if avoidance policies had the flexibility which William Young J suggests. This Court could simply have derived a general exception from the overarching importance of ports. But this Court did not do so. Instead, it set out a careful approach of first finding a conflict and then embarking on a structured analysis which gave full weight both to the needs of the port and to environmental factors, with no assumption one would prevail over the other.

[332] Deriving a general exception not tied to a conflict[400] subverts the foundation of *Port Otago* and effectively allows that structured analysis, so central to the *Port Otago* decision, to be sidestepped. At the least, it creates a parallel system of analysis, with no clear guidance on when each would apply (as discussed further below).

[333] In this case there is no conflict between the infrastructure and avoidance policies as discussed above. The infrastructure provisions in the NZCPS are not worded in a directive manner.[401]

[334] I comment further that "infrastructure" (even important infrastructure) is a far larger and more nebulous concept than "ports". Ports, by their nature, have a functional need to be located in the coastal marine area. Infrastructure as a category has no such need (though individual infrastructure projects may). In this regard, I do recognise above the possibility that *Port Otago* might envisage a conflict arising on the facts even where policies are not worded in a directive fashion. If there were such an exception, it would obviate the need for any freestanding exception of the type the

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398 At [69]; and see above at [246].
399 At [78]–[82]; and above at [209]–[211].
400 The majority makes it clear that their exception is not tied to a conflict between the avoidance and infrastructure policies: above at [122]–[123].
401 Above at [246]–[248].

majority recognises. Such a conflict on the facts does not, however, arise here, given there is no functional need for the EWL to be located in the coastal marine area.[402]

[335] In summary, the exceptions of the majority and William Young J (in spite of their differences in approach) overrule *King Salmon*, *Port Otago* and *RJ Davidson* to a greater or lesser degree. They undermine the environmental bottom line approach enshrined in the NZCPS, as upheld in *King Salmon* and applied in *RJ Davidson*, as well as the careful approach to the identification and resolution of conflicts in *Port Otago*. Neither the majority nor William Young J gives any reason justifying overruling these very recent decisions and, in any event, there is no plausible reason that could be given for doing so. Their exceptions effectively purport to overrule the legitimate choice of environmental protection made in the NZCPS.[403]

The majority's reasons for finding a freestanding exception

[336] The majority justifies its exception by saying that there is still room in Policy 11 for "deserving exceptions that do not subvert the policy's purpose".[404] In this regard, the majority refers to the remarks of Lord Reid in *British Oxygen Co Ltd v Minister of Technology* (*British Oxygen*).[405] The majority says that, unlike some of the other policies in the NZCPS, Policy 11 is set at a "high level of generality" and is "not intended to produce perverse outcomes". It must therefore leave room for exceptions to ensure it works in the "innumerable places and circumstances to which it must be applied, and without producing outcomes plainly at odds with Part 2" and to ensure policies are applied in accordance with the purpose of the RMA.[406] Allowing an exception can "protect the integrity" of the policy from "anomalous or unintended outcomes".[407] Therefore, the majority says, large-scale infrastructure is not, by definition, inevitably prohibited by or contrary to the objectives and policies

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402 Above at [246]–[250]. Any possible contention that *Port Otago* does not apply to resource consents is simply wrong: see above at [209] in particular.

403 See above at [196], [198] and [201]. In particular, I cannot see how applying the avoidance policies in their own terms as environmental bottom lines (a legitimate choice under the RMA) could ever be "plainly inconsistent with the purpose of the RMA" whatever the merits of the proposal that would breach those environmental bottom lines: see above at [101].

404 Above at [99].

405 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL) at 625.

406 See the reasons of the majority above at [105].

407 Above at [109].

of the AUP or NZCPS.[408] The majority derives the terms of the exception in this case from the provisions of the AUP and says that, if a proposal satisfies the requirements of this "exceptions pathway" in the AUP, it will be a "genuine exception to NZCPS Policy 11 which does not subvert its objectives".[409]

[337] I comment first on the majority's assertion that Policy 11 allows for exceptions that do not subvert its purpose. This is hard to follow, given that the purpose of Policy 11 is to set environmental bottom lines. An exception allowing those environmental bottom lines to be breached must by definition subvert that purpose. Preventing harm to the specific species to which Policy 11 refers can therefore never be "anomalous", "unintended" or "perverse".[410] It is *exactly* what Policy 11 is designed to do.[411] Environmental protection through avoidance polices also accords with Part 2 of the RMA, as *King Salmon* makes clear.[412] I also comment that what is a perverse, anomalous or unintended outcome to one person may seem totally sensible to another person.[413]

[338] It is also not correct that Policy 11 operates "at a high level of generality".[414] Policy 11(a) does apply a high level of protection, but to particular defined classes of highly vulnerable flora and fauna. For example, Policy 11(a)(i) and (ii) refer not just to indigenous or rare taxa in the abstract but to taxa which are specifically listed as threatened according to extrinsic criteria, and (vi) similarly refers to areas that are protected under legislation.[415]

[339] The majority's exception for significant infrastructure is not derived from the wording of Policy 11. Nor is it derived from the wording of the infrastructure policies

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408 Above at [113].
409 Above at [118]–[119].
410 Above at [105], [109] and [122].
411 Contrast the reasons of the majority above at [105] and [110].
412 See above at [196]–[198].
413 See for example the comments of Arnold J in the analogous context of contractual interpretation and commercial absurdity, where he cautioned that "absurdity tends to lie in the eye of the beholder": *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [90] per McGrath, Glazebrook and Arnold JJ.
414 See the reasons of the majority above at [105].
415 Note also that Policy 11(a)(iv) refers to species that are at the limit of their natural range and (v) refers to "nationally significant examples" of indigenous community types. Policy 11(b) is certainly more general, but is limited by the "avoid *significant* effects" threshold (emphasis added).

in the NZCPS or indeed the AUP properly construed.[416] This is despite the fact that *King Salmon* stresses the importance of analysing the wording in the NZCPS and by extension any lower-order planning documents which must give effect to it.[417] As noted above, the majority's exception was not an exception contemplated in *King Salmon.*[418]

[340] It is also unclear how an exception for "significant infrastructure"[419] in particular can be within the contemplation of Policy 11. Significant infrastructure, while it may deliver more in the way of non-environmental benefits and may be a public good, is by its nature more destructive of the environment than small-scale infrastructure and therefore creates much greater risk of major breaches of the environmental bottom lines protected by Policy 11.

[341] The reasoning of the majority rests to an extent on the proposition that all policies must have exceptions in terms of the remarks of Lord Reid in *British Oxygen*. That case related to a policy which had "evolved"[420] in the practice of a decision maker with wide discretionary authority.[421] By contrast, NZCPS Policy 11 is a directive policy set down in a document authorised by statute and one to which lower-order planning documents must give effect. It was subject to extensive public consultation[422] and sets environmental bottom lines. Appeal to *British Oxygen* or a

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416 Above at [244]–[248] and [261]–[279].

417 *King Salmon*, above n 178, at [126]–[129] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and above at [203]. The majority says that *King Salmon* focused on the prohibition of "inappropriate" development: above at [75]. The majority also states that "inappropriate" did the work of reconciling the relevant policies at issue in *King Salmon*: above at [77]. But the Court in *King Salmon* explicitly held that "inappropriate" in the context of the relevant avoidance policies means avoiding the relevant adverse effects: *King Salmon*, above n 178, at [102], and see also at [126] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

418 Indeed, it is quite contrary to the recognition in *King Salmon* of environmental protection being an integral part of sustainable management and with the decision's recognition of environmental bottom lines as being consistent with Part 2.

419 See the reasons of the majority above at [118].

420 At 625.

421 The relevant policy in *British Oxygen* concerned monetary grants for industrial items: above n 405, at 621. Lord Reid found that the relevant discretion not to give a grant was unqualified: at 624. The relevant passage states that an authority may adopt a policy restricting its own discretion but must not refuse to listen to considerations or arguments which might persuade it to change its policy: at 625.

422 In accordance with ss 46A, 47–51 and 57(1) of the RMA. I refer to the comments on the importance of consultation in *King Salmon* above n 178, at [15] and [32]. See also the discussion of the important role of the Minister of Conservation: at [13], [31] and [78]–[79].

general proposition that all policies (even those akin to rules)[423] must have exceptions cannot justify departure from *King Salmon* and the clear terms of Policy 11.[424]

Lack of certainty and guidance

[342] As noted above, the majority's exception is said to apply to projects requiring reclamation in a SEA.[425] The requirements for the exception are derived from the majority's interpretation of the provisions of the AUP (in particular the reclamation provisions), the view that infrastructure is a public good and the particular circumstances applying to Auckland.[426]

[343] This means that there is little guidance as to how an exception might operate in other regions and other contexts, apart from that any exception will be difficult to make out and is a high bar.[427] This is an issue not just at resource consent level[428] but also at the planning level, given the fact that the exception found by the majority in this case arises from the AUP (which, as noted above, must give effect to the

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423 See above at [218]. The majority also cites (above at [100], n 90) two examples of cases which they regard as presenting an "analogous context" to this one: *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041 at [131] per Elias CJ; and *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995 at 13–16. They are not analogous for the reasons set out by the majority at [100], n 90.

424 *Wentworth Securities Ltd v Jones* [1980] AC 74 (HL) at 105 contains the classic statement of when courts can read qualifications into a statute. According to Lord Diplock, the purpose of the Act needs able to be precisely determined; it must be apparent that the drafters of the Act inadvertently overlooked the eventuality that the qualification seeks to address; and it must be possible to state "with certainty" that the additional qualifying words would have been inserted by the drafters and approved by Parliament had it considered this eventuality. See also Carter, above n 293, at 418–419. Applying Lord Diplock's criteria, by analogy, to policy statements like the NZCPS further demonstrates that an "exception" should not be read into the policy wording in the present case. Lord Diplock's criteria clearly have not been met. The policy makers cannot be said to have inadvertently overlooked, and thus failed to address, a situation where a significant infrastructure proposal impacts the flora and fauna protected in the avoidance policies. This has been explicitly addressed through the clear wording of the infrastructure and avoidance policies in the NZCPS itself. Nor can it be said with any certainty that the policy makers would have inserted and approved of the majority's qualification. To the contrary, the wording of the avoidance policies suggests the opposite.

425 Above at [118].

426 See the reasons of the majority above at [85]–[91].

427 See above at [91], [111] and [122].

428 It would seem that on the approach of William Young J, the lower-order planning documents must still give effect to the avoidance policies in the NZCPS by either prohibiting activities that breach them or by classifying such activities as non-complying. The flexibility then arises at the resource consent level.

NZCPS).[429] This undermines the certainty *King Salmon* considered important.[430] Another uncertainty is how the approach in this case will come to affect and undermine the approach to the application of other policies in the NZCPS (for example, the relationship between the avoidance policies and the ports policy at issue in *Port Otago*).

[344] It is unclear too how the majority's exception would apply in situations in Auckland which do not involve reclamation. It is of course the case that the majority does not draw *only* on the reclamation provisions in the AUP, but these provisions loom large in the majority's pathway. As such, what the majority's pathway would look like absent reclamation is unclear. Even in this project, not all of the reclamation area is in a significant ecological area and I understand that no reclamation is in the most vulnerable SEA-M1, although part is in SEA-M2. There are further environmental harms (for example, caused by activities in Anns Creek) which will not involve reclamation at all but will breach avoidance policies.[431]

Reasons for the majority allowing the appeal

[345] The majority would allow the appeal partially on the basis that the Board took an overall judgment approach, which *King Salmon* rejected.[432] While I agree that the Board did this, as soon as an exception is allowed to an environmental bottom line, it must be open for a decision maker to consider (as the Board obviously did) that a project is important enough for the avoidance policies to be overridden, provided that there is an adequate package of mitigation and offset measures proposed. Any failure to give appropriate weight to any particular factor in such an analysis would usually be an error of fact and not law.[433]

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429 At the risk of labouring the point, it is uncertain when lower-order documents may add an exception and the scope of any possible exception, and it is therefore uncertain whether or not any added exception would breach the obligation to give effect to the NZCPS.

430 *King Salmon*, above n 178, at [137] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and see above at [202].

431 These distinctions may not be significant in the present case as the EWL has been assessed as a whole. However, this may not always be the case in regard to other projects.

432 Above at [144]–[148].

433 There may be an exception where the notion of weight is built into the test itself, and where it is clear that the appropriate weight has not been given to that factor that may amount to an error of law. Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1016 says that the "weight to be given to mandatory considerations is a matter for the decision-maker" but that "[a]n exception is where a mandatory relevant consideration

[346] Summarising its approach, the majority says that, for a proposal to qualify for its exception, it:[434]

> … must be necessary in the ways specified in the policies, any adverse effects that cannot be avoided must be minimised, and any remaining environmental harm must be plainly justified by the proposal's benefits.

[347] This seems very close to the process of reasoning followed by the Board. The Board certainly thought the EWL was necessary as a result of its national and regional significance and that operationally the EWL needed to be located in the coastal marine area;[435] that the harms were commensurate with its benefits;[436] and that there was a generous and well-prepared offset and mitigation package.[437]

[348] The Board's analysis seems to have started with its assessment of the national and local benefits of the EWL and a determination that the current route best meets the project's objectives. It then considered the avoidance policies but concluded that the effects were not serious enough to mean the consent applications should be declined: the birds would feed elsewhere and the most sensitive parts of Anns Creek East had been avoided.[438] Overall, it considered that at least a balance of ecological effects on an integrated (bucket) basis suffices.[439] The Board may have erroneously thought that there was only a minor breach of the avoidance policies related to avifauna (as discussed above). But it did assess environmental benefits (treating avoidance policies as important considerations)[440] and decided that the package of

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internalises built-in weight": at [17.23.2], citing *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 for this proposition but noting the appeal in *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

434 Above at [142] (footnote omitted); and see also the majority's earlier summary of its pathway above at [118].

435 The Board found that the route of the EWL was operationally necessary (Board Decision, above n 173, at [653] and [700] and [1266]) and would provide significant regional or national benefit (at [236]–[267]; [627(b)] and [1301]). Similarly, the majority states that the proposal must meet requirements in relation to operational or functional need and requirements relating to regional or national benefit: above at [118(a)].

436 Board decision, above n 173, at [694], [731] and [1301]; and see above at [252], [295], [303] and [326].

437 Board decision, above n 173, at [614].

438 See above at [300].

439 See above at [297].

440 For example, the Board refers to avoidance policies as "strong directive[s]": Board decision, above n 173, at [731].

mitigation and offset measures was at least sufficient to balance these effects, particularly given the changes made in the course of the hearing.[441]

[349] It is even harder to understand why the majority concludes that the High Court erred. The majority does accept that the High Court was "much closer to the mark"[442] but says that Powell J erred by holding that consent authorities only have to genuinely consider directive policies but can refuse to apply them.[443] On the majority's approach, these statements (while not complying with the majority's pathway) are not material given the nature of Powell J's overall finding. Powell J found that there was a narrow framework contemplated by the AUP through which important infrastructure could pass.[444] This seems to be a similar conclusion to the majority's (although I accept that Powell J came to it by a different interpretive route).

[350] The majority would also allow the appeal on the basis that the Board erred by relying on Waka Kotahi's use of the s 171(1)(b) assessment of alternatives rather than satisfying itself that the "no practicable alternative" requirement in the relevant policies had been met.[445] The majority also considers that the Board wrongly transposed the standard Waka Kotahi applied to select the best route under s 171 ("most enduring transport benefit") and applied it in its application of the AUP policies.[446]

[351] I am inclined to agree with William Young J that the Board did not just rely on Waka Kotahi's assessment under s 171 but that the Board agreed with it.[447] Further, I comment that it seems unfair to characterise Waka Kotahi's assessment as selecting a route based on which route would provide "the most enduring transport benefit".[448] Their assessment was based on a two-stage process based on a multi-criteria

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441 At [605] and [731]. I accept, however, that the Board did not apply the exact approach now said to be necessary by the majority.
442 Above at [141].
443 Above at [169]; and HC judgment, above n 174, at [83].
444 At [68].
445 Above at [149]–[160] and [168].
446 Above at [150].
447 Below at [418].
448 Board decision, above n 173, at [622] as cited in the reasons of the majority above at [150]. The Board did say this but it may have been shorthand, given that Waka Kotahi's consideration included a range of factors, including environmental factors.

analysis.[449] It is fair to say, as the majority does, that environmental considerations were offered no overriding weighting against social or economic considerations in Waka Kotahi's multi-factorial analysis.[450] But environmental factors were nevertheless seen as relevant and important considerations.

[352] For example, in the selection of the recommended corridor, the opportunities for environmental betterment provided by the ultimate option chosen appear to have been a notable factor in its selection by Waka Kotahi.[451] Further, the *East West Link: Assessment of Effects on the Environment* stated that:[452]

> Potential effects of the Project on the important environmental and cultural values associated with Anns Creek … and reclamation in the Coastal Marine Area (CMA) were discussed in detail in the relevant assessments. All of those areas have significant values that are reflected in relevant planning documents. *The need to avoid effects on these values or if avoidance was not possible then remedy or mitigate as much as possible such effects, was expressly part of the considerations and assessments.*

[353] So it is clearly the case that environmental factors, and the avoidance policies in particular, played a significant role in the choice of route. I agree, however, as stated above, that primacy was not given to environmental considerations. But it is important to note that Waka Kotahi was under no obligation to afford environmental considerations such primacy, except in relation to the areas covered by the avoidance policies.

[354] William Young J criticises the majority for allowing the appeal on the basis of questions of law which did not form a major part of the appeal.[453] I agree with the majority that this Court is free to draw the legal conclusions it considers to be required even if they differ from the arguments put forward by the parties.[454] But I would comment that, while deciding an appeal on a different basis may be an available avenue for the Court, it should not be taken without having given the parties the

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449 Above at [188]. See also the description of Waka Kotahi's process summarised in the Board decision at [1309]–[1310] and cited in the reasons of the majority above at [135].

450 Above at [157].

451 AEE, above n 183, at 125–127. The Board noted that the final route for the EWL was a modified version of Option F: see at [799] and [804].

452 At 123 (emphasis added).

453 Below at [421].

454 Above at [172].

opportunity to make specific and considered submissions on the decisive point. That did not occur in this case with regard to the s 171 point.[455]

Summary of my reasons

The law

[355] In *King Salmon*, this Court rejected the overall judgment approach and held that a choice of absolute protection of the environment comes within the definition of "sustainable management" in s 5 of the RMA.[456] It held that avoidance policies in the NZCPS set environmental bottom lines and the effect of these must be carried through to lower-order planning documents.[457] It noted that conflicts between policies will be rare.[458] Where a conflict does arise, it will be resolved according to the structured analysis set out in *Port Otago*.[459] *King Salmon* applies to resource consents, as does *Port Otago*.[460]

[356] The NZCPS avoidance policies either require all adverse effects to be avoided or require significant adverse effects to be avoided. Avoid has its normal meaning of "not allow" or "prevent the occurrence of". Mitigation, remediation, offsets and adaptive management may as a matter of law operate to bring the harm down to less than material or significant (as the case may be). Some offsets proposed by Waka Kotahi may have been available to meet the avoidance policies, provided a proper precautionary approach was taken.[461] Others (particularly the proposed research funding) would not.[462]

Reclamation

[357] The reclamation policies in the AUP must be interpreted in accordance with the requirements of NZCPS Policy 10.[463] Policy 10 requires that land outside the

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455 See the comments of William Young J below at [421].
456 Above at [196]–[198].
457 Above at [201] and [223].
458 Above at [203].
459 Above at [206]–[211].
460 Above at [213]–[226] for *King Salmon*; and [209]–[212] for *Port Otago.*
461 Above at [314].
462 Above at [315].
463 Above at [268]–[270] and [282].

coastal marine area not be available for the proposed activity, that the activity can only occur in the coastal marine area, that there be no practicable alternative methods of providing the activity and that the reclamation will provide significant regional or national benefit. On the basis of the Board's factual findings these requirements are not met.[464] This in itself suffices to allow the appeal.

Relationship between infrastructure and avoidance policies

[358] The infrastructure and reclamation policies in the NZCPS are subject to the avoidance policies.[465] There is no relevant conflict among those policies on the wording or on the facts in this case.[466] The provisions of the AUP must give effect to the NZCPS and be interpreted accordingly.[467]

[359] The avoidance policies relating to biodiversity in D9.3(9) and (10) of the AUP are directive and properly mirror the avoidance policies in the NZCPS, as adapted to conditions in the Auckland area.[468] That the NZCPS avoidance policies must be applied under E26 of the AUP relating to infrastructure is made explicit by E26.2.2(6)(h).[469] In the case of reclamation, chapter D will overarch the inquiry, given the effect of F2.2.3(2) and F2.1.[470] All relevant provisions of the AUP are therefore subject to the avoidance provisions protecting biodiversity. There is no window, narrow or otherwise, allowing the avoidance policies to be breached.[471]

Errors made by the Board and the High Court

[360] The Board and the High Court erred in their interpretation of the relevant documents by not recognising the environmental bottom lines created by the NZCPS, and the need to respect and apply the directive avoidance policies in the NZCPS and

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464 Above at [291]–[293].
465 Above at [248].
466 Above at [246]–[248].
467 Above at [254].
468 Above at [260]–[263].
469 Above at [274]–[275].
470 Above at [266]–[267].
471 Above at [359].

AUP.[472] The High Court erred in finding that E26 provides a window for the approval of projects even if they do not meet F2 or D9.[473]

[361] The Board failed to treat the avoidance policies as binding in accordance with *King Salmon*.[474] It also erred when it relied on the benefits of the EWL to water down the choices to protect biodiversity made in the NZCPS and the AUP, and in taking what was, in effect, an overall judgment approach in violation of *King Salmon*.[475] The Board did say that it accorded particular weight to the avoidance policies.[476] However, this too is not the proper approach. In the context of the AUP the directive avoidance policies operate as environmental bottom lines.

[362] The Board also erred in failing to assess whether the mitigation and offsets package proposed by Waka Kotahi made the adverse effects on the values protected less than material or less than significant (as the case may be).[477]

[363] All of these errors were material and also mean that the appeal must be allowed.

Result and costs

[364] I agree with the majority that the appeal should be allowed but, as noted above, for different reasons.

[365] Had my views prevailed, there would likely have been little point in remitting to the Board. If the test in the AUP relating to reclamation is construed in accordance with the NZCPS, it does not seem possible that the reclamations necessary for the EWL could be lawful. This is because of the Board's factual finding that there was no functional need for the EWL's route and the fact that there were alternative routes available.[478] I accept that, on the majority's view, however, the proposal should be remitted to the Board.

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472 Above at [289] and [302].
473 Above at [284]–[287].
474 Above at [302].
475 Above at [303]–[305].
476 Board decision, above n 173, at [662].
477 Above at [308]–[310] and [313].
478 Above at [291]–[293].

[366] I agree with the majority that memoranda should be filed if costs cannot be agreed between the parties.[479]

[479] Above at [355].

WILLIAM YOUNG J

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Where I differ from the majority

[367] If the East West Proposal (the Proposal) complies with the Auckland Unitary Plan (AUP) policies specifically addressing infrastructure in sensitive areas (such as Policy F2.2.3(1)), I consider that it can (although will not necessarily) pass through the gateway provided for in s 104D(1)(b) of the Resource Management Act 1991 (RMA). This is so even though the Proposal is likely to cause effects that are within the AUP avoid policies, most relevantly Policy D9.3(9). To this extent, my approach

is at least similar in result to that of the majority. However, I differ from the reasoning of the majority in a number of ways and, most significantly, in the following respects.

[368] The first of these relates to whether the Board's conclusion that the Proposal complies with the infrastructure policies in the AUP (particularly Policy F2.2.3(1)) was premised on an approach that was erroneous in law. On the approach of the majority, at least as I understand it, this critical aspect of the case comes down, at least in large measure, to whether the Board appropriately determined that the "no practicable alternative" criteria in the infrastructure policies (particularly Policy F2.2.3(1)) had been satisfied. When considering the relevant notices of requirement under s 171(1)(b)(ii) of the RMA, the Board was required to address the adequacy of consideration given by Waka Kotahi | New Zealand Transport Authority (NZTA) to "alternative sites, routes, or methods of undertaking the work". In considering Policy F2.2.3(1), the Board itself had to be satisfied that there was no practicable alternative to the East West Link, including most particularly its proposed route. The assessments required by s 171(1)(b) and Policy F2.2.3(1) covered much the same ground, but they were different, possibly as to the exact nature of the relevant alternatives[480] and, more significantly for present purposes, as to the role of the Board.[481] The majority considers that the Board carried over to the Policy F2.2.3(1) exercise its conclusions in relation to s 171(1)(b) and did not appropriately form its own view as to the absence of practicable alternatives. As I will explain, I do not agree that this is what the Board did and, more generally, I see no error in this aspect of the Board's report (the Report).

[369] A second and more general difference between my approach and that of the majority is that I see the avoid policies in the AUP as less controlling than the majority does. As to this, the primary difference relates to what is entailed by the requirements in ss 104 and 171 of the RMA—respectively, to "have regard" and "particular regard" to the AUP and New Zealand Coastal Policy Statement (NZCPS). As will be apparent,

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480 The overlap between alternatives that were relevant for s 171(1)(b) and AUP Policy F2.2.3(1) was substantial to say the least and we heard no argument to as to whether there was a difference that was material.

481 Under s 171(1)(b), the Board had to be satisfied that NZTA had given adequate consideration to the issue (that is, the Board had to perform a review function) whereas AUP Policy F2.2.3(1) required the Board to be itself satisfied as to the absence of a practicable alternative.

I construe these requirements as meaning what they say, and thus not as if they were requirements to comply with those policies.

[370] A third and final difference relates to some criticisms of the Board's approach that I see as inappropriate. I give examples of this below at [419]–[420].

Structure of what follows

[371] In what follows I will discuss or provide:

(a) mana whenua issues;

(b) the relevant NZCPS and AUP policies and their legal consequences;

(c) the interpretation and application of the relevant NZCPS and AUP policies;

(d) the factual findings of the Board as to relevant effects;

(e) the application of the RMA s 104D(1)(b) "gateway test";

(f) the application of ss 104 and 171 of the RMA; and

(g) concluding remarks.

Mana whenua issues

[372] Ngāti Whātua Ōrākei Whai Māia Ltd (Ngāti Whātua Ōrākei) was an appellant before the High Court.[482] Grounds of appeal based on the mana whenua issues which Ngāti Whātua Ōrākei wished to pursue before us were abandoned in the High Court and Ngāti Whātua Ōrākei did not, itself, seek leave to appeal to this Court against the judgment. It is, instead, a party, under s 301 of the RMA, to the present appeal. The appellant, Royal Forest and Bird, did not advance the mana whenua issues when seeking leave to appeal. Had Ngāti Whātua Ōrākei itself applied for leave to appeal,

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[482] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 (Powell J) [HC judgment].

it would have struggled to obtain leave in relation to arguments it had abandoned in the High Court.[483] In those circumstances, I consider that the mana whenua issues are not properly before us and therefore do not address their merits.

The relevant NZCPS and AUP policies and their legal consequences

Preliminary comments

[373] In light of the Board's factual findings and the basis on which the majority is allowing the appeal, the primarily important aspects of the NZCPS and AUP are:

(a) Policy 11(a) of the NZCPS; and

(b) Policies D9.3(1) and (9) and F2.2.3(1) of the AUP.

Because I can adequately explain my approach to the case by reference to these policies, I do not discuss other aspects of the NZCPS and AUP.

Policy 11(a) of the NZCPS

[374] The policy is relevantly in these terms:[484]

> To protect indigenous biological diversity in the coastal environment:
>
> (a) avoid adverse effects of activities on:
>
> (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
>
> (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
>
> …
>
> (v) areas containing nationally significant examples of indigenous community types; …
>
> …

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483 That this appeal is to be allowed on the basis of arguments that were neither advanced in the High Court, nor signalled in the notice of appeal, and were addressed only in a limited way in argument by counsel for the appellant might be thought to cast a shadow over this comment. I nonetheless think it is correct and it is certainly correct as to what my position would have been if I had been addressing whether leave should be granted to pursue an appeal to this Court on a point abandoned in the High Court.

484 Footnotes omitted.

Policies in D9.3(1) and (9) of the AUP

[375] The general policies managing effects on significant ecological areas (which include the Māngere Inlet and the Ann's Creek area) are stated in D9.3(1) and include:

> (a) avoiding adverse effects on indigenous biodiversity in the coastal environment to the extent stated in [Policy] D9.3(9) …;
>
> (b) avoiding other adverse effects as far as practicable, and where avoidance is not practicable, minimising adverse effects on the identified values;
>
> (c) remedying adverse effects on the identified values where they cannot be avoided;
>
> (d) mitigating adverse effects on the identified values where they cannot be avoided or remediated; and
>
> (e) considering the appropriateness of offsetting any residual adverse effects that are significant and where they have not been able to be mitigated, through protection, restoration and enhancement measures, having regard to Appendix 8 Biodiversity offsetting.

[376] Policy D9.3(9)—also directed at protection of significant ecological areas—is stated in directive terms:

> Avoid activities in the coastal environment where they will result in any of the following:
>
> (a) non-transitory or more than minor adverse effects on:
>
> (i) threatened or at risk indigenous species …;
>
> (ii) the habitats of indigenous species that are at the limit of their natural range or which are naturally rare;
>
> (iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;
>
> (iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types; or
>
> …
>
> (b) any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes; or
>
> (c) the deposition of material at levels which would adversely affect the natural ecological functioning of the area.

Policy F2.2.3(1) of the AUP

[377] Policy F2.2.3(1) reads:

> Avoid reclamation and drainage in the coastal marine area except where all of the following apply:
>
> (i) the reclamation will provide significant regional or national benefit;
>
> (ii) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;
>
> (iii) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage.

The statutory provisions as to the relevance and significance of the NZCPS and AUP policies

[378] The key statutory provisions are ss 104, 104D and 171 of the RMA. They relevantly provide:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must … have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
>
> (b) any relevant provisions of—
>
> …
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> … ; and

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

…

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment … will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; …

…

171 Recommendation by territorial authority

…

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

…

(ii) a New Zealand coastal policy statement:

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

(iv) a plan or proposed plan; …

I will refer to the requirements in ss 104 and 171 as "have regard to" obligations, noting for completeness that I recognise that the specific phrasing of s 171 is to have "particular" regard.

[379] Material to the interpretation and application of ss 104, 104D and 171 are ss 61(1)(da), 66(1)(ea), 67(3)(b) and (c), 74(1)(ea), and 75(3)(b) and (c) of the RMA. Under:

(a) s 61(1)(da), regional councils must prepare and change regional policy statements "in accordance with … [the NZCPS]";

(b) s 66(1)(ea), regional councils must prepare and change regional plans "in accordance with … [the NZCPS]";

(c) s 67(3)(b) and (c), regional plans "must give effect to … [the NZCPS]" and "any regional policy statement";

(d) s 74(1)(ea), territorial authorities must prepare and change district plans "in accordance with … [the NZCPS]; and

(e) s 75(3)(b) and (c), district plans "must give effect to … [the NZCPS] and "any regional policy statement".

For ease of discussion, I will refer to these provisions (including those using the expression, "in accordance with") as imposing "give effect to" requirements.

Interpreting and applying the relevant NZCPS and AUP policies

Flexibility of avoid policies

[380] For the purposes of the present appeal, I see the word "policy" as referring to the adoption of a consistent approach to the issue to which it is directed. Such a policy might be inflexible in that it is to be applied no matter what the circumstances. However, as a matter of ordinary English usage, an approach may be sufficiently:

(a) consistent to be properly regarded as a policy; but also:

(b) flexible enough to allow for occasional exceptions.

The flexibility or otherwise of a policy is a function of both the language in which it is expressed and its underlying purpose, and the context in which it is to be applied.

[381] Activities can be classified by reference not only to their nature and purpose (such as "residential", "commercial", "industrial" or, in this case, "reclamation"), but also to their effects.[485] If complete inflexibility had been the purpose of the avoid policies, I would have expected the NZCPS to have required prohibited activity classification for activities having effects within the avoid policies.[486] As it happens, it was not argued by anyone before us that the "give effect to" obligation in relation to Policy 11(a) of the NZCPS required a "prohibited" classification in the AUP of activities (such as reclamation) if they would cause effects required by Policy 11(a) to be avoided. For these reasons, I do not read the avoid policies as being inflexibly prohibitory in nature.

[382] In *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*), "avoid" in the NZCPS was treated by the majority as meaning "not allow" or "prevent the occurrence of".[487] Contrary to the apparent view of the *King Salmon* majority, I do not see "not allow" and "prevent the occurrence of" as exact synonyms. More particularly, for the reasons just given, I do not see "avoid" in the avoid policies as meaning "prevent the occurrence of". If that had been the purpose, the policies would have required prohibited activity classifications. I am, however, willing to treat "avoid" as meaning "not allow". On this basis, Policy 11(a) of the NZCPS can be given effect to in the AUP by:

(a) policies that are consistent with it (which is how I see Policy D9.3(9)); and

(b) rules under which activities that are likely to have such effects (such as reclamation) are "non-complying"—the most stringent classification after "prohibited".

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485 See for instance *Application by Christchurch City Council* [1995] NZRMA 129 (PT).

486 This is possible under RMA, s 58(1)(e), which provides for the NZCPS to state "policies about matters to be included in" regional coastal plans "in regard to preservation of the natural character of the coastal environment".

487 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*] at [93] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

[383] I construe the avoid policies in the AUP in the same broad way. As to this, I consider that the AUP should be considered as a whole so that, in interpreting the policies, the rules are relevant (and vice versa). If the purpose of the policies and rules was to preclude the granting of resource consents for activities with effects inconsistent with directive avoid policies, that could have been expressed very simply and directly by (a) the policies requiring such activities to be classified as prohibited; and (b) the rules so classifying them. In this context, the absence of a rule classifying such activities as prohibited provides powerful support for the view that the avoid policies were not intended to have an indirect prohibitory effect.

[384] The flexibility of the avoid policies is, as I have indicated, a function of not only their meaning but also the context in which they fall to be applied. Where that context is governed by "give effect to" obligations, there is no scope for flexibility beyond that provided for in the language of the policy construed in accordance with its purpose. However, in a context in which the governing statutory provisions stipulate only "have regard to" obligations, there might be thought to be considerable additional flexibility.

[385] By way of cross-reference to the approach of the majority, I see the text and purpose of the avoid policies as offering a degree of flexibility that is not dissimilar to that favoured by the majority. We do, however, differ significantly as to whether additional flexibility is available where the statutory requirement in relation to those policies is in the form of a "have regard to", and not a "give effect to", obligation. I will come back to discuss this after briefly considering the comparative weighting of different AUP policies.

Comparative weighting of the avoid and infrastructure policies in the AUP

[386] Policy 11 of the NZCPS is, in part,[488] given effect to by Policies D9.3(1) and (9) of the AUP containing directive avoid policies in relation to significant ecological areas, both terrestrial and marine.

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[488] NZCPS Policy 11 is also given effect to by the provisions of the AUP that define as non-complying those activities (such as reclamation) which have the potential to cause effects that the NZCPS requires to be avoided.

[387] I accept that the logic of *King Salmon* and the requirement to construe the AUP consistently with the avoid policies in the NZCPS means that policies in the AUP that recognise the need for infrastructure are less directive than those in D9.3(1) and (9).[489] This is also consistent with the qualifications in the infrastructure policies that are referred to in the reasons of the majority and Glazebrook J.[490]

The significance of this comparative weighting

[388] I consider that the result of a comparison of relative "directiveness", while material to the approach that the Board was required to take, is not of controlling significance. This is because the Board was not required to "give effect to" the AUP policies but rather to:

(a) have regard to them (under ss 104 and 171); and

(b) decide whether the proposal was contrary to them (under s 104D).

Did ss 104 and 171 require the Board to comply with the avoid policies in the NZCPS and AUP?

[389] As the avoid policies in the NZCPS and AUP do not mandate prohibition, the appellant's contention that these policies were controlling in respect of the Board's decisions under ss 104 and 171 largely falls away. But because questions as to the comparative directiveness to be accorded to these policies remain, the point nonetheless warrants discussion.

[390] I do not accept that requirements to "have regard to" the NZCPS (and the corresponding policies in the AUP) can be construed as requiring consent authorities (under s 104) and territorial authorities (under s 171) to "give effect to" the NZCPS and the AUP policies.

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489 See above at [72].

490 See the reasons of the majority above at [64]–[67] and the reasons of Glazebrook J above at [273]–[277].

[391] I accept, as I must, that *King Salmon* generally states the law as to the interpretation of the NZCPS.[491] I also accept that the *King Salmon* logic must also apply to the interpretation of the AUP policies that are relevant to this appeal. However, any extension of the *King Salmon* approach to resource consent applications (for instance by treating "have regard to" obligations as if they were "give effect to" obligations) would be a significant development and one I do not support.

[392] In issue in *King Salmon* was a proposed plan change under which salmon farming was to be reclassified as a discretionary, rather than prohibited, activity in specified locations in the Marlborough Sounds. Section 67(3)(b) of the RMA required the relevant regional plan "to give effect to" the NZCPS. Since salmon farming in the location in issue in the appeal would produce effects within the avoid policies of the NZCPS, the majority's interpretation of the NZCPS meant that the plan change could not be approved.[492] There was no issue as to the meaning of s 67(3). It was construed as meaning what it says.

[393] I see no reason why the "have regard to" language of ss 104 and 171 should not, likewise, be construed as meaning what it says. As to this, I note that:

(a) When concluding that the effect of the "have regard to" obligation in s 104 requires compliance with the relevant avoid policies, the majority offers no explanation as to why, if that was the legislative purpose, Parliament did not employ "give effect to" language of the kind used in ss 67(3) and 75(3) or impose a requirement to "act in accordance with" of the kind expressly provided for in ss 61(1)(da), 66(1)(ea), and 74(1)(ea).

(b) The majority observes that the "have regard to" obligations extend to "regulations" that "are intended to bind".[493] Obviously, if regulations directly control the decision-making of consent authorities, they must

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491 *King Salmon*, above n 487.

492 At [77] and [153]–[154] per Elias CJ, McGrath, Glazebrook and Arnold JJ. This is subject to the point made above at [382].

493 Above at [108]. The "have regard to obligations" also extend to "rules" but I am not aware of any "rules" that might be relevant in this context.

> be complied with. But such binding effect would not be a consequence of the "have regard to" obligation; rather, it would simply involve giving effect to the regulations in accordance with what they require. If a regulation were not independently binding on the decision-making of a consent authority, the "have regard to" obligation could not sensibly be thought to make it so. Regulations that are not directly controlling may nonetheless be relevant to such decision-making—for instance, as part of the regulatory landscape against which an application must be assessed, a consideration which provides a sensible explanation for a "have regard to" obligation.

[394] In *RJ Davidson Family Trust v Marlborough District Council*, the Court of Appeal commented: "A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side."[494] As expressed, that comment is plainly right. That said, similar language is sometimes deployed to suggest that the only way a consent authority can properly "have regard to" a policy is by complying with it, which is how I construe the majority's reasons.[495] Put simply, this is not what the statute requires. As it happens, I consider that the Board did "have regard to" the relevant avoid polices. By way of examples of this, the Board discussed the policies at great length, and the terms of the consents that were granted and the conditions imposed were substantially influenced by those policies. This is apparent from the passage of the Report that I have set out below at [406].

[395] Similar considerations apply to the majority's proposition that "have regard to" obligations do not justify "outcomes that *subvert* applicable NZCPS policies".[496] In issue were what the policies were intended to achieve and the extent to which consent authorities are required to comply with them. That there was no subversion is apparent from the Board's conclusion, in the passage to which I have just referred,

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494 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [73].
495 See above at [108]–[109] and [169].
496 See above at [108] (emphasis in original).

that "the Proposal can be reasonably supported within the overall policy direction of the [AUP] … and NZCPS".[497]

"[C]ontrary to the objectives and policies"

[396] The phrase used in s 104D(1)(b), "contrary to the objectives and policies" of the relevant plan (here, the AUP), is consistent with the holistic approach adopted in *New Zealand Rail Ltd v Marlborough District Council*,[498] and *Dye v Auckland Regional Council*,[499] and more recently summarised in *Akaroa Civic Trust v Christchurch City Council*: [500]

> [73] When considering this second gateway test the local authority must apply … the word 'contrary' … as meaning "… opposed in nature different to or opposite, repugnant to or antagonistic". A proposal which simply fails to satisfy, or meet a policy is not necessarily contrary to it.
>
> [74] In all but the simplest cases the second gateway test is very difficult to apply because most district plans have a plethora of objectives and policies. We consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game: at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others. But the proposal may be so strong in terms of that policy that it outweighs all the others if that is the intent of the plan as a whole. Conversely, a proposal may be consistent with and achieve all bar one of the relevant objectives and policies in a district plan. But if it is contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal before the consent authority, it may be open to the consent authority to find the proposal is contrary to the objectives and policies under section 104D. We add that it is rare for a consent authority, or the court, to base its decision either way, on a single objective or policy. The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed.

[397] I accept that on this holistic approach, conclusions that the Proposal is inconsistent with the avoid policies and not in conformity with the pro-infrastructure policies such as Policy F2.2.3(1) would justify a finding that it was contrary to the policies in the plan for the purposes of s 104D. And likewise, I consider that a conclusion that the Proposal was broadly consistent with the infrastructure policies

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497 *Final Report and Decision of the Board of Inquiry into the East West Link Proposal: Volume 1 of 3 – Report and Decision* (21 December 2017) [Board Report] at [731].
498 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
499 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).
500 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110.

would, in the circumstances of this case (which include only limited deviation from the avoid policies), open the way for a finding under s 104D that the Proposal was not "contrary to the objectives and policies" of the AUP.

[398] As I read the reasons of the majority, the decision to allow the appeal rests largely on its view that the Board's conclusion that the Proposal is consistent Policy F2.2.3(1) (and similar "no practicable alternative" criteria in other infrastructure policies) was affected by legal error. For reasons that I will come to, I disagree. But before I deal with all of this issue in detail, it is necessary to discuss the factual findings of the Board as to the relevant effects.

The factual findings of the Board as to relevant effects

[399] There are two relevant sets of adverse effects:

(i) first, effects on birds in the Māngere Inlet, Anns Creek estuary and Anns Creek wetland (avifauna effects); and

(ii) secondly, in relation to Anns Creek and particularly Anns Creek East, effects on rare lava shrubland, freshwater raupō and gradients between mangroves to saltmarsh to freshwater wetland (Anns Creek ecological effects).

Avifauna effects—Board assessment

[400] The Board referred to avifauna effects in two passages in its Report[501] that the majority sees as inconsistent.[502] The first of these was at [471] of the Report:

> The Board accepts that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant. On the basis of the evidence, however, the Board concludes that the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. …

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501 Board Report, above n 497.

502 See the reasons of the majority above at [166]–[167] and the reasons of Glazebrook J above at [319]–[321]. See also the HC judgment, above n 482, at [36]–[37].

[401] The second was at [645]:[503]

> *It is contestable whether the Proposal will have non-transitory or more than minor adverse effects on threatened or at-risk indigenous species (clause D9.3(9)(a)(i)), given that experts agreed that the Proposal would not adversely affect the populations of those species and that the shore birds would opportunistically feed elsewhere in the Māngere Inlet, Manukau Harbour or Tāmaki River.* Regarding clause D9.3(9)(a)(ii), the Proposal will result in non-transitory and more than minor effects on areas of habitat utilised by some rare species. It will not result in such effects on habitats of species that are at the limit of their natural range, or habitats that are at the limit of their natural range. Evidence received indicated that the habitats to be affected are important to shore birds, including rare and threatened species, but that the shore birds will roost and feed elsewhere.

[402] I see no inconsistency. In these paragraphs, the Board was addressing different (albeit overlapping) issues. The first passage deals with "loss of feeding and roosting areas for shore birds, including threatened and at-risk species" and the significance of this in relation to Policies D9.3(9)(a)(ii) and D9.3(b). The italicised part of the second passage is concerned with Policy D9.3(9)(a)(i) and "adverse effects on … threatened or at risk species". I have no difficulty with the logic of reasoning along the lines that there will be a significant effect on feeding and roosting areas, at least if those areas are narrowly defined, but this will not itself result in adverse effects on the relevant species (or local populations) as the birds will feed and roost elsewhere in the vicinity. When [645] is read in its entirety, it is clear that this is the point the Board was making. That said, I have reservations about whether an impact on habitat that does not have a corresponding effect on relevant populations is sufficiently material to be inconsistent with Policy D9.3(9)(a)(i). Further, I see the issue as essentially factual: whether a conclusion as to impact on habitat warrants an inferential conclusion of adverse effects on a species. For these reasons, I do not see the Board's conclusion as susceptible to challenge in the context of an appeal confined to points of law.

Anns Creek ecological effects

[403] The Board appears to have accepted evidence to the effect that:[504]

> Anns Creek East contains sensitive and unique ecological values with lava shrubland habitats, threatened plant habitats and gradients between mangroves to saltmarsh to freshwater wetland. The viaduct has been designed to be

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503 Emphasis added and footnote omitted.
504 Board Report, above n 497, at [592].

> located within the more modified northern edges of the creek which contain weed species, native plantings and areas of fill. The location of piers will be designed to avoid sensitive areas of lava shrubland.
>
> Construction of the Anns Creek viaducts, including access for temporary staging and location of a construction yard, however, will result in significant ecological effects:
>
> (a) disturbance and loss of lava shrubland ecosystems;
>
> (b) disturbance and loss of freshwater [raupō] wetland and saltmeadow communities;
>
> (c) disturbance and loss of ecological sequences from terrestrial to saline to freshwater;
>
> (d) loss of and impacts on a naturally uncommon ecosystem type.
>
> The viaducts will result in significant adverse effects on the north-eastern lava flow, and loss of [raupō] wetland and saltmarsh ecosystems. A total of 9,599m2 (18%) of vegetation communities in Anns Creek East will be adversely affected by the Great South Road intersection design.
>
> Ongoing operational effects of the Anns Creek viaducts will include shading and rain shadow effects on vegetation in Anns Creek, and increased weed invasion from the construction and staging footprint.
>
> …

[404] On the Board's approach:[505]

(a) It is "contestable" whether the Proposal is inconsistent with Policy D9.3(a)(i). This is the point that I have already discussed above at [402].

(b) The Proposal is inconsistent with Policy D9.3(9)(a)(ii) as creating non-transitory and more than minor effects on areas of habitat used by some rare species.

(c) The Proposal is inconsistent with Policy D9.3(9)(a)(iii) and (iv) in relation to the Anns Creek area.

(d) The Proposal is inconsistent with Policy D9.3(9)(b) because of the permanent displacement of birds from the areas of reclamation and some

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505 At [645]–[648].

ongoing disturbance from use of the proposed walkway that would extend further into the inlet than the current walkway.[506]

(e) The Proposal is contrary to Policy D9.3(9)(c) as it would result in deposition of material adversely affecting the natural ecological functioning of the area of deposition.

Relevance of offsets

[405] Section 104 provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must … have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; …
>
> …

[406] The Board's findings of fact set out above at [399]–[404] addressed adverse effects before any allowance was made for offsets under s 104(1)(ab). The Board's detailed discussion of the offsets was mainly in relation to s 104 (and the obligation to have regard to the NZCPS and the avoid policies in the AUP). As to this, its conclusion was:[507]

> … the Board finds that the Proposal achieves a level of consistency with the planning framework commensurate with the overall benefits of the Proposal, including those afforded by offsets. The Proposal responds in a strong positive manner to transport (including freight, public transport, walking and cycling), economic, and stormwater provisions … . The Proposal meets the multitude of other provisions that relate to the management of earthworks, contaminated land, and air quality. With respect to those elements of the Proposal that are inconsistent or contrary to provisions, and without reading down the strong directive of avoidance policies, the Board finds that adverse effects have been

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506 It added that it is "unclear whether it is contrary to that policy directive", as the affected birds could still feed and roost opportunistically elsewhere in the inlet: at [647].

507 At [731].

> avoided to the extent practicable in the context of the Proposal objectives and route, and residual effects (some of which are significant) will be mitigated or offset to the extent that the Proposal can be reasonably supported within the overall policy direction of the [AUP] … and NZCPS.

I see these conclusions as material to its earlier assessments in relation to s 104D(1)(b). The offsets recognised by the Board are, of course, material to the significance of the inconsistencies between the Proposal and Policy D9.3(9) and, as will be apparent, this was picked up when it dealt with s 104D(1)(b).[508]

The application of the s 104D(1)(b) "gateway test"

The statutory language

[407] As I have noted, the AUP classified as non-complying activities (such as reclamation) likely to produce effects that the NZCPS required to be avoided. For this reason, s 104D(1)(b) is engaged. Under paragraph (b), resource consents could only be granted if the activities that comprise the Proposal would "not be contrary to the objectives and policies of … the relevant plan …". For these purposes, the AUP can be treated as the "relevant plan".

[408] There is no mention of the NZCPS (or any other national instrument) and thus no express requirement under s 104D(1)(b) to give effect to, or have regard to, Policy 11(a) of the NZCPS. That said, on the basis that AUP Policy D9.3(9) does give effect to NZCPS Policy 11, this is of no moment. What is more significant is the statutory test—whether the Proposal is "contrary to" the AUP's "objectives and policies". This is to be determined on the basis discussed in *New Zealand Rail Ltd*, *Dye* and *Akaroa Civic Trust*.[509]

The Board's findings as to inconsistency with Policy D9.3(9)

[409] The Board's conclusions as to inconsistency with Policy D9.3(9) were summarised in this way:

> [605] … the Board accepts that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such

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508 See below at [409].

509 *New Zealand Rail Ltd*, above n 498; *Dye*, above n 499; and *Akaroa Civic Trust*, above n 500.

> effects must be considered significant but … the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. The Board is satisfied that the potential impacts that the Proposal will have on shore birds can be adequately mitigated and offset, with some modification of the design and construction methodology. … [E]xcluding sub-tidal dredging (with the exception of the Anns Creek tidal channel works) and removal or modification of the headlands will reduce ecological effects. The Board finds that those changes to the Proposal would positively influence the effects / mitigation balance. Consequently, it will become less finely balanced and less dependent on every element of the package having a direct ecological benefit with respect to marine ecology and avifauna.
>
> …
>
> [610] The Board accepts Ms Myers' evidence that the adverse effects within Anns Creek East have been avoided to the greatest extent practicable by pushing the Proposal alignment as far north as possible … so as to avoid the most intact lava shrubland habitats and the threatened plant habitats, and minimise construction access impacts. While experts agree that like-for-like mitigation of effects on the lava shrubland ecosystems is difficult, the Board accepts that restoration and enhancement of existing ecosystems is more likely to succeed than establishing new ecosystems.
>
> [611] The Board also finds that the mitigation and offsets now offered will adequately address the effects of that construction activity and the shading that will occur on completion of the works. This includes the additional planting in Anns Creek Reserve, additional pest control throughout Anns Creek and extending the management period for those areas as direct mitigation for terrestrial and coastal effects on those environments.
>
> …
>
> [1373] The Proposal does impact on feeding and roosting grounds of shorebirds, some of which are threatened or endangered. These effects challenge the biodiversity provisions of the [AUP] … The biodiversity provisions are also engaged by the effects of the Proposal through Anns Creek, and particularly Anns Creek East. This has required very careful consideration by the Board. For the reasons discussed in chapter 14.2 of this Report, the Board's finding is that the effects will be adequately avoided, mitigated or off-set and that the effects will not put at risk species populations, or types of habitat.

The Board's conclusions as to s 104D(1)(b)

[410] The Board's substantive assessment in relation to s 104D(1)(b) started with whether the Proposal complied with Policy F2.2.3(1) of the AUP and concluded that it did. Given that this aspect of the Report has attracted criticism by the majority, I will deal with it separately. Before I do, a brief summary of other the aspects of the Board's approach is appropriate.

[411] The Board concluded that the Proposal was also consistent with other relevant elements of chapter F of the AUP.

[412] The Board then turned to chapter D9 of the AUP and particularly the policies in D9.3(9). In passages which I have already set out, it concluded that implementation of the Proposal would cause some effects that were required to be avoided by Policy D9.3(9). It found no other inconsistencies with the AUP avoid policies that are said to be material for present purposes.[510]

[413] It expressed its conclusions in this way:[511]

> [662] The Board is persuaded … that the approach taken by the Environment Court in *Akaroa Civic Trust v Christchurch City Council* is appropriate to adopt. … In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the NZTA Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.
>
> [663] On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the [AUP] when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with noncomplying status but has also recognised … broader planning assessments … . The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.
>
> [664] While the Proposal is concluded to be contrary to a small number of policies or sub-clauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the [AUP] with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s104D purposes against the Proposal as a whole.

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510 The Board found that there would be limited effects on views from a particular cemetery that possibly involved inconsistency with a policy protecting, inter alia, views from sites of historical significance: Board Report, above n 497, at [655].

511 Footnotes omitted.

The Board's discussion of Policy F2.2.3(1)

[414] Because the error attributed to the Board involves s 171(1)(b) of the RMA, it is appropriate to set that provision out. It relevantly provides:

> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
>
> …
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
>
> …
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; …
>
> …

[415] Given the significance of this to the outcome of the appeal, it is also appropriate to set out the relevant passage of the Report in full:[512]

> [621] Later in chapter 15.12 of this Report, the Board undertakes the statutory assessment required by s171(1)(b) of the RMA as to whether adequate consideration has been given to alternative routes or methods for undertaking the work. The Board explores the process used by NZTA for identifying and evaluating corridor and alignment alternatives using Multi Criteria Analysis (MCA) methodology, and briefly outline the "Long List" comprising 16 corridor options, the six options selected to the next stage of the MCA (alignment evaluation) plus the OBA option, which led to the selection of the preferred option.
>
> [622] It will become clear that the potential need for reclamations for the Proposal in locations of high environmental value were balanced against the potential opportunities for environmental betterment. A central component of NZTA's reasoning for accepting a foreshore alignment with the associated reclamations was that it would provide the most enduring transport benefit.
>
> [623] *In the context of its consideration of the [AUP] provisions most relevant to the proposed reclamations, it is critical for the Board to be satisfied that the EWL alignment is indeed the option that provides the most enduring transport benefits to the extent that those benefits are necessary and that there are no "practicable alternatives" to achieve that outcome.*
>
> [624] Mr Burns, when addressing the Board on Policy F2.2.3(1)(b) submitted:

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[512] Footnotes omitted and emphasis added. Emphasis and typographical error in [624] changed.

> "[T]he test is not whether this is the best, or cheapest, option for NZTA's road, or whether it is justified by transport outcomes, but simply whether there are any practicable ways of putting the road somewhere else."

[625] The Board disagrees. The analysis undertaken by Mr A Murray, which contributed to the balancing of all factors in choosing the proposed alignment, must be relevant to whether there is a practicable alternative. It is not appropriate, under the detailed and integrated option selection process undertaken, to apply such a simplified interpretation of "practicable alternative" i.e. whether any road can be located elsewhere, regardless of how inferior its transport, walking and cycling, or public transport benefits may be.

[626] *For these reasons, the Board is indeed satisfied that there is no "practicable alternative" to the route NZTA proposes.* The Board reaches this conclusion simply because it is satisfied that NZTA's scrutiny of alternative routes did not produce any enduring transport solution other than the selected route.

[627] In consideration of Policy F2.2.3(1), the Board finds:

(a) While some submissions considered that NZTA had selected the wrong alignment, and that the Proposal should not extend into the CMA, it was common ground that the EWL would provide significant regional benefit. The Board is also satisfied that given the significant contribution that the Penrose-Mt Wellington area makes to the Auckland economy and employment, the EWL can reasonably be concluded to have significant national benefit.

(b) If unencumbered by topography or development, it is intuitive that there will be a practical alternative landward route suitable for the provision of a road. However, the areas surrounding the Māngere Inlet are fully developed with industrial, commercial and residential land uses. As discussed in chapter 15.12 of this Report, the Board is satisfied with NZTA's evidence on the assessment of alternatives and enduring transport benefits conferred by the chosen alignment. Therefore, it finds that there are no "practicable alternative" ways of providing for the objectives of the Proposal in a manner that avoids the proposed reclamations and coastal occupation. The Board accepts that in refining the EWL alignment, NZTA has sought to balance a range of effects, including ecological, business disruption, cultural and social. In turn, that alignment has necessitated mitigation in the general form and scale of that proposed.

(c) As discussed in chapter 14.2 of this Report, the Board finds that efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use. The scale and form of the reclamations has been developed through an integrated design process and is now the minimum necessary to mitigate landscape, visual, severance and amenity effects. Additional efficiency has been achieved by using the wetlands within the reclamations to

> treat stormwater runoff from the developed hinterland, and to provide an alternative upgraded treatment option for landfill leachate.
>
> [628] As a result, the Board finds that the Proposal is generally consistent with, and not contrary to, Policy F2.2.3(1) of the [AUP]. …

The errors attributed to the Board

[416] The majority is of the view that the Board carried over its conclusions in relation to the assessment required by s 171(1)(b) of the RMA (which focused on the adequacy of NZTA's consideration of the alternatives) into its consideration of Policy F2.2.3(1). In this way it is said that the Board inappropriately jumped to the conclusion in relation to Policy F2.2.3(1)(b) that it was satisfied that there were "no practicable alternative ways" of providing for the activity, including locating it on land outside the coastal marine area.[513]

[417] The majority also criticises other broadly associated aspects of the Board's reasoning. Most particularly, the majority considers that the Board was required to, but did not, approach the case on the basis that the Proposal was "presumptively inconsistent with and contrary to relevant objectives and policies and should not be approved except in narrowly defined exceptional circumstances".[514] Associated with this, there is said to have been a "regression to overall judgment" on the part of the Board and there are also criticisms of the specificity or otherwise of the Board's reasons.[515]

Should the appeal be allowed on the basis proposed?

[418] In considering consistency with Policy F2.2.3(1), the Board took into account the exercise it had carried out under s 171(1)(b). This is unsurprising given that the evidence in relation to s 171(1)(b) was also relevant to Policy F2.2.3(1)(b). It would be remarkable if an expert Board, headed by a retired judge, had made the elementary error of conflating the two issues. Indeed, in the passage from the Report that I have

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513 At [1372].
514 Above at [168].
515 See the reasons of the majority above at [144]–[148].

set out,[516] the Board recognised the nature of the exercise that was required. I say this because:

(a) A comparison of [621] and [623] of the Report shows that the Board recognised that there was a clear distinction between its review function under s 171(1)(b), focused on the adequacy of NZTA's consideration of alternatives, and the related but separate question of whether it was, itself, satisfied that there were no practicable alternatives.

(b) The conclusion expressed in [626] confirms that the Board itself was satisfied as to the absence of practicable alternatives. The reference back to the s 171(1)(b) issue is not indicative of error. If detailed analysis revealed that there was no practicable alternative, the conclusion that there was indeed no such practicable alternative might be thought to reasonably follow.

(c) Although the Board put great weight on NZTA's analysis, the findings underpinning the conclusion expressed that are set out in [627] are expressed in terms that show that they represent the view of the Board and not NZTA.

[419] As I have noted, there were other associated criticisms by the majority of the Board's approach, namely that:

(a) it was required to but did not approach the case on the basis that the Proposal was "presumptively inconsistent with and contrary to relevant objectives and policies and should not be approved except in narrowly defined exceptional circumstances";

(b) it had "regressed" to an "overall judgment" approach; and

(c) its reasons were insufficiently detailed and specific.

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[516] See above at [415].

[420] I can most conveniently deal with these criticisms together:

(a) The criticisms are premised in large part on the view that the "have regard to" obligations in ss 104 and 171 meant that the Board was bound by the avoid policies.[517] However, the Board applied the "have regard to" language of the statute in accordance with the ordinary meaning of the words used and what must have been a deliberate decision by the legislature not to impose "give effect to" obligations. In my view, it was right to do so.

(b) As the majority notes, the Board was required to weigh incommensurables, an exercise that the majority recognises as requiring a "considered approach".[518] Such an approach necessarily requires an "overall judgment" as to the weight to be given to the competing incommensurables. I accept that it follows from *King Salmon* that if a particular consideration (such as an avoid policy) is of trumping effect, there is no scope for an overall judgment approach. But given that the majority recognise that a weighing exercise was required, I see no justification for criticising the Board for using the expression "overall judgment".

(c) The Board was required to approach the case in accordance with the statutory framework provided by s 104D and ss 104 and 171. That framework makes no reference to presumptions against the grant of consent to be displaced only "in narrowly defined exceptional circumstances". I think it inappropriate for the courts to impose what in effect are jurisdictional threshold requirements that are not firmly based in the legislation and I cannot interpret the AUP policies as imposing a threshold requirement expressed in that way.

(d) The reasons of the Board that are now said to be inadequate were not challenged by the parties before us. We do not have all of the relevant

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517 See above at [108]–[109] and [169].
518 Above at [143].

evidence given, and submissions made, to the Board that related to the issues in respect of which its reasons are now criticised. I am of the view that such criticisms ought not to be made in the absence of all relevant material.

[421] There are related issues that concern me:

(a) The issues on which the majority proposes to allow the appeal were not amongst the questions of law on which the appeal to the High Court was based. Further, they were addressed in neither the notice of appeal to this Court nor the written submissions of the appellant.

(b) I accept that in the course of argument, concerns were put to counsel along the lines that the Board's approach to Policy F2.2.3(1) may have been inappropriately based on its consideration of the separate s 171(1)(b) issue. However, those concerns were not picked up in a detailed way by counsel for the appellant who, in her reply, argued merely that the "no practicable alternative" conclusion of the Board warranted what she called "a hard look". The debate on this issue was necessarily at a high level as the printed record on the case did not include the evidence as to practicable alternatives that the Board had relied on. As well, and significantly to my way of thinking, no one in the course of argument before us identified a practicable alternative that the Board could fairly be said to have wrongly overlooked.

(c) More generally, the appeal succeeds on the basis of a legal approach that had not been identified prior to the hearing before us and was the subject of no more than cursory discussion at that hearing. The Report that is set aside was delivered more than six years ago, was the culmination of a streamlined process under Part 6AA of the RMA, and concerned a matter of national significance. The Court is remitting all issues to the Board. It is unclear, at least to me, whether the Board can legally or practically be reconstituted, whether the practical result will

be that the whole process must be repeated and, if not, how the reconsideration will be effected.

Conclusion as to s 104D(1)(b)

[422] I am of the view that the Board was entitled to conclude that the relatively limited and inconsequential inconsistencies with the D9.3(9) policies did not mean that the Proposal was contrary to the AUP objectives and policies, with the result that it was open to the Board to find that the s 104D(1)(b) gateway test was satisfied. As will be apparent, I see no relevant error of law by the Board.

The application of ss 104 and 171 of the RMA

[423] I can deal with this aspect of the case relatively briefly.

[424] The challenge to this part of the Board's conclusions rested primarily on contentions as to what was said to be the controlling effect of the NZCPS and AUP avoid policies—contentions that I have already rejected based on my interpretation of those policies and their significance in respect of the ss 104 and 171 decisions. As it happens, I see no error in the Board's approach.

Concluding remarks

[425] For the reasons given, I would dismiss the appeal.

Solicitors:
P D Anderson, Royal Forest and Bird Protection Society of New Zealand Incorporated, Christchurch for Appellant
Buddle Findlay, Auckland for Respondent
Simpson Grierson, Auckland for Auckland Council as Interested Party
N T E Strong, Ngāti Whātua Ōrākei Trust, Auckland for Ngāti Whātua Ōrākei Whai Māia Limited as Interested Party
McCaw Lewis, Hamilton for Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust as Interested Parties

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2016-425-84
[2017] NZHC 2086

UNDER	The Judicature Amendment Act 1972 and Part 30 of the High Court Rules
IN THE MATTER OF	An application for judicial review
BETWEEN	JONATHAN PAUL GABLER, JENN BESTWICK AND GLENORCHY HOMESTEAD LIMITED Applicants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Respondent
	THE PLAYGROUND LIMITED Second Respondent

Hearing:	13 December 2016 and resumed hearing 16 August 2017
Appearances:	M J Slyfield for Applicants J C Campbell and A H Balme for First Respondent
Judgment:	29 August 2017

JUDGMENT OF NICHOLAS DAVIDSON J

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A. INTRODUCTION

[1] This application for judicial review challenges the decision of Queenstown Lakes District Council ("**QLDC**" or "**the Council**") made on 10 June 2016 not to serve limited notice or publicly notify an application for resource consent made by the second respondent, The Playground Ltd ("**The Playground**").

[2] The outcome of this review thus bears directly on the resource consent granted the same day to establish commercial recreational activities at Alan Reids Rd in the Wakatipu Basin at the foot of Coronet Peak, on land zoned Rural General in the District Plan.

[3] The consented activities, which the Court is told have commenced, include paintball, archery combat, a high ropes course, bubble soccer, mountain boarding and sumo wrestling. The infrastructure is not significant in the context of this judicial review. The proposal includes a car park. Hours of operation are restricted to daylight, seven days a week, with customer and vehicle movement limits per day.

[4] The applicants in this judicial review own or occupy land to the south and west of The Playground's site. Mr Gabler has consent for a residential building close to the southwest corner of the subject property. Ms Bestwick, as trustee, owns the residential property at 741 Malaghans Rd, with road frontage to Alan Reids Rd. Mr Chudleigh and his partner occupy that land. Glenorchy Homestead Ltd ("**Glenorchy Homestead**") owns all the land between the southern boundary of the site and Malaghans Rd, which includes a residence close to the common boundary.

[5] Alan Reids Rd is unsealed, carries little traffic and is about 900 metres in length. It provides access to two dwellings: Ms Bestwick's, and another, the owner of which is not involved in these proceedings.

The genesis of this judicial review

[6] The decision not to *publicly notify* the application was made in the exercise of the Council's discretion under s 95A(1) of the Resource Management Act 1991

("**the Act**"). The Council also decided that no person was an "affected person" for the purposes of *limited notification* pursuant to s 95B(1) and 95E(1) of the Act.

[7] The applicants say they and others are "affected persons" and should have been served with the application by way of limited notification so they might participate in the consenting process. Mr Slyfield, counsel for the applicants, submits that the notification decision was flawed and should be declared invalid, as should the resource consent, and the Council needs to return to first base and address it properly before any decision is made as to notification and whether consent should be granted.[1] At the heart of the applicants' case is the contention that the Council did not have sufficient relevant information before it to reach a decision about notification and the consent, in particular about the effects of noise from the activities, and as a result it made an error of law, or its decision was otherwise unreasonable.

[8] Mr Slyfield also says that the failure of The Playground to respond to a request for further information made by the Council means the application *had* to be publicly notified.

[9] The relief sought is comprised of declarations of invalidity and quashing of decisions as to notification and consent.

Notification principles

[10] The scheme for notification under the Act includes the following:

> **95A Public notification of consent application at consent authority's discretion**
>
> (1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.
>
> (2) Despite subsection (1), a consent authority **must** publicly notify the application if—
>
> (a) it decides (under section 95D) that the activity will have or is likely to have adverse effects on the environment that are more than minor; or

[1] Citing s 104(3)(d) of the Act, and *Tasti Products Limited v Auckland Council* [2016] NZHC 1673, (2016) 19 ELRNZ 555.

(b) the applicant requests public notification of the application; or

(c) …

95B Limited notification of consent application

(1) If a consent authority does not publicly notify an application for a resource consent for an activity, it must decide (under sections 95E to 95G) whether there is any affected person, … in relation to the activity.

(2) The consent authority must give limited notification of the application to any affected person unless a rule or national environmental standard precludes limited notification of the application.

…

95E Consent authority decides if person is affected person

(1) A consent authority must decide that a person is an affected person, in relation to an activity, if the activity's adverse effects on the person are minor or more than minor (but are not less than minor).

(2) The consent authority, in making its decision,—

(a) may disregard an adverse effect of the activity on the person if a rule or national environmental standard permits an activity with that effect; and

104 Consideration of applications

(3) A consent authority must not, —

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

Grounds of this judicial review

[11] Judicial review does not address the general merits of a decision, except to the extent that it is challenged for unreasonableness.[2] The established principles of judicial review of a decision of this kind are as follows:[3]

(a) All relevant considerations must be taken into account, and irrelevant considerations ignored.

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2 *Ferrymead Retail Limited v Christchurch City Council* [2012] NZHC 358 at [98].

3 *Sutton v Canterbury Regional Council* [2015] NZHC 313, (2015) 18 ELRNZ 774 at [34].

(b) The decision must be one a reasonable decision maker could reach on the basis of the material available to it.

(c) The weight given to relevant matters is for the decision maker, but there must be something there to which the decision maker can give weight.

(d) This Court will scrutinise the decision more closely and with a less tolerant eye than it would decisions where there are broad policy considerations and there is less impact on people's lives.

[12] The applicants submit that the Council's assessment of potential noise and other effects was based on inadequate information, and failed to bring to account the effect of the change to the noise environment by operation of the consent. They submit the decision that the adverse noise effects on the applicants would be "less than minor" was one which no reasonable decision maker could have reached on the material available. They submit that the Council took account of irrelevant considerations, that expert advice was that noise effects would be "reasonable" or "acceptable", rather than "less than minor", and "may have taken account" of an irrelevant consideration, namely a flawed understanding of the "permitted baseline" in respect of noise from the proposed activity. The assessment of traffic effects on the character of the environment, and the assessment of cumulative effects including those on the rural environment and neighbours, is submitted to be illogical, contradictory and unreasonable. The challenge to the assessment of traffic effects was not advanced further at the hearing.

[13] The assessment of effects at the properties owned or occupied by the applicants in this judicial review is submitted to have been limited, confined to effects raised in correspondence from them to the Council, and failed to take account of relevant District Plan assessment criteria. The assessment of effects on Glenorchy Homestead is alleged to have failed to take account of the use of the pedestrian pathway between the car park and the activity areas.

A late stage consideration

[14] When the Council's landscape architect asked about the expected noise levels and where they might come from, the Council's planner responded that this information would be included in a request for further information under s 92 of the Act. The Playground suggested the landscape consultant and planner visit the site and listen to the noise made by paintball guns, but that suggestion was not taken up. The lack of further information about noise was not however thought sufficient to render the application incomplete. The Council made a s 92 request for further information, which was answered, but not to the letter.

[15] Counsel did not address s 95C of the Act in submissions at the hearing. It was not pleaded. Close to delivery of this judgment I recognised the potential implications of that section, which might, on the case made for the applicants be determinative, but was otherwise relevant. It is directed to a failure by an applicant for resource consent to provide information when requested by a consent authority. Counsel were asked to make further submissions. Section 95C is addressed later in this judgment. It involves a purposive interpretation of s 95C. It is associated with the question whether the Council was sufficiently and relevantly informed to reach the notification decision and whether it was reached on relevant and no irrelevant considerations.

B. THE APPLICATION FOR RESOURCE CONSENT

The application

[16] The application, with the Assessment of Effects on the Environment ("**AEE**"), had the required declaration by Ms Devlin, consultant planner for The Playground, that the information provided in support was complete and accurate.

[17] It described the site as two pronounced land forms; the southern portion characterised by relatively flat paddocks, and the northern portion terraced and undulating. The site rises in a northerly direction from Malaghans Rd to the Coronet Peak hillside, and was at the time of the application used for pastoral farming purposes.

[18] The Playground was described as a collection of affordable, low risk, fun, high quality activities in one location, attractive to groups. The activities would be undertaken on 4.2 hectares of a site area of 19.9433 hectares.

[19] The activities were described, with photographs. Paintball is a "combat style sport", where participants wear a safety mask and use a gun designed to fire marble-sized balls of paint within a course of portable structures (drums or tyres). The high ropes course and mountain boarding speak for themselves.

[20] The Playground sought non-notification and did not request public notification. Approvals were given by the owner of the site and the owner of the Flight Park, a neighbouring property to the east.

[21] Under "effects on the environment", the natural and pastoral character, visibility, form and density, cumulative effects on the landscape, and rural amenities were all detailed. Assessment considerations for commercial recreation activities were set out, including traffic and pedestrian activity incompatible with the character of the surrounding rural area, and adverse effects of noise vibration and lighting incompatible with the levels acceptable in a low density rural environment. The activity would not result in vibration, nor need fixed lighting. The noise from all of the activities, including the paintball guns, would meet the District Plan noise limits, due to the natural topography, vegetation and separation distance from the nearest residential neighbours. The area was described as "remote or isolated" so there would be no loss of privacy, or disturbance to the sense of remoteness or isolation. The nearest neighbours would not be able to see the activities. The high ropes course poles would be set against Douglas Fir forestry and the expansive Coronet Peak hillside. The activities would be largely screened to avoid cumulative effects of the development in the area, which was said to have the potential to absorb some change. Traffic, pedestrian safety, litter, waste and the cumulative effects of these elements were described, and the existing commercial recreational activities including the nearby Flight Park. Amenity and landscape values were addressed.

[22] Noise was addressed as follows:

> 5.4.6 Noise
>
> As described above, the activities and buildings are well separated from any residential dwellings or platforms, and the outcrop along the southern edge of the activity area acts as a natural sound barrier. None of the activities will result in excessive noise emissions as no motorised equipment is required. It is possible some low level noise emissions might be heard at Flight Park, however, that property owner has given written approval. Accordingly, all activities will meet ODP noise limits for the zone and the proposal will result in adverse noise effects *that would be minor or no more than minor*. (emphasis added)

[23] I will refer further to the noise limits and their relevance to decisions made by the Council and for this judicial review.

Council process

[24] Mr Denney, the Council's landscape architect, wrote to Mr Woodward, the Council Planner, on 22 April 2016, requesting information about a range of issues, including "expected noise levels associated with the activity, and where these may be generated from".

[25] On 27 April 2016, Mr Denney again wrote saying he was surprised "how contained the site is". He added:

> I'm only interested in noise in terms of impacts on landscape values within the rural context, rather than health or nuisance effects. Just want clarification that the activity would not include PA systems, loud music, or constant screaming that may otherwise distract from the tranquil rural setting … although given the flight park next door there is perhaps already a degree of this.

[26] That same day, Mr Woodward wrote to Ms Devlin for The Playground, with a request for further information under s 92(1) of the Act. He asked for an overview of all relevant sources of noise to give the Council an idea of potential noise effects and whether they would affect the residential amenities of the nearby residential neighbours. He asked, and Ms Devlin replied as follows: (answers italicised)

> 8. Please provide an overview of all of the relevant sources for noise that is likely to be generated from the proposed activity. In particular, please provide confirmation whether any PA systems, amplified music or ongoing alarms will be in use. This information will give Council an idea on what

the potential noise effects will be and whether this will affect the residential amenities of the nearby residential neighbours.

The proposal does not include a PA system, amplified music or alarms. A stereo may be used for background music, which would meet the zone noise standards and would not be heard from any residential neighbours, including A Fairfax due to distance, topography, and vegetation.

9. Further to the above, it is understood through reviewing the AEE that all activities are able to maintain compliance with the relevant noise standards of the District Plan. Given no specific confirmation has been provided to provide Council reassurance these provisions can be complied with, please advise whether conditions of consent can be volunteered stating that all activities associated with the proposal will maintain compliance with the relevant noise standards.

The following conditions are volunteered to ensure compliance:

There shall be no amplified music, public address systems or alarms on the site at any time.

The consent holder shall ensure that sound for activities conducted on the site measured in accordance with NZS 6801:2008 and assessed in accordance with NZS 6802:2008 shall not exceed the following noise limits at any point within the notional boundary of any residential unit, other than residential units on the same site as the activity:

(i) daytime (0800 to 2000 hrs) 50 dB LAeq(15 min)

Sound from the activities which is received in another zone shall comply with the noise limits set in the zone standards for that zone.

[27] Mr Woodward visited the site to better understand the proposal. He considered the effects on residential neighbours and on 6 May 2016 he wrote to Ms Devlin. He was concerned about traffic movements and adverse effects on residential properties along Alan Reids Rd. Ms Devlin replied on 7 May 2016 to say that traffic movements would be limited to 24 maximum per day. Mr Denney provided a memorandum to Mr Woodward on 12 May 2016, commendable in its detail, which addressed rural amenity.

[28] About this time neighbours began to write with their concerns. I do not detail all these, but they were extensive. Ms Bestwick wrote on 23 May 2016 and mentioned the disturbance caused by paragliding activities at the nearby Flight Park. This was relevant. On the frequent very still days, noise travelled and conversations between instructors and their customers could be heard word for word as they circled to the landing area east of The Playground's site. Ms Robb, solicitor, wrote to

Mr Woodward on 24 May 2016 and said that the concerns of one of her clients meant that there should be at least limited notification to landowners in the vicinity. One of Ms Robb's clients was the property owner at 791 Malaghans Rd. She said it was not sufficient simply to say that there would be no excessive noise emissions given the nature of the activities because the Flight Park had said the same thing, but "paragliders/fliers scream very loud in the air as they come in to land". This reference to the noise made by customers is apposite to this judgment and Mr Denney had already identified this. Ms Robb said her clients' concerns were for peaceful enjoyment of their property. They sought a scaling back of the operating hours.

[29] Mr Gabler wrote on 25 May 2016 explaining his purchase of land for a deer farm on the northern side of Malaghans Rd, some 85 hectares, to establish an international standard polo facility. He and his partner had met with the applicants. They had no opposition to the proposal at a personal level, but there were concerns. Traffic noise was said to be "very noticeable" and they thought there would be numerous elements which would be seriously detrimental to peace and enjoyment in the immediate area and on their farm and residential lot west of Alan Reids Rd. Mr Gabler wrote:

> I believe the resulting noise from the operation will be very noticeable and more than minor in several instances, namely:
>
> 1. Noise from air suspension lifting and lowering the vehicle, door opening/closing air compression/decompression) and engine noise from starting and stopping buses/coaches at bus 'depot'.
>
> 2. Noise from customers gathering at the depot and exciting/entering buses/coaches (especially as the applicant has stated they are targeting Stag Party groups, conference groups and groups of children for their business). This means large groups of 20 or more people spending some time in the parking area, near residences on Alan Reids Road.
>
> 3. General noise from participants and spectators of the outlined activities at the site (Bubble Soccer, Paint Ball, Archery Tag, Mountain Board, plus High-Rope Course and Zip-line to be added in the future) – all of which are action/adrenalin/boisterous activities and none of which, in my opinion, are at all well suited in a Rural General Zone. I believe there are far better suited sites such as Frankton or other industrial/commercial areas.
>
> 4. Noise generated from the proposed BBQ area onsite and the potential for alcohol and parties with noise carrying to neighbours.

Dr Chiles

[30] Mr Woodward decided to seek expert advice on noise issues from Dr Chiles, who I consider to be an expert on the evidence before me. There was no written instruction. Dr Chiles responded promptly on 27 May 2016 to say that he had not been to the site, and had the same information as Mr Woodward as to noise sources and the noise emitting properties of the equipment. He did not make a specific noise assessment. However, he said he knew the area. Sound data for the activities was not available, but he thought the equipment would generate minimal sound levels at neighbouring properties. Dr Chiles anticipated noise would be made by customers of The Playground. If the sound levels complied with the District Plan noise limits, then that would result in "reasonable noise that is compatible with residential activities". He recognised low ambient sound levels around Malaghans Rd, but not the specific level, and that even sound which complied with District Plan noise limits would often be clearly audible from neighbouring properties. Sound from other activities was already audible in the environment and occasional sound from The Playground would be "acceptable". He addressed concerns expressed by neighbours one by one, and overall said that the traffic and noise levels would be "acceptable" or at a "reasonable level" if they complied with District Plan noise limits.

[31] Mr Slyfield's submission is that there was no assessment by Dr Chiles, Mr Woodward or anyone else, whether the noise which would be experienced by adjacent land owners would be "less than minor", although that language was expressly employed in the decisions under review to which I now refer. It is a quantitative and qualitative test, which is a testing proposition for a consent authority.

C. THE DECISIONS

Summary

[32] The Summary of the two decisions (non-notification and resource consent), records that the application would be processed on a non-notified basis given the findings in Section 6.0 of the report of the decisions. The non-notification decision was made by the Senior Planner under delegated authority.

[33] Resource consent was granted subject to conditions expressed and emphasised in this way: *"This consent only applies if the conditions outlined are met"*. The summary records:

> To reach the decision to grant consent the application was considered (including the full and complete records available in the Council's electronic file and responses to any queries) by Paula Costello, Senior Planner, as delegate for the Council.

[34] The purpose of the application was set out, then the relevant provisions in the District Plan. A mix of restricted discretionary, discretionary, and non-complying activities was identified and overall it was considered as a non-complying activity. The "permitted baseline" did not apply as the only permitted commercial activities are those involving five persons or fewer.

[35] Public notification was addressed in Section 3.1 of the Decision. The assessment of effects on the environment was undertaken in Section 4. The assessment comprehended the criteria in the District Plan. The site falls within the description of Visual Amenity Landscapes ("**VAL**") and include the criteria for the effects on natural and pastoral character, visibility of development, form and density of development, cumulative effects of development on the landscape, and rural amenity.

[36] The Decision records that Mr Denney considered the activities would be "highly contained within the depression created by the natural topography of the "upper end" terrace…" That assessment was accepted in the Decision. The visibility of the development addressed the same confinement of activities to the upper terrace. The proposed car park situated off Alan Reids Rd represented the most visible feature of the proposal viewed from Malaghans Rd, with vehicles passing at intermittent times throughout the day. Mounding and a cluster of trees would mitigate the effects of the proposed car park. Form and density of development recognised the existing landform so that much of the development, with the exception of the car park, would be screened from public view. For that reason the proposal can be appropriately absorbed into the environment "without detracting from the overall arcadian pastoral landscape". Most of the site will remain unchanged in its pastoral state. The cumulative effects of development on the

landscape include an increase in commercial activity in the area, but given the topography and the way the proposal was situated, the adverse visual landscape effects would be less than minor. For much the same reasons, the open space views would not be affected within the description of rural amenities. Overall, the proposal would have less than minor adverse visual and landscape effects on the wider environment.

[37] The commercial recreational activities were assessed against the proposed cap on vehicle movements to 24 per day, and a maximum number of 200 customers each day. Traffic would be intermittent and of low volume such that adverse effects on character and rural amenity would be no more than minor. The movements are calculated to 2.4 vehicle movements per hour, although there would likely be periods of multiple vehicle use. Most of the day would see little to no vehicle movement.

[38] Pedestrian use would be limited throughout the day given the substantially screened nature of the activities and the cap on customer numbers.

[39] Noise, vibration and lighting were addressed against compatibility with levels "acceptable" in a low density rural environment. There is no lighting. As to noise, Dr Chiles had noted that the dominant noise source would be from people participating in the activities, talking and laughing, and vehicle noise. Dr Chiles considered that given the confined nature of the activity and inherent separation from surrounding sites, and natural screening of the landforms, noise would be able to comply with the District Plan noise limits and any noise audible at times would be acceptable. Given the inherent separation distance between the activities and public spaces, the noise effects on people in the wider environment would be intermittent and less than minor. "Noise from paintball guns [are] unlikely to be heard from beyond the site given the lack of noise emissions from this type of equipment". Dr Chiles considered that "Noise from people participating in the activities" was able to meet the District Plan requirements and a condition of consent was volunteered in that regard. There was consideration of the loss of privacy and sense of remoteness or isolation.

[40] Overall, the Council decided that the activity was not likely to have more than minor adverse effects on the environment for the purpose of s 95A(2) (public notification).

Limited notification – "Effects on persons"

[41] The effects on persons were discussed in Part 5 of the Decision. The concerns of owners or occupiers of each property were set out in considerable detail. Each property was assessed and conclusions were reached as to adverse effects. An answer to concerns about noise was that the activities would comply, and *have to comply* with the noise limits as a condition of consent. Concern was expressed about stag parties, but alcohol consumption is not part of the proposed activities. It was decided that the adverse effects of the proposal would be less than minor in each case. Reasons were given. These included separation distances and screening, with recognition that noise may be audible, but at a level which would not detract from the rural residential amenities of the property and at a level permitted by the District Plan. Other noise from the gathering of persons in the car park would be intermittent, and limited. There would be no activity in the more sensitive night time hours. The consideration of the effects at various neighbouring properties is extensive but some examples are pertinent to judgment.

> *743 Malaghans Rd*
>
> As discussed above, Dr Chiles has provided expert advice with respect to potential noise effects. Dr Chiles considers that the separation distances afforded between the dwelling and the activity area, along with the prevailing characteristics of the terrain, noise from those participating in activities will be able to comply with the relevant noise limits of the District Plan. In this regard, while at times noise may be audible, adverse effects on this property are considered to be less than minor particularly when acknowledging the day time nature of the operation, the lack of amplified noise sources and intermittent nature in terms of the use of the site/activities.
>
> *761 Malaghans Rd– sec (Sec 2 SO 468375)*
>
> In terms of traffic noise, specific concerns have been raised with respect to coaches entering and exiting the proposed carpark from Alan Reids Road, given the location of the approved platform on the neighbouring site in relation to the carpark entrances.
>
> Dr Chiles has advised that while these sounds may be momentarily audible, they would be at a reasonable level in compliance with the District Plan

noise limits. The expert advice of Dr Chiles' has been relied upon and on this basis and as such, adverse effects on this party will be less than minor. It is further noted that the use of coaches will be intermittent in the sense that the predominant mode of transport is anticipated to be from the company minibus or private vehicles. Furthermore, any vehicle movements are limited to daylight hours and outside of the more sensitive periods such as early mornings and evening hours.

…

Concerns were raised by this party in terms of noise generated from users of the site, including noise generated from people gathering in the carpark on arrival and prior to leaving.

As discussed the separation distances afforded between the activity area (located in the 'upper' terrace) and the approved platform (where the approved platform is located approximately 500 metres from the activity area) along with the natural screening provided by the terrain will mitigate noise effects from users partaking in the commercial recreation activity. Based upon the expert advice of Dr Chiles, whilst there may be times where noise is audible, this is considered to be of a level that will not detract from the rural residential amenities of this property (and of a level permitted by the District Plan).

In terms of the congregation of persons in the carpark, any such noise will be intermittent and limited to a short period of the day. Again, it is acknowledged that these activities are during daytime hours and any disruption to the neighbouring property during more sensitive night time hours will be avoided.

761 Malaghans Rd, Wakatipu Basin (Sec 1 SO 457201)

The separation distances afforded along with the natural screening provided will mitigate noise generated from people partaking in activities. Based on the expert advice of Dr Chiles, the level of noise generated from people participating in activities will be able to comply with the noise limits of the District Plan noting the inherent separation distances provided between the activity areas and surrounding sites and the screening afforded by the terrain. In this regard, while at times noise may be audible, these will be of a level that will not detract from the rural residential amenity enjoyed by this site.

791 Malaghans Rd, Wakatipu Basin (Sec 7 SO 457201)

Specific concerns raised by this neighbour includes past experience with users of the Flight Park where screams from participants are disruptive due to the level of noise generated. Dr Chiles acknowledges these concerns however points out that the provision of a natural buffer for the subject site will provide mitigation to noise that is not present for this property with the Flight Park operation. In this regard, whilst people noise may be audible at times, based on the expert advice of Dr Chiles it is considered that these levels will have less than minor adverse effects on the amenity for this property.

…

Summary

The proposal involves introducing a commercial operation to a rural environment, however after considering the mitigating factors, volunteered restrictions on the operation and expert advice provided by Dr Chiles and Mr Carr (and subsequently reviewed by Mr Wardill), it is considered that the proposal as sought will have less than minor effects on surrounding properties.

For completeness no other parties beyond those discussed above are considered to be affected by the proposed activity.

[42] The decision as to limited notification was expressed as follows:

5.3 DECISION: EFFECTS ON PERSONS (s95B(1))

In terms of Section 95E of the RMA, no person is considered to be adversely affected.

[43] The overall conclusion was that after considering mitigating factors, volunteered restrictions on the operation, and expert advice provided by Dr Chiles and others, the proposal would have less than minor adverse effects on surrounding properties. The correct statutory test for limited notification was applied, that the effects would be less than minor, on all *potentially* "affected persons". A central question for this judgment is whether the Council lawfully reached that conclusion.

D. LAW

[44] Mr Slyfield for the applicants submits that s 88 of the Act is a foundation point for the applicants' case. It provides:

88 Making an application

(1) …

(2) An application must—

(a) …

(b) include the information relating to the activity, including an assessment of the activity's effects on the environment, as required by Schedule 4.

(2A) …

(3) A consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not—

(a) include the information prescribed by regulations; or

(b) include the information required by Schedule 4.

(3A) The consent authority must immediately return an incomplete application to the applicant, with written reasons for the determination.

(4) If, after an application has been returned as incomplete, that application is lodged again with the consent authority, that application is to be treated as a new application.

(5) Sections 357 to 358 apply to a determination that an application is incomplete.

Schedule 4

[45] Section 125 of the Resource Management Amendment Act 2013 ("**RMAA**") replaced Schedule 4 of the Act, which now relevantly provides:

Schedule 4

Information required in application for resource consent

…

2 Information required in all applications

(1) An application for a resource consent for an activity (the **activity**) must include the following:

(a) a description of the activity;

(b) a description of the site at which the activity is to occur;

(c) the full name and address of each owner or occupier of the site;

(d) a description of any other activities that are part of the proposal to which the application relates;

(e) a description of any other resource consents required for the proposal to which the application relates;

(f) an assessment of the activity against the matters set out in Part 2;

(g) an assessment of the activity against any relevant provisions of a document referred to in section 104(1)(b).

(2) The assessment under subclause (1)(g) must include an assessment of the activity against -

(a) any relevant objectives, policies, or rules in a document; and

(b) any relevant requirements, conditions, or permissions in any rules in a document; and

(c) any other relevant requirements in a document (for example, in a national environmental standard or other regulations).

(3) An application must also include an assessment of the activity's effects on the environment that –

(a) includes the information required by clause 6; and

(b) addresses the matters specified in clause 7; and

(c) includes such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

…

6 Information required in assessment of environmental effects

(1) An assessment of the activity's effects on the environment must include the following information:

…

(b) an assessment of the actual or potential effect on the environment of the activity:

…

(f) identification of the persons affected by the activity, any consultation undertaken, and any response to the views of any person consulted:

…

7 Matters that must be addressed by assessment of environmental effects

(1) An assessment of the activity's effects on the environment must address the following matters:

(a) any effect on those in the neighbourhood and, where relevant, the wider community, including any social, economic, or cultural effects:

(b) any physical effect on the locality, including any landscape and visual effects:

(c) any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity:

(d) any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural value, or other special value, for present or future generations:

(e) any discharge of contaminants into the environment, including any unreasonable emission of noise, and options for the treatment and disposal of contaminants:

(f) any risk to the neighbourhood, the wider community, or the environment through natural hazards or the use of hazardous substances or hazardous installations.

(2) The requirement to address a matter in the assessment of environmental effects is subject to the provisions of any policy statement or plan.

The obligation to inform the consent authority

[46] In combination these provisions without question demonstrate the significant obligation of an applicant to *inform* the consent authority, by description of the activity, relevant Plan/s or other instruments, and assessment of environmental effects. The adequacy of this information is a crucial aspect of this case. This is associated with the question whether amendments to the Act in 2006 and 2009 have liberalised the approach to notification, to allow the consent authority greater scope *not to notify*.

"Discount Brands"

[47] Whether there is such or not, a sound decision can only be reached by a consent authority sufficiently and relevantly *informed* of all characteristics of an application for resource consent. A decision must then be reached only on relevant considerations. Mr Slyfield submits that the law remains largely as stated in the judgment of the Supreme Court in *Westfield (New Zealand) Ltd v North Shore City Council* ("*Discount Brands*"):[4]

> [114] … the information in the possession of the consent authority must be adequate for it (a) to understand the nature and scope of the proposed activity as it relates to the district plan; (b) to assess the magnitude of any adverse effect on the environment; and (c) to identify the persons who may be more directly affected. The statutory requirement is that the information before the consent

[4] *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17 [2005] 2 NZLR 597. (Blanchard J).

> authority be adequate. It is not required to be all-embracing but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis.
>
> [115] The statutory requirement addresses more than the scope of the information. The consent authority must necessarily be satisfied as well that the information is reliable, especially so where an expert opinion is tendered. The authority will need to consider whether the author of the opinion is both appropriately qualified to speak on the subject and sufficiently independent of the applicant so as to be seen as giving expert advice rather than acting as an advocate for the applicant.
>
> [116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

"Coro Mainstreet"

[48] The Court of Appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* addressed the application of these principles.[5] Section 76 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 repealed ss 93-95 of the RMA and replaced them with ss 95A - 95F. In *Coro Mainstreet*, counsel agreed in the High Court that *Discount Brands* applied.[6] The Court of Appeal observed that the High Court thought that *Discount Brands* remained good law following the amendments, citing *Ferrymead Retail Ltd v Christchurch City Council*.[7] The courts have generally held that the 2003 amendments did not alter the approach in *Discount Brands*, and that perspective has been applied in a number of cases.[8]

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5 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, (2013) 17 ELRNZ 427 at [34]-[41].

6 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442.

7 *Coro Mainstreet (Inc) v Thames-Coromandel District* Council, above n 5; *Ferrymead Retail Ltd v Christchurch City Council*, above n 2 at [80]. In *Green v Auckland Council* [2013] NZHC 2364, [2014] NZRMA 1 at [92], Priestley J also held that there was clear authority the principles of *Discount Brands* had not been undercut, citing *Ferrymead*.

8 See for example: *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC) at [90]-[93]; *Sawmill Workers Against Poisons Inc v Whakatane District Council (No 2)* [2006] NZRMA 500 (HC) at [41]; *Mount Victoria Residents Association Inc v Wellington City Council* [2009] NZRMA 257 (HC) at [20]-[21].

[49] The Court of Appeal nevertheless considered the possibility that the statutory amendments altered the law as articulated in *Discount Brands*, as amendments to the Act were significant. *Discount Brands* was concerned with s 93 of the Act.

> **93. Notification of applications** –
> (1) Once a consent authority is satisfied that it has received adequate information, it shall ensure that notice of every application for a resource consent made to it in accordance with this Act is –
> …
> (g) Publicly notified; …
> unless the application does not need to be notified in terms of section 94.

[50] The threshold need for "satisfaction" of the consent authority that it had adequate information meant that *only then* would the application be ready for notification, or otherwise under s 94(2) of the Act:

> 94(2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and –
>
> (a) the consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
>
> (b) written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[51] Sections 93 and 94 were amended in 2003, removing the statutory requirement that the consent authority be "satisfied" it had received adequate information.[9] They were repealed in 2009.[10]

[52] However, the 2009 amendments were described by the Court of Appeal in *Coro Mainstreet* as more wide ranging. The Court noted the differences between s 95A and the provisions under consideration in *Discount Brands*:[11]

> (a) The *presumption* in favour of notification has been removed, and replaced with a *discretion* whether to notify an application.

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9 Resource Management Amendment Act 2003, s 41.

10 Resource Management (Simplying and Streamlining) Amendment Act 2009, s 76.

11 *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, above n 5, at [39] (emphasis added).

(Note: I add that with stated exceptions there is no discretion available to a consent authority if there is an "affected person" – who must be given limited notification – s 95B(2)).

(b) The word "satisfied" has been replaced by "decides". In *Discount Brands* the Chief Justice had commented that the use of the term "satisfy" could be contrasted with the use of the term "decides" in other sections of the Act, and *implied a higher* degree of certainty than provisions where the term "decides" was used.

(c) The consent authority must now "decide" whether the adverse effects "will have or are likely to have" effects that are "more than minor". This contrasts with the provision in issue in *Discount Brands* which required the consent authority to be "satisfied" that the adverse effects on the environment "will be minor".

(d) There is now no express requirement that the consent authority have "adequate information" before making a notification decision. However, as noted above, this requirement was removed in 2003, so was already a feature of the legislative regime before the 2009 amendment.

[53] The Court of Appeal adopted the *Discount Brands* approach with these observations:

> [41] The argument before us addressed the stricter requirements as outlined in *Discount Brands*, and in the absence of argument on the effect of the 2009 amendments we will deal with the case on that basis. But we should not be taken to have accepted that the amendments made to the RMA since *Discount Brands* have had no effect on the non-notification process and on the analysis of the previous law in the Supreme Court's decision in *Discount Brands*. If the point had affected the outcome of the present case, we would have wanted to consider whether the 2009 amendments gave effect to the apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications, and to reduce the intensity of review to be applied to non-notification decisions from that mandated in *Discount Brands*.

Supreme Court

[54] The judgment of the Supreme Court in *Auckland Council v Wendco (NZ) Ltd*,[12] bears on the approach to notification. The majority referred to *Discount Brands* and said:

> [46] … the validity of the non-notification decision does not depend on this Court agreeing with the view taken by the Council that the adverse effects of the activity, … would be less than minor. On the other hand, the Court must review the adequacy of the information before the Council when

[12] *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113.

making the non-notification decision. This assessment must reflect the reality that in making the decision not to notify the application, the Council was precluding any opportunity for [the affected company] to have input into the decision.

[55] The Court adopted the following passage from Elias CJ's judgment in *Discount Brands*:

> [25] … The requirement that the consent authority must be "satisfied" that effects are minor before deciding not to notify a resource consent application to undertake a discretionary or non-complying activity is a requirement of caution. The consent authority must be clear that notification would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor.
>
> [26] It was not sufficient for the consent authority to have before it "some material of probative value", … . Nor do I consider that the Court of Appeal was correct in the view … that the consent authority had to decide "on the information then available to them, whether any impact on existing centres would be so substantial as to threaten their viability". The consent authority had to decide whether it could be satisfied without notification that the adverse effects on the environment were minor. It could not confine its consideration to the material before, it because that would be to avoid the question. (citations omitted)

[56] In *Wendco*, the majority of the Supreme Court said:

> [47] It is arguable that subsequent changes to the RMA mean that an approach to non-notification decisions which is less exacting than that required by *Discount Brands* should now be adopted. This is discussed in some detail in *Coro Mainstreet (Inc) v Thames-Coromandel District Council*. Given that the Court below proceeded on the basis of *Discount Brands* and we are satisfied that the *Discount Brands* standard was in fact met, we see the associated arguments as best left for another case.

[57] The Supreme Court endorsed the judgment of Peters J at first instance:[13]

> This application, with detailed information supplied, was considered by experienced specialists at the Council. They did not take that information at face value but made enquiries on several occasions and required revisions to the proposal that they considered were necessary. It was only when they were satisfied with the information provided that the notification decision was made. Accordingly, I am satisfied that the Council had sufficient information before it to assess the adverse effects of the proposal and to decide that they were less than minor.

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13 *Wendco (NZ) Ltd v Auckland Council* [2014] NZHC 1481 at [51].

Discussion

[58] In *Aro Valley Community Council Inc v Wellington* City Council, McKenzie J said he did not think it was necessary for the consent authority to *separately* address the intensity or adequacy of information, but that Parliament's intention is that the plaintiff still faces a high hurdle to challenge a non-notification decision.[14] I am not satisfied that a challenge faces a higher hurdle as the result of the amendments, as I will explain. In *Tasti Products Ltd v Auckland Council*, Wylie J considered that *Discount Brands* remains good law, but observed:[15]

> There is no longer a statutory requirement that a Council must be satisfied that it has received adequate information. To my mind, as the law now stands, what is amenable to judicial review is the decision Council makes on notification. The adequacy of the information before the Council may well reflect in the quality of its decision, but the adequacy of the information itself is not a matter which falls within the scope of s 4 of the Judicature Amendment Act 1972.

[59] Mr Slyfield accepts the observations of Wylie J but says that the Council's decision is reviewable because it failed to take relevant matters into account, as there was no, or insufficient, relevant information about sources of noise generation with their effect on neighbours, *or* the decision was one that no reasonable decision maker could come to, on the available information. When the point was raised by the Court he submitted that s 95C of the Act applies, and that as the Council failed to provide a proper answer to the s 92 request for further information, there was no option but for the Council to *publicly notify* the application. This falls for separate determination in this judgment.

[60] There are other generic considerations. Consent authorities are expected to reach sound, but not unduly burdensome, decisions. Chisholm J said:[16]

> [103] Any suggestion that consent authorities are under a rigid obligation to check all the raw data accompanying resource consent applications… is untenable… Any such obligation would impose unrealistic and unworkable administrative burdens upon consent authorities, not to mention the cost implications. Whether or not such raw data needs to be tested will depend on the particular application. For example, if there is some reason to doubt

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14 *Aro Valley Community Council Inc v Wellington City Council* [2015] NZHC 532, (2015) 18 ELRNZ 555.

15 *Tasti Products Ltd v Auckland Council*, above n 1, at [45].

16 *Ferrymead Retail Limited v Christchurch City Council, above* n 2.

> the integrity or reliability of the data then further enquiry might be expected, with the nature of the enquiry being a matter of judgment for the consent authority, subject to appeal rights.

[61] In *Discount Brands*, Tipping J said that "information should be distinguished from assertion",[17] which is closely related to the discussion by Blanchard J as to reliability of information provided to the consent authority.

[62] Another consideration is identified by Williams J, who observed that the non-complying status of an activity means that it generally does not belong in the area, and this means a "hard look" must be applied at the notification and consent stages, which takes in proper consideration of the permitted baseline. He added:[18]

> … the planners must ask in-depth questions about amenity impacts – noise, vehicle movements, visual and industrial style impacts. If the answers are superficial, then further information must be sought.

[63] In this case, counsel disagree on the effect of the amendments to the Act. Mr Slyfield submits that *Discount Brands* remains good law. Ms Campbell submits that the *Discount Brands* requirements have been relaxed. She refers to the Court of Appeal in *Coro Mainstreet* supported to a degree by the observations of the Supreme Court in *Wendco*. She submits the consent authority must *decide* the level of effects, and that is to a lesser degree than it being "satisfied", therefore there is greater scope *not* to notify applications, to reduce the intensity of review of non-notification, so that a material error of law in need of correction must be identified.

[64] Correctly, and I consider of importance in this case, Ms Campbell submits that the *effects* are for the consent authority to determine in its specialist function, and the High Court should not lightly interfere.[19] Even if Blanchard J's judgment in *Discount Brands* has full application, then the Council says it had adequate information before it, so the *Discount Brands* test is met.

[65] While Ms Campbell submits that Wylie J's analysis in *Tasti Products Ltd v Auckland Council* indicates a reduced intensity of review I do not

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17 *Westfield (New Zealand) Ltd v North shore City Council*, above n 4, at [146].
18 *Hanna v Whanganui District* [2013] NZHC 1360, (2013) 17 ELRNZ 314 at [32].
19 *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [63].

read His Honour's judgment in that way.[20] In that case, there were shortcomings in the application and the applicant did not fully address the request for further information. Wylie J found that there was sufficient information to properly assess whether the applicants for judicial review were affected persons. While a consent authority does not have to be "satisfied" of the "adequacy" of information, it still must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects. I recognise there is room for debate whether the word "satisfy" as opposed to "decides" indicates a higher degree of certainty was required before the amendment, but a decision whether adverse effects are, for example, "less than minor" could not be reached unless the decision maker was "satisfied" of that. I do not see how a Council could decide something unless it was satisfied that it was sufficiently and relevantly informed, and satisfied of the decision it makes. A Council could not say it was "not satisfied" about those matters but nevertheless go on to make a decision which affects the rights of others.

[66] In short, I agree with Wylie J that the obligation on the Council to be "satisfied" that it has adequate information is no longer a separate and reviewable element of its decision making process. I do not consider that this in any way altered the need for a decision maker to be sufficiently and relevantly informed. It does not alter the need for the decision maker to apply relevant and not irrelevant considerations, and make a decision which stands up to the test of "reasonableness". Being sufficiently and relevantly informed does not ensure these elements of decision making will be lawfully undertaken. In these respects *Discount Brands* in my view has undiminished force. It recognised a distinct step in the (repealed) legislation, but there must always be a secure foundation for such important decisions. Parliament cannot have intended to remove that foundation. That is not to endorse a counsel of perfection, but of sufficiency and relevance, and that is how I conclude the decision in this case should be judicially reviewed. It is fundamentally a test of the quality of the decision.

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[20] *Tasti Products Ltd v Auckland Council*, above n 1, at [51].

E. ANALYSIS

Approach

[67] A non-notification decision requires the decision maker to be sufficiently and relevantly informed and to bring that information properly to account in a reasoned way. The activity here is non-complying, so it does not generally belong, and must be scrutinised in that light.

[68] Ms Campbell submits that the applicants have misconstrued the information before the Council, and its adequacy, and have drawn an illogical conclusion from the Council's *public notification assessment*, as opposed to the Council's *limited notification assessment*. Ms Campbell submits that the Council clearly understood the nature and scope of the proposed activity, evaluated its effects comprehensively, and properly brought to account the noise limits in the District Plan. The Council's decision has been summarised. It concluded that noise from paintball guns was unlikely to be heard from beyond the site, and noise effects on adjacent land owners would be less than minor. In this conclusion it relied on Dr Chiles' advice and the fact the District Plan noise limits would be complied with. Evaluating noise from an accumulation of such activities and the effect of that noise is not straightforward. It requires information and judgment. Here, the equipment in use is not inherently noisy. The variety of noises, the ambient sound levels, and the intermittent timing of noise generating activities make evaluation difficult. The activity is limited in the number of customers, and in a discrete setting.

[69] I have disagreed with Ms Campbell's submission that the likely effects of the amendments to the RMA were to give consent authorities greater scope to decide not to give limited notification. I agree, however, that the Court should be slow to intervene in the Council's specialist exercise of its powers, and should only do so when there is a plain error of law needing correction. The principle is reflected in the High Court judgment in *Coro Mainstreet (Inc) v Thames-Coromandel District Council*:[21]

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[21] *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, above n 6.

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

The s 92 request for further information, and s 95C of the Act

[70] This is a discrete issue but it is closely tied to whether the Council was sufficiently and relevantly informed, and made a lawful decision. The request under s 92 of the Act for further information has been set out above. Shortly before this judgment was to issue, I adverted to the provisions of s 95C of the Act which relevantly read as follows:

> **95C Public notification of consent application after request for further information or report**
>
> (1) Despite section 95A(1), a consent authority must publicly notify an application for a resource consent if –
>
> (a) it has not already decided whether to give public or limited notification of the application; and
>
> (b) subsection (2) or (3) applies.
>
> (2) This subsection applies if the consent authority requests further information on the application under section 92(1), but the applicant –
>
> (a) does not provide the information before the deadline concerned; or
>
> (b) refuses to provide the information.
>
> (3) This subsection applies if the consent authority notifies the applicant under section 92(2)(b) that it wants to commission a report, but the applicant—
>
> (a) does not respond before the deadline concerned; or
>
> (b) refuses to agree to the commissioning of the report.
>
> (4) This section applies despite any rule or national environmental standard that precludes public or limited notification of the application

[71] This section had not been the subject of pleading or submissions. Indeed, the Council accepted in submissions that the request for further information was "not fully responded to". Later this concession was retracted. Ms Campbell's answer was that Wylie J in *Tasti Products* decided the consent authority had adequate information before it despite an insufficient response to the s 92 request, and after The Playground first replied to the request, this was "corrected" by Dr Chiles' expert assessment and by The Playground agreeing to a condition of consent requiring the District Plan noise limits to be met, together with other information.

[72] Section 95C has a peremptory ring to it. A consent authority "must publicly notify an application …" where a request for further information has been made under s 92(1) of the Act, but the applicant does not provide the information before the deadline concerned, which may be extended, or refuses to provide it. There was no refusal in this case. The issues are:

(a) whether the request for further information was sufficiently met;

(b) whether there is a "drop dead" time for the response;

(c) whether any failure to reply in full is fatal to non-notification, or if information can be made up from other sources.

[73] A telephone conference on 16 August 2017 was convened as a resumption of the December 2016 hearing, to hear submissions on this issue. Mr Slyfield's position is straightforward. He says that the response to the Council's s 92 request failed to provide an overview of relevant noise sources. He says that is fatal to the decision not to notify. A draft amended statement of claim incorporating reference to s 95C was put before the Court and will be filed if the Court requires, but the point is straightforward, and formal pleading is unnecessary.

[74] Mr Slyfield's submission is that the request for further information had two parts, "general" and "particular". He focuses on paragraph 8 of the request set out at para [26] above. The request for an "overview" of the sources of noise included details of PA systems, amplified music or ongoing alarms. The information sought

was expressly to give the Council an idea of the potential noise effects, and whether they would affect the residential amenities of neighbours. The answer referred to these particulars, that there would be no background music, that the sound given off would meet the noise standards, and would not be heard by any residential neighbours.

[75] Mr Slyfield acknowledges that the application for resource consent was detailed and *identified* sources of noise, but says there was no answer which sufficiently informed the Council by way of "overview" about the relevant sources of noise. He gives the example of paintball guns and that there was no information regarding the "characteristics of such noise", and it cannot be found anywhere in the material before the Council. He says the policy behind s 95C is that there should be a response to the request, as it is put, or else there will be repercussions.

[76] Ms Campbell does not contest the submission that there was no "overview" answer, nor specifically about the noise from paintball guns, but she refers to the application with the AEE and Dr Chiles' advice which addressed noise from these guns. She says the reply from Ms Devlin of 29 April 2016 was detailed in the particulars which were sought. The application referred to paintball guns, that *no noise* would be heard from them, and the discrete location of the activity. Dr Chiles was alert to the nature of the application, and was asked to assess the potential noise effects. He recognised that sound level data for all the specific activities was not available, but he said that the "equipment itself should generate minimal sound levels at neighbours, but people participating are likely to make some sound including with raised voices". The sound of people with raised voices was of most concern, and he made a qualitative assessment of that. He addressed ambient noise levels, the noise from vehicles and customers, that the sound levels could, and must fall within the noise limits. He recognised sound would still be heard at neighbouring properties.

[77] Mr Slyfield submits with precision that despite all this there was no answer provided by the applicant about noise emitting *properties*, nor the level, character, or duration, of noise emissions from the equipment, nor the existing noise environment. Rather, it simply asserted that noise emissions would comply with the Plan's noise

threshold for permitted activities in the zone. Mr Slyfield submits that there had to be further enquiry, as otherwise the consent decision lacked the necessary foundation for a reasoned decision. He put it that this was not enough, or "*not good enough"* evidence to properly assess the noise effects of the proposal. Compliance with District Plan noise standards is an assertion, with no supporting information. He accepts that the planner proceeded in an orthodox way to ask questions, but submits that there was still *no information* about the sources of noise so The Playground's answer to the s 92 request was superficial, and the request was overlooked, or consciously disregarded. I reject the latter submission, as there was a detailed explanation of the proposal and its effects in The Playground's dealings with the Council.

[78] Mr Slyfield says Dr Chiles' advice added nothing to materially improve the quality of the planner's assessment and the "overview" of all sources of noise was not provided, thus not known to the Council. Mr Slyfield submits that there was no sufficient response to the s 92 request, and nothing makes up for it, so s 95C directs the answer. He says the consenting process should have come to a halt while the application was publicly notified. Aside from that, but for reasons which include that, he says there was insufficient information for the decisions to stand. He submits it is not enough to comply with the noise standard and further scrutiny should be given to that assertion and the effect on residential neighbours, even when activities are within the noise limits.

[79] The question remains whether there was in the accumulation of information and the application of the noise limits, sufficient relevant information, and whether s 95C should be interpreted to preclude the Council proceeding on all the information before it, even if not provided by the applicants for resource consent.

[80] Another example given of alleged insufficiency of relevant information is that Glenorchy Homestead occupies land adjacent to the pedestrian path between the car park and the activity area. The assessment of effects refers to visual effects of the proposed structures and car park but makes no mention of the pathway and its use. The noise from recreational activity was addressed by reference to separation distances and natural screening, not large groups of people walking between the car

park and the activity area, for which no screening is proposed, and where the separation distance is least. This in my view is a question of fact and the Council was well able to conclude any effects would be less than minor, with little foot traffic.

Relevance of noise limits

[81] For public *and* limited notification decisions, the consent authority may disregard an adverse effect of a proposed activity if the district or regional plan permits an activity having the effect of the proposed activity.[22] Effects *above* that baseline require assessment, if the permitted baseline test has application.

[82] Rule 5.3.5.2(v) of the District Plan reads:

> **v Noise**
>
> (a) Sound from non-residential activities measured in accordance with NZS 6801:2008 and assessed in accordance with NZS 6802:2008 shall not exceed the following noise limits at any point within the notional boundary of any residential unit, other than residential units on the same site as the activity:
>
> (i) daytime (0800 to 2000 hrs) 50 dB $L_{Aeq(15\ min)}$
>
> (ii) night-time (2000 to 0800 hrs) 40 dB $L_{Aeq(15\ min)}$
>
> (iii) night-time (2000 to 0800 hrs) 70 dB L_{AFmax}

[83] This is related to Rule 5.4.2.3(xiv) which reads:

> **xiv Discretionary Activity – Commercial Recreational Activities (other than on the Surface of Lakes and Rivers)**
>
> (a) The extent to which the recreational activity will result in levels of traffic or pedestrian activity which are incompatible with the character of the surrounding rural area.
>
> (b) Any adverse effects of the proposed activity in terms of:
>
> (i) noise, vibration and lighting, which is incompatible with the levels acceptable in a low-density rural environment.
>
> (ii) loss of privacy or a sense of remoteness or isolation.

[22] Resource Management Act, ss 95D(b) and 95E(2)(a).

…

(d) The extent to which the nature and character of the activity would be compatible with the character of the surrounding environment.

[84] Ms Campbell submits that in what is an untested setting, for low noise emitting equipment, the Council was entitled to bring to account and decide that noise associated with the proposed activities could and must comply with the District Plan noise limits. A condition imposed to that effect, given separation distances, and limits imposed on customer numbers and vehicle movements, would achieve such compliance.

[85] The response to the alleged shortcoming is submitted by Ms Campbell to have been made up by other material; the application and AEE, Dr Chiles' expert assessment, and the condition which underpins the consent that the District Plan noise limits must be met. The Council does not have to assume non-compliance.[23] Dr Chiles and the Council expressly brought to account the topography, separation distances and noise effects. In assessing the reliability of the information provided, the Council was entitled to rely on Dr Chiles' expert advice, as he was independent and he knows the area. The Council was entitled to conclude the potential noise effects will be within those limits. There was repeated reference to such compliance in the decision under review and the applicants did not seek resource consent in order to legitimise a breach of the District Plan limits, but I accept Mr Slyfield's submission that does not of itself answer the case raised for the applicants.

[86] Mr Slyfield submits that the *permitted activity* is defined by the zone standard, not by the noise standard. There was no suggestion that The Playground's application would breach the District Plan noise limits, quite the contrary. Ms Campbell submits that the Council need not assess those components of an activity *for which no resource consent is required*.[24]

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[23] *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA) at 318 cited with approval in *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [134].

[24] *Nash v Queenstown Lakes District Council* [2015] NZHC 1041.

[87] Mr Slyfield submits that it should not be assumed by this Court that Mr Woodward's reference to compliance with District Plan noise limits represents a reference to the "permitted baseline". The decision does not say as much, so that would have to be inferred, and Mr Slyfield submits that is not "appropriate". If it is to be inferred, then Mr Slyfield still says that the decision discloses no effort to analyse the *quality* of the noise. In essence, Mr Slyfield submits an activity which in numbers falls outside the permitted range is not appropriately assessed against a numerical threshold. The "quality" of the noise effect would be influenced by the arrival of coach loads of "enthusiastic and excited patrons", the air suspension of the coaches, congregation of those groups, the movement on foot to the upper terrace, participation in adrenalin inducing activities, and patrons retracing their steps on departure. If it was sufficient to adopt a *quantitative* approach to noise, then Mr Slyfield says data must be available to consider the unsupported assertions for The Playground.

[88] As the noise limits permit a level of effect, Ms Campbell says that means the Council is entitled to have regard to that and to disregard such level. That is a matter of discretion. Here, the Council did *not* disregard that level of effect, but used that as part of its reasoning, in assessing whether the noise effect would be less than minor. I do not consider the Council *disregarded* noise effect, but correctly brought the noise limit to account as relevant.

[89] The Council recognised the activity involved several sources of noise. It recognised the rural setting and the discrete placement of the activity on the site. It recognised the utility of the noise limits, as a measure of effect, then as a fundamental control on the proposed activities. The Council can intervene if the application is found to have contained inaccuracies and assertions about noise levels, including failure to comply with the noise limits. The Council can also review the conditions, and if necessary cancel the consent under ss 128 and 132 of the Act. The Playground takes that very real risk. It is incumbent on it to comply. When something which is difficult to assess for effect in the abstract is tested in its operation against a numerical limit, then there is inherent risk to the consent holder's commercial operations.

"Less than minor" and reliance on Dr Chiles' report

[90] Mr Slyfield recognises that compliance with District Plan noise limits was relevant. However, he says the Council addressed whether the effects would be "reasonable" or "acceptable" or cause undue disturbance, and there was a fundamental failure to address how any person would *or may* be adversely affected by noise, as the noise limits do not answer that question. The Council says that the District Plan noise rules *must* be relevant to consideration of noise effects. The noise concerns raised by neighbours put the Council on inquiry, and it engaged Dr Chiles for that reason. Dr Chiles was entitled to give his opinion in a way that would help the Council's overall assessment, and he used language he thought appropriate. He did not make a statutory decision for the Council. He is an expert and he was offering an expert opinion which the Council, in conjunction with all the information available, had to evaluate against the "less than minor" test. The Council was informed, amongst other things, by his assessment.

[91] Dr Chiles did not expressly use the Act's "less than minor", "minor", or "more than minor", criteria. Mr Slyfield submits that the right questions were asked of Dr Chiles but little more than that. "Minor" may be "reasonable" and "less than minor" is more protective of those who may be affected. In *Green v Auckland Council*, the Court described "less than minor", and "more than minor" as "degrees of smallness".[25]

[92] Dr Chiles did not express a view as to notification. Mr Slyfield says that the inference is that he was not asked to do so, or if he was asked, he did not for some reason feel that he could answer. He submits that Dr Chiles made limited qualitative comments and simply relied on the assertion that the activity would comply with District Plan limits. His expressions of "reasonable" and "acceptable" effects might be "useful", but Mr Slyfield says he did not address whether adverse effects on neighbours would be *less than minor*. When the planner referred to "the lack of noise emissions from this type of equipment", and Dr Chiles was of a similar view, Mr Slyfield says there was no information available upon which that conclusion could be reached, and the planner could not have known whether

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[25] *Green v Auckland Council*, above n 7, at [126].

"reasonable" or "acceptable" noise might be minor, more than minor, or less than minor.

[93] The nuanced qualitative assessment of effects was discussed in the High Court by Priestly J:[26]

> The statutory tests of "minor", "more than minor", and "less than minor" can only be informed by context. One is dealing with degrees of smallness. Where the line might be drawn between the three categories might not be easily determined. "Less than minor", however, is the only category which relieves a consent authority of its s 95E(1) obligation to notify.

[94] The test used to be of "de minimis" effect. The use of the expression "less than minor" points in a similar direction. "Less than minor" in my judgment means that which is insignificant in its effect, in the overall context, that which is so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons.

[95] Dr Chiles was, in my view, able to use language that would assist the Council's decision and I consider that he provided advice which was relevant and helped the Council to reach the decision which it did. The Council submits that if there was an *unreasonable* effect that would point to notification, but the Council's express conclusion was that the noise effects would be less than minor. The Council plainly inferred that was what Dr Chiles meant when he used the adjectives "reasonable" and "acceptable", but his advice was just part of the information available. The Council unquestionably did address the correct statutory test, and in doing so brought to account compliance with the noise limits, and Dr Chiles' expressed opinion. It reached a tenable and reasoned conclusion with sufficient relevant information.

Rural Amenity

[96] The Council's decision discusses rural amenity in the context of "more tangible effects" including landscape, traffic and noise. Ms Campbell submits it is impossible to consider rural amenity for remoteness without those types of effect being brought to account. Rural amenity is conceptually composite in nature, a

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[26] *Green v Auckland Council*, above n 7, at [126].

shorthand for individual characteristics and effects that combine to affect rural amenity, and no Plan rule addresses rural amenity by itself. Landscape, traffic, and noise effects were expressly considered in the assessment of effects on persons, and found to be less than minor in all cases. Given this, the Council could only have found, as a matter of logic, that effects on rural amenity or remoteness on these persons would be less than minor. Further, it is submitted that "proper" regard to rural amenity values does not warrant this Court "delving" into the merits of the Council's assessment of effects; the weight given to elements for assessment should be left to the Council as a specialist consent authority.

[97] I agree with Ms Campbell that the rural amenity values were considered, first in the context of public notification assessment, and then the more tangible effects. Rural amenity is a composite notion. As landscape, traffic and noise effects were expressly considered, and found to be less than minor, the Council's conclusion with effects on rural amenity or remoteness were reasonably taken to be less than minor.

[98] The applicants submit that the notification decision was flawed because it failed to consider the effects on persons *other than* adjacent landowners, or occupiers, or *other than* those mentioned by the landowners, or occupiers. However, the Council's decision expressly recorded that no other parties *beyond those* discussed in its assessment of effects on the environment, or on persons, were considered to be affected by the proposed activity.

[99] That is not surprising, given the rural context, the separation distances, and topography. The catchment of potentially affected persons is thus more limited than in a closely held urban setting. If those persons closest to the proposed activity are not affected even in a minor way, then it is implausible that those further away would be considered to be affected. The Council does not need to record that.

[100] When the Council concluded that the proposed activity would have less than minor adverse effects on potentially affected persons, that applied to *all* potential adverse effects, and it does not have to list them. I can identify no failure of the Council to have regard to a relevant effect. A Council staff member asked those with concerns to outline them, and this was a thorough response. Hence, the report

prepared for the Council addressed all those concerns, and the Council sought The Playground's waiver of time to extend the statutory processing period to ensure all those concerns were considered. Reference to specific effects was the product of the Council identifying those of most significance. There are six pages of assessment of the effects on persons.

The 'lens' used by the Council

[101] Mr Slyfield says the planner was concerned with landscape assessment, and he knew that noise might impact on landscape values in a rural context detracting from the "tranquil rural setting". The decision made by the Council responded to each concern raised by Mr Gabler and others in correspondence. Mr Slyfield submits the Council must assess the effects on adjacent land owners *in all their potential*, not just as non-expert land owners or occupiers understand them. There is a submission that the Council did not make a thorough and independent assessment of effects on those parties. He says people such as Mr Gabler and Ms Bestwick have no expertise, and it is not for them to identify the adverse effects on them. Submissions and expressions of concern do not narrow the field of necessary consideration. This proposition must be right, as a matter of law. Mr Slyfield refers to the amenities in the rural zone, including a sense of remoteness or isolation, and that commercial recreational activities may adversely affect this. Mr Gabler and Ms Bestwick did not address their concerns in this way, and the decision of the Council did not address that impact on their properties. Mr Chudleigh and Ms Bestwick were not familiar with the District Plan assessment criteria, and they would have used that language had they known. In short, this is a submission that the Council ring-fenced its considerations against the concerns expressed by the neighbouring property owners. I do not find that is the case. There was close attention given to their concerns but taken together they represented the considerations which the Council had to bring to account. They captured the issue Mr Slyfield submits is missing, the way in which the noise of the activity will be received.

Conclusion as to sufficiency of relevant information

[102] I have reached the view that the Council is correct, and there was adequate information as to the nature and scope of the proposed activities, including the sources of noise and their effects. The activities were listed, the infrastructure described, the restricted number of participants, the restricted vehicle movements, together with restricted hours of operation. It identified where the activities would comply with the District Plan, and where they required consent. When The Playground said the activities *would* comply with the District Plan noise limits, that had to comprehend all these elements. The Council says it had the answer it needed, but only by an accumulation of all the information available to it. I repeat that a Council (consent authority) has long been held to be entitled to assume lawful behaviour, thus compliance with the conditions of consent.[27]

[103] The question of noise effect associated with proposed commercial recreational activity is exactly of the type which this Court should be loathe to upset. The fact that something is missing in expressed reasons is not fatal to a Decision, and Ms Campbell invokes that principle. It boils down to whether the Council was sufficiently and relevantly informed. Each element of activity was considered and the Council put the proposal in its true context of a relatively quiet rural general zone, but where there are other activities which already generate noise. The noise is hard to evaluate and there were cogent expressions of concern made by neighbours, all of which were considered. In my view, it is in order for the Council to respond to a difficult noise evaluation by the "sweeper" effect of a condition requiring compliance with a noise limit. I find that the Council's Decision properly considered noise effects on neighbours, and accept the submission that there was no further enquiry required, because there was no reason to doubt the integrity of the information. The test in *Discount Brands* is met, that information must be sufficiently comprehensive to enable the consent authority to consider the application on an informed basis.

[104] I conclude that the description and explanation for the proposed activity was extensive and detailed, identified compliance with the District Plan or otherwise, and

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[27] *Barry v Auckland City Council*, above n 23, at [318].

in the explanation that the noise associated with the activities would comply with District Plan limits. There is more to it than the noise limit, given the restriction on customer numbers, times of operation, vehicle movements, topography, and separation distances. Dr Chiles thought that the proposed activities would comply with the District Plan noise limits in the zone, although not for a permitted activity. The Council had sufficient relevant information to make a lawful decision and the decision was not unreasonable under the test for judicial review.

The strictness of s 95C

[105] The request for further information was not as fully responded to as it could have been. The response addressed particular questions regarding PA systems and music. The same position applied in *Tasti Products*, despite an insufficient response to the s 92 request.[28] Ms Campbell says that the lack of a targeted response was "corrected" by Dr Chiles' expert assessment and by The Playground agreeing to a condition of consent requiring the noise limits to be met.

[106] I do not consider that Parliament intended that s 95C of the Act should apply in a "drop dead" way in every case. If a reply is a day late, or the Council already has, or gets information it seeks from elsewhere, it cannot have been intended that there *must* be public notification. Section 95C is a discipline on an applicant for resource consent. Sometimes delay, or recalcitrance may activate s 95C in its full rigour. This is not one of those cases. The Playground was a well intentioned applicant providing detailed information in a straightforward way. The question put to it was evaluative, and in the end very much for a specialist body such as the Council to decide.

Exercise of discretion on judicial review

[107] *If* an error is identified under the established tenets of judicial review, then its materiality must be assessed in the exercise of the Court's discretion. Error which involves prejudice to someone affected means relief should be granted.[29] In such a case this Court would have to consider the materiality of any errors established, the

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28 *Tasti Products Ltd v Auckland Council*, above n 1, at [51].
29 *Air Nelson Limited v Minister of Transport* [2008] NZCA 26 at [59].

potential effects on The Playground, which was not able to contribute to this litigation, and the utility of granting the remedy sought given the noise limit in the Plan, whereby the Council may intervene and review the consent if the noise limit is breached. Mr Slyfield submits there must be strong reasons to refuse relief, if the grounds are made out, as the default position is to grant relief.[30] If errors are thought by the Court to be "relatively fundamental" then that favours the discretion of the Court being exercised in the applicants' favour. There are no alternative remedies available, and Mr Slyfield otherwise says that is a relevant consideration in the exercise of discretion.[31] There is a remedy however if the noise limits are breached, or if the noise generated is unreasonable. Mr Slyfield says to deny relief would condone reviewable errors, and overall fairness favours relief. He cites the Court of Appeal:[32]

> … a discretionary withholding of relief is not the normal outcome of a successful attack on a reviewable decision. If some form of relief could have practical value then it ought to be granted.

[108] Had it come to this point, I would regard the condition regarding compliance with the noise limits as a compelling reason not to grant relief as The Playground is on notice that the condition it volunteered means it should expect little quarter if the activities are in breach. Further, the applicants extensively expressed their concerns, and the Council gave them full attention. While information about effects may be dressed up differently, now with experience of the activity, I do not consider that there was such an insufficiency of relevant information to vitiate the decision not to notify, and to return it to the Council for fresh consideration. It would no doubt produce *more* information, but it is not, in my view, necessary for a sufficiently and relevantly informed decision.

F. CONCLUSION AND DISPOSITION

[109] The Council, as a matter of good practice, should have obtained a better and more focused reply to its s 92 request at the time. The reply was detailed, but not to the letter of the request. The public record should reflect the request and the

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30 *Air Nelson Limited v The Ministry of Transport*, above n 29, at [60] [2] [61]; *Independent Fisheries Limited v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 at [186].

31 *Sutton v Canterbury Regional* Council [2015] NZHC 313, (2015) 18 ELRNZ 774 at [75].

32 *Just One Life Limited v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA) at [39].

identifiable answer, so that the information gathering can be tracked, and not require factual exploration as here.

[110] The instruction of Dr Chiles should have been in writing. An expert report which is not directed to the statutory test, but instead refers to what *might* be taken as a shorthand for "less than minor" is also not good practice when that statutory test needs to be understood by the reader to have been applied, in particular a neighbour having regard to the effect of a non-notification Decision. The Council had to search for information. Otherwise, I agree with Ms Campbell that the report prepared for the decision maker's consideration went beyond what is typically included in such a report by assessing concerns specifically and individually. The application and the Assessment of Effects were carefully drafted with a description of activities and effects which gave the Council a good understanding of the sources of noise, with reasons for saying that the effects on neighbours would be limited by the nature of the equipment, separation distances, and compliance with noise limits.

[111] In summary, I have reached the conclusions that:

(a) The Council applied the correct test of "less than minor" effects for the non-notification decision.

(b) Although the s 92 request for further information should have been the subject of a particularised and better reply as to an overview of the sources of noise, and their effect, the Council was by then aware of the sources of noise, site characteristics, and separation distances. It understood there was no obvious noise making equipment, and the sound emitting qualities of each activity. The discrete location, separation distances, screening, the ambient sound, the noise limits, time of operation and numbers of patrons and their activities, and traffic noise were all brought to account. It did overall have adequate information on which to make a relevant and informed decision. The Decision reflects consideration of all the factors which were relevant. Nothing "missing" has been identified.

(c) The applicants and others did put the Council on notice with their expressed concerns and they were addressed in a considered way. This helped the Council in its decision making.

(d) The Council was entitled to bring the noise limit to account. That was relevant, whether the permitted baseline test was adopted or not. It allowed Dr Chiles to express an opinion which involved his recognition as an expert of the noise made by paintball guns, and assisted the Council to reach a decision. Sound effects without the limits were not "disregarded" but recognised for what they were. More than five people will "play" at The Playground. They will make noise. It will at times be heard. But if it is, it will be within the noise limit or The Playground should not be allowed to operate. I conclude that the Council had sufficient relevant information to make its decision, brought to account no irrelevant considerations, applied the correct test, and the decision was reasonable.

(e) Section 95C does not operate to require public notification in this case.

Disposition

[112] The application for judicial review is dismissed. Costs are reserved, but I observe that this is a case where the Council by its process left itself open to challenge, which will influence the outcome of any costs application.

.....
Nicholas Davidson J

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IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
NGĀMOTU ROHE

CIV-2024-443-000072
CIV-2025-443-000021
CIV-2025-443-000037
[2026] NZHC 55

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 299 of the Act
BETWEEN	REMEDIATION (NZ) LIMITED Appellant
AND	TARANAKI REGIONAL COUNCIL Respondent

Hearing:	9-12 September 2025, further memorandum 25 September 2025
Counsel:	J W Maassen and B D Mead for Appellant M G Conway and B A G Russell for Respondent S J Ongley and P D McCarthy for Te Rūnanga o Ngāti Mutunga R B Enright and R B Haazen for Uruti Community Parties
Judgment:	29 January 2026

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Question 4: Was the Environment Court's award of costs outside the available range? [218]
Assessment of the overall proportionality of the award [223]
Comparison with High Court scale [227]

Conclusion on costs appeal [231]

Costs [232]

Introduction and summary

[1] Remediation (NZ) Limited (RNZ) appeals against the refusal to grant resource consent to allow it to continue operating a composting and vermiculture facility in Taranaki. RNZ essentially sought renewal of an existing consent permitting it to discharge waste material to land, discharge stormwater and leachate to land (where it may enter water), and discharge odour to air from its facility in the Uruti Valley, east of New Plymouth.

[2] The Taranaki Regional Council (the Council) declined RNZ's consent application on 26 May 2021. The Environment Court dismissed RNZ's appeal on 30 August 2024 (the substantive decision).[1]

[3] The Environment Court hearing spanned 11 days in two blocks, first in July 2022 and then in November and December 2023, with the intervening period provided so that RNZ could carry out further investigations and the parties could provide additional information and evidence. The parties agreed on and submitted a list ultimately containing 76 issues for the Court's consideration, divided into topics based on the evidence the parties had provided to the Court. The Court addressed these issues in detail in the substantive decision.

[4] The reasons for the substantive decision included concerns about effects on water quality and ecology, effects of discharges to air, cultural effects, and the management and long-term effects of discharges from the stockpile of drilling waste on one of the composting pads (Pad 3). The Environment Court also considered the application to be inconsistent with key aspects of the Resource Management Act 1991 (RMA) and relevant planning frameworks, including Te Mana o te Wai.

[5] RNZ now appeals the decision on five key grounds. It submits the Court considered matters outside of the scope of the consent application, erred in its assessment of the application's effects on the environment and conditions, made findings that were not available to it, and conducted an unfair hearing. The

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1 *Remediation (NZ) Ltd v Taranaki Regional Council* [2024] NZEnvC 213 [substantive decision].

respondents submit that the Environment Court's decision was available to it, no errors of law are made out, and the appeal should be dismissed.

[6] For the reasons set out below, I find that: there was no error of law in the Court's approach to the scope of the application; the Court's assessment of the effects of the application were meticulous and resulted in findings that were clearly available on the evidence; it was clearly appropriate for the Court to assess whether the offered conditions and management plans were feasible and would appropriately manage effects on the environment; the Court's findings on key issues were available to it; and the Judge's conduct did not reach the high threshold required to establish an unfair hearing.

[7] In the final part of the judgment I dismiss RNZ's appeal against the Environment Court's costs decision, as there was no error of law in the Environment Court's approach and its overall award of 66 per cent of actual costs was clearly open to it.

Background

The Uruti Valley site

[8] As already mentioned, RNZ operates a composting and vermiculture facility in the Uruti Valley, near Urenui, east of New Plymouth (the site). Composting is the controlled microbial transformation of organic materials under aerobic and thermophilic conditions into a valuable product as a soil conditioner and organic fertiliser. Vermiculture is the process of using worms to decompose organic waste into nutrient-rich compost. RNZ receives an approved list of organic materials for processing by vermiculture and composting.

[9] The site is notable for its waterways and steep valley sides, the operations being conducted on the valley floors in close proximity to the Haehanga Stream.

[10] The Appellant's composting operation consists of three composting pads (areas where compostable material is processed), several ponds, and multiple irrigation areas. The ponds capture runoff and leachate from the composting pads, along with an

engineered wetland (which also receives material from a composting pad). They retain water for washing trucks, collect water for use on forestry fires, and store water from the composting pads for irrigation.

Applications for consent

[11] RNZ has held and exercised discharge permits for composting operations since 2010, and says composting had operated for at least a decade before that. The Council, the respondent, is a regional council and consent authority for the Taranaki region under the Resource Management Act 1991 (RMA).

[12] RNZ lodged the consent application to renew the previous consent in November 2017, which was later revised in answer to requests for further information, and publicly notified in January 2019. The Council subsequently requested further information, resulting in a revised assessment of environmental effects statement in June 2020 and further information concerning policy 3.24 of the National Policy Statement for Freshwater Management 2020 in December 2020.

[13] After a hearing at which RNZ and some submitters provided input, the Council declined consent on 26 May 2021. The substantive decision summarised the reasons for refusal as follows:[2]

> - Significant adverse effects on water quality and ecology, not adequately mitigated by the proffered conditions of consent;
> - Unacceptable discharges to air;
> - Inadequate meaningful consultation with iwi and inadequate mitigation of adverse effects on cultural values;
> - Inadequate detail about removal or bioremediation of stockpiled material, and potential long term adverse effects of it;
> - Inconsistency with Te mana o te wai;
> - In terms of "effects management hierarchy", residual effects more than minor, with no offsetting or compensation;
> - Inconsistency with the tests under ss 6(e), 7(a), and 8 RMA

[2] Substantive decision, above n 1, at [9] (emphasis omitted).

- Inconsistency with the relevant policies of the Regional Freshwater Plan (RFWP);
- Inconsistency with Policy 5.1 of the Regional Air Quality Plan (RAQP); and
- Inconsistency with s 107 RMA.

The statutory framework

[14] The purpose and principles of the RMA are set out in Part 2. Section 5 sets out the Act's purpose:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (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.

[15] Sections 6, 7 and 8 set out important matters for decision-making under the Act.[3] Section 6 sets out matters of national importance that must be recognised and provided for when exercising functions and powers under the Act. Section 7 contains other matters that decision-makers must have particular regard to, including kaitiakitanga, the efficient use and development of natural and physical resources, and intrinsic values of ecosystems. Lastly, s 8 requires decision-makers to take into account the principles of the Treaty of Waitangi | Te Tiriti o Waitangi.

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[3] See Briar Gordon and others *Resource Management* (online looseleaf ed, Thomson Reuters) at [A6.01(1)].

[16] Campbell J explained the categorisation of activities for resource consent applications in *Cable Bay Wine Ltd v Auckland City Council* (*Cable Bay*):[4]

> [30] The RMA categorises activities along a spectrum: permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited. Permitted activities can be undertaken as of right. They do not require a resource consent. A resource consent is required for a controlled, restricted discretionary, discretionary or non-complying activity (with the hurdle to obtain consent rising as one moves along the spectrum). No application for a resource consent can be made (let alone granted) for a prohibited activity.

[17] RNZ sought consent for non-complying activities, namely the discharge of waste material to land for composting, the discharge of stormwater and leachate from composting materials to land where contaminants may enter water, and the discharge of odour and dust to air from composting operations. This meant RNZ had to meet the requirement of ss 104, 104B, 104D and 107 of the RMA.

[18] Section 104 applies to all resource consent applications and relevantly provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:

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4 *Cable Bay Wine Ltd v Auckland City Council* [2021] NZHC 2596 (footnote omitted).

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

(vi) a plan or proposed plan; and

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

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

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

…

(3) A consent authority must not,—

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

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

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

…

(c) grant a resource consent contrary to—

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

…

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

(7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.

[19] Subsection (1)(a), which requires the consent authority to have regard to "any actual and potential effects on the environment of allowing the activity", is of particular relevance to this appeal. The Supreme Court recently noted that this standalone requirement does not require activation through policy statements or plans, which "reflects its role as a primary lever for achieving the third of the RMA's three

key themes: controlling adverse effects on the environment."[5] The effects of an application on the environment are also relevant to the s 104D assessment I will address in more detail below.

[20] "Effect" and "environment" are terms defined broadly in the Act. "Effect" is defined in s 3:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term effect includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[21] "Environment" is defined in s 2(1):

> ***environment*** includes—
>
> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

[22] These definitions mean the s 104(1)(a) assessment has a very broad scope.[6]

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5 *Sustainable Ōtākiri Incorporated v Whakatāne District Council* [2025] NZSC 158 at [47].
6 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [58]–[59].

[23] As the Supreme Court recently explained in *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, an application for resource consent for a non-complying activity must, in addition to the assessment in s 104, pass through the more stringent test set out in s 104D.[7] A non-complying activity can only be considered for consent if either its effects will be no more than minor or it will not be contrary to the objectives and policies of the relevant plan (if, as here, there is a plan but no proposed plan, in respect of the activity).

[24] If one of these conditions are met, the application can then be considered under s 104 in the usual way.[8] Section 104B provides that, after considering an application for a resource consent for a non-complying activity, the consent authority "may grant or refuse the application". Section 104B(b) provides that, "if it grants the application, it may impose conditions under section 108".

[25] As the application was for "a discharge of contaminant to land in circumstances which may result in that contaminant … entering water", s 104(3)(c) means the consent could not be granted unless the requirements of s 107 were met. Under s 107 the authority must not grant the consent "if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to … any significant adverse effects on aquatic life".

Decision under appeal

[26] RNZ appealed the Council's decision to decline the consent applications under s 120 of the RMA.

[27] The first hearing week in the Environment Court took place in July 2022. As the hearing progressed, it became clear that there was likely to be considerable existing contamination from the current and previous composting activities at the site, but the information available was not sufficiently comprehensive for the Court to understand

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7 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [122]–[123]. This explanation is consistent with this Court's in *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [34].

8 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [123].

all of the potential contaminants, their sources, and the pathways for discharges to the environment.[9] The Court also required further information to determine whether the operation could, in future, meet the proposed consent conditions.[10]

[28] The Court issued a minute requiring information to be obtained and presented at a resumed hearing to commence in February 2023.[11] The hearing was then adjourned to late 2023 to allow more time to collect the information. During this time, RNZ completed preliminary and detailed site investigations and continued or commenced upgrades to the site's layout and management.

[29] The hearing recommenced on 29 November 2023. The parties submitted to the Environment Court a list containing 76 issues for the Court's determination, divided into topics based on the evidence the parties had provided to the Court. The proceedings were complex and required substantial input from expert witnesses called by RNZ, the Council and Ngāti Mutunga.

[30] The Environment Court declined consent in a decision dated 30 August 2024. The decision is long, running to 183 pages excluding the appendix, and contains a detailed examination of the agreed issues. The consent was declined on several bases, including the following.

[31] First, the Court said the biggest factor in its decision to decline consent was the lack of data, information and proof that the consent should be granted.[12] The Court held that the lack of information stood as a complete reason for the refusal of consent, even without its other findings on effects and the applicable environmental standards and policy statements.[13] The Court noted that RNZ was given significant opportunities to engage in further studies and take action after the first tranche of hearings, and said this filled only some of the information gaps.[14]

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9 Substantive decision, above n 1, at [41].
10 At [43].
11 Substantive decision, above n 1, at [46]; *Remediation (NZ) Ltd v Taranaki Regional Council* EnvC Auckland ENV-2021-AKL-59, 15 July 2022 (Minute of the Court).
12 Substantive decision, above n 1, at [520], [521], [558] and [654].
13 At [520] and [654].
14 At [520] and [654].

[32] Second, where there was sufficient evidence as to the adverse effects of the site's operation on the environment, the Court found these were often more than minor and sometimes significant, and not addressed by the proposed conditions.[15]

[33] The Court considered the management and long-term effects of discharges from the stockpile of drilling waste on one of the composting pads (Pad 3).[16] Pad 3 contained contaminated material and was a source of contaminants being discharged under the consents RNZ was seeking to renew. The Court held that it could not conclude on the evidence that leaving the contaminated stockpile is an appropriate outcome;[17] and that a range of consents would be required to accompany the remediation of the site, which should not be dealt with under another consent application while the site continued to operate.[18] The Court found that Pad 3 "proved to be one of the most significant areas of uncertainty in the case, in which RNZ fell seriously short of meeting the burden of proof needed for its case for a consent."[19]

[34] The Court also considered the effects of wastewater discharge into the Haehanga Stream. The Court observed that the evidence indicated the stream was significantly contaminated, as a result of recent past history of compost piles larger than consented, stockpiling of wet paunch materials, waste being directed to a wetland not properly engineered to treat it, along with insufficiently robust wastewater and stormwater management.[20] The Court further held there was insufficient information to conclude that RNZ had proposed adequate measures to improve freshwater contamination.[21]

[35] Third and relatedly, the Court said there was insufficient evidence for it to be satisfied that the "complex" conditions of consent offered by RNZ were achievable and would sufficiently mitigate the environmental effects to produce a viable consent.

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15 At [655].
16 The Court provided a summary of its findings with regard to Pad 3 at [539]–[542].
17 At [128].
18 At [130].
19 At [542].
20 At [153]–[160] and [519].
21 At [173]–[178] and [511].

To reach this conclusion, the Court did not have regard to RNZ's record of non-compliance with previous consents.[22]

[36] The Court was also critical of the substantial degree to which the proposal would be left to management plans.[23] The Court found that management plans proposed by RNZ to ensure compliance with the conditions of the application were complex, incomplete, and in most cases insufficient to provide any such surety.[24] The Court said that the large information gaps on key matters, notwithstanding the opportunities provided by the Court to cure these gaps, was "quite extraordinary".[25] The Court found that RNZ had not been successful, by a large margin, in showing that the parameters and objectives of the plans were attainable.[26]

[37] Fourth, the Court held the application engaged ss 104(3)(c)(i) and 107(1)(g), which precluded the Court from granting the discharge permit as it would result in significant adverse effects on aquatic life.[27] The Court found that there was so little evidence on aquatic biota that given the poor water quality recorded at the site it could not be certain there would not be significant adverse effects on aquatic biota.[28] It later held that there had been significant adverse effects of the activities on aquatic biota and that it was very likely that this would get worse over at least the next ten years.[29] The s 107(2) exceptions were not engaged, despite evidence led by RNZ about the social and economic benefits to the community and as to an existing investment on the site, which "could not be described as notable, let alone 'exceptional'."[30]

[38] Fifth, the Court placed considerable weight on the National Policy Statement for Freshwater Management 2020 (the NPS) pursuant to s 104(1)(b) and *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*.[31] The Court held that RNZ came "nowhere near" crossing the high threshold for protection and preservation

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22 At [488] and [665].
23 At [466].
24 At [521]–[522].
25 At [522].
26 At [522]–[523].
27 At [559]–[579] and [660].
28 At [207].
29 At [279] and [578].
30 At [563]–[567].
31 At [580]–[586]; *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 36 at [28].

of the health of freshwater set by the NPS and the fundamental concept of Te Mana o te Wai underpinning it. The proposed activities were considered to be contrary to the objectives and policies of the NPS, "in many cases strongly".[32]

[39] The application did not give effect to Te Mana o te Wai as required by Policy 1 of the NPS.[33] It also failed to comply with Policy 7 and cl 3.24 of the NPS, as it would result in a loss of river extent and values and there was no functional need for the activity.[34] Additionally, the application did not comply with: Policy 2 (that Māori freshwater values are identified and provided for);[35] Policy 3 (that freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments);[36] Policy 5 (that freshwater is managed through a National Objectives Framework to ensure the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained);[37] Policy 9 (that the habitats of indigenous freshwater species are protected);[38] Policy 13 (that the condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends);[39] Policy 14 (that information about the state of water bodies and freshwater ecosystems, and the challenges to their health and well-being, is regularly reported on and published);[40] and Policy 15 (that communities are enabled to provide for their social, economic, and cultural wellbeing in a way that is consistent with the NPS).[41]

[40] In the decision's appendix, the Environment Court assessed the proposed activities against the Regional Policy Statement for Taranaki 2010, Regional Air Quality Plan for Taranaki 2010 and Regional Freshwater Plan for Taranaki 2001. In

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32 At [604] and [649].
33 At [605]–[611].
34 At [618]–[628].
35 At [629]–[630].
36 At [631]–[632].
37 At [633]–[636].
38 At [637]–[640].
39 At [641]–[642].
40 At [643]–[644].
41 At [645]–[647].

most cases, the Court was not satisfied the proposed activities complied with the relevant provisions as a result of its effects on the environment.[42]

[41] Weighed against these findings, the Court found the proposal offered largely neutral and some moderately positive economic effects.[43]

Approach on appeal

[42] RNZ has a right of appeal on questions of law under s 299. On appeal, RNZ bears the onus establishing there was an error of law.[44] An error of fact is insufficient, unless the factual finding is "so insupportable — so clearly untenable — as to amount to an error of law."[45] The error of law must materially affect the result of the decision under appeal before the appellate court will grant relief.[46]

[43] An error of law arises if a decision-maker applied a wrong legal test, or came to a conclusion to which it could not reasonably have come on the evidence, or took into account irrelevant matters or failed to take into relevant matters.[47]

[44] The Environment Court is entitled to give such weight as it considers appropriate to the evidence.[48] As the High Court held in *Guardians of Paku Bay Association Inc v Waikato Regional Council*:[49]

> This Court can only intervene in such situations where the Environment Court has come to a decision to which, on the evidence, it could not reasonably have come. This can be described as a situation in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory to the determination, or as one in which the true and only reasonable conclusion contradicts the determination.

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42 See at [657]

43 At [656].

44 Resource Management Act 1991 (RMA), s 299; *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

45 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]–[26]; citing *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36. See also *Port Otago Ltd v East Otago Taiapure Management Committee* [2013] NZHC 2795 at [13]; and *Marris v MWD* [1987] 1 NZLR 125, (1987) 12 NZTPA 100 (HC).

46 *Countdown Properties (Northlands) Ltd v Dunedin CC* [1994] NZRMA 145 (HC); *Hutt City Council v Mico Wakefield* [1995] NZRMA 169 (HC).

47 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271, [2012] NZRMA 61 at [29]; *Countdown Properties (Northland) Ltd v Dunedin City Council*, above n 46, at 153.

48 *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [73].

49 *Guardians of Paku Bay Association Inc v Waikato Regional Council*, above n 47, at [32].

[45] In *West Coast Regional Abattoir Co Ltd v Westland County Council*, the High Court held the Planning Tribunal's conclusion, that there was no evidence on which it could make a particular finding, was a finding of fact.[50]

Issues for determination

[46] The parties' submissions focused on the following five key questions:

(a) Was the Court able to consider the fate of the contaminants already on site when considering the effects of the proposal?

(b) Did the Court err in law in its approach to assessing the effects of the wastewater discharge on the Haehanga Stream?

(c) Did the Court erred in law in its assessment of the feasibility of RNZ's offered conditions when considering the effects of the proposal?

(d) Were the Environment Court's findings on key issues available to it?

(e) Did the Environment Court's conduct of the case render the hearing unfair?

[47] There were a number of other discrete questions of law advanced by RNZ but there was substantial overlap between them, and Mr Maassen, counsel for RNZ, responsibly accepted the appeal could not succeed if I found against RNZ on the key questions. I have, however, endeavoured to address the substance of RNZ's other complaints in determining these key questions.

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[50] *West Coast Regional Abattoir Co Ltd v Westland County Council* HC Wellington M126/82, 23 November 1981 at 13, 15 and 19.

Question 1: Was the Court able to consider the fate of the contaminants already on site when considering the effects of the proposal?

RNZ's argument

[48] RNZ argues that the Environment Court improperly considered matters outside the scope of the consent application (and thus the Environment Court appeal), including issues relating to future remediation and the suitability of bund materials. It says that no new land use consents were required for current operations on Pad 3 and that any future remediation issues would be addressed through subsequent RMA processes, such as other resource consent applications.

[49] In essence, RNZ submits the Environment Court made a material error of law by considering the future remediation of the material stockpiled on Pad 3. This meant the Court considered the actual or potential effects on the environment for an activity for which consent was not sought. It notes that s 104(1)(a) requires the consenting authority (here the Environment Court on appeal) to consider "any actual or potential effects on the environment of allowing the activity". It submits that the remediation of Pad 3 did not fall within the activity for which consent was sought of discharging waste material to land for the purpose of composting, or discharging stormwater and leachate generated from those operations. It says assessments under s 104 are ring-fenced by the scope of the application.

[50] In support of this submission RNZ relies on the different functions of regional councils and territorial authorities under ss 30 and 31 of the RMA respectively. It notes that s 30(f) provides that the "control of discharges of contaminants into or onto land, air, or water and discharges of water into water" are within the regional council's functions, whereas a territorial authority's functions under s 31(1)(b) include the "control of any actual or potential effects of the use, development, or protection of land…". It therefore submits that because the proposed remediation of Pad 3 would not involve any discharge of contaminants, it is outside Taranaki Regional Council's functions and within the functions of the New Plymouth District Council.

[51] Accordingly, RNZ says it was an error of law for the Environment Court to have regard to, or place any weight on, the evidence relating to the remediation of Pad 3 in reaching its decision.

[52] RNZ further submits the effect of focusing on future remediation of the site, particularly Pad 3, was to inappropriately convert these consent proceedings into enforcement proceedings. It says this is confirmed by the Environment Court referring to the approach it was taking (giving RNZ an opportunity to provide further evidence and propose further conditions following a Preliminary Site Investigation (PSI) and a Detailed Site Investigations (DSI)) as the *Erskine*/*Cable Bay* approach.[51] The *Erskine*/*Cable Bay* approach was explained by the High Court (in an appeal against the consent conditions imposed by Environment Court in *Cable Bay*) as being as an approach in which the Court issues interim decisions as a means to assist the parties to get the appropriate controls in place and make sure those controls will work.[52] RNZ submits that as *Cable Bay* was a case involving both an application for a resource consent and enforcement action for a failure to obtain consent, the Environment Court was inappropriately using the proceedings for an enforcement purpose unrelated to the activity for which consent was granted.

Assessment

[53] I accept the respondents' submissions that there was no error of law in the Court's assessment that the fate of Pad 3 was relevant to the management of discharges to the receiving environment.[53]

[54] The updated application for the resource consent before the Environment Court referred to the remediation of the stockpile on Pad 3 as part of the site activities for which consent was sought. A list of issues and proposed conditions filed by the parties before the first week of hearing, in July 2022, and again before the resumed hearing, in November 2023, expressly referred to the remediation of Pad 3 as an issue for determination. Thus, RNZ itself identified the remediation of Pad 3 as an issue

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51 Substantive decision, above n 1, at [32]; *Cable Bay Wine Ltd v Auckland City Council*, above n 4; *Wellington Company Ltd v Save Erskine College Trust* [2018] EnvC 106.

52 *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [25].

53 Substantive decision, above n 1, at [101]–[131].

relevant to its consent application, and proposed conditions to address it. At no stage of the Environment Court process did RNZ suggest that consideration of the issue was irrelevant to the consent application or that any consideration of it would be improper or an error of law.[54]

[55] It now says on appeal that the conditions offered to address remediation of Pad 3 were unrelated to the activity for which consent was sought but were nevertheless voluntarily offered. Such conditions are known as *Augier* conditions.[55]

[56] However, there is no suggestion in the material filed prior to the first week of hearing that the relevant conditions were being offered on this basis. A later RNZ memorandum, dated 12 November 2023, could perhaps suggest the proposed conditions for the remediation of Pad 3 were being offered as *Augier* conditions. It attaches RNZ's updated statement of issues for determination following completion of the Detailed Site Investigation (DSI). The first page identifies as an issue "How should Pad 3 be remediated?" and goes on to list a number of other issues in relation to the remediation of Pad 3.

[57] The memorandum also attaches an email sent by Mr Maassen to the other parties dated 28 September 2023, following completion of the DSI. The email states:

> [The DSI] is part of a more comprehensive investigation beyond the consent sought from the Court following the *Cable Bay* approach that the Court adopted. To some extent, the Court was responding to the parties' invitation since, for example, Ngāti Mutunga raised these issues of matters of concern to be addressed in the course of the new consent and any exit plan. Because the Court invited the response, as did Ngāti Mutunga, it behoves all parties to now work to resolve these contamination matters. RNZ is willing to do so, as exhibited by its commitment to and significant investment in the contamination investigation. The focus should be on planning for remediation by the DSI by conferring on conditions between the planners.

[58] Although the email asserts the DSI was part of a more comprehensive investigation beyond the consent sought, there is no suggestion that *any* consideration

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54 I have not overlooked that RNZ's closing submissions contended that the only consent sought was for composting and that the question of the Pad 3 materials should be resolved at the end of a Pad 3 options window (being a 4-5 year period from the date of commencement of a new consent): see at [130]. However, there was no suggestion that the consideration of Pad 3 amounted to an error of law.

55 *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219.

of the remediation of Pad 3 was outside the scope of the consent sought. And the email clearly confirms that RNZ was content to cooperate with the Court's adoption of the *Cable Bay* approach (an issue I will return to below).

[59] Perhaps the high point of a RNZ's case that the conditions relating to the remediation from Pad 3 were being offered as *Augier* conditions, is RNZ's submissions filed in March 2023 addressing whether consideration of a bond condition was appropriate. In that context, RNZ said "it was not offering a bond as an *Augier* condition in an unconstrained framework for the reasons expressed" in a joint memorandum of counsel. However, there is no suggestion the Court would be erring in law by given *any* consideration to the proposal for the remediation of Pad 3 in determining the consent application because it was unrelated to the activity for which consent was sought.

[60] Notably, RNZ's own expert also addressed the remediation of Pad 3, including accepting that at least some of the remediation would need to occur during ongoing operations, and agreeing that investigation of the potential for contamination to be present across the wider site was an appropriate step.

[61] By acknowledging the relevance of the site remediation, including Pad 3, in its consent application, lists of issues, expert evidence and submissions, it is clear that RNZ considered site remediation was connected to the effects of the activity for which it sought consent.

[62] Against that background, it is hardly surprising that the Court gave extensive consideration to the remediation of Pad 3. Although this background is instructive, it is not determinative of the legal question before me. That question is whether the Environment Court was wrong as a matter of law to consider the remediation of Pad 3 in reaching its decision. The fact that experienced senior counsel for RNZ did not raise this point in the Environment Court, and that RNZ raised and actively participated in the consideration of the remediation of Pad 3, is only relevant to the extent it may reflect the strength (or lack thereof) of the argument now advanced on appeal. For the following reasons, I do not accept the Environment Court erred in law by considering the remediation of Pad 3.

[63] I accept the Council's submission the Court was entitled to consider the fate of the contaminants already on the site because they were the source of the contaminants being discharged under the consents RNZ sought to renew. This is essentially a factual issue regarding the duration and intensity of the effects arising from the discharges for which RNZ sought consent. RNZ sought resource consent to authorise the discharge of waste material to land for the purpose of composting, the discharge of stormwater and leachate generated from those materials, including from the stockpile of waste on Pad 3, as well as the compost processing areas elsewhere on the site. It also sought consent to discharge odour and dust to air from those areas.

[64] I accept the Council's submission that, logically, the size of the pads and the nature and volume of material stored on them were directly relevant to the volume and characteristics of the leachate generated and needing to be treated and disposed of under the consents. For example, the composition and volume of composting material will affect the volumes and/or concentrations of leachate, which will in turn need to be treated and disposed of. It was therefore uncontroversial and appropriate that (like the expired consent RNZ had been operating under) RNZ offered conditions that included the types of material that could be brought onto the site, how much material could be stored on site, and site reinstatement requirements.

[65] I also accept Ngāti Mutunga's submission that the Court was entitled to consider the potential for further discharge of contaminants from Pad 3 through leaks in addition to the existing pathways for contamination through leachate to stormwater and ground water (a leak having been detected during the DSI process).[56] I accept this falls into the category of a potential effect that cannot be sensibly disregarded in the effects evaluation.[57]

[66] Therefore, to perform its function properly, the Environment Court had to consider the effects of the discharge from the materials RNZ had brought onto the site. Whether the materials containing the contaminants found in the leachate were to remain on the site, and for how long, was directly relevant to the duration of the discharge and magnitude of its effects, especially where the existing material on site

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56 Substantive decision, above n 1, at [41], [44], [52] and [213].
57 *Beadle v Minister of Corrections* [2002] ELHN 44 at [304].

is already generating leachate and having adverse effects. Further, if the contaminated material had been relocated elsewhere on the site (for example to form bunds, as occurred here), the potential for discharge of leachate in other locations arises.

[67] The materials already on site were brought on as materials to compost, not as a long-term stockpile. The RMA and regional plan regulate the Pad 3 stockpile by regulating the discharge of contaminants, including the discharge of leachate and odour from the stockpile to land, air, and water.[58] It follows that there was no error in the Environment Court considering the presence and fate of the source of those contaminants as part of the effects assessment. To exclude them would have been inconsistent with the scheme and purpose of the RMA.

[68] Although future land use consents may be needed for site remediation and site exit, that does not make it unlawful to enquire into the plans to reduce or remove the stockpile that is the source of current and future discharges and their effects. The long-term effects of a proposal are relevant effects to be assessed under s 104 of the RMA.

[69] In respect of RNZ's reliance on the different functions of regional councils and territorial authorities under ss 30 and 31 of the RMA respectively, I note that the functions of the regional council extend to "the investigation of land for the purposes of identifying and monitoring contaminated land",[59] as well as "the control of discharges of contaminants into or onto land, air, or water and discharges of water into water".[60] I accept the Uruti Community Parties' (UCP's) submission that the Court was obliged to consider the integrated management of Pad 3 in the context of the wider discharge issues in accordance with these functions.[61] RNZ's approach would require an artificially narrow interpretation of the word "activity" in s 104(1)(a). In *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, the Supreme Court has recently rejected a narrow interpretation of when effects come within the activity

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58 RMA, s 15.
59 RMA, s 30(1)(ca).
60 RMA, s 30(1)(f).
61 The function of integrated management is confirmed by the planning instruments referred to in the Court's assessment of the application against those instruments in the appendix to the Court's decision.

for which consent is sought by reference to the scope of regional and district council functions under ss 30 and 31.[62] I discuss this decision further below.

[70] I do not accept the submission that the Court's decision to direct PSIs and DSIs supports the proposition that it was going beyond its jurisdiction because PSI and DSI have specifically defined meanings in the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NESCS). As counsel for Ngāti Mutunga pointed out, the Ministry for Environment guidelines state that "contaminated land investigations can have a variety of purposes, other than to fulfil the requirements of the NESCS".[63] The guidelines go on to provide some examples, including providing an owner or occupier with background information on a site, a benchmark for contaminant concentrations, the feasibility of a proposal, or to apply for a resource consent under the RMA.[64] The essential purposes of the DSI was to identify pathways for contamination to water.[65] As the assessment of discharge pathways was mandatory under s107(1)(b) RMA, the investigation of them cannot be an error of law.

[71] The Court expressly stated on a number of occasions that the proceedings were not enforcement proceedings,[66] and that separate consent applications would likely be required for completion of the remediation process.[67] Rather than purporting to exercise either jurisdiction, the Court was noting the implications of these unknown matters. The Court said that future resource consents for the remediation of Pad 3 were irrelevant to the assessment of effects of the proposal before the Court,[68] and declined the respondent parties' proposal of a short-term exit consent as being outside scope.[69] I consider the Court carefully and appropriately assessed the matters that were within the scope of the application before it.

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62 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [94].
63 Ministry for the Environment *Contaminated land management guidelines No 1: Reporting on contaminated sites in New Zealand* (June 2021) at 9.
64 At 9.
65 Substantive decision, above n 1, at [41] and [49].
66 Substantive decision, above n 1, at [475]–[476], [482], [485], and [665].
67 At [59], [107], [115], [117], [120], [123], [130] and [152].
68 At [128]–[131].
69 At [508] and [659].

[72] The Environment Court expressly rejected RNZ's submission that the remediation of Pad 3 should be dealt with under a separate consent process because the only consent sought was for composting activities. The Court said that this would be at odds with the consent applied for here, which was to discharge waste material to land for composting, and to discharge leachate "from composting operations" to land.[70]

[73] I also accept Ngāti Mutunga's submission that the existing contamination of the receiving environment was integral to considering the potential adverse effects of continued operation of the site. This was the Environment Court's role on appeal, standing in the shoes of the regional council. That approach was not precluded by the fact that contaminated site management also fell within the jurisdiction of the territorial authority (here, the New Plymouth District Council). It was necessary for the Environment Court to consider how the proposed continued operation of the site could affect the risk of further contamination of an already contaminated site. I consider the Court's approach was consistent with the approach to assessing effects required under ss 104 and 107, the fourth schedule to the Act and relevant case law.[71]

[74] In support of its submission, Ngāti Mutunga pointed to the definition of "effect" in s 3 of the RMA which includes "any past, present, or future effect" and "any cumulative effect which arises over time or in combination with other effects … regardless of the scale, intensity, duration, or frequency of the effect".

[75] The Supreme Court's recent decision in *Sustainable Ōtākiri Incorporated v Whakatāne District Council* discusses when "effects" fall within the scope of the activity for which consent is sought. The Court held:[72]

> [58] Our review of the relevant statutory provisions makes clear that, on its face, s 104(1)(a) has a very broad scope. The key words in s 104(1)(a)—"environment" and "effect"—are defined inclusively and multi-dimensionally. They are plainly intended to have wide import. That is unsurprising since they serve the extraordinarily complex and polycentric statutory purpose of promoting sustainable management. The legislature

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70 At [128]–[131].

71 See for example, *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2019] NZRMA 289.

72 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5.

> clearly did not intend that a restrictive approach should be taken to the application of these words.
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> [59] That said, we accept that "effects" is not of limitless scope. Not every matter will require consideration under s 104(1)(a). Identifying the effects that are within s 104(1)(a)'s scope is an exercise of statutory interpretation in light of facts. Put another way, the meaning of "effects" must be determined by the words of the RMA construed in light of its purpose and context, and applied in the particular factual context. The effects that will be relevant in any particular case will depend on the controlling objectives, policies and rules (if there are any) and on the facts as determined by the consent authority.

[76] The Court held that, in many cases, "the question will not be whether a given effect on the environment is excluded as a matter of principle, but rather as a matter of fact and degree."[73] In that case, the Court found that there was nothing in the RMA to suggest that the environmental effects of plastic bottle disposal (as a consequence of a water bottling operation) were "irrelevant in principle; the real question is whether these effects [were] relevant in fact."[74]

[77] The Court outlined some "basic propositions" that emerge from the statutory definitions of "environment", "effect" and "sustainable management". Those included that: "if allowing an activity would either adversely affect the ability of natural and physical resources to meet the reasonably foreseeable needs of future generations or compromise the life-supporting capacity of an ecosystem, those effects are very likely to be relevant under s 104." The Court added that where allowing the activity may have that effect, this may be a relevant potential effect, and whether that is so in any particular case will depend on considerations of fact and degree.[75]

[78] *Sustainable Ōtākiri Incorporated* did not consider the impact of s 108AA on the test for whether effects are within the scope of the activity for which consent is sought (presumably it did not apply to the resource consent application in that case because it came into force on 18 October 2017, and only applies to applications after that date).[76] That section provides that a consent authority must not include a condition in a resource consent for any activity unless "the condition is directly connected to …

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73 At [71].
74 At [98].
75 At [72]; citing RMA, ss 3(e)–(f), 5(2)(a)–(b) and 104(1)(a); and *West Coast ENT Inc v Buller Coal* [2013] NZSC 87, [2014] 1 NZLR 32 at [119].
76 Resource Management Act, sch 12, cl 12.

an adverse effect of the activity on the environment" (among other things). However, s 108AA(2) states that "[s]ubsection (1) does not limit this Act or regulations made under it."

[79] RNZ submits that the enactment of s 108AA means a narrower approach should be taken to whether effects come within the scope of the activity for which consent is sought. This is because the Court of Appeal in *Sustainable Ōtākiri Incorporated* considered it helpful to assess this issue by reference to the test for imposing conditions under s 108.[77] The Court of Appeal held that, in general terms, the rule is that a condition must be fairly and reasonably related to the subject matter of the consent.[78] RNZ submits that, as the test for imposing conditions has been narrowed by s 108AA(1) to those "directly connected" to an adverse effect of the activity, the same approach should be taken to what constitutes relevant effects under s 104(1)(a). Namely, the effects must be "directly connected" to the activity for which consent is sought. However, I note that in *Sustainable Ōtākiri Incorporated*, the Supreme Court said that it did not "find the analogy with s 108(1) relied on by the Court of Appeal as to the required nexus between consent and consent conditions to be of real assistance."[79] It then said that the controls on bottle production had the required linkage with the land use consent.

[80] The effect of RNZ's submission is that the enactment of s 108AA was intended to add a gloss to the plain words of s 104(1)(a), so that it should now be read as "any actual and potential effects on the environment *directly connected to allowing the activity*". On its face, the wording of s 108AA(2) (that subsection (1) "does no limit this Act") suggests there was no such intention to narrow the interpretation of "actual and potential effect on the environment of allowing the activity" in s 104(1)(a) or the definition of "effect" in s 3. Moreover, such a narrow approach to effects appears contrary to the Supreme Court's approach in *Sustainable Ōtākiri Incorporate.*[80]

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77 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, (2022) 24 ELRNZ487, [2023] NZRMA 280.

78 At [54].

79 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [95].

80 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [95].

[81] However, even if such an interpretation is required, for the reasons set out above, I consider the remediation of Pad 3 is directly connected to the composting operations on site, and therefore within the scope of the activities for which consent was sought.

[82] Accordingly, there was no error of law in the Environment Court's approach to the scope of the application.

Question 2: Did the Court err in law in its approach to assessing the effects of the wastewater discharge into the Haehanga Stream?

[83] RNZ submits the Environment Court erred in law in the approach it took to assessing the effects of the wastewater discharge into the Haehanga Stream. RNZ submits the Court did not make the necessary findings to reach its conclusions on the effects on the environment of allowing the activity under s 104(1)(a).

[84] RNZ submits the Court erred by failing to determine the environmental condition of the Haehanga Stream without the proposed activities, and then assessing the effects on that waterbody or groundwater that would arise after applying RNZ's proposed conditions, assuming RNZ would meet them.

[85] I consider RNZ is in essence challenging factual findings of the Court that were open to it. It is well established that imperfections in expression or infelicities in language will not amount to errors of law.[81]

[86] As noted above, the parties in the Environment Court agreed on detailed lists of issues for the Court's consideration. This resulted in the Court considering 76 issues, divided into effects-related topics based around the evidence the parties had adduced for the Court to carry out its assessment under s 104. The Court analysed the evidence in detail and reached extensive findings about it from [65] to [382] of the decision.[82]

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81 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [37]; and *Lim v Medical Council of New Zealand* [2016] NZHC 485, [2016] NZAR 447 at [41].

82 Substantive decision, above n 1, at [65]–[382].

[87] The Court then set out its "[o]verall and general conclusions on effects",[83] before later coming to its "[o]verall conclusion".[84] In its "[s]ummary of findings on effects", the Court said:[85]

> In some instances however, we were able to make findings on adverse effects of a number of different kinds. We confirm that such effects, with the exception of odour and health, were more than minor, in many cases significantly so.

[88] However, the Court also emphasised that the "biggest issue" was the "lack of data, information and proof that consent should issue",[86] which it also described as "inordinate gaps on the part of RNZ in proving a case that it should gain consents."[87]

[89] I reject RNZ's submission that there was a logical flaw in the Court's reasoning that it had sufficient evidence to make findings about certain effects but insufficient evidence about other effects and insufficient evidence in respect of the feasibility of RNZ's proposed conditions. There is nothing logically flawed about the Court considering it had sufficient evidence to make factual findings about some effects, but insufficient evidence to make findings on other effects. The feasibility of the steps that RNZ proposed to take to address those effects through conditions was a separate issue that required separate findings.

[90] I also reject RNZ's specific complaint about the process the Court adopted for assessing the effects on the Haehanga Stream. There can be no doubt that the Court assessed the effects on the Haehanga Stream of the operation of the site.[88] The Court also considered ongoing contamination and effects of operating the site regardless of the proposed new conditions,[89] and reached the overall conclusion that proposed conditions were not achievable on the evidence offered by RNZ.[90]

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83 At [510]–[558].
84 At [653]–[667].
85 At [558].
86 At [558].
87 At [654].
88 See the Court's discussion of issues 35 to 38 at [257] and [258]; and issues 41, 43, 44 and 45 at [267] and following.
89 At [511]
90 AT [655].

[91] The Court's assessment of the evidence was meticulous and exhaustive. It made findings that were clearly open to it and there was no error of law in its approach.

Question 3: Did the Court err in law in its assessment of the feasibility of RNZ's offered conditions when considering the effects of the proposal?

[92] RNZ submits the Environment Court erred by treating the feasibility of achieving the proposed conditions as part of the effects analysis. It contends this misapplied the law, ignored the "presumption of compliance" with conditions, and failed to properly assess the effects of the proposal.

[93] As already mentioned, the Court carried out a meticulous and detailed assessment of the actual and potential effects under s 104(1)(a).[91] I accept the Council's submission that, in doing so, it was entitled to consider the degree of confidence it could have about anticipated effects and the ability of proposed conditions to manage those effects.[92] Those matters are directly relevant to assessing effects on the environment, and the presumption of compliance with conditions is more nuanced than RNZ asserts.

[94] RNZ contends the Court conflated the assessment of the feasibility of conditions with its assessment of the adverse effects of the activity. In essence, RNZ submits the Court should have been satisfied that the detailed proposed conditions would reduce any adverse effects to minor because it must be presumed that they can and will be fully complied with.

[95] The Council submits the Court was entitled to take the view that the proposed conditions would not produce a workable consent due to the complexity of the site, particularly its past, present and future contamination issues, and the significant uncertainties and lack of detail in the evidence about how the proposed conditions would be successfully achieved. This was not a situation where it could be assumed the conditions would be complied with due to these deficiencies in the evidence.

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91 As expanded on below and above, the parties jointly developed an issues list. In its decision, the Environment Court went through these issues in turn, making its findings on each. The overall and general conclusions on effects are found from [510]–[558] of the decision.

92 See the below discussion of *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 and *Blakeley Pacific Ltd v Western Bay of Plenty District Council* [2011] NZEnvC 354.

[96] RNZ submits that in assessing the effectiveness of proposed conditions, the consent authority should assume that a consent holder and its successors will act legally and adhere to them. RNZ relies on the High Court decision of *88 The Strand* in support of this proposition.[93] The Environment Court distinguished *88 The Strand*, noting that in that case, there was no suggestion the offered conditions could not be followed, as there is here.[94]

[97] I agree with the Environment Court; this case bears little resemblance to the comparatively straightforward situation in *88 The Strand*. In that case, the High Court held the Auckland City Council's decision to not notify a consent to operate a car wash business was correct because compliance with the conditions of the consent meant there would be no breach of noise requirements in the proposed district plan. The Court held that a consent authority is entitled to assume an application will adhere to the rules of the consent, but also noted, "[t]here is no suggestion in this case that the noise conditions *cannot* be observed."[95]

[98] In stark contrast, the Court heard extensive evidence and submissions in this case that adverse effects were likely to continue as a result of the activity for which RNZ was seeking consent, and that there was insufficient detail or certainty in respect of the proposed conditions to meet these concerns.[96]

[99] I accept the Council's submission that an applicant's ability to rely on offered conditions is not absolute and there is nothing improper about the Court considering the achievability of those conditions. The consent authority is entitled to examine whether proposed conditions can be met in practice in assessing whether they will be effective in addressing the adverse effects they are designed to manage.

[100] In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* the High Court considered the feasibility of a consent condition for Solid Energy to transfer wetland habitat and wildlife from the area of a proposed mine,

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93 *88 The Strand Ltd v Auckland City Council* [2002] NZRMA 475.
94 Substantive decision, above n 1, at [207] and [488].
95 At [19] (emphasis in original). The decision in *88 The Strand* was also a judicial review of a non-notification decision, rather than a detailed assessment of the effects of a proposal.
96 See, for example, substantive decision, above n 1, at [207].

and then transfer it back upon closure.[97] The Court found no error in the Environment Court's consideration of feasibility, its consideration of the substantial evidence addressing feasibility, or its imposition of the relevant condition. Panckhurst J also found it was inappropriate for the High Court, on an appeal on questions of law, to "assess the merits" of competing evidence about whether offered conditions were attainable, as this was the function of the Environment Court.[98]

[101] A similar approach was taken in *Blakeley Pacific Ltd v Western Bay of Plenty District Council*, where the applicant offered numerous conditions to mitigate the effects of a subdivision proposal.[99] The Court expressed concern about how conditions addressing matters such as pest control would be achieved and was not comfortable that they were "realistic or enforceable in a practical sense."[100] The concern was even greater in relation to other more complex proposed conditions about habitat maintenance. The Court went on to conclude that there were a number of effects of the proposal, some of which had the potential to impact upon native flora and fauna. Despite the offered conditions purporting to limit those effects, the Court concluded those effects must be taken into account in terms of the overall evaluation, and refused to grant consent overall.[101]

[102] I consider it was clearly appropriate for the Environment Court to assess whether RNZ's offered conditions were feasible on the evidence. That assessment was a quintessentially factual determination for the Court. The Court made no error in questioning the complexity and practicality of the proposed conditions, nor in finding that "imposing increasingly complex conditions of consent will not produce a viable consent".[102] The Court's conclusions were based on the lack of evidence establishing that the proposed operation of the site could be achieved within the

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97 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council*, above n 92.
98 At [55].
99 *Blakeley Pacific Ltd v Western Bay of Plenty District Council*, above n 92.
100 At [42].
101 At [51].
102 Substantive decision, above n 1, at [488]. This is also supported by the above comments in *Blakeley Pacific Ltd v Western Bay of Plenty District Council*, above n 92.

offered conditions.[103] The Court's findings about this evidence were factual findings it was entitled to make.

[103] Taking RNZ's argument to its logical conclusion would mean that, even if proposed conditions would be ineffective because they are unrealistic and unachievable, the Court must ignore this when assessing the effects of the proposal under s 104(1)(a). Simply stating this proposition reveals its absurdity.

[104] Although not determinative, I also note that in his opening submissions in the Environment Court, Mr Maassen accepted that "there is a point at which the Court has to be satisfied that [the consent] is achievable, otherwise there is no reality to the performance of its function and that can't be right."

[105] I accept the Council's submission that the following example from this case demonstrates the fallacy of RNZ's argument. An expert witness called by the Council gave evidence that the site likely did not have sufficient irrigation land area to meet the conditions that RNZ proposed. Although there was insufficient information available to fully determine the effects, the Court found "there would likely be an issue with compliance [with the condition] in the reduced irrigable area".[104] If the proposal was on a new site with no existing contaminants, it would be easier for the applicant to adjust the level of activity (and discharge volume) to stay within offered conditions. However, as this proposal involved an operational site with existing contamination, including a stockpile that required careful management, RNZ could not easily shrink the volume of discharge, as discharges and effects are already present. This meant there were fewer mechanisms available to control effects. The Court was entitled, indeed required, to consider these nuances and complexities in assessing the effectiveness of the proposed conditions.

[106] RNZ further submits the Court improperly reasoned that the uncertainty about feasibility was proof of significant effects. I do not accept this. As already noted, the

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103 Substantive decision, above n 1, at [520] (emphasis omitted):

> [The lack of evidence and uncertainty] is the biggest factor in the conclusion to decline consent in this case, and stands as a complete reason for refusal, even without our other findings on effects and statutory instrument provisions.

104 Substantive decision, above n 1, at [323].

Court made clear findings that the adverse effects (except for odour and health) were more than minor, and in many cases significantly so.[105] Having done so, it was entitled to find on the evidence that it had insufficient confidence that the effects would be appropriately managed through the proposed conditions, and to conclude that this was relevant to its overall assessment of the effects.

[107] I reject RNZ's submission that the concerns about the feasibility of the conditions should have been disregarded because the Council can ensure compliance through the RMA's enforcement regime. The enforcement regime has the distinct purposes of penalising and remedying non-compliance. That non-compliance will often have caused environmental harm before enforcement action is taken, which is the very thing resource consent conditions are intended to prevent. The existence of the enforcement regime cannot be used to pave over gaps in a consent proposal. I accept the Council's submission that the robustness of the enforcement regime does not reduce the need for conditions to be feasible and achievable; robust and workable conditions are necessary to support the proper role of enforcement mechanisms.

[108] RNZ also submits the Environment Court erred in its approach to management plans. The Court was critical of the substantial degree to which the proposal would be left to management plans (particularly given the site's record of poor management), and the lack of detail in those plans.[106]

[109] I accept the Council's submission that the Environment Court was entitled to consider whether the combination of conditions and management plans provided sufficient clarity about how the activity would be carried out and whether its effects would be properly managed. In *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council*, the Environment Court noted that management plans can provide information as to how parameters can and will be met, but it is inappropriate for the parameters themselves to be left to the management plan.[107] In *Re Canterbury Cricket* the Environment Court said:[108]

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105 At [558].
106 At [85], [206], [466], and [533].
107 *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [175].
108 *Re Canterbury Cricket Association* [2013] NZEnvC 184.

> [130] Where management plans are proposed, it is our expectation that the applicant lead evidence demonstrating how the effects of the activity are to be managed (a) under the management plans' objectives and (b) in broad terms how those objectives are to be achieved. Without evidence, on what basis can the court be satisfied that the proposed conditions are appropriate?

[110] I agree with these statements of principle. I consider there was no error of principle in the Environment Court's approach to the management plans and that it made findings about those plans that were open to it on the evidence.

[111] Accordingly, there was no error of law arising from question 3.

Question 4: Were the Environment Court's findings on key issues available to it?

[112] It is convenient to address a number of alleged errors of law under the broad question of whether the Court's findings were open to it on the evidence due to the related nature of the remaining issues.

Did the Court err in finding it had insufficient information to grant consent?

[113] Section 104(6) of the RMA provides that a "consent authority may decline an application for resource consent on the grounds that it had inadequate information to determine the application." Section 104(7) provides that in making its assessment of the adequacy of information under s 104(6), the consent authority "must have regard to whether any request" for "further information or reports resulted in further information or any report being available."

[114] RNZ submits the Environment Court erred in relying on s 104(6) in finding there was insufficient information to determine the application on the basis that this was inconsistent with the Court's own analysis of effects and ignored s 104(7).

[115] The Council relies on the following statement of principle from the High Court decision of *Gabler v Queenstown Lakes District Council*:[109]

> While a consent authority does not have to be "satisfied" of the "adequacy" of information, it still must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects.

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109 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086 at [65].

[116] The Council also submits the information before the consent authority must be of adequate quality, as well as sufficient detail, to enable the grant of consent.[110] These appear to be uncontroversial statements of principle.

[117] In this case, the Environment Court found that the predominant factor in its decision was the uncertainty and unknown risks for the environment due to inadequate information.[111] RNZ submits the Court's findings that it both had too much information (noting the Court's complaints about the volume of evidence)[112] and inadequate information were hard to reconcile. I disagree. There is nothing illogical about concluding that there was a large volume of information that failed to adequately address the relevant issues. Quantity of evidence is no guarantee of quality.

Did the Court fail to properly consider s 104(7)?

[118] I do not accept RNZ's submission that the Court failed to consider s 104(7) in making its findings under s 104(6). The Court plainly had regard to the extensive further information provided by RNZ, even if it was not impressed by its relevance or quality.[113] The Court concluded:[114]

> [654] … the biggest factor in our conclusion to decline consent in this case has been inordinate gaps on the part of RNZ in proving a case that it should gain consents. *This, despite the significant opportunities afforded it to engage in further studies and actions after the first tranche of hearings*. As we have said, on this factor alone we are compelled to refuse consent.

[119] Nothing more was required of the Court to comply with s 104(7).

Did the Court err in not assuming that the requirements of ss 104(6) and (7) were met?

[120] I do not accept RNZ's submission that, if an applicant has met all information requests prior to a hearing, it is entitled to an assumption that ss 104(6) and (7) are met.

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110 *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [29] (upheld on appeal: *RJ Davidson Family Trust v Marlborough District Council* (CA), above n 71).

111 Substantive decision, above n 1, at [520] and [654].

112 At [4].

113 For example, at [2], [7], and [159]. Relevantly, the hearing was adjourned while more information was gathered: at [47].

114 Emphasis added.

[121] The starting point is the wording of the provisions. Section 104(7) only requires the Court to "have regard" to whether requests for information have been met, and s 104(6) provides a discretion to decline an application based on inadequate information. The combined effect is that it is a discretionary matter for the consent authority to determine what weight it places on any further information provided and whether the adequacy of that information is grounds to decline consent. I accept the Council's submission than even when the applicant has provided further information in response to a request, the question remains whether the Court considers it has the information it needs (and if not, it may decline consent under s 104(6)).

[122] I also accept the Council's submission that uncertain evidence about effects and proposed conditions can appear throughout the process, which is what occurred here despite the lengthy adjournment for more information to be gathered.[115] As already noted, volume of information is no guarantee of quality. If, despite an opportunity to provide further information, there remains insufficient information to properly assess the application, the Court may determine it has inadequate information to grant consent under s 104.

[123] Accordingly, I consider there was no error in the Environment Court's approach to s 104(6) and (7).

Did the Court correctly apply the burden of proof?

[124] RNZ submits the Court erroneously placed on it an evidential onus to prove it could meet the offered conditions. It contends the onus was instead on the other parties to prove that RNZ could not meet the offered conditions.

[125] The Court noted there is an overall persuasive burden on a consent applicant in the sense that it must prove that consent should be granted.[116] The Court set out its approach as follows:[117]

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115 Substantive decision, above n 1, at [32]

116 Substantive decision, above n 1, at [459], citing *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 at [136].

117 Footnotes omitted, citing *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227 at [129].

> [459] In preceding paragraphs about proof of aspects of the case, we referred to the need for an applicant to persuade the Court that consent should be granted, and a standard of proof about future effects requiring a certain level of satisfaction on the part of the consent authority. In 1999 the Environment Court held that in cases before consent authorities including the Court, there is a burden of proof that can shift as the case goes along (rather than a legal burden such as the "balance of probabilities" as in civil cases); there is however an overall legal persuasive burden on an applicant in the sense that it must prove that consent should be granted.
>
> [460] Those statements by the Environment Court have stood the test of time but have been further explained recently by the High Court in *RJ Davidson Family Trust v Marlborough District Council* in a section of the Judgment not affected by the subsequent Court of Appeal decision. It held that while facts must be proved to the civil balance of probabilities, future effects are different. In assessing future effects, the Court is not required to satisfy itself that an effect is more likely than not; simply that it is likely, even if the effect is of low probability.

[126] The 1999 decision that the Court noted has "stood the test of time" is the decision of the Environment Court in *Shirley Primary School v Christchurch City Council*. In that case, the Court held that an applicant has a burden to persuade the Court that the proposal will achieve the purpose of the RMA, but there is also an evidential burden that may shift or "swing" to the person who will fail without further evidence.[118]

[127] I have some concerns about how *Shirley Primary School v Christchurch City Council* is being interpreted based on the submissions I received in this case. There appears to be some confusion about the difference between a legal burden of proof and an evidential burden. A burden of proof must be met by a party in order to establish its case, while an evidential burden is the description given to the practical consequences that flow from a failure to call evidence to rebut an opposing party's case. For example, if an applicant has called evidence capable of establishing its case, there will be an evidential burden on the respondent to call evidence in response because failing to do so will likely result in the applicant meeting its legal burden. However, at no stage does the legal burden of proof shift; it remains with the applicant throughout.[119]

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118 *Shirley Primary School*, above n 116, at [121].

119 There are of course exceptions to this general rule. For example, in criminal proceedings a defendant must prove the defence of insanity on the balance of probabilities (Crimes Act 1961, s 23); and in civil proceedings, a defendant must prove an affirmative defence.

[128] The starting point is the statutory language. Section 104D relevantly provides that the consenting authority (here, the Court on appeal) "may grant a resource consent … only if *satisfied* that either … the adverse effects of the activity on the environment … will be minor" or not contrary to any policies in a relevant plan or proposed plan.[120] Section 104 sets out the matters the authority "must, subject to Part 2, … have regard to" when considering a consent application (including not granting consent contrary to s 107). Section 107 relevantly provides that the authority "shall not grant a discharge permit … if … the contaminant … is *likely* to give rise to … any of the following effects …".[121]

[129] I consider these provisions and the consenting process do not sit easily with the adoption of traditional standards of proof. The burden on the applicant to persuade the authority that consent should be granted, after applying the test in s 104D and having regard to the relevant matters in s 104 and the purpose of the RMA, appears to make this an evaluative decision that simply requires the authority to "make up its mind".[122] What is required for a decision maker to "make up its mind" is highly context specific.[123] I am not attracted to the idea that individual aspects of this process should be subject to a balance of probabilities standard, or indeed any legal standard of proof.[124]

[130] For example, in my view the effects assessment under s 104(1)(a) does not require proof of each *actual* effect on the balance of probabilities, or proof of each *potential* effect to a specific legal standard. Instead, when making findings necessary

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120 Emphasis added.

121 Emphasis added.

122 *R v White* [1988] 1 NZLR 264 at 268; *Seleni v Chief Executive of the Department of Corrections*, [2024] NZSC 152, [2024] 1 NZLR 690; *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *R v Leitch* [1998] 1 NZLR 420 at 428.

123 See *Seleni v Chief Executive of the Department of Corrections*, above n 122, at [52].

124 I note that in *Shirley Primary School v Christchurch City Council*, above n 116, at [120], [126], and [136], the Court reached similar conclusions. See also *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZHC 2897, (2014) 18 ELRNZ 97 at [90]:

> Burden of proof is a complex issue in RMA proceedings. Very often RMA proceedings involve proof of existing fact, assessment of future effects and an evaluative judgment in light of prescribed statutory thresholds. Allocation of evidential and persuasive burden is problematic and sometimes inapposite in this context, as several leading cases demonstrate.

However, Whata J acknowledged that his approach was context specific because he was faced with an unusual application for a negative declaration under Part 12 of the RMA that a person does not have a lawful right to operate in reliance on a resource consent.

to be satisfied that consent should be granted (including findings on the effects under s 104(1)(a), or whether the conditions are feasible), the authority is required to determine what evidence it accepts or rejects, but need not decide whether individual pieces of evidence are proven to a particular legal standard. The authority will then need to consider these factual findings when deciding if consent should be granted after applying the test in s 104D, and having regard to relevant matters under s 104 and the purpose of the RMA.

[131] Such an approach is supported by the established position in other areas of the law. In criminal proceedings, it is only the elements of a charge that must be proven beyond reasonable doubt and no standard of proof is required to be met for the acceptance of individual pieces of evidence.[125] Likewise, in civil proceedings, in general it is the elements of the cause of action that must be proven on the balance of probabilities rather than individual pieces of evidence.[126]

[132] The High Court decision referred to by the Environment Court, *RJ Davidson Family Trust v Marlborough District Council*, discusses how actual and potential effects can be assessed.[127] In that case, the Court noted that determining actual effects is relatively straightforward because it concerns existing factual circumstances that can be proven on the balance of probabilities.[128] However, the Court said that the predictive assessment required for determining potential effects means proof on the balance of probabilities is not required for such effects.[129]

[133] Although the Supreme Court did not expressly address burdens or standards of proof in *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, there are aspects of the decision that appear to accord with this approach. The Court referred to the effects considered in the s 104(1)(a) assessment as "the actual or potential consequences of defined activities — consequences that are ascertainable (*with*

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125 *R v Holtz* [2003] 1 NZLR 667 (CA) at [39].
126 Andru Isac *Cross on Evidence* (LexisNexis, online looseleaf ed) at [2.3.2].
127 *RJ Davidson Family Trust v Marlborough District Council* (HC), above n 117.
128 At [129].
129 At [133].

varying degrees of confidence) through evidence."[130] The Court also held, as a "basic proposition", under s 104(1)(a):[131]

> … the effect need not necessarily be likely, at least not if its potential impact will be high. This means that the relevance and weight of less likely effects will also be application-specific matters of fact and degree.

[134] The general approach to proof of future events does not impose a balance of probability standard even when the future event is an essential element in the case. As the High Court noted in *RJ Davidson Family Trust*, the general approach to the prediction of future events is to require establishment of a real and substantial risk or possibility of them occurring.[132] Although other authority in this context interprets the word "likely" in legislation as meaning real and *appreciable* possibility or risk,[133] this makes no practical difference to the approach.

[135] In my view, this general approach to establishment of potential effects aligns with the evaluative judgment the consent authority must make, the sustainable management purpose of the RMA, and the precautionary approach available under environmental legislation when environmental effects are uncertain.[134] Notably, in *Auckland Council v Woolworths NZ Ltd*, in the alcohol licensing context, the Court of Appeal held the adoption of a "real and appreciable possibility" test can be described as "precautionary" because "it admits remedial measures to reduce harm although their effects are uncertain."[135]

[136] I note that s 107 adds a further specific requirement when it is engaged (under s 104(3)(c)(i)), namely that the authority cannot grant consent "if … the contaminant … is *likely* to give rise to … any of the" relevant effects.[136] The consent authority will therefore need to make an overall determination of whether this test has been met

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130 *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [98] (emphasis added).

131 At [72] (footnote omitted).

132 *RJ Davidson Family Trust v Marlborough District Council* (HC), above n 117, at [112].

133 See, for example, *Farish v R* [2024] NZSC 65 at [27]; *Commissioner of Police v Ombudsman*, above n 122.

134 *Auckland Council v Woolworths NZ Ltd* [2021] NZCA 484 at [60].

135 At [62]. The Supreme Court agreed that a precautionary approach is open and that a restriction may be justified on the basis of a reasonable likelihood that it will reduce alcohol-related harm: *Woolworths NZ Ltd v Auckland Council* [2023] NZSC 45, [2023] 1 NZLR 113 at [84].

136 Emphasis added.

based on the evidence it accepts, and interpreting likely as meaning a real and appreciable possibility.

[137] Drawing these threads together, I consider the required approach is as follows. The applicant has the usual persuasive burden of establishing its case for consent.[137] This requires the applicant to persuade the authority to be satisfied (make up its mind) that consent should be granted after applying the test in s 104D and having regard to the relevant factors in s 104 and the purpose of the RMA. In making factual findings necessary for this assessment, the authority is not required to apply any legal standard of proof; it must simply decide which facts it accepts or rejects. When making findings about actual and potential effects on the environment under s 104(1)(a), the authority will have regard to the definition of effect in s 3 and is entitled to take a precautionary approach that can incorporate a real and appreciable possibility assessment. However, when s 107 is engaged, the additional test in that section must be met, which means no consent can be granted if there is a real and appreciable possibility the discharge will give rise to one of the listed effects.

[138] The approach taken by the Environment Court in this case substantially accords with this approach, and any departure from it was in RNZ's favour. For example, the Court understandably applied the approach in *RJ Davidson Family Trust,* that actual effects should be proven on the balance of probabilities, whereas I consider factual findings about effects do not need to meet this legal standard.

[139] It follows that there was no error in the Court requiring RNZ to establish that the proposed conditions were feasible and achievable. As the applicant, it was for RNZ to adduce evidence to satisfy the Court that consent should be granted, including evidence on the feasibility of the proposed conditions. The fact that the other parties called evidence and made submissions in opposition to the application did not change the position. Moreover, the Court's finding that RNZ had failed to satisfy it that the proposed conditions would successfully manage adverse effects was clearly open to it on the evidence.[138]

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137 *Shirley Primary School v Christchurch City Council*, above n 116, at [136]; *Saddle Views Estate Ltd v Dunedin City Council*, above n 124, at [90]–[93].

138 Substantive decision, above n 1, at [665]: "[RNZ] should have concentrated on providing evidence to support its proffered conditions of consent and showing that they are achievable."

Did the Court err in its approach to RNZ's compliance history?

[140] RNZ submits the Environment Court wrongly based part of its decision on effects on RNZ's poor compliance history. The Council submits the Environment Court did not rely on previous non-compliance, nor treat it as determinative. The Council notes the Court specifically said that its decision was reached without needing to fully examine the appellant's compliance record.[139] The Council further submits that, even if the Court did base part of its decision on previous non-compliance, it was entitled to do so.

[141] The Court said that site history serves "as evidence about the site and potential environmental effects rather than to inform whether consent should be granted or refused based to some degree on past behaviour by the consent holder".[140] The Court concluded its discussion of this issue as follows:[141]

> We ultimately find that for the many reasons of science, Māori culture, and law, imposing increasingly complex conditions of consent will not produce a viable consent (in the sense of being workable in meeting the purpose of the Act and the many requirements of other sections of it, and the many statutory instruments we have needed to consider). *To reach this point we do not need to examine whether or not this applicant has a record that demonstrates it as unable or unwilling to comply in the future*.

[142] I do not therefore accept that the Court wrongly placed reliance on RNZ's compliance history. But even if I am wrong about this, I do not consider it would have been an error of law for the Court to have had regard to RNZ's compliance history.

[143] The Council notes there is High Court and Environment Court authority that recognises that prior conduct can be considered under s 104(1)(c) (as an "other relevant matter"), but could never be more than a peripheral consideration.[142] Prior conduct may become relevant in deciding the adequacy of conditions if there is evidence that earlier conditions have not proved satisfactory.[143]

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139 At [488].
140 Substantive decision, above n 1, at [482].
141 Substantive decision, above n 1, at [488] (emphasis added).
142 *NZ Suncern Construction Ltd v Auckland City Council* [1997] ELHNZ 219 (HC).
143 *Walker v Manukau City Council* ENC Auckland C213 99, 7 December 1999 at 6.

[144] I note that RNZ itself referred to issues with its past non-compliance, and the efforts it was making to improve, in its updated application for consent. I find no fault in the Court's approach of not relying on previous non-compliance to demonstrate an inability to comply, and instead considering evidence of the site history as relevant to the potential environmental effects of the site. But even if this could be interpreted as placing some reliance on previous non-compliance, I reject the suggestion that this was completely irrelevant to the issues the Court had to determine. As a matter of logic and commonsense, RNZ's past operation of the site was relevant to the potential effects from its continued operation of the site and the likely effectiveness of the proposed conditions.

[145] I therefore consider there was no error of law in the Court's approach to RNZ's compliance history.

Did the Environment Court err in its assessment of the positive effects of granting consent?

[146] I do not accept RNZ's submission that the Court failed to assess the positive effects of the proposal. For example, the Court assessed economic effects[144] and found that they were neutral to mildly positive.[145] The Court also found that riparian planting was a positive step for freshwater ecosystems,[146] but noted the lack of evidence establishing the improvement in water quality that would result from it.[147] I also accept the Council's submission that the lack of information was a barrier to assessing some of the positive effects of the proposal, as well as the adverse effects.[148] RNZ's essential complaint is that the Court should have placed greater weight on the positive effects of the proposal, which is not a complaint capable of succeeding on a question of law appeal.

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144 Substantive decision, above n 1, at [492] and following.
145 At [558] and [656].
146 At [635].
147 At [636].
148 See Substantive decision, above n 1, at [654].

Did the Environment Court err in finding that s 107 precluded consent?

[147] The Court found the proposal would significantly affect aquatic life in breach of s 107(1)(g).[149] I accept the Council's submission that although this finding has legal consequences under s 107(1)(g), the finding about effects was a finding of fact the Court was entitled to make on the evidence. I also accept the Council's submission that a factual finding of this nature is not converted into an issue of mixed fact and law merely because it produces legal consequences.[150] RNZ's submissions claim the Court misinterpreted the evidence on effects and effectively invites me to reassess it, which I cannot do on a question of law appeal unless its findings were untenable. The Court was entitled to make the factual finding that there would be significant adverse effects.

[148] RNZ submits the Court's focus on the feasibility of the offered conditions means it must have been satisfied that s 107 was met. However, the Court found that part of the infeasibility of the proposed conditions were their inability to prevent adverse effects on the environment, including "significant adverse effects of the activities on aquatic biota and we consider that this will continue to be case [sic]."[151]

[149] I also reject RNZ's submission that the Court did not make a "reasonable mixing" determination in accordance with s 107(1). I accept the Council's submission that the Court clearly set out the need to consider the effects of discharge after reasonable mixing, and noted the attempts made during the hearing to obtain clarity on the issue of the effects of the proposed activity on aquatic life.[152] It noted that a lack of data, among other things, meant the experts could not draw "firm conclusions", but was able to conclude that "it is clear to us that there have been significant adverse effects on aquatic life".

[150] RNZ's complaint essentially relates to findings the Court made about whether the conditions would appropriately respond to the assessed effects. This is not a complaint capable of establishing an error of law as the findings were clearly open to the Court on the evidence.

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149 At [207], [279], [578] and [660].
150 *Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 2662 at [22].
151 Substantive decision, above n 1, at [207] and [279].
152 At [282].

Did the Environment Court err in its assessment of functional need?

[151] Policy 5A.4.1 of the Council's Regional Freshwater Plan, which enacts cl 3.24(1) and Policy 7 of the NPS, provides:

> The loss of river extent and values is avoided, unless the council is satisfied that:
>
> (a) there is a functional need for the activity in that location; and
>
> (b) the effects of the activity are managed by applying the effects management hierarchy.

[152] In applying these provisions, the Court must consider whether there will be a loss of whatever values are found to be relevant and, if so, whether there is a functional need for the activity in the location and whether the activity's effects will be adequately managed by conditions.[153] The Environment Court found there was not a functional need for the activity (having already found that the effects will not be adequately managed by conditions).[154]

[153] RNZ submits that this clause is only concerned with loss of river value through changing river morphology (its bed and banks) for reasons set out in the Court's decision.[155] The Court rejected this argument, concluding:

> [622] Clause 3.24 seeks to avoid "the loss of river extent and values". We consider this wording allows a consent authority to consider water quality and ecological values, as well as physical values. This aligns with the definition of "loss of value" in the [NPS] …

[154] The Environment Court preferred the evidence of the Council's planning witness, that there were no imperatives for the activity to occur at this particular site that would mean there is a functional need for the activity to occur at the site.[156] I am not persuaded there is was any error of principle in the Court's approach and the Court was clearly entitled to prefer the Council's witness' evidence on this issue.

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153 See substantive decision, above n 1, at [624].
154 At [628].
155 At [618]–[621].
156 At [628].

Did the Environment Court err in its approach to Te Mana o te Wai and cultural matters?

[155] RNZ submits that the Court treated "cultural aspirations", that water should enter and exit the site at the same quality, as an effective right of "veto" for Ngāti Mutunga.[157]

[156] I do not accept that this is a fair reading of the decision. I accept the Council's submission that the cultural aspirations finding is simply one of the Court's findings among many. The Court rightly considered Ngāti Mutunga's position relevant to the assessment of the overall effects of the proposal on water quality. Cultural effects are also relevant under the s 104(1) assessment,[158] and the Court's assessment against the regional policy statement.[159]

[157] The Court reiterated that the biggest issue was the lack of data, information, and proof, and that this also applied to the assessment of cultural issues.[160]

[158] I therefore do not accept the Environment Court treated cultural considerations as an effective right of veto.

Conclusion on the Court's key findings

[159] Accordingly, I am satisfied that the Court's findings on the above key issues were open to it, and do not constitute an error of law.

Question 5: Did the Environment Court's conduct of the case render the hearing unfair?

The initial allegation of bias

[160] RNZ's written submissions alleged that the Environment Court was unfair and biased, relying on the well-established test for bias in the Supreme Court's decision in

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157 Referring to substantive decision, above n 1, at [203].

158 For example, when the Environment Court assessed effects in *Paokahu Trust v Gisborne District Council* [2003] ELHNZ 393, or in the present substantive decision, where findings on cultural issues were stated at [454]–[458].

159 Regional Policy Statement for Taranaki 2010, appendix to substantive decision, above n 1, at 185.

160 At [558].

Saxmere Company Ltd v Wool Board Disestablishment Company Ltd: whether a fair-minded and informed lay observer would have a reasonable apprehension that decision-maker might not bring an impartial mind to the resolution of the matter.[161]

[161] Reliance was placed on the following matters as evidence of the Court's bias or predetermination: strongly worded expressions of disapproval following a site visit; the presiding Judge taking two photographs during the site visit; emphasis on RNZ's failure to seek the necessary site exit consent; forcing the *Cable Bay* approach on RNZ, including directing a PSI and DSI; directing RNZ to provide confidential corporate information; and repeatedly raising the issue of a bond condition for consideration and submission, despite RNZ's opposition.

[162] At the commencement of the hearing, I referred the parties to a recent decision of mine, *W v S*, where I dealt with allegations that judicial intervention and bias in a civil proceeding had caused an unfair trial.[162] Following this, RNZ's focus shifted to an overall allegation that the hearing was unfair due to improper judicial intervention in the proceedings, including improperly requiring RNZ to acquiesce to the *Cable Bay* approach.

The relevant principles

[163] In *W v S*, I set out what I consider to be the framework for consideration of such allegations as follows:[163]

> [45] The decision of Ellis J in *W v W* contains a helpful summary of the relevant principles.[164] I agree with Ellis J that the most useful authority is the decision of the United Kingdom Supreme Court (UKSC) in *Serafin v Malkiewicz and others*.[165]
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> [46] In *Serafin* the Court held the tone and nature of the trial Judge's interventions during a defamation claim brought by a litigant in person transgressed the core principle of impartiality. The Court found that the Judge

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161 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [89].

162 *W v S* [2024] NZHC 3642

163 *W v S*, above n 162.

164 *W v W* [2023] NZHC 3491, [2023] NZFLR 782. Counsel for the appellant relied on Cull J's decision in *Rongotai Investments Ltd v Land Valuation Tribunal* [2022] NZHC 1669. However, I find that case less helpful as it involved allegations of bias in judicial review proceedings demonstrated by a Tribunal's interventions during the hearing of oral evidence.

165 *Serafin v Malkiewicz and others* [2020] UKSC 23, [2020] 1 WLR 2455 [*Serafin*].

had acted with hostility towards the claimant and his case, and did not allow the claim to be properly presented. This meant the Judge could not fairly appraise the claim, rendering the trial unfair.

[47] The Court in *Serafin* focused on whether the trial was unfair, rather than apparent bias.[166] The Court referred to authority drawing a distinction between allegations of bias (meaning prejudice to a party or its case for reasons unconnected with the merits of the case) and trial unfairness. On the assumption that this meaning of bias was correct, the Court dealt with the case on the basis of trial unfairness. This was because the transcript of the trial indicated the Judge's conduct was a product of his "almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources."[167] …

[48] I consider the following principles can be drawn from the authorities:

(a) In the criminal jury trial context, it has been said there is nothing wrong with a Judge intervening in the evidence "to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear."[168] However, judicial interventions during oral evidence inevitably carry the risk identified in *Yuill v Yuill*, that a Judge who himself conducts the examination, "... descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."[169]

(b) An apparently balanced and well-reasoned judgment may not cure an unfair trial: "[t]he careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent … of prejudicing the exploration of the evidence."[170]

(c) The principles apply with equal rigour to criminal and civil proceedings.[171]

(d) An assessment of the overall tone, nature and frequency of the interventions is required in determining whether the trial was unfair.[172]

(e) A judgment resulting from an unfair trial is, in effect, a nullity, and requires an order for a complete retrial.[173]

[49] In *Rongotai Investments Ltd v Land Valuation Tribunal and others*,[174] Cull J endorsed the *Serafin* principles in the context of an allegation of

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166 At [37]–[39].
167 At [39].
168 *R v Tuegel and others* [2000] 2 All ER 872 (CA) at 888.
169 *Serafin*, above n 165, at [43]; and *Yuill v Yuill* [1945] P 15, [1945] 1 All ER 183 at 20.
170 At [44]; *re G (A Child)* [2015] EWCA Civ 834, [2015] All ER (D) 46 (Sep) at [52].
171 At [42].
172 *W v W*, above n 164, at [110].
173 *Serafin*, above n 165, at [49]; and *W v W*, above n 34 at [65].
174 *Rongotai Investments Ltd*, above n 164.

apparent bias in judicial review proceedings.[175] The Judge noted the following commentary from a leading text:[176]

> New Zealand judges commonly take an active part in a trial, usually by asking questions of witnesses. Such questioning, even if vigorous and substantial, will not normally give rise to apparent bias. In contrast, where the authority's actions, seen in the context of a series of disciplinary actions, appeared to be ad hominem not ad rem, bias was found.

[50] It is clear from these principles that an allegation that judicial intervention has caused an unfair trial requires careful assessment of the overall context of the trial and the tone, nature and frequency of the interventions.

[51] A Judge taking an active role in the trial by asking questions of witnesses to clarify issues or better understand the parties' cases will not in itself render the trial unfair. But the tone, nature and frequency of those interventions may prevent a party from properly presenting their case to the point of unfairness.

[52] However, not every improper judicial intervention will render a trial unfair. For a criminal trial to be unfair, the error or irregularity must be "so gross, or so persistent, or so prejudicial, or so irredeemable that an appellate Court will have no choice but to condemn the trial as unfair ...".[177] Given the principles relating to judicial intervention apply with equal rigour to criminal and civil proceedings,[178] I consider this test provides helpful guidance. *Serafin* and *W v W* are clear cases where the nature, tone, and frequency of the interventions were so gross, persistent and prejudicial that the courts had no choice but to condemn the trials as unfair. Prejudice caused by improper judicial intervention that does not reach this level can, in Judge-alone civil trials, likely be remedied by an appellate court's unconstrained ability to intervene on a general appeal.[179]

The reframed allegation of unfairness

[164] Following consideration of *W v S* during the appeal hearing, RNZ reframed its allegation by submitting that persistent improper interventions by the presiding Judge meant it did not get a fair hearing. It is contended that the effect of the interventions

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175 At [138]–[141].

176 Graham Taylor (ed) *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [13.66] (footnotes omitted).

177 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [78] citing *Randall v R* [2002] 1 WLR 2237 and *R v Howse* [2006] 1 NZLR 433 (PC).

178 Although the principles apply with equal rigour, their application must be context specific. For example, judicial interventions that may indicate a Judge's views during a jury trial are likely to have a greater impact on the fairness of the rial than in a Judge-alone trial.

179 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141. For example, if the improper intervention has prevented the adducing of relevant evidence, an application to adduce fresh evidence can be made and the appellate court can assess that evidence on appeal.

was to generate coercive pressure on RNZ to cooperate with the *Cable Bay* approach, divert the case into areas outside the scope of the application, and convey premature adverse views about RNZ's conduct and reliability.

Was there improper conduct that has resulted in an unfair hearing in this case?

[165] Mr Maassen accepted that if RNZ's case failed on the four key questions I have already addressed, the allegation of unfairness on its own would likely not be sufficient to allow the appeal. That was a responsible position to take given RNZ's submissions about unfairness had a considerable focus on the allegation that the Judge's intervention caused the case to be diverted beyond the scope of the application. As I have already determined the case did not get diverted beyond the scope of the application, this consequence cannot support a finding that the hearing was unfair.

[166] I accept the presiding Judge actively questioned counsel about how the proceedings should be progressed during the first week of the hearing and indicated preliminary views on certain issues. However, the context for this is important. The evidence was filed in advance of the hearing and the Judge indicated that he had read a considerable amount of it before the proceedings started.[180] Prior to hearing, the experts agreed (including RNZ's expert) that there were significant gaps in RNZ's application, requiring further information on the contamination of the site. Further, the hearing had been brought on at short notice to address Ngāti Mutunga and UCP's concerns about delay. I also note UCP's submission that judicial interventions are common in complex Environment Court cases.

[167] Therefore, when the Judge and other members of the Court undertook the site visit on the afternoon of the first day of hearing, they had heard RNZ's opening submissions, were familiar with the issues and evidence, and were aware that the experts agreed that further information would be required.

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[180] The parties advised me that the filing of evidence for the Court to read in advance of a hearing is the Environment Court's standard practice.

Was it improper for the Judge to take photographs during the site visit?

[168] In this context, I see nothing improper about the Judge taking two photographs during the site visit. The Judge referred to this as being "brave" and "impertinent" in later exchanges with counsel and witnesses, but the Judge clearly has a colourful turn of phrase that is evident throughout the transcript of the first week of the hearing. Although the Judge said he had never taken such photographs before, he told counsel what he had done and had the photographs produced in evidence. The photographs did no more than capture a small portion of what the Judge saw during the site visit. Rather than making a note recording what he saw, the Judge took the more accurate and efficient option of recording it in two photographs.

[169] In circumstances where no objection could be taken to the Judge recording observations in a note, there was nothing improper about recording observations in photographs. I reject the submission that the Judge taking photographs in these circumstances was the Judge taking on the role of gathering evidence. It was simply the Judge recording part of what he saw on the site visit to enable him to ask the parties and witnesses about it.

Did the Court repeatedly raising the issue of a bond condition for consideration despite RNZ's opposition, or any other matter, suggest bias for reasons unrelated to the merits of the case?

[170] I see no basis for the allegation of bias due to the Court raising the issue of a bond condition for consideration, and Mr Maassen did not press this point in oral argument. It is not correct that consideration of a bond was first raised by the Judge, as RNZ initially suggested on appeal. Rather, the Judge noticed from the evidence filed pre-hearing that Ngāti Mutunga sought a bond, but RNZ did not consider a bond was necessary. There is simply no evidence of bias in the sense explained in *Serafin* (the Court having a motive to find against RNZ for reasons unrelated to the case) due to the Court raising the bond condition for consideration despite RNZ's opposition to it (or for any other reason).[181]

[181] *Serafin v Malkiewicz and others*, above n 165, at [38]–[39].

Did the Judge's perceived lack of merit in RNZ's case result in interventions that caused an unfair trial?

[171] It follows that RNZ appears to now accept that to succeed on unfairness grounds it must establish that the Judge's perceived lack of merit in RNZ's case caused him to improperly intervene in the proceedings to such a degree that the cumulative effect was an unfair hearing.

[172] The transcript indicates that the Judge robustly expressed concerns during the first week of hearing on a variety of issues. However, the Judge directed robust questions to all counsel and there is no suggestion that his tone was overbearing or even impolite. The matters raised included that the hearing appeared to have been brought on too early to address the interested parties concerns about delay, that further information in the form of a PSI and/or DSI were likely to be required, and concerns about whether the proposed conditions should include a bond.

[173] The Court signalled the possible use of the *Cable Bay* approach early. During RNZ's opening submissions, the Court said that if it goes down the path of seeking further information there may be an opportunity for RNZ demonstrate it is capable of coping as was demonstrated in *Cable Bay*. Then during counsel for the UCP parties' opening submissions the Judge said:

> … one thought that's in the back of my mind is that this is a case that is so complex we are not going to be able to deliver an oral interim decision at the end of this week, that would be superhuman and beyond the possible. However, after hearing the testing of the witnesses and having read the case comprehensively, if under pressure … we may be able to give indications of where we would be landing in terms of … a path to be followed…so we're continuing deliberations in the back room and we'll see where we get to.

[174] In essence this was the approach taken. Although at the end of the first week the Court's views had developed further, it was still using language that indicated the Court's views were tentative. For example, in relation to the Council's suggestion that some form of enforcement order by consent be made to ensure compliance pending the next stage of the hearing, the Judge said he did not think it would be appropriate to offer a comment and anything along those lines would probably need to come before the Court on an agreed basis. The Judge went on to make a "very, very tentative observation" that:

> … [RNZ] needs to be aware that we have these tentative thoughts in our minds about the shape of things and [RNZ] needs to reflect carefully and if it decides to adopt a different course, it needs to signal that to the parties and to the Court as soon as humanly possible.

[175] It is important to emphasise that the Judge could not have made it clearer that the purpose of the further investigations was to give RNZ the ability to establish that it could responsibly operate the site in a way that would allow consent to be granted.

[176] RNZ points to other parts of the transcript that it says demonstrate the Judge had predetermined views about RNZ's ability to comply with conditions. For example, in testing the utility of granting a short-term site remediation exit consent with counsel for Ngāti Mutunga, the Judge said that he worried about misplaced optimism that the company might do the right thing and spend a lot of money for no return. However, in context this appears to be the Judge questioning the incentives for *any* company to comply with an exit consent when no revenue can be generated from the operation of the site.

[177] RNZ also complains that during Mr Maassens' opening, the Judge said the Court might have some questions about how RNZ's other sites are operated because "[w]e might be interested to know whether the company is capable of behaving better than it has been on this site." However, this is an example of the Court giving RNZ an opportunity to meet its concerns in circumstances where evidence had been filed (and read in advance) that set out RNZ's largely undisputed poor compliance history.

[178] In some final exchanges with Mr Maassen at the conclusion of the first week of hearing, the Judge directly indicated that RNZ needed to be aware that a range of consequences could follow from a decision not to cooperate with the further investigation that the Court, experts and other parties considered appropriate. The Judge then said that if, after further investigation, the Court reached the view that the conditions of consent and management plans were so complex and unlikely to be capable of implementation, this could inform a refusal of consent. However, rather than raising objection to this, Mr Maassen said:

> … if we're going down this pathway and the Court has tentative views in that nature, we would be grateful to receive them because there is no purpose, if

> the Court has a strong inclination about certain things, to simply carry on pushing forward …

[179] Mr Maassen's position was responsible and, in my view, reflects an orthodox position. It is common in modern litigation for Judges to have robust exchanges with counsel (and indeed robustly question witnesses)[182] in order to raise issues and test positions. This can often include expressions of tentative or preliminary views that will assist counsel with their presentation of the case and taking instructions from their clients about how to continue to advance the case. Indeed, at times this process can result in an agreed settlement of the case before the conclusion of the proceedings.

[180] I do not consider the Judge's robust expressions of preliminary views in order to guide the parties to provide further information to assist the Court were improper. In circumstances where a very experienced Environment Court Judge had read a large volume of material pre-hearing, which included expert evidence indicating further investigation was required, and had undertaken a site visit, it was reasonable for him to have formed some preliminary views at the start of the hearing. These views unsurprisingly crystallised once the experts for all parties gave evidence that further investigation was required, which enabled more robust views to be expressed at the conclusion of the first week. In these circumstances, it was entirely reasonable for the Court to have formed the view that it was not in a position to grant consent without further information.

[181] Counsel for RNZ said he welcomed such views, obtained instructions from RNZ confirming cooperation with the suggested approach (including agreeing to a PSI and DSI), and in conjunction with the experts and parties drafted a memorandum setting out the agreed process for completion of further steps for the Court's consideration.

[182] I do not accept that any of the Judge's interventions were improper either individually or collectively. I accept the Judge on occasions used colourful language that he may not have used with the luxury of some further consideration. But that does not in itself make the interventions improper.

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[182] *Rongotai Investments Ltd v Land Valuation Tribunal*, above n 164, at [138]–[141]; citing *Serafin v Malkiewicz*, above n 165, at [108]–[110].

[183] For example, in describing the concerns the Court had during the site visit, the Judge said, "We're frankly pretty horrified by a great deal of what we saw and we will have a lot of questions for witnesses about what we saw." The use of the word "horrified" was unwise, but there was nothing wrong with the Judge conveying the Court's serious concerns about the site and indicating that it would have questions of the witnesses about it. It also appears this comment was at least partly due to the Judge's mistaken belief that a photograph depicted discharge from Pad 3 directly into a tributary of the Haehanga Stream rather than into an irrigation pond. The process the Judge adopted of taking the photograph and asking about it enabled this misunderstanding to be corrected.

Were the Judge's questions of RNZ witnesses about a possible bond condition improper?

[184] RNZ contends that the Judge's questions of RNZ witnesses about the possibility of a bond was improper. At the hearing of the appeal, Mr Maassen initially suggested the Judge had breached privilege by requiring the provision of Board minutes about RNZ's willingness to provide a bond, and by asking about without prejudice discussions between Ngāti Mutunga and RNZ regarding a bond. However, Mr Maassen later conceded that he had an opportunity to take instructions from RNZ and object to the provision of the information on the basis it was privileged. That concession was clearly appropriate based on the matters captured in the transcript. Any claim of litigation privilege was clearly either not asserted or waived.

[185] In relation to the without prejudice discussions between Ngāti Mutunga and RNZ about the bond, the transcript of the hearing indicates that there was express waiver of this by both parties before it was discussed in evidence. In respect of the allegation that RNZ was required to produce confidential Board minutes, Mr Maassen accepts he had overnight to take instructions and raise any concerns before providing these to the Court.

[186] In fairness to Mr Maassen, he did not press the point that there was an error of law due to a breach of privilege or confidentiality in relation to these matters. Instead, he relied on them as examples of general unfairness. I consider they are simply examples of the Judge's direct approach to ensure that important issues were properly

addressed. Although I accept the Judge's approach would have placed Mr Maassen under some pressure, I do not consider the interventions crossed the line into improper conduct, or unfairly interfered with RNZ's ability to put its case. As the United Kingdom Supreme Court said in *Serafin*, "training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case".[183]

Was RNZ forced to cooperate with the *Cable Bay* approach?

[187] I consider there is no merit in the allegation that the Judge's interventions unfairly coerced RNZ to cooperate with the *Cable Bay* approach.[184] When RNZ was given the opportunity of cooperating with this approach, it made its choice with the knowledge that the consent application eventually succeeded in *Cable Bay*. Thus, although by the end of the first week the Court was indicating robust preliminary views based on the evidence as it stood, it was clear that RNZ was being given a realistic opportunity to succeed following the provision of further information.

[188] In the *Cable Bay* appeal, Campbell J rejected an argument that the Court coerced the applicant into surrendering earlier consent conditions by indicating that failure to do so might hinder the Court's ability to grant consent.[185] The Judge held that "[f]ar from being a breach of natural justice, this approach was the embodiment of it." As the Court indicated possible outcomes and gave the applicant an opportunity to be heard, the applicant had not been forced into a position and was free to make a choice. That the applicant may not have liked either possibility was simply the position it found itself in, rather than a situation created by the Environment Court.[186]

[189] That reasoning is equally applicable here. The need for further investigation before consent could be granted was a consequence of the written evidence filed and oral evidence called during the first week of hearing. RNZ had a choice to cooperate with the further investigation or accept that the consent would be declined and appeal

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183 *Serafin v Malkiewicz and others*, above n 165, at [46].

184 The *Cable Bay* approach involves the Court issuing interim decisions as a means of to assist the parties to get the appropriate controls in place and make sure those controls will work: *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [25].

185 *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [126].

186 At [127].

that decision. It was given an opportunity to consider its position and understandably favoured cooperation. Its dislike of either option was a consequence of the position it found itself in and does not amount to improper or unfair conduct by the Court.

Conclusion on unfairness

[190] It follows that, apart from the occasional possibly unwise use of colourful language, I see no basis to criticise the Judge's conduct of the hearing. And certainly no basis to find that the Judge acted improperly, nor to find the conduct of the hearing as a whole reached the high threshold required to render it unfair. In fact, the conduct of the hearing gave RNZ every opportunity to provide further information to establish its case. There was nothing unfair about the Court ultimately finding that it failed to do so.

Conclusion on substantive appeal

[191] For the reasons summarised at the outset, and set out in detail above, I conclude that no error of law has been established. I therefore dismiss the appeal.

COSTS APPEAL

Environment Court costs judgment

[192] On 25 March 2025, the Environment Court issued an interim costs decision relating to applications for costs by the Council, UCP, and Ngāti Mutunga against RNZ.[187] UCP applied for 80 per cent of its costs incurred, being $181,761.93 (the "full fee" amount); the Council sought 66 per cent of its costs, being $827,592.29; and Ngāti Mutunga sought indemnity costs of $202,553.76.

[193] RNZ submitted costs should be 25 per cent of UCP's costs; 25 to 33 per cent of the Council's costs; and 33 per cent of Ngāti Mutunga's costs.

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[187] *Remediation (NZ) Ltd v Taranaki Regional Council* [2025] NZEnvC 87 [interim costs decision].

[194] The Environment Court set out four bands that "many of the Court's awards have tended to fall within":[188]

> (a) no costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or in cases where some aspect of the public interest counts against any award being made;
>
> (b) standard costs, which generally fall between 25 – 33 per cent of the costs actually and reasonably incurred by a successful party (sometimes referred to as the "comfort zone");
>
> (c) higher than standard costs, where certain aggravating factors are present as discussed below; and
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> (d) indemnity costs, which are awarded rarely and in exceptional circumstances.

[195] The Court observed that RNZ fell well-short of establishing that consent should be granted (for the reasons noted above).[189] The Court found that RNZ had "very largely caused the high expenses incurred by the other parties", as a result of the continuing shortcomings of its application, which led to a succession of delays, and the enormous volume of evidence it filed in breach of the Court's Practice Note, which placed unreasonable pressure on the other parties.[190] The Court noted that RNZ had been given opportunities to remedy the defects in its application, but had continued to fail to "measure up".[191]

[196] The Court rejected RNZ's submission that it should be hesitant to award increased or indemnity costs where a *Cable Bay* approach is followed. The Court said the *Cable Bay* approach gave RNZ a "more than reasonable opportunity" to avoid refusal of consent, and would not have been required had RNZ submitted complete information initially.[192] The result of this approach was that the other parties "bore the brunt in time and costs [in] terms of having to chase the moving target set by RNZ".[193]

[197] The Court held that a comparison with the High Court and District Court costs scales were not helpful, given the multiple parties, multiple issues and complex

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188 Interim costs decision, above n 187, at [7]; citing *Barraclough v Gisborne District Council* [2024] NZEnvC 157.
189 At [62].
190 At [63].
191 At [70] and [73].
192 At [67]–[70].
193 At [73].

scientific evidence involved in the current proceedings.[194] The Court considered the eleven days' total hearing time was not reflective of the time spent on the proceedings by counsel and expert witnesses.[195]

[198] The Court accepted the Council's submission that where an internal council expert gives evidence, it is as legitimate to pursue recovery as it would be for an external consultant expert, notwithstanding RNZ's submission to the contrary. The Court held that the Council's witnesses' involvement "was far above involvement in hearings as 'usual business'."[196]

[199] The Court considered RNZ's specific submissions about costs claimed in specific UCP invoices and made adjustments to UCP's costs schedule.[197]

[200] RNZ also took issue with UCP applying for "full fee" rates, despite only being invoiced a discounted "net fee" that was over $110,000 less. This was as a result of an agreement where, as the Court understood it at the time of the interim decision, UCP paid reduced fees with the understanding that fees may be recoverable upon a costs award.

[201] The Court found that to hold UCP to a low rate of fee recovery would be counter to the public interest of pro bono activity.[198] However, the Court required confirmation that the difference between the higher and lower sums will not become a cash windfall for the UCP parties, and information as to the proportions for which each of the UCP parties will be liable.[199] Hence, the decision was an interim decision.

[202] The Court found against awarding indemnity costs by a narrow margin.[200] The Court indicated it would order RNZ to pay costs of $144,000 to UCP (subject to the further information received), $827,000 to the Council and $134,000 to Ngāti Mutunga, being roughly 66 per cent of costs incurred.

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194 At [75]–[76].
195 At [77].
196 At [80].
197 At [81]–[85].
198 At [89].
199 At [91].
200 At [99].

[203] On 22 May 2025, the Court issued its final costs decision.[201] UCP clarified that its agreement with its counsel was that any costs incurred above the resource available would be recorded as a pro bono contribution, to be recovered in the event of a successful costs application. UCP were liable to pay counsel and an air quality expert $142,411.50.[202] UCP and its counsel gave undertakings that the costs award would be paid to its counsel and expert witness.[203]

[204] The Court confirmed the total costs owed by RNZ to be $1,055,000, being $94,000 to UCP (subject to the further information received), $827,000 to the Council and $134,000 to Ngāti Mutunga.[204]

Approach on appeal

[205] In *Auckland Council v Loranger,* Wylie J dismissed costs appeals by the resource consent applicants and the Auckland City Council in the *Cable Bay* litigation, awarding the respondents costs of $495,324 (requiring $412,770 be paid by Cable Bay and $82,854 by the Council).[205] The respondents in that case were s 274 parties who owned land in the vicinity of the Cable Bay vineyard. Although they were ultimately unsuccessful in their opposition, the application was only granted after the Environment Court offered the opportunity to proceed by way of the iterative approach described above, which allowed the parties the opportunity, with the guidance of the Court, to reach the point where consent could be granted.[206] As Wylie J observed, but for the guidance and assistance given by the Environment Court, it is likely that the application for retrospective resource consent would have been declined in its totality.[207]

[206] As Wylie J also noted in that case, a costs appeal is on a question of law under s 299 of the RMA. I have already set out above the principles applicable to question

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201 *Remediation (NZ) Ltd v Taranaki Regional Council* [2025] NZEnvC 160.
202 At [10]
203 At [12].
204 At [15].
205 *Auckland Council v Loranger* [2022] NZHC 3242.
206 At [11].
207 At [48].

of law appeals. After setting out the authoritative description of the required approach from the Supreme Court decision in *Bryson v Three Foot Six Ltd*,[208] Wylie J said:

> [25] In the present case, these observations must be applied having regard to the nature of an appeal against a decision on costs. Costs decisions are quintessentially discretionary.[209] Appeals against costs awards, particularly those involving assessments of fact and degree, seldom succeed because the trial Court is uniquely placed to make the costs assessment. An appellate Court cannot hope to capture the ephemeral but significant impressions which inform the assessments and discretions exercised by the trial Court.[210] Appellate Courts will not interfere unless satisfied that the trial Court acted in one of the ways noted above.[211]

Issues for determination

[207] There was initially a question of law posed in respect of the calculation of costs for the UCP parties relating to whether legal fees payable under a conditional fee arrangement are costs and expense "incurred" under s 285(1) of the RMA. However, following further analysis of the actual costs award during the course of the appeal hearing, it was accepted that the answer to this question will make no difference to the outcome. The appeal on this question was therefore abandoned.

[208] Although a number of questions of law were posed in the notice of appeal, most of them relied on me finding that there were errors of law in the Environment Court's substantive decision. There is no need to address these questions given my findings on the substantive appeal.

[209] This means that the costs appeal essentially comes down to the following four questions:

(a) Did the Environment Court err in its assessment of the conduct of the parties?

(b) Did the Environment Court err in its assessment of the relevance of the *Cable Bay* approach?

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208 *Bryson v Three Foot Six Ltd*, above n 45, at [24] and [26]-[27].
209 *Thurlow Consulting Engineers & Surveyors Lid v Auckland Council* [2013] NZHC 2468 at [26].
210 *R v Reid* [2007] NZSC 90, [2008] 11 NZLR 575 (SC) at [23].
211 *Kinney v Pardington* [2021] NZCA 174 at [1].

(c) Was the Environment Court's award of costs outside the available range?

(d) Did the Environment Court err in its assessment of the relevance of the High Court costs scale?

Question 1: Did the Environment Court err in its assessment on the conduct of the parties?

[210] RNZ submits that the Environment Court should have placed more weight on the conduct of the Council, Ngāti Mutunga and the UCP parties and less weight on the conduct of RNZ in reaching its conclusion on costs. Given the nature of the appeal, RNZ needs to establish not just that there was some error in the weighting given to these factors but that, as these were essentially factual findings, the Court's assessment was so clearly untenable it amounts to an error or law.

[211] I accept the Council's submission that the Environment Court was entitled to find aggravating factors justifying increased costs (*Bielby* factors) in this case.[212] The Court found that RNZ "fell well short of establishing that consent should be granted", and "it did not meet the burden of providing evidence to demonstrate that the effects of the proposal would be adequately managed".[213] The Court held that RNZ's approach required the other parties to "chase the moving target" as RNZ attempted to close the gaps in its evidence.[214] This in turn was part of the reason for the Court undertaking the *Cable Bay* approach, which RNZ ultimately accepted. It was therefore open to the Court to find that RNZ's approach had resulted in the parties incurring significant costs.[215]

[212] I also do not accept RNZ's submission that the Court's "sole reason" for the large costs award was because of the large volume of material produced by RNZ placing unreasonable pressure on the other parties. Rather, as the Council submitted,

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212 *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587 (HC).
213 Interim costs decision, above n 187, at [62].
214 At [73].
215 At [99].

the Court did not give a "sole reason" for a large costs award but a number of reasons stemming from RNZ's conduct of the case.[216]

[213] I also reject RNZ's submission that the number of issues was largely controlled by the respondents. The number of issues in the case was a consequence of the complexities of the site and the actual and potential effects on the environment. Moreover, RNZ was actively involved in, and agreed to, the submission of a number of lists of issues that were modified over time, ultimately resulting in 76 issues for the Court's consideration.

Question 2: Did the Environment Court err in its assessment of the relevance of the Cable Bay approach?

[214] RNZ submits that the use of the *Cable Bay* approach unfairly and substantially increased costs. I have addressed the alleged unfairness in the *Cable Bay* approach in detail in dismissing the substantive appeal and I will not repeat my findings here. As already noted, RNZ freely chose to co-operate with the *Cable Bay* approach. It must bear the costs consequences of making that choice. As the Environment Court noted, costs were also awarded against the applicant in the *Cable Bay* litigation despite ultimately succeeding in obtaining consent.[217]

Question 3: Did the Environment Court err in its assessment of the relevance of the High Court costs scale?

[215] RNZ submits that the Environment Court failed to have proper regard to the High Court costs scales in reliance on *Environmental Protection Authority v BW Offshore Singapore Pte Ltd*.[218] In that case, Cooke J acknowledged that the costs regimes in the High Court and District Court Rules are not binding on an Environment Court but expressed the view that they provide helpful guidance for costs decisions.[219] However, I agree with Wylie J's comments in *Loranger* that those scales do not constrain the Environment Court's discretion to award costs.[220] As Wylie J said, the Environment Court exercises specialist jurisdiction where it has been given a very

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216 At [65].
217 *Cable Bay Wines Ltd v Auckland Council* [2022] NZEnvC 90.
218 *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577.
219 At [40].
220 *Auckland Council v Loranger*, above n 205, at [54].

broad discretion to award costs, and that discretion is not circumscribed by scales of the kind contained in the High Court and District Court Rules. The Environment Court can draw comparisons with those scales if considered appropriate, but it is not required to do so. In other words, there is no error of law in declining to make this discretionary comparison.

[216] As demonstrated by the approximately $500,000 costs award in *Cable Bay* (despite the actual hearing time being only seven days), there is the potential for large costs awards against unsuccessful resource consent applicants. Although I have been advised that the costs awards in *Cable Bay* and this case are the two largest costs awards made by the Environment Court, that by itself cannot amount to an error of law.

[217] I also accept the Council's submission that comparisons with the Environment Court's approach to costs in plan change appeals, or to costs awards against consenting authorities defending consent decisions in the public interest, are of little assistance in cases such as this, involving costs awards against unsuccessful commercial resource consent applicants. As the Council submitted, the potential for significant costs awards against such parties provides the appropriate incentive to carefully evaluate the position before filing an appeal.

Question 4: Was the Environment Court's award of costs outside the available range?

[218] The next issue is whether the overall costs award in this case is so large that it was outside the range of reasonable awards. In other words, was it open to the Environment Court to order around 66 percent of actual costs, totalling $1,055,000, in the exercise of its discretion.

[219] In this regard, I accept the Council's submission that there are fundamental reasons why the Environment Court has a separate costs regime, where guidance is provided through a Practice Note rather than a costs scale. These factors include the diverse range of cases that come before it, and the Court's need to make evaluative assessments of past and future events based on environmental and scientific

disciplines, where there is a need for expert evidence (which often results in reasonably held divergent views).

[220] This results in complex hearings involving extensive expert environmental and scientific evidence. That was exemplified in this case, which involved a complex site and difficult and technical issues that required significant input from counsel and experts across several disciplines over an extended period. Given these factors, comparison with costs awards in another jurisdiction is of limited assistance.

[221] RNZ's submission that the costs award here was disproportionate having regard to the 11 days of hearing time, is similar to a submission rejected by Wylie J in *Loranger* in respect of a costs award of approximately $500,000 for a seven-day hearing. The Judge found this comment to be "divorced from the reality of the proceedings" and that "[w]hile there were only seven days of hearing, there was some two years' work leading up to the final decisions given".[221]

[222] Likewise, the hearing time in this case did not reflect the time involved for the Council's experts and lawyers. The 11 hearing days were in three blocks over 18 months (without including the time leading up to the first hearing). The first hearing took place in July 2022 and a hearing on the bond issues scheduled for February 2023 was ultimately decided on the papers. Finally, the third hearing block was held in late 2023 in two parts due to RNZ counsel's prior commitments. I accept the Council's submission that it was required to undertake significant work to address the evidential matters raised as the appeal progressed. For example, its expert, Mr Bedford, spent 330.25 hours carrying out further work to assess the provision of additional information and management plans following the initial hearing. There were 74 statements of evidence, supplementary evidence and affidavits; 14 expert conferencing sessions prior to the first week of hearing alone (with more later); 20 joint witness statements produced; 31 memoranda filed; and 11 Court minutes issued.

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221 *Auckland Council v Loranger*, above n 205, at [49].

Assessment of the overall proportionality of the award

[223] It is important to note at the outset that RNZ does not suggest that the total costs incurred by each party were unreasonable. In other words, there is no suggestion that the parties have been charged unreasonable or excessive fees by their respective counsel and experts.[222]

[224] Secondly, RNZ conceded in the Environment Court that a starting point for a costs award of 33 per cent was reasonable based on the Environment Court's bands contained in its Practice Note. I agree with the Council that in these circumstances it is surprising that RNZ now submits on appeal that it should only pay 25 per cent of actual costs.

[225] In *Loranger*, Wylie J, in response to an argument that a costs award of 60 per cent of actual costs was unfair and unreasonable, said:[223]

> [63] Again, and for the reasons I have already set out, I am not persuaded that there was an error by the Environment Court as asserted. The costs award was large. The Environment Court did however expressly consider whether or not the costs sought by the s 274 parties were reasonable. It set out, albeit succinctly, why it considered that an award of increased costs was appropriate. It identified various of the *Bielby* factors when discussing whether costs should be awarded against Cable Bay or the Council. It concluded that it was appropriate to allow to the s 274 parties 60 per cent of the costs they had reasonably incurred and it apportioned the resulting award between the Council and Cable Bay. Its conclusions as to quantum and apportionment called for the exercise of the discretion conferred on the Court, in a principled manner and according to law. The resulting award was high, but this of itself does not indicate that any error of law was made. Except as noted above, there is nothing else to suggest that the Environment Court erred in principle or that it made an error of law.

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222 Although there was some discussion at the hearing about the comparatively low fees incurred by Ngāti Mutunga (in particular) to the fees incurred by the Council, this is irrelevant in the absence of a challenge to the reasonableness of the actual costs incurred. In any event, the difference is likely a function of the Council being represented by a large commercial law firm and Ngāti Mutunga being represented by a barrister whose fees (I was advised) were partially covered by a legal aid grant and otherwise charged at an agreed modest rate. I also raised a question about whether the method of calculation of the Council's internal expert witness costs was appropriate. However, the Council provided further information post-hearing that satisfies me this was appropriate, as it was based on an hourly rate set in accordance with the guidance provided by the Controller and Auditor General: Controller and Auditor-General "Setting and administering fees and levies for cost recovery: Good practice guide" (August 2021) <https://oag.parliament.nz>.

223 *Auckland Council v Loranger*, above n 205.

[226] The reasoning applies with equal force to this case. That the award here was 66 per cent rather than 60 per cent was entirely a matter within the Environment Court's discretion having regard to its findings of fact about RNZ's conduct, and cannot amount to an error of law.

Comparison with High Court scale

[227] Although unnecessary for the disposal of the appeal, a cross-check with the High Court scale does not cause me to reconsider my above conclusions.

[228] The Council provided a supplementary memorandum post-hearing at my direction setting out a calculation under the High Court Rules on a 3C basis (a case of significant complexity requiring large amounts of time).[224] The Council drew my attention to *Van Dyke v Tasman District Council*, where the Environment Court noted that comparison with the High Court costs scale is difficult given the significant distinction between costs awards in the Environment Court and those in other jurisdictions,[225] as noted above. In *Van Dyke*, the Environment Court awarded costs over twice as large as the comparable High Court calculation of 3C costs, including 66 per cent of legal costs incurred and 100 per cent of expert costs.[226]

[229] It is important to note that the overall costs award in this case included expert witness fees. Under the High Court Rules, these would be included as a disbursement for which full recovery is available (subject to reasonableness).[227]

[230] Thus, the appropriate comparison is between the portion of the costs award that relates to legal costs and a calculation of 3C costs under the High Court Rules. Here, the portion of the costs award that related to legal fees was $464,029.70 (56 per cent) and the remainder was expert fees. By comparison, the Council's calculation of 3C costs under the High Court Rules is $260,161. However, I accept the Council's submission that the gap between the two figures can be substantially accounted for by the following:

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224 High Court Rules 2016, rr 14.3–14.5.
225 *Van Dyke v Tasman District Council* [2011] NZEnvC 405 at [61]–[62].
226 At [27] and [70].
227 High Court Rules, r 14.12.

(a) No specific allowance is made in the High Court Rules for legitimate Environment Court appeal-related steps such as counsel preparing expert conferencing agendas, assisting with expert conferencing sessions and preparation of joint witness statements.

(b) The High Court costs scale does not reflect the sheer bulk of evidence that had to be prepared and reviewed in this case.

(c) There were multiple hearings in this case, with significant procedural steps (including further evidence) in between.

(d) Consultation is underway on a proposal to increase the daily recovery rates by around 37.8 per cent on the basis that they are out of date.[228]

Conclusion on costs appeal

[231] It follows that the costs appeal is dismissed, as I consider there was no error of law in the Environment Court's approach and its conclusions were clearly open to it, including its overall award of 66 per cent of actual costs.

Costs

[232] If costs cannot be agreed, the parties should agree a timetable for filing memoranda (limited to five pages) and I will determine costs on the papers. The parties can revert to me if a timetable cannot be agreed.

La Hood J

Solicitors:
Heaney & Partners, Auckland for Appellant
Simpson Grierson, Wellington for Respondent
Auld Brewer Mazengarb & McEwen, New Plymouth for Te Rūnanga o Ngāti Mutunga
QuinLaw, New Plymouth for Uruti Community Parties

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[228] The Rules Committee "Updating daily recovery rates for costs: Consultation with the legal profession" (2 July 2025).

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2025] NZEnvC 213

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	C J INDUSTRIES LIMITED
	(ENV-2023-CHC-79)
	Appellant
AND	TASMAN DISTRICT COUNCIL
	Respondent

Court:	Environment Judge P A Steven Environment Commissioner C J Wilkinson Environment Commissioner K A Edmonds
Hearing:	at Nelson on 23 – 27 September 2024
Appearances:	S Gepp KC and J Marshall for the appellant J C Ironside for the respondent G Stafford for Te Rūnanga a Ngāti Rārua L Clark for Wakatū Incorporation O Langridge for O & N Langridge D Nightingale for Valley Residents Against Gravel Extraction
Last case event:	20 January 2025
Date of Decision:	26 June 2025
Date of Issue:	26 June 2025

INTERIM DECISION OF THE ENVIRONMENT COURT

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A: The appeal is allowed. The appellant is to file an amended set of conditions and plans addressing the matters discussed in paragraphs [352] – [356], [386] and [398].

B: The court **directs that within 15 working days of the date of this decision**, CJ Industries is to consult with all parties and report to the court with a timeframe within which it anticipates the final condition set could be provided for the court's consideration.

REASONS

Introduction

[1] This proceeding concerns an appeal by CJ Industries Limited against the Tasman District Council's decision on its application for a suite of resource consents to establish a quarry on the application site located at 134 Peach Island Road, Motueka (site).[1]

[2] At first instance, a Commissioner acting on delegated authority of the Council refused consent due to the unacceptable risks of the proposal to groundwater and drinking water quality, the negative impacts on the productive capacity of highly productive land, inadequate mitigation of cultural effects, and inconsistencies with the objectives and policies of the National Policy Statement for Highly Productive Land 2022 (NPS-HPL) and National Policy Statement for Freshwater Management 2020 (NPS-FM).

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[1] Legally described as Lot 2 DP 2357 comprised in RT NL77/73 and Lot 2 DP 432236 comprised in RT 524970. The site is owned by Tim Corrie-Johnston, who lives onsite with his family. Other Corrie-Johnston family members are shareholders of CJ Industries, and Mr Des Corrie-Johnston is the director. A related company, Rapid Ridge Ltd, owns the property to the south, at 493 Motueka River West Bank Road, through which access to the site is proposed.

Background

[3] CJ Industries is the only supplier of alluvial aggregate for concrete and sealing chip in the Motueka area. Current demand requires 6,000 to 8,000 tonnes monthly. Alluvial aggregate, particularly river gravel, is essential for concrete manufacturing and sealing chip applications due to its properties that meet New Zealand specifications.

[4] The concrete produced by CJ Industries is widely used in various construction projects, including house builds, factories, sheds, driveways, marae, community facilities, natural hazard recovery, infrastructure and anywhere else that concrete is required. The sealing chip is used in road construction and maintenance.

The site and locality

[5] The site is situated near the western edge of the Moutere Depression at the base of the Arthur Range, within the lower Motueka River Valley. The valley is confined on both sides by steep granite topography. The foothills of the Arthur Range extend to approximately 1 km west of the site. The Arthur Range consists of steep hills which provide the catchment for "Shaggery Stream" which diverts surface water flows from the Arthur Range around the western edge of Peach Island, which is located 1 km upstream of the Motueka-Riwaka Plains.

[6] The site is located on flat to undulating alluvial terraces laid down in the last 500-1000 years as a result of the Motueka River moving back and forth across the river terrace during flood events.

[7] The site is located approximately 6 km west of Motueka and 4.3 km north of the Alexandra Bluff Bridge on a flat undulating alluvial terrace of the Motueka

River (consisting of both river terrace and berm land).[2] It has an elevation between 17 and 20 m above sea level and is partially on an active floodplain of the Motueka River.

[8] A small tributary of the Motueka River flows from south to north along the site's western boundary. Stopbanks are constructed in a "U" shape along the eastern, southern, and western areas of the site.

[9] The site features flat agricultural pastureland spanning approximately 13.5 ha that has been farmed for many decades. It contains an existing house and a shed, accessed via a right of way from Peach Island Road. The remainder of the site is in pasture which is grazed. It is surrounded by rural production activities, including agriculture, horticulture, and rural residential living. The existing environment surrounding the site also includes a number of current and former aggregate quarrying and backfilling sites.[3]

[10] Under the Tasman Regional Management Plan (TRMP) it is zoned Rural 1 and is within Land Disturbance Area 1. The site itself is not subject to any overlay notations but the berm land outside of the Motueka River stopbanks is subject to a flood hazard overlay.

[11] The gravel surface is 0.5 to 1 m below ground level, with topsoil above it. Bore logs indicate the area consists of sandy gravel with lower permeability or organic-rich strata.

[12] The site consists of two lots separated by an unformed legal road, which will be used for site access and haulage. It can also be accessed from the north via

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2 Tasman Regional Management Plan, Ch 2 defines "Berm land" as *land located between the bank of a river and a stop bank on the same side of the river and includes the land between the western Peach Island stop bank and West Bank Road.* The land to be quarried during Stage 1 is classified as berm land in accordance with this definition. The remainder of the property is not berm land because it is protected by the stopbank, or it will not be quarried.

3 Opening submissions for CJ Industries at [16].

Peach Island Road.

[13] Peach Island Road is classified as an 'Access Place'. Nearby, Motueka River West Bank Road is classified as a 'Collector Road', and the Motueka Valley Highway is classified as an 'Arterial Road'.

[14] There are no watercourses within the site and no areas on the site or within 10 m of the proposed works footprint, that meet the definition of a 'natural inland wetland' under the NPS-FM, or a 'natural wetland' under the TRMP.

[15] The site locates within the Motueka Ecological District, which historically supported lowland forests with species like tōtara, mataī, kahikatea, black beech, and silver beech. The original native vegetation has however been completely removed and no vegetation currently within the site constitutes "indigenous vegetation".

[16] The site does not provide core or important habitat for indigenous terrestrial wildlife (e.g. birds, bats, or lizards).[4] Nor does it contain any values that are so significant or so rare or threatened that they should be identified as Significant Natural Area (SNA)[5] (or the like).

[17] The site is within the Motueka, Motupiko catchments and their tributaries are Statutory Acknowledgement Areas which are recognised under the 'Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Wakaa-Māui Claims Settlement Act 2014', the 'Ngati Toa Rangatira Claims Settlement Act 2014', and the 'Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014'.

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4 EIC of Tony Payne at [1](a)(iii).

5 TRMP defines Significant Natural Area as *an area of indigenous vegetation or indigenous fauna habitat that has been assessed as significant according to the ecological criteria in Schedule 10C and listed in Schedule 18.1A.*

The proposal

[18] Following the Council's decision, the proposal has been amended and refined to address key concerns. It was further revised after the hearing and subsequent consideration of the conditions and accompanying draft management plans. The proposal is described here in its current form, as it stands before us. CJ industries seeks to:

(a) establish a 6.73 ha quarry for gravel extraction and clean fill deposition.
(b) yield 375,000 to 525,000 tonnes of gravel over 15 years; and
(c) continue to undertake water quality monitoring for two years after quarrying ends.



Figure 1: Extract of the site plan filed 25 October 2024

[19] The quarry will operate in three stages:

(a) Stage 1 locates to the west of the stopbank;
(b) Stage 2 is within the stopbank, to the west of the paper road; and
(c) Stage 3 is within the stopbank to the east of the paper road.

[20] Land will be excavated, backfilled and rehabilitated progressively within each stage starting with Stages 2 and 3. Only after successful mitigation planting takes place will Stage 1 commence. The Stage 1 area will be quarried in three 'tranches' from October to March over three consecutive years to mitigate flooding and erosion risks.

[21] No processing, screening, washing, or crushing of gravel will occur on-site. Instead, a "Stockpile and Service Area" will be established on the western side of Stage 2.

[22] Daily operations would involve removing and stockpiling topsoil and subsoil, unless reused the same day. Aggregates will be extracted using an excavator and transported by 30-tonne dump trucks (sometimes referred to as High Productivity Mass Vehicles or HPMV) to the Stockpile and Service Area, where clean fill will also be stored.

[23] The ground level below the stockpiles will be lowered by 1 m to reduce noise and visual effects, with stockpiles not exceeding 4 m in height.

[24] The dump trucks will return clean fill to the extraction site for reinstatement. At the end of each day, clean fill will replace the extracted material in excavation pits, limiting the pit size to 1600 m^2.

[25] Clean fill will be compacted with an excavator bucket, and subsoil and topsoil will be placed on top according to soil management requirements. The rate of pit advancement will vary based on soil depth and groundwater distance, with an estimated daily advancement of 16 linear meters or 320 m^2.

[26] The excavation and backfilling process will proceed in stages, with aggregate beneath the Stockpile and Staging Area excavated last.

[27] The proposal now involves the use of granite clean fill from the appellant's quarry in Riwaka, an amendment made to the proposal since the council decision. Subsoil and topsoil will be separately reinstated, then pasture re-established and managed (except in a flood-prone area where native planting is proposed).

[28] Because of the intermittent nature of the site works and fluctuating groundwater levels, backfilling will be conducted as excavation advances. This adds to the complexity of site operations. It also adds weather-related variability to the precise operations to be conducted on site.

[29] Stock will continue grazing areas of the site that are not actively being quarried or remediated separated from working areas by electric fences.

Statutory framework

[30] In determining this appeal, we have the same powers, duties and discretions as the first instance decision maker (s290, RMA). Having regard to the appealed decision (s290A) we may grant or refuse the land use consents and discharge permits sought and impose conditions as necessary (ss104B and 108).

Parties' position on appeal

CJ Industries Limited

[31] The appellant contends that granting the resource consents will support sustainable management of resources. The aggregate can only be sourced from current or former riverbeds, and supply from current rivers is insufficient to meet demand. Hard rock quarry material is not a suitable substitute, making aggregate quarries necessary to meet the needs of the Motueka community.

[32] Despite being theoretically possible, transporting gravel from sources in other parts of the region to the processing site is significantly more expensive due to similar supply constraints and restrictions. These increased costs are passed on to the end user, rendering this alternative uneconomical.

[33] The alluvial aggregate from Peach Island is essential for housing, infrastructure, and community projects, benefiting social, cultural, and economic wellbeing.

[34] The conditions of consent proposed will manage any effects of the activity according to the objectives and policies of the TRMP and higher order documents. The proposal ensures efficient use of the site, with aggregate extraction in the short to medium term, followed by continued rural production after site rehabilitation.

Tasman District Council

[35] The Commissioner acting on delegated authority of the Council declined consent in the first instance. Through joint witness conferencing, many of the issues of concern to the Council have since been narrowed. The Council has assisted the court throughout the hearing by providing expert evidence and legal submissions to defend its plan in regard to the remaining areas of disagreement.

Section 274 parties

[36] The following parties joined this appeal as interested parties under s274 RMA, all of whom were opposed to the proposal.

Te Rūnanga o Ngāti Rārua

[37] Expressing dissatisfaction with the initial consultation process, Te Rūnanga o Ngāti Rārua joined the appeal opposing the grant of the resource consents on the basis of the inadequacy of the assessment of cultural effects, the adverse effects on groundwater quality (believed to not be adequately avoided, remedied, or

mitigated) and non-compliance with the NPS-FM.

[38] Specifically, they argue that the proposal fails to uphold the principles of Te Mana o Te Wai, mana whakahaere, kaitiakitanga, and manaakitanga and fails to align with the objective and policies of the TRMP regarding groundwater quality and cultural effects. The consent terms are also opposed.

[39] Ngāti Rārua did not call any witnesses, or present evidence at the hearing. Opening legal submission were filed in advance of the hearing. Mr George Stafford, a representative for Ngāti Rārua, attended the hearing.

Wakatū Incorporation

[40] Wakatū Incorporation opposes the relief sought for several reasons: the potential adverse effects of contaminant discharges on groundwater and freshwater, which may not be adequately managed through the draft management plan; inconsistencies with the NPS-FM; and the lack of cultural recognition and consultation. It emphasised the need for a formal Cultural Impact Assessment agreed upon by Mana Whenua iwi to gauge the cultural significance of the area.

[41] Additionally, Wakatū Incorporation expressed concern about the impact of gravel extraction, site rehabilitation, and backfill activities on adjoining properties and the environment, the inappropriateness of the proposed access routes for the extraction site, and the effect of traffic on the integrity of the stopbank. The consent terms are also opposed.

[42] Wakatū Incorporation did not call or cross-examine any witnesses, present evidence at the hearing nor did it make legal submissions, or cross-examine any witnesses. Instead, it had a representative attend the hearing to take notes and maintain a "watching brief" of the proceedings and to respond to any question the court may have for it as a s274 party to the proceeding.

O & N Langridge

[43] From their home, the Langridges have an elevated, panoramic view of the lower Motueka Valley. They live in this river valley for its peace and tranquillity and for the beauty of the natural environment, which they cherish and actively protect. They have an existing resource consent to operate a Yoga and Meditation Centre on their property.

[44] Such an activity requires quiet and tranquil environments. They consider the proposed quarry, located just 1200 m away and within direct line-of-sight, will have significant negative impacts on this venture and their enjoyment of their land as no proposed shelter belts, berms, or other measures could effectively mitigate the noise or visual effects of the quarry.

[45] While understanding the public need for gravel, they believe that establishing gravel mining in this area would be disastrous for the unique natural, recreational, historical, and cultural values of the Motueka River and adjacent land. They fear that the negative impacts could last well beyond the next 15 years if further proposals are granted.

[46] Mr Langridge considers the proposal's impacts are broad and incompatible with the valley floor. He contends that a quarry of this scale and duration would significantly diminish the qualities he, his neighbours, visitors, and the wider community all enjoy.

[47] Mr Langridge attended the hearing and provided a lay statement of evidence, including a short video depicting the special qualities of the location and the things he values about living there.

Valley Residents Against Gravel Extraction

[48] Valley Residents Against Gravel Extraction (Valley RAGE) is an incorporated society formed in 2021 in response to the proposed gravel extraction

project. It comprises more than 60 members who live in or around the Motueka Valley area including on or near Peach Island. Valley RAGE and a number of its members (as individuals) submitted on the first instance applications.

[49] Despite amendments to address initial defects, Valley RAGE considers the proposal piecemeal and unworkable, citing concerns about the loss of productive capacity due to soil compaction and handling. They consider key aspects of the methodology and management plans remain unclear.

[50] Valley RAGE argues that the adverse effects on groundwater quality and productive land have not been adequately mitigated, making the proposal inconsistent with relevant planning documents. They seek the appeal be declined, stating that the proposal does not achieve the sustainable management purpose of the RMA and that the proposed quarrying activities would significantly alter the quiet rural valley, impacting the tranquillity and wellbeing of residents and visitors.

[51] At hearing the court heard lay evidence from several members opposing the project.[6] Dr Iain Campbell, Soil Scientist/Geologist, also gave independent expert evidence on the Society's behalf.

District plan context

[52] The TRMP is the relevant version of the district plan in relation to the proposal, the provisions of which provide guidance and/or direction on our consideration of the disputed issues.

[53] The TRMP applies to the use of resources within particular zones, areas and sites throughout the Tasman district to manage adverse environmental effects, promoting sustainable management.

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6 Anthea Garmey; Darrin Bisley; David Kellogg; Graham Peacock; Helen Webster and Max Clark.

[54] The TRMP is described as an effects-management focussed plan, that contains few enabling provisions. In relation to aggregate extraction, it does not specifically enable aggregate extraction, although it includes a policy of protecting areas of specific value such as hard rock aggregate resources from encroachment from other activities.[7]

[55] The site is contained within a Rural 1 zone, being one of three rural production zones in the district.

[56] The introductory text in Chapter 7 identifies issues for these productive areas as being the fragmentation of rural land, the establishment of rural land without any productive use of the land, and the occurrence of residential activities in rural locations that may create reverse sensitivity effects.

[57] Rural-residential living opportunities are provided for in the Rural 3 zone, containing the least productive soils within the rural zones of the district.

[58] Provisions of particular relevance to the proposal are contained in Chapter 5 Site Amenity Effects, Chapter 7 Rural Environment Effects, Chapter 9 Landscape and Chapter 12 Land Disturbance Effects.

[59] Objectives and policies of particular relevance to the issues raised in this appeal include (in summary):

(a) Objectives 5.1.2 and 5.2.2 and implementing policies that address matters of amenity, these being general provisions of district wide application, which address management of the effects of change in land use in both the urban and rural environment;
(b) Objectives 7.1.2 and 7.2.2.1 and implementing policies in relation to the use of rural land for uses other than for plant and animal production;

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7 Policy 5.1.3.3.

(c) Objective 7.4.2 and implementing policies on rural character and amenity values;

(d) Objective 9.2.2 and implementing policies in relation to retention of rural characteristics and rural landscapes; and

(e) Objective 11.1.2 and supporting Policy 11.1.3.in relation to the traffic effects of the proposal, including on amenity values.

[60] Relevant provisions on rural character and amenity values warrant particular reference. These are:

(a) Objective 5.2.2[8] which is:

> Maintenance and enhancement of amenity values on site and within communities throughout the District.

(b) Objective 7.4.2[9] which is:

> Avoidance, remedying or mitigation of the adverse effects of a wide range of existing and potential future activities, including effects on rural character and amenity values;

(c) Policy 7.4.3.3 which is:

> To provide for the maintenance and enhancement of local rural character, including attributes as openness, greenness, productive activity, absence of signs, and separation, style and scale of structures.

[61] As to these provisions, we accept that where potential adverse effects on rural character and amenity values cannot be fully avoided, the focus must turn to whether they are adequately remedied or mitigated.

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8 None of these district-wide policies that implement this objective have particular relevance to this proposal.

9 This provision mirrors Objective 5.1.2 which applies on a district-wide basis.

[62] In considering whether the proposal achieves the appropriate level of remediation or mitigation, this evaluation must account for the local rural character where the proposal is to be established, with reference to the attributes identified in the wording of the policy (openness, greenness etc).

[63] As do many district plans throughout the country, this plan requires the "maintenance and enhancement of amenity values". However, this objective only appears in Chapter 5 which is of district-wide application.

[64] In Chapter 7, this policy requirement applies to local rural character with reference to specified character and attributes of the rural location.

[65] Maintenance and enhancement of local rural character must be understood with reference to the parent objective (Objective7.4.2), which as we have stated, adopts the effects management hierarchy rather than directing avoidance. "Maintain" allows a council to protect rather than preserve or enhance, whereas to "protect" means to "keep safe from harm or injury".[10]

Resource consents required for proposal

[66] In summary, the proposal requires three resource consents:

(a) two land use consents:
    (i) one for the extraction of gravel, stockpiling of topsoil, amenity plantings, and reinstatement of quarried land as a restricted discretionary activity under Rules 16.10.2.2 and 18.5.2.4, and as a discretionary activity under Rule 17.5.2.9;[11]
    (ii) the second to erect onsite health and safety signage and establish a second vehicle crossing, and access via an unformed legal road

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10 *Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 136 at [147], citing *Port Otago Ltd v Dunedin City Council* EnvC C04/02.

11 RM200488.

as a controlled activity under Rule 16.1.5.3 and as a restricted discretionary activity under Rule 16.2.2.6.[12]

(b) one discharge permit for the discharge of clean fill to excavated land as a discretionary activity under Rule 36.1.5.2.[13] [14]

[67] When assessing multiple resource consent applications involving different activity classes under s87A RMA, the applications must be bundled under the most stringent activity class. As a result, the proposal is to be assessed as a discretionary activity under s87A(4) RMA.

[68] The planning witnesses were not agreed on the approach of the TRMP in relation to quarrying activities, and whether, as a discretionary activity they are anticipated in the Rural 1 Zone. However, this is not an issue that warrants consideration. Within the objective and policy framework of the TRMP it is an irrelevant question.

[69] We are inclined to agree with the Commissioner who took the view that only permitted activities are anticipated. Provision for quarrying as a discretionary activity gives rise to no presumption for or against a proposal; the effects of a new proposal must be considered on a case-by-case basis.

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12 RM200489.

13 RM220578.

14 During the hearing, the court questioned the scope of the discharge permit, which authorises the "discharge of contaminants being clean fill to land". The appellant maintains the permit is appropriate, as it accounts for potential changes in groundwater chemistry (such as elevated aluminium concentrations) resulting from the replacement of natural alluvial aggregate with granite. This the appellant argues classifies the clean fill as a "contaminant" under the RMA. In contrast, the deposition of soil to land is generally not considered a "discharge of contaminants" under the RMA, as soil rarely comes into contact with groundwater and, when it does, it is unlikely to alter its chemistry. Onsite soil replacement does not introduce new contaminants, and imported soil is managed to prevent chemical changes. Other potential contaminants, such as fuel or *E. coli* are managed through land use conditions rather than discharge permits. See CJ Industries memorandum dated 25 October 2024 at [6]-[10].

Evolution of conditions

[70] As mentioned, the proposal and the conditions of consent have evolved throughout the course of this proceeding. For clarity, we record that the conditions were revised twice following the hearing. These revisions were made in response to matters raised during the hearing, subsequent consideration of the conditions and accompanying draft management plans, and in recognition of the need to ensure alignment with good practice as outlined in the Environment Court Practice Note 2023.

[71] The appellant filed a memorandum of counsel dated 25 October 2024, which informed the closing submissions made by the Council and Valley RAGE. That memorandum described and enclosed what were referred to as "volunteered" new and amended conditions, intended to address issues raised during the hearing. The land use consent and discharge permit were accompanied by revised draft management plans dated 25 October 2024, including:

(a) draft Soil Management Plan;
(b) draft Dust Management and Monitoring Plan;
(c) draft Noise Management Plan; and
(d) draft Groundwater and Clean Fill Management Plan.

[72] The memorandum also confirmed that the Landscape Mitigation Plan, Stage 1 River Terrace Restoration Plan and Maintenance and Establishment Plan relied upon remain unchanged from the version dated June 2024.[15]

[73] CJ Industries closing submissions recorded it made further changes to the volunteered condition. A copy of the land use consent and discharge permit conditions were attached to submissions dated 18 December 2024. Throughout the remainder of our decision, any reference to a condition or draft management

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15 EIC of Elizabeth Gavin, Attachment 1, Figs 3 and 4.

plan refers to the versions described above, unless otherwise specified.

Assessment of environmental effects

Matters not in dispute

[74] The JWS Planning records there is no dispute between the parties and their respective experts regarding the following effects of the proposal. It is agreed that these effects are appropriately avoided, remedied, and mitigated by the conditions of consent proposed at that time.

[75] While the conditions sought have since evolved considerably over the course of this proceeding, we are satisfied that the conditions relating to these undisputed matters have not been altered to an extent that would affect the conclusions reached by the parties and their experts, rather the amendments give us increased confidence in their conclusions. We accept the positions detailed in the JWS and refer to them briefly here for completeness.

Terrestrial ecology

[76] Provisions of relevance to terrestrial ecology in the TRMP include Objective 12.1.2 which seeks to ensure the avoidance, remediation, or mitigation of adverse environmental effects resulting from land disturbance activities, specifically those impacting indigenous animal and plant habitats, culturally significant sites or areas, indigenous biodiversity, and the intrinsic ecological values of affected ecosystems.

[77] Further, provisions such as Objective 8.2.2 and its supporting policies, seek the maintenance and enhancement of the natural character of the margins of rivers, and Objective 12.1.2 and its supporting policies in relation to avoidance, remedying or mitigating the adverse effects of land disturbance on habitats and ecosystems. Additionally, Objective 10.1.2 and supporting Policy 10.1.3.2 seek to protect and enhance indigenous biological diversity and integrity of terrestrial,

freshwater and coastal ecosystems, communities and species.[16]

[78] Mr Tony Payne, an independent expert ecologist called by the appellant, gave evidence that the site has been heavily modified from its original natural state and now mainly supports exotic pasture grasses, a few mature exotic trees, and some weed species. With no indigenous vegetation or wetlands, and limited habitat value for native wildlife, he considers the proposed gravel extraction, its associated effects,[17] and the subsequent 1.35 ha of rehabilitation planting, using eco-sourced trees, shrubs, and hedges will result in an ecological net-benefit over the medium-term, being 5-15 years.[18]

[79] He concluded the proposal will not have adverse effects on terrestrial ecology that are more than negligible.[19]

Flooding, Erosion and Climate Change

[80] The TRMP promotes the identification of hazard-prone areas, the implementation of land use controls, and the development of resilient infrastructure. Relevant provisions relating to flood and geotechnical hazards are contained at Chapter 13 (Natural Hazards) which outlines a strategic framework for managing the risks associated with natural hazards by avoiding or mitigating the adverse effects of natural hazards (like flooding, coastal erosion, slope instability, and earthquakes) on people, property, and the environment. The provisions seek to manage areas subject to natural hazard to ensure that development is either avoided or appropriately mitigated, depending on the degree of risk.[20]

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16 EIC of Hayden Taylor at [189].

17 Including dust and vehicle movements.

18 EIC of Tony Payne at [1](g).

19 EIC of Tony Payne at [1](b).

20 Relevant provisions include Objective 13.1.2.1 and Policies 13.1.3.1, 13.1.3.4, 13.1.3.9, 13.1.3.13 and 13.1.3.14.

[81] Mr Aiken, water resources consultant for the appellant, conducted a worst-case scenario modelling and reviewed the draft Landscape Mitigation Plan and Stage 1 River Terrace Restoration Plan prepared by Boffa Miskell. As to the impact of climate change, Mr Aiken considers that:[21]

(a) the proposed quarrying and clean filling will conclude by 2040–2041, making long term climate change projections (beyond 2090) irrelevant;
(b) the consent conditions address the short term climate impacts;
(c) the proposal will not worsen flood risk for 1% or 10% AEP events, even if their frequency increases; and
(d) any increased inundation would be an operational matter, not an adverse effect.

[82] The proposal's continuous backfilling and revegetation will ensure there is no permanent change to floodplain hydraulics. Further, no critical infrastructure or dwellings will be built on the floodplain. As such, long term climate change impacts on the site are expected to be negligible.

[83] Provided the proposed gravel extraction operates in accordance with the conditions (such as restoring ground levels after inundation and revegetating the floodplain) there will be no adverse effects on flood flows. The floodplain would function hydraulically as it did before, and the activity is unlikely to impact the long term stability of the stopbank, generate offsite effects or alter floodplain conveyance or storage.[22]

[84] The effects of the proposal on the integrity of the stopbanks and on land stability effects for neighbouring properties was addressed in the evidence of Mr Averill, Geotechnical Engineer for the appellant. He considers that the stability and function of the stopbanks will not be affected by the proposed excavation

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21 EIC of Simon Aiken at [27].
22 EIC of Simon Aiken at [24].

works or associated truck movements. Any potential impacts on adjacent land stability can be managed with proper batter angles, and settlement from vehicle movements can be mitigated by placing a sacrificial fill layer.[23]

[85] Notwithstanding this conclusion, the appellant has volunteered a setback distance for excavations of 20 m from the southern boundary of the Stage 3 area, to address concerns raised by Wakatū Incorporation, who own the adjacent land.

Surface Water Quality and Aquatic Ecology effects

[86] The relevant provisions of the TRMP focus on protecting water quality, managing stormwater, and preventing hazardous discharges. Expert evidence indicates the proposal aligns with TRMP objectives and policies and will not adversely affect surface water quality or ecological values.

[87] In particular, Dr Calum MacNeil freshwater ecologist for the appellant, assessed the effects of the proposed extraction on surface water quality, particularly regarding the potential of the proposed extraction works to degrade instream ecological values through increased fine sedimentation. He noted that extraction from the application site is less potentially ecologically damaging to the river than if extracted from the active river channel.[24]

[88] Since the site is a former riverbed located away from the Motueka River and other water bodies, he concluded the effects will be less than minor. He considers the proposed mitigation measures to be appropriate and effective in protecting instream ecological values in both the Motueka River and the unnamed stream to the west. He also considers any effects on surface water quality to be less than minor and notes that, even during extreme flood events, the works will

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23 EIC of David Averill at [32].

24 EIC of Dr Calum MacNeil at [24].

have no discernible impact on the river's ecological values.[25]

Positive effects

[89] The JWS Planning records agreement between the planners, Mr Taylor and Ms Bernsdorf Solly, that there will be positive effects associated with the proposal.[26] This was also recognised at first instance.[27]

[90] Ms Elizabeth Gavin, landscape planner and Mr Payne both confirm in their evidence that the proposal will have positive effects on terrestrial ecology, with the 1.35 ha planting of native forest through eco-sourced planting, contributing to ecological restoration of the Stage 1 River Terrace which is predicted to achieve a net ecological gain as well as positive natural character/visual amenity effects in the long term (over and above what is required to mitigate the effects of the activity).[28]

[91] In addition, counsel for the appellant submitted that the proposal would have positive social and economic benefits. Despite the extent to which alluvial aggregate could be sourced from elsewhere being in contention, counsel submits there are few other sites in the region that would meet the requirements for a new alluvial aggregate quarry.

[92] Further demand cannot be met from other rock types or from aggregate extracted from rivers and that travel costs associated with bringing material from outside the region mean it is not economical to supply local concrete and sealing chip demand using imported product.

[93] A further consideration put forward by the appellant is that compared to a scenario where aggregates are sourced from further away, the proposal will result

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25 EIC of Dr Calum MacNeil at [54].
26 Planning JWS dated 19 September 2024 at 1(d).
27 Decision of the Hearing Commissioner at [221]-[226].
28 EIC of Elizabeth Gavin at [68] and EIC of Tony Payne at [74].

in a significant reduction in greenhouse gas emissions.[29]

[94] Counsel explained that 90 people are employed by CJ Industries and associated concrete and civil construction businesses that are reliant on aggregate. Dr Kaye-Blake prepared an economic assessment of the proposal for the appellant. Based upon a cost-benefit analysis, Dr Kaye-Blake considers that the net benefit to Tasman District of the proposal to quarry in this location, as opposed to bringing aggregate from outside the Motueka area (assuming imported aggregate is available), is $3.60 million over 15 years.[30]

[95] Dr Kaye-Blake considers this economic benefit greatly outweighs the economic cost of the loss of pastoral production on the site over the duration of the consent.[31] Relative to not granting consent which would necessitate the sourcing of aggregates from more distant locations.

[96] Mr Scott considers that the proposal could provide a significant regional benefit through providing aggregate to meet current and increasing demands for aggregate based products (concrete and sealing chip) for essential infrastructure including homes, roads, marae, and coastal and flooding infrastructure.[32]

[97] The appellant contends that the evidence of Mr Corrie-Johnston, Mr Scott and Dr Kaye-Blake supports a finding that the positive economic effects associated with the granting of consent benefit the wider economy rather than being benefits to the appellant.

Application of the permitted baseline

[98] When having regard to any actual and potential effects of the proposal in accordance with s104(1)(a) the court may disregard the adverse effects of an

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29 Opening submissions for CJ Industries at [140](d).
30 Opening submissions for CJ Industries at [82]-[83].
31 EIC of Bill Kaye-Blake at [96].
32 EIC of Wayne Scott at [2], [25].

activity if a National Environmental Standard or the district plan itself permits an activity with that effect (s104(2)), "the permitted baseline". Application of the permitted baseline was not the subject of agreement between the appellant and the Council.

[99] The purpose of a permitted baseline is to assist the assessment of the proposal as a whole, rather than being an activity-by-activity comparison of its component parts. The intent is to simplify the resource consent process by allowing the consenting authority to focus only on those effects that exceed the effects of those activities that are permitted under a district plan or national environmental standard.[33]

[100] If the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count, rather it is part of the permitted baseline in the sense that it is deemed to already affect the environment. The consent authority is only entitled to have regard to adverse effects of discretionary and non-complying activities that were "other or further" than those adverse effects permitted as of right that are brought into account.[34]

[101] Consent authorities are not compelled to disregard permitted effects, but rather have a discretion to do so. The *Lyttelton Harbour Landscape Protection Assn Inc v Christchurch City Council*[35] decision sets out the factors to be considered when determining whether to exercise the discretion to apply the permitted baseline. The factors are summarised as follows:[36]

(a) the plan must include a permitted activity that allows for a meaningful comparison of adverse effects with the proposed activity;

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33 *Mahora Residents Society Inc v Hastings District Council* [2024] NZHC 3322 at [34]-[38].

34 *Mahora* at [29], citing *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 at [29].

35 *Lyttelton Harbour Landscape Protection Assn Inc v Christchurch City Council* ENV Christchurch C55/06, 11 May 2006.

36 At [21].

(b) the court must be given strong reasons to either apply or not apply the permitted baseline;

(c) if parties believe the permitted baseline test is helpful, they should agree on which permitted activities to compare. If they disagree, the court must assess the merits of each position;

(d) there must be enough evidence about both the proposed activity and the hypothetical permitted activity to allow a proper comparison of their adverse effects;

(e) if the permitted activity is fundamentally different in kind or purpose from the proposed activity, the baseline may not be appropriate;

(f) applying the baseline must not undermine the RMA's overarching purpose and principles, particularly Part 2.

[102] Similarly, the Environment Court recently confirmed in *Mahora Residents Society Inc v Hastings District Council*[37] that the correct and well-accepted approach to permitted baselines is to identify a non-fanciful activity that could occur on the site without needing a resource consent, consider the effects such an activity would have and compare those effects with the effects of the proposed activity.[38]

[103] A key question in deciding whether to apply the permitted baseline is whether doing so aligns with the purpose of the Act. Rigid adherence to the baseline may not always lead to an assessment that reflects the guidance of Part 2. The less a proposed activity resembles permitted activities, the less likely the baseline will apply. Similarly, the more an activity diverges from the plan's objectives and policies, or differs in purpose from what the plan authorises, the less appropriate it is to apply the baseline.

[104] Where an applicant invites the consent authority to disregard permitted effects, it must provide credible evidence of realistic, non-hypothetical examples

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37. *Mahora Residents Society Inc v Hastings District Council* [2024] NZHC 3322.

38 At [30].

of permitted activities with measurable effects. This enables a meaningful comparison between the proposed activity and what is permitted.

[105] Ms Bernsdorf Solly considers that the permitted baseline should not be applied, as the activity's overall effects differ from those typically permitted within the Rural 1 zone. She does not consider the Rural 1 Zone can be said to anticipate an activity, that in terms of the scale of excavation, is an order of magnitude of about 300 times the permitted threshold.[39]

[106] To justify application of the permitted baseline, she considers that the permitted baseline must provide a useful and realistic comparison to the effects of the proposal as a whole, and not specific effects of the proposal.[40] She submits that the permitted baseline allows the court to disregard an adverse effect of the activity where an activity with that effect is permitted. It does not require that the effects of the proposal as a whole are similar to the effects of a permitted activity.[41]

[107] Mr Taylor's evidence states a range of activities could be undertaken on the site as of right, with effects sufficiently similar to those of the proposal to warrant inclusion in the permitted baseline assessment. The activities listed below are submitted to have comparative effects to those that would result from the proposal. These include effects such as traffic, productive capacity, visual amenity, noise, dust, and erosion or sediment movement:[42]

(a) horticultural and agricultural activities and associated vehicle movements, which could involve heavy machinery;
(b) disturbance or recontouring of up to 1 ha of the site each year. This could include activities like cultivation;
(c) formation of any road or track up to 100 m per hectare;

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39 EIC of Susanne Bernsdorf Solly at [32]-[37].
40 Planning JWS dated 19 September 2024 at 3(d).
41 EIC of Susanne Bernsdorf Solly at [34].
42 EIC of Hayden Taylor at [39].

(d) vehicles on public roads.

[108] Mr Taylor states that the effects of these permitted activities could result in effects similar to those arising from the proposal. Importantly, he records that the effects that are similar to those of permitted activities (visual/landscape, noise, dust) are not in contention.[43] The JWS Planning records agreement that these are appropriately managed and are no more than minor.[44] Mr Taylor therefore opines that the difference of opinion is not critical to consideration of the proposal.[45]

[109] We agree with Mr Taylor. As will be discussed the permitted baseline is applied in considering such effects below but given the agreement that these effects are adequately avoided or mitigated discussion of this any further is of limited assistance.

Matters in dispute

[110] We now consider the potential effects of the proposal in contention.

Whether potential cultural effects have been suitably assessed and addressed

[111] At the close of the hearing the cultural effects of the proposal remained a point of contention. Of note, Ngāti Rārua had expressed in submissions its concern over the adequacy of cultural engagement and assessment, opposing the consent but indicating a willingness to be involved in determining the conditions of consent if granted.[46]

[112] Following further engagement with representatives of Ngāti Rārua and Wakatū Incorporation after the hearing, the appellant amended[47] and reordered

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43 EIC of Hayden Taylor at [40].
44 Planning JWS dated 19 September 2024 at 3(c).
45 Reply evidence of Hayden Taylor at [5].
46 Opening submissions for Ngāti Rārua at [7]-[10].
47 Conditions 12-17, 68A and 127.

some of the conditions, including combining two conditions into one.[48] The amendments made incorporated several cultural and environmental mitigation measures. These include staff cultural inductions,[49] a pre-commencement Cultural Audit,[50] and a Cultural Health Indicator (CHI) monitoring programme.[51]

[113] The CHI monitoring programme required by condition 16 of the land use consents requires the consent holder to fund Te Ātiawa o Te Waka a Māui[52] and Ngāti Rārua to carry out a monitoring programme to be carried out at multiple stages of the project, with all associated costs covered by the appellant and the framework established prior to any earthworks.

[114] Condition 15, meanwhile, requires the consent order to enquire whether a pre-commencement Cultural Audit, is of interest to Te Ātiawa o Te Waka a Māui and/or Te Rūnunga o Ngāti Rārua and if it is desired, to fund this.

[115] Both conditions 15 and 16 are not only volunteered but also constitute *Augier* conditions which the court could not normally impose.

[116] Additional measures included to mitigate adverse cultural effects include avoiding the use of chemical dust suppressants,[53] adhering to Accidental Discovery Protocols,[54] and removing exotic trees after quarrying activities conclude.[55]

[117] Both Ngāti Rārua and Wakatū Inc have since confirmed the draft conditions are acceptable, with Wakatū Inc clarifying that this does not equate to

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48 Conditions 14 and 127 regarding accidental discovery now identified as condition 12.
49 Condition 13.
50 Condition 15.
51 Condition 16.
52 Te Ātiawa o Te Waka a Māui submitted on the application for consent at the Council hearing stage but did not join this appeal.
53 Condition 56.
54 Condition 12.
55 Condition 27(a).

support for the proposal.[56]

[118] The appellant submits that, with these agreed conditions, cultural effects have been appropriately avoided, remedied, or mitigated. We agree.

Amenity effects

[119] The amenity effects of the proposed activities were a key issue raised in submissions, particularly from submitters who reside or own land in proximity to the application site. Experts agreed that, individually, these effects are appropriately avoided remedied or mitigated by the volunteered conditions so as to be no more than minor when each is considered individually. Dispute remains however, as to the cumulative toll of these effects on the amenity of the area.[57]

[120] In their evidence, residents expressed deep concern about how they believe the proposal will impact them. They emphasised that the cumulative impacts of the quarry such as noise, traffic, and visual disruption, will significantly degrade the quality of life and natural environment in the Motueka Valley. In their view, this will make country living stressful and unpleasant by undermining the peace, beauty, and rural character of the Motueka Valley, diminishing both their quality of life and emotional connection to the area.[58]

[121] Residents all spoke of their desire to maintain the present amenity of their rural lifestyle, which was described as a peaceful and tranquil environment where noise associated with surrounding farming, orchard and rural-residential activities is "barely noticeable".[59]

[122] They also fear that granting these consents will set a precedent for further

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56 Email from Rowena Cudby to Hayden Taylor dated 11 December 2024, filed as an attachment to the appellant's closing submissions on 18 December 2024.

57 Planning JWS dated 19 September 2024 at 1.

58 EIC of Anthea Garmey, Darrin Bisley, David Kellogg, Graham Peacock, Helen Webster, Max Clark and Ollie Langridge.

59 EIC Graham Peacock at [9].

development, threatening the safety and enjoyment of local activities and the broader landscape. Additionally, they express sincere concern about potential risks to their water supply. A common view as described by Mr Kellogg is that the grant of consent for a "large scale commercial gravel extraction" would be unconscionable given it would be at the expense of the "peaceful, idyllic lifestyle[s]" cherished by the community.[60]

[123] Valley RAGE submissions state the residents consider the adverse effects they will experience extend beyond those effects in their homes and outdoor areas, but also include the effects while going about their daily lives, including walking, biking and driving along Motueka River West Bank Road.[61]

[124] Counsel for Valley RAGE referred to *Harewood Gravels Company Ltd v Christchurch City Council*[62] where the HC quoted the Environment Court's statement that:[63]

> … visual amenity is important, as is the effect on amenity of any change in background levels of noise, dust, vibration and increase in volume of HGV movements. *Change per se* does not constitute an adverse effect on rural character or amenity. To test the scale and intensity of effects and change, the baseline environment must be established.

Traffic

[125] Vehicles will transport gravel from the site to CJ Industries' processing yard in Hau Rd, Motueka by back-filling empty trucks. Vehicles will also bring clean fill from CJ Industries' Riwaka Quarry to Peach Island. Mr Gary Clark, traffic engineer. provided expert evidence for the appellant.

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60 EIC of David Kellogg at [14].
61 Valley RAGE opening submissions at [30].
62 *Harewood Gravels Company Ltd v Christchurch City Council* [2018] NZHC 3118.
63 At [77].

[126] The proposal has been limited to 30 truck movements per day[64] using designated truck routes (HPMV routes) along with fewer than 10 light vehicle/class1 trips for staff; totalling less than 40 vehicle movements per day. The nature of the activity is that this will equate to two trucks inward and two trucks outward per hour when gravel is being removed from the site (condition 66). Mr Gary Clark notes this is a maximum with some movements in one week and none in others depending on demand and site management.[65]

[127] The conditions of consent require the site access at 493 Motueka River West Bank Road, to be upgraded within the road reserve to ensure that, with minor improvements to and maintenance of sight distances[66] and access width,[67] the road network can safely and efficiently accommodate the activity.[68]

[128] In particular the proposal as now presented reduces heavy vehicle movements to the processing plant located on Hau Road from that considered by the Commissioner. As discussed, the amended proposal requires clean fill to be sourced from the Riwaka Quarry, removing the possible additional movements that could have been generated by third parties delivering clean fill to Hau Road.

[129] Mr Gary Clark's evidence records he considered the vehicle movements past sensitive areas, such as near the Marae and Papakāinga. Trucks travelling past the marae and papakāinga will naturally slow to under 40 km/h due to a moderate curve at the intersection, mitigating any safety concerns. With fewer than four trucks per hour the traffic volume is minimal and would blend with existing flows.

[130] He notes that this is consistent with the Commissioner's decision which

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64 15 in, 15 out.

65 EIC of Gary Clark at [57].

66 Conditions 32 and 33 of Land Use permit require tree removal.

67 Condition 35 of land use permit requires bank recontouring/widening to accommodate truck and trailers.

68 Conditions 32-37 of the land use permit.

stated that provided the maximum truck movements are not exceeded[69] the overall traffic impact would remain negligible.[70] Condition 68A has been volunteered as an *Augier* condition by the appellant requiring it to ensure that trucks do not pass the marae while noise sensitive outdoor events take place (e.g. tangihanga).

[131] The concerns raised by Valley RAGE have been addressed in Mr Gary Clark's evidence in reply.[71] Acknowledging the concern regarding increased heavy vehicle use of Motueka West Bank River Road, Motueka Valley Highway and Motueka Bridge (SH60), he notes that both roads and the bridge are on designated HPMV routes approved by Tasman District Council and the NZ Transport Agency as suitable for heavy and long vehicles and that there are no restrictions on the number of vehicles using these routes.[72]

[132] He explains the HPMV designation of Motueka West Bank River Road was considered during the development of the Tasman Great Taste Trail, which led to a speed limit reduction to 80 km/h to better accommodate the use of the road by cyclists Additionally, the applicant has volunteered to limit truck speeds to 60 km/h travelling along Motueka River West Bank Road (another *Augier* condition).[73]

[133] Conditions provided in closing submissions, include proper amendments to condition 68 to expressly state that trucks must not pass through Brooklyn. Mr Gary Clark considers this in conjunction with the proposed speed restrictions and the truck route using Alexander Bridge will minimise the impact on other road users improve safety for cyclists.[74] Further, in relation to cyclist safety Mr Gary Clark notes that trucks provide better visibility for drivers, allowing them to see

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69 Condition 64 at that time limited maximum truck movements to 30 heavy vehicle movements per day (15 in, 15 out) which is the same as what is now proposed.

70 EIC of Gary Clark at [59]-[62].

71 Reply evidence of Gary Clark at [4]-[15].

72 Reply evidence of Gary Clark at [12].

73 Reply evidence of Gary Clark at [9]-[10].

74 Reply evidence of Gary Clark at [19].

cyclists and other road users more easily and are operated by professional drivers familiar with the route and its constraints.[75]

[134] Mr Max Clark, a resident represented by Valley RAGE, recounts the Council's traffic expert's comments at the first instance hearing about the proposal, the doubling heavy vehicle movements along Motueka West Bank River Road.[76] Mr Gary Clark however, explains evidence of the sort that is based on percentage increases can be misleading on low-volume roads. Despite the percentage increase being high the road experiences low traffic flows so the percentage increase overstates the actual risk.[77]

[135] The crash rate is low (averaging one crash per year over a 9 kilometre stretch), and occur less than once every five years between Alexander Bridge and the site access. The crashes recorded have been a result of driver error rather than road design. Mr Gary Clark states this indicates the road operates relatively safely.[78]

[136] Mr Gary Clark's evidence (which the Council's expert agreed with) based on current crash records, the low number of vehicle movements, vehicle speeds and the mitigation measures proposed concluded that the effects of the Proposal to be less than minor based on the number of truck movements associated with the activity, the reduced speed of trucks associated with the activity and the level of risk being low, subject to the identified mitigation measures such as the conditions that address speed limits,[79] the aforementioned access upgrades,[80] and movement limits.[81]

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75 Reply evidence of Gary Clark at [5].
76 EIC of Max Clark at [7].
77 Reply evidence of Gary Clark at [12].
78 Reply evidence of Gary Clark at [15].
79 Land use condition 69.
80 Land use conditions 32-40.
81 Land use condition 66.

[137] Further refinements have been made to the conditions since he made that assessment, but we do not consider the amendments to be of the nature that would alter his conclusion.

[138] The proposal aligns with TRMP transport objectives, ensuring safe and efficient road use without compromising amenity or environmental values. Specifically, the proposed activities are in a location with appropriate access to roads that are able to safely and efficiently accommodate vehicle movements associated with the activity, and the site access will be appropriately designed and located to achieve consistency with Policies 11.1.3.2, 11.1.3.3, 11.1.3.6 and 11.2.3.3.

[139] Further, Policy 11.1.3.12 seeks to facilitate a regional cycle trail. The Tasman Great Taste Trail has already been achieved and uses Motueka River West Bank Road. As part of the Council hearing process, the appellant agreed to work with the Trust to help facilitate the addition of further off-road sections of the trail, and a condition of consent was volunteered in respect of this.[82] The proposal therefore aligns with the policy and will not hinder the trail's use or development.[83]

Noise

[140] Noise from quarrying activities can impact nearby communities and lead to complaints that may restrict operations. While noise can be managed at the source or where it is received, quarries must follow the RMA's requirement to avoid unreasonable noise using the best practicable methods (s16, RMA). However, compliance with permitted noise standards may still be challenging, often requiring expert acoustic assessments to evaluate and manage potential effects.

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82 Condition 5 of the land use consent.

83 This addresses the concerns re increased Traffic on Motueka River West Bank Road raised by Mr Peacock. He stated in his EIC at [23]: "The road is narrow and winding and in places there is little or no verge to walk on. I think it is dangerous for cyclists and pedestrians to compete with heavy trucks and other vehicles for space. There are already too many heavy trucks using this road, and increased heavy traffic from the quarry will increase the risk".

[141] Mr Hegley gave expert acoustic evidence for the appellant. Mr Hegley had measured the ambient noise levels on the site and using best practice computer noise modelling, modelled the noise from the proposal, including the noise of the trucks while using the surrounding road network.[84]

[142] In addition to the requirement to comply with specified noise standards for construction and operational activities, Mr Hegley recommended the following measures, which have been included as conditions of consent, to mitigate the noise effects:[85]

(a) construction and maintenance of a 3 m grassed bund to screen 131 Peach Island Road;[86]
(b) requirement that all vehicles operating on the site be fitted with broadband, rather than tonal reversing alarms;[87]
(c) sealing the access road to the stockpile to reduce body rattle from the trucks;[88]
(d) lining the trays of trucks operating on the site with a plastic deck liner to reduce the impact noise resulting from the loading and a requirement to immediately address any maintenance issues that will create noise;[89]
(e) limitations on the hours of operation, hours of heavy machinery operation and provision of a Christmas holiday shut-down period;[90] and
(f) preparation and implementation of a Noise Management Plan (NMP)

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84 EIC of Rhys Hegley at [1]-[2].
85 EIC of Rhys Hegley at [26].
86 Land use consent condition 29, shown in Landscape Mitigation Plan.
87 Land use consent condition 59.
88 Land use consent conditions 35 and 36.
89 Land use consent conditions 60 and 60A. This addresses concern raised by Mr Peacock in his EIC where at [8] referring to a gravel extraction activity near his property during the summer of 2018 he states he could clearly hear the sounds of the gravel being loaded into trucks.
90 Land use consent condition 64.

> detailing the best practicable option for ensuring the noise standards are complied with.[91]

[143] Mr Hegley concluded that with the proposed mitigation measures, operational noise levels will be well below the TRMP's rural zone limits and consistent with existing ambient sound. While audible at the nearest houses, the noise is considered reasonable and will not affect community amenity. Truck noise on local roads is too low to impact residents, and no further mitigation is needed. Noise effects on people and birdlife were assessed, with no significant concerns identified.[92]

[144] It is important to note that the evidence of Mr Langridge had expressed concern that the proposal will create noise which will negatively impact their property and surrounding properties as well as adversely impact their business venture.[93] Mr Langridge's concerns were shared by all other residents who gave evidence at the hearing.

[145] At the hearing, Mr Hegley was cross-examined by Mr Langridge as to the robustness of his modelling leading to his noise predictions. Mr Hegley stated that his predictions had been conservative wherever possible, for instance, by assuming eight truck movements per hour in terms of noise associated with road trucks bringing material in and exporting it from the site, when he had been told that truck movements would be limited to three per hour.[94]

[146] His assessment considered predicted noise against measured ambient levels. He further confirmed that the model had been constructed based on actual contours of the topography of the location, accounting for the topography of the Waimea Plain and surrounding hills where many of the residents opposing the

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91 Land use consent conditions 18(b) and 22.
92 EIC of Rhys Hegley at [75]-[83].
93 EIC of Ollie Langridge at [6]-[12].
94 NOE at p 178 l 23-28.

appeal own dwellings.[95]

[147] Mr Hegley's evidence demonstrates that predicted noise levels at their property will be very low, significantly lower than could be expected at this property as a result of permitted activities on adjoining land, and also significantly lower than the existing ambient noise levels from vehicles on the adjacent road network.[96]

[148] Mr Hegley predicts that quarry noise received at the Langridge property would be only 25-27dB L_{eq} during excavation activities, and 20dB L_{eq} when only truck loading is taking place which is significantly lower than the existing ambient noise levels from traffic on the adjacent road network.

[149] On the basis of Mr Hegley's evidence the noise effects of the proposal are reasonable and will comply with permitted noise standards. We find that the noise associated with the proposal is reasonable and typical for a rural working environment. The proposed conditions of consent will ensure noise remains within acceptable limits.[97] Accordingly, we find that any effects on amenity, including for nearby residents and recreational users, are minor at worst.

[150] Valley RAGE had relied on *Mobil Oil New Zealand Ltd v Taupō District Council*[98] as authority that:

> the test is not whether the plan's noise levels are met but are the potential adverse effects of noise going to detract from the residential amenity of the neighbourhood and will the noise be reasonable.

[151] However, that 1998 decision pre-dates development of the permitted baseline concept and amendments to s104(2) to codify the permitted baseline. We

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95 NOE at p 182 l 20 – p 183 l 11.

96 EIC of Rhys Hegley at [73].

97 Land use conditions 59-63.

98 *Mobil Oil New Zealand Ltd v Taupo District Council* ENV Auckland A149/98, 16 December 1998.

agree with the appellant that the TRMP permitted noise standards provide a good indication of the expectations of the zone, and the fact that the court may legally disregard such noise effects reinforces this.

Dust

[152] Objective 5.1.2 of the TRMP outlines the need to avoid, remedy, or mitigate the adverse effects of land use on neighbouring properties and on natural and physical resources. Policy 5.1.3.9 highlights the need to manage dust and other particulate emissions, while Policy 5.1.3.14 emphasises the need for sufficient flexibility in managing rural amenity impacts.

[153] Chapter 7 Rural Environmental Effects addresses rural land fragmentation, non-rural land use, and the protection of rural character and amenity. Key policies restrict non-rural activities that may conflict with primary production (Policy 7.2.3.12), support rural activities despite effects like noise or odour (Policy 7.4.3.2), and exclude incompatible uses where adverse effects cannot be managed (Policy 7.4.3.4). Objective 7.4.2 focuses on managing the effects of current and future activities on rural character and amenity.

[154] Chapter 12 Land Disturbance Effects, targets the environmental impacts of land disturbance activities such as cultivation, excavation, and vegetation clearance. Objective 12.1.2 aims to avoid, remedy, or mitigate adverse effects, including sedimentation and debris entering waterways.

[155] The air quality evidence of Mr Bluett addresses the adverse effects associated with dust generated on site from the proposed activities. No aggregate crushing will occur on site. Potential dust sources from the proposal include excavation, transport, stockpiling, and rehabilitation. These could affect residential amenity, health, ecology, and nearby horticultural operations.[99]

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99 EIC of Jeffrey Bluett at [3]-[4].

[156] The standards in condition 51 requires there be no noxious, dangerous, objectionable, or offensive dust beyond the boundary of the site. In addition to achieving that standard condition 52 requires dust control measures to reflect the best practical option for controlling dust. These effects will be managed through measures outlined in the Dust Management and Monitoring Plan (DMMP).[100] Such measures include road sealing,[101] water suppression[102] using an existing water permit,[103] and activity restrictions during sensitive wind conditions and horticultural periods.[104] Expert evidence concludes that, with these measures, dust effects will be less than minor.[105]

[157] The appellant's reply submissions record dust effects are predicted to be less than minor, and there is no expert evidence to counter that assessment.[106]

Landscape and visual effects

[158] To limit visual effects from the proposed works, visual mitigation planting is planned around the periphery of the works area and along the western side of the proposed access. This planting is detailed in a Landscape Mitigation Plan and an associated Maintenance and Establishment Plan.[107]

[159] The visual effects of the proposal are relevant, given the visibility of the site from neighbouring properties, public roads, and private property in the

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100 Required by land use consent conditions 18(d) and 24 and related to the operational standards detailed in conditions 51-57.

101 Land use consents conditions 35 and 36

102 Land use consents condition 56.

103 The existing water permit was varied in 2022 to authorise use of water sufficient for dust suppression. The consent holder Mr Corrie-Johnston has authorised CJ Industries to use this water in accordance with the conditions of the permit. The permitted take retains ample water for ongoing irrigation of pasture and landscaping, including the areas to be rehabilitated.

104 Conditions 53 and 54.

105 EIC of Jeffrey Bluett at [117].

106 Appellant's reply submissions at [84].

107 Land use consent conditions 48 and 27.

surrounding hills.

[160] Visual effects will be mitigated through:[108]

(a) locating the stockpile area behind the stop bank berm, set 1m below ground level and no higher than 3 m above ground level to reduce adverse visual effects outside of the site;
(b) restricting the size of the excavation pit to no greater than 1600 m^2 at any one time;
(c) requiring the site to be progressively revegetated;
(d) the landscape mitigation plan which forms part of the application (as appended to the evidence of Ms Gavin);
(e) staging the application so that Stage 1 can only be excavated after mitigation is established.

[161] The expert evidence of Ms Gavin specifically addresses landscape and visual effects. Ms Gavin considers visual and landscape effects from a range of vantage points, including surrounding dwellings and roads. She concludes that, with proposed mitigation plantings, adverse effects would be low-moderate overall, being 'minor' in RMA terms.[109]

[162] Only the land to be quarried during Stage 1 is classified as berm land. The remainder of the property is not berm land because it is protected by the stopbank, or it will not be quarried. Residents questioned the likely viability of plants located on the river side of stopbanks where they may be subject to flooding. Mr Payne expressed a high degree of confidence that the proposed planting will establish successfully.[110]

[163] Ms Gavin notes the moderate positive effects associated with the

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108 EIC of Elizabeth Gavin at [86](c).
109 EIC of Elizabeth Gavin at [4].
110 EIC of Tony Payne at [60]-[64].

restoration of the Stage 1 area over long term and that any adverse visual effects are not permanent.

[164] Having considered the expert evidence and revised consent conditions the court is satisfied that adverse effects on the visual amenity of residents of the surrounding areas, general members of the public who may be able to view the site from public vantage points, and also effects on the overall character and amenity values of this rural location will be no more than minor and will reduce over time as mitigation plantings become more established.

[165] Traffic, noise, dust, landscape, and visual amenity cumulatively. An important factor to record here is that Ms Bernsdorf Solly adopted the view that the proposal is not consistent with TRMP objectives and policies insofar as they relate to amenity values. These include Objective 5.1.2 and associated Policies 5.1.3.1 and 5.1.3.9; Objective 5.2.2 and associated Policy 5.2.3.8; Objective 7.4.2 and associated Policy 7.4.3.4; Objective 9.2.2 and associated Policy 9.2.3.3. She remains of the opinion that, where policies relate to amenity values, these policies are not met due to the **cumulative amenity effects.**

[166] In response to Mr Taylor's and Ms Gavin's reply evidence, she noted that she has not considered combined effects, but cumulative effects on amenity. In other terms she has assessed "all factors that contribute to the "pleasantness" of an area". The full extent of amenity effects cannot be assessed by "slicing and dicing" and assessing effects in isolation.[111]

[167] Mr Taylor criticises the position Ms Bernsdorf Solly has adopted as leaving it to residents to address the cumulative effects. While acknowledging that the residents' evidence is relevant to assessing amenity effects, Mr Taylor refers to the evidence of Ms Gavin, Mr Bluett and Mr Hegley. Mr Taylor considers that Ms Bernsdorf Solly is mistaken in her application of cumulative effects, explaining by

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111 Planning JWS dated 19 September 2024 at 1(g).

way of example that an accumulation of dust from the proposed activity in conjunction with dust effects from a neighbouring activity would be an example of cumulative effects. He states that the accumulation of varying effects that are less than minor in order to obtain an overall 'more than minor' level of effects is not justified, or consistent with the concept of cumulative effects.[112]

[168] Chapter 5 of the TRMP addresses matters of amenity, specifically Objectives 5.1.2 and 5.2.25 and supporting Policies 5.1.3.1 , 5.1.3.9 , 5.2.3.4 and 5.2.3.8. This extends to the impact of traffic noise on amenity values, as addressed by Objective 11.1.2 and supporting Policy 11.1.3.4. We are satisfied, on the basis of expert advice, that amenity values on the site and in the surrounding community will be maintained.

[169] Policy 7.4.3.2 is noted, which acknowledges that rural activities may involve levels and types of effects that may not meet standards typically expected in urban areas. This concept is also reflected in policy 5.1.3.1. Within this context and through managing effects to avoid impacting adversely on other productive rural activities, and rural character and amenity values, consistency with Objective 7.4.2 and supporting Policy 7.4.3.4 is achieved.

[170] The court is satisfied that the proposal is consistent with Objective 8.2.2, supporting Policies 8.2.3.4 and 8.2.3.7, and Objective 9.2.2 and supporting Policies 9.2.3.3, 9.2.3.4 and 9.2.3.5. These relate to maintaining the natural character of the margins of rivers and of the contribution that rural landscapes make to the character and amenity values of the district. In particular, Policy 9.2.3.4 encourages landscape enhancement and mitigation of changes through landscape analysis and planting proposals throughout rural areas. Based on the advice of Ms Gavin, it is evident that the proposal achieves this.

[171] With regard to dust effects, Objective 34.1.2 and supporting Policies

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112 Reply evidence of Hayden Taylor at [26].

34.1.3.1 , 34.1.3.4 and 34.1.3.8 are relevant. It is important to note that, as detailed in Policy 34.1.3.4, the TRMP provides for the management of dust as ancillary to land use activities rather as discharges in their own right, and to take them into account when assessing the land use activities that may generate dust.

[172] Based on the expert evidence of Mr Bluett, the mitigation measures proposed and the improvements to the conditions initially proposed, the court is satisfied that there are now adequate standards specifying what dust management is to achieve. Condition 51 requires there to be no noxious, dangerous, objectionable or offensive dust beyond the boundary of the site. In addition the dust management plan is to further demonstrate best practicable options to ensure that dust is managed on site to minimise the adverse impacts of potential dust discharges on the receiving environment. The proposal not only met the objectives and policies in this regard but also provides greater direction as to what is appropriate for this activity in this location.

[173] Overall, we consider that traffic, noise, dust, landscape and visual effects will be appropriately managed through the conditions of consent and through strict adherence of the management plan requirements. This gives us confidence in concluding that the effects including in combination with each other, on amenity values are reasonable, and will be no more than minor.

Methods of operation: whether the site can be quarried and remediated in the manner intended

[174] Valley RAGE raised concerned as to whether the site could be quarried and remediated as intended., and also whether the Council is adequately resourced to ensure compliance. Regarding the latter, a consent authority should not refuse an application based on an assumption that the applicant will fail to comply with the conditions of consent.[113]

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113 *New Zealand Kennel Club Inc v Papakura District Council* ENV Wellington W100/2005, 28 November 2005.

[175] The Council has a statutory obligation to monitor compliance and to enforce the conditions of consent. It must therefore ensure it is appropriately resourced to fulfil this obligation. It is common practice, particularly where enforcement resources are limited, for Council's to adopt a risk-based approach. This may include, for example, the use of a risk matrix to prioritise monitoring efforts, focussing on consent holders with a history of non-compliance or where there is a higher degree of uncertainty.

[176] The conditions of consent proffered by the appellant in closing includes trigger levels and parameters that the management plans are required to meet.[114] This approach aligns with Judge Newhook's observation in *Remediation (NZ)*,[115] that such matters should not be left entirely to be determined by management plans.[116] We agree with the appellant's submission that *Remediation (NZ)* does not displace the proposition that a consent authority is entitled to assume that consent conditions will be complied with rather it is authority for the proposition that in order to grant consent the court needs to be satisfied that the design and operation of a proposed activity, and the evidence as to how effects will be managed, are consistent with future compliance with the proposed consent conditions.

[177] We record also that the appellant has proposed the inclusion of a bond as security for remediation. While Valley RAGE has submitted that it considers the bond's value is insufficient and should be increased to cover potential costs associated with repairing the community water supply and remediating the aquifer,

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114 See land use conditions 85, 89 and 92 relating to groundwater level triggers. Discharge permit conditions 26 and 27 relating to concentrations of contaminants in groundwater chemistry. Discharge condition 28 outlines the sampling required should a trigger level be exceeded, condition 24 the analysis requirements for that sampling and conditions 29 and 30, the next steps based on outcome of that analysis. Condition 32 requires reporting made available to the Council to include any exceedance of contaminant trigger concentrations. Similarly, discharge conditions 21, 28(c) and 31 similarly detail the requirements should a trigger level listed in table be exceeded. Noise limits are set in conditions 61 and 62 of the land use consent. Condition 53 states no material shall be disturbed if wind speed is higher than 7.5m/s (27km/h).

115 *Remediation (NZ) Ltd v Taranaki Regional Council* [2024] NZEnvC 213.

116 At [466].

we do not consider this will be necessary. We discuss this in our evaluation below.

[178] Mr Corrie-Johnston has provided evidence detailing at length how the proposed quarry would be operated.[117] He explained site preparation will include upgrading the access bridge and entrance, constructing the access road with stormwater and sediment controls, building stopbank ramps and a gravel course, installing a weather station and water monitors, creating noise bunds, planting vegetation, enhancing site security, and setting up a dust suppression system.

[179] Before any extraction begins, property boundaries and setbacks from key features like stopbanks will be surveyed and clearly marked. Staff cultural inductions, the pre-commencement cultural audit will take place and the framework for the CHI monitoring programme established.[118] CJ Industries and its advisors will complete and submit the required management plans to an independent certifier before providing these to the Council.[119] This removes the potential for deemed certification in circumstances where the Council does not respond within a specified timeframe.[120] This approach is consistent with *Eyre Community Environmental Safety Society Inc v Canterbury Regional Council*[121] and *Christchurch City Council v Canterbury Regional Council*[122] and reflects Ms Bernsdorf Solly's recommendation in response to the court's questions on this matter.[123] Further, CJ Industries must notify the Council of its intended start date for operations.[124]

[180] As earlier described, the project involves three proposed stages. Based on

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117 EIC of Tim Corrie-Johnston and evidence in reply of Tim Corrie-Johnston.

118 Land use consent conditions 13, 15 and 16.

119 Land use consent condition 18.

120 Land use conditions 18-24 and discharge permit conditions 10-11 were amended to specify a different method of management plan certification.

121 *Eyre Community Environmental Safety Society Inc v Canterbury Regional Council* [2020] NZEnvC 138.

122 *Christchurch City Council v Canterbury Regional Council* [2019] NZEnvC 118.

123 NOE at p 468-469.

124 Land use consent condition 17.

Ms Gavin's landscape advice, work will begin in Stages 2 and 3 to allow mitigation planting to establish before Stage 1 commences. The proposal has also incorporated Mr Bluett's recommendation that no quarrying or clean fill placement should occur within 100 m of orchards between January and May as condition 54.[125]

[181] To ensure that vegetative cover establishes before winter, condition 104 limits quarrying and placement of clean fill, subsoil and soil in Stage 1 to the months of October to March. In conjunction, these conditions limit the occurrence of Stage 1 quarrying and placement of clean fill, subsoil and soil within 100 m of orcharding activities to only take place in October, November and December. This seasonal restriction will require works to alternate between Stages 2 and 3 at different times of the year. The aggregate beneath the designated Stockpile and Service Area will be extracted last.

[182] Regarding security, Mr Corrie-Johnston explains his house is adjacent to the quarry site, and security cameras will be installed around the area. Public access to Peach Island is legally available via a paper road connecting to Motueka River West Bank Road at the island's northern end. However, this road merges into paddocks near the residential area and does not extend to the southern end, effectively making it a dead end. As such, installing a gate to restrict access is not considered necessary, as public entry via the paper road is unlikely.

[183] As to extraction methodology Mr Corrie-Johnston explains topsoil and subsoil will be removed from the day's extraction area and stockpiled.[126] For Stage 1, the only topsoil that will remain in the Stage 1 area is that required for the day's rehabilitation. All other Stage 1 topsoil will be stored on the landward side of the stopbank. Aggregate will then be extracted using an excavator and carted from

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125 Land use consent condition 54. As condition 104 limits Stage 1 quarrying and placement of clean fill, subsoil and soil to the months of October to March and thus this means Stage 1 quarrying and placement of clean fill, subsoil and soil within 100 m of orcharding activities can only take place in October, November and December.

126 EIC of Tim Corrie-Johnston at [70].

the burrow[127] by dump trucks or loader.

[184] The aggregate will be stockpiled in the stockpile and service area located behind the stopbank.[128] The base of the stockpile will be 1 m below ground level. The maximum height will be 4 m (so 3 m above surrounding ground).[129] Clean fill will also be stockpiled in that area. At all times sufficient clean fill will be stored on site to allow for backfilling of any open areas.[130] Dump trucks returning to the extraction pit from the stockpile will bring clean fill that will be tipped into the extraction site and compacted using the digger bucket.

[185] The extraction site will move daily. The rate of advancement will vary depending on depth of topsoil and subsoil, and the distance to groundwater. The daily rate of advancement is expected to be 16 linear meters or 320 m^2. Condition 99 restricts the maximum pit size to no greater than 1600 m^2 (i.e. 20 m wide x 80 m length) though the shape may vary from time to time.[131]

[186] Only one excavation pit will be open at any time, unless one pit has been completed and the excavation of a new pit is commencing, in which case two open excavations are permitted.[132] It is likely that the pit[133] would be extracted and fully reinstated within a month. If an alternative aggregate source becomes available from elsewhere (e.g. through Council's global river consent) part of a pit may be left open for longer, but the conditions require that this not exceed six months.[134] Further, it is envisaged that extraction, carting to the stockpile and the return of

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127 The term "burrow" in this context refers to a pit or excavation site where aggregate materials are extracted for use elsewhere. These pits are temporary and are created to source fill material or aggregate for building roads, embankments, or other infrastructure.

128 As depicted on the Site Plan appended to the conditions filed 25 October 2024.

129 Land use consent condition 76.

130 Land use consent condition 100. The advice note records that this condition has been volunteered to demonstrate that there will at all times be sufficient clean fill available to enable backfilling of the excavation pit in the event of rising groundwater levels.

131 Land use consent condition 99.

132 Land use consent condition 101.

133 Referred to as strip in conditions.

134 Land use condition 112.

fill would only need to take place around one week each month on average.

[187] From the stockpiles, aggregate will be unloaded onto truck and trailers with sound deadening deck liners in place using a loader.[135] The loader will also be used to load clean fill from the stockpile onto the dump truck for site reinstatement. These truck and trailer units will haul aggregate via a set route and will return loaded with clean fill to minimise truck movements unless there is already a full stockpile of clean fill on the site. CJ industries "eroad" GPS system will record the number of truck routes and vehicle movements and will alert the quarry manager if the speed limits are exceeded.[136]

[188] At first instance, the Commissioner expressed doubt that the management plans would be able to be implemented on a continuous basis by the Site Manager alone.[137] This was in part due to the complexity of ensuring clean fill coming from multiple sites met waste acceptance criteria, and the need for a suitably qualified and experienced practitioner to be available across multiple sites.[138]

[189] The complexity as to clean fill quality is removed by the volunteered condition requiring a single clean fill source, which has already been tested to ensure its suitability for use at Peach Island. As the proposal currently stands, the Site Manager, Mr Corrie-Johnston, will have primary responsibility for ensuring compliance with the conditions of consent and the associated management plans, and that staff receive adequate training so that works are conducted during operating hours comply with the consent conditions and management plans.

[190] The Site Manager's daily pre-start checks will include:

(a) windspeed checks;

(b) groundwater levels and programming the excavator GPSs; and

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135 Land use condition 60.

136 Land use consent condition 70.

137 Decision of the Hearing Commissioner at [283].

138 At [284].

(c) rain forecast to ensure that the site is prepared for a weather event.

[191] Mr Corrie-Johnston states that while the Site Manager holds many responsibilities, the Site Manager can generally manage these alone. That is aided by the adoption of automated systems, where possible. In terms of the above responsibilities, wind speed and direction will be measured using an ultrasonic wind sensor that will be mounted on a 5 m high mast.

[192] The metrological monitoring station[139] will be coupled with a data logger and telemetry system that will send live data to a cloud database system capable of sending out alerts[140] to key quarry staff via text message and email to ensure that the appropriate dust management and mitigation measures are in place. Alternatively, the telemetry system can also be configured to automatically turn the pump to the sprinkler system on and off based on the pre-defined wind speed limits. As to groundwater levels, the water levels measured by the data loggers, will be checked and entered into the excavator GPS. This means the excavator operator will know the exact depth they cannot go beyond. The GPS will also record the actual depth of excavation and this information will be made available to Council.

[193] Further, he records that CJ Industries intends to hire a suitably trained part-time worker who can be brought in as needed. Additionally, if the Site Manager is away, a temporary replacement will be appointed. This will be another staff member who has received training in the consent conditions and management plans. The Site Manager will be fully aware of compliance obligations under the consent (both active and passive).

[194] Mr Corrie-Johnston is confident sufficient staffing will be in place to ensure compliance with consent obligations and a range of Standard Operating Procedures (SOPs) reflect the volunteered consent and Management Plan

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139 Required by land use consent condition 57.

140 When average wind speeds exceed 7.5 m/s during two consecutive 10-minute periods.

conditions. Despite being in draft form, if consent is granted these will be updated to reflect the final conditions and Management Plans. These SOPs will then be made available to all staff working at the Peach Island site, and compliance with the SOPs will be an employment requirement.

[195] CJ Industries has an Environmental Compliance Officer, Mr Markham, whose duties include auditing resource consent compliance, reporting to company directors and Council, health and safety, and complaint response. If this application is granted, a quarry manager or trained supervisor at Riwaka Quarry will be responsible for ensuring clean fill material is extracted and handled in accordance with the Groundwater and Clean Fill Management Plan (GCMP) (including the SOP).

[196] Operating hours will be limited to between 7am and 5pm Monday to Friday. However, having considered submissions the appellant has further restricted site operations to require that no heavy machinery (excavator, dump trucks, bulldozer, loader) is started and no extraction or backfilling will occur before 7:30am. The only activity occurring between 7am and 7:30am will be staff vehicles arriving on site, plus pre-start checks and safety checks.

[197] Apart from servicing (e.g. an oil change by trained personnel) heavy vehicle maintenance will not occur at the site. Refuelling would occur at the end of each day, using a Ute with a fuel tank or towing trailer with a fuel tank which transports the fuel to the heavy machinery. Heavy machinery will be parked close to where the vehicle is used (burrows or stockpiles) when not in use. There will be a dedicated parking area for Utes close to the stockpile. Fuel trailers will be kept in a bunded area. If heavy rain is forecast, all machinery will be moved inside the stopbank.

[198] The site layout will provide for vehicles to deposit fill and then loop around to the point at which they load up. Trucks will only need to reverse when they are approaching the clean fill stockpile to dump fill. Any vehicle used onsite will be

required to have a broadband-type reversing alarm.

[199] Following the hearing the appellant's reply submissions record that minor operational changes were made to address issues raised during the hearing. A new requirement for the perimeter of reinstated land is to be clearly marked with temporary stock fences (or similar) to make clear that vehicles must not drive on those areas.[141]

[200] In closing submissions Ms Gepp states that operational details are only relevant to the extent they actually relate to an effect of the activity on the environment. She submits, and we agree, that sufficient information has been provided.[142] We consider that this provides sufficient certainty to support our decision-making, based on the information before us.

[201] Despite Valley RAGE's assertions that the proposal is piecemeal and unworkable, Ms Gepp submits that it is in fact neither. She submits the proposal has evolved to address issues of concern around groundwater protection and to minimise impacts on productive capacity, but each aspect of its evolution has been carefully thought through and all facets of the application have been extensively assessed by independent technical experts. She submits the proposal has the most comprehensive and stringent environmental controls of any of the appellant's previous quarries and other quarries referred to in evidence. This reflects the changing regulatory landscape.[143]

Groundwater quality effects

[202] Potential effects on groundwater quality were a significant reason for consent being declined in the first instance. The two key issues were the risk of exposure of groundwater in open pits and risk of groundwater becoming

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141 Land use condition 121.

142 Closing submissions for CJ Industries at [4].

143 Closing submissions for CJ Industries at [6].

contaminated through the deposition of contaminated clean fill.

[203] Potential effects on groundwater quality were a significant reason for consent being declined in the first instance. The two key issues were risk of exposure of groundwater in open pits and risk of groundwater becoming contaminated through the deposition of contaminated clean fill. The Commissioner accepted expert evidence that groundwater exposure was unavoidable and that consent conditions lacked clarity.

[204] While both experts agreed that adherence to the GCMP would prevent adverse effects, the Commissioner remained concerned about implementation and condition complexity. He also found the proposed contamination trigger levels too lenient, potentially allowing water quality degradation and deemed the response to contamination inadequate and concluded that the proposal was inconsistent with the NPS-FM.

[205] The changes that have been made to the proposal in relation to groundwater quality matters, specifically include the use of a single source of backfill material,[144] the setting of groundwater quality trigger levels[145] and compliance limits based on baseline water quality levels.[146]

[206] Valley RAGE resident Mr Peacock records concern as to the potential effects on groundwater quality especially the potential risks to the drinking water supply. TRMP Objective 5.1.2 and its associated policies aim to ensure that land use activities do not adversely affect the enjoyment and use of neighbouring properties or degrade natural and physical resources. Specifically, Policy 5.1.3.11 focuses on preventing contaminants from spreading beyond the property where they originate.

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144 Land use condition 115 requires all clean fill material to be sourced from Riwaka Quarry.

145 See land use consent condition 85, 89 and 92 relating to groundwater level triggers.

146 See discharge permit conditions 18, 26 and 27.

[207] Objective 12.1.2 seeks to ensure that land disturbance activities do not lead to significant soil loss, erosion, slope instability, sedimentation of water bodies or contamination of surface and subsurface water systems. It also aims to protect aquatic habitats, maintain the natural appearance of landscapes, and safeguard areas of cultural or ecological significance.

[208] The associated policies[147] under this objective guide how land disturbance should be managed to minimise risk by encouraging mitigation measures that reduce sediment runoff, encourage the retention of vegetation cover, and require appropriate erosion and sediment control measures. These policies also support the identification of high-risk areas and the application of stricter controls in those zones to prevent long term environmental degradation.

[209] Objective 33.1.2.1 seeks to ensure that the discharge of contaminants does not result in adverse effects on the environment, particularly on water quality, aquatic ecosystems, and the various uses and values associated with land and water resources. Recognising that discharges can degrade water quality, harm aquatic life and compromise the suitability of water for uses such as recreation, drinking, irrigation, and cultural practices, the objective emphasises the importance of maintaining the physical, chemical and biological integrity of land and water.

[210] The associated Policies 33.1.3.1 – 33.1.3.8 encourage preventing or minimising any resulting contamination from discharges, require treatment or mitigation measures before discharges occur, promote land use practices that reduce the risk of runoff and leaching, prioritises the protection of sensitive environments and high-value water bodies and the management of discharges in a way that aligns with community values and environmental sustainability.

[211] The appellant's submissions record there were disputes or uncertainties in some witnesses' opinions relating to consistency with national and regional water

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147 TRMP, Policies 12.1.3.1-12.3.1.5.

policy.[148] The appellant submits that effects on groundwater are managed so as to be entirely consistent with relevant national and regional policy direction.

[212] The groundwater issues were significantly narrowed by the start of the hearing, and the remaining issues in dispute were confirmed by Dr Rutter as being appropriately resolved so that, while she could never say there is no risk, she was satisfied residual effects were less than minor and the risk acceptable.[149]

[213] Counsel for Valley RAGE sought to establish a lack of assessment of contamination risk to the drinking water bore close to Mr Corrie-Johnston's house through questions that were put only to Dr Rutter and not to Mr Nicol. Mr Nicol's evidence explains why it was not necessary to specifically model the potential for *E.coli* to impact that bore. Dr Rutter confirmed she had not taken any issue with his evidence on this point.[150]

[214] Based on the JWS Groundwater, Ms Bernsdorf Solly recorded her opinion in the JWS Planning that apart from her concern regarding the exposure of groundwater in an open pit and the remediation of any contamination, all her concerns were satisfactorily addressed by the conditions of consent as discussed in the JWS Groundwater (2).

[215] The experts agreed that there should be restrictions on land use for a period of time immediately post-rehabilitation to allow the rehabilitated soils to redevelop to a sufficient quality to support land use. A single tested and approved clean fill source will be used and sufficient clean fill will always be on-site to backfill excavated pits. Land use condition 126 requires limits on stocking rates for at least three years and that cultivation is avoided for at least three years.

[216] Following three years, Dr Hill does not recommend any restrictions on land

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148 Opening submissions for CJ Industries at [25].

149 NOE, p 489.

150 NOE, p 482.

use of the rehabilitated areas, as he considers that after three years the soils will have developed to a sufficient quality to be capable of supporting a land use similar to what occurs at the proposed clean fill site now.

[217] Groundwater levels at the site fluctuate between 0.5 and 5.1 m below ground level, affecting extraction depth. As Mr Nicol states, there will always be some uncertainty in this respect.[151] Excavation into groundwater fluctuation zones will only occur with adequate clean fill and machinery available to prevent accidental inundation.

[218] At least 1 m of original material will be maintained between the pit base and groundwater, with deeper excavations allowed only under stable weather conditions. These must be backfilled the same day if groundwater levels rise or weather warnings are issued. The Site Manager will check the water level on the data loggers as part of the pre-start checks. That level will be entered into the excavator GPS which will ensure the excavator operator will know the exact depth they cannot go beyond. The GPS will record the actual depth of excavation and this information will be made available to Council.

[219] A comprehensive water quality monitoring and management plan includes a year of baseline monitoring, annual sampling of downgradient bores, condition surveys, contaminant analysis, and reporting to the Council.

[220] Actions will be taken if trigger levels are exceeded, and an annual monitoring report will be prepared and submitted to the Council.

[221] Expert evidence recommended that in order to protect groundwater:[152]

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151 Evidence in reply of Ryan Nicol reply at [13].

152 EIC of Tim Corrie-Johnston at [75]. He states he relies on Mr Nicol's evidence and the volunteered conditions and the Groundwater and Clean Fill Management Plan.

(a) maximum excavation depth is no less than 0.3 m above groundwater level or in some circumstances no less than 1 m above groundwater level;

(b) all excavations to depths between 1 m and 0.3 m above groundwater level must be undertaken during dry weather conditions.

[222] Detailed spill management measures have been incorporated into the GCMP and the conditions of consent. Land use conditions 80 and 82 require the machinery used on site to be maintained and operated in a manner that minimises spills.[153] The requirements include that no heavy vehicle maintenance will occur on site apart from servicing measures such as oil changes (but only by trained personnel) which must be conducted in a manner that do not result in leaks or spoils and this must occur within designated areas of the site.

[223] Refuelling of machinery and overnight parking will not occur in proximity to the excavation pits and refuelling must occur at distances greater than 20 m from both surface water and exposed groundwater. All fuel is to be stored behind stopbanks or above the 100-year flood level. Mobile tankers, when not being used for refuelling, will be stored in designated areas at the site.[154]

[224] The experts agree that spill management criteria of this kind will ensure the potential impact on groundwater is appropriately managed.

[225] Having reviewed the monitoring data collected to date, the groundwater experts agree the use of the proposed methodology for determining trigger concentrations is reflective of existing groundwater quality variations and is a practical approach for setting trigger concentrations.

[226] The experts are agreed that if calculated trigger concentrations are greater

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153 Land use consent condition 26 outlines the requirements for the GCMP to address response and mitigation to a spill.

154 Land use consent condition 81.

than half maximum acceptable value (MAV), then an independent groundwater scientist shall review the data and determine an appropriate trigger concentration. The requirement incorporated into the proposed conditions for the discharge permit is that an independent groundwater scientist will review all trigger concentrations and the data used to calculate these.

[227] Groundwater quality monitoring will be undertaken as described in the updated GCMP and the discharge consent conditions.[155] The proposed groundwater quality monitoring includes the sampling and testing of dedicated monitoring bores located downgradient of the clean fill site at quarterly intervals after clean filling activities commence.

[228] With respect to the groundwater conditions, we note further amendments were made to conditions to address points made by Valley RAGE and the Council, specifically:[156]

(a) both land use condition 85 and discharge condition 18 require that bore heads are locked;
(b) land use condition 88 defines "stable groundwater level trends" as an increase of more than 0.15 m over a 6-hour period in any monitoring bore. This is the more conservative approach recommended by Mr Nicol as opposed to assessing groundwater levels based on averaging across multiple bores;
(c) the definition of "decreasing or stable flow" for the purpose of land use condition 88(b) has been provided by Mr Nicol, based on an assessment of flow data from TDC Woodmans Bend flow recording site. The definition includes flows that show increases in flow over a 6-hour period but allows for "a greater rate of increase with the agreement of TDC". No party opposed this definition;

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155 Discharge permit conditions 18-25.

156 CJ Industries memorandum dated 25 October 2024 at [5] and closing submissions for CJ Industries [90]-[102].

(d) the use of the term "heavy rain event" in land use condition 89(d), instead of "heavy rainfall" for consistency with condition 92A;

(e) the deletion of the term "high rainfall event" from discharge condition 18(c), given its similarity to "heavy rain event", while retaining the specified threshold for heavy rain, being "daily rainfall greater than 30 mm recorded over 24 hours".

[229] Valley RAGE submits that the proposal's effects on groundwater are inappropriate and unmitigated. That submission does not reflect the evidence of the appellant which we accept.

[230] We are satisfied that the volunteered conditions of consent and the management plans will adequately address the potential for adverse effects on groundwater quality. As to the contention that the bond should cover the costs of rehabilitating the aquifer should it become contaminated, we will address that later.

Effects on productive land

[231] We now turn to consider the effects of the proposal on productive land. Although the Council addressed this issue in the context of both the TRMP and the NPS-HPL, this latter instrument must take priority in our consideration of this issue.

National Policy Statement on Highly Productive Land (NPS-HPL)

[232] The NPS-HPL was gazetted shortly before the first instance hearing commenced in 2022.[157] It directs councils on how to identify and manage highly

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157 The application for land use consents that are the subject of the appeal was lodged with the Council on 15 June 2020. The application for a discharge permit was lodged on 15 July 2022. The NPS-HPL came into force on 17 October 2022, approximately one month before the Council hearing commenced on 21 November 2022.

productive land under the RMA.

[233] The NPS-HPL has a single overarching objective "highly productive land is protected for use in land-based primary production, both now and for future generations." The nine policies collectively aim to give effect to this objective by recognising highly productive land as a finite and valuable resource (Policy 1) and requires its management to be integrated with freshwater and urban development planning (Policy 2).

[234] Councils are required to identify and map this land for inclusion in regional and district planning documents (Policy 3). The use of HPL for primary production is to be prioritised and supported (Policy 4), while its rezoning for urban (Policy 5) or rural lifestyle development (Policy 6), as well as its subdivision (Policy 7), is to be avoided unless specific exceptions apply. The NPS-HPL also seeks to protect highly productive land from inappropriate use and development (Policy 8) and to manage reverse sensitivity effects, ensuring that new activities do not constrain existing or future primary production (Policy 9).

[235] In accordance with cl 3.5(7) of the NPS-HPL, the site is to be treated as highly productive land.[158] The proposed use of the site does not fall within the definition of *land based primary production.*[159] The court has to determine whether a proposal is in "conflict with the intentions of the NPS-HPL".[160] The issues in dispute relate to the application of exceptions to the avoid directive in cl 3.9. This clause seeks to give effect to the policy direction to protect highly productive land from inappropriate use and development (Policy 8).

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158 The mapping exercise required by cl 3.4 has not yet been undertaken so cl 3.5(7) applies given the land is: zoned TRMP Rural 1, the site is identified in the New Zealand Land Resource Inventory as LUC 3, it has not been identified for future urban development and there is no relevant plan change to rezone the land to urban or rural lifestyle.

159 Land-based primary production means production, from agricultural, pastoral, horticultural, or forestry activities, that is reliant on the soil resource of the land.

160 *Gibbston Vines Ltd v Queenstown Lakes District Council* [2023] NZEnvC 265 at [47].

[236] Clause 3.9(1) states:

> Territorial authorities must avoid the inappropriate use or development of highly productive land that is not land-based primary production.

[237] Mr Ironside for the respondent submits that the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*[161] provided guidance as to the interpretation of "avoid" in the context of national policy statements prepared under Part 5 of the RMA. The Supreme Court determined "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of".

Clause 3.9(2) – when use of highly productive land is not "inappropriate"

[238] Clause 3.9(2) identifies exceptions to that avoid direction. It specifies a range of circumstances when a "use" is not "inappropriate". Two of these (potentially) relate to the proposal before us:

> (2) A use or development of highly productive land is inappropriate except where at least one of the following applies to the use or development, and the measures in subclause (3) are applied:
>
> …
>
> (g) it is a small-scale or temporary land-use activity that has no impact on the productive capacity of the land:
>
> …
>
> (j) it is associated with one of the following, and there is a functional or operational need for the use or development to be on highly productive land:
>
> …
>
> (iv) aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand.
>
> …

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161 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [96].

> (3) Territorial authorities must take measures to ensure that any use or development on highly productive land:
>
> (a) minimises or mitigates any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
>
> (b) avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on land-based primary production activities from the use or development.
>
> …

[239] The appellant submits that these clauses should not be interpreted as mutually exclusive. The specific mention of aggregate extraction in cl 3.9(2)(j) does not preclude the possibility that such a proposal could also fall under other provisions of cl 3.9, the other possibility being cl 3.9(2)(g). We accept that, and note the proposal only need satisfy one of these exception pathways.

[240] Further, in interpreting the available exception pathways we take guidance from the High Court's recent decision in *Te Rūnanga o Ngāti Whātua v Auckland Council*[162] where Justice Whata considered a similar exception pathway provided by the NPS-FM, he stated:[163]

> … it is necessary to observe that as with the avoid policies themselves, any express exceptional pathway standards must be read in light of their purpose and context. They cannot be so rigid as to make the exception standard impossible to satisfy, but they must be sufficiently robust to achieve the purpose of those standards, that is to only allow activity that is demonstrably needed, minimises the scale of adverse effects as far as is practicable and is justified.

[241] Where a use meets an exception listed in cl 3.9(2), that use of land is not inappropriate where the measures in sub cl (3) are applied.

[242] As this is a requirement whichever of the cl 3.9 gateways are invoked, we

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162 *Te Rūnanga o Ngāti Whātua v Auckland Council* [2024] NZHC 3794.

163 At [285].

consider this provision before moving to our consideration of the two relied upon by the appellant.

Clause 3.9(3)

[243] Subclause (3)(a) directs territorial authorities to take measures to ensure that any use or development on highly productive land minimises or mitigates any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in the district.

[244] Subclause (3)(b) requires that the proposal "avoid if possible, or otherwise mitigates any reverse sensitivity effects on land-based primary production activities from the use or development".

[245] "Mitigate" and "minimise" both connote making an effect smaller. The appellant submits that in this context these terms were intentionally chosen to make clear that the expectation is to reduce the extent of loss rather than avoiding loss altogether. This interpretation is consistent with the nature of cl 3.9, which makes provision for activities to take place on highly productive land even where they would result in some loss of highly productive land.[164]

[246] We agree. Throughout the proposed consent term, land that is not actively being worked will continue to be grazed (being the existing land use on the site). Such a reduction in the availability of highly productive land will be minimal in the court's view.

[247] "Productive capacity" in relation to land, as it is defined in the NPS-HPL means:

> … the ability of the land to support land-based primary production over the long term, based on an assessment of:

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164 As was the case in *Re New Zealand Transport Agency – Waka Kotahi* [2024] NZEnvC 133. Referred to in opening submissions of CJ Industries at [145].

(a) physical characteristics (such as soil type, properties, and versatility); and
(b) legal constraints (such as consent notices, local authority covenants, and easements); and
(c) the size and shape of existing and proposed land parcels

[248] It is not defined by reference to a particular type of output or intensity of use, but rather by the ability to support land-based primary production over the long term. As the appellant submits, neither a short term loss of capacity for productive use, nor a longer term reduction or narrowing of the types of productive uses to which that land could support over the long term, will be contrary to sub cl (3).

[249] The JWS Productive Land records disagreement as to the extent and impact of change on the site post-quarrying as the specific changes to soil structure, biology, chemistry and the time that is necessary to restore these properties are unknown. The experts have differing opinions in this regard. However, it is agreed that "the SMP is a best endeavour to minimise any loss of productive capacity of highly productive land".[165]

[250] According to Dr Hill's evidence, restoration in accordance with the Soil Management Plan is entirely achievable provided that the SMP is followed. He anticipates that any effects on the productive capacity of the site will be remedied within the first three years following remediation. Both Ms Langford and Dr Campbell disagree indicating the timeframe for recovery of soils disturbed by excavation, storage and reinstatement is not realistically achievable within such a brief period.

[251] While this remains a matter of contested expert opinion, through careful management of all soil-related activities, including revegetation and the management of post-placement land use following reinstatement of the soil it is expected that soil quality will improve and that the deeper, more uniform

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165 Productive land JWS, at 12.

reinstated soils will at least retain the productive capacity of the site.

[252] Further, as Ms Gepp observes in her closing submissions, the experts in cross-examination were unable to proffer any further mitigation measures that would minimise the loss of availability and productive capacity of the land.[166]

[253] It is important also to note that the way cl 3.9(3) is phrased reads as if it is aimed more at the territorial authorities' plan-making functions rather than as a requirement in determination of individual resource consent applications, given its concern focusses on taking measures in relation to highly productive land "in the district".

[254] We are satisfied that the cl 3.9(3)(a) requirements to minimise or mitigate any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in the district are met. It would be too rigid an interpretation to require no loss of availability or productive capacity occur, if that were the intended purpose then this would be unworkable. A commonsense interpretation of this clause clearly contemplates some loss of productivity.

[255] While not addressed by the parties, we are satisfied that no reverse sensitivity effects are in issue in relation to this proposal for the purpose of cl 3.9(3)(b).

Clause 3.9(2)(g)

[256] The first exception pathway is cl 3.9(2)(g) which provides an exception for land use activities that are either small in scale or temporary in nature, provided they have no impact on the land's productive capacity.

[257] The JWS Productive Land records agreement that change and degradation will occur from this activity, but disagreement as to whether the change and

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166 Closing submissions for CJ Industries at [45].

degradation could be considered small scale, temporary and whether it would impact on the productive capacity of the land.

[258] The planning witnesses also remain in disagreement as to whether the proposed activities are "temporary" and whether the site's productive capacity would be impacted.

[259] The requirement that there be "no impact in the productive capacity of the land" must be considered in conjunction with consideration of whether or not loss of productive capacity has been adequately mitigated or minimised, this being a requirement discussed above, that also applies in the context of cl 3.9(3)(a).

[260] The term "small-scale or temporary" is not defined and must therefore be interpreted in context. The evidence before us focuses on whether the activity is "temporary" rather than the scale of the activity. Ms Bernsdorf Solly considers that the 15-year duration for which consent is sought is not sufficiently short to be considered "temporary".[167]

[261] Mr Taylor provides additional context to this by explaining that while the overall consent term is 15 years, the quarrying activity will not occur continuously across the entire site for that duration. Instead, the activity will be conducted intermittently and in stages. Each stage will involve excavation, backfilling, and rehabilitation of specific areas, with the remainder of the site, including other stages, remaining in productive use (grazing).

[262] For any given portion of land (excluding the stockpile area), Mr Taylor states the maximum period of disturbance from topsoil removal to replanting after reinstatement is approximately six months. This is submitted to be a sufficiently brief period that the activity should be considered temporary in nature, particularly in the context of the NPS-HPL's focus on long term productive land use. On this basis, counsel for the appellant submits that the proposal qualifies as a temporary

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167 EIC of Susanne Bernsdorf Solly at [82]-[89].

land use.[168]

[263] Counsel for the respondent Mr Ironside, submits that a prolonged process for restoring soil properties and productive capacity is not what is contemplated under cl 3.9(2)(g). He submits that a strict interpretation of cl 3.9(2)(g) requires that there be no impact on the productive capacity of the land at all.[169]

[264] Further, he disputes the appellant's characterisation of the works impact on productive capacity, arguing that it does not accurately reflect the nature of the proposal. Mr Ironside submits that the excavation will involve the permanent removal of significant quantities of alluvium and aggregate from the site, permanently altering the composition of the site's fluvial soils which will be replaced with clean fill sourced from Riwaka Quarry. Subsoils and topsoils will be reinstated, and an alternative source of subsoil may be required to restore original ground levels. He submits that these are permanent changes and thus the activity cannot be considered "temporary".[170]

[265] Mr Taylor considers that "productive capacity", as defined in the NPS-HPL, refers to the land's ability to support land-based primary production over the long term, taking into account a range of factors. This does not impose a 'nil effects' threshold.

[266] The appellant's position is that adherence to the SMP will ensure that the removal, management and placement of soil avoids or minimises impacts on soil properties both before and after placement. It is further submitted that, over the long term, the re-established soil will retain or potentially exceed, the soil versatility (and range of land use options) of the original soil on the site.

[267] Supporting this interpretation the evidence of Dr Hill and Mr Nelson

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168 Opening submissions for CJ Industries at [148].

169 Opening submissions for the Council at [16]-[17].

170 Opening submissions for the Council at [11]-[17].

indicates that the reinstated land will support land-based primary production over the long term. Mr Taylor refers to the examples provided by Dr Campbell of what he considers to be unsuccessful examples of reinstatement of productive land.[171] Mr Taylor however, considers that these would satisfy the requirements of cl 3.9(2)(g) as those sites are now used for horticulture, demonstrating that the mineral extraction was temporary, and the land remains available for productive use.[172]

[268] Effects on the productive capacity of the *region's* productive land are minimised through the proposed term of consent, which is longer than the minimum term that would be required to extract the site's aggregate resource. This enables CJ Industries to make use of river-based aggregate sources when these are made available by the respondent, which extends the time before a new land-based quarry is needed.

[269] We agree that a zero effects threshold would be too stringent an expectation. Referring again to Justice Whata's rejection to a "no material harm" threshold when considering a requirement to "avoid" in *Te Rūnanga o Ngāti Whātua v Auckland Council*.[173] Justice Whata rejected the objection to that approach in respect of the NPS-FM, citing a passage in *Port Otago*:[174]

> This Court in *Trans-Tasman* said the standard was protection from material harm, albeit recognising that temporary harm can be material. Although in a different context, the comments were nonetheless applicable to the NZCPS. It is clear from *Trans-Tasman* that the concepts of mitigation and remedy may serve to meet the "avoid" standard by bringing the level of harm down so material harm is avoided."
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> …

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171 EIC of Dr Iain Campbell, Appendix 2.

172 Evidence in reply of Hayden Taylor at [14].

173 *Te Rūnanga o Ngāti Whātua v Auckland Council* [2024] NZHC 3794.

174 At [294], Whata J quotes the summary of Glazebrook J in *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 at [65].

> … the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected, including the relevant values and areas and when considering any development, whether measures can be put in place to avoid material harm to those values and areas.

[270] We take guidance from this passage. We consider that employment of the minimise and mitigate concepts in these exception pathways serves to meet the "avoid" direction by bringing the level of harm down so that that material harm is avoided.

[271] We are satisfied that some elements of the cl 3.9(2)(g) gateway (in relation to impact on productive capacity) are satisfied by this proposal. However, we refrain from making a finding on whether the proposal passes through this gateway, as the appellant had placed greater reliance on application of the cl 3.9(2)(j)(iv) gateway in legal submissions.

Clause 3.9(j)(iv)

[272] The other relevant exception is cl 3.9(2)(j)(iv) which specifically allows for aggregate extraction where there is a functional or operational need for the associated use to be located on highly productive land. This provision requires that the use must provide a significant national or regional public benefit that could not otherwise be achieved using resources available within New Zealand.

[273] The appellant submits the activity of aggregate extraction is clearly covered by cl 3.9(2)(j). However, the question arises whether it also covers the deposition of clean fill. Without receiving submissions on this issue, the Commissioner at first instance, held that it does not. The appellant contends that this conclusion is incorrect.[175]

[274] Such an interpretation would render the exception difficult to rely upon as

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175 Opening submissions for CJ Industries at [132].

mitigation of effects on productive value (as required by sub cl (3)) will typically necessitate reinstatement of the land, which in turn requires the deposition of clean fill.

[275] Counsel Ms Gepp submits that the inclusion of the phrase "associated with" extends the application of the clause to uses associated with the aggregate extraction, such as the deposition of clean fill. The sole purpose of the deposition of the clean fill is to achieve rehabilitation of the quarried land. Deposition of the clean fill will reinstate ground levels, and associated land use options, following aggregate extraction. It is connected to the aggregate extraction activity and would not occur independently. We agree.

[276] The National Planning Standard defines "functional need" as "the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment."[176]

[277] Ms Gepp's submissions take guidance from the leading authorities on that term: *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*[177] and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*.[178] In *Te Rūnanga o Ngāti Awa* the Court of Appeal found that the activity of water bottling had a functional need for a rural location, given that is where the water is located.[179]

[278] *Poutama Kaitiaki* dealt with the context of functional need in the context of the reference in cl 3.22 of the NPS-FM, the definition for which is the same as that appearing in the National Planning Standards that we must consider. The Court in that case held that the focus is not on a particular location, but the need for an

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176 Opening submissions for CJ Industries at [133], referring to National Planning Standards, Definitions.

177 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 (subject to appeal to the Supreme Court).

178 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629. This decision pre-dates the Court of Appeal decision in *Te Rūnanga o Ngāti Awa* but follows the High Court decision which was to like effect.

179 At [152].

activity to locate in a "particular environment," which is a much broader concept than a "location"[180] and that this is a context and fact-specific enquiry.[181]

[279] Ms Gepp further submits, there is significant overlap between highly productive land and river plains where alluvial aggregate is found. However, the question is not whether the quarry has a functional need to locate on highly productive land, rather it is whether it has a functional need to locate in the environment where the highly productive land is located.[182]

[280] She submits that aggregate deposits are 'location specific' in that they can only be sourced from where the aggregate is physically present and accessible to the industry. The "environment" in which extraction must occur is one that contains river gravel. Accordingly, the proposal has a functional need to locate within this environment; an environment that also happens to contain highly productive land.[183]

[281] "Operational need" is defined in the National Planning Standard definitions as meaning: "the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints".[184]

[282] In *Poutama Kaitiaki* the Court recorded that this term was included in the National Planning Standards "to cover situations where there are valid reasons why an activity should be enabled to occur in a particular location". Mr Scott and Mr Corrie-Johnston have outlined the quarry's operational need to be in this environment (in particular, the need to be located close to its processing site).[185]

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180 At [53]-[55].
181 At [58].
182 Opening submissions for CJ Industries at [134].
183 Opening submissions for CJ Industries at [134].
184 Opening submissions for CJ Industries at [135].
185 EIC of Wayne Scott at [14], EIC of Tim Corrie-Johnston at [31].

[283] Dr Kaye-Blake's analysis assesses the cost-benefit of carting aggregate from Peach Island compared to Richmond/Appleby or Tapawera, to derive the economic value to the region and the averted emissions achieved by enabling extraction from this site.

[284] He calculated a net benefit of $3.6 million through enabling utilisation of the Peach Island aggregate source (a 4.58 percent loss of productivity in aggregate production averted) compared with sourcing aggregate from further afield. He assessed that benefit to be significant to the region.

[285] In addition, averted emissions amounted to 366 tonnes of CO2-e annually. The respondent's challenges to Dr Kaye Blake's evidence in cross-examination and in legal submissions did not undermine his evidence. We agree with the appellant's position thus far.

[286] The issue remaining in dispute is whether the use of land as proposed will provide significant national or regional benefit that could not otherwise be achieved using resources within New Zealand. We adopt Ms Gepp's use of the term "significance/alternatives threshold" when discussing this.[186]

[287] Whether a regional public benefit is "significant" is context dependent. What constitutes a significant benefit may differ from one region to the next. The nature of the benefit may also vary. For example, it could arise from the addition of employment opportunities or the provision of a specific aggregate source for a particular project.

[288] The Environment Court is yet to consider the significance/alternatives threshold. Although the court is not bound by a decision of an Expert Consenting Panel (the panel), Ms Gepp alerted the court to the Panel's analysis in *Brookby*

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186 Opening submissions for CJ Industries at [136]-[146].

Quarry Stage 3[187] which she considered may assist the court in making findings on this aspect of the NPS-HPL.

[289] The panel addressed the phrase "provides a significant national or regional public benefit that could not be achieved using resources within New Zealand" as it is used in cl 3.11 of the NPS-IB in the context of addressing a functional or operational need for an activity to locate in a specific location.

[290] The panel states that whether there is "significant national or regional public benefit" requires consideration, not just of availability of the resource but also the accessibility, local supply, pressure on the roading network, savings in freight costs, road wear and tear, and emissions. The panel explained it is the:[188]

> significant public benefit provided by the proposal that is the "yardstick" and that "resources within New Zealand" should be considered adopting a "real-world" approach with reference to consented and accessible aggregate extraction resource.

[291] Ms Gepp submits the appellant has assessed possible alternative locations by considering consented and accessible aggregate extraction resources as possible alternatives as well as considering the suitability of unconsented sites. Further, she submits the adoption of a "real world" approach to the significance/alternative's threshold, as adopted in *Brookby*, is particularly important.[189]

[292] We agree. The relevant question is whether the public benefit could be achieved using alternative resources within New Zealand, not merely whether aggregate could be sourced elsewhere. Given the high transport costs associated with aggregate, sourcing it from distant sites can reduce its public benefit. This

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187 Expert Consenting Panel decision on Brookby Quarry Stage 3 dated 2 October 2024. This refers a decision of an Expert Consenting Panel constituted under the Covid-19 Recovery (Fast-track Consenting) Act 2020 that was released following the hearing prior to final reply submissions.

188 At [398].

189 Closing submissions for CJ Industries at [13].

understanding is reflected in cl 3.9(2)(j)(iv) of the NPS-HPL, which deliberately refers to whether the public benefits, rather than just the material, could otherwise be obtained elsewhere.

[293] In this case, the proposal offers various benefits by supplying the demand for availability and utility of the aggregate product, as well as the regional economic and environmental efficiencies.[190] The key question is whether these economic and emissions-related benefits are significant in the sense of being important or noticeable within the region.

[294] As Ms Gepp submits, the evidence supports that they are. We agree that the significance of a proposal involving aggregate extraction must be assessed based on the public benefit of the specific activity, not the general value of aggregate as a resource. Mr Scott's evidence also described the significant regional benefit that the project provides through provision of aggregate to meet current and increasing demands for aggregate-based products for essential infrastructure. His evidence was not undermined by cross-examination.

[295] In the Tasman region (and across New Zealand), demand for aggregate is high and increasing. This demand is not met by a single large supplier but from distributed sources. That is the nature of aggregate production. No single source can meet the region's needs.

[296] In this context, significance relates to the proposal's contribution to meeting local demand and the associated regional economic benefits that accrues from that. Ms Gepp submits that is best assessed through the type of averted productivity loss analysis undertaken by Dr Kaye-Blake. We agree.

[297] The respondent submitted that the significant regional public benefit should be "plain and obvious"[191] and that "it is appropriate to expect that a

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190 Emission reductions.

191 Closing submissions for the Council at [12].

significant regional public benefit should be one that is obvious and able to be clearly identified". Mr Ironside suggested that it would be met by something like "a very significant development plan that needs access to this resource in a high-population centre, and therefore ..., or there's a road that needs to be extended, widened, straightened, et cetera, to make traffic move more efficiently".

[298] However, we agree with the appellant's rejection to this approach. There is no legal or logical basis to find that development in high population centres (only) or straightening a road to make traffic move more efficiently would provide regionally significant benefit but provision of economically efficient aggregate to Motueka to address the needs of its community and the wider region would not.

[299] Some level of impact on productive land is anticipated by the exception pathways and that impact is dealt with under cl 3.9(3)(a), not through the benefits/alternative's threshold. That said, in determining the net benefit of the proposal Dr Kaye-Blake's cost-benefit analysis *does* factor a "cost" for effects on productive land and still concludes that the net outcome is a regional benefit.

[300] So to bring together our evaluation of the proposal under this exception pathway, we agree that there is both a functional and operational need for the proposed activity to occur at the site as that is where the aggregate is located. Further, we accept that alternative locations have been considered but are impracticable.

[301] We accept also that the aggregate resource will have a regionally, if not nationally significant benefit in meeting current demand for this resource, the various uses of which will have positive benefits for the wider public not just the appellant. The proposal involves aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand.

[302] The uncontested evidence is that there will be positive economic effects for the region in two ways. First, there is a benefit that accrues from the cost of

sourcing aggregate from this site rather than a site further afield. Second, the economic assessment assumes aggregate is available from elsewhere, when in fact it is constrained everywhere. This site provides a source of aggregate that is in high demand and short supply. Positive effects accrue to the sectors that use concrete and sealing chip from the supply of those high value products.

Clause 3.10

[303] Clause 3.10 contains a separate enabling provision for the use of HPL that is not otherwise enabled by the cl 3.9(2) gateways. This applies to land that is subject to permanent or long term constraints that mean the use of the HPL for land-based primary production is not able to be economically viable for at least 30 years. "Long term constraint" means a constraint that is likely to last for at least 30 years.

[304] To come within this clause, the use or development must avoid any significant loss of productive capacity of highly productive land in the district and avoid fragmentation of large and geographically cohesive areas of HPL. This clause could have application to the land within Stage 1. However, in light of our conclusion on application of the cl 3.9(2)(g) exception pathway, we do not need to consider this clause.

Other relevant statutory planning documents

[305] Section 104(1)(b) RMA lists the statutory planning documents to which regard must be had. In determining the application of these documents to the proposal we were assisted by the evidence of Mr Taylor and Ms Bernsdorf Solly. In addition to their evidence, the experts JWS Planning largely recorded agreement on the relevant planning documents, but for the NPS-HPL addressed below and discussed as to the proposal's effects on productive land.

National Policy Statement for Freshwater Management

[306] The NPS-FM is relevant to this proposal as it involves land disturbance near freshwater bodies and the proposed quarrying and backfilling of the land has the potential to affect groundwater beneath the site. This NPS seeks to ensure the sustainable management of New Zealand's freshwater resources through its policies which require that:

(a) freshwater must be managed in a way that prioritises the health and wellbeing of water bodies, reflecting Te Mana o te Wai[192] as a fundamental principle (Policy 1);
(b) tangata whenua must be actively involved in freshwater management, including decision-making, and their values and relationships with freshwater must be recognised and provided for (Policy 2);
(c) freshwater management must be integrated, taking into account the effects of land use and development across entire catchments, including downstream environments (Policy 3);
(d) degraded water bodies and ecosystems must be improved, while the health of all other water bodies must be maintained or enhanced, guided by the National Objectives Framework (Policy 5);
(e) the significant values of outstanding water bodies must be protected (Policy 8), as must the habitats of indigenous freshwater species (Policy 9);
(f) the habitat of trout and salmon must also be protected, provided this does not conflict with the protection of indigenous species (Policy 10);
(g) communities must be enabled to provide for their social, economic, and cultural wellbeing in ways that are consistent with the overall objectives of the NPS (Policy 15).

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192 This is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and wellbeing of the wider environment.

[307] Such a framework enables local authorities to prioritise the health and wellbeing of water bodies, followed by the essential needs of people before other uses.

[308] We note that during the course of this proceeding s104(2F) RMA was inserted into the RMA.[193] This section states that when considering an application and any submissions received, a consent authority must not have regard to cl 1.3(5) or Objective 2.1 of the NPS-FM which relate to the hierarchy of obligations.[194] Further, cl 3.22(1)(e)(i) was amended so that the loss of natural inland wetlands must be avoided, their values protected, and their restoration promoted except where the regional council is satisfied that the activity is necessary for mineral extraction and its associated operations.[195]

[309] While acknowledging these developments to the NPS-FM, we do not consider these relevant to the proposal before us as the proposal does not involve prioritising competing interests regarding the take and use of water nor does the site contain any natural inland wetlands.

[310] Dr MacNeil and Mr Nicol have addressed consistency with the NPS-FM in their evidence, concluding that they are satisfied that the proposed activities will be consistent with it, including preservation of Te Mana o te Wai and the protection of drinking water resources.[196]

[311] Mr Taylor's evidence recorded he concurs with the opinion of Mr Nicol that the intent of the NPS-FM does not extend to avoiding all discharges that may alter groundwater chemistry from its existing water chemistry. As noted by Mr

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193 By s23 of the Resource Management (Freshwater and Other Matters) Amendment Act 2024.

194 There is a hierarchy of obligations in Te Mana o te Wai that prioritises first, the health and wellbeing of water bodies and freshwater ecosystems; second, the health needs of people (such as drinking water) and third, the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future.

195 Resource Management (Freshwater and Other Matters) Amendment Act 2024.

196 EIC of Ryan Nicol at [104] and EIC of Calum MacNeil at [49].

Nicol in his evidence, Policy 5 requires that freshwater is managed to ensure that the health and wellbeing of waterbodies is maintained, not that the concentration of individual groundwater chemicals must not change at all.

[312] The JWS Planning records the planners are both satisfied that the proposal is consistent with the provisions of the NPS-FM.

National Policy Statement for Highly Productive Land

[313] As discussed earlier, the proposal is consistent with the NPS-HPL.

National Policy Statement for Indigenous Biodiversity

[314] The NPS-IB provides a national framework for protecting, maintaining, and restoring indigenous biodiversity across New Zealand. It directs councils to identify and manage significant natural areas, protect the habitats of native species, and promote ecological restoration. It also requires councils to work in partnership with tangata whenua, ensuring Māori values and knowledge are integrated into biodiversity management.

[315] The parties agree that the proposal is consistent with the NPS-IB.[197] Mr Payne's EIC explains the proposal satisfies the objectives set out in the NPS-IB and will maintain indigenous biodiversity so that there is at least no overall loss in indigenous biodiversity.[198]

[316] Of note, Policy 13 requires councils to promote the restoration and enhancement of indigenous biodiversity. This is particularly relevant to the proposal given the existing degraded state of the sites indigenous biodiversity which will be improved as part of the rehabilitation of the site which will require

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197 Planning JWS at [9](b).

198 EIC of Tony Payne at [1], [66].

indigenous plantings on 1.3 ha of the site and the removal if exotic tree species.

Tasman Regional Policy Statement

[317] Objective 6.7 and Policy 6.2 of the Tasman Regional Policy Statement (TRPS) stress the importance of ensuring mineral resources (including gravels by definition under the Crown Minerals Act 1991) can be accessed. Further, issue 6.9 acknowledges that minerals are locationally fixed, must be extracted where they occur, and may underlie land of high productive value.

[318] The TRPS, has not been amended to give effect to the NPS-FM, the NPS-HPL or the NPS-IB.

[319] The JWS Planning records the parties planning witnesses agree that the TRMP gives effect to the TRPS, therefore the TRPS does not require separate consideration.[199]

Water Conservation (Motueka River) Order 2004 and s217 RMA

[320] The Water Conservation (Motueka River) Order 2004 (Motueka WCO) is relevant, as the Motueka River, located east of the site, is referenced in Schedule 2 of the Order. Section 217 RMA prevents a consent authority from granting a discharge permit to discharge water or contaminants into water if doing so would contravene any restriction, prohibition, or other provision of a Water Conservation Order (WCO).

[321] The relevant restrictions specify that no resource consent shall be granted for activities that would cause a material alteration to a river channel shape, meandering pattern, or braided characteristics, or where they involve discharges into Schedule 2 waters that may lead to physical, biological, or chemical changes

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199 Planning JWS at [9].

in those waters.

[322] The current proposal does not involve a direct discharge into the Schedule 2 waters and will not affect the river's morphology. Both Mr Nicol and Dr MacNeil have confirmed that neither the clean fill discharge component of the proposal nor any potential erosion or sediment transport would breach the parameters set by the WCO.[200] The planners agree with this assessment.[201]

Our evaluation

[323] While the issues in dispute are narrow, the application is for a discretionary activity, and as such, it must be considered under ss104B and 104 RMA, having regard to all potential effects and relevant planning provisions.

[324] As stated in the appellant's legal submissions, the RMA is not a no-effects statute. Every activity has some form of an effect and an approach of prohibiting activities with any adverse effects at all would not enable positive effects, or allow people to provide for their social, cultural or economic wellbeing, or be consistent with the authorities on how "avoid" policies are to be interpreted and applied, while accounting for whether there will be material harm.[202]

Relevance of precedent

[325] The matter of precedent is raised in submissions and by Council. The concern is whether the grant of consent to this proposal would result in the Council being more likely to approve similar activities in the future. Several resource consents have been granted for quarrying in the vicinity of the site, including on non-berm Rural 1 land. These either pre-dated the introduction of

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200 EIC of Ryan Nicol at [73], EIC of Calum MacNeil at [51] and opening submissions for the appellant at [179].

201 Planning JWS at [9](b).

202 Opening submissions for CJ Industries at [33].

the NPS-HPL or have since lapsed.[203]

[326] Ms Bernsdorf Solly considers precedent to be a relevant issue, but only in relation to land on the landward side of the quarrying activity.

[327] Counsel for the appellant, Ms Gepp and Mr Marshall, refer to the Court of Appeal decision in *Dye v Auckland Regional Council*[204] and submit that granting a resource consent does not create a legal precedent in the strict sense. As no two applications are ever likely to be the same, albeit one may be similar to another, the most that can be said is that the granting of consent may influence how another application is considered.

[328] While consistency in applying legal principles is essential, each application is fact-specific. Although one decision may influence another, the degree of influence depends on how similar the cases are. The extent of that influence will depend on the extent of the similarities.[205]

[329] Mr Taylor's evidence reiterated that position. He stated precedent is not a matter of concern, as any future applications for such an activity are provided for in the TRMP as discretionary activities and will therefore be assessed on the application's individual merit.

[330] The granting of consent for any future proposed quarrying activity would be based on the premise that it is provided for, and therefore consistent with, provisions of the NPS-HPL. Accordingly, no issue of precedent would arise.

[331] The JWS Planning records both witnesses agree that a high level of detailed and site-specific expert assessment has been undertaken in respect of the current proposal, and detailed management plans and mitigation measures have been

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203 EIC of Susanne Bernsdorf Solly at [63]-[64].

204 *Dye v Auckland Regional Council* CA86/01, 11 September 2001.

205 CJ Industries legal submissions at [46]-[48], referring to *Dye* at [38]-[39] and [41]-[42].

proposed. The planners therefore agree this would be a mitigating factor where precedent is of concern, as the extent of those measures may well distinguish this proposal from future proposals.

[332] We do not consider precedent is a factor to consider in our assessment of this proposal.

Section 104

[333] Under s104(1) of the RMA, the consent authority must consider applications "subject to Part 2" of the RMA specifically ss5, 6, 7 and 8. Consideration under Part 2 is appropriate where the consent authority has doubt as to whether the planning documents have been prepared in a manner that appropriately reflects Part 2.

[334] Valley RAGE acknowledges some attempts have been made to address the proposal's defects, but it remains of the view that under s104 the project is not a proposal of the kind that should be granted consent. We do not agree.

[335] Having had regard to the actual and potential effects on the environment of allowing the activity we are satisfied that the effects will range from less than to no more than minor, and that the conditions of consent, which include those of an *Augier* nature, are sufficient to secure the mitigation measures.

[336] We have considered the relevant provisions of the NPS-FM, NPS-HPL, TRPS and the TRMP. We have assessed the proposal against the relevant objectives and policies of each and are satisfied that the proposal achieves sufficient consistency with these policy documents.

Section 104B

[337] Section 104B applies to the consideration of discretionary activities. It directs that where a consent authority has determined to grant the application it

may impose conditions under s108. The conditions of consent were addressed above. We are satisfied that these conditions adequately mitigate the adverse effects.

Sections 105 and 107

[338] Having considered the expert advice in respect of groundwater quality matters, the court is satisfied that sufficient regard has been had to the matters detailed at s105(1) of the RMA, and that none of the effects detailed at s107(1)(c)-(d) of the RMA will occur. As such, s107 does not preclude the granting of the discharge permit sought for the proposed discharge of clean fill to land.

Sections 108, 108AA and 108A

General observations

[339] Resource consent conditions must meet the requirements of ss108 and 108AA, RMA. The latter includes a requirement that the condition must either be agreed by the applicant or be directly connected to an adverse effect of the activity on the environment or an applicable rule or be related to administrative matters that are essential for efficient implementation of the consent.

[340] A useful starting point for considering conditions is the Practice Note. Clause 10.4 outlines key principles for standards of good practice. Importantly, a resource consent, including its conditions, must stand on its own and be capable of being interpreted and applied independently. The conditions of consent must not undermine the consent itself or unreasonably restrict individual rights.

[341] Conditions presented to the court must be clear, coherent, certain, enforceable and properly justified. They should specifically reflect the activity for which consent is sought, including any modifications suggested or offered throughout the hearing, and must promote sustainable management.

[342] Conditions should apply specifically to the elements or aspects of the activity requiring resource consent and should not simply list all documents presented with the application.

[343] It is important that conditions explicitly state clear performance standards (as opposed to leaving these to be determined at a later date). Where expert certification or oversight is required, the condition must state clear parameters and specified standards in relation to this.

[344] Any condition volunteered by an applicant that could not normally be imposed (e.g., an *Augier* condition) must be specifically identified, along with the basis for its inclusion.

[345] We acknowledge the additional work by the appellant to sharpen up the conditions and to ensure that the draft management plans are fit for purpose.

[346] We note our decision refers to some, but not all, of the revised conditions. This does not mean that our conclusions were not informed by the conditions we have not specifically mentioned.

Proposed conditions

[347] Prior to the filing of the closing conditions, penultimate conditions (dated October 2024) were the focus of closing submissions. The appellant filed the condition set (dated December 2024) to address the matters raised in closing submissions and in response to the closing submissions of the respondent and Valley RAGE.

[348] We do not need to deal with every detail of the appellant's amended consent conditions and the basis for them. However, we consider it important to highlight several issues before addressing the conditions where challenge is raised. In so doing, we do not set out all amendments sought to the conditions, despite having considered and rejected the same.

Identification of approved plans

[349] Condition 1 as provided in closing lists various documents with which all work shall accord. Counsel for CJ Industries, submits this no longer refers to evidence, instead it references an "Approved Plan set, dated 25 October 2024". The memorandum states that the "Approved Plan set" comprises the Site Plan and the Plan of Monitoring Bores.

[350] Condition 1 of the discharge permit adopts the same approach and this is again reflected by closing conditions dated 18 December 2024.[206]

[351] Given the ongoing evolution of the proposal throughout the hearing process we consider it necessary to update this condition, as many of the referenced documents are now significantly outdated.

[352] It is our view that further refinement to these conditions is necessary. Rather than referencing a bundle of documents, the condition should list and identify (with reference to plan title and date etc) all plans to which the consent relates. These must be approved by the court.

Comments on management plans

[353] Management plans should not be referred to in condition 1. The requirement to comply with the certified management plans should be included in condition 18. Parties are to consider whether a clause should be included explicitly stating that the role of the management plans is subservient to the conditions of consent.

[354] The relevant draft management plans are those dated 25 October 2024. We consider that these draft management plans should be amended prior to our final decision. This would reduce the likelihood of people preparing and certifying the

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206 CJ Industries memorandum dated 25 October 2024 at [5].

management plans which must meet the standards and requirements set out in conditions, while also being in general accordance with the draft management plans.

[355] We direct a final check and revision of the draft management plans in line with our decision.

[356] Further, we note that the definitions of "stable groundwater level trends", "decreasing or stable flow" and "heavy rain event" were amended throughout the proceeding as mentioned earlier. The parties are to ensure that any references to definitions used in the draft management plans appropriately reflect those included in conditions.

Certification of management plans

[357] In closing submissions, Valley RAGE raised particular issues with the certification conditions contained in the October 2024 condition set.[207] Valley RAGE also opposes the revised approach to certification of a management plan by an independent certifier for three reasons.

[358] The first objection is that independent certification is being used in place of standards in conditions. That is not correct. The standards to be achieved are set out in the conditions.

[359] The second objection is that the independent certifier is certifying that implementation will achieve compliance with the consent and that is inappropriate because the certifier does not know whether the consented activities are in fact being carried out in accordance with the plans. Counsel submits that the independent certifier [should] be required to certify (following review of the actual practice on the ground at the site) that the design and operational procedures the consent holder proposes to undertake fulfil the conditions [and] are consistent

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207 Closing submissions for Valley RAGE at [21]-[36].

with the requirements of the consent conditions.

[360] The appellant's response is that independent certification is not in the nature of certifying that the consent activities are in fact being carried out in accordance with the management plans. That is a matter for the consent holder (to comply) and for the Council's monitoring and enforcement functions. Certification can only ever relate to ensuring one document (a management plan) implements another (conditions).

[361] As an example we note that condition 22 for noise for all activities on site (other than construction activities) now states that the role of the respective management plans is to set out the actions required to comply with the standards specified in conditions 61 and 62, as well as demonstrating the best practicable option to ensure that the emission of noise from activities on site does not exceed a reasonable level.

[362] The third objection is that the independent certifier approach removes the ability of the Council to decline to accept, or make recommendations to management plans, and say the Council should retain final sign-off.

[363] The appellant opposes that approach on the basis it would add another layer of review and certification to the management plan process, by someone without relevant expertise. It also would not address the workability concerns that Ms Bernsdorf Solly referred to in recommending the independent certifier method.

[364] After careful consideration of this point, we have concluded it is not necessary or justified for the Council to retain the final sign-off.

[365] Valley RAGE seeks a condition requiring an independent certifier oversee the site works and ensure they comply with the management plans and conditions at all times.[208] The example they gave is from *Eyre Community Environmental Safety*

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208 Closing submissions for Valley RAGE at [29].

Society Inc v Canterbury Regional Council.[209]

[366] The appellant submitted that a requirement for an independent monitor throughout the 15–17 year term would be unreasonable and also fail the requirements of s108AA, RMA. The *Eyre* case concerned consents for a large water storage dam behind dam embankments of 4.5 – 12.5 m height. The dam was an engineered structure. The New Zealand Dam Safety Guidelines 2023 specify formal peer review of investment, design and construction by an independent experienced engineer as best practice for this type of dam, and the court treated those Guidelines as "the yard stick". In that case, a condition requiring an independent engineer to oversee construction (expected to take 12 to 20 months) was imposed in accordance with those Guidelines.[210]

[367] Counsel submits extrapolating a specific engineering requirement, one that accords with published best practice for engineered structures, to the present application would not be appropriate.

[368] We agree with the appellant and accept that an independent monitor is not necessary or justified.

Condition addressing Riwaka Quarry Consent status

[369] A key change, as part of the proposal before us, pertains to the conditions volunteered as condition 115 of the land use consents and condition 17 of the discharge permit in relation to the sourcing of clean fill from outside the site. The chapeau of these conditions is phrased as follows:

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209 *Eyre Community Environmental Safety Society Inc v Canterbury Regional Council* [2020] NZEnvC 138.

210 The condition is discussed at [127] and [152] of *Eyre Community Environmental Safety Society Inc v Canterbury Regional Council* [2016] NZEnvC 178. Closing submissions for CJ Industries at [98].

> All clean fill material sourced from offsite shall be granite clean fill material sourced from the quarry at 44 Takaka Hill Road, …

[370] The quarry here referred to is the appellant's Riwaka Quarry.

[371] Clean fill will be extracted from and stockpiled at the Riwaka Quarry in accordance with standard operating procedures. From there it will be transported to the site by the appellant via a range of routes including State Highway 60, Pah Rd, Motueka Valley Highway and Motueka River West Bank Road – but not including via Brooklyn.

[372] The roads are suitable for this purpose as there are no weight or geometric constraints. Records will be kept noting the date and volumes delivered to site and those records will be kept on site and readily made available if the Council requests to inspect these.[211]

[373] The JWS Planning records agreement among Ms Bernsdorf Solly, planner for the Council and the appellant's planner, Mr Taylor, that due to the form of the volunteered conditions of consent, the proposed quarry could not proceed without the Riwaka Quarry consents.

[374] Given the proposal involves progressive backfilling as excavation advances, that excavation cannot begin (and the consents accordingly cannot be given effect to) unless the Riwaka Quarry sourced clean fill is available for backfilling purposes.

[375] To address this, Ms Bernsdorf Solly sought the inclusion of a condition explicitly preventing commencement of the activities until the Riwaka Quarry consents are granted, while Mr Taylor did not consider such a condition necessary.[212]

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211 Land use consent condition 115.

212 EIC of Susanne Bernsdorf Solly at [26].

[376] We record a condition of the kind sought[213] is outside the ambit of the controls able to be imposed as conditions of the land use consents and discharge permit under s108, RMA. Further, it fails to meet the requirements of s108AA(1)(b) as it is not connected to an effect of the proposal, an applicable rule, nor does it relate to essential administration matters.

[377] As the appellant has not agreed to this condition, it cannot be imposed under s108AA(1)(a). The risk that the land use consent and discharge permits may not be able to be exercised, and would subsequently lapse, is a risk that the applicant takes in volunteering the conditions as sought.

[378] However, this matter has since become a moot point. Mr Tim Corrie-Johnston's reply evidence states that CJ Industries had reached agreement with the relevant parties in that separate consent application and Council has since received confirmation that those parties no longer oppose the consent being granted.[214] The appellant's reply submissions record the land use consent and discharge permit for the Riwaka Quarry site were granted on 16 December 2024.[215]

Video surveillance – clean fill activities

[379] Valley RAGE sought the inclusion of a condition requiring video surveillance of all truck movements into the site.[216] The appellant opposed this request, expressing concern about the feasibility of implementing such a condition and the uncertainty surrounding its potential benefits versus costs. This matter was not the subject of evidence nor put to any witnesses. Further, existing conditions already include requirements to adequately manage clean fill quality.[217]

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213 Making one application contingent on the other.
214 Reply evidence of Tim Corrie-Johnston at [14].
215 Closing submissions for CJ Industries at [93].
216 Closing submissions for Valley RAGE at [38].
217 Closing submissions for CJ Industries at [101].

Rehabilitation

[380] The Council sought the following:[218]

> Condition 118B(f): Delete the words **at least moderately well or** … so as to achieve the same drainage class as prior to excavation activities.
>
> Condition 118B(g): For similar reasons delete the words: **at least imperfectly drained, preferably moderately well or** … .
>
> [Council's emphasis]

[381] The appellant did not support those amendments as Ms Langford's evidence that the soils are currently "well drained" is based on how drainage characteristics of Riwaka silt loam are described in Nelson (2003), rather than on the conditions of the site's soils.[219]

[382] Dr Reece Hill's evidence is that the soils are currently variable, including "well drained" and "moderately well drained". In any event, "moderately well drained" soils will not limit land use in Stages 2 and 3 and will not be the overriding factor determining the LUC classification of these areas.[220] It is "nothing more than a slight limitation" and would still provide a versatile soil,[221] particularly with reduced variability, as discussed by Mr Nelson.

[383] Even if Ms Langford's evidence is preferred, a requirement for "moderately well drained" reinstated soils would adequately mitigate the project's effects on highly productive land. Requiring reinstated soils to be "well-drained" rather than "moderately well drained" is overly onerous, especially given that the NPS-HPL requires cl 3.9 activities to "minimise loss" rather than "avoid any adverse effects"

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218 Closing submissions for the Council at [22].
219 NOE at p 402-403, closing submissions for CJ Industries at [92].
220 EIC of Dr Reece Hill at [136].
221 NOE p 226 at l 1-9.

on highly productive land in the district. We agree.

[384] The Council's submission on land use consent condition 126 and the associated SMP clauses acknowledged that the new condition is a recast of what had previously been included at cl 11.4 of the draft SMP. The Council understands that the Groundwater JWS contemplates future land use being determined following revegetation and inspection by a soil expert, and that such restrictions may exclude any stock grazing for a period of time.

[385] Condition 126 should not assume that stock grazing will occur during the first three years of reinstatement. Instead, it should be confined to the restriction at subclause (d) "no cultivation and use of under-sowing techniques" with any further land use, such as stock grazing, subject to certification by a suitably qualified soils expert and any restrictions they impose.[222]

[386] The respondent further considers cl 11.4(1), (2) and (3) of the SMP should be redrafted to address the need for a future land use certification process.

[387] The appellant considers that condition 126 responds to the Groundwater JWS by imposing strict controls on the types of activities that may occur during the first three years of soil and pasture reinstatement. Ms Gepp submits that the outcome now sought by the appellant that there be no grazing of stock at all during the first three years of reinstatement and that a future certification process by a suitably qualified expert before *any* stock grazing can occur was not put to any witnesses and was not recommended by Dr Rutter. Pasture growth will still need to be managed so this also creates operational issues.[223]

[388] We accept the appellant's response and do not consider this necessary.

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222 Closing submissions for the Council at [22].

223 Closing submissions for CJ Industries at [92].

Post-rehabilitation use

[389] Valley RAGE sought that *definition of minimum stocking rate be included.*[224] The appellant considered a definition unnecessary, suggesting that this should be a matter of farming judgment informed by the requirement to achieve healthy revegetation. They submitted that if however, a rate is to be specified, Dr Hill recommends that 8 stock units/ha would be appropriate.[225] We agree it is appropriate to leave this as a matter of farming judgment.

Bond

[390] Section 108(2)(b) states that a bond may be required as a condition of consent and s108A sets out the parameters for such a condition. A bond condition has been volunteered as a condition of consent by the appellant and it relates to the remediation requirements.

[391] Ms Gepp explained in closing that the proposed bond condition aligns with s108A of the RMA. Although it does not fall within the specific categories listed in s108A(1)(a) – (c), those provisions are inclusive rather than exclusive, as indicated by the word "including".[226] The bond secures a positive action – the provision of a water supply – which is consistent with the purpose of the section and has previously been accepted by the Environment Court.[227]

[392] In the alternative, the appellant submitted it can be included on the basis it is an *Augier* condition.

[393] We accept that the condition is consistent with s108A and accordingly see no need to specifically conclude that it is an *Augier* condition in case any question

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224 Closing submissions for Valley RAGE at [40].
225 Closing submissions of CJ Industries at [101].
226 Closing submissions of CJ Industries at [87].
227 *Morgan v Whangarei District Council* ENC Auckland A021/07, 20 March 2007 at [53].

should arise about its status in the future.

[394] We acknowledge Valley RAGE considers the bond should reflect the value required to remedy the costs of fixing the community water supply if contamination were to occur and repairs were required to remedy the aquifer.[228] We do not consider that necessary given the existing mitigation measures have been agreed to avoid, remedy or mitigate that risk.

Noise conditions 61 – 63

[395] Condition 62 sets a maximum noise level of 55 dBA $_{Leq}$ (day) when measured at or within the notional boundary of any dwelling (where the notional boundary is a line 20 m from any side of a dwelling, or the legal boundary where this is closer to the building).

[396] Condition 61 addressed noise associated with construction work. That term is defined in condition 62, which applies to all other noise. In condition 62, the Advice Note states that construction work is said to apply to activities defined as construction under NZS 6803:1999, including the construction of the earth bund and the haul road with the gravel extraction operation or truck movements which are covered by condition 62.

[397] Construction noise has different noise standards – 70dB$_{LAeq}$ and 85dB $_{LAFmax}$ – and is differently measured (condition 61). Noise associated with construction activity is measured 1 m from the most exposed façade of any dwelling located beyond the site.

[398] We consider that the Advice Note contained in condition 62 should be removed. The construction work should be limited to construction of the earth bund and the haul road, rather than being open ended.

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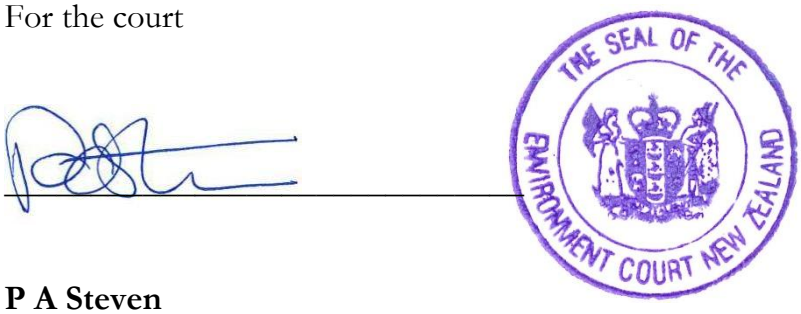
228 Opening submissions of Valley RAGE at [29].

Outcome

[399] We are satisfied that on the basis of our assessment, resource consents are able to be granted. However, before we are able to issue a final decision, we require a further set of conditions be filed addressing the relatively minor matters raised throughout this decision at paragraphs [352] – [356], [386], [398] and including the most up to date plans and management plans.

[400] Accordingly, the court **directs that within 15 working days of the date of this decision**, CJ Industries is to consult with all parties and report to the court with a timeframe within which it anticipates the final condition set could be provided for the court's consideration.

For the court



P A Steven
Environment Judge

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000405
[2013] NZHC 815

	BETWEEN	QUEENSTOWN CENTRAL LIMITED Appellant
	AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
	AND	FOODSTUFFS (SOUTH ISLAND) LIMITED Applicant
	AND	SHOTOVER PARK LIMITED Associated Respondent

Hearing: 12-14 February 2013
(Heard at Queenstown)

Appearances: J Young for Shotover Park Limited
J Gardner-Hopkins and E Matheson for Queenstown Central Limited
T Ray and J Macdonald for Queenstown Lakes District Council
N Soper and A Ritchie for Foodstuffs (South Island) Limited
G Todd for Cross Roads Properties Limited

Judgment: 19 April 2013

RESERVED JUDGMENT OF FOGARTY J

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Road map

[1] *There are two resource consent applications at issue: one application by Foodstuffs to build a Pak'nSave at Frankton Flats, and another by Cross Roads Properties to build a Mitre 10 Mega, also at Frankton Flats. Queenstown Lakes District Council (QLDC) declined the Foodstuffs application. The Cross Roads application went directly to the Environment Court. The Environment Court granted both applications. Now the Environment Court's decisions have been appealed to the High Court. The High Court is releasing two separate decisions, one for each application.*[1] *This is necessary as there are separate rights of appeal. Both decisions need to be read together.*

Introduction and summary of both the Foodstuffs and the Cross Roads appeals decision

[2] This summary endeavours to collect in one place the reasoning of both decisions.

[3] The Resource Management Act 1991 requires applications for consent to be processed promptly; even on the eve of a proposed plan for the locality becoming operative; even when the applications are in conflict with what is being proposed.

[4] There is a tension, not resolved by a rule, rather guided by standards, between the consent authority's duty to process the applications and the duty to do so having regard to the proposed plan for the locality.

[5] In 2012, the Environment Court was seized with two applications for consent to establish a Pak'nSave supermarket and a Mitre 10 Mega on the Frankton Flats, being undeveloped land adjacent to the airport at Queenstown. These were significant applications, taking up about 4 hectares of a 42 hectare

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1 This decision and *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.

area of undeveloped rural zoned flat land. The land is identified for urban development in objective 6 of the operative district plan. To implement objective 6, including to provide for industrially zoned land, there is a proposed plan, PC19. The Council had heard submissions for and against it, and reached a decision. There have been numerous appeals against that decision, and those appeals were pending before another division of the Environment Court, already part heard. Neither the Pak'nSave nor the Mitre 10 Mega proposals are permitted in the proposed plan change.

[6] The two applications for consent were for two large scale retail developments, Foodstuffs, 2.8 hectares, and Cross Roads, 1.82 hectares, to be located in the proposed E1 and E2 zones, but located significantly in the E2 zone, abutting the eastern access road and partly encroached on the pure industrial zone E1. E2 is for light industrial activities with some provision for retail. As PC19(DV) stood at the time, area E, including E1 and E2, provided for industrial activities with limited retail activities. These applications were not permitted by proposed plan PC19.

[7] The Council, via a Commissioners' decision, had declined the Pak'nSave application. On appeal, the Environment Court, by a majority, held that a Pak'nSave would have only "minor" adverse effects on the environment, and, unanimously, would not on the whole be contrary to the objectives and policies of PC19. Having gone on to consider the merits of the application, having regard to the proposed change, the Environment Court granted the application.[2] Commissioner Fletcher dissented from the finding that the Pak'nSave proposal would have only a "minor" adverse effect. He considered the loss of future supply of industrially zoned land to be an adverse effect that was more than "minor". He otherwise agreed with the decision. The Environment Court similarly split on adverse effect in the Cross Roads

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2 *Foodstuffs (SI) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs*).

application for a Mitre 10 Mega.[3] Here though, Commissioner Fletcher completely dissented. That application was heard directly by the Environment Court.

[8] Both decisions are appealed and were heard by this Court together. The issues in both appeals centre upon whether and how the Environment Court should have considered PC19 providing for the development of Frankton, when considering whether or not the two applications would have adverse effects on the environment. For the purposes of s 104D analysis, there is no material difference between the Foodstuffs and Mitre 10 Mega proposals.

[9] It is the scheme of the RMA that there is always an operative plan, and often a proposed plan. Before any consents are granted, the operative plan has to be applied, and regard must be had to the proposed plan, s 104. The jurisprudence is that the closer the proposed plan comes to its final content, the more regard is had to it. Consent has to be given under both plans.

[10] Within this basic scheme there is a sliding scale of analysis of the merits of applications, depending on the degree of conformity or departure from the operative and proposed plans. Those are ss 104 and 104A-D. This case concerns principally the application of s 104D.

[11] Section 104D provides:

> **104D Particular restrictions for non-complying activities**
>
> (1) Despite any decision made for the purpose of [section 95A(2)(a) in relation to adverse effects], a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> (a) the adverse effects of the activity on the environment (other than any effect to which [section 104(3)(a)(ii)] applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of—

[3] *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177 (*Cross Roads)*.

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

(Emphasis added)

[12] In both cases, the Environment Court, by a majority, applying s 104D(1)(a), was satisfied that the adverse effects of the separate proposals on the environment will be "minor". The Court found the proposals will have only a "minor" effect in two different ways:

(i) By ignoring the proposed change PC19 completely, and effectively assuming as a fact that the Frankton Flats area was going to remain undeveloped;

(ii) In case (i) was wrong: By taking the proposed change into account and finding that "minor" could be any loss less than 20%, arguing that using a number scale was "no more arbitrary" than the statutory standard "minor", and finding the loss of industrial land was less than 5%, and so "minor".

[13] The assumption in (i) of a rural undeveloped environment is contrary to objective 6 and policies 6.1 and 6.2 of the operative district plan and to the current contest between property developers for the most valuable commercial development of Frankton Flats which is the remaining undeveloped flat land in Queenstown. There is no prospect of the land remaining undeveloped. While the Environment Court was right not to focus on the specifics of PC19(DV)'s content, it should have recognised:

- that the future environment of Frankton Flats was urban, consistent with objective 6 and its policies;

- the sites of the proposals were located within the last area of Frankton Flats to be rezoned urban;

- There was competition for development of that land and a pending plan change (PC19).

[14] As to (ii), it is not permissible to substitute a numeric test for the statutory test. The application of that test oversimplified the task set by law in subsection (1)(a).

[15] These two errors undermine both judgments of the Environment Court, for they had the consequence that the gatekeeping section, s 104D(1)(a), was not applied correctly. Inasmuch as the Environment Court may have considered its s 104 analysis led to satisfaction of s 104D(1)(b), as an alternative to (1)(a), it was also in error of law.

[16] There is a real prospect that had s 104D been applied correctly, both these applications would have been dismissed at either of the two s 104D thresholds. Therefore the errors are material. It is not the task of the High Court on appeal to apply s 104D.

[17] Accordingly, both appeals have to be allowed. The applications remain on foot, and can be pursued, but will be examined now against the latest decision on the proposed change, which was released by another division of the Environment Court on 12 February 2013.[4]

[18] There were other arguments presented to the Court, contending other errors of law on the part of the Environment Court. Because of the Court's findings on the application of the gateway section 104D, these issues are of

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[4] *Queenstown Airport Corporation Ltd and Anor v Queenstown Lakes District Council* [2013] NZEnvC 14 (*QAC v QLDC*).

lesser importance to this Court. In case, however, this matter goes on to the Court of Appeal, the two judgments identify these other issues of law, and give summary reasons as to the Court's findings, both on error and on materiality.

[19] The first of these arguments is that the Environment Court should not have heard the appeal against the *Foodstuffs* decision or the original application in respect of *Cross Roads Properties Ltd* until the decision of the other division of the Environment Court on PC19(DV). The second argument is that the Court wrongly classified Queenstown Central Limited (QCL) as a trade competitor, with improper motives, with the result that it did not give QCL a fair hearing. The third argument is that the Court misinterpreted objective 10 of PC19(DV).

[20] This Court is releasing separate judgments on each appeal. However, there is significant cross-referencing. Effectively, both decisions have to be read, to collect the complete reasoning. The reason for separate judgments is to allow the parties to each appeal to make separate decisions to seek leave to appeal or not.

Section 104D issues

The context

[21] Queenstown is a resort town with an international appeal. The resort town proper is built right on the edge of the lake, at the head of Frankton Arm. Its centre is a bustling resort town, a mix of retail, restaurants, bars, backed by hotels, motels and apartments.

[22] The area suitable for industrial land is at the head of Frankton Arm, on flat land known as the Frankton Flats. The Frankton Flats are significantly developed. The airport is there. There is also industrially zoned land called Glenda Drive. There is also a large area of undeveloped land, not yet built upon, a good part of which is the subject of this litigation.

[23] The Council notified its district plan under the Act in 1995. It was declared partially operative in 2003 and fully operative in 2009. Frankton Flats was given a Rural General zoning; however, the district plan recognised that eventually it would become urbanised. Under the heading in the section of the operative district plan dealing with "District Wide Issues" "Urban Growth" the following appears:

> ***Objective 6 – Frankton***
>
> > ***Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the natural landscape approach to Frankton along State Highway No. 6.***
>
> ***Policies:***
>
> *6.1 To provide for the efficient operation of the Queenstown airport and related activities in the Airport Mixed Use Zone.*
>
> *6.2 To provide for expansion of the Industrial Zone at Frankton, away from State Highway No. 6 so protecting and enhancing the open space and rural landscape approach to Frankton and Queenstown.*

[24] Part of Frankton Flats is developed; another part (FFA) remains undeveloped, but for a large excavation undertaken by a failed developer. The rezoning of the balance of Frankton Flats, known as FFB, is the purpose of plan change 19 (PC19). It was first notified back in July 2007. After hearing submissions, the Council released what is known as PC19 (Decision Version) ("PC19(DV)").

[25] PC19(DV) has as its overall purpose the completion of the rezoning of Frankton Flats for urban activities, implementing objective 6 and policies 6.1 and 6.2 of the operative district plan. The mix of activities includes education, residential, visitor accommodation, commercial, industrial, business and recreation. It covers an area of approximately 69 hectares; 38-42 hectares, variously described, which provide for industrial uses.[5] It provides for a village centre, generally towards the west end of the area, being itself a mix of

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[5] See *Foodstuffs* at [100]. See *QAC v QLDC*, at [28], (numbers are hectares) – D-7.95, E1-20.39, E2-9.37, E4-1.62.

commercial, business, residential, visitor accommodation and retail. Generally to the south and near the airport, it provides for industrial and yard-based activities, with minimum lot sizes and more limited site coverage, with no residential or visitor accommodation and limits on retail. Generally, to the east it provides for industrial activities, with no residential or visitor accommodation and retail prohibited. This land to the east abuts existing industrial zoned land known as Glenda Drive. This proposed plan reflects the usual urban separation of residential activities from unsuitable commercial and industrial activities, made to avoid nuisance, or, in current RMA language, to avoid reverse sensitivities.

[26] The Council's decision on the proposed change, PC19(DV), was the subject of a number of appeals. While these appeals were pending, Foodstuffs applied to the QLDC to construct a supermarket, to be a Pak'nSave, in the area of PC19(DV). Likewise in PC19's area, Cross Roads Properties Limited applied for consent to erect a Mitre 10 Mega alongside the Pak'nSave, both businesses sharing a large car park.

[27] Because the operative zoning of the land for both the Foodstuffs and the Cross Roads applications is Rural General, the proposed uses were non-complying against the operative district plan.

[28] Both the Foodstuffs and the Cross Roads proposals were inconsistent with PC19(DV). Section 87B(1)(c) of the RMA requires that as the rules proposed by PC19 are not yet operative, any application must be treated as an application for a discretionary activity. The Pak'nSave proposal was located mostly within the E2 activity area, where all activities are prohibited unless an outline development plan had been approved. Inasmuch as Pak'nSave was located in area E1, it was a prohibited activity.

[29] In the case of Cross Roads, it was located principally in the E1 industrial zone, and in that regard is a prohibited activity. But for the same reason, it is treated as a discretionary activity by application of s 87.

[30] To obtain consent therefore the two proposals needed to get past the gateway of s 104D and then survive analysis under s 104. The first way that both applications could get to s 104 was if the consent authority (here the Environment Court) would be satisfied that the effects on the environment of the Pak'nSave proposal, and separately, the Mitre 10 Mega proposal, would not be more than "minor".

Preliminary observations

[31] The Environment Court framed the application of s 104D(1)(a) in the following way, in [71] of its *Foodstuffs* decision:

> [71] Similarly, the resources or people against which or on whom possible effects are assessed to ascertain whether they are adverse (and, if so, more than minor) are identified either in principles in Part 2 of the RMA, or in operative objectives and policies, or in proposed objectives and policies in a proposed plan (change) that are beyond challenge. In our view they do not include the objectives and policies of a proposed but challenged plan (or plan change). Where the provisions of a proposed plan (change) are under challenge then they are not reasonably foreseeable as settled in that form for the purposes of section 104D(l)(a) of the RMA. It is worth noting that while permitted activities under a proposed district plan (or plan change) are not relevant to the first gateway test, proposed objectives and policies are still relevant under the second gateway test (and under section 104(1)(b) if we reach that far). In summary:
>
> (1) the first gateway (section 104D(l)(a)) is concerned with the adverse effects of a proposal on the existing and likely (reasonably foreseeable) future environment as explained in *Hawthorn*;
>
> (2) the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;
>
> (3) the second gateway (section 104D(l)(b)) is concerned principally with the adverse effects of a proposal on the future desired environment (even if, in the case of a proposed plan (change) that may be unlikely).

[32] The issues on this appeal principally concern the legality of subparagraphs (1) and (2). I observe, however, that this judgment should not be taken in any way as an endorsement of (3). Because both appeals turn on the application of the first gateway threshold, and because I have not had full

argument on the framing of the second gateway test (3), this judgment does not discuss that framing. It is sufficient to say that I think (3) is inconsistent with s 104D(1)(b). The objectives and policies of plans are not confined to avoiding adverse effects.

[33] As a preliminary to more detailed analysis of the first gateway, I briefly introduce the issue by way of reference to the arguments that I heard. I do not intend, however, to attempt to summarise all the arguments from the five sets of counsel. That would unduly burden the judgment, without assisting the comprehension of it. It is, however, important to signal at the outset that this Court's judgment as to the application of the first gateway test does not coincide with any one of the five arguments received. It also does not wholly reject the approach of the Environment Court. The Environment Court rightly observed that PC19(DV) was under appeal in many respects, and so it was difficult to forecast what its ultimate shape and content would be.

[34] Mostly, counsel before me presumed that the task of applying the standard "will be minor" in the first gateway test involved examining the effects of each proposal on the future environment as provided for in PC19. In that regard, I heard a great deal of detailed argument as to the distinctions between the industrial E1 zone, the mixed industrial commercial and retail E2 zone, and the potential alignments of the Eastern Access Road.

[35] The Environment Court correctly identified, and all counsel agreed, that one of the ultimate issues was whether or not there was an adverse effect of the loss of industrial land. The first gateway test s 104D(1)(a), of being satisfied that the proposed activity's effects on the environment will be "minor", does not refer in any way to the operative or proposed plans. By contrast, the second gateway test s 104D(1)(b) does refer to operative and proposed plans, but only to their objectives and policies. For reasons which I detail hereafter, I am of the view that the first gateway test is a forward looking judgment as to whether or not the proposed activities may cause an adverse effect more than "minor" on the existing and future environment. That judgment can be made, and must be made, with regard to the provisions of the operative plan, existing

resource consents, commercial activity competing for use of the subject and surrounding land, and associated regulatory initiatives by way of proposed change. But the judgment is not made in any static setting, for example, examining PC19(DV) as though it will remain unchanged.

[36] Second, I observe that the cornerstone material fact in the application of the first gateway test is that there is an operative district plan which contains objective 6, which provides for the urbanisation of this area to accommodate residential, commercial and industrial activity. I note that in [71] of the Environment Court's framing, it has correctly included in the consideration of whether effects are adverse and, if so, more than "minor", "operative objectives and policies".[6] However, I go on to reason that in fact it did not do this when applying the first gateway test. This is because, in my respectful view, it got sidetracked by the decision of the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd*.[7]

[37] Overall, the Environment Court was looking at these two applications, in the context of a plan change promulgated by the Council to give effect to the operative district plan objective 6, policies 6.1 and 6.2 and implementation methods, in accordance with the "Explanation and Principal Reasons for Adoption". It was a zone with multiple uses, endeavouring thereby to accommodate a residential village, shopping for the residents and to provide for additional commercial, industrial and yard-based activities.

[38] This is all in a setting where optimal growth of Queenstown makes it desirable to make provision for a low cost residential community and, second, for more industrial activity which, in the nature of things, is easier located on flat land. Flat land was scarce. This is the remaining flat land within the urban boundaries of Queenstown not yet developed. None of these facts are in dispute. All are common knowledge, and the stuff of regular debate in the local community.

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6 See third and fourth lines.

7 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

[39] At the time that the Environment Court heard both applications for resource consent, in July and August 2012, PC19(DV) was under appeal. As already noted, there were numerous submissions for change, and the different zone boundaries and policies were very much under challenge. There was, however, no suggestion that the area of Frankton Flats B would remain undeveloped as rural general land. On the contrary, there is going to be intensive development, and the setting was one of making planning decisions to accommodate all the proposed activities, including a large area of industrial activity onto this area.

[40] There is very little land zoned industrial in the operative plan which remains undeveloped. It is all at Glenda Drive. In 2006, it amounted to 6.2 hectares.[8] There were competing estimates by the experts as to how much industrial zoned land Queenstown needs. The estimates vary between a low of 60 hectares and a high of 100 hectares. It was common ground that Queenstown is short of industrial land.[9] The Frankton Flats B zone, under PC19(DV), is approximately 69 hectares, of which 38-42 hectares provided for industrial (not exclusively) activities. Hence the important conclusion by the Environment Court, at [100] of the *Foodstuffs* decision:

> [100] ...Indeed, providing a maximum of some 42 hectares within Frankton Flats B is not going to meet all the need identified [for industrial land], no matter which numbers are used.

[41] The next part of this decision summarises the reasoning in the *Foodstuffs* and the *Cross Roads* decisions, before returning to the issue as to whether or not that reasoning was in error of law. Both judgments of the Environment Court are detailed and very long. I am indebted to Mr Todd for his summary of the Environment Court's reasonings in both decisions, when applying s 104D(1)(a).

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8 *Foodstuffs* at [107].
9 *Foodstuffs* at [63], [291], [298].

Foodstuffs decision

[42] The Court noted that a resource consent was required under both the operative plan and under the proposed plan.[10] It noted the extended definition of "effect" in s 3 of the RMA.[11] It set out the wide definition of "environment" in s 2 of the Act.[12] It is appropriate to set out both of those definitions now.

[43] Section 2 contains a broad definition of "environment"; it provides:

> **Environment** includes—
>
> (a) Ecosystems and their constituent parts, including people and communities; and
>
> (b) All natural and physical resources; and
>
> (c) Amenity values; and
>
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[44] Section 3(a) of the RMA provides:

> **3 Meaning of "effect"**
>
> In this Act, unless the context otherwise requires, the term effect … includes—
>
> (a) Any positive or adverse effect; and
>
> ...

[45] The Court then went on to find that the meaning of "environment" was explained by the Court of Appeal in *Hawthorn*, setting out [42] of that decision:[13]

> [42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other

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10 At [23].
11 At [66].
12 At [67].
13 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

> consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial.

[46] The Environment Court then went to apply what it considered the Court of Appeal's conclusion was:

> [84] In summary... in our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach.

[47] Then in [69] of its judgment, the Environment Court recognises that the Frankton Flats was generally undergoing major changes, and these were all about changes "to one of the few as yet un-urbanised areas remaining on the flats". It then observed that just about everything about PC19(DV) had been challenged on appeal. It then moved on to [71], as we have seen.

[48] In the *Foodstuffs* decision, the Environment Court was satisfied that the adverse effects of the activity of a Pak'nSave supermarket on the environment would be "minor". It reached this decision by firstly finding that the landscape in the area had already been modified by the adjoining urbanisation of the Frankton Flats. That part of the decision is not under challenge. Second, and more pertinently, it found:

> [104] ...By analogy with *Hawthorn* where the Court of Appeal held that possible applications for resource consents were not part of the reasonably foreseeable environment, we hold that a possible exclusively industrial zoning for the site under the unresolved (and challenged) PC19(DV) is not part of the reasonably foreseeable environment.

> [105] ...Consequently the potential effect of removing possible exclusively industrial land from use as such within the potential Frankton Flats B zone is not an effect on the "environment" within the meaning of section 104D(1) of the RMA.

[49] By these two findings, the Environment Court removed from the future environment the possibility of industrial zoning. As will become apparent, the qualifier "exclusively" was not relevant; it is not used again in the Court's reasoning. The effect of these two findings is that it did not consider either the subject site or the receiving environment as a place where industrial activity might occur in the future. This is contrary to objective 6, which we have seen expressly provides for industrial activity on the Frankton Flats generally, and specifically in policy 6.2 for expansion of the industrial zone at Frankton. Effectively, the Environment Court used [84] of *Hawthorn* to remove consideration of objective 6 of the operative district plan when examining the future environment of the Frankton Flats.

[50] In case that reasoning was wrong as a matter of law, the Court went on to examine the receiving environment in the context of the planned development of Frankton Flats B for urban activities, including industrial land. In this alternative analysis it substituted the test of "minor" for a test of a 20% or less loss of potentially industrial land. It set "minor" alongside the complementary concept of "major" to arrive at the 20% figure. It then found that the potential loss of industrial land was less than 5%. It used this finding to find that quantitatively and qualitatively the effect would be "minor".

[51] Therefore, on two alternative bases the Court was satisfied that the adverse effects on the environment would be "minor", and so was satisfied that s 104D(1)(a) applied. That enabled the application for a non-complying activity to proceed to s 104 analysis.

[52] I note that in the *Foodstuffs* analysis the Court also considered the question of an adverse effect on the amenities of the future Eastern Access Road and another road, Road 2, and adverse effects on the future of urban structure on the Frankton Flats. It came to the conclusion that both effects were "minor". These aspects of the decision were not the focus of the appeal.

[53] The appeal by QCL against the *Foodstuffs* decision did not contend that the Environment Court also cleared the Foodstuffs application under the second gateway test, subsection (1)(b). However, it is arguable it did. At [119], the Court found:

> [119] Since we have found that any adverse effects of the proposal on the environment are not more than minor, the first gateway under section 104D(1)(a) of the RMA is passed and we do not have to consider the second, that is whether the proposal is contrary to the objectives and policies of either the outline development plan or of the PC19(DV). However, out of an abundance of caution and in the light of Mr Gardner-Hopkins' submission that consent cannot be granted because both gateway tests are failed, we will consider each of the objectives and policies to which the proposal by Foodstuffs is said to be contrary, after we have discussed them below under section 104(1)(b) of the Act.

[54] In its s 104 analysis, the Environment Court did find that the Pak'nSave proposal was consistent with objective 10 of the proposed change, when considered as a whole. In the companion *Cross Roads* decision of the Environment Court, it came to a similar position. The appeal point was taken principally in the *Cross Roads* appeal. In that decision, I find that there were several errors by the Environment Court in the construction of the objectives and policies. For the purposes of this judgment it is sufficient to say that my conclusion in that regard in *Cross Roads* is of equal application to *Foodstuffs*. So that if the Environment Court did clear the *Foodstuffs* application under the second gateway that was an error of law. I also observe that it is important in regulatory statutes to ask the right question at the right time. If the second gateway test of s 104D(1)(b) was going to be examined in *Foodstuffs*, it should have been before considering the criteria under s 104(1)(b). As under s 104, the issue is not "will not be contrary" to the objectives and policies, for even if there is a conflict a proposal may be granted.

Cross Roads decision

[55] The *Cross Roads* decision was released after the *Foodstuffs* decision. It followed the analysis on the law in *Foodstuffs*, particularly as applying to the application of *Hawthorn* and as to the substitution of a numeric test for the

statutory test of "minor". Like *Foodstuffs* it started with a landscape "minor" effect analysis, which does not concern us on this appeal.

[56] On the *Hawthorn* point, the Environment Court said, at [59]:[14]

> [59] The short answer is that, adopting the analysis in *Foodstuffs*, as a matter of law the supply of possible industrially zoned land under proposed PC19(DV) is not part of the (future) environment for the purposes of section 104D. We acknowledge that the *Foodstuffs* analysis was dealing with the E2 area, while this case is about E1. However, we were advised that in the PC19(DV) appeal hearings SPL is seeking that the site be part of a proposed "E3" area, in which a range of other activities including "trade and home improvement retail" would be enabled. Obviously, the future environment under PC19 is very unpredictable. Thus we consider the *Foodstuffs* analysis still applicable.

[57] Then it moved on to the alternative analysis:

> [60] In case we are wrong about that, we proceed to consider whether the removal of 1.8 hectares of industrial land would be only minor or not...

[58] The Environment Court then reached its conclusion:

> [65] ...Taking all those matters into account, we are satisfied that to lose 5% (cumulatively up to 5.6%) of the only land that is proposed by PC19(DV) to be protected for "true" industrial uses would be an effect on the PC19(DV) environment that is only minor.

[59] It then dealt with adverse effects on the Eastern Access Road and Road 2.

[60] It then, again similarly to *Foodstuffs*, appeared to have deferred the second gateway test until after consideration of s 104, as in the last sentence of [71] it said:

> [71] ...We consider the extent to which the proposal implements (or fails to implement) the relevant objectives and policies of PC19(DV) in part 3 of this decision.

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[14] *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177.

Does Hawthorn apply to the application of s 104D(1)(a), in the context of this case?

[61] The Court in *Foodstuffs* approached s 104D(1)(a) by identifying the range of alleged adverse effects. The alleged adverse effects identified by the evidence were:[15]

(i) effects on the landscape;

(ii) effects on industrial land supply;

(iii) effects on the amenity of the neighbourhood and in particular on the Eastern Access Road and Road 2;

(iv) effects on "urban structure".

[62] The practical consequence of applying [84] in *Hawthorn* literally, however, is that the Court is not allowed to examine the effects of the Foodstuffs and Cross Roads proposals on the future environment. Rather, applying [84] of *Hawthorn* to s 104D(1)(a), requires adopting the unreal prospect that the undeveloped land will continue to be the activity on the receiving environment. Likewise, housing, retail, etc, is excluded from consideration by the application of [84]. Or to use the drier phrasing of the Environment Court, in [71], cited above at [30]:

> [71] ...
>
> *(2) the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;*
>
> ...

[63] The Environment Court found effectively that *Hawthorn* prevented it from taking into account the reality that there was a demand for more industrial land for Queenstown, which had been recognised in the operative district plan as an objective to be provided in the future, and that the only available flat land will be used at least in part for that industrial activity.

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15 *Foodstuffs* at [65].

[64] Paragraph [84] is a summary of paragraphs [34]-[83]. In the core of its analysis, the Court of Appeal endorsed a future orientated assessment of the environment, in [53] and [54],:

> [53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the council or the Environment Court on appeal makes its decision on the resource consent application.
>
> [54] ...It would be surprising if the Act, and in particular s 104(1)(a), were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[65] *Hawthorn* also recognised that these standards have to be applied in context:

> [61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur...

That was not the context of *Hawthorn*.

[66] I think [84] of *Hawthorn* was read literally as applying to any context. I do not think the Court of Appeal intended it to be read this way. To read [84] as a rule applying to this context was an error of law. The context of this case is materially different from the context in *Hawthorn*. The Court of Appeal in *Hawthorn* did embrace a future environment as the consideration in s 104D (s 105(2A) previously) and s 104. For these combinations of reasons, it does not govern the application of these facts. It does, however, support relying upon objective 6 and policies 6.1 and 6.2 as reliably informing the assessment of "minor" effect on the future environment.

[67] In *Hawthorn* the applicant applied for consent to subdivide 33.9 hectares into 32 separate lots, and for consent to erect a residential unit on each lot. The proposal required consent as a non-complying activity under the operative district plan and as a discretionary activity under the proposed district plan, so it did engage the predecessor to s 104D, s 105(2A).

[68] It is very material when comparing the context of *Hawthorn* to this case that the following relevant resource consents already existed in the *Hawthorn* baseline and receiving environment:

(a) An unimplemented consent to subdivide the subject site into 8 blocks of approximately 4 hectares each; (baseline)

(b) Building consents in respect of a 166 hectare triangle, which included the subject site, for 24 houses already erected and a further 28 consented to, but not yet built; (part baseline, part receiving) and

(c) Consents in respect of a further 35 building platforms outside the area of the triangle (receiving).

[69] This large number of existing consents meant that there was no issue, but that the environment would have a rural/residential quality. Furthermore, the applicant developer in *Hawthorn* had proffered as a condition of its application not to intensify the residential quality, by not making any further application for subdivision within the receiving environment. It is not surprising that consent was granted, and not disturbed on two appeals.

[70] None of the baseline or receiving environment cases has ever been deployed before to rule out consideration by a consent authority of the prospect that an application would impede an established objective in the operative plan. Given objective 6 and its policies 6.1 and 6.2, and recognising Queenstown's needs, it is inevitable that the Frankton Flats <u>will be</u> urbanised and used in part for industrial activities. "Will be" is the language used in s 104D(1)(a).

[71] The predecessor of s 104D was s 105(2A). It has been considered by the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*[16] and in *Dye v Auckland Regional Council*.[17] They also are distinguished by

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16 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).
17 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).

context. Like *Hawthorn*, they were subdivision applications into relatively stable existing environments.

[72] There is no doubt that a Pak'nSave supermarket and/or a Mitre 10 Mega would have major effects on the future environment. They involve the erection of very large buildings, putting in place a large number of car parks, and will generate tens of thousands of vehicle movements each week. They would enhance the economic wellbeing of the community by delivering the benefits of competition in the marketplace.

[73] The question is not whether the Foodstuffs (or Cross Roads) proposal would affect the environment. But the question is whether it will be an adverse effect, and if so, can the consent authority be satisfied it will be less than minor.

[74] All counsel agreed that utilisation of scarce land for an inappropriate use can be an adverse effect. This is because Part II of the Act, particularly s 5(2), includes consideration of meeting community needs, in the future.

[75] Section 5 provides:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (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.

[76] The consent authority cannot consider any adverse effect on the community of using land for retail activities, which is suitable for industrial activities, if the s 104D(1)(a) analysis is done without the Court being able to have regard to the future needs of Queenstown for industrial land, and the objective in the operative district plan to provide more industrial land at Frankton Flats.

[77] The sort of issues that had to be confronted in *Foodstuffs* simply were not in play in *Hawthorn*. One cannot say with confidence how the Court of Appeal in *Hawthorn* would have analysed the material facts of this case. For these reasons, I do not consider that the Environment Court or this Court are bound by [84] in *Hawthorn*.

[78] Furthermore, the finding at [84] of *Hawthorn* was a non-binding observation that I erred, when I suggested, obiter, that the effects of resource consents that might in future be granted should be brought into account in considering the likely future state of the environment. The Court of Appeal endorsed the Environment Court's approach, which had taken a more restricted view. But the Court still answered the question in the negative, meaning that they did not think there was a material error in the High Court judgment, and no error in the Environment Court judgment.

[79] When the RMA had its genesis, it was intended by many of the promoters to introduce effects based decision-making. Activities which did not generate adverse effects should not be regulated, was the attractive goal. That idea has never been completely lost. The Act did finally embrace the inevitability of plans, but not the inevitability of rules. Plans were to have objectives, policies to implement them, and those policies might or might not have rules: ss 30(1)(a) and 31(1)(a). But alongside that was the understanding that if an activity was innocuous (had no significant adverse effect on the environment), it did not need to be regulated or controlled by the RMA.

[80] That, in my view, is the natural context of s 104D(1)(a). If the activity is non-complying but has only "minor" (no need to be bothered about) adverse effects, then, even though it is non-complying, consent can be considered under s 104.

[81] There are a number of Environment Court decisions which examine the meaning of "minor" in s 104D(1)(a). They were not cited in argument.

[82] Section 104D(1)(a) is a section intended to impose a further restraint on consents being granted for non-complying activities under either an operative plan or a proposed plan, and activities which are inconsistent with the proposed plans, unless they have only a "minor" effect. It is a very small eye in the needle. It can be contrasted with ss 104A-C. I develop this point later in this judgment, when considering the numeric substituted test for "minor".

[83] There was no dispute to the proposition of fact that each activity, the Pak'nSave and Mitre 10 Mega, considered separately would have the adverse effect of a loss of land for industrial use. There was evidence before the Environment Court of a shortage of industrial land – quite independent of PC19(DV)[18]. That assessment can be made without regard to the operative plan. But, in fact, it is reinforced by objective 6, and its policies of the operative plan.

Conclusion

[84] The context of this case was materially different from *Hawthorn*. That decision recognised the importance of context. Read as a whole, it endorses having regard to objective 6 and its policies as a guide to the future environment. [84] was a summary only, and itself should not be read out of context. It is an observation which does not bind this Court in this case.

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[18] *Foodstuffs* at [63], [291] and [298].

[85] Section 104D, and indeed the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment. Read as a whole, *Hawthorn* endorses having regard to objective 6 and its policies. The current development of the Frankton Flats, of which these applications are only part, was inconsistent with the plain statutory injunction imposed on the consent authority to consider the adverse effects on the future environment, contained in the phrase "will be". To read down s 104D(1)(a) so that the judgment is will be "minor" if established in an undeveloped environment, was contrary to the operative plan and the facts, and so thwarted the intention of Parliament. It was a significant error of law in the *Foodstuffs* decision, and likewise in *Cross Roads.*

Did the Environment Court err in its interpretation and application of "minor" when applying the alternative numeric analysis, which does take into account and recognise the presence of PC19(DV)? Did the Environment Court err in law when defining a 20% threshold for "minor" effects?

[86] In the alternative to applying *Hawthorn*, the Environment Court, in case it was wrong, went on to consider whether the effect of granting consent to the retail use of a Pak'nSave would be more than "minor". The Court considered four possible areas against which the Foodstuffs area could be "measured":[19]

(1) The activity areas proposed to be zoned industrial under PC19(DV) (42 hectares);

(2) All undeveloped industrial land in the Queenstown/Wakatipu area;

(3) The quantity of industrial land demanded in the district;

(4) The total area of industrial zones plus proposed industrial zones within the district.

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[19] *Foodstuffs* at 106.

[87] The Court opened its discussion of the alternative application of the standard "minor" in s l04D(1)(a), as follows:

> [72] Counsel did not refer to authorities on what "minor" means. The dictionary definitions suggest it means comparatively small or unimportant or lesser in number, size or [extent]. Based on normal usage "minor" seems to come between minimal on one side, and more than minor and then major on the other side of a scale of effects. Further, the concepts of size and importance seem to have both quantitative and qualitative dimensions. Accordingly, whether adverse effects are "minor" or "more than minor" depends on the circumstances and context. For example, where a significant habitat of a threatened indigenous species is at risk in a region where the species' population has already reduced to 20% of its former population, even a small (say 1%) reduction in its habitat or population may be more than minor. It depends on the species, the factors on which its population viability depend and the margins of error in the analysis.
>
> [73] We are also acutely conscious of the "One Percent Problem" "... where small contributors account for so much of a ... problem that the social goal cannot be met without regulating many one percent sources".[20] Even very minor effects which may happen have the potential to lead to adverse accumulative effects ...
>
> [74] We return to the assessment of other adverse effects, including any strict cumulative effect - an effect that is at least reasonably likely to happen if a proposal gains consent and if it is implemented. The situation that most often arises with predicting such an effect is that the consent authority (or on appeal the Environment Court) is faced with making an unscientific qualitative prediction on evidence that gives no margin of error or confidence limits. A further complication is that in *Westfield*[21] Blanchard J approved an Environment Court decision in which the court placed "significant" somewhere in the scale, at least where there are possible trade effects (which must be disregarded under (now) section 104(3)(a)(i)). For the purposes of this decision we ignore any complexities introduced by *Westfield* and apply the first gateway test in the standard way. We hold that any adverse effect which changes the quantity or quality of a resource by under 20% may, depending on context, be seen as minor.

[88] It may be noted that no authority is cited for the last sentence. The last sentence has to be read as justified by the preceding analysis. That analysis starts with reference to the "dictionary definitions" and "normal usage". It is not referenced to the function of s l04D in the scheme of the RMA.

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[20] Citing an article by K M Stack and M P Vandenberg *The One Percent Problem* (2011) 111 Columbia Law Review 1385 at 1388.

[21] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).

[89] When it came to applying the standard against the key issue on appeal, whether the loss of potential industrial land is an effect on the environment, as we have seen, the Court identified a loss of about 5% of the proposed supply of scarce industrial land. It recognised this as a distinct adverse effect, but concluded it was only minor:

> [110] ...However, in these particular circumstances we are satisfied that it is quantitatively and qualitatively only minor (and at the lower end of minor too).

[90] No counsel defended the proposition that any adverse effects which change the quantity or quality of a resource by under 20% may, depending on context, be seen as "minor". Rather, counsel supporting the decision emphasised that the Court was relying on a much lower percentage of 5%.

[91] The context is the unchallenged common assumption by the Environment Court under appeal and all counsel before me that land suitable for industrial activities is a resource and is necessarily limited within the urban area of Queenstown. Moreover, there is competition for land suitable for industrial activities, to be used for other, here retail, activities. In this context, loss of land for industrial activity can be an "adverse effect" on the environment. The definition of environment is engaged under s 2(a), (b) and (d), set out above in [43].

[92] I do not think it is possible to ignore the Court's approach to the application of "minor" by its substitution of a 20% test. This is for two reasons. Firstly, it is a substitution of one standard, a statutory one, by another. Second, by identifying 20% as a demarcator between "minor" and "not minor", the Court is creating an anchoring effect on reasoning. Setting up the break line at 20% facilitates and indeed encourages a judgment that a loss of 5% will be "minor". This is even though there are qualifying passages in the Court's judgment saying that a significant 1 % loss could be "minor".

[93] The legal method deployed by the Environment Court in its analysis is a traditional legal method known as "literal" or "black letter". This is the method of reading a provision in isolation, as a businessman would, giving the words in the provision their usual meaning and then applying them to the facts.

[94] This legal method can apply quite satisfactorily when the provision is a rule. A rule can be applied without the need to understand why the rule is there, and without the need to understand the other body of rules surrounding it. So, for example, we are all familiar with driving to a strange city and immediately becoming familiar with the parking prohibitions around our hotel. It is not necessary to understand the policy or purpose behind why there is a no stopping sign and yellow lines painted in a particular part of a particular street. The signs and the yellow lines send a clear and unmistakeable communication.

[95] This black letter method cannot apply reliably, however, when the statutory provision is not a rule but a standard. When the statutory provision contains a term like "minor", that is a standard, application of which requires resolution of a question of degree. There is no bright line distinction between "minor" and "not minor". There is always room for two persons to honestly disagree in good faith on the application of a standard.

[96] It is not possible to apply standards in any way consistently without the persons who are applying them examining and agreeing on the policy or reason why the standard has been imposed, rather than a rule made. Standards are usually imposed when the task is of such complexity that it is simply not possible for it to be regulated by precise rules. In such situations it is necessary to apply the standard against the purpose for which it is applied. This is the classic situation where s 5 of the Interpretation Act 1999 applies. Section 5(1) provides:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[97] The operative standard in s 104D(1)(a) is:

> A consent authority may grant a resource consent for a non-complying activity only if it is satisfied that ... the adverse effects of the activity on the environment ... will be minor.

[98] It is not simply an application of a standard of "minor". It requires a positive satisfaction on the part of a consent authority that the adverse effects of the activity on the environment in the future will be "minor".

(Emphasis added.)

[99] Coming to this standard for the first time, the consent authority should ask: "Why is it here?" The reason is not hard to find. It is an amendment to the RMA, introduced to elaborate upon s 104. Section 104 is the cornerstone section which sets out the criteria that a consent authority must have regard to when considering any application for a resource consent. Sections 104A, B, C and D amplify s 104 by distinguishing separate criteria for applications for controlled activities s 104A (which "must" be granted), and discretionary or non-complying activities s 104B, restricted discretionary activities s 104C, and non-complying activities s 104D, (all of which "may" be granted).

[100] It also needs to be appreciated that s 104D(1)(a), treated as a threshold, is plainly intended to be applied without the obligation to have regard to either the operative district plan or proposed district plan. In context, it may be appropriate, and was here, to recognise that there was a plan change in process implementing objective 6 and policies 6.1 and 6.2. That exercise must be done when applying s 104D(1)(b) and, later, s 104(1)(b).

[101] In this context, it becomes clear that the purpose of s 104D(1)(a) is to allow applications for non-complying activities which may or will be contrary to the objectives and policies of an operative district plan or proposed district plan where the adverse effect is so "minor" that that is likely not to matter. It presents a picture where non-complying activities are unlikely to get consent under an operative district plan, let alone under a proposed district plan, but they will be considered if the adverse effects will be "minor".

[102] In that context, it can be understood immediately that "minor" here is very much at the lower end of adverse effect. That it is quite wrong to approach "minor" as indicating something of the order of 20% of loss. So that if something is lost by a proposal, one can tolerate it if it is merely 20%.

[103] Secondly, by a different line of critique, the jurisprudence is full of cases which constantly warn against the dangers of substituting the statutory test with another. In the *Cross Roads* decision, the Environment Court said of the 20% demarcator:

> [39] ...We accept that 20% is an arbitrary figure when compared with the range of figures from 15 to 25%, but it is not unreasonable. All we are trying to do is set an approximate upper limit beyond which we would, in most reasonably foreseeable circumstances, not be able to find that an adverse effect was only minor. Nor do we think such an approximate test is any more arbitrary than the words "minor" used in section 104D of the RMA or "significant", often used in this context.

[104] Embedded in that last sentence is the notion that the very deployment by Parliament of the "minor" standard in s 104D(1)(a) is "arbitrary". That is not intended as a complimentary term. The Courts must take statutes as they are enacted. A test cannot be dropped because it is perceived as arbitrary, and replaced by a Judge made "better" test.

[105] However, regard to the scheme and purpose of the Act, and particularly the functioning of s 5, shows there is nothing arbitrary in the term "minor". It is a sensible standard which, understood for its purpose, is designed to give applications which will have only a "minor" adverse effect on the environment but are for other reasons non-complying an opportunity to be approved. It fits in as part of a statutory policy that otherwise non-complying activities which are contrary to the policies and objectives of plans and proposed plans simply will not be approved, s 104D will stop the application even being considered under s 104. In that regard, non-complying activities are close to but fall short of being prohibited activities. There is nothing "arbitrary" in this graduated scale of the classification of activities from permitted through to prohibited. To be sure, the application of the standard calls for judgment and it is always

possible for decision-makers to disagree on these questions of degree, but, when inculcated into the scheme of analysis and the values to be applied, such disagreement tends to be minimised.

[106] In [74] of the *Foodstuffs* judgment, cited above,[22] the Court distinguished approval by Blanchard J, in *Discount Brands Ltd v Westfield (New Zealand) Ltd,*[23] of the use of the synonym "significant" in the context of applying the test of "minor" as it appeared, a provision dealing with applications not requiring public notification. Section 94A provides:

> **94A Forming opinion as to whether adverse effects are "minor" or more than "minor"**
>
> When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority¬
>
> (a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and
>
> (b) for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity[; and]
>
> (c) must disregard any effect on a person who has given written approval to the application.

[107] This provision has since been repealed. Blanchard J said:[24]

> [119] An important matter which the council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres - on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by

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22 At [99].
23 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).
24 At [119]-[120].

> trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.
>
> [120] The Court of Appeal considered that only "major" effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were "ruinous" the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be "significant" before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[108] The standard of "minor" applies within a particular statutory provision when applied to a particular context. Just as it is wrong to go to the dictionary, so also it is wrong, as I have noted, to take the meaning given to a standard in a statutory provision dedicated to another purpose and assume it has the same reference in a different provision, with a different purpose.

[109] What I do take from the judgment of Blanchard J, approving the judgment of Randerson J in the High Court, is the standard "significant" used as a synonym to "minor" was used as part of a purposive explanation of the appropriate reach and application of s 94(2).

[110] I am satisfied that it was an error of law for the Environment Court to use the standard of 20%, albeit with all its qualifications.

[111] There are additional reasons why it was an error of law, which have some pertinence to the judgments that have to be made. The first is that, as the Environment Court recognised, analysis of adverse effects is both a qualitative

and quantitative exercise. It is impossible to use an arithmetical measure of quality. Land developers and planners are very aware, acutely aware, of the distinction between the quantity of land and the quality of land for particular activities. So are businessmen who understand the market. Take the position that pertains in Queenstown as an example. Most of the industrial land is. located on flat land in the village of Frankton, which is at the end of Frankton Arm. The resort town proper, right on the edge of the lake, at the head of Frankton Arm, is built on the slopes at the head of Frankton area. It is also now filled with a busy town centre, all the accoutrements of a village, and surrounded by hotels and apartment complexes. It is not an industrial area. It is also folded around hills. The northern exit from this village goes almost immediately into very high quality landscape, which is not suitable for an industrial sprawl.

[112] Reducing the adverse effects of the Pak'nSave proposal to 5% or less does not give one the answer as to whether that will be a "minor" non-complying activity. This is for two reasons. Firstly, the Environment Court has already been anchored by the proposition that anything less than 20% may well be "minor". 5%, of course, is much lower than 20%. That was a mental distraction, a legally irrelevant consideration. Second, the percentage does not really tell the consent authority anything about the quality of the land for industrial uses. It might be not only land that is intended to be zoned industrial, but land which the marketplace will find is highly desirable as industrial land, rather than land for some other activity. It may also have other desirable qualities, namely for commercial use. That will pose a difficulty for the decision-makers who will have to decide how tightly to define the range of activities on that piece of land, depending on what goal they are trying to achieve.

[113] The areas suitable for industrial land, within the bounds of the town, are the Frankton Flats, upon which are located the airport and a significant area of operatively industrially zoned land in Glenda Drive. But because of the high demand for flat land for commercial as well as industrial uses, a lot of the Glenda Drive industrial land is in fact occupied by non-industrial uses. As the

Environment Court has had occasion to recognise in its *Foodstuffs* judgment, this is because of market forces which tend to place on land activities which obtain the highest value for the land. To be sure, you can categorise the land as "land zoned industrial", but, if the zoning also allows some commercial or retail activities, everybody knows that the land may be lost to industrial use. A substantial town like Queenstown requires industrial land to meet its needs. Industrial land has to be found. This is why a plan may have to secure land for industrial activity, in order to prevent market forces putting it to more remunerative activities.

[114] It follows that for the development of a town and its ongoing growth, the critical issue is what industrial land is available, or is potentially available, and what is its quality, rather than the total of land zoned industrial in the operative plan. The Court was told from the bar that Remarkables Park retail zone was considered as a site for Mitre 10 Mega, but it is not flat.

[115] For all these reasons, the Environment Court fell into error of law, when treating the statutory test as arbitrary, and when substituting a numerical percentage loss for the "satisfied will be minor" test.

Did the Environment Court err in law in considering all undeveloped industrial land in Queenstown/Wakatipu was the appropriate base against which to measure the loss of industrial land in relation to the Foodstuffs application?

[116] This is a subsidiary ground of appeal. The issue falls out of the four possible areas against which loss of industrial land could be measured, set out above in [98]. The Environment Court had selected option 2 (all undeveloped industrial land in the Queenstown/Wakatipu area). It was alleged by QCL that that was an error of law. That the focus should have been on the Frankton Flats area.

[117] As Mr Soper for Foodstuffs pointed out, however, the framing of the question: of "all undeveloped industrial land in the QueenstownlWakatipu area" was not in fact widening the focus away from the Frankton Flats. For all

undeveloped land suitable for industrial uses was located on the Frankton Flats and was a combination of the land to be developed under PC19(DV) and the undeveloped but currently zoned industrial land in Glenda Drive, which is nearby and on the Frankton Flats. Mr Soper argued the frame of reference of the inquiry by the Environment Court was correctly in the sensitive area, being the land proposed to be zoned industrial under PC19 and the adjacent industrially zoned land in Glenda Drive. This Court agrees.

[118] That frame of reference led to the following analysis in the *Foodstuffs* decision:

> [107] We know that it is proposed there be some 42 hectares on which industrial activities will be permitted under PC19(DV). As of 2006 when the CLNA was prepared, there were 6.2 hectares of land undeveloped in Glenda Drive. We do not know how much remains undeveloped at Glenda Drive, but it must be a maximum of 6.2 hectares. Thus the proposed Pak 'N Save will use for retail purposes between 4.5% and 5.2% of the proposed future supply of industrial/business land under PC19(DV).
>
> [108] We can also test the qualitative (or policy) importance of losing industrial land. Since, on the hypothesis, we are looking at the possible outcomes of PC19 (even though we believe that to be incorrect under *Hawthorn*), we can look at how PC19(DV) rates the importance of losing industrial land. The answer appears to be that it is important but compromise is possible - without needing to have regard to the importance of industrial land supply. That is because PC19(DV) contemplates that within Activity Area E2 as shown on the structure plan, "Showroom Retail with a gross floor area more than 500 m^2 per retail outlet" is a limited discretionary activity and all other retail is discretionary. So PC19(DV) seems to consider that all retail and even large retail will not be an adverse effect on the supply of industrial land anywhere in E2. No reason is put forward either in PC19(DV) or in the evidence in this proceeding as to why other proposed retail (such as the Pak 'N Save) would have an adverse effect on industrial land supply when PC19(DV) implies that showroom retail would not. In fact, the scheme of PC19(DV) shows that the effects on industrial land supply of using it for retail are irrelevant: "Showroom retail" in an area identified as E2 on a structure plan - because it is a limited discretionary activity - goes with a list of matters to which the council has restricted its discretion. None of those matters relates to the effect of the proposal on the supply of industrial land - see proposed rule 12.20.3.3i and iv.
>
> [109] Potentially it is possible for the whole of the E2 subzone under PC19(DV)'s structure plan to be developed for Showroom retail as a series of limited discretionary applications. That is, an area of 10.62 hectares could be removed from the industrial land supply. That can only be justified on the basis that either the adverse effect on industrial

> land supply is minor, or that the land is more valuable for (showroom) retail. Either way, the same justification applies (absent reference to the proposed policies) to other retail such as a supermarket.

[119] I remind myself the issue here is not whether this is a meritorious evaluation, but whether there is any error of law embedded in this evaluation. I have already found that it is an error of law to depart from the "satisfied will be minor test" and going to the 20% loss threshold, and pursuing a numeric evaluation for both quantitative and qualitative analysis. The question now becomes whether there is any additional error of law in the analysis in [107] through to [109].

[120] The appellant, QCL, submitted that the appropriate basis upon which to measure the loss of industrial land supply is the type of industrial land that PC19 intended for the Pak'nSave site. QCL submitted that Area E2 was intended for "light industry" and, as the AAE2 borders the Eastern Access Road, development is to be higher amenity, good quality urban design with activities including higher quality showroom-type uses and other premier businesses who can exploit the passing trade the Eastern Access Road will provide.

[121] One can immediately see that QCL's argument tries to narrow the area of loss to equate in fact the total area of loss. Assessed against the area of land for E2 as it was under PC19(DV), the level of loss for industrial land is in fact a loss of nearly 21 %. Secondly, in evaluating the issue of "minor" or not, in [108] we can see that the Environment Court replied on the retail aspects as to uses available in the E2 zone. This is developed in [109].

[122] Mr Soper for Foodstuffs submitted the Environment Court was entitled to find it was unlikely that the Foodstuffs site would be used for industrial purposes in the near future. Secondly, the decision to adopt all undeveloped industrial land as an appropriate base was a judgment issue, a matter of fact, and not a question of law.

[123] I consider that the QCL argument is too specific for an inquiry under s 104D(1)(a), as to potential loss of industrial land. I heard a lot of argument, getting into the niceties of the distinctions between E1 and E2 industrially zoned land in PC19(DV). But the Environment Court was right not to get bogged down in the detail of these zones, which could change as a result of the appeals, and did. Section 104D(1)(a) analysis is not against the specific content of proposed plans. That is subsection (1)(b), (where it is confined to objectives and policies). The subsection (1)(a) analysis is properly considered in terms of the very preceding words of s 104D, as an inquiry into whether or not the Court can be satisfied that there will be no more than a "minor" effect on the environment in the future. That involves envisaging what the future environment may be. That is a broader lens than focussing on the specifics of the current proposed change, which is under appeal.

[124] I do not agree with Mr Soper's submission that the Environment Court was entitled to find it unlikely that the Foodstuffs site would be used for industrial purposes. That is not the s 104D(1)(a) test. Second, the final content of PC19 could not be predicted at that time.

[125] In the *Cross Roads* decision, I have addressed the arguments that the Environment Court was in error of law when interpreting objective 10 of PCI9(DV). That reasoning is to be read as adopted in this judgment.

[126] Applying s 104D(1)(b), a consent authority could not be satisfied that the Pak'nSave supermarket in the El and E2 zones will not be contrary to objective 10 of PCI9(DV).

[127] If the Environment Court did so find, this was a material error of law. For, had the decision gone the other way, these applications would not have got past s 104D.

General conclusion on error of law in the Foodstuffs application on the evaluation that the Foodstuffs application could be no more than a "minor" adverse effect, and was not contrary to objective 10 of PC19(DV)

[128] For these reasons, I am of the view that it is clear that the *Foodstuffs* analysis was in error of law on the gateway issues. The principal error of law was to ignore the facts: that the Frankton Flats was suitable for industrial activities, was inevitably going to be urbanised, and was intended to be for activities including industrial, by objective 6 of the operative plan. Second, it was to depart from the "minor" test, both in turning to the dictionary meaning and implicitly contrasting it with major; and using a numeric standard as a substitute when it is not. Third, it erred when interpreting objective 10 of PC19(DV). The resultant consequence was that the Environment Court lowered the threshold enabling applicants for non-complying activities to get past the gate, set up to prevent non-complying activities from even being considered for consent unless the effects will be "minor". If it did make a decision on s 104D(1)(b), it was in error to find that it was satisfied that the application would not be contrary to objective 10.

Materiality of error of law

[129] This Court only intervenes where there are material errors of law. In this case, the question divides into two parts.

[130] The first question is whether the judgment on the first gateway might have been different had the Environment Court not applied *Hawthorn* and had not substituted the numeric standard for the "minor" standard. For a number of reasons, I think that it is likely that the judgment would have been different.

[131] On the gateway issues, Commissioner Fletcher dissented in both the *Foodstuffs* and the *Cross Roads* decisions. His reasons can be summed up in *Foodstuffs,* by his two paragraphs [291], [292] and the opening sentence of [293].

> [291] Further, I consider there is evidence of a scarcity of industrial land. The evidence of scarcity in the CLNA is that "the supply of commercial land is likely to be exhausted in the near future" (p. 1) and table 4 showing that as of 2006 out of 120 hectares of commercial land there is only 30 (25%) hectares vacant, and that within this there is 54 hectares of industrial land, of which only seven hectares (13%) is vacant. As well, we have the parties' acceptance of the "fact that there is a shortage of land for these types of activities". The impending shortage is due to the lack of land zoned industrial (and perhaps that that which is so zoned is not exclusively so). Scarcity would normally push up prices (which it has) which would bring more supply into the market, which can only happen if there is land available and it is zoned accordingly. The parties agree that:
>
> > The Frankton Flats is the last remaining greenfields site within the Urban Growth boundary of Queenstown south of the State Highway.
>
> There is no more land available in Queenstown suitable to be zoned industrial.
>
> [292] I consider the loss of around 5% of the future supply of industrially zoned land to a supermarket to be [an] adverse effect that is more than minor.
>
> *Qualitatively*
>
> [293] I disagree with my colleagues about the policy importance of losing industrial land...

[132] I do not set out the rest of the qualitative analysis. It is closely related to a proposed rule in PC19(DV) and an objective. We then come to his conclusion:

> [294] Both quantitatively and qualitatively the effect of losing 2.2 hectares of future industrial land to a supermarket would be more than minor in my judgment.

[133] In the *Cross Roads* decision, Commissioner Fletcher's reasoning was similar:

> [196] As to the first, I consider that the 5.6% loss in proposed industrial land would be a more than minor adverse effect. This would be relevant under section 104D if the industrial protection of area E1 under PC19(DV) was part of the (future) environment, and will be relevant under section 104(1)(a) of the Act.
>
> ...
>
> [201] I agree with the majority that resource consent(s) should be granted to CRPL under the operative district plan. However, in relation to PC19(DV) I disagree with my colleagues on this point. In my view

> not only is the loss of future industrial land an effect in terms of section 104(1)(a) that is more than minor, but there is more to the issue. The proposal not only does not give effect to, but is contrary to objective 10, and specifically policies 10.1 and 10.11 of PC19(DV). I would refuse consent under PC19(DV).

[134] The reasoning of Commissioner Fletcher is close to the reasoning in this judgment.

[135] The second part of the materiality reasoning is the decision of Judge Borthwick's division on the PC19 higher order issues, released on 12 February.[25] This decision was released at the beginning of the oral hearing of this case. But, at my request, it was not examined until the last day, after the appeal had been argued on the facts as they presented to the Environment Court of Judge Jackson. This decision of the Environment Court was written after having a resumed hearing on 7 November 2012, which was after the release of the *Foodstuffs* and *Cross Roads* decision by Judge Jackson's division.

[136] Judge Borthwick's division's decision did not amend PC19 to accommodate the Pak'nSave and Mitre 10 Mega proposals. The zone plan is now little different from PC 19(DV), as it was before the Environment Court on these consent applications. The Pak'nSave site is affected, however, in a significant way, in that the E2 zone on the eastern side of the Eastern Access Road is reduced in width, so that the Pak'nSave site is now located as to one-third in E2 and two-thirds in E1. As to the Mitre 10 Mega site, there is no change; it remains squarely within E1. J udge Borthwick's division endorsed the E1 zone as an area for industrial activities.[26] The Court granted leave to the parties *"to review and propose a revised version of the objectives and policies, but subject to their overall direction being maintained".*[27]

[137] I have not lost sight also of the fact that the Commissioners' decision rejected the Foodstuffs application. The Commissioners decided that the

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[25] *Queenstown Airport Corporation Ltd* v *Queenstown Lakes District Council* [2013] NZEnvC 14.

[26] At [656].

[27] At [662].

proposal failed both gateways under s 104D.[28] They held that the adverse effects on the rural environment would be significant,[29] that the adverse effects in terms of urban design would be significant,[30] and made more general findings that the proposal would have significant adverse effects on the environment.[31] They also found that the Pak'nSave proposal would be contrary to the objectives of PC19(DV) and undermine the integrity of the plan change.

[138] Accordingly, I come to the general conclusion that the errors, when applying s 104D(1)(a), are material.

[139] Inasmuch as there might have been findings in respect of the second gateway issue (1)(b) of lack of material conflict with objective 10, those errors also are material, in both applications. My reasoning in this regard is to be found in the *Cross Roads* decision.

[140] It follows that the two consents must be set aside.

Other issues

Should the Environment Court have adjourned the hearings?

[141] Counsel for QCL argued that, because there was an imminent decision by another division of the Environment Court on PC19(DV), this division of the Environment Court should have deferred its decision on the consent application. The submission was that it was an error of law, because the circumstance meant that Judge Jackson's division could not reasonably have proceeded with either of its decisions, and/or, in doing so, the Environment Court did not appreciate the consequence of doing so, and have regard to relevant considerations.

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28 *Foodstuffs* at [260].
29 At [258].
30 At [259].
31 At [260].

[142] The argument did not rely on provisions of the RMA. Nor could it, because they are the other way. Both appeals had to be heard; ss 87I(1)(c), 101(2), 272.

[143] Rather, the argument went to the inherent power of the Environment Court to schedule its hearings. It is long established that the High Court is loathe to interfere with scheduling decisions of any statutory Court. The decision to proceed with these hearing applications did disrupt the decision-making processes of the other division. It had an additional hearing on 7 November 2012 to consider the consequences of the grants of consents for the Pak'nSave and the Mitre 10 Mega. However, in my view, given the clear scheme of the statute which allows for applications to proceed in the face of plan changes, and indeed requires applications to be dealt with promptly, I do not consider that the decision of Judge Jackson's division to continue was an error of law. Whether or not it was meritorious is a different question. But it is not one within the jurisdiction of this Court limited on appeal to errors of law.

Was the Court prejudiced by an error of law classifying QCL as a trade competitor? Did this materially affect the decision?

[144] I address this issue less summarily, as it may have ongoing relevance to these parties. The RMA is the fourth planning statute in our legislative history. As part of the reforms it allows any person to make submissions or applications, whether or not they own land, and whether or not they are adversely affected by other activities nearby, s 96(2). So a concerned environmental activist in Kaitaia can make a submission against the development of opencast coalmining in Southland. A person can apply for consent for an activity on another person's land, even though the applicant does not even have a conditional agreement to purchase that land. A concerned activist in Kaitaia can take an interest in the amenity values of the suburb of Sydenham in Christchurch, and file a submission in opposition to an application for consent for a retail activity in the Sydenham shopping centre.

[145] Businesses competing in trade, unrelated to competition to purchase land and develop it, began to take an interest in RMA disputes. It became the practice for many years for supermarket operators to take a very keen interest in attempts by rivals to locate in their customer catchment. Typically, the competing supermarket retained lawyers, planners and other experts to run sophisticated planning arguments as to why consent should not be granted for another supermarket within their customer catchment. Of course, the arguments did not say they were worried about trade competition. But it was commonly thought by participants in the process and obviously in the end by Parliament that this participation was motivated by the fact they were in competition in trade.

[146] As a result of amendments to the RMA in 2003, trade competitors are now the only class of person who must have a legitimate RMA reason for participating in an RMA process.

[147] The relevant provisions now are:

> **96 Making submissions**
>
> (1) If an application for a resource consent is publicly notified, a person described in subsection (2) may make a submission about it to the consent authority.
>
> (2) Any person may make a submission, but the person's right to make a submission is limited by section 308B if the person is a person A as defined in section 308A and the applicant is a person B as defined in section 308A.

In Part l1A, ss 308A and 308B provide:

> **308A Identification of trade competitors and surrogates**
>
> In this Part,
>
> (a) person A means a person who is a trade competitor of person B:
>
> (b) person B means the person of whom person A is a trade competitor:
>
> (c) person C means a person who has knowingly received, is knowingly receiving, or may knowingly receive direct or

indirect help from person A to bring an appeal or be a party to an appeal against a decision under this Act in favour of person B.

308B Limit on making submissions

(l) Subsection (2) applies when person A wants to make a submission under section 96 about an application by person B.

(2) Person A may make the submission only if directly affected by an effect of the activity to which the application relates, that

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

(3) Failure to comply with the limits on submissions set in section 149E or 149O or clause 6(4) or 29(1B) of Schedule 1 is a contravention of this Part.

[148] Foodstuffs South Island Limited was the applicant for the Pak'nSave supermarket. Queenstown Central Limited owns part of the land in PC19. It does not own land over which the Pak'nSave supermarket would be operated. Shotover Park Limited (SPL) is another property owner, over whose land Foodstuffs' Pak'nSave would operate. Cross Roads Properties Limited is a subsidiary of the leading South Island retailer, H W Smith Limited, who operate Mitre 10s in the South Island. Queenstown Gateway Limited (QGL) owns land adjacent to PC19, which has a consent for the establishment of a Countdown supermarket. QGL and QCL are managed by the same company. But there is no common shareholding.

[149] At [37] of the *Foodstuffs* decision, the Court made five points on what it saw as the trade competition complexities of the case:

> [37] The proceeding is fraught with trade competition complexities:
>
> - Foodstuffs owns the Pak 'N Save and New World supermarket brands. There is a New World at the Remarkables Park shopping centre on the south side of the airport. It is easy to see that Foodstuffs would not want to have their Pak 'N Save in close proximity to its sister brand;

- conversely, Foodstuffs may like to place the Pak 'N Save in close proximity to the Countdown supermarket proposed to be built on land in Frankton Flats A, immediately to the west of the PC19 land. The Countdown brand is owned by Progressive Enterprises, Foodstuffs' main rival in the supermarket trade in New Zealand;

- the Countdown supermarket is proposed to be built on land owned by Queenstown Gateway Limited ("QGL"). It is obvious that QGL may not want a Pak 'N Save in close proximity to the proposed Countdown supermarket. We understand QGL is a sister company of QCL, with related ownership. The management of the QGL land and the QCL land in the C1 area of PC19(DV) is done by the same company, the Redwood Group Limited ("RGL");

- the Remarkables Park shopping centre is on land owned by Remarkables Park Limited ("RPL"), which we understand is a related company to Shotover Park Limited, sharing common ownership.

- RPL and SPL on one side are trade competitors with QCL and QGL on the other side.

[150] The appellant argues that the Environment Court found that QCL was a sister company of Queenstown Gateway Limited (QGL) and a trade competitor, without giving QCL the opportunity to address the issue further, in breach of natural justice. Secondly, having found QCL to be a trade competitor, the Environment Court took that into account when making its substantive assessment. This finding altered the weight it gave to evidence from witnesses from QCL, and its refusal to stay its consideration of the applications and await the higher order decision on PC19 from Judge Borthwick's division.

[151] For Foodstuffs, Mr Soper submitted that the appellant's arguments were misconceived, and misinterpreted the Environment Court's reasoning. That the Court did not find, for the purposes of the Pak'nSave application, that QCL was a trade competitor. Mr Soper argued that QCL has overstated the position when saying that there was prejudice occasioned by error of law as to whether or not QCL was a trade competitor.

[152] As to the Environment Court taking the perception that QCL was a trade competitor, there are two dimensions to the analysis which need to be separated. One is the meaning of trade competitor, and the second is the Court's evaluation of the relationship between QCL and QGL.

[153] Mr Soper, supported by Mr Todd for Cross Roads, denied vigorously that the Court had made a finding that QCL was a trade competitor.

[154] I am quite satisfied that the Court did regard QCL as a trade competitor with QGL, as it states so simply in the last bullet point at [37]. Mr Soper submits that that last phrase is confined to the PC19 proceedings. I agree. As a matter of fact there is no doubt that QCL and SPL are in competition for the best uses of appropriately zoned land in the Frankton area. QCL is the owner of around about 23 hectares of land.

[155] QCL and SPL are disagreeing on the appropriate zoning of their respective parcels of land. Let us allow that to be described as a form of competition or competing with each other. It does not follow they are in trade competition.

[156] In the absence of a statutory definition of "trade competitor", the qualifier "trade" can be understood by taking into account the mischief which was perceived to be afoot, as outlined above.

[157] There is no doubt that the Environment Court was perfectly aware that neither SPL nor QCL were directly active as retailers. It dubbed them as trade competitors by their association with Foodstuffs and with Progressive. SPL and QCL are property developers. Property developers develop property with an eye to the market for that property. That does not make them participants in the trade of the use to which the property is likely to be put. There is nothing in Part 11A of the RMA to suggest such an extended definition.

[158] Keeping in mind the overall policy of the RMA to allow all-comers to participate, there is no justification for extending the phrase "trade competitors" to property developers competing for the best use of land. I am satisfied that the Environment Court was in error of law in categorising SPL and QCL as trade competitors.

[159] Competition between land developers is an inevitable ongoing phenomenon. As the Environment Court had occasion itself to observe, if the market is left unregulated, land will trend towards its most valuable use.[32] It is the purpose of regulation of use of the land to prevent that. This is discussed very clearly in the dissent of Commissioner Fletcher, in *Foodstuffs*. The RMA is a mixture of statutory reform of the common law of nuisance, and providing for national, regional and local regulations of use of natural resources.

[160] Where the total amount of land is a limited resource, choices have to be made. The situation in Queenstown is a classic example of that. There is a very limited amount of flat land available in the Queenstown urban environment. There is a contest for the use of that land. There is a community interest to build a significant amount of low cost housing to enable workers to live in Queenstown and not have to commute all the way from Cromwell. There is a need for retail and commercial activities to support that residential population. But on top of this, there is a recognised and overall shortage in Queenstown of industrial land. If it was entirely left to market forces the local authority could not be sure that all those needs would be catered for on the Frankton Flats. In the long run, that would be to the overall detriment of the economic welfare and growth of the town. Hence, the Council, in its plan, has endeavoured to meet needs for all of those activities. It is in this context that owners of land located in Frankton Flats compete to get their land zoned for the highest valued use. That is not trade competition, as that word is used in the RMA. If it were, numerous planning disputes would be wrongly categorised as trade competition.

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32 *Foodstuffs* at [102].

[161] Rather, trade competition presents as the use of RMA arguments to serve the ulterior purpose of retaining or obtaining market share in unrelated markets. So a supermarket as a trade competitor stops a rival building another supermarket in its customer catchment, and uses every available RMA argument to do so. This is a wholly different game from property owners competing for the best use of their land.

[162] In [263] of the *Foodstuffs* decision, the Court said:

> [263] ...Quite apart from our duty to issue a decision as soon as practicable, the strong flavour of anti-competitive behaviour by QCL suggests a decision should be issued sooner not later.

[163] While it was unfortunate that the Environment Court labelled QCL as a trade competitor, and criticised its behaviour, I do not think it was an error of law which had material consequences. There is no evidence, beyond QCL's genuinely held perception, however, that the characterisation of QCL as a trade competitor influenced the decision, except possibly the decision to hear these applications, notwithstanding the commencement of the proceedings before the other division of the Environment Court in respect of PC19.

Result

[164] The appeal is allowed, for the reason that the decision has material errors of law, summarised at the beginning of this judgment. The case is remitted back to the Environment Court. In case there be any doubt, the application now requires re-evaluation against the current terms of PC19, as they have been amended by the February 2013 decision.

[165] Costs are reserved. If the parties cannot agree costs, I require counsel to circulate draft submissions on costs, not extending beyond five pages each. After that process, file the submissions. I will deal with these submissions on the papers unless there is a request for an oral hearing. Leave to apply in that regard is reserved.

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 243

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under section 120 of the Act
BETWEEN	SADDLE VIEWS ESTATE LIMITED AND K J TAYLOR
	(ENV-2013-CHC-93)
	Appellants
AND	DUNEDIN CITY COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner O Borlase
Hearing:	At Dunedin on 15 and 16, Site inspection 17 September 2014 (Final submissions received 10 October 2014)
Appearances:	T Shiels QC for Saddle Views Estate Limited and K J Taylor M R Garbett for the Dunedin City Council
Date of Decision:	26 November 2014
Date of Issue:	26 November 2014

SECOND DECISION (4A BRAESIDE)

A: Under section 290 of the Resource Management Act 1991 the Environment Court confirms the decision of the Dunedin City Council in respect of subdivision application SUB-2012-111 and land use application LUC-2012-588 in respect of the land legally described as Lots 6 and 10 DP 415033.

B: Under section 290 of the Act the appeal by Saddle Views Estate Limited is refused as it relates to the land at 4A Braeside, Mosgiel.



C: For the avoidance of doubt nothing in this decision affects Decision [2014] NZEnvC 221.

D: Costs are reserved. Any application should be made within 15 working days and any reply within a further 15 working days.

REASONS

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1. Introduction

1.1. The issue

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[1] As described in the First Decision (dated 17 October 2014) in *Taylor and Saddle Views Estate Limited*[1], this proceeding is about an application for resource consent for two subdivisions (with accompanying land use consents) by owners of two separate parcels of land south of Dunedin on the slopes of Saddle Hill. The appeal in respect of 103 Riccarton Road East was granted in that First Decision.

[2] The question for this second decision is whether resource consents should be granted to subdivide, and to build and use dwellings, on land owned by the appellant Saddle Views Estate Limited ("SVEL"), at 4A Braeside, Mosgiel[2]. Consents were refused by the Dunedin City Council ("DCC") and so SVEL appealed to this court.

1.2. The site, the proposal and its status

[3] 4A Braeside contains 16.0027 hectares. Its legal description[3] is Lots 6 and 10 Deposited Plan 415033 ("the site"). We annex marked "A" a copy of an undated plan prepared by Mr C Horne called "Proposed Subdivision of Lot 6 DP 415033.

[4] Lot 6 — the principal subject of the 4A Braeside application — contains 14.1051 hectares. While there is an approved building platform on its upper slopes, there is no development on this lot. The proposal lodged with the Council was first to subdivide Lot 6 DP 415033 into seven lots between 2.0 hectares to 2.1 hectares in area and second, for land use consent for dwellings[4] on each allotment subject to conditions similar to the Rural-Residential Zone yard provisions.

[5] The second allotment involved in SVEL's part of the application — Lot 10 DP 415033 — is a private road known as Hollands Drive. Its amalgamation with Lot 6 was a requirement of the Hearings Committee as part of the subdivision consent decision[5], creating these lots. It is proposed that Hollands Drive, being Lot 10 DP 415033, will be held in a separate title by a company complying with the requirements of the Securities Act (Real Property Developments) Exemption Notice 2007. Rights of way will be provided over this lot in favour of all other lots as necessary.

[6] The application plan attached to Mr Cubbitt's evidence[6] shows an extra allotment: Lot 8. This is a 0.3m wide lot containing 53m^2 situated between the lower part of Hollands Drive and the neighbouring property (10 Braeside). In the original application, this area was part of Lot 1. While the change was not discussed within the appeal or the evidence-in-chief, SVEL's planning witness Mr Cubbitt explained in his

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1 *Taylor and Saddle Views Estate Limited v Dunedin City Council* [2014] NZEnvC 221.
2 Dunedin City Valuation Number 27871-22708.
3 See Computer Freehold Register CFR456955.
4 AEE p 3 attached to the application to the DCC dated 19 December 2012.
5 DCC reference SUB-2007-202 (issued 29 July 2008).
6 P A Cubbitt, evidence-in-chief [Environment Court document 7].

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rebuttal evidence[7] that because this strip serves no purpose for Lot 1 it is to be amalgamated with Lot 10 (Hollands Drive).

[7] The site is zoned Rural in the Dunedin City District Plan ("the district plan"[8]) and the proposal is for non-complying activities. The high parts of the site are situated within the Saddle Hill Landscape Conservation Area as described in the district plan[9].

1.3. The matters to be considered and the witnesses who gave evidence on them

[8] The RMA contains a list of matters which must be considered by a consent authority. First, because the application is for non-complying activities, we must consider whether each activity passes the thresholds in s 104D of the Resource Management Act 1991 ("the Act" or "the RMA").

[9] If the application passes one of the thresholds, we must then, subject to Part 2 of the Act, have regard to:

(1) the actual and potential effects of the proposed activities (subdivision and residential development) on the environment[10];
(2) the relevant provisions of the relevant statutory instruments, including of the District Plan (and of any proposed plan)[11]; and
(3) the Council's decision[12].

We may also consider any other relevant matters[13].

[10] In relation to the phrase "subject to Part 2" in s 104(1), Mr Shiels referred to a passage in *Re Skydive Queenstown Limited*[14] ("*Skydive*") where the Environment Court wrote[15]:

> It is well-established that the words "subject to" show that Part 2 of the Act only needs to be resorted to if there is a conflict in or between any of the other three sets of considerations in section 104(1) of the Act: *Minister of Conservation v Kapiti Coast District Council*[16] relying on an earlier decision of the Court of Appeal — *Environmental Defence Society v Mangonui County Council*[17] (on the Town and County Planning Act 1977) where Cooke J stated "... the qualification "subject to" [is] a standard method of making clear that the other provisions referred to are to prevail in the event of a conflict".

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7 P A Cubbitt, rebuttal evidence para 3 [Environment Court document 7A].
8 The district plan is abbreviated to "Dunedin District Plan" in the footnotes.
9 Paragraph 14.5.3(c) Saddle Hill LCA [Dunedin District Plan p 14:25].
10 Section 104(1)(a) RMA.
11 Section 104(1)(b) RMA.
12 Section 290A RMA.
13 Section 104(1)(c) RMA.
14 *Re Skydive Queenstown Limited* [2014] NZEnvC 108.
15 *Re Skydive Queenstown Limited* [2014] NZEnvC 108 at [19].
16 *Minister of Conservation v Kapiti Coast District Council* (1994) 16 ELRNZ 234, [1994] NZRMA 385 at [8].
17 *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 at 260; [1989] 13 NZTPA 197 at 202.

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[11] In *Taylor v Dunedin City Council*[18] we wrote:

> Mr Shiels submitted that passage gives rather more weight to Part 2 than is justified, and that the phrase "subject to Part 2" is strictly a qualification on the obligation to have regard to the list of matters in s 104(1) RMA. We are not sure that we understand his submission. It seems to us that *Skydive* accurately summarised the law so far as it went. The gloss we would add is — and this may be what Mr Shiels meant — that *Environmental Defence Society v New Zealand King Salmon Co Ltd*[19] conveys an authoritative message that conflicts between provisions should not be superficially assumed. Plans should be read carefully and coherently as a whole where possible[20].

[12] We have since recalled that in *KPF Investments Limited v Marlborough District Council*[21] ("*KPF (Port Ligar*") the Environment Court had already acknowledged that *Skydive*:

> ... is not quite accurate. First, the reference to a "broad judgment" needs to be read subject to a recent Supreme Court decision — *Environmental Defence Society v The New Zealand King Salmon Company Limited*[22] .... Second, we observe that a further, potentially important difference between the RMA and the earlier statute is that the "subject to" formula is now used not merely to resolve a conflict between provisions in the statutory documents, but also to resolve a conflict between section 104(1)(a) to (c) considerations if they weigh on different sides of the scales. In other words the formula "subject to" now has substantive implications rather than merely instructions as to application of the relevant statutory documents.

[13] There may also be a question as to whether both *Skydive* and *KPF (Port Ligar)* need to be qualified further in the light of another passage in *Environmental Defence Society v NZ King Salmon* where the Supreme Court's majority decision which states of the relationship between Part 2 and the plan[23]:

> Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

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18 *Taylor et ors v Dunedin City Council* [2014] NZEnvC 221 at 23.

19 *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38; [2014] 1 NZLR 594; [2014] NZRMA 195 (SC).

20 *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [129] – [130] ; [2014] 1 NZLR 594; [2014] NZRMA 195 (SC).

21 *KPF Investments Limited v Marlborough District Council* [2014] NZEnvC 152 at [15].

22 *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38; [2014] 1 NZLR 594; [2014] NZRMA 195 (SC).

23 *Environmental Defence Society v New Zealand King Salmon Co. Ltd* [2014] NZSC 38 at [151]; [2014] 1 NZLR 594; [2014] NZRMA 195 (SC).

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However, we received no submissions on that issue. In any event the Council's evidence and submissions emphasised what they submitted were the clear objectives and policies of the district plan. We will consider those shortly.

[14] Two witnesses were called for each party: Mr M W Moore, a landscape architect, and Mr P A Cubbitt, a planner for the applicant; Dr M Read, a landscape architect, and Mrs L C Darby, a planner, for the Council.

[15] We have briefly described SVEL's proposal. Further details will emerge as we discuss the evidence. The scheme of this decision is next to describe (briefly) the relevant objectives and policies in the Dunedin City's district plan and then in the succeeding parts of this decision:

- to describe the "environment" in which the proposal is set (part 2);
- to predict any adverse effects on that environment (part 3);
- to consider whether the proposal passes either of the threshold tests in s 104D of the RMA (part 4);
- to make an overall evaluation of the proposal having regard to all the matters we are required to (part 5);
- coming to a result (part 6).

1.4. The objectives, policies and rules of the district plan

[16] Four chapters of the Dunedin District Plan are particularly relevant to the applications: Chapter 4 (Sustainability), Chapter 6 (Rural and Rural-Residential Zones), Chapter 14 (Landscape), and Chapter 16 (Subdivision Activity). We adopt the general description of the relevant objectives in the First Decision[24]. We only need add one thing here. The planner called by SVEL, Mr Cubbitt, drew our attention to the sustainability section[25] of the district plan and suggested this over-rides (our word) later provisions in the district plan. It is possible and can be useful to write a plan that way[26]. We consider that the Dunedin District Plan does not work that way: it generally complies with the cascade model where earlier general objectives are particularised by later specific ones. The principle stated in *New Zealand Rail Limited v Marlborough District Council*[27] applies:

> … where there are relevant general objectives and policies that might be thought to be in conflict with more specific relevant objectives and policies, we take the view that for the purposes of section 105(2)(b)(ii) of the Act it is the latter that should be regarded as being applicable, otherwise absurd results could follow. A general objective and policy could be read as precluding a development referred to in a more specific objective and policy.

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24 *K J Taylor and Saddle Views Estate Limited v Dunedin City Council* [2014] NZEnvC 221.
25 Policy 6.3.7 [Dunedin District Plan p 6:18].
26 See, for example, Chapter 4 of the Queenstown Lakes District Plan.
27 *New Zealand Rail Limited v Marlborough District Council* C36/93 at p 146.

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2. The environment of the site

2.1. What is the "environment" in s 104(1)(a) and s 104D(1)(a)?

[17] A question arose in the evidence as to what the "environment" is in the context of this application. Mr Cubbitt, the planner for the applicant, explained the problem this way[28]:

> Under the heading of "Amenity Values and Landscape Character" … , Mrs Darby [the Council's planning witness] discusses[29] the starting point from which environmental effects should be assessed. She rightly notes that we disagree on this. Her view is that it needs to be in the context of the zone statement on amenity values while my position is that it must be considered in the context of environment as it exists.
>
> Neither the Act's definition of 'environment' nor Section 104(1)(a) of the Act make reference to the provisions of the zone within which the environment is located. The 'zoning' of land is a legal construct, neither a natural nor a physical resource. To start an effects assessment from the environmental ideal as expressed by zone provisions is unrealistic and would lead to an assessment of effects that is out of kilter with the real world.

[18] As it happens the (rather vague[30]) concept of a "real world" analysis was referred to by Fogarty J when considering the "environment" in *Queenstown Central Limited v Queenstown Lakes District Council* (called *"Pak 'N Save"*)[31]. He wrote:

> Section 104D … calls for a "real world" approach to analysis, without artificial assumptions … creating an artificial future environment. Read as a whole (the Court of Appeal decision in) *Hawthorn* endorses having regard to [an] objective … and its policies.

Fogarty J actually went rather further than that. First, he recognised that the first threshold test "… is plainly intended to be applied without the obligation to have regard to either the operative district plan or proposed district plan" [32]. We respectfully agree. But then he continued:

> In context, it may be appropriate, and was here, to recognise that there was a plan change in process implementing objective 6 and policies 6.1 and 6.2. [Emphasis added].

We are uncertain about that because it both appears to conflict with earlier authorities and appears to trespass on questions of fact.

[19] Higher authority on the meaning of the "environment" is to be found in *Queenstown Lakes District Council v Hawthorn Estate Limited*[33] (shortened to

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28 P A Cubbitt, rebuttal evidence paras 5 and 6 [Environment Court document 7A].

29 L C Darby, evidence-in-chief para 33 *et ff* [Environment Court document 10].

30 Who would ever admit to a "unreal" analysis?

31 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239 at [85].

32 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239 at [100].

33 *Queenstown Lakes District Council* v *Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [57].

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"*Hawthorn*"). There the Court of Appeal identified the central question in section 104 (rather than s 104D) of the Act as[34]:

> ... whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not implemented, were implemented in the future ...

The Court examined numerous provisions in the Act in which the "environment" was referred to, then analysed[35] the scheme and purpose of the RMA and concluded:

> In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

That was in the context of a plan change which was beyond challenge — unlike the disputed plan change before Fogarty J in *Pak 'N Save*.

[20] Recently, in *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*[36], the Court of Appeal stated:

> In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. [Emphasis added].

The cautious reference to a "degree of futurity" suggests that the Court of Appeal is anxious for consent authorities, when considering applications for resource consents, to avoid speculating too widely about the future environmental setting of each case.

[21] It is also relevant to this case — since SVEL's witnesses gave evidence that the area is "in transition" — that in *Hawthorn* the Court of Appeal was contemplating environments where change is occurring rapidly. Cooper J wrote[37]:

> Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur. However, even those areas would have an applicable policy framework in the district plan that, together with the rules, would give considerable guidance as to the nature and intensity of future activities likely to be established on surrounding land.

Quite clearly the Court of Appeal contemplates having regard to operative or proposed and accepted objectives and policies. It does not refer to having regard to proposed but

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34 *Queenstown Lakes District Council* v *Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [11].

35 *Queenstown Lakes District Council* v *Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [57].

36 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 at [80].

37 *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (2006) 12 ELRNZ 299 at [61] (CA).

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challenged objectives and policies when predicting the reasonably forseeable environment.

[22] Finally, we record our understanding that finding the existing and predicting the future state of the environmental setting of a proposal is a factual matter, not the exercise of a discretion — relying on the Court of Appeal's statement in *Hawthorn*[38]:

> Mr Wylie submitted that, properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.
>
> We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion.

We observe that if there is no discretion as to what constitutes the environment then it is, or should be, difficult to raise a question of law in relation to the factual or predictive findings of a consent authority or the Environment Court (unless the stricter standards of the *Wednesbury*[39] type are breached).

[23] The reasonably foreseeable future environment must be realistically and practically assessed. As the Court of Appeal also explained in *Hawthorn* there are limits to the enquiry into the future state of the environment[40]:

> ... In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred [in the High Court] when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed.

[24] So Mr Cubbitt is, with respect, wrong when he said that the provisions of a plan (or for a zone within a district plan) should not be considered when describing the environment "as it exists". He overlooked that the environment is also the reasonably foreseeable future environment. However, there is an element of truth in Mr Cubbitt's concept that the "environment" in s 104 (and s 104D) is not an "ideal". Objectives and policies may not be backed up by rules giving precise effect to them. We consider that if the district plan's objectives and policies contemplate different activities then it is impermissible to prefer one over another as being the likely future environment on the basis of a preference for one type of activity (but see the High Court's decision in *Pak*

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38 *Queenstown Lakes District Council* v *Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [89] and [90].

39 *Associated Provincial Picture Houses Limited Wednesbury Corporation* [1948] 1 KB 223 (CA).

40 *Queenstown Lakes District Council* v *Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [84].

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'N Save[41] where the court appeared to do precisely that). That is of some importance in this proceeding because (as we shall show shortly) the objectives and policies for the Rural Zone contemplate both rural and rural-residential activities.

2.2. Findings about the environment of 4A Braeside

[25] The site is currently split into four large paddocks together with one small paddock and some stockyards by the access road on the western boundary[42]. The paddocks are on the crest of a broad ridge on the north-western slopes of Saddle Hill. Approximately one-third way down the site a shallow gully splits the ridge into two with most of the flatter land on the south-west side of this gully. While the broad slopes of the ridge are in pasture, the gully has been planted in exotic trees, presumably to stop erosion[43].

[26] The bedrock (not visible on the site) under the site is complex: it consists of sedimentary rock[44] overlain by marine sedimentary rock and basaltic (volcanic) rocks from the Saddle Hill volcano. However, the top 3.3 to 7.5 metres of the site are a "colluvium"[45] of volcanic boulders and clayey silt (2 – 4 metres down) with a layer of loess (windblown dust) of 1 – 3 metres and 0.3 to 0.5 metres of topsoil.

[27] The geotechnical assessment which is part of the Assessment of Environmental Effects also draws attention[46] to the fact that a slip from (probably) the early 1900s has its head scarp within Lot 4 and its run-out downslope through the eastern margins of Lots 1 and 3. The slopes on either side of the ridge — off-site — show signs of extensive movement in the past. The assessment continues "The only sign of mass movement in the vicinity of this slide is shallow topsoil creep in the eastern part of the head scarp area. The down-slope extremity (nose zone) of the slide displayed no sign of deformation at the time of examination ... [which] followed two weeks of heavy rainfall".

[28] The Assessment also claims that suitable sites for the construction of stable building platforms are available on all seven lots. Despite that we consider that if the consents are to be granted, there would need to be at least a condition requiring individual geotechnical reports and engineering certification[47] under NZS 3604 before any building permit was granted for any new lot. We note that there is an approved

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41 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239.

42 M Read, evidence-in-chief para 33 [Environment Court document 9].

43 M Read, evidence-in-chief para 33 [Environment Court document 9].

44 The Henley formation of schist and greywacke pebbles and boulders and the Taratu Formation of quartz pebbles and granules in a sand matrix: J K Lindqvist *Geotechnical Assessment* September 2012 p 5 (attached to the AEE) [Part of Environment Court document 2].

45 J K Lindqvist *Geotechnical Assessment* September 2012 p 5 (attached to the AEE) [Part of Environment Court document 2] at p 6.

46 J K Lindqvist *Geotechnical Assessment* September 2012 p 5 (attached to the AEE) [Part of Environment Court document 2] at p 10.

47 See Rule 18.6.1(t) [Dunedin District Plan p 18-22].

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building platform on the site. It is located approximately in the centre of proposed Lot 7. No dwelling has been built, or even commenced as yet.

[29] Saddle Hill is one of the "significant landform features"[48] listed in the NZ Geological Society Geopreservation Inventory for the Otago Region. We were advised by Mr Moore, and no other witness demurred, that the area identified in the Inventory is above Saddle Hill Road. The proposed developments will have no impact on this area and no impact on the significance of Saddle Hill as a landform feature.

[30] We have recorded that the top half of the site — including most of Lot 4 and Lots 5 to 7 — is within the "Saddle Hill Landscape Conservation Area". That is described in Section 14 (Landscape) of the district plan as[49]:

> ... contributing to the setting, visual containment and skyline for the Taieri Plains and Lower Kaikorai areas. Its visual quality therefore has a substantial impact on the visual quality of wider areas.

We find that one of the characteristics of the site's environment is the skyline which is the ridgeline of the northern part of Saddle Hill and the main hilltop ridges either side. That skyline is generally defined by natural elements[50] rather than buildings. The development proposed is on the lower slopes and will have no impact on the skyline.

[31] Mr Cubbitt described the area in this way[51]:

> The general development pattern in this landscape is a progression of residential density from a relatively high density in the Residential 1 zone along the State Highway, through to Residential 6 and rural-residential development as you move up the slope towards the largely un-built upper slopes of the Saddle Hill. The area is in 'transition', a fact illustrated by the plans **attached** as Appendix 2 and 3 and the various figures produced by Mr Moore. These plans highlight that the surrounding environment is a mix of zonings and a mix of undersized rural allotments ranging in area from 0.4 up to 6.7 hectares (with most being in the 1.5 to 2 hectare range) which defines the character of this area. Several of these small non-complying rural sites have been created reasonably recently ...

From Mrs Darby's responses for the Council, it is apparent that many of the undersized lots in the vicinity of 4A Braeside are below the site and in the vicinity of the Main South Road. Further, most were subdivided before the current district plan came into force.

[32] Dr Read described the environmental context as follows[52]:

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48 Section 14.5.3 [Dunedin District Plan p 14:25].
49 Section 14.5.3(c) [Dunedin District Plan p 14:25].
50 Para 14.5.3 [Dunedin District Plan p 14:25].
51 P A Cubbitt, evidence-in-chief para 12 [Environment Court document 7].
52 M Read, evidence-in-chief para 20 [Environment Court document 9].

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> ... The lower slopes are more complex in terms of their topography and vegetation cover which enables the absorption of small scale change without significant effects on the wider landscape character. The middle third, approximately, of the hillside has a limited ability to absorb development consisting of more expansive open slopes. The open parts of the slopes provide the most coherent character feature within this landscape character area and fragmentation and a reduction of openness are the most significant threats to this. The northern boundary of the SHLCA approximately follows the division between the lower and middle slopes of the hillside. The upper slopes have the lowest [capacity] to absorb development being steep and elevated.

[33] Despite what Mr Cubbitt wrote there is strictly (as in zoned) no rural-residential development in the vicinity of the site. The nearest zoning is east of the site on Coalstage Road about one kilometre away. The land immediately to the north-east of the site is the Kinmont subdivision which is zoned Residential 6. The surrounding land is otherwise zoned rural. However, we accept that despite the rural zoning, the area between the site and SH1 contains a number of houses or approved building platforms for houses on sections which are smaller than 15 hectares. Indeed, the area along SH1 is fairly similar in character to the Kinmont subdivision (zoned residential) to the north of the site. We annex marked "B" a copy of a plan[53] prepared at the court's request by the Council's planner, Mrs Darby, and lodged after the hearing, showing those houses and platforms. There has been no challenge by the appellant as to the accuracy of that plan and indeed it is very similar to the plan produced[54] by Mr Cubbitt for SVEL. We accept that houses are likely to be built on the already consented platforms[55], and that will have some effect on the environment by increasing the density of housing and curtilage areas.

[34] We also find that the environment of the site may be "in transition" in the sense that it is changing over time from a typical rural working landscape with few houses to a lifestyle area with more up-market (as opposed to utilitarian) houses on 15 hectare blocks on the middle and upper slopes of Saddle Hill. We have found it is likely that, quite independently of the SVEL proposal, up to seven more houses[56] will be built in the relevant environment because there are existing approved building platforms. Mrs Darby stated[57] it is only the lower slopes which are becoming more urban in character. The site itself is in the Rural Zone and it cannot be said to be in transition from a rural character to an urban character. It is simply moving from one type of rural character to another.

3. Predicting any adverse effects on the environment

3.1. Introduction

[35] In relation to the effects of the proposal, the Dunedin District Plan contains three relevant sets of assessment matters: for rural use development (in Chapter 6 of the district plan), for landscape (Chapter 14) and for subdivision activities (Chapter 18).

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53 L C Darby, Exhibit 10.2 being Plan 2B lodged after the hearing [held with Environment Court document 10].

54 Appendix 2 to P A Cubbitt, evidence-in-chief [Environment Court document 7].

55 Marked in yellow on L C Darby's Figure 2B.

56 Transcript pp 83 and 84.

57 L C Darby, evidence-in-chief para 38 [Environment Court document 10].

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There are numerous assessment matters, some of them overlapping and some irrelevant, so we do not identify them all specifically. However, we have considered them all, and we identify the effects of the subdivision and development under the most relevant assessment matters next. In addition to the direct effects we must have regard to the cumulative effects[58] and we discuss those where they were raised in the evidence.

[36] When assessing the probability and impact of all the identified adverse effects we consider those effects as having been remedied or mitigated[59] as stated in the applicant's proposal, as suggested in cross-examination, and as volunteered in counsel's closing submissions. In particular, mitigation[60] measures are proposed for the site to minimise the adverse effects of buildings and associated development on rural character and amenity. In addition to controls on building design and appearance, additional plantings are proposed that will provide compensatory strengthening of the natural character in the gully landforms of the site. Colours of buildings are to have a low reflectivity value (less than 30%).

3.2. The subdivision and on-site impacts

[37] The assessment matters for subdivision consents are in Section 18 of the district plan. We need to consider first the lot size, dimensions and layout[61]. Each of the lots is 2.0 hectares or a little more in area. That figure was chosen by the applicant because it is the (minimum) size of rural residential allotments[62].

[38] In Mr Moore's opinion[63] the 4A Braeside subdivision layout relates well to the topography and does not create a requirement for significant earthworks that would unacceptably modify the character of the landform. We find the first part of that assessment is rather exaggerated in that the layout of the lots has little regard to topography. It seems to have been determined by the wish to ensure that each of proposed Lots 1 to 7 is 2.0 hectares or a little more and that there is a suitable building platform on each. In most cases, this has resulted in approximately rectangular sections, but Lots 1 and 3 both straddle the central gully so that there is pasture in the northern side of those two lots which is disconnected from the obvious house sites.

[39] There are no significant heritage, ecosystem or tangata whenua values[64] associated with the site at 4A Braeside. There are generic natural character values associated with the SHLCA that will be modified to a minor extent by the proposed development, but for reasons already discussed we consider this acceptable in this context. Biodiversity will be enhanced to a minor extent by the proposed additional tree planting.

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58 Rule 6.7.4 [Dunedin District Plan p 6:41].
59 Rule 14.7.2 [Dunedin District Plan p 14:32].
60 Rule 14.7.2 [Dunedin District Plan p 14:32].
61 Rule 18.6.1(q) [Dunedin District Plan p 18:21].
62 Under Rule 6.6.1(ii) [Dunedin District Plan p 6:36].
63 M W Moore, evidence-in-chief para 92 [Environment Court document 6].
64 Rule 18.6.1(s) [Dunedin District Plan p 18:21].

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[40] As for the provision of building platforms for dwellings, the general rules do not require these to be identified so none are for Lots 1 to 3. The witnesses are agreed that each of those lots is likely to have a suitable platform close to Hollands Drive. In contrast, Lots 4 to 7 are all above the SHLCA boundary and so each of those lots is treated in its entirety as a large building platform: that is, a dwelling could be erected anywhere on them. To manage the uncertainty, SVEL has proposed that the Rural-Residential yard provisions[65] are applied (although there is no particular reason they should be) to these undersized Rural-zoned lots, then residential activity could be established within 10.0m of any side or rear boundary. On the appropriateness[66] of building dwellings on the proposed lots Mr Moore wrote[67]:

> At 4A Braeside, Lots 4, 5, 6, and 7 are within the Saddle Hill Landscape Management Area. Landscape Building Platforms are effectively sought for these sites but without restricting building sites to any specific part of the Lots. The impact of buildings on landscape values is controlled by proposed restrictions on building footprint, height, colour and the scale of accessory buildings rather than by requiring them to be within an identified area within the lot. Given the relatively small lot size there is limited scope to influence openness through identifying a specific building platform location, and the attendant restrictions of the development options of future owners of doing so, is not considered justifiable.

[41] Ms Darby was concerned that such large building platforms were put forward by SVEL. In her opinion, those platforms negated the purpose of the rule requiring building platforms to be identified, which is (in her view) to minimise adverse landscape effects. We agree that is a purpose of the controlled activity rule[68] and that it is not met in this case.

[42] In relation to the land use consents we must also have regard to the scale and bulk[69] of any buildings that could be placed on those platforms. Buildings are to be limited to 8 metres in height and a maximum footprint of 350m^2, and a condition will be imposed that there is only one ancillary building (maximum footprint of 100m^2; maximum height 5 metres) on each site.

[43] Another matter to assess under the district plan is the possibility of future further subdivision[70]. We note that is a potential accumulative effect, which is not relevant to s 104(1)(a) — *Dye v Auckland Regional Council*[71] — but can only be considered under s 104(1)(c) as another possibly relevant matter. We return to this later, briefly.

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65 Rule 6.6.2(i) [Dunedin District Plan p 6:36].
66 Rule 18.6.1(h) [Dunedin District Plan p 18:19].
67 M W Moore, evidence-in-chief para 89 [Environment Court document 6].
68 Rule 14.6.4(a) [Dunedin District Plan p 6:14:30].
69 Rule 6.7.9 [Dunedin District Plan p 6:42].
70 Rule 18.6.1(k) [Dunedin District Plan p 18:20].
71 *Dye v Auckland Regional Council* [2001] NZRMA 513; [2002] 1 NZLR 337 (CA) at [41].

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3.3. Effects on rural character and openness

[44] An important issue which the district plan requires us to have regard to is the effect (at the appropriate places) — including the cumulative effect — of the proposed development on the rural character[72] and open nature[73] of the environment. For that part of the site above the SHLCA line some additional qualities are identified in the district plan as required to be conserved[74] and we discuss that issue next.

[45] The explanation[75] to objective 6.2.2 of the district plan identifies the "key elements" of rural character as being:

- predominance of natural features over human made features;
- high ratio of open space relative to the built environment;
- significant areas of vegetation in pasture, crops, forestry and indigenous vegetation;
- [p]resence of large numbers of farmed animals;
- low population densities relative to urban centres;
- narrow unsealed roads;
- absence of urban infrastructure.

We discuss these below where they are most relevant.

3.4. Conserving the qualities of the Saddle Hill Landscape Conservation Area

[46] In relation to the upper part of the site — Lots 4 to 7 — Dr Reid said that the district plan sought to "preserve"[76] the qualities of the SHLCA. That is not the correct standard — the landscape section of the Dunedin District Plan has a hierarchy of measures — from the top down: protecting, preserving, and conserving — and the SHLCA is at the lower end of these, not in the middle. Section 14 of the district plan speaks of the features and characteristics to be "conserved"[77] in a landscape conservation area — as the name suggests — (whereas ONLs are to be protected[78], and coastal areas preserved and protected[79]).

[47] The first characteristic of the SHLCA to be conserved is the visual[80] dominance of natural landform. Mr Moore acknowledged that the proposed 4A Braeside development will reduce the relative dominance of natural elements over built "to an extent" by the introduction of six additional houses and associated driveways and sheds. In his evidence-in-chief, Mr Moore wrote[81]:

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72 Rule 6.7.4(iii) [Dunedin District Plan p 6:41].
73 Rule 6.7.15 [Dunedin District Plan p 6:43].
74 Rule 14.7.4 [Dunedin District Plan p 14:32].
75 Dunedin District Plan p 6:6.
76 M Read, evidence-in-chief para 71 [Environment Court document 9].
77 Para 14.5.3(c) [Dunedin District Plan pp 14:25 *et ff*].
78 Objective 14.2.1 [Dunedin District Plan p 14:5].
79 Objective 14.2.2 [Dunedin District Plan p 14:11 *et ff*].
80 Para 14.5.3(c) and Rule 14.7.4 [Dunedin District Plan pp 14:25 and 14:32].
81 M W Moore, evidence-in-chief para 90 [Environment Court document 6].

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> Landscaping requirements are included but at a macro rather than building site by building site level. The aim of the planting proposed is to reinforce the natural character of the gully areas to balance built impact elsewhere on the site. It can be anticipated that future owners will establish shelter and amenity plantings and these will serve to screen and soften the impact of buildings. Give the wider context and the land backdrop of houses from surrounding viewpoints, it is not considered necessary to specify particular requirements for this.

[48] In Mr Moore's opinion[82], the density of development proposed for 4A Braeside will sit comfortably between the Residential 6 density in the adjacent Kinmont subdivision to the northeast and the sparser housing in the rural landscape above the site. The buildings provided for will be similar in scale and character to those in the rural area surrounding. He proposed that conditions would integrate plantings and fences with the rural context. In addition to that evidence for the applicant, SVEL volunteered a landscaping condition[83] and we will take that into account as likely to mitigate some of the landscape effects.

[49] Dr Read on the other hand was of the opinion that adding six more dwellings on the site (in addition to one already consented on Lot 6) was "completely incompatible"[84] with "the open rural landscape" in which the site is set. She considered that the proposed restrictions on the size and bulk of the proposed dwellings would have either a small or no mitigatory effect because "these are still potentially large two storey buildings"[85].

[50] With some reservations, given Dr Read's overstatement of the depth of conservation required by the district plan, we prefer her evidence and find that the visual dominance of the natural landform and other elements will be reduced in a more than minor way by the preparation of building platforms, erection of dwellings and the establishment of amenity planting (even if all these are mitigated).

[51] One of the other characteristics of the embedding environment is the "extent, integrity, coherence and natural character" of the "landform, streams and areas of indigenous vegetation"[86]. Some of those qualities are absent from the site — any streams are ephemeral and the only areas of native vegetation are a few mature plants in boundary planting or as under-storey plants in the central gully/slip area.

[52] Earthworks and roading[87] would have some effect on the naturalness of the landform, although that could be mitigated by design features and reinforced by conditions. The most significant effects on the landform would be caused by the presence of the houses, developed curtilage, driveways and shelter/boundary plantings or combination. Landform coherence will be reduced to some extent by the introduction

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82 M W Moore, evidence-in-chief para 74 [Environment Court document 6].
83 See Transcript pp 80 – 81 and closing submissions.
84 M Read, evidence-in-chief para 74 [Environment Court document 9].
85 M Read, evidence-in-chief para 54 first bullet point [Environment Court document 9].
86 Para 14.5.3(c)(ii) [Dunedin District Plan p 14:25].
87 Paragraph 14.5.3(c)(iv) [Dunedin District Plan p 14:25].

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of buildings and plantings on what is now open grassland. A concrete drive on the fall line as in the adjacent Kinmont subdivision[88] would not be appropriate, but that could be addressed by conditions. On the positive side, the natural character of the gully areas and watercourses will be enhanced by additional plantings and a majority of us consider this outweighs[89] the issue as to landform coherence in importance. No indigenous vegetation will be impacted.

[53] A characteristic of the area to be had regard to is the extent and quality of views from the principal public routes and viewpoints[90]. We consider that in a later part of this decision. In Dr Read's opinion[91]:

> ... the proposed development ... is not sympathetic[92] to the form and character of the landscape in its vicinity, breaking up a significant area of open pasture and altering its character from pastoral to residential. It is not sympathetic to the scale of the landscape in that it proposes to locate seven dwellings on a prominent slope.

Dr Read has used the word "sympathetic"[93] rather than "compatible" as in the particular standard[94], but nothing turns on that.

3.5. Effects on neighbours

[54] The landscape witnesses, Mr Moore and Dr Read, agreed[95] about the intervisibility of proposed development with existing dwellings and building platforms. They were also generally agreed regarding the magnitude of the effects of the visibility of each extra dwelling on the visual amenity of some nearby lots[96].

[55] We should also have regard to the effect of the bulk and location[97] of possible houses (and outbuildings) upon the amenity values[98] of neighbours, and on the surrounding areas. Mr Moore's initial opinion in relation to other visual effects was[99]:

> From the residential properties adjacent to 4A Braeside, the proposed development will have minimal effects on amenity due to its location behind, and away from the main focus of northward views, and in the case of Lots 1 – 4, screening by the gully vegetation. A dwelling on proposed Lot 5 could be built to 10m from the boundary with the residential sections below under the proposed rule framework but given the access point and the better views available at

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88 Transcript p 82.
89 Rule 18.6.1(g) [Dunedin District Plan p 18:19].
90 Para 14.7.1 [Dunedin District Plan p 14:32].
91 M Read, evidence-in-chief para 69.
92 See Rule 14.7.3 [Dunedin District Plan p 14:32].
93 Presumably with reference to rule 14.7.3 [Dunedin District Plan p 14:32].
94 Rule 14.7.5 [Dunedin District Plan p 32].
95 Joint Landscape Statement para 11 [Environment Court document 6B].
96 Lot 1 and Lot 2 DP 360804, Lot 1 DP 400513 (incorrectly identified in Dr Read's evidence as Lot 1 DP 415033), Lot 8 DP 415033, and Lots 23 and 26 DP 341800.
97 Rule 6.7.9 [Dunedin District Plan p 6:42].
98 Rule 6.7.15 [Dunedin District Plan p 6:43].
99 M W Moore, evidence-in-chief para 51 [Environment Court document 6].

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the top of the lot, this is unlikely. There were no submissions against the proposal from the owners of these properties, nor were there any from owners of the adjacent rural properties.

[56] Dr Read produced a table called "Summary of Effects on the Visual Amenity of Surrounding Sites"[100] based on the proposition that some of the building platforms would allow buildings much closer than the Rural Zone standards. When cross-examined by Mr Shiels[101], she conceded that if building platforms had been defined as part of the application that might "potentially, but probably not" address her concerns[102].

[57] We are unsure what that means in terms of her assessment of the effects of subdivision on neighbours. It appears to mean that even if optimally sited so as to minimise adverse visual effects for neighbours, the proposal will still have adverse visual effects. We now consider the evidence about the effects on each of neighbouring properties.

101 and 107 Riccarton Road

[58] Dr Read considered the effect of development on the site on views from houses on the ridge to the south (above and north of Mr Taylor's property[103] would be moderate[104] in the case of 101 Riccarton Road East[105] and moderate to significant[106] in the case of 107 Riccarton Road East[107].

[59] Mr Moore's response[108] was that the adverse effects on Lots 2 (101 Riccarton Road East) and 4 DP 415033 (107 Riccarton Road East) would be minor due to the distances (a minimum of 300 metres) at which the proposed houses would be seen. We prefer his evidence in relation to the effects on view from these houses.

4B Braeside (Lot 8 DP 415033)

[60] Dr Read considered the visual effects of development on the site would be likely to be "significant to very significant adverse"[109]. Mr Moore fairly agreed[110] that there would be adverse effects on a house at 4B Braeside (Lot 8 DP 415033). He proposed (and SVEL agreed to this) that any house on Lots 6 and 7 be set back from the boundary by 30 metres and any building be restricted to a maximum height of six metres.

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100 M Read, evidence-in-chief Appendix 9 [attached to Environment Court document 9].
101 Transcript p 88 at line 25.
102 Transcript p 88 at line 25.
103 The subject of the First Decision in these proceedings.
104 M Read, evidence-in-chief Appendix 9 [Environment Court document 9].
105 Lot 2 DP 415033.
106 M Read, evidence-in-chief Appendix 9 [Environment Court document 9].
107 Lot 4 DP 415033.
108 M W Moore, Rebuttal evidence para 6 and Appendix R1 [Environment Court document 6A].
109 M Read, evidence-in-chief Appendix 9 [attached to Environment Court document 9].
110 M W Moore, Rebuttal evidence para 14 [Environment Court document 6A].

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4C Braeside (Lot 7 DP 415033)

[61] There is no development on this property at present. However, a house at 4C Braeside would stand above all lots (and houses) on the proposed subdivision, even if it is behind a row of pine trees. In addition a closer house site on SVEL's land has already been approved by resource consent. Consequently the permitted baseline on the site would allow slightly greater adverse effects on the views from 4C Braeside. We discount Dr Read's evidence that the visual amenity effects here would be "moderate to significant" because she does not appear to have taken the baseline into account. In the circumstances we prefer Mr Moore's evidence that the visual amenity effects of the proposal on 4C Braeside would be small[111].

Lot 9 DP 415033 (231 Morris Road)

[62] Dr Read assessed the adverse effects on this property as "significant to very significant". Mr Moore stated that[112]:

> The main northward outlook from this property is over the Residential 6 area of Braeside (only approximately 120m distant) and the orientation of the house is to the north-east and away from 4A Braeside. Proposed Lots 6 and 7 are behind (to the southwest) of the house and proposed Lot 5 is beside it (to the west). Whilst development on Lot 5 in particular, is likely to have a small impact on spaciousness and the proximity of adjacent development, there will be minimal impact on the main outlook from this house.

Mr Moore added that given the best viewpoints on Lot 5 are from the southern part of the lot, and that the proposed access to Lot 5 is from the south, it "is most likely that a house on proposed Lot 5 would be built in the southern part of the site and well out of view-shed of [the] dwelling [at 231 Morris Road]"[113]. We accept that.

Summary

[63] We conclude that, even with mitigation by siting and other conditions, there are likely to be adverse visual effects on some properties which are more than minor.

3.6. Visual effects from the Taieri Plains and other places

[64] There is a raft of assessment matters requiring the consent authority to have regard to the effects of the visibility[114] of the proposed activity or development from the main public viewpoints and[115] to its visual impact on visual amenity and significant views.

[65] The site generally has moderately high levels[116] of visibility being on the hill slopes overlooking Mosgiel and the North Taieri (although often screened from these places by foreground trees or structures). The house sites are a considerable distance

111 M W Moore, Rebuttal evidence para 11 [Environment Court document 6A].
112 M W Moore, Rebuttal evidence para 13 [Environment Court document 6A].
113 M W Moore, Rebuttal evidence para 13 [Environment Court document 6A].
114 Rule 14.7.1 [Dunedin District Plan p 14:32].
115 Rule 6.7.13 [Dunedin District Plan p 6:42].
116 M W Moore, evidence-in-chief para 70 [Environment Court document 6].

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(more than 1 km) from the main public roads and viewpoints from which they could be seen. The viewing distances combined with the mitigation measures proposed (particularly colour controls), and the landform backdrop, will be effective in minimising the visual impact of buildings on the rural landscape character. Existing trees on the site, together with trees on surrounding properties, are likely to provide partial screening from various viewpoints and will help to integrate buildings.

[66] Various viewpoints on roads were chosen by the landscape experts as representative of the more distant views of the site: Main Street (Mosgiel), the Joe Brown Reserve, SH1 and several roads across the Taieri Plains.

Main Street Mosgiel

[67] It is likely that at least three dwellings on 4A Braeside will be visible as one faces south-west in the main street of Mosgiel (Gorden Road/SH87). Mr Moore considered any adverse effects on the views would be minor (referring to his Figure 14A). Dr Read referred to that figure and considered that "the effect would be adverse and its extent moderate"[117].

Joe Brown Reserve

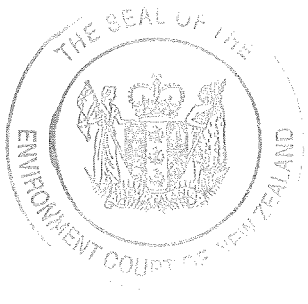
[68] This viewpoint is on a public reserve approximately 1.2km from the site. Mr Moore considered[118] "that it is one of the places most impacted visually by the proposed developments in terms of general visibility of the site and proximity". It was also chosen as generally representative of views toward the area from the north / north-easterly direction including the urban area of Mosgiel. However, few viewpoints have such unimpeded visual access from this direction as the Joe Brown Reserve, although Mr Moore also opined that[119] "views southward are not the main focus due to screening by the reservoir structure and trees". Having had the benefit of a site inspection, we accept that evidence.

Visual effects from State Highway 1 and other roads

[69] State Highway 1 is the most important road in the local environment[120]. The highway follows the toe of the hills in a northeast / southwest orientation. That location, together with the shape of the landform and the presence of trees combine to ensure that there are no visual effects of any significance from this route[121]. Dr Read agreed[122] that the effects are not "significant".

[70] Chain Hills Road is a secondary rural road located on the hills to the northeast of the sites. It provides access to a Rural-Residential area on Chain Hills and is about 1.4km distant to the northeast. There are views of the 4A Braeside property from a short

117 M Read, evidence-in-chief para 42 [Environment Court document 9].
118 M W Moore, evidence-in-chief para 36(b) [Environment Court document 6].
119 M W Moore, evidence-in-chief para 36(b) [Environment Court document 6].
120 See Assessment matter (ii) in Rule 6.7.13 [Dunedin District Plan p 6:42].
121 M W Moore, evidence-in-chief para 46 and Figure 2 [Environment Court document 6].
122 M Read, evidence-in-chief para 105 [Environment Court document 9].



section of this road. In Mr Moore's opinion[123] only three houses (those on Lots 5, 6 and 7) will be visible. These three houses, together with houses on two higher consented sites, will be seen extending along the broad spur from the Braeside residential area below. He assessed these as integrating readily, especially considering their proposed colour mitigation controls and the land backdrop.

Riccarton Road West, approximately 700m north of the railway

[71] From this viewpoint the proposed house sites are approximately 2 – 2.5km away. Mr Moore described this viewpoint as[124] "generally representative of an open view toward the properties from a north-westerly angle. It is far enough back from the hills to allow the lower slope areas involved to be seen as an entity without significant foreground screening but not so distant as to minimise visual effects unduly". He considered the effect of six extra dwellings on the site would reduce the dominance of natural elements over built[125]. In Dr Read's view, the addition of five visible dwellings in this view would make the site look like an extension of the Kinmont (Braeside) subdivision to the east of the site[126]. In her opinion, that would have a "moderately significant" adverse effect on these views[127].

3.7. Summary of adverse effects

[72] We have found this a difficult issue. In summary the proposed developments will have (but barely) a more than minor effect on the extent of views from some public routes and viewpoints especially those which are closer to the site. The character of views of the lower slopes of Saddle Hill will be modified by the additional buildings at 4A Braeside. We have given careful thought to Mr Moore's belief that the development will integrate readily and that this change would not equate to a significant loss of rural amenity. While we agree that there may not be a loss of amenity overall, we do judge that there will be a more than minor loss of rural character to the closer views. Finally, we find that the visual dominance of natural landform and natural vegetation will be reduced in a more than minor way.

4. The threshold tests

4.1. The first gateway (s 104D(1)(a) of the RMA)

[73] The first "gateway[128] test" for the proposal is whether the adverse effects of the activity on the environment are likely to be minor. "Environment" and "effect" are defined (widely) in section 2 of the RMA, but "adverse" and "minor" are not defined at all.

123 M W Moore, evidence-in-chief para 47 [Environment Court document 6].
124 M W Moore, evidence-in-chief para 36(a) [Environment Court document 6].
125 M W Moore, evidence-in-chief para 77 [Environment Court document 6].
126 M Read, evidence-in-chief para 44 [Environment Court document 9].
127 M Read, evidence-in-chief para 44 [Environment Court document 9].
128 *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323 (CA) at [5].

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Meaning of "minor"

[74] The earliest and, with respect, still the most useful discussion of "minor" was in *Elderslie Park Limited v Timaru District Council*[129] where Williamson J wrote:

> The word "minor" is not defined in the Resource Management Act. It means lesser or comparatively small in size or importance. Ultimately an assessment of what is minor must involve conclusions as to facts and the degree of effect. There can be no absolute yardstick or measure.

[75] Writing of the use of "minor" in (then) s 94 of the RMA, the Court of Appeal wrote in *Bayley v Manukau City Council*[130]:

> ... the [consent] authority must consider whether there is *any* adverse effect, including any minor effect, which *may* affect any person. It can disregard only such adverse effects as will certainly be *de minimis*, of which the minimal intrusion of the closets into the yard space may be an example, and those whose occurrence is merely a remote possibility.

That is of interest because it suggests that a major, potentially catastrophic, effect could be regarded as minor if the probability of its occurrence is very low. With respect that is a sound approach to risk, and in the spirit of the RMA.

[76] In *King v Auckland City Council*[131] the High Court stated that a minor effect will be "at the lower end of a scale including major, moderate and minor effects but must be something more than *de minimis*". To similar effect, in *Progressive Enterprises Limited v North Shore City Council*[132], Baragwanath J wrote:

> "Minor" is not defined. The dictionary meanings of "minor" include "petty" and "comparatively unimportant" (Cassell Concise English Dictionary); "relatively small or unimportant ... of little significance or consequence".

More recently, but still consistently, in *The Dome Valley District Residents Society Inc v Rodney District Council*[133], Priestley J wrote:

> There is some discussion and criticism that the Judge ... referred to effects as not being "significant" rather than "minor". I do not consider, given the context and reasoning of the Court, that the use of the words "not significant" constitutes an error of law. Particularly in the context of what the Court had to decide I would for my part regard "not significant", "insignificant", and "minor" as synonymous.

[77] However, Fogarty J has recently suggested in relation to the meaning of "minor" that "... it is wrong to go to the dictionary" *Queenstown Central Limited v Queenstown*

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129 *Elderslie Park Limited v Timaru District Council* [1995] NZRMA 433.

130 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 576.

131 *King v Auckland City Council* [2000] NZRMA 145; [1999] 6 ELRNZ 79 (HC) at [29].

132 *Progressive Enterprises Limited v North Shore City Council* [2006] NZRMA 72.

133 *The Dome Valley District Residents Society Inc v Rodney District Council* HC, Auckland CIV 2008-404-000587 at [73].

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Lakes District Council[134] *(Pak 'N Save)*. That is not consistent with the approach taken by Baragwanath J. Nor is it consistent with the approach taken by significantly higher authority (under different legislation). In *Commerce Commission v Fonterra Co-operative Group Limited*[135] Tipping J, giving the reasons of the Supreme Court, wrote[136]:

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment[137] must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
>
> ...
>
> The concept of a plain and ordinary meaning does not involve the court having recourse to external sources such as expert evidence and textbooks[138]. If the court has to do that there can hardly be a plain meaning. If one has to go outside the immediate text in this way, there is no logical reason to stop there. Any suggestion of a plain meaning must then evaporate.

We respectfully adopt that approach. We also draw attention to the footnote in that passage from the Supreme Court's decision which states: "Reference to recognised dictionaries is, of course, in accordance with the plain meaning approach".

[78] Turning to the dictionaries we find that the adjective "minor" is defined in the *New Zealand Oxford Dictionary*[139] of "lesser or comparatively small in size or importance". According to *The Shorter Oxford English Dictionary* "minor" means "... lesser ... opposite to MAJOR ... comparatively small or unimportant". We hold that those meanings are what is intended in section 104D(1)(a). The reference to "comparatively" emphasises that what is minor depends on context — and at least all the authorities agree on that.

[79] We have found that the adverse effects of the proposal on some closer views, on the amenities of at least one neighbour, and on the rural character of the environment are likely to be more than minor. Accordingly the proposal does not pass the first threshold test.

4.2. <u>The second gateway (s 104D(1)(b))</u>

[80] The second gateway or threshold is whether the proposal is contrary to the objectives and policies of the operative district plan. A key question here is whether a proposal has to be generally relevant not contrary to the objectives and policies of a

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134 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239 at [108].

135 *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36.

136 *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36 at [22] and [23].

137 "Enactment" means "the whole or a portion of an Act or regulations": see s 29 of the Interpretation Act 1999.

138 Reference to recognised dictionaries, is, of course, in accordance with the plain meaning approach.

139 *The New Zealand Oxford Dictionary* (OUP, 2005) p 716.

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plan, or whether it must be not contrary to any objective and policy. The former has been understood to be the correct legal position for most of the life of the RMA. There has been a suggestion that two decisions called *Queenstown Central Limited v Queenstown Lakes District Council* throw doubt upon that. The two decisions are *Queenstown Central Limited v Queenstown Lakes District Council and Foodstuffs* ("the *Pak 'N Save* decision already referred to several times in this decision)[140] and *Queenstown Central Limited v Queenstown Lakes District Council and Cross Roads Ltd*[141] *("Cross Roads")*. In *Pak 'N Save*, Fogarty J wrote:

> Applying s 104D(1)(b), a consent authority could not be satisfied that the Pak'nSave supermarket in the E1 and E2 zones will not be contrary to objective 10 of PC19(DV).
>
> If the Environment Court did so find, this was a material error of law, for, had the decision gone the other way, these applications would not have got past s 104D.

[81] In the *Cross Roads* decision, he wrote[142]:

> ... The question in s 104D(1)(b) is whether there can be a gateway satisfaction that the proposal will not compromise <u>any</u> objectives and policies. [Emphasis added].

In both decisions, the High Court seems to be suggesting that being contrary to one objective in a proposed plan entails that the second threshold test is failed.

[82] Counsel agreed that this approach by the High Court is inconsistent with the previous approach of the Court of Appeal. For example in *Dye v Auckland regional Council*[143] the Court of Appeal stated:

> ... The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law.

We respectfully prefer the latter approach.

[83] We find that the proposal is contrary to the rural objective which seeks to maintain and enhance[144] the amenity values associated with the character of the rural area. In particular we have found that the predominance of natural features over human-made features will be reduced, and that the high ratio of open space relative to the built environment will be reduced[145]. Another objective to which the proposal is contrary is

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140 *Queenstown Central Limited v Queenstown Lakes District Council and Foodstuffs* [2013] NZHC 815; [2013] NZRMA 239 (HC).

141 *Queenstown Central Limited v Queenstown Lakes District Council and Cross Roads Limited* [2013] NZHC817.

142 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815; [2013] NZRMA 239 at para [30].

143 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at para [25].

144 Objective 6.2.2 [Dunedin District Plan p 6:10].

145 See the description of rural characteristics in the Explanation to 6.2.2 [Dunedin District Plan p 6:10].

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to provide for rural residential development to avoid (as much as practicable)[146] any location within a "Landscape Management Area". One such class of Landscape Management Areas are the "LCAs" — and the site is, in part, on one of those. Further, in respect of that part of the site within the Saddle Hill Landscape Conservation Area the most relevant policy is to conserve[147] the characteristics which are important in "maintaining landscape quality"[148]. Those qualities are identified a little later in the plan[149]. We quoted them earlier and then found that they would not be conserved by the proposal.

[84] As we have held, whether the proposal is contrary to one or more of the objectives and policies is not the test. However, standing back and looking at the relevant objectives and policies — especially those in chapters 6 and 14 (being the most relevant) — read as a whole, we find that the proposal is contrary to those objectives and policies. In summary, the proposal fails both threshold tests under section 104D of the Act. Consequently the application (and appeal) should be declined.

5. Overall evaluation

5.1. The issues to be balanced

[85] In case we are wrong in our determinations under section 104D of the RMA we turn to consider the substantive issues. Those issues are:

(1) the extent to which the proposed subdivision and development of 4A Braeside will have positive and adverse effects on the environment, and where the net benefit lies;
(2) whether or not the subdivision and development of 4A Braeside will, overall, achieve the objectives and policies of the district plan;
(3) whether there is a 'true exception' argument applicable to the site and the proposal which would allow the subdivision and development of 4A Braeside without undermining the district plan;
(4) whether any precedent set would be considered 'undesirable'.

5.2. The positive and negative effects

[86] The positive effects are clear: granting resource consents would allow very desirable houses to be built on the site on lots which face the sun and have views and space, with consequential benefits for the community.

[87] The potential negative effects are identified in the district plan. In relation to the visual dominance[150] of the Saddle Hill Landscape Conservation Area, its skyline[151], and

146 Objective 6.2.3 [Dunedin District Plan p 6:11].
147 Landscape policy 14.3.3 [Dunedin District Plan p 14:7].
148 Landscape policy 14.3.3 [Dunedin District Plan p 14:7].
149 Landscape policy 14.5.3(c) [Dunedin District Plan p 14:25].
150 Section 14.5.3(c) [Dunedin District Plan p 14:25].
151 Section 14.5.3(c) [Dunedin District Plan p 14:25].

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the extent and quality of views from the principal public routes and viewpoints[152] the relevant threats to visual quality are[153]:

> [•] Structures: inappropriate siting, design, scale, density and finish of structures such that they become visually dominant from public viewpoints.
> • Roads and tracks:
> Inappropriate siting, scale and design of roads and tracks such that they cut across the landform rather than follow it and become visually dominant features.
> • Shelterbelts:
> Inappropriate siting, scale and design of shelterbelts such that they diminish the visual coherence of the natural landform character.

[88] The cumulative effect[154] of the activity on the natural and physical resources of the city including, but not limited to, cumulative adverse effects in relation to:

> (i) Amenity values
> (ii) Rural character
> (vi) Landscape Management Areas …

[89] The question here is[155] "how much subdivision and development of the density proposed can be accommodated before an unacceptable threshold is reached in terms of rural character amenity values and the natural character qualities associated with Landscape Management Areas". In Mr Moore's opinion, the answer is:

> … that the lower slopes on this side of the Taieri Plains have capacity to absorb further appropriately designed and controlled rural-residential scale development. My reasons are essentially that the area has a warm aspect and moderately dense rural housing in areas that have amenable landform would be expected and appropriate, particularly near existing settlements.

[90] As for the "Saddle Hill Landscape Management Area" and the naturalness of the higher slopes, Mr Moore considered that the site at 4A Braeside is "about as high as this should go"[156]. He considered that the proximity to the suburban area of Kinmont Park and "the amenable landform" provides a logic that may be missing elsewhere.

[91] The site faces towards Mosgiel and the Taieri Plains. It has potentially high levels of visibility from these places. From many places (including Mosgiel) the property is sufficiently low on the slope of Saddle Hill that it is obscured behind foreground vegetation and buildings. We have recorded already there are no clear views of any significance from State Highway 1. The proposed mitigation measures (in particular, controls over building colour) will be effective in minimising built impact.

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152 Section 14.5.3(c)(ii) [Dunedin District Plan p 14:25].
153 Section 14.5.3(c)(iii) and (iv) [Dunedin District Plan p 14:25].
154 Rules 6.7.4 [Dunedin District Plan p 6:41] and 6.7.15 [Dunedin District Plan p 6:43].
155 M W Moore, evidence-in-chief para 59 [Environment Court document 6].
156 M W Moore, evidence-in-chief para 61 [Environment Court document 6].

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The development will modify the current open rural character of the site and result in a smaller scale and more complex landscape pattern.

5.3. Does the proposal achieve the objectives and policies of the district plan?

[92] The recent decision of the Supreme Court in *Environmental Defence Society v The New Zealand King Salmon Co. Ltd*[157] is an important statement that Part 2 of the RMA and the higher order statutory documents must be applied as particularised in regional and district plans[158]:

> … The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality — the general is made increasingly specific.

[93] The Supreme Court identified one of the reasons for the importance of documents such as the district plan is that[159]:

> Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

We infer that the Supreme Court considers that specific, particularised objectives and policies should not be subverted by reference to the matters in section 6 and 7. We will endeavour to treat the district plan with the appropriate respect.

Chapter 6 Rural and Rural-Residential Zones objectives and policies

[94] The key policies are those which seek to maintain rural character amenities[160], especially certain landscape values[161] and to locate Rural-Residential Zones appropriately.

[95] The proposal will achieve several of the relevant objectives[162] for the rural areas of the district. It would avoid[163] locating "rural residential" type development in areas containing high class soils. Roading and other infrastructure is to be supplied by SVEL[164] and is assumed by the City to be sustainable[165]. By supplying solar efficient (north-facing) and attractive sections, it would tend to maintain the ability of the site to meet the needs of future generations[166]. The policies which seek to protect productive

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157 *Environmental Defence Society v New Zealand King Salmon Co. Ltd* [2014] NZSC 38]; [2014] 1 NZLR 594; [2014] NZRMA 195 (SC).

158 *Environmental Defence Society v New Zealand King Salmon Co. Ltd* [2014] NZSC 38 at [14]]; [2014] 1 NZLR 594; [2014] NZRMA 195 (SC).

159 *Environmental Defence Society v New Zealand King Salmon Co. Ltd* [2014] NZSC 38 at [15]; [2014] 1 NZLR 594; [2014] NZRMA 195 (SC).

160 Policy 6.3.5 [Dunedin District Plan p 6:16].

161 Policy 6.3.5 [Dunedin District Plan pp 6:16 and 6:17].

162 Section 6 (Rural) of the Dunedin District Plan.

163 Objective 6.2.3 [Dunedin District Plan p 6:11].

164 P A Cubbitt, evidence-in-chief para p132 [Environment Court document 7].

165 Objective 6.2.4 [Dunedin District Plan P 6:11].

166 Objective 6.2.1 [Dunedin District Plan p 6:10].

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use[167] of rural land are irrelevant to this appeal. So are the policies[168] which seek to ensure that infrastructure, water supply, effluent disposal and roading in the rural areas are sustainably managed.

[96] However, two key rural objectives will not be achieved. They are:

- the maintenance and enhancement of (rural) amenity values[169]; and
- the objective seeking to avoid, as much as practicable, locations within landscape management areas[170] and we discuss this further below.

Chapter 14 Landscapes

[97] In parts 3 and 4 of this decision we identified[171] those characteristics[172] which are generally important in maintaining landscape quality in the rural area and specifically those which are important in the SHLCA. We must also encourage[173] development which integrates with the character of the landscape and enhances landscape quality. In Mr Moore's opinion[174]:

> Landscape character will change in that the current level of openness will reduce, but landscape quality will be protected through the mitigation measures proposed to acceptably control the visual impact of buildings. The proposed structural plantings will help to balance and compensate for the additional buildings and will have minor positive effects on biodiversity.

However, we consider that the proposed 4A Braeside development will not integrate readily into the Rural Zone. That seems obvious because it would be, by design, a de facto rural residential zone. Even more importantly the policy[175] requiring conservation of the extent and quality of views from the principal public routes and viewpoints[176], and the inappropriate siting and (rural residential) density of buildings so that they would — even with all the proposed mitigating conditions — be visually dominant[177] in the Saddle Hill Landscape Conservation Area, is not achieved.

Chapter 15 Trees

[98] The proposed development encourages the conservation and planting[178] of trees in that existing trees will be protected and further trees planted as conditions of consent. We have already found that the proposed tree planting would enhance natural character,

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167 Policies 6.3.1, 6.3.2 and 6.3.3, 3rd bullet point of Policy 6.3.4, (6.3.10 and 6.3.12) [Dunedin District Plan pp 6:14, 6:15, 6:19 and 6:20].
168 Policies 6.3.8 and 6.3.9 [Dunedin District Plan pp 6:18 and 6:19].
169 Objective 6.2.2 [Dunedin District Plan p 6:10].
170 Objective 6.2.3 [Dunedin District Plan p 6:11].
171 Policy 14.3.3 [Dunedin District Plan p 14:7].
172 From the list in paragraph 14.5.3(c) of the Dunedin District Plan.
173 Policy 14.3.4 [Dunedin District Plan p 14:8].
174 M W Moore, evidence-in-chief para 67 [Environment Court document 6].
175 Policy 14.3.3 [Dunedin District Plan p 14:7].
176 Para 14.5.3(c)(ii) [Dunedin District Plan p 14:25].
177 Para 14.5.3(c)(iii) [Dunedin District Plan p 14:25].
178 Objective 15.2.1 [Dunedin District Plan p 15:3].

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slightly increase biodiversity on the site, and would help to mitigate to some extent the adverse effects of additional houses on rural landscape values.

Chapter 18 Subdivision

[99] We hold that the subdivision policies are generally achieved.

Summary

[100] Again standing back and evaluating the proposal under the objectives and policies as a whole, and while acknowledging that the proposal achieves a raft of other objectives and policies, we find that it still insufficiently achieves the key relevant objectives and policies relating to subdivision and residential development in the Rural Zone.

5.4. Other relevant matters

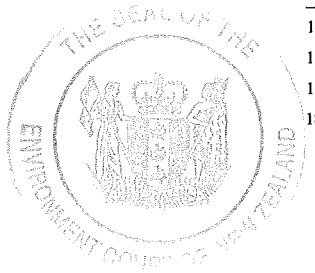
[101] Under section 104(1)(c) we may have regard to any other relevant matter. Under this head we consider the Council's submissions first that granting consent would create a precedent under which it would have difficulty to resist future applications around the site, and secondly, that the application by SVEL is not a true exception which is not contemplated by the district plan. Those two arguments seem to be opposite sides of the coin to us: if the application is a true exception to the district plan, then it is unlikely to create a precedent. The other point we must bear in mind is that neither expression — "precedent" or "true exception" occurs in the RMA, and that too much weight should not be placed on the concepts: see *Gould v Rodney District Council*[179]. Further a planning decision can never create a precedent in the strict sense: *Dye v Auckland Regional Council*[180]. While that is undoubtedly correct in the strict legal sense, we suspect district planners dislike that statement because they, and councillors, have to deal regularly with people raising "They have subdivided, so why not us?" argument. Precedent in a wide sense is about treating like cases alike, and people are very sensitive to fairness issues on whether cases are unlike or not.

[102] We turn to the 'true exception' point. The applicant has expressly sought consents for a rural residential subdivision without the zoning. The district plan contemplates that is normally to be achieved by rezoning — policy 6.3.4[181]. That course was not adopted by the applicant and we see no special circumstance which suggests that course was inappropriate.

[103] We accept the evidence of Mrs L C Darby[182] that granting these consents would create an undesirable planning precedent and would undermine the integrity of the

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179 *Gould v Rodney District Council* [2006] NZRMA 217 (HC) at [99].
180 *Dye v Auckland Regional Council* [2001] NZRMA 513 (CA) at [32].
181 Dunedin District Plan p 6:15.
182 L C Darby, evidence-in-chief paras 11, 100 and 101 [Environment Court document 10].



district plan. She recorded that the smaller lots below the site were the result[183] of historic subdivisions before a district plan controlled subdivision.

[104] The Council's decision is brief and to the point. It declined the consent for the following reasons:

- … [the development] is not in accordance with the expectations of the zoning, and will not maintain the openness of the rural landscape in this location which is still an important characteristic of this area[184];
- … While all new buildings are expected to be readily visible from many parts of Mosgiel and the Taieri Plain, those built within the Landscape Conservation Area will extend above the adjacent residential development at Braeside and into a band of largely undeveloped hillside, therefore being particularly prominent. The Committee does not consider that this development will maintain or enhance the quality of the Saddle Hill Landscape Conservation Area. The proposal would have the appearance of an expansion of the Braeside urban area[185];
- … No specific planting is promoted on the new lots for screening purposes, such planting would take years to establish in any case therefore having limited benefit as a mitigation measure, and the sense of openness would be lost. Existing plantings within the gully of the subject site will do little to screen new development from most public viewpoints. Accordingly, the Committee does not consider that the proposed conditions will adequately mitigate the visual effects of the proposed development in a manner which will preserve the rural character of the site or zone[186].

[105] We respectfully agree with those reasons.

6. Result

[106] As for Part 2 of the Act, we consider all the relevant considerations are covered by and particularised in the provisions of the Dunedin District Plan. With one exception we see insufficient conflict in the evidence between section 104(1)(a) to (c) considerations to justify opening up Part 2 factors. In particular, we record that there are no matters of national importance to consider[187].

[107] The only evidence that has made us pause and consider s 7 of the RMA relates to the efficient use of natural resources under s 7(b). The Council's witnesses suggested rather faintly that the proposal would be an inefficient use of land because it will fragment rural land and preclude efficient use for farming. In response Mr Cubbitt's evidence was that[188]:

> The land is not productive and is ideally suited and located to provide for rural residential living which is a legitimate use of rural land. It is an efficient use of the subject lands and assists in protecting a truly finite and limited resource, high quality rural land, from development pressure.

183 L C Darby, evidence-in-chief para 41 [Environment Court document 10].
184 DCC decision 15 July 2013 para (h).
185 DCC decision 15 July 2013 para (i).
186 DCC decision 15 July 2013 para (j).
187 Under s 6 RMA.
188 P A Cubbitt, evidence-in-chief para 154 [Environment Court document 7].

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We assume Mr Cubbitt is referring to high quality rural land elsewhere, for example on the Taieri Plains. Thus the proposal reduces the quantity for high quality rural land for housing, by supplying much lower producing land (the site) instead.

[108] Mr Cubbitt continued[189]:

> As I have noted earlier, the ability of land zoned rural to meet the needs of future generations is not limited solely to its rural productive capacity. The RMA is an enabling piece of legislation and allows for people to provide for their own welfare without unnecessary restriction by local government. Many people desire to live in locations that afford them space and views, with good access to sunlight but within reasonable proximity to urban areas which contain the infrastructure and services necessary in today's life.

We accept that evidence, although we note that any development would have to be subject to satisfactory geotechnical reports. Further, it is a notorious fact that rural land of this quality is substantially more valuable for rural residential than for its limited rural productive potential. Thus prima facie the land is more efficiently used for (rural-) residential use than for farming. That is a factor quite strongly in favour of the application.

[109] However, overall we consider the social well-being that would very likely be achieved by granting resource consents is outweighed by the other factors especially by the key provisions of the district plan as to maintaining and enhancing the rural amenities and protecting the characteristics of the Saddle Hill Landscape Conservation Area. On balance we consider that the subdivision and land use consents should not be granted. Consequently, the appeal in respect of SVEL's land should be declined.

Other potential issues

[110] One of the assessment matters for subdivision requires examination[190] of the possibility of future development of the site and the adjoining land. How far it is lawful to consider the latter on an application for resource consent is a difficult issue since that is not a cumulative effect — see *Gould v Rodney District Council*[191]. Another seeks to enhance connectivity[192] by providing pedestrian and/or cycle links (and vehicle links) between areas. These were not raised in the evidence and indeed were not were covered by the initial AEE. Accordingly we have not taken them into account in this decision.

[111] Nor should this decision necessarily be the final word on development of the site. It is possible, we make no finding on the issue, that the lower half of the slopes on the northwest face of Saddle Hill (facing Mosgiel) might be appropriate for denser development under a rural residential or even urban zoning. Such a rezoning is a matter

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189 P A Cubbitt, evidence-in-chief para 155 [Environment Court document 7].
190 Rule 18.6.1(q) — third bullet point [Dunedin District Plan p 18:21].
191 *Gould v Rodney District Council* [2006] NZRMA 217.
192 Rule 18.6.1(e) [Dunedin District Plan p 18:19].

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for the current review of the district plan and will require careful weighing ("balancing") of the various factors (landscape, housing demand, geotechnical being the three most obvious considerations). These are important issues in the vicinity of the site because the landscape experts were agreed that the SHLCA line across the site does not make much sense; and there was good evidence of the potential benefits of greater housing density on the site.

For the court:



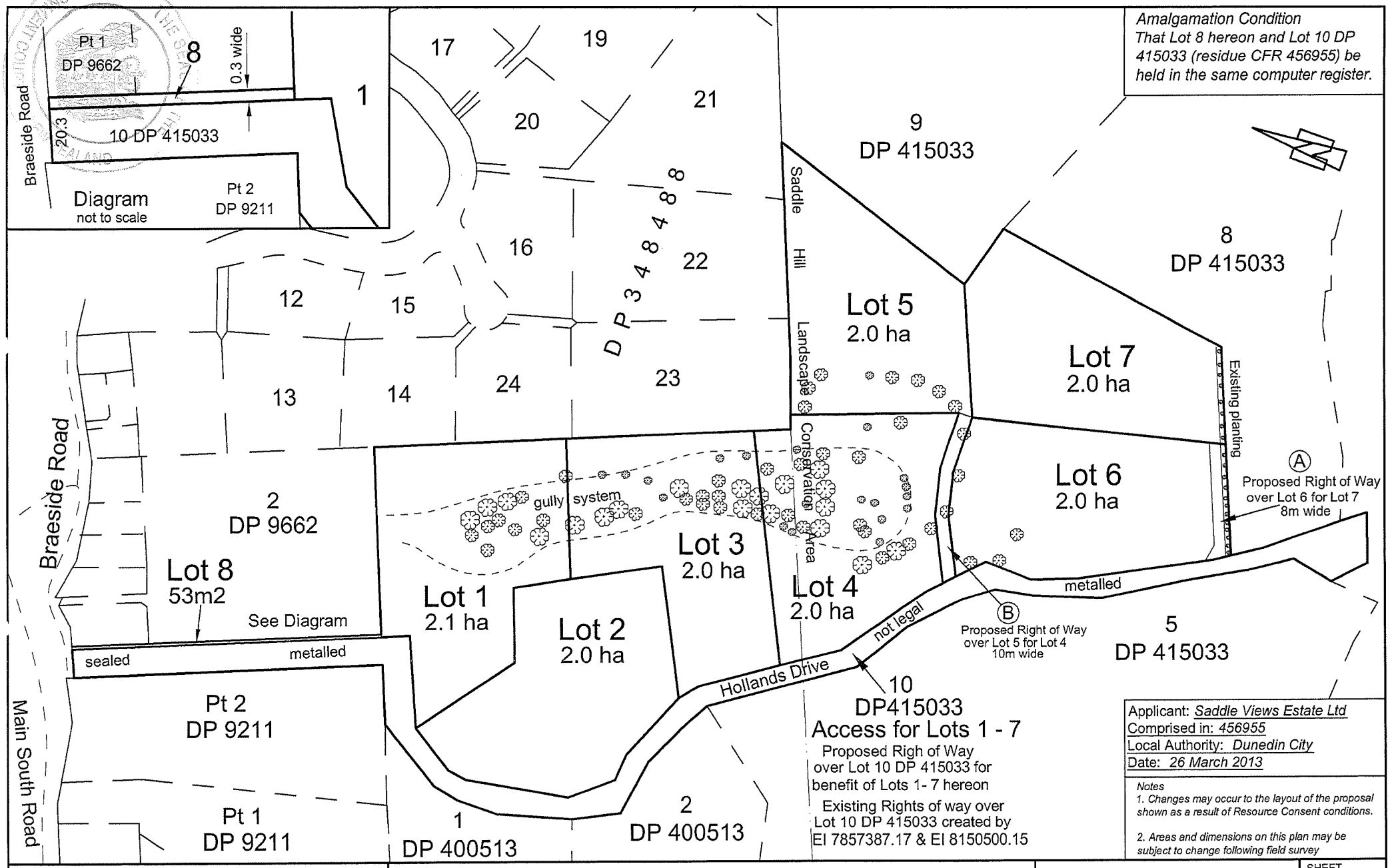
J R Jackson
Environment Judge

Annexures:

A. Subdivision Plan.

B. Exhibit 10.2, copy of Mrs L C Darby's Figure 2B: Building Sites on Rural zoned land.

Jacksoj\Jud_Rule\d\Saddle Views Estate Ltd v DCC



CRAIG HORNE
Registered Surveyor
5 MAIN SOUTH ROAD EAST TAIERI
P.O. BOX 56 MOSGIEL
PH (03) 4847008
FAX (03) 4847009

Proposed Subdivision of Lot 6 DP 415033

Hollands Drive, Braeside

Ref: Saddle Views Estate Ltd E46

SHEET 1

Drawn CH	Checked	A3 SCALE
Traced		1:2500

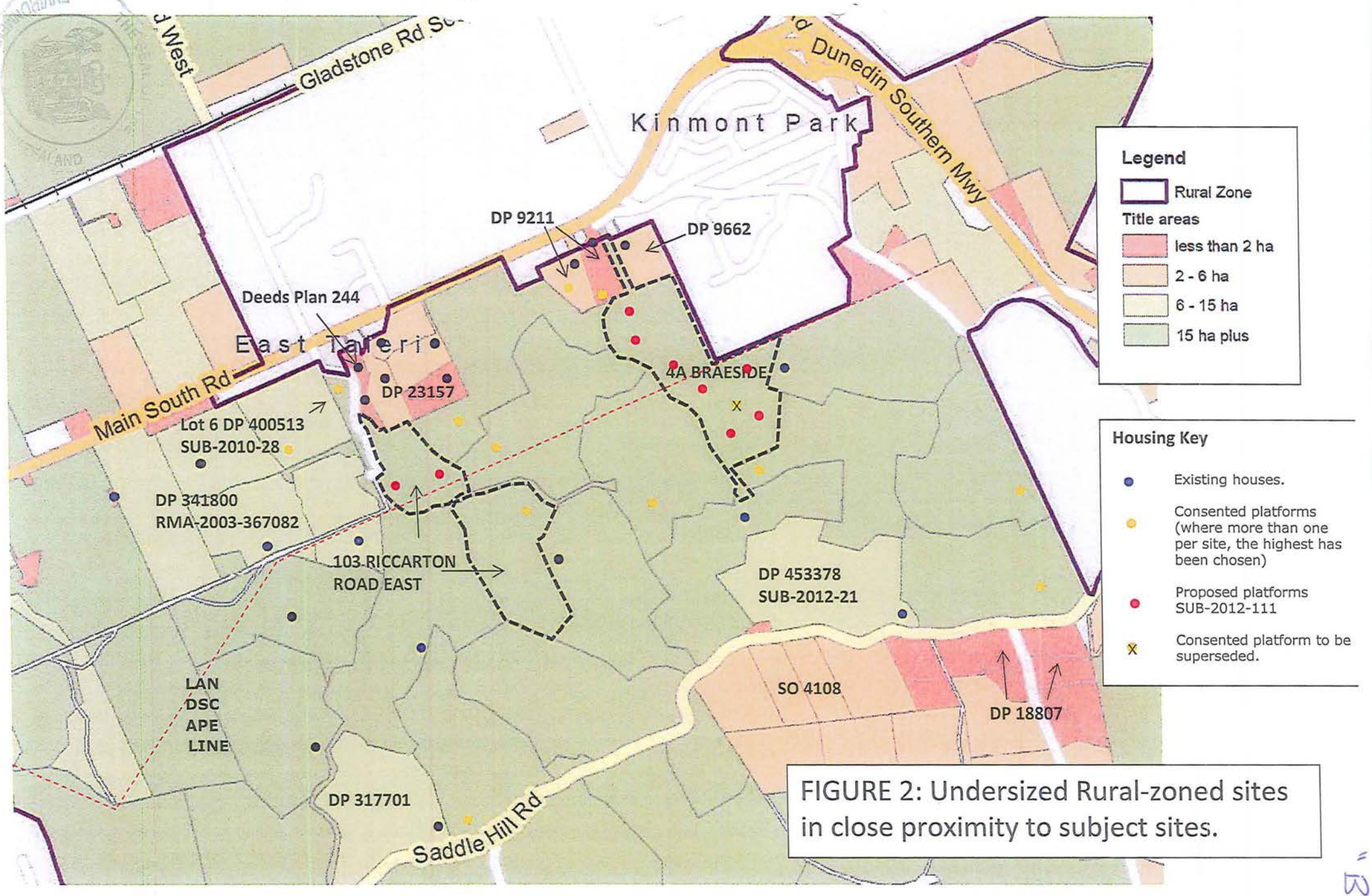


FIGURE 2: Undersized Rural-zoned sites in close proximity to subject sites.

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 140

IN THE MATTER OF	two appeals under s 120 of the Resource Management Act 1991
BETWEEN	PROTECT AOTEA
	(ENV-2020-AKL-155)
AND	PROTECT OUR GULF INCORPORATED
	(ENV-2020-AKL-157)
	Appellants
AND	AUCKLAND COUNCIL
	Respondent
AND	PORTS OF AUCKLAND LIMITED
	Applicant
AND	SOCIETY FOR PROTECTION OF AOTEA COMMUNITY AND ECOLOGY INCORPORATED
	NGĀTI PAOA TRUST BOARD
	RALPH GOLABOSKI
	CAIT DEVEY
	SAM GRIMSHAW
	MANUKA DAVENPORT
	SHARON REID
	s274 Parties

Court:	Chief Environment Court Judge D A Kirkpatrick sitting alone under s 279(1)(c) and (e) of the Act
Hearing:	At Auckland on 26 July 2021
Appearances:	J Gardiner-Hopkins for Protect Aotea
	R Enright and R Haazen for Protect Our Gulf Inc

A Buchanan and R O'Connor for Auckland Council

B Carruthers and P Senior for Ports of Auckland Ltd

Elise Bishop on behalf of Society for Protection of Aotea Community and Ecology Inc

Date of Decision: 14 September 2021

Date of Issue: 14 September 2021

DECISION OF THE ENVIRONMENT COURT
ON PRELIMINARY ISSUES

A: On the bundling issue:

a) The assessment of the effects of capital dredging and of maintenance dredging should be considered together in order to provide a properly holistic assessment of them so that their effects can be managed by appropriate conditions; but

b) While consent for capital dredging may be refused as a restricted discretionary activity under ss 87A(3) and 104C of the Resource Management Act 1991 within the scope of the rules of the plan which apply to that activity, consent for maintenance dredging must be granted as a controlled activity under ss 87A(2) and 104A of the RMA and the rules of the plan which apply to that activity and therefore the two activities should not be bundled for the purpose of determining a single class of activity.

B: On the effects of dumping dredged material outside the coastal marine area:

a) While the effects of dumping dredged material outside the coastal marine area are within the scope of the actual and potential effects

on the environment of allowing the dredging activities, where there is a sufficient consent of a marine consent authority under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 there is no basis on which a consent authority under the RMA or this Court on appeal can undertake any competing assessment of those matters.

b) POAL's marine dumping consent forms part of the existing environment and the dredging consents sought by POAL may not be refused on the ground that there should be no offshore dumping.

REASONS

Introduction

[1] These two appeals are against a decision of independent hearing commissioners appointed by the Auckland Council (**the Council**) granting two resource consents to Ports of Auckland Limited (**POAL**). One resource consent is to undertake capital dredging in the Waitematā Navigation Channel Precinct and adjacent to Fergusson Wharf in the Port Precinct of the General Coastal Marine Zone in the regional coastal part of the Auckland Unitary Plan (**AUP**). The other resource consent is to undertake maintenance dredging in the same areas.

[2] This decision addresses two preliminary issues which the parties have identified and consider should be addressed in advance of the substantive hearing of the appeals. These issues are:

a) Whether the two applications for resource consents made by POAL should be bundled, so that they are assessed and determined together; and

b) Whether the effects of dumping dredged material outside the

coastal marine area (**CMA**) but within New Zealand's exclusive economic zone (**EEZ**) are a relevant consideration in the assessment and determination of the resource consents.

[3] The applicant POAL is an incorporated company carrying on the business of a port company under the Port Companies Act 1988 at the Waitematā Harbour and elsewhere.

[4] The respondent Council is a unitary authority established under s 6 of the Local Government (Auckland Council) Act 2009 and a consent authority for the purposes of Part 6 of the Resource Management Act 1991 (**the RMA**).

[5] The appellant Protect Aotea is a registered charitable trust incorporated under the Charitable Trusts Act 1957, based on Aotea / Great Barrier Island, with the general charitable purpose of promoting and nurturing the holistic wellbeing and integrity of the island, its rocky outcrops and environs and its mana moana. In its amended notice of appeal it raised a number of inter-related issues. Most relevantly for the purposes of the preliminary issues it identified the following:

> (c) the integrated consideration and assessment of effects of the proposal as a whole, including the effects of the capital dredging works within the CMA of the Waikato Regional Council, and within the EEZ;
>
> (d) the scope of or jurisdiction for the consent authority (and the Environment Court) on appeal to consider (c), ie the "**jurisdictional error**";

[6] The appellant Protect Our Gulf Inc is an incorporated society based on Waiheke Island with interests in the adverse effects of human activities on the Waitematā harbour, the Hauraki Gulf and the waters seaward of Aotea / Great Barrier Island. In its notice of appeal it raised the following issues which are relevant for the purposes of the preliminary issues:

> (a) the decision to unbundle and treat the Capital Dredging Works and Maintenance Dredging Works applications as separate

applications was flawed; …

(j) The Panel was wrong in finding that it did not have jurisdiction to consider the effects of dumping as part of the Capital Dredging Works and Maintenance Dredging Works applications;

[7] The other party which was heard on these preliminary issues, Society for the Protection of Aotea Community and Ecology Inc (**SPACE**), is an incorporated society based on Aotea / Great Barrier Island which supports the appeal by Protect Aotea.

Background

[8] POAL occupies the CMA and the marine and coastal area (as that term is defined in the Marine and Coastal Area (Takutai Moana) Act 2011) and adjacent land of the port at or near 1 – 19 Quay Street, Auckland with structures for the berthing of large vessels in order to load and unload freight. To provide access to these structures for such vessels, the seabed must be dredged around the structures and in a channel from there to deeper water. As the size and draught of vessels increases, the depth of dredging required to accommodate them also increases.

[9] Two kinds of dredging are proposed in POAL's application: capital and on-going maintenance. The purpose of capital dredging is to deepen a berthing area or channel, excavating areas to depths that have not previously been dredged. In this case, the proposal is to deepen the existing Waitematā navigation channel from a depth of 12.5 m below the chart datum for the Rangitoto Channel to 14 – 14.2 m. The purpose of maintenance dredging is to generally maintain the depth achieved by the capital dredging, removing slumped material or other forms of accretion. In the relevant locations, the proposed capital dredging is a restricted discretionary activity under the AUP[1]

[1] Auckland Unitary Plan, rule I103.4.1(A3) in the Waitematā Navigation Channel

and the proposed maintenance dredging is a controlled activity under that plan.[2]

[10] The Council's reporting officer opined that the effects of the two consents would overlap and that they should be considered together and bundled as a restricted discretionary activity overall. The Council's hearing commissioners accepted the contrary submissions on behalf of POAL and decided that the consents should not be bundled because the effects of the two activities do not overlap and are capable of being and logically must be undertaken separately as distinct operations over time. However, they heard the applications together. At one point in their decision they stated that they considered the activities holistically but imposed separate sets of conditions, but at another point they said that they considered them separately.

[11] The concerns of the two appellants and the s 274 party include not only the effects of the proposed capital and maintenance dredging, but also matters relating to the disposal of the dredged material. Such disposal is proposed to occur at the Cuvier Disposal Site (**CDS**) which lies 27 nautical miles (50 km) east of Cuvier Island. That island lies north of the Mercury Islands and approximately halfway between them and Great Barrier Island. The location of the CDS is outside the territorial sea of New Zealand[3] and is therefore outside of the CMA. Accordingly, no coastal permit or other type of resource consent under the RMA can be required in respect of the disposal of dredged material in that location.

[12] The CDS is within New Zealand's EEZ[4] and accordingly POAL requires a marine dumping consent under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**) in accordance with the

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Precinct and rule I208.4.1(A6) in the Port Precinct.

2 Auckland Unitary Plan, rule I103.4.1(A2) in the Waitematā Navigation Channel Precinct and rule I208.4.1(A5) in the Port Precinct.

3 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 3.

4 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 9.

Exclusive Economic Zone and Continental Shelf (Environmental Effects – Discharge and Dumping) Regulations 2015 (**EEZ Dumping Regulations**). The CDS is an authorised location under those regulations. POAL presently holds such a marine dumping consent numbered EEZ400011 which was granted on 27 June 2019 and expires on 27 June 2054. This consent authorises the disposal of:

a) A total of 2 million cubic metres of dredged material from capital dredging over the term of the consent; and

b) Up to 50,000 cubic metres of dredged material from maintenance dredging and up to 400,000 cubic metres of dredged material from capital dredging in any 12 month period.

[13] The consent is subject to a number of conditions relating to the manner in which dumpling may occur, requirements for sampling of the sediment for contaminants and methods to protect marine mammals and birds.

[14] The Council's hearing commissioners found that POAL is entitled to rely on its marine dumping consent as an existing resource consent and as a component of the existing environment. While finding that the cultural effects of dredging and marine dumping are interconnected and that they may be of some significance, they concluded that they had no jurisdiction to make any findings in relation to the marine dumping.

[15] POAL and the Council say that this consent addresses all issues concerning the effects of the disposal of dredged material outside the CMA and therefore no such issues are relevant in the consideration of these appeals. The appellants and the s 274 party say that the consent does not deal with various issues of mana whenua, mana moana and tikanga and so these appeals should address them. Counsel for Protect Aotea stated that these issues included ancestral relationships with the moana, kaitiatikanga and interests in fisheries, especially ancestral fishing grounds and taonga species.

[16] The two issues presented by the parties are distinct. I will address them in turn.

Bundling

[17] Bundling, in the context of resource management in New Zealand, refers to applications for two or more resource consents being considered together. Beyond the procedural requirements to hear related matters together,[5] it denotes a practice of how to assess the class or status of the bundled activities overall. Where the activities involved are of different classes in terms of s 87A of the Act and any relevant regulation, national environmental standard or plan rule, the applicable class for the bundled application may be the most stringent class. For example, if a proposal involves some activities which are classed as discretionary and some as non-complying, the whole proposal may be assessed as non-complying.

[18] Bundling is a rule of practice rather than a statutory requirement. There is no express reference to it in the RMA. One may observe that the practice is supported by, or at least related to, several provisions of the RMA and their logical corollaries, and in particular:

a) The various requirements of Part 3 that no person may do certain things that are restricted under that Part in a manner that either contravenes or is not expressly allowed by a national environmental standard or a rule in a relevant plan unless that thing is either expressly allowed by a resource consent or is the subject of some form of existing use right or other particular statutory authority;

b) The logical corollaries of those requirements that, absent any resource consent or form of existing use right or other particular statutory authority:

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5 Resource Management Act 1991, ss 103 and 270.

i) all relevant rules must be complied with; and therefore

ii) the most restrictive rule will set the overall limit for the use or activity (that is, a less restrictive rule does not permit non-compliance with the most restrictive rule);

c) The functions of regional councils under s 30(1)(a) and territorial authorities under s 31(1)(a) to establish and implement methods to achieve integrated management of resources and of the effects of the use, development or protection of land and associated resources;

d) The power in s 91 for a consent authority to defer the notification or hearing of an application if other resource consents will also be required in respect of the proposal to which the application relates and it is appropriate for the better understanding of the proposal that applications for such other consents be made before proceeding further;

e) The requirement in s 103 that where 2 or more applications for resource consent have been made in relation to the same proposal to a consent authority and that consent authority decides to hear the applications, it shall hear and decide them together unless they are sufficiently unrelated that it is unnecessary to hear them together and the applicant agrees that a combined hearing need not be held;

f) The requirement in s 270 for the Court to hear together two or more proceedings relating to the same subject matter unless that is impractical, unnecessary or undesirable;

g) The logical corollary of all the preceding items that granting consent to one application and refusing consent to another related application may effectively mean that the granted consent is

incapable of being exercised;

h) The provision in s 104(5):[6]

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

[19] It became apparent in the course of argument before me that notwithstanding the single rule of practice, the term "bundling" has come to be used in practice in at least two different ways:

i) generally in relation to an overall or combined assessment of a proposal; and

ii) more specifically in relation to the particular class or status of activity that applies to such an assessment.

[20] The first way is essentially procedural and is required by ss 30(1)(a), 31(1)(a), 103 and 270 of the RMA. The second way has substantive effects with potentially significant consequences. It may result in a proposal which largely complies with all relevant standards and rules being considered overall as a non-complying activity, or even being a prohibited activity, because of one aspect. If that aspect is central to the proposal, that consequence is likely to be appropriate in terms of the purpose of the RMA. If it is tangential to the proposal, that consequence may not promote that purpose.

[21] Assisted by the careful submissions made to me, it is desirable that I set out clearly the legal foundation for the practice of bundling so that I can rule on the first issue of whether the two resource consents in this case should be bundled.

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6 As suggested in *West Coast Ent Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32, [2014] NZRMA 133 at [7].

[22] The origins of the practice extend back at least as far as the decision of the Administrative Division of the Supreme Court in *Locke v Avon Motor Lodge Ltd*.[7] The relevant legislation at that time was the Town and Country Planning Act 1953. In that case Cooke J was considering an appeal from a decision of the Town and Country Planning Appeal Board in relation to a proposal to increase the size of an existing tourist house. The works would add a block that was six stories high and generally complied with the relevant bulk and location requirements of the Christchurch district scheme but contravened a side yard requirement. The scheme included an ordinance that provided that any predominant use (what is now called a permitted activity) which did not comply with the relevant bulk and location requirements was deemed to be a conditional use (what is now called a discretionary activity). Cooke J found that this ordinance applied to make the whole project a conditional use, saying:[8]

> The Board evidently acted mainly on the view that it was only concerned with any detraction that might result from the non complying side yard. In my opinion that approach is not warranted as a matter of interpretation of the Act and the ordinance. I agree with counsel for the City that a use is either wholly predominant or wholly conditional. The hybrid concept would add an unnecessary complication to legislation already sufficiently complicated and it would tend to limit rights of objection. In a case of ambiguity the legislation should not be so construed. On a conditional use application the fact that there is only minor non compliance with predominant use requirements is a relevant consideration, but it is neither exclusive nor necessarily decisive.

[23] The assessment of what a use might be in a particular case is more complicated where more than one use or activity is involved. The endless variety of human activity and of ways in which to describe it results in many, if not most, sites being used for multiple uses or activities. A comprehensive approach to dealing with this, as developed in English planning law, is to identify what is called the planning unit. A concise summary of that approach is set out in the decision of the Queen's Bench Division in *Burdle v Secretary of*

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7 *Locke v Avon Motor Lodge Ltd* (1973) 5 NZTPA 17.

8 Note 7, at 22.

State for the Environment:[9]

> What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.
>
> First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. …
>
> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
>
> Thirdly, however, it may frequently occur that. within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.
>
> To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There indeed be an almost imperceptible change from one category to another. …

[24] That approach was adopted in New Zealand by the High Court and the Court of Appeal in *Centrepoint Community Growth Trust v Takapuna City Council*.[10] The relevant legislation then was the Town and Country Planning Act 1977. In the High Court, Casey J referred to the first two categories of the *Burdle* analysis as involving consideration of the totality of the Trust's operations on its site, being "the whole bundle of uses to which this land would be put." This approach was approved by the Court of Appeal, which said

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9 *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 at 1212; 3 All ER 240 at 244;

10 *Centrepoint Community Growth Trust v Takapuna City Council* HC (Admin Div), M 596/83, 9 July 1984, Casey J; and *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702, (1984) 10 NZTPA 340 (CA).

that these were accepted principles to be applied in determining land use for planning purposes.

[25] In *K B Furntiture Ltd v Tauranga District Council*[11] the bundling approach was applied under the RMA. Thorp J considered whether the uses in that case should be considered disjunctively or as a bundle of uses to determine overall compliance or non-compliance. His Honour observed[12] that where the different uses are closely linked or there is a dominant use or purpose, an overall assessment may be appropriate, but when the different uses are not closely related or one is carried out in a separate area from the others, a single joint classification would not represent the reality of the situation. He went on to say[13] that before an overview could be correct, the decision-maker must correctly identify the different uses in the bundle and analyse them in regard to the various permitted uses.

[26] In *Rudolph Steiner School v Auckland City Council*[14] the Environment Court expressly ruled that the reasoning in *Locke* remained applicable under the RMA notwithstanding that the RMA had been amended[15] to provide for a territorial authority to state in a rule a restriction on the exercise of its discretion on a discretionary activity, thereby introducing a hybrid concept that did not exist when *Locke* was decided. This decision was cited with approval by Salmon J in the High Court in *Aley v North Shore City Council*.[16]

[27] In *Bayley v Manukau City Council*[17] the Court of Appeal confirmed that where part of the proposal consisted of a restricted discretionary activity then

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11 *K B Furniture Ltd v Tauranga District Council* (1993) 2 NZRMA 291 (HC).
12 Note 11, at 299.
13 Note 11, at 303.
14 *Rudolph Steiner School v Auckland City Council* (1997) 3 ELRNZ 85.
15 Section 40 of the Resource Management Amendment Act 1993, inserting s 76(3B) (repealed), which is now given effect by ss 77A(2)(c), 77B(3) and (4), 87A(3) and 104C of the RMA.
16 *Aley v North Shore City Council* [1998] NZRMA 361, 378.
17 *Bayley v Manukau City Council* [1999] 1 NZLR 568, [1998] NZRMA 513 (CA).

the approach in *Locke* may be inappropriate, saying:[18]

> Salmon J's observations [in *Aley*] were made concerning a discretionary activity consent application in respect of which the Council had not restricted its discretion. Mr Gault appeared to accept the force of them, but he argued that where the Council has restricted its discretion, then the activity which it is considering under s94(2) [now, s 95A] and will later consider under s104 does not consist of the whole of the proposed development, but only those aspects of it which the Council has specified as remaining for its consideration. Counsel drew attention to the fact that Salmon J had qualified his endorsement of the Environment Court's approach by distinguishing restricted discretionary activities.
>
> Mr Gault's argument is in our view correct as a matter of construction. For the purpose of the restricted activity consent applications, the activities in the present case were the activity or use involving intrusion into the yard space and the activity or use relating to access to the site. So far as the yard space was concerned, the Council had ruled out for itself any consideration of any activity falling outside r14.13.3. The words "activity for which consent is sought" in s94(2) do not extend to an activity which is able to be undertaken without that consent and, more importantly, is unable to be considered by the Council. Section 88(5) states that the applicant's assessment is only to address the matters over which the authority has retained control. Under the proviso to s105(1)(b) the authority may refuse consent or impose conditions only on the basis of those matters. It would make little sense to require a consent authority to notify an application because it may involve effects which the authority must then disregard at the hearing of the application. That would provide false hope for objectors and be wasteful of time and money.
>
> Mr Gault's argument does not in this case lead to the result he seeks. Here the Council, as permitted by the statute, has restricted itself to consideration of particular matters. When that has been done the approach taken in *Locke* may be inappropriate. In this case, however, when the content of r14.13.3 is examined it can be seen that the "restriction" is relatively unconfining, especially in relation to site layout.

[28] Later in the same decision, the Court referred to a related application for a controlled activity consent which had not been notified and observed that where the matters requiring consideration under multiple land use consent applications overlap, all should be notified together so as to look at the proposal in the round rather than split it artificially into pieces.[19]

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18 At [1999] 1 NZLR 568, 577.

19 [1999] 1 NZLR 568, 580.

[29] In *King v Auckland City Council*,[20] the High Court held that the approach in *Bayley* to the treatment of restricted discretionary consent applications must apply in the same way to controlled consent applications given the restrictive provision of (now) s 104A of the RMA which requires a consent authority to grant a resource consent and authorise the imposition of conditions.[21]

[30] In *Body Corporate 97010 v Auckland City Council*,[22] the High Court held and the Court of Appeal confirmed that where the effects of a proposed discretionary activity (being stacked car parking in the basement) did not overlap with the effects of a controlled activity (being the proposed dwelling units), the two activities should be considered separately.[23] This decision shows that the issue of whether a matter requiring consent is central to a proposal or tangential to it is to be determined by the nature of the effects of the elements of the proposal and the extent to which the various effects of those elements which require resource consent overlap.

[31] In *Southpark Corporation Ltd v Auckland City Council*[24] Southpark proposed to erect a power line partly over road where it was a discretionary activity and partly over private land where it was a permitted activity. It applied for a resource consent for the line over roads and requested certificates of compliance for the line over private land. The Council refused both to grant consent and to issue certificates of compliance. Southpark appealed both decisions. The central issue for the Court was whether the line should be assessed in its entirety as a single proposal or in parts as separate proposals.

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20 *King v Auckland City Council* [2000] NZRMA 145 (HC).

21 Note 20, at [40] – [41].

22 *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 202 (HC), upheld on appeal: *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513, [2000] NZRMA 529 (CA).

23 In the High Court decision at [28] – [32]; in the Court of Appeal decision at [21] – [22].

24 *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350.

[32] That decision of this Court sets out a careful summary of the development of the law on bundling to this point, reviewing the preceding cases and summarising the position as follows:

> [15] From those authorities, it is our understanding that while the *Locke* approach remains generally applicable, so a consent authority can consider a proposal in the round, not split artificially into pieces, that approach is not appropriate where: (a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and (b) the scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and (c) the effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application, but are distinct.

[33] The decision goes on to observe that for the permitted activity of the proposed power line over private land, the scope of the consent authority's discretion was not merely restricted but eliminated altogether so that, whatever effects that activity may have, those effects could not lead to a decision to refuse to issue a certificate of compliance. While the consideration of the proposed power line over a road was fully discretionary and so would include such effects as cumulative on the effects of the line over private land, neither that consideration nor the broad statutory aim of integrated management of effects and reference to the concept of the planning unit overcame the absence of discretion in relation to the permitted activity of a power line over private land.

[34] On that basis the Court held that the two elements of the proposed line must be considered separately. Although a consent authority would be obliged to have regard to the effects of the line over road that were cumulative on the effects of the line over private land in considering whether to exercise its discretion to grant consent to the former, it could not take into account the effects of the line over road in dealing with the request for a certificate of compliance.

[35] In *Urban Auckland v Auckland Council*[25] the High Court reviewed whether the Council should have notified four separate applications by POAL involving extensions to an existing wharf into the Waitematā. Several aspects of the project required resource consent and the classes of activities included controlled, restricted discretionary and discretionary activities under both operative and proposed plans. In particular, the expansion of the wharf required consent as a controlled activity while the discharge of stormwater from that expansion required consent as a discretionary activity.

[36] In the course of reviewing the Council's decisions on notification, the High Court undertook an examination of the practice of bundling from *Locke* to *Southpark*.[26] After quoting paragraph [15] in *Southpark* (as set out above) with apparent approval, the Court observed that the extension of the wharf was a controlled activity and therefore:

> [65] … that it is necessary to consider the scope of the Council's control and whether the effects of exercising all the consents required under both operative plans and the proposed plan overlap or are quite distinct.

[37] The Court then concluded on this point:

> [68] In written submissions the Council also suggested that as the Coastal Plan left it with no discretion whether to grant the consent and precluded notification that application should not, for that reason alone, be bundled with the other consents. Taken to its logical conclusion, that argument would exclude bundling in almost every case involving a controlled activity. That is not supported by the authorities I have been referred to.

[38] Respectfully, the exclusion of controlled activities from bundling for the purposes of determining the relevant class of activity or the basis on which consent may be granted or declined appears to be a consequence of the caselaw as summarised in *Southpark* and, in particular, the reasoning in *King*. Ultimately that is not an issue of judicial authority but a necessary result of s 104A(a) and predecessor provisions of the RMA requiring a consent authority

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25 *Urban Auckland v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235.

26 Note 25, at [44] – [64].

to grant an application for a resource consent for a controlled activity. It is, with respect, difficult to see how that statutory provision can be complied with if the controlled activity is bundled with a more restrictive class of activity so that consent to it may be refused. It is beyond question that a statutory provision prevails over a common law rule of practice. That statutory provision is not referred to in the decision in *Urban Auckland*, but of course there the High Court was concerned with a review of the consent authority's notification decision and not with an appeal in relation to the substantive consenting decision.

[39] The High Court went on to note that the issue of the overlap of effects involved the extent to which the discharge of stormwater was related to the increased area of the wharf. The Court concluded on this point that the discretionary activities only arose because of the extension to the wharf and consequently the consideration of such effects would be materially and directly affected by the size of the extension, so that the applications should have been bundled for the purposes of considering whether to notify them. As the effects could have been more than minor, the applications should have been notified.[27]

[40] In *Marlborough District Council v Zindia*[28] the High Court was dealing with an appeal against a decision of the Environment Court[29] to cancel an abatement notice requiring certain commercial forestry operations to cease. In the course of the appeal, the High Court considered an argument that it was permissible to bundle permitted activities with those requiring resource consent. This argument involved consideration of the caselaw relating to the permitted baseline and the extent to which the effects of permitted activities

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27 Note 25, at [92] – [94].

28 *Marlborough District Council v Zindia* [2019] NZHC 2765, [2020] NZRMA 216; leave to appeal granted but not on a question which is relevant to this issue: see *Zindia v Marlborough District Council* [2020] NZCA 229.

29 *Zindia Ltd v Marlborough District Council* [2019] NZEnvC 30.

applies to the determination of applications for resource consent.[30]

[41] The Court's conclusion on this topic, respectfully, helps to clarify the difference between the two ways in which bundling may be referred to and the correct treatment of different classes of activities when they are bundled. For ease of reference I set it out in full (citations omitted):

> [64] Having reviewed the authorities on the concept of bundling, it appears that, at least from a practical perspective, permitted activities can be bundled with other classes of activity. This is particularly evident from the Court of Appeal's commentary in *Bayley* and also from *Southpark Corporation Ltd,* which concerned resource consent applications for various permitted and discretionary activities, as is the case in the present appeal.
>
> [65] The Environment Court in the present case came to this same conclusion, stating:
>
> > [55] 'Bundling' is a well-established approach in the consideration and determination of resource consent applications under the RMA. According to this approach, where various activities (in this case, land uses) are closely related but have different activity classifications under a relevant RMA plan, the most restrictive activity classification is applied to all of them. Hence, if one land use is a discretionary activity, but all others in the bundle applied for are controlled or restricted discretionary, all default to be determined as discretionary activities. However, the principle that underlies the bundling approach to consenting also extends to where one aspect of a bundle is classed as a permitted activity when the other activities in the bundle are discretionary. In that scenario, it is also more consistent with the purpose of the RMA to allow for a properly holistic assessment of the effects of all inter-related land uses so that those effects can be properly managed through consent conditions.
>
> [66] While the Environment Court did not err in its reasoning, in my view, it is preferable to avoid the use of the term bundling when discussing permitted activities. This is for the following reasons:
>
> > (a) Bundling can only occur where a person or entity submits a resource consent application comprising multiple activities (of which there are two or more activity classes). Permitted activities may occur as of right and do not require a resource consent.

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30 Reviewing *Bayley v Manukau City Council* , note 17; *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473 (CA); and *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

(b) Bundling proceeds on the basis of the most restrictive activity. As permitted activities are, by definition, the most permissive of activities under the RMA, these activities would necessarily be excluded from the proposed resource consents if bundled with any other class of activity.

(c) If consent is not granted for a proposed bundle of activities, the applicant is nevertheless able to engage in the permitted activities by themselves or in combination with each other, so long as the criteria for each permitted activity is satisfied.

(d) A local authority is only permitted to refuse consent on the basis of matters over which it retains control. It does not retain control over permitted activities in the same way it does in respect of activities that require a resource consent. This principle was reaffirmed in *Smith Chilcott Ltd* where the Court of Appeal stated [at 479]:

> The essential point is that the consent authority may have powers to consent depending on its characterisation of the proposed use of the land or activity. Such may be non-complying, discretionary, restricted discretionary or controlled, whichever characterisation it uses. But its power does not go beyond the extent retained so long as it is exercised in accordance with the Act.

Accordingly, a local authority is not able, as of right, to grant a resource consent with conditions in respect of aspects of that consent which constitute permitted activities unless, as is the case in the present appeal, the applicant consents.

[67] The Environment Court's view on the ability to bundle permitted activities is more accurately a reaffirmation of the observation of Salmon J in *Aley*, cited with approval by the Court of Appeal in *Bayley*, that a resource consent application must be considered holistically. The local authority is not required to determine whether each activity should be granted individually. An application may be declined on the basis it is unacceptable as a whole, notwithstanding that it predominantly comprises permitted activities. This is, however, not equivalent to the concept of bundling even if practically, the same outcome ensues.

[68] Nevertheless, while I consider the Environment Court's terminology to be inappropriate, I do not consider the outcome reached by the Environment Court in considering the resource consent and the discretionary and permitted activities together in a holistic approach to be incorrect.

Conclusion on the bundling issue

[42] I respectfully take from the High Court's analysis in *Zindia*, as set out

above, that while holistic assessment of the related elements of a proposal is required no matter what combination of activity classes may be involved, "bundling" in its specific sense of treating the overall class of the proposal as being the most restrictive is not automatic and requires care to ensure that the statutory limits in relation to different classes of activity are observed. In particular, bundling cannot override the statutory provisions of ss 9, 104A and 104C. It should be noted, however, that if activities which are permitted or which are to be assessed as controlled and restricted discretionary may only be exercised if the associated discretionary or non-complying consents are also granted on appropriate terms and conditions, the practical effect of those limits may be reduced or even non-existent.

[43] In this case, it presently appears to me that if POAL were not to be granted the consent for the restricted discretionary activity of capital dredging, then it is unclear what use it could make of any controlled activity consent for maintenance dredging. But the preliminary issue concerning bundling in this case does not depend on the answer to that question.

[44] On the information put before me to argue the preliminary issue (which includes the assessment of environmental effects to undertake the activities), I am satisfied that the two activities of capital dredging and maintenance dredging relate to the same subject matter and should be heard together. I also think it likely that the effects of the two activities overlap, even if they may occur at different times, so that they should be considered together. However, they should not be treated as having the same activity class or status and cannot be bundled for that purpose as to do so would be contrary to the statutory limitations applicable to making decisions on applications for restricted discretionary and controlled activities.

[45] The conclusion I reach on the bundling issue is therefore in two parts:

a) The assessment of the effects of capital dredging and of

maintenance dredging should be considered together in order to provide a properly holistic assessment of them so that their effects can be managed by appropriate conditions; but

b) While consent for capital dredging may be refused as a restricted discretionary activity under ss 87A(3) and 104C of the RMA within the scope of the rules of the plan which apply to that activity, consent for maintenance dredging must be granted as a controlled activity under ss 87A(2) and 104A of the RMA and the rules of the plan which apply to that activity and therefore the two activities should not be bundled for the purpose of determining a single class of activity.

Effects of dumping dredged material outside the CMA

[46] I start this section of my decision by setting out certain background information which is relevant to the issue.

[47] The RMA applies to all of the territory of New Zealand. This territory includes the territorial sea, which is the area of the sea within 12 nautical miles (22.2 km) of the low water mark, generally, along the coast of New Zealand including the coast of all islands.[31] Under the RMA, the area of the territorial sea is generally referred to as the CMA, noting that the CMA also includes the foreshore up to the line of mean high-water springs. The CMA is generally co-extensive with the marine and coastal area under the Marine and Coastal Area (Takutai Moana) Act 2011, which also extends as far as the outer limits of the territorial sea.

[48] While New Zealand has certain sovereign rights to areas of the sea outside its territorial sea under the United Nations Convention on the Law of

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31 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, ss 3 – 6A.

the Sea and has made certain enactments to govern those areas, the RMA does not extend to those areas. The management and regulation of activities within those areas is the subject of the EEZ Act. The purpose of the EEZ Act is set out in s 10 as follows:

> **10 Purpose**
>
> (1) The purpose of this Act is—
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations under section 27, 29A, 29B, or 29E and the consideration of applications for marine consent.

[49] It is immediately apparent that the purpose of the EEZ Act is directly comparable to the purpose of the RMA, both being based on the sustainable management of resources, protecting the life-supporting capacity of the environment and addressing the adverse effects of activities on the

environment.

[50] The definition of "environment" in s 4 of the EEZ Act is somewhat more focussed than the corresponding definition in s 2 of the RMA, but that is understandable given the nature of the offshore marine environment. In the EEZ Act, "environment" means:

> … the natural environment, including ecosystems and their constituent parts and all natural resources, of—
>
> (a) New Zealand:
>
> (b) the exclusive economic zone:
>
> (c) the continental shelf:
>
> (d) the waters beyond the exclusive economic zone and above and beyond the continental shelf

[51] It is also notable that the definition of effect in s 6 of the EEZ Act is essentially the same as the definition in s 3 of the RMA.

[52] As well as referring to the implementation of New Zealand's obligations under various international conventions, the EEZ Act also makes the following provision in respect of the principles of the Treaty of Waitangi in section 12:

> **12 Treaty of Waitangi**
>
> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
>
> (a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise marine consent authorities so that decisions made under this Act may be informed by a Māori perspective; and
>
> (b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
>
> (c) sections 33 and 59, respectively, require the Minister and a marine consent authority to take into account the effects of activities on existing interests; and

(d) section 46 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

[53] The EEZ Act, like the RMA, is a framework statute setting out the bases on which certain activities may be undertaken within New Zealand's EEZ but directing that the detailed controls be provided in regulations and setting out consenting processes for a range of anticipated activities, including the dumping of waste or other matter. For present purposes the principal regulations are the EEZ Dumping Regulations.

[54] The Environment Court has limited jurisdiction under the EEZ Act, confined to dealing with enforcement proceedings.[32] The Environmental Protection Authority (**EPA**) is the primary marine consent authority and generally has the administrative, decision-making and executive enforcement functions under the EEZ Act and the numerous enactments made under it.[33] Certain types of application for consent must be referred by the responsible Minister to a board of inquiry.[34] Appeals from the decisions of the EPA and boards of inquiry must be made to the High Court and are limited to questions of law.[35]

[55] As noted in the background to this decision, POAL holds a marine dumping consent under s 62 of the EEZ Act and in accordance with the EEZ Dumping Regulations allowing it to dump dredged material at the CDS, subject to a number of conditions. The issue between the parties is whether the effects of such dumping are a relevant consideration in the assessment of the effects of POAL's application to undertake capital and maintenance dredging in the CMA. The Council's hearing commissioners held that they had no jurisdiction to consider those effects or make findings about them in respect of POAL's

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32 EEZ Act, s 114.
33 EEZ Act, s 13.
34 EEZ Act, s 52.
35 EEZ Act, ss 105 and 113A.

application, even though they heard submissions made in relation to them and found that the effects "may well be of some significance culturally".

[56] In submissions before me, counsel for Protect Aotea also emphasised certain alleged shortcomings in the process by which the EPA had granted a marine dumping consent to POAL. I expressed concern to counsel that in light of both the jurisdictional limits of the RMA and the absence of any original jurisdiction of this Court to review a decision on a marine dumping consent under the EEZ Act and the EEZ Dumping Regulations, I should not question the validity of that consent. That concern was apparently accepted. Subsequent to the hearing, I learned that Protect Aotea has applied to the High Court to review the EPA's decision to grant that consent. After enquiring of the parties, I am satisfied that those judicial review proceedings do not preclude me from continuing to consider the issue of whether the effects of the exercise of that consent (assuming that it is valid) are relevant to these appeals and give my decision on that issue. While POAL's consent is now the subject of an application for judicial review, it remains valid unless and until declared by that Court to be otherwise[36] and so this Court must proceed on that basis.[37]

[57] The focus of the issue which is before this Court is the extent to which a consent authority must have regard to any actual and potential effects on the environment of allowing the activity under s 104(1)(a) of the RMA. The broad definitions in the RMA of "environment" in s 2 and "effect" in s 3, and the breadth of the ordinary meaning of the words "activity" and "use" as found throughout the RMA, might be taken to support the idea that regard must be had to any consequence anywhere of any action that is related to the application being considered. On its face, that limitless proposition is too broad and uncertain to be a satisfactory interpretation of s 104(1)(a) of the RMA. It is appropriate to examine it in its context (both textual and purposive)

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36 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).
37 *Auckland City Council v Long* [1998] NZRMA 183 (HC).

carefully to see what limits are set. There are a number of aspects to that which I will review, including whether any relevant effects are appropriately dealt with other than under the RMA. It is important to keep in mind that no single aspect is likely to be determinative of the issue.

[58] One may start with the general principle that the law does not concern itself with trifles and so negligible effects will ordinarily be set aside.[38] Effects that are minor (as that may be assessed relative to some appropriate standard rather than merely so described), however, are to be taken into account.[39] Also as a general principle, the consequential effects of allowing the activity may not be relevant if they are too remote or unrelated.[40] A causal relationship, tempered by considerations of nexus and remoteness, must normally be identified. In this context, nexus refers to the degree of connection between the activity and the effect while remoteness refers to the proximity of such connection, both being considered in terms of legal relationships rather than simply in physical terms. It must be recognised that these assessments are likely to be in terms of factors of degree rather than of absolute criteria and so are usually matters of weight rather than intrinsically dispositive of any decision.[41]

[59] Various submissions were presented to the effect that dredging and dumping are independent activities too remote from each other to share a causal relationship. These included the ability to exercise the consents separately and the separate jurisdictions governing them. In my opinion, those distinctions are formal and do not go to the substantive nature of the activities or their effects. The analysis of alternative methods of disposal

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38 *Bayley v Manukau City Council*, note 17 at 576; *Westfield (NZ) Ltd and Northcote Mainstreet Inc v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597.

39 *King v Auckland City Council*, note 20, at [29](e), [54] – [57].

40 *Beadle and Wihongi v Minister of Corrections* NZEnvC A74/2002 at [88] – [92]; *Royal Forest and Bird Protection Soc. of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156 at [42] – [43]; *West Coast ENT Inc v Buller Coal Ltd*, note 6 at [117] – [119].

41 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388 at [81] – [82].

required to be considered under s 59(2B)(c) of the EEZ Act, as set out in the EPA's reasons for granting the marine dumping consent, demonstrates the connection clearly. While dredgings can be used in reclamations and as landfill, and those options are often preferred where possible (for example, use in reclamations reduces transport costs) or necessary (contaminated dredgings must go to appropriate landfills), the scale of the dredging operations and the need for certainty that the Waitematā Navigation Channel will always be open for large cargo vessels led the EPA to conclude that there is presently no feasible alternative to a marine dumping option and that there is no realistic alternative to dumping at the CDS over the proposed duration of the consent. On that basis there is no real foundation available on the evidence before me to say that the dredging activities and the dumping of dredgings do not have a clear causal relationship in terms of both nexus and remoteness: without dredging, there would be no dumping; and without the ability to dump, dredging would not occur. The consequential effects of allowing the dredging activity therefore include the effects of disposal of dredged material.

[60] Next, the RMA provides certain express exclusions in relation to the effects that can be considered. Adverse effects of the activity may be disregarded if a national environmental standard or the relevant plan permits that effect (s 104(2)). There are no permitted activities relating to dredging in either the Port precinct or the Waitematā Navigation Channel precinct. It was not suggested that the Plan or any national environmental standard permits any effect of dredging. No effect that might be excluded by s 104(2) of the RMA is relevant in this case.

[61] Certain specific effects (such as those of trade competition (s 104(3)(a)) and until recently the effects of a discharge to air of greenhouse gases on climate change (s 104E)) have been excluded by Parliament for policy reasons, but none of those is relevant here.

[62] Capital dredging is a restricted discretionary activity under the AUP. As required by ss 87A(3) and 104C of the RMA, the consent authority's power to decline consent or to impose conditions on the consent is restricted to the matters identified in the relevant plan. In that regard, effects on coastal processes, ecological values, water quality (including the release of any contaminated sediment) and natural character and landscape values and effects on mana whenua values are relevant considerations within the restrictions set by the applicable provisions of the AUP for the capital dredging[42] and were raised by counsel for the appellants as matters that could therefore be addressed in these appeals.

[63] There can be little doubt that the biophysical effects of capital dredging are within the restricted discretion of the consent authority and, on appeal, this Court. The extent to which effects on natural character and landscape values may arise from the dumping of dredgings in water which is around 700m deep would depend on evidence which is yet to be presented. Any doubt at this stage about such evidence is immaterial given the clear jurisdiction to consider biophysical effects.

[64] Counsel for Protect Aotea submits that the consideration of mana whenua values must be in light of tikanga Māori.[43] That was not put in issue before me and I do not doubt it. Any such consideration can only be based on the evidence before the consent authority as to what those values are and what the effects of the proposed activity on them may be, so that:[44]

> … any assessment of this kind will be predicated on the asserted relationship being clearly grounded in and defined in accordance with tikanga Māori and mātauranga Māori and that any claim based on it is equally clearly directed to the discharge of the statutory obligations to Māori and to a precise resource management outcome.

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42 Auckland Unitary Plan, F2.23.1(1)(c) and (f), I103.8.1(1), and I208.8.1(3).

43 *Trans Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [177] – [178].

44 *Ngāti Maru Trust v Ngāti Whatua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [110] and [133].

[65] At this preliminary stage no such evidence is before the Court, but I can proceed on the assumption that, under the broad provisions of ss 6(3), 7(a) and 8 of the RMA, the relationship of Māori with Te Moana-nui-a-Kiwa, their role as kaitiaki of the moana and the Treaty principles of protection and participation all include or support values which may be relevant to these appeals within the scope of the discretion as restricted by the AUP.

[66] Maintenance dredging is a controlled activity for which consent must be granted under ss 87A(2)(a) and 104A(a) of the RMA, but in respect of which conditions may be imposed. As required by ss 87A(2)(b) and 104A(b)(ii), however, such conditions may only be for those matters for which the consent authority has reserved its control in the relevant plan. No reference has been made before me to any relevant reservation of such control in the AUP. My own reference to the AUP indicates that control is reserved to effects on water quality, harbour traffic, navigation and safety and the duration and monitoring of consent.[45] Outside the Port and Waitematā Navigation Channel Precincts (including at the CDS) it would appear that only the issue of effects on water quality could be relevant.

[67] I conclude that effects on coastal processes, ecological values, water quality and, perhaps, natural character and landscape values as well as on mana whenua values in the environment, including the environment beyond the CMA, are within the discretion of the consent authority whether to grant or refuse the application for resource consent to undertake capital dredging. Effects on water quality are within the reservation of control by the consent authority in relation to maintenance dredging. It follows that such effects may be considered in the assessment of effects of the consequential dumping of dredgings from the respective activities of capital and maintenance dredging in the General Coastal Marine Zone of the AUP.

[68] As well as identifying the relevant effects of allowing the activity for the

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45 Auckland Unitary Plan, I103.7.1 and I208.7.1.

purposes of the consideration under s 104(1)(a) of the RMA, there must also be consideration of the relevant environment where and when those effects occur. As noted earlier, the RMA applies throughout the territory of New Zealand, but not beyond it. The environment, both as defined in s 2 of the RMA and in its ordinary meaning, is not so limited. The statutory definition is inclusive and expressly includes ecosystems and all natural resources. Nature generally does not limit itself according to human boundaries. It would accordingly be unreal to suggest that effects might occur outside or beyond the environment.

[69] Counsel for POAL submitted that the relevant location of effects must be "local". That is one of those words which is often used to describe a dimensional relationship but which conveys little intrinsic meaning in the absence of contextual information about the scale of the relevant dimension. Such words tend to be over-used in this jurisdiction: the most egregious usage is of the word "minor" without more. Thankfully, counsel defined her use of "local" effects as meaning those experienced inside the outer limits of the territorial sea. She said this would be consistent with the approach in *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council.*[46]

[70] I find it difficult to see any clear basis on which a consideration of which effects are "local" adds anything to the more fundamental causal considerations of nexus and remoteness. I do not understand that the word would affect that assessment: the references in the decision of the High Court in the *Te Runanga o Ngāti Awa* case were, as far as I can see, intended to distinguish the effects of the use of water within New Zealand from the export of water rather than to inform the analysis of remoteness. The High Court concluded that the Environment Court's reliance on the territory of New Zealand as a basis for remoteness was incorrect, but ultimately that was not material to its decision.[47] In any event, I have already found that the boundary

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46 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council* note 41.

47 Note 46, at [142].

of the territorial sea does not limit the extent of assessment of the effects of dredging in the CMA on the environment.

[71] The temporal dimension is also important. The definition of "effect" in s 3 of the RMA includes any future effect, any cumulative effect which arises over time or in combination with other effects and any potential effect either of high probability or of low probability which has a high potential impact. The environment, in the context of s 104(1)(a), embraces the future state of the environment, which includes how it might be modified by the carrying out of permitted activities or the likely implementation of current resource consents.[48]

[72] Within New Zealand, planning documents are to be prepared by councils having regard to the need for consistency with the planning documents of adjacent councils.[49] Similar consideration must be given by regional councils to the extent to which their policy statements and plans need to be consistent with regulations made under the EEZ Act.[50] When considering an application under s 104 of the RMA, a consent authority must have regard to any relevant regulations: those made under the EEZ Act would be within the scope of that requirement.[51] It may be noted that the responsible Minister under the EEZ Act, when developing regulations, need not give the same consideration to regional planning documents, but must take into account effects on the environment that may occur in New Zealand or in the waters beyond the outer limits of the EEZ.[52]

[73] Those provisions strongly indicate that the consideration of effects on the environment of allowing an activity are not restricted simply by the

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48 *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 at [34] - [84].

49 RMA, ss 61(2)(b) (for regional policy statements), 66(2)(d) (for regional plans) and 74(2)(c) (for district plans).

50 RMA, ss 61(2)(c) and 66(2)(e).

51 RMA, s 104(1)(b)(ii)

52 EEZ Act, ss 33(3)(a) and (b) and 34A.

territorial extent of the consent authority's jurisdiction under the RMA. Such consideration should include effects beyond its boundaries, guided by the relevant planning documents of its neighbours under the RMA and by any relevant regulations under the EEZ Act. I accordingly find that the extent of the environment is not limited by the scope of the RMA and extends beyond the CMA.

[74] The existence or not of other regulatory regimes may be a relevant consideration in the assessment of effects on the environment. In *Metekingi v Rangitikei-Wanganui Regional Water Board*[53] Cooke J acknowledged that the Water and Soil Conservation Act 1967 was not primarily aimed at resolving issues between competing land uses, but considered the nature of the matters in issue in that case to be related and that it would be unreasonable to restrict the ambit of such issues from being addressed when the appellants had no other legal forum in which to advance their contentions. In *Beadle & Wihongi v Minister of Corrections*[54] this Court, in undertaking a review of caselaw concerning consequential effects, concluded:

> [88] From reviewing all those cases, we discern a general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness. Of course the weight to be placed on them has to be case-specific. *Lee's* case is a reminder that a decision-maker should not have regard to matters extraneous to the Act; *Ngati Rauhoto* that an appeal on one topic cannot be turned into an appeal on another; and *Cayford* that consequential effects may be too slightly connected to the consent sought, and too remote.

[75] Similarly, while consideration of the effects on the environment under the RMA may include effects beyond the CMA (subject to the limits discussed above), such consideration must also be consistent with other relevant legislation where there is another regulatory regime in place. In *West Coast*

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53 *Metekingi v Rangitikei-Wanganui Regional Water Board* [1975] 2 NZLR 150, (1975) 5 NZTPA 330 (SC).

54 *Beadle & Wihongi v Minister of Corrections*, note 40 at [88].

Environmental Network Inc v West Coast Regional Council[55] this Court considered whether a possible mine, where a mining licence under the Coal Mines Act 1979 had been amended but not yet implemented, could form part of the existing environment as interpreted in *Hawthorn Estates*.[56] Ultimately, the Court held that the possible exercise of a consent was too uncertain to be included in the environment for the purposes of making a decision on a resource consent. In the course of its reasoning, however, the Court had to consider whether the mining licence was pertinent to the assessment when it was not a resource consent and did not create a permitted activity under the relevant district plan. The Court held that a legal consent under other legislation authorising an activity with no further consents or permissions necessary (particularly under the RMA) could constitute an element of the existing environment which would require its effects to be considered cumulatively with those of a proposal being considered under the RMA.[57]

[76] On appeal in *Royal Forest and Bird Protection Soc Inc v Buller District Council* [2013] NZHC 1324,[58] Fogarty J referred to this consideration of the mining licence with apparent approval, while upholding the Environment Court's decision that on the facts of the case the particular licence was insufficient to bring it and the activity so authorised within the ambit of the existing environment. The point is also mentioned in the decision of the Court of Appeal refusing special leave to appeal, without apparent criticism.[59]

[77] The assessment of consistency between regulatory regimes includes whether the consent authority or this Court can, and if so how it should, have regard under the RMA to effects on the environment which are those of an

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55 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 42.

56 *Queenstown-Lakes District Council v Hawthorn Estates Ltd* note 48.

57 *West Coast Environmental Network Inc v West Coast Regional Council* note 55 at [43].

58 *Royal Forest and Bird Protection Soc Inc v Buller District Council* [2013] NZHC 1324.

59 *Royal Forest and Bird Protection Soc Inc v Buller District Council* [2013] NZCA 496 at [13].

activity which has been granted consent under the other regime. A comparison of the regimes under the RMA and the EEZ Act indicates substantial similarities or at least consistent treatment. The EEZ Act is founded on a similar purpose of sustainable management of resources. There is an application and consenting framework requiring assessment of activities in a similar manner to that under the RMA.

[78] Restrictions on dumping of dredgings within the EEZ are regulated under ss 20D and 20G of the EEZ Act. Dumping of dredged material in an authorised location (such as the CDS) is a non-notified discretionary activity under reg 32 of the EEZ Dumping Regulations. An application for a marine dumping consent is required under s 38, including an impact assessment under s 39. A marine consent authority must consider the application under s 59 of the EEZ Act and must:

a) take into account the following matters under s 59(2):

> (a) any effects on the environment or existing interests of allowing the activity, including—
>
> > (i) cumulative effects; and
> >
> > (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and
>
> (b) the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity, including—
>
> > (i) the effects of activities that are not regulated under this Act; and
> >
> > (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and
>
> …
>
> (d) the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and
>
> (e) the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and
>
> …
>
> (h) the nature and effect of other marine management regimes; and

…

(j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and

(k) relevant regulations (other than EEZ policy statements); and

(l) any other applicable law (other than EEZ policy statements); and

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

b) take into account the following matters under s 59(2B):

…

(b) the effects on human health of the dumping of waste or other matter, or the abandonment of the pipeline, if consent is granted; and

(c) any alternative methods of disposal of the waste, other matter, or pipeline that could be used; and

(d) whether there are practical opportunities to reuse, recycle, or treat the waste, other matter, or pipeline.

c) have regard to the following matters under s 59(3):

(aa) EEZ policy statements; and

(a) any submissions made and evidence given in relation to the application; and

(b) any advice, reports, or information sought under this Part and received in relation to the application; and

(c) any advice received from the Māori Advisory Committee.

d) not have regard to the following matters under s 59(5):

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

(b) the effects on climate change of discharging greenhouse gases into the air; or

(c) any effects on a person's existing interest if the person has given written approval to the proposed activity.

[79] The marine consent authority may then make its decision whether to grant or refuse the application under s 62 of the EEZ Act. It must refuse the application under s 62(1A) if:

(a) the marine consent authority considers that the … other matter … may be reused, recycled, or treated without—

(i) more than minor adverse effects on human health or the environment; or

(ii) imposing costs on the applicant that are unreasonable in the

circumstances; or

(b) the … other matter … is identified in such a way that it is not possible to assess the potential effects of dumping … it on human health or the environment; or

(c) the marine consent authority considers that dumping the … other matter … is not the best approach to its disposal in the circumstances.

[80] It may also refuse the application under s 62(2) if it considers that it does not have adequate information to determine the application.

[81] It is apparent that both the structure of the consenting process under the EEZ Act and substantial elements of its content are very similar to the corresponding structure and content under the RMA. The range of relevant considerations appears to be comprehensive. The absence of purpose provisions in the EEZ Act which correspond to the provisions in ss 6 and 7 of the RMA is not significant in light of the detailed list of matters that must be taken into account, as quoted above.

[82] A difference that was emphasised in the submissions of counsel for the appellants was the limited extent to which there are rights of participation in consenting processes under the EEZ Act compared to those available under the RMA. It would be useful to have evidence on the actual extent to which participation of affected persons occurs in the two regimes, although the enormous difference in the numbers of applications could make direct comparisons of little value. Also, the participatory dimension under the RMA has been reduced substantially by successive amendments over the years. I do not consider this to be a significant factor for comparison.

[83] On the question of the extent to which the EPA considered matters of concern to Māori, which was a matter that counsel for Protect Aotea submitted was of particular importance, I note that the decision of the EPA granting Marine Dumping Consent EEZ400011 includes the following:

a) Recording at paragraph 10(a) that 60 Māori organisations or

groups (being iwi authorities and applicant groups for customary marine title or protected customary rights) were sent letters advising them that POAL had lodged its application, including links to the EPA website to access the application, IA, and supporting documents;

b) Advising at paragraph 13 that its external expert reviewers, Ngā Kaihautū Tikanga Taiao, being the EPA's Māori Advisory Committee, had been commissioned to report on the Māori perspective of the potential impacts of the application, and including a summary of that report at paragraphs 24 - 27;

c) Addressing Māori existing interests at section 9.2.3 of its decision (paragraphs 163 – 171) as required by s 59(2)(b) of the EEZ Act;

d) Noting at paras 185 – 187other relevant marine management regimes, including the Māori Fisheries Act 2004, as required by s 59(2)(h) of the EEZ Act; and

e) Considering at paragraphs 200 - 209, as "any other matter [it] considers relevant and reasonably necessary to determine the application" under s 59(2)(m) of the EEZ Act, Māori perspectives on the potential effects on cultural values and interests.

[84] I do not address the substance of any of those parts of the EPA's decision or whether those properly respond to the matters required to be considered under the EEZ Act. That is the function of a court on review and may be undertaken in the separate proceedings which Protect Aotea has now commenced in the High Court. If the High Court concludes that there has been a reviewable error in the making of the EPA's decision it may quash it, with potential consequences for POAL's ability to exercise its dredging consents, but that is not a matter on which this Court should speculate.

[85] I also acknowledge that there are numerous differences between the two regimes. Given the difference in the range of matters which may be regulated under the RMA and the comparatively more limited range of matters within the scope of the regime under the EEZ Act, that is to be expected. Decision-making under the two regimes will also be different, for the same reasons. It would be unreal to expect that the structure and content of a decision of the EPA under the EEZ Act would match, in every material particular, the structure and content of a decision of a consent authority under the RMA. The differences in the subject matter between the two statutory schemes and procedural details are always likely to result in such differences. What is of substantially more importance is whether the issues that are likely to affect the environment, and in particular in this case the issues that the parties have raised in their appeals, are dealt with on some equivalent basis, so that there can be proper consideration of whether a consent granted under the EEZ Act adequately deals with the matters of concern in proceedings before this Court.

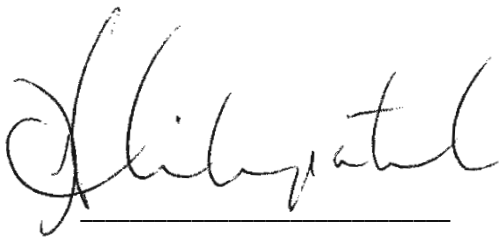
Conclusion on consideration of effects of dumping

[86] The purpose of setting out the required elements for and listing certain parts of the EPA's decision is to show that the EPA did consider those matters in reaching its decision on POAL's application for a marine dumping consent under the EEZ Act. Having done that, there is no basis for this Court to say that there is a gap in the regulatory scheme in relation to those matters in the EEZ which would justify a consent authority or this Court on appeal in undertaking such assessment under the RMA for the purposes of determining the capital and maintenance dredging consents in the CMA. I find that the consenting regime under the EEZ Act is comprehensive and that consents granted under that regime should be treated as comparable to those granted under the RMA.

[87] I also find that consideration of the adverse effects on the environment of dumping dredged material at the CDS is within the scope of the matters to which regard was required to be had by the marine consent authority under

the EEZ Act. There is no jurisdiction under the RMA to make any decision in relation to any marine dumping consent. There is no basis on which the holder of a marine consent can be required to have that consent reviewed by a consent authority or this Court under the RMA. I therefore conclude that while the effects of dumping dredged material outside the coastal marine area are within the scope of the actual and potential effects on the environment of allowing the dredging activities, where there is a sufficient consent of a marine consent authority under the EEZ Act there is no basis on which a consent authority under the RMA or this Court on appeal can undertake any competing assessment of those matters.

[88] It follows that POAL's marine dumping consent forms part of the existing environment. The effects of exercising it are anticipated by that consent and controlled by the conditions attaching to it. While the dumping and its effects are relevant to the proposed dredging activities, being connected and proximate to them, the fact that there is a sufficient consent granted by an appropriate marine consent authority obviates the need for any further assessment. On that basis, the dredging consents sought by POAL may not be refused on the ground that there should be no offshore dumping.



D A Kirkpatrick
Chief Environment Court Judge



BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 137

IN THE MATTER	of an appeal under a decision on one of the Notices of Requirement for the City Rail Link pursuant to s174 of the Resource Management Act 1991 (**the Act**)
BETWEEN	TRAM LEASE LIMITED (ENV-2014-AKL-000057) Appellant
AND	CJM INVESTMENTS LIMITED A party under s274 RMA
AND	AUCKLAND TRANSPORT Respondent/Requiring Authority
AND	AUCKLAND COUNCIL Territorial Authority

Hearing at:	Auckland on 29 and 30 June and 1, 2 and 3 July 2015,
Court:	Principal Environment Judge LJ Newhook Environment Commissioner IM Buchanan Environment Commissioner JA Hodges
Appearances:	Mr T Daya-Winterbottom for the appellant and s274 party

Mr A Beatson and Ms S Anderton for the respondent/requiring authority
Ms V Evitt and Mr R Wilson for Auckland Council

Date of Decision: 21 August 2015.

DECISION OF THE ENVIRONMENT COURT REFUSING APPEAL

A. The designation will be confirmed, subject to the finalising of appropriate conditions.

B. Costs are reserved.

C. Commentary is offered on the work of expert witnesses and the related duties of counsel.

REASONS FOR DECISION

Introduction

[1] This appeal by Tram Lease is against one of six Notices of Requirement (NOR6) for infrastructural works proposed in Auckland for a 3.4km underground passenger railway line to connect Britomart station and the North Auckland Line near Mt Eden station.

[2] NOR6 is the part of the proposed works in the near vicinity of land owned by Tram Lease in the suburb of Mt Eden. The land is the subject of a head lease to CJM Investments Limited, which in turn has sub-leased parts to various businesses.

[3] The evidence on behalf of Auckland Transport ("**AT**") was to the effect that the City Rail Link involves a very significant investment of the order of $NZ2.8b, and it was AT's counsel's submission that the positive effects of the project should be taken as overwhelmingly in favour of the designation being confirmed. It was his

submission that there was no challenge credibly mounted to suggest that the CRL is not necessary to meet the objectives of Auckland Transport or the needs of Auckland.

[4] NOR6 provides for works to upgrade the Mt Eden railway station and connect the CRL lines into the North Auckland line of KiwiRail. The works would include the grade separation of the Normanby Road rail crossing, comprising a raising of the existing road level, and a lowering of the adjoining railway track, thereby necessitating the construction of an access ramp into the Tram Lease site.

Problems of process

[5] While pre-reading the evidence for the hearing during the preceding week, members of the Court gained the understanding that one of the reasons for the evidence being so voluminous and the parties so polarised, was that they had taken it upon themselves to terminate expert conferencing part-way through, contrary to the Court's directions about what they were to endeavour to achieve by that process. The Judge was then obliged to issue 3 Minutes directing resumption of expert conferencing and requiring counsel to confer and produce a succinct statement of issues in dispute, narrowed he hoped by outcomes of the further conferencing.

[6] Witnesses are not to take it upon themselves to terminate conferencing when that has been directed by the Court. (On this occasion, witnesses had promised the facilitator that they would undertake some further studies then resume sessions at a later date, but instead they undertook no further conferencing until the Court issued further directions just prior to the hearing). Counsel have a responsibility to ensure that witnesses undertake independent conferencing to a professional conclusion, and to manage client expectations in that regard.

[7] When conducted appropriately, conferencing can produce professional narrowing of disputes and save everybody time and expense (as belatedly proved possible in this case after conferencing resumed). Undertaken in the manner and negative tone that counsel permitted to occur here however, conferencing will instead simply add another layer of cost onto proceedings. The Court in such instances in future might give consideration to the NSW approach of limiting experts to one Court-sanctioned witness per discipline.

The issues

[8] Remarkably (given the climate between the parties), issues narrowed significantly after the resumed facilitated conferencing.

[9] The whole thrust of the appeal had, prior to that, appeared to be to bring about a result whereby AT be forced to acquire the site and compensate Tram Lease and CJM Investments. That flavour did not entirely disappear, but crumbled somewhat as the hearing progressed and Tram Lease's and CJM's positions were tested. Subsidiary to that, the issues divided themselves into:

(a) effects prior to commencement of works;

(b) temporary effects during construction;

(c) permanent effects after completion of the works.

We now proceed to list the sub-categories of effects within each of those.

Effects prior to commencement of works

[10] (i) "planning blight" due to uncertainty of commencement of these public works of significant scale, with a related complaint that the "specified date" for triggering an ability to claim compensation under s62(2)(c) of the Public Works Act is entirely under the control of AT;

(ii) lapse period for commencement of works (ultimately agreed at ten years);

(iii) effects on tenants due to uncertainty (possible tenant loss, possible problems gaining replacement tenants, possible reduced rentals);

(iv) consequent property value reduction;

Temporary effects

[11] Effects during construction, and particularly during the 3-4 week ramp construction period alleged to include:

(i) reduction in the number of on-site carparks;

(ii) accessibility of replacement off-street carparking provided by AT;

(iii) safety of that pedestrian access to off-site parking;

(iv) how to manage allocation of parking as amongst the several tenants.

Permanent effects

[12] Issues concerning landscaping, street frontage and visual effects (visibility of site from public areas), traffic ramp design, and carparking numbers and arrangements, following the conclusion of construction, as follows:

(i) gradient of ramp into the site from grade separation of raised street – safe and efficient?

(ii) Reduced car parking numbers available compared to the existing situation and surveyed needs;

(iii) visibility of the site for people passing in the local streets;

(iv) visual aspects of lowering the adjoining railway tracks (views from within the Tram Lease site);

(v) extent of landscaping necessary to mitigate adverse effects.

Key issue

[13] The key issue in this case is, after mitigation of adverse effects (many ultimately agreed among the experts) are the adverse effects so significant that the Notice of Requirement should be cancelled?

Some preliminary legal issues

[14] Counsel for Tram Lease Mr Daya-Winterbottom raised some preliminary legal issues which he foreshadowed as hurdles for the designation. While he resiled from that strong position under questioning from the Court, conceding that "they are not road blocks", some quite considerable time was taken up addressing them,

particularly through comprehensive submissions that other counsel felt compelled to present.

[15] These issues were:

(a) Alleged non-availability of some adjoining Kiwi Rail land for mitigation purposes.

(b) Alleged further problem with that land, being that its use for mitigation would be precluded by Part 4 of the Nga Mana Whenua o Tamaki Makaurau Collective Redress Act 2014.

(c) The legal principle of non-derogation from grant.

(d) That the appellant's land would become legally "landlocked".

(a) Alleged non-availability of some adjoining KiwiRail land for mitigation purposes

[16] This issue appeared to have been at the heart of difficulties of communication amongst the parties earlier this year, and may to some degree have led to the improper termination of expert conferencing in April.

[17] Auckland Transport had proposed to mitigate the effects of the proposed designation and works on the Tram Lease property by utilising a narrow strip of land owned by KiwiRail adjacent to it, essentially to allow for an alternative entrance strip, additional permanent parking, and landscaping opportunities.

[18] Auckland Transport claimed to have reached agreement in principle with KiwiRail to obtain and utilise the strip for those purposes, but legal rights to the land were yet to be formalised.

[19] Auckland Transport offered to make utilisation of the KiwiRail land for these purposes an express condition of the Designation, but this approach was resisted by Tram Lease and the s274 party CJM Investments.

[20] There was a suggestion during the lead-up to the hearing that Tram Lease's counsel would make an issue of the legality of the draft condition offered by Auckland Transport, although little information was forthcoming at that stage. AT and Auckland Council therefore had to prepare in detail to argue the issue.

[21] Lack of detailed allegations from Tram Lease and CJM was one of the concerns noted by the Court in Minutes issued to the parties in the week before the hearing.

[22] Counsel for AT and Auckland Council took steps to anticipate an argument, and came to the hearing equipped with highly detailed submissions about the validity of imposition of a "condition precedent," and the possible relevance or otherwise of property rights in this context.

[23] Mr Daya-Winterbottom submitted that there was no documentary evidence before the Court concerning the availability of the KiwiRail land, such that it could only therefore be assumed that the land would be available. He argued that the draft conditions were intended to take effect as conditions precedent.

[24] Mr Daya-Winterbottom however then acknowledged that the use of conditions precedent in planning and resource management was well established.[1] He argued, however, that there remained a need to ensure that conditions were reasonable and could be enforced, particularly where an applicant did not own or control the relevant land. He tentatively indicated that such difficulties could be avoided by framing conditions to require that the designation should not be given effect to unless access had been constructed. He acknowledged that a similar approach could be used to overcome any potential invalidity from requiring a consent-holder to rely on the consent, authorisation, or activities of a third party.

[25] He then argued that KiwiRail would need to remove its designation from the allegedly redundant operational land under s182 RMA (to avoid the continued need for written consents under s176 RMA); for AT to obtain resource consents from Auckland Council for construction of the new access ramp and provision of parking spaces on the KiwiRail land; and for AT to enter into legal arrangements to make the land available to Tram Lease and its successors for use in connection with activities on their site. He pointed to certain rules in the Operative Isthmus District Plan.

[1] ***Grampian Regional Council v City of Aberdeen*** (1984) 47 P&CR 633

[26] Rather remarkably, Mr Daya-Winterbottom conceded at that point in his submissions that the issue was not "a road block" for the Designation!

[27] Despite the latter concession, counsel for AT and Auckland Council had prepared detailed submissions on the issue. In view of the concession we will very much summarise the submissions.

[28] Those parties argued that conditions precedent (that is, that must be satisfied before a consent-holder can undertake activities authorised by a consent or a designation) are lawful, subject to requirements that they do not:

(a) purport to impose conditions prior to the substantive consent having legal effect;[2]

(b) require the consentholder to do something that it cannot lawfully do;[3]

(c) frustrate the grant of consent;[4]

(d) give rise to undue uncertainty as to the effects of the consented works.[5]

[29] Detailed arguments were put by both counsel to the effect that none of these limitations arose in connection with the draft conditions put forward by AT.

[30] We consider that the draft conditions appropriately anticipate mitigation utilising the KiwiRail land, prior to the activities the subject of the designation commencing. As was said by the High Court in the ***Director-General of Conservation v Marlborough District Council*** case:[6]

> While none of the options can be determined at this stage with certainty, they are nevertheless technically feasible... To require an applicant for a large infrastructural consent process such as this, to have all the necessary property rights in place at the resource consent stage, would be untenable.

[31] In approving for present purposes, the latest version of draft condition 30.1(k) and (l) put forward by AT, we acknowledge that counsel appropriately

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[2] See ***Director-General of Conservation v Marlborough District Council*** (2004) ELRNZ 254
[3] ***Westfield (NZ) v Hamilton City Council*** HC Hamilton, CIV-2003-485-000956, 17 March 2004
[4] ***Hindeman v Waitaki District Council*** [2010] NZEnvC 51
[5] ***Laidlaw College Inc v Auckland City Council*** [2011] NZEnvC 248
[6] at paragraph [41]

realised the need for a strengthening of its wording at the time his submissions were delivered, and it is that version that we approve.

[32] We also agree with his submission that the appropriate term during which the land should be available would be until such time as the site is reconfigured and the access ramp into the property no longer required (agreed by AT that this would be determined by Tram Lease or successor).

(b) Use of the KiwiRail land precluded by Nga Mana Whenua o Tamaki Makaurau Collective Redress Act 2014?

[33] Seizing upon the description of the KiwiRail strip as "redundant," Mr Daya-Winterbottom submitted that Part 4 of this legislation might come into operation if there was a disposal of the land. Strangely, however, having raised the point, he acknowledged that there would be technical legal means by which the situation could be avoided.

[34] Mr Beatson offered submissions about such means, and it is perfectly clear (as we think was conceded by Mr Daya-Winterbottom) that the problem would not be insurmountable. Techniques are provided in ss128-141 of that legislation, some operating in concert with s50 of the Public Works Act 1981 whereby an existing public work or its associated land can be disposed of to another local authority whether of the same kind or not, if there are continuing requirements for it in the public interest. Auckland Transport would come within the definition of local authority in the PWA for such purpose.

[35] In the alternative, KiwiRail could continue to hold the land but authorise its use for mitigation works by AT.

[36] We hold that there is nothing in this issue, as seemed ultimately to be conceded by Mr Daya-Winterbottom.

(c) The legal principle of non-derogation from grant

[37] Another "straw man" was raised by Mr Daya-Winterbottom in his opening submissions, the doctrine of non-derogation from grant. He pointed to the existence

of leases and marked parking spaces, the latter said to be "District Plan compliant." He submitted that, while rights to these things are not real property, "*they create property-like interests and are protected by the doctrine of non-derogation from grant.*"[7]

[38] Under questioning from the Court about the inter-relationship of requirements for designation and extant resource consents, Mr Daya-Winterbottom appeared to resile from the proposition that consents could act as some sort of shield to a requirement for designation. This too ceased to be any sort of "road block."

(d) The appellant's land would become legally "landlocked"

[39] Mr Daya-Winterbottom submitted that the site owners have a right of access along the full frontage of their property with the existing road, and that there would be a statutory right to compensation under s330 Local Government Act 2002 where property was affected by a change in road level. He made the rather remarkable submission that "*absent the construction of the proposed access ramp the site would become landlocked in terms of ss326-331 of the Property Law Act 2007.*" He noted in addition a reduction of site frontage would be likely to come about, that there would be a reduction in parking space numbers, and that "*interference with access rights and alteration to road levels are recognised causes of action in private nuisance.*"(!)

[40] Mr Beatson on behalf of AT rightly pointed out that land is only landlocked if there is no reasonable access to it.[8] He noted that the site has approximately 29m of road frontage, that legal access could be obtained from any part of that, and that mitigation was proposed after the raising of the street, by the intended provision of an access ramp; also that it is not uncommon for sites to have a single access point, as indeed is the current state at the property.

[41] Once again, there was nothing in Mr Daya-Winterbottom's submission. It was not supported by fact or law, and was sadly a diversion from the true issues in the case.

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[7] RMA, s122; ***Thomas Gibbons "Property Rights in Resource Consents: Some thoughts from law and economics"*** (2012) NZULR 46; ***Tram Lease Limited v Croad*** [2003] 2NZLR 461; ***Aoraki Water Trust v Meridian Energy Limited*** [2005] 2NZLR 268

[8] s326 Property Law Act 2007

Potential adverse effects

[42] As we have already noted, the issues in the case narrowed somewhat after the belatedly resumed expert conferencing. Indeed, narrowing continued during the hearing itself.

[43] As we have also already indicated, the disputes focussed on three types of potential adverse effects:

(a) adverse effects prior to commencement of works;

(b) temporary effects (during construction); and

(c) permanent effects after completion of the works.

[44] It became clear during the course of the hearing that the latter two kinds of effect could be sufficiently mitigated by conditions of consent, and/or the subject of compensation. The dispute therefore tended to focus more on effects prior to commencement of works, than the latter ones. We perceived once again that the driver was money. The thrust of the legislation so far as compensation is concerned, is that there is no provision for compensation prior to the works getting under way. Tram Lease and CJM Investments made a very determined push for cancellation of the Requirement for Designation on this account, although quite unusually, the stance on even that topic changed by the end of the hearing, to a request by those parties for the case to be adjourned so that some sort of negotiation could take place. This notion was stoutly resisted by AT, on the understandable basis that a public body is strictly constrained by legislation in the extent to which it can offer money or other forms of compensation. AT's stance was that the Requirement should now either stand or fall; and that there was no basis established by Tram Lease and CJM for the latter. As will be seen, our decision is that the Requirement should be confirmed.

Effects prior to commencement of works

[45] In an earlier paragraph of this decision we listed four sub-topics under this head, but during the course of deliberating about them, we perceived that they would all more or less come under one umbrella, termed by the appellant, "planning blight."

[46] Mr Daya-Winterbottom submitted that the concept of planning blight refers to depreciation of existing land value because of the existence of proposals for public works, and has affinities with the concept of injurious affection, referencing the writing of Patrick McAuslan, "*Land, Law and Planning*" (Weidenfield & Nicholson, 1975 at page 689), although he cited no case law.

[47] As occurs with most major public works, there is some uncertainty about precise timing of commencement and completion of works in the vicinity of the Tram Lease property. AT was quite open about this, noting for instance the evidence-in-chief and rebuttal evidence of Mr WR Newns, the design manager for the Principal Technical Advisor team to AT for the City Rail Link project. In his rebuttal statement he candidly acknowledged that certainty regarding construction start and duration will not be known for some time. Similarly, Mr R Galli, AT's Land Acquisition and Programme Delivery Manager for the project, acknowledged that finalisation of alignment and development of detailed design would have a "considerable gestation period", and other uncertainties would arise from the need to resolve availability of funding and competing priorities, as with all such major projects.

[48] The concerns for Tram Lease and CJM Investments were summarised succinctly by the six valuation and real estate expert witnesses when they finally returned to the conferencing task at about the time of the commencement of the hearing. They recorded:

> Tram and CJM's witnesses' major concern is the negative effect of the impending works during the pre-construction period. In particular Tram and CJM witnesses consider that they will each suffer significant losses which will not be compensated under the PWA. This is exacerbated due to the ownership structure of the site – ie, Tram owns the freehold, CJM has a ground lease of the site, owns the improvements and pays ground rent to Tram, and sub-leases the improvements to the sub-tenants. AT witnesses acknowledge this concern.
>
> **Pre-construction effects**:
> (a) Tram & CJM witnesses consider that there remains considerable uncertainty as to when the works will commence and what the site will look like post-construction. In particular funding has yet to be confirmed for NoR6 and the final design has yet to be completed. In addition there is uncertainty around what the effects of the work will be on sub-tenants of the site.
> (b) Regardless of design and timing of the work, Tram and CJM witnesses consider that the existing sub-tenants, and any potential future sub-tenants will most likely consider the construction works to be a major business interference, and the site following construction will be significantly inferior to the status quo.
> (c) The effects of uncertainty, the knowledge of major construction interference, and the impending change in character of the site include:

(i) Tram is unable to complete the 1 January 2004 rent review and this position will continue for the lapse period or until completion.

(ii) CJM risks losing current sub-tenants or facing claims for rent reduction, achieving lower rents and shorter lease terms for replacement tenants as well as possibly lower quality sub-tenants. The combination of these for a leasehold interest (which CJM holds) can be terminal.

(iii) It will be extremely difficult for either Tram or CJM to sell their respective interests prior to construction and neither of them will be entitled to compensation under the PWA or otherwise.

[49] The planning witnesses also addressed these issues in their belatedly resumed conference. The planning consultant called by Tram Lease and CJM, Mr MJ Foster, stated that the draft conditions did not provide sufficient mitigation prior to commencement of construction because of a lack of recognition of the degree of uncertainty that could prevail for sub-lessees on the property and whether PWA compensation rights would be available to address such an issue. The planning consultant called by AT, Ms AJ Linzey, disagreed with Mr Foster, and considered that there were specific draft conditions to meet those concerns, including such steps to be taken by AT as providing information to the community. Beyond that, she did not consider it appropriate or possible to further quantify or compensate for such effects.

[50] Mr Daya-Winterbottom submitted (correctly) that under s62(2)(c) of the PWA the specified date that would trigger the ability to claim compensation would be either the date on which any interest in the land was vested in AT, or the date of entry on the land to commence work, whichever occurred first. His real concern was that both events were entirely under the control of AT, and uncertain as previously noted.

[51] The valuation witnesses called by each party gave significantly differing evidence about monetary quantification of such likely impacts. The approaches taken by the various witnesses were frankly speculative, and we noted that they were barely cross-examined, which tended to confirm our own view that the evidence on behalf of Tram Lease and CJM adopted extreme and unrealistic positions of a "worst case" type.

[52] At the heart of the question appears potential anxiety on the part of the sub-tenants about what may occur when construction gets under way, and the environment post-construction. Under questioning by Mr Beatson, Mr Foster offered the strange response "*...what it's boiled down to is that there may or may not be substance to the possible claim that a tenant may or may not walk, is that where we're at?*

[53] Counsel for AT referred us to decisions of the Environment Court concerning anxiety. In ***Telecom New Zealand Limited v Christchurch City Council,***[9] the Court found that social angst and lack of wellbeing in the community potentially affected by a proposal cannot be a material consideration when assessing merits. More directly, the Court stated in ***Shirley Primary School v Christchurch City Council:***[10]

> Whether it is expert evidence or direct evidence of such fears we have found that such fears can only be given weight if they are reasonably based on real risk.

[54] Of some note, no witnesses were called from amongst the existing sub-tenants to describe or explain any such anxiety.

[55] We accept the submissions of counsel for AT that uncertainty about precise construction commencement date is not uncommon with large infrastructure projects that take time for detailed design and funding to be completed. He told us that AT is committed to working with sub-tenants and tenants, noting that CJM Investments has claimed that it has strong relationships with its tenants. Intriguingly, not only were sub-tenants not called to give evidence, but there appeared to be a reluctance on the part of Tram Lease and CJM to allow AT representatives access to them during the pre-construction period to endeavour to allay fears.

[56] Counsel for AT addressed submissions on the subject of the relevance of property values in RMA cases, offering case law. The submissions were not challenged by counsel for Tram Lease and CJM. The principles are not complicated or controversial, and we can state them simply as follows.

[57] The starting point is that effects on property values are generally not a relevant consideration, and that diminution of property values will generally simply be found to be a measure of adverse effects on amenity values and the like: ***Foot v Wellington City Council.***[11]

[58] Similarly in ***Bunnik v Waikato District Council,***[12] the Court held that if property values are reduced as a result of activities on an adjoining property, then any devaluation experienced would no doubt reflect the effects of that activity on the environment. The Court held that it was preferable to consider those effects directly

[9] Decision number W165/96
[10] [1999] NZRM 66 at paragraph [193]
[11] Decision number W7398, at paragraph [256]
[12] Decision number A42/96 [Environment Court, Auckland]

rather than the market's response, because the market can be an imperfect measure of environmental effects.

[59] In ***Hudson v New Plymouth District Council,***[13] the Court held that people concerned about property values diminishing were inclined to approach the matter from a rather subjective viewpoint. The Court held that such people become used to a certain environment, and might consider that property values would drop after physical changes occurred, however a purchaser who had not seen what was there before, would take the situation as he/she/it found it at the time of purchase, and might not be greatly influenced by matters of moment to the present owner or occupier.

[60] We agree with the findings in those cases and the reasoning behind them.

[61] The valuation and real estate witnesses for AT were not cross-examined, particularly on the issue of whether existing sub-tenants would leave the site, and/or whether it would prove difficult to re-let parts of the property. We agree with counsel for AT that such claims must, on the evidence before us, be viewed as being entirely speculative.

[62] We consider that Parliament has deliberately created a framework for compensation under the RMA and PWA, in particular s185 of the former and s62 of the latter. This legislative framework contemplates that compensation is not available until a taking occurs or works commence. We discern a number of reasons for this regime. First, losses caused by possible anxiety would be extremely difficult of calculate objectively. Secondly, the "public purse" is involved, and is to be protected from payments being sought beyond compensation expressly ordained by statute. Thirdly, if designations could be successfully attacked and cancelled in the absence of provision for pre-construction compensation, it is conceivable that many major infrastructural projects would never get off the ground, particularly those that require some years of detailed planning and implementation. We were offered no sensible legal framework for finding the existence of a novel type of compensation, and indeed Mr Daya-Winterbottom's own submission about s62 PWA recorded at paragraph [50] above, runs directly counter to the possibility of such existing in law.

[13] Decision number W/138/95 [Environment Court, Wellington]

Temporary effects (during construction)

[63] The evidence on behalf of AT tended to focus on the length of time it would take to construct a new ramp into the Tram Lease property, approximately 3-4 weeks. That however would be to ignore the potential impact of construction effects from the grade separation works between the railway to the north of the property and its road frontage onto Normanby Road.

[64] We consider it important to start by remembering that when major infrastructural works occur in cities, roading patterns are at least temporarily disrupted, and adverse effects such as noise, vibration and dust can be experienced by occupiers of properties in the vicinity. The question is whether these can be adequately mitigated in any given case, or whether a requirement for a designation should be cancelled.

[65] The principal adverse effects here are likely to be of the traffic and transport variety, including vehicular and pedestrian access to the Tram Lease site where there are commercial outlets including a commercial stationery operation and a subscription gymnasium.

[66] The traffic and transport witnesses (Mr I Clark and Mr M Nixon for AT, Mr G O'Connor for the Council, and Mr B Harries for Tram Lease and CJM) were able to reach agreement about a number of matters at the belatedly resumed expert conference.

[67] First they agreed that a safe and operable pedestrian route could be provided between the temporary parking area and the site throughout the ramp construction period. They also agreed that a pedestrian route for persons with disabilities, to and from the temporary carpark to the north of the site, could not be provided because it would need steps; but that this could be addressed through Condition 61. All agreed that the pedestrian accessibility from Normanby Road could be provided for all persons through the existing driveway, and that the permanent arrangement for pedestrian access into the site from Normanby Road would be safe and reasonable.

[68] They also agreed that the on-site parking supply available during the ramp construction period would be less than existing peak demands as surveyed. They agreed that temporary off-site parking would be inconvenient when the carpark on the site was fully occupied during this period, including the need for an approximately

1km diversion route between the two carparks, for vehicles. Mr Nixon offered the opinion that the difference between regular and repeat customers could be taken account of, and "repeat customers," for instance those attending the gym, could be better informed of access to the temporary off-site carparking area, and irregular visitors given priority on site.

[69] The witnesses agreed that the reduction in on-site parking spaces during the construction period would be 15.

[70] Disagreements arose amongst them over the practicality of maintaining the best possible access for parking by customers of the stationary business OfficeMax on account of the 1km quite complex detour. Mr O'Connor and Mr Nixon continued to hold the view that management of parking spaces as between tenancies would assist with mitigation. They considered that offsite provision, combined with such management, would offer acceptable mitigation. The witnesses agreed that if such steps could not be taken, the customers of OfficeMax would be most likely to shop elsewhere if the carpark were full at any time during the 3-4 week construction period (AT's estimate).

[71] We have looked closely at the work done on draft conditions of consent in this regard, and consider that it has been approached sensitively and constructively by AT. There remains the potential for some adverse effects to be somewhat more than minor (but not greatly so).

[72] There was a dispute amongst the witnesses as to the validity of parking surveys that had been undertaken to compare availability of parking at "peak times" with actual usage. The impact on the case of this relatively minor dispute was not addressed in the legal submissions on behalf of the appellant, and Mr Clark was not cross-examined on it.

[73] The parking surveys tended to favour the AT view that disruption would be less than was claimed by Tram Lease and CJM. We agree with the submission made in closing by Mr Beatson that further mitigation measures could be implemented through operation of conditions of consent, for instance through the Social Impact and Business Disruption Deliver Work Plan, assisting with management of parking by different groups of people.

[74] At the end of the day there is also provision for compensation for injurious affection, if needed, under Part 5 of the Public Works Act 1981.

Permanent effects

[75] Adverse effects on Tram Lease, CJM Investments, and sub-tenants and their customers, can be summarised broadly as:

(a) changes to the site frontage;

(b) the addition of an access ramp;

(c) the loss of six carparks (which could have been lessened to 5 carparks absent a request by the appellant about the geometry of the ramp).

[76] The effects tended principally once again to be in the traffic and transport area, but also in the area of urban design and visual amenity.

[77] The traffic and transport witnesses noted that the main section of the new ramp structure as proposed by AT would comply with the maximum gradient in Standard AS2890.2 (that is, 1:6.5), but would not meet the operative District Plan standard of 1:8. The witnesses for AT and the Council agreed that the solution was "not ideal, but safe and reasonable" and as anticipated by draft condition 30.1(i). Mr Harries, called by Tram Lease and CJM, considered that design to the District Plan standards was preferable and achievable because it would provide "greater familiarity to Auckland car and truck drivers, albeit at the cost of one parking space." We consider that this matter can be adequately addressed in conditions of consent.

[78] Bearing in mind the agreement amongst landscape witnesses about minimising the area required for a landscaping strip, the traffic and transport witnesses were able to agree that car parking spaces lost following completion of the construction works would be precisely 1 with a fully compliant District Plan ramp design, and zero with an Austroads design ramp. Having regard to the surveys, Mr Clark considered that a permanent arrangement of 35 carparking spaces would be sufficient to accommodate the observed peak parking demand. Mr Harries considered that tenant access to "legally entitled parking spaces" should take precedence over general carparking occupancy surveys when assessing the situation. Mr Clark maintained the view that parking surveys are useful to establish existing rather than theoretical parking demand, and therefore to understand the actual adverse effect of

loss of parking. He was supported in this by Mr O'Connor and Mr Nixon. We make the same findings concerning the survey issue as we did in discussing temporary effects above.

[79] The urban design and visual amenity witnesses were Mr R Pryor called by Tram Lease, Mr A Ray by AT, together with assistance provided by Mr Newns for explanation of engineering drawings and minimum landscaping dimensions, and Mr S Chapman, a vegetation expert called by AT.

[80] Once again, the resumed expert conferencing proved capable of resolving more than the parties anticipated back in April.

[81] The witnesses agreed that the principal issue in the case is the diminished visibility and physical separation arising from grade separation. Other issues such as the amount of landscaping to be provided were considered comparatively minor.

[82] The visualisations provided with Mr Pryor's evidence-in-chief, and the landscaping elements in the visualisations in Mr Ray's evidence-in-chief, had been superseded as the number of engineering design elements was evolving.

[83] The witnesses agreed that in terms of landscape and visual effects the site and surrounding environment would change substantially. Some of the changes would be positive and some negative.

[84] The positive changes would include:

(a) removal of the level crossing and associated visual clutter and sounds;

(b) lowering of the rail lines adjacent to the site, reducing noise and visual effects, noting however that there was a risk that the catenary might be brought to eye level from the OfficeMax site.

[85] Negative changes comprised most of the matters on which the witnesses were unable to agree, discussion of which follows.

[86] Agreement was reached about modifications to detail such as balustrades (permeability of view favoured), and a balance of the quantum of carparking and

landscaping to be provided. The witnesses agreed that while landscaping would enhance on-site amenity, it was not critical to the functioning of the site.

[87] It was also noted that a 1m wide landscaping strip shown in earlier drawings, could be reduced to 0.5m and offer visual mitigation through planting.

[88] The witnesses agreed that the project has "CPTED" implications (crime prevention through environmental design), which could be addressed through the detailing of permeable balustrades, maximising the width of footpath, orientation of steps parallel to the overbridge, good level of lighting, and selecting materials for ramp and footpath to enhance visual amenity. The witnesses agreed that the draft conditions of consent were heading in the right direction.

[89] Where this group of witnesses was unable to reach agreement, was as to the degree of visual impact anticipated. Mr Ray believed that the design proposals would result in an environment not uncommon in the city fringe area, and believed that the site would still be capable of functioning for activities enabled by the District Plan. Mr Pryor considered that the reduced visibility and physical separation of the site created as a result of grade separation would have an adverse effect on the site's visual amenity. There is some force in both views, but we find Mr Ray's opinion about the locality more powerful, and Mr Pryor's concerns capable of being significantly addressed through mitigation.

[90] We consider that there is nothing in Mr Pryor's complaint that the electric rail catenary might come into view when the overall infrastructure is lowered. Indeed we consider that there would be an improvement in outlook to the north from the site overall, and that the presence of a wire running horizontally through the view would be a minor adverse effect at worst.

[91] There is no doubt that visibility of the site and existing development on it from Normanby Road and wider surrounds will change significantly. The lower part of the building occupied by OfficeMax will be obscured below the raised Normanby Road feature. There was concern on the part of Tram Lease and CJM witnesses that this lessened visibility could result in a downturn in business on the site, but as pointed out to them by the Court during the hearing, signs could be placed on the top of the building (albeit requiring permission under bylaws – as to which we encourage Auckland Council to consider such an approach favourably); and the current relatively

low level of development on the site might not necessarily pertain indefinitely in any event.

[92] We agree with submissions by Mr Beatson that mitigation activity could be further addressed through operation of conditions of consent, including the Social Impact and Business Disruption Delivery Work Plan. Also, that loss of value arising from the change in road level (as with any decrease in carparking spaces) could be the subject of claim under Part 5 PWA. The negative sentiments expressed by valuation and real estate witnesses called by Tram Lease and CJM Investments, not tested by cross-examination, were in our view unduly pessimistic and speculative, and have not succeeded in persuading us that we should contemplate cancelling the requirement for designation. We consider that market forces will be many and varied, will change constantly over time, and should have very little influence on the outcome of the present proceedings other than through imposition of appropriate conditions of consent.

Difficulties with the planning evidence called by appellant and s274 party

[93] We had significant concerns about the evidence of Mr Foster, not just because it covered a great many more issues than it was ultimately necessary to consider (for reasons already discussed), but also because of the way it had been constructed, unsupported by much reasoning, and the use of pejorative and unprofessional expressions about other people and other evidence.

[94] Mr Foster recorded that he is a planning and resource management consultant with over 30 years experience, the last 20 of which have included extensive involvement in large commercial development planning and major infrastructure projects.

[95] Our first concern about Mr Foster's evidence, including his answers to questions in Court, was his tendency to over-confident assertions of opinion backed by little in the way of professional analysis of fact, planning instruments, or expert evidence, but instead amounting to an invitation to us to trust his judgment, something he appeared proud of. The point can be illustrated by an early answer from him to cross-examination by Mr Beatson as follows:

> ...I was looking for a mechanism that actually would allow the concerns of both Tram and CJM as to the effects of the designation on their leasing abilities and so on in the interim period. Now I've always approached major infrastructure projects and I've led many of them, on the basis of

> attempting to as far as possible mitigate any adverse effects whether they be real or perceived and what I'm outlining to the Court in my view is a pragmatic way of addressing the kind of issues that are being raised. Well now it may be off the wall, unusual, but, hello, I have a bit of a reputation for that.

[96] The flavour of his significant confidence in his track record in infrastructural projects unfortunately manifested itself in the tone he employed throughout his evidence, particularly his rebuttal evidence.

[97] With that flavour came a related concern for us, that much of the evidence amounted to advocacy, contrary to the expectations of the Court in its December 2014 Practice Note guiding the work of expert witnesses.

[98] These approaches led him to offer such statements as:[14]

> ...AT fails to recognise or acknowledge such effects. The reality is that an experienced infrastructure provider would realise that such effects are sufficiently significant to warrant a pragmatic approach that involves "buy the property, do the work, and then on-sell it."

[99] Further observations, immediately following the last, included that, in his opinion, the temporary and long-term measures proposed by AT were "unworkable, unrealistic and impractical", followed by an observation that the "*whole thrust of the AT case is founded on the assumption that land will allegedly be made available by KiwiRail to mitigate the adverse effects of the project* [no such arrangement having been made]."

[100] Much of the rest of the evidence-in-chief followed the pattern of starting with a strong negative advocated position, supported by little more reasoning than that we should accept his word because of his considerable experience with major infrastructure projects over the last 20 years.

[101] Yet another concern was that in his evidence, Mr Foster would repeat the expert evidence of other witnesses called by his clients, supply the assertion about his experience, then offer a conclusion that somewhat resembled an assessment of the sort that should be left to the decision maker, in this case the Court. This occurred particularly in his rebuttal evidence.

[14] Mr Foster, evidence-in-chief, paragraph [3.2]

[102] Members of the Court were sufficiently concerned about all of these aspects of Mr Foster's evidence that the Judge questioned him to enquire whether he wanted to stand by them, resile from them, or express them in different terms. With one exception (where he accepted from the Judge that he could have expressed his criticism of AT as "arrogant" better, by saying that they had proved more difficult to deal with than a certain national infrastructure authority), he refused to resile from his positions.

[103] In addition, the Judge gave Mr Foster the opportunity to explain why he and others brought the facilitated expert conferencing to a premature end, and he acknowledged that with hindsight that decision was "*probably unfortunate*."

[104] We took the rare approach of asking the witness to recite from memory the requirements of the Court's Practice Note for the work of expert witnesses, and after some hesitation, and some prompting from the Court, he accepted the need for truthfulness, independence, objectivity, impartiality, and respect for other experts even if fundamental disagreements existed between their positions.

[105] The Court took Mr Foster through the passages of evidence in his two statements that were of concern to it. Mr Foster proved resolute in defence of them, considered that they represented an appropriate expert witness approach, and returned to the theme that he considered that AT had been difficult to negotiate with (we inferred as some sort of justification for the strength of his own responses and statements). Regrettably, all that was finally forthcoming was a heavily qualified and mis-directed apology:

> All I can say is that if I have offended the Court then I apologise. That was not my intention. I have appeared before the Court on a considerable number of occasions and never before had the kind of questions that Your Honour has directed to me been directed at me and that's why I say that I did not – that I, sorry not I did not – I gave very, very serious consideration as to how I should frame my evidence.

[106] We are bound to record that whether or not the Court is "offended" is not the issue. The issue is the requirement of the Court's practice note calling for professionalism.

[107] After the Court had questioned Mr Foster, Mr Daya-Winterbottom re-examined on these matters. Even then, Mr Foster took no opportunity to resile from his positions. It needs however to be said that counsel shares responsibility for

ensuring professionalism of performance by a witness, from the earliest stages of the life of a case.

[108] As a consequence of the belated outcomes of the facilitated conferences and counsels' ability to produce a considerably narrowed statement of unresolved issues, much of Mr Foster's evidence was not needed. If the other elements had remained in contention however, we would have struggled to assign much of it any real weight. (Mr Daya-Winterbottom offered us detailed submissions on the last day of the hearing, from which it was apparent from decided authorities that such problems usually go to weight rather than admissibility. Having said that, our attention was subsequently drawn to a recent decision of the Privy Council ***Pora v R***,[15] a criminal appeal, where an expert witness was held to have purported to supplant the Court's role as the ultimate decision maker on matters that were central to the outcome of the case. The transgression having been significant, his evidence was held to be inadmissible. For the reasons given at the start of this paragraph we have not needed to make a determination as between admissibility and weight on this occasion).

Decision

[109] It will be apparent from the findings that we have been made in earlier parts of this Decision, that we will not be cancelling the Requirement for Designation, but instead have the intention of confirming it. This will need to be on appropriately framed conditions of consent, as to which we provide guidance to the parties in the following paragraphs.

[110] Our intention is that the parties should work further on the draft conditions of consent, and refer them back to the Court. We comment that the Court has already been asked to consider draft consent orders in relation to four of the six Notices of Requirement for the CRL project, and a fifth is due shortly.

[111] In that context, AT and Auckland Council are to conduct an additional exercise of ensuring consistency where necessary, of conditions proposed to attach to all six Designations. The Court will then consider the draft conditions of consent in the present case along with the others, and no doubt issue consent orders in the others, and will a final decision in the present one.

[112] Costs are reserved.

[15] [2015] NZPC1: [2015] UKPC 15 (3 March 2015)

Guidance on draft conditions of consent

[113] The following are the matters the Court requires the parties to attend to concerning the conditions for the designation:

A. Add a new 1.1(g) to include information provided at the Environment Court hearing;

B. Amend condition 1.2(b) to add in a reference to the Environment Court hearing;

C. Amend condition 2.1 so that the lapse period is ten years;

D. Minor clarification proposed by AT to condition 30.1(c);

E. Revised condition 30.1(i) recommended by Ms Linzey in her rebuttal evidence paragraph [10] concerning pedestrian and two-way vehicle access being maintained at all times to 32 Normanby Road. (Note that we approve the changes to (iii));

F. New and revised aspects of conditions 30.1(j) and (k) based on proposal by counsel for AT in legal submissions on 29 June 2015 in relation to KiwiRail land, incorporating tracked changes proposed by the planners at expert conferencing on 29 June, and further changes recommended by Ms Linzey in her rebuttal evidence paragraph [10]. Note that in (j) references should be to 34 carparking spaces in two places, revision 5.0 of Plan 0058, and a reference to District Plan design standards should be added into (i). Sub-clause (v) to read:

> Provision for landscape planting both on the site and on KiwiRail land in the areas shown on DRG 0058 Rev 5.0, in accordance with condition 47.2(c)(x) where appropriate; indicative widths of landscaping to 1m for the section shown alongside the railway and 0.5m for the section on the southern side of the ramp.

In 30.1(k), reference in the first line to be to sub-condition (j), and reference added to the requiring authority in the second line, and a reference to the access ramp no longer being required by the landowner in the third line. In the sixth line, a timeframe to be referred to.

The trigger point for the condition precedent is to be "construction of grade separation works at Normanby Road… not commencing until KiwiRail land is available…"

G. Condition 47.2(b)(ix) to be as recommended by the planners in their expert conference report dated 29 June, with sub-clause (d) to add in reference to ARCOP guidance for pathways in high risk, high brightness areas;

H. New condition 47.2(c)(x) as recommended by Ms Linzey in the tracked change version and further modified in her rebuttal evidence paragraph [7], concerning landscaping on private property, to take account of comments made by Mr Foster and Mr Scrafton;

I. Revised condition 48.1, which was the subject of the joint witness statement by the visual witnesses, remove the last sentence from Ms Linzey's version as recommended also by the planners;

J. Condition 55.1A – to remain as in the Commissioner's version, with Ms Linzey's tracked changes not to apply – see Ms Linzey rebuttal evidence paragraph [5];

K. Condition 55.3(c) – Ms Linzey's recommended addition to address a concern raised by Mr Scrafton in his EIC paragraph 36, appears appropriate;

L. Provide a condition about a permeable balustrade being required not just for CPTED purposes, but also to provide views into the site to address Tram Lease's concerns;

M. An appropriate condition is to be prepared allowing for AT to consult with sub-lessees in the presence of landowner and head lessee, concerning mitigation and to lessen anxieties;

N. Mr Scrafton in his rebuttal evidence paragraph [50] suggests that the visualisation as prepared by Mr Ray be added to the list of drawings in new condition 1.1; however we doubt the wisdom of that pending detailed design;

O. The footprint of the area of the designation should either be extended to include the additional sliver of KiwiRail land, and to accommodate the steps down from Normanby Road; or provision made for KiwiRail to utilise its designation to authorise necessary the works;

P. There is to be no provision for transfer of KiwiRail land to Tram Lease. The conditions should simply remain silent on this point;

Q. Similarly, there is to be no requirement for periodic reports back to the Court, and the conditions will remain silent on that point;

SIGNED at AUCKLAND this 21st day of August 2015

For the Court

L J Newhook
Principal Environment Judge

BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 403

IN THE MATTER of appeals under Section 120 of the Resource Management Act 1991

BETWEEN

DIRECTOR-GENERAL OF CONSERVATION (NELSON-MARLBOROUGH CONSERVANCY)
(ENV-2007-CHC-000162)
(ENV-2008-000128)

NEW ZEALAND AND NELSON MARLBOROUGH FISH & GAME COUNCILS
(ENV-2007-CHC-000166)

ORMOND AQUACULTURE LIMITED & NEW ZEALAND CLEARWATER CRAYFISH (KOURA) LIMITED
(ENV-2007-CHC-000167)

TRUSTPOWER LIMITED
(ENV-2008-CHC-000217)

SAVE THE WAIRAU INCORPORATED
(ENV-2008-CHC-000222)

JET BOATING NEW ZEALAND INCORPORATED
(ENV-2008-CHC-000223)

Appellants

AND

MARLBOROUGH DISTRICT COUNCIL

Respondent

Hearing at: Blenheim on 2 – 5, 9 – 13, 23 – 26 November 2009, 30 November – 4 December 2009, 7 – 11 December 2009, 8 – 12 February 2010, 10 – 14 May 2010

Court: Environment Judge R G Whiting
Environment Commissioner A J Sutherland
Environment Commissioner J R Mills
Environment Commissioner H M Beaumont

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Counsel: Mr C N Whata and Ms C N Sheard for TrustPower Limited
Ms M Radich, Mr P Radich and Mr J Maassen for Marlborough District Council
Ms M A Baker for New Zealand and Nelson-Marlborough Fish & Game Councils
Mr M Hardy-Jones for save the Wairau River Incorporated and Jet Boating New Zealand Incorporated
Mr D J Clark for J & J McLauchlan (s 274 party)
Ms A J Parr for self (s 274 party)
Ms P Doyle for self (s 274 party)
Mr S Browning for Green Party Kaikoura Electorate Branch (s 274 party)

Date of Decision:

DECISION OF THE ENVIRONMENT COURT

A. The appeal of TrustPower is allowed to the extent that the decision of the Marlborough District Council is upheld save for the amendments to the conditions of consent as contained in Appendix 2.

B. The remaining appeals are dismissed save for the amendments to the conditions of consent as contained in Appendix 2.

C. Because of the complexities of the conditions of consent the Marlborough District council is given 30 days to apply for the correction of any errors.



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1 BACKGROUND

1.1 Introduction

[1] The Wairau River in Marlborough is the northern-most braided river on the east coast of the South Island. TrustPower Limited (**TrustPower**) presently operates three power stations within tributaries of the Wairau River in Marlborough – one on the Waihopai River, and two (Argyle and Wairau) on the Branch River. TrustPower now has plans to expand its generating capacity in Marlborough with the development of six new small hydro stations within the Wairau Valley. If it proceeds, this development will take place in the lower Wairau Valley, extending along the south-bank of the Wairau River from approximately 1km upstream of the Branch-Wairau River confluence, downstream to just above the Waihopai-Wairau River confluence.

[2] The scheme will involve the extraction of up to $40m^3/s$ of water from the Wairau River, combining this with the water take from the existing Branch Scheme, and directing this flow along a constructed canal (approx 49km in length) built along the true right of the Wairau River. The canal will direct this water through six small power stations, to a final discharge point into the Wairau River. The water not passed through the canal is to be returned to the Wairau River through the existing, but enlarged, Wairau Power Station tailrace.

[3] TrustPower has sought a suite of consents including land use consents, water permit consents, and discharge consents, to do all that is necessary to construct and operate the proposed hydro-electric scheme.

[4] The Marlborough District Council (**the Council**) convened a hearings panel of two independent commissioners, former District Court Judge Anthony Willy and Mr Max Barber, and an elected councillor from the Council, Miss Jill Bunting, to hear and determine the application. The Council Hearing was convened in Blenheim over a number of months between June and December 2006. The Hearing Panel issued an Interim Decision in June 2007 and a Final Decision in July 2008.

[5] The decision granted the suite of over 200 resource consents necessary to construct the proposed hydro-electric scheme, subject to a detailed set of conditions.

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[6] From the Council's decisions, a number of appeals were lodged, including one from TrustPower in respect of some of the conditions of consent. A number of s 274 parties joined the proceedings in support of one or other of the appeals. A number of the appellants (including TrustPower) settled their appeals by varying the conditions of consent. During the hearing before us, TrustPower further varied the proposed conditions of consent to address matters raised during the hearing.

1.2 Applications and Council decision

[7] The initial application was lodged with the Council on 14 July 2005. The application was publicly notified on 8 September 2005. Submissions totalling 1,442 were received in response to the notification - 527 submissions were received in support, and 903 received in opposition. This application covered the majority of the consents required for the construction, operation and maintenance of the proposed scheme.

[8] More particularly, the application sought a number of land use consents, water and discharge permits. The land use consents relate to land disturbances, excavation and gravel extraction, location and building of roads, tracks and bridges, the intake structure, pipes, penstocks and associated buildings. It also sought consent to clear and restore existing vegetation, create visitor facilities, and generally to do all that is necessary to construct, operate, and maintain the proposed scheme.

[9] The application also sought consent to take water by means of an intake, divert it to the canal and discharge it back to the Wairau River with the outlet located above its confluence with the Waihopai River, having first utilised it for electricity generation purposes. In addition, the application sought water and discharge permits necessary to construct, operate and maintain the proposed scheme. We set out below some of the various types of consents required:

- To take groundwater from aquifers during construction of the scheme;
- To discharge water and contaminants to land and water during construction of the scheme;
- To discharge water and contaminants to water-bodies during construction of the scheme;

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- To take groundwater from aquifers to canals and impoundments during operation of the scheme;
- To use groundwater/water for electricity generation during operation of the scheme;
- To discharge water from the canals and impoundments to land during operation of the scheme;
- To construct and use open channels;
- To construct and use on-ground pipes;
- To install temporary migration barriers and waterbodies;
- To impound water behind the temporary migration barriers;
- To install temporary coffer dams;
- To impound water behind the temporary coffer dams;
- To install temporary bank armouring (if necessary);
- To take water from waterbodies for wetland remediation;
- To discharge water to wetlands for remediation purposes;
- All other consents necessary to enable the scheme.

[10] A second application was lodged with the Council on 20 March 2006. TrustPower considered it necessary to lodge this application as a result of additional information sought by the Council pursuant to s92 of the Act. This relates to groundwater activities including extraction and discharge rates.

[11] The hearing panel issued an interim decision in June 2007 granting consent subject to the final formulation of consent conditions. The interim decision assessed the merits of the scheme and concluded that in light of the proposed mitigation and remedial measures, the scheme would have no more than minor effects on the environment. The decision also assessed the proposal against the relevant objectives and policies of the Wairau Awatere Resource Management Plan (**the Plan**) and it was concluded by the hearings panel that the scheme would not be contrary to the provisions of that Plan.

[12] The key findings recorded in the interim decision are as follows:

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[a] The effects individually, collectively and accumulatively, are not more than minor (*Interim Decision, Section Q, at [2]*);

[b] Unanticipated effects which are more than minor can be managed (*Interim Decision, Section D, at [3]*);

[c] The proposal will confer tangible benefits both locally and nationally (*Interim Decision, Section B, at [5]*);

[d] The proposal will not be contrary to the objectives and policies of the Plan (*Interim Decision, Section P, at [91]*);

[e] A grant of consent will not be contrary to the objectives, policies or provisions of the Plan (*Interim Decision, Section Q, at [13]*);

[f] In terms of permitted baseline, although the proposal is not permitted, a number of the effects are contemplated and provided for in the Plan either at a scale predicted by the experts or of a similar nature but smaller in scale (*Interim Decision, Section P, at [43]*).

[13] The Interim Decision released in June 2007 established a process for receiving and considering further submissions on the form and content of the conditions of consent. The submissions on conditions closed in August 2007. TrustPower was then afforded the right of reply to the submissions made regarding conditions. TrustPower's response was provided on 22 November 2007.

[14] In July 2008, the commissioners issued a final decision dealing specifically with matters raised at the conditions hearing, and set out the conditions that were to be imposed.

[15] The decision includes an array of 184 consent conditions. These were organised as follows:

- General conditions
- Pre-construction conditions (largely preparation of management plans)

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- Post-construction conditions (largely implementation of the management plans and separate, stand-alone conditions)
- Review conditions

[16] Many of the conditions rely on or refer to management plans as part of what the decision called an adaptive management approach. Some 14 separate management plans are required by way of consent conditions.[1] These are:

1. Construction Management Plan (conditions 14, 15, 16, 38, 39 and 64);
2. Traffic Management Plan (conditions 26 and 85);
3. Landscaping Plan (conditions 27 and 87);
4. Health and Safety Plan (condition 28);
5. Groundwater Management Plan (conditions 46, 47, 106 and 168);
6. Aquatic Ecology Management Plan (conditions 55, 112 and 170);
7. Pre-scheme Black-fronted Tern and Black-billed Gull Research Monitoring and Predator Control Plan (condition 58);
8. Vegetation Management Plan (conditions 61, 117 and 179);
9. Walker's Stream Management Plan (condition 42);
10. Vegetation Protection and Restoration Plan (condition 62);
11. Vegetation Monitoring Plan (condition 63);
12. Dam Safety and Surveillance Management Plan (condition 91);
13. Post-scheme Predator Management Plan (conditions 113 and 173);

[1] Condition numbers quoted as in the Council's decision

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14. Post-scheme Black-fronted Tern Monitoring Plan and Black-billed Gull Research, Monitoring and Predator Control Plan (conditions 115 and 175).

[17] Each management plan must be approved by Council and the Vegetation Management Plan requires the approval of the Department of Conservation (**DOC**), the New Zealand Fish & Game Council (**Fish and Game**) and The Royal Forest & Bird Protection Society of New Zealand (**Forest and Bird**). Most management plans also require an expert peer review. Many of the conditions provide specific guidance on the content of management plans. Condition 6 allows for any amendments to any management plans, and condition 7 allows for the review of any management plans. Conditions 5, 6, 7 and 8 provide that the consent authority *shall approve all management plans*. In addition to the specified management plans, condition 5 requires *such management plans as are required to give effect to the decision.*

[18] It is clear from a reading of the decision that underlying the use of the management plans is a form of adaptive management. The decision records adaptive management as being used: [2]

> ... to acknowledge unanticipated adverse consequences which may arise from the grant of a resource consent.

Extensive use of the management plans forms the cornerstone for adaptive management of effects from the proposal.

1.3 The hearing

[19] The appeals extant at the commencement of the hearing before us were:

[a] New Zealand and Nelson-Marlborough Fish & Game Councils; and

[b] Save the Wairau River Incorporated.

[20] Both appellants were generally opposed to the consented scheme because, among other things, of the changes to the flow regime in the diversion reach of the river and downstream of the outfall. These hydrological changes, they said, could have significant

[2] Interim Decision at [35]

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effects, including the effects on the natural character and the aquatic ecology of the river to the detriment of the trout, angling amenity, river birds, landscape, and general amenity.

[21] A number of s 274 parties also appeared before us:

[a] Ms Alison Jane Parr on behalf of herself and Mr Ian Rogers. They supported the appeals because of serious and wide-ranging concerns about the scheme;

[b] Mr John and Mrs Joan McLauchlan, the owners and occupiers of Burnside Farm at the eastern-most end of the proposed scheme. They were vehemently opposed to the scheme, they have not, and asserted they will not, consent to TrustPower using their land. They argued that any consent would be futile and should not be granted for that reason;

[c] The Green Party Kaikoura Branch (**the Green Party**) which argued that TrustPower had not adequately advanced alternative methods of energy production; and

[d] Ms Pauline Doyle, a local resident, who was particularly concerned about the effects of this scheme on her property in times of flooding and/or emergency discharges.

[22] The hearing took place in Blenheim over 33 sitting days. During that time we made three site visits which included a helicopter flyover. The site visits helped us to better understand the evidence. We heard or read the evidence-in-chief of 56 witnesses by far the majority of which were expert witnesses. A list of witnesses is attached as Appendix 1. Their evidence-in-chief filled 10 Eastlight folders. Most of those witnesses were cross-examined and re-examined, resulting in 2,787 pages of transcript. In addition, we were referred to numerous graphs, figures, tables and reports. The quantity of evidence was such that it is just not possible to refer in this decision to all that was said, nor is it necessary to refer to all of the witnesses to determine the issues in contention. Accordingly, if specific parts of the evidence are not averred to in this decision, we mean no disrespect to the parties or their witnesses. In coming to our decision we have had regard to the totality of the evidence.



[23] The proposed conditions of consent as determined by the Council have, since the hearing committee's decision, been amended and added to on an iterative basis. This has been to address matters of concern raised by the parties and the Court as the appeals progressed. TrustPower's final draft of proposed conditions was lodged with the Court on 12 May 2010 at the commencement of closing submissions. We have by this decision made some amendments. We attach as Appendix 2 the 12 May 2010 version of the proposed conditions, but as amended by us. Our amendments are shown as track changes.

2 LEGAL MATTERS

2.1 Preliminary legal issue – futility

[24] Counsel for Mr & Mrs McLauchlan lodged with the Court on 13 February 2009 an interlocutory application seeking the following rulings:

[a] Whether the applicant's opposition is a relevant matter to consider under the Act in dealing with TrustPower's applications for resource consent;

[b] Whether or not the applicant's opposition will make the granting of the resource consents, if they are granted under the appeal, futile;

[c] Whether the futility referred to in the preceding paragraph renders the continuation of the proceedings an abuse of process;

[d] The granting of other such relief that consequentially arises from findings in relation to [a] to [c] above.

[25] Affidavits in support of the application were lodged by Mr & Mrs McLauchlan, Ms Doyle, and Ms Parr. They stated that the deponents would not grant access over their lands to TrustPower. Effectively it was submitted in support of the application, that to grant consent would thus be futile, and accordingly to grant the consents would be an abuse of process.

[26] At the preliminary hearing the Court ruled that the question should be deferred to the substantive hearing as the issue involved both questions of law and fact.

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2.1.1 The evidence before us

[27] Before us Mr & Mrs McLauchlan and Ms Parr reiterated their stance that they would not grant access over their land to TrustPower. The McLauchlan farm is near the eastern end of the proposed scheme. Power Station 5 is proposed to be on the McLauchlan land as are parts of Canal 8 and Canal 9. Canal 7 would cross the Parr/Rogers land and the head pond for Power Station 4 would also be on their land.

[28] The implacable opposition of these land owners needs to be seen in perspective. It was Mr Lilley's evidence that it was his role to negotiate and liaise with land owners directly affected. He told us[3] that in total there are 58 land holdings crossed by the proposed scheme, currently owned by 51 entities. He provided a breakdown of land owners and status of the stage reached in negotiating agreements in Table 1 of his evidence in chief. We reproduce that table here:

Table 1.1 Landholding Status (On Scheme Alignment)

Landholdings on Alignment	Number	%
Signed Agreement	36	62%
Draft Agreement Sent to Legal Advisor	12	21%
Verbal Agreement	3	5%
Initial Agreement Prepared	2	3%
Awaiting the Grant of Consents	2	3%
Awaiting Financial Compensation Offers	1	2%
Opposed (in principle) to the Scheme	2	3%
	58	

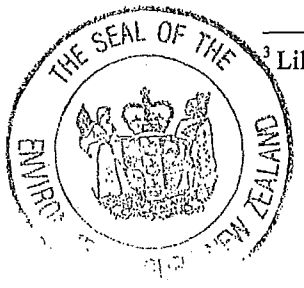
[29] As can be seen from the table, at the time of the hearing agreements had been executed for 36 (62%) of the landholdings. Mr Lilley told us that a further 15 (26%) have agreement very near completion. Of the remaining five (8%), they are divided between:

[a] Land owners waiting for resource consent decision;

[b] Land owners waiting for financial compensation offers; and

[c] Land owners who have lodged submissions against the scheme.

[3] Lilley EIC at [6.1] to [7.7]



[30] According to Mr Lilley, it is TrustPower's intention to continue negotiating with the land owners to seek the necessary agreements. It was his view, that even if some land owners would not agree, the scheme could still proceed as alternative routes or termination points are technically feasible.

[31] Mr Lilley further stated that TrustPower had given consideration to its options should access to the two properties not be secured. One such option could involve piping canal water to avoid one property, in order to complete the scheme. Another could involve diverting the canal back to the river earlier. However, it was quite apparent from Mr Clark's cross examination and questions from the Court, that alternative routes or termination points have not thus far been given more than a cursory consideration. We accept that detailed analysis would be a costly exercise and is not warranted at this stage.

2.1.2 Property rights and the Resource Management Act

[32] It has long been settled law that consent authorities and this Court on appeal are concerned with a proposed activity's effects, not the nature of an applicant's legal rights in respect to the particular land.[4] Disputes about private property rights are outside the Environment Court's jurisdiction and are not generally considered in determining a resource consent application.[5]

[33] Section 88 of the Act enables a person to make an application to a local authority for resource consent. This is not subject to any proviso that the person must have a property interest. In *Coleman v Kingston* Hammond J stated:[6]

> ... the Resource Management Act floats, rather like oil on water, across the top of ownership rights without affecting the underlying substance. The Resource Management Act 1991 and the Property Law Act 1952 have different objectives and do not conflict (*NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419; and *Haddon v Auckland Regional Council* [1994] NZRMA 49).

[34] Private property rights should only be taken into account where they are relevant to, or reasonably necessary to, determine an issue under the Resource Management Act[7].

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[4] See *MacLaurin v Hexton Holdings Ltd* 2008 [NZCA 570 at [47]]

[5] See *Congreve v Big River Paradise Ltd* HC AK, CIV 2005-404-6809, Fair ACJ, 1 June 2006 at [21], upheld on review, HC AK CIV 2005-404-6809, Lang J, 4 August 2006; *Director General of Conservation v Marlborough DC* C113/04 at [48]; *Degan v Southland Regional Council* C110/98 at [15]; *Saunders v Northland Regional Council* A40/98 at [56 - 57]; *Schmuck v Far North District Council* A26/00 at [33]

[6] HC AK AP103-SW00, Hammond J, 3 April 2001 at [28]

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Mr Clark for Mr & Mrs McLauchlan contended that there is a distinction between water take applications and land use consents. The grant of a water permit has an allocative component, as its grant excludes others from applying for it. On the other hand, the resource consent granted in respect of land does not lock the land up, as it cannot be exercised without property rights. At first glance, Mr Clark's argument sounds attractive. But on reflection, it would be inappropriate to make such a distinction without clear legislative intent. In any event, the concern raised by Mr Clark can, if necessary, be addressed by fixing the lapsing period of any consent.

[35] However, in this case, it is not the question of property rights per se that is the issue. It is the futility arising from the lack of the necessary property rights to exercise the consent that is the issue.

2.1.3 Futility

[36] Mr Clark relied on the following passage from the Environment Court decision *Director General of Conservation v The Marlborough District Council*[8]:

> In considering applications for resource consents the RMA does not consider who is applying, it is irrelevant whether the applicant has any legal right to exclude others from the resource, or to be excluded, unless a party can show that it would be futile to grant resource consent because it would be impossible to exercise it. Such matters are outside the Environment Courts jurisdiction; *Whakatipu Environmental Society Incorporated v Queenstown Lakes District Council* (Decision A71/2004 at [22])

[37] It may well be that, as a matter of process, it would be inappropriate to issue a decision granting a resource consent that will be impossible to exercise. But in our view the Court should not lightly make such a determination. To do so would usurp or arrogate the applicant's options.

[38] In this case, the applicant has adduced expert evidence, through Mr Lilley, that alternate routes and/or termination points are technically feasible (albeit little exploratory work has been undertaken to date). Whether such alternatives could proceed by way of a

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[7] See *Congreve v Big River Paradise Ltd* [HC AK CIV 2005-404-6809 Faire ACJ, 1 June 2006 at [21], upheld on a review (HC AK CIV2005-404-6809 Lange J, 4 August 2006 at [30]; *Cornerstone Group Ltd v North Shore* CC A42/07 at [123]

[8] Decision No. NZEnv C113/2004 at [47]

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variation to the existing applications is a moot point. In any event the applicant could apply for any new consent deemed necessary.

[39] TrustPower also has other options. Arguably it could request the compulsory acquisition of land under the Public Works Act 1981, as s 186(1) of the RMA enables a network utility operator that is also a requiring authority, to utilize the Public Works Act. Under s 166(d) it could be argued that TrustPower could become a network utility operator for the purposes of the proposed scheme's canal as it involves the distribution of water for supply including irrigation.

[40] A further option is for TrustPower to instigate an amendment to existing legislation, or even to instigate through the proper channels new legislation. These options are of course non-inclusive.

[41] While none of the options can be determined at this stage with certainty, they are nevertheless technically feasible. To arrogate those options that are available to the applicant TrustPower would be untenable. To require an applicant for a large infrastructural consent process such as this, to have all of the necessary property rights in place at the resource consent stage, would be untenable. It would be untenable for one or two land owners out of 58 landholders, as is the case in this instance, to be able to checkmate this opportunity for new renewable energy generation to be enabled. Hence we reject the futility application.

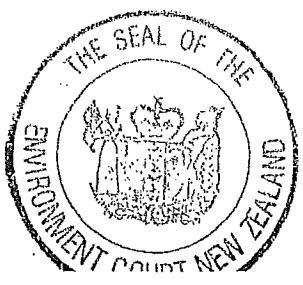
[42] We now focus on, and address the merits of the proposal and whether the proposed scheme will better enable sustainable management.

2.2 Legal basis for decision

2.2.1 The Act

[43] All agreed that the proposed scheme is to be assessed as a non-complying activity. Thus, we are required to assess the proposal under the *threshold tests* of s 104D of the Act. These are commonly referred to as the two gateways. The s 104D tests require that the scheme:

[a] has no more than minor adverse effects; or



[b] not be contrary to the relevant objectives and policies.

[44] Provided that the proposal passes through either of the two gateways, we are then required in terms of the overall discretion inherent in s 104B, to exercise our discretion bearing in mind the relevant matters referred to in s 104(1). These relevantly include:

[a] Any actual and potential effects on the environment;

[b] The provisions of the relevant planning instruments; and

[c] Any other matter we consider relevant and reasonably necessary to determine the application.

Section 290 of the Act provides that we must have regard to the Council's decision that is under appeal.

[45] As a number of consents sought are discharge permits, we must have regard to the matters set out in s 105 of the Act and we are required to apply the provisions of s 107 relating to reasonable mixing.

2.2.2 Part 2 of the Act

[46] Section 5(2)(b) & (c) states that the purpose of the Act is, in part:

> (2) ...
>
> (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.

[47] Much of the evidence we heard was about protecting the capacity of the river and its margins to support particular species of native flora and fauna and provide for trout and salmon. There was also a considerable amount of evidence on the effects of the proposed scheme on natural character, landscape and amenity.

[48] The evidence we heard requires us to consider the directions contained in s 6 & 7. We must recognise and provide for the following matters of national importance:

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6. Matters of national importance

...

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

...

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

[49] We are to have particular regard to:

7. Other matters

...

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

...

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

2.2.3 The relevant plans

[50] The following statutory instruments are relevant:

[a] the Marlborough Regional Policy Statement (**RPS**)

[b] the Transitional Regional Plan for the Nelson-Marlborough Region (**the Transitional Regional Plan**)

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[c] the partially operative Wairau/Awatere Resource Management Plan (**the Plan**).

[51] All parties agreed that the Transitional Regional Plan is largely obsolete, it having been superseded by the Plan. The relevant provisions therefore derive from the RPS and the Plan.

2.3 The statutory instruments

2.3.1 Regional Policy Statement

[52] The Regional Policy Statement became operative in 1995. As Mr Delamore said, it is overdue for review. As the Council is a unitary authority, the policy statement foreshadows the objectives, policies and rules for the Plan. The Plan has only recently become operative and the environmental issues are dealt with much more comprehensively than in the RPS. To discuss in detail the provisions of the RPS would not add anything to the decision, as there is nothing contained in it that is not comprehensively addressed in the Plan. We say no more about it.

2.3.2 The Wairau/Awatere Resource Management Plan

[53] It is trite to say that when assessing a proposal against a relevant plan, we should look at the relevant objectives and policies in the round. When assessing the overall application of the objectives, policies and provisions of a plan, the reference should not be to any single objective and policy, but to those relevant to influencing the decision.

[54] In this case, the objectives, policies and provisions of the Plan that are relevant to influencing our decision are those that relate to:

[a] Natural character;

[b] Landscape and amenity (including recreation);

[c] Flora and fauna;

[d] Water quality; and

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[e] Water allocation.

We discuss each in turn.

2.3.2.1 Natural Character – Chapter 10

[55] Chapter 10 of the Plan reflects s 6(a) of the Act. It points out, that the preservation of natural character and protection from inappropriate subdivision, use and development, will generally be achieved by a process which addresses identified components of natural character. Relevantly, these include:

[a] Freshwater landforms;

[b] Scenic or landscape values;

[c] Indigenous flora and fauna and their habitat;

[d] Water and water quality, including ecosystems;

[e] Habitat of trout and salmon.

[56] A number of policies seek to support other sections of the Plan, emphasising the need to provide an integrated mechanism for the management of natural character.

[57] Policy 1.1 discourages inappropriate subdivision, use and development in those areas which are predominantly in their natural state and have natural character that has not been compromised.

[58] Policy 1.3 is of importance. It states:

> Policy 1.3 To consider the effects on those qualities, elements and features which contribute to natural character, including:
>
> (a) Coastal and freshwater landforms;
>
> (b) Indigenous flora and fauna, and their habitats;
>
> (c) Water and water quality;
>
> (d) Scenic or landscape values;

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(e) Cultural heritage values, including historic places, sites of early settlements and sites of significance to iwi;

(f) Habitat of trout and salmon;

(g) Natural movements of sediments, water, air and biota;

(h) Natural productivity; and

(i) other dynamic processes.

[59] Policy 1.6 seeks to encourage the restoration and rehabilitation of natural character as a part of any proposed development.

[60] Policy 1.7 emphasises the need to adopt a precautionary approach in making decisions where the effects on the natural character are unknown. The explanation in the Plan also recognises that:

> While it is seen as nationally important to preserve the qualities of natural character, it is not intended that this principle should preclude appropriate subdivision, use and development.[9]

[61] Finally Policy 1.8 promotes the concept of rivers and streams as ecological corridors to the coast.

2.3.2.2 Landscape – Chapter 5

[62] Chapter 5 of the Plan addresses landscape issues. The first issue is:

> 5.3 Degradation of natural features and landscapes which have special characteristics

The Plan identifies significant regional and district features. The Wairau River is identified as a significant district feature. The Plan says:

> Although partly modified, the river remains a significantly important multi-recreational landscape.

[63] There is one objective which follows this issue:

> Objective 1 Management of the visual quality of the Wairau/Awatere plan area and protection of outstanding natural features and

[9] Page 10.4 Volume One

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> landscapes from inappropriate subdivision, use and development.

[64] Relevantly, Policy 1.2 recognises the Wairau River *"as outstanding in a more localised context"*. There then follows a number of policies which effectively ensure that built structures, land disturbance and earthworks do not compromise the landscape values and avoid, remedy or mitigate long-term effects on the landscape.[10]

[65] The second issue is:

> General degradation and detraction from the landscape and visual amenity values of the district.

Under this issue, the Plan recognises:

> The rivers of the Wairau/Awatere district are other very significant features. The presence of natural water and vegetation is an attraction and the rivers are a focus for recreation. The scenic qualities of these areas are very important and provide opportunities for combining flood management practices with recreational, ecological, heritage and landscape objectives. This is the case in both rural and urban locations.[11]

[66] Objective 2 seeks to protect the scenic quality of the Wairau River and its valley. It says:

> To provide for appropriate development practices within areas not identified as outstanding natural landscapes.

[67] There then follows a number of policies which relevantly seek to:

[a] Maintain an open rural character (Policy 2.3); and

[b] Recognise the significant landscape values of rivers including their aesthetic and intrinsic values (Policy 2.6).

[10] See Policies 1.3, 1.4 and 1.5
[11] Pages 5 - 8 Volume One

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2.3.2.3 Flora, Fauna and their Habitat – Chapter 4

[68] Chapter 4 of the Plan implements the requirement of the Plan under s 6(c) of the Act to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. Also, it fulfils the Council's obligations to give particular regard to the intrinsic value of ecosystems and the protection of the habitat of trout and salmon under s 7(d) and s 7(h) of the Act, respectively.

[69] The Plan divides ecosystems into land-based (or terrestrial) and freshwater ecosystems. With regard to terrestrial ecosystems, the Plan's objectives and policies seek to protect and enhance areas of significant indigenous vegetation and habitats.

[70] The Plan notes that lowland ecosystems are the most affected by human activities and lists the forest remnants on the Wairau River as a major value under threat from clearance and stock. Objective 4.2.2.1 seeks to protect areas of significant indigenous vegetation and habitat and is supported by Policies 1.5, 1.11 and 1.12 relating to the protection and restoration of natural wetlands and riparian vegetation.

[71] With regard to water ecosystems, the Plan identifies in Issue 4.3.1, that waterbodies have many ecological, recreational and amenity values. A summary of the values associated with freshwater resources can be found in Appendix A to Volume One.

[72] The Plan identifies a number of activities that can affect water quality and habitat, including:

[a] Water abstraction;

[b] Damming and diversion;

[c] Gravel abstraction; and

[d] Discharges.

[73] There is one overarching objective which says:

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The protection and enhancement of freshwater and riparian ecosystems.

There is a range of policies of which the following are relevant:

Policy 1.1	To provide for the protection and natural functioning of aquatic ecosystems by avoiding, remedying and mitigating the adverse effects of water abstraction from all rivers, including the setting of sustainable flow regimes for specified important rivers.
Policy 1.2	To set water quality standards which provide for the protection and natural functioning of aquatic ecosystems and to control point and manage diffuse source contamination to maintain water quality standards.
Policy 1.3	Maintain and enhance wetlands, lakes and rivers as natural corridors where water and riparian margins can act as links along which fauna can move and flora can spread.
Policy 1.4	In the absence of detailed knowledge on the hydrology or ecology of rivers, lakes and wetlands in the plan area, adopt a precautionary approach when considering changes to freshwater ecology and instream values.
Policy 1.5	To recognise and provide for the protection of the habitats of indigenous fish and birds, and trout and salmon in wetlands, lakes and rivers.
Policy 1.6	Avoid, remedy or mitigate any adverse effects of river work activity.
	...
Policy 1.12	To avoid, remedy or mitigate the adverse effects of activities within river and lake beds to protect instream values, including fish passage and recreational values.
Policy 1.13	To promote the use of water storage techniques to achieve the sustainable management of freshwater resources.

[74] The policies recognise that rivers, streams and waterways have many ecological values. They emphasise the need to protect the natural functioning of ecosystems and that such protection is fundamental to the maintenance of the values of these rivers, streams and waterways.

2.3.2.4 Freshwater – Chapter 6

[75] Chapter 6 of the Plan addresses freshwater which includes groundwater and surface water resources. The Plan identifies the freshwater resources of the area as being

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among the region's most important natural assets.[12] The significant groundwater resources of the Wairau aquifers supply drinking water and water for irrigation and industrial use. The Wairau River and its tributaries are the key surface water resources in the area, providing important ecological, recreational, cultural, amenity and commercial values, and are the principal source for recharging the Wairau groundwater systems.

[76] The emphasis in the Plan is on maintaining freshwater quality and quantity at levels required to meet ecological, cultural, recreational, social and economic needs. There are a number of relevant issues identified, which give rise to a number of objectives and supporting policies. The first issue is:

> Use of freshwater resources may compromise the life-supporting capacity of the resource.

This issue recognises that the use of freshwater can adversely affect the life-supporting capacity of the resource, through altering the course, quality or quantity of the resource. Uses of freshwater include consumptive and non-consumptive uses, and use of the water as a receiving environment for the direct (or point source) discharge of contaminants. The following objectives and policies are particularly relevant in the context of this case:

Objective 6.2.1.1	To provide for the taking, use, damming and diversion of freshwater in a manner which safeguards the life-supporting capacity of the resource and avoids, remedies or mitigates any adverse effects on the environment.
Policy 1.1	To maintain surface water flows at levels which safeguard the life-supporting capacity of the resource by setting and enforcing Sustainable Flow Regimes (SFRs) in terms of specified river flows.
Policy 1.2	To maintain groundwater levels and flows at levels which safeguard the life-supporting capacity of the resource by setting and enforcing Sustainable Flow Regimes (SFRs) in m^3/year.
	...
Policy 1.5	To set the SFR for fresh surface waters to: • Protect instream habitat and ecology; • Improve fish passage and spawning grounds;

[12] See page 6.1 Volume One

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- Protect the natural character of freshwater resources;
- Maintain water quality;
- Protect cultural values;
- Maintain amenity values; and
- Provide for aquifer recharge.

Policy 1.6 To set aside a proportion of the abstraction flow, where appropriate, as additional flow for instream values, over and above the SFR.

[77] The second objective addresses water quality. It says:

> To maintain, and where appropriate, enhance existing freshwater quality.

There then follow some eight policies, two of which are particularly relevant in the context of this case:

Policy 2.1 To apply water classifications to all surface water and groundwater resources which reflect the existing values of each freshwater resource and provides for maintenance and enhancement of existing water quality as appropriate (as outlined in Appendix J, Volume II)

Policy 2.2 To require compliance with the water classification standards, after reasonable mixing, for all new point source discharges to surface water, except where a discharge meets the criteria of exceptional circumstances specified in Section 107(2) of the Act.

[78] The next relevant issue addresses the equitable allocation and use of surface and groundwater resources. It says:

> Competing and increasing demands for freshwater resources may lead to an inequitable allocation.

This issue recognises that with the increase in demand for water there is a potential for increased conflict between different users and increased competition for the total resource available.

[79] The following objectives and policies are designed to achieve equitable allocation. The objective says:

> To achieve equitable allocation and use of surface water and groundwater resources.

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[80] Of particular relevance is Policy 1.2 which says:

> Policy 1.2 To establish and apply a triple class permit system for the taking of water and to set and enforce maximum allocations for each class.

The triple class system is a complex system and is explained in the Plan as follows:

> Water will be allocated on a 'first come, first served' basis through the triple class permit system of allocation. This framework allows a certain quantity of water to be allocated to users. This quantity is called a Class and, as successive permits are issued, the allocation available within the class reduces and eventually becomes fully allocated. No further allocations will be made in that class except in the following cases:
>
> - Where the existing full allocation volume is reassessed and is increased, or a resource is assessed as having a larger safe yield, as a result of more information being available;
> - Where part of the existing full allocation volume becomes available following a permit renewal which reduces the volume attached to an existing permit;
> - Where part of the existing full allocation volume becomes available following the revoking of an existing permit.
>
> Three classes of water permit exist for each of the water resources, Class A, Class B and Class C. Allocation moves sequentially through each of the classes, from Class A to Class C (for further explanation of the triple class allocation system refer to the General Rules in Volume Two). Applications for allocations may be made outside of the triple class system but are Non-Complying activities unless they are Prohibited.
>
> The SFRs set shall form the basis of maximum allocation of water. The formula shall be applied as follows:
>
> - The maximum allocation shall be determined on the five year, seven day, low flow of the water body less the SFR of this waterbody if set, otherwise on a case by case basis.

[81] Policy 1.4 provides for water permit volumes to be granted on the basis of allocation guidelines set out in the Plan. Irrigation rates are specified in mm/day and volumes in m^3/week/hectare for a range of crops.[13]

[82] The triple class system and allocation guidelines also address the next issue which relates to the inefficient use of water. This issue states:

[13] Plan page 6-6 Volume One

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> The inefficient use of freshwater resources can compromise the sustainability of the resource.

This relates to both the use of water resources and administrative efficiency, and reflects the requirement of the Council under s 7(b) of the Act to have particular regard to the efficient use and development of natural and physical resources.

[83] The objective states:

> Objective 1 To establish an efficient resource use regime and support sustainable management of the freshwater resource.

The objective is followed by some 6 policies, of which Policy 1.1 is the most relevant. It states:

> Policy 1.1 To enable more efficient use of fresh water resources through implementation of a triple class water permit system.

[84] This objective and policy is explained in the Plan as follows:

> A more efficient, flexible triple class water allocation system, which will more closely match water demand and supply, enabling more efficient water allocation use, while still providing an efficient SFR to protect the sustainability of the resource. This will be particularly important for surface water systems, where excess flow during wetter periods is currently lost to the system (for an explanation of the triple class allocation system refer to Volume Two[14]).

[85] There is a further issue identified in the Plan relating to the use of water during periods of low flow. The objective is to achieve sustainable, equitable and efficient allocation of water during periods of low flows. The policies that follow require the setting of flows and levels and the need to include conditions in water permits requiring users to reduce and suspend takes when specified flows or levels are reached.

[86] In summary, Chapter 6 of the Plan identifies the ecological, recreational, social and economic demands on the water resource. Water is considered to be one of the region's most important natural assets. The Plan recognises the need to maintain freshwater quality and quantity at appropriate levels. This is achieved in three ways:

[14] The 'Rules' section of the Plan

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[a] By maintaining surface water flows at levels that safeguard the life-supporting capacity of the resource by setting and enforcing minimum flows, the sustainable flow regimes (SFR);

[b] By setting aside a proportion of the abstraction flow (where appropriate), as additional flow for instream values, over and above the SFR; and

[c] Requiring compliance with the water quality standards.

The Plan also recognises a need for the equitable allocation of water. This is achieved, in part, by the establishment and application of a triple class permit system for the taking of water. We say in part because the Plan recognises in its explanation that applications for allocations may be made outside of the triple class system but are non-complying activities unless they are prohibited.

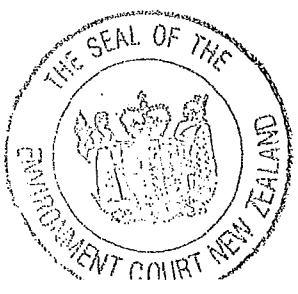
[87] The provisions of the Plan gave rise to two contested issues. The first issue related to the interpretation of the provisions of the Plan and the application of s 69 of the Act with respect to the water standards relating to reasonable mixing. The second issue related to the triple class system and flow-sharing regime. It was submitted by the appellants opposed to the proposed scheme that to allow the proposed scheme would be completely at odds with the comprehensive sustainable flow regime and allocation regime set out in the Plan. We now address both of these issues.

2.3.3 Section 69 of the Act and reasonable mixing

[88] In her final submission, Ms Baker raised a novel legal argument, that any activity not complying with Schedule 3 of the Act (or other standards imposed by the Council) is prohibited by s 69 of the Act. Mr Whata appropriately objected to the late inclusion of this submission. However, as we find, for reasons about to be given, Ms Baker's argument is without merit, we address her submission notwithstanding its lateness.

[89] As we understand Ms Baker's argument:

[a] Compliance must be achieved with the standards in Appendix J of the Plan;



[b] It is likely that sediment flushing discharges will breach turbidity standards;

[c] Section 69 of the Act contains a statutory prohibition on activities which do not comply with Schedule 3 (or the standards imposed in Appendix J).

[90] The argument would have general application if we found any of the standards are likely to be breached.

[91] Section 69 of the Act states:

> **69 Rules relating to water quality**
> (1) Where a regional council—
> (a) provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and
> (b) includes rules in the plan about the quality of water in those waters,—
> the rules shall require the observance of the standards specified in that schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.
> (2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.
> (3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.

[92] The Plan gives effect to s 69 of the Act by Objective 6.2.1.2 which is *to maintain, and where appropriate enhance, existing freshwater quality.* This is done by applying the water classification standards in Appendix J. For convenience, we repeat Policies 2.1 and 2.2. They respectively state:

> Policy 2.1 To apply water classifications to all surface water and groundwater resources which reflect the existing values of each freshwater resource and provides for maintenance and enhancement of existing water quality as appropriate (as outlined in Appendix J, Volume Two).
>
> Policy 2.2 To require compliance with the water classification standards, after reasonable mixing, for all new point source discharges to surface



water, except where a discharge meets the criteria of exceptional circumstances specified in s107(2) of the Act.

[93] Notably, Policy 2.2 says the standards only apply after reasonable mixing except where the criteria for exceptional circumstances are met as specified in s 107(2) of the Act. Section 107 states:

> **107 Restriction on grant of certain discharge permits**
> (1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—
> (a) the discharge of a contaminant or water into water; or
> ...
> if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:
> ...
> (d) any conspicuous change in the colour or visual clarity:
> ...
> (2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—
> (a) that exceptional circumstances justify the granting of the permit; or
> (b) that the discharge is of a temporary nature; or
> (c) that the discharge is associated with necessary maintenance work—
> and that it is consistent with the purpose of this Act to do so.
> ...

[94] Reasonable mixing is in turn defined in the Plan as:

> Reasonable Mixing — the maximum zone of reasonable mixing means for any point source discharge the zone of reasonable mixing in the receiving water shall extend from the discharge point as follows:
>
> For rivers and streams, the lesser of:
>
> (a) A distance downstream which equals seven times the width of the river or stream when the flow is at half the median flow; or
>
> (b) 200 metres downstream.
>
> ...

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> A larger (or different shaped) reasonable mixing zone will be accepted where the applicant can demonstrate (to the satisfaction of the Council) by physical or numerical modelling, and/or dispersion trials at the discharge point, that
>
> (a) It is not practical to achieve reasonable mixing within the standard zone; and
>
> (b) The objectives of the water quality classification(s) are not frustrated by a larger (or different shaped) zone; and
>
> (c) Adverse effects will not occur.

[95] Also of importance is Rule 27.1.9.2 which relevantly says:

> **27.1.9.2 Standard Conditions Applying to All Discharges to Water**
>
> The following standard conditions apply to all Permitted and Controlled activities. For completeness they are cross referenced at the end of all rules for Permitted and Controlled activities, and are referred to as "the standard conditions"
>
> ...
>
> d) Meets water clarity standards defined in Appendix J, after reasonable mixing.

[96] Quite stringent water quality turbidity standards are provided for in Appendix J for classes F, CR, and FS respectively – the classes that apply to the affected reach. The evidence of Mr Delamore[15] drew to our attention that the standards are unlikely to be achieved.

[97] The Plan sets out a number of permitted activities. If a discharge is not a permitted activity, as is the case here, it is a discretionary activity under Rule 27.1.10.2. One of the assessment criteria under this rule is:

> An assessment of effects on the environment in accordance with the appropriate water classification standard/s listed in Appendix J and the Fourth Schedule of the Act 1991.

[98] The only prohibited activities listed in Rule 27.1.10.3 are the discharge of untreated human sewage, or untreated animal waste into water. Clearly the activities of TrustPower under the discharge provisions of the Plan are to be treated as discretionary

[15] Delamore EIC at [5.14] – [5.15]

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activities and the standards listed in Appendix J are one of the assessment criteria against which the application is to be considered.

[99] In our view, s 69 of the Act does not amount to a statutory prohibition. It sets the threshold for the standards to be set in the Plan. If, as here, the standards have been set in accordance with s 69, it is quite open for the Council to consider their breach as part of the overall assessment process to be taken into account when considering an application. That is what the Plan does.

[100] Appendix J is simply one of the matters to be taken into account when considering the application. The standards are plainly relevant considerations, but they should not be elevated by the Plan to immutable requirements to be satisfied before any grant of consent.

[101] Whether or not the sediment flushing regime, or for that matter other activities which may be in breach of one or more of the standards, undermine the objectives of the classifications – safe consumption, contact recreation and spawning[16] – and whether the sediment flushing regime is consistent with the Plan objectives protecting in-stream ecology are all matters that we discuss in other sections of this decision.

[102] Before leaving this matter, we note that Policy 2.2 requires compliance with the water classification standards, after reasonable mixing, except where a discharge meets the criteria of exceptional circumstances specified in s 107(2) of the Act. We are satisfied that the proposed scheme does amount to an exception for the following reasons:

[a] The proposed scheme is a hydro-scheme that can only occur on a river;

[b] The proposed discharges containing suspended sediment would be temporary discharges;

[c] The proposed discharges would occur only during times of reasonably high flow when the clarity of the river would be naturally low.

[103] For the reasons given above, we reject Ms Baker's argument.

[16] Ryder EIC at [11.19] – [11.20]

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2.3.4 The triple class system and flow-sharing regime

[104] It was the contention of Save the Wairau and Fish & Game that the Plan required the take of water to be allocated within the triple class system and flow-sharing regime foreshadowed in the objectives and policies contained in Chapter 3 of the Plan. To address this submission it is necessary for us to make an analysis of the rules relating to freshwater allocation set out in Chapter 27 of the Plan.

[105] The planners were agreed that the relevant rules comprise two parts:

[a] An activity classification based on the abstraction volume and the particular water resource (the Plan 27.1.2 Fresh Water Abstractions); and

[b] The management and allocation of water (the Plan 27.1.1 Rules for Abstractions).[17]

2.3.4.1 The activity classification

[106] Small scale abstractions (up to $10m^3$/day/site for domestic and livestock and up to $50m^3$/day/site for construction works) are permitted activities subject to the abstraction rate not exceeding 5% of stream flow and limitations set out elsewhere in the Plan.[18]

[107] Abstractions of Class C water for the purpose of retaining water in storage are a controlled activity with control reserved over the volume and rate of take.[19]

[108] Abstractions between 10 and $500m^3$/day/site from the Wairau River (downstream of the Branch confluence) are a discretionary activity subject to the abstraction rate not exceeding 5% of stream flow and the cumulative take being no greater than 10% of the instantaneous flow. Consent conditions may specify the type of permit as A, B or C Class.[20]

[17] Joint statement of planning witnesses (undated)
[18] Plan 27.1.2.1 Permitted Activities
[19] Plan 27.1.2.2
[20] Plan Rule 27.1.2.3

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[109] Abstractions of greater than 500m^3/day/site or any abstraction from the Wairau River upstream of the Branch confluence are non-complying activities.[21]

[110] The proposed diversion clearly requires non-complying resource consents due to both the volume and location of the take. All the planners are agreed on this activity classification.

2.3.4.2 The Sustainable Flow Regime

[111] Rule 27.1.1.1.1 sets minimum flows (the SFR flow) for the Wairau River of 14m^3/s at the Narrows and 8m^3/s at the Tuamarina recorder. The Sustainable Flow Regime (SFR) is defined in the Plan:[22]

> ... means minimum flow levels which have been set for surface and groundwater systems to protect stream environmental values, and to prevent aquifer compaction, and/or prevent saltwater intrusion, while allowing spring discharges to continue unaffected.

[112] The explanation of the SFR flow in Chapter 6 of the Plan notes:[23]

> It is not possible to continually monitor flows along the entire length of a surface water body. For this reason, trigger levels are applied where recorder sites have been established, usually in the upper catchment of the surface water body. The intent of the trigger levels is to achieve the SFR and a corresponding flow relative to the SFR for the remainder of the surface water body.

[113] The SFR flow applies along the whole length of the Wairau River including the diversion reach. That is the minimum residual flow in the diversion reach should be at least the *corresponding flow relative to* 14m^3/s at the Narrows and 8m^3/s at Tuamarina. We address the issue of compliance with the SFR flow when considering the effects of the scheme on the flow regime of the Wairau River in the diversion reach.

2.3.4.3 The triple class system

[114] Rule 27.1.1.2.1 introduces the water permit classes and its interpretation was the subject of considerable evidence and cross-examination. We set it out in full:

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[21] Plan Rule 27.1.2.4
[22] Plan Definitions at 26-16
[23] Plan at 6-3 explanation to 6.2.1 Objectives and Policies for taking, use, damming and diversion of fresh water

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> The water allocation system incorporates three classes of resource take – Class A, B and C. Permits for Class A, B and C takes can be made available for all fresh water resources, except those where:
>
> a. Water use is classed as Non-Complying or Prohibited, as these resource systems are considered too vulnerable to support water abstractions; or
>
> b. Steady or static water bodies, such as spring flows, where flows do not exhibit a seasonal variation.

[115] Rules 27.1.1.2.2 – 9 set out how the Class A, B and C permits are to be allocated and exercised. Class A permits allow the holder to take water with a high degree of certainty (likely to be restricted only 1 week every 5 years).

[116] Class B permits enable a moderate degree of certainty with restrictions likely late summer and autumn (fully available 80% of the time, partially available 18% and unavailable 2% of the time). Class C permits are only available at flows above the flow that is exceeded 80% of the time. Class C permits may only be drawn to supply a storage reservoir, recharge groundwater or generate electricity.

[117] Class B and C permits are subject to a 2:1 flow sharing regime.

[118] Rule 27.1.1.2.10 sets out the allocations to Classes A, B and C for the main rivers, including the Wairau River below the Branch confluence:

[a] There is no Class A water allocation for the Wairau River;

[b] The total Class B allocation for the Wairau River from the Branch confluence to Tuamarina is $15m^3/s$ when the flow is above $30m^3/s$ at Tuamarina. The Class B allocation progressively reduces at low flows reaching zero:

[i] For the reach from the Branch to Tuamarina when the flow at Tuamarina is $8m^3/s$;

[ii] For the reach from the Branch to the Waihopai confluence when the flow at The Wash bridge is $9m^3/s$;

[c] Class C water is available at flows above $30m^3/s$ at Tuamarina with no upper limit for the allocation.

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[119] Messrs Kyle and Constantine held the view that non-complying activities are not subject to the class permit allocation system. During cross-examination Mr Kyle accepted that the Council had, as a general practice, granted non-complying takes as Class B permits. However he considered that not to be in accordance with a *strict interpretation of the Plan.* While he agreed that the rule used the term *"use"* his interpretation of the rule was that it refers to the *"take"*.[24]

[120] Mr Delamore considered the provision in 27.1.1.2.1(a) that appears to exclude non-complying activities to be ambiguous and not supported by the explanation to the relevant policies (6.3.1) in the Plan.

[121] Mr Hardy-Jones submitted:[25]

> It is the water **use** which determines whether or not an application is able to be made within the Class System. That is where a water **use** is non-complying or prohibited then no consent can be granted within the Class System.

[122] Mr Hardy-Jones considered the Plan to clearly differentiate between a water **take** and a water **use** and quoted a number of plan provisions to illustrate his point. He further submitted that for an application to be granted outside the Class System it must be a true exception and not undermine the allocation framework. He went on to illustrate how an application could be granted using an allocation of both B and C Class water and 2:1 flow sharing.

[123] Ms Baker submitted that any activity contrary to the permit class system and flow share regime would effectively be contrary to the relevant objectives and policies in the Plan[26]. She considered the objectives and policies to be achieved through the setting of minimum flows and the triple class permit system and described this as:[27]

> ... the foundation mechanism the Plan uses to manage water and enable sustainable and equitable abstraction.

[124] Addressing the question of whether the permit regime is mandatory, optional or not applicable at all, Ms Baker described the plan provisions as *contradictory and*

[24] Transcript at 2494 – 2496
[25] Hardy-Jones closing submissions at [26][b]
[26] Baker opening submissions at [125]
[27] Baker supplementary closing submissions at [4]



unclear. She submitted that if the permit system is not applicable then the weight of the Plan provisions indicated more stringent or conservative restrictions to protect the water body deemed to be *too vulnerable*[28] for the permit system to apply.[29]

[125] Mr Whata submitted:[30]

> In any event when the provisions of the Plan are read in their totality, the Triple Class system is enabling, providing a fast track for certain, relatively small abstractions, within specified locations and a mechanism for managing those abstractions on a coordinated basis. While other larger takes or takes in locations not included within this system must be subject to a more thorough assessment of effects.

[126] Mr Whata noted the explanation to the objectives and policies for fresh water resources in the Plan:[31]

> Applications for allocations may be made outside of the triple class system but are Non-Complying activities unless they are Prohibited.

2.3.4.5 Interpretation of Rule 27.1.1.2.1

[127] Rule 27.1.1.2.1 clearly links the Class System to the fresh water resource and that is the key to interpretation rather than focussing on the single word *"use"* as opposed to *"take"*. Sub-clauses (a) and (b) both refer to particular fresh water resources, firstly those considered too vulnerable to support abstractions, as listed in the non-complying and prohibited activity rules (Rules 27.1.2.4 and 27.1.2.5), and, secondly, steady or static water bodies without seasonal flow variation. Given the context of the particular resource, in this case the Wairau River above the Branch confluence, it is clear that this rule puts the non-complying take from (or the use of) the resource outside of the Class System.

[128] It has been the Council practice to issue Class B permits, with the associated 2:1 flow sharing conditions, for non-complying applications. We agree with Mr Kyle that a strict interpretation of the Plan would lead the Council to issue water permits for non-complying water takes outside the Triple Class System. Of course the conditions of such

[28] Quoting Rule 27.1.1.2.1(a)
[29] Baker supplementary closing submissions at [11]
[30] Whata closing submissions at [3.35]
[31] Plan Chapter 6 Explanation to objective 6.3.1 at 6-9

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water permits may still include the 2:1 flow sharing and SFR provisions as if they were Class B or C permits. However, Council practice in the past does not preclude an applicant making an application and proposing alternative conditions, controlling the flow regime, to meet the objectives and policies for fresh water resources as set out in the Plan.

[129] We find that the water take from the Wairau River is a non-complying activity and is not subject to the triple class system and the associated 2:1 flow sharing rules in the Plan. We concur with Ms Baker's submission that the reason for this take to be assessed outside of the triple class system is that the water resource (that is the Wairau River above the Branch confluence) is considered to be *too vulnerable* for this standard approach. As such we must carefully consider the effects on the environment subject to the proposed conditions of consent, and their alternative approach to the flow regime, in the diversion reach of the Wairau River. Given the support for the 2:1 flow sharing regime in the policy framework of the Plan it is appropriate to compare the outcomes of the proposed minimum residual flow regime and flow sharing provisions of the scheme to the SFR and 2:1 flow sharing set out in the rules.[32]

3 PHYSICAL CONTEXT, THE EXISTING ENVIRONMENT AND PERMITTED BASELINE

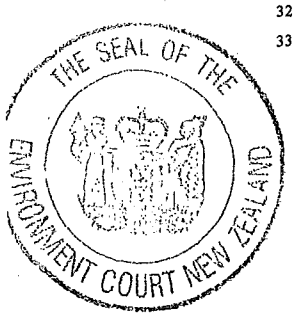
3.1 General Description

[130] We agree with Mr Whata that the Wairau River is a dynamic environment, and that the changing nature of the environment must be considered. He referred us to the following passage from *Lower Waitaki River Management Society v Canterbury Regional Council*:[33]

> We emphasise that the environment should never be regarded as static in any case. At the least the description of the existing environment should be regarded as a snapshot of existing elements and activities with some future activities superimposed on them under the principles set out by the Court of Appeal in *Hawthorne Estates Limited v Queenstown Lakes District Council*. In many cases the description of the environment needs to have regard to the dynamism of many of its elements. That is particularly so in relation to a braided river like the Waitaki as it is a very complex and dynamic hydrological and ecological system.

We agree entirely with this passage which relates equally to the Wairau River.

[32] See Section 6.3.4.4 herein
[33] C80/09 at [10]



[131] As we have said, the Wairau River is the northern-most braided river on the east coast of the South Island. While similar in size to the braided rivers in Canterbury, it has a different hydrological pattern due to limited glacial and natural lake storage. As a result, low flows occur over the summer period (February – April). In this regard the Wairau River is unique compared with other braided east coast South Island rivers, where low flows occur over the winter period.[34]

[132] The proposed scheme is located in the Wairau Valley upstream from Blenheim. The valley is about 4km – 5km wide in the region of the site and the Wairau River flows in a northeast direction. The main stem of the Wairau River is at least 176km long.[35] We refer to the reach of the Wairau River between the intake and the outfall as the diversion reach. This is to distinguish it from the affected reach which extends from the intake to at least Tuamarina where flow fluctuations induced by the scheme will be experienced.

[133] The most significant geological feature in the valley is the Wairau Fault, which runs down the valley and separates greywacke sandstone and mudstone rocks to the south from metamorphic schist to the north. The rock in the base of the valley is covered by silty gravels of both glacial and more recent origin. It is within these silty gravels that the majority of the scheme will be constructed.[36] Tributary rivers flow from the north and the south, discharging to the Wairau River. These tributaries range from large streams to small creeks. The Wairau River falls 253m between the proposed intake site and the proposed outfall over a distance of approximately 48km.

[134] State Highway 63 runs down the valley approximately parallel to the Wairau River with several roads branching off the highway.

3.1.1 River control works

[135] Historically, extensive river works occurred in the Wairau Valley particularly over the lower 36km of the river. Dr Hudson in his evidence-in-chief explained in some detail the extent of the river works.[37]

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[34] Keen EIC,at [3.1]
[35] Wadsworth rebuttal at [11]
[36] Dawson EIC at [5.1] and following
[37] Hudson EIC at [5.6] – [5.11]

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[136] Dr Hudson referred to the *River Control and Drainage* chapter of *Water and Soil Resources of the Wairau.* He noted the following from that publication:

[a] Much of the stopbank and erosion control in the Wairau plains (below the Waihopai confluence 36 kilometres upstream from the river mouth (km36)) was completed during the period 1960 – 1975. Numerous other flood and erosion control works were also undertaken on the plains and surrounding hills;

[b] The net result was that the lower river was diverted to the north of the valley, distributory channels were cut off, and the river confined to control the natural tendency of the river to migrate across the flood plains through Blenheim; and

[c] Upgrading and maintenance of the lower river continues today.

[137] In 1974 bank protection on the Wairau River was extended upstream of the Waihopai River confluence (km36) to the Wye River confluence (km72). From the *Wairau River Draft Management Plan (Marlborough District Council 1993)*, Dr Hudson noted the following:

[a] An objective of the river works was to maintain a relatively narrow exposed riverbed fairway;

[b] An objective of the river works was to force the river from an extensive braided pattern to a single channel.

[138] He told us that there are extensive river works in much of the diversion reach and that the Council sought to constrain the river from typically a 1,000m wide riverbed down to one 600m wide. He considered that the Council had succeeded to a large degree with the average width in the diversion reach being 670m. He based his view on the following:

[a] More than 60% of the Waihopai (km36) to Wye (km72) reach of the Wairau River is confined with structures on one or other bank. Other sections are planted for bank protection or have rock outcrops;

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[b] Sections of the diversion reach to the Wye River confluence are now approximately half the width prior to river works in the 1970s; and

[c] In the reach from the Wye River (km72) to the intake (km88) the largest structural modification is the almost 1km long stopbank at the Argyle Power Station outfall. There is extensive tree-planting for bank protection (undertaken historically by Council), and natural erosion protection from rock outcrops.

[139] According to Dr Hudson, the roles today have changed somewhat, but extensive channel maintenance and river works continue in the diversion reach:

[a] Council removes vegetation to maintain a relatively narrow cleared fairway and since 1994 landowners have been maintaining and constructing river works;

[b] Construction of stop banks and bank protection planting are on-going with further encroachment into the historic riverbed. Dr Boffa illustrated these changes in his Figures 7.1 – 7.4;

[c] Works are underway to recover land from the breach of the stopbank near Top Valley (above Wairau township) where the Wairau cut a large new channel (4km long and up to 550m wide) in the 1994 flood.

[140] The views of Dr Hudson were reflected by Dr Boffa in his evidence. Dr Boffa considered the reclamations of the riverbed to create unnatural patterns along the river margins and impact on the ecological and visual connectivity of the areas.[38] He noted that the Wairau Valley Flood Control Scheme had been largely discontinued, but the Council continues to carry out limited river control works in the form of tree removal and gravel extraction in the fairway, with adjacent landowners being responsible for initiating flood control works in the form of stopbank construction or remediation works.

[141] Dr Boffa said:[39]

[38] Boffa EIC at [9.2]
[39] Boffa EIC at [5.3]

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> While the Wairau River is a significant landscape feature within the valley, it is the least visible and is not readily apparent from most public viewpoints. Notwithstanding this, the Wairau River has also experienced widespread modification in recent years, particularly as a result of river training works and land use change which has resulted in the development of new river margin landscapes. The nature and appearance of river edge landscapes are also changing as a consequence of more extensive and expansive viticulture development within the valley. Being a wide braided river, the river itself is also subject to natural change.

3.1.2 Morphology

[142] The Wairau River has a relatively wide, largely exposed gravel bed, with predominantly braided flow.[40] The river is subject to frequent high flows which can be disruptive to aquatic life.[41] River engineering works have resulted in changes to river character:[42]

[a] the objective to reduce the riverbed width from approximately 1,000m to 600m in the diversion reach was largely successful

[b] there are now fewer channels than historically

[c] the narrower river bed results in more erosion, deposition and channel shifting, and thus more vegetation clearance

[d] the increase in river bed turnover is disruptive to aquatic life

[e] the Council still removes vegetation to maintain a relatively narrow cleared fairway.[43]

[143] There is little relationship between the number of channels and flow in the mean annual low flow (**MALF**) to median flow range.[44] Relatively large freshes are required for small-scale changes of the river channel.[45] Large floods are required to reset the structure of the bed.[46]

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[40] Hudson EIC at [4.1]
[41] Hudson EIC at [4.2]
[42] Hudson EIC at [4.3]
[43] Hudson EIC at [5.10]
[44] Hudson EIC at [44]
[45] Hudson EIC at [5.19]
[46] Hudson EIC at [5.19][c] and Fig 9

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[144] Disconnected and spring-fed channels may form in abandoned high flow channels and are fed by sub-surface flows until flood flows occur. Flows in the spring-fed channels are relatively independent of flow in the main channel.[47] There is little change in the proportions of the main habitat types (primary, secondary and tertiary channels, and seepage in pools) over the median to MALF range.[48]

3.1.3 The tributaries

[145] The southbank tributaries surveyed along the diversion reach:

[a] have intermittent flow;[49]

[b] are heavily modified and degraded by existing pastoral activities;[50]

[c] contain poorly represented fish and macro-invertebrate communities;[51] and

[d] are subject to proliferation of periphyton cover in summer flows.[52]

[146] The northbank tributaries are steeper, most are perennial, and some can become disconnected from the main stem by gravel accumulation or as a result of braid migration southward.

3.1.4 Water quality

[147] The Wairau catchment includes alpine streams, a braided river and slow moving lowland reaches providing a diverse range of aquatic habitat. The water quality is generally high with temperature and nutrient concentrations increasing in a downstream direction.[53]

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[47] Hudson EIC at [5.32]
[48] Ryder EIC at [5.19]
[49] Keesing EIC at [4.1]
[50] Keesing EIC at [6.1] – [6.5]
[51] Keesing EIC at [5.17] – [5.20], [5.22] – [5.25]
[52] Keesing EIC at [5.12] – [5.13]
[53] Ryder EIC at [5.18] – [5.22]

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[148] The existing temperature range is approximately 5 – 19°C at Dip Flat and 5 – 24°C at Tuamarina. The river is turbid during flood events with sediment levels generally exceeding ANZECC (2000) Guidelines in floods greater than $80m^3/s$.[54]

3.1.5 Aquatic ecology

[149] Extensive quantitative surveying during low to medium flow conditions has been undertaken over several years. This shows:

[a] While didymo has been recorded in the upper Wairau River, it has not spread noticeably since it was first recorded[55]

[b] Invertebrate densities are relatively high on occasions and are comparable to other large east coast South Island rivers[56]

[c] The abundance and distribution of native fish appears relatively high[57]

[d] Brown trout are present throughout the river with high densities in the reach downstream of the scheme.[58]

3.1.6 Avifauna

[150] It is commonly accepted that the Wairau River bed as a whole is an outstanding bird habitat and supports populations of a number of threatened species including the black-fronted tern, the black-billed gull and the banded dotterel. A number of water fowl including game birds are distributed sparsely along the river and associated wetlands.[59]

[151] All of the ecologists agreed that the Wairau River is a significant habitat for indigenous fauna in terms of s 6(c) of the Act, and outstanding in terms of its importance for bird life.

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[54] Levy EIC at [7.10]
[55] Ryder rebuttal at [4.22]
[56] Ryder EIC at [5.3]
[57] Ryder EIC at [5.46]
[58] Ryder EIC at [5.40]
[59] Jolly Rebuttal at [4.1]

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3.1.7 Wetlands and the terrestrial environment

[152] The Wairau Valley and river margins support a variety of exotic and native vegetation in both terrestrial (largely dry) and wetland environments.

[153] Areas of native terrestrial vegetation were noted within the potential zone of influence associated with the scheme. A number of willow wetlands were identified along the riverbanks, particularly towards the lower end of the diversion reach. Some of these are subject to on-going clearance and disturbance.[60]

[154] The wetlands associated with the river within the diversion reach provide limited habitat for specialist wetland fauna such as bittern, spotless crake and the marsh crake.[61]

[155] The total area between the permanently vegetated banks is approximately 3,700ha. Of this area, approximately 10% is vegetated.[62] Freshes and small floods in the operational range of the scheme ($10m^3/s - 200m^3/s$) are ineffectual in removing channel vegetation.[63] Many of the existing wetlands within the potential zone of influence of the scheme are open to stock and are grazed.

3.1.8 Landscape and natural character

[156] The Wairau Valley landscape extends from Cloudy Bay to St Arnaud, a distance of approximately 120km. It contains a diverse and distinctive pattern of land use.

[157] The mid-section of the Wairau River, within which the proposed scheme would be developed, is currently experiencing a change from extensive pastoral to viticulture and intensive dairying on both sides of the river. The landscape experts generally considered the mid-Wairau landscape to be an attractive rural working landscape.

[158] Within the Wairau Valley, the three characteristic features are the hills that define the valley, the valley-floor within which most of the intensive rural activities take place, and the Wairau River itself. The proposed scheme would have the most impact on the valley floor and the river.

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[60] Slaven EIC at [5.14]
[61] Jolly EIC at [3.1][b]
[62] Hudson EIC at [5.21]
[63] Hudson EIC at [5.26]

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[159] The Wairau River is identified in the Plan as an outstanding natural feature in a local context and a significantly important multi-recreational landscape. The mid and lower sections of the river have experienced modification in recent times, particularly as a result of river control works and land-use changes. Notwithstanding, the river landscape retains a level of natural character, the degree of which was disputed by the expert landscape witnesses.

[160] We note that the Wairau River is affected by the Branch Scheme, a matter we discuss in greater detail elsewhere in this decision.

3.1.9 Recreation

[161] It was accepted that the Wairau River supports a range of recreational activities. Swimming, kayaking and jet-boating occur over the length of the river. According to Mr Greenaway, the majority of the activities occur downstream of the SH6 bridge.[64] It is also clear from the evidence that family picnicking is a popular pastime on the river.

[162] Angling is a key recreational activity which occurs throughout the river. The Wairau River is the most significant salmonid fishery in the Nelson-Marlborough Fish and Game region. Fish and Game provide 47 access points over the entire river with 11 along the diversion reach.[65]

3.2 Existing abstractions from the Wairau River

[163] Abstractions from the river already occur, broadly subject to the sustainable flow regime provisions of the Plan, including:

[a] A minimum flow of $8m^3/s$ at Tuamarina[66]

[b] A minimum flow of $14m^3/s$ at the Narrows[67]

[c] 2:1 flow sharing.[68]

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[64] Greenaway EIC at [2.2]
[65] Hovell EIC at [4.46]
[66] Rule 27.1.1.1.1
[67] Rule 27.1.1.1.1
[68] RMP Rule 27.1.1.2.5

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[164] The Plan contemplates a 3-tier classification system under which Class A, B and C permits are issued. We have already discussed the class system and application of the related rules.

[165] On the Wairau River between the Branch confluence and Tuamarina there is no Class A allocation.

[166] The total Class B allocation is $15m^3/s$, of which $9.7m^3/s$ have already been allocated. Mr Wadsworth by way of affidavit dated 29 March 2010 detailed Class B allocation for the diversion reach as : unrestricted $0.0199m^3/s$; Southbank $2.9414m^3/s$; Northbank $0.4023m^3/s$; giving a total of $3.3636m^3/s$.

[167] Class C permits enable water-takes for storage reservoirs, recharge groundwater or electricity generation, when the flow at Tuamarina is above $30m^3/s$, subject to compliance with a 2:1 flow sharing regime. Mr Wadsworth in his affidavit stated that there are $0.0748m^3/s$ allocated Class C takes in the diversion reach.

3.3 The Branch Scheme

[168] There was some argument as to whether the Branch Scheme, given its temporary nature, was part of the existing environment. Ms Baker submitted that circumstances may justify the consideration of the existing environment as it might be without the Branch Scheme consents.[69] The Branch Scheme commenced generation in 1984 and the consents were renewed by the Council in 2001 for a term of 35 years. The operation of the Branch Scheme has impacted on the hydrology and ecology of the Branch and Wairau Rivers for many years and will continue to do so for many years to come. Accordingly we consider that the Branch Scheme should clearly be considered as part of the existing environment.

[169] Given that the Branch Scheme is part of the existing environment any effects cumulative upon the effects of the Branch Scheme must be taken into account. As was said in *Kuku Mara Partnership v Marlborough District Council*:[70]

> ... if an existing activity has adverse effects, and a proposed activity also has an adverse effect even if only minor, which would add to the existing effects, then

[69] Baker closing submissions at [3.5]–[3.8]
[70] [2005] 11ELRNZ466 [EnvC]

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> the definition requires a consideration of both. It would be an exception to the permitted baseline concept, but only to the extent that one could have regard to existing adverse effects when, and only when, taken together with the new effect, they produce a synergetic impact on the environment.

[170] Cumulative effects cannot be limited to those arising from the proposed activity, but include the effects of the proposed activity in combination with any existing effects, whether arising from existing uses or consented and probable uses.[71]

[171] In any event, the Branch Scheme would be subsumed into the proposed scheme as the two schemes will work in conjunction with each other. We thus propose when considering adverse effects to look at the combined effects of the two schemes working together, which is effectively having regard to any cumulative adverse effects or any changes to the existing adverse effects arising from the Branch Scheme.

[172] The Branch Scheme, commissioned in 1984, is a cascade diversion scheme whereby water is diverted from the Branch River, passed through two power stations (the cascade) and then returned to the Wairau River. The discharge point is 5.7km downstream of the Branch/Wairau confluence. The Argyle and the Wairau power stations which form the cascade have maximum power outputs of 3.8MW and 7.2MW respectively and a combined average annual energy production of 55GWh (Gigawatt hours).

[173] Appendix 3 is a schematic showing the Branch Scheme to have resource consent to take up to $29m^3/s$ with the requirement to leave $1m^3/s$ (May – December) and $1.5m^3/s$ (January – April) as residual flows in the Branch River. Of the extracted water only $20m^3/s$ can pass through the power stations the other $9m^3/s$ being used in flushing the sedimentation basin adjacent to the intake. Generation flows of $20m^3/s$ occur approximately 25% of the time with the average flow being some $11.3m^3/s$.

[174] An important feature of the scheme is the Argyle pond upstream of the Argyle power station. The pond can store a $20m^3/s$ flow for up to seven hours. This allows regulation of power station inflows and thus matching power generation to demand for approximately 80% of the time. A consequence of this is a variable discharge from the cascade system to the Wairau River and thus the variations in river discharge and river levels.

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[71] ***Outstanding Landscape Protection Society Inc v Hastings District Council*** [2008] NZRMA8

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[175] In summary the Branch Scheme:

[a] removes up to $20m^3/s$ from 3.8km of the Branch River and 5.7km of the Wairau River; and

[b] introduces fluctuations in discharge and water level in the Wairau River from the point of discharge downstream to at least Tuamarina for approximately 80% of the time.

[176] We note here that [a] above will not change under the proposed scheme to be described and that the fluctuations in [b] above will not occur in the reach between the Wairau outfall and Marchburn with the proposed scheme. However as discussed later in this decision the proposed scheme will have varying discharges and thus induce flow variations downstream of its discharge point at Marchburn.

3.4 Existing hydrology of the Wairau River

[177] Downstream of The Wash bridge the Wairau River is a wide, braided gravel bed river. Apart from times of flood only some 20 to 30% of the river bed is occupied by water. The gravel bed material ranges in size from 20 to 300mm with sand fractions found amongst the dominant gravels.

[178] At low flows there is sand movement over the bed with gravel movement occurring in flows over $100m^3/s$. For flows ranging up to the order of the mean annual flood of $535m^3/s$ the movement is limited but sufficient to cause small changes in the bed topography. With larger flows gravel movement increases substantially, armouring layers are broken and the braiding pattern can be changed.[72]

[179] The annual suspended sediment discharge is *most likely* to lie in the range 260,000 to 500,000 tonnes per year.[73] The annual bed load discharge will be at least 10% of the value.[74] Dr Davies suggests it may be much more than this particularly at low flows.[75] We find the data on which he bases this suggestion unconvincing as no attempt

[72]Levy EIC at [4.12] – [4.14]
[73]Levy EIC at [4.16]
[74]Levy Rebuttal Evidence Attachment 1 Memorandum at 3
[75]Davies EIC at [4.4]

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was made to show the river from which it was derived is similar to the Wairau in terms of slope, sediment size or flow regime.

[180] Mr Levy states that the sediment discharge is supply limited[76] yet he produced a sediment rating curve for the intake site[77] which would indicate the supply is discharge limited for flows greater than approximately 100m^3/s. Dr Davies is of the view that sediment supply is discharge limited.

[181] Long term flow records for the Wairau River are available from the Dip Flat gauging station (Site 60114) in the upper catchment from June 1951 until the present and from sites at Tuamarina[78] (Sites 60108 and 60109) from January 1989 until present.

[182] Concurrent flow gaugings at Dip Flat and the proposed intake site between 2006 and 2009 established a correlation between the flows at these locations. Flow records for the period 1951 to 2008 at the intake were then synthesised with the results shown in the central column in the table below.[79] Figures derived from the Tuamarina records from July 1989 – June 2008 and presented in evidence to the court[80] are shown in the right hand column in the table:

	Flows at Intake	Flows at Tuamarina
Minimum flow on record	6.5 m^3/s	
Seven day five year low (7DQ$_5$)	8.9 m^3/s	
Mean annual low flow (7DMALF)	10 m^3/s	6.0 m^3/s
Median flow	25 m^3/s	54.0 m^3/s
Mean flow	35 m^3/s	90.0 m^3/s*
Mean annual flood	535 m^3/s	2150 m^3/s
10 year flood	820 m^3/s	
100 year flood	1280 m^3/s	
500 year flood	1500 m^3/s	
1000 year flood	1650 m^3/s	

*Mr Wadsworth, Environmental Scientist with the Council gives 99m^3/s for the mean flow at Tuamarina

[76] Levy EIC at [4.18]
[77] Levy EIC Figure 2
[78] Tuamarina is 29km downstream of the proposed outfall at Marchburn and 12.8km from the river mouth
[79] Mitchell EIC at [3.6]
[80] Keane EIC Appendix Table 22(a)

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[183] It is the magnitude of the flood events that causes the mean flow to be greater than the median flow which is exceeded, by definition, 50% of the time. In the Wairau River the mean flow is exceeded some 30% of the time.[81] For this reason the median rather than the mean flow is sometimes regarded as a typical flow and used as a reference flow in ecological studies.

[184] Concealed within the above flow statistics is the highly variable nature of the Wairau River flow regime.[82] Between 1951 and 2008 annual mean flows varied by a factor of 2.2 ranging from 22.7m^3/s in 2005 to 49.8m^3/s in 1988. Monthly mean flows show much greater variation from year to year. The November figures show the ratio of the maximum mean monthly flow to the minimum mean monthly flow over the 1951 to 2008 period to be 11.0 with the most stable month being October where the ratio is 5.6. Within any given year the months of February to April are likely to have the smaller monthly means while October to December are likely to have the larger monthly means.

[185] Two common measures of flow variability are the coefficient of variation (CV)[83] and the FRE3 statistic.[84] The former ranges from 1.0 at the intake to 1.3 at Marchburn and 1.5 at Tuamarina.[85] These values suggest the size of the floods varies little from year to year. The FRE3 values range from 10 at the intake to 13 at Marchburn. Thus there are regular freshes within this reach.

[186] In 2008 and 2009 the Council made three gauging runs along the Wairau River measuring at eight sites from The Wash bridge to the Narrows.[86] The other six sites were the intake site, upstream and downstream of the Wairau Power Station, Wairau Valley and upstream and downstream of PS5. The gauging runs were at the low flows of 7.2m^3/s, 9.2m^3/s and 11.4m^3/s. Main north and southbank tributaries were gauged at the same times.

[187] Steady increases in flow were observed from the intake site to Marchburn and then decreases in flow to Tuamarina. The increases matched the measured tributary inflows showing there were little if any losses from the channel between the intake and

[81] Mitchell EIC Appendix 8 Figure 8.1
[82] Mitchell EIC Appendix 9 Table 9.1
[83] The standard deviation divided by the mean
[84] The number of floods in a year equal to or greater than three times the median flow
[85] Mitchell Addendum to Rebuttal Table 10
[86] Mitchell EIC at [6.21] – [6.25]

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Marchburn.[87] Declines in flow downstream of Marchburn are likely due to losses to groundwater and to irrigation abstractions.

[188] Flow statistics derived for the six sites for the period 1 January 1989 – 31 December 2008 were presented by Mr Mitchell in the form of flow duration curves and tables showing the number of days annually at each site that flow would be below nominated thresholds for dry, average and wet years. Examples for flow at the intake and at Marchburn (in parentheses) are:[88]

	Days Annually Below			
	80 m^3/s	20 m^3/s	15 m^3/s	10 m^3/s
2005 (dry year)	361 (321)	197 (37)	80 (0)	3.7 (0)
1995 (wet year)	318 (117)	44 (0)	15 (0)	0 (0)
1989 – 2008	343 (245)	131 (18)	66 (0)	7.3[89] (0)

[189] The zero entries for Marchburn reflect the contributions from the northbank tributaries. Derived flow duration curves showed tributary inflows to be between 4 and $5m^3/s$ during extreme low flows, to exceed $5m^3/s$ 95% of the time and $25m^3/s$ 50% of the time.

[190] The number of consecutive days for which flows are below nominated thresholds were presented by Mr Mitchell in tabular form in his evidence to the Council hearing. Ms Baker in her cross examination of Mr Wadsworth produced Mr Mitchell's tables from which the following figures for the intake and for Marchburn (shown in parentheses) are derived.

Return Period (Year)	Probability of Occurrence[90] in 35 yrs (%)	Consecutive Days Annually Below			
		80 m^3/s	20 m^3/s	15 m^3/s	12 m^3/s
10	97.5	160 (82)	59 (29)	38 (0.7)	30 (0)
20	83.4	179 (95)	69 (5.5)	44 (1.0)	36 (0)
100	29.7	222 (126)	90 (24)	58 (3.6)	49 (0)

[87] Mitchell EIC Appendix 4 Figure 4.1
[88] Mitchell EIC Appendix 8 Tables 8.1 and 8.5
[89] We are puzzled as to why this figure exceeds the value given for the dry year
[90] The probability of occurrence in 'n' years of an event with a return period of 'r' years is $[1-(1-(1/n))^r]$

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[191] The zero entries for Marchburn result from the sample sizes being too small to be meaningful.

[192] Operation of the Branch Scheme affects flows and levels in the Wairau River. By responding to changes in electricity demand, in particular the morning and evening peaks, the scheme releases discharges ranging from 0 to $20m^3/s$ to the Wairau River via the Wairau tail race. This results in fluctuations in both discharge and water level in the river from the Wairau tail race downstream to at least Tuamarina.

[193] Measurements over the period 15 February to 10 March 2006 show typical fluctuations in discharge at Marchburn to be 10 – $15m^3/s$ and up to $18m^3/s$. Corresponding water level fluctuations are typically 75 – 120mm and up to 160mm. Fluctuations at Tuamarina are smaller being typically 6 – $10m^3/s$ and 50 – 100mm and up to $14m^3/s$ and 120mm.[91] The fluctuations may occur twice a day (morning and evening peaks) or only once a day.

[194] Caucusing of hydrological experts representing the Department of Conservation, Fish and Game, Marlborough Water Augmentation Group and TrustPower in 2006 produced an agreed statement which included:

> It is agreed that the effect of the existing Branch Scheme generation is to cause flow fluctuations in the order of ±20 percent about the rolling 24-hr average flow at Tuamarina.

[195] Groundwater plays an important role in the Wairau Valley. It interacts with surface waters, contributes to the maintenance of wetlands and is a source of water for domestic, agricultural and industrial purposes via wells and infiltration galleries.

[196] On the south bank the groundwater flow is predominantly down the valley and towards the river.[92] Wells in this region thus derive their water from the hills to the south and not from river recharge of the aquifers. On the north bank the flow has a more complex pattern[93] with a series of groundwater zones some of which have flow towards the river and while others have flow from the river. One concludes that groundwater inflow to the river is a small component of the river flow in the affected reach.

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[91] Mitchell EIC Appendix 11 Figures 11.4 and 11.5
[92] Callander EIC at [4.24] and [4.28]
[93] Callander EIC at [4.23] and [4.29]

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[197] Groundwater is of good quality within the Wairau Valley with the exception of some saline waters in Walkers Stream and Saltwater Creek. Reasons for the presence of saline water are not fully understood.[94] The groundwater has higher concentrations of nitrite and nitrate nitrogen (NO_x) and dissolved reactive phosphorus (DRP) than surface waters.[95] It is expected that this contributes NO_x and DRP to the smaller tributaries of the Wairau and to wetlands but not to the main river in any significant way.

3.5 The permitted baseline and its relevance

[198] When assessing the effects on the environment of the proposed scheme, we have discretion as to whether or not to use what has become known as the *permitted baseline* as a point of comparison.[96] There was a difference of opinion as to whether we should apply the permitted baseline.

[199] It was TrustPower's submission that it would be unrealistic not to have regard to the permitted baseline when evaluating the overall merits of the proposed scheme. It was the appellants' contention, that we should exercise our discretion and not apply the permitted baseline for the reason that the activities permitted under the Plan are of such a small scale compared with the proposed scheme, that no reasonable comparison can be made.

[200] To determine the permitted activities relevant to considering the proposal, we were referred to the General Rules (Chapter 27) and Rural Zones (Chapter 30) of the Plan. A detailed explanation of the permitted activities was set out in the evidence of Mr Kyle.[97]

[201] Mr Kyle succinctly summarised what he considered any permitted baseline assessment should account for:[98]

> 7.14 Overall, the permitted baseline and future/existing environment assessment should account for:

[94] Callander EIC at [6.10]
[95] Callander EIC at [6.4]
[96] See Sections 104(2) and 104D(2) of the Act
[97] Kyle EIC atat [7.1] and following
[98] Kyle EIC at [7.14]

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- Small scale abstractions for domestic use, abstractions for irrigation needs and abstractions associated with construction activities;
- Bores to a depth of 5m;
- Diversion of water for irrigation purposes subject to the volumetric limits that apply to other abstractions;
- River control and drainage channel works where these works are conducted by the River Control Authority (Council);
- Stormwater discharges from earthworks and vegetation clearance subject to adherence to a range of "good practice" protocols and area limitations;
- Application of agrichemicals;
- A range of land uses including farming, viticulture, forestry, irrigation, erection of buildings, cultivation and land disturbance;
- Discharges of dust to the atmosphere;
- Existing consented activity, especially existing lawfully permitted bore usage.

[202] Many of the permitted activities identified, are relatively small in scale when compared to the scale and extent of the proposed scheme. The permitted rules for abstraction and discharges bear no relation to the large scale operation of the scheme. Some of the permitted river works have some relevance to the construction and maintenance phases of the proposed scheme. However, the appeals focus on the changes to the flow regime and the effects on natural character and ecology. Accordingly, we see no need to compare the scheme against what is permitted as of right in the relevant provisions of the Plan.

4 THE PROPOSED SCHEME

[203] Early in the hearing a joint statement of evidence giving an overview of the proposed scheme was presented by Messrs P B Lilley, R M Dawson and G J Levy. The scheme description which follows is based largely on their helpful statement.

4.1 Overview

[204] TrustPower propose to extend the Branch Scheme by taking water from the Wairau River at an intake approximately 2km upstream of the Branch confluence. This water will be combined in the existing Wairau head pond with water from the Branch Scheme. The head pond will supply both the existing Wairau power station and a new

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Wairau power station built adjacent to the existing station. The water will then flow via a canal along the south side of the Wairau River through five new power stations to discharge back to the Wairau River at Marchburn some 48km downstream of the intake. The proposal is thus for a cascade diversion scheme which, when in operation, will result in reduced flows in the Wairau River between the intake and Marchburn, the diversion reach.

[205] We will refer to the new Wairau station as the new WPS and the other five new stations as PS1 to PS5.

[206] The scheme will add a maximum power generation of 72.8MW and an annual energy production of 397GWh if a plant factor of 63%, as is obtained in the Branch Scheme, is assumed.

[207] It is important to understand that the Branch Scheme is an integral part of the proposal. Thus the flow regime associated with the proposal and its effects include those of the Branch Scheme.

[208] Appendix 4 is a schematic of the proposal which shows:

[a] the existing Branch abstraction and the Argyle Power Station;

[b] an abstraction of up to $40m^3/s$ from the Wairau with residual flows varying monthly between $10m^3/s$ and $20\ m^3/s$;

[c] a return flow of $5m^3/s$ from the intake for periodic flushing of the associated sedimentation basin and a continuous flow from fish screens at the entry to the canal system;

[d] a flow of up to $55m^3/s$ through the two Wairau power stations;

[e] a return to the river of up to $15m^3/s$ through the existing Wairau Power Station tail race;

[f] a flow of $40m^3/s$ through the proposed canal and five new power stations with discharge back to the river;

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[g] maximum flow reductions in the Wairau River of $35m^3/s$ for 2km, $55m^3/s$ for 7.7km and $40m^3/s$ for 38km. These reductions occur for 14%, 11% and 27% of the time respectively.[99]

[209] The mean flow extracted from the Wairau at the intake[100] is $15m^3/s$ which when combined with the $11.3m^3/s$ mean flow extracted from the Branch river gives a mean flow in the canal of $24m^3/s$. Under this condition one finds reductions in the mean flow in the reaches identified in [g] above are of the order of 15, 26.3 and $24m^3/s$ respectively.

[210] Recommendations from TrustPower's ecologists have led to the following suggested minimum residual flows at the intake:

January to July	10 m^3/s
August	12 m^3/s
September	15 m^3/s
October, November	20 m^3/s
December	15 m^3/s

[211] We note that the proposed $10m^3/s$ flow is above the low flows that have been recorded at the intake site.[101]

[212] The above minimum flows plus $5m^3/s$ in each case are proposed for the river upstream of the PS5 discharge at Marchburn. During dry periods when tributary inflows are insufficient to provide the additional $5m^3/s$, water will be released via the Wairau tail race to supplement flows in the diversion reach.

4.2 The intake

4.2.1 Physical description

[213] Immediately upstream of the proposed intake the Wairau River emerges from a narrow reach with one channel and has, historically, split into two channels. Water is to be taken from the southern channel while the northern channel will remain unaffected to

[99] Mitchell Addendum to Rebuttal Evidence Figure 1
[100] Mitchell Rebuttal Evidence Table 1 Page 3
[101] Mitchell EIC Appendix 10

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ensure fish passage past the intake. Between 80,000 and 160,000 tonnes per year of mainly suspended sediment is expected to be carried into the intake.[102]

[214] A rock groyne and a gravel bund will provide a ponding area in which gravel and coarse sand will be trapped and subsequently flushed back into the river at the intake site. It is estimated that 24,000 to 48,000 tonnes per year[103] could be trapped in the ponding area.

[215] The gravel bund is sacrificial in that it will wash away in times of flood thus allowing the full river channel to convey the flow. This also means that flood flows are unaffected by the scheme. Reinstatement of the bund will take place as soon as possible on the receding limb of the flood.

[216] From the ponding area the water will pass through intake ports into a short canal and thus to a sediment retention basin. Here most of the remaining sediment (estimated to be between 32,000 and 64,000 tonnes per year)[104] will deposit for later flushing back to the river approximately 900m downstream of the intake. At the outlet from the sediment retention basin into the canal there is a fish screen and a regulation gate which is used to control the abstracted flow and thus the flow to the power stations.

4.2.2 Operation

[217] The intake control structure will be operated to:

[a] ensure residual flow requirements are met;

[b] provide flushing (ecological) flows down the river such as may be required by consent conditions;

[c] cease abstraction when natural flows in the Wairau River are below the residual flows required;

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[102]Levy EIC at [6.2]
[103]Levy EIC at [6.3]
[104]Levy EIC at [6.8]

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[d] cease abstraction when river flows exceed 200m^3/s (typically 3 to 4 times annually) which will avoid major influxes of sediment to the system and reduce the amount required to be flushed from the intake pond and the sediment retention basin.

4.2.3 Regulation pond

[218] Together the existing and proposed Wairau power stations will be able to operate with flows up to 55m^3/s which exceeds the capacity of the remaining five power stations, viz 40m^3/s. If the extra 15m^3/s can be stored downstream of the Wairau stations this will allow these stations to provide peaking capacity and thus respond to peaks in energy demand. This storage is to be provided by a regulation pond located between the existing tail race and Saltwater Creek. With a surface area of 15ha it provides some 245,000m^3 of live storage, sufficient to accept 15m^3/s for up to four hours. The water level in the pond may thus rise and fall reflecting the peaks in energy demand.

[219] Discharge from the pond will be controlled to ensure successful operation of the five proposed power stations PS1 to PS5. Control will include being able to shut the flow off completely in times of maintenance shut down or in emergencies. The abstracted water would be returned to the Wairau River via the existing Wairau tail race which will have to be enlarged to cope with the increased flows (from the existing 20m^3/s to the proposed 55m^3/s).

[220] The combined effect of the additional six stations and the regulation pond is to increase the ability of the system to provide peak energy at times of high demand by 4 to 5 times.

[221] The regulation pond will provide a recreational setting. A flooded ecological margin or moat will be established around the pond and isolated from the water level fluctuations in the pond. An indigenous aquatic wetland of approximately 4.3ha is proposed to be created.

4.3 Canals

[222] The 46km of canals is to be formed in cut and/or fill with trapezoidal cross sections. At 40m^3/s the water depth will be 3.2m, the water surface width 22m with top

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width ranging from 27m to 33.5m. The canal's footprint width will vary depending on whether the particular section is in cut, fill or cut and fill. Footprint widths up to 70m are expected. As the canals approach power stations they will be widened to form head ponds. These are to provide the storage necessary for start up and shut down of turbines.

[223] Where the canal water level is above that of the adjacent groundwater the canal will be lined to minimise seepage losses. Other sections of the canal will be unlined.

[224] Eighteen lowered sections of the canal embankments (reduced freeboard) will serve as spillways. Twelve of these are emergency spillways and six will serve as both operational and emergency spillways.

[225] Provision will be made for controlled dewatering of the canal. Although this is most unlikely it could become necessary if there is movement on the Wairau fault. Water can be released from the canal through the existing tail race at the Wairau power station, through a tail race to be constructed downstream of PS4 and through a drop shaft into Kiernan Creek. Each power station other than PS5 will have a bypass valve to allow water to pass should the station be unable to operate when dewatering is required.

4.4 Tributary and road crossings

[226] Thirty eight southbank tributaries intersect the line of the proposed canal. Five crossing types are proposed the choice in a particular case depending on the tributary size and the relative water levels in the canal and the tributary. The crossings which are designed for a 100 year flow in the tributaries will be one of the following types:

[a] the tributary in a culvert under the canal, e.g. Wantwood Creek;

[b] the tributary passed into the canal by means of a drop structure, e.g. Centre Valley Stream;

[c] the tributary passed over the canal in a structural flume, e.g. Saltwater Creek;

[d] the canal passed over the tributary in a structural flume, e.g. Branch River;

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[e] the canal passed under the tributary in an inverted siphon, e.g. Wye River.

[227] Flows up to the 100 year flows in tributary streams apart from those in [b] above will be unaffected by the scheme as will the recharge they provide to aquifers between the canal line and the river.

[228] Should the 100 year flows be exceeded water from the tributaries may flow into the canal. This water together with that entering the canal through the drop structure ([b] above) will be used to generate power with the scheme abstraction from the river being reduced accordingly. Should this not be possible the operational spillways and possibly the emergency spillways will come into operation.

[229] Twin lane highway bridges will be built at the four locations where the canal passes below SH63 and a single lane bridge built where the canal passes beneath Centre Valley Road. A range of farm crossings is to be provided to maintain access to all affected properties.

4.5 Power stations

[230] The new WPS will receive water from the existing Wairau head pond through a 3.2m diameter concrete penstock. It will discharge into the existing tail race enlarged to accommodate 55m^3/s. The maximum power generation will be 12.1MW.

[231] PS1 to PS4 will each receive water from a head pond through a 3.5 m diameter concrete penstock. Each station will have one turbine and will discharge into the canal leading to the next head pond. The maximum power generation from each of PS1 to PS4 is, respectively, 6.7 MW, 11.0 MW, 8.1 MW and 12.6MW.

[232] PS5 will have two turbines and receive water through twin 2.3 m diameter concrete penstocks. Discharge will be into a tail race leading to the Wairau River. The maximum power generation will be 22.3MW.

4.6 Tail races

[233] The scheme proposes three tail races through which water may be discharged directly back to the Wairau River.

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[234] The existing Wairau tail race, enlarged to carry $55m^3/s$, will convey flows from the Wairau power stations to the regulation pond. It will also have a direct connection to the river controlled by an outlet gate. The gate will normally be closed and open if the regulation pond and canal system cannot accept all or any of the flow in the tail race.

[235] A new tail race is to be constructed from a point on the canal 2.3km downstream of PS4 directly to the Wairau River, a distance of 1km. It will have a capacity of $40m^3/s$ and be controlled by an outlet gate approximately 50m from the canal. The downstream section of the tail race will normally be dry and available for grazing. An un-gated weir structure with a drop of 2m will operate as a fish barrier preventing fish from the river entering the canal.

[236] Flows from PS5 will pass along a 1.4km tail race, with a capacity of $40m^3/s$, to the river. Two un-gated weir structures each with a 2 m drop will control the flow and act as fish barriers. It is proposed to incorporate a number of recreational facilities adjacent to the tail race between SH63 and the river. Kayaking, walking, picnicking and boat launching facilities are envisaged.

4.7 Non-engineering works

[237] Recreational facilities as described above are to be provided at the regulation pond and downstream of PS5.

[238] A proposed vegetation package including a vegetation management plan has been agreed with the Department of Conservation. The plan and proposed associated conditions of consent require:

[a] legal protection of 18.7ha of ecologically significant indigenous bush and 15.6ha of exotic forest which provide important ecological corridors

[b] gradual replacement of the exotic components in these corridors

[c] active revegetation of 4.7ha of native forest, 5.3ha of indigenous wetlands and of a 10m riparian strip at the canal intersection with Saltwater Creek

[d] control of weeds and animal pests at nominated sites.

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These measures are seen by TrustPower as mitigation and compensation.

5 THE CONTESTED ISSUES

[239] Having set the context of the proposed scheme, we now identify the issues within the statutory framework, within which we must make our decision.

5.1 Positive effects

[240] There were a number of positive effects identified by the TrustPower witnesses. Many of these are acknowledged by those opposed to the proposed scheme. What was contested was:

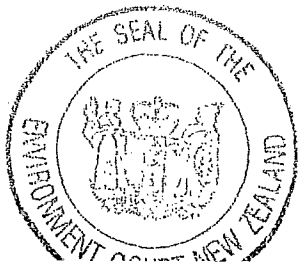
[a] The economic and social benefits.

5.2 Adverse effects

[241] The appellants opposed to the proposed scheme raised a number of adverse effects that they maintained would result. These effects can, for convenience, be grouped as follows: *Group 1 Effects* - those effects resulting (in whole or in part) from the hydrological changes to the flow regime of the river; *Group 2 Effects* - those effects relating to health and safety.

Group 1 effects

1. Hydrological effects including tributary connectivity and groundwater
2. Sediment transport capacity
3. Aquatic Ecology
4. River birds
5. Wetlands and terrestrial ecology
6. Natural character, landscape and amenity (including recreation)



Group 2 effects

1. Well water quality and quantity

2. Dust

3. Seismic Risk

4. Flooding

6 ENVIRONMENTAL EFFECTS

6.1 Undisputed positive effects

[242] The TrustPower witnesses identified a number of positive effects that would result from the construction and operation of the proposed scheme. They included:

[a] Construction of the regulation and sediment retention pond areas which would enhance the amenity of and access to the Wairau River as well as providing recreation opportunities including new walkways and viewing areas;[105]

[b] A boat ramp and kayak play facility that would be provided;[106]

[c] Provision for the canal to carry irrigation waters for the Wairau Valley Water Enhancement Scheme (WVWES);[107] and

[d] Improved access to emergency water supplies for fire fighting along the length of the Wairau Valley.[108]

[243] A number of other mitigating and compensatory initiatives have been proposed for native flora and fauna. We address these specifically when considering actual and potential effects on the ecosystem.

[105] Joint brief at [8.6] exhibit 17
[106] Hovell EIC at [6.12]
[107] McKenzie EIC at [32] – [35]
[108] Bains EIC at [5.89]



6.2 Disputed economic and social benefits

[244] Both Mr Donnelly and Dr Layton identified a number of potential economic and social benefits that would result from the proposed scheme. These included:

[a] Increasing the proportion of New Zealand's electricity produced by renewable resources;[109]

[b] Reducing New Zealand's greenhouse gas emissions;[110] and

[c] Increasing the security of electricity supply in the Nelson/Marlborough region.[111]

[245] The appellants did not call an economist to rebut or contradict the economic evidence of either Mr Donnelly or Dr Layton. Mr Delamore did however enter into the economic sphere. He challenged all three of the above benefits identified by Dr Layton and Mr Donnelly. We thus briefly comment on each.

6.2.1 Supply of renewable electricity generation

[246] Mr Donnelly pointed out[112] that electricity is an essential commodity as it forms the basis of our economic prosperity. Demand is growing, at around 2% or 850 GWh per year. Dr Layton put it at 1.3%. Both Mr Donnelly[113] and Dr Layton[114] considered there would be a benefit by the proposed scheme contributing to the supply of renewable generation. Mr Delamore[115] questioned whether the construction of the proposed scheme is necessary to meet future increases in demand for renewable electricity generation at the national or regional level. He reproduced[116] summary data from a July 2009 Electricity Commission publication. This lists the generation projects that were then under consideration. He pointed out that the renewable energy projects had a combined capacity of 4,189 MW.

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[109] Layton Executive Summary at [2.6]
[110] Layton Executive Summary at [2.6]
[111] Layton Executive Summary at [2.6]
[112] Donnelly EIC at [4.1] and following
[113] Donnelly EIC at [13.1]
[114] Layton EIC at [16.7]
[115] Delamore EIC at [4.11] and following
[116] Delamore EIC at [4.13]

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[247] As Dr Layton pointed out, the statistics cited by Mr Delamore are a measure of generation capacity which is measured in megawatts. Electricity output over a period of time (energy) is measured in gigawatt hours. Output does not equate with capacity as no plant can operate at 100% capacity all of the time. The average capacity factor for New Zealand hydro generation plants in 2008 was 46.9%.

[248] We agree with Dr Layton that Mr Delamore has exaggerated the increase in output available from the proposed renewable generators listed in his reproduced table. Further, we agree with both Dr Layton[117] and Mr Donnelly[118] that any proposals need to be put into perspective. Not all of the current proposals will be consented. There is also considerable uncertainty over the commercially viability of some projects.

6.2.2 Impact on carbon emissions

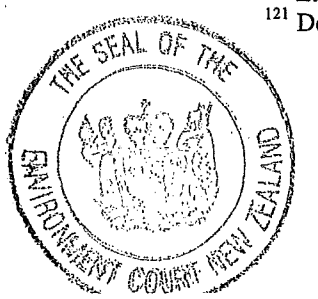
[249] In his evidence-in-chief, Dr Layton concluded that the proposed scheme's generation of an additional 370GWh per year would avoid 140,600 tonnes of CO_2 per year if this electricity were instead generated from a gas-fired plant or 330,000 tonnes per year from a coal-fired plant.[119] He did point out[120] that one could not foretell which plant would be displaced by the proposed scheme's output, as that is the role of the electricity market. But more often than not, fossil fuel-fired thermal plants would be displaced because of their higher short-run marginal costs.

[250] Mr Delamore questioned Dr Layton's conclusion[121] and stated that the proposed scheme's output would only assist in off-setting emissions when South Island power is being used to replace thermal generation in the North Island, or less frequently when thermal generation is being sent to the South Island during periods of low hydro lake levels.

[251] Notwithstanding Mr Delamore's criticism, we find that the commissioning of a new hydro-electricity station would be a net benefit because it would assist in increasing the ratio of hydro generation compared with fossil fuel-fired generation. This would assist in reducing carbon emissions.

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[117] Layton Rebuttal at [3.6]
[118] Donnelly EIC at [13.2] & [13.3]
[119] Layton EIC at [12.2]
[120] Layton EIC at [12.6]
[121] Delamore EIC at [4.19]



6.2.3 Security of electricity supply

[252] Dr Layton concluded,[122] that the proposed scheme would increase security of electricity supply in the Nelson-Marlborough region, by reducing its dependence on the transmission lines into the region from the south. Mr Delamore was critical of Dr Layton's view. He suggested that the key mechanism for establishing security of supply is the transmission network, rather than generation per se,[123] and that the scheme will operate below maximum capacity much of the time.[124]

[253] With regard to the first criticism, Dr Layton pointed out that transmission can improve security of supply in a region by connecting more than one generator to it, so that in the event one generator fails, supply can be provided by the other generator or generators. He did acknowledge that in the event of a transmission fault emerging, the operation of local generation, including the proposed scheme, would be limited by operational constraints.

[254] We acknowledge the limitations raised by Mr Delamore to the effect that the proposed scheme will not be able to fully insulate the local community from transmission faults. However, there would be a net benefit to the local community in terms of a reduction in lost electricity supply that would be equivalent to the energy output of the proposed scheme for the duration of the transmission fault.

6.3 Disputed Group 1 effects
Adverse effects resulting from the hydrological changes to the river

[255] We first discuss the hydrological changes that will result from the construction and operation of the proposed scheme. The river's hydrology and its changes are not in dispute.

6.3.1 Hydrology

[256] The proposed scheme would divert water from the Wairau River into a canal, through a series of turbines and then discharge the water back to the river some 48km

[122] Layton EIC at [15.4]
[123] Delamore EIC at [4.21]
[124] Delamore EIC at [4.22]

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downstream. Thus the hydrological effects include the reduced flows in the diversion reach, the discharges at Marchburn, temporary discharges associated with flushing events and potential changes in groundwater levels and tributary connectivity.

6.3.2 Flow management

[257] Flows at the Branch intake are controlled by a gate and limited by the physical size of the intake. Residual flows are removed first by means of a bypass system.

[258] Flows at the Wairau intake are to be controlled by a regulation gate at the exit from the sediment retention pond and are to be measured in the first section of canal. The difference between this flow and the flow at either Dip Flat or The Wash bridge (adjusted to the intake site) will be the residual flow passing the intake in the river. Residual flows will thus be set by adjusting the regulation gate.

[259] A control gate at the exit from the ponding area will be shut preventing abstraction when river flows fall below the required residual flow. It will also close when the river flow exceeds $200m^3/s$ opening again when the flow drops below $150m^3/s$. Reopening will be done gradually taking up to 30 minutes. The gate will also be closed for scheme maintenance typically during low flows when abstraction rates are small. This ensures minimum effect on the river and minimises generation loss.

6.3.3 Discharges from the scheme

[260] For the majority of the time the only discharge from the scheme will occur at Marchburn. Other discharges will occur over the operational and emergency spillways as described above, through the upgraded Wairau tail race when the regulation pond is unable to store the abstracted water which cannot be passed into the canal system, and when flushing of the intake pond and sediment retention basin is undertaken.

6.3.3.1 The discharge from PS5 at Marchburn.

[261] During periods of high river flows when the total abstracted flow from the Branch and the Wairau exceeds $40m^3/s$ the Wairau tail race will be discharging and PS1 to PS5 will be operating at full capacity with the canal flow being essentially constant. There is

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thus little or no variation in discharge from PS5 under this condition which is expected to occur for approximately 25% of the time.

[262] It is inefficient for a station to generate at less than 25% of its capacity. At low flows therefore water will be stored in the regulating pond and released in pulses down through PS1 to PS5. The discharge from PS5 will thus rise and fall. This condition will occur about 10% of the time.

[263] Changes in the discharge will also occur during shut down and start up events (expected to be infrequent) and during conditions between the high and low flow conditions mentioned above. To control such changes in discharge three conditions[125] have been proposed which effectively limit both the magnitude and rate of change of discharge from PS5 to the river.

[264] A maximum ramping rate of $20m^3/s/h$ is proposed by TrustPower. Fish and Game have suggested $5m^3/s/hr$. The purpose of the ramping rate is to limit the rates of change of water depth and wetted width in the receiving waters resulting from changes in discharge to those waters. The maximum anticipated change in discharge is $31m^3/s$.[126] The Wairau River is of the order of one kilometre wide at Marchburn with the flow being in several braids.[127]

[265] Dr Ryder addressed the matter of changes in wetted width by assuming a single channel, 105m wide and carrying $22m^3/s$, receiving an extra $31m^3/s$. The increase in wetted width in this circumstance is 12m.[128] However, the Marchburn discharge will be into one of several braids. Thus the changes in this braid may well be significant but there will be no changes in the remaining braids until they merge with the receiving braid. At this stage any effects will be greatly reduced. Similar comments apply to changes in water depth.

[266] Comparisons are drawn between the existing fluctuations in river levels resulting from the Branch Scheme and those expected from the proposed scheme. These are unhelpful in that the former have had some 48km of river to spread across all braids while the latter will be confined to one braid for some distance.

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[125] Conditions 167 - 170
[126] Mitchell EIC Appendix 11 at [11.10]
[127] Mitchell EIC Appendix 11 at [11.12]
[128] Ryder EIC at [12.8]

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[267] This braid will be the closest to the south bank and thus access to other braids may be impeded over the distance required for the braid to merge with others in the cross section. This is likely to occur even when the tail race is discharging at the lower end of its range and ramping rates are thus irrelevant. The braid may provide good fishing as fish which are attracted to it by the larger flow (compared with the other braids) will be unable to move into the tail race because of the 2m high weirs.

[268] Imposing a ramping rate will therefore be for the safety of those who choose to fish in the receiving braid. Many of these will choose to go to there because it is the receiving braid and thus will be aware of the fluctuating flows. Nevertheless, is will be necessary for appropriate signage to be erected along the length of the receiving braid and in particular at any Fish and Game access points in the vicinity. This will be a condition of consent.

[269] No evidence has been supplied to support either TrustPower's or Fish and Game's suggested ramping rate. With TrustPower's $20m^3/s/hr$ maximum rate the $31m^3/s$ change would occur over at least 90 minutes. We favour this rate for the following reasons:

[a] It provides the greater benefit to the production of electricity

[b] It is likely to be limited by the other two conditions on the discharge

[c] The ramping rate does not affect access to the riverbed

[d] There is no effect over the majority of the braids with either ramping rate

[e] Those affected are in the region by choice and many will be well aware of the flow fluctuations

[f] Signage would be adequate to address any safety concerns

[270] A $20m^3/s/hr$ ramping rate is approved and will be included as a condition of consent.

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[271] Fish and Game proposed a condition requiring a regulating pond be constructed to reduce the rate of change of discharge from PS5. We consider the impacts of these flow fluctuations on the ecology before considering the need for a regulating pond.

[272] The other two conditions control fluctuations in discharge at Tuamarina in times of low flow and place a limit on the ability of the system to operate as a peaking system.

6.3.3.2 Operational and emergency discharges from canals

[273] Operational discharges will occur over the lowered sections of canal walls acting as spillways. These are to cope with large (of the order of 1% AEP)[129] rainfall events when inflows to the canal from tributary streams and directly from the land cause the capacity of the canal to be exceeded and, if necessary, during maintenance work on the power stations. Emergency spillways will operate in the event of a control system failure, in extreme rainfall events (up to 0.1% AEP events have been considered) and if the stations cannot operate for example in an intense storm which takes out the transmission lines.

[274] In all cases discharge from these spillways will be into tributary streams on the downstream side of the canal. As the scheme does not increase the volume of flood flows, provided the stations are operating, the presence of the scheme will in general reduce flood flows in the tributaries by intercepting flows and discharging them in a controlled manner. If the stations are not operating during a flood event with a 1% AEP in the tributary streams the flood flows in those streams will, with two exceptions, be reduced. Flows in Saltwater Creek and the Wye River will be increased by 18% and 4% respectively.[130] This could result in increased local flooding. The probability of this occurring is much less than that of the flood alone which during the 35-year consent period is 30%.

[275] No issues were raised with respect to discharges from the upgraded Wairau Power station tail race or the proposed PS4 tail race.

[276] Discharges associated with flushing flows are discussed below under the heading Sediment Transport Regime.

[129] AEP is the Annual Exceedance Probability
[130] Levy EIC Table 2

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6.3.4 Proposed flow regime

[277] The proposal will significantly change the existing, but modified, flow regime of the Wairau River:

[a] by reducing the mean and the median flows and altering the flow duration curve for the diversion reach i.e. downstream of the intake to the outfall at Marchburn

[b] downstream of Marchburn, by altering the pattern of flow fluctuations presently occurring there as a result of operation of the Branch Scheme

[c] by increasing the possibility of loss of connectivity between northbank tributaries and the Wairau River along the diversion reach.

6.3.4.1 Changes in the diversion reach

[278] Changes from the existing flow regime can be quantified in a number of ways. Those most useful for evaluating amenity and ecological effects are changes in:

[a] Long term mean and median flows and the MALF;

[b] Number of days per annum below specified flows;

[c] Number of consecutive days per annum below specified flows;

[d] Flow variability as measured by the CV and FRE3;

[e] Flow variability between years and monthly variability within a typical year.

[279] Since the intake is to be closed when flows there exceed 200m^3/s the flood regime of the Wairau River will not be altered by the proposal.



[280] By making assumptions about the operation of the proposed scheme and using existing records of past flows, synthetic flow series can be developed.[131] These series represent flows that would have occurred had the scheme been operating for the period covered by the existing records. In this case records from the intake site from 1951-2008 and from Marchburn from 1989-2008 were used. Examples of the statistics derived from the synthetic series[132] are presented in the Table below: (the values are in m^3/s)

	Site*	Existing	Post-Scheme	% Reduction
Mean	1	35	19	46
	2	42	27	38
	3	87	64	26
Median	1	25	10	60
	2	26	13	50
	3	57	31	46
7DMALF	1	10	10	0
	2	11	11	0
	3	19	15	21

*Site 1 is the intake. Site 2 is upstream of the Wairau tail race. Site 3 is Marchburn

[281] The smaller percentage reductions that occur in the mean and median flows as distance downstream from the intake increases result from the tributary inflows which are unaffected by the proposal. The major effects are upstream of the Wairau tail race but those further downstream are still significant.

[282] By using the same synthetic flow series described above flow duration curves can be derived. They show reduced flow variability throughout the reach with a pronounced shift to longer periods at lower flows.[133] These effects can be quantified by examining the number of days and the number of consecutive days per annum for which flows are below nominated thresholds post scheme (existing in parentheses). Examples of these are:[134]

	Number of Days Per Annum Below			
Threshold (m^3/s)	**80 m^3/s**	**20 m^3/s**	**15 m^3/s**	**10 m^3/s**

[131] Mitchell EIC Appendix 7
[132] Mitchell EIC Appendix 7 Tables 1 to 13
[133] Mitchell EIC Appendix 8 Figures 8.1 to 8.6
[134] Mitchell EIC Appendix 8 Tables 8.1, 8.5 and 8.6

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Intake	354 (343)	281 (131)	234 (66)	7.3 (7.3)
Above Outfall	296 (245)	88 (18)	15 (0)	0 (0)
Below Outfall	241 (245)	18 (18)	3.7 (0)	0 (0)

[283] For consecutive days below threshold values based on a 20 year return period[135] the values are:[136]

	Number of Consecutive Days Per Annum Below			
Threshold (m^3/s)	**80 m^3/s**	**20 m^3/s**	**15 m^3/s**	**12 m^3/s**
Intake	229 (179)	135 (69)	128 (44)	112 (36)
Above Outfall	129 (95)	46 (5.5)	22 (1.0)	* (*)
Below Outfall	89 (95)	7.1 (5.5)	0.4 (1.0)	* (*)

*The starred values refer to sample sizes too small to fit the distribution

[284] Scheme operation will increase flow variability as measured by the CV in the diversion reach. Values of the CV will move from 1.0 to 1.6 at the intake, 1.3 to 1.9 above the WPS outfall and 1.3 to 1.7 at Marchburn.[137] There will be no change in CV values below Marchburn.

[285] Changes in flow variability were of concern to Fish and Game and Save the Wairau. Dr Hayes believes[138] the best measures of flow variability are the CV and the ratios of MALF and median flow to the mean flow, and the ratio of the MALF to the median flow. Greater values, he opined, of these ratios imply a poorer ecosystem and lower trout abundance. The ratio MALF to mean is increased. The ratio median to mean is decreased. The ratio MALF to median, being the quotient of the previous two ratios, must necessarily increase and thus adds no new information. These tests for ecosystem quality are thus, in this case, inconclusive.

[286] Mr Mitchell provided limited information on monthly flow variability under the proposed scheme. His data are from 2008, a year for which the flow duration curves match closely those of the long term record.[139] Hydrographs for 2008 at the intake and at

[135] A 20-year return period event has a probability of occurrence in 35 years (the consent duration) of 83.4%
[136] Exhibit Wadsworth 1. Mitchell Tables 6.1, 6.5 and 6.6 from his evidence at the Councils' hearing tabled by Ms Baker during her cross-examination of Mr Wadsworth
[137] Mitchell Rebuttal Evidence Table 10
[138] Hayes EIC at [7.28]
[139] Mitchell EIC Appendix 9 Figure 9.1

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Marchburn[140] show that for large flows (greater than 40m^3/s) the monthly distribution of the proposed flow regime matches that of 2008. High flows will occur in the periods January to March, July, and September to December.

[287] The hydrographs show clearly that post-scheme the recession phases associated with high flows will be greatly reduced. Dr Hayes' hydrographs for the period July 2001 to June 2002[141] clearly show that under TrustPower's proposal much of the recession portion of the hydrograph is removed. It seems Dr Hayes' hydrographs refer to the intake site and thus show the conditions that would occur within the reach down to the Goulter confluence and WPS outfall (approximately 7.5km). Downstream of the Goulter confluence the effect would be reduced.

[288] The FRE3 statistic will be increased by the scheme partly because the median flow is approximately halved. At the intake it will move from 10 to 14 and at Marchburn from 13 to 17. For ecological purposes it may be more appropriate to reference the FRE3 statistic to the existing median flow. The changes are then from 10 to 7 at the intake and from 17 to 10 at Marchburn.[142] These figures suggest there will be some 7 to 10 freshes each year capable of disturbing the river biota.

6.3.4.2 Changes downstream of Marchburn

[289] There will be an immediate increase in flow and in flow variability just downstream of the outfall. The maximum change in discharge[143] during a day under the proposed operating rules is 31m^3/s. The associated change in river level is 300mm. The corresponding figures for the existing conditions with the Branch Scheme operating are 18m^3/s and 160mm.

[290] The fluctuations will attenuate rapidly in the reach to Tuamarina where proposed condition 167 requires fluctuations in discharge to be less than ±10% about the rolling 24 hour average flow. The Branch Scheme causes fluctuations of ±20% about the 24 hour rolling average at Tuamarina.

[140] Mitchell EIC Appendix 9 Figures 9.2 and 9.4
[141] Hayes EIC Appendix 1
[142] Mitchell Rebuttal Evidence Table 11
[143] Mitchell EIC Appendix 11

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6.3.4.3 Connectivity issues

[291] Retaining connectivity between the northbank tributaries and thus access for trout to spawn was seen as important by all parties. Possible effects of the scheme include gravel build up at the confluences and a change in the braiding pattern with braids moving to the south and away from the tributaries. Condition 189 has been proposed to deal with these possibilities. The Court sought clarification as to possible amendments to this condition.[144]

[292] By way of a memo to the Court dated 5 July 2010 counsel for Meridian provided an amended condition, responses from Fish and Game and from Save the Wairau to the amended condition and TrustPower's response to them. The amended condition extends the possible causes to reduced surface flows, provides for increased frequency of monitoring during the period May to August and requires assessment of possible causes by an independent expert before remedial action is undertaken.

[293] TrustPower's evidence is that the likelihood of loss of connectivity is low with Dr Keesing reporting that he could *find no evidence based on stream paths or flows that I have witnessed to suggest that loss of connectivity might occur.*[145] Mr Wadsworth for the MDC expressed a similar view.[146] Given these views it is reasonable to require TrustPower to seek consent from the MDC for the proposed remedial work as soon as a loss of connectivity is detected and thus remedy the loss as soon as is possible without having to wait for an independent expert to investigate and report. We thus reject this section of the amended condition.

[294] Save the Wairau requested the Branch River and Pine Valley Stream should be included in the condition. We note the Branch River problems are being addressed in separate consenting procedures and decline to include the Branch in the amended condition. With respect to Pine Valley Stream, Mr Deans for Fish and Game notes Pine Valley Stream is frequently dry in its lower reaches for many months of the year.[147] It is thus unreasonable to include Pine Valley Stream.

[295] Accordingly the connectivity condition will read:

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[144]Transcript page 2761
[145]Keesing EIC at [8.1]
[146]Transcript at 2248
[147]Deans EIC at [9.25]

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[a] The consent holder shall monitor the connection between the Wairau River and Goulter River, Top Valley Stream, Timms Creek/Cat Creek and Fabians/Barnetts Creek to ensure flow connection is maintained and not interrupted by either the formation of a gravel obstruction or reduced surface water flows;

[b] Monitoring shall be carried out at least once per month during May – August (inclusive) in periods of low flow and once every four months for the remainder of the year;

[c] The consent holder shall submit the results of the monitoring to the Consent Authority within seven days of completion of the monitoring;

[d] In the event that monitoring shows that connectivity between any of the monitored tributaries and the Wairau River has been lost, the consent holder shall immediately prepare and submit to the Consent Authority for approval a plan for restoring the lost connection and seek any necessary consents for its implementation;

[e] Having obtained the Consent Authority's approval and any necessary resource consents the consent holder shall immediately implement the plan in [d] to the satisfaction of the Consent Authority.

6.3.4.4 Comparison with SFR

[296] Mr Mitchell, using the 1989 – 2005 flow series for the intake derived the corresponding flow series for the residual flows below the intake under three operating scenarios: the proposed flow regime, a regime with flow sharing and a minimum of $8m^3/s$ at the intake (SFR8) and a regime with flow sharing and a minimum of $9m^3/s$ at the intake (SFR9). The SFR8 and SFR9 regimes were subject to the 2 for 1 flow sharing described in the Plan.[148] The results were presented as monthly mean and monthly median flows, as annual mean flows and illustrated by flow duration curves.[149]

[148] Mitchell Rebuttal Evidence at [6.1] to [6.5]
[149] Mitchell Rebuttal Evidence Appendix 1 Figures 4, 5 and 6

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[297] There was no significant difference between any of the results for the two SFR scenarios. The monthly means and medians of the residual flows for the proposed regime showed a similar distribution throughout the year to those of the SFR scenarios but values were smaller in the months January to July and greater in the months August to December. The latter is a reflection of the higher minimum residual flows required by the proposed flow regime in this period (12 to $20m^3/s$) than those required by the SFR scenarios (8 and $9m^3/s$). The maximum difference in the monthly means of $3.6m^3/s$ (12%) and monthly medians of $3m^3/s$ (18%) occurred in October.

[298] The mean residual flow over the 1989 -2005 period below the intake was the same for SFR9 and the proposed flow regime at $19.3m^3/s$ while the mean flow for SFR8 was $19m^3/s$ for the same period.

[299] The flow duration curves show a changed distribution of residual flows. The principal change is that the SFR scenarios produce flows of $20m^3/s$ or greater for 18% of the time while for the proposed regime the figure is 24%. The reason for this is again the higher minimum residual flows required by the proposed flow regime.

[300] Condition 179 requires TrustPower to maintain flows above the PS5 outfall of 15 to $25m^3/s$ depending on the time of year unless the natural flows are insufficient to meet the requirement. Flows at the Narrows and Tuamarina will thus not drop to the SFR minimums of 14 and $8m^3/s$ respectively as a result of the scheme operation. Equally flows throughout the diversion reach will not drop to those corresponding to the SFR minimums. In effect condition 179 ensures the minimum residual flows will always (provided there is enough water naturally in the river) exceed the SFR minimums.

[301] We find, in the light of the above results, that the proposed flow regime is not significantly different from that produced by the Plan requirements embodied in the SFR scenario. The principal differences arise from the variable minimum flow regime imposed by the proposal at the intake and upstream of the PS5 outfall which at all times results in higher minimum flows than would occur under the SFR scenario.

[302] TrustPower has agreed to a limited flow sharing regime which sets flows below the Goulter confluence for the period October to January inclusive[150]. This will increase the monthly mean and median flows from those used in the above comparison with SFR

[150] Consent condition 177

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scenarios. However during these months the proposed regime monthly flows exceed those of the SFR scenarios. So while the flow sharing may provide more water in the diversion reach it does not improve the comparison with the SFR minimum flows. However like the 2:1 sharing of the Plan it does assist in providing mid range flow variability and for this reason the court supports it.

6.3.5 Sediment transport regime

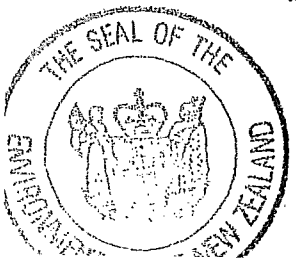
[303] The proposal will cause changes to the sediment transport regime in the diversion reach by reason of the abstraction of water at the intake and the flushing of sediment from the intake pond and the sediment retention basin. There will also be sedimentation effects during construction of the intake and when works are required in the river bed as part of the scheme operation.

6.3.5.1 Sediment transport in the affected reach

[304] The abstraction of water from the river at the intake will reduce the sediment transport capacity of the river throughout the diversion reach. The principal effect of this is accumulation of bed load material in the vicinity of the intake. Dr Davies presented a formula[151] which in conjunction with the flow duration curves for the existing and the proposed flow regimes allows the reduction in annual bed load sediment transport volume to be estimated. The formula is sensitive to the threshold discharge at which bed load transport begins and assumes the transport is discharge limited. This assumption is conservative and we accept it as being appropriate.

[305] Dr Davies and Mr Levy disagree over the amount of material that will accumulate in the vicinity of the intake and the resultant rise in bed level. Dr Davies uses an accumulation rate of 20,000m^3/yr (without any explanation of why this figure was chosen) and from it estimates bed level rises of 1m in 18 years and 2.5m after 100 years.[152] Mr Levy's estimates based on a threshold discharge of 100m^3/s are 2,100 m^3/yr and a bed level rise of up to 1.3m after 100 years.[153] He opines this is an over estimate given that sediment transport at the smaller flows is supply limited and thus sediment transport rates are unlikely to change appreciably in small to moderate floods as a result

[151]Davies EIC at [4.2]
[152]Davies EIC at [4.5] and [4.6]
[153]Levy Rebuttal Evidence Attachment 2



of the proposed flow regime. He thus expects a rise of considerably less than the calculated value.[154] To support this view he records the experience at other intakes with significant abstractions from braided South Island rivers. Aggradation has not been observed at any of these intakes.[155]

[306] We accept Mr Levy's views on possible aggradation at the intake and thus have no concerns over increased bank erosion or bed form changes in the vicinity of the intake arising from the proposal.

[307] We turn now to consider the effects on sediment transport along the diversion reach. The scheme will shut down when flows at the intake exceed 200m^3/s, a flow expected to be exceeded about twice a year. It is the larger flows which are responsible for the evolution of the braided form of the riverbed and which produce the bulk of the sediment transport volume. Mr Levy quotes Mr Williman, the Council Rivers Engineer, who expressed the view:[156]

> It takes 400 to 500m^3/s of flow before the braids start to move, and 1300m^3/s for significant bed movement.

[308] As these flows are unaffected by the proposed scheme we expect the river to retain its braided form which will respond to each flood as it does presently. The total sediment load transported through the reach (260,000 to 500,000tonnes/yr) will be reduced by the annual volume of deposition in the vicinity of the intake. Estimates of the annual deposition range from 2,100 to 20,000m^3/yr. If the deposit is assumed to increase by 10,000m^3/yr this is less than 7% of the estimated annual sediment load.

[309] The reduction in sediment load may result in local changes in channel slope and cross sectional shape.[157] We accept Mr Levy's observation[158] that presently channel slopes in the diversion reach vary by ±25% which is larger that any change in slope that could reasonably be attributed to the reduction in annual sediment load. Given the channel forming role of the larger flows which will be unaffected by the proposal we do not agree with Dr Davies with respect to possible changes in braid cross section.

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[154] Levy Rebuttal Evidence at [4.25]
[155] Levy Rebuttal Evidence at [4.28] - [4.32]
[156] Levy rebuttal at [4.15]
[157] Davies EIC at [4.9]
[158] Levy rebuttal at [4.19]

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[310] Immediately downstream of Marchburn some degradation can be expected. Dr Davies asserts it will occur at approximately the same rate as aggradation does at the intake.[159] This assertion seems to overlook the phenomenon of armouring that will act to limit the depth of degradation but not its downstream extent. We have no information from which to estimate the depth of the degradation. However, we can say it will increase slowly and be limited. Any adverse effects on stop banks or irrigation intakes will thus be minor if any occur at all.

[311] Mr Keane, witness for Fish and Game, was concerned about possible reductions in the number of *optimum* angling days as a result of the proposed flow regime and changed sediment transport regime. It seems the bounds on the optimum range of flows for angling are set by the associated water clarity. He states that at low flows the water is too clear while at flows above the mean flow turbidity increases rapidly and catch rates fall markedly.[160] The optimum range of flows at the Goulter confluence is $20m^3/s$ to $65m^3/s$ and the total range over which anglers may be expected on the river is $10m^3/s$ to $80m^3/s$.[161]

[312] Mr Keane and Mr Levy agree that abstraction of water at the intake will have very little effect on water clarity[162] since this depends on the concentrations of the fine sand and silt fractions in the suspended load which are supply limited and thus not a function of discharge. This is well illustrated in Mr Levy's Figures 7 and 8.

[313] We accept that the turbidity presently experienced at the Goulter confluence at $80m^3/s$ will be unchanged after the scheme has extracted $35m^3/s$ and the flow there reduced to $45m^3/s$. Mr Keane notes that this will become the upper limit of the total fishable range.[163] This flow will be exceeded on approximately the same number of days as the $80m^3/s$ is exceeded presently. Any change in the number of days on which an angler cannot fish as a result of high turbidity will thus be small.

[314] Similarly with the scheme operating at capacity and extracting up to $35m^3/s$ all flows below 35 to $45m^3/s$, depending on the time of year, will be reduced to the relevant minimum flow with the water clarity essentially unchanged. The flows will remain

[159] Davies EIC at [4.12]
[160] Keane EIC at [12.4] and [12.5]
[161] Keane EICTable 8
[162] Keane EIC at [12.9] and Levy Rebuttal Evidence at [8.9] and [8.12]
[163] Keane EICTable 9

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turbid enough for them to be fishable and the number of days of angling opportunity will not change appreciably.

[315] We agree with Mr Keane that the range of optimum flows for angling will be reduced but accept Mr Levy's view that the number of days when the river is within that range will not change appreciably.

6.3.5.2 Flushing regime and effects

[316] Sediment will accumulate in the intake pond and the sedimentation retention basin necessitating periodic flushing by sluicing into a major braid of the river. TrustPower suggests that this may occur for at least two hours between 12 and 20 times per year from the intake pond and 12 to 20 times per year from the sediment retention basin. Flushing from the pond and the basin will not be done concurrently but may occur sequentially on the same flood. Flushing will only be done at times when the river flow is in excess of $80m^3/s$ and the turbidity at The Wash bridge recorder site is greater than 5.6NTU.[164] Flushing will be avoided as far as possible during the brown trout spawning season.[165]

[317] ANZECC and MfE[166] have published water quality guidelines for aquatic ecosystems and recreational use which set trigger levels of 4.1NTU for turbidity and 1.6m for water clarity. For a natural flow of $80m^3/s$ at the intake, these trigger levels are exceeded at Dip Flat and at Tuamarina. Thus flushing when flows are greater than $80m^3/s$ as proposed will not of itself result in these trigger levels being exceeded.[167]

[318] TrustPower and Fish and Game disagree as to where the $80m^3/s$ trigger level is to be measured. TrustPower has suggested a condition whereby the $80m^3/s$ is measured at The Wash bridge recorder site. Fish and Game's preference is for there to be at least 80 m^3/s immediately downstream of the intake.[168]

[319] Flushing from the intake pond and the sediment retention basin will cause temporary increases in suspended sediment concentration over that occurring naturally in the receiving water. The peak expected concentration in the river at the flushing outfalls

[164]Levy EIC at [6.10] and [7.11]
[165]Levy EIC at [6.13]
[166]Australia and New Zealand Environment Conservation Council and Ministry for the Environment
[167]Levy EIC Figures 7 and 8
[168]Consent condition 175

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is 3000 to 4000g/m^3 a value normally expected with a 100 year flood.[169] This will reduce on mixing with the flow in the river, with time as flushing continues and with distance downstream.[170] At 80m^3/s the natural concentration is 200 to 300g/m^3.

[320] There is disagreement over the extent of a mixing zone with TrustPower suggesting the reach between the outfalls and the Branch confluence while Fish and Game want the mixing zone to be 200 metres. Mr Levy used a length of approximately 1km (from the outfall to the Branch confluence) to model the likely effects of sediment. He considered that to be a reasonable distance in which it could be expected that the braids had rejoined and the river would be fully mixed. While he had looked at possible changes in water clarity and turbidity he did not consider it possible to make predictions and said that would require field trials.[171]

[321] We have found that the proposed scheme is an exception in terms of s 107 of the Act. Bearing this in mind we accept Mr Levy's estimate of 1km to be a reasonable distance for mixing and the flushing condition 198 reflects this.

[322] Sediment capture and its subsequent release to the river is an integral part of any scheme in which significant quantities of water are abstracted from a river. The effects of this cannot be avoided but they can be mitigated. The trigger level of 80m^3/s is not disputed. To maximise the effect of the trigger level we accept Fish and Game's proposal that it refer to the flow just downstream of the intake. This to be computed by differencing the flow as recorded at The Wash bridge site and the intake flow to the scheme.

[323] The proposed flushing condition 194, as in Appendix 2, refers to *the sediment pond adjacent to the intake*. It should also apply to flushing from the sediment retention basin. Thus, the flushing condition will read:

> 194 The consent holder shall ensure that sediment flushing from the sediment ponding area immediately in front of the intake ports and/or the sediment retention basin downstream of the intake into the Wairau River only occurs if the following requirements are met:

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[169] Levy EIC at [6.10] and [7.4]
[170] Levy EIC Figure 6
[171] Transcript at 1212 – 1213

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[324] Proposed condition 196 will require a similar amendment.

[325] Proposed condition 200 refers to monitoring of the flushing flows. Condition 200(a) would be of greater utility if the turbidity record was determined at The Wash bridge recorder site (the control site for turbidity during flushing) rather than in the scheme intake channel. Further, we see condition 200(b) as onerous and unnecessary. An amended condition has thus been included.

6.3.6 In-river works

[326] Periodically works will be required in the river bed. Such works will require a bulldozer or large hydraulic excavator to move bed material and may occur over a two kilometre stretch of the river centred on the intake structure.[172] At times it will be necessary to do these works in flowing water.

[327] Circumstances requiring work in the river include:

[a] during initial construction of the intake;

[b] during an extended dry period if insufficient flow is reaching the intake;

[c] after freshes and minor floods if the channel has moved away from the intake or from the sediment flushing outlets;

[d] after major floods when the gravel bund needs to be reinstated.

[328] These works are all of a temporary nature and each will occur infrequently. Consent conditions have been proposed to ensure adverse effects of the works are minimised. These include the requirement to work outside the flowing water as far as practicable, to do reinstatement works during the recession phase of the flood when the river is still turbid and to ensure any black-fronted tern and black-billed gull nesting sites in the vicinity are not affected. With these conditions we have no concerns regarding possible adverse effects from in river works.

[172] Levy EIC Figure 4

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6.3.7 Interaction with groundwater

[329] The scheme will affect the groundwater system both during construction and operation. The proposed conditions detail requirements for a Groundwater Management Plan and require a comprehensive pre-construction groundwater monitoring programme. Should the proposal be approved we see these conditions as appropriate and endorse them.

6.3.7.1 During construction

[330] Excavations for power house foundations and for sections of the canal below adjacent groundwater levels will need to be dewatered. This will result in local groundwater lowering which may affect wells in the vicinity and inflows to wetlands and tributary streams.

[331] The extent of the lowering has been estimated and presented by Mr Callander in tabular and graphical form. The maximum lowering resulting from power house excavations of up to 18m is expected at PS5. Canal excavations may result in lowering of up to 14m. The areas affected by lowering extend from the canal almost to the Wairau River and up to 2km along the canal in each direction from the power house locations. Lowering initially reduces rapidly as one moves away from the excavation and more slowly as the distance from the excavation increases.

[332] Dewatering of the excavations is to be by pumping with stipulated maximum pumped flow rates. Should these not be sufficient to control groundwater inflows alternative methods such as sheet piling are available. These will not increase groundwater lowering. The pumped water has to be discharged which raises the possibility that it could be directed to areas of significant lowering or be used to supplement inflows to affected wells, wetlands and spring fed streams.

6.3.7.2 During operation

[333] Changes in groundwater levels during operation of the scheme will be much less than those experienced during construction. This is because differences in water levels between groundwater and the water in the canal will be much less than those resulting from the excavations during construction.

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[334] Levels will be lowered locally near those sections of the canal in which the water surface is below adjacent groundwater levels. Any associated adverse effects will be much less than those encountered during construction and be mitigated by the same methods.

[335] Levels will be raised (mounding) along those sections of the canal in which canal water levels are above adjacent groundwater levels and seepage from the canal is expected. Such loss of water from the canal is undesirable from an operational perspective and will raise adjacent groundwater levels. This mounding could have the adverse effect of impeding land drainage which may lead to water logging of soils and reduction in their structural strength. It may also raise the level of the saline groundwater with consequent effects on plant life.

[336] To limit seepage losses it is intended to line the canal with low permeability material in those sections from which seepage is predicted. Even so outflows from the canal are expected to exceed inflows with an average loss of some 10*l*/s/km. Should this result in mounding being a problem it can be controlled by means of cut-off drains with the collected water being returned to the canal downstream, directed to areas in which lowering is occurring, to wetlands or to the headwaters of the spring fed streams.

[337] Many of the southbank streams are ephemeral ceasing to flow in drier periods. It is likely that some of these streams and also some wetlands will benefit either directly from the seepage from the canal or as a result of these flows being diverted to them. This together with the relationship between TrustPower and the Wairau Valley Enhancement Scheme led Mr Callander to the conclusion

> ... it is most likely the water supply situation within the Wairau Valley can be enhanced as a result of this scheme going ahead ...

6.3.7.3 Maintenance of water supplies

[338] During both construction and operation the key issue is maintenance of domestic and stockwater supplies that are affected by the scheme. Mr Callander notes there are potentially up to 60 wells, galleries or springs within the zones of predicted drawdown. These abstraction systems will be affected to differing degrees and will thus have to be assessed individually so that measures appropriate to each can be devised and implemented. This is required by the Groundwater Management Plan. TrustPower has

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given an undertaking to provide an alternative water supply to any affected property that is equivalent to, or better than, the supply currently utilised. Available methods include improving well construction and/or the pumping system or providing a new supply by tanker in the short term or in the longer term a new well.

6.3.7.4 Effect of reduced river flows

[339] Reduced flows in the diversion reach of the river would have an effect on the groundwater levels in the gravels adjacent to the river. Mr Mitchell's evidence is that there will be prolonged periods when the river level is 0.3m below existing levels and for short periods in some locations the drop may be up to 0.6m. Similar drops will be experienced in groundwater levels near the river. The drop in levels will decrease with distance from the river. Groundwater flows towards the river will increase as levels drop and exert a moderating effect. Monitoring of wells near the river suggests that the effects of reduced flows in the Wairau will be limited to 300m from the river.

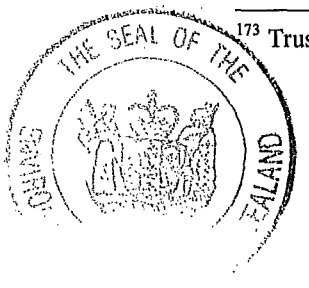
[340] The minimum flow requirements will ensure that groundwater levels will fall no more than they do presently. The duration of the lowered levels will however be increased.

6.3.8 Overall findings on hydrology

[341] The most obvious change to the hydrology is the reduction in flows and reduced mid-range flow variability within the diversion reach. At the intake the median flow is reduced by 60%, a significant effect in itself and one that may have consequential and related effects on the ecosystem and natural character values of the river.

[342] Mr Whata submitted that the abstraction of water could not in itself be considered an adverse effect and that it was the consequential effects that must be considered. He contended that regarding an abstraction as an adverse effect would be an impossible hurdle for any application to take or divert water.[173] We agree that for most applications for water permits a simple abstraction would not be considered to be an adverse effect on the environment. However, that must be assessed on the facts in each case. Most water takes are for a small fraction of the total flow and do not impact on the natural

[173] TrustPower introductory submissions at [10.17]



functioning of the water body. In this case the water take is a large proportion of the median flow and very large in comparison to the MALF.

[343] Mr Whata has already referred us to the Lower Waitaki decision and we note the finding in that decision on the water take:[174]

> There is one significant adverse effect of the NBTC which cannot be avoided – substantially reduced flows over 30 kilometres of the Waitaki River by (on average) 211m^3/s.

In the Waitaki scheme the 211m^3/s take was a 57 % reduction in the median flow. This is very similar to the 48 to 60% reduction in the median flow along the diversion reach as a result of the proposed scheme. However, there the comparison ends as the Waitaki River is quite different to the Wairau River and the related and consequential effects of the water take and operation of the proposed power schemes are also different. We must now consider the related and consequential effects of the changes to the flow regime on the ecosystem, natural character and amenity values of the Wairau River.

6.4 Water Quality

6.4.1 Temperature

[344] Dr Hudson considered the water temperature in the Wairau River to be related to cloud cover and solar radiation, more than to stream-flow.

[345] He predicted the maximum increases in mean daily water temperature as a result of the proposed scheme to be less than 0.7°C and maximum daily temperature to be up to 1.7°C higher in the lower river.[175] Dr Ryder observed that warm temperatures often occur in the Wairau River over the summer and these may be sufficient to cause sub-lethal effects on macro-invertebrates and trout. Brown trout will cease feeding above 19°C and seek refuge in cooler waters. Dr Ryder recommended monitoring to determine the relationship between temperature, river flow and the scheme operation. If shown to be necessary a temperature management plan would be developed.[176] Mr Dungey considered that it might be beneficial to avoid or alleviate temperature stresses on fish following a long dry spell by allowing part or all of a fresh to pass down the river.[177]

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[174] C80/09 at [376]
[175] Hudson EIC at [4.7] – [4.8]
[176] Ryder EIC at [10.4] – [10.9]
[177] Dungey rebuttal at [29]

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[346] We will return to the issue of water temperature after we have considered the habitat modelling and monitoring information for periphyton, macro-invertebrates and trout.

6.4.2 Turbidity and sediment

[347] Mr Deanes was concerned that the increased suspended sediment levels from flushing operations will breach the turbidity and water clarity requirements of the Plan and impact upon invertebrates and fish, including salmonid spawning.[178] Dr Olsen was particularly concerned about local effects from fine sediments on the abundance and diversity of invertebrates. He predicted a possible reduction in sensitive invertebrates – *Ephemeroptera* (mayflies), *Plecoptera* (stoneflies), *Tricoptera* (caddis flies) together the EPT taxa – affecting the availability of prey species for adult trout and aerial feeding river birds.[179]

[348] Mr Levy analysed sediment transport in the river at suitable depth and flow for spawning and concluded that the river was able to transport the sediment load. He acknowledged that some smaller braids may well receive and deposit sandy sediment from flushing, much as they do on the recession from natural freshes and floods.[180]

[349] Dr Ryder agreed with Dr Olsen that fine sediments can adversely affect invertebrates and fish but considered the short duration of the flushing events to render any such effects acceptable. He recommended monitoring as a precautionary measure.[181]

[350] As discussed earlier in this decision flushing from the intake pond and sediment retention basin will increase turbidity and reduce clarity although no numerical predictions have been made. There will be increased sediment deposition downstream immediately following flushing. We have already found that the mixing zone should extend from the outfall to the Branch confluence and that the flow in the river should be at least $80m^3/s$ below the intake before flushing is commenced.

[351] The increased turbidity, reduced clarity and increased sediment deposition as a result of flushing may have localised and temporary effects on both invertebrates and

[178]Deans EIC at [12.109] – [12.115]
[179]Olsen EIC at [5.13] – [5.14]
[180]Levy rebuttal at [3.4] – [3.8]
[181]Ryder rebuttal at [4.9] – [4.14]

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fish. We accept that numerical predictions are not possible without more detailed field work. Therefore we agree with Dr Ryder that monitoring of the invertebrate community should be undertaken as a precautionary measure.

6.5 Aquatic ecology

6.5.1 Position of the parties

[352] Ms Baker, for Fish and Game, submitted[182] that the proposed changes to the flow regime *could significantly affect the aquatic ecology of the river in respect of the trout food producing habitat, fish migration and water quality.* She noted the uncertainty as to the extent of adverse effects on fish habitat and food production and considered the adaptive management regime to be inadequate.[183]

[353] Mr Whata, for TrustPower, submitted that, on average, overall 90% of habitat is predicted to be maintained[184] and noted that different parts of the diversion reach, particularly the Argyle reach, would be affected more than others.[185]

[354] Mr Hardy-Jones, for Save the Wairau, submitted that there would be consequential adverse effects on river birds and higher flows should be maintained from late July through to February or March.[186]

6.5.2 Habitat modelling to assess ecological effects

[355] Assessment of in-channel ecological effects that may result from the proposed scheme relied upon the habitat modelling used to predict potential physical habitat for a number of species under different flow regimes. It is important to note that this modelling does not set minimum flows, but allows an assessment of potential effects and a comparison of the effects associated with various levels of minimum flow. Nor does the model indicate how much habitat is used or required.

[356] We first give a general description of habitat modelling and then consider in detail how it was applied in this case.

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[182]Baker opening submissions at [7]
[183]Baker opening submissions at [11]
[184]Whata opening submissions – water at [1.5]
[185]Transcript at 608
[186]Hardy-Jones closing submissions at [61]

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[357] The first step is hydraulic modelling of the river channels which allows estimates to be made of changes in water velocity and depth and in wetted area associated with anticipated changes in flow rate. Next habitat suitability criteria which define the preferences of each species at their different life stages for particular depth, velocity and substrate conditions are developed. Such criteria are based upon field observations of the behaviour of the species under consideration. Values range from 0 (unsuitable) to 1 (ideal). The criteria are then used in conjunction with the hydraulic model to predict the potential physical habitat for the species of interest and a range of flows.

[358] The habitat available for each species is expressed as an index referred to as weighted usable area (**WUA**) in units of square metres (m^2) for a particular reach or square metres per metre of river length (m^2/m).

[359] Dr H R Hudson, an engineer specialising in river systems, carried out the hydraulic modelling for TrustPower. Prior to doing so Dr Hudson met with experts representing key stakeholders.[187] It was agreed by these experts that the model *River2D* be used to simulate how the river hydraulics and habitat change with flow and the location of three modelling reaches.[188] It was also agreed that the mean annual low flow (**MALF**) be used as the benchmark for assessing habitat retention levels.[189]

[360] Dr Hudson claimed[190] that the accuracy of the hydraulic modelling has been shown by others to be of lesser importance than the details of the habitat suitability criteria for 2D modelling of habitat changes. However, the volume of evidence, rebuttals, second rebuttals and the extent of the cross examination by the appellants devoted to perceived inadequacies in the hydraulic modelling suggests strongly that they do not accept this claim. We observe that the habitat suitability criteria used by Dr Hudson[191] exhibit sharp drop offs in habitat suitability in the ranges of water depths and velocities of interest to this decision. The validity of the hydraulic modelling is thus, in our view, of importance.

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[187]The stakeholder expert panel represented TrustPower, Fish and Game, DOC and Marlborough District Council.
[188]Argyle, Hillersden, and Marchburn located 4km, 23km and 46 km downstream of the intake respectively.
[189]Hudson EIC at [3.2]
[190]Hudson EIC at [7.33]
[191]Hudson EIC Appendix 4

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[361] To assist in evaluating the modelling the Court asked that Mr Jowett, a professional engineer with acknowledged expertise in modelling the habitat and flow requirements of benthic invertebrates, brown trout and native fish, prepare evidence evaluating Dr Hudson's model and its application to the Wairau river. The Council offered to and presented Mr Jowett as their witness.

6.5.2.1 The hydraulic model

[362] Hydraulic modelling of a river channel requires a detailed topographical survey of the channel bed and an estimate of its roughness characteristics. A computational mesh is then established over the channel bed. The model must then be calibrated and verified. The former involves comparing model outputs of velocity, depth and flow patterns with measured values for a particular flow rate. The channel roughness and the computational mesh are adjusted until the best agreement is attained. Verification then requires good agreement to be obtained for different measured flows without further change to the model parameters.

[363] An original version of the hydraulic model was presented at the Council hearing. Subsequent to that a revised version with a denser computation mesh was developed by Dr Hudson. This enabled a better description of the bed topography and in particular the edges of channels.[192] The effects of assuming different values for the bed roughness were investigated and found to be small.[193]

[364] It is the revised model that is of interest in this case.

6.5.2.2 Model design and calibration

[365] Dr Hudson, Dr Hayes and Mr Jowett agreed that with respect to the revised model the survey procedures were appropriate and the raw survey data, over some 80% of the reach areas, was adequate for the modelling exercise.[194]

[366] Computational mesh design (often referred to as the black art of hydraulic modelling) provides, by means of a digital representation of the surveyed river channel

[192]Jowett EIC at [20]
[193]Hudson Second Rebuttal at [3.13]
[194]Hudson Executive Summary at [5.9][b]

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the framework on which the hydraulic equations that govern the flow are evaluated. Dr Hudson developed his initial mesh using his considerable field experience of river behaviour and hydraulic modelling. The refinement of this mesh and the adjustment of channel roughness during development of the revised model may be considered as a calibration process.

[367] Dr Hayes was particularly critical of what he saw as inadequate calibration.[195] In his view calibration involves adjusting model parameters until differences in observed and predicted water levels are minimised.[196] As a result of bed level changes between the time of his topographic surveys and the collection of water level data Dr Hudson was unable to do this. Instead he relied on flow distributions between different channels, comparison of flow depths (as opposed to water levels) at critical locations and a comparison of inflow to various reaches with the out flow from these reaches. In Dr Hudson's view[197] there were reasonable matches for both flow distributions and flow depths.

[368] Mr Jowett expressed reservations about the original model including that it was not calibrated directly and that it relied on the observation that changes in roughness had little effect on the outputs. The revised model with its improved definition of bed topography and mesh design and changed roughness characteristics partly alleviated Mr Jowett's concerns.[198] However, he retained concerns over Dr Hudson's determination of water levels. Mr Jowett felt they should have been done with constant flow in the river (i.e. with the Branch Scheme switched off) and to greater levels of accuracy.[199]

[369] We share the concerns expressed by Dr Hayes and Mr Jowett with respect to the model calibration.

6.5.2.3 Verification

[370] Dr Hudson employed several means to verify his model including comparison of model predictions with aerial photographs to assess flow distributions, with observed

[195]Hayes EIC at [6.11] – [6.19]
[196]Hayes EIC at [6.12]
[197]Hudson Executive Summary at [7.1][b]
[198]Jowett EIC at [23]
[199]Jowett Transcript at 1993

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water levels and with measured hydraulic geometry and flow distributions. He also carefully considered the internal consistency of hydraulic relations for different flows.

[371] The above taken together and supplemented by his extensive field experience of over 100 days on the river led Dr Hudson to be confident that the hydraulic model provides a realistic representation of the hydraulic relations for a complex, evolving, braided river.[200] He thus believed it has been adequately verified and that *collectively the verification processes have shown the model to be sound.*[201]

[372] Dr Hayes was critical of each of the individual verification methods and did not agree that evaluating them as a whole as Dr Hudson did constitutes adequate verification. Indeed, Dr Hayes claimed that in total the data falls far short of that which could be described as a convincing, robust validation data set.[202]

[373] For his assessment of model verification Mr Jowett conducted a detailed study of the model outputs and observed values. In his view the test of a model is whether it correctly predicts water levels and flow distributions throughout the reach for a range of flows.[203] Dr Hayes agreed that this is the appropriate test.[204]

[374] By considering measured and predicted flows and wetted widths in different braids for a range of total flows Mr Jowett found that:

[a] in the Argyle reach model performance was poor with water levels and thus flows and wetted widths being generally over predicted;[205]

[b] in the Hillersden reach the model similarly overestimated water levels;[206] and

[c] in the Marchburn reach over and under predictions of levels and flows in the braids occurred with no systematic bias and in approximately equal numbers.[207]

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[200]Hudson EIC at [7.54]
[201]Hudson Rebuttal Evidence at [3.6]
[202]Hayes Second Rebuttal Statement at [5.6]
[203]Jowett EIC at [24]
[204]Hayes Executive Summary at [1.38]
[205]Jowett EIC at [31]
[206]Jowett Addendum at [11]

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[375] Thus Mr Jowett could not conclude from this analysis that model performance was inaccurate nor that it was accurate and considered there to be possible errors of up to $3m^3/s$ in the main channel.[208]

[376] Throughout his evidence and rebuttal statements Dr Hayes emphasised the need for the model to be calibrated and subsequently validated to acceptable scientific standards. We agree with Dr Hayes that calibration and verification of the model was not done in the rigorous way that might have been expected. However, we are conscious of the difficulties of working in a gravel bed river such as the Wairau which has fluctuating flows and multiple channels. In such circumstances one must rely to a certain extent on the experience and judgement of those involved. In this regard we choose to rely more on the experience and judgement of Dr Hudson and Mr Jowett.

6.5.2.4 Habitat modelling

[377] Habitat suitability criteria must be selected for use with the outputs from the hydraulic model. Those used by Dr Hudson are presented in his Appendix 4. These criteria were selected by an expert panel which included Dr Hayes and Fish and Game staff.[209] We therefore accept them as appropriate for use in making predictions of habitat changes in the Wairau River.

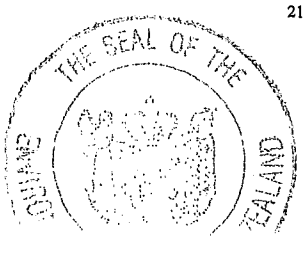
[378] Dr Hudson was confident that the hydraulic habitat model provides a reliable representation of the habitat availability for target species in the Wairau River.[210]

[379] Mr Jowett carried out an independent habitat modelling exercise by using measured cross sections at a range of flows and using his preferred 1D model (RHYHABSIM) to estimate flows which would produce maximum trout habitat and maximum food production.

[380] His results for maximum trout habitat[211] were 10, 17 and $23m^3/s$ for the Argyle, Hillersden and Marchburn reaches respectively. These agreed very well with the

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[207] Jowett EIC at [35]
[208] Jowett EIC at [35]
[209] Hudson EIC at [3.21]
[210] Hudson EIC at [7.59]
[211] Jowett Executive Summary at [18]



corresponding values from Dr Hudson's analysis,[212] namely 10, 15-20 and 20m^3/s. For maximum food producing habitat Mr Jowett's values for the three reaches[213] were 15, 28 and 35 m^3/s while Dr Hudson's were,[214] gradually increasing with flow at Argyle, 40m^3/s at Hillersden and 50m^3/s at Marchburn. Mr Jowett considered his flow values to be lower because he had not included food producing habitat in the minor braids.[215]

[381] Mr Jowett compared the shape of the average habitat suitability index (HSI) (calculated by dividing the WUA expressed as m^2/m by the water surface width) against flow for each of the three reaches as calculated using the original and revised models.[216] Mr Jowett explained that the HSI indicates the quality of habitat and the WUA the quantity of habitat.[217] He considered the shapes of the HSI/flow relationships to be more plausible with the revised model. Flows of 15-25m^3/s provided the maximum value of HSI for food production and just under 10m^3/s the maximum value for adult brown trout habitat.

[382] From his investigation and with the benefit of 30 years research into factors influencing the distribution and abundance of trout[218] Mr Jowett concluded that there is sufficient information to make an assessment of flow requirements.[219]

[383] We agree with Mr Jowett[220] that no flow habitat survey is perfect and no flow assessment is precise implying that the flow values obtained are only estimates and may be plus or minus 5m^3/s. To assume otherwise introduces a spurious impression of precision with respect to habitat retention levels. Dr Hayes also acknowledged the uncertainties inherent in ecological modelling of the type just described. But, it seems, attributed them to lack of calibration and verification of the hydraulic model rather than to the nature of the Wairau River and to an imperfect knowledge of the preferences and behaviour of trout.[221]

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[212]Hudson Second Rebuttal Evidence at [2.1][e]
[213]Jowett Executive Summary at [18]
[214]Hudson Second Rebuttal Evidence at [2.1][f]
[215]Jowett EIC at[36]
[216]Jowett EIC at[40] – [41] and Fig 8
[217]Transcript at 2039
[218]Jowett EIC at [4]
[219]Jowett Executive Summary at [18]
[220]Jowett Executive Summary at [18]
[221]Hayes Executive Summary at [1.47] and [1.49]

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6.5.2.5 Findings on the habitat modelling

[384] We find:

[a] it unreasonable to expect complete agreement between predicted and measured values in a river such as the Wairau;

[b] calibration of the model has been justifiably criticised; and

[c] Mr Jowett's review demonstrated that verification of the model was sufficient to allow the ecological effects of the changed flow regime, including those associated with the proposed minimum flows, to be assessed with a degree of confidence.

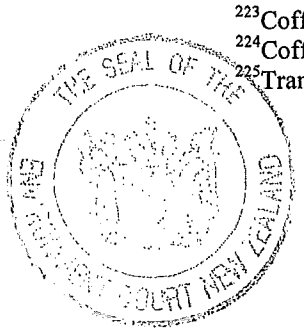
6.5.3 Periphyton and didymo

[385] Dr Coffey described the resident periphyton community that supports the aquatic invertebrates, fish and water birds of the Wairau River. He considered the stable riffles and runs to be important habitat requiring regular disturbance by scouring or rumbling flows to ensure that silt did not accumulate and the periphyton mat was rejuvenated. He observed nuisance periphyton in the minor braids of the river in February 2006 and noted that this was an unusual condition.[222]

[386] *Didymosphenia geminata* (didymo) has been observed in the river although there had been no reports of serious problems. Dr Coffey did not expect the scheme to exacerbate or spread didymo.[223]

[387] Dr Coffey predicted the frequency, duration and peak biomass of short-term proliferations of filamentous green algae may increase in the affected reach as a result of the reduced flow velocity and increased number of consecutive days of low flow[224]. During cross-examination he explained that he considered such an increase in periphyton to be generally beneficial to river productivity. However there would be times when periphyton becomes *over mature* and considered a nuisance.[225] Dr Coffey considered the

[222]Coffey EIC at [6.32] – [6.37] and rebuttal [4.03]
[223]Coffey rebuttal at [4.05] – [4.06]
[224]Coffey EIC at [6.39]
[225]Transcript at 1671



proposed residual flow regime to contribute to up to a doubling of the periphyton biomass[226] but that the frequency of nuisance blooms would not change. He explained that the frequency is controlled by the occurrence of flows greater than 200m^3/s, which remove periphyton, and are unchanged in the proposed flow regime.[227] He accepted that the duration of nuisance events may be greater given an extended period of low flow.[228]

[388] Excessive periphyton growth can affect water quality (pre-dawn oxygen depletion and pH fluctuations) and invertebrate community composition (limiting food for fish). Dr Coffey considered even the worst case scenario for periphyton growth for the proposed flow regime would be unlikely to result in such adverse effects.[229] He recommended a contingency plan to close the intake when river flows increased above 150m^3/s following an extended period of summer low flow and the presence of nuisance periphyton.[230]

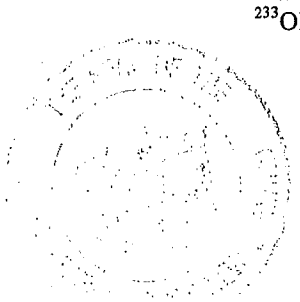
[389] Mr Deans also considered the Wairau to be a river with little periphyton or *slime* and had only observed substantial periphyton growth on rare occasions following prolonged low flow. He considered the proposed flow regime to remove *flow fluctuation,* increase water temperatures and nutrient levels. He concluded that the altered periphyton and invertebrate community would result in poor fish habitat.[231]

[390] Mr Deans and Dr Olsen were concerned about the compounding effects of changed land use (resulting in increased nutrients), the advent of didymo and increased fine sediment deposition.[232] Dr Olsen had observed extensive growths of cyanobacteria in the Wairau River and was concerned about the potential for neurotoxins posing a threat to dogs and humans.[233]

[391] During cross-examination Dr Coffey agreed that cyanobacteria were present although he did not share Dr Olsen's concern about the production of toxins. He explained that toxins are typically released following blooms in nutrient rich conditions.

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[226]Coffey EIC at [6.51]
[227]Transcript at 1668 and proposed consent condition 173 to cease abstraction when flow >200m^3/s
[228]Transcript at 1669
[229]Coffey EIC at [6.55] – [6.58]
[230]Coffey EIC at [6.62] – [6.64]
[231]Deans EIC at [12.39] – [12.40]
[232]Deans EIC at [12.46] and Olsen EIC at [5.12] – [5.14] and [5.24] – [5.27]
[233]Olsen EIC at [5.22]



He considered the species dominating the Wairau not to be associated with toxin production and the levels of nutrient to be low.[234]

[392] Dr Coffey agreed that the proposed flow regime was more favourable for the growth of didymo and other periphyton. He also agreed that the increase in nutrient concentrations (from landuse change and reduced dilution due to the lower flows) would increase periphyton growth.[235]

Discussion and findings

[393] We agree with the ecologists that the proposed flow regime is likely to increase periphyton growth in the river, including the growth of didymo. We note that nuisance growths are unusual and in general increased periphyton biomass is likely to contribute to the invertebrate productivity of the river and hence to the availability of food for fish and birds. However we consider even occasional nuisance growths to be an adverse effect with respect to amenity of the immediate area. We accept the evidence of Dr Coffey that nuisance levels of periphyton are unlikely to result in adverse effects on water quality and the invertebrate community composition across the river as a whole.

[394] We acknowledge the concern of Mr Deans and Dr Olsen that TrustPower relies on natural floods and freshes to mitigate such nuisance events. However, we note that nuisance events arise from a combination of natural climatic conditions in the catchment, such as those observed in 2006, ongoing agricultural land use intensification (unrelated to this proposal) and the proposed flow regime.

[395] We are not convinced that the frequency of periphyton blooms would be unchanged. While Dr Coffey considered the frequency to be controlled by the occurrence of flows greater than $200m^3/s$ we think it is likely that flows below this may remove a considerable proportion of the periphyton on the river bed. Further, it is the extended periods of low flow that provide favourable conditions for nuisance growths. Therefore, we consider there is a potential for the frequency of nuisance growths to increase.

[234] Transcript at 1666
[235] Transcript at 1679 – 1680

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[396] We find that the predicted increase in periphyton growth is unlikely to result in an adverse effect on the overall ecological functioning of the river. We find that nuisance growths of periphyton, with local effects on amenity, may increase in frequency, extent and duration under the proposed flow regime. We agree with the recommendation of Dr Coffey that a contingency plan for long periods of low flow in the river and the growth of nuisance levels of periphyton should be provided for as a condition of the consent. Given such a condition we find the adverse effects of increased periphyton growth will be adequately remedied and will not affect the ecological or amenity values of the river.

[397] The proposed condition (212 in Appendix 2) specifically excludes didymo and refers to *an extended period of low summer flow*. Summer is considered to be between 1 November and 30 April but the period of low flow is not defined. The response is to close the intake and to allow the next flood flow of $150m^3/s$ or more to flow through the river for at least 24 hours. We consider that nuisance growths of didymo should trigger the requirement to close the intake just as for any other species of periphyton. Further we consider that the response should be repeated if nuisance levels of periphyton persist or re-establish six weeks or more after the most recent flow above $150m^3/s$ for 24 hours or more.

6.5.4 Macro-invertebrates

[398] Dr Hudson considered the frequent freshes and floods of the Wairau River to be highly disruptive to aquatic life and the resulting disturbance to be limiting rather than the availability of habitat. He considered that any reduction in space was unlikely to result in a reduction in the abundance of various species.[236] Dr Hudson modelled the availability of physical habitat, expressed as weighted usable area (WUA) in square metres, at flows of $10m^3/s$ through to $80m^3/s$ for the Argyle, Hillersden and Marchburn reaches.[237]

[399] Mr Jowett also considered flood flows to be limiting invertebrates on the Wairau River.[238] Dr Olsen similarly agreed that disturbance from flood flows was a major determinant of the distribution and productivity of invertebrate communities in gravel bed rivers. He considered the frequency of disturbance to be a critical factor and also the role

[236] Hudson EIC at [7.68]
[237] Hudson EIC Appendix 4
[238] Transcript at 2020

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of conditions between flood events.[239] Dr Hayes considered that floods, habitat or food could be limiting depending on the recent history of flow in the river.[240]

[400] Dr Ryder had surveyed the macro-invertebrate community and found it to be generally made up of mayflies, caddis flies, beetles and diptera. He considered invertebrate densities to be comparable with other large east coast South Island rivers and did not find any rare or endangered taxa or community structures. Surveys of invertebrate drift found *Deleatidium* mayflies dominated the water column.[241]

[401] Dr Ryder considered that the retention of 70% of the existing habitat relative to the median flow would maintain the existing aquatic community structure.[242] Drawing on research undertaken by Mr Jowett, Dr Ryder noted that food producing habitat at median flow was strongly associated with trout abundance.[243] Dr Ryder used Dr Hudson's modelling to compare habitat availability at the proposed minimum residual flow regime and at the existing median flow. To estimate habitat retention he took into account the increasing flows, moving downstream from the intake, along the diversion reach.[244] Modelling showed that *'food producing waters'* and *Deleatidium* habitat decreased with decreasing flow although considerable habitat was still available at the proposed minimum flow. The annual average habitat retention was 90.2% for *'food producing waters'* and 86.4% for *Deleatidium* mayfly. Dr Ryder considered the predicted levels of habitat retention to provide an adequate level of habitat for food for fish within the river.[245]

[402] Dr Ryder considered the quantitative survey data gathered for small fish, benthic macro-invertebrates and invertebrate drift to indicate that there is a large amount of biomass available for larger fish and birds under the proposed flow regime.[246] He considered this empirical data to support the model predictions for habitat retention levels.[247] During cross-examination Dr Hudson wryly observed that the amount of fieldwork undertaken during sustained periods of low flow on the Wairau River had essentially eliminated the need for the modelling although he agreed that he did not have

[239]Olsen EIC at [4.10] – [4.11]
[240]Hayes EIC at [7.7]
[241]Ryder EIC at [5.31] – [5.34]
[242]Ryder EIC at [7.1]
[243]Ryder EIC at [6.11]
[244]Ryder EIC at [8.7] and Table 4 in Appendix 3
[245]Ryder EIC at [8.19] – [8.23] and rebuttal at [3.54]
[246]Ryder EIC at [9.2]
[247]Ryder rebuttal at [3.21]

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the expertise to comment on the adequacy of the biological data obtained.[248] Dr Ryder confirmed that sampling he had undertaken during low flows demonstrated high quality habitat and high densities of mayflies.[249]

[403] Dr Hayes considered the modelling results to be subject to considerable uncertainty although he acknowledged that the revised predictions (compared to those at the original hearing) probably had less uncertainty.[250]

[404] Mr Jowett considered the model results to be adequate for an assessment of habitat maxima and break points subject to an uncertainty of a few m^3/s in river flow. He did not favour the use of habitat retention levels and preferred to identify the flow at which habitat begins to decline sharply and set minimum flows near this level. Using Dr Hudson's model results Mr Jowett noted that maximum food producing habitat was at $60m^3/s$ reducing sharply at flows below $30m^3/s$ for the Marchburn reach and maximum at $40m^3/s$ reducing at $25m^3/s$ for Hillersden.[251]

[405] Mr Jowett modelled (using his 1-D model) food producing habitat in the main channel of the Wairau River and predicted maximum food producing habitat at 35, 28 and $15m^3/s$ at Marchburn, Hillersden and Argyle respectively.[252] He considered the flow values to be lower than those predicted by Dr Hudson because Dr Hudson had included food producing habitat in the minor braids.[253] Mr Jowett concluded that extended summer flows of $10m^3/s$ at the intake and $15m^3/s$ at Marchburn would reduce food production by about 20%. He considered a minimum flow of $25m^3/s$ at Marchburn during the summer period (December to March[254]) would have no effect on food production for trout.[255]

[406] Dr Hayes considered the key problem of the proposed flow regime to be the lack of mid-range flow variability, particularly in the upper part of the diversion reach, where flows would be *flat lined at the MALF ($10m^3/s$).* Invertebrate food production would be adversely affected limiting food for trout.[256] He noted the importance of both the

[248]Transcript at 1762
[249]Transcript at 2355
[250]Hayes executive summary at [1.41]
[251]Jowett EIC at [52] – [55]
[252]Jowett addendum at [12]
[253]Jowett EIC at [36] and transcript at 2027
[254]Transcript at 2048
[255]Jowett EIC at [57] – [62]
[256]Hayes executive summary at [1.20]

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magnitude and duration of flows between the minimum and median flow in maintaining productive habitat. He considered that a higher minimum flow or a flow sharing regime would provide for this productive habitat.[257]

[407] Dr Ryder considered Dr Hayes' analysis of the influence of flow variability to relate only to the 1km - 2km stretch of the river upstream of the Branch confluence and to ignore the tributaries that contribute to variability along the affected reach. He considered the actual proportion of habitat lost to be minor and considerable habitat to be maintained overall.[258] Overall Dr Ryder did not share Dr Hayes' concerns regarding mid-range flow variability except for flow variation to stimulate the migration of fish and to remove periphyton accumulation.[259] During cross-examination Dr Ryder accepted that the loss of habitat was significant for the Argyle reach but considered the losses to be less than minor for the majority of the diversion reach. Similarly, Dr Ryder considered the *flat lining* to be most accentuated in the Argyle reach and not to occur all the way down the river.[260]

[408] During cross-examination Dr Hayes accepted that he had relied on the evidence and information from the first hearing and had not taken into account the more recent (2007 through to 2009) invertebrate survey data when forming his opinion about the significance of the adverse effects.[261] He agreed that the Wairau River supported a relatively high density of aquatic invertebrates and under low flow conditions maintained a healthy and productive habitat.[262]

[409] Dr Olsen was concerned that prolonged low flow would reduce the extent and productivity of the hyporheic zone (the interface between the surface water and groundwater) with consequential adverse effects on the invertebrate community.[263] Dr Ryder agreed that the hyporheic zone is a potential source of macro-invertebrates but was not aware of any information indicating changes in flow would have an adverse effect on the hyporheic community.[264] During cross-examination Dr Ryder agreed that the hyporheic zone of the Wairau River was large and permeable and would reduce as the

[257]Hayes second rebuttal at [6.29] – [6.30]
[258]Ryder rebuttal at [3.33] – [3.39]
[259]Ryder rebuttal at [3.42]
[260]Transcript at 2327 – 2329
[261]Transcript at 1911
[262]Transcript at 1915
[263]Olsen EIC at [6.1] – [6.15]
[264]Ryder EIC at [10.15] – [10.16] and rebuttal at [4.32] – [4.33]

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surface water flows reduced. He agreed that this zone contributed to invertebrate productivity but did not consider there was any evidence to suggest any consequent change to abundance or diversity of invertebrates in the river.[265]

[410] Dr Olsen considered the secondary and tertiary braids and seepages to be productive habitats for invertebrates and any reduced extent and quality of these to be detrimental.[266] During cross-examination Dr Ryder agreed that secondary and tertiary braids provided productive invertebrate habitat and a source for re-colonisation of the main channel following flood events. He agreed this habitat and colonisation source would potentially be lost at the proposed minimum flows.[267]

[411] Dr Hudson considered spring fed channels to be high quality stable habitats that become a much larger proportion of total available habitat as the river flows reduce. These channels have not been included in the habitat modelling therefore predicted habitat is conservative at low flows.[268] Mr Jowett considered the exclusion of spring-fed channels to be correct because although they contribute to invertebrate production, and hence food for native fish and birds, trout are found in the main stem in deeper water. Therefore food producing capacity for trout should be calculated in the main channel only and not in the other braids.[269]

Discussion and findings

[412] We accept the modelled predictions of 80 to 90% annual average habitat retention for the invertebrates within the river. While we acknowledge some uncertainty with this modelling we agree with Dr Hudson that it is conservative and additional habitat will be available within the spring fed channels. We also agree with Dr Ryder that while absolute accuracy (area of habitat for a particular flow) cannot be attained the model is helpful in terms of estimating the change in available habitat with flow.[270]

[413] We do not accept Dr Hayes' evidence as to the magnitude of the impact of the loss of mid range flow variability. We agree with Dr Ryder that this has been

[265]Transcript at 2345 – 2347
[266]Olsen EIC at [5.9] – [5.10]
[267]Transcript at 2333 – 2334
[268]Hudson rebuttal at [3.2]
[269]Transcript at 2008
[270]Transcript at 2353

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exaggerated by focussing on the reach upstream of the Branch confluence and ignoring the contribution of the tributary flows along the diversion reach. We acknowledge Dr Olsen's concerns about the lack of knowledge of the impact of the reduced flows on the hyporheic zone. However we consider that there is sufficient empirical evidence to show that healthy and abundant invertebrate communities continue to thrive in the Wairau River following extended periods of low flow.

[414] We acknowledge that the habitat modelling is a useful predictive tool but it is inherently uncertain. We recognise that even the best model is an approximation as it does not take into account the dynamic effects of freshes and floods, and the recovery time following these events, and ignores any potential effects from the loss of tributary connections. However, we find that the modelling provides a useful indication of the likely response of the invertebrate community to changes in the flow regime. We consider the aquatic ecology survey data to be comprehensive and to support the model predictions. We find the combination of modelling work and empirical evidence sufficient to demonstrate that adverse effects on invertebrate productivity and community composition are most unlikely and, if they occur, will be minor. Consequently we consider that the invertebrate community is expected to provide adequate food supplies for both fish and birds under the proposed flow regime.

6.5.5 Trout and salmon

[415] Mr Deans considered the proposed scheme to interfere with the life cycle of salmonids in several ways – impede migration (low water levels and physical structures), reduce spawning cues (lack of freshes and higher temperatures), reduce habitat for adult and juvenile trout, reduce feeding opportunities, entrain and kill juveniles and adults, and interfere with spawning (attract adult migratory fish to artificial outflows).[271] We return to the issue of fish screening later in this decision.

[416] Dr Ryder estimated habitat retention for adult brown trout relative to the median flow to be approximately 100% (monthly range 93 – 106%), for yearling fish 89 – 90% and for spawning habitat 87%. He noted that using habitat retention relative to the median flow was conservative with respect to assessing effects on the brown trout population.[272] He considered the spawning habitat available in the river under the

[271] Deans EIC at [12.8]
[272] Ryder EIC at [8.14]

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proposed flow regime to be more than adequate for the existing population of trout and salmon.[273] Dr Ryder considered the amount of adult trout and food producing habitat in the Wairau, under the proposed flow regime, to be comparable with or higher than other South Island rivers with salmonid fisheries.[274]

[417] Dr Hayes described trout habitat in the Wairau River as *highly variable in space and time* resulting in a highly mobile population. He commented on the patchy distribution of trout with concentrations in deep water refuges at times of low flow. He considered the maintenance of mobility and habitat throughout the river to be important to the growth and abundance of trout.[275] Mr Jowett agreed that the affected reach of the Wairau River has a variable trout population and considered it to be a *corridor* with the number of trout stopping to become resident varying from year to year.[276]

[418] Dr Hayes described trout in the Wairau as having variable growth rates with some growing fast to reach a large size. Studies indicate movement out to sea or to the lower river where fish prey is abundant. Dr Hayes agreed with Mr Deans that free passage through the Wairau River and its tributaries is crucial for growth and abundance. He recommended the release of freshes, if trout appear to be concentrated in particular areas waiting for higher flows, all year round and not just in the spawning season.[277]

[419] Mr Dungey agreed that fish move extensively through the Wairau with a definite migration upstream during the spawning season. Adults move to and from spawning grounds and juveniles move from the spawning grounds to the mainstem.[278] Mr Dungey observed salmon to spawn mostly in the Rainbow River and occasionally in the mid reaches of the Wairau and lower Goulter. Brown trout were recorded spawning in the Wairau, Goulter, Leathem and Branch Rivers.[279] Patterns of fish movement varied in response to flow conditions with long periods of low flow delaying spawning migrations. He considered low flow periods may need to be alleviated with occasional freshes to facilitate fish movement up and down the river.[280]

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[273]Ryder EIC at [8.11] – [8.15]
[274]Ryder EIC at [9.5] and Table 5 in Appendix 3 listing the Ashburton, Clutha, Hawea, Waitaki, Rangitata, Monowai, Hakataramea, Oreti, Mataura, Mararoa, Arnold, Taieri and Pomahaka Rivers
[275]Hayes EIC at [3.17] – [3.18]
[276]Transcript at 1990 – 1992
[277]Hayes EIC at [7.20] – [7.26]
[278]Dungey rebuttal at [6] – [11]
[279]Dungey EIC at [42] – [43]
[280]Dungey EIC at [50] – [52]



[420] Dr Ryder agreed with Mr Dungey that should stable low flow patterns occur, and hold up the movement of fish during spawning, the intake should be closed to allow the next fresh to pass down the river. Dr Ryder and Mr Dungey considered this would be an uncommon occurrence given the variability provided by the tributaries and floods from the upper Wairau River.[281] Mr Dungey maintained that the critical period is February to July to cover the spawning season and the period of low flows.[282]

[421] Mr Dungey proposed a condition of consent with a trigger (40 days of flow 15-20m^3/s or less below the Goulter and groups of more than 25 trout in a single pool in the Hillersden reach) then a response of allowing the next fresh to pass down the river. The Aquatic Ecology Management Plan is to include a discussion of fish spawning and monitoring over the period April to June and the contingency action of flows of at least 45m^3/s for 48 hours.[283] During cross-examination Mr Dungey agreed that if review following the contingency action found it to be ineffective then the next fresh should also be released down the river.[284] In response to questions from the court he clarified that the count for 40 days of low flow would start at a flow of 15m^3/s or less and not stop until flows reached 20m^3/s or more.[285]

[422] Dr Hayes reasoned that an extended duration of low flow, concentrating trout in deep refuge habitats, may lead to food limitation. He considered the habitat modelling to have been undertaken at too coarse a scale to understand such local effects. He recommended bioenergetics modelling to link flow influences on invertebrate drift with feeding habitat requirements of trout and to complement the habitat modelling.[286] The natural variable flow regime ensured that potentially limiting conditions at low flow would regularly be alleviated.[287] Such variability would be reduced by the proposed scheme.

[423] Mr Jowett reviewed the evidence of Drs Hudson and Hayes.[288] As noted in the discussion of invertebrate habitat Mr Jowett considered the model results to be adequate for an assessment of flows that provide habitat maxima and break points.[289] He

[281]Ryder EIC at[10.12] & rebuttal [3.42], Mr R G Dungey rebuttal at [24]
[282]Deans EIC at [12.64], Dr J W Hayes EIC at [7.26], and Mr R G Dungey rebuttal at [12] – [25]
[283]Dungey supplementary statement at [3.1] and [4.1]
[284]Transcript at 1872 – 1873
[285]Transcript at 1877
[286]Hayes EIC at [7.16] – [7.18]
[287]Hayes EIC at [7.19]
[288]Jowett EIC at [13]
[289]Jowett EIC at [52]

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considered there to be relatively little trout habitat available in the diversion reach and little variation in the amount of habitat with flow. He considered suitable habitat to be limited by the area of water deeper than 0.5m and the response of trout to be influenced more by changes to food producing habitat.[290] He wrote:

> In terms of the natural flow regime, flows near the median provide maximum food producing habitat, whereas flows near the mean annual low flow provide near maximum adult brown trout habitat. I have often found that maximum trout habitat occurs at low flow and maximum food producing habitat appears at median flow in rivers of this size.[291]

[424] Mr Jowett considered extended summer flows of $10m^3/s$ at the intake and $15m^3/s$ at Marchburn would reduce adult trout habitat slightly but have a greater effect on food production (reduction of about 20% in the affected reach). He expected trout to respond by moving to more productive areas on the river.[292] During cross-examination he estimated a 20% reduction in habitat could result in, at worst, a 20% reduction in trout numbers.[293] Dr Hayes considered the 20% reduction in food producing habitat to pose a *fair degree of risk* that there would be a change in the trout population. He considered that some 15 to 20 years of monitoring data would be required to detect such a change.[294]

[425] During cross-examination Dr Ryder agreed that the period December through to April was important to trout in terms of being able to access adequate food supplies because of warmer water temperatures (increasing the metabolism and hence energy requirements) and the need for the fish to put on condition before spawning.[295]

Discussion and findings

[426] We accept that the reduction in food producing habitat and the proposed flow regime could have an impact on the distribution, abundance and condition of the trout population. We have found that the modelling of food producing habitat is conservative, ignoring the spring fed channels, although we accept that trout are concentrated in the main stem and not the minor braids. We have accepted the modelled prediction of 80% - 90% average annual retention of food producing habitat while noting this does not take

[290] Jowett EIC at [48]
[291] Jowett EIC at [55]
[292] Jowett EIC at [57] – [60]
[293] Transcript at 2032
[294] Transcript at 1964 – 1965
[295] Transcript at 2320

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into account the dynamic effects of freshes and floods that are likely to disrupt invertebrate communities.

[427] Dr Ryder's comparison of available habitat in other rivers that support salmonid fisheries demonstrates that adequate food producing habitat is available in the diversion reach of the Wairau River with the proposed flow regime. We find that at worst there could be a 10% - 20% reduction in trout numbers in the diversion reach due to the loss of food producing habitat but consider this to be unlikely to affect the trout population of the river as a whole. We agree with Mr Jowett that trout are likely to simply move to another part of the river if they are able.

[428] All of the experts agree that trout have a patchy distribution in the Wairau River and movement up and down the main stem as well as into the tributaries is essential for the maintenance and condition of the population. We accept the evidence of Dr Ryder and find that the physical habitat for trout will be maintained in the diversion reach. However, we note the importance of migration through this reach and share the concerns of Mr Deans, Dr Hayes and Mr Dungey about restricted movement during extended periods of low flow. We consider that extended periods of low flow have the potential to significantly impact on the trout population both by restricting movement and elevating temperatures in the river over the summer period.

[429] Proposed condition 211 provides for monitoring of flows and triggers for trout held up in pools in the period 1 April to 30 June each year. During cross-examination Mr Dungey explained that this is the critical period with respect to the spawning migration.[296] Once triggered the condition provides for part or all of the flow from the next fresh to be released down the river such that the flow is at least 45m^3/s on the recession of the fresh for 48 hours. While this condition addresses the issue of the movement of trout during the spawning migration it does not assist with the potential for limited movement and elevated temperatures through the summer period.

[430] We will return to the issue of the flow regime through the summer period after we have considered the potential effects on river birds and proposed conditions with respect to the minimum residual flows and flow sharing.

[296] Transcript at 1871

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6.5.6 Native fish

[431] Dr Ryder described the fishery of the Wairau River as *typical of those found in South Island braided rivers.*[297] Native fish are dominant with dwarf galaxiids, upland bully and long fin eel in abundance. No regionally or nationally endangered species were found.[298] Dr Ryder considered it to be generally accepted that native fish have lower flow requirements than adult trout. Thus if the minimum flows are sufficient for adult trout then there will be adequate suitable habitat for the native fish species.[299] Dr Ryder noted that the Department of Conservation was satisfied with the proposed flow regime with regard to effects on native fish.[300]

[432] Dr Hayes considered adult brown trout and invertebrates to have the highest flow requirements.[301]

[433] Given that no party has raised any issues with respect to native fish we accept the unchallenged evidence of Dr Ryder and find that there will be no adverse effects on the native fish populations in the Wairau River.

6.5.7 Fish screening

[434] Dr Ryder noted that fish, particularly edge dwellers (such as bullies, juvenile trout and eels and galaxiids), would be attracted to the intake and drawn into the canal system and injured or killed by passage through the turbines. He considered a 5mm slot spacing would exclude salmonid fry as smaller live stages live in the gravels. Juvenile bullies and galaxiids are likely to have a high survival rate through turbines.[302] Small salmonids have a survival rate of 90 - 95% depending on fish size and turbine characteristics.[303]

[435] Dr Ryder considered fish (including trout and eels) would be attracted by the discharge from PS5 to feed on invertebrate drift or attempt to gain access upstream. Adverse effects could be avoided by a barrier system to prevent fish from entering the

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[297]Ryder EIC at [5.46]
[298]Ryder EIC at [5.47]
[299]Ryder EIC at [6.11]
[300]Ryder rebuttal at [3.30]
[301]Hayes EIC at [5.9]
[302]Ryder EIC at [11.2] – [11.10]
[303]Ryder rebuttal at [3.7]

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tailrace and returning them to the river. Other occasional discharges would be of short duration and could be ramped to avoid fish stranding.[304]

[436] Mr Bejakovich was concerned that the proposed fish screen (with 5mm spacing) and associated conditions were inadequate to protect sports fish particularly as there was no requirement to target juvenile sports fish.[305] He recommended specific criteria for fish screens to ensure effective protection for juvenile fish.[306]

[437] Dr Ryder recommended further survey work and trials before detailing the fish screen specifications. He considered Mr Bejakovich's criteria to be conservative and more appropriate for irrigation intakes where the flow is not returned to the river. Dr Ryder estimated a survival rate of 60 – 77% for small salmonids passing through the five turbines.[307]

Discussion and findings

[438] There is a potential for juvenile salmonids to enter the canal system and either remain resident or suffer as a result of one or more trips through a turbine. We are somewhat sceptical of the survival rates quoted by Dr Ryder given the passage through six turbines in series and consider that higher mortalities are possible. However, the overall proportion of juvenile fish that might become entrained within the canal system and lost to the main stem of the river is unknown. We agree with Dr Ryder's recommendation that further survey work and trials should be undertaken to determine the most effective approach to fish screening.

6.5.8 Downstream flow fluctuations

[439] Dr Olsen expressed concern at the potential for flow fluctuations downstream of PS5 to adversely affect invertebrates in the *varial zone* – that section of the surface of the riverbed periodically wetted and dried and therefore generally unproductive. He was concerned that reduced productivity in the lower river may have adverse effects on food for trout.[308]

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[304]Ryder EIC at [13.2] – [13.4]
[305]Bejakovich EIC at [3.4]
[306]Bejakovich EIC at [7.23]
[307]Ryder rebuttal at [3.3] – [3.16]
[308]Olsen EIC at [5.36] – [5.40]

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[440] The Branch Scheme presently introduces such flow fluctuations. Dr Ryder described the results of aquatic surveys on the Wairau River downstream of the Branch Scheme as revealing *healthy and relatively diverse benthic macroinvertebrate and fish communities*.[309] He agreed with Dr Olsen that a varial zone may develop but considered this would be a very small proportion of the wetted width of the river.[310] He noted that the flow fluctuations from PS5 would be less than those from the Branch Scheme and considered this to be a positive effect.[311]

[441] During cross-examination Dr Ryder acknowledged that flow fluctuations from PS5 would be greater in the medium flow band but approximately half of those that exist now in the low flow range. On balance he was not concerned about the potential effects of these flow fluctuations on the downstream ecology.[312]

[442] Flow fluctuations from the proposed scheme would replace those from the Branch Scheme. Given the conditions controlling the magnitude and rate of change we find that there would be no adverse effect with respect to aquatic ecology. Accordingly, we reject the suggestion of Fish and Game that a regulatory pond is required to reduce the flow fluctuations from the PS5 discharge.

6.6 River birds

[443] The parties are agreed that the Wairau River is an outstanding habitat for wildlife supporting populations of the black-fronted tern and black-billed gull, both threatened species.

[444] Mr Whata, for TrustPower, submitted that the scheme is unlikely to affect the food supply or predation rate of the terns and that there was a good chance that the proposed mitigation would result in increases in the black-fronted tern population. He described the adaptive management approach as appropriately precautionary given the inevitable uncertainties with a large complex scheme.[313] Mr Whata submitted that the

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[309]Ryder EIC at [12.3]
[310]Ryder rebuttal at [4.29]
[311]Ryder rebuttal at [3.62]
[312]Transcript at 2336
[313]Whata opening submissions – water at [10.33]

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predator management programme to be implemented for black-fronted tern nesting sites could be considered as a positive effect of the scheme.[314]

[445] Mr Hardy-Jones, for Save the Wairau, submitted that the scheme would impact on the availability of food for river birds and allow predators to access breeding sites on islands within the river. He submitted that these adverse effects may be such that the black-fronted tern may decline below a sustainable population.[315]

[446] The court was assisted by three ecologists with expertise in avifauna. Dr Mark Sanders and Dr James Jolly, called by TrustPower, and Mr David Melville, called by Save the Wairau. These three ecologists (and three other ecologists)[316] had filed a joint statement[317] following an expert witness caucus and further discussions in July 2009.

[447] The ecologists were agreed that the Wairau River is a significant habitat for indigenous fauna in terms of s 6(c) of the Act and outstanding in terms of its importance for birdlife. They noted a number of threatened species and, of these, considered the black-fronted tern, the black-billed gull and the banded dotterel to be the species most vulnerable to the proposed scheme. They considered management actions to sustain the terns and gulls to also confer benefits to the dotterels and other bird species living on the river.[318]

[448] The Wairau River is particularly significant for black-fronted terns, supporting 11 to 19% of the national population, and hosting the largest population on a single river. During the breeding season 40 to 50% of Wairau breeding terns nest within the diversion reach. The most important months for breeding are August to January with peak nesting from mid October to late December. The ecologists were uncertain as to how long fledged young terns were dependent on the river for feeding with most leaving breeding colonies by end of January but some being present on the river through to March or April.[319]

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[314]Whata opening submissions – water at [10.44]
[315]Hardy-Jones opening summary of submissions at [17]
[316]O'Donnell, Steffens and Gaze on behalf of DOC
[317]Joint statement bird fauna witnesses dated 23 July 2009
[318]Joint statement at [2.1] – [2.2]
[319]Joint statement at [2.3] – [2.6]

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[449] The ecologists were agreed that two of the most significant threats to braided river birds (including black-fronted terns) are flooding and predation.[320] These two factors resulted in the destruction of in the order of 80% of nests on the Wairau monitored over two years. Harriers were responsible for most of the predation of eggs where the cause could be identified. Cats and hedgehogs were identified as nest predators and cats also killed adult breeding birds. The impact of stoats and black-backed gulls was uncertain.[321]

[450] The ecologists noted that nesting habitat and suitable food resources are essential for river birds.[322] Flow modification as proposed was agreed to potentially: reduce aquatic food producing habitat and food availability; promote weed encroachment and thereby reduce nesting habitat; and increase mammalian access and predation.[323]

[451] The ecologists were not agreed on the degree of risk posed by the predicted loss of food producing water under the proposed scheme or on the relative importance of terrestrial food sources for black-fronted terns.[324] Nor were they agreed on the issue of weed encroachment and potential adverse effects on nesting and foraging.[325]

[452] The proposed conditions of consent provide for increased minimum residual flows and some flow sharing during the peak nesting season for the black-fronted tern. Condition 176 specifies the minimum residual flows in the Wairau River below the intake:

January to July	$10m^3/s$
August	$12m^3/s$
September	$15m^3/s$
October to November	$20m^3/s$
December	$15m^3/s$

[453] Condition 177 provides for a limited 2:1 flow sharing arrangement from 1 October to 31 January when the flows at The Wash bridge exceed the minimum residual flow by $5m^3/s$ or more. During these months when the proposed scheme is drawing

[320] Joint statement at [4.1]
[321] Joint statement at [5.4] – [5.5]
[322] Joint statement at [4.1]
[323] Joint statement at [5.3] and Figure 1
[324] Joint statement at [4.1] and [5.2]
[325] Joint statement at [5.9]

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water from the Wairau River, the flow in the Wairau River below the Goulter confluence will be equal to the minimum residual flow required by condition 176 plus one third of the flow above the sum of the minimum residual flow and $5m^3/s$.

6.6.1 Food sources for the tern

[454] Dr Jolly described the results of his study of the diet and feeding of adult black-fronted terns at their nesting colonies.[326] Flying insects were the most frequently caught food and dip-feeding for insect larvae was important. Small native fish were caught infrequently and more often later in the nesting season. There were no significant differences in preferred feeding habitats (riffles, runs or pools) within the river channels.[327] However feeding rates were higher in primary channels, than in minor channels, and higher mid-channel, than at the edge or in pools. Feeding in seeps was rare.[328] Terns also feed off-river, both before and during nesting, on terrestrial invertebrates.[329] Stable isotope analysis of chick blood indicated they were fed primarily on terrestrial invertebrates (about 50%) and fish (about 40%) with a minor contribution from aquatic insects (about 10%).[330]

[455] Dr Sanders considered it most unlikely that the proposed scheme would adversely affect tern by affecting their food supplies as he considered that food is unlikely to be limiting terns on the Wairau.[331] In response to questions from the Court Dr Jolly agreed that historically there would have been higher densities of birds on the river suggesting the numbers today are well below the carrying capacity. However, he noted that the fairway has also reduced over time making it difficult to distinguish between the effects of predation and reduced food supply.[332]

[456] Dr Hudson modelled the relationship between flow and aquatic food production using the *Deleatidium* mayfly curve, the general invertebrate 'food producing' curve, the Rangitata tern feeding curve (relating to aquatic insects and feeding early in the season) and the Waimakariri tern feeding curve (relating to fish and feeding later in the season

[326] Jolly executive summary at [2.1][f]
[327] Jolly EIC at [8.23]
[328] Jolly EIC at [8.21]
[329] Jolly EIC at [8.27] – [8.31]
[330] Jolly EIC at [8.35]
[331] Sanders EIC at [12.1] – [12.2]
[332] Transcript at 988

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including feeding of chicks).[333] Dr Hudson's modelling showed more than 80% of the food producing habitat for aquatic invertebrates was retained under the proposed flow regime when compared to the median flow. More habitat is available for terns feeding on small fish as flows decrease below the median flow.[334] Dr Hudson noted that these relationships should be treated as conservative given the importance of off-river feeding to the tern diet.[335]

[457] Mr Melville considered knowledge of tern feeding to be limited and the relative importance of aquatic and terrestrial habitat to be unresolved.[336] He noted a 2006 study by Dr O'Donnell[337] that found adult terns were dependent on aquatic habitat and avoided farmland during the breeding season. Approximately 93% of feeding observations were within the active river flood plain with 80% over river channels. The terns were using both major (42%) and minor (58%) channels for feeding and were mostly (87%) over broken or undulating water (rapids, riffles and runs).

[458] Mr Melville acknowledged the variety of food fed to tern chicks, as indicated by the isotope study, but did not consider the data to be sufficient to assess the relative contributions of the different food sources.[338] Similarly, he agreed adults terns feed over farmland but considered that the relative importance, compared with river feeding, could not be determined. He noted the importance of sufficient food of suitable composition during courtship and egg formation as well as nesting.[339]

[459] It is clear from the evidence that the food available to birds, particularly the black-fronted tern, could be reduced under the proposed flow regime for the river. The habitat modelling indicates a reduction of up to 20% in aquatic invertebrate food sources. However, we accept that both fish and terrestrial invertebrates also contribute to the diet of both adult birds and chicks. We also note the context of the reduced population of birds compared with historical numbers even allowing for the reduction in fairway width. Given these two factors we find that the predicted reduction in aquatic invertebrates is most unlikely to adversely affect the black-fronted tern population on the Wairau River.

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[333] Jolly addendum to reply at [4.2] and Fig 1
[334] Hudson EIC at [8.23] – [8.26]
[335] Hudson EIC at [8.27]
[336] Melville EIC at [8.1]
[337] Melville EIC at [8.1] and Appendix 3
[338] Melville EIC at [8.7]
[339] Melville EIC at [8.14]

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6.6.2 Nesting habitat for the tern

[460] Mr Melville considered the reduced flow variability may result in weed encroachment around channel margins and adversely affect nesting and foraging opportunities for terns and other river birds. Drs Jolly and Sanders considered that any such effect would be *de minimis* and very short term given the frequent floods that pass down the Wairau River.[340]

[461] Dr Hudson evaluated the effects of the scheme on the vegetation across the riverbed and concluded that river characteristics and expanses of exposed or sparsely vegetated riverbed are determined by the flood regime, which would not change.[341]

[462] We accept Dr Hudson's evidence that it is the flood flows that manage vegetation across the riverbed. While the issue of exotic weeds invading the riverbed is of concern, and may well have contributed to the decline in the river bird population, it is not a problem that is of TrustPower's making and nor will the scheme exacerbate the weeds.

[463] We find that the proposed scheme would not have an adverse effect on the nesting habitat of river birds through weed encroachment.

6.6.3 Predators and the tern population

[464] Dr Sanders' study of terns on the Wairau over the 2007 and 2008 nesting seasons indicated 70% and 62% loss of nests due to predation.[342] Terns nesting on islands had, on average, a much higher success rate almost certainly because the water around them deters mammalian predators.[343] Dr Sanders noted that eggs took approximately 25 days to hatch and chicks 28 days to fledge.[344]

[465] Dr Sanders observed 15% (2007) and 44% (2008) of nests in the diversion reach were located on islands and therefore potentially affected by the flow reduction.[345] Dr Sanders could find no relationship between rates of predation of colonies and flow,

[340]Joint statement bird fauna witnesses dated 23 July 2009 at [5.9]
[341]Hudson EIC at [8.2] – [8.3]
[342]Sanders reply at [3.14]
[343]Sanders EIC at [9.4] – [9.8]
[344]Sanders EIC at [5.1(d)]
[345]Sanders EIC at [4.3]

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velocity, channel width, channel depth or the number of channels between the island colony and the mainland. He concluded that the safety on islands was not related to the amount of water or the hydraulic characteristics but simply to the presence of water.[346]

[466] Dr Sanders considered DNA and video evidence on predators to indicate that avian predators, especially harriers and possibly black-backed gulls, currently account for the majority of nest predation on the Wairau River. Mammalian predators are also present and the impact of cats on adult birds at mainland sites was a concern.[347] In response to questions from the Court Dr Sanders said:[348]

> I think we can be pretty confident that stoats in particular, but stoats, cats and ferrets, are all able to cross braids ... stoats are a terrible predator and are very able to capture adults and are essentially oblivious to flow.

[467] Dr Jolly recorded the presence of mice, rats, hedgehogs, cats and ferrets.[349] He also observed goats, people (including quad bike riders) and a dog moving close to or through black-fronted tern colonies.[350] He considered human related disturbance near access points to the river to be a potentially significant factor in nesting failure.[351]

[468] Dr Hudson looked at the relationship between flow and the number of islands available for nesting and concluded that the reduced flows would not reduce the number of islands available for nesting and would not materially change the degree of isolation (the moat effect) around islands.[352]

[469] Mr Levy noted the possibility of in-river engineering works affecting nesting river birds and recommended conditions to ensure no construction or diversion activities within 50m of nesting areas (condition 87(e)) and no diversion that would remove an existing water barrier between nesting areas and the river bank (condition 87(g)).[353]

[470] Mr Melville agreed that predation of terns was of great concern nationally and noted[354] that *predation is severely limiting the number of young fledged on the Wairau at*

[346]Sanders EIC at [9.21] and Fig 3
[347]Sanders EIC at [10.1][c]
[348]Transcript at 1021
[349]Jolly EIC at [7.24]
[350]Jolly EIC at [8.8]
[351]Jolly EIC at [8.10]
[352]Hudson EIC at [8.28]
[353]Levy EIC at [5.13]
[354]Melville EIC at [9.1]

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present. He considered the research methods used in the DNA study to be untested although accepted that harriers were an important predator.[355] He expressed concern that harrier control may result in a proportional increase in mammalian predation.[356]

[471] During cross-examination Dr Sanders agreed that reducing the numbers of harriers or black-backed gulls might influence the predator/prey dynamics of mammalian species.[357] While he considered that avian predators should be given priority in a predator control programme on the Wairau he considered it would be prudent to also target mammalian predators.[358]

[472] Mr Melville considered little was known about the population structure and dynamics of the black-fronted tern, particularly whether the Wairau terns *are a source or sink population or one which is self-sustaining.*[359] He considered Dr Sanders' assessment of predation rates related to flow to be confounded by harrier predation.[360] He concluded that an assessment of the effects of the loss of adult birds and lack of recruitment could not be done.[361] Dr Melville recommended additional monitoring to assess recruitment to the tern population and to assess causes of mortality other than predation.[362]

[473] Dr Sanders agreed with Dr Melville that harrier predation would be unaffected by flow but maintained this did not alter his conclusion that there is no relationship between predation (and abandonment) of nests and flow.[363] He did not support further monitoring to directly measure recruitment or to assess causes of mortality as he maintained that it is the survival of the vulnerable egg and chick life-history stages that is crucial.[364]

[474] In response to questions from the Court Dr Sanders clarified his position on predator control and the conditions of consent.[365] He recommended predator control be implemented regardless of the findings of the monitoring given the threatened status of the species on the river.

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[355]Melville EIC at [9.2]
[356]Melville EIC at [9.9]
[357]Transcript at 1002
[358]Transcript at 1004
[359]Melville EIC at [9.10]
[360]Melville EIC at [9.16]
[361]Melville EIC at [9.17]
[362]Melville EIC ats [10.14] – [10.18]
[363]Sanders reply at [3.16]
[364]Sanders reply at [3.24]
[365]Transcript at 1021 – 1023

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[475] We accept the ecologists' evidence that predation is limiting the numbers of black-fronted terns nationally and this is likely to be the dominant factor in the Wairau River. We accept the evidence of Dr Sanders that the survival of eggs and chicks is crucial to maintaining the tern population on the Wairau River. We accept the evidence of Dr Sanders that it is the presence of water around islands that is important rather than the flow characteristics in the range of flows of interest here. We find that the residual flow regime is unlikely to significantly reduce the moat effect protecting nests and chicks from mammalian predators.

[476] We accept Mr Melville's concerns about the potential effect of predation on adult terns and the consequential effects on recruitment to the population. We note that Mr Melville and Dr Sanders agree that control of harriers and, possibly black-backed gulls, may alter the predator/prey dynamics.

[477] All the ecologists acknowledge the presence and importance of a number of threatened river bird species particularly the black-fronted tern, the black-billed gull and the banded dotterel. While the residual flow regime is unlikely to have an adverse effect on the river bird populations through increased predation there remains an element of uncertainty. Given the importance of the bird species dependent on the riverbed environment we agree with Dr Sanders' recommendation that predator control should be carried out as part of the conditions of consent.

6.6.4 Mean river flow and number of terns

[478] Mr Melville referred to research by O'Donnell and Hoare[366] looking at trends in breeding populations of black-fronted terns. This study found tern numbers appeared to be highest on rivers with large average flows with the largest contemporary counts from rivers with relatively high and little modified flows. Their models suggested that there was an average 10% per annum decline in populations on low to medium flow rivers (mean flow $<30 m^3/s$). Mr Melville was concerned that the reduction in flow in the Wairau River might cause it to change from the 'high flow' to 'medium flow' category and hence a decrease in the tern population could be expected.[367]

[366] Melville Appendix 2
[367] Melville EIC at [5.12] – [5.14]

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[479] Mr Melville expressed a general concern as to the adequacy of the available information:[368]

> Notwithstanding recent research in Black-fronted Terns on the Wairau there remain gaps in our knowledge which reduce the level of certainty with which potential effects of the project may be predicted.

[480] During cross-examination Mr Melville was referred to Mr Keane's evidence on mean flows in the Wairau River (below the intake, below the Branch and Goulter confluences and above the outfall) currently and predictions post-scheme.[369] For convenience we reproduce some of that information in the following table.[370]

	Mean annual flow (m^3/s) along main stem of Wairau River			
	Intake	Branch	Goulter	Outfall
Existing	34.2	40.9	60.2	83.5
Post-scheme	18.8	25.5	36.9	59.3

[481] Mr Melville agreed that the mean annual flows post-scheme would still be in the high flow category, although at the lower end, downstream of the Goulter confluence. At the intake the existing monthly mean flows are less than $30m^3/s$ for six months of the year and post scheme less than $30m^3/s$ every month except October ($35.4m^3/s$) and November ($35.6m^3/s$). Mr Melville agreed that October and November were important months for the black-fronted terns and noted that he considered the period from August through to January/February to be important.

[482] Mr Melville acknowledged that predator management was also a factor influencing the number of terns in the O'Donnell and Hoare research and even partial pest management strategies had a beneficial effect. He agreed that a comprehensive pest management regime on the Wairau would benefit the black-fronted tern population.[371]

[483] Dr Jolly compared tern densities on the Wairau River with the Lower Ohau River and the Lower Rangitata River and concluded that controlling the flow would have no discernable effect.[372]

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[368]Melville EIC at [4.3]
[369]Transcript at 1039
[370]Keane EIC Appendix 3 Table 3 based on flow statistics July 1989 - June 2008
[371]Transcript at 1045 – 1046
[372]Jolly EIC [11.5]

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[484] During cross-examination Dr Jolly accepted that populations of black-fronted terns were in decline on medium to low flow rivers and rivers with higher flows, such as the Wairau, were very important. He agreed on the need for caution if there is likely to be a significant effect on the black-fronted tern.[373] When asked about the adequacy of knowledge about the river birds Dr Jolly said he had appropriate information to be very confident that the scheme would not have a more than minor effect on the birds.[374]

[485] In response to questions from the court Dr Jolly commented on the distinction between stable bird populations on larger rivers and those in decline on small to medium rivers and noted that the figure of $30m^3/s$ is somewhat arbitrary. He did not know what was driving this difference.[375]

[486] Dr Sanders also acknowledged the research showing a decline in tern populations on rivers with a mean flow of less than $30m^3/s$ but warned against using that relationship to predict how a change in flow might influence bird numbers.[376] He considered it important to take into account other factors known to affect braided river birds, particularly predators and physical habitat.[377]

[487] Dr Sanders agreed with Dr Melville that there is uncertainty about the likely effects of the scheme on river birds but that the research undertaken had reduced this uncertainty considerably. He considered the scheme and associated monitoring and management provided for in the conditions to be more likely to have beneficial effects on birds.[378]

[488] During cross-examination Dr Sanders addressed the question of adaptive management and scientific uncertainty.[379] He agreed we could not have complete certainty about the future but was confident that the scheme, with the proposed monitoring and management, would not result in adverse effects on the river birds. However he considered the adaptive management approach to be necessary because of the threatened status of the species present on the river.

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[373]Transcript at 957
[374]Transcript at 960
[375]Transcript at 992
[376]Sanders evidence-in-reply at [3.6]
[377]Transcript at 1001
[378]Sanders reply at [4.1]
[379]Transcript at 1007 – 1010

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Findings

[489] We share the concern of the ecologists that there is some uncertainty with respect to the outcomes for the black-fronted tern population at the lower flows associated with the scheme. We acknowledge the considerable research that has been undertaken and accept that this demonstrates that adverse effects are unlikely. However, any adverse effect would have a high potential impact given the importance of the black-fronted tern population on the Wairau. In accordance with the meaning of effect in s 3(f) of the Act we find that there is a potential adverse effect on the black-fronted tern population although acknowledge that this is a low probability.

6.6.5 Proposed conditions for predator control

[490] During the course of the hearing the proposed conditions of consent were revised to include an obligation on the consent holder to carry out predator control for the habitat of birds within the diversion reach from October to January each year (condition 144(g)).

[491] Mr Delamore did not think that the proposed condition was sufficient to provide a benefit to the river birds given that the overall objectives for the management plan were to maintain the status quo.[380] We agree that the objectives constrain the management plan to maintaining the status quo and do not provide for the possibility of enhancement of the river bird population. We think the objective stated in condition 144(a)(iii) should be amended such that mortality at nests of black-fronted terns or black-billed gulls is reduced as a result of the scheme. Further we consider that the primary objective of the plan should be to maintain or enhance the populations of black-fronted terns and black-billed gulls on the Wairau River. Such an objective maintains the bottom line of no biologically significant difference in fledging success or population growth rate but allows for the possibility of improvements in both of these measures. The conditions recognise that the black-billed gulls are in decline nationally and halting or slowing that decline for the population on the Wairau would be a benefit.

[492] Conditions 217 and 218 provide for an expert panel to advise on measures to be taken if a biologically significant decline in populations or fledging success is reported. These measures may include an increase in the minimum residual flow during the nesting season, further predator management and/or habitat enhancement.

[380] Transcript at 2645 – 2647

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6.6.6 Overall findings on river birds

[493] The monitoring conditions ensure that good information on the river bird populations will be available. If a biologically significant decline is reported there is provision for an adaptive management response.

[494] The commitment of TrustPower to undertake predator control, even if monitoring data show the populations of river birds are stable or increasing, is likely to be beneficial. The amended conditions of consent provide sufficient certainty that the river bird populations will be maintained or enhanced and adequately remedy the potential adverse effects of the proposed scheme on river birds.

6.7 Riparian vegetation, wetlands and game birds

[495] Mr Slaven noted numerous small ephemeral wetlands in the Wairau valley which were dependent on rainfall rather than groundwater. He identified 16 perennial wetlands containing indigenous vegetation in the potentially affected area of the valley (between the intake and the outfall of the proposed scheme) and noted that most suffered from on-going drainage, were open to stock and degraded by weed infestation. Some had been identified by DOC, the Council or Mr Slaven as having ecological significance. Mr Slaven opined that the majority of these wetlands would be unlikely to be present in a decade or so irrespective of whether or not the proposed scheme proceeds.[381]

[496] Mr Slaven noted the willow wetlands along the banks of the Wairau river provide little habitat of ecological significance except where the tributaries enter and form a floodplain. Ten such areas were identified although none had been identified as having ecological significance in the DOC Protected Natural Areas Programme (PNAP) or Council Significant Natural Areas (SNA) surveys. Mr Slaven noted the on-going loss of riparian willows through land clearance for viticulture.[382]

[497] Relying on Mr Callander's predictions as to the drawdown of groundwater Mr Slaven considered it unlikely that there would be adverse effects on the indigenous wetland habitats. The willows in the riparian zones are potentially most affected with the change in species composition and health being somewhat uncertain. However Mr

[381] Slaven EIC at [5.5] – [5.11]
[382] Slaven EIC at [5.12] – [5.14]

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Slaven considered these stands to be predominantly exotic and weedy and therefore any adverse effects were not considered to be significant with respect to botanical values.[383] Mr Slaven considered that any decline in health in these wetlands would be fully compensated by the establishment of 4.3ha of indigenous wetland at the regulation pond, and 1ha of wetland and 1.2ha of riparian planting associated with the embayment areas of Canals 4 and 5.[384]

[498] During cross-examination Mr Slaven emphasized that his assessment was of the botanical values of the wetland habitat and not the values for fish or birds.[385] He acknowledged that a number of the willow wetlands did contain indigenous plant species but maintained that their botanical conservation value was low.[386] Mr Slaven agreed that he had not undertaken rigorous assessment of the riverbed vegetation but he had observed that it is dominated by invasive exotic weed species with few native plants.[387]

[499] Mr Slaven acknowledged that the Beverly Hills Flax wetland on Ms Parr's property has high conservation values and would potentially be affected by fluctuating groundwater levels during the construction phase. He considered the wetland to be fed by the Huddleston Stream and there to be little chance of catastrophic effects. He was happy for that wetland to be included in the monitoring programme.[388]

[500] Mr Deans was concerned about the loss of freshwater wetland habitat, waterfowl habitat and game-bird hunting opportunity.[389] He considered the effects on wetlands and game-birds to have been overlooked and was concerned at the loss of wetted area and riverine wetlands within the Wairau River bed.[390] Mr Deans initially estimated that 250[391] to 275[392] hectares of wetted area would be lost. After reading Dr Keesing's supplementary evidence he acknowledged the improvement in information but was still not confident that the estimates were accurate.[393] On cross-examination he agreed that

[383]Slaven EIC at [6.8] – [6.12]
[384]Slaven EIC at [6.18] and [7.12] – [7.13]
[385]Transcript at 314 – 315
[386]Transcript at 325
[387]Transcript at334 – 336
[388]Transcript at354 – 356
[389]Deans executive summary at [10][i]
[390]Deans EIC at [10.20] – [10.23]
[391]Deans EIC at [13.12]
[392]Deans EIC at [10.22]
[393]Transcript at 1530

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the figure is likely to be considerably less than 250 hectares but rather more than Dr Keesing's estimate of some 44 hectares.[394]

[501] Mr Jolly considered the wetlands associated with the river to be small and modified with low to moderate values for wetland birds. He did not find specialist wetland fauna such as the bittern, spotless crake or marsh crake.[395] Mr Jolly noted the presence of 18 species of riverbed birds including a number of game birds[396] – mallard, paradise shelduck, Canada goose and Californian quail.[397] He considered the canal itself, the enhanced embayment areas and the regulation pond would offer substantial additional habitat for wild fowl.[398]

[502] During cross-examination Mr Jolly agreed the survey was not designed specifically for game birds and wild fowl populations, rather it was to ascertain the presence of native species. He agreed that his survey work did not produce an accurate picture of the game bird populations. Mr Jolly was not aware that Fish and Game considered the wetlands and the river to be of significant importance for game birds.[399]

[503] When asked about the quantification of wetland loss and the adequacy of the environmental compensation proposed Mr Slaven was confident the compensation was sufficient.[400] Mr Slaven did not think it was possible to quantify the loss of wetlands except by monitoring, as proposed, once the scheme is in operation.[401] Condition 81(b) specifies the monitoring of the vegetation in the wetlands and willow stands and requires remediation or mitigation of any adverse effects. The Vegetation Management Plan outlines contingency measures such as supplying additional water, transplanting at risk species or any other means as determined by the Council to be appropriate.[402]

[504] Dr Keesing mapped the riparian area (between the fairway and the agricultural land) from aerial surveys and riparian transects through the larger and more complicated areas. He recorded vegetation type, the species present, standing water, damp soils and

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[394]Transcript at 1567 – 1569
[395]Jolly executive summary at [2.1][d]
[396]Jolly EIC at [7.8]
[397]Jolly reply at [4.1]
[398]Jolly reply at [4.3] – [4.4]
[399]Transcript at 951 – 956
[400]Transcript at 343
[401]Transcript at 344
[402]Transcript at 349

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wetland fauna observed.[403] Of the 1277 hectares of riparian area Dr Keesing estimated 44ha to be wetlands area – 38ha willows and 6ha native. Dr Keesing described the willow wetland areas as having a dense canopy of grey and crack willow with a ground cover of native and exotic species. The native wetlands were typically associated with old river channels or holes with standing water. Carex grasses and Juncus were mixed with exotic species along with kiokio, cabbage trees and *Coprosma propinqua.* Dry native shrubland areas totalled about 157ha comprising kanuka and kowhai.[404]

[505] Dr Keesing adopted a groundwater drawdown effect of 0.3m across the riparian zone and considered that the majority of the vegetation in the riparian zone, including the willow wetlands, would be unaffected as it was tolerant of a range of groundwater conditions. He noted that the small native wetland areas would be potentially affected.[405] Overall he concluded that the riparian area would not be diminished or changed in an adverse way and the predominantly exotic habitat would persist. He considered the primary threat to be continued clearance and development of land for production.[406]

[506] Dr Keesing did not observe any concentrations of game birds, other than quail, in the riparian areas and opined that the Wairau riparian forests contained no water or wetland habitat for water fowl.[407]

[507] Mr Deans analysed Dr Keesing's new mapping of the wetland areas using his familiarity of the river system and recent aerial photographs from Google Earth. He identified a number of wetlands in the riparian zone that he considered would provide wetland wildlife habitat but had not been mapped by Dr Keesing. He included still water wetlands and still or slow moving water from inflowing tributaries. Mr Deans considered the additional areas to be a significant addition to the estimated total of 44ha.[408]

[508] Dr Keesing confirmed that his mapping was based on and updated Mr Slaven's work[409] and incorporated Dr Simpson's[410] descriptions of the wetland sites. During cross-examination he accepted that he had mapped a number of areas as dry when in fact

[403]Keesing supplementary evidence at [1.5] – [1.10]
[404]Keesing supplementary evidence at [1.17] – [1.19]
[405]Keesing supplementary evidence at [1.25] – [1.27]
[406]Keesing supplementary evidence at [1.38] and [1.47]
[407]Keesing supplementary evidence at [1.48]
[408]Deans addendum to rebuttal at [7] – [11]
[409]Transcript at 2115 – 2116 and Slaven EIC Appendix 2 Fig 4a, 4b and 4c
[410]Transcript at 2132 and Slaven EIC Appendix 6 Vegetation report prepared by Simpson

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they did have slivers or ribbons of wetland running through them. He agreed that some of these contained open water wildlife habitat and were up to 400m in length and 50m wide. Dr Keesing did not consider these pockets of wetlands to change his estimate of the total area and stated that even if he had missed some 20ha he did not consider this to make a difference to the quantity of habitat available. He considered the willow wetlands in question to be strongly braid or tributary driven and the plant species to be tolerant of even a half metre change in water level. Dr Keesing noted the difficulty in classifying ephemeral wetlands as wetland or dry land and noted that many wetland plants could also be found in dry areas. He classified ephemeral willow wetland areas as dry where he considered the area to be *predominantly dry.*[411]

[509] On re-examination Dr Keesing explained that he did not consider even an additional 20ha of wetland habitat in the riparian zone to be ecologically significant when looking at the wetland habitat available on the river as a whole. He noted that the tertiary braids within the fairway are commonly used by ducks and geese.[412]

[510] Dr Bartlett considered the riparian areas and the willow wetlands to have some ecological value in terms of habitat and biodiversity but did not consider these values to be at risk from the predicted groundwater drawdown.[413] She agreed with the monitoring approach recommended by Mr Slaven although did not consider it necessary to monitor the willow stands.[414] In response to questions from the Court Dr Bartlett agreed that proposed condition 221 on monitoring could be clarified and usefully linked to the Vegetation Management Plan (VMP).[415] Conditions 222 to 225 specify the proposed monitoring in considerable detail. The objectives of the management plan are set out in condition 78.

Findings

[511] The riparian margins of the Wairau River are dominated by invasive exotic vegetation and contain only small areas of wetland habitat. Very little of this wetland habitat contains significant native vegetation. We agree with Mr Deans that the total area of riparian wetland habitat is likely to have been underestimated. However we accept Dr

[411]Transcript at 2117 – 2136
[412]Transcript at 2149 – 2150
[413]Bartlett EIC at [6.27] – [6.29]
[414]Bartlett EIC at [8.1] – [8.2]
[415]Transcript at 2165 – 2166

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Keesing's evidence that these wetland areas are small compared with the wetland habitat available across the Wairau River as a whole.

[512] We accept the evidence of Drs Keesing and Bartlett and Mr Slaven that it is unlikely that the predicted drawdown of groundwater in the vicinity of the river will adversely affect the wetland vegetation in the riparian area. While adverse effects on the very small native wetlands areas are possible we agree with Mr Slaven that the establishment of some 6.5ha of wetland and riparian area associated with the canals and regulation pond will compensate for this potential loss.

[513] We accept the evidence of Dr Jolly that the canals and regulation pond will also provide habitat for wild fowl. We acknowledge the difficulty in retaining or constructing wetlands in the riparian areas given the extent of invasive weed species present along the river.

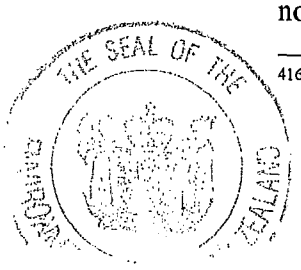
[514] We find that adverse effects on wetlands are unlikely to be more than minor and the proposed wetland areas to be constructed in association with the canal embayments and the regulation pond to provide adequate compensation. We find no adverse effects on game birds.

[515] The proposed consent conditions specified the monitoring, trigger levels and contingency actions in excessive detail. While we appreciate that these new conditions were offered in response to questions from the Court we consider that much of the detail provided in this part of the consent conditions is better to be contained within the VMP and able to be more easily reviewed and amended as necessary. Proposed conditions 78 and 79 provide sufficient detail on the objectives and proposed mechanisms within the VMP.

6.8 Native bush and shrubland

[516] As well as the effects within the riparian areas described above there are direct effects from the clearance of vegetation required to construct the scheme. Mr Slaven noted that the canal route, power stations and spillways were located almost exclusively within pastoral and viticultural land and while a few native plants would be lost that did not constitute a significant adverse effect.[416]

[416] Slaven EIC at [6.2]



[517] The proposed regulation pond at Traverse Spur is sited within a *mosaic of remnant indigenous vegetation* identified as H5 or RAP15 in the DOC PNAP survey. The area affected is kanuka forest with associated kowhai treeland, growing on post glacial alluvium. While noting that the area has been grazed and degraded Mr Slaven considered the loss 0.8ha at the site to be an adverse effect that could be mitigated by protection and enhancement planting of the wider H5/RAP15 site.[417]

[518] Mr Slaven described the legal protection and enhancement proposed to compensate for the loss of the area within the footprint of the regulation pond:[418]

[a] 18.7ha of existing native vegetation at the H5 site would be legally protected , including 10.7ha of RAP sites;

[b] 15.6ha of exotic forest, providing ecological corridors linking the bush remnants in the H5 area, would be legally protected;

[c] enhancement of the H5 area with both active revegetation (3.6ha) and passive restoration (6.7ha);

[d] 4.7ha of indigenous bush would be planted around the two wetland embayments (1.2ha) and at Traverse Spur (3.5ha);

[e] 7.7ha of regenerating shrubland and stone fill habitat would be restored.

[519] A predator and weed management programme would be implemented for the entire H5 complex and the two embayment revegetation sites to assist in establishing the plantings. In total the proposed mitigation covers 34.3ha of existing vegetation and 16.8ha of revegetation/restoration (including the wetland areas). Mr Slaven considered this to be more than sufficient mitigation for the predicted adverse effects associated with the loss of kanuka bush at the regulation pond site and minor declines in riparian vegetation associated with the groundwater changes.[419]

[417] Slaven EIC at [6.3] – [6.5]
[418] Slaven EIC at [7.4] – [7.14]
[419] Slaven EIC at [7.15] – [7.18]

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Discussion and findings

[520] The predicted effects on native vegetation are minor with the only significant loss being the removal of vegetation for the regulation pond at Traverse Spur. This loss has been adequately compensated for and the restoration and enhancement programme described is expected to provide benefits within the H5/RAP15 area. We accept that the VMP, as described by Mr Slaven, provides sufficient detail of the protection and enhancement work to ensure that these benefits are delivered. We have simplified the proposed conditions by reference to the VMP.

6.9 Proposed conditions and ecological findings

6.9.1 Overall findings on ecology

[521] We have found that increased periphyton growth will generally contribute to the biological productivity of the river. The adverse effects associated with nuisance growths are adequately remedied by the proposed conditions of consent and will not affect the overall ecological or amenity values of the river.

[522] Adverse effects on the invertebrate community are most unlikely and if they occur would be minor. Accordingly, we consider the invertebrate productivity would provide adequate food supplies for both fish and river birds.

[523] The habitat modelling predicts, at worst, a 10 to 20% reduction in the number of trout within the diversion reach. This may result in displacement of fish to other parts of the river. Despite the modelling results there is a concern over fish passage through the diversion reach in the event of prolonged periods of low flow during the summer months. Severe restrictions to the movement of fish through the diversion reach could result in adverse effects on the number and condition of trout. The passage of trout during the spawning season is the subject of conditions as discussed elsewhere in this decision.

[524] No adverse effects are predicted for native fish.

[525] The black-fronted tern has been the subject of considerable monitoring and research. There is a potential adverse effect on the population of the black-fronted tern given the reduction in flows along the diversion reach. We acknowledge that this is of

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low probability, given the conditions of consent, however the tern is a threatened species and any adverse effect would be of considerable concern.

[526] We also note that the proposed predator management programme is likely to improve the breeding success of the black-fronted tern. This would be a benefit to the populations of the back-fronted tern and other river birds including the black-billed gull and banded dotterel.

[527] We have found that effects on wetlands have been adequately mitigated by proposed enhancement and compensation for the potential loss of habitat due to reduced groundwater levels. The loss of native bush and shrubland due to the regulation pond and other infrastructure is a minor effect and more than compensated for by proposed revegetation and enhancement programmes within legally protected areas at Traverse Spur.

6.9.2 The flow regime as proposed

[528] TrustPower proposed amended conditions of consent during closing submissions on 14th May 2010, the final day of the hearing. Three conditions specify the flows in the Wairau River at which the consent holder must cease abstraction:

[a] When flows exceed $200m^3/s$ at The Wash bridge (condition 173);

[b] When flows are below $10m^3/s$ at The Wash bridge (condition 174);

[c] When flows are below $14m^3/s$ downstream from PS5 (condition 175).

[529] Two conditions (conditions 176 and 177) provide for increased minimum residual flow and flow sharing through the river bird nesting season (agreed with DoC):

[a] Minimum residual flows below the intake must be:

[i] $10m^3/s$ January to July

[ii] $12m^3/s$ August

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[iii] 15m^3/s September

[iv] 20m^3/s October and November

[v] 15m^3/s in December

(except when the natural flow upstream of the intake is less than these flows).

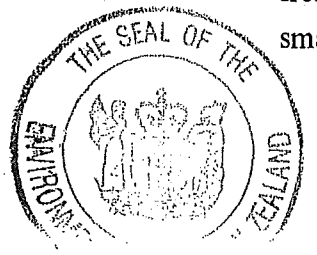
[b] From 1st October to 31st January flow sharing shall apply when the Wairau River flows at The Wash bridge exceed 25 m^3/s in October and November, 20m^3/s in December and 15m^3/s in January. The flow in the Wairau River immediately below the Goulter confluence must equal the minimum residual flow required by condition 176 plus one third of the flow above the sum of the minimum residual flow and 5m^3/s (i.e. if the flow at The Wash bridge is 31m^3/s in October then the flow below the Goulter must equal 20 + (6/3) = 22m^3/s).

[530] A further condition (condition 179) ensures that the minimum residual flows at the downstream end of the diversion reach are at least 5m^3/s greater than those at the intake.

6.9.3 Comparison with SFR scenarios

[531] We have already compared the proposed flow regime with the flow regimes that would result from the application of the Plan provisions, SFR8 and SFR9, and found little difference with respect to the hydrology. We now consider the outcomes for the ecosystem.

[532] Dr Ryder assessed habitat retention for adult brown trout, *Deleatidium* mayflies and 'food producing' water under the SFR8 and SFR9 scenarios compared to the proposed flow regime. He concluded that all three flow scenarios provided identical habitat for adult brown trout. The proposed flow regime would have small losses in invertebrate habitat over the summer months (up to 6% for mayflies) and distinct gains from September through to November (around 20% for mayflies). There were only very small differences (less than 5%) between the flow scenarios for the food producing



waters. Dr Ryder concluded that ecological outcomes were very similar overall with the proposed flow regime potentially more favourable over the bird breeding season.[420]

[533] The habitat modelling shows little difference in the availability of habitat for invertebrates and adult brown trout between the proposed flow regime and the SFR scenarios. This is not unexpected given the very similar outcomes of the three scenarios with respect to mean and median flows. The differences are in the distribution of flows. While the proposed flow regime provides for higher minimum residual flows during some months, SFR8 and SFR9 provide a greater variability in the mid-range flows. We accept Dr Ryder's assessment that the outcomes for the invertebrates are likely to be very similar.

[534] We have noted the importance of mobility and passage through the diversion reach for trout and salmon. This is a particular issue during the spawning season when trout are moving upstream and into the tributaries. The proposed flow regime may lead to extended periods of low flow from January to July including through the spawning season. These periods of low flow may hinder the movement of trout within and through the diversion reach. Such extended low flow periods are less likely under the SFR8 and SFR9 scenarios with the 2:1 flow sharing providing higher flows during freshes and floods. Thus the SFR8 and SFR9 scenarios are likely to provide better outcomes for trout.

[535] The higher minimum residual flows and limited flow sharing through the bird breeding season are expected to provide benefits in terms of both the food supply and the protective moat effect when compared to the SFR scenarios. In this case the proposed flow regime is likely to provide better outcomes for the river birds with the potential for improved breeding success.

6.9.4 Performance standards

[536] Fish and Game proposed[421] amendments and additions to the conditions including a range of performance standards and triggers, for aquatic ecology and river birds, linked to the contingency actions contained within the aquatic ecology management plan.

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[420] Ryder EIC at [8.25] – [8.29]
[421] Conditions of consent version handed up Monday 10th May 2010

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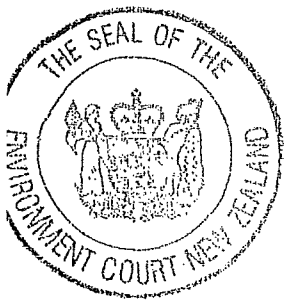
[537] The first of the performance standards is the retention of 80% adult trout habitat and 90% aquatic invertebrate habitat to be determined by an appropriately qualified expert. This is in addition to the monitoring requirements of the conditions and associated aquatic ecology management plan. As discussed habitat modelling is not an exact science and estimating the habitat retention post-scheme would be a difficult and expensive exercise. The result would be a theoretical estimate of available physical habitat rather than a measure of either trout or invertebrate population health. We do not see any benefit in adding this to the monitoring requirements.

[538] Fish and Game seek a performance standard for water quality to be maintained at Class F and Class FS standards as defined in Appendix J of the Plan. Given the multiple uses of the river and the catchment it is not appropriate to require this as a condition of consent.

[539] The third performance standard requires the maintenance of fish passage through the diversion reach and tributaries at all times. We agree that passage through the diversion reach should be maintained at all times but note that some of the tributaries are known to dry up, that is, lose their surface water connection to the Wairau River, during low flow periods. The proposed residual flow regime and conditions requiring limited flow sharing and the passage of freshes during long periods of low flow will provide for improved passage along the main stem. Condition 189, as amended by us, provides for connection to be maintained with the *major northbank tributaries* if obstructed by the formation of gravel banks or reduced surface water flows. We consider these conditions to be appropriate and the proposed performance standard to be unhelpful.

[540] The fourth standard concerns trout and salmon spawning success. Spawning success varies from year to year depending on natural conditions in the river and varies across the catchment. As with the proposed standard for habitat retention a considerable monitoring effort would be required to estimate compliance with such a standard.

[541] While rejecting these quantitative performance standards we acknowledge that the objectives of the aquatic ecology management plan do not explicitly acknowledge the importance of the salmonid fishery. Hence, we consider that a qualitative objective requiring the maintenance of the habitat of trout and salmon would be appropriate. We suggest an additional objective for condition 58:



Maintain the habitat of trout and salmon within the affected reach of the Wairau River.

6.9.5 The triggers

[542] Condition 59(i) specifies the trigger for macro-invertebrates:[422]

30% reduction in the average density of mayfly and caddisfly larvae within the scheme diversion reach of the Wairau River relative to pre-operational levels and/or the control sites

[543] Fish and Game proposed condition 57B(a):[423]

(i) A 30% reduction in average density of macroinvertebrate and native fish community relative to pre-operational levels and control site levels for two consecutive monitoring occasions

(ii) A statistically significant reduction in the density of caddisfly

[544] A healthy and diverse macroinvertebrate community is essential for the overall health of the instream ecosystem. The EPT taxa are an important food source for trout and the river birds. Therefore we consider the proposed condition 59(i) specifying mayfly and caddisfly density as a trigger to be appropriate and sufficient. We do not accept Fish and Game's proposed condition 57B(a).

[545] Fish and Game have suggested additional triggers related to the trout population and the trout spawning migration. The trigger for the spawning migration considerably simplifies the condition 211 as proposed by TrustPower by removing the requirement to count trout potentially held up in pools along the river and increasing the low flow trigger from 15 to 20m^3/s.

[546] We agree that simplifying this trigger would be an improvement and we do not see any need to introduce additional delays and costs by requiring an aerial survey to count trout. Given that the critical period for the spawning migration is April through to June we consider that the count of low flow days should begin in March. Otherwise there is the potential for low flows to extend all through March and April before the trigger is set off (10 May at the earliest) and there is potentially a further period waiting for a fresh

[422] Conditions of consent TrustPower closing submissions Friday 14th May 2010
[423] Conditions of consent version handed up Monday 10th May 2010

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to come down the river. Similarly, we consider that the 40 days should be reduced to 30 days to better facilitate the movement of trout.

[547] To reflect the above condition 211 will read:

> (a) The consent holder shall operate the scheme to ensure that it does not cause or exacerbate conditions which impede trout spawning migration.
>
> (b) The consent holder shall as part of the Aquatic Ecology Management Plan include methods to ensure that trout spawning migration is not impeded as a result of the scheme including the following requirements:
>
> (i) Monitor the mean daily flows calculated immediately below the Goulter (in accordance with condition 177) during the period 1 March to 30 June each year;
>
> (ii) In the event flows fall and remain below $20m^3/s$ for 30 consecutive days the consent holder shall ensure that on the next fresh of $45m^3/s$ or more (calculated below the Goulter) the residual flow in the river is at least $45m^3/s$ (calculated below the Goulter) on the recession of the fresh for at least 48 hours.

[548] This amended condition will better provide for fish passage through the diversion reach particularly leading up to the critical spawning season. However we consider there is still a potential adverse effect on the movement of trout outside of this period and consequently on the numbers and condition of trout in the river. This would only occur during very dry years where prolonged periods of low flow, due to the absence of significant freshes, may be exacerbated by the scheme. We consider this to be a low probability but it would be a significant impact on the productivity of the fishery and subsequently on the amenity of Wairau fishery.

[549] The suggested trigger for the trout population reads:[424]

> A 30% reduction in the average abundance, age structure, fish size, condition or species recruitment of brown trout relative to pre-scheme levels for three consecutive years

[550] The trigger requires a considerable amount of monitoring and evaluation in order to determine compliance and would be expensive to implement. The ecologists were all agreed as to the variability of the trout population within the diversion reach and its

[424] Conditions of consent version handed up Monday 10th May 2010

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function as both home and corridor for trout. Given this variability, the expense incurred in monitoring, the three year lag time before the trigger can be set off and the potentially confounding factor of changes in fishing pressure we do not consider such a trigger to be appropriate. Given the potential for adverse effects as a result of restricted passage through the diversion reach we agree with Dr Ryder[425] that the adult trout population in the river should be monitored and trout numbers considered, in the context of other monitoring data, by the Ecological Advisory Group (as required by conditions 206 and 207).

6.10 Natural character, landscape and amenity

[551] Natural character is not defined in the Act. Historically, the Court has received evidence on this topic from landscape architects and there has been a tendency to combine evidence on natural character with that on landscape and visual amenity. While we acknowledge some overlaps this approach opens the door for confusion.

[552] The dictionary definitions[426] can assist:

> **natural** – of, existing in, or produced by nature;
>
> **character** – all those qualities that make a person, group, or thing what he, she or it is and different from others.

[553] Thus, the natural character of the Wairau River and its margins consists of those qualities, produced by nature, that make the river (and its margins) what it is and different from others.

[554] The Plan aligns with the dictionary definitions in its description of natural character in the introduction to Chapter 10:

> Natural character can generally be described as being those characteristics (qualities and features) of a particular environment.
>
> The natural character of the coastal environment and freshwater bodies is comprised of a number of key elements:
>
> - Coastal or freshwater landforms

[425] Transcript at 2361
[426] The New Zealand Oxford Dictionary

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- Indigenous flora and fauna, and their habitats
- Water and water quality, including marine and freshwater ecosyatems
- Scenic or landscape values
- Cultural heritage values
- Habitat of trout and salmon.

[555] Mr Kyle produced a similar list of the elements comprising the natural character of the Wairau River – water flows, sediment movement, water quality, instream habitat quality, fish habitat, avifauna habitat, and scenic or landscape values. He considered the assessment of natural character to have evolved over time from an early reliance on visual perception to a consideration of the *natural elements with a natural distribution arrived at as a result of natural processes rather than human activities.*[427]

[556] The three landscape witnesses took somewhat different approaches to their assessments. In terms of natural character they all acknowledged the importance of the natural elements, natural processes, natural patterns *triumvirate* but had diverging views on the importance of the biophysical (or scientific) component compared with the perceptual component of natural character.

[557] Dr Steven's evidence addressed:

[a] Effects of the scheme on the naturalness or natural character of the Wairau River;

[b] The implications for the amenity of the river of changes in naturalness.

[558] Dr Steven set out and explained, at some length, the framework he used to analyse the effects of the scheme on natural character:[428]

> Naturalness and natural character are synonymous constructs, in my opinion. Naturalness can be understood as two distinctly different concepts:
>
> Biophysical naturalness, based upon the objective assessment of natural elements, natural patterns and natural processes and the extent to which these have been subject to human modification or intervention; and

[427] Kyle EIC at [6.23] – [6.24]
[428] Steven EIC at [15], [16] and [22]

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> Apparent naturalness – that seems like nature. The basis for the assessment of apparent naturalness varies, but I regard it as being predominantly an aesthetic judgment.
>
> I regard it as a matter or importance that assessments undertaken for the purposes of s6(a) of the Resource Management Act (RMA) be based upon a scientific approach to the assessment of biophysical naturalness, rather than apparent naturalness. This opinion is based upon the premise that there are greater intrinsic values associated with landscape and landscape features that have not been the subject of human modification. The value associated with naturalness increases as naturalness approaches the pristine end of a naturalness scale. That is to say, landscapes and landscape features displaying natural elements, natural patterns and natural processes in a substantially unmodified state maybe regarded as having greater value by virtue of that relatively unmodified state.
>
> Apparent naturalness is a subjective assessment that informs the assessment of aesthetic quality. Accordingly, it is relevant to s6(b) assessments of landscape significance and 7(c) assessments of landscape amenity. However, I do not regard apparent naturalness as being relevant to s6(a) assessments of the natural character of the coastal environment, or wetlands, and lakes and rivers and their margins. Landscapes assessed as being highly natural according to biophysical natural parameters will embody the qualities and characteristics that are valued in assessments of apparent naturalness.

[559] Dr Steven accepted, with the exception of the comments on natural character, the broad descriptions of the landscape context for the scheme provided by Dr Boffa.[429]

[560] Dr Steven noted the high degree of visual separation of the river fairway from the adjacent agricultural and horticultural landscapes of the river valley. From within the river fairway the intensive land use activities of the adjacent landscape have little or no affect on the recreational experience of being on the river.[430]

[561] Dr Steven used a 5-point scale[431] when describing natural character and we reproduce that table below:

Naturalness of Rivers				
Completely Natural	Partly Modified	Substantially	Mostly Modified	Completely
Very high	High	Moderate	Low	Very Low

[429] Ibid EIC at [44]
[430] Steven at [45(a)]
[431] Steven at [20]

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Existing naturalness → Post scheme naturalness

[562] Dr Steven outlined the natural elements, patterns and processes of a braided river by way of examples:[432]

[a] Natural elements – the water, the sediments of the bed and banks, the biological elements including fish, invertebrates and avifauna

[b] Natural patterns – braided channel pattern, behaviour of water, width of riverbed, physical nature of riverbed.

[c] Natural processes – erosion, transport and deposition of sediment, degradation and elevation of riverbed, transport of nutrients and invertebrates, aquifer recharge.

[563] He considered the abstraction to have effects that extended beyond the reduction in flow (with direct effects such as changes in braiding pattern), given the complex web of relationships between biological and physical elements of the river and the processes operating within the ecosystem. Dr Steven accepted that the proposed flow regime was within the natural range of flows but that the variation in flow differed both spatially and temporally. For example post-scheme low flows are likely to occur at a greater frequency.[433]

[564] Dr Steven's position, and a fundamental element of his evidence, was that the residual flow regime is a direct consequence of the manipulation of flow for electricity generation, and must by definition, diminish the natural character of the river.[434] A significant abstraction of what is the river's principal element – water – is a significant human modification to the river and results directly in a reduction of the natural character of the river.[435]

[565] Dr Steven was highly critical of the Boffa Miskell Assessment of Environmental Effects (the AEE)[436] where it found that the modifications to river flows can have an

[432] Steven EIC at [61]
[433] Steven EIC at [64] – [66]
[434] Steven EIC at [67]
[435] Steven EIC at [79]
[436] Boffa Miskell April 2005 (Appendix 9 to Trust Power AEE)

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effect on natural character, but suggested this aspect should be dealt with as it relates to the *perception of change*. He was critical of the *perception of change* theme through the evidence of Dr Boffa. Dr Steven's opinion was that, while changes to natural character are able to be perceived, the capacity of a lay observer to notice such changes should not be a factor in determining the extent to which (the human) interventions diminish natural character.[437]

[566] Where the AEE claims at 3.3.3.4 that the residual flow regime protects the intrinsic value, Dr Steven argued:[438]

> In environmental terms, intrinsic values are those aspects of the environment that are valued for their own sake – nature valued in its own right, rather than for instrumental or use purposes. The notion that the intrinsic values of a resource can be acknowledged and protected while at the same time using that resource for instrumental purposes (the generation of electricity) is contradictory.

[567] In answer to the Applicant's claim that the proposed flows in the diversion reach will follow or *mimic* seasonal patterns, Dr Steven's evidence was that this is only in the sense that these flows will exhibit a pattern of peaks and troughs that respond in frequency and occurrence to the seasonal patterns of rainfall events.[439] He described this outcome as naturalistic but not natural – the defining difference being that the flows in the diversion reach will be the direct result of human induced modifications to the natural flow pattern.

[568] Dr Steven went on to say that in a braided river such as the Wairau a reduction of flow is accompanied by a relatively large reduction in the wetted area which usually results in a direct loss of aquatic habitat for many aquatic species or a change to the habitat quality. He was careful to point out that he is not qualified to comment on the implications of these changes for invertebrates, fish life and avifauna – and we note the Court has before it a plethora of expert testimony on these matters. Dr Steven's opinion and a further important element of his evidence was that the concepts of ecological sustainability and natural character are not synonymous[440].

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[437] Steven EIC at [62]
[438] Steven EIC at [68]
[439] Steven EIC at [83]
[440] Steven EIC at [84] – [86]

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[569] In answer to questions from the Court Dr Steven confirmed his approach by agreeing that it was the abstraction of water that is the primary effect on natural character. The greater the abstraction in proportion to the flow of the river the greater the effect on natural character.[441] He acknowledged that measures to reduce the manipulation of the flow regime, such as flow sharing, would mitigate effects on natural character.[442]

[570] Other factors such as any reduction in habitat, aquatic life or avian life are what Dr Steven considered consequential effects and the preserve of other specialist witnesses.

[571] Dr Frank Boffa provided both a primary and a rebuttal brief and a series of visual simulations to illustrate the appearance of the project from representative public viewpoints.

[572] Dr Boffa stated that the post-scheme river flows are to be within the range of natural and seasonal flows, the flood and major fresh flows will be retained, and that ecological investigations demonstrate that there will be no more than minor adverse effects. For these reasons he considered the flow regime under the scheme would not have an adverse or significant effect on natural character.[443]

[573] This conclusion was based on the evidence of TrustPower's expert witnesses such as Dr Ryder and Dr Hudson (in terms of ecological processes), Dr Keesing (in terms of aquatic systems), Mr Slaven (in regards to indigenous terrestrial and wetland systems) and Dr Sanders and Mr Jolly (in regard to avian fauna).

[574] In respect of any effects on the river, Dr Boffa started by defining natural character (and we note this definition accords with that used by Dr Steven). However, he went on to say in respect of the in-river structures that neither the intake nor the outfall structures and their associated river training works would create adverse effects on natural character nor would they have visual effects beyond their immediate river environment.[444]

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[441] Transcript at 1446
[442] Transcript at 1451 – 53
[443] Boffa Executive Summary at [12]
[444] Boffa EIC at [9.7]

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[575] We pause here to note our appreciation of Dr Boffa's helpful visual attachments, Tab 1 Viewpoint 7 of which illustrated his opinion (noted above) in respect of the intake area.

[576] The remainder of Dr Boffa's analysis on this issue related to the perception of natural character and he relied on the Riverscape and Flow Assessment Guidelines[445] (the Guidelines). The Guidelines note there are many situations where significant effects on natural character will be avoided or minimised if:

[a] The proposed flows are within the natural range of flows;

[b] The river forming flows such as floods and major freshes are retained;

[c] The proposed flow regime mimics the natural fluctuations such as seasonal highs and lows;

[d] Ecological investigations suggest that any adverse effect on flora and fauna will not be significant.

[577] Dr Boffa's consideration of the effects of the scheme on the braided pattern of the river was assisted by 3D simulations of the topography (based on Dr Hudson's modelling) and a study of available aerial photography, flown between November 2003 and March 2006. He concluded that the braided river pattern will be retained under the flow regimes proposed by TrustPower.[446]

[578] Dr Boffa went into some detail describing catchment river control works that have been carried out on the river since the late 1950s:[447]

> The River and its margins are substantially modified. I also consider the effects of the scheme on natural character and amenity values as a result of reduced flows are likely to be considerably less than the effects of the physical activities and river fairway modifications that are currently occurring within the river and on its margins.

[445] Riverscape and Flow Assessment Guidelines: Guidelines for the selection of methods to determine river flows based on landscape natural character and visual amenity considerations. Boffa Miskell June 2009
[446] Boffa EIC at [9.20]
[447] Boffa EIC at [9.33]

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[579] While Dr Boffa accepted (during cross-examination) that the flume carrying the scheme water across the Branch River adjacent to the State Highway 63 road bridge is a *very visible part of the scheme*, it remained his opinion that the most significant effect of this scheme is the abstraction of water[448] and its consequential effects. He accepted that this would diminish natural character, however, he did not resile from his opinion that this was not of significance.[449]

[580] Mr Brown provided *"A critical review of the visual and landscape implications of the Proposed Scheme"* – what he describes as *an entirely independent examination of the situation in relation to landscape effects.*

[581] Mr Brown also accepted that the abstraction of water is *the most significant component of the project in terms of landscape and natural character effects.*[450] Mr Brown went on to say that the scheme would not cause a fundamental change to the *braided river* nature of the Wairau, and the perceived effects of the water diversion would be quite low. Accordingly, the potential changes to the river's biophysical and landscape character would not be as significant as was perhaps initially foreseen.[451]

[582] Mr Brown's evidence in relation to the Wairau Valley – outside of the river fairway – accords with that of the other landscape experts. It is very much a working landscape with power stations:[452]

> ... encased within buildings that are compatible with other rural buildings in terms of their scale and general profile. With power stations 2 and 3, in particular, sited well away from local roads and all five stations designed and finished in materials and colours that are appropriate and in keeping with the rural Wairau landscape it appears most unlikely that they would either singularly or collectively have a significant impact on the perceived character and the many values of the local environment.
>
> At worst, the amalgam of canal, penstocks and power stations might appear to compound the current state of flux evident within the Wairau Valley. As a result, they might – cumulatively, but also incrementally – increase the feeling of widespread transition towards a working, as opposed to amenity, landscape.

[448] Transcript at 1511
[449] Transcript at 1510-11
[450] Brown Executive Summary at [4]
[451] Brown Executive Summary at [8]
[452] Brown EIC at [75] – [76]

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[583] While he agreed that the impacts on the more intrinsic landscape and natural character values of the river system maybe more elevated, he argued along with Dr Boffa that this fairway has already been the subject of extensive stream bank modification and reclamation.[453]

[584] Mr Brown stated that:[454]

> ... intuitively, up to a 44 percent reduction in such river flows seems significant: certainly it raises the prospect of considerable changes to the extent of water visible on a day to day basis and potential modification of the braiding.

[585] However, the combination of aerial photographs and photo simulations/montages convince him that it is difficult to discern visible differences between river flow and at different levels.

[586] In contrast to Mr Kyle, Mr Brown considered that assessments of natural character under the Act had initially revolved around the three categories – natural elements, natural processes, and natural patterns – and now there was more emphasis on the perception of such values. He presented a set of indicators for natural character from a 2002 workshop:[455]

[a] Abiotic factors (landform);

[b] Vegetation type (native/endemic and exotic);

[c] Vegetation cover and patterns;

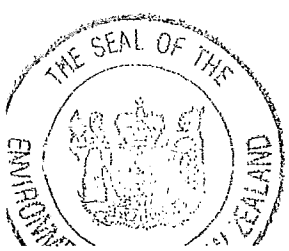
[d] Land use / activities (presence / absence of buildings and structures);

[e] Seascapes and water areas;

[f] Natural processes.

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[453] Brown EIC at [80]
[454] Brown EIC at [81]
[455] Brown EIC at [56]



[587] Mr Brown considered natural character to have both a perceptual and biophysical component and noted that landscape architects, depending on their qualifications, were generally more competent to address the perceptual component and the indicators were tools to use in that assessment. He was clear that *landscape architects are not specialists in all of the fields that pertain to natural character values.* Mr Brown considered he had focused on the perceptual component and the evidence of the ecologists would also contribute to the Court's consideration of natural character values.[456]

[588] Overall Mr Brown concluded:[457]

> ... the reduced flow levels within the river would have an impact on the perceived and intrinsic landscape and natural values, especially during times of average to lower in-river flow rates, but such changes would not affect the fundamental structure or character of the river environs and landscape. Such effects appear likely to be essentially incremental and lower than was intuitively expected given the degree of flow reduction proposed.

6.10.1 Evaluation of natural character

[589] As we have discussed there is a degree of overlap in the evidence on natural character, landscape and visual amenity. We intend to evaluate and come to findings on them separately.

[590] To properly evaluate the evidence on natural character we first must consider the approach of Dr Steven (who contends that the abstraction of water and change in the flow regime is itself an adverse effect on natural character and therefore on the environment) and Dr Boffa, (who contends that it is any biophysical effects – such as any reduction in habitat and adverse effects on trout or river birds – that determines any effects on natural character of the scheme). Mr Brown acknowledged that both aspects must be considered and his own evidence focussed on the perceptual component of such changes.

[591] An abstraction of a significant volume of water – one of the river's primary elements – from the river for a significant distance (48km or about a quarter of the river's length) in excess of 50% of the time such that periods of low flow are extended beyond the seasonal patterns, impacts on the natural character of the river. We see that logic as

[456] Brown rebuttal at [4] – [18]
[457] Brown EIC at [90]

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unassailable. We accept that any human induced changes to the natural elements, patterns and processes are an effect on natural character.

[592] For this reason we, generally speaking, prefer the approach of Dr Steven. However, we find his preference for the use of the word(s) *natural* and *naturalness* over *natural character* somewhat unhelpful.

[593] While we think biophysical assessment of the natural elements, natural patterns and natural processes is critical in assessing components of natural character, the word *character* requires that any assessment must also recognise and consider what is perceived. Hence our use of the words *generally prefer the approach of Dr Steven.* We agree with Mr Brown that both the biophysical and perceptual components of natural character must be considered. These effects on natural character will be able to be perceived but not necessarily to an untrained eye or someone unfamiliar with the river.

[594] We note that through the cross-examination and in response to questions from the Court, Mr Brown and to a lesser extent Dr Boffa appeared to resile slightly from their original position. Mr Brown accepted[458] that the abstraction degrades natural character – but the question was *to what degree?* Dr Boffa accepted[459] that the reduction in flow *would diminish the naturalness that occurs* but went on to say that it would not be of significance.

[595] We are mindful of and agree with Mr Whata's submission that should we find that the abstraction by itself has a more than minor adverse effect on natural character, then that does not mean the scheme is inappropriate either under s 6(a) or the Plan. However, we do not agree with Mr Whata's further submission that such an approach would ... *present an impossible bar for water abstracters.*[460] To determine whether or not an abstraction would have an adverse effect on natural character one must consider the volume of the take as a proportion of the natural flow, its geographic extent, and the duration of the abstraction. Each case must be considered individually. In the case before us our finding that the proposed scheme impacts on the natural character of the Wairau River is but one of a number of issues to be factored in to our final determination under s 5 of the Act.

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[458] Transcript at 1397
[459] Transcript at 1510
[460] Whata closing submissions at 60 at [16.7]

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6.10.1.1 The quantum of the abstraction and the length of the diversion reach

[596] The abstraction is a maximum of $40m^3/s$ from a mean river flow at the intake of $35m^3/s$. A minimum residual flow of between 10 to $20m^3/s$ (depending on the time of year) is required to remain in the river immediately below the intake point. The mean flow (at the intake) will go from 34 to $19m^3/s$ post-scheme. Mr Mitchell provided evidence describing existing and post scheme flows at different points on the affected reach.[461] The maximum flow reductions of $35m^3/s$ for 2km, $55m^3/s$ for approximately 7.5km, and $40m^3/s$ for 38km and these reductions occur for 14%, 11% and 27% of the time respectively.[462]

[597] It was obvious from his answers in cross-examination that Dr Steven was not entirely clear in his understanding of the proposed flow regime, and in particular the percentage of time that the maximum abstraction would actually occurr. He has omitted to consider the duration and variability of the take, the reduced impact moving downstream from the intake, or the geographic extent of the diversion reach. For this and other related reasons we hold that Dr Steven has overestimated or exaggerated the abstraction and resulting changes to the flow regime.

[598] We have found the Branch River abstraction to be part of the existing environment. As noted above, the maximum new abstraction of $40m^3/s$ will only occur 27% of the time and the $55m^3/s$ abstraction, to which Dr Steven repeatedly refers, will occur approximately 11% of the time within a 7.5km stretch of the river. Post-flow hydrology and any consequential bio-physical effects are analysed in some detail elsewhere in this decision.

[599] Approximately a quarter of the length of the river will be affected by the diversion due to the scheme. We accept Mr Mitchell's evidence[463] in relation to the quantum of abstraction, the length of the river affected and the percentage of time that particular abstraction occurs. We note that the greatest effect is in the upper 7.5km of the diversion reach and below that tributaries increase the rate of flow and contribute to flow variability.

[461] Mitchell Evidence in rebuttal at [10.11]
[462] Mitchell evidence in rebuttal Fig 1
[463] Mitchell rebuttal, at [10.11]

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6.10.1.2 The character of the abstraction

[600] Mr Mitchell's evidence is that the average abstraction at the intake is $15m^3/s$ resulting in a 44% reduction in mean flow at the intake. This reduces to a 27% reduction in mean flow above Power Station 5.[464]

[601] Dr Steven stated that the duration of the abstraction is not *particularly pertinent.*[465] We disagree with this opinion. We have already noted our agreement with Dr Steven that:

> As a general principle one might state that the greater the level of abstraction in proportion to the flow of the river, the higher the effect on naturalness.

[602] It must therefore follow that both the volume of the abstraction and the duration are factors in any assessment of effects on natural character.

[603] We are firmly of the view that the maximum (new) abstraction of $40m^3/s$ is significant. However, the fact that this maximum abstraction is likely to occur only 27% of the time reduces, to some degree, the adverse effects on natural character.

[604] In coming to a finding on the adverse effects on natural character it is necessary to consider the existing natural character of the river. While the witnesses are not in complete agreement on this point, they do agree that the existing natural character is somewhere between very high to high (Dr Steven) and high to moderate (Dr Boffa and Mr Brown). The difference relates to the impact on natural character due to historical river catchment and flood protection works, the Branch Scheme and agricultural development of the margins. While not completely in the natural state, we find the Wairau River and its margins retain a moderately high level of natural character.

Findings

[605] We have already considered the effects on braiding patterns and sediment transport and found no significant changes are likely with respect to the riverbed. There are temporary and localised effects on turbidity and clarity associated with the flushing of sediment but these are not expected to be significant.

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[464] Mitchell rebuttal, at [5.10]
[465] Transcript at 1426

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[606] The overall findings on the ecology of the river indicate some changes in the periphyton and invertebrate community in response to changes in the flow regime. However the scale and extent of these changes will not impact significantly on natural character. Similarly the distribution of trout along the river may change in response to the proposed flow regime. However given the large variability in trout populations this is not considered to be significant with respect to natural character. The river bird populations may benefit from predator control programmes and the predator control itself is seen as a benefit and may enhance natural character.

[607] However, we consider the water and the flow regime to be *the most* important aspects of the natural character of the Wairau River – without the water there is no river. The abstraction will result in significant changes to the mean and median flows in the diversion reach. The low flow periods would be extended well beyond the natural pattern. The diversion reach is a significant proportion of the length of the Wairau River. Accordingly, we find the adverse effects of the proposed water abstraction and diversion on the natural character of the Wairau River are significant.

6.10.2 Landscape and visual amenity

[608] With respect to any off-river adverse effects on landscape, Dr Boffa stated that the scheme has been planned and designed to be an integral part of the rural working landscape and to, as far as possible, avoid the creation of adverse environmental impacts.[466] He stated that the scheme can be sensitively accommodated and visually integrated into the rural Mid-Wairau Valley working landscape.[467]

[609] Dr Boffa described the Wairau River as a difficult river to view because it is visually contained, that it is expansive and difficult to access. From within the river bed only local and confined views are available. Those most likely to experience these views have direct contact with the river such as anglers, boat users and recreational walkers. The witness did acknowledge that while the stretch of river affected by the scheme is not particularly visible from public and frequently used viewpoints (such as roads) – the relative isolation is an attribute valued by some sections of the community.

[466] Boffa EIC at [8.3]
[467] Boffa EIC at [8.4]

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[610] His evidence, which accords with that of Dr Steven, was that the intrinsic ecological values are important in terms of landscape perceptions and how people feel, experience and respond to the river.

[611] Dr Boffa discussesd the landscape amenity effects of the proposed flow regime with reference to Table 1 of Dr Mitchell.[468] He explained, by reference to Riverscape Flow Assessment Guidelines,[469] that people's ability to accurately assess a given river flow was generally poor. The research found that *people generally overestimate low flows and underestimate high flows, with estimates being wrong by as much as 50 percent to 100 percent in large single stem rivers.*

[612] Dr Boffa's evidence was, that notwithstanding the effects of low flows over extended periods of time contributing to other effects, and in particular those on natural character, he considered the survey results to be relevant in terms of the visual effects of low flows. The research findings confirmed his own conclusions relative to the appearance and visual effects of modified flows in the Wairau River.[470] His evidence in terms of river flow preferences was that recreational users probably relate individual flow preference to their main interests associated with the river. He considered however, that most casual users and observers of the Wairau River are unlikely to be aware of differences in the flows/volumes of the river under the proposed scheme.

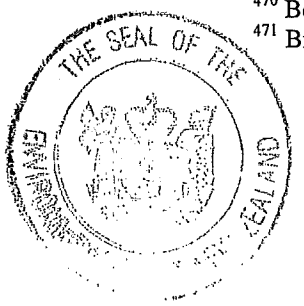
[613] Mr Brown agreed with the conclusions of Dr Boffa and stated:[471]

> During periods of lower rainfall, when diversion has a greater physical effect, there would inevitably be a reduction in wetted surfaces within the river course, some loss of vigour and dynamism in relation to the water courses, and potentially a long term increase in the vegetative content around and across the river braids. But, analysis to date indicates that such effects would remain of a low order and would not fundamentally or significantly affect the landscape and natural character values associated with the Wairau River at present.

[614] We accept Dr Boffa's evidence, sourced from the Flow Assessments Guide that the majority of people recreating on or near the river will have difficulty in assessing

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[468] Mitchell rebuttal at [3.4]
[469] Boffa Miskell 2008 ***The Aesthetic Value of River Flows: an online assessment of flow preferences and flow level estimations*** - unpublished
[470] Boffa EIC at [9.49]
[471] Brown EIC at [104]



flows and changes to these flows. And for this reason the artificially regulated flows, as a result of abstraction may not be readily detectable by most people.

[615] The exceptions are those that use the river regularly and for whom flows are important. Anglers are likely to be the most significant group in this category. It was clear to us from their evidence that many anglers have an intimate knowledge of the river, its characteristics at different flows, the habitat and the food that the river provides for trout. We accept the evidence that kayaking was not undertaken to any great extent on the Wairau.

[616] Any adverse effects on trout or angling – matters to be considered with respect to s 7(c) and s 7(h) of the Act – are assessed in separate sections of this decision.

[617] We accept the expert evidence (agreed by the 3 landscape witnesses) that off-river effects of the scheme on landscape and visual amenity will be minimal on the grounds that the Wairau Valley is a working landscape and is undergoing change. The conversion of pastoral land to the more intensive uses of viticulture and dairying adds to the industrialisation of this working landscape. It is then more easily able to accommodate such a scheme.

Findings

[618] We find that as a result of the extended low flows some of the dynamism of the river will be lost and this would be a loss of amenity, particularly for those familiar with the river. However, we note that few of the general public would be aware of this change and we note that very low flows (less than $10m^3/s$) and flood flows (greater than $200m^3/s$) will be unchanged.

[619] After considering all the expert evidence on the subject we find the adverse effects (outside of those on anglers) from the scheme on the landscape and visual amenity of the Wairau River to be minor.

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6.10.2.1 Amenity impacts on the Parr/Rogers, McLauchlan and Doyle properties

[620] Ms Parr, in particular, raised a number of concerns about the proposed scheme and the effects it may have on the use and enjoyment of properties affected by the scheme.

[621] A number of these issues, particularly those of a technical nature (such as flooding, danger as a consequence of canal failure, ground water effects) and the legal issue of futility (because both the McLauchlans and the Parr/Rogers refuse to let TrustPower either onto or to use their land) have already been addressed. As we have already noted, no expert technical evidence was adduced by any of the landowners to support their various contentions. However, we accept as genuine and can understand the landowners' submissions and evidence in respect of the impacts of the proposed scheme on their amenity.

[622] Both homes on the Parr property are in close proximity to, and immediately below, the proposed scheme. Ms Parr and her family have recently relocated from Auckland for the express purpose of enjoying the stress free amenity and rural lifestyle of their Wairau Valley property. The presence of the canal will be imposing and, notwithstanding the expert evidence, will affect their enjoyment of their property.

[623] By the same token the McLauchlans, who have been farming and improving their property for nearly three decades, and who intend passing it on to their children, will be greatly impacted if the scheme proceeds. The McLauchlan property will effectively be subdivided by 2.2 kilometres of canal 8, have a significant canal structure above the homestead and host Power Station 5. Short of redesigning the scheme, there is little TrustPower can do or offer that will reduce or mitigate the adverse effects on amenity for the McLauchlans.

[624] We accept the concerns with respect to amenity held by both families. TrustPower also appears to accept that these concerns are genuinely held, and that on their face the impacts on amenity will be as the Parr/Rogers and McLauchlan families describe.[472]

[472] Transcript at 2770

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6.10.2.2 Effects on the amenity of Ms Doyle

[625] Ms Doyle is concerned about the flooding on her land should the Kiernan Creek spillway be used for an emergency discharge.

[626] Proposed conditions of consent only allow discharge down this spillway in an emergency. In response to questions from the Court, Mr Dawson explained that there would be operational and testing requirements for use of the Kiernan Creek drop shaft, on an annual basis, releasing small amounts of water. Larger volumes would only be released if required by major seismic events, expected extremely infrequently, one in several thousand years.[473]

[627] We acknowledge Ms Doyle's concerns are genuinely held, but find that such flooding is unlikely. The canals and headponds are some distance from the Doyle home. We find that the potential adverse effects on the Doyle's amenity to be minor.

Finding on amenity effects on individual landowners

[628] The adverse effects on amenity of both the Parr/Rogers and the McLauchlans in their ability to farm, use and enjoy their properties would be significant.

6.11 Recreation

[629] Angling is a key recreational activity which occurs throughout the river. The Wairau River is the most significant salmonid fishery in the Nelson-Marlborough Fish and Game Society region. Fish and Game provide 47 access points over the entire river with 11 along the diversion reach.[474]

[630] Ms Baker submitted[475] that the proposed scheme would significantly reduce the number of angling days, the length of accessible and fishable river, the natural character values and potentially the number and condition of trout. The scheme would affect access, both during construction and after commissioning. Ms Baker further submitted

[473] Transcript at 241–244
[474] Hovell EIC at [4.46]
[475] Baker opening submissions at [170]

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that irrespective of angler use – remote areas are important and those remote, natural experiences are worthy of protection.[476]

[631] In summary[477] Fish and Game's case is that the Wairau Fishery is top quality and highly valued for a range of reasons, including:

- The number of large fish;
- Extensive range of fishable water;
- Tranquil, peaceful surroundings;
- High catch rate;
- Opportunities to catch salmon and trout;
- Angling opportunities provided when other rivers are unfishable;
- Ease of access;
- Low encounter (other anglers) rate;
- Only between 9 and 19 percent of angling occurs within the affected reach (we believe that she was referring to the diversion reach).

[632] In response, Mr Whata submitted that there is (if salmonid habitat is maintained) unlikely to be any significant loss of angling opportunity in the river when flows are between 8 and 14 m^3/s.[478]

6.11.1 Importance of the fishery

[633] The Wairau River supports wild populations of brown trout, rainbow trout and Chinook salmon and is best known as a trout fishery. Most fish caught are brown trout with some rainbow trout in the middle reaches of the river. The trout fishery is entirely a wild stock requiring fish to move freely between different parts of the river system to complete their life cycle. The Wairau has 140km of fishable water with a wide variety of fishing opportunities and a discontinuous or patchy distribution of fish along the river.[479]

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[476] Baker supplementary closing submissions at [12]
[477] Baker closing submissions at [12.4]
[478] The proportion of time river clarity is within the fishable range will change little as a result of the extraction
[479] Deans EIC at [5.1] – [5.13]

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[634] Messrs Deans, Greenaway and Hovell were agreed the upper Wairau River above The Wash bridge is nationally significant for its salmonid angling and the river downstream of The Wash bridge is regionally significant.[480] They were also agreed that adult salmonids would be able to pass through the diversion reach via the main channel and would be able to access spawning tributaries.[481] They were not certain the proposed flow regime would provide adequate habitat for brown trout or salmon or the range of fishing opportunities that currently exist in the diversion reach and possibly downstream.[482]

[635] Mr Deans expressed some concern about dividing the Wairau River into separate reaches and considered it to qualify as an outstanding fishery in its entirety.[483] He considered the river as a whole to be a nationally important trout fishery and a regionally important salmon fishery.[484] During cross-examination he agreed it was generally appropriate to subdivide larger rivers where their character alters. However, he did not think the amenity changes in an abrupt way at The Wash bridge on the Wairau.[485] Mr Deans explained that angler surveys divided the river at The Wash bridge as it is easily identifiable and the point at which the regulations (for species, bag limits and seasons) change for fishing. He considered the recreational amenity to be quite different at the extremes of the catchment and to *grade imperceptibly* from one end of the river to the other.[486]

[636] The Wairau provides a valuable and extensive fishery resource which is well used by anglers from the local community and beyond. While the character of the river does not change abruptly at The Wash bridge it is a convenient and identifiable point with respect to fishing and the associated recreational amenity. We find that it is appropriate to subdivide such an extensive fishery and accept that the river downstream of The Wash bridge is regionally significant for salmonids.

[480] Joint statement of recreation witnesses dated 17 July 2009 at [3.3]
[481] Joint statement of recreation witnesses dated 17 July 2009 at [6.1]
[482] Joint statement of recreation witnesses dated 17 July 2009 at [10.2]
[483] Deans EIC at [5.70]
[484] Deans EIC at [18.1]
[485] Transcript at 1556
[486] Transcript at 1585 – 1586

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6.11.2 Angling amenity

[637] We note the summary of angling visits to the various reaches of the Wairau derived by Mr Hovell from the data supplied by Messrs Deans, Boyes and Winter. Mr Boyes spent 13% of his total angling effort between 1992 and 1998 in the diversion reach. For Mr Winter the figure was 42% and from the collated data supplied by Mr Deans, 26% of total effort was in the diversion reach.

[638] This data supports Mr Hovell's evidence[487] that while the portion of Wairau River below The Wash bridge is of regional significance, the diversion reach is subject to less use by anglers.

[639] Mr Boyes' evidence was that changes to water flow, water clarity, periphyton and temperature resulting from the scheme could adversely affect the optimal conditions for angling on the Wairau River. He stated the scheme would have serious adverse effects on the ability of anglers to successfully catch fish. The residual flow regime would result in sustained periods of low flow which could adversely affect fish passage. Increased periphyton growth and temperature increase would adversely affect fish habitat. Mr Boyes' evidence is that the TrustPower proposal would induce drought conditions for unnaturally extended periods in the middle river, this would force the majority of trout out of the diversion reach, and create unnaturally high numbers of stressed, still uncatchable fish in the lower reaches.[488]

Evaluation

[640] We accept the figures supplied by Messrs Deans, Boyes and Winter related to total angling effort and agree that the diversion reach is the least used when compared to downstream of Marchburn or above The Wash bridge.

[641] We also accept Ms Baker's submission, derived from the evidence of the expert anglers (Messrs Boyes and Winter) that fishing in flows below $20m^3/s$ is far from optimal although fish are still able to be caught. We agree with Ms Baker's further submission[489] that irrespective of angler use, the remote natural areas and remote experiences are

[487] Hovell summary of evidence at [2.7]
[488] Boyes EIC at [6.24]
[489] Baker Supplementary Opening Statement at [12]

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worthy of protection. However, post-scheme such experiences will in the main be still available, albeit with a reduced optimal opportunity. The one qualifying aspect is the presence of warning signs advising of river fluctuations. While providing for increased safety these signs will detract from the remote/natural experience.

[642] We have found that there is a potential effect on the numbers and condition of trout as a result of extended periods of low flow during the summer. This concern is the subject of specific conditions of consent requiring the release of freshes to facilitate the spawning migration. Monitoring and adaptive management provisions provide an additional safeguard. However, these conditions do not guarantee that this potential effect will be satisfactorily remedied in very dry years with prolonged low flows.

[643] There was not sufficient evidence to persuade us that some or all of those anglers who currently fish the affected reach would be displaced to other reaches. However, we accept Mr Winter's evidence that there will be a change in the quality of the angling experience in the affected reach and that this is an adverse effect on those anglers who value their current experience.

[644] While the Wairau River, in its current state, could not be said to deliver a *big river* experience – such as that of the Waitaki – we note the evidence of Mr Brown that post-scheme the Wairau will be of reduced vigour.[490] We think this supports the evidence of Mr Winter – when he discusses change in perception. We also think it important to repeat the premise held, we are sure, by most anglers that the values associated with the angling experience are far wider than an opportunity or ability to catch fish.

[645] When we consider all the evidence before us on the impacts of the scheme on the total angling amenity we find there will be an adverse effect somewhere between moderate and significant.

6.12 Disputed Group 2 effects - health and safety

6.12.1 Dust and air quality

[646] Construction activities inevitably generate dust and possibly odours that reduce amenity and may cause health problems. For this proposal problems may arise from

[490] Transcript at 1394

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vehicle use of haul roads, from vehicle emissions, from earthworks including excavations which can release odours as well as dust and from stockpiling of topsoil.

[647] Condition 17 requires air quality monitoring for 12 months. Such monitoring was undertaken in 2008 and 2009.[491] The results showed the existing air quality in the upper Wairau Valley to be generally good but that dust from farming activities can cause some nuisance effects. Seasonal effects were noted with the potential for dust nuisance being greatest in spring and summer.

[648] Condition 18 requires the Construction Management Plan (**CMP**) to contain provisions outlining the methods to be used for dust management. These include speed restrictions on haul roads, use of water trucks to dampen dust, minimising works during high winds and ensuring the MfE dust nuisance criteria are not exceeded at adjacent properties.

[649] The CMP acknowledges it may not be possible to meet the criteria at a number of residences. Methods to mitigate the associated effects include relocation of residents to other parts of the valley together with provision of air conditioning and cleaning and laundry services.[492] Relocation is to be offered to all who reside within 100m of construction activity and to those residing within a defined construction envelope and who have any respiratory condition which is likely to be affected by discharges from the scheme construction.[493] The above listed services will be offered to residents within 100m of construction and to those within 200m if the effects are likely to occur for more than six months.

[650] Ms Parr seeks to have the 100m limit of condition 93 (relocation of residents) and the 100m and 200m limits of condition 97 (air conditioning and cleaning and laundry services) extended to 300m thus encompassing an extra 20 residences. We thus consider the reasons advanced for proposing 100m. Mr Cudmore notes the various buffer distances put forward by Mr Curtis are based on his experience, are generally consistent with his (Mr Cudmore's) experience and with various buffer distance guidelines in Australia. His discussion of these buffer distances[494] however suggests a note of caution since the scale of the project is greater than those for which guidelines are generally

[491] Curtis EIC at [4.6]
[492] CMP Section 18 page 39
[493] Proposed condition 93
[494] Cudmore EIC at [5.50] – [5.54]

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devised. We are thus sympathetic to Ms Parr's suggestion but only in respect of condition 97 in which each limit is to be increased by 100m.

[651] Condition 95 requires real time particulate monitoring equipment to be installed adjacent to those properties whose owners choose not to be relocated. This is in response to a suggestion by Mr Cudmore[495] which we endorse. Trigger levels for particulate concentrations as measured by these monitors are to be set in conjunction with the Consent Authority and used to require increased mitigation or cessation of the works should the lower or higher level be exceeded respectively. The reference to condition 95 within the condition should be to condition 96.

[652] Condition 96 requires the MfE dust nuisance guidelines to be met at the notional boundary of any residence on another site. The units used for the 24 hour average total suspended particulate within the condition are incorrect and should read 120μg/m^3.

[653] Other conditions require revegetation (91 and 92) and work scheduling to avoid work affecting properties within 100m of construction work during the spring months (condition 98).

[654] Odour problems arising from uncovering contaminated sites (offal and refuse pits) are to be dealt with by remediation of the sites as set out in conditions 100 and 101.

[655] Health issues associated with PM_{10} and $PM_{2.5}$ were raised by Counsel for Fish and Game and for Save the Wairau as well as by various witnesses.[496] Dr Kelly a physician and a specialist in the field of public health medicine addressed these issues for TrustPower. Her overall opinion is that the construction of the scheme is highly unlikely to produce any general adverse health effects in the community. Further she considered the CMP will adequately ensure control of exposure to risks for those individuals who may have increased susceptibility because of pre-existing health conditions.[497]

[656] In reaching her conclusions Dr Kelly considered the presence of respirable particulates including silica and asbestiform that could be encountered in excavations. Mr B Symanns, a geotechnical engineer for Meridian, assessed the likelihood[498] of

[495] Cudmore EIC at [5.33]
[496] PM_x refers to particulate matter smaller in size than x μm
[497] Kelly EIC at [2.1]
[498] Symanns EIC ats [15.1] – [15.4]

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encountering ultramalfic rocks (which can produce asbestiform on breaking down) and silica based materials during scheme construction. He states that for each case it is unlikely that any significant amounts of these materials will be encountered. The Air Quality section of the CMP contains a process for identifying the presence of these materials and Dr Kelly notes that there are established mitigation approaches to deal with them.[499] We are satisfied that the risk associated with abestiform and siliceous materials is insignificant.

[657] Based on the evidence of Mr Curtis, Dr Kelly is satisfied that vehicle emissions do not require specific consideration. However, Mr Cudmore, while admitting that this is probably correct, recommends a more cautious approach. His recommendation is to measure carbon monoxide levels, as a proxy for particulate emissions from fuel oil and diesel powered construction equipment, at two representative sites for a limited period.[500] These measurements would be expected to confirm Mr Curtis' opinion that Dr Kelly relied upon.

[658] Given the monitoring of particulates required in the conditions, we see no need for additional monitoring of vehicle emissions. With the change to condition 97 increasing the mitigation package to residents, we find that the adverse effects with respect to dust and air quality are minor.

6.12.2 Seismic matters

[659] The geological structure of the Wairau valley is dominated by the Wairau fault which runs adjacent to the south bank of the Wairau River throughout the diversion reach. The proposed canal crosses the fault line ten times and the penstock leading to PS4 also crosses the fault line. Hazards associated with the canal as a result of the proximity of the fault include ground shaking and rupture, liquefaction and slope stability.[501] These hazards were of particular concern to Ms Parr and Mr Rogers.[502]

[660] Ms Parr chose not to call evidence on the seismic hazard nor on the design philosophy and solutions proposed to mitigate the hazards. She expressed the belief that

[499] Kelly EIC at [3.14]
[500] Cudmore, EIC at [5.61]
[501] Symmans EIC at [10.9]
[502] Parr closing submission at [4]



the safety of some 500 people living close to the scheme was secondary to TrustPower's desire for an effective scheme.[503]

[661] Dam safety, which includes safety of canals, is managed primarily under the dam safety regulations of the Building Act 2004.[504] It is of relevance under the RMA and thus to this decision because the effects of a failure of low probability could have a high impact. It is the NZSOLD[505] Guidelines that are the basis for the dam safety regulations.

[662] The approach embodied in the regulations and the guidelines is to relate the design specifications to the consequences of failure. These consequences must be evaluated and then the dam or canal placed within one of three Potential Impact Categories (**PIC**), low medium or high. The structure must then be designed to withstand, without failure, a specified extreme event that varies with the PIC.

[663] For seismic design two levels of event are defined. The Operational Basis Earthquake (**OBE**) must be sustained with only minor damage and the Maximum Design Earthquake (**MDE**) under which the impounding capacity of the structure must be maintained.[506] The magnitudes of these earthquakes are determined from an analysis of the geology of the region and a detailed examination of the fault line to determine its earthquake history. Mr Berryman, an earthquake geologist for Meridian, presented the results of such examinations as: a slip rate of 4-5mm/yr, a single event displacement of 5-7m and a maximum earthquake of magnitude 7.6.[507] He also discussed recurrence intervals and the elapsed time since the last earthquake on the Wairau fault and attached a paper[508] to his evidence in which it is stated *the time elapsed since the last event {on the Wairau fault} is in the order of 1-2 times the average recurrence interval implying that the Wairau fault is near the end of its interseismic period.* The need for conservative design with respect to earthquake loadings is thus emphasised.

[664] Dam break analyses for the canal led to PIC categories being assigned to each section of the canal. From the intake to PS1 the PIC was mostly low, from PS2 to PS4 there were approximately equal lengths of low and medium PICs, and from PS4 to the

[503] Parr closing submission at [6]
[504] Dawson EIC at [7.1]
[505] New Zealand Society On Large Dams
[506] Dawson EIC at [7.10]
[507] Berryman EIC at [3.2]
[508] Berryman EIC Appendix 2

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outfall the PIC was mainly medium.[509] The associated design values for the OBE are an earthquake of 1 in 150 AEP[510] for both low and medium PIC and MDE of 1 in 1000 AEP for the low PIC and 1 in 10000 AEP for the medium PIC.[511] These values are all at the conservative end of recommended ranges.

[665] With respect to ground displacement the canal crossings and the penstock crossing of the fault line are to be designed to withstand 13m of lateral movement without collapse and release of the stored water. This is almost twice the maximum value of 7m suggested by Mr Berryman as a result of his investigations.

[666] There is no question that the proposal carries the risk of failure due to an earthquake on the Wairau fault. The procedure above has identified the possible impacts and following international and New Zealand best practice determined appropriate design specifications. This is the appropriate procedure which has been applied conservatively thus reducing (but not eliminating) the risk of failure to nationally accepted levels. Detailed risk assessment of the final design is a matter for the building consent stage. We certainly do not have the ability to do that assessment or to comment on it further.

[667] We note that construction of water retaining structures on fault lines is not unusual in New Zealand. Examples of such structures include the Clyde Dam, Aviemore Dam and the Matahina Dam.

[668] The importance of proper process during the final design and construction phases has been recognised by TrustPower. The Construction Management Plan and the proposed conditions address these issues. Particularly important is the role of a geotechnical engineer which is provided for in Condition 16(b)(vi) with his or her role being required to be set out by Condition 16(b)(vii). We endorse Mr Symanns' suggestion that a geotechnical design statement should be prepared prior to commencement of construction and his list of items that should as a minimum be included.[512] Mr Dawson also addressed the dam safety assurance programme to be adopted.[513] We see all these measures as appropriate to the design and construction stage and accept the uncontested opinion of Mr Symanns that the conditions of consent from a

[509] Core Bundle of Visuals Tab 5
[510] Annual Exceedance Probability
[511] Dawson EIC Appendix B Table 2
[512] Symmans EIC at [23.3] – [23.7]
[513] Dawson at [10.1] – [10.14]

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geotechnical perspective are robust and compatible with the NZSOLD Guidelines.[514] These we have noted as being in accord with international and New Zealand best practice.

[669] Liquefaction of soils poses a hazard under earthquake conditions. The likelihood of this occurring can be assessed by identifying soils in the vicinity that are prone to liquefaction. No such soils were found in the investigations carried out to date.[515] Should such soils be encountered during construction the problem can be managed as part of the construction programme.[516]

[670] Land instability could result in embankment movement or deposition of material into the canal causing overtopping and possible erosion. The various geological features adjacent to the canal have been evaluated for their susceptibility to sliding under earthquakes or heavy rain. Mitigation measures that could be employed should any of the features become prone to sliding are listed in Mr Symmans' Appendix B Table 3.

[671] We accept that it is unlikely there will be any significant land instability issues that cannot be appropriately managed.[517]

[672] We are satisfied that within the relevant statutory framework there is no reason to decline consent on the basis of possible canal failure due to earthquakes.

7 COST/BENEFIT ANALYSIS AND ALTERNATIVES

[673] Mr Donnelly produced a cost/benefit analysis for the construction of the scheme compared with doing nothing (referred to as a CBA assessment). That CBA assessment was criticised by the parties opposed to the proposed scheme. Also, a s 274 party (the Green Party – Kaikoura Electorate Branch) alleged that there was an onus on TrustPower to produce a cost/benefit analysis compared with alternative methods of producing electricity.

[674] A CBA assessment is a tool which can assist us to assess the proposed scheme against s 7(b) of the Act. CBA assessment attempts to value all relevant costs and

[514] Symmans EIC at [23.1]
[515] Symmans EIC at [10.20]
[516] Symanns EIC at [10.22]
[517] Symmans EIC at [11.4]

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benefits, both market and non-market, in dollar terms. Even though in environmental cases, it is generally not possible to quantify all costs and benefits in this manner, there is still an advantage in undertaking a partial CBA assessment. This is because it helps to focus on those matters that cannot be quantified in dollar terms, and therefore, of necessity, be assessed using different decision making criteria.

[675] Because of the complexity of the electricity industry – both its structure and market – Mr Donnelly employed three alternative valuation methods:

[a] Value of output;

[b] Long-run marginal cost; and

[c] Case study simulations.

[676] His methodology and findings were peer reviewed by Associate Professor Sharp who concluded:[518]

> In my opinion the economic assessment provided by Mr Donnelly is based on methods accepted by the profession. Application of the cost/benefit framework has been consistently applied. New Zealand's electricity market is quite unique and presents its own particular challenges, especially in the area of benefit estimation and, in the case of the Proposed Scheme, changes in the flow of environmental services. Mr Donnelly's evidence is balanced and recognises the importance of these limitations.
>
> Subject to the unavoidable difficulties outlined above relating to the exclusion of some non-market values associated with the likely changes in the flow of environmental services, I accept the costs and benefits as projected by Mr Donnelly.

[677] Mr Donnelly set out in some detail his alternative methodologies and his costs and revenue assumptions. Because we did not receive any expert economic evidence that challenged Mr Donnelly's findings, we do not propose to set them out in full in this decision. Mr Donnelly concluded:[519]

> All three valuation methods produced positive net benefits at 10% discount rate, which indicates the scheme is efficient, although the values of environmental impacts have not been included. For the scheme to not produce a benefit to the

[518] Sharp EIC at [28] & [29]
[519] Donnelly EIC at [12.26]

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> nation, the value of the net non-quantified impacts on the environment would have to be negative and greater than the net quantified benefits. For example, based on the preferred Method 3 – National General Costs Avoided, net negative impacts on the environment would have to exceed $475M.

[678] We accept the findings of Mr Donnelly, subject to recognising the limitations of the three valuation methods employed. His assessment gives us an indication as to the economic efficiency of the scheme from both a national and regional perspective.

[679] In so finding we are mindful of and adopt the caveat of the Environment Court in *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*:[520]

> Finally, there are two other points to note about section 7(b) of the RMA. First costs benefit analysis and economic efficiency under the RMA do not determine resource allocation decisions. That is consistent with economic theory which recognises that cost benefit analysis provides information and organizes that information, enabling it to be placed alongside other decision-making criteria in a useful manner.

7.1 Alternatives

[680] The Green Party – Kaikoura Electorate Branch in their closing submissions, presented by Mr Browning, submitted that there is an onus on TrustPower to properly explore the options of alternative methods of producing electricity when considering the use of the Wairau River as a resource in energy generation.

[681] Mr Shearer, a long-standing member of the Green Party, gave evidence to support this contention. It was Mr Shearer's opinion, that there is no need for the output of the scheme or the need could be totally avoided by a combination of:

[a] Increased energy conservation through better household design and insulation, more efficient lighting, the adoption of improved appliances and electric motors;

[b] Increased use of small-scale distributed generation and energy sources such as solar water heaters, micro-wind generators, photovoltaic cells,

[520] C80/2009 at [202]

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domestic bio-energy (i.e. wood and pallet burners), and micro-hydro stations; and

[c] The adoption of marine generation technologies.

[682] There was argument as to the need for a cost/benefit analysis with respect to alternatives. The cost/benefit analysis provided by Mr Donnelly was restricted to considering the proposal against the status quo – in other words, the alternatives are between the proposal or doing nothing. It is accepted that from an economic efficiency perspective, least cost requires consideration of alternatives and that this includes alternative ways of achieving the same objective, as well as the alternative of doing nothing. The issue before us is whether, from a resource management perspective, the consideration of alternatives and the use of cost/benefit assessment needs to incorporate all credible alternatives to the proposal.

[683] Mr Browning, for the Green Party, relied on the following passage from *Lower Waitaki*:[521]

> We conclude that the role of a consent authority, when having particular regard to Section 7(b), is, where possible, to internalise the effects of a proposal, so that the cost of the externalities are imposed on the consent holder. It is then left to that person to decide whether their proposal can compete against others in the market. Consequently it is not usually necessary to consider alternative uses of the resource in question, or the use of alternative resource to obtain a similar benefit. However there are at least three exceptions:
>
> (1) where the costs cannot be fully internalised to the consent holder;
>
> (2) where there is no competitive market (e.g. in congestion on roads where the relevant resource is the land near those roads; we also note there is a very limited market in water permits); or
>
> (3) where there is a matter of national importance in Part 2 of the Act involved and the cost benefit analysis requires comparing measured and unmeasured benefits and costs (as is usually the case) so that the consent authority has to rely principally on its qualitative assessment, e.g. *TV3 Network Services Limited v Waikato District Council.*[522]

[684] Mr Whata submitted that the statement of the Environment Court quoted above was wrong and contrary to *Brown v Dunedin City Council.*[523] We do not accept that submission. *Brown* was considering a different point, namely the consideration of

[521] C80/2009 at [201]
[522] [1997] NZRMA539; [1998] 1NZLR360 (HC)
[523] [2003] NZRMA420 at [16]

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different methods under s 32 of the Act – methods referring to the methodologies that could be used in a proposed plan. However, we can find no statutory foundation for the three exceptions, nor were we referred to any.

[685] There is no direct statutory direction requiring us to consider alternative locations or methods in a s 120 appeal. Section 88(2)(b) of the Act requires a person applying for a resource consent to include, in accordance with Schedule 4, an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment. Subsection (3) provides that if an application does not include an adequate assessment of environmental effects, the local authority may, within 5 working days after the application was first lodged, determine that the application is incomplete and return the application, with written reasons for the determination, to the applicant. Section 92(1) of the Act authorises a consent authority to request further information that may include the consideration of alternatives in accordance with Schedule 4.

[686] Schedule 4 includes the following:

> **1. Matters that should be included in an assessment of effects on the environment**
>
> Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 should include—
>
> ...
>
> (b) where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:
>
> ...

[687] There are other provisions in the Act that require consent authorities to consider alternatives but these are specific to circumstances that are not applicable here.[524] There is a strong policy direction in the Act that alternatives should be a part of the overall assessment of the effects of a proposed activity, when the threshold of significant adverse effects is reached.

[688] We are of course bound by the High Court decision of *TV3 Network Services Limited.* In our view its principle is simple and straight-forward. Where a proposal

[524] See sections 105(1)(c) and 107A(2) (f)

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would result in significant adverse effects on matters of national importance, alternative locations or methods may need to be considered.

[689] In *Maniototo Environmental Society Incorporated v Central Otago District Council*,[525] the Environment Court held that it is possible that alternatives should also be considered in cases where significant environmental effects are present (other than that they involve matters of national importance). However, the Court did not go so far as to decide this issue.

[690] It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[691] We are mindful of what the Environment Court raised in *Waiareka Valley Preservation Society Incorporated & Ors v Waitaki District Council & Anor*:[526]

> [316] As the Planning Tribunal noted in *Transpower New Zealand Limited v Rodney District Council*[527]; there ought to be some limit to what is raised in terms of alternative locations and methods, though it is difficult, except in extreme cases, to prescribe that limit in advance. The Tribunal also held that in the circumstances of significant adverse effects it would be open to opponents of the proposal to test (and we presume for the Court to make findings on) the adequacy of the applicant's consideration of alternative locations and methods.

[692] The consideration of alternatives in an assessment of effects on the environment is a broad concept. It includes alternative locations and methods of generation, or methods to avoid the need for generation, as outlined by Mr Shearer. However, it also encompasses variations to the proposal in terms of the scale, geographic extent, or mode of operation in order to address particular environmental concerns.

[693] TrustPower has considered alternatives and presented its preferred layout and operation by way of the technical specifications for the construction and operation of the

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[525] C103/09
[526] C58/2009
[527] A56/1994

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scheme as well as the proposed conditions of consent, particularly those addressing the flow regime in the river. Mr Lilley described the initial scoping process and an early decision to reduce the output of the scheme in order to provide a higher minimum residual flow in the river (from 6 to $10m^3/s$). The subsequent engineering feasibility study and assessment of environmental effects were conducted in parallel to identify both engineering and environmental constraints and make adjustments to the scheme design.[528]

[694] Mr Lilley outlined the consideration of alternative generation options in the region including hydro-generation on the upper Wairau River (between Dip Flat and The Wash bridge), the lower Wairau River (between The Wash bridge and the Narrows) with a dam, an enhanced Branch Scheme, hydro-generation on the Clarence River and options for wind farms.[529]

[695] Clearly TrustPower has considered a broad range of alternatives as part of its scoping for this project and assessment of effects on the environment. While it has not undertaken a detailed CBA assessment of each of these alternatives we do not think that such an assessment is always necessary or even appropriate. It is entirely open to TrustPower to consider the merits of these alternatives using other decision making criteria.

[696] We also acknowledge that the alternative methods proposed by Mr Shearer in his evidence, are not within the capacity of TrustPower to arrange. This raises problematic practicalities. Indeed, if we were to embark on intensive analysis between TrustPower's proposal and various alternative options and methods proposed by Mr Shearer, we would be entering into the field of central planning, which is neither TrustPower's responsibility as an applicant nor our function as a Court.

[697] We consider that TrustPower has properly considered alternatives as part of its assessment of environmental effects. We do not agree with the Green Party submission that a CBA assessment of all potential alternative generation options is required.

[698] Since writing this part of the decision the judgment of the full High Court in *Meridian Energy Limited and Ors v Otago Regional Council*[530] has been released. It has

[528] Lilley EIC at [4.27] – [4.37]
[529] Lilley EIC at [4.1] – [4.11]
[530] CIV 2009 412 000980 at 76

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held that the three imperatives set out in the extract from the Lower Waitaki, relied upon by the Green Party are erroneous in law. On our reading of the High Court judgment we see no reason to amend what we have written.

8 STATUTORY TESTS

[699] In considering the statutory tests we consider the proposed scheme subject to the amended proposed conditions of consent as set out in Appendix 2.

8.1 Section 104(D) Gateways

8.1.1 First gateway – adverse effects

[700] The first gateway test requires us to consider the effects of the proposed scheme on the environment. We must be satisfied that the effects of the proposed scheme on the environment will be minor. Mr Whata, relying on the authority of *Bayley v Manukau City Council*[531] submitted that in considering this gateway we should have regard to positive effects that offset adverse effects. That case, of course, was not concerned with the gateway tests, but to the notification procedures under s 94 of the Act as it then was.

[701] There have been a number of conflicting decisions of the Environment Court as to whether the Court should consider the positive effects of a proposal when deciding whether the threshold test has been met. We prefer the reasoning set out in *Stokes v Christchurch City Council*[532] where the Court said:

> ... The Court of Appeal's decision in *Bayley* must cast doubts on transferring the Elderslie Park approach to s 105(2A) as this division of the Court did in *Baker Boys* (with qualifications). Especially since we have to consider the 'adverse effects' (plural) we consider that while it is still appropriate to consider each adverse effect as mitigated, there is no statutory authority for us to consider the positive effects of a proposal when deciding whether the threshold test in s 105(2A)(a) is met. To that extent we consider that in the light of *Bayley*, we were wrong in *Baker Boys* in adopting a (qualified) net adverse effect approach to the first threshold test. The test is whether the adverse effects as proposed to be remedied and/or mitigated, and taken as a whole are more than minor.

[702] Stokes has been followed in a number of Environment Court decisions including:

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[531] [1999] 1NZLR568 (CA) at 571
[532] [1999] NZRMA409 at 434

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[a] *The Warehouse Limited v Dunedin City Council*;[533]

[b] *Stretch v Queenstown Lakes District Council*;[534]

[c] *Mainframe Limited v Queenstown Lakes District Council*;[535]

[d] *River Management Society Incorporated v Canterbury Regional Council.*[536]

[703] We thus propose to consider the effects of the proposed scheme as mitigated by the conditions of consent – but not the positive effects of the proposed scheme.

[704] It is obvious from our discussions of, and the findings on, the adverse effects on the environment in Chapter 6 of this decision, that some of the adverse effects of the proposed scheme are more than minor. These include:

[a] The reduction of flow in the river over the diversion reach and the resulting diminishment of natural character;

[b] The potential effect on trout within the diversion reach if there are extended periods of low flow through the summer period;

[c] The potential effects on the black-fronted tern which are considered to be of low probability but high impact.

[705] Accordingly, the proposal does not pass through the first gateway.

8.1.2 Second gateway – objectives and policies of the Plan

[706] We now consider the proposed activity and effects on the environment against the relevant objectives and policies of the Plan. We must be satisfied that the activity will not be contrary to the objectives and policies of the Plan.

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[533] C101/2001
[534] C09/2004
[535] C08/2004
[536] C80/2009

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[707] We have identified and discussed in some detail in Chapter 2.2.3 the relevant provisions of the Plan. The objectives and policies of particular relevance to this threshold are:

[a] Natural character;

[b] Landscape and amenity (including recreation);

[c] Flora and fauna;

[d] Water quality; and

[e] Water allocation.

8.2 Consideration against the provisions of the Plan

[708] The activity having the greatest potential effect on the environment is the abstraction and diversion of water from the main stem of the Wairau River. The operation of the scheme including, in particular, the provision of power during peak demand and the flushing of sediment add to the effects of that diversion. The activities and the effects on the environment, as modified by the proposed conditions of consent, must now be considered in the context of the Plan.

8.2.1 Chapter 6 - Fresh Water

[709] Chapter 6 of the Plan addresses fresh water with relevant objectives relating to provision for use while safeguarding the life supporting capacity of the resource, and maintaining and enhancing water quality.

Objective 6.2.1.1 - Life-supporting capacity of the resource

[710] Policies in support of the provision for the use of water while safeguarding the life-supporting capacity of the resource propose the SFRs and flow sharing. These tools are to provide for protection of the instream ecology, fish passage and spawning, and water quality as well as associated cultural and amenity values.

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[711] We have found that the proposed flow regime is slightly different to the flow regime indicated by the SFRs and 2:1 flow sharing provisions of the Plan. The proposed regime has higher minimum residual flows and limited flow sharing during the critical bird nesting season. However, it has reduced mid-range flow variability particularly outside of this nesting season.

[712] Policy 1.4 relates directly to the setting of SFRs on the basis of monitoring information and states that amendments would be sought through a plan change. Mr Wadsworth[537] considered the proposed minimum residual flows to amount to a *de facto SFR* that is higher than that set by the Plan. We consider this to be consistent with the policy as, while there has not been a plan change process, the proposed minimum residual flow has certainly been based on extensive monitoring and other research.

[713] Flow sharing is addressed through Policy 1.6 setting aside a proportion of the abstraction flow, over and above the SFR, for instream values. The scheme addresses instream values in two ways, first through the limited flow sharing, and secondly through the increased minimum residual flows during some months of the year. While not following the precise methods set out later in the Plan this approach does meet the policy intent.

[714] Turning to the instream ecology we have found that the proposed flow regime is likely to increase periphyton with generally positive outcomes for biological productivity. The small likelihood of increased nuisance growths is adequately addressed by a condition requiring flood flows to be passed down the main stem of the river, if triggered by nuisance growths, including didymo.

[715] The macro-invertebrate community is unlikely to be adversely affected. The inevitable scientific uncertainty associated with the model predictions is addressed through conditions requiring monitoring, with a trigger linked to the sensitive EPT taxa. An adaptive management plan sets out the responses, and a review of conditions may be undertaken should the trigger level be breached. The composition and productivity of the macro-invertebrate community is predicted to be sufficient to support the fish and river bird populations.

[537] Transcript at 2182

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[716] Fish passage and spawning migration were found to be potentially affected by the proposed flow regime. A proposed condition requiring small freshes and floods to be released during the spawning migration of trout has been included to address this effect. The management plan for aquatic ecology has been amended to include a specific objective on the habitat of trout and salmon. This is to ensure that the revised condition is effective and the potential for restricted movement of trout and salmon does not result in unanticipated adverse effects.

[717] The use of the scheme to provide for peak power demand will result in fluctuations in river flow downstream of the discharge and the potential formation of an unproductive varial zone. However, the proposed scheme will remove the flow fluctuations that currently affect the river in the diversion reach as a result of the operation of the Branch Scheme. Downstream of the discharge point fluctuations in flow from the proposed scheme will replace those of the Branch Scheme. We have found any increase in adverse effects from this to be minor.

[718] Discharges associated with the flushing of sediment from the scheme will introduce concentrated quantities of fine sediment with localised and temporary effects on the invertebrate community. This is unlikely to affect the overall invertebrate productivity and monitoring is proposed to check the extent of such effects.

[719] We have compared the outcomes of the proposed flow regime (with seasonally varying minimum residual flows and limited flow sharing) with the SFR (set minimum flow) and 2:1 flow sharing provisions of the Plan. We found that the proposed flow regime would have better outcomes for the river birds and the SFR scenarios were likely to provide better outcomes for trout and salmon. The outcomes for instream periphyton and the macro-invertebrate communities would be very similar.

[720] Overall we are satisfied that the proposed abstraction and diversion of water and the associated discharges will be managed in such a way that the life-supporting capacity of the resource will be maintained and the effects on the environment will be adequately remedied or mitigated. We find that the proposed activity, subject to the conditions of the consents, is not contrary overall to this objective and the associated policies. While the potential effects on fish passage are contrary to one part of Policy 1.5 *to improve fish passage and spawning*, overall we find the proposal to be consistent with this policy. The proposal is consistent with Policy 1.6, on additional flows above the SFR, as it sets a

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higher minimum residual flow and provides for flow sharing (albeit limited when compared to the rules in the Plan) for instream values, particularly the river birds.

Objective 6.2.1.2 - Maintaining and enhancing water quality

[721] The direct impacts of the proposed scheme on water quality are a possible increase in temperature in the diversion reach and the increase in turbidity associated with sediment flushing. The predictions are for very minor changes in water temperature and comprehensive conditions and trigger levels are proposed to manage this concern.

[722] The extent of the increased turbidity as a result of sediment flushing will not be known more precisely until field trials have been undertaken. We note that the conditions require flushing to occur when the flow in the river is high and already turbid.

[723] We have accepted that the mixing zone may be taken from the intake to the confluence with the Branch River. There will be localised and temporary increases in turbidity and decreases in clarity along this stretch of the river, particularly before the discharge is fully mixed across the braids. However, we consider this to be reasonable given the nature of the river.

[724] We have found that nuisance periphyton growths are unlikely to be exacerbated by the scheme to such an extent that there will be consequential adverse effects on water quality.

[725] Overall, we find the proposed scheme to be consistent with the objective and policies for water quality.

Objective 6.3.1.1 - Equitable allocation and use

[726] The triple class permit system is introduced in Policy 1.2 to set and enforce maximum allocations of water. We have found that this application is not subject to the triple class system. Nor do we consider it to undermine the application of the triple class system as the rule framework clearly identifies which applications would be subject to the permit classes.

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[727] We have noted that the scheme would carry irrigation water for the WVWES. Mr Wadsworth considered that the allocation of water through Class B permits on the south bank of the Wairau River already exceeded what was required for irrigation. He indicated that the Council would rationalise individual consents where they overlapped with the WVWES and that process would reduce the total allocation. He considered there was sufficient Class B water available for both existing and future irrigation needs on the north bank.[538]

[728] We find the proposed scheme to be consistent with the objective for equitable allocation and use of water from the Wairau River.

Objective 6.5.1.1 - Sustainable and equitable allocation during low flow

[729] Policies 1.1 and 1.2 emphasize the SFRs and the need for rationing during periods of low flow. The rules set out the flow level at which rationing should take place on the Wairau River. TrustPower's proposed take would not be subject to such rationing conditions although the higher minimum residual flows and limited flow sharing, during some months, would contribute to the policy intent. The requirement to ensure that flow in the Wairau River above PS5 is at least $5m^3/s$ above the minimum residual flow at the intake provides additional protection to instream values during low flow periods.

[730] The conditions of consent include a non-derogation clause to ensure that existing downstream consent holders are able to take water in accordance with their consents. Minimum flows are set at which TrustPower must suspend its take. In addition TrustPower is required to allow some part of freshes down the river following prolonged periods of low flow through the trout spawning season.

[731] We find that the scheme is consistent with these policies and contributes to the objective for sustainable, equitable and efficient allocation of the water during low flow periods.

8.2.2 Chapter 4 - Flora, Fauna and their Habitats

[732] Relevant objectives address the protection of significant indigenous vegetation and habitat, and the protection of fresh water and riparian ecosystems.

[538] Transcript at 2238

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Objective 4.2.2.1 - Significant vegetation and habitat

[733] The forest remnants of the Wairau River are noted as a major value under threat from clearance and stock. Drainage of wetlands is an ongoing concern. The proposed scheme does involve the clearance of areas of indigenous vegetation and the potential loss of native wetlands. We have found that the proposed wetland and riparian areas associated with the canals and regulation pond will compensate for this loss. The proposed revegetation, enhancement and legal protection of remnant native vegetation at Traverse Spur and exotic forest corridors is consistent with the policies relating to the protection and restoration of wetland areas and riparian vegetation.

Objective 4.3.2.1 - Freshwater and riparian ecosystems

[734] As discussed with respect to the objectives and policies relating to the life-supporting capacity of the resource we find the proposed scheme to be consistent overall with the policies relating to the natural functioning of the aquatic ecosystem, water quality, and the Wairau River as a corridor along which fauna can move and flora spread. The predator management required by the conditions of consent will enhance the habitat for the river birds. We note that one of the anticipated environmental results from the implementation of the objectives and policies relating to indigenous flora and fauna and their habitats is:[539]

> Sustainable habitats that enable the maintenance or enhancement of population numbers and distribution of rare and endangered species.

[735] Policy 1.4 requires a precautionary approach in the absence of detailed knowledge on hydrology or ecology. While some uncertainty remains with respect to the extent and exact nature of the effects of the proposed scheme we do not consider this to amount to the *absence of detailed knowledge*. We find the extent of monitoring and modelling work undertaken with respect to the potential effects of the proposed scheme to be sufficient to not trigger a precautionary approach under this policy.

[736] We have noted the potential for adverse effects on the movement of trout and salmon which is contrary to that part of Policy 1.5 on the habitat of trout and salmon.

[539] Plan at 4-11

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However, the habitat of native fish and birds is provided for, so overall we find the scheme to be not contrary to this policy.

[737] Similarly, the proposed scheme is contrary to Policy 1.12 on instream values including fish passage. We have noted that trout numbers may decline in the diversion reach as the longer periods of low flows could lead to the displacement of fish to other parts of the river.

[738] While we find the proposed scheme to be contrary to one policy and partially contrary to another it is consistent with the other relevant policies contributing to this objective. The likely benefits for the river birds have to be considered alongside the potential hindrance to the passage of trout and salmon during extended periods of low flow. Overall, we find the proposed scheme to be not inconsistent with the objective of protecting and enhancing the ecosystem.

8.2.3 Chapter 10 - Natural Character

[739] The objective of this chapter is the preservation of the natural character of the rivers and their margins, repeating s 6(a) of the Act. Policy 1.1 discourages use and development of rivers which are predominantly in their natural state where natural character is not compromised. As we have noted, while not completely in its natural state – as a result of flood protection works, the presence of the Branch Scheme and agricultural development of the margins – the Wairau River retains a moderately high degree of natural character. While the proposed scheme is not contrary to this policy nor is it entirely consistent with it.

[740] Policy 1.3 requires the consideration of effects on the listed qualities and features of natural character. There has been a comprehensive assessment of effects and we have found adverse effects with respect to natural character concerning three out of nine matters on the list. We note that the policy merely requires a consideration of effects. However, in the context of the overall objective we find that the adverse effects on natural character to be inconsistent with parts of this policy. The benefits in terms of bush restoration and potential improvements in the breeding success of river birds are consistent with other aspects of this policy.

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[741] Policy 1.4 directs the reader to other chapters of the Plan dealing with (relevantly) flora and fauna, open space and recreation. As it is so broad we found it of little assistance and to repeat the intent of Policy 1.3.

[742] Policy 1.6 concerns the ability to restore or rehabilitate natural character in the area subject to the proposal. When the scheme is operating there is no ability to restore or rehabilitate the natural character impacted as a result of the abstraction. However, the rehabilitation of bush remnants and some wetlands, through planting and protection, is consistent with the policy.

[743] Policy 1.7 recommends a precautionary approach when effects are unknown. We have a high degree of certainty as to the effects of the scheme on natural character and do not consider the precautionary approach to be triggered.

[744] Policy 1.8 promotes rivers as ecological corridors. The diversion scheme does not interrupt the river in the manner of a dam and the minimum residual flows will ensure connectivity. However, we have found potential adverse effects on the movement of trout through the diversion reach during prolonged periods of low flow. Specific conditions are proposed to deal with this particularly through the spawning season and an adaptive management approach is incorporated. No interruption to the movement of invertebrates or bird species is anticipated. Overall we find the scheme to be consistent with this policy.

[745] We find the scheme to contribute to some policies on natural character and to be inconsistent with others. Overall, we find it to be not inconsistent with the objective of preserving natural character from inappropriate development.

[746] Accordingly, we find that the proposal passes through the second gateway.

9 SECTION 104 MATTERS

9.1 Introduction

[747] It is now necessary for us to consider our findings on the matters we have discussed, and make a judgment as to whether the single purpose of the Act, as set out in s 5, is achieved. This involves a careful balancing and weighing of the contested and

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non-contested factual issues within the statutory framework as we have described it. In reaching our conclusion we are required to apply the relevant matters set out in s 104(1).

9.2 Effects on the environment

[748] We have discussed at some length in Chapter 6 of this decision the actual and potential effects on the environment of allowing the proposed scheme. We summarise our findings:

[a] *Positive Effects* – we found that there were a number of positive effects that would result from the proposal including;

[i] contributing to the supply of renewable electricity generation,

[ii] assisting in reducing carbon emissions,

[iii] assisting in the security of supply of electricity for the Nelson/Marlborough area,

[iv] the provision of improved amenity and recreation opportunities by the construction of the regulation pond, new walkways, kayak course, viewing areas and access to the Wairau River,

[v] the mitigating and compensation initiatives proposed, such as the creation of new wetlands, planting of indigenous bush, predator and weed management programmes, and predator control to benefit river birds.

[b] *Negative Effects* – we found that there were a number of negative effects that would result from the proposal, including;

[i] a likely increase in periphyton growth in the river, including didymo, which may cause some impact on amenity, but is unlikely to result in adverse effects on the overall ecological functioning of the river,

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[ii] the reduction in food producing habitat and the proposed flow regime could have an impact on the distribution, abundance and condition of the trout population. We have found that, at worst, there could be a 10% – 20% reduction in trout numbers in the diversion reach, but consider this to be unlikely to affect the trout population of the river as a whole,

[iii] there is some uncertainty with respect to the outcomes for the black-fronted tern population at lower flows associated with the proposed scheme. The considerable research undertaken to date, demonstrates that adverse effects are unlikely, but any adverse effects would have a high potential impact, given the importance of the black-fronted tern. The amended conditions of consent adequately remedy the potential adverse effects,

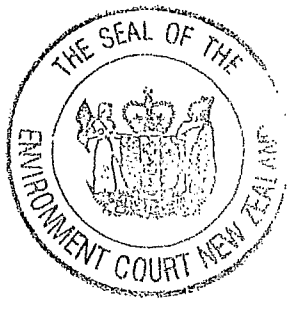
[iv] there will be adverse effects on the very small native wetland areas, but the establishment of some 6.5ha of riparian wetland area will compensate for any loss,

[v] the quantity of water that would be extracted from the affected reach would be an effect on the natural character of the river that is more than minor – water being a fundamental element of the river. We consider the impact on natural character to be significantly adverse,

[vi] there would be an adverse effect on the angling amenity that would be more than minor,

[vii] there would be adverse effects on the amenity of the properties of Ms Parr/Mr Rogers and Mr & Mrs McLauchlan.

[749] We must consider all of these effects and evaluate their significance and the weight to be given to them in the context of the Plan provisions and Part 2 of the Act.



9.3 Relevant provisions of the Plan

[750] We have earlier in this decision, in Chapter 8.1.2, related our findings to the relevant objectives and policies of the Plan. The relative objectives, policies and rules were part of the statutory framework against which our assessment and findings in Chapter 6 were carried out.

[751] We are satisfied that the proposed scheme would generally satisfy the Plan's provisions designed to protect the natural values of the river and its margins, including:

[a] Natural character;

[b] Landscape and amenity;

[c] Flora and fauna;

[d] Water quality; and

[e] Water allocation.

The conditions of consent as amended by us would ensure an adequate flow regime will be retained in the river at all times when compared with the existing flow.

[752] There was some suggestion that the Plan provisions do not anticipate a development of the scale proposed. There is some credibility in that comment. However, the Plan does allow for larger water takes as a non-complying activity and gives comprehensive policy guidance. The complex and detailed conditions constrain the proposed scheme within the confines of the objectives, policies and rules of the Plan. So much so that we reject the submission of those opposed to the proposed scheme, that to allow it would set a dangerous precedent, or more particularly, would compromise the Plan's integrity.

9.4 Part 2 of the Act

[753] In Chapter 2 of this decision we identified that s 6(a), (c) and (d) of the Act were particularly relevant matters of national importance.

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[754] Section 6(a) of the Act requires us to recognise and provide for the preservation of the natural character of the river and its margins from inappropriate use and development. We have found that the natural character of the river will be significantly adversely affected by the abstraction over the diversion reach. This diminution of natural character needs to be considered in the context of the other matters that we are required to provide for by the statutory directions.

[755] It is settled law that the preservation of natural character is not to be achieved at all costs. In an early and important case, *NZ Rail v Marlborough DC*, Greig J had this to say:[540]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s6(a) is to achieve the purpose of the Act that is to say to promote the sustainable management of natural and physical resources. That means the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or objective on its own but is accessory to the principal purpose.
>
> ...
>
> It is certainly not the case that the preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs must all play their part in the overall consideration and decision.

[756] Section 6(c) of the Act requires us to recognise and provide for the protection of significant vegetation and significant habitats of indigenous fauna. We have found that indigenous vegetation and fauna are generally adequately protected by the amended proposed conditions. While we acknowledge potential for adverse effects on threatened river bird species, given the reduced flows along the diversion reach, we also consider the potential for benefits from the proposed predator control programmes. Public access to the river is maintained, and in some cases, enhanced by the proposed conditions of consent.

[757] We turn now to the relevant matters that we are to have particular regard to under s 7 of the Act. We are satisfied that this is an efficient use of water and of the existing generation infrastructure of the Branch Scheme. The canals will also deliver water for irrigation along the length of the scheme. While we have found adverse effects on the

[540] NZRMA [1994] at 70 at [85] and [86]

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amenity of particular properties and on aspects of angling, we consider that overall amenity values are maintained to a satisfactory degree.

[758] The proposed conditions of consent, as amended by this decision, safeguard the values of the ecosystem and maintain the quality of the environment. The waters of the river are clearly a finite resource. We are satisfied that there has been adequate provision made for irrigation water and recreational use as well as ecosystem services. We note that electricity generation is a non-consumptive use and the water is returned to the river, albeit at some considerable distance downstream.

[759] The proposed scheme will assist in reducing greenhouse gas emissions, improving security of electricity supply in the region and contribute to the supply of renewable generation.

[760] Sections 6 and 7 of the Act inform and guide our ultimate decision as to whether or not this scheme is an appropriate development and one that will promote sustainable management of natural and physical resources. This exercise is not a mechanistic checklist or simple score sheet. Nor do we consider s 6 matters to somehow trump or override s 7 matters. We must take all these matters into careful consideration

10 EXERCISE OF DISCRETION

[761] In exercising our discretion we have regard to all our findings which we have come to in accordance with the legal and statutory framework and directions. We acknowledge that there are some unavoidable effects of allowing the scheme, in particular taking relatively large flows from the river over the diversion reach.

[762] The large amount of water abstracted impacts on our obligations under s 6(a) and (c) of the Act. As we have said earlier, impacts on natural character within the diversion reach should not be seen in isolation. We must also consider the benefits of renewable generation in accordance with s7.

[763] The relatively large flows that would be taken are, as we have said, constrained by the conditions to ensure a flow regime that generally meets the objectives of the SFR in the Plan and sustains the ecosystem. We acknowledge that there will be comparatively longer periods of low flow during the summer months.

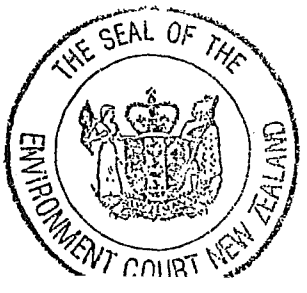
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[764] We acknowledge the need for a cautious approach with respect to the river birds. The conditions requiring the consent holder to undertake extensive monitoring and reporting, with triggers to activate an adaptive management regime, ensure that any unanticipated adverse effects on the river bird populations can be addressed. We are satisfied that the broad suite of conditions, as amended by this decision, is sufficiently robust to protect the ecological values of the river and its margins.

[765] When we stand back and balance all of the factors we have identified and considered with respect to the generation of electricity, the effects on the environment, and the life supporting capacity of the ecosystem, our decision is finely balanced.

[766] Overall, we are satisfied that the proposed scheme would fit within the statutory directions in Part 2 of the Act. It would give effect to the single purpose of the Act – the promotion of the sustainable management of natural and physical resources.

[767] Accordingly, we exercise our discretion in favour of allowing the proposed scheme subject to the amended conditions in Appendix 2.



11 DETERMINATION

[768] The appeal of TrustPower is allowed to the extent that the decision of the Marlborough District Council is upheld as per the amended conditions of consent as contained in Appendix 2.

[769] The remaining appeals are dismissed save for the amendments to the conditions of consent as contained in Appendix 2.

[770] Because of the complexities of the conditions of consent the Marlborough District Council is given 30 days to apply for the correction of any errors.

R G Whiting
Environment Court Judge

A J Sutherland
Environment Commissioner

J R Mills
Environment Commissioner

H M Beaumont
Environment Commissioner

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APPENDIX 1

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CONDITIONS ATTACHING TO GRANT OF CONSENTS TO TRUSTPOWER LIMITED TO CONSTRUCT THE WAIRAU HYDRO POWER ELECTRICITY SCHEME

(U050729 & U060284)

GENERAL

Interpretation

1. Where any consent is required of the Consent Authority for the doing of any act by the consent holder, such consent shall not be unreasonably or arbitrarily withheld.

2. Nothing in these conditions shall prevent the consent holder from reaching an agreement with affected persons to undertake measures to avoid, remedy or mitigate effects in place of measures specified in any condition. Prior to implementing any such measure, the consent holder shall first obtain the approval of the Consent Authority.

3. No scheme construction shall commence until all obligations emanating from the pre-construction conditions have been met to the satisfaction of the Consent Authority.

Consent Lapse

4. That the consent lapsing period for this consent shall be ten years from the commencement of the consent.

5. Pursuant to section 116 of the Resource Management Act 1991 these consents shall commence upon the date all appeals on consents UO50729 and UO60284 are determined.

Non-derogation

6. The scheme shall be operated at all times such that it will not derogate from the rights of those consented irrigation takes from the Wairau River and its tributaries within the reach of the river affected by the scheme that existed at the date of granting this consent, but excluding those consents that were notified after the date of notification of the applications for which this consent was granted. Where a consent holder renews on the same terms or for a lesser rate and volume of water, this non derogation obligation shall continue to apply.

Management Plans

7. The consent holder shall prepare ~~to~~for the approval of the Consent Authority such management plans as are required to give effect to the purposes and objectives specified in this consent.

8. The consent holder may, without changing the purpose or objectives of a management plan referred to in condition 7, seek the approval of the Consent Authority for any necessary amendment to such plan.

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9. The consent holder may review and revise any management plan at any time on the following terms:

   (a) The review shall be undertaken in consultation with and be approved by the Consent Authority;

   (b) The Consent Holder shall, in relation to any change to any management plan, consult with the same parties it is required to consult in relation to the preparation of the original management plan under these conditions of consent;

   (c) Such review shall be necessary to give effect to the purpose or objectives of the management plan.

10. All Management Plans shall state the objective or objectives sought to be achieved by such Plans.

11. The following management plans shall be prepared and submitted to the Consent Authority for approval. The likely timing of the delivery of these management plans shall be identified by the consent holder within three months of the issue of this consent. The consent holder shall work collaboratively with the Consent Authority to ensure that ample notice of the delivery date for each plan is provided to assist the Consent Authority with planning the allocation of resources to assess each of the plans. The Aquatic Ecology Management Plan shall be submitted for approval at least 6 months before commencement of instream construction works.

   (a) The Construction Management Plan.

   (b) The Traffic Management Plan.

   (c) The Landscaping Plan.

   (d) The Health and Safety Plan.

   (e) The Groundwater Management Plan.

   (f) The Aquatic Ecology Management Plan.

   (g) The Pre-Scheme Black-Fronted Tern and Black-billed Gull Research Monitoring-Plan.

   (h) The Black-Fronted Tern and Black-Billed Gull Work Plan and Programme.

   (i) The Vegetation Management Plan.

12. The consent holder shall pay all actual and reasonable costs of the Consent Authority in connection with the review of all management plans prior to their approval.

Advice Note:
Consent Authority approval to be within 90 working days of receipt of each plan or plans.

Review

Advice Note:



These conditions apply where specific review conditions have not otherwise been imposed.

13. The Consent Authority may during the month of June in the fifth year after the commencement of this consent, and every five years thereafter, serve notice on the consent holder of its intention to review the conditions of the consent pursuant to section 128(1) of the Resource Management Act 1991 for the purpose of avoiding, remedying or mitigating any adverse effect on the environment that may arise from the exercise of these consents and that was not anticipated at the time of commencement of this consent.

14. In accordance with section 127 of the Resource Management Act 1991 the consent holder may, no earlier than twelve months after the approval of the management plans required by condition 9 of this consent, apply to change or cancel any of the conditions of this consent.

Sequence of Compliance

15. Except with the prior written consent of the Consent Authority the consent holder shall not proceed from the pre-construction to construction phase unless and until all pre-construction conditions have been fully complied with.

PRE-CONSTRUCTION

Construction Management Plan

16. (a) A Construction Management Plan shall be prepared and submitted to the Consent Authority for approval in accordance with Condition 11. The objectives of the management plan shall be to provide guidance on environmental management for the construction of the Scheme, and to impose measures to avoid, remedy or mitigate any adverse environmental effects associated with construction activities. The purpose of the Construction Management Plan shall be to:

(i) describe the methods proposed for the construction of the scheme and the programme for construction of each element;

(ii) describe what actions will be taken to manage the actual or potential effects of construction activities (including effects relating to traffic movements, dust, noise, stormwater discharges, sediment runoff, earthworks) associated with the scheme and to satisfy conditions 83 and 84;

(iii) provide a list of key personnel and points of contact during scheme construction; and

(iv) describe how stakeholders will be kept informed during construction and how complaints will be managed.

(b) The Construction Management Plan shall include the following details:

(i) The staging plan, identifying the works and proposed duration of each stage;

(ii) The detailed design responsibilities and method of construction, including methods of conducting earthworks, disposal of excavation material, in river works management, surface water and erosion management;

(iii) Methods to avoid the spread of Didymo. The Plan shall ensure that no equipment is used in the exercise of this consent that has been used previously to undertake activities in any water body known to contain Didymo, unless that equipment has been thoroughly cleaned in accordance with the Biosecurity New Zealand document titled *Cleaning Methods for Freshwater Activities;*

(iv) The methods for management of hazardous substances, dust management and noise management, and fire prevention;

(v) The name and contact details of key positions and points of contact, including an appropriately qualified staff members, to manage environmental issues and any community complaints on site, to have responsibility for managing and responding to environmental issues and, any community complaints, and to ensure management plans and consent conditions are adhered to throughout construction;

(vi) The name and contact details of the geotechnical engineer to be engaged by the consent holder throughout earthworks construction, and an outline of the role and responsibilities of the geotechnical engineer during construction;

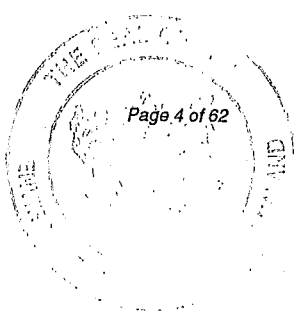
(vii) An outline of the critical elements of the scheme where geotechnical involvement is required for the construction;

(viii) An outline of the critical elements of the scheme where groundwater engineering involvement is required for the construction;

(ix) Details of the minimum requirements for investigations, inspections and monitoring throughout construction to ensure that construction is being undertaken in accordance with the requirements of this consent;

(x) The consent holder shall engage an expert peer reviewer to review the Construction Management Plan prior to it being submitted to the Consent Authority for approval. The peer reviewer shall be nominated and appointed by agreement between the consent holder and the Consent Authority; and

(xi) The steps which the consent holder shall take to ensure that the effects of construction ~~mitigate against~~minimise loss of public access to the Wairau River during the construction period.



Dust Management (Construction Management)

17. Prior to the commencement of construction the consent holder shall undertake background air quality monitoring, including total suspended particulate (TSP) monitoring for a period of 12 months. The consent holder shall submit this data to the Consent Authority prior to the commencement of construction of the scheme.

18. As part of the Construction Management Plan described in condition 16, the consent holder shall include provisions which set out the methods for dust management and shall include the following details:

(a) Limiting vehicle speed to 60kmp/h on haul roads when they are not within 300m of any residence and 20kmp/h when the haul roads are within 300m ~~to~~of residences;

(b) Ensuring a high level of maintenance on the haul roads; in accordance with, as applicable, the Marlborough Roads document Operational Performance Measure, General Maintenance Marlborough South Area;

(c) The implementation of wind breaks should affected residents choose not to be relocated as specified in condition 93; and

(d) The use of crusting agent additives to water used to control dust where necessary.

Cultural and Archaeological Protocols (Construction Management)

19. Prior to the commencement of construction:

(a) The consent holder shall appoint a project archaeologist. This person shall be a suitably qualified and experienced contract archaeologist whose qualifications and experience would allow the New Zealand Historic Places Trust to authorise them to carry out any work specified by an Authority under the Historic Places Act 1993. The project archaeologist shall be engaged for the duration of the construction activities and may nominate a suitable representative. Overall responsibility for archaeological matters shall remain with the Project Archaeologist.

(b) The project archaeologist as appointed in condition 19(a) (or their nominated representative) shall undertake an archaeological survey of the canal route and the areas likely to be affected by earthworks associated with the construction of the scheme. The purpose of the survey shall be to identify any potential archaeological sites prior to the commencement of construction. The survey and reporting results shall be submitted as part of the Construction Management Plan required by condition 16. The report shall include a map of the canal route and areas potentially affected by earthworks activities associated with the construction of the scheme with all items of archaeological significance plotted.

(c) Prior to the start of earthworks, the consent holder shall implement a training programme for construction staff under the direction of the project archaeologist regarding methods of identifying, reporting and managing features of archaeological significance. The training programme shall be repeated as necessary to accommodate any new staff who may be engaged for earthworks construction.

Fish Screening and fish bypasses

20. Prior to the commencement of construction of the scheme, the consent holder shall prepare design specifications for:

(a) A fish screen to be installed at the downstream end of the ~~settling~~sediment retention basin in Reach 1.

(b) A fish bypass channel to return fish excluded by the screen safely back to a permanently flowing channel connected to the main stem of the Wairau River.

(c) The performance objectives for design of the fish screen and fish bypass channel shall be:

(i) to exclude all adult Eels and Salmonids and where practicable juvenile Eels and Salmonids from passing through the fish screening device and to return them safely back to the Wairau River downstream of the scheme intake;

(ii) ensure a sustainable population of dwarf galaxias (Galaxias divergens) remains in the diversion reach of the Wairau River;

(iii) to establish a method for ensuring that the fish screen is kept substantially clean and free from debris excluding Didymo; and

(iv) to exclude elvers and other fish from entering the downstream entrance of the fish bypass channel.

(d) ~~A f~~Fish barriers to be installed at the downstream end of the outfall of PS5 and~~,~~ to the ~~existing~~enlarged Wairau Power Station tailrace.

(e) ~~A f~~Fish bypass channels to return fish excluded by the barriers of (d) above safely back to a permanently flowing channel connected to the main stem of the Wairau River.

(f) The performance objectives for design of the fish screen bypass channels shall be:

(i) To exclude all adult Eels, and Salmonids and, where practicable, juvenile Eels and Salmonids from passing through the fish barrier and return them safely back to the Wairau River upstream of the outfall.

21. To ensure the effectiveness of the fish screen in achieving its objectives in condition 20(c) above the consent holder shall undertake a trial prior to the commissioning of the scheme. The trial will consist of:

(a) Monitoring of small fish (trout and salmon fry) in the Wairau River to determine whether the small fish are moving past the

intake location in such numbers as to warrant fish screening~~, and at what size~~.

(b) Based on the monitoring undertaken in condition 21(a) the consent holder shall derive a screen size, or an alternative appropriate method, to avoid, remedy or mitigate the effects of the scheme intake on fish passage in this location of the river.

Using the information obtained in condition 21 (a) and (b) the consent holder shall implement a trial of the fish screen to guide design specifications in condition 20.

The fish screen and bypass specifications shall be submitted to and approved by the Consent Authority and shall incorporate, but not be limited to, the following features:

(c) A report detailing the outcome of fish monitoring and the fish screen trial and the design considerations that emerge from that trial;

(d) The standards for maintenance and operation of the fish screen including operation during flood events up to 200m^3/s ~~cumecs~~;

(e) A monitoring programme to ensure the ongoing efficiency of the fish screen.

Sediment Retention Basin

22. Prior to the commencement of construction the consent holder shall prepare design specifications for the sediment retention basin and shall submit the specifications to the Consent Authority for approval. The performance objectives for the sediment retention basin shall include provision for the implementation of the best practicable option for mitigating the adverse effects of sediment flushing on the water quality of the Wairau River including options for managing visual clarity and turbidity.

Scheme Design Standards

23. The design of the scheme shall generally accord with the plans submitted as part of the resource consent application and hearing for the applications for consent. Prior to the commencement of construction of any structures authorised by this consent, accurate site plans and detailed structural plans including the dimensions and elevations of all structures shall be submitted to and approved by the Consent Authority.

24. Structures authorised by this consent shall be designed, constructed and maintained for the life of the scheme in accordance with the NZSOLD Dam Safety Guidelines, November 2000 (and any subsequent amendments).

25. Prior to the commencement of construction of the structures authorised by this consent, a geotechnical design statement shall be prepared by an experienced chartered geotechnical engineer and shall be submitted to and approved by the Consent Authority.

26. Prior to the commencement of construction of the scheme the consent holder shall ensure that a recognised engineer as defined by section 149 of the Building Act 2004 is engaged to review the proposed scheme design. The peer reviewer shall be nominated and appointed by agreement between the consent holder and the Consent Authority. The sole function of the reviewer shall be to review the proposed scheme design and advise the Consent Authority whether it is in accordance with accepted industry standards.

Traffic Management

27. The consent holder shall ensure that all accessways to State Highway 63 necessary for construction activities are designed in accordance with the New Zealand Transport Agency's Planning Policy Manual. The consent holder shall complete these accessways to the satisfaction of the NZ Transport Agency and the Consent Authority prior to commencement of construction for that stage of the scheme necessitating the access in question.

28. The consent holder shall prepare detailed design plans for the widening of Centre Valley Road to at least 6m over the section between State Highway 63 and the canal alignment (a distance of approximately 130m). Those plans shall be submitted to and approved by the New Zealand Transport Agency and the Consent Authority. The widening of Centre Valley Road shall be completed by the consent holder to the satisfaction of Marlborough Roads and the Consent Authority prior to the commencement of construction of the scheme.

29. The consent holder shall ensure that a Traffic Management Plan is prepared and submitted to the Consent Authority in accordance with Condition 11. The objectives of the Traffic Management Plan shall be to identify and detail the traffic management measures that will be put in place during construction and to manage any adverse actual or potential traffic effects arising from construction activities. The Traffic Management Plan shall be prepared in consultation with the New Zealand Transport Agency and the Consent Authority. It shall detail the traffic management measures to be put in place during construction including details of the following:

(a) The safety of all road users including pedestrians;

(b) The temporary traffic management locations and methods to be put in place during the construction period;

(c) The locations where works will occur within the road reserve and the general method of traffic management and control that will be utilised;

(d) Routes for haulage of materials on any public road, and measures for ensuring the local road network is maintained in a satisfactory condition;

(e) How provision will be made for property access to affected properties during construction;

(f) All necessary temporary site access requirements, design and traffic management; and

(g) Procedures for liaison between the community, the consent holder and the contractor with regard to traffic related matters.

Landscape and Visual Amenity

30. The consent holder shall ensure that a Landscaping Plan is prepared and submitted to the Consent Authority for approval in accordance with Condition 11. This plan shall be prepared by a suitably qualified and independent landscape architect. Where landscaping works are located on land owned by parties other than the consent holder, the consent holder shall be required to consult with that landowner about the proposed works and the results of that consultation shall be reflected in the Plan. The purpose of the plan shall be to provide for the following matters:

(a) All cuts, fills and embankments shall be graded and formed so that they appear as natural extensions of the adjacent landforms and landscape patterns;

(b) All disturbed areas shall be grassed and managed to appear as an integral part of the wider rural landscape;

(c) Where shelter belts are removed in whole or in part, replanting or, as an alternative, the construction of an artificial screen to meet the shelter requirements of directly affected landowners shall be undertaken in consultation with the respective landowners;

(d) Where screen planting is necessary to mitigate any adverse effects of the scheme on adjacent landowners, the consent holder shall provide landscaping mitigation in consultation with land owners as appropriate;

(e) Disposal areas for surplus excavation material shall be placed in locations agreed with landowners and contoured so they visually integrate with their rural setting;

(f) Power stations shall be designed and finished in materials and colours that are in keeping with the rural Wairau landscape;

(g) The steel penstocks and other built elements shall be finished and maintained in a colour that integrates with the landscape;

(h) The design plans for the recreational areas at the regulation pond and outfall shall be generally consistent with the plans attached as Figures A and B. The design plans shall be submitted to the Consent Authority for approval prior to commencement of construction of the scheme;

(i) With respect to planting, the plan shall include proposed details of species location and selection, plant density, maintenance and pest control; and

(j) This Plan may allow for staged implementation. If it does then an overall plan showing the various stages and their inter-relationships shall be included in the Landscaping Plan.

Health and Safety

31. The consent holder shall ensure that a Health and Safety Plan is prepared and submitted to the Consent Authority for approval in accordance with Condition 11.

32. Prior to the commencement of construction the consent holder shall, in order to minimise the risk of persons undertaking recreational activities in the vicinity of the scheme:

(a) Erect signs at appropriate locations to be determined in consultation with the Nelson Marlborough Fish and Game Council, the applicable kayaking and jet boating clubs, and the Consent Authority to warn users of dangers in that area both during and after construction;

(b) Include appropriate information in the public newspaper prior to the undertaking of the construction works and weekly during the construction period;

(c) Liaise with known user and interest groups advising of programmed works; and

(d) There shall also be two signs erected on State Highway 63 - one at each end of the works site. On each sign shall be clearly displayed the details of the construction manager, contact person and a free phone number.

Advice note:
Other health and safety issues are dealt with at: 16 – 18, 91 – 99, 107 – 108, 110 - 111.

Community Liaison Group

33. Prior to the commencement of construction of the scheme, the consent holder shall undertake an open public process to offer local residents and interested people, including representatives from the consent holder, the Consent Authority and the contractors for the scheme the opportunity to be involved in a Community Liaison Group. In the event it is possible to establish such a group the Community Liaison Group, shall be chaired by an independent facilitator appointed by the consent holder in consultation with the Consent Authority.

34. In the event that it is not possible to establish such a group through no fault of the consent holder then such failure to do so shall not be a breach of these conditions.

35. The objectives of the Community Liaison Group shall be to:

(a) Build effective working relationships and mutual trust between the local community and the consent holder (including its contractors), especially during construction;

(b) Promote the free flow of information in all directions between the local community, the consent holder, the contractors and the Consent Authority, in order to try to anticipate and resolve any potential issues before they arise;

(c) Evaluate the results of monitoring activities on a periodic basis;

(d) Oversee a Community Complaints Procedure, ensuring appropriate responses from the consent holder are forthcoming; and

(e) Recommend any changes to proposed mitigation measures that might be appropriate in light of the monitoring.

Complaints Procedure

36. Prior to the commencement of construction of the scheme and at all times during construction of the scheme, the consent holder shall establish and operate a Community Complaints Procedure as follows:

(a) The consent holder shall have a clearly nominated and publicly communicated contact person within its own organisation or within one of its local agents for receipt of and attendance to complaints during construction;

(b) The consent holder shall establish a 24 hour free phone number for the local community to call if they have any concerns or complaints regarding construction. The free phone number shall be advised to all residents within that part of Wairau Valley affected by scheme construction via post and shall be advertised in the local newspaper prior to the commencement of construction of the scheme and at regular periods during construction;

(c) The consent holder shall maintain a log of any complaint received including the following: the date, time, complainant name and contact details, nature of the complaint including the cause and effect if known, record of action taken to address or mitigate the complaint;

(d) The consent holder shall respond to complaints as soon as is practicable but not later than 24 hours and shall log the action that it intends to take in response to the complaint;

(e) The consent holder shall communicate with the complainant about actions taken;

(f) The consent holder shall document any other longer term actions to be taken;

(g) The consent holder shall present an incident summary (ie (c) to (e) above) to the meetings of the Community Liaison Group (in the event it is established) for review; and

(h) The consent holder shall make the complaints and response log available to the Consent Authority on request.

Southern Tributaries

General

37. The consent holder shall give Ormond Aquaculture Ltd (OAL) at least six months notice in writing of its intention to give effect to the resource consents for the proposed scheme.

Monitoring Mill Stream / Walkers Stream Flow

38. Prior to the commencement of construction of the scheme, the consent holder shall, at its own cost, monitor the flows in Walkers Stream and Mill Stream to determine the existing flow regimes. Monitoring locations will be as close as practical to immediately upstream and downstream of the canal structure, and be established to the satisfaction of the Consent Authority as follows:

(a) Walkers Stream

(i) water level / flow site to be established at Parsons Road Bridge (approx. Map ref. O28: 521584);

(ii) water level / flow site to be established upstream of the canal alignment on Walkers Stream at side road (approx. Map ref. O28: 511578 – naming to be determined);

(iii) monthly visits to include concurrent gaugings at both recorder sites plus twice for tributary inflows within 0.5km upstream of Parsons Road site.

(b) Mill Stream

(i) Mill Stream at the Ormond Aquaculture site – Marlborough District Council permanent site (60130) to be continued;

(ii) water level / flow site to be established at Mill Road near Ford (approx. Map ref. O28: 515596);

(iii) water level / flow site to be established in Mill Stream between Andersons Floodway and Canal 8A crossing (location to be determined);

(iv) monthly visits to include concurrent gaugings at all recorder sites plus minor tributary adjacent to upstream recorder site (as required).

39. (a) Data from at least two years records shall be used to determine the existing flow regime for Walkers Stream and Mill Stream. After the first 12 months the monitoring undertaken in accordance with condition 38(a) and (b) shall be reviewed by the consent holder.

(b) The flow relationships shall be established with concurrent gauging data up to median flow as determined by at least two years of record at each site. ~~The f~~Flow relationships between the streams ~~should be statistically significant~~shall be derived. Should the flow relationships between the upstream and downstream sites on each stream not be deemed to be statistically significant by the Consent Authority, the consent holder may submit flow relationships based

on other data for consideration. All data used in deriving any flow relationships is to be provided to the Consent Authority.

40. The consent holder shall supply Ormond Aquaculture Limited and the Consent Authority with a copy of its Construction Management Plan required under condition 16 where it relates to the proposed construction work within the Mill Stream Catchment, one month prior to that work commencing.

41. The Construction Management Plan shall include the following provisions:

(a) A summary of the consultation undertaken by the consent holder with Ormond Aquaculture Limited in relation to the construction programme in the Mill Stream Catchment;

(b) An appropriate and agreed protocol for ongoing consultation by the consent holder with Ormond Aquaculture Limited during both the construction and operational phases of the scheme;

(c) An appropriate and agreed methodology for managing water quality within Mill Stream and its catchment during construction to ensure that Ormond Aquaculture Limited is able to continue to extract water from Mill Stream for the purposes of its fish farming operations; and

(d) The procedures to be followed in the event that sediment discolours the receiving waterway and does not disperse after a period of reasonable mixing occurs in Mill Stream.

42. Prior to the commencement of construction of the scheme within the Mill Stream and Walkers Stream catchments, the consent holder shall investigate construction dewatering options including the pumping of groundwater from dewatering wells around the edge of the excavation or the utilisation of other methods such as drainage or pumping from within the construction area. These options shall first be identified in the Construction Management Plan required by condition 16. The de-watering method that will be adopted shall be determined from a consideration of the feasibility of achieving the required de-watering and a consideration of the environmental outcome in terms of discharge flows and discharge quality effects on the receiving environment. The selected method shall be advised to the Consent Authority.

43. In the event that low flows at the downstream monitoring sites are lower than the flows predicted by the derived relationships the consent holder shall release sufficient water from the canal to Mill Stream as required to maintain the existing low flow regime as determined under condition 39. Such release of water shall be via a vegetated swale, or concrete channel, sufficient to ensure no decrease in water quality or clarity in the receiving stream.

Walkers Stream Canal Crossing

44. During the detailed design for the scheme the consent holder shall investigate options for the Walkers Stream canal crossing point. This investigation shall include assessment of the use of:

(a) An option to capture the flow of Walkers Stream into the canal and release the flow via a controlled gate back to the stream; or

(b) a culvert; or

(c) a flume.

45. Prior to construction of the canal between the Wye River and Lansdowne Road, the consent holder shall submit to the Consent Authority for approval full design details of the selected option for the canal crossing, together with a management plan for managing flows in Walkers Stream. The management plan shall include provision for retention of suitable low flows as outlined in conditions 38 and 39 in order to provide for in stream ecological values, as well as an assessment of the requirement for provision for suitable periodic flushing flows. These flow regimes shall be set having received advice provided by independent hydrological and ecological experts.

Advice Note:
This condition notes that the consent holder's preferred option at the time of issuing this consent is to capture the stream flow and release an equivalent flow to back to Walkers Stream downstream of the canal via an automatically controlled release gate. The required release flow would be calculated in real-time based on the flow at the upstream gauge (condition 38) and the flow relationship derived in condition 39. The design capacity of the controlled release gate shall account for the range of flows observed during the pre-scheme monitoring (condition 38) excluding flood flows. The release of flow back to Walkers Stream shall be via a vegetated swale, sufficient to ensure no decrease in water quality or clarity in the receiving stream.

Monitoring of Water Quality in Mill Stream/Walkers Stream

46. The consent holder shall determine an appropriate methodology for monitoring water quality in Mill Stream and Walkers Stream post construction of the scheme. The methodology shall include a protocol for establishing any significant change in baseline water quality caused by the operation of the scheme. The methodology for conducting this monitoring shall be developed in consultation with Ormond Aquaculture Limited and submitted to the consent authority for approval, prior to the commencement of construction of Canal 8A.

Spill Ways

47. The consent holder shall ensure that all operational and emergency spillways are designed to have a stabilised path to a receiving stream. This can be via either an existing channel with erosion protection as necessary or a new designed overland flow path.

48. At no time shall emergency and operational discharges exceed the permitted maximum flows under U050729 & U060284 – Operational Discharge Permits.

Groundwater Management

49. A The consent holder shall ensure that a Groundwater Management Plan is prepared and submitted to the Consent Authority for approval in accordance with Condition 11. The objectives of the Groundwater Management Plan are to:

(a) Ensure the adverse effects on groundwater resources as a result of the construction and operation of the scheme are appropriately avoided, remedied or mitigated.

(b) Determine the approach to be adopted to adaptively manage construction activities and the subsequent operation of the scheme in order to manage effects on the existing groundwater resource within the area defined within the plan referred to in condition 51.

(c) The Groundwater Management Plan shall include the following details:

(i) The approach to monitoring, assessment and mitigation that will be implemented by the consent holder to address the effects related to the interception, abstraction and/or discharge of groundwater where these are caused by the construction and subsequent operation of the scheme;

(ii) The trigger levels to determine when action is necessary on the part of the consent holder and shall include provision for appropriate methods to be assessed and applied to successfully mitigate any adverse effects on existing groundwater abstractions or the groundwater resource more generally;

(iii) The pre-construction/baseline investigations and monitoring of existing groundwater usage and quality;

(iv) The monitoring and mitigation measures required during the preconstruction, construction and operational phase;

(v) The level of reporting required at each phase; preconstruction, construction and operational phase;

(vi) How the Groundwater Management Plan shall assist in giving effect to the obligations inherent in conditions 124 to 135, and 201 - 204; and

(vii) The procedures for resolving complaints/disputes.

50. The consent holder shall engage an expert groundwater peer reviewer to review the Groundwater Management Plan prior to it being submitted to the Consent Authority for approval. The peer reviewer shall be nominated and appointed by agreement between the consent holder and the Consent Authority. The peer reviewer's report shall be part of the documentation submitted to the Consent Authority.

51. The Groundwater Management Plan shall encompass a defined area as shown on the Figure C attached to these conditions.

52. Prior to the commencement of construction of the scheme the consent holder shall submit to the Consent Authority the following details for groundwater benchmarking purposes:

(a) The number and location of appropriate control sites (being bores and spring fed streams) within the Wairau Valley that will be utilised for the purpose of monitoring groundwater levels and spring flows; and

(b) Confirmation of the location of all groundwater abstractions existing at the time of granting this consent within the Groundwater Management Plan area defined in condition 51. The following details are to be recorded for each groundwater abstraction point:

(i) name of well owner

(ii) well depth and screen position

(iii) type of pumping system

(iv) pump operating level

(v) well use

(vi) depth to water

(vii) well yield and drawdown characteristics;

(viii) Field measurements of electrical~~ity~~ conductivity, pH and temperature

(ix) maximum permitted take under any water permit.

(c) Identification of any feasible alternative water supply system for those existing groundwater abstractors identified in Condition 52(b).

53. For 12 months prior to the commencement of construction of the scheme the consent holder shall carry out monthly groundwater level monitoring at the locations and /or abstraction points specified in accordance with condition 52(a).

54. At least six months prior to the commencement of construction of the scheme the consent holder shall conduct monitoring of groundwater quality at representative points within the area defined by condition 51. Groundwater quality samples will be analysed for pH, electrical conductivity, alkalinity, E.Coli, Chloride, Nitrate-N, Nitrite-N, Ammonia-N, Total-N, Dissolved Reactive Phosphorus, Total Phosphorus and Arsenic. This monitoring shall occur at least twice during this six month period.

55. Prior to the commencement of construction of the scheme the consent holder shall conduct detailed geotechnical investigations. This shall include in-situ testing to assist with determining the permeability parameters of the ground materials in areas likely to be affected by construction of the scheme. It shall also include further analysis to determine the quantity of water expected from dewatering areas, and more detailed design of the temporary support/groundwater cut-off mechanisms.

56. Prior to the commencement of construction of the scheme the consent holder shall install trial de-watering bores to adequately determine optimal

pumping rates and de-watering methods for construction purposes. These trial bores shall be used to test the quality of the de-watering discharge and to check the drawdown extent that the pumping creates in the surrounding strata.

57. Prior to the commencement of construction of the scheme, the consent holder shall supply the results of all monitoring (Conditions 53 and 54) and the additional groundwater investigations in accordance with conditions 55 and 56 to the Consent Authority in writing. This information shall be coupled with a report which shall detail the following:

(a) The information gathered from the work described in conditions 52 - 56 above;

(b) An estimation of the natural seasonal range of groundwater level, stream flow, wetland condition and groundwater quality fluctuations, based on a review of all groundwater data and an assessment of the longer term range of climatic fluctuations;

(c) The identification of trigger levels that will represent abnormal conditions that could be caused by scheme activities. These trigger levels will take into account natural fluctuations and comparison with monitoring bores located outside the area of influence from the scheme. They will be determined on a location by location basis and may include absolute water levels and/or rate of change of water levels and/or the potential lateral extent of effect;

(d) An identification of specific wells, wetlands or streams likely to be adversely affected, based on the de-watering trials;

(e) Definition of targeted mitigation measures for each location where the potential for adverse effects has been defined;

(f) A programme of works prepared for the approval of the Consent Authority for the implementation of mitigation measures prior to the occurrence of any adverse effects that are more than minor; and

(g) Establishment of a forward monitoring programme prepared to the approval of the Consent Authority, appropriate for each identified location, such that trigger levels can be effectively measured.

Aquatic Ecology - Main Stem

Aquatic Ecology Management Plan

58. The consent holder shall ensure that an Aquatic Ecology Management Plan is prepared and submitted to the Consent Authority for approval in accordance with Condition 11. The formulation of this management plan shall be carried out in consultation with the Department of Conservation, Nelson Marlborough Fish and Game Council and the Royal Forest and Bird Protection Society. The Aquatic Ecology Management Plan shall set out the approach to monitoring and adaptive management that will be implemented by the consent holder to mitigate any actual and/or potential adverse effects on aquatic ecology related to the construction and operation of the scheme. The objectives of the Aquatic Ecology Management Plan shall be to:

(a) Protect the overall health and vitality of the existing aquatic ecosystem of the Wairau River and those tributaries that lie within the affected reach of the River;
(b) Ensure that the activities associated with the construction and operation of the scheme do not give rise to adverse effects on the existing aquatic ecosystem in the Wairau River or exacerbate any pre-existing adverse effect;~~.~~
(c) Maintain the habitat of trout and salmon within the affected reach of the Wairau River.

59. The Aquatic Ecology Management Plan shall establish environmental triggers to provide an indication of ecosystem stress and a process which directs consent holder action upon a trigger threshold being exceeded. The Aquatic Ecology Management Plan shall include the following triggers:

(i) A 30% reduction in the average density of mayfly and caddis_fly larvae within the scheme diversion reach of the Wairau River relative to pre-operational levels and/or the control sites.
(ii) Within the Scheme diversion reach, the instantaneous (hourly) water temperature exceeds 23.0°C and temperatures exceed 20.0°C for more than four hours in a 24 hour cycle, and for more than three consecutive days.
(iii) Immediately downstream of the Power Station 5 tailrace after full mixing, instantaneous (hourly) water temperatures exceed 24.0°C and temperatures exceed 20.0°C for more than six hours in a 24 hour cycle, and for more than three consecutive days.
(iv) A sustained decrease in dissolved oxygen throughout the scheme diversion reach to below 80% saturation.
(v) A sustained decrease in water clarity throughout the scheme diversion reach by greater than 33% relative to the upstream control sites.
(vi) A 25% increase in the embeddedness of riffle habitats within the scheme diversion reach over two consecutive monitoring occasions through the diversion reach relative to pre operational levels and upstream control sites.
(vii) During sediment flushing a sustained decrease in water clarity downstream of the scheme diversion reach greater than 50% relative to upstream control sites.

60. Without limiting conditions 63–69 below, the Aquatic Ecology Management Plan shall set out the methods by which the consent holder conducts:

(a) Pre construction/baseline investigation and monitoring of existing aquatic ecosystem composition and abundance, and water quality characteristics;
(b) Monitoring and identification of mitigation / management measures during the construction and operational phases; and

(c) Reporting obligations at each phase (preconstruction, construction and operation of the scheme), and identification of appropriate and robust contingency plans should any adverse effects be detected.

61. The consent holder shall engage an expert aquatic ecology peer reviewer to review the Aquatic Ecology Management Plan prior to it being submitted to the Consent Authority for approval. The peer reviewer shall be nominated and appointed by agreement between the consent holder and the Consent Authority. It is envisaged that this peer reviewer will later be appointed to the Ecological Advisory Group (EAG) required by condition 207. The report of the peer reviewer shall form part of the documentation submitted to the Consent Authority.

62. The consent holder shall be responsible for the implementation of the Aquatic Ecology Management Plan throughout the pre construction, in-river construction and operation of the scheme, and its regular review as appropriate. Any review of the Aquatic Ecology Management Plan shall be completed to the satisfaction of the Consent Authority to ensure that it meets the objectives set out in condition 58.

63. Prior to the commencement of any in-river construction activities the consent holder shall conduct the following monitoring. This monitoring shall be undertaken for at least two years prior to any in river construction activities associated with the implementation of the scheme.

(a) Abundance and distribution of benthic macroinvertebrates, periphyton and fish;
(b) Water quality, including water clarity, electricality conductivity, dissolved oxygen, pH, Nitrate/Nitriate-Nitrogen, Ammoniacal-Nitrogen, Total-Nitrogen, Dissolved Reactive Phosphorous, Total Phosphorous, Total Suspended Solids and temperature;
(c) Any other monitoring deemed necessary by the consent holder to properly characterise existing aquatic ecological values.

Advice note:
For the purpose of satisfying this condition, research and monitoring data collected prior to the grant of consent may be utilised to established baseline conditions.

64. The consent holder shall ensure that the monitoring outlined in condition 63(a) and (b) is undertaken:
(a) In November, February, and May of each year or as close as possible to these months should high flow prevent effective sampling over these months for benthic macroinvertebrates, periphyton and fish.
(b) In November, February, May and August of each year or as close as possible to these months should high flow prevent effective sampling over these months for water quality.

65. The consent holder shall ensure that the monitoring outlined in condition 63(a) and (b) is undertaken at the following sites within the Wairau River, or such other sites as determined and described in the approved Aquatic Ecology Management Plan:
   (a) A site known as 'Six Mile' located approximately 12km upstream of the bund associated with the intake for the scheme, to be used as a control site;
   (b) A site known as 'Airstrip' located approximately 1 – 2 km upstream of the bund associated with the intake for the scheme, to be used as a control site;
   (c) A site known as 'Argyle' located approximately 3.5km downstream of the sediment ~~pond~~retention basin sluice tailrace confluence with the river;
   (d) A site known as 'Wairau Valley' located approximately midway between the intake for the scheme and the Power Station 5 tailrace confluence with the river;
   (e) A site known as 'Marchburn' located just upstream of the Power Station 5 tailrace confluence;
   (f) A site approximately 1km downstream of Power Station 5 tailrace confluence;
   (g) A site known as 'Renwick' located approximately 500 metres upstream of the Renwick Bridge (SH6).

66. Prior to the commencement of any in-river construction activities and for at least two years, the consent holder shall undertake an annual drift dive survey of the salmonid population at the following sites within the Wairau River, or such other sites as determined and described in the approved Aquatic Ecology Management Plan:
   (a) Dip Flat
   (b) Intake site
   (c) Below the Branch River confluence
   (d) Top Valley
   (e) Marchburn
   (f) The Narrows
   (g) Tuamarina.

67. Prior to the commencement of any in-river construction activities and for at least two years, the consent holder shall undertake two annual helicopter counts of salmonids (one prior to and the other during peak spawning (March to May)) in the Wairau River between the Power Station 5 tailrace confluence and The Wash bridge.

68. Prior to the commencement of in-river construction activities and for at least two years, the consent holder shall undertake continuous water temperature monitoring at the following sites along the Wairau River, or such other sites as determined and described in the approved Aquatic Ecology Management Plan:
   (a) Either at The Wash bridge or at the Scheme intake site;

(b) A site known as 'Marchburn' located just upstream of the Power Station 5 tailrace confluence;

(c) A site approximately 1000 metres downstream of the Power Station 5 tailrace confluence.

69. The consent holder shall ensure that the results from the monitoring undertaken in accordance with conditions 60-68 are reported and a copy of this report submitted to the Consent Authority as part of the Aquatic Ecology Management Plan prior to the commencement of construction.

River Birds

70. Prior to the commencement of construction the consent holder shall prepare, and implement a Pre-Scheme Black-Fronted Tern and Black-Billed Gull Research and Monitoring Plan. This plan shall be prepared and submitted to the Consent Authority for approval in accordance with Condition 11. This Plan shall be prepared in consultation with the Department of Conservation, Royal Forest and Bird Protection Society and the Ornithological Society of New Zealand and with input from a biostatistical expert.

71. The purpose of the Pre-Scheme Black Fronted Tern and Black-Billed Gull Research and Monitoring Plan shall be to build on current knowledge of the ecology of Black-fronted Terns and Black-billed Gulls on the Wairau River to ensure that there is a sound statistical base to enable the implementation of adaptive management to mitigate any adverse effects arising from the construction and/or operation of the scheme. The plan shall incorporate but not be limited to the following requirements whereby the consent holder shall be required to:

(a) Collect data on Black-Fronted Tern and Black-Billed Gulls and other river birds on the Wairau River during the nesting season October to January inclusive);

(b) Investigate the relationship between breeding success (including number of chicks fledged) and river flows;

(c) Determine the breeding success of Black-Fronted Tern and Black-Billed Gulls colonies and predation rates throughout the nesting season;

(d) Select monitoring sites including nesting sites within the diversion reach and outside of it and in sufficient numbers to ensure that monitoring is statistically valid and scientifically robust;

(e) Collect data for Black-Fronted Terns and Black-Billed Gulls at sufficiently regular intervals to effectively monitor egg and chick survival and fledging success during the nesting season (October to January inclusive) but in a manner that minimises disturbance to the birds;.

(f) Collect data including but not limited to:

(i) number of nests with eggs

(ii) number of eggs per nest

(iii) number of eggs hatched

(iv) number of failed eggs

(v) number of fledged chicks

(vi) details of the cause of death of eggs, chicks and adults, as far as practical.

(g) Collect data on other species of river birds if determined to be appropriate in the preparation of the Black-Fronted Tern and Black-Billed Gull Research and Monitoring Plan. Undertake surveys of the number and distribution of Black-Fronted Terns and Black-Billed Gulls and other river birds on the Wairau River for at least two years prior to the commencement of operation of the Scheme.

Advice note:

For the purpose of this condition, research and monitoring data may include data obtained prior to the grant of consent.

72. The consent holder shall submit the Pre-Scheme Black-Fronted Tern and Black-Billed Gull Research and Monitoring Plan to an expert peer review panel consisting of two appropriately qualified experts, one nominated on behalf of the consent holder and the second nominated by Department of Conservation. The expert panel shall review the plan having regard to, but not limited by, the purpose of the plan and criteria (a) to (g) set out in condition 71.

73. Prior to the commencement of construction of the scheme, the consent holder shall submit the Pre-Scheme Black-Fronted Tern and Black-Billed Gull Research and Monitoring Plan to the Consent Authority for approval. The report of the expert panel shall form part of the documentation submitted to the Consent Authority.

74. In the event that the expert panel cannot agree as to the appropriate research and monitoring and measures required, each expert shall submit their preference to the Consent Authority and the Consent Authority who shall then make the final decision as to the contents of the Pre-Scheme Black-Fronted Tern and Black-Billed Gull Research and Monitoring Plan. The Consent Authority may seek such independent expert advice as it thinks fits in its decision making.

75. Immediately following approval of the Pre-Scheme Black-Fronted Tern and Black-Billed Gull Research and Monitoring Plan the consent holder shall implement the Plan. The consent holder shall continue to implement the Plan so as to ensure that it obtains at least two years of research and baseline monitoring data prior to the commencement of operation of the scheme.

Advice note:

For the purpose of this condition, research and monitoring data may include data obtained prior to the grant of consent.

76. By the 15th of May each year, the consent holder shall submit to the Consent Authority a report prepared by an appropriately qualified expert detailing the results of the annual research and monitoring required under condition 71. The consent holder shall provide a copy of this report to the Department of Conservation, Royal Forest and Bird Protection Society and the Ornithological Society of New Zealand.

Terrestrial Vegetation and Wetlands Management

77. The consent holder shall ensure that a Vegetation Management Plan is prepared and submitted to the Consent Authority for approval in accordance with Condition 11. The formulation of this plan shall be carried out in consultation with the Department of Conservation, New Zealand Fish and Game Council and the Royal Forest and Bird Protection Society.

(a) In formulating the Vegetation Management Plan the consent holder shall ensure that the following objective is achieved:

(i) That adverse effects on terrestrial vegetation and wetlands are appropriately avoided, remedied or mitigated throughout the construction and operation of the Scheme.

(b) The purpose of the Vegetation Management Plan shall be to determine the approach ~~to be adopted~~ to monitoring, assessment and mitigation that will be implemented by the consent holder related to the construction and operation of the scheme to address the actual and potential effects of the scheme on terrestrial vegetation and wetlands. The plan shall include the following details:

(i) A description of the vegetation protection and restoration associated with the scheme;

(ii) The proposed monitoring of the existing significant vegetation and wetlands within the scheme footprint to be undertaken, in order to verify predictions; and

(iii) Identification of a range of contingency measures which can be implemented if necessary.

78. In accordance with the Vegetation Management Plan the consent holder shall ensure that the following objectives are achieved:

(a) Protect as much as possible of the presently isolated and fragmented copses of remnant indigenous vegetation within the RAP 15 (as shown on Figure 1: Proposed Protection and Restoration contained in the Vegetation and Wetlands Management Plan) *Argyle Kanuka* complex at Traverse Spur;

(b) Connect the RAP 15 sites by way of protecting stands of exotic forest that provide habitat linkages and also by way of additional plantings of native vegetation. Exotic stands will be managed towards a greater presentation of indigenous vegetation;

(c) Establish an appropriate and functional forest type in the revegetation sites, both at RAP 15 and in the Canal 4 and 5

embayments. These revegetation plantings will need to be dominated by indigenous species which in the past would have characterised the area;

(d) Establish indigenous wetlands within the Regulating Pond, and within Canal 4 and 5 embayments, which will serve as waterfowl and wader habitat;

(e) Assist in the natural regeneration cycle that is presently occurring within some of the existing shrubland and stonefield habitat at RAP 15, and assist in the conversion of the exotic habitat linkages referred to above into native bush corridors;

(f) Restore self sustaining ecosystem processes within the rehabilitated, linked and revegetated areas, including natural regeneration, successional processes, evolving habitat opportunities, soil formation, seed dispersal and nutrient cycling;

(g) Implement ongoing ecological management of the protected and restored sites, including pest, predator and weed control.

79. Subject to condition 80, as part of meeting the obligations inherent in condition 77, the consent holder shall prepare and submit a Vegetation Protection and Restoration Plan (being a sub-set of the wider Vegetation Management Plan) for the approval of the Consent Authority. This Plan shall be required to achieve the following:

(a) The legal protection of 18.7 ha of existing ecologically significant indigenous bush, including 10.7 ha of RAP 15 Argyle Kanuka and an area of manuka shrubland that may be unique within the context of the Hillersden Ecological District;

(b) The legal protection of 15.6 ha of exotic forest (comprising a variety of species) that presently provides functional connections (i.e. ecological corridors) between the otherwise fragmented remnants of RAP 15 Argyle Kanuka;

(c) The gradual replacement of the exotic component of these existing corridors with indigenous forest species, by way of incremental ring-barking and low-level direct efforts such as seed-broadcast by hand or planting within the created light wells;

(d) The passive ecological restoration of 6.7 ha of presently regenerating shrub land and moss-stone field habitat at RAP 15 Argyle Kanuka;

(e) The active revegetation (ie physical planting) of 3.6 ha of native forest at RAP 15 Argyle Kanuka;

(f) The active revegetation (ie physical planting) of 4.3 ha of indigenous wetlands at RAP 15 Argyle Kanuka;

(g) The active revegetation (ie physical planting) of 1.2 ha of native riparian forest around the Canal 4 and Canal 5 embayments;

(h) The active revegetation (ie physical planting) of 1.0 ha of indigenous wetlands at the Canal 4 and Canal 5 embayments;

(i) Control of weeds as well as animal pests and predators in the RAP 15 Argyle Kanuka area and at the Canal 4 and Canal 5 embayment revegetation sites.

80. The consent holder shall use best endeavours to secure the legal protection of the lands and habitats specified in condition 79. In the event that the consent holder is unable to secure such protection in some instances, the consent holder shall in consultation with the Department of Conservation and the Consent Authority, provide equivalent protection elsewhere for alternative indigenous habitat of at least the same ecological value, or otherwise provide works in lieu of protection up to a similar dollar value that would have been associated with the protection of alternative sites.

81. As part of meeting the objectives inherent in condition 77, the consent holder shall prepare and submit a Vegetation Monitoring Plan (being a sub-set of the wider Vegetation Management Plan) for the approval of the Consent Authority. This Plan shall be required to set out methods necessary to:

(a) Monitor the existing native terrestrial bush and shrub lands within the Wairau River, its margins, and in areas influenced by the canal construction, to determine whether or not there are any adverse effects directly attributable to the lowering or mounding of groundwater levels and the lowering of average river stage height associated with the construction and operation of the scheme;

(b) Monitor the natural wetlands and riparian willow stands within the Wairau River and its margins to determine whether or not there are any adverse effects directly attributable to the lowering or mounding of ground water levels and the lowering of average river stage height.

82. The consent holder shall ensure that the monitoring conducted to give effect to the Vegetation Monitoring Plan includes the following measures:

(a) Establishment of a full set of sites and identification of a sub-set of bush sites suitable to provide sufficient information about the existing ecological health of native terrestrial bush and shrub lands within and adjacent to the margin of the Wairau River.

(b) The completion of a baseline (pre-construction) survey including:

(i) a survey of the vegetation health of up to seven bush sites (all north bank) and two control sites; and

(ii) monthly piezometer readings at all monitoring sites (as required by the Groundwater Management Plan).

CONSTRUCTION

Construction Management Plan

83. The consent holder shall implement and adhere to the requirements of the Construction Management Plan required by condition 16 at all times during construction of the scheme.

84. The consent holder shall ensure that the scheme is constructed in generally accordance with conditions 23 – 26.

In-River Construction Works Management

85. No fuel storage or machinery refuelling shall be undertaken within 50 metres of a surface water body as defined by the Resource Management Act.

Advice note:
Water body (RMA Definition): means fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area.

86. Bunds will be positioned around the perimeter of fuel stores and the bunded area shall be lined with an impermeable layer to capture spills and clean-up equipment shall be maintained in a serviceable manner at each fuel store throughout the duration of the construction period.

87. In carrying out construction works in relation to the intake site, the tailrace and any other in-river works (including the Wairau River main stem and south bank tributary water bodies) the consent holder shall:

(a) Keep the affected working area to a practicable minimum and ensure that all plant and machinery working in the river is cleaned so as to be free of weeds or pest plants or seeds prior to entering the water;

(b) As far as practicable, work outside the flowing water;

(c) Ensure that any reinstatement of works after floods ~~are~~is, as far as practicable, on the recession of the flood, while the river flow is still naturally turbid;

(d) Install velocity barriers to prevent the upstream movement of fish at the end of all operational outfalls;

(e) Ensure that no construction or diversion activities occur within 50 metres of an occupied Black-Fronted Tern or Black-Billed Gull nesting area;

(f) Prior to undertaking any construction or maintenance activities in the months 1 July to 31 January (inclusive), ensure that a river bird nesting survey is undertaken by a suitably qualified expert to determine the location of any nests / nesting areas. A copy of this report shall be provided to the Consent Authority and the Department of Conservation.

(g) Ensure that any diversion of river braids for the purpose of the intake, facilitation of operational sediment flushing and outfall works does not: prevent an existing water channel from flowing between any Black Fronted Tern nesting colony and the river bank, or impede fish passage; and

(h) Ensure that the installation of culverts adheres to the Fish Passage Guidelines prepared by the Department of Conservation (1999).

(i) Ensure that public access to the Wairau River is maintained as far as practicable throughout the construction period but in a manner consistent with maintaining public safety.

For the avoidance of doubt, this condition applies only during the construction of the Scheme and shall not apply during operation to works in the Wairau River bed necessary after flood events or freshes to reinstate flow diversions or repair bunds.

Scheme Construction Earthworks

88. In carrying out all earthworks (excluding earthworks necessary for the construction of the canal which are addressed in condition 89 below and in-river works undertaken in the bed of the Wairau River and its tributaries being those water courses covered in conditions 87 and 90), the consent holder shall adopt the recommendations of the Environment Canterbury Erosion and Sediment Control Guidelines 2007 for control and treatment of storm water runoff including the following measures:

(a) Divert clean runoff around the construction area;

(b) Contain runoff from a worked site in a pond to settle sediment before discharge to the receiving stream or water;

(c) Where practicable, pass the discharge through a grassed swale to further reduce the sediment load to be discharged to the receiving stream or water;

(d) Provide protection against erosion and entrainment of further sediment at the discharge point;

(e) Reinstate and re-grass any worked areas as soon as practicable following completion of earthworks or where there will not be any works for more than six months, in order to minimise the potential entrainment of sediment in water.

89. In carrying out earthworks relating to the construction of the canals and head ponds, the consent holder shall (without derogating from the guidelines referred to in condition 88):

(a) Divert clean runoff around the construction area;

(b) Capture storm runoff from worked areas and treat in ponds prior to discharge to receiving streams or to clean water drainage channels;

(c) Where practicable, pass the discharge through a grassed swale to further reduce the sediment load to be discharged to the receiving stream or water;

(d) Provide protection against erosion and entrainment of further sediment at the discharge point;

(e) Keep the worked area to a practicable minimum, and reinstate as soon as practical following the completion of any work;

(f) Ensure that those areas of natural vegetation that are to be retained post construction of the scheme are protected by a 10 metres wide buffer from earthworks and that other areas of natural vegetation are not used for staging or turning areas, avoid disturbing the

surface of such areas and where such areas are disturbed, reinstate as soon as practical following the completion of such work;

(g) Collect groundwater and "clean" surface runoff and convey it along the invert of the canal to the first convenient discharge point; and keep the catchment area for any discharge point as small as practicable;

(h) Keep machinery and haul roads out of flowing water (except as indicated below in condition 90 relating to stream crossings);

(i) The consent holder shall create a register of names and contact details of the downstream property owners and implement a communication and complaints protocol with these owners.

90. In carrying out earthworks relating to stream crossings, the consent holder shall adopt the following standards:

(a) Keep work areas outside flowing water as far as practicable;

(b) If there is continuous flowing water, install a temporary culvert or other practicable method to convey base flows in the event that a haul road needs to cross the stream;

(c) Construct stream crossings in stages so that there is always a floodway available outside the work area or via completed permanent structures;

(d) Where the method imposed by condition 90(b) is to be implemented, the culvert is to be constructed adjacent to the stream and once finished, the stream is to be diverted through the culvert;

(e) Reinstate worked areas as soon as practicable following completion of the work;

(f) When installing culverts a minimum diameter of 300mm shall be utilised.

Dust Management

91. In order to mitigate the effects of dust nuisance the consent holder shall undertake the revegetation of any earthworks areas (including stockpile areas) within one month of completion of construction works on a particular site or if earthworks are not planned on the particular site for a period of more than two months.

92. If climatic conditions are such that revegetation of worked areas is not successful then the consent holder shall as soon as practicable undertake necessary additional mitigation measures to ensure that dust nuisance does not occur.

93. Where construction activities are to occur within 100 metres of a residence, the consent holder shall offer to temporarily relocate the affected persons of that residence. The relocation may be to other residences in the Wairau Valley, or other accommodation as agreed individually by the resident and the consent holder. The rights created by this condition shall also extend to any person who is living within the "construction envelope" which is attached as Figure D to these conditions

who is able to demonstrate to the satisfaction of the Consent Authority by reference to an objective ambient air quality monitoring standard and on production of a medical certificate from a suitably qualified independent medical practitioner approved by the Consent Authority, that the resident or any person under their care has a respiratory condition which has been or is likely to be adversely affected by any discharges to air caused by the scheme construction works.

94. The dust mitigation measures identified in the Construction Management Plan shall be implemented by the consent holder at all times during the construction process.

95. The consent holder shall install real time particulate monitors adjacent to those properties whose owners choose not to be relocated as provided for in condition 93. Two trigger values will be established in consultation with the Consent Authority. The lower value will be used to warn construction staff and contractors that dust concentrations are increasing and that further mitigation measures as described in condition 18 are required. Where this trigger is exceeded, the mitigation in question shall be employed. The second value will be that at which all work affecting the said dwelling will be required to cease immediately. Where this trigger is exceeded, all work creating dust which affects the said dwelling shall cease until environmental conditions are such that the second value will not be exceeded by construction operations. The consent holder shall maintain a log of the monitoring data and shall make copies of the logs available to the Consent Authority when dust limits exceed the limits in condition 9~~6~~5 and/or upon request by the Consent Authority.

96. The consent holder shall ensure that the concentrations of nuisance dust attributable to construction activities do not exceed the Ministry for the Environment's dust nuisance criteria of 120~~um~~ug/m^3 as a 24 hour average for total suspended particulate, and 4g/m^2/30 days above ambient for deposited particulate, at the notional boundary of any residence on another site.

97. Where the construction activities causing dust discharges to air are within ~~1~~200m of a residence or where construction causing dust discharges to air occurs for more than six months within ~~2~~300m of a residence the consent holder shall offer to undertake the following:

(a) Internal cleaning services;

(b) External cleaning services;

(c) Provision of alternate arrangements for drying clothes, and

(d) Except where the occupants have been relocated under condition ~~8~~93, provision of air conditioning for so long as the activity will be in close proximity to the residence.

98. The consent holder shall schedule portions of the construction programme that have the potential to generate dust, to avoid work affecting properties within 100m of construction work during the spring, being from 1 September to 30 November inclusive.

Noise Management

99. The noise from construction works shall be measured and assessed in accordance with the requirements of NZS6803:1999 Acoustics – Construction Noise. The consent holder shall ensure that construction noise from the scheme complies at all times with the requirements of NZS6803:1999 Acoustics – Construction Noise.

Contaminated Sites

100. Should the consent holder uncover a contaminated site, it shall notify the Consent Authority and the consent holder shall formulate a method for remediation of the site. This method shall be submitted to the Consent Authority for approval.

The consent holder shall then implement the remedial action to the approval of the Consent Authority.

101. If any offal pits are uncovered during the construction of the scheme the consent holder shall undertake the following actions:

(a) Notify the Consent Authority;

(b) Temporarily cease all construction work within a 50m radius of the offal pit, until remediation as outlined in condition 101 (d) is completed;

(c) Take immediate steps to secure the offal pit against incursion by vermin such as rats and seagulls and cover the offal pit with clean fill to minimise odour until remediation can occur;

(d) Arrange immediately for compliance staff from the Consent Authority to investigate the discovery and provide recommendations for remediation. The consent holder shall follow these recommendations and provide confirmation in writing to the Consent Authority that it has done so, and arrange for a final inspection by the Consent Authority once remediation has been completed.

Cultural and Archaeological Protocols

102. The consent holder shall ensure that the Project Archaeologist or nominated representative appointed in accordance with condition 19 supervises all earthworks activity on sites identified in the survey undertaken in accordance with condition 19.

103. If any artefacts or historical, cultural or archaeological material, is found or uncovered whilst undertaking work authorised by this consent, the following shall be complied with by the consent holder:

(a) Work shall cease immediately within a 50m radius of the artefact or cultural, historical or archaeological material;

(b) Notice of the discovery shall be given, as soon as possible, to Te Runanga a Rangitane o Wairau, Ngati Toa Ki Wairau, Ngati Rarua Iwi Trust, and Ngati Apa Ki Te Waipounamu;

(c) No work shall recommence until 72 hours after advice has been given to such iwi or agreement reached between the parties regarding appropriate protection measures, whichever is the sooner;

(d) If any activity associated with the above proposal (such as earthworks and planting) is likely to modify, damage or destroy an archaeological site, an authority from the New Zealand Historic Places Trust must be obtained for the work to proceed lawfully. In the event that an archaeological site is encountered during work, all works must cease on the site and the New Zealand Historic Places Trust must be contacted as soon as possible.

Advice Note:
The consent holder is advised to consult with officers of the New Zealand Historic Places Trust regarding the need for any archaeological assessment of the site or archaeological authority prior to any earthworks or construction taking place.

In the event of the accidental discovery of any artefacts or historical, cultural or archaeological material the consent holder shall ensure that the Project Archaeologist or ~~their~~ nominated representative is on site within 48 hours to advise on and supervise the necessary course of action in general accordance with condition 103.

Fish Screen

104. To ensure the effectiveness of the fish screen and fish barriers in achieving the objectives in conditions 20 and 21 the consent holder shall undertake a trial to determine the efficacy of the proposed fish screen and fish barriers. The trial shall require the consent holder to trial the fish screen and fish barrier designs and refine the designs prior to the commissioning of the scheme to ensure the objectives as stated in condition 20 are achieved.

105. The consent holder shall prepare a report detailing the findings of the trial undertaken in accordance with condition 104 in particular the effectiveness of the fish screen and fish barriers and specifying whether any design refinements are required to achieve the objectives as stated in condition 20.

Sediment Retention Basin~~Pond~~

106. The consent holder shall construct the sediment retention basin~~pond~~ in accordance with the performance objectives outlined in condition 22..

Traffic Management

107. All traffic management measures associated with scheme construction shall be implemented in accordance with the Traffic Management Plan required by these conditions and with the New Zealand Transport Agency Code of Practice for Temporary Traffic Management including:

(a) If road closures or deviations are adopted then the effects on local traffic shall~~euld~~ be monitored in accordance with the Code of Practice for Temporary Traffic Management ~~to ensure~~and no traffic hazards or excessive disruption ~~are~~ created;

(b) The monitoring of the effect of dust on visibility at the haul road crossings;

(c) If traffic signals are installed at construction road/public road intersections, road safety audits and on-going monitoring will be required to ensure road safety is maintained and that excessive delays do not result in disruption to the public road traffic.

108. The consent holder shall ensure that Church Lane is not utilised as a haulage route at any time during construction of the scheme.

Landscape and Visual Amenity

109. The consent holder shall implement the requirements and methods set out in the Landscaping Plan required by condition 30 during, and where necessary post construction of the scheme. All planting obligations shall be completed within six months of the completion of work on the stage for which planting is intended. If any plant or tree should die or become diseased it shall be replaced with either the same or more suitable species, at the consent holder's expense.

Health and Safety

110. Prior to the commencement of operation of the scheme, the consent holder shall ensure that:

(a) Warning signs are placed at the intake and immediately upstream of the rock groyne, warning people that the southern channel is a power station intake, and to keep out;

(b) Signage is erected in locations agreed by the Consent Authority indicating the potential for river flow fluctuations downstream of the intake structure;

(c) These signs shall be maintained by the consent holder for the duration of these consents; and

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~~(c)~~(d) The consent holder shall erect and maintain warning notices informing people about the variable nature of the discharges from Power Station 5. Such notices shall be placed adjacent to the downstream end of the outfall from Power Station 5 and at Fish and Game access points in the vicinity of the outfall.

111. The consent holder shall implement an early warning system to assist in advising residents in the vicinity and users of affected waterways that are designated spillways that spilling from the canal is about to occur and/or sediment flushing is about to be carried out within the Wairau River.

Recreation

112. Prior to the commencement of operation of the scheme, the consent holder shall ensure that:

(a) A haul-out area for kayaks is provided on the Wairau River upstream of the scheme intake channel;

(b) Play facilities for kayakers are provided below Power Station 5 and within the canal above the scheme outlet;

(c) The design and operation of the intake structure on the Wairau River enables kayaks and jet boats to pass safely and continue along the Wairau River; and

(d) Appropriate pedestrian access is provided to the Wairau River for the public in the vicinity of the existing Fish and Game access at Tapps Road.

113. The consent holder shall ensure that the design of the recreational facilities in condition 112 shall generally accord with the layout plans submitted as part of the consent application.

Dam Safety and Surveillance Management Plan During Operation (Scheme Design)

114. Structures authorised by this consent shall be designed, constructed and maintained for the life of the consent in accordance with the NZSOLD Dam Safety Guidelines, November 2000 (and any subsequent amendments).

115. Prior to the commencement of operation of the scheme, commissioning procedures, operation and maintenance manuals and safety management plans (including an Emergency Action Plan) which meet the recommendations of the NZSOLD Guidelines shall be prepared by the consent holder and submitted to the Consent Authority for approval.

Community Liaison Group and Complaints Procedure

116. Prior to the commencement of construction and at all times during construction of the scheme, the consent holder shall establish and operate a Community Liaison and Complaints Procedure as follows:

(a) The consent holder shall have a clearly nominated and publicly communicated contact person within its own organisation or ~~with~~in one of its local agents for complaints during construction;

(b) The consent holder shall establish a 24 hour complaints freephone number for the local community to call if they have any concerns regarding construction. The freephone number shall be advertised in the local newspaper prior to the commencement of construction and at regular periods during construction;

(c) The consent holder shall maintain a log of any complaint received including the following: the date, time, complainant name and contact details, nature of the complaint including the cause and effect if known, record of action taken to address or mitigate the complaint;

(d) The consent holder shall respond to complaints as soon as is practicable but not later than 24 hours and shall log the action that it intends to take in response to the complaint;

(e) The consent holder shall communicate with the complainant about all actions taken;

(f) The consent holder shall document any other longer term actions to be taken;

(g) The consent holder shall present an incident summary (ie (b) to (e) above) to the meetings of the Community Liaison Group for review; and

(h) The consent holder shall make the complaints and response log available to the Consent Authority on request.

117. The Community Liaison Group ~~if established in accordance with condition 116~~ shall meet as decided by members of the ~~committee~~Group during both the construction and post construction of the scheme to receive and deal with any feedback or complaints from affected members of the local community.

118. The consent holder shall provide the Community Liaison Group with a copy of all environmental monitoring reports once they have been completed. The reports shall be submitted to the Community Liaison Group at the same time as they are submitted to the Consent Authority.

119. During construction of the scheme the consent holder shall ensure that independent social monitoring is undertaken. Social monitoring shall include interviews with residents and community members within the vicinity of the scheme. The interviews shall be undertaken once every six months during the construction period and a report shall be prepared. The consent holder shall submit a report outlining the results of the social monitoring to the Consent Authority and Community Liaison Group along with an action plan of how the consent holder intends to mitigate the concerns raised. The report and plan shall be submitted not later than four weeks after it is prepared.

Southern Tributaries

120. The consent holder shall ensure that it does not modify the low flow regime of Walkers Stream, or Mill Stream during construction or operation of the scheme. For the purposes of this condition low flow shall be considered to be any flow below the median flow. The regime shall be monitored during construction by gauging stations immediately upstream and downstream of the canal as specified by condition 38.

121. The consent holder shall use reasonable endeavours to ensure that existing water flows into Mill Stream and Walkers Stream are not disturbed or affected by the construction of the scheme.

122. The consent holder shall continue to monitor all permanent gauging stations used to derive the relationships ~~derived~~ in accord with conditions 38 and 39 during the construction and operation of the scheme, and

supply that information to the Consent Authority in electronic format on a daily basis.

123. The consent holder shall ensure that all construction work affecting Mill Stream and Walkers Stream is conducted and completed between 1 November and 15 April.

Groundwater Management

124. During the construction period the consent holder shall implement the mitigation and monitoring regime as described in condition 49.

125. Where reporting and/or monitoring (including Complaint Logs in accordance with condition 127) are required to be undertaken by the consent holder then unless specifically stated elsewhere, the consent holder shall supply such information to the Consent Authority on a monthly basis.

126. In addition, for each de-watering discharge point the following records shall be kept:

(a) Daily records of the peak and average discharge flow;

(b) A description of the discharge point; and

(c) A daily field measurement of the discharge water quality to determine the pH, electrical conductivity and turbidity of the discharge.

127. The consent holder shall establish a Groundwater Complaints Log. This log will operate throughout the construction period and record complaints or concerns which are related to changes in groundwater conditions or changes in surface waterways due to groundwater activities and the subsequent response actions taken by the consent holder.

128. The consent holder shall analyse the groundwater monitoring data. The analysis shall be provided to the Consent Authority and should identify:

(a) A comparison with the measurements made before the construction activities commenced;

(b) Comparison with measurements made outside of the areas that could be affected by the scheme activities.

129. The consent holder shall implement mitigation measures as described within the Groundwater Management Plan if the following triggers are breached during the construction period:

(a) A breach of the 'natural' range of fluctuations in the groundwater monitoring network ~~set out~~estimated in accord with condition 57(b) ~~above~~; or

(b) A discharge of a quality that is likely to cause abnormal exceedance or variances of existing levels of pH, electrical conductivity, alkalinity, E.Coli, Chloride, Nitrate-N, Nitrite-N, Ammonia-N, Total-N, Dissolved Reactive Phosphorous, Total Phosphorous and Arsenic in the receiving environment, as determined by the discharge quality

measurements that are undertaken as part of the water quality monitoring detailed in conditions 54 and 126; or

(c) In the event that a complaint related to credible groundwater effects is received.

130. If the consent holder receives a credible complaint related to groundwater effects and the nature of that complaint is such that an existing domestic or stockwater supply has been interrupted, the consent holder shall take all reasonable and necessary steps to immediately restore that supply or provide an alternative suitable supply of a standard that is of similar or better quality and quantity.

131. Following the construction period and prior to commencement of operation of the scheme the consent holder shall prepare a report for the Consent Authority detailing the groundwater monitoring that has been undertaken, the effects created by the construction activities and the mitigation measures that have been implemented. This report shall include all data collected as well as the recommendations as to the following:

(a) The future monitoring requirements;

(b) The trigger levels to be used during the operation of the scheme for determining any adverse effects on the groundwater system, or on those who rely on it;

(c) The mitigation measures to be maintained or implemented during the operational phase of the scheme.

132. The consent holder shall appoint an expert groundwater peer reviewer for the duration of the construction period associated with the scheme. The peer reviewer shall be nominated and appointed by agreement between the consent holder and the Consent Authority (and be the same person in accordance with condition 50). The groundwater peer reviewer may be called upon for determining any claim that changes to ground water conditions arising from scheme construction have caused a breach of the natural range of groundwater fluctuations whereby that breach removes or dewaters an existing well or groundwater take, or has caused an abnormal exceedance of existing levels of those values referred to in conditions 57 and 129 within the area defined within condition 51.

Process for the Assessment of Claims

133. If the Consent Authority is notified of an adverse effect of the nature specified in condition 127 by the owner of an existing well or groundwater take (claimant) within the area defined by condition 51, or it has been necessary for the consent holder to take remedial action in accordance with condition 130, then:

(a) The Consent Authority (or a suitably qualified nominee) and the consent holder (or a suitably qualified nominee) shall undertake a joint inspection of the affected site;

(b) If the Consent Authority forms the view that there are reasonable grounds for the claim and that the effect may be a result of the exercise of this consent, the Consent Authority shall formally notify the claimant that the consent holder will either remedy the adverse effect if that has not occurred already or invite the claimant to refer the claim to the groundwater peer reviewer;

(c) If following assessment the groundwater peer reviewer concludes that the claimed breach or exceedance was caused by the scheme construction then the consent holder shall take steps to remedy the breach or exceedance at its own cost if it has not done so already;

(d) For the purpose of this condition the findings of the groundwater peer reviewer shall be binding to both parties;

(e) The consent holder may, instead of undertaking any remedial work or completing the assessment process, choose to negotiate with the claimant to undertake or pay the cost of those remedial works directly to the claimant, or otherwise reach agreement with the claimant in respect of any damage;

(f) For the purpose of this condition, remedy shall include a water supply of similar, or better quality ~~or~~and quantity as determined by the groundwater quality monitoring in conditions 57 and 129;

(g) If the groundwater peer reviewer concludes that the claimed breach or exceedence was not caused by the scheme construction then the consent holder shall not be required to take remedial action. If remedial action has already been implemented in accordance with condition 130, then all reasonable costs associated with remedy shall be reimbursed to the consent holder by the claimant.

134. The consent holder shall ensure that in the event that there is any discharge required for remediation purposes, the discharge shall be strictly limited to that needed to remedy any breach or exceedance identified in accordance with conditions 129 or 130.

135. ~~Should disagreement arise in relation to the remedial actions proposed or undertaken in accordance with conditions 133(e) - (g) t~~The Groundwater Management Plan shall set out procedures to resolve any ~~such~~ disputes that may arise in relation to the remedial actions proposed or undertaken in accordance with conditions 133(e) - (g).

Aquatic Ecology - Main Stem

136. The consent holder shall be responsible for the implementation of the Aquatic Ecology Management Plan throughout the construction and operation of the scheme, and its regular review as appropriate. Any review of the Aquatic Ecology Management Plan shall be completed to the satisfaction of the Consent Authority to ensure that it meets the objectives set out in condition 58.

137. During the in-river construction works the consent holder shall conduct the following monitoring:

(a) Abundance and distribution of benthic macroinvertebrates, periphyton and fish;

(b) Water quality, including clarity, electrical conductivity, dissolved oxygen, pH, Nitrate/Nitraite-Nitrogen, Ammonia-Nitrogen, Total-Nitrogen, Dissolved Reactive Phosphorous, Total Phosphorous and suspended sediment.

138. The consent holder shall ensure that the monitoring required by condition 63(a)–(c) is undertaken:

(a) In November, February, and May of each year or as close as possible to these months should high flows prevent effective sampling over these months, for benthic macroinvertebrates, periphyton and fish.

(b) In November, February, May and August of each year or as close as possible to these months should high flows prevent the effective sampling over these months for water quality.

139. The consent holder shall ensure that the monitoring in condition 63(a)–(c) throughout the construction period is undertaken at the sites listed in condition 65.

140. During the in-river construction works the consent holder shall undertake an annual drift dive survey of the salmonid population at the sites listed in condition 66.

141. During the in-river construction activities the consent holder shall undertake continuous water temperature monitoring at the following sites along the Wairau River:

(a) Either at The Wash bridge or at the Scheme intake site;

(b) A site downstream of the Wairau power station;

(c) A site known as 'Marchburn' located just upstream of the Power Station 5 tailrace confluence;

(d) A site approximately 1km downstream of the Power Station 5 tailrace confluence;

(e) The Scheme canal ~~water~~ in the immediate vicinity of Power Station 5.

142. The consent holder shall ensure that the results from the monitoring undertaken in accordance with conditions 137-141 are analysed and submitted to the Consent Authority.

143. The contingency actions contained in the Aquatic Ecology Management Plan are to be implemented if the analysis of the information gathered from the monitoring undertaken in accordance with conditions 137–141 shows that the triggers set out in Condition 59 have been breached.

River Birds

Management Plan

144. Prior to commencement of operation of the scheme, the consent holder shall prepare a Black-fronted Tern and Black-billed Gull Work Plan and Programme for the first five years of scheme operation. The Black-fronted Tern and Black-billed Gull Work Plan and Programme shall be a rolling five year plan which is revised annually to update research, monitoring and work obligations for the life of the Scheme and it shall include an annual work programme. The need for this work plan and programme shall be reviewed at five yearly intervals. The Black-Fronted Tern and Black-Billed Gull Work Plan and Programme shall incorporate, but not be limited to, the following provisions:

(a) The objectives of the Black-Fronted tern and Black-Billed Gull Work Plan and Programme shall be to:

(i) Monitor and assess the effects of the scheme and associated management actions on river birds, particularly Black-Fronted Terns and Black-Billed Gulls;

(ii) Ensure that good quality breeding and foraging habitat is retained within the Wairau River environment for Black-Fronted Terns and Black-Billed Gulls;

(iii) ~~Ensure that~~Reduce mortality at nests of Black-Fronted Terns and Black-Billed Gulls ~~does not increase as a result of the scheme~~;

(iv) Improve knowledge and techniques for management of Black-Fronted Terns and Black-Billed Gulls.

(b) The Work Plan and Programme shall contain the methods for estimating Black-Fronted Tern, Black-Billed Gull and other river bird abundance and distribution on the Wairau River during the breeding season using data collected in accordance with condition 71;

(c) An appropriate five year monitoring and work programme outlining methods shall include (but not be limited to):

(i) The type and timing of monitoring of aquatic invertebrates and fish (including Dwarf Galaxias (*Galaxias divergens*)), including monitoring during the October to January (inclusive) bird nesting season, and the means by which data shall be incorporated into the analysis of food supplies and feeding by Black-Fronted Terns and Black-Billed Gulls.

(ii) Methods for identifying any biologically significant difference between pre-scheme and post-scheme breeding success and populations of Black-Fronted Terns and Black-Billed Gulls. These methods shall include assessments of the fledging success of Black-Fronted Terns and Black-Billed Gulls within and outside the diversion reach and shall include the use of a biostatistical expert to determine whether there has been a biologically significant change in fledging success.

(iii) Predator control that is required to be implemented in the scheme diversion reach of the river in order to assist in meeting the objectives of the Black-Fronted Tern and Black-Billed Gull Work Plan and Programme set out in condition 144(a).

(iv) Methods for managing any reduction in the population and/or breeding success (including fledgling success) of the Black-Fronted Tern and Black-Billed Gulls, as a result of the scheme including but not limited to aquatic food availability, flow management, predator control, habitat enhancement including shrub weed removal at known breeding sites, and the means by which the consent holder will implement these methods.

(v) The reporting obligations of the consent holder during operation to detail the monitoring that has been carried out, the effects created by the scheme, the mitigation measures that were implemented and the cost of implementing the monitoring and mitigation measures.

(d) The work plan and programme shall set out the projected costs of implementing the five year monitoring and mitigation measures.

(e) The work plan and programme shall set out the details of the annual work programme to be implemented in the following year including the projected costs of implementing the programme.

(f) The consent holder shall investigate the efficacy of a public awareness and education campaign aimed at raising awareness of the conservation status of Black-Fronted Terns and Black-Billed Gulls in the Wairau River Catchment.

(g) The Black-fronted Tern and Black-billed Gull Work Plan and Programme shall incorporate an obligation on the consent holder to establish and implement predator control for the habitat of the birds within the scheme diversion reach of the Wairau River, from October to January each year.

Advice note:

For the purposes of these conditions:
A biologically significant difference for Black-Fronted Terns is a negative growth rate, as estimated from pre-scheme and post-scheme bird counts. One approach for estimating population growth rate would be to use general linear models. However, the final method will be confirmed with a biostatistician, in consultation with the Department ~~O~~of Conservation and stakeholders.

For Black-Billed Gulls, a biologically significant difference in population size is defined as a negative growth rate which is greater (steeper decline) than the existing (negative) growth rate for Black-Billed Gulls. The rationale for this is that because Black-Billed Gulls are currently declining, monitoring should aim to detect further decline, beyond that which is already occurring.

A biologically significant difference for Black-Fronted Tern and Black-Billed Gull breeding success is defined as a fledgling success rate less

than that determined through pre-scheme research and monitoring studies.

145. Prior to the commencement of the operation of the scheme and annually thereafter the consent holder shall submit the Black-Fronted Tern and Black-Billed Gull Annual Work Plan and Programme to an expert peer review panel. The panel shall consist of two appropriately qualified avifauna experts, one nominated by the consent holder and one nominated by the Department of Conservation. The panel shall be assisted by a mutually agreed biostatistical expert. In undertaking the review the expert panel shall have regard to, but not be limited by, the purposes and objectives of the plan and the provisions ~~criteria (a) to (f)~~ set out in condition 144.

146. Prior to the commencement of operation of the scheme the consent holder shall forward the Black-Fronted Tern and Black-Billed Gull Work Plan and Programme to the Consent Authority for approval. A report of the expert panel on the efficacy of the work plan and programme shall form part of the documentation submitted to the Consent Authority.

147. In the event that the expert peer review panel cannot agree as to the appropriate course of monitoring and measures required, each expert shall submit their preference to the Consent Authority who shall then make the final decision as to which programme of works and monitoring will be required during the operation of the scheme. The Consent Authority may seek such independent expert advice as it thinks fit to assist in its decision making.

148. The consent holder shall be responsible for meeting the costs of the approved monitoring and management measures included in the Black-Fronted Tern and Black-Billed Gull Annual Work Plan and Programme and the annual work programme provided that:

(a) The maximum amount payable over the term of the consent shall not exceed $3 million (the amount outstanding at the end of each year shall be adjusted by an amount equivalent to the increase in the Consumer Price Index);

(b) In the event that the $3 million referred to in 148(a~~d~~) has been fully expended and Black-fronted Tern numbers are in decline as a direct result of the operation of the scheme determined in accordance with condition 217, a further $1 million will be made available (adjusted annually by an amount equivalent to the increase in the Consumer Price Index);

(c) The maximum amount of funding to be made available in any single year shall not exceed $200,000 (adjusted annually by an amount equivalent to the increase in the Consumer Price Index).

Advice Notes:

1. *The purpose of condition 144(c)(i) shall be to evaluate habitat retention for Deleatidium mayfly (Waitaki) and ensure that the desired minimum 80% habitat retention for Deleatidium mayfly (Waitaki) assessed as a monthly median averaged over the*

diversion reach of the Wairau River from 1 October to 31 January is being achieved.

2. *As a general principle the amount to be made available annually for implementation of the measures specified in condition 148(c) shall exceed the amount to be used on monitoring and research.*

3. *For the avoidance of doubt, the consent holder's financial liability under condition 148 in terms of funding to be made available for the Black-fronted Tern and Black-billed Gull Annual Work Plan and Programme shall not exceed $4 million over the term of the consent (provided that the amount outstanding at the end of each year shall be adjusted by an amount equivalent to the increase in the Consumer Price Index).*

Terrestrial Vegetation and Wetlands Management

149. The consent holder shall during the construction period implement the requirements of the Vegetation Management Plan. Monitoring conducted to give effect to this management plan shall include the following measures:

(a) Routine monitoring of the sub-set of three Impact Bush Sites and one Control Site;

(b) Routine monitoring of ~~all~~ wetland sites, willows and two of the Control Sites;

(c) Routine monitoring shall be undertaken at six monthly intervals over the course of the construction phase;

(d) Routine monitoring shall also include monthly piezometer readings at all monitoring sites;

(e) Routine monitoring shall include single wetland specific one-off surveys involving a single pre and a single post construction sampling run at the wetland sites when canal excavations occur in their immediate vicinity.

150. (a) In the event that monitoring undertaken in accordance with conditions 149 shows ~~the following effects have occurred~~ a deterioration in the Vegetation Health Indices (as specified in the Vegetation Management Plan) ~~and these effects are, in the opinion of~~the consent holder shall appoint an expert peer reviewer ~~appointed by the consent holder,~~to determine if the effects are attributable to the construction or operation of the scheme~~., then the consent holder shall implement the contingency responses outlined in condition 150(b):~~

~~(i) Obvious dieback in the canopy of any of the stands of indigenous vegetation within the wider Scheme footprint, as may be observed over the course of the route monitoring surveys, or otherwise reported by the local community; or~~

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~~(ii) Greater than 10% dieback of indigenous canopy along any of the 3 transects at any one monitoring site; or~~

~~(iii) Greater than 10% mortality of key understorey indigenous species within all 3 plots along any one transect; or~~

~~(iv) Discolouration and/or wilt of leaves in more than 25% of the indigenous vegetation within all 3 plots along any one transect; or~~

~~(v) Mortality of greater than 10% of indigenous wetland plants (recorded by tier and species) as evidenced by direct observation of dead vegetative material; or~~

~~(vi) A reduction in the species diversity of indigenous wetland plants of greater than 10%; or~~

~~(vii) Significant decrease in the size of the indigenous part of the wetland (greater than 10%); or~~

~~(viii) Replacement of greater than 10% of indigenous wetland species by terrestrial or weed species.~~

~~(c)~~(b) If the expert reviewer considers the effects to be attributable to the scheme ~~T~~the consent holder shall, in consultation with the Consent Authority, prepare and implement an appropriate contingency response plan in accordance with the Vegetation Management Plan. ~~The contingency response plan may include the following:~~

~~(i) Supplying water to the affected stands on the south bank directly from the canal to the extent that the observed health decline is halted;~~

~~(ii) Supplying additional water to affected stands on either the south bank or the north bank by excavating around spring discharge areas to enhance the hydraulic efficiency of the spring outlet;~~

~~(iii) Supplying additional water to affected stands on the south bank or the north bank by excavating deeper inverts within existing tributary streams to provide enhanced inflows to affected areas under lowered water table conditions;~~

~~(iv) Supplying additional water to affected stands on the south bank or the north bank by works at the confluence of north bank tributaries with the Wairau River.~~

~~(v) If necessary and practicable, the translocation of affected plants to a safe area.~~

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OPERATIONAL

Fish Screen, Barrier and Bypasses

151. The consent holder shall operate, maintain and monitor the fish screen, ~~and~~ fish barriers and bypasses ~~in accordance with condition 104~~to ensure the objectives stated in condition 20 are achieved.

152. In the first year of operation of the Scheme the consent holder shall prepare and submit quarterly monitoring reports as to the effectiveness of all aspects of the fish screening and barrier systems, including the size of the screen to the Consent Authority. Each monitoring report shall be submitted to the Consent Authority no later than 4 weeks following its completion. The monitoring reports shall include an evaluation by an independent expert of the effectiveness of all aspects of the fish screening and barrier systems, including the fish screen size.

Dam Safety and Surveillance Management Plan During Operation

153. The consent holder shall ensure that inspections and safety reviews of structures shall be carried out in accordance with the recommendations of the NZSOLD Guidelines.

154. The consent holder shall provide affected residents or landowners with at least one weeks notice prior to carrying out any planned maintenance work associated with the scheme that may affect them.

Community Liaison Group and Complaints Procedure

155. The Community Liaison Group referred to in condition 33 shall meet as required by condition 117.

156. The consent holder shall provide the Community Liaison Group with a copy of all environmental monitoring reports once they have been completed. The reports shall be submitted to the Community Liaison Group at the same time as they are submitted to the Consent Authority.

Southern Tributaries

Mill Stream /Walkers Stream

157. The consent holder shall ensure that it does not modify the low flow regime of Walkers Stream or Mill Creek during operation of the scheme. For the purposes of this condition low flow shall be considered to be any flow below the median flow. The regime shall be monitored by gauging stations immediately upstream and downstream of the canal.

158. The consent holder shall use reasonable endeavours to ensure that existing water flows into Mill Creek and Walkers Stream are not disturbed or affected by the operation of the scheme.

159. The consent holder shall continue to monitor all permanent gauging stations used to derive the relationships derived in conditions 38 and 39 during the operation of the scheme, and supply that information to the Consent Authority in electronic format on a daily basis.

160. The consent holder shall compare monitored flow data at Walkers Stream and Mill Creek with the predicted derived relationships on an ongoing

basis to determine whether flow regimes have been affected by the scheme operation and report to the Consent Authority on a monthly basis.

161. In the event that low flows at the downstream monitoring sites are lower than the flows predicted by the derived relationships the consent holder shall release sufficient water from the canal to Mill Stream to maintain the natural low flow regime as determined under conditions 38 and 39. Such a release of water shall be via a vegetated swale, sufficient to ensure no decrease in water quality or clarity in the receiving stream.

162. The consent holder shall ensure that any discharge from the canal into Mill Stream is discharged via the vegetated swale at a point as close as practicable to the Canal.

163. The consent holder shall keep records of all recorded and predicted data, and of any releases ~~to~~of water, and make these available to the Consent Authority on an annual basis (following data audit) for verification. Daily data will be made available in an electronic format as required by condition 159.

Vegetated Swale

164. In the event that the consent holder is required to convey water from the Canal into Mill Stream in accordance with condition 161, the consent holder shall convey the required water via a vegetated swale constructed by the consent holder at its cost in general accordance with the following:

(a) Be fenced with a standard six wire fence along both sides of its length where it traverses through land used for farming;

(b) Be formed and vegetated prior to the commencement of the operation phase of the scheme;

(c) Be maintained (either mechanically or by grazing of sheep only - not cattle) at least once per year to ensure that excessive vegetation does not cause flooding of the adjacent farm land and so that an unimpeded flow of water along the swale can occur at all times.

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Use of Emergency Spillways

165. Where practicable, the consent holder shall notify Ormond Aquaculture Limited not less than 24 hours prior to using the Emergency Spillways within the Mill Stream catchment. Where it is not practicable to do so the consent holder shall notify Ormond Aquaculture Limited immediately upon the use of such emergency spillways.

Monitoring of Water Quality in Mill Stream / Walkers Stream

166. For a period of two years following the commencement of the scheme operation, the consent holder shall at its own cost conduct water quality monitoring in Mill Stream and Walkers Stream in accordance with the methodology established under condition 46.

167. The consent holder shall report the results of the monitoring conducted under condition 166 to the Consent Authority, with a copy being made to

Ormond Aquaculture Limited and Nelson Marlborough Fish and Game Council to determine whether any observed changes result in an adverse effect on water quality.

168. In the event that the results of the monitoring under condition 166 show the quality of the water has deteriorated the consent holder shall immediately and, at its own cost, appoint an appropriately qualified independent expert:

(a) To identify the cause of the deteriorated water quality; and

(b) In the event the expert concludes that the scheme has caused the deterioration of the water quality, to provide recommendations for remedial action to return the water quality to the baseline standard.

169. In the event that the independent expert's assessment concludes that the scheme has caused the deterioration in water quality in Mill Stream and Walkers Stream the consent holder shall forthwith undertake the recommended remedial action to return the water quality to the baseline water quality standard.

170. The consent holder shall ensure that no herbicide is applied to the water being conveyed in Canal 8A (being the reach of canal that traverses Mill Stream).

171. The consent holder shall monitor fish passage at the Mill Stream culvert within Canal 8A and shall ensure that fish passage is maintained to the satisfaction of the Consent Authority.

Upland Bully Monitoring

172. At five yearly intervals in November the consent holder shall monitor upland bully presence in Saltwater, Hillersden and Walkers tributaries upstream of the flumes which intersect with the canal. In the event that upland bully is not present, and that event coincides with a known period of drought then in the following spring the consent holder shall transfer rocks with upland bully egg masses and adults of both sexes into that tributary reach to assist recolonisation.

Flow Regime

173. The consent holder shall cease abstraction from the Wairau River intake once the flow rates in the Wairau River exceed $200m^3/s$ as measured at The Wash bridge recorder site.

174. The consent holder shall cease abstraction from the Wairau River intake when the flow in the Wairau River measured at the Wash Bridge is below $10m^3/s$.

175. The consent holder shall cease abstraction from the Wairau River intake when the flows in the Wairau River measured at the permanent flow monitoring station installed in the Wairau River immediately downstream of Power Station 5 (pursuant to condition 182(c)) is below $14m^3/s$.

176. The consent holder shall ensure that the scheme operation is such that the minimum residual flows in the Wairau River below the scheme intake (as derived by differencing the flows as measured at The Wash bridge recorder site and the take to the scheme) accords with the following:

(a)	January - July	10m³/s
(b)	August	12m³/s
(c)	September	15m³/s
(d)	October - November	20m³/s
(e)	December	15m³/s

Provided that when the natural instantaneous flow immediately upstream of the Wairau intake is less than the flows detailed in condition 17660 (a) to (e) above the residual flow shall be equal to the natural instantaneous flow immediately upstream.

Flow Sharing 1st October to 31st January

177. During the period 1st October to 31st January, the consent holder shall adhere to an additional flow sharing regime to that imposed via condition 176. This flow sharing regime shall apply whenever the Wairau River flows at The Wash bridge recordered site exceed the following flows:

(a)	October – November	25m³/s
(b)	December	20m³/s
(c)	January	15m³/s

This flow sharing obligation shall only apply to that portion of the flow that passes The Wash bridge recorder that exceeds the flow (a) – (c) above. When the flows in (a) – (c) above are exceeded the consent holder shall ensure that the minimum total flow in the Wairau River immediately below the Goulter River confluence equals the residual flows in condition 176 plus one third of any of the flow above the limits in (a) to (c) above.

The total Wairau River flow immediately below the Goulter confluence shall be derived by totalling the following:

(i) Wairau River residual flow at the scheme intake (as derived by differencing the flows measured at The Wash bridge recorder site and the take to the scheme)

(ii) Branch River residual/spill flow.

(iii) Wairau Power Station tailrace discharge flow.

(iv) Goulter River flow.

Monitoring

178. The total flow data measured ~~at the tailrace~~ in accordance with condition 177 shall be recorded at hourly (average) intervals and forwarded

electronically to Marlborough District Council's website twice daily at 12 hourly intervals. The information provided to the Consent Authority shall include all flows (i) to (iv) above and the total of all flows being the derived total Wairau flow immediately below the Goulter River confluence.

~~*Advice Note*~~

~~*For the avoidance of doubt, provided that the residual flows in conditions 177 are met, this condition shall not require the consent holder to release further flow into the Wairau River where the additional one third flow above the levels in condition 177 (a) to (c) is met immediately below the Goulter River confluence using the method for deriving total flow set out below including, but not limited to, the inflow from the Goulter River.*~~

~~*The flow sharing regime established under condition 177 is intended to provide at least 80% habitat retention for Deleatidium mayfly (Waitaki) assessed as a monthly median average over the diversion reach of the Wairau River from 1 October to 31 January.*~~

179. The consent holder shall ensure that the scheme operation is such that the minimum residual flows in the Wairau River immediately upstream of the Power Station 5 discharge as derived by differencing the flows as measured at the Wairau River recorder (as described in Condition 182(c)) and the Power Station 5 discharge shall accord with the following:

(a)	January - July	15m³/s
(b)	August	17m³/s
(c)	September	20m³/s
(d)	October - November	25m³/s
(e)	December	20m³/s

Provided that when the natural instantaneous flow immediately upstream of the Wairau River intake is less than the flows detailed in condition 179(a) – (e) above the residual flow shall be equal to the natural instantaneous flow immediately upstream of the Wairau intake plus 5m³/s.

Advice Note:
The flows referred to in condition 179 are net of all other consented abstractions in the ~~affected~~diversion reach consented prior to the lodgement of TrustPower's application.

180. In the event that the flows in condition 176 are not realised, a top-up flow will be released from the ~~existing~~ Wairau Power Station tailrace or via the tailrace from the regulating pond located below the ~~existing~~ Wairau ~~P~~power ~~S~~stations to achieve the required minimum flow in condition 176. When the Wairau River Intake is closed, however, top up flow shall not be less than the instantaneous flow abstracted by the Branch Hydro Electric Power Scheme (as measured by the Branch River de-silting basin discharge weir).

181. The consent holder shall undertake gauging checks in the ~~affected~~diversion reach of the Wairau River once the scheme is

operational over a range of flow conditions to confirm that the flows required by conditions 176 and 179 are consistently achieved. These gaugings are to be undertaken quarterly until a stable relationship is derived:

(a) Upstream and downstream of the Wairau River Intake

(b) Upstream of Hillersden

(c) Upstream of Wairau Valley

(d) Immediately upstream of the Power Station 5 discharge.

182. The consent holder shall ensure that the following monitoring equipment is installed, maintained and monitored to the satisfaction of the Consent Authority. The consent holder shall prepare a map showing the location of the equipment and shall install the equipment in the locations shown on the map or within 100m of those locations.

(a) Existing hydrological monitoring at the Branch Hydro Electric Power Scheme shall be continued to enable the accurate calculation of flows from the Branch River intake on a real time basis;

(b) A generation flow versus station generation (cumecs per MW) relationship and its variability under differing headwater and tailwater conditions shall be maintained and established for Power Station 5 such that station flow can be accurately derived in real time;

(c) A permanent flow monitoring station shall be installed in the Wairau River immediately downstream of the Power Station 5 discharge to measure the total flow in the river; ie the sum of the residual flow upstream of Power Station 5 and the Power Station 5 discharges. The consent holder shall ensure that regular gauging of the residual flow (quarterly and following freshes) upstream of the Power Station 5 discharge is carried out to confirm compliance;

(d) Headwater and tailrace level gauges shall be installed to calculate the observed head differential for use in the calculation of generation flow; and

(e) Relocation or reinstatement ~~levels~~ of the Narrows (site 60119) water gauge currently used for flood warning purposes by the Consent Authority to provide a midpoint indication of the water level and flow response between Marchburn and Tuamarina. This site is not to be rated.

(f) A permanent flow monitoring station shall be installed in the Goulter River.

183. The permanent flow monitoring site to be installed by the Consent Authority at The Wash bridge will be used by the consent holder as an indicator of the total flow upstream of the Wairau River intake. The consent holder shall upgrade the telemetry at the Dip Flat site to act as a backup site, and shall ensure that the flow relationships between all three sites (Dip Flat, The Wash bridge and the Wairau River intake) are kept up to date. The consent holder shall ensure that regular gauging of the residual flow (quarterly and following freshes) downstream of the intake is carried out to confirm compliance.

Advice Note:
Any upgrade of the Dip Flat recorder shall be undertaken in accordance with the provisions of condition 236.

184. The consent holder shall continuously monitor (or derive by difference) the residual flow of the Wairau River in accordance with conditions 176 and 179. The monitoring shall be in real time and the residual flows data shall be recorded at hourly (average) intervals and forwarded electronically to the Marlborough District Council's website twice daily (at 12 hour intervals).

Power Station 5

185. The consent holder shall ensure that if and when instantaneous flows in the Wairau River fall to 15.5m^3/s as measured at Tuamarina, Power Station 5 will be operated at all times to ensure that the magnitude of the flow fluctuations at Tuamarina will be no greater than ±10% about the rolling 24 hour average flow measured at Tuamarina.

186. The consent holder shall ensure that whenever the 24 hour rolling average inflow to Power Station 5 exceeds 5m^3/s the discharges from Power Station 5 are operated at all times to ensure that the minimum discharge (base flow) does not fall below 50% of the 24 hour rolling average inflow.

187. The consent holder shall ensure that Power Station 5 is operated to ensure that the discharge from it does not exceed a maximum ramping rate of 20m^3/s per hour.

188. On one occasion per calendar year from the commencement of operation the consent holder shall manage the discharge from Power Station 5 such that the discharge occurs on a steady state basis for a continuous 24 hour period to enable the Consent Authority to undertake state of the environment aquifer monitoring within the lower reaches of the Wairau River catchment as follows;

(a) The steady state discharge shall occur when flows as measured at Tuamarina are less than 50m^3/s and the daily average river flow has been in a natural decline for a minimum of 7 days.

(b) In order to provide a variety of monitoring opportunities, the steady state discharge shall occur within two different flow ranges in alternate years in one year in flows below 25m^3/s as measured at Tuamarina, and in the following year in flows between 25m^3/s and 50m^3/s as measured at Tuamarina.

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(c) For the 24 hours previous to, and during the steady state discharge, the residual flows at the Wairau River and Branch River intakes shall be maintained at a constant rate.

(d) The consent holder shall provide not less than 72 hours notice to the Consent Authority that the steady state discharge from Power Station 5 is to occur subject to the river flow remaining in a state of natural decline.

(e) The steady state discharge shall commence between 12am and 5pm on the date advised, and continue for at least 24 hours.

(f) The commencement of the steady state discharge shall not be scheduled to occur on a Friday or Saturday, except with the specific approval of the Consent Authority.

(g) In the event that the steady state discharge is interrupted by rising river levels, or other scheme operational issues which cause the discharge flows to fall outside of the definition below, the Consent Authority may require the consent holder to repeat the steady state discharge.

Advice Note:
"Steady State discharge, in the context of this condition, shall mean that the discharge flow from the station shall be maintained within a range of ±10% or ±1m^3/s as measured by the flow discharge device at the outlet of Power Station 5, which ever is the lesser."

Northbank Tributaries

189. ~~The consent holder shall monitor, at least once per month during May – August (inclusive), and thereafter once every four months the connection between the Wairau River and its major northbank tributaries to ensure that flow connection is maintained and not interrupted by the formation of a gravel obstruction. In those circumstances where such obstruction occurs then the consent holder shall carry out remedial works to remove the obstruction to the satisfaction of the Consent Authority. For the purposes of this condition the north bank tributaries to be monitored are; Goulter River, Top Valley Stream, Timms Creek/Cat Creek, and Fabians/Bartletts Creek.~~

The consent holder shall monitor the connection between the Wairau River and Goulter River, Top Valley Stream, Timms Creek/Cat Creek and Fabians/Bartletts Creek to ensure flow connection is maintained and not interrupted by either the formation of a gravel obstruction or reduced surface water flows:

(a) Monitoring shall be carried out at least once a month during May – August (inclusive) in periods of low flow and once every four months for the remainder of the year;

(b) The consent holder shall submit the results of the monitoring to the Consent Authority with seven days of completion of the monitoring;

(c) In the event that the monitoring shows that connectivity between any of the monitored tributaries and the Wairau River has been lost, the

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consent holder shall immediately prepare and submit to the Consent Authority for approval a plan for restoring the lost connection and seek any necessary consents for its implementation;

(d) Having obtained the Consent Authority's approval and any necessary resource consents the consent holder shall immediately implement the plan in (c) to the satisfaction of the Consent Authority.

Spill Ways

190. The consent holder shall ensure that back up power systems or fail safe overrides are in place at critical locations being the isolating gates, to maintain key functions of the scheme operation at all times.

191. In the event that there is spill from an emergency spillway, the consent holder shall:

(a) Keep records of any spills that occur and responsive actions, and report to the Consent Authority where spills have caused damage and have required reparation;

(b) Maintain spill maps showing inundated areas and provide spill maps to the Consent Authority on request.

192. The consent holder shall ensure that the spillways and stabilising paths are inspected annually, consistent with NZSOLD requirements.

193. In the event that it is necessary to dewater the canal, the consent holder shall:

(a) Determine the rate and duration of any discharge required and, where the dewatering is via outlets other than the canal directly to the Wairau River, advise affected property owners by giving them at least 8 hours ~~of~~ notice that dewatering is to occur;

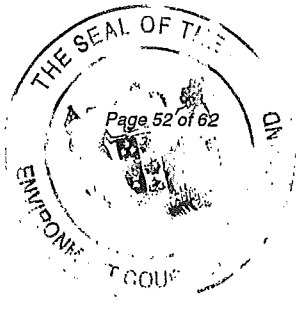
(b) Ensure that the rate and duration of discharge established in condition 193(a) will not be exceeded during dewatering of the canal;

(c) Inspect the downstream receiving waterway for any potential damage that might occur from the discharge prior to dewatering of the canal, and any effects on property or access, and put in place appropriate mitigation measures to avoid damage or nuisance;

(d) Ensure that the inspection undertaken in accordance with condition 193(c) shall be documented and the records held by the consent holder shall be supplied to any affected property owners identified in condition 193(a);

(e) Inspect the downstream receiving waterway for any damage following the dewatering of the canal event and reinstate any damage that occurs by a method agreed by the consent holder and the property owner directly affected as a result of the discharge; and

(f) During emergency situations where dewatering is undertaken, the consent holder shall use its best endeavours to achieve conditions 193(a)-(d) above.



Sediment Flushing

194. The consent holder shall ensure that sediment flushing from the sediment ponding area immediately in front of the intake ports and/or the sediment retention basin ~~adjacent to the intake into the Wairau River~~ only occurs if the following requirements are met:

(a) When the river flow is greater than 80m³/s as ~~measured~~determined immediately downstream of the intake ~~at the Wash Bridge recorder site~~ and the river hydrograph is likely to rise further (the flow is to be determined by differencing the flow as measured at The Wash bridge recorder site and the intake flow);

(b) ~~When t~~The turbidity in the river is greater than 5.6 NTU (nephielometric turbidity units) as recorded at The Wash bridge recorder site;

(c) Sediment flushing shall not occur during the period 1 May to 31 July except where necessary to avoid compromising the operation of the intake pond or the sediment retention basin. ~~The basin o~~Operation of these facilities will be deemed to be potentially compromised, and flushing will be allowed during the trout spawning season, in the event that more than 65% of the designed sediment storage capacity is filled with sediment~~.~~;

~~(c)~~(d) The intake pond and the sediment retention basin shall not be flushed simultaneously but may be flushed sequentially on the same flow event.

195. The consent holder shall keep reliable records of sediment flushing activities and, shall supply a copy of relevant reports to the Consent Authority within 48 hours of each event.

196. The consent holder shall maintain a significant river braid continuous with each sediment~~the~~ flushing outlet~~,~~ to facilitate the conveyance of the flushed sediment~~,~~ and provide for the safe passage of fish from the fish screen bypass leading from the sediment retention basin.

197. The sediment flushing channel must be separate from the fish bypass.

198. For the purpose of assessing the effects of sediment flushing, the mixing zone shall extend to the confluence of the Branch River with the Wairau River

199. Where practicable during the first year of scheme operation, the consent holder shall give advance notice to the Consent Authority and to nominated representatives of the Department of Conservation and of Nelson Marlborough Fish and Game Council of the possibility that a flushing event might occur. As soon as practicable after the decision by the consent holder to commence flushing, these parties shall be notified that flushing has commenced.

200. The consent holder shall monitor sediment flushing flows as follows:

(a) ~~During sediment flushing, the consent holder shall m~~Maintain continuous records of turbidity at ~~t~~The Wash bridge recorder site,

~~upstream end of the intake channel adjacent to the river, and~~ in the sediment flushing outlet channel and in the channel containing the major portion of the flushed sediment immediately upstream of the Branch confluence.

~~(b) For each sediment flushing event the consent holder shall calculate the time series for sediment concentration in each part of the river upstream of the intake, and in the fully mixed river flow downstream of the flushing channel.~~

~~(c)~~(b) These records ~~and calculations~~ shall be available to the Consent Authority on request within two weeks of a flushing event occurring, or on 48 hours notice at other times.

Groundwater Management

201. During the operation of the scheme the consent holder shall implement the monitoring and mitigation regime as described in condition 131.

202. Within 12 months following the commencing of the operation of the scheme the consent holder shall analyse the groundwater monitoring data. The analysis shall be provided to the Consent Authority and will identify:

(a) A comparison with the measurements made before the scheme activities commenced; and

(b) Comparison with measurements made outside of the areas that could be affected by the scheme activities.

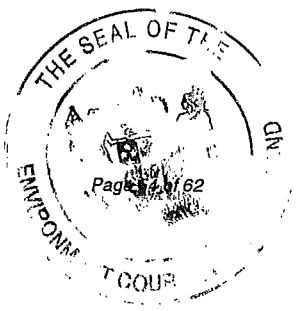
203. The consent holder shall implement mitigation measures as described within the Groundwater Management Plan if the following triggers are breached during the operation of the scheme:

(a) A breach of the 'natural' range of fluctuations in the groundwater monitoring network set out in condition 131.

(b) A discharge of a quality that is likely to cause an abnormal exceedance or variances of existing levels of pH, electrical conductivity, alkalinity, E.Coli, Chloride, Nitrate-N, Nitrite-N, Ammonia-N, Total-N, Dissolved Reactive Phosphorous, Total Phosphorous and Arsenic in the receiving environment, as determined by the discharge quality measurements that are undertaken as part of the water quality monitoring detailed in condition 131.

(c) In particular, the consent holder shall ensure that a water supply of similar, or better, quality and quantity is available to all groundwater users located within the area that is affected by groundwater changes resulting from the scheme activities, as determined by the groundwater level monitoring specified in condition 131.

(d) The provisions set out in conditions 133, 134 and 135 for assessing and addressing claims shall also be available during the operation of the scheme if there is a breach of the triggers set out herein.



204. Within six months following the first two years of operation of the scheme the consent holder shall prepare a report for the Consent Authority detailing the groundwater monitoring that has been undertaken, the effects created by the operation of the scheme and the mitigation measures that have been implemented.

Aquatic Ecology - Main Stem

205. The consent holder shall be responsible for the implementation of the Aquatic Ecology Management Plan through the operation of the scheme and its regular review as appropriate. Any review of the Aquatic Ecology Management Plan shall be completed to the satisfaction of the Consent Authority to ensure that it meets the objectives set out in condition 58.

206. During the operational phase of the scheme the consent holder shall for a period of at least three years, continue to monitor at the sites listed in condition 65 to determine:

(a) Abundance and distribution of benthic macroinvertebrates, periphyton and fish;

(b) Water quality, including clarity, electrical conductivity, dissolved oxygen, pH, Nitrate/Nitrite-Nitrogen, Ammonia-Nitrogen, Total-Nitrogen, Dissolved Reactive Phosphorous, Total Phosphorous, and suspended sediment;

(c) Water temperature.

207. In the event that the monitoring undertaken in accordance with condition 206 shows that the early warning triggers identified in the Aquatic Ecology Management Plan have been exceeded then the consent holder shall report the monitoring results to an Ecological Advisory Group (EAG) made up of three independent and suitably qualified aquatic ecologists (approved by the Consent Authority). The EAG shall determine:

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(i) Whether the recorded reduction or change is likely to be prolonged, or is a result of a natural perturbation, or a short term or unforeseen event; and

(ii) Whether the Scheme has contributed to or caused the recorded reduction or change.

(a) If in the opinion of the EAG the reduction or change is likely to have been caused by the operation of the Scheme, the EAG will recommend an appropriate contingency action which could include, amongst other things:

(i) A change to the minimum flow regime to the extent necessary to reverse the reduction or change and restore the ecological health of the affected reach of the river.

(b) The consent holder shall implement the recommendation of the EAG in accordance with condition 207 to the satisfaction of the Consent Authority. In the event that benthic invertebrates, periphyton, fish communities, water temperature and/or water

quality parameters have not been restored to levels within the trigger values identified in condition 59 in monitoring carried out subsequent to the implementation of the recommendations of the EAG, the Consent Authority may review the conditions of consent.

208. In the first year of operation of the scheme the consent holder shall monitor four sediment flushing events from the sediment retention basin to assess the effects on embeddeness on rifle habitats and water clarity. The monitoring shall be undertaken at the following sites in the Wairau River immediately before and as soon as practicable after the flushing event:

(a) A site known as 'Six Mile' located approximately 12km upstream of the bund associated with the intake for the scheme, to be used as a control site;

(b) A site known as 'Airstrip' located approximately 1 – 2km upstream of the bund associated with the intake for the scheme, to be used as a control site;

(c) A site approximately 1km downstream of the Scheme intake;

(d) A site known as 'Wairau Valley' located approximately midway between the intake for the scheme and the Power Station 5 tailrace confluence with the Wairau River;

(e) A site known as 'Marchburn' located just upstream of the Power Station 5 tailrace confluence;

(f) A site approximately 1km downstream of the Power Station 5 tailrace confluence;

(g) A site known as 'Renwick' located approximately 500m upstream of the Renwick Bridge (SH6).

209. The consent holder shall ensure that the monitoring of the sediment flushing events in accordance with condition 208 is undertaken using the black disk method to assess clarity.

210. (a) In the event that the monitoring undertaken in accordance with condition 208 shows:

(i) A 25% increase in the embeddedness of riffle habitats within the diversion reach over two consecutive monitoring occasions ~~through the diversion reach~~ relative to pre operational levels and upstream control sites; and/or;

(ii) A decrease in water clarity downstream of the diversion reach greater than 50% relative to upstream control sites;

then the consent holder shall form an Ecological Advisory Group.

(b) The ~~consent holder shall be required to form an~~ EAG shall be made up of three independent and suitably qualified aquatic ecologists (approved by the Consent Authority) to determine:

(i) whether the recorded change is likely to be prolonged or is a result of a natural perturbation, or a short term or unforeseen event; and

(ii) whether the scheme has contributed to the recorded change.

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(c) If in the opinion of the EAG the change is likely to have been caused by the operation of the scheme, the EAG will recommend an appropriate contingency action which could include amongst other things:

(i) Reducing the sediment concentrations in the flushing discharge by approximately 25% by using alternative methods of disposal.

(d) The consent holder shall implement the recommendation of the EAG in accordance with condition 210(c) to the satisfaction of the ~~e~~Consent ~~a~~Authority. In the event that embeddedness and water clarity have not been restored to levels within the trigger levels identified in condition 210(a) in monitoring carried out subsequent to the implementation of the recommendations of the EAG, the ~~e~~Consent ~~a~~Authority may review the conditions of consent.

211. (a) The consent holder shall operate the Scheme to ensure that it does not cause or exacerbate conditions which impeded trout spawning migration.

(b) The consent holder shall as part of the Aquatic Ecology Management Plan include methods to ensure that trout spawning migration is not impeded as a result of the Scheme including the following requirements:

(i) Monitor the daily mean flows calculated immediately below the Goulter River confluence (derived in accordance with ~~the methodology contained in~~ condition 177) during the ~~trout spawning season~~period from 1 ~~April~~March to 30 June each year;

(ii) In the event that from 1 ~~April~~March to 30 June each year the daily mean flow falls and remains below 20m^3/s for 30 consecutive days the consent holder shall ensure that on the next fresh of 45m^3/s or more (calculated below the Goulter) the flow in the river, immediately below the Goulter confluence, is at least 45m^3/s for at least 48 hours.~~:~~

~~(a) Flows fall below 15m^3/s calculated immediately below the Goulter confluence; and~~

~~(b) Remain below 20m^3/s calculated immediately below the Goulter confluence for the following 40 consecutive days.~~

~~(iii) As soon as viewing conditions permit immediately conduct an aerial survey of the Hillersden reach to check for any groups of adult trout greater than 25 in number in a single pool in the Hillersden reach.~~

~~(iv) In the event that any groups of trout greater than 25 in number in a single pool are identified, ensure that on the next fresh of 45 cumecs or more (calculated immediately below the Goulter~~

~~River confluence) the residual flow in the river is at least 45 cumecs (calculated immediately below the Goulter River) on the recession of the fresh for at least 48 hours to facilitate adult trout spawning migration.~~

~~(v) As soon as viewing conditions permit immediately following the action set out in (iv) above, repeat the aerial survey to check whether any groups of adult trout greater than 25 in number remain in a single pool in the Hillersden reach.~~

~~(vi)~~(iii) ~~Re-implement the actions in (iv) and (v) above until such time as no groups of adult trout greater than 25 in number remain in a single pool in the Hillersden reach.~~

212. (a) In the event that nuisance periphyton growth (~~exclu~~including didymo) has occurred in the Wairau River relative to pre-operational levels and/or the control sites for two consectutive monitoring occasions, the consent holder shall ensure that when ambient river flows increase to 150m3/s as measured at The Wash bridge recorder site following an extended period of low summer flow (ie conditions under which nuisance growths of periphyton have developed), the scheme intake shall be closed or water shall be diverted back to the river via the ~~sedimentation~~intake pond for a 24 hour period.

(b) Should nuisance levels of periphyton re-establish or persist an additional flushing flow is not required sooner than six weeks following a flushing flow provided in accordance with condition 212(a) or a high flow event in accordance with condition 173.

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Advice Note:

For the purpose of this condition, a nuisance periphyton growth shall be defined as a 60% maximum cover of diatoms/cyanobacteria on the visible stream bed that is >0.3cm thick or a 30% maximum cover of filamentous algae on the visible stream bed that is >0.2cm long between 1 November and 30 April in any given year.

213. The consent holder shall notify surrounding land_owners and water abstractors of the intent to utilise herbicide control in the canal not less than four weeks in advance.

River Birds

214. Following commissioning of the scheme the consent holder shall immediately implement the monitoring and measures required by the Wairau Valley Black-Fronted Tern and Black-Billed Gull Work Plan and Programme in accordance with conditions 144 to 148. The consent holder shall continue to implement this plan for as long as such a plan is required in accordance with condition 144.

215. A report detailing the results of monitoring and management work undertaken in accordance with the Black-Fronted Tern and Black-Billed Gull Work Plan and Programme shall be reviewed by the expert panel

established under condition 145. The consent holder shall submit the monitoring and management report together with the review panel's report to the Consent Authority following the ~~for the~~ completion of monitoring in February each year by 1 May in the same year.

216. In the event that a biologically significant decline in Black-Fronted Tern and/or Black-Billed Gull population and/or fledging success is reported under condition 215 the consent holder shall instruct the expert panel required under condition 145 to advise the Consent Authority on the probable reasons for the reduction in fledging success. The expert panel shall prepare and submit a report to the Consent Authority by 31 July each year assessing whether the decline in population and/or fledging success is likely or unlikely to be a result of the scheme.

217. (a) In the event that a biologically significant decline is reported under condition 215 and unless in the opinion of the expert panel that decline is unlikely to have been caused by the scheme, the consent holder shall obtain further advice from the expert panel as to what measures should be implemented immediately in order to mitigate ~~against~~ the decline, including determining whether it is necessary to increase the minimum residual flow during the river bird nesting season.

(b) Upon the receipt of the advice from the expert panel the consent holder shall implement the recommended measures.

218. In addition to the requirements of condition 21~~7~~5 the consent holder shall instruct the expert panel to:

(a) Prepare a report outlining and assessing methods for avoiding further reductions in fledging success in the next breeding season including where appropriate, but not limited to implementation of:

(i) a permanent increase in the minimum residual flow during the river bird nesting season;

(ii) further or amended predator management techniques; and/or:

(iii) habitat enhancement measures.

(b) This report shall be submitted to the Consent Authority ~~for approval~~.

219. If in accordance with condition 21~~7~~8(a) the expert panel recommends that the minimum residual flow should be permanently altered then a review of the conditions of consent by the Consent Authority shall be undertaken in accordance with condition 22~~6~~30. If a review is conducted in accordance with condition 22~~6~~30, the consent holder shall continue to implement the measures required by condition 21~~7~~8 during the river bird nesting season for the duration of the review period.

220. The consent holder shall place and maintain annually during the period 1 October to 31 January at public access points on the diversion reach as defined in the Annual Work Plan and Programme, appropriate signs advising of the Black-Fronted Tern and Black-Billed Gull nesting colonies and of the importance of avoiding disturbance to birds during the nesting season. This shall be completed in consultation with the Department of Conservation.

Advice Note:

For the purpose of these conditions fledging success means the percentage of eggs laid that produce a fledged chick.

Terrestrial Vegetation and Wetlands Management

221. The consent holder shall implement the requirements of the Vegetation Management Plan throughout the operation of the scheme. Monitoring shall be undertaken in accordance with the management plan and include:

(a) Routine monitoring of the sub-set of three Impact bush sites, as well as ~~all~~three wetland sites, ~~willows~~ and two control sites.

(b) Routine monitoring shall include monthly piezometer readings at all monitoring sites.

222. The consent holder shall monitor Vegetation Health Indices and ~~undertake Photo Surveys~~implement contingency actions if required in accordance with the Vegetation Management Plan. ~~This monitoring shall be undertaken at 6 monthly intervals for an 18 month period following the commissioning of the Scheme.~~

~~223. Following the initial 18 month monitoring period identified in condition 222, the consent holder shall monitor Vegetation Health Indices and piezometers readings annually for a period of five years, and from there, once every five years for the consent term.~~

~~224. In the event that monitoring undertaken in accordance with conditions 222 shows the following effects have occurred and these effects are, in the opinion of an expert peer reviewer appointed by the consent holder, attributable to the construction or operation of the scheme, then the consent holder shall implement the contingency responses outlined in condition 225~~

~~(i) Obvious dieback in the canopy of any of the stands of indigenous vegetation within the wider Scheme footprint, as may be observed over the course of the route monitoring surveys, or otherwise reported by the local community; or~~

~~(ii) Greater than 10% dieback of indigenous canopy along any of the 3 transects at any one monitoring site; or~~

~~(iii) Greater than 10% mortality of key understorey indigenous species within all 3 plots along any one transect; or~~

~~(iv) Discolouration and/or wilt of leaves in more than 25% of the indigenous vegetation within all 3 plots along any one transect; or~~

~~(v) Mortality of greater than 10% of indigenous wetland plants (recorded by tier and species) as evidenced by direct observation of dead vegetative material; or~~

~~(vi) A reduction in the species diversity of indigenous wetland plants of greater than 10%; or~~

~~(vii) Significant decrease in the size of the indigenous part of the wetland (greater than 10%); or~~

~~(viii) Replacement of greater than 10% of indigenous wetland species by terrestrial or weed species.~~

~~225. The consent holder shall in consultation with the Consent Authority prepare and implement an appropriate contingency response plan. The contingency response plan may include the following:~~

~~(i) Supplying water to the affected stands on the south bank directly from the canal to the extent that the observed health decline is halted;~~

~~(ii) Supplying additional water to affected stands on either the south bank or the north bank by excavating around spring discharge areas to enhance the hydraulic efficiency of the spring outlet;~~

~~(iii) Supplying additional water to affected stands on the south bank or the north bank by excavating deeper inverts within existing tributary streams to provide enhanced inflows to affected areas under lowered water table conditions;~~

~~(iv) Supplying additional water to affected stands on the south bank or the north bank by works at the confluence of north bank tributaries with the Wairau River.~~

~~(v) If necessary and practicable, the translocation of affected plants to a safe area.~~

Flow Measurement

2236. The consent holder shall ensure that the following international standards are adhered to for all flow measurements associated with the scheme as may be relevant.

(a) ISO/TR 8363:1997 Measurement of liquid flow in open channels – New General guidelines for selection of method.

(b) ISO 11655:1995 Measurement of liquid flow in open channels – Method of specifying performance of hydrometric equipment.

(c) ISO 748 Measurement of liquid flow in open channels – Velocity area methods.

(d) ISO/TS 24154 Hydrometry – Measuring river velocity and discharge with acoustic Doppler profilers.

(e) ISO 110-1 Measurement of liquid flow in open channels – Part 1; Establishment and operation of a gauging station.

(f) ISO 110-2 Measurement of liquid flow in open channels – Part 2; Determination of the stage-discharge relation.

REVIEW CONDITIONS RELATING TO GROUNDWATER, FISH SCREENS & RIVER BIRDS

2247. The conditions of this consent with respect to groundwater management may be reviewed in accordance with section 128 of the Resource Management Act 1991 at the following times:

(a) At any time up to six months after the consent holder completes the reporting required under condition 57;

(b) At any time up to six months after the consent holder completes the reporting required under condition 131;

(c) At any time up to six months after the consent holder completes the reporting required under condition 204;

(d) At five yearly intervals thereafter.

~~228.~~ *Advice note:*

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The results of all investigations and surveys will be used by the Consent Authority to assess whether the project is likely to have, or is having, any unforeseen and significant adverse effects on the groundwater resource within the area defined within the Groundwater Management Plan required by condition 51.

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2259. The conditions of consent concerning fish screens may be reviewed by the Consent Authority pursuant to section 128 of the Resource Management Act 1991 upon receipt of a report under condition ~~136~~152 which concludes that the fish screening system is not meeting the terms of these conditions

22630. The conditions of this consent with respect to River Birds may be reviewed in accordance with section 128 of the Resource Management Act 1991 at the following times:

(a) Immediately upon the receipt of a report under condition 2169 which concludes that there has been a biologically significant reduction in breeding success and that an alteration to the residual flow regime is necessary to mitigate ~~against~~ the decline in river bird population decline.

(b) At any time following the commencement of construction of the Scheme to address any unanticipated effects of the Scheme on avifauna (including, for the avoidance of doubt, any reduction in breeding success as a result of the Scheme).

Advice note:

It is recorded that this review condition is not intended to restrict, replace or abrogate the right of the Consent Authority to review the consent pursuant to the provisions of s128(1)(c) and section 132(4) of the Resource Management Act 1991.

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22731. The conditions of this consent with respect to Aquatic Ecology may be reviewed upon receipt of any report that trigger levels set in Condition 59 have been breached.

BEFORE THE LAND VALUATION TRIBUNAL **LVT-05-13**
AT TAURANGA DISTRICT COURT

	IN THE MATTER OF	**THE PUBLIC WORKS ACT 1981**
	BETWEEN	RUSSELL LEONARD TAYLOR and DULCIE MAY TAYLOR Applicants
	AND	THE MINISTER FOR LAND INFORMATION NEW ZEALAND Respondent

This Judgment was delivered by me at 11.30am 4 July 2014

M. J. Carruthers
Deputy Registrar
District Court
Tauranga

Hearing:	30 April, 1,2,5,6 & 9 May 2014-06-26
Court:	Judge T R Ingram - Chairperson L T Green - Member
Appearances:	Mr Crombie and Ms Hymers for the Applicants Mr Parker and Ms Jacobs for the Respondent
Judgment:	4 July 2014

RESERVED DECISION OF WAIKATO BAY OF PLENTY
NO: 4 LAND VALUATION TRIBUNAL

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[1] Mr and Mrs Taylor owned a dry-stock pastoral unit at Bell Road, Papamoa. The property straddles the local authority boundary, with 39.64 hectares lying in the Western Bay of Plenty District Council and 118.5 hectares in the Tauranga City Council jurisdiction. The land is irregularly shaped, with two frontages on to Bell Road at the southern end, with a long boundary fronting on to an existing residential development at the northern end.

[2] The topography of the block includes a narrow corridor of swampy ground, of approximately 9 hectares at the northern end adjoining the current residential development, with the southernmost 45 hectares approximately being peat flats, and 104 hectares of undulating sand country to the north.

[3] The development of Papamoa into a substantial residential suburb of Tauranga has been a significant feature of regional local body planning for the last two decades. The development of a long term growth strategy led in 2005 to Tauranga City Council taking steps to update its city plan by promulgating Plan Change 44, which among other things, was designed to deal with the increasing need for a proper arterial route through the developing portion of Papamoa and generally out to the south-east of the city. Plan Change 44 was in gestation for a period of approximately six years until May of 2011, when it was adopted.

[4] Plan change 44 designated a corridor of land for a motorway, now described as the Tauranga Eastern Link (TEL). A number of routes had been proposed for the TEL, and the one chosen was the "sand hills route" which avoided the peat lands of inland Papamoa, generally pursuing areas of sand country in preference to peat, because of the much higher cost of road building in peat country.

[5] The TEL cut straight through the middle of Mr and Mrs Taylor's farm, almost exactly on the boundary between Tauranga City Council and the Bay of Plenty District Council land. The land taken by the Crown to construct the TEL comprises a corridor of some 7.5606 hectares running east to west, including two segregation strips of 0.0169 and 0.0166 hectares respectively. The land taken was all in pasture, and it included the buildings on the property.

[6] Mr and Mrs Taylor are entitled to compensation for the taking of their land under the provisions of the Public Works Act 1981, and an agreement was entered into on 29 June 2011 under which the Crown agreed to purchase the land and to pay interim compensation in the sum of $1.44 million, with the Taylor's retaining the right to bring a claim for compensation. That agreement was later varied on 22 December 2011, increasing the sum payable to the Taylors by $279,000 plus GST, in return for the Taylors assuming responsibility for carrying out access work from Palm Springs Boulevard, which the Crown had agreed to complete in the agreement. That sum is consideration for a Crown obligation arising in the original transaction. It is not compensation for land taken.

[7] Mr and Mrs Taylor filed and served a Notice of Claim requiring this claim to be heard by the Land Valuation Tribunal at Tauranga on 20 May 2013. The hearing of this claim commenced in the Tribunal on Wednesday the 30th of April 2014, and on Thursday the 1st of May this Tribunal inspected the subject property, and a number of other properties which were being proffered by various valuers as comparable sales. The inspection was undertaken in the company of junior counsel and a valuer from each side.

[8] The hearing took place over a period of six days, and evidence was given by a number of very experienced valuers; Messrs Smithies, Dean, Boyd, Harris and Gamby. Economic evidence was given by Mr Dickens. Planning evidence came from Messrs Frentz and Batchelar. A cadastral surveyor, Mr Cowles also gave evidence. A property developer, Mr Clark, also gave evidence. Detailed opening and closing submissions were provided by Mr Crombie for the Taylors and Mr Parker for the Crown.

[9] The Public Works Act 1981 provides for the taking of land from private owners for public purposes, and s 60(1) provides that the owner is entitled to "full compensation". The meaning of the term "full compensation" was decided as long ago as 1898, in *Russell v Minister of Land (1898) 17 NZLR 241(SC) 253.* It means payment of such money as will place the affected owner in a position as similar as possible to that which the owner was in before the land was taken.

[10] The role of the tribunal is not to take an over generous approach. It must assess compensation and make its award on the basis of fair and adequate compensation. *(Napier Lane v Minister of Lands* LVP 08/07 19 October 2010*).*

[11] An applicant is entitled to receive the full money equivalent of what he has lost in respect of each category of compensateable loss *(Riddiford v Attorney General* [2009] NZCA 603*).* In assessing compensation, the sum to be paid should be equivalent to the loss suffered by the owner, which is the objective monetary diminution in value of the asset at the time of the land acquisition. The principle of liberality dictates that in cases of genuine doubt, the owner of the land is to be given the benefit of such doubt.

[12] Compensation under s 60 of the Public Works Act is assessed in accordance with the principles set out in s 62 of the Act which relevantly provides:-

> 62 Assessment of compensation
>
> (1) The amount of compensation payable under this Act, whether for land taken, land injuriously affected, or otherwise, shall be assessed in accordance with the following provisions:
>
> (a) subject to the provisions of sections 72 to 76 of this Act, no allowance shall be made on account of the taking of any land being compulsory:
>
> (b) the value of land shall, except as otherwise provided, be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise, unless—
>
> > (i) the assessment of compensation relates to any matter which is not directly based on the value of land and in respect of which a right to compensation is conferred under this or any other Act; or
> >
> > (ii) only part of the land of an owner is taken or acquired under this Act and that part is of a size, shape, or nature for which there is no general demand or market, in which case the compensation for such land and the injurious affection caused by such taking or acquisition may be assessed by determining the market value of the whole of the owner's land and deducting from it the market value of the balance of the owner's land after the taking or acquisition:
>
> (c) where the value of the land taken for any public work has, on or before the specified date, been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction shall not be taken into account…

[13] The "value of the land" which has been taken is to be determined by reference to the amount which the land might be expected to realise on the specified date, if sold on the open market by a willing seller to a willing buyer. The transaction must be an arms' length transaction, and it is assumed that the transaction would occur after proper marketing. It is also assumed that both the vendor and purchaser would be knowledgeable, prudent, and be acting without compulsion *(Hall v Land Information New Zealand* [2005] NZLVT 29th November 2005).

[14] In assessing the market value, valuers are entitled to take into account sales after the specified date, only to the extent that they confirm a trend observable on the

specified date *(Napier Lane Limited v Minister of Lands* LVP 08/07 19 October 2010*).*

[15] No allowance is to be made for the fact that the taking of the land is compulsory, and S 62(1) (c) provides that any increase or reduction in the value of the land, as a result of the work or proposed work for which the land is taken, is not to be taken into account. Betterment was not raised in this case, and S 62(1)(b)(i) does not apply.

[16] S 62(1) (b) (ii) was dealt with by Wylie J in *Green and McCahill Holdings Ltd v Auckland City Council* [2013] NZHC 507, where he pointed out that this provision is directed at land taken in circumstances where there will be no demand or market for that very piece because of its size, shape or nature. In those circumstances, the valuation method to be adopted is to assess compensation for both the land taken and for injurious affection caused by the taking, by a process of determining the market value of the whole of the owners land before the taking, and deducting from that market value, the market value of the balance of the owners land after the taking or acquisition. This is the well known "before and after" mechanism for valuation.

[17] In this case, it was accepted by all the valuers that the portion of the Taylor block which has been taken is of a shape and nature for which there is no general demand or market, and compensation must accordingly be assessed under s 62(1)(b)(ii). It follows that both compensation for the land taken and the injurious affection caused by the taking is to be assessed by determining the market value of the whole of the Taylor block on a "before and after" basis.

[18] S 62 (c) of the Act requires that the works for which the land is taken be ignored in the assessment of compensation, and any designation or zoning caused by the work is also to be ignored. See *Lewis v Christchurch Drainage Board* [1972] NZLR 229. In determining the price at which the land would have sold in the open market, by a willing seller to a willing buyer, on the specified date, which in this case is the 23rd of December 2010, the valuation must proceed on the basis that the amount of any increase or reduction in the value of the land taken for the public

work has not been either increased or reduced by the creation of the TEL, or the prospect of its creation. This became a key issue in this case.

[19] The Taylor block is some 15 kms from the centre of Tauranga City. It is bisected by the Wairakei Stream at its northernmost end, and practical access is available to the Taylor lands from both Bell Road from the south and from the north west via Palm Springs Boulevard. The land taken for the TEL is over a kilometre from the coast.

[20] Only a very small proportion of the land taken lies inside the Western Bay of Plenty District Council land, and only a very small proportion of the Tauranga City Council land lies to the south and east of the TEL corridor. The property contained buildings and improvements valued by Mr Boyd at $250,000, an assessment which was not seriously challenged. We accept his assessment.

[21] At the specified date, the Tauranga City Council land was zoned future urban land, and the Western Bay of Plenty District Council portion was zoned rural G. The WBPDC land comprised within the TEL corridor which was taken, amounts to 0.984 hectares. But the Tauranga City Council zoning was about to change, as any prospective purchaser of the land would have known. Plan Change 44 (PC44) dealt with the urbanisation of the area towards the south and east of the existing developed land at Papamoa, in an area transected by the Wairakei Stream. The area as a whole is known as "Wairakei".

[22] The process for implementing PC 44 was well advanced by December 2010. There had been a lengthy process of hearings and mediations to resolve the planning issues thrown up by PC 44, and they were all but concluded by December 2010. Although PC 44 had not been formally adopted by the Tauranga City Council, the major details had been worked out, and any prospective purchaser would have been able to get a very full picture of both the detail and timing of zoning and infrastructure proposals simply by enquiring of the Council in late 2010. The zoning change from future urban land to residential land for most of the Taylor block would have been available market information, as would the constraints on development posed by infrastructure development requirements.

[23] The Taylor block is generally very suitable for residential development, with almost all of the land north of the TEL being sand based soils suitable for conversion to residential development. A strip of land along the Wairakei Stream, which runs close to the northern boundary of the Taylor lands is low lying and/or swampy and is required for reserve.

[24] The Tauranga City Council finances infrastructure by means of "subdivision infrastructure fees" (SIF's) which run to approximately half a million dollars per hectare for residential land. It was common ground during the hearing that the infrastructure already in existence in 2010 would allow the residential development of approximately one thousand residential units before infrastructure overload would require further infrastructural development at this end of Papamoa.

[25] It was common ground between the parties that not all of the Taylor block would be developed immediately if a developer were to purchase the Taylor block, for two main reasons. The market at that time could not absorb such a large tranche of residential sections. The cost of development and the impost of SIF's would be such that market conditions would have to improve substantially before much development would be economically justifiable.

[26] Other developers had developed land available in 2010, and were in the process of developing further residential land on adjacent properties. They could be expected to develop and sell up to half of the available residential lots, before the one thousand residential unit "cap" on development imposed by Tauranga City Council infrastructure requirements compelled the construction of further infrastructure, or otherwise constrained the development and sale of residential sections.

[27] In practical terms, this means that the Taylor block could conceivably be used for the development of about 500 residential sections without further infrastructure development, and in particular the development of an arterial route named Te Okuroa Drive. Development of the southern portion of the Taylor block would in all likelihood require the practical completion of Te Okuroa Drive.

[28] Te Okuroa Drive is specified in PC44 to run parallel to the TEL a few hundred metres to the north. It is designed to provide road access to residential areas, and it connects a proposed new town centre further to the south and east of the Taylor block known as Wairakei town centre, with a number of areas of land designated in PC 44 as "employment land". Employment land is intended to provide commercial and light industrial land for use in accordance with the prevailing urban design philosophy of "live work play", a design philosophy which requires planners to make provision for adequate recreational and employment opportunities in close proximity to residential areas.

[29] When looking at a planning map of the area covered by PC44, a striking feature is the provision of employment land in generally circular areas, or nodes, separated by residential and recreational land use areas. The underlying philosophy would appear to be that a circle is the geometric figure which encloses the most land within a given perimeter, and a circular area of employment land would expose the least possible perimeter to areas designated solely for residential land use. Such circular employment "nodes" are designated on PC44, but only to the east and to the west of the Taylor block and not on the Taylor block itself.

[30] The employment land designated on the Taylor block in PC44 is a strip or a ribbon of land enclosed between Te Okuroa Drive and the TEL. That strip or ribbon of employment land makes complete sense when viewing the plans attached to PC44, simply because it lies between a motorway and a major arterial roadway. The noise and traffic movement associated with those roads would make that strip of land between two busy roads the least attractive area for residential development in the whole Taylor block, and the next highest or best use would seem to be employment land.

[31] A major issue in this case is the extent to which the taking of the land for the TEL influenced the zoning of both the subject land and the land in the vicinity. In such cases as *Lewis v Christchurch Drainage Board [1972 NZLR 229]* and *Coomber v Birkenhead Borough Council [1980 NZLR 681]*, it is made clear that there must be a direct causal connection between the zoning decision taken by the local authority, and the work or proposed work which is the object of the land taking exercise.

[32] The Crown case is that there is no causal connection between the taking of the land and the employment zoning imposed by the Tauranga City Council. The Crown contends that the land adjacent to the land taken was zoned employment in PC44, and there is no reason to think that that without the TEL, both the land taken and the adjacent strip would not have been zoned employment land.

[33] The essence of the applicants case is that the taking of the land for the TEL has been the determining factor in the Tauranga City Council's decision to zone the land north of the TEL and south of Te Okuroa Drive as employment land. The applicants argue that there is the clearest possible causal connection between the two, which is immediately obvious when looking at the maps of the area detailing the PC44 zoning, as they show a strip of employment land acting as a buffer between the TEL and the residential land. The applicants contend that a strip or ribbon of employment land in this location makes no planning sense without both the TEL and Te Okuroa Drive. It was submitted that the employment zoning of this strip "gels" with the planning objectives and design criteria evident in PC44 only because the land lies between two major roads and has a buffering role.

[34] It was common ground at the hearing that if not zoned employment land, the subject land would indubitably have been zoned residential, as the highest and best use of the land.

[35] The planning evidence for the applicants was given by Mr Batchelar. It was his evidence that in this locality a strip or ribbon of employment land makes little or no planning sense, except in the context of a buffer strip running between two major pieces of roading infrastructure and residential land. It was his evidence that, if the TEL is removed from the plan, as required by the provisions of s 62 (1) (c) of the Public Works Act 1981, the only realistic designation for the land lying between Te Okuroa Drive and the Tauranga City Council boundary is residential.

[36] His evidence was that the policy underlying the employment zoning for this strip of land is clearly stated in the 2004 Papamoa East Urban Development Strategy Structure Plan as being a "noise buffer zone" between the TEL and the residential land further north. That policy was adopted by the Tauranga City Council in March

2004, and appears in the explanation attached to PC44 Policy Explanation and Reasons at paragraph 27.3.3.1. That document preceded the promulgation of PC 44 in 2005 as a proposed plan change.

[37] The creation of circular nodes of employment land is an obvious design feature of PC44, and no such nodes are included in the Taylor block on PC44. In his opinion, if the Taylor block had no employment land zoned within it, any extra employment land required in the area would most likely be provided by enlarging the circular boundary of one or more of the existing nodes of employment land, rather than the creation of a new node, or strip of employment land.

[38] Mr Frentz, the planning expert witness for the Crown, had a different view. He expressed the opinion that without the strip of employment land between Te Okuroa Drive and the Tauranga City Council boundary, the quantum of available employment land would be insufficient to adequately meet the demands of the "live, work, play" philosophy which underlies the whole of PC44. Around 50 hectares of employment land would be needed to replace that lost if the subject land was zoned residential. It was his evidence that there is nothing inherently illogical or unacceptable about a rectangular shaped block of employment land from an urban design planning viewpoint.

[39] On his view, any change of zoning of the land between Te Okuroa Drive and the Tauranga City Council boundary would require a similar quantum of employment land to be designated somewhere within the immediate environs, probably within the Taylor block. If not, there would be a 50 hectare shortage of the employment land necessary to meet the planning philosophy or criteria underpinning PC44. It was his view that both the subject land and rest of the land lying immediately south of Te Okuroa Drive could well have been zoned employment land even if the TEL had not been created. It would have good access from Te Okuroa Drive, it would be bounded by a major road to the north and rural land to the south, and it would enjoy close proximity to the residential areas to the north.

[40] These competing views underpin much of the valuation evidence presented to the tribunal, and resolution of this issue is required to address the major factor affecting the valuation of the subject land.

[41] We prefer Mr Batchelar's evidence, and we accept his assessment that, but for the creation of the TEL, there is no realistic prospect that either the land taken or the land adjacent to it on the northern side of the TEL would have been zoned anything other than residential land. We find his analysis the more convincing, particularly in connection with the underlying "live work play" philosophy that gave rise to the design features of PC44.

[42] We accept that circular nodes of employment land are a key design feature of PC44, and that without the imposition of TEL upon the Taylor block, there would be little likelihood that any of the Taylor block would have been zoned employment land, at least within the Tauranga City Council boundary. The need for additional employment land would in all likelihood have been met by the Tauranga City Council making adjustments by increasing the size of the other employment zones.

[43] We accept that the land to the south of the local body boundary would not ever have been zoned employment land in any event. We are further satisfied that the highest and best use of the land taken is residential use. We accordingly accept that both the subject land and the rest of the Taylor block to the north of the Tauranga City Council boundary would have enjoyed residential zoning and not employment zoning, absent the TEL. We are accordingly satisfied that there is a direct causal connection between the creation of the TEL and Tauranga City Council's decision to create a strip of employment zoned land on the Taylor block.

[44] Economic conditions in 2010 were described in detail by Mr Dickens, who is an economist with expertise in, and considerable experience of, analysis of the property market. It was his evidence, backed up by several of the valuers who gave evidence, that the property market conditions were entirely flat from mid 2009 through to well after the end of 2010. Mr Dicken's evidence was that the effect of the 2008 global financial crisis had fully hit home by 2010, and the problems associated with that crisis impacted severely upon property developers.

[45] Firstly, it was difficult for developers to access finance at that time, as neither the banks nor the second tier financiers such as finance companies had sufficiently repaired their balance sheets following the nose dive that the property market took in the aftermath of the GFC. Secondly, inward migration to Tauranga, and growth in the employment sector in Tauranga had declined from highs earlier in the decade, with the result that migrant pressure on the Tauranga property market had reduced substantially, reducing prices and demand. Thirdly, Mr Dickens emphasised that a close and detailed analysis of the Tauranga property market revealed that there were over 900 sections on the market in the Tauranga area, just in the major subdivisions being marketed, at the end of 2010. In addition to that number, there would have been a substantial number of residential sections available from cross-leases and other small private subdivision transactions. Mr Deans' analysis to the contrary was not persuasive to us.

[46] Mr Dickens' evidence was that the number of section sales in Tauranga had dropped substantially by 2010, although prices had not dropped much. The lack of movement in the price of developed sections can be attributed both to the financial resilience of the developers in the area, and the likely effects of price cutting on the banking covenants that most developers would have, which usually preclude serious price cutting in order to safe-guard the capital ratios required by most financial institutions lending to developers. The combination of difficult financial conditions for developers, slowing population and employment growth, and very slow section sales meant that the prospects for residential section developments were relatively bleak at the end of 2010.

[47] Property developers are usually optimistic, or they would not be engaged in the development industry, and whilst the end of 2010 was a difficult time for property developers generally, the Taylor block nevertheless represented a good opportunity for a developer to purchase a block for future development. Interest rates had hit historic lows, and at that time the future cost of capital appeared likely to remain low. Whilst the prospective rate of financial recovery and the prospect for increased section sales was uncertain at best, a cyclical upturn could be expected within a few years, and a return to earlier patterns of inward migration and employment growth in the Tauranga area could be expected. All of these factors

would have influenced the purchasing decision of a hypothetical well informed purchaser, who in this case would certainly be a developer, and who would obtain planning and valuation advice before making an offer to buy.

[48] The valuation methodologies available to a professional valuer to decide what a willing buyer would pay for the subject land include: an assessment of comparable sales with a before and after block analysis; a hypothetical subdivision of the subject land; a discounted cashflow analysis; and an assessment of the value of surrounding rural land with a premium for subdivision potential. Each of these methods was used by at least one of the valuers who gave evidence, and the use of the different methods provided something of a cross check or reference in respect of the other methods used.

[49] Of the valuation methods available, the valuers all preferred the comparable sales block analysis, with the caveat that there were few market transactions of more than a passing relevance to a transaction of the nature of the hypothetical sale of the subject land in this case.

[50] Unsurprisingly, the valuers differed as to the value of the land taken on the block valuations. The extent of their differences was substantial. Messrs Smithies and Dean adopted figures of $300,000 per hectare for residential land. On a before and after valuation, Mr Dean produced a valuation showing a "before" valuation of $37.394m, an "after" valuation of $34.134m, and a compensation figure of $3.260m. Mr Smithies produced a calculation showing a "before" valuation of $39.37m, an "after" valuation of $36.43m, and a compensation figure of $2.94 m.

[51] Mr Gamby adopted $200,000 per hectare for employment and residential land. Mr Gamby produced a valuation showing a "before" valuation of $24.408m, an "after" valuation of $22.885m, and a compensation figure of $1.523m. Mr Boyd adopted $150,000 per hectare for employment land and $200,000 per hectare for residential land. Mr Boyd produced a valuation showing a "before" valuation of $22.78m, an "after" valuation of $21.58m, and a compensation figure of $1.21m. Mr Harris adopted $185,000 per hectare for employment land and $200,000 per hectare

for residential land, producing a valuation showing a "before" valuation of $23.613m, an "after" valuation of $21.981m, and a compensation figure of $1.631m.

[52] The hypothetical subdivision (hypo-sub) method was used by most valuers as a check on the range of values produced by comparable sales analysis. The variability of outcomes associated with relatively small variations in input assumptions attaching to this method was universally seen by the valuers as a drawback of such proportions that the hypo-sub method was not sufficiently reliable to support a firm valuation in this case. The range of compensation value outcomes on the hypo-sub method, depending on inputs, varied between $590,000 and $2.1m just on Mr Gamby's various analyses. That range is too great for any real confidence to be attached by the Tribunal to the hypo-sub workings of a valuer whom we found to be very experienced and thoughtful. Mr Gamby himself attached no great significance to his hypo-sub calculations, other than as a check on his conclusions reached by other methods, and none of the other valuers had any more confidence in the reliability of this method of valuation than Mr Gamby did, in this particular case.

[53] The value of the analyses done with the hypo-sub method in this case lies in providing a check on the conclusions reached by other methods, adding to the confidence each valuer had as to the robustness of his own conclusions. Whilst we acknowledge that value of the hypo-sub analyses, the differences in the valuers' respective hypo-sub conclusions were such that we have come to agree with and accept Mr Harris' view given in evidence, that the limitations of the hypo-sub method of valuation in cases where a long time period is applicable mean that the hypo-sub is simply not an appropriate method of valuation for the Taylor block in this case. Accordingly, we do not see any point in reviewing the voluminous evidence of the various hypo-sub calculations put before us, because we consider that the range and volume of market transaction evidence available to us as a whole, coupled with the broad range of expert analysis and commentary from an impressive panel of experienced and authoritative valuers, was sufficient to provide an acceptable level of confidence that a proper comparative sales analysis could be undertaken.

[54] However, while noting the unacceptably large range of outcomes according to the variable inputs with the hypo-sub method in this case, we consider that a well-informed purchaser would have sought detailed planning and valuation advice, on the basis of at least 14 residential sections per hectare, and would have regarded the difficulty of producing a reliable hypo-sub calculation as a factor indicative of the risks and uncertainty attaching to the purchase.

[55] The discounted cashflow analysis method of valuation suffers from the same drawbacks as the hypo-sub, and suffers in particular from the drawback that the time periods involved in this case were forecast by Mr Boyd to be in the order of 20 years from purchase to final disposition of the subject block. As this method's only proponent, Mr Boyd acknowledged that the time periods involved and the sensitivity of the model to variable inputs meant that that his model was insufficiently reliable to support a valuation in this case.

[56] The method of taking the value of surrounding rural land and adding a premium for the prospective residential subdivision was again regarded as unreliable by those valuers who conducted that valuation exercise. The premiums adopted in this case ranged from 50% to 100%, in the opinion of the valuers concerned, and a variation of that size is simply too large to provide a reliable comparator.

[57] It was generally accepted by the valuers that the use of comparative sales for assessment on a before and after basis is the most useful valuation method in this case, despite the relative paucity of true comparator sales. We accept that view.

[58] In this case, the most comparable land for valuation purposes is other land taken for the TEL: the Pattie block immediately to the west, the Papamoa South block immediately to the east, and the By de Ley block to the east of that.

[59] There is difficulty with each of those properties as comparators. The By de Ley property was bought by the Crown for TEL related and other public works, and it is not necessarily a fully comparable open market sale. The Papamoa South block was not a negotiated sale but an acquiring authority transaction involving an arbitrated sale price decision, which was given in 2013, several years after the

specified date. It was thus not available market information as at 2010. The Pattie block was to some extent a forced or distressed sale entered into as a result of financial pressure on the owners from the institution carrying financing on the property.

[60] The topic of using acquiring authority transactions as market comparators was explored by the learned arbitrator in the Papamoa South case. We respectfully agree with the conclusion that he reached in paragraph 38 of that decision, that there is no reason for rejecting acquiring authority transactions as comparables, provided they are approached with appropriate caution and appropriate adjustments are made to account for the relevant factors applicable to each block.

[61] It is necessary to recognise that with a block the size of the Taylor block, the timing of development would be of major significance. There can be no doubt that such a large block would be developed in stages, because the cost of developing the necessary infrastructure is such that developers will only incur the expense when the market conditions are ripe for sales. The Taylor block has existing practical access off Palm Springs Boulevard, and that access was available in 2010. Because of the "cap" of 1,000 additional residential units in the Papamoa area imposed by the limitations of existing Tauranga City Council infrastructure, the most that could be hoped for by any purchaser of the Taylor block would be that an unknown portion of the northern most 500 sections could be developed and potentially sold immediately, without any major Tauranga City Council infrastructure spending being required on the Taylor block itself. The timing of future infrastructure spending would depend on demand created by a future upturn in the market, which was unknowable as to strength and timing in 2010.

[62] A major hurdle to development of the southern area of the Taylor block, where the subject land lies, is the development of Te Okuroa Drive. We accept the evidence of the Crown witnesses that in practical terms the southern extremities of the Taylor block are likely to be developed last and are likely to be developed after Te Okuroa Drive is fully formed. The issue thus arises as to what a well informed purchaser would be able to ascertain about the timing of that infrastructural development as at 2010.

[63] The best guide would be the Tauranga City Council expenditure forecasts, which reveal substantial expenditure on Te Okuroa Drive commencing in 2016, with practical completion appearing to be budgeted for in 2019. Any experienced property developer would know that those dates are not fixed, and would vary according to market developments in the years to follow.

[64] Given the geographical layout of the Taylor block, the way that Te Okuroa Drive bisects the block, and the 1000 residential unit infrastructure "cap", we accept the view that a well informed purchaser would have seen the prospects for sale of the subject land as lying as much as ten years or more out from the decision to purchase in December 2010.

[65] A well informed purchaser would have known that market conditions can change substantially, and quite quickly, but would also have known that the view from December 2010 was for a wait of several years before the residential property market would turn up again, and when it did there would be substantial competition from capable and experienced residential property developers in very close proximity, all keen to get as big a share of the 1000 residential unit "cap" as they could.

[66] A related issue is the density of housing. A developer will need to know how many sections can be made available on a given development block. PC 44 requires a minimum average density for residential housing of 15 per hectare across the Wairakei area, with a minimum density of 14 residential housing units per hectare. In combination with the neighbourhood centres, 15 units as an average density would seem relatively easy to achieve, because densities of up to 30 units per hectare are proposed for the neighbourhood centres. We accept that a minimum of 14 units per hectare would be required by a well informed purchaser.

[67] All of these factors, together with the generally flat economic conditions, and lack of recent local economic and population growth, would influence a well informed purchaser's buying decision. But so would the low interest rate environment, and the opportunity to purchase a substantial block of developable land immediately adjoining existing residential developments, with immediate

infrastructure capacity and a clear path set out in the Tauranga City Council structure plan for further infrastructure capacity development.

[68] A well informed purchaser would then turn to look at the available market information, seeking comparable sales.

[69] The best comparator would seem to be the sale of the block at 144 Parton Road, known as the Pattie block, immediately west of the Taylor block. It is some 18.9635 hectares, and it sold at a private sale in September 2009 for $2.5 million, with half of the price being deferred for a year. The evidence establishes that the property was sold by vendors under considerable pressure to sell from the financial institution holding security over the block, and we accept that it can properly be described as a "distressed sale", although it was not a mortgagee sale. The learned arbitrator in the Papamoa South arbitration analysed the Pattie block sale at about $250,000 per hectare, after making adjustments for the sand to peat ratio of the land, and the "distressed" nature of the sale.

[70] There was considerable evidence lead before us from a number of witnesses about the actual proportions of peat country as opposed to sand country in the Pattie block. None of the evidence, including a geotechnical assessment prepared by Harrison Grierson, dealt with this issue comprehensively. No witness gave an assessment which we could accept as authoritative on this issue. The available evidence was simply inconclusive.

[71] It was the considered view of the learned arbitrator in the Papamoa South case that the purchaser would have understood that only 35% of the property was sand based. That conclusion was heavily criticised by a number of Crown witnesses, with some substantial justification.

[72] Firstly, the Harrison Grierson report seems to indicate that more like a half to two-thirds of the property could fairly be described as sand based. That report was a decade old in 2010. It was not prepared for the purpose of assessing the ratios of sand and peat soils on the Pattie block, and is not precise on that issue. It was not apparently put in evidence in the Papamoa South arbitration.

[73] Secondly, there is at least a suggestion that enquiries of the vendor may well have revealed different proportions than those adopted by the learned arbitrator. Thirdly, the evidence before us, and in particular the evidence of Mr Harris, was that the Pattie block contained substantial reserves of sand which have a value as fill for remediation of peat land, whether on the Pattie block, or on other nearby blocks where remediation of peat land is required for development purposes. That evidence may not have been available to the arbitrator, or it may not have weighed much in his assessment. Finally, although the learned arbitrator expressly held that an informed purchaser would have known that the Pattie block was 1/3 sand based and 2/3 peat based soils, in his decision he actually adopted valuations which had the proportions as half and half.

[74] Mr Gamby valued the sand based land at about $200,000 per hectare, depending on the value ascribed to the peat land. So did Messrs Harris & Boyd. Their initial valuation in each case was predicated on a zoning of employment land, with upward adjustment required to reflect the difference (if any) in price between employment land and residential land. Those valuers who were prepared to venture an opinion as to the likely difference in market value between employment land and residential land were all prepared to accept a differential in the order of a 10% premium for residential land, which we accept and adopt.

[75] A further adjustment would be necessary to reflect the fact that the vendor was not a "willing vendor" in the sense contemplated by s 62, in that the Pattie block vendor was under duress from a financial institution at the time of sale. That duress was evidenced by a letter outlining that circumstance from the vendor's solicitor, which we accept as proof on the balance of probabilities.

[76] An adjustment would in our view be required to fairly reflect the "distressed" nature of the sale. In order to comply with the statutory requirements, we must make our assessment of market value on a "willing buyer, willing seller" basis. There is no reason in principle why we cannot adjust a "distressed" sale to reflect the difference between the two types of sale. Mr Gamby said in evidence that an adjustment range of 5% to 30% could apply, but he was reluctant to accept more than 5% in this case because of the two year period the property was on the market before sale.

[77] We do not accept the argument advanced in particular by Mr Harris, and to a large extent by Mr Gamby, that the two years or so this property was on the market prior to sale can somehow establish that the price achieved on sale was a market price agreed between a willing buyer and willing seller. The evidence is clear that the property had to be sold because of pressure from the vendor's financier; it follows that the vendor was not a willing seller. The vendor accepted the price offered not because he was willing to do so, free of all constraint, but because his financier insisted on sale. Without that pressure for sale, there would not have been a sale, at least at that price.

[78] We consider that Mr Gamby's range of 5% to 30% to be a useful guide. We consider his preference for the lower end of that range to be overly cautious in the circumstances applicable to the Pattie block sale. Whilst this was not a mortgagee sale in the strict sense, it was not far removed from a mortgagee sale in its character, in that the seller's hand was forced by a financial institution requiring a sale. No sale was not an available option, and as Mr Harris pointed out, at the time of the Pattie block sale, the market consisted of little else but "distressed" sales. So the market clearing price for willing vendors must have been above the sale price achieved in such sales.

[79] A mortgagee sale would justify the application of an uplift towards the top end of Mr Gamby's range. On the information available to us, we consider that a one third allowance for the difference in character between a true mortgagee sale on the one hand, and the circumstances of the sale of the Pattie block on the other hand, would represent an adequately cautious assessment of the adjustment necessary to reflect the "distressed" nature of the Pattie block sale. Accepting as we do Mr Gamby's 30% range as a fair analysis of the difference applicable to such sales, we assess the uplift required to address the difference between a market sale from a willing seller to a willing buyer, and a distressed sale from an unwilling seller, at 20% in the case of the Pattie block.

[80] An upward adjustment to the sand based land price might also be required to account for the cost of remediation of the peat lands by addition of fill, but only if that course was economically justifiable from a developer's perspective at the time.

There was no evidence put before us that would justify such a conclusion being drawn, on the market information available in December 2010. Remediation had not begun, and indeed the land had only just been paid for. Subdivision impact fees had not been incurred. No market participant in 2010 could conceivably have analysed the Pattie block sale as requiring expensive remediation of all the peat country, because the option of holding some or all of the peat country unremediated remained open to the new owner in 2010.

[81] In this case, we are not bound by the finding of the learned arbitrator in the Papamoa South case as to his analysis of the Pattie block sale, particularly as we had more and different evidence available to us than was apparently made available to him for his consideration. We nevertheless find his analysis of the sale persuasive and useful, whilst recognising that his analysis was not market information available in 2010. The fact of the sale, its distressed nature, the fact that sand and peat land were present in unknown proportions, and the price obtained for the block as a whole was all available information in 2010, and any purchaser of the Taylor block would have carefully analysed the Pattie block sale on the basis of that information.

[82] Messrs Harris and Boyd valued the sand based land on the Pattie Block at $189,222 and $188,688 per hectare respectively, as employment land. Their figures can fairly be averaged to $189,000. Mr Gamby's various valuations straddle that mark at $162,154 with peat at a higher value, or $200,000 with the peat at a lower value of $55,000 a hectare.

[83] Messrs Dean and Smithies simply asserted that the cost of remediation of the peat land suggests a figure in the region of $500,000 per hectare for the sand country. That value would only be justifiable if it was known in the market in December 2010 that remediation of the peat would actually take place. There was no such evidence available to us. We prefer Messr's Harris and Boyd's analyses, and we adopt $189,000 per hectare as the available price information for the Pattie block sand country in December 2010, prospectively zoned as employment land when PC 44 came to be adopted.

[84] Adjusting the figures to reflect the generally accepted 10% difference between employment and residential zoned land would produce a calculation showing $189,000 for employment land plus $18,900, a total of $207,900, which we would round up to $208,000 per hectare for residential land. A 20% upward adjustment in that figure would amount to $41,600, which in our view would be a fair reflection of the "distressed" nature of the sale, as discussed above.

[85] The resulting figure of $249,600 could fairly be rounded up to $250,000 per hectare for sand based residential zoned land on the immediate western boundary of the Taylor block, for a sale which occurred in September of 2009, some fifteen months before the valuation date for the Taylor block.

[86] The learned arbitrator in the Papamoa South case reached the same conclusion, without being quite specific as to the apportionment of the components of his assessment of the Pattie block sale. There was no evidence of any change in market conditions in the intervening 15 months, and in our view there was sufficient market information available in December 2010 for both a willing vendor and a willing purchaser to analyse the Pattie block sale in the way that we have.

[87] The next most useful sale is the By de Ley block at 461 Bell Road. Some 120.471 hectares was acquired by the Crown for $13,954,375 in June 2010. This block has similarities with the Taylor block, being bisected by the local authority boundary between Tauranga City Council and WBPDC, and being generally sand based on the Tauranga City Council portion and peat based rural zoned land in the WBPDC portion.

[88] This block has been analysed by a number of valuers at $165,000 per hectare for the Tauranga City Council block, and it can be seen as a benchmark for lands in the eastern portion of the Wairakei area with potential for urban development. Because it is much further east than the Taylor block, and has employment zoning, adjustment would be required to bring it into line with the parameters applicable to the Taylor block. All the valuers accepted that there would be a value gradient for land running from west to east, corresponding generally to the expected time to development and sale.

[89] The valuers accepted that an upward adjustment of up to 10% would properly reflect the change between employment and residential zoning. A 10% adjustment for that factor would produce a figure for the By De Ley block of $181,500 as residential land. The difference between the Pattie block assessment at $250,000 per hectare, and the By De Ley block at an adjusted $181,500 per hectare for sand based residential property, can readily be explained by the difference in time to market between the two blocks. On the evidence we heard, and taking into account the need to build all of Te Okuroa Drive before development of the easternmost blocks of land could occur, it would not appear unrealistic to suggest a time to market differential in the order of 5-7 years between the Pattie block and at least some portion of the By De Ley block.

[90] An analysis which has the By de Ley block at an adjusted 27.4% discount to the Pattie block would seem a reasonable fit at a conservative discount rate of 5%, at a time of historically low interest rates. It would indicate a five year or more delay from the point at which the Pattie block development would reach the market before the By De Ley block would become ripe for development. It is necessary to bear in mind that in 2009 and 2010 any purchaser would face a delay of several years before a market upturn would make even the Pattie block ripe for development, let alone the By De Ley block. Those delays and attendant uncertainties would seem to justify the discount this analysis produces.

[91] The Papamoa South block lies between the Taylor block and the By de Ley block. As at December 2010 it had been taken by the Crown, but compensation had not been assessed. That market information would have been available to the hypothetical purchaser in December 2010, but it would reveal very little of any use. The learned arbitrator valued this block at $275,000 per hectare in his award in 2013. That award, whilst not available for consideration in this valuation, at least in terms of constituting market information available to a hypothetical purchaser, is none the less useful as a check on our conclusions.

[92] A number of valuers made reference to the Papamoa Junction block, which is at the corner of Parton Road and Te Okuroa Drive. This block is zoned commercial business, and it sold for $4.5 million in December 2009. It was not subject to PC 44,

and its neighbours are a retirement village, a secondary school and an industrial park. We do not accept that this sale is a useful comparator.

[93] References to the Steiner block, the Golden Sands Drive block, and the Tauriko blocks purchased by Mr Clarkson were not much relied upon by any of the valuers who gave evidence before us, for good reason. The Steiner block was a sale in very different market conditions. The Golden Sands Drive block is not properly comparable given its small size and location, and the considerations applicable to Mr Clarkson's failed gamble on Tauranga City development to the south west of the city are too remote in time and location to provide any reliable comparability.

[94] Reference was made to blocks at Dixon Road in Hamilton and at Taupo. Some effort was made to persuade us that there was sufficient comparability between those markets and Papamoa for useful information to be gleaned from those sales. We do not accept the proposition in either case.

[95] Tauranga is a much larger and much more economically active regional centre than Taupo. We do not accept that there are any real market similarities between land in Papamoa, historically a relative hot bed of development by New Zealand regional standards, and a block of land close to Taupo airport in an area with little in the way of industry when compared to the industrial areas of Tauranga and Mount Maunganui, not to mention New Zealand's busiest port.

[96] Whilst we accept that Hamilton has more comparability, Hamilton is a bigger city, with an existing industrial base which is large and diverse. The Dixon Road block was purchased for a retirement home, a rather different market than that into which the Taylor block would be sold. In essence, we consider that with all its documented drawbacks, the market information available from the properties in the immediate locality of Papamoa provide substantially more reliable market evidence for the Taylor block valuation than a retirement home sale a hundred kilometres away in a larger city.

[97] The Tauranga City Council portion of the Taylor block has a number of attractions to a developer. It has ready access for development through existing

roading infrastructure, and better access than the Pattie block, which effectively requires completion of the adjacent Te Okuroa Drive before development could be completed. The Taylor block has a large and nearly uniform block of sand based soil immediately adjacent to existing housing developments and infrastructure, including schools, shops and services, all within the Tauranga City Council boundary, together with a rural peat land area within the WBOPDC boundary. A substantial income could be earned from its development and sale in stages before the Tauranga City Council infrastructure limit of 1000 residential units began to inhibit sales and development. It is extremely well suited to staged development, with a Tauranga City Council structure plan underpinning that approach.

[98] Those advantages do not apply to the Pattie block, which had an unknown quantum of peat based soils, some or all of which might require the substantial expense of remediation. The Pattie block has an irregular shape, and it requires Te Okuroa Drive to be developed before it would be commercially saleable.

[99] We thus consider that the Taylor block would have had greater attraction to a sophisticated developer than the Pattie block in December 2010, and we consider that it would have commanded something in the order of a 10% higher price than the Pattie Block, mostly because of its access advantages and the ready infrastructure available for substantial development. It would however be necessary to make an allowance to reflect the larger size of the Taylor block. A reduction from a 10% premium to one of 8%, accounting the larger size of the Taylor block, would produce a figure of $270,000 per hectare. That figure bears comparison to the figure of $275,000 per hectare reached in the Papamoa South arbitration.

[100] On the evidence we heard, the comparable sales, when appropriately adjusted, can be properly analysed to support a valuation figure of $270,000 per hectare for sand based residential zoned land in 2010. That figure would take into account zoning, soil type, the timing of comparable purchases, and the identified value gradient from west to east in this area. The size of the respective blocks is accounted for, and the figures adopted reflect a cautious approach to valuation, given the necessity for including in the analysis property which has been purchased by an acquiring authority in the case of the By de Ley block, and the "distressed sale"

nature of the Pattie block transaction. We are unable to accept Messrs Smithies and Deans' view that a valuation of $300,000 per hectare would have been justified on the market information available in December 2010, and we note that our assessment is some 10% lower than their valuations.

[101] Turning to rural land values, there was agreement between Messrs Smithies and Dean that the rural land value should be assessed at $90,000 per hectare. Messrs Boyd and Harris separately assessed the rural land value at $71,000 per hectare, and Mr Gamby assessed it at $70,000 per hectare. His analysis took account of the downturn consequent upon the global financial crisis commencing in 2008, and we accept the validity of his criticisms of the figures adopted by Messrs Smithies and Dean, as not appropriately adjusting sales figures to properly account for the low ebb to which the market had sunk by late 2010. We were persuaded by Mr Gamby's analysis, and we adopt his figure of $70,000 per hectare for rural land.

[102] With figures of $270,000 per hectare for prospective residential land and $70,000 per hectare for rural land, a before and after analysis can be undertaken as follows;

Land	Before	After	Taken
TCC Urban Land	102.7490	95.9344	6.8146
Wairakei Drainage & Conservation	14.9000	14.9000	0.0000
TCC Rural	2.5479	2.5479	0.0000
Western BoP Rural land	37.9431	37.1971	0.7460
Total	158.1400	150.5794	7.5606

The value of the land taken is;

TCC Urban Land	6.8146	Ha	@	$270,000	$1,839,942
Western BoP Rural land	0.746	Ha	@	$70,000	$52,220
Total					$1,892,162

[103] The issue of injurious affection was difficult for all the valuers. This tribunal was fortunate in having assembled before it a panel of valuers who might fairly be

described as senior, experienced and profcssionally prominent. Their professionalism was revealed in response to enquiries about the assessment of injurious affection. Whilst Mr Boyd indicated his view that injurious affection could be capable of discrete calculation, all the remaining valuers accepted that at least in a case of this kind, injurious affection could only be expressed in percentage terms based upon a valuers overall assessment of the situation. Messrs Smithies and Dean respectively allowed 10% and 25% reductions in value for injurious affection over different areas, producing figures of $30,000 per hectare and $75,000 per hectare respectively for urban land.

[104] Messrs Gamby and Boyd made no allowance for injurious affection of the urban land, although both conceded in their evidence that an allowance could be made. Both took the view that the range available in this case would not exceed 10%. Mr Harris allowed 5%.

[105] It is our view that Mr Gamby was correct when he observed in his oral evidence that there may well be injurious affection on the row of lots immediately fronting the TEL, as they would effectively be located next to a motorway. We accept his view that the second and subsequent lots behind those fronting on to the TEL are very unlikely to have any price differential determinable specifically as injurious affection, and we accordingly limit injurious affection for land north of the TEL to the 10% figure (which was assented to by a majority of the valuers) over some 45 lots, which we assess at 2.25 hectares on the basis of an average of 500 square metres per lot. That calculation produces a sum of $60,750 being 2.25 x $27,000.

[106] The buildings on the Taylor block were on the land taken. The buildings and other improvements which were removed from the land which has been taken were variously valued by different valuers. Mr Gamby did not assess the buildings. We accept the assessment of Mr Boyd, who assessed the buildings and improvements and valued them at $250,000.

[107] Because the buildings on the Taylor block were on the land taken it is necessary to create a new dwelling site, which Mr Gamby assessed at $300,000 for a

dwelling site of 3,000 square metres. Other valuers adopted lower figures, but we accept his assessment as realistic and authoritative.

[108] The rural land injurious affection calculation differed markedly between the valuers. Mr Smithies allowed ten hectares at $10,000 per hectare, or $100,000. Mr Dean allowed 8.4 hectares at $9,000 per hectare, or $75,600. Mr Boyd allowed $3,000 per hectare over 39.44 hectares, producing a figure of $118,320 plus $50,000 being a 20% assessment on a dwelling site that he valued at $250,000. The aggregation of those figures produces a total on Mr Boyd's estimation of $168,320. Mr Harris was of the view that there is simply no injurious affection on the rural land, except for a 10% reduction on a dwelling site he valued at $270,000. He accordingly assessed injurious affection on the rural land at $27,000.

[109] Mr Gamby assessed injurious affection at $59,920 for 8.56 hectares of WBOPDC land at $7,000 per hectare (10% of $70,000), plus $30,000, being 10% of a site valued at $300,000. He thus arrived at a total $89,920 for the WBOPDC land only. We found Mr Gamby's assessment to be realistic and solidly based on values which we accept as having been demonstrated on the evidence before us. We are satisfied that the 2.5749 hectares of TCC rural land remaining would also be affected to the same extent, producing a calculation of 2.5749 x $7,000, and an injurious affection figure of $17,835 for the TCC rural land.

[110] Our calculation of injurious affection can be summarised as follows;

Rural land injurious affection

Site value		$300,000		Less 10%	$30,000	
WBOPDC	8.56	Ha @	$7,000	($70,000 less 10%)	$59,920	
TCC	2.5479	Ha @	$7,000	($70,000 less 10%)	$17,835	$107,755

Urban land injurious affection

2.25	Ha @	$27,000	($270,000 @ 10%)	$60,750	
					$168,505

[111] The amount of compensation payable is thus;

Land taken	$1,892,162
Injurious affection	$168,505
Improvements	$250,000
Total	$2,310,667

[112] Compensation of $1,640,000 plus GST has already been paid. These calculations are all made on the basis that GST is to be added if payable. The sum of $279,000 was paid by way of relief from an obligation originally accepted by the Crown, to form access from Palm Springs Boulevard. That sum is consideration for a Crown obligation arising in the original transaction, and is not to be accounted for as part payment already made by the Crown. The balance due to the applicants is thus;

Total due	$2,310,667 plus GST
Less paid	$1,640,000 plus GST
Balance owing	$670,667 plus GST

[113] We thus assess the compensation due to the applicants at $670,667, plus GST. We allow interest on that sum at 5% from 23rd December 2010. Counsel may file memoranda as to costs (if they are not agreed) within 21 days of the date of this decision.

Judge T R Ingram
Chairperson

L T Green
Member