Case law on limits for freshwater quality and environmental flows

Prepared for the Ministry for the Environment

16 April 2010
TABLE OF CONTENTS

1. EXECUTIVE SUMMARY .................................................................1
2. PROJECT SCOPE ........................................................................12
   Background – Government Direction on Fresh Water ..................12
   Scope of this report ...................................................................12
   Questions about the law on limits for freshwater quality and environmental flows ....13
3. GLOSSARY ..............................................................................14
4. WHAT DOES THE CONCEPT OF ENVIRONMENTAL LIMITS ENCOMPASS? ..........16
5. DISCUSSION OF QUESTIONS ....................................................18
6. DISCUSSION OF KEY STATUTORY PROVISIONS .........................37
   Overview ....................................................................................37
   How are water quality and quantity standards applied in practice? ..........41
   Standards versus objectives and policies ....................................41
   Statutory minimum water quality standards (sections 70 and 107) ............43
   Water Conservation Orders ......................................................45
   National Environmental Standards ............................................46
   Water classification and Third Schedule standards ...........................46
   How are water quality limits applied in practice? .........................49
   Reasonable mixing ....................................................................49
   Retrospective application of new water quality and quantity standards to existing consents ......................................................50
   RMA options for setting environmental flows, levels and rates of take .......53
7. SUMMARY OF KEY ISSUES RELATING TO SETTING WATER QUALITY AND QUANTITY LIMITS .................................................................57
8. DISCUSSION OF PRE-RMA STATUTE AND CASE LAW ..................61
   Statutory provisions ....................................................................61
   Cases about water quality and classification ................................64
   Cases about minimum flows .....................................................66
9. DISCUSSION OF CASE LAW UNDER THE RMA .................................71
   Cases about water quality limits ...............................................71
   Cases about environmental flows, levels and rates of take in regional plans and policy statements .................................................................79
   Prosecutions for unconsented takes or breaches of flow restrictions ........89
   Water Conservation Order decisions .........................................90
   Drafting of rules and standards ..................................................91
   Review of consents based on new limits ......................................91
   General case law principles about non-complying activities ............92
   General case law principles about plan integrity/precedent ...............94
   General case law principles about prohibited activities ..................94
10. COMMENTS ON SOME FIRST INSTANCE DECISIONS ..................................96
    Decisions about water quality limits ..........................................96
    Decisions about flows, levels and rates of take ..............................97
1. EXECUTIVE SUMMARY

1.1 For ease of reference we have set out brief summaries of our answers to your 21 questions in the table below, along with additional comments where relevant. We note that both the answers and our comments are our own views based on experience. In many instances there is no supporting case law because the issues have been resolved without the need for a Court ruling.

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<td>1. Consultation approaches/methods used by regional councils to set limits for freshwater quality and environmental flows – whether limit setting attempts by councils are failing or succeeding on the basis of the consultation approach used.</td>
<td>There is no statutory requirement to consult with the general public on policy statement, plans or resource consents (clauses 3, 3A, 3B and 3C of the first schedule, and section 36A) nor have limits been rejected on the grounds of lack of consultation. Some councils have had difficulties with getting new proposed limits applied or operative, but it is speculation as to whether this is indicative of poor consultation, or simply indicates a matter on which different parts of the community have differing views and/or reflects difference in technical evidence.</td>
<td>Often the issues with setting limits revolve more around the scientific and policy basis for the proposed limits rather than the basis of the consultation approach used. Public consultation, while not obligatory, has the potential to reduce conflict regarding both technical issues and value judgements.</td>
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<td>2. Technical criteria/methods used by regional councils to set limits for freshwater quality and environmental flows – whether limit setting attempts by councils are failing or succeeding on the basis of the technical criteria/methods used.</td>
<td>There has been very limited case law on limits within plans under the RMA. Rather than applying a strict statistical analysis based on MALF (mean annual low flow), the Environment Court has relied on an approach of balancing competing factors, such as: • policies and objectives • MALF; • drought figures; • in stream uses of water; • out of stream uses of water; • economic effects on an irrigator through loss of water; • higher flow requirements for trout and salmon; • flow requirements of native fish;</td>
<td>The debate regarding adequacy of technical justification is tending to occur in the context of first instance hearings on proposed limits and in consent hearings. Where councils adopt a guideline rather than a standards-based approach, the debate regarding the appropriateness of the limits in the guidelines tends to occur during the consent process, whereas with standards, there tends to be more debate during the plan process because once the standards are locked in the council has reduced discretion.</td>
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<td>• adverse social effects of less water for irrigation on employment;</td>
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<td>• social and recreational benefits of an increase;</td>
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<td>• perceived benefits of various minimum flows; and</td>
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<td>• costs of various minimum flows.</td>
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<td>Environment Waikato’s approach to nitrate budgets in the Lake Taupo catchment was accepted by the Environment Court. This approach was more about maintaining existing discharge levels rather than establishing what future limits should be.</td>
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<td>3. The use of RMA schedule 3 (water quality classes) in plans – how council use of schedule 3 (water quality classes) in plans is being ruled on by the court.</td>
<td>There are as yet no Court decisions on the use of the third schedule classes under the RMA. Few plans use the classes in conjunction with the third schedule as standards and no plans include the prohibitions which appear to be envisaged by section 69. Key points from pre-RMA cases (which have only limited relevance under the RMA) include:</td>
<td>In our view, a key reason for Council reluctance to use the third schedule as standards in a plan, is because this approach is inflexible given the requirement of section 69 to prohibit discharges which do not comply. The more common approach is to leave the standards as guidelines to be applied during the consent process. Some of the third schedule standards are narrative standards with no numerical limits. If these standards are used as standards within plans, there will inevitably be significant debate regarding how they are to be applied. Arguably it is inappropriate to impose contact recreation or other standards where they can not be achieved because of permitted discharges upstream. However it may well be acceptable to have a management objective or policy of achieving these goals within a particular timeframe, and to support that policy with guidelines or assessment criteria which may include improvement to point source discharges as well as non point source contamination.</td>
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<td>• water classifications should not be set lower than the existing water quality than exists at the time of classification without good reason;</td>
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<td>• a higher standard of quality than that existing in the waters should be imposed if such quality is reasonably needed and is reasonably attainable;</td>
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<td>• water classifications should reflect what is reasonable and should take into account the current water quality; higher standards can be aimed for in the long term, but it is unreasonable to impose an unobtainable classification on waters.</td>
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<td>4. The use of RMA section 107 in plans and consent applications – how council decisions on s107(1)(c)-(g) matters are being ruled on by the court.</td>
<td>There are very few decisions relating to section 107. A common approach is to simply copy the 107 standards into consent conditions as a basis for satisfying the section 107 requirement, but this approach has not been tested to any substantial degree in the Courts. There is little case law under the RMA about the extent of the exceptions in section 107(2). “Exceptional circumstances” has been held to connote something out of the ordinary.</td>
<td>The section 107 standards contain a double discretion which can lead to debate in relation to enforcement. First, they apply after reasonable mixing. This uncertainty can be resolved by the consent decision clearly identifying the reasonable mixing zone for the contaminants in issue. Secondly all of the standards are narrative standards which can lead to debate as to what is meant by terms such as “conspicuous”, &quot;objectionable&quot; and “significant&quot;. These uncertainties can be reduced but not eliminated by clear wording in conditions or in policies in the plan.</td>
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<td>5. The determination of &quot;reasonable mixing zones&quot; in plans and consent decisions – how council decisions on “reasonable mixing zones” are being ruled on by the court.</td>
<td>The Courts have not ruled on the use of reasonable mixing zones in relation to appeals of plan limits, or the third schedule. What is “reasonable mixing” is a question of fact in each case, and will turn on factors such as the size of the waterway, velocity of water, tributaries and the like. The Courts have (in effect) ruled that a reasonable mixing zone should be no greater than what is consistent with sustainable management. There is no general requirement that water quality standards must allow for reasonable mixing, however that is a commonly accepted approach to both standards and guidelines. Allowance for reasonable mixing is required in relation to the section 70 and 107 standards and the third schedule standards if they are adopted as such.</td>
<td>In our view, if a consent condition or a standard in a plan specifies a reasonable mixing zone, that will be an enforceable part of the limit. In our view, the concept of reasonable mixing encompasses the technical notion of “reasonably well mixed” (based on mixing studies) as well as the value judgement of “What is reasonable in the circumstances?&quot;</td>
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<td>6. The interpretation of RMA section 14 use rights – what constitutes “reasonable domestic need” and “reasonable need for an individual’s animals for drinking water”.</td>
<td>We are not aware of any RMA case law on these terms.</td>
<td>One issue that arises is whether increased stock water needs as a result of increased stocking (eg dairying conversions) should be covered by the exception (it would appear that in the absence of a rule to the contrary they are covered). Another issue is whether the stock component of a take can be separated from other components. In our view both of these issues can be addressed by drafting of regional plan rules, which can override the section 14 presumption.</td>
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<td>7. The use of RMA section 69(1) and (2) – what the rulings are on council decisions classifying water bodies through plan rules.</td>
<td>Because there are few if any plans which both classify and apply the third schedule standards, there is little case law. In the Paokahu line of cases, the Court considered whether Gisborne District Council's proposed regional plan had complied with the requirements of section 69. The Court decided that despite the Policy's identification of the classes as SA, SB, etc not being identical with those in the Third Schedule, the purposes of management are materially the same in both the Plan and the Third Schedule, so the lack of precise correlation in terminology was not problematic. In its conclusions on the provisions, the Court was not satisfied that:</td>
<td>Where section 69 is applied and the third schedule classes and standards are applied, the rules must require the standards to be met. We are not aware of any examples of the third schedule being used in this way. Although section 69 does not expressly state as much, in our view it is implicit that if a council uses the third schedule management classes and adopts higher standards it must require those standards to be met. This is a very inflexible approach and would cause difficulties where breaches of the standards occur as a result of natural events or non point source contamination. In our opinion section 69 requires amendment or deletion. The use of existing rule making powers allows councils more flexibility.</td>
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<td>• the Council held the opinion that the classes or standards in Schedule 3 were not adequate or appropriate: s 69(1)(b) and s 69(2). • the Plan's standards are more stringent or specific than the Schedule 3 standards: s 69(1)(b).</td>
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<td>8. The use of RMA section 69(3) – what the rulings are on council decisions to set water quality limits which would reduce water quality in plans.</td>
<td>We are not aware of any case law substantively considering this issue.</td>
<td>In our view it is clear from section 69 that if it is applied, the rules must not allow water quality to be reduced from the existing quality.</td>
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<td>Where section 69 standards are applied, section 69(3) seems to prevent new discharges to water until existing quality has been improved. That is because it will often be difficult if not impossible for a new discharge to maintain existing water quality.</td>
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<td>9. Establishing the significance of effects (ie distinguishing between “significant adverse effects”, “no more than minor effects” and “no adverse effects”) – whether councils have established a correct determination of the significance of effects in plans and consent decisions.</td>
<td>There has been some case law on what amounts to more than minor effects in the context of non-complying activities and in relation to notification decisions. However there has been no guidance in the context of water quality or quantity limits.</td>
<td>The test of “no more than minor” effects is only a threshold test in relation to non-complying activities and then only when the activity would be contrary to the relevant objectives and policies. There is no general requirement that effects be minor or that they not be significant.</td>
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<td>The Courts tend to approach this question as an issue of fact to be determined on the evidence available to it in any given case, rather than defining what the terms “significant” and “minor” mean.</td>
<td>Although it is inherent in part 2 of the Act, that adverse effects need to be adequately avoided, remedied or mitigated, there will be some activities which inevitably have more than minor effects but which are nevertheless approved as being sustainable.</td>
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<td>Sections 15B, 70, and 107 include a requirement on discharges of no significant adverse effects on aquatic life after reasonable mixing. The Courts have not ruled on what “significant adverse effect” means in this context.</td>
<td>In the context of water quality and quantity limits, the test of no more than minor adverse effects will only be directly relevant where limits have been incorporated into non-complying activity rules.</td>
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<td>Whether councils have established a correct determination of the significance of effects in plans and consent decisions is not a question we can answer. The setting of limits is not directly about whether effects are minor, significant or something in between. Rather the limits should reflect what is sustainable (a value judgement on behalf of the community) having regard to the requirements of section 32 (efficiency, effectiveness, costs and benefits).</td>
<td>Cumulative effects are relevant under section 3(d) and relate to the gradual build up of consequences over time. The Courts have accepted that, particularly where the total load of a particular contaminant has an adverse effect on the environment, even small incremental increases can have a significant cumulative effect. The Lake Taupo Carter Holt decision is an example of where the regional council's approach to managing these cumulative effects was upheld.</td>
<td>There are many first instance decisions where councils have imposed stringent conditions on existing or new point source discharges, to address cumulative effects, including the effects contributed or even caused by upstream non point source discharges. Although there is little case law on cumulative effects and non point source discharges, the Court must factor these matters into any decisions on new limits within plans. The Lynton Dairy decision is an example of a case where the Court did not accept the Canterbury Regional Council's views regarding cumulative effects. There are also a series of subsequent commissioner decisions that adopted a different approach to cumulative effects to that proposed by the Council. However in all cases, cumulative effects were considered. The debate was around whether new activities should be prevented as a consequence (the plan did not prohibit the grant of consent).</td>
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10. Cumulative effects of point source discharges and nonpoint source discharges on receiving water quality when considering new applications for activities/ point source discharges – how council decisions about these matters are being ruled on by the court.
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<td>11. Regulating the effects of non-point source discharges on water quality – whether the view (in some quarters) that it is inappropriate to regulate these effects has been tested by the court.</td>
<td>Both regional councils and territorial authorities can control the effects of land use on water quality.</td>
<td>The Court has accepted arguments that it is appropriate to regulate the effects of non point source discharges, since such regulation is envisaged by section 30 and is consistent with the purpose and principles of the RMA. In our view there is no basis to argue to the contrary. We note that the contrary argument was not advanced in the Lake Taupo case. The debate there was about how the limits should be implemented.</td>
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<td>12. Alternative methods of discharge [RMA schedule 4(1)(f)] in consent decision making – what the rulings are on the consideration councils have given to alternative methods when making consent decisions.</td>
<td>The requirement under section 105(1)(c) is for the consent authority to consider alternative methods of discharge, not alternative methods of achieving the applicant's aims.</td>
<td>The Court has held that its role relating to consideration of alternatives is not to substitute its own judgement for that of the applicant, but to find whether the applicant gave adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge and made a reasoned choice. In particular, affordability is for the applicant to judge.</td>
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| 13. Regional councils using their planning documents to control land use for the purposes of maintaining and/or enhancing water quality, or maintaining water quantity – whether regional councils are able to control land use for water quality and quantity purposes. In particular what the court has ruled when | The functions of regional councils under section 30 include controlling the use of land for the purpose of:  
  - maintaining the quantity of water in water bodies; and  
  - maintaining and enhancing the quality of water in water bodies.  

The tools available to councils to control the effects of non point source discharges include:  
- Regional or district rules regulating land use including |
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| regional council use of section 9 has been challenged. (For example, rules on stocking rates.) | potentially stock numbers and fertiliser application.  
- Discharge rules in relation to fertiliser.  
- Considering the effects of farming intensification when considering applications to use water for irrigation.  
In the Lake Taupo case the Court upheld hybrid section 9 and 15 rules and accepted that the effects of animal emissions can be controlled by regional land use rules. The effect will be a cap on stocking rates. The Court declined to rule on whether emissions from animals are a discharge that can be subject to discharge rules. | |
| 14. District councils controlling land use for the purposes of maintaining and/or enhancing water quality, or maintaining water quantity – whether district councils are able to control land use for water quality and quantity purposes. | The Court of Appeal has held that a regional council can include rules relating to land use activities for the purposes of section 30 and that a territorial authority can include rules about activities under section 31. Both authorities have overlapping powers but the powers of territorial authorities are also subject to section 75(2). | We are not aware of any Court decisions regarding limits which district councils have imposed for the purpose of controlling the effects of land use on water quality or quantity. Most district plans leave these issues to regional plans. |
| 15. Regional councils combining the use of section 9 and section 15 – what the court has ruled on challenges to regional council rules that combine section 9 and section 15. | In the Lake Taupo case, rules about nitrogen leaching were made into hybrid section 9(2) and section 15 rules just in case non-point source nitrogen leaching activities are eventually found to be discharges (i.e. to avoid making those discharges illegal due to the restrictive presumption in section 15). | In our view it is generally undesirable to have section 15 rules combined with section 9 rules. We think it is confusing to mix rules regarding land use activities with rules relating to discharges. In most cases it should be sufficient to control non point source discharges by way of land use rules without the need to have discharge rules as well.  
The Courts have still not resolved the debate as to whether non point source emissions from animals are discharges. If such emissions are discharges, existing farming operations will be unlawful until |
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<td>16. Regional policy statement directions to district councils to control the use of land for the purposes of water quality and quantity – how effective regional policy statements are at directing district council land use functions for the purposes of water quality and quantity.</td>
<td>We are not aware of any Regional Policy Statements that have been used for that purpose. If there are, they do not appear to have been tested in the Court yet. Where Regional Policy Statements deal with the effects of land use on water quality, that tends to be implemented via regional plans rather than district plans.</td>
<td>An RPS can make it clear which authority has primary responsibility for controlling the effects of land use on water quantity and quality, however few currently do so.</td>
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<td>17. The ability of different activity classes (permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited) to enforce water quality and environmental flow limits – how effective the different activity classes are at enforcing limits.</td>
<td>The power to classify activities by way of rules is subject to the section 32 duty to evaluate &quot;whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives&quot; in the plan. Apart from the Lake Taupo decision there is no case law as to how best to implement water quality and quantity limits.</td>
<td>In our view, activities that do not comply with standards should usually be non-complying or prohibited. Activities that do not achieve guidelines or policies may be left as discretionary or restricted discretionary activities so that the question of whether the guidelines should be achieved can be left to the consent process. This issue is discussed in the two papers by Philip Milne relating to the management of cumulative effects.</td>
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<td>18. Instances where consent has been granted for activities that attracted non-complying consent status because they breached water quality and environmental flow limits status – which part of the gateway test allows activities to breach limits.</td>
<td>Both parts of the section 104D gateway test allow activities to breach limits. If the effects of the activity are no more than minor then the activity has passed through that gateway and could be consented despite a breach of a policy, unless there is some Part 2 or precedent (integrity of the plan) reason to decline consent. Conversely, even if the effects of the activity are more than minor, the activity could still get through the gateway if the objectives and policies in the plan are weak. There is case law on these points but not in the context of water quality or quantity limits.</td>
<td>For non-complying activity status to be effective, the regional plan's objectives and policies need to be robust and clear in their intention. A proposal is not &quot;contrary&quot; to the plan provisions simply because those provisions do not actively support the proposal. A regional council intending to rely on the section 104D(1)(b) gateway (contrary to objectives and policies) should ensure that its plan provisions are drafted in a manner that makes it clear what is envisaged as acceptable and what is unacceptable.</td>
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| 19. The enforceability of permitted activity rule conditions relating to water quality and environmental flow limits – whether the ability to monitor and enforce permitted activity rule conditions is a barrier to regulating the effects of activities on water quality and environmental flows. | In the Lake Taupo case the Court held that the permitted activity rule put forward for controlling nitrogen leaching activities was too complex, and the Court preferred to use a controlled activity rule in order to achieve the certainty that was necessary. The Court commented that:  
*For a permitted activity no resource consent is required if the activity complies with any standards, terms or conditions specified in the plan. Therefore it is necessary for any such standards, terms or conditions to be included in the plan and to be stated with sufficient certainty such that compliance is able to be determined readily without reference to discretionary assessments.*  
The enforceability of permitted activity rule conditions relating to water quality and environmental flow limits is a practical issue not a legal issue.  
Permitted activity standards can be used for enforcement and/or to require consents to be obtained provided the standards are clear and certain.  
Which approach to use is a section 32 issue (what will be most effective and efficient). In many cases it will be appropriate to utilise controlled, discretionary, non-complying or even prohibited activity status to implement limits. |                                                                                                                                                                                                 |
| 20. Breaches of resource consents and plans – how council actions on breaches are being ruled on by the court. | There are many enforcement/prosecution cases relating to unlawful discharges and a few relating to unauthorised taking of water. Most relate to breach of resource consent conditions or discharge or take without a resource consent.  
There are few examples of direct enforcement of limits in plans because such limits are usually incorporated into conditions of consent. Furthermore as noted earlier, many plans use guidelines, which will only be enforceable via consent conditions.  
Where consent or permitted activity conditions are clear and measurable, they will be enforceable.  
It is beyond the scope of this report to summarise the case law in relation to enforcement of limits imposed by way of conditions of consent. | |
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| 21. How section 104(6) has been interpreted — whether activities requiring consent which may have an effect on water quality or flow have been declined on the basis of inadequate information. Where there is uncertainty as to the effects on water quality and flow, have Councils or the Court imposed condition and if so, what type of condition? | We are not aware of any decisions relying directly on section 104(6). In addition to the option of declining consent, the tools available to consent authorities to deal with a lack of information include:  
- further information requests.  
- the granting of interim consents requiring upgrade.  
- the granting of short term consents.  
- adaptive management conditions.  
- review conditions under section 128.  
- discharge standards.  
- receiving water standards.  

There has been an increasing use of adaptive management conditions in conjunction with review conditions and/or short term consents, and the Court has sanctioned the use of adaptive management (and the precautionary principle). | It is beyond the scope of this report to summarise examples of use of adaptive management conditions in conjunction with review conditions and/or short term consents. There is some discussion of this in the papers we refer to by Philip Milne, relating to the management of cumulative effects.  

This issue has also been canvassed in first instance decisions relating to Canterbury groundwater and other first instance decisions. |
2. PROJECT SCOPE

Background – Government Direction on Fresh Water

2.1 On 8 June 2009, the Government announced its new strategy *New Start for Fresh Water*. It outlines the Government's new direction for water management in New Zealand and sets out some of the choices being faced and the implications of those choices. A programme of work has been developed to run until 2011 and beyond.

2.2 This report relates to the first two of ten priority projects being undertaken as part of the MfE officials' work programme, environmental flows and water measuring, and water quality limits.

2.3 The officials' work programme as a whole is working towards two main decision points:

(a) technical amendments and guidance on the current freshwater management framework as identified, with RMA amendments to be coordinated with the broader second phase of resource management ("Phase Two") package; and

(b) a summary and analysis of options available to address the major issues in July/August 2010.

Priority Project 1: Environmental flows and water measuring

2.4 The proposed project on environmental flows and water measuring will work to ensure that quantity limits reflect ecological bottom lines, wider community values are set and enforced, and ensure it is known how much water is being used. This project is closely linked to the allocation project, as the decision on how much water is provided for ecological and other values is effectively an allocation to in-stream values. The project will also consider potential improvements to water conservation order processes.

2.5 Long-term work will concentrate on environmental flows beyond those required to protect ecological values. These include tangata whenua, recreation, economic, amenity and natural character values. Setting environmental flows is ultimately a local political decision, requiring value judgements and balancing of competing interests (eg from industry, fishing, conservationists, recreationists and hydro-generators).

2.6 A significant component of this work will be to identify options for improving how environmental flow setting decisions recognise and incorporate Maori traditional and contemporary ecological knowledge.

Priority Project 2: Water quality limits

2.7 This project will consider ways to ensure quality limits are set and met which reflect wider community objectives (including economic objectives). This project aims to provide options for a robust framework, first to determine how water quality objectives can be defined and agreed, and then to translate these objectives into a quantifiable figure to enable management.

Scope of this report

2.8 The purpose of the current report is to provide a review of case law and legal considerations relevant to the questions and issues set out below, which were

1 Environmental flows are the flows and water levels established by a regional plan or other statutory tool to provide for a given set of values such as ecological, tangata whenua, cultural, amenity, recreational, landscape and natural character values and other values associated with water. Ecological flows are therefore just one component of environmental flows.
formulated by MfE staff. Given that there is limited case law on many of these issues it was agreed that we would broaden the scope of this report to include legal issues related to the relevant statutory provisions dealing with limits. We have also included limited discussion of some first instance decisions which provide an insight into some key issues relating to the setting and use of environmental limits.

2.9 MfE has requested regional and unitary councils to outline other first instance decisions which may be of relevance. Those will be considered by MfE separately.

Questions about the law on limits for freshwater quality and environmental flows

2.10 The objectives underpinning priority projects 1 and 2 can be paraphrased:

(a) How should objectives for freshwater quality and environmental flows be set?
(b) How should those objectives be translated into something quantifiable?
(c) How can it be ensured that those quantified limits are met?

2.11 21 questions were formulated by MfE staff and will be the focus of this report. The questions are set out in the Executive Summary above along with brief summaries of our responses. Aspects of these questions are also discussed throughout this report. Our response to all questions is set out in section 5 of this report. We discuss related and additional issues in section 7.

2.12 We note that the wording of the questions/issues is not ours and in some cases we have read beyond the precise question which has been asked and/or reframed the issue.
3. GLOSSARY

3.1 The following abbreviations have been used in this report:

(a) **ANZECC**: Australian and New Zealand Environment and Conservation Council.

(b) **ECan**: Environment Canterbury.

(c) **MfE**: Ministry for the Environment.

(d) **MoH**: Ministry of Health.

(e) **NES**: National Environment Standard.

(f) **NPS**: National Policy Statement.

(g) **RMA**: Resource Management Act 1991.

(h) **RPS**: Regional Policy Statement.

(i) **WCO**: Water Conservation Order.

(j) **WSCA**: Water and Soil Conservation Act 1967.

3.2 The following “definitions” have been used in this report. They reflect our use of the terms in question rather than any statutory or case law definitions:

(a) **Environmental limit (see the discussion in Part 4)**: An upper or lower bound set out in a plan beyond which an activity is unlawful or is subject to additional restrictions or additional hurdles. Limits provide a clear direction as to what is regarded as acceptable. These may be standards or guidelines.

(b) **Guideline**: A limit in a plan which is not directly enforceable but which provides guidance in relation to the environmental limits expected of resource users and/or the environmental quality to be achieved. Such limits are usually in the form of guidelines which may be used as assessment criteria and reflected in objectives and policies. Guidelines may be numerical or narrative. Such limits may (but need not) lead to the decline of “non compliant” applications or may be reflected to some degree in consent conditions. Guidelines are often converted to directly enforceable standards in consent conditions. For example minimum flow conditions, receiving water quality conditions and discharge standards.

(c) **Standard**: A limit incorporated into rules in a plan such that if the standard is not complied with the activity classification changes. Standards may be incorporated into rules as conditions of permitted activities or as standards on controlled, discretionary or non-complying activities. Standards may be used to prohibit an activity. Standards may also be converted into consent conditions.

(d) **Activity classification standard**: A standard that, if not complied with, changes the activity classification (e.g., from permitted to controlled or discretionary or from discretionary to non-complying or sometime prohibited.)
(e) **Section 69 water quality standard/"water classification standard":** A water quality standard that applies under section 69 and the third schedule of the RMA if water has been classified for a particular purpose and if there are rules setting out the quality to be achieved in the classified water. Where this provision is used the rules must require the standards in the third schedule or more restrictive standards to be met. Often the third schedule standards are simply incorporated into plans as guidelines rather than as standards.

(f) **Discharge standard:** A standard that applies to the material being discharged (e.g., wastewater discharge standards that apply in or at the end of the pipe, before the discharge enters the receiving environment).

(g) **Receiving water standard:** A standard that applies after the discharge enters the receiving environment, and which may in some cases allow for reasonable mixing.

(h) **Narrative limit:** A qualitative limit using words rather than numerical limits to describe the required outcome (e.g., "The water shall not be rendered unsuitable for bathing by the presence of contaminants" or "The natural quality of the water shall not be altered"). Sections 70 and 107 of the RMA set out statutory minimum standards which are narrative in form. The third schedule of the RMA also uses narrative standards. Guidelines may also be expressed in a narrative form.

(i) **Numerical limit:** A clearly defined quantitative or numerical limit which can readily be used as a standard or a guideline. For example, the amount or percentage or loading of a contaminant (e.g., "The pH of surface waters shall be within the range 6.0–9.0 units" or "The concentration of dissolved oxygen in surface waters shall exceed 5 grams per cubic metre"). Minimum and maximum flows are also examples of numerical limits.

(j) **Water quantity limit:** Plans may include water quantity limits as standards incorporated into rules or as guidelines. Water quantity standards include minimum flows, levels and pressures, and maximum rates or volumes of abstraction. Sometimes these may be left as guidelines rather than standards.
4. WHAT DOES THE CONCEPT OF ENVIRONMENTAL LIMITS ENCOMPASS?

4.1 The overall project and this report relate to "limits" in respect of water quality and quantity. The focus is on limits that are reflected in regional plans in objectives and policies and that may be included in rules. We exclude limits that are not incorporated into plans (for example non statutory guidelines that are not incorporated or referenced in a plan). Limits in plans may be narrative/qualitative or they may be quantitative and measurable. Limits need to be included in methods within a plan. That is, they should be incorporated into rules or assessment criteria and in both cases referred to in policies. Limits are one means of achieving objectives but need not be referred to within objectives.

4.2 The term limits is not one that is used in the RMA, but is commonly understood as being an upper or lower bound, beyond which an activity is unlawful or is subject to additional restrictions or additional hurdles. In the context of this project, we are referring to limits within regional plans which are intended to restrict water takes or discharges to water so as to protect environmental values. These may either be enforceable standards or guidelines.

4.3 We use the term "limits" to cover numerical and narrative standards and numerical and narrative guidelines.

4.4 Standards may be numerical (quantitative) or narrative (qualitative). The nature of a standard (as that term is used in the RMA) is that an activity must either comply with the standard or be subject to additional restrictions. The RMA makes provision for standards in three contexts:

(a) First (and most common) are standards which define the bounds of a particular activity classification. If the bound is overstepped the activity shifts to another activity class or may be prohibited.

(b) Secondly, there is express provision in sections 68 and 69 of the RMA for water quality and quantity standards including those in the third schedule of the RMA if they are used in that way in the plan.

(c) Thirdly, sections 70 and 107 set out what might be called statutory minimum standards for water quality that apply irrespective of the limits in plans.

4.5 Sometimes the term "standards" is used to refer to what are in fact guidelines (eg non statutory guidelines or the third schedule standards where those standards have not been incorporated into the relevant rules). In this report we will normally use the term "standards" to refer to directly enforceable limits and use the term "guidelines" to refer to limits that guide decision making but that are not directly enforceable except to the extent they are incorporated into consent conditions.

4.6 The term "limits" as used here encompasses what might be called soft limits. That is, policies, assessment criteria and non statutory guidelines relating to water quality or quantity. Non compliance with these types of limits does not have the consequence of prohibiting the activity or changing the activity class. However, the limit can still be an effective way of imposing additional obligations on activities either by discouraging them or by providing a basis for imposing conditions which reflect the limits. Where consent conditions require compliance with a guideline the condition in effect becomes a standard that becomes directly enforceable.

4.7 The key difference between standards and guidelines is that standards are directly enforceable whereas guidelines are not. Guidelines provide guidance to decision
making. This may be by way of declining consent, or by or being incorporated in conditions of a resource consent. As discussed above, a key example of this is the Third Schedule Water Quality "standards". These are not standards unless they are incorporated directly into plans as standards. Alternatively, they may be replaced by more detailed standards, or may be left simply as guidelines, or not used at all. The same comment applies to the MFE guidelines on freshwater quality and other commonly used guidelines such as the ANZECC 2000 guidelines. These are often referred to as standards but are not such unless incorporated directly into rules in a plan.

4.8 For the purposes of this report, we only treat policies, guidelines and assessment criteria as limits where they provide a clear direction as to the desired limit. Thus, for example, a policy of aiming to achieve contact recreations standards/guidelines after reasonable mixing is a limit because there is a reasonably clear indication of what the required standard is. In contrast, a policy of avoiding adverse effects on recreational amenity and public health is not a limit.

4.9 We also note that some guidelines, such as the ANZECC 2000 guidelines and the MFE/MoH contact recreation guidelines, are not expressed as absolute limits but instead have "trigger values" that represent degrees of risk. For example, further monitoring or investigation may be required if a particular trigger level is reached. Councils may convert trigger values to absolute standards but will need to be in a position to justify that as the appropriate level of risk beyond which discharges should be restricted or prohibited.

4.10 Finally, we note that many water quality standards or guidelines are expressed in terms of receiving water quality and usually apply after allowance for reasonable mixing. Alternatively quality limits may also be expressed as "end of pipe" or "discharge" standards. Commonly receiving water limits (whether standards or guidelines) are converted in consent conditions to discharge standards after making due allowance for reasonable mixing where required. However, sometimes the conditions are also expressed as receiving water limits. (Such an approach can lead to enforcement difficulties and a lack of certainty for consent holders because a limit that applies in river may be affected by upstream discharges and natural events.)
5. DISCUSSION OF QUESTIONS

5.1 We have answered the questions as best we can from our review of case law and our own experience acting for applicants and councils. As can be seen from the discussion, there is little if any case law relating to some of the specific questions. Our discussion makes reference to some relevant first instance decisions and to issues we are aware of from our practice. We also provide the relevant statutory context in relation to each question/issue. There is a more detailed discussion of the statutory provisions in the following section of the report.

Question 1: Consultation approaches/methods used by regional councils to set limits for freshwater quality and environmental flows – whether limit setting attempts by councils are failing or succeeding on the basis of the consultation approach used

5.2 There is no general statutory requirement to consult with the public in relation to policy statements, plans or resource consents. Nor have limits been rejected on the grounds of lack of consultation. However, some councils have had difficulties with getting new proposed limits applied or operative. For example, ECan’s proposed interim allocation limits for the red zones have not been applied by commissioners in part because they have been seen as too broad brush. There have also been suggestions that the limits focus too much on environmental outcomes and ignore the economic benefits of irrigation. It is speculation as to whether this perception in some quarters is indicative of poor consultation, or simply indicates a matter on which different parts of the community have differing views. Decisions are still awaited on submissions on the Proposed Natural Resources Regional Plan that raise these issues.

5.3 We note that the Lynton Dairy decision and the subsequent commissioner decisions on the red zone were not based on lack of consultation. The issues have revolved more around the scientific basis for the proposed limits. There is clearly a lack of consensus amongst stakeholders and experts as to what the limits should be. However, that is not necessarily a reflection on the consultation which has occurred.

Question 2: Technical criteria/methods used by regional councils to set limits for freshwater quality and environmental flows – whether limit setting attempts by councils are failing or succeeding on the basis of the technical criteria/methods used

5.4 There has been very limited case law on limits within plans under the RMA. In the Otago Minimum Flows case, the Environment Court set the minimum flow for scheduled catchments (i.e. those where investigation and recording were taking place) by taking into account all of the balancing mechanisms – the policies and objectives identified in the water plan and subsequently in the rules, as well as the MALF (mean annual low flow) and 1999 drought figures. In each case it was an issue of what was appropriate for each catchment (or sub-catchment). It did not apply a strict statistical analysis based on MALF.

5.5 In the Kakanui Flows case, the Environment Court balanced the competing demands between in stream and out of stream use of water when setting minimum flows for the Kakanui River. In setting the minimum flows, the Court evaluated the following:

- Economic effects on an irrigator through loss of water;
- Higher flow requirements for trout and salmon;

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2 RMA section 36A and clauses 3, 3A, 3B and 3C of the first schedule.
3 Discussed at paragraph 9.65.
4 Discussed at paragraph 9.49.
5 Discussed at paragraph 9.51.
• Flow requirements of native fish;
• Adverse social effects of less water for irrigation on employment;
• Social and recreational benefits of an increase;
• Perceived benefits of various minimum flows; and
• Costs of various minimum flows."

5.6 See paragraph 9.55 for a discussion of the unique "bounce back" minimum flow provision imposed by the Court in the Kakanui Flows case.

5.7 Environment Canterbury has had difficulties with having its proposed red zone interim allocation limits accepted by independent commissioners. None of the commissioner decisions to date have been tested in the Environment Court.

5.8 The commissioner decisions on Rakaia/Selwyn and Waimakariri/Selwyn have raised concerns regarding the science behind the interim allocation limits. There is a significant level of dispute between ECan scientists and applicant scientists on some key issues. The two key commissioner decisions to date have not accepted some aspects of the ECan science and rationale for the proposed limits. By way of example, the decisions raise concerns as to whether the ECan science has overestimated the link between deep groundwater takes and flow depletion in lowland streams. Concerns have also been raised as to whether the limits should be the same for all parts of the zones and for all aquifers.

5.9 Decisions are still awaited as to submissions on the Proposed Natural Resources Regional Plan provisions. Accordingly, it is too early to tell whether the concerns raised by commissioners dealing with resource consent decisions will also be accepted by the Committee dealing with the new rules and/or the Environment Court.

5.10 In terms of water quality limits, in Carter Holt Harvey v Waikato Regional Council Environment Waikato's approach to nitrate budgets in the Lake Taupo catchment went largely unchallenged and was accepted by the Court. However it should be noted that this approach was more about maintaining existing discharge levels rather than establishing what future limits should be. The Court did accept that as a minimum response, grandfathering existing nitrate budgets as at 2001 is appropriate.

Question 3: The use of RMA schedule 3 (water quality classes and standards) in plans – how council use of schedule 3 in plans is being ruled on by the court

5.11 There are as yet no Court decisions on the use of the third schedule classes under the RMA. This is because few plans use the classes in conjunction with the third schedule as standards, and no plans include the prohibitions which appear to be envisaged by section 69.

5.12 In our view, a key reason for reluctance by councils to use the third schedule as standards in a plan, is because this approach in inflexible given the requirement of section 69 to prohibit discharges which do not comply. Section 69 in its current form does not allow for the council to exercise any discretion in relation to compliance with the third schedule if those standards are incorporated into the plan. As a result the more common approach is to leave the standards as guidelines to be applied during the consent process. This approach is more flexible and less controversial and accordingly there is no case law on using the third schedule in this manner.

5.13 If future plans do introduce prohibitions based on the third schedule, there is likely to be opposition and appeals. In that event councils will need to justify why the prohibition is

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A123/08.
Case law on limits for freshwater quality and environmental flows

necessary. In particular they will need to demonstrate, in terms of section 32, that such an approach is the most appropriate way to achieve the purpose of the Act, taking into account benefits and costs and the risk of acting or not acting in the face of any uncertainty or insufficiency in information.

5.14 Another difficulty that arises in relation to the third schedule standards is that some of them are narrative standards with no numerical limits. If these standards are used as standards within plans, there will be significant debate regarding how they are to be applied.

5.15 In part 10 of this report we note several pre-RMA decisions relating to water classification under the WSCA regime. For example, in NZ Underwater Association Incorporated v Hawke’s Bay Catchment Board7 the Planning Tribunal held that it was inconsistent with the structure of the WSCA to take unusual or spasmodic natural events into account when considering a water classification. The Tribunal imposed a SA classification even though on occasions that standard was breached naturally.

5.16 In Water Resources Council v Southland Skindivers Club Inc8 the Supreme Court held that water classifications under the WSCA should not be set lower than the water quality that exists at the time of classification without good reason. The Court also stated that in general, a higher standard of quality than that existing in the waters to be classified should be imposed if such quality is reasonably needed and is reasonably attainable.

5.17 In Minister of Conservation v Gisborne District Council9 the Court held that water classifications under the WSCA should reflect what is reasonable and should take into account the current water quality. Higher standards can be aimed for in the long term, but it is unreasonable to impose an unobtainable classification on waters.

5.18 The different purpose and principles under the RMA as compared to the WSCA, suggests that the above two decisions must be treated with some caution. Nevertheless, in our view these decisions have some relevance in relation to moves by some regional councils to classify waterways for contact recreation or other purposes, in circumstances where standards/guidelines cannot currently be met as a result of non point source or other permitted discharges.

5.19 In this context, we suggest that the Courts may well find that it is inappropriate to impose contact recreation or other standards where they can not be achieved because of permitted discharges upstream. However, it may well be acceptable for regional plans to have a management objective or policy of achieving these goals within a particular timeframe, and to support that policy with guidelines or assessment criteria. This is an approach used by many regional councils (eg Wellington and Otago). The plans for these councils indicate that discharges will generally be managed so as to achieve particular third schedule standards.

Question 4: The use of RMA section 107 in plans and consent applications – how council decisions on s107(1)(c)-(g) matters are being ruled on by the court

5.20 Again, there are very few decisions relating to section 107. There is no case law consideration of whether it is sufficient or necessary for a council to simply copy the 107 standards into consent conditions as a basis for satisfying the section 107 requirement (which is a very common approach). We are aware of at least one situation in which this has been sanctioned by the Court (Renouf v Hawke’s Bay Regional Council10).

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7 W28/89.
8 (1975) 5 NZTPA 239.
9 A106/91.
10 W090/2006 and W105/06.
However, the question of whether it is appropriate to restate section 107 in the consent conditions was not tested to any significant degree. The Court simply included the section 107 conditions on the basis that it would do no harm and it was consistent with the other consent conditions and with permitted activity conditions in the Regional Plan.

5.21 The section 107 standards contain a double discretion which can lead to debate in relation to enforcement. First, they apply after reasonabe mixing. This uncertainty can be resolved by the consent decision clearly identifying the reasonable mixing zone for the contaminants in issue (such as occurred in the Renouf case). Secondly all of the standards are narrative standards which can lead to debate as to what is meant by terms such as "conspicuous", "objectionable" and "significant". These uncertainties can be reduced but not eliminated by clear wording in conditions or in policies in the plan.

5.22 At first instance level, it is now generally accepted that the 107 standards should be incorporated into discharge permits unless it is clear that the standards will be met without needing such conditions. It has also become common practice to define the reasonable mixing zone in consent conditions, and sometimes the narrative standards are converted to prescriptive standards.

5.23 The other issue which arises in relation to section 107 relates to the exceptions in section 107(2), which provides:

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.

5.24 There is little case law under the RMA as to the extent of these exceptions. In Paokahu Trust v Gisborne District Council11 "exceptional circumstances" was held to connote something out of the ordinary. Notwithstanding that a council had been tardy in addressing the continued discharge of (largely untreated) sewage that was a violation of tikanga Maori, the consequences of refusal of a coastal permit to discharge would mean that the city would be unable to legally use its sewage system. The Court was compelled to grant consent for a term of two further years because of these "exceptional circumstances".

5.25 The equivalent provision in the WSCA (section 21) also contained an exception for temporary situations. In Canterbury Frozen Meat Co v North Canterbury Catchment Board12 the Planning Tribunal held that what is a "temporary situation" is a question of fact in the particular case. In that case it allowed a non compliant discharge to continue for some years so as to enable time for it to be upgraded.

11 A162/03.
12 (1977) 6 NZTPA 280.
Question 5: The determination of "reasonable mixing zones" in plans and consent decisions – how council decisions on “reasonable mixing zones” are being ruled on by the courts

5.26 The term reasonable mixing is used in sections 70 and 107 and in the third schedule. There is no general requirement that water quality standards must allow for reasonable mixing, however that is a commonly accepted approach to both standards and guidelines. In essence, a reasonable mixing zone is a zone around or downstream of discharge within which the applicable limits (whether standards or guidelines) do not need to be achieved. This concept provides a limited degree of flexibility when applying limits which refer to reasonable mixing.

5.27 The Courts have not ruled on the use of reasonable mixing zones in relation to appeals of plan limits, or the third schedule. In Paokahu Trust v Gisborne District Council the Environment Court held that what is “reasonable mixing” is a question of fact in each case. This was an unsuccessful appeal by Paokahu Trust against Gisborne District Council's granting of coastal permits to enable continued use of an existing wastewater outfall at Waikanae Beach in Gisborne. In this case, the Court found that “reasonable mixing” was at a 250m radius around the diffuser's length.

5.28 In Southland Regional Council v New Zealand Deer Farms, the Court considered what the term meant in terms of a prosecution. The prosecution was for breach of a permitted activity standard which incorporated the section 107 standards after reasonable mixing. The Court adopted a case by case approach to reasonable mixing rather than the approach in the proposed Plan of a reasonable mixing zone of 200 metres. In particular, the Court considered that the "size of the waterway, velocity of water, tributaries and the like" were factors to consider. The Court held that the question of reasonable mixing will be dependent on site specific factors.

5.29 In our view this case by case approach will not be applicable where a consent condition specifies a reasonable mixing zone. In that event that will be an enforceable part of the limit. However where enforcement is based on breach of a permitted activity rule the reasonable mixing zone will only be fixed if it has been expressly incorporated into a condition of the permitted activity as a fixed zone. In the Southland Regional Council case the Court found that it was not bound by the 200m reasonable mixing zone specified in the Plan.

5.30 Earlier case law under the WSCA established that a reasonable mixing zone "will be a question of fact and degree in each particular case".

5.31 In our view, the concept of reasonable mixing encompasses the technical notion of "reasonably well mixed" (based on mixing studies) as well as the value judgement of "What is reasonable in the circumstances?" That approach has not been considered by the Courts but is consistent with the case law of no more that what is reasonable in the circumstances. An associated issue is whether mixing zones should be different for different contaminants in a discharge.

5.32 Finally, we note that in our experience there is a considerable amount of confusion regarding the use of reasonable mixing in relation to consent conditions. Often the debate focuses on the question of: "At what point is the discharge reasonably well mixed?" rather than the question of: "At what point is it reasonable and necessary for the purposes of sustainable management to require limits to be met?" Although there is

13 A162/03.
15 Page 81 of Mahuta v National Water and Soil Conservation Authority (1973) 5 NZTPA 73.
no case law on this point, in our view the Courts will focus on the latter question rather than the former.

**Question 6: The interpretation of RMA section 14 use rights – what constitutes “reasonable domestic need” and “reasonable need for an individual’s animals for drinking water”**

5.33 We are not aware of any case law on these terms in section 14. Where section 14 has been referred to in case law, the Court has generally only referred to the legislative wording rather than discussing what it means. It is clear that water for dairy sheds is not covered by the exception.

5.34 One issue that arises is whether increased stock drinking water needs as a result of increased stocking (e.g., dairying conversions) are covered by the exception. It is not clear whether the reference to an “individual” precludes stock drinking water for large scale farming operations. In our opinion all reasonable stock water requirements are covered by the exception. However, the exception can be overridden by regional rules. Thus, rules could limit the extent of permitted stock water takes (e.g., on the basis of the size of a property).

5.35 Another issue which arises is whether the stock component of a take can be separated from other components. Depending upon how regional plan rules are drafted an applicant may be able to separate out the stock and domestic component of a take and only apply for consent for the non-authorised portion. However, a rule may override the RMA section 14 presumption and require all of the take to be consented once some defined limit per property is exceeded, or where there is a mixed component to the use of the water.

**Question 7: The use of RMA section 69(1) and (2) – what the rulings are on council decisions classifying water bodies through plan rules**

5.36 While some regional plans classify water for the third schedule management purposes, few if any have adopted the third schedule standards as such. We have discussed reasons for that above. In particular, section 69 requires rules which require the standards to be met if they are incorporated into the plan. Because there are few if any plans which both classify and apply the third schedule standards, there is little case law.

5.37 In *Paokahu Trust v Gisborne District Council* the central issue was whether the Council’s proposed regional plan purported to set standards for water quality without complying with the requirements of one or more of RMA sections 69(1)-(3) (including the need to require such standards to be met).

5.38 In relation to section 69(1) the Court found that two questions needed to be asked. The first was whether the Council provided in the plan that waters were to be managed for any purpose described in respect of any of the classes specified in the third schedule. The Court decided that the Council had done this despite the Policy’s identification of the classes as SA, SB, etc not being identical with those in the third schedule. The Court stated that the lack of precise correlation in terminology was not the point because “The purposes of management are materially the same in both the PRCEP and the Third Schedule” (paragraph 5).

5.39 The second question was whether the Council had included rules in the plan about the quality of those waters. The Court found that this was unclear so it moved on to section

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16 Eg *Lower Waitaki River Management Society Inc v Canterbury Regional Council* (C080/09) and *Opiki Water Action Group Inc v Manawatu-Wanganui Regional Council* (W64/2004).
17 W036/05
69(2). The Court found that the Council had stated new classes or standards in the plan. At paragraph 12 the Court stated "That being so, for the Council to be able to state in the proposed plan … new classes and standards … it must have come to the view that the classes in the Third Schedule are not … adequate or appropriate … for the purpose. We can find nothing in the material to suggest that the Council has come to that view".

5.40 In its subsequent final decision (W078/05) the Court summarised its conclusions on these issues as follows:

"In summary, our views about the s 69 factors are these:

- The PRCEP provides that waters are to be managed for a purpose described in Schedule 3: s 69(1)(a).
- The Council included rules in the PRCEP: s 69(1)(b).
- The rule must require observance of the Schedule 3 standards unless the Council has decided that those standards are not adequate or appropriate: s 69(1)(b).
- We cannot be satisfied that the Council held the opinion that the standards in Schedule 3 were not adequate or appropriate: s 69(1)(b).
- We cannot be satisfied that the PRCEP standards are more stringent or specific than the Schedule 3 standards: s 69(1)(b).
- We cannot be satisfied that the Council held the opinion that the classes specified in Schedule 3 are not adequate or appropriate for management purposes: s 69(2).
- We cannot be satisfied that the PRCEP standards will not allow water quality to decline below that in existence at the time of notification: s 69(3)."

5.41 We note the Court’s reference to the requirement that …The rule must require observance of the Schedule 3 standards unless the Council has decided that those standards are not adequate or appropriate (section 69(1)). Although section 69 does not expressly state as much, it seems implicit that if a Council adopts higher standards it must require those standards to be met.

Question 8: The use of RMA section 69(3) – what the rulings are on council decisions to set water quality limits which would reduce water quality

5.42 We are not aware of any case law substantively considering this issue. In Paokahu Trust v Gisborne District Council the Court referred to section 69(3) but was not able to consider this issue as it did not have evidence before it about whether the Plan's limits would reduce water quality. See the decisions referred to in relation to water classification under the WSCA, which may provide some assistance.

5.43 In our view it is clear from section 69 that if it is applied, the rules must not allow water quality to be reduced from existing. This may be another reason why section 69 is not being applied. The effect of section 69(3) would seem to be to prevent new discharges

18 W036/05.
to water until existing quality has been improved. That is because it will often be difficult for a new discharge to maintain existing water quality (unless a very generous interpretation of reasonable mixing is applied).

Question 9: Establishing the significance of effects – how do you distinguish between “significant adverse effects”, “no more than minor effects” and “no adverse effects”?

5.44 This is a broad question and one that is grappled with to some extent in most consent decisions and appeals. The Courts approach this question as an issue of fact to be determined on the evidence available to it in any given case, rather than defining what the terms "significant" and "minor" mean.

5.45 We note that the test of "no more than minor" effects is only a threshold test in relation to non-complying activities and then only when the activity would be contrary to the relevant objectives and policies. There is no general requirement that effects be minor or indeed that they not be significant. Although it is inherent in part 2 of the Act that adverse effects need to be adequately avoided, remedied or mitigated, there will be some activities which inevitably have more than minor effects but which are still approved as being sustainable.

5.46 In the context of water quality and quantity limits, the test of "no more than minor adverse effects" will only be directly relevant where limits have been incorporated into non-complying activity rules. In this context, if limits are not complied with, then in order to pass the threshold test an applicant will need to establish that either the activity will not be contrary to objectives and policies, or that the activity (and in particular the non-compliance with the relevant standards) will not cause more than minor adverse effects on the environment.

5.47 "Minor" is not defined in the RMA, and there is no absolute yardstick for what might constitute a minor effect (Elderslie Park Ltd v Timaru District Council\(^{19}\)). In Stokes v Christchurch City Council\(^{20}\), the Environment Court confirmed that the proper test in relation to a non-complying activity is whether the adverse effects as proposed to be remedied and/or mitigated are more than minor, taken as a whole (ie after taking into account any consent conditions which the consent authority may include). In Taylor v Waimakariri District Council\(^{21}\), the Planning Tribunal held that, ultimately, an assessment of what is "minor" involves conclusions as to facts and the degree of effect.

5.48 RMA sections 15B, 70, and 107 include a requirement of no significant adverse effects on aquatic life after reasonable mixing, as a result of discharge of a contaminant. The Courts have not ruled on what "significant adverse effect" means in this context. In particular is not clear whether a more than minor adverse effect is significant.

5.49 In Opiki Water Action Group Inc v Manawatu-Wanganui Regional Council\(^{22}\) and Napier City Council v Hawke's Bay Catchment Board\(^{23}\) the question of whether a reduction in flow pressure in the context of bore water constitutes an adverse effect on other users was considered. It was held that existing bore users have no right to pressure giving flowing artesian water and that pressure is convenience whose loss is almost inevitable.

\(^{19}\) [1995] NZRMA 433 (HC).
\(^{21}\) C022/96.
\(^{22}\) W64/2004.
\(^{23}\) (1978) 6 NZTPA 426.
Whether councils have established a correct determination of the significance of effects in plans and consent decisions?

5.50 This is not a question we can answer. The setting of limits is not directly about whether effects are minor, significant or something in between. Rather the limits should reflect what is sustainable having regard to the requirements of section 32 (efficiency, effectiveness, costs and benefits).

5.51 When councils establish limits (whether standards or guidelines) in their plans, they are making a value judgement on behalf of the community as to acceptable/sustainable levels of adverse effects on the environment. Where those limits are accepted by the community without appeals, one can perhaps assume that the Council got it generally right. However, as noted above, many councils have not included standards in their first generation plans.

5.52 In the case of guidelines, the testing of the limits will usually not occur until the consent stage. This is because guidelines are often regarded as less contentious and as a result are not the subject of appeals or appeals are resolved by mediation.

5.53 Both standards and guidelines will be tested through the consent process. At that point the test is whether or not there are appeals and if so whether the Court accepts that the limits should be reflected in the consent decision. That could be by declining consent or by translating the limits into conditions.

5.54 A good measure of whether councils are getting it right in terms of the sustainability of limits is the extent to which plan limits are challenged on appeals. To date the main examples of this are Carter Holt Harvey Limited v Waikato Regional Council\(^{24}\) and the Kakanui Flows case. In both cases the councils' approaches were generally upheld.

5.55 Debates such as those surrounding the Canterbury ground water allocation limits are ultimately about whether the Council has got the balance between environmental and economic outcomes correct rather than whether the Council has correctly determined what is "significant" and what is not.

5.56 In terms of consent appeals, we are not aware of any decisions which centre on compliance with plan limits.

Question 10: Cumulative effects of point source discharges and nonpoint source discharges on receiving water quality when considering new applications for activities/point source discharges – how council decisions about these matters are being ruled on by the court

5.57 The starting point for this question is section 3(d) of the RMA, which includes cumulative effects within the definition of effects that must be considered. Cumulative effects are not the same as precedent (that is, the risk that if the consent is granted, other similar applications will follow). Instead they are recognition that "... any one incremental change is insignificant in itself, but at some point in time or space the accumulation of insignificant effects becomes significant",\(^{25}\) In Dye v Auckland Regional Council\(^{26}\), the Court of Appeal made the following comments about cumulative effects:

> The definition of effect includes “any cumulative effect which arises over time or in combination with other effects”. The first thing which should be noted is

\(^{24}\) A123/08.  
\(^{25}\) Gargiulo v Christchurch City Council [2002] 1 NZLR 337.  
\(^{26}\) [2002] 1 NZLR 337.  
\(^{27}\) Paragraph 38, emphasis added.
that a cumulative effect is not the same as a potential effect. This is self evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words “which arises over time or in combination with other effects”. The concept of cumulative effect arising over time is one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. The same connotation derives from the words “regardless of the scale, intensity, duration or frequency of the effect”.

5.58 In Mahuta v Waikato Regional Council\(^28\) the Court accepted that "if the total load has an adverse effect on the environment, then even a relatively small contribution to the phosphorus load of the river should not be ignored" (paragraph 155).

5.59 In Carter Holt Harvey Limited v Waikato Regional Council\(^29\) the Court accepted evidence that even small incremental increases in nitrogen leaching could have a significant cumulative effect on Lake Taupo (see the further discussion of this case under later questions).

5.60 The issue of cumulative effects has come to the fore in the context of the so called groundwater red zones in Canterbury. The Proposed Natural Resource Regional Plan has deemed these resources to be over-allocated and has made new takes which exceed the interim allocation limits non-complying. The basis for the limits is that the adverse cumulative effects of new takes in conjunction with the combined effects of existing takes are unsustainable.

5.61 The Lynton Dairy decision was in essence about these cumulative effects on lowland streams as a result of abstraction. The case was decided before the Proposed Natural Resources Regional Plan, which now contains "interim" allocation limits, was operative. The PNRRP was notified before the decision but submissions had not been heard and the non-complying status for new takes did not apply to this take.

5.62 The outcome of the case may possibly have been different if the PNRRP had been at a more advanced stage, however even that is debatable. The Court granted consent despite the view of Council witnesses that the discharge would add to already unacceptable adverse effects. In essence the Court did not accept that view for reasons set out in the decision which we set out later in this report.

5.63 There has been much debate following the Lynton Dairy decision and the subsequent Environment Canterbury commissioner decisions in relation to the groundwater red zones. Debate has focused on whether those decisions adequately took into account the cumulative effects which underpin the proposed groundwater allocation limits. There have also been some suggestions (in particular from the CEO of Environment Canterbury) that the RMA needs amendment to better address cumulative effects. Those debates are beyond the scope of this report but we note that Philip Milne has written some articles on the topic of cumulative effects management with particular reference to setting environmental limits.\(^30\)

\(^{28}\) A091/98.
\(^{29}\) A123/08.
\(^{30}\) When is enough, enough? Dealing with cumulative effects under the Resource Management Act, Philip Milne, February 2008; (MfE Quality Planning Website) When is enough, enough? Dealing with cumulative effects under the RMA, Philip Milne, Resource Management Bulletin March 2009 (Part I) and April 2009 (Part II).
There are many first instance decisions where the consent authority has imposed stringent conditions on existing or new point source discharges to address cumulative effects, including the effects contributed or even caused by upstream non point source discharges. Examples we are aware of include:

(a) The recent Masterton District Council waste water discharge consents which were guided by the Contact Recreation policies (guidelines) in the Regional Plan.

(b) The Clutha District Council wastewater consents which required a significant upgrade to work towards higher water quality standards and the medium term aim of contact recreation standards in the Tokomairiro River (the plan has a policy of managing towards achieving contact recreation guidelines).

(c) The Rakaia Selwyn and Waimakariri Selwyn groundwater decisions which include quite restrictive adaptive management conditions to reflect the cumulative effects of groundwater abstraction on lowland stream flow.

(d) Hawke’s Bay Regional Council decisions on recent water take applications to address the cumulative effects of abstraction on river flow.

Although there is little case law on cumulative effects and non point source discharge, we have no doubt that the Court will (as it must) factor these matters into any decisions on new limits within plans. Examples which we have referred to include the Lake Taupo nitrate issues in relation to non point source discharges, and the Lynton Dairy decision in relation to the cumulative effects of ground water abstraction.

Cumulative effects have been a significant focus of the Canterbury ground water decisions and various applications (such as that by Central Plains Water Trust) for irrigation. In particular the issue of the cumulative effects of farming run off has been considered in these hearings in the context of applications to use water for irrigation purposes.

There are first instance decisions relating to the cumulative effects of point source discharges in combination with non point source discharges. There are also first instance decisions dealing with the cumulative effects of new water takes on rivers or ground water in combination with the effect of existing takes.

Question 11: Regulating the effects of non-point source discharges on water quality – whether the view (in some quarters) that it is inappropriate to regulate these effects has been tested by the court

Both Regional Councils and territorial authorities can control the effects of land use on water quality (see question 13 and question 14 below). In our view there is no basis for the argument that it is inappropriate to regulate the effects of non point source discharges, since such regulation is envisaged by section 30 and section 31 and is consistent with the purpose and principles of the Act. We note that the debate in the Carter Holt decision was not about whether such discharges could or should be regulated but about how they should be regulated.

There has been some debate as to whether animal emissions are discharges in terms of section 15. In Carter Holt Harvey Limited v Waikato Regional Council31 the Court noted that the framing of a resource consent as a land use consent or a discharge permit is significant, because the requirement to consider alternatives (as well as the

31 A123/08.
other restrictions in sections 105, 107 and 108(8)) only apply to discharge permits, not to land use consents.

5.70 In *Carter Holt Harvey Limited v Waikato Regional Council*\(^{32}\) the purpose of the Regional Council's rules which were under appeal was to control the cumulative effects of non-point source "discharges" from pastoral grazing. The Court declined to make a finding about whether animal emissions were discharges (point source or otherwise). The Court agreed with the Council that the rules should cover animal emissions under section 15 "just in case" they were ultimately found to be discharges. The rules were made into hybrid section 9(2) and section 15 rules. The Court accepted that in this case it was preferable to regulate the effects of non point source discharges by way of a controlled activity rule rather than by way of permitted activity conditions as sought by Federated Farmers.

**Question 12: Alternative methods of discharge [RMA section 105 and schedule 4(1)(f)] consent decision making – what the rulings are on the consideration councils have given to alternative methods when making consent decisions**

5.71 Section 105(1)(c) requires a consent authority to consider "*any possible alternative methods of discharge, including discharge into any other receiving environment*" when considering a section 15 discharge permit application. Clause 1(f)(ii) of the fourth schedule requires applicants to address alternative methods of discharge in the AEE.

5.72 In *Mahuta v Waikato Regional Council*\(^{33}\), the Court noted that alternative methods of discharge (land disposal) would have deserved further consideration if the proposed discharge to the Waikato River from the expanded dairy factory would:

(a) have significant adverse effects on the quality of the water in the river; or

(b) fail to recognise and provide for the relationship of iwi with the river and their kaitiakitanga in respect of it.

5.73 However, it found that those factors were not present in that case. This was because consent conditions were able to prevent adverse effects on the river environment, and because the discharge had been designed specifically to recognise and provide for the relationship of iwi with the river and their kaitiakitanga.

5.74 In *Walker v Hawke's Bay Regional Council*\(^{34}\) the Court confirmed that the requirement is to consider alternative *methods* of discharge, not alternative methods of achieving the consent applicant's aims (in that case the removal of willow trees in a lake by aerial spraying).

5.75 *Tainui Hapu v Waikato Regional Council*\(^{35}\) involved consideration of land and water disposal alternatives. The Court noted that there were two occasions for considering the adequacy of consideration of alternatives in this case: as part of the process of consultation with tangata whenua, and under the section 104(3) direction. The Court noted that its role is not to substitute its own judgement for that of the applicant, but to "*find whether the District Council gave adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge and made a reasoned choice*"\(^{36}\). In particular, the Court held that affordability is for the applicant to judge\(^{37}\).

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\(^{32}\) A123/08.

\(^{33}\) A091/98.

\(^{34}\) [2003] NZRMA 97.

\(^{35}\) A063/2004.

\(^{36}\) Paragraph 148.

\(^{37}\) Paragraph 151.
5.76 In the *Tainui* case, the Court found that the applicant had given land-disposal options sufficient consideration, and the evidence suggested that it was simply not a feasible option given its affordability and the impermeable nature of surrounding land. The Court concluded that a thorough and business-like consideration of alternatives had occurred, and despite being unable to avoid discharge into the harbour, a reasoned choice was made by enhancing the quality of discharged treated wastewater to shellfish-gathering standard.

**Question 13: Regional councils using their planning documents to control land use for the purposes of maintaining and/or enhancing water quality, or maintaining water quantity – whether regional councils are able to control land use for water quality and quantity purposes. In particular what the court has ruled when regional council use of section 9 has been challenged. (For example, rules on stocking rates.)**

5.77 The main case discussing this question is *Carter Holt Harvey Limited v Waikato Regional Council* 38. There was considerable debate at the hearing about whether pastoral farming was a discharge as well as a land use. The Court declined to make a finding about whether animal emissions are discharges but accepted that the effects of such discharges can be controlled by regional land use rules. The rules were made into hybrid section 9(2) and section 15 rules. The effect will be a cap on stocking rates because farmers are required to comply with a cap on their nitrogen leaching as modelled in conjunction with the Waikato Regional Council.

5.78 The tools available to councils to control the effects of non point source discharges include:

(a) Rules regulating land use including, potentially, stock numbers and fertiliser application (these can be regional or district rules).

(b) Discharge rules in relation to fertiliser.

(c) Considering the effects of farming intensification when considering applications to use water for irrigation (eg Central Plains and the McKenzie basin applications).

5.79 In *Carter Holt Harvey Forests Ltd & Fletcher Challenge Forest Ltd (Weyerhaeusernz Inc) v Tasman District Council* 39, Carter Holt Harvey sought deletion of provisions that sought to control effects on water resources by restricting the establishment of tall vegetation. The Court upheld the provisions.

5.80 The Court noted that one of the Council's functions is to control the use of land for the purpose of maintaining the quantity of water in water bodies, pursuant to section 30(1)(c)(iii) of the RMA. The artificial establishment of tall vegetation, such as plantation forestry, is a form of land use subject to section 9 of the RMA. If this form of land use has a significant effect on water resources then such an activity is subject to Council intervention of an appropriate kind.

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38 A123/08.
Question 14: District councils controlling land use for the purposes of maintaining and/or enhancing water quality, or maintaining water quantity – whether district councils are able to control land use for water quality and quantity purposes

5.81 Canterbury Regional Council v Banks Peninsula District Council\(^{40}\) was an appeal from the Planning Tribunal's decision in an Application by Canterbury Regional Council\(^{41}\).

5.82 In the Planning Tribunal, Canterbury Regional Council sought declarations as to the relationship between regional and district plans in relation to land use control. The Tribunal held that regional councils were not superior to territorial authorities, and that there was no hierarchy in plans. The Tribunal refused to make the declaration that territorial authorities did not have the authority to control the effects of the use of land for the purpose of water quality and water quantity.

5.83 This decision was appealed to the Court of Appeal with the overall result being that the Planning Tribunal decision was read subject to the Court of Appeal's decision. The Court held that a regional council can include rules regarding the activities for the purposes of section 30 and that a territorial authority can include rules about activities under section 31. Both authorities have overlapping powers but the powers of territorial authorities are also subject to section 75(2).

5.84 We are not aware of any Court decisions regarding limits which District Councils have imposed for the purpose of controlling the effects of land use on water quality or quantity. Most District Plans leave these issues to Regional Plans. The debate over intensification of farming in Canterbury and elsewhere may cause pressure on territorial authorities to implement controls on intensification.

Question 15: Regional councils combining the use of section 9 and section 15 – what the court has ruled on challenges to regional council rules that combine section 9 and section 15

5.85 In Carter Holt Harvey Limited v Waikato Regional Council\(^{42}\), discussed above, the rules about nitrogen leaching were made into hybrid section 9(2) and section 15 rules by the Court just in case non-point source nitrogen leaching activities are found to be discharges in the future (ie to avoid making those discharges illegal due to the restrictive presumption in section 15).

5.86 We are of the view that in general it is undesirable to have section 15 rules combined with section 9 rules. We think it is confusing to mix rules regarding land use activities with rules relating to discharges. We are also of the view that in most cases it will be sufficient to control non point source discharges by way of land use rules without the need to have discharge rules as well. Furthermore, the Courts have still not resolved the debate as to whether non point source emissions from animals are discharges.

5.87 In the case of fertiliser application, this could be controlled either by way of discharge or land use rules.

\(^{40}\) [1995] NZRMA 452 (CA).
\(^{41}\) [1995] NZRMA 110.
\(^{42}\) A123/08.
Question 16: Regional policy statement directions to district councils to control the use of land for the purposes of water quality and quantity – how effective regional policy statements are at directing district council land use functions for the purposes of water quality and quantity

5.88 We are not aware of any regional policy statements that have been used for that purpose. If there are, they do not appear to have been tested in the Court yet. There may well be broad policies regarding land use and water quality (eg a policy that earthworks should not cause undue sediment discharges) but these have seldom, if ever, been in the form of directions to territorial authorities. Those regional policy statements that do deal with the effects of land use on water quality tend to deal with these effects via regional plans rather than district plans.

Question 17: The ability of different activity classes (permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited) to enforce water quality and environmental flow limits – how effective the different activity classes are at enforcing limits

5.89 There is little case law on this point. In Carter Holt Harvey Limited v Waikato Regional Council43, Federated Farmers argued that it would be sufficient to control stocking rates by way of conditions in permitted activity rules. Although the Court accepted that this was possible as a matter of law, it upheld the Council’s approach of using a controlled activity rule for leaching within the 2001 cap and a non-complying activity rule for leaching exceeding the cap. At paragraph 145 the Court stated:

"We find that for proposed Rule 3.10.5.3 a controlled activity is the most appropriate type of activity to implement the objectives and policies of the plan and to assist the Regional Council to carry out its functions to achieve the purpose of the Act."

5.90 Section 77A of the RMA authorises local authorities to categorise activities as permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited activities. The power to classify activities by way of rules is subject to the section 32 duty to evaluate "whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives" in the plan. As a general proposition the more restrictive the approach which is used the greater the need for the council to justify its approach in terms of section 32.

5.91 Apart from the Carter Holt decision there is no case law as to how best to implement water quality and quantity limits. This issue is discussed in the two papers by Philip Milne relating to the management of cumulative effects.

5.92 In our view, activities that do not comply with standards should usually be non-complying or prohibited. Activities that do not achieve guidelines or policies may be left as discretionary or restricted discretionary activities so that the question of whether the guidelines should be achieved can be left to the consent process.

5.93 See below (question 18) for discussion of the need for clear policies when using non-complying activity status in order to ensure that the second limb of section 104D(1) has meaning.

43 A123/08.
Question 18: Instances where consent has been granted for activities that attracted non-complying consent status because they breached water quality and environmental flow limits status – which part of the gateway test allows activities to breach limits

5.94 Both parts of the section 104D gateway test allow activities to breach limits. If the effects of the activity are no more than minor, the activity has passed through that gateway and could be consented despite a breach of a policy, unless there is some Part 2 or precedent (integrity of the plan) reason to decline consent.

5.95 Conversely, even if the effects of the activity are more than minor, the activity could still get through the gateway if the objectives and policies in the plan are weak. However, even if one or other gateway is passed the consent authority or Court still has discretion to decline consent.

5.96 In *Hopper Nominees Ltd v Rodney District Council*[^44], the High Court rejected an argument that if the effects are minor, significant weight ought not to be attached to the plan provisions. The Court found that there is no reason for giving primacy to either of the two alternative conditions referred to in section 104D(1). Even if one of the constraints imposed by section 104D(1) is overcome, the discretion to grant or refuse consent remains. For example, even if the adverse effects will be no more than minor, there remains a broad discretion to decline consent based on the finding that a proposal was contrary to the plan’s objectives and policies or Part 2.[^45]

5.97 For non-complying activity status to be effective, the regional plan’s objectives and policies need to be robust and clear in their intention. A proposal is not "contrary" to the plan provisions simply because those provisions do not actively support the proposal.[^46] A proposal could be said to be contrary to objectives or policies even if it does not actually cut across or contradict those objectives or policies.

5.98 In our view, a regional council intending to rely on the section 104D(1)(b) gateway (contrary to objectives and policies) should ensure that its plan provisions are drafted in a manner that makes it clear what is envisaged as acceptable and what is unacceptable.

5.99 There are a number of commissioner decisions relating to ECAn’s red zones, where consents have been granted for non-complying takes. In all of these decisions the commissioners found that the applications could pass through either gateway. The commissioners did not accept evidence that the consents would cause more than minor cumulative effects. In terms of the policies in the plan the commissioners noted that the key policy was that the applicant must establish that the take would not cause more than minor adverse effects. They considered that this test was passed. The other point to bear in mind in this instance is that the proposed limits in the plan were at an early stage (no decisions on submissions).

5.100 The more recent Canterbury Meat Packers decision also granted consent of a non-complying take. In this instance the Council officers recommended that consent be declined on the basis of “precedent” even if the non-complying activity tests were passed. The commissioners granted consent and found that there would be no impact on the integrity of the plan since it was at an early stage and the activity in question was different in a number of respects from other applications which might be made.

Question 19: The enforceability of permitted activity rule conditions relating to water quality and environmental flow limits – whether the ability to monitor and enforce

[^46]: *Outstanding Landscape Protection Soc Inc v Hastings District Council* [2008] NZRMA 8 (EnvC).
permitted activity rule conditions is a barrier to regulating the effects of activities on water quality and environmental flows

5.101 In Carter Holt Harvey Limited v Waikato Regional Council\textsuperscript{47}, Federated Farmers argued that a permitted activity rule would be the most appropriate way to control nitrogen leaching activities, on the basis that it was the least restrictive activity classification that would achieve the objectives of the plan. The Court commented:

"[116] For a permitted activity no resource consent is required if the activity complies with any standards, terms or conditions specified in the plan”. Therefore it is necessary for any such standards, terms or conditions to be included in the plan and to be stated with sufficient certainty such that compliance is able to be determined readily without reference to discretionary assessments."

5.102 In this case the permitted activity rule put forward was deemed to be too complex, and the Court preferred to use a controlled activity rule. The Court concluded:

"[143] We find that to give effect to that policy [Policy 3, which caps nitrogen outputs from land in the catchment] it is necessary to have a rule which provides for the complex procedure of collating a considerable amount of data, some of it requiring expert analysis and interpretation, and using the OVERSEER computer model to calculate the long term Nitrogen Discharge Allowance for each farm. Once the Nitrogen Discharge Allowance has been assigned then a Nitrogen Management Plan is to be prepared to describe key farm management practices that, when modelled in OVERSEER, demonstrate that the nitrogen leaching from the property will not exceed the Nitrogen Discharge Allowance. On-going monitoring of compliance is anticipated. At this early stage in the development of the RPV5 regime there is a need for a high level of Council involvement.

[144] Although joint caucusing between the planning experts resulted in a draft proposed permitted activity version of the rule, we find that it falls well short of the requirements for a permitted activity. No doubt some further re-drafting could improve it. But we do not accept that it can achieve certainty, or comprehensibility, or reduce the need for expert judgement, to satisfactory and adequate levels. Although the same procedure is to be followed throughout the catchment, the application to each property requires discretion to recognise site specific variations. We find that overall the task required of any rule to implement Policy 3(b), in particular, is too complex and requires considerable expert technical input such that it is inappropriate as a permitted activity. We share the concern of the Tuwharetoa interests "... that the farming groups may be endeavouring to shoehorn this complex process into a permitted activity regime".

5.103 The enforceability of permitted activity rule conditions relating to water quality and environmental flow limits is a practical issue not a legal issue. Permitted activity standards can be used for enforcement and/or to require consents to be obtained provided the standards are clear and certain. Which approach to use is a section 32 issue (what will be most effective and efficient). In many cases it will be appropriate to utilise controlled, discretionary, non-complying or even prohibited activity status to implement limits.

\textsuperscript{47} A123/08.
Question 20: Breaches of resource consents and plans – how council actions on breaches are being ruled on by the court

5.104 There are many enforcement/prosecution cases relating to unlawful discharges and a few relating to unauthorised taking of water. Most relate to breach of resource consent conditions or discharge or take without a resource consent. It is beyond the scope of this report to summarise the case law in relation to enforcement of limits imposed by way of conditions of consent. There are few examples of direct enforcement of limits in plans. That is because such limits are usually incorporated into conditions of consent. Furthermore, as noted earlier, many plans use guidelines, which will only be enforceable via consent conditions.

5.105 Where consent or permitted activity conditions are clear and measurable, they will be enforceable. For example, in Hawke’s Bay Regional Council v Morton Estate\(^\text{48}\) the flow restrictions in consent conditions were clear and the collection of reliable data (also required by the conditions) allowed the Court to find that there had been a breach and to impose a fine of $50,000. Likewise in Canterbury Regional Council v Roy,\(^\text{49}\) the Court imposed a fine for taking water from a "fully allocated red zone" for irrigation without the necessary resource consent. See also Canterbury Regional Council v Holmes\(^\text{50}\).

Question 21: How section 104(6) has been interpreted – whether activities requiring consent which may have an effect on water quality or flow have been declined on the basis of inadequate information

5.106 We are not aware of any decisions relying directly on section 104(6), which provides:

“\textit{A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.}”

5.107 There are of course examples of applications being declined because the council and/or Court are not satisfied that the adverse effects of the activity can be adequately avoided, remedied or mitigated. This may be because of lack of information, or because the available information suggests that the effects in issue cannot be addressed by conditions.

\textbf{Where there is uncertainty as to the effects on water quality and flow, have councils or the Court imposed conditions and, if so, what type of condition?}

5.108 In addition to the option of declining consent, the tools available to consent authorities to deal with a lack of information include:

(a) further information requests before or at the hearing;

(b) the granting of interim consents that require upgrade;

(c) the granting of short term consents to allow for the possibility that effects may become unacceptable and consent may need to be declined at the time of renewal;

(d) adaptive management conditions that require ongoing monitoring of the effects of an activity in case there are effects that could not reliably have been

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\(^{48}\) Decision made in March 2010. As at the time of writing this report the written decision was not yet available.

\(^{49}\) Decision made in March 2010. As at the time of writing this report the written decision was not yet available.

\(^{50}\) 27 June 2001, District Court, Christchurch.
predicted in advance, and staging or adaptation of the activity if that proves to be necessary;\textsuperscript{51}

(e) review conditions under section 128 as a back stop in case the conditions prove inadequate;

(f) discharge standards that set limits on the levels of contaminants in the discharge stream; and

(g) receiving water standards that set limits on the levels of contaminants in the receiving water body after reasonable mixing.

5.109 There has been an increasing use of adaptive management conditions in conjunction with review conditions and/or short term consents. It is beyond the scope of this report to summarise examples of this. However, we note that the Canterbury groundwater commissioner decisions all included adaptive management conditions, review conditions and relatively short term consents.

5.110 The Courts have sanctioned the use of adaptive management. In particular see \textit{Minister of Conservation v Tasman District Council}\textsuperscript{52} where the High Court held that this was an appropriate technique for the management of marine farming.

\textsuperscript{51} Eg see \textit{Golden Bay Marine Farmers v Tasman District Council} (W019/03).

\textsuperscript{52} 9/12/03, High Court Nelson, Ronald Young J.
6. DISCUSSION OF KEY STATUTORY PROVISIONS

Overview

6.1 The RMA provides regional councils with functions relating to water quality, environmental flows, levels and pressures, and restrictions on the rates of take from a water body. Section 30 is the starting point:

30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

…

(e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) The setting of any maximum or minimum levels or flows of water:

(ii) The control of the range, or rate of change, of levels or flows of water:

(iii) The control of the taking or use of geothermal energy:

(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

…

(4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) nothing in paragraph (a) affects section 68(7); and

(c) the rule may allocate the resource in anticipation of the expiry of existing consents; and
(d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—

(i) allocate all of the resource used for an activity to the same type of activity; or

(ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and

(e) the rule may allocate the resource among competing types of activities; and

(f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

6.2 Sections 30 and 68(5) provide regional councils with a power to make rules in regional plans controlling, amongst other things, the taking of water and discharges to water. Rules may include conditions in relation to permitted activities and standards in relation to other activity classes. Accordingly, irrespective of sections 68(7) and 69, which relate to rules about water quantity and quality, regional councils may include water quality and quantity restrictions in rules relating to activities, and such rules may be specific to particular water bodies or areas and may be specific to particular times or environmental situations (eg flow and/or time related restrictions). Section 69 is additional to the more general power to set standards. Section 68(7) is an additional power which, together with section 128, allows water quality and quantity limits to affect existing consent holders.

6.3 The relevant rule making provisions are as follows:

68 Regional rules

(1) A regional council may, for the purpose of—

(a) Carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and

(b) Achieving the objectives and policies of the plan,—

include rules in a regional plan.

(2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

...

(5) A rule may—

(a) Apply throughout the region or a part of the region:

(b) Make different provision for—

(i) Different parts of the region; or

53 The RMA does not define "standard".
(ii) Different classes of effects arising from an activity:

(c) Apply all the time or for stated periods or seasons:

(d) Be specific or general in its application:

...

(7) Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, the plan may state—

(a) Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and

(b) That the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

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.

6.4 The RMA provides regional councils with the authority to include rules in plans that classify the taking and use of water and discharges to water as permitted, controlled, discretionary, restricted discretionary, non-complying or prohibited activities. Regional councils must have regard to the actual or potential effects on the environment in making such rules and must consider the efficiency and effectiveness of the rules in meeting the purpose of the RMA (section 32).
6.5 Water takes, diversions and discharges may potentially be classified by reference to various standards (e.g., location, time, rate, volume, end use, quality etc.). Discharges to water or land may potentially be classified by reference to water quality standards.

6.6 Rules that classify activities are usually subject to conditions in the case of permitted activities or standards in relation to other activities. These conditions or standards may include water quality standards and restrictions on flow or take. Usually, if a standard is not complied with in a rule, this changes the activity classification (e.g., from permitted to controlled or discretionary or from discretionary to non-complying or sometimes prohibited).

6.7 When considering how water quality restrictions have been applied, it is important to distinguish between these “activity classification standards” and more specific water quality standards under section 69. For the purposes of this report, we will refer to the latter as “water classification standards”. Sometimes the use of these separate mechanisms will overlap. However, it is important to appreciate that:

(a) Water quality standards may be incorporated into rules as activity classification standards without the need to rely on section 69. That is, without classifying water bodies by reference to management purposes in the third schedule.

(b) Water classification standards only apply if waters have been classified and if there are rules setting out the quality to be achieved in the classified waters.

(c) If waters are not classified in terms of management purposes then the statutory direction in section 69 does not apply (i.e., the requirement that 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).

6.8 Similarly, in relation to water quantity, regional councils may include specific rules in relation to environmental flows, levels and pressures which define activity classification or may have separate stand-alone water quantity limits. Water quantity or quality limits will only be directly enforceable if incorporated into rules as standards. Although the RMA allows for standalone limits, the more usual approach is to utilise activity classification standards or to leave limits as guidelines rather than standards.

6.9 In relation to both water quality and quantity restrictions, standards may either be classified as activity classification standards or specific standards applying to a water body which may or may not be linked to activity classification. For example, a minimum flow may be expressed in a stand-alone rule coupled to conditions on permitted activities and a policy that the minimum flow will be reflected in the conditions of any resource consent. Alternatively, the minimum flow may be reflected in the activity classification rules as a standard. For example, the rules may provide that any take which is not intended to be subject to the minimum flow is a non-complying activity or perhaps even a prohibited activity.

6.10 As an alternative to the standards we have referred to above, both water quality and quantity limits may be incorporated into plans as guidelines that will be referred to in policies and that may (but need not) be referred to in rules as “assessment criteria”. To date, the guideline approach has been more common, however, some plans include both standards and guidelines.
How are water quality and quantity standards applied in practice?

6.11 Sinclair Knight Merz has prepared a separate report summarising the different approaches adopted by regional councils to water quality and quantity provisions. In reviewing case law under the RMA it should be remembered that there are relatively few examples of “pure” standards for water quality or quantity. This is because to date most councils have made more use of guidelines, policies and assessment criteria rather than standards this approach can provide more flexibility than a standards based approach. There also tends to be less litigation around this approach since it leaves discretion in relation to the application of these limits to particular consent applications.

6.12 Water quality and quantity limits may be used in a number of ways, which often overlap. These are as follows:

In relation to proposed activities

(a) As permitted activity conditions (consent is required if condition is not met).

(b) As standards on controlled, restricted discretionary or fully discretionary activities (if the standard is not met by the proposed activity then it moves to a more restrictive category, e.g. controlled becomes discretionary or discretionary becomes non-complying).

(c) As a prohibition (consent can not be granted if the standard is not met).

(d) As guidelines which are used as assessment criteria against which consent applications must be considered.

In relation to existing consents

(e) Where the plan incorporates limits as standards these may be used to review the conditions of existing consents under section 128(1)(b) so that the standard will be met. (See also section 68(7).)

Standards versus objectives and policies

6.13 It is important to distinguish between water quality and quantity standards, on the one hand, and objectives, policies, guidelines and assessment criteria on the other. The RMA allows regional councils to set standards, but in practice it is more common for current plans to have only guidelines.

6.14 Where a standard is not met the activity will usually shift to a more restrictive category which may include prohibited status. The essential characteristics of “standards” as determined by case law can be summarised as follows:

(a) Standards must be included within rules either directly or by cross reference and they will then have the force of regulations.

(b) If the standards are permitted activity conditions, then they will be enforceable in relation to activities which do not comply with the conditions and which do not have consent.

(c) Standards must be clear and certain. That is, they must not reserve a discretion to the consent authority to determine whether or not the standard is met.
(d) The only exception to that relates to the section 70 and 107 standards, some of the third schedule standards and reasonable mixing (these all involve a limited degree of discretion and we discuss this below).

6.15 In summary, people must be able to identify whether their activities or intended activities will or will not meet the standards and the consequences of not meeting the standards must be clear (eg consent required, activity class changed, or activity prohibited). The standards must be sufficiently clear so that they can form the basis for enforcement action if they are not complied with and the necessary consents are not obtained. In passing, we note that Water Conservation Orders may contain standards and some of the case law regarding the need for certainty is in that context.

6.16 Sometimes the term “standards” is used to refer to what are in fact policies or assessment criteria. For example a rule or policy might provide that when considering whether to grant consent, and if so what conditions to impose, the consent authority “will have particular regard to the water quality standards set out in schedule x”. In this report we have referred to such limits as “guidelines”.

6.17 When used in this way, the limits are not standards as that term is used in relation to rules. Limits may be used for both purposes. For example the standards may be used as permitted activity conditions (ie standards) and as assessment criteria (guidelines) in relation to activities which require consent.

6.18 What is important is that plans are clear about how limits are to be used. Water quality and quantity limits may be used as standards in the manner listed earlier and/or as assessment criteria for considering consent applications. Some plans use water quality targets or guidelines solely as assessment criteria, others may include some as standards (eg the section 107 water quality standards), and then also use the limits as assessment criteria in relation to activities which will not meet one or more of the standards.

6.19 Currently very few if any plans have water quality standards that prohibit activities which do not meet the standards. The Regional Freshwater Plan for Taranaki prohibits any discharge to the Hangatahua (Stony) River catchment, meaning no water quality standards are required in that catchment (as the quantified limit is "no contaminants"). That prohibition reflects a pre existing requirement of a Local Water Conservation Notice made under section 20H of the WSCA.

6.20 Finally we note that there are two types of water quality guidelines or target. First there are schedules of intended or desired water quality standards that are set out in a plan. Secondly plans may incorporate by reference various MfE, ANZECC or other guidelines. Examples of the key water quality guidelines which may be incorporated by reference or absorbed into Plan schedules are as follows:

(a) ANZECC Australian water guidelines (1992);
(b) MfE water quality guidelines (1992/1994);
(c) The Ministry of Agriculture and Fisheries Technical paper on the influence of agriculture (Smith et al, 1993);
(d) ANZECC water quality guidelines for fresh and marine water quality (2000); and
(e) Microbiological Guidelines for Marine and Freshwater Recreation (MfE/MoH 2003).
Statutory minimum water quality standards (sections 70 and 107)

6.21 Section 70 sets out statutory minimum water quality standards that apply to permitted activity rules. These narrative standards apply after reasonable mixing. Section 70 requires the Regional Council to be satisfied that any discharges it permits by way of rules will meet these standards. As a result many councils have simply included the section 70 standards as permitted activity conditions in their discharge rules. Given that permitted activity rules must be certain and given that the section 70 standards apply after reasonable mixing, many plans include a definition of reasonable mixing, at least for the purpose of the permitted discharge rules.

6.22 Section 70 is as follows:

70 Rules about discharges

(1) Before a regional council includes in a regional plan a rule that allows as a permitted activity—

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

(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,—

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

(c) The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) Any conspicuous change in the colour or visual clarity:

(e) Any emission of objectionable odour:

(f) The rendering of fresh water unsuitable for consumption by farm animals:

(g) Any significant adverse effects on aquatic life.

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54 Examples of councils who have included section 70 standards in their discharge rules include Taranaki Regional Council, Greater Wellington Regional Council, West Coast Regional Council, Auckland Regional Council, Environment Bay of Plenty, Environment Canterbury, Gisborne District Council, Hawke’s Bay Regional Council, Horizons Regional Council and Marlborough Regional Council.

55 Examples of plans which define “reasonable mixing” include Auckland Regional Council’s proposed Air, Land and Water Plan, and Taranaki Regional Council’s Regional Freshwater Plan.
(2) Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—

(a) The nature of the discharge and the receiving environment; and

(b) Other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

6.23 Section 107 sets out the same narrative standards and prohibits the grant of discharge permits unless the consent authority is satisfied that the standards will be met. This provision does however allow for three exceptions to the prohibition (exceptional circumstances, temporary discharges or necessary maintenance). In each case the council also has to be satisfied that it will be consistent with the purpose of the RMA to allow the non compliant discharge. Where these exceptions are relied upon the council has a discretion to include conditions requiring staged upgrade so that the section 107 standard and any relevant rules will be met by the expiry of the consent. (In practice the council has such a discretion in any event under section 108.)

6.24 Section 107 is as follows:

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 15]) allowing—

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

(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or

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

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

(c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) Any conspicuous change in the colour or visual clarity:

(e) Any emission of objectionable odour:

(f) The rendering of fresh water unsuitable for consumption by farm animals:

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

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

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

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

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

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

6.25 The principal issues that arise in relation to section 107 relate to what reasonable mixing means, how the narrative standards are to be applied and what the exceptions allow for. The narrative standards in sections 70 and 107 are somewhat unusual in that they include a prohibition but the wording of the standards includes a discretion. This is not something that a standard in a plan can do.

6.26 The apparent rationale for this difference in approach is that the section 70 and 107 standards apply to a consent authority rather than to resource users. It is up to the consent authority to be satisfied that the limits will be achieved and some limited discretion is left to the authority. In contrast, standards in a plan directly affect resource users and the Courts have held that users of the plan are entitled to certainty as to the status of an actual or proposed activity.

Water Conservation Orders

6.27 Section 200 of the RMA provides that Water Conservation Orders may restrict or prohibit the use of Regional Councils' water-related powers as follows:

200 Meaning of “water conservation order”

In this Act, the term water conservation order means an order made under section 214 for any of the purposes set out in section 199 and that imposes restrictions or prohibitions on the exercise of regional councils' powers under paragraphs (e) and (f) of section 30(1) (as they relate to water) including, in particular, restrictions or prohibitions relating to—

(a) The quantity, quality, rate of flow, or level of the water body; and

(b) The maximum and minimum levels or flow or range of levels or flows, or the rate of change of levels or flows to be sought or permitted for the water body; and

(c) The maximum allocation for abstraction or maximum contaminant loading consistent with the purposes of the order; and

(d) The ranges of temperature and pressure in a water body.
6.28 These powers are similar to those in sections 30 and 68(7). Accordingly, some of the case law in relation to Water Conservation Orders and the form of environmental limits is relevant to regional plan limits. However it is important to remember that the starting point is fundamentally different. The purpose of regional limits under the RMA is to achieve sustainable management and the principles of the RMA. In contrast WCO limits are for the purpose of protecting the outstanding characteristics identified in the order. As a result the Courts have adopted a more precautionary approach to the setting of limits within a WCO (see for example the Rangitata report\(^{56}\)).

**National Environmental Standards**

6.29 Section 43 provides for National Environmental Standards that may include water quality, levels or flows:

(1) The Governor-General may, by Order in Council, make regulations, to be known as national environmental standards, that prescribe any or all of the following technical standards, methods, or requirements:

(a) standards for the matters referred to in section 9, section 11, section 12, section 13, section 14, or section 15, including, but not limited to—

(i) contaminants:

(ii) water quality, level, or flow:

(iii) air quality:

(iv) soil quality in relation to the discharge of contaminants:

(b) standards for noise:

(c) standards, methods, or requirements for monitoring…

6.30 As yet there is no gazetted NES relating to water quality or quantity limits, so the case law relating to regional limits and Water Conservation Order limits will be of some relevance in terms of the drafting of NES limits. There is no right of appeal in relation to NES limits, however if this tool is utilised, case law is likely to focus on interpretation and enforcement of the limits.

**Water classification and Third Schedule standards**

6.31 We have set out the relevant parts of sections 68 and 69 above. We have noted that there is a need to distinguish between section 69 standards and activity classification standards. We observe that section 69 standards may also classify activities, but activity classification standards are not necessarily section 69 standards.

6.32 There is confusion regarding the effect of section 69 of the Act. In particular it provides as follows:

(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

\(^{56}\) See Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council (C109/2004), which is the interim decision and Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council (C135/05), which is the final report.
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.

6.33 Schedule 3 of the RMA specifies 11 classes of water and sets out standards that are deemed to apply to those classes if adopted by a regional plan. Those classes are as follows:

(a) Class AE Water (being water managed for aquatic ecosystem purposes);
(b) Class F Water (being water managed for fishery purposes);
(c) Class FS Water (being water managed for fish spawning purposes);
(d) Class SG Water (being water managed for the gathering or cultivating of shellfish for human consumption);
(e) Class CR Water (being water managed for contact recreation purposes);
(f) Class WS Water (being water managed for water supply purposes);
(g) Class I Water (being water managed for irrigation purposes);
(h) Class IA Water (being water managed for industrial abstraction);
(i) Class NS Water (being water managed in its natural state);
(j) Class A Water (being water managed for aesthetic purposes); and
(k) Class C Water (being water managed for cultural purposes).

6.34 Examples of the standards that apply in these classes are set out below:

1 Class AE Water (being water managed for aquatic ecosystem purposes)

(1) The natural temperature of the water shall not be changed by more than 3° Celsius.

(2) The following shall not be allowed if they have an adverse effect on aquatic life:

(a) Any pH change:

(b) Any increase in the deposition of matter on the bed of the water body or coastal water:

(c) Any discharge of a contaminant into the water.

(3) The concentration of dissolved oxygen shall exceed 80% of saturation concentration.
(4) There shall be no undesirable biological growths as a result of any discharge of a contaminant into the water.

5 Class CR Water (being water managed for contact recreation purposes)

(1) The visual clarity of the water shall not be so low as to be unsuitable for bathing.

(2) The water shall not be rendered unsuitable for bathing by the presence of contaminants.

(3) There shall be no undesirable biological growths as a result of any discharge of a contaminant into the water.

9 Class NS Water (being water managed in its natural state)

The natural quality of the water shall not be altered.

6.35 If one adopts a literal interpretation of section 69, its effect is as follows. If the plan classifies any waters for any of the purposes specified in the third schedule and if it includes rules about the quality of the water in those waters (either the third schedule standards or more restrictive standards) then the rules must require discharges to meet those rules. In other words, if a plan has rules and standards of this type, it must provide that activities that do not meet these rules are prohibited. This interpretation is consistent with the approach adopted by the Court in *Paokahu Trust v Gisborne District Council*.

6.36 The wording of section 69 is a carry over from the Water Classification provisions of the WSCA. In our opinion, the difficulty with section 69 is that if it is applied it compels regional councils to take a more rigid approach than will usually be necessary or acceptable to the community.

6.37 In practice, we are not aware of any plans which have adopted the section 69 approach. There are a number of reasons for this. The most obvious reason is that absolute prohibitions are usually unacceptable to the community, or at least highly contentious. It is usually desirable to have a degree of flexibility to allow for exceptions. The pure section 69 approach does not (if read literally) allow for discretion. The only discretion in relation to section 69 standards is in respect of reasonable mixing (if the standards allow for reasonable mixing).

6.38 In any event, regional councils do not need to utilise section 69 since they can classify water bodies and manage them with standards or guidelines without the need to rely on section 69. The use of the general rule making power rather than the section 69 power does not in our view preclude the use of sections 68(7) and 128(1)(b) to enforce new limits against existing consent holders.

6.39 The difficulty caused by section 69 is that where councils classify waters for management purposes, confusion can arise as to whether this is being done in reliance on section 69. (This issue has arisen in relation to the Proposed One Plan in the Manawatu-Wanganui Region.)

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57 W24/2005 and W036/05.
How are water quality limits applied in practice?

6.40 The range of approaches which are available in relation to water quality limits are as follows:

(a) Water quality standards as activity classification standards not linked to third schedule.

(b) Use of some limits as a basis for prohibitions (unusual).

(c) Use of non third schedule standards as assessment criteria (may include incorporating external guidelines such as Contact Recreation guidelines).

(d) Use of third schedule management classes and the third schedule standards or some variation of them as guidelines for assessing consent application.

(e) Use of third schedule management classes and the third schedule standards or some variation of them as activity classification standards in conjunction with a prohibition (ie using section 69).

6.41 In practice, for the reasons outlined above the section 69 option is seldom if ever used. The most frequently used approaches are (a), (c) and (d). Sometimes these are used in combination. Some regional councils have opted solely for either or both of (c) and (d). That is, the plans contain only guidelines or targets not standards. Increasingly there is a move towards having some standards in the plan often in conjunction with guidelines.

6.42 By way of example, the current operative Regional Plans for Hawke’s Bay and Wellington both utilise the “guideline” approach, but Greater Wellington Regional Council is moving toward some standards in its second generation plan.

6.43 The current Horizons Land and Water Regional Plan uses water quality standards to classify activities. Thus discharges that after reasonable mixing will not meet the standards listed in the Plan are non-complying activities. In contrast, the Horizons Proposed One Plan appears to use water quality targets as standards in relation to permitted activities and as assessment criteria (guidelines) in relation to discharges that do not meet the permitted activity standards. It does not use the standards as a basis for classifying non compliant discharges as non-complying or prohibited activities.

Reasonable mixing

6.44 The concept of “reasonable mixing” and “reasonable mixing zones” (question 5) is a carry over from the Water Classification provisions of the WSCA. In essence under the WSCA the concept allows for some limited discretion when applying the water quality standards under a water classification.

6.45 Under the WSCA, the water quality classification standards did not apply until after reasonable mixing. This was interpreted as being after the discharge was reasonably well mixed with the receiving waters. Arguably it also incorporated the notion of what is reasonable in the circumstances. In practice, the reasonable mixing zone was a zone of non compliance. The determination of the size of the reasonable mixing zone left some discretion for consent authorities (Regional Water Boards) and became the focus of debate once classifications were set (in practice few classifications were set).

58 Submissions on the Proposed One Plan have sought that the manner of application of its water quality targets be clarified.

59 The size of the reasonable mixing zone was debated in Mahuta v National Water and Soil Conservation Authority (1973) 5 NZTPA 73, and Southland Regional Council v New Zealand Deer Farms (2004); CRN3025010005; [2004] BRM Gazette 110.
6.46 Under the RMA, the concept of reasonable mixing is relevant in four situations:

(a) The statutory minimum water quality standards in section 70 (set out above) apply to permitted activities after reasonable mixing.

(b) The identical statutory minimum water quality standards in section 107 apply to prohibit the grant of consents which do not meet the standards after reasonable mixing, unless one of the other exceptions is met.

(c) The third schedule contains a note to the effect that those standards all apply after reasonable mixing.60

(d) Some Regional plans have policies or rules applying water quality standards or guidelines after reasonable mixing.61

6.47 The latter use of the concept is optional. There is nothing in the RMA that requires non third schedule standards to be applied after reasonable mixing. Nevertheless in practice the concept is useful because it provides a degree of discretion in relation to the applications of standards or guidelines. There is, however, considerable debate regarding what reasonable mixing means or should mean and how it should be applied to different contaminants. Reasonable mixing is a question of fact in each case.62

6.48 Case law63 will be relevant to defining reasonable mixing, particularly in relation to first three situations above. Definitions in the relevant plan and policies about deciding upon reasonable mixing will also be relevant, particularly where the concept is applied on a "voluntary basis" to standards or guidelines.

6.49 In our experience the concept of reasonable mixing often leads to considerable debate.64 Sometimes that debate about the point at which a contaminant is "reasonably mixed" obscures the real question, being:

Taking into account the sensitivity of the receiving environment, the potential effects of the discharge, the purpose and principles of the Act and the objectives and policies of the relevant plan, at what point should the discharge be required to comply with any applicable standards or guidelines?

Retrospective application of new water quality and quantity standards to existing consents

6.50 Section 128(1)(b) together with section 68(7) of the RMA make it clear that regional councils may set rules relating to minimum flows, rates or levels which affect existing resource consent holders.65 This is a two step process. The rule must first be operative, and then existing66 consents may be reviewed to incorporate new conditions.

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60 The standards listed for each class apply after reasonable mixing of any contaminant or water with the receiving water and disregard the effect of any natural perturbations that may affect the water body.
61 For example Auckland Regional Council’s Air, Land and Water Plan refers to the 95 percent trigger values for freshwater (groundwater) specified in the Australian and New Zealand Guidelines for Fresh and Marine Water Quality (2000) as upper values after reasonable mixing.
62 Paokahu Trust v Gisborne District Council (A162/08)
63 Eg Mahuta v National Water and Soil Conservation Authority (1973) 5 NZTPA 73, Paokahu Trust v Gisborne District Council (A162/03), Southland Regional Council v New Zealand Deer Farms (2004); CRN3025010005; [2004] BRM Gazette 110.
64 For example in Southland Regional Council v New Zealand Deer Farms (2004); CRN3025010005; [2004] BRM Gazette 110 the Court adopted a case by case approach to ‘reason able mixing’. In particular, the Court considered that the “size of the waterway, velocity of water, tributaries and the like” were factors to consider. There has been some debate over whether this is the correct approach.
65 The Whanganui Minimum Flows Case (W70/90) remains the primary example of the application of a minimum flow to an existing user.
66 Section 128(1)(b).
reflecting the new rule. This may be a lengthy process with the potential for appeals on both the rule and/or the reviews.

6.51 There is currently some confusion in respect of the relationship between water quantity and quality standards and section 128 reviews. Sections 128 and 130 provide as follows:

**128 Circumstances when consent conditions can be reviewed**

1. A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—

   (a) At any time or times specified for that purpose in the consent for any of the following purposes:

      (i) To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or

      (iii) For any other purpose specified in the consent; or

   (b) In the case of a coastal, water, or discharge permit, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council’s opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met; or

   (ba) in the case of a coastal, water, or discharge permit, when relevant national environmental standards have been made …; or

**130 Public notification, submissions, and hearing, etc**

1. Sections 96 to 102 shall, with all necessary modifications, apply in respect of a review of any resource consent (other than a coastal permit granted in respect of a restricted coastal activity) as if—

   (a) The notice of review under section 129 were an application for a resource consent; and

   (b) The consent holder were the applicant for the resource consent.

2. Sections 96 to 102 and section 117(4), (6), (7), and (8), with all necessary modifications, apply to the review of a coastal permit granted in respect of a restricted coastal activity as if—

   (a) the notice of review under section 129 were an application for a resource consent; and

   (b) the consent holder were the applicant for a resource consent.

3. Sections 95 to 95F apply, with all necessary modifications, as if—

   (a) the review of consent conditions were an application for a resource consent for a discretionary activity; and
Case law on limits for freshwater quality and environmental flows

(b) the references to a resource consent and to the activity were references only to the review of the conditions and to the effects of the change of conditions respectively.

(4) Repealed.

(5) If a regional plan or regional coastal plan states that a rule will affect the exercise of existing resource consents under section 68(7), a consent authority—

(a) is not required to comply with sections 95 to 95F; but

(b) must hear submissions only from the consent holder if the consent holder requests (within 20 working days of service of the notice under section 129) to be heard.

(7) Notwithstanding subsections (5) and (6), if a consent authority considers special circumstances exist, it may require that a review be notified and a hearing be held even if a plan expressly states that a rule shall affect the exercise of existing consents under section 68(7).

6.52 Section 68(7) is as follows:

(7) Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, the plan may state—

(a) Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and

(b) That the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

6.53 At first sight, it might be thought that new water quality or quantity standards may only be used as a basis for the review of existing consents if the rule specifies that this is the intention. We understand that when this provision was drafted that was the intention. The rationale was that it was reasonable for the plan to give clear warning to existing consent holder that they would be subject to the new rules, thus providing them with notice that if they did not agree with the rule they should submit on it.

6.54 In practice however, a literal reading of sections 68(7) and 128(1)(b) suggest that the effect of the former provision is that if the rule specifies that it applies to existing consent holders, a review may, at the discretion of the consent authority, be carried out on a non notified basis with only the consent holder having a right of submission and appeal. It would seem to follow that where the rule is silent as to its effect on existing consents, the Council still has a power to review those consents but must do so utilising a fully notified process. (The rule would still need to be operative before section 128(1)(b) applies.)

6.55 It is debatable whether this is what was intended and, if so, whether it is a reasonable approach. However, in our view this is best interpretation as to the effect of section 68(7). If this is not what is intended then the reference within section 68(7) to section 130 should be amended to refer to section 128(1)(b).
6.56 A regional council may wish to review existing consents in situations where it has become apparent that the resource has been over-allocated and/or where adverse environmental impacts, as a result of upstream taking diversion or discharges have become apparent.

6.57 Minimum flow or quality rules may allow existing consent holders additional time to comply with the new minimum flow level (section 68(7)(b)). For example, the rule may allow existing consent holders a specified number of years after the rule becomes operative to put in place systems to meet the new levels or identify an alternative source of water.

6.58 Section 131 also provides that when regional councils are reviewing conditions, they must have regard to the matters in section 104 and whether the activity allowed by the consent will continue to be viable after the change. Any decision is appealable. Accordingly, a proposed condition to reflect a flow rule may be contested on the grounds that it will make the use of water (for say hydro generation or irrigation) unviable. In other words, an operative water quantity standard does not automatically apply to existing consents.

6.59 A regional council may also grant resource consent subject to a review condition (sections 108 and 128) that would allow the consented water take to be reviewed in particular circumstances for specific purposes, even in the absence of new flow rules. Review conditions are common in longer term consents. This may allow review of existing condition to address unforeseen adverse effects or perhaps to take advantage of more efficient technology.

6.60 The power to use operative water quality or quantity standards to review existing consents is important because there is very limited opportunity for a regional council to retrospectively restrict a consent after it has been granted. The alternative to a section 128(1)(b) review is a review under section 128(1)(a) to deal with adverse effects or for some other purpose specified in the consent. In relation to reviews for the purpose of addressing adverse effects, the onus will be on the Regional Council to prove that each consent being reviewed is having such effects. (This view is reinforced by the recent case law that has treated resource consents as quasi private property rights.)

6.61 In our opinion it would be unfortunate to allow consent holders’ rights to be interfered with in the absence of clear proof. In contrast, if the review is based on an operative rule, there will be a presumption that the rule is generally appropriate and should be complied with by all consent holders unless there are exceptional reasons which suggest otherwise. Put simply, it will be much easier for a regional council to review existing consents if it has operative rules with standards that come within section 128(1)(b).

RMA options for setting environmental flows, levels and rates of take

6.62 Sections 30 and 68(7) provide for the control of the quantity, level and flow of any water body, including setting maximum or minimum levels of flow and control of the range or rate of change of levels or flows. Such flows or rates must meet the requirement of section 32 and be necessary for achieving the purpose of the RMA.

6.63 There has been some debate regarding the wording of section 68(7), which refers to … a rule relating to maximum or minimum levels or flows or rates of use of water.
Clearly section 68(7) encompasses minimum flows but the reference to *rates of use* is peculiar. It could be argued that this precludes rules relating to *rates of take and/or diversion*. This issue has not been tested in the Courts, however in our view section 30 provides regional councils with the power to set maximum rates of take and diversion as well as maximum rates of use:

*The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—*

(i) *The setting of any maximum or minimum levels or flows of water:*

(ii) *The control of the range, or rate of change, of levels or flows of water:*

6.64 In our view the power to control levels or flows implicitly includes the power to set maximum rates of take and/or diversion of surface and/or ground water. However section 68(7) could be amended to make this explicit. We also note that the wording in sections 30, 68 and 200 is slightly inconsistent (section 200 refers the range of pressure in "a water body", whereas section 68 refers to ranges of pressure of *geothermal* water, and section 30 is silent on water pressure).

6.65 As with water quality standards, environmental flows and levels may be established either as standards, or as assessment criteria or both. For example a minimum flow may be a permitted activity condition and perhaps a controlled activity standard. It may then be an assessment criterion for discretionary and/or non-complying activities. Alternatively but unusually, activities in breach of the minimum flow may be defined as prohibited activities, with or without exceptions to that rule.

6.66 Usually a flow or level rule will have the effect that new water permits will include conditions specifying that once a particular flow has been reached at a particular point in a river (or level in a lake) the take or diversion must be temporarily suspended or reduced. These rules (or policies) will affect new applications and applications for renewals, as soon as the provision is notified.

6.67 Under the RMA as it stands, specific methods used for water quantity limits include the following either as activity classification standards or assessment criteria or both:

(a) minimum and maximum flows, levels and pressures;

(b) maximum allocatable volume for a section of river or a groundwater zone;

(c) allocation caps;

(d) staged flow restrictions;

(e) first in first served restrictions;

(f) proportional reductions in take above a minimum flow (sharing the pain);

(g) A and B permit restrictions (first in, last to turn off);

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70 The Otago Regional Plan: Water contains provisions that address primary, secondary and supplementary allocations with different minimum flows for each.
(h) groundwater takes limited by reference to stream flows;

(i) one to one flow sharing (one unit for the river one for take or diversion);

(j) a gap between A and B permits where no water can be taken;

(k) rostering (imposed or voluntary); and

(l) temporary transfer of spare allocations during times of restriction.

Minimum and maximum flows, levels and pressures

6.68 The advantage of the inclusion of rules which set minimum flows or groundwater levels, is that they set an absolute "bottom line", below which consumptive use of the water is prohibited or restricted (subject to any exceptions set out in the relevant rule relating to domestic use etc).

6.69 One limitation of such rules is that minimum flows are only a "bottom line". Absolute minimum flow rules do not address issues about competing in stream and out of stream uses above the bottom line. If a plan's only mechanism for controlling water abstraction is a minimum flow, then out of stream uses may be unrestricted until the minimum flow level is reached. The minimum flow would not prevent the river being reduced to low flows (above the minimum) more often than would have occurred naturally.

Staged flow regime / restriction thresholds

6.70 A staged flow regime is a variation on the minimum flow regime. This method involves reducing water takes as water flows (or lake levels) reach specified levels. The advantage of this method is that rivers are less likely to reach minimum flow levels as frequently, because water take is restricted well before the absolute minimum is reached. Such regimes can maintain more variability in a water body.

Maximum rate of take

6.71 Regional rules can also impose a maximum rate of water take as a maximum total take per reach of river or per aquifer. If this total rate is exceeded, restrictions can apply. Again, these rules can apply to existing users. In this way, rules setting out such limits operate in a similar way as minimum flow rules.

6.72 Maximum rates per user can also be used with minimum flows or maximum takes per resource. This is similar to a staged flow regime (eg "Between at x and y cumecs all takes shall be limited to z% of the maximum rate of take which would otherwise have applied by way of consent conditions. At y cumecs all taking shall cease until such time as the flow returns to x").

Allocatable volume

6.73 A further mechanism that regional councils have to allocate water between in stream and out of stream uses is to set an allocatable volume. This mechanism involves setting a maximum allocatable volume for the out of stream uses for each river or part of...
a river at particular flows or times of year. This could be a variable volume (eg. a certain volume at low flows and higher volume of higher flows). Rules which set such limits would apply when a consent is sought, and would alter the activity status of the water take, depending on how much water is required and is left within the allocatable volume. By way of example, if an application is to take water above the total allocatable level for a particular river at a particular time of year, the take could be classified as a non-complying activity or a prohibited activity. In the case of a non-complying activity, the plan should provide policies as to the circumstances (if any) where exceptions could be made.

6.74 The RMA contains no direct reference to the ability to impose allocatable volumes. However, in our view this mechanism can come within the general rule-making powers in section 68 of the RMA (in particular the ability to classify activities as permitted, discretionary etc as set out in section 68(3)). An allocatable volume could also be set by policy but would have less effect. Because of the wording of section 68(7), an allocatable volume rule may not be able to affect existing users until the time they seek renewal (except if introduced via minimum flows and maximum rates of take).

6.75 The setting of an allocatable volume, at least for sensitive rivers or ground water zones, is desirable because a minimum flow regime will usually not provide adequate protection on its own.

**Sharing regime**

6.76 Regional councils can also include rules or policies in their plans which provide for a sharing regime by allocating water between in stream and out of stream uses. This could be by say percentage split, with say x% of the water being required to remain in stream at particular flows. This method can ensure that flow variability in a river is maintained (albeit not at "natural" levels). An example of this is the one to one flow sharing in the Rakaia Water Conservation Order.

**Rostering**

6.77 Rostering is a variation on sharing, and involves rostering water take between out of stream uses particularly at times of low flow. Thus for example at some times of the year the water may be critical for particular crops and the relevant farms may be given priority of use. At other times of the year those farms may not require the water and it may be rostered to others. Alternatively, water may be rostered to particular uses by time of day. A regional council could impose a rule that might say that at certain times, water may only be taken by certain users and/or for certain uses.

6.78 Informal rostering has occurred in some areas for many years (eg parts of Otago and Canterbury). Formal rostering may also be occurring by way of consent conditions.\(^\text{73}\)

6.79 There are some potential difficulties in formulating rostering rules, particularly if consents have already been granted. However, formulating the rostering rules could potentially be done by way of sliding maximum rates of take, which are then enforced against existing consents via consent review. Informal rostering via guidelines or policy is also an option. So too is rostering via consent transfer (eg setting a maximum rate of take at low flows and allowing users to transfer any surplus to other users on a temporary basis).

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\(^\text{73}\) By way of example, the Oroua Catchment Water Allocation & River Flows Regional Plan explains that an abstraction roster for the use of the low flow water budgets set out in rules in the plan will be determined during the consent process (see the explanation to OCWA Policy 6).
7. SUMMARY OF KEY ISSUES RELATING TO SETTING WATER QUALITY AND QUANTITY LIMITS

Issues arising from case law and our experience

7.1 The executive summary in section 1 summarises the key issues in terms of the questions posed by MfE. In this section we outline some additional issues which we are aware of. We note that the views expressed are those of the authors and, while not inconsistent with case law, can not necessarily be referenced back to particular Court decisions.

7.2 Limits are only enforceable where they are clear and certain. The use of narrative limits can give rise to substantial debate at consent hearings. Numerical limits are generally preferable to narrative limits. Where narrative limits are used in plans, the plans (or the relevant guidelines) should provide guidance as to how the narrative limits are to be interpreted. Generally it will be preferable to convert narrative limits to numerical standards in consent conditions.

7.3 Although numerical limits provide greater certainty as to what is expected, there are often difficulties with a "one size fits all" approach. This is illustrated by the Canterbury groundwater decisions. The same issue arises in relation to water quality standards. For example appropriate nutrient standards will vary according to the hydrology of a river and the values to be protected. Similarly, applying contact recreation limits to parts of water ways which are unsuitable for contact recreation for reason not related to water quality (eg size, access, safety etc) may not be appropriate. Applying contact recreation limits irrespective of flow may also be inappropriate in some instances.

7.4 The use of standards will be more restrictive than the use of guidelines. The advantage of standards is that they provide greater clarity and have direct effect on the status of activities. The advantage of guidelines is that they are more flexible and provide greater scope for discretion. In our experience the use of guideline limits can be very effective provided that the associated objectives and policies are strong. An example of this is the Wellington Regional Freshwater Plan in relation to the contact recreation and other guidelines set out in the plan.

7.5 In many cases there is a need for clearer guidance in plans as to how guidelines are to be applied. Again, the Wellington Regional Freshwater Plan provides some examples, however the same can be said of most, if not all, regional plans which incorporate limits.

7.6 Where standards are used some degree of flexibility and discretion can still be maintained. The degree of discretion/flexibility will depend upon how the standards are used in rules and how they are linked to policy. For example, if non compliance with a limit makes the activity fully discretionary then there will still be considerable discretion to grant appropriate exceptions. If the activity becomes non-complying there will be less discretion and if it becomes prohibited there will be none.

7.7 There is a case for making greater use of non-complying activity status for activities which are likely to breach standards. Discretion can still be retained to grant non-complying consents in exceptional cases or where the effects on the environment will be no more than minor.

7.8 Where non-complying activity status is used for activities, this needs to be coupled with strong and clear policies. The policies should make it clear as to the sorts of situations where exceptions to the limits will be allowed.
7.9 The concept of "precedent" or "integrity of the plan" is relevant to the application of limits. Even if an activity breaches a limit, the consent authority or Court may allow the activity if the effects on the environment are acceptable, even if the proposal is contrary to objectives and policies (e.g., it might be contrary because the limits will be breached). Where adverse effects are likely to be no more than minor, the Court will generally not decline consent on the basis of integrity of the plan (contrary to policy) arguments unless there is nothing to distinguish the application from other applications which are likely to be made.

7.10 Councils may now opt to not to make a proposed standard effective until it is past the point of appeal. Where councils do not adopt this approach, the limits have immediate effect but will be given increasing weight as the plan proceeds through the first schedule process.

7.11 Although there is little case law on the topic, the concept of reasonable mixing has the potential to give rise to unnecessary debate and litigation. This can cause difficulties or at least debate in the context of limits because the concept imports a discretion and value judgement into a context of enforceable standards. However, the concept is also a useful way of providing flexibility in relation to the implementation of limits.

7.12 In our view, there is a need for clarification in relation to the use of the term "reasonable mixing". There is currently confusion about when reasonable mixing should be applied and its meaning. One possible interpretation is that it means "after a particular contaminant is reasonably well mixed with the receiving water". Another interpretation is that it means "at the point where it is reasonable in all the circumstances to apply the relevant standard". In our opinion, the most sensible approach is a combination of both of those interpretations.

7.13 It is accepted that it is often useful to maintain some degree of flexibility in relation to standards and the concept of reasonable mixing can provide that. The difficulty is that currently the debate tends to focus on the question of "adequate mixing" rather than the point at which a limit should apply in terms of the effects it is intended to address. We see some benefit in also providing clarification in the RMA or in guidelines as to what is intended by reasonable mixing. (In our view, the current MfE guidelines do not provide clarity on this point.)

7.14 Plans use non-statutory guidelines in differing ways. In our view there needs to be more consistent use of guidelines, particularly where there are conflicting guidelines.

7.15 Some of the guidelines which are referred to in plans are misinterpreted by councils. For example, trigger levels for further investigation are sometimes treated as absolute levels when that is not how they were intended to be used. Another example is the use of the Microbiological Guidelines for Marine and Freshwater Recreation (MfE/MoH 2003). There is some confusion regarding how these are to be applied.

Statutory drafting issues

7.16 The wording of section 69 is a carry over from the Water Classification provisions of the WSCA and could be deleted because it is not in our view appropriate or necessary in relation to the RMA. This is because there is an ability to use water quality standards in a more flexible manner that is required by section 69. It is also unclear what the requirement to ensure the standards are met means in practice. On a literal interpretation, if a plan has rules and standards of this type, it must provide that activities which do not meet these rules are prohibited, which would be a highly contentious approach and one that has not to our knowledge been adopted in any plans.
Case law on limits for freshwater quality and environmental flows

in New Zealand. Also, there were few water classifications adopted under the previous legislation.

7.17 The third schedule is also largely if not wholly redundant, and leaves uncertainty about what status its standards have (i.e., do those standards need to be used as standards or could they be used as guidelines?). If both section 69 and the third schedule were deleted, regional councils would still have the power to specify management objectives and water quality standards and/or guidelines in relation to each class of water. The third schedule could be reproduced instead as a MfE guide to regional councils as to standards or guidelines that may be used with flexibility and adapted to local circumstances.

7.18 We note that there is no reference to section 69 within section 68(7) and 128(1)(b). Accordingly, if section 69 was repealed, regional councils would still be able to set minimum standards of water quality and enforce those through consent reviews.

7.19 There has been some debate regarding the wording of section 68(7). Clearly this provision encompasses minimum flows but the reference to rates of use is peculiar. It could be argued that this precludes rules relating to rates of take and/or diversion, although in our view section 30 provides regional councils with the power to set maximum rates of take and diversion as well as maximum rates of use.

7.20 The reference in section 68(7) to section 130 is also peculiar. Given that section 68(7) relates to the possibility that a rule might affect the exercise of existing resource consents, it would seem logical for it to refer to section 128(1)(b) instead. However that is not what it says. A literal interpretation of section 68(7) would be that if the rule specifies that it applies to existing consent holders, a review may, at the discretion of the consent authority, be carried out on a non-notified basis with only the consent holder having a right of submission and appeal. It is debatable whether this is what was intended and, if so, whether it is a reasonable approach. If this is not what is intended then the reference within section 68(7) to section 130 should be amended to refer to section 128(1)(b).

7.21 The wording in sections 30, 68 and 200 is slightly inconsistent. Section 200 refers the range of pressure in "a water body", whereas section 68 refers to ranges of pressure of geothermal water, and section 30 is silent on water pressure.

7.22 The RMA contains no direct reference to the ability to impose allocatable volumes, but in our view this comes within the general rule-making powers in section 68 of the RMA. An allocatable volume could also be set by policy but would have less effect. Because of the wording of section 68(7), an allocatable volume rule may not be able to affect existing users until the time they seek renewal (except if introduced via minimum flows and maximum rates of take).

Issues from first instance decisions and Regional Council experience

7.23 Some regional plans, such as those for Hawke’s Bay and Wellington utilise the “guideline” approach to limits. (Greater Wellington Regional Council is moving toward some standards in its second generation plan.) In our experience the current approach has worked reasonably well. The guidelines are given significant weight in the consent process.

7.24 By way of example, the operative Wellington Regional Freshwater Plan contains policies indicating that the Ruamahanga River is to be managed for contact recreation and aquatic purposes and the plan contains guideline “standards” that apply after reasonable mixing. In a decision on consent applications for the upgrade of the
Masterton wastewater treatment plant the hearing panel accepted that these guidelines should be reflected in consent conditions. It found however that there was no need for the receiving water standards to be included directly in conditions. It found that the plan guidelines and the management objective could be achieved by way of discharge (end of pipe) standards aimed at achieving contact recreation and aquatic purposes guidelines after reasonable mixing.

7.25 The operative Regional Plan: Water for Otago contains a policy to the effect that the Regional Council will manage the river for contact recreation purposes. This is not really a limit, because the plan does not include any water quality standards. In the Milton waste water decision, the independent commissioners considered that the policy of working towards achieving contact recreation standards could not be treated as a standard. There was considerable debate at the hearing as to which guidelines should be applied and how. There was also debate regarding what reasonable mixing zone should be provided for in relation to the section 107 standards. In our view this decision highlights the need for limits to be expressed more clearly in plans while still providing for an appropriate degree of flexibility.

7.26 The current Horizons Land and Water Regional Plan uses water quality standards to classify activities (ie activity classification standards). In contrast, the Proposed One Plan appears to use water quality targets as standards in relation to permitted activities and as assessment criteria in relation to discharges which do not meet the permitted activity standards. It does not use the standards as a basis for classifying non compliant discharges as non-complying or prohibited activities. This approach does have the advantage of providing flexibility in relation to consent applications. However we also note that it provides considerable scope for non compliant consents to be granted.

7.27 The Commissioners' decisions in relation to Canterbury groundwater highlight a number of issues which often arise in relation to limits including:

(a) At least where they are contentious, proposed limits may only be given limited weight when first proposed, but can be given increasing weight after decisions have been made on submissions. Accordingly it is desirable to get new limits through the first schedule process as quickly as possible.

(b) The weight which is given to limits which are not operative will depend upon the adequacy of the evidence to support the limits.

(c) Whether limits are ultimately upheld will also depend upon the evidence in support of the limits. In particular section 32 requires the Council and the Court on appeal to be satisfied that "having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives" of the plan.

(d) There are potential difficulties with limits which adopt a "one size fits all" approach. Such limits lead to debate as to whether different areas or situations warrant different limits. Councils will need to be in a position to justify such an approach.

(e) It is important that the policies set out clearly the circumstances where exceptions to the limits may be appropriate.

(f) If it is not envisaged that exceptions will be granted then it may be preferable to make breach of the limits prohibited.
8. DISCUSSION OF PRE-RMA STATUTE AND CASE LAW

Statutory provisions

8.1 Several of the RMA water-related provisions discussed earlier in this report have their origins in the Water and Soil Conservation Act 1967. A comparative table is set out below:

<table>
<thead>
<tr>
<th>Topic</th>
<th>RMA provision</th>
<th>WSCA provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Functions of regional councils</td>
<td>30</td>
<td>20J</td>
</tr>
<tr>
<td>Rules relating to minimum flows</td>
<td>68</td>
<td>20J</td>
</tr>
<tr>
<td>Rules relating to water quality</td>
<td>69</td>
<td>20J, 21(3A), 26C</td>
</tr>
<tr>
<td>Water management classes and standards</td>
<td>Schedule 3</td>
<td>Schedules 1 to 9</td>
</tr>
<tr>
<td>Review of consents to meet new standards</td>
<td>68(7) 128(1)(b)</td>
<td>24D</td>
</tr>
<tr>
<td>Rules about discharges</td>
<td>70</td>
<td>21(3A)</td>
</tr>
<tr>
<td>Restriction on grant of certain discharge permits</td>
<td>107</td>
<td>21(3A), (3B)</td>
</tr>
<tr>
<td>Consent reviews</td>
<td>128</td>
<td>24D, 24I</td>
</tr>
</tbody>
</table>

8.2 The relevant WSCA provisions are set out below.

20J Board may fix levels, flows, and standards

The Board may from time to time, after consultation with representatives of all interested bodies and persons known to the Board, fix maximum and minimum levels, and minimum standards of quality to be sought or permitted for the natural water in lakes, both natural and artificial, and the minimum acceptable flow and minimum standard of quality of the natural water of any river or stream, and, where desirable, fix the maximum range of flow and arrange for the retention or disposal of surplus natural water.

21 Rights in respect of natural water

...(3A) In granting any right under this section to discharge natural water waste into any natural water that has been classified under section 26E of this Act the Board shall, subject to subsection (3B) of this section, impose such terms and conditions as may be necessary to ensure that—

(a) After allowing for reasonable mixing of the discharge with the receiving water, the quality of the receiving water does not as a result of the discharge fall below the standards specified in the classification of that water:

(b) The combined effect of the discharge being authorised and of all existing discharges and authorised discharges into the receiving water will not result in any failure to maintain the standards of quality specified in the classification of the receiving water:

(c) Any discharge into water that is classified other than Class SE is substantially free from suspended solids, grease, and oil:

(d) No discharge of any undisintegrated waste is made into water that is classified Class SE.
(3B) Where it is impracticable, because of emergency overflows, the carrying out of maintenance work, or any other temporary situation, for the Board to impose any term or condition that is required to impose under subsection (3A) of this section in granting any right, it may grant the right without imposing that term or condition. In any such case the Board shall publicly notify the reasons for so acting.

24D Imposition of restrictions on exercise of rights

(1) Where any right has been granted or authorised under this Act, notice in writing may (except as expressly provided in the right) be given by the Board to the holder for the time being of the right requiring the holder to restrict or suspend the exercise of all or any of the powers conferred by the right after such date as may be specified in the notice, being not less than 14 days after the day on which the notice is given.

(2) The powers conferred on every Board by this section shall be exercised so as to maintain minimum levels, minimum flows, and minimum standards of quality of natural water as determined in accordance with this Act:

Provided that nothing in this subsection shall restrict the exercise by the Board of any power expressly conferred by any right.

(3) The provisions of section 25 of this Act shall apply to every requirement of the Board under this section as if it were a decision of the Board under section 24 of this Act.

(4) If the holder of a right has been given a notice under subsection (1) of this section and appeals under section 25 of this Act against the requirement specified in the notice within 14 days after the date on which the notice was given, he shall not be obliged to comply with the requirement unless and until the [Planning Tribunal] dismisses the appeal.

24I Revocation and variation of permits under Waters Pollution Regulations 1963

(1) Notwithstanding anything to the contrary in any permit issued under the Waters Pollution Regulations 1963, a Regional Water Board (if the permit is deemed to be a right granted under subsection (3) of section 21 of this Act to discharge waste within or from its region) … may—

(a) Revoke the permit; or

(b) Amend or revoke any of the terms or conditions to which the permit is subject; or

(c) Add any new terms or conditions to the permit—

for the purpose of maintaining the minimum standards of quality of the receiving water.

(2) A Board … shall not exercise any power conferred on it by subsection (1) of this section unless it has first given to the holder of the permit concerned 3 months’ notice in writing of its intention to exercise that power.
(3) The holder of a permit in respect of which any power is exercised by a Board under this section shall have a right of appeal in accordance with section 25 of this Act as if the exercise of that power were a decision of a Board under section 21 of this Act and as if the holder of the permit were an applicant.

26C Classification of natural waters

(1) The Board may, after considering any investigation carried out under section 26A of this Act in respect of any natural water, classify that natural water in accordance with sections 26D, 26E, and 26F of this Act.

(2) Every such classification shall specify the natural water to which the classification relates by reference to a map or plan attached to the classification.

(3) Every such classification shall—

(a) If it is in respect of any water other than coastal water, be in accordance with one of the 4 classes specified in paragraphs (a), (b), (c), and (d) of subsection (4) of this section:

(b) If it is in respect of any coastal water, be in accordance with one of the 5 classes specified in paragraphs (e), (f), (g), (h), and (i) of subsection (4) of this section.

(4) The requirements as to quality for each class of natural water shall be those specified in respect of that class in the appropriate Schedule to this Act, being—

(a) In respect of Class A, Schedule 1:

(b) In respect of Class B, Schedule 2:

(c) In respect of Class C, Schedule 3:

(d) In respect of Class D, Schedule 4:

(e) In respect of Class SA, Schedule 5:

(f) In respect of Class SB, Schedule 6:

(g) In respect of Class SC, Schedule 7:

(h) In respect of Class SD, Schedule 8:

(i) In respect of Class SE, Schedule 9:

(5) In classifying any area of natural water the Board may, by adding the symbol X to the classification, indicate that the area of water in respect of which the symbol is added is sensitive to enrichment.

(6) The Governor-General may from time to time, by Order in Council, amend any Schedule to this Act.
Cases about water quality and classification

NZ Underwater Association Incorporated v Hawke’s Bay Catchment Board\(^{74}\) (pre-RMA, high significance, question 3 and question 5)

8.3 This case involved a series of appeals under section 26G of the WSCA in relation to various provisions contained in the final classification of the waters of Hawke's Bay by the Hawke's Bay Regional Catchment Board and Regional Water Board. Such water classifications were made following the hearing of objections to a preliminary classification.

8.4 Although this case was decided under the WSCA it has relevance to questions 3 and 5. In relation to question 3 the Planning Tribunal held that it was inconsistent with the structure of the WSCA to take unusual or spasmodic natural events into account when considering a water classification. The Tribunal imposed a SA classification even though on occasions that standard was breached naturally. (This was in the context of the express reference in the WSCA to "disregarding natural perturbations". The same words do not appear in the RMA, but as a matter of common sense the approach adopted by the Court would probably still be applied.)

8.5 In relation to question 5 the Planning Tribunal considered the relationship between reasonable mixing and water classification standards and noted the amount of discretion in setting these standards. This case is also relevant in relation to the finding that "the natural state of the waters or their existing quality must be that which generally prevails during weather conditions when use is likely to be made of these waters by the general public" (page 8). This is particularly relevant to contact recreation standards or guidelines which, it can be argued, should only be applied at times and places where recreation is likely.

Wright v New Zealand Paper Mills Ltd\(^{75}\) (pre-RMA, moderate significance, question 3)

8.6 This case is of limited relevance to the Ministry's project (question 3), but does include discussion of water quality classes under the WSCA regime. One of the issues on appeal was whether or not the effect of section 21(3A) of the WSCA was that all water rights granted must be deemed to be subject to the conditions protecting the quality of the classified waters.

8.7 Section 21(3A) stated:

"In granting any right under this section to discharge natural water waste into any natural water that has been classified under section 26E of this Act the Board shall, subject to subsection (3B) of this section, impose such terms and conditions as may be necessary to ensure that—

(a) After allowing for reasonable mixing of the discharge with the receiving water, the quality of the receiving water does not as a result of the discharge fall below the standards specified in the classification of that water" (our emphasis)

8.8 The Court held that section 21(3A) was clear in its terms and it was directed at the Board and the giving of rights. The Board was directed to take a case by case approach and impose conditions appropriate to each case.

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\(^{74}\) W28/89.

Huakina Development Trust v Waikato Valley Authority\(^76\) (pre-RMA, moderate significance, question 3)

8.9 This case is again of limited significance to the Ministry's project but it includes similar analysis of section 21(3A) to the Wright case. Here the Court interpreted section 21(3A) to mean the authority, when granting a right to discharge water or waste into water, needed to impose terms and conditions sufficient to ensure that the quality of the receding water did not fall below the standard specified in the classification of that water. It found that in this instance, in the absence of evidence to the contrary, the classification standards would be met and the section 21(3A) test would be satisfied.

Water Resources Council v Southland Skindivers Club Inc\(^77\) (pre-RMA, moderate significance, question 3)

8.10 This case also includes discussion of the water classification standards under the WSCA, and accordingly may have some relevance to question 3.

8.11 This case involved five appeals that arose out of final classifications of water under the WSCA made by the Water Resources Council in respect of the waters of Southland and of certain coastal and other waters in the Bay of Plenty. The Supreme Court held that water classifications should not be set lower than the existing water quality at the time of classification without good reason. The Court also stated that in general, a higher standard of quality than that existing in the waters to be classified should be imposed if such quality is reasonably needed and is reasonably attainable. This decision is now reflected in the wording of section 69(3) of the RMA.

Minister of Conservation v Gisborne District Council\(^78\) (pre-RMA, moderate significance, question 3)

8.12 This case has some limited relevance to question 3, as it relates to the classification of water under the WSCA. Here, the applicants sought alterations to water classifications in the Poverty Bay. The Court held that water classifications should reflect what is reasonable and take into account current water quality. High standards can be aimed for in the long term, but it is unreasonable to impose an unobtainable classification on waters.

Mahuta v National Water and Soil Conservation Authority\(^79\) (pre-RMA, moderate significance, question 5)

8.13 This case has some relevance to question 5 in that there is some discussion of the concept of reasonable mixing. However, it was decided in the context of the provisions in the WSCA and accordingly has limited relevance in relation to the definition of reasonable mixing under the RMA.

8.14 This case involved appeals against the grant to the Minister of Electricity under section 21 of the WSCA of the right to take water from the Waikato River for electricity generation and then discharge water back to the Waikato River for cooling purposes in relation to the proposed Huntly Thermal Power Station.

8.15 In this case the Court interpreted "reasonable mixing" as what is "no more than reasonable in the circumstances in order to achieve sustainable management". This is

\(^76\) [1987] 2 NZLR 188.
\(^77\) [1976] 1 NZLR 1; (1975) 5 NZTPA 239.
\(^78\) A106/91.
\(^79\) (1973) 5 NZTPA 73.
the "effects-based approach" to reasonable mixing. This approach was followed in subsequent decisions made under the WSCA. 80

Kerikeri Properties Ltd v Northland Catchment Commission81 (pre-RMA, moderate significance, question 10)

8.16 Although this case was decided under the WSCA it does have some relevance to question 10 in that it includes some discussion around point source discharges. The Court held that the point of discharge is the point at which the waste leaves the effective control of the discharger. The cause of that discharge is relevant to the effects of the discharge. In this case it was held that the discharge in question fell to be regulated under section 15 of the WSCA at the point it reached land or water, which was not within the coastal marine area. Accordingly, a discharge permit, rather than a coastal permit, was required.

Cases about minimum flows

8.17 Section 20J of WSCA was the precursor to section 30 of the RMA. Section 20J enabled regional water boards, after consultation with interested bodies and persons, to fix (amongst other things) maximum and minimum levels for lakes, and minimum acceptable flows for rivers and streams.

Keam v Minister of Works and Development82 (pre-RMA, moderate significance)

8.18 This case does not relate to any of the questions in particular, however it is still of relevance to the Ministry's project as it discusses the balancing test which became the lynchpin of water allocation decisions under the WSCA. Cooke J described it in this manner: "that any proposed use of natural water should be a beneficial use, and the loss which might follow from the taking of water should be weighed against the benefit which will result from its use". This can be contrasted to Part 2 of the RMA, which requires sustainable management of water resources rather than the most beneficial use of water.

Whanganui Minimum Flows case83 (pre RMA, moderate significance, question 2)

8.19 The purpose and effect of section 20J was extensively considered by the Planning Tribunal in the Whanganui Minimum Flows decision. In this case, the Tribunal defined the purpose of fixing "a minimum acceptable flow". However, the Tribunal's interpretation in that case was (of necessity) influenced by the word "acceptable" and by the statutory context of the provision, in particular the long title of the WSCA and the matters set out in section 20.

8.20 This case has some relevance to question 2, in terms of the method of setting a minimum flow. However the case was decided in the context of the purpose of the minimum flow provisions under the WSCA, and accordingly it has limited relevance to the purpose of a minimum flow under the RMA. This will be guided primarily by Part 2 of the RMA, and will need to be justified in terms of section 32 of the RMA.

8.21 Given that the purpose of the RMA is to promote sustainable management and given the other matters listed in Part 2, the purpose of minimum flows is now to assist with sustainable management of the resource in a manner consistent with Part 2.

80 This approach was followed in Freezing Co (Southland) Ltd v Southland Catchment Board (1977) 6 NZTPA 247 and Kerikeri Properties Ltd v Northland Catchment Commission (1977) 6 NZTPA 344.
81 (1977) 6 NZTPA 344.
83 Electricity Corporation of New Zealand Ltd v Manawatu - Wanganui Regional Council, W70/90, affirmed on appeal (3/6/92, Jefferies J, HC Wellington, P 302/90).
8.22 The Whanganui Minimum Flows decision involved appeals to the Planning Tribunal against a decision by the Rangitikei-Wanganui Catchment Board to fix the following minimum acceptable flows:

(a) on the Wanganui River immediately downstream of the western diversion intake at 100% of the natural flow; and

(b) on the Whakapapa River at the footbridge recording site at 8.5 cumecs for the period 1 December to 30 April, and 4.2 cumecs for the balance of the year, subject to such flows being naturally available.

8.23 Provision was made for Electricorp to seek a lower minimum flow in times of national power shortage. In terms of deciding whether to fix a minimum flow and, if so, the level of that flow, the Planning Tribunal summarised its own decision as follows (page 199):

"The purpose of fixing a minimum acceptable flow of the natural water of a river is the conservation of resources of natural water so that they are protected against harm and waste, and are available to meet as many demands as possible, so that their benefits can be enjoyed and shared by all interests to the best advantage of the nation and of the region in which they exist in the course of nature. The essence of it is the conservation of natural resources. The demands, benefits and interests which are relevant will vary from one case to another; but they will generally include instream values, and the cultural values of the tangata whenua.

The minimum acceptable flow is the lowest desirable flow of water in the river or stream, below which it would be desirable to restrict or suspend abstractions authorised by law, and which is fixed after balancing all the factors that are relevant to the public interest, including the benefits derived from taking water, the requirements of conservation and creation, Maori spiritual and cultural values, and the practicality of implementing various flow regimes.

It is relevant when deciding whether to fix a minimum acceptable flow, and what that flow should be, to understand and have regard to the effect which that would or could have on the holders of existing rights, and on those who may in future seek rights, in respect of the body of water concerned.

A minimum flow which has been fixed can be given effect by requiring restriction or suspension of existing rights to the extent necessary to maintain the fixed flow. That may have the effect of altering a right during the term of the minimum flow regime. A right holder is not entitled to any priority or special protection against the effects of fixing a minimum acceptable flow.

... Electricorp’s entitlement to divert water from the Wanganui River could be affected by a requirement to restrict or suspend diversion to the extent necessary to maintain a minimum flow. If the minimum flow regime is in effect when Electricorp applies for new water rights to replace its present entitlement, the effect on the attainment of the minimum acceptable flow of the diversion sought would be relevant to (though not necessarily decisive of) the outcome of those applications.

In deciding whether a minimum acceptable flow should be fixed in respect of the Wanganui River, and if so, what that minimum flow should be, spiritual, cultural and traditional relationships of the tangata whenua with the Wanganui
River are to be considered; and also the effect on Maori spiritual and cultural values."

8.24 The Tribunal held that the benefits of existing uses, and the disadvantages if those uses were restricted, needed to be considered when deciding on a minimum flow. The Tribunal also noted that existing uses should not necessarily be given priority over future uses:

"In the process of deciding on a minimum acceptable flow, existing uses of the water of the river are to be evaluated, both for the benefit to be derived from them and for any resulting disadvantages. Those benefits and disadvantages, and the effect on them of restricting the exercise of those rights so that a proposed minimum flow is maintained, have to be taken into account in determining what the minimum acceptable flow is to be. However, existing uses are not to be given priority over present or future uses merely because the latter are not the subject of current water rights."

…

Uses of the river which have commenced since 1983 do not deserve priority, nor are they to be ignored. Nor should future potential uses be ignored, nor priority given to existing uses over them so as to avoid restriction of the exercise of existing water rights. They should all be considered and evaluated on an even scale, with none having priority over others." (page 201)

8.25 In terms of weight to be placed on instream values, the Tribunal held that "in fixing a minimum acceptable flow under section 20J, no primacy, preference, priority, or bias is to be given to conservation of instream values, or to ecology, or to the natural flow of the river. Those matters are to be ascribed the weight which the decision-maker judges that they deserve in the circumstances of the particular case" (page 80). (This must be contrasted to Part 2 of the RMA where sections 5, 6, 7 and 8 require different weight to be given to various matters and gives all of these matters higher weight than other non-listed considerations.)

8.26 The Planning Tribunal's decision was affirmed on appeal to the High Court. Again, the High Court decision is of limited relevance given the different statutory context. In dismissing the appeals, the Court noted:

"This Court does not find that the Planning Tribunal's decision to apply a Keam type balancing exercise to s20J, which unquestionably [reins] in the extensive and even untrammelled rights Electricorp had by virtue of the Order in Council of 1958, is wrong in law."

8.27 However, the Court had reservations about the Tribunal's suggestion that the purpose of minimum flows was to allow the sharing of the water resource by all users:

"I think sharing is a concept that is shapeless, and might do unnecessary harm to water rights, which have the characteristics of property." (page 31-32)

8.28 The Court commented on the meaning of "minimum acceptable flow" and "minimum standard of quality" as follows:

"In my view minimum acceptable flow and minimum standard of quality are linked together, but it is the word flow which is the benchmark. A definition of minimum acceptable flow is, I believe, the flow below which the

84 3/6/92, Jefferies J, HC Wellington, P 302/90.
consequences are unacceptable. The consequences are the several factors or considerations which dictate the meaning to be given to the word acceptable. I think they are the standard of quality, benefits derived from abstraction, the requirements of recreation, Maori spiritual and cultural value, the practicality of implementing various flow regimes and instream values not covered by any other specifics mentioned." (page 26, emphasis added)

8.29 The Court rejected an argument that holders of existing rights have a legitimate expectation that they will be able to continue to exercise those rights. (The Aoraki decision found that resource consents do have characteristics of property rights and may be subject to legitimate expectations, although the Court accepted that any such rights were subject to section 128(1)(b).)

Napier City Council v Hawke’s Bay Catchment Board (pre RMA, low significance, question 9)

8.30 This case related to ground water pressure and may have some relevance to question 9 in terms of the extent to which a reduction in flow pressure constitutes an adverse effect on other users. However, the Opiki case, which was decided under the RMA, is more directly relevant.

8.31 This was an appeal against a condition imposed on a water right under the WSCA to take artesian water from a well for public water supply purposes. The condition read:

"Satisfactory arrangements being made to compensate county well owners whose water pressure from existing unpumped wells is shown to be adversely affected by more than 1 metre, subject to any such county well users water use being lawfully authorised in terms of the Water and Soil Conservation Act, 1967."

8.32 The condition was held to be ultra vires and uncertain. In the course of making its decision the Planning Tribunal stated:

"The Act envisages the multiple use of natural water and it is the function of the respondent to apportion the available water between users and/or potential users thereof. There is nothing in the Act to indicate the necessity for maintenance of well pressure as opposed to the availability of the water itself. If, as a result of multiple use of available water, users are required to install pumps this does not in any way infringe their right to make use of that water. It simply governs the method by which it is made available. If loss of pressure indicated a depletion of the aquifer to a point where continued supply might be imperilled then that would be a situation in which the respondent could invoke its powers under the Act. Loss of pressure and/or a drop in the level of water at a well head might in some circumstances enable the invocation of powers under the Act but this would be a question of fact and a matter of degree which could only be assessed at an appropriate time in the future." (page 427, emphasis added)

8.33 This decision and the Opiki decision also need to be read with the Aoraki and Southern Alps Air decisions in mind. If a reduction in pressure and consequent increase in pumping costs were found to be a substantial derogation from the existing consents, then that derogation would be prohibited.

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85 (1978) 6 NZTPA 426.
This case may have some relevance to question 2. However, given that it turned on the facts and the particular evidence, that relevance is low.

This case involved appeals against four replacement water rights granted to farmers to divert, take and discharge water from a stream for irrigation of farm land. The respective water rights were rostered with each other to ensure that flow through intakes did not exceed 500 litres per second. The rights were also rostered to ensure that specific minimum flows in the stream downstream of the takes were not breached. Those minimum residual flows were higher than the minimum residual flows contained in the expiring water rights. Those minimum flows were set under the WSCA and were deemed minimum flows under the RMA in the Transitional Plan, rather than flows set in any regional plan. The applicants appealed those conditions seeking that the residual flows be reduced.

The Planning Tribunal agreed with the applicants and reduced the residual flows. The determination of this issue turned on the evidence presented by the parties, in particular the evidence that the existing minimum flow rate regime had not had any adverse effect on the fisheries values in the stream or on downstream water right holders. The Tribunal accepted evidence that the "Montana" method for determining minimum residual flows was inferior because it did not provide for a seasonal and changing flow regime as occurs naturally, and to which fish and other stream biota are adapted. The Tribunal held that in the circumstances of this case the Catchment Board was not justified in applying a graduated scale.

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*Cocks v South Canterbury Catchment Board*\(^6\) (low significance, question 2)

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\(^6\) C077/83.
9. DISCUSSION OF CASE LAW UNDER THE RMA

Cases about water quality limits

9.1 There is little case law on sections 70 and 107 (question 4). There is for example, no substantial case law consideration of whether it is sufficient or necessary for a Council to simply copy the 107 standards into consent conditions as a basis for satisfying the section 107 requirement (this is a common approach). We are aware of at least one situation in which this has been considered by the Court, but the question of whether it is appropriate to restate section 107 in the consent conditions was not tested to any significant degree in that case. The Court included the condition on the basis that it would do no harm and it was consistent with the other conditions and with permitted activity conditions in the regional plan.

9.2 There is very limited RMA case law on the setting of water management classes or on the effect of section 69 (question 7). The *Paokahu* cases about the limits in Gisborne District Council's Proposed Regional Coastal Environment Plan are relevant, as discussed below. There are also some decisions under the WSCA that are of limited relevance, for example *Minister of Conservation v Gisborne District Council*88, where the Court held that it is unreasonable to impose an unattainable classification on waters.

9.3 There is limited RMA case law (discussed below) that assists in defining the concept of reasonable mixing (question 5).

*Paokahu Trust v Gisborne District Council*89 (moderate significance, question 4 and question 5)

9.4 This case has some relevance to questions 4 and 5 in relation to reasonable mixing. The Court held that definitions adopted under transitional and proposed regional plans were not determinative of what reasonable mixing was under section 107 of the RMA. Reasonable mixing was held to be a question of fact.

9.5 This was an unsuccessful appeal by Paokahu Trust against Gisborne District Council's granting of coastal permits to enable continued use of an existing wastewater outfall at Waikanae Beach in Gisborne. In this case, the Court found the discharge, after reasonable mixing, was likely to give rise to the effects set out in section 107(c) and (d) in the receiving waters (after reasonable mixing at 250m radius around diffusers length, the discharge is still likely to give rise to conspicuous oil or grease films and cause change in colour of receiving waters).

9.6 However, the Court stated that it could still grant the consent if there were exceptional circumstances to support this. The Court found that such circumstances did exist, given that "the consequences of a coastal permit to discharge being refused, would mean that the City would be unable to legally use its sewage and wastewater system" (paragraph 77). The Court felt compelled to give consent for a further two years.

*Southland Regional Council v New Zealand Deer Farms*90 (moderate significance, question 4 and question 5)

9.7 In this case the Court considered what reasonable mixing meant in terms of a prosecution for breach of section 13(1)(b) by allowing deer to have access to a waterway where that was not expressly allowed by a rule in the regional plan or a

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87 Renouf v Hawke's Bay Regional Council (W090/2006 and W105/06).
88 A106/91.
89 A162/03.
90 (24/6/2004); CRN3025010005; [2004] BRM Gazette 110.
resource consent. The Court adopted a case by case approach to "reasonable mixing". In particular, the Court considered that the "size of the waterway, velocity of water, tributaries and the like" were factors to consider. The Court found that it was not bound by the 200m reasonable mixing zone specified in the Plan because of the need for a case by case approach rather than a blanket zone for all activities and waterways.

**Paokahu Trust v Gisborne District Council**

9.8 This case is relevant to questions 3, 7, 8 and 17. The central issue for the Court was whether the Council's Proposed Regional Coastal Environment Plan (PRCEP) purported to set standards for water quality without complying with the requirements of one or more of RMA sections 69(1)-(3). The Court raised the issue of section 69 and questioned whether the Council had considered the 3rd Schedule RMA classes. At paragraph 26 the Court stated "We can find no direct reference in the evidence to the Council having decided that the Third Schedule classes are not adequate or appropriate, but we assume that it must have, otherwise the PRCEP would not be structured as it is."

9.9 In terms of question 17, the Court also discussed the relationship between the proposed regional plan and the discharge of sewage and considered whether the discharge of sewage was discretionary or prohibited. The appellants argued that the Council was wrong to vary the Plan in such a way that the existing sewage discharge into the General Management Area (which includes most of Poverty Bay), and which fails to meet the section 107 standards, would have discretionary planning status, rather than the prohibited status which it had under the existing wording of the Rule.

9.10 At paragraph 15 the Court noted that:

"removing the prohibited status in the present Rule will not ultimately change anything, because classifying a discharge activity as something other than prohibited in a Plan cannot change the fact that the consent authority may not grant a coastal permit under s 107 unless it meets the standards that section requires".

9.11 Further at paragraph 21 the Court commented that:

"What has to be borne in mind is that no matter what standards the Rule contains, or how it classifies the activity (except, as discussed, a prohibited classification) s 107 predominates. Therefore, even if the Rule provides for the outfall as a discretionary activity, the consent authority could not grant a coastal permit if any of the standards in s 107(1)(c) to (g) are not met."

**Paokahu Trust v Gisborne District Council**

9.12 This was the second interim decision following decision W024/05 and again has some relevance to questions 7 and 8.

9.13 The Court discussed the rules and methods of the RMA and in particular whether the Council's Regional Plan had set standards for water quality without complying with section 69. The Court concluded that the Council must have decided the classes of schedule 3 were not adequate or appropriate without any material to support that decision. The Court also looked at section 68 of the RMA.

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\[91\] W24/2005, interim decision.
\[92\] W036/05.
9.14 The Court engaged in some discussion of both sections 69(1) and 69(2). In relation to section 69(1) the Court found that two questions needed to be asked. The first was whether the Council provided in the PRCEP that waters were to be managed for any purpose described in respect of any of the classes specified in the third schedule. The Court decided that the Council had done this despite the Policy's identification of the classes as SA, SB, etc not being identical with those in the third schedule. The Court stated that the lack of precise correlation in terminology was not the point, because "The purposes of management are materially the same in both the PRCEP and the Third Schedule" (paragraph 5).

9.15 The second question was whether the Council had included Rules in the PRCEP about the quality of water in those waters. The Court found that this was unclear so it moved on to section 69(2). The Court found that the Council had stated new classes or standards in the PRCEP. At paragraph 12 the Court stated "That being so, for the Council to be able to state in the proposed plan … new classes and standards … it must have come to the view that the classes in the Third Schedule are not … adequate or appropriate … for the purpose. We can find nothing in the material to suggest that the Council has come to that view."

9.16 The Court noted that it could not give substantive consideration to section 69(3) without evidence.

Paokahu Trust v Gisborne District Council\(^3\) (high significance, question 3, question 7 and question 8)

9.17 This was the final decision following Interim Decisions W024/05 and W036/05 (above), which related to decisions made by the council in November 2003. The Court engaged in further discussion of section 69 and came to an overall conclusion. The Court's summary of its conclusions about section 69 at paragraph 23 is particularly useful:

"In summary, our views about the s 69 factors are these:

- The PRCEP provides that waters are to be managed for a purpose described in Schedule 3: s 69(1)(a).
- The Council included rules in the PRCEP: s 69(1)(b).
- The rule must require observance of the Schedule 3 standards unless the Council has decided that those standards are not adequate or appropriate: s 69(1)(b).
- We cannot be satisfied that the Council held the opinion that the standards in Schedule 3 were not adequate or appropriate: s 69(1)(b).
- We cannot be satisfied that the PRCEP standards are more stringent or specific than the Schedule 3 standards: s 69(1)(b).
- We cannot be satisfied that the Council held the opinion that the classes specified in Schedule 3 are not adequate or appropriate for management purposes: s 69(2).

\(^3\) W078/05
We cannot be satisfied that the PRCEP standards will not allow water quality to decline below that in existence at the time of notification: s 69(3)."

9.18 Given these conclusions, the Court could not see how it could report to the Minister of Conservation supporting approval of the Council's decision of 22 November 2003 to adopt the proposed standards and methods into the PRCEP. At paragraph 27 the Court stated that "the appropriate outcome of our inquiry is to report to the Minister and to recommend that, in exercising the power of approval of the Proposed Regional Coastal Environment Plan under Cl 19 of Schedule 1, the Minister should decline to approve so much of it as is contained in Variation 10. If the Council still wishes to achieve a similar result it should repeat the Variation process, paying attention to the requirements of section 69."

9.19 The Paokahu decisions confirm our view that if a Council utilises section 69 then the rules must make contravening discharges at least non-complying activities, if not prohibit them altogether. In practice this will discourage most councils from utilising section 69.

Lake Taupo nitrate decision\(^{94}\) (high significance, question 10, question 11, question 12, question 13 and question 15)

9.20 This decision involved appeals against an Environment Waikato regional plan variation that introduced controls on nitrogen leaching activities in order to reduce the nutrient levels in Lake Taupo. One of the objectives introduced by the variation (and upheld by the Court) was as follows:

"Objective 2  Effect on Lake Taupo water quality from land use activities

Land use activities which result in nitrogen leaching, particularly farming, are managed to facilitate the restoration of the water quality characteristics of Lake Taupo to their 2001 levels."

9.21 In terms of question 10, the evidence was that even small incremental increases in nitrogen leaching could have a significant cumulative effect on Lake Taupo.\(^{95}\) The variation introduced rules controlling nitrogen leaching activities, with a particular focus on farming, which is a high contributor to the nitrogen in the lake. Forestry was also the subject of restrictions to a lesser extent. The measures introduced by the variation included:

"(a) Restricting nitrogen discharges from rural land use activities by imposing a "cap" on nitrogen leaching at historical (July 2001 to June 2005) levels. This should avoid any increase in the outputs of nitrogen from rural land within the Lake Taupo catchment;

(b) Utilising a public fund to achieve a reduction (the aim is a 20% reduction by 2020) in manageable nitrogen discharges. This would compensate for nitrogen which is already in transit to the lake, in groundwater or streams, and which will arrive at the lake over several decades;

(c) Creating the context for the trading of nitrogen discharge allowances to occur. This would provide flexibility for landowners and enable

\(^{94}\) Carter Holt Harvey Limited v Waikato Regional Council (A123/08).

\(^{95}\) Paragraph 162.
In terms of questions 13 and 15, one issue was whether the rules about nitrogen leaching activities (e.g., pastoral farming and forestry) should be land use rules under section 9(2) and/or discharge rules under section 15. The rules as proposed were framed as land use rules under section 9(2) and section 30(1)(c)(ii) of the RMA. The latter section empowers regional councils to "control … the use of land for the purpose of … the maintenance and enhancement of the quality of water in water bodies and coastal water". Carter Holt Harvey Limited, and later the Council, argued that the rules should also be discharge rules under section 15 to avoid any implication that non-point source discharges from animal emissions and nitrogen fixing plants might be unlawful discharges under section 15(1)(b). The farming interests opposed making the rules land use and discharge rules on the basis that such an approach would imply that farming (more specifically, emissions from farm animals) is restricted under section 15. The Court's decision quoted the following passage from Federated Farmers' legal submissions as a summary of those parties' argument:

"Focusing on pastoral farming, the starting point is to consider which of the provisions of Part 3 of the Act best fit the activity. Pastoral farming is clearly a land use in terms of section 9(3), and it is not a discharge in the section 15 sense. There may be point source discharges of nitrogen, such as those from fertilizer application to land. However these can be adequately controlled by way of land use rules, without the unnecessary complication of requiring two different types of consent (land use and discharge permit)."

"A finding in this case that pastoral farming is a discharge activity would have significant implications for Regional Councils and farmers throughout New Zealand. Due to the restrictive presumption of section 15 and the lack of section 20A interim protection, it would effectively be a finding that any farmer with stock on his or her land, who does not currently hold a discharge permit from the relevant Regional Council is in breach of section 15 of the RMA and risks prosecution. Such a finding should not be made lightly or without the benefit of detailed legal submissions on the matter."

The Court noted that the RMA's distinction between land use and discharge permits is an important one, because "other sections of the RMA treat them differently. For example:

(i) Section 9(3) creates a presumption that land may be used unless a regional plan provides otherwise. By contrast, section 15(1) prohibits discharges unless allowed by a regional plan or resource consent;

(ii) Sections 105, 107 and 108(8) describe matters relevant to discharge applications and restrictions on their grant. These sections do not apply to land use consents;

(iii) Section 108(2)(e) specifically allows the imposition of a condition on a discharge permit requiring the holder to adopt the best practicable option. No corresponding provision exists for land use consents;"

96 Federated Farmers, Fonterra, Taupo Lake Care, and Ngati Tuwharetoa Agricultural Group.
97 The authors of this report acted for Federated Farmers in this appeal.
(iv) The default duration for land use consents is unlimited, whereas the default duration for a discharge permit is 5 years (with a maximum duration of 35 years);

(v) Land use consents attach to the land, whereas discharge permits may be transferred in certain circumstances; and

(vi) Section 128(1)(b) enables the review of a discharge permit to meet, among other things, standards of water quality promulgated in an operative regional plan. No such review applies to a land use consent" (paragraph 196)

9.25 The Court declined to make a finding about whether animal emissions are discharges, but accepted that the effects of such discharges can be controlled by regional land use rules. The Court indicated that (paragraph 175):

"This is an issue that could affect every pastoral farmer in New Zealand and every Regional Council. Perhaps due in part to earlier scientific understanding, pastoral farming in New Zealand has traditionally been regulated on a permissive basis as a land use activity, rather than a discharge activity (albeit that a farmer may also carry out specific activities that require discharge permits, such as dairy shed discharges). A finding in this case that non-point source discharges arising from pastoral farming are discharges under section 15(1)(b) would have significant implications for farmers and Regional Councils throughout New Zealand. Given the significance of any such finding, it should more properly have been sought by way of an application for a declaration with supporting affidavit evidence."

9.26 The rules as proposed by the Regional Council were largely upheld, and were made into hybrid section 9(2) and section 15 rules. This outcome is relevant to questions 11 and 15, because although the Court declined to make a finding about whether animal emissions were discharges (point source or otherwise) it agreed with the Council that the rules should cover these emissions under section 15 "just in case" they were found in the future to be discharges.

9.27 In our view it is preferable to regulate the water quality effects of pastoral grazing via land use rules. The use of discharge rules is unnecessary and potentially problematic given the lack of control a farmer has over the animals' emissions.

9.28 The decision to make the rules discharge rules as well as land use rules is also relevant to question 12. As the Court noted, sections 105, 107 and 108(8) only apply to discharge permits, not to land use consents.

9.29 With some limited exceptions, farming in the Lake Taupo catchment is now a controlled activity, with the Regional Council retaining control over the nitrogen budget for the farm. Farmers are required to prepare a Nitrogen Management Plan showing how they will comply with the nitrogen cap, and submit the plan to the Council as part of a consent application. Activities that exceed the 2001 nitrogen cap are non-complying activities. As a result of the Court's decision, the applications will need to be for both a land use consent and a discharge permit.
9.30 In *Mahuta* the Court considered appeals against the grant of consents for a dairy factory expansion, including discharges of wastewater into the Waikato River.

9.31 In terms of question 10 the Court noted that even though the discharge would only contribute about 5 or 6 percent of the total phosphorus in the river and would have minor effects, it was a relevant effect and should be restricted. The Court held:

"[253] We start by recognising that it is common ground that there should be a limit on the amount of phosphorus that may be included in the discharge. Next we find that even the amount proposed by Anchor Products, would not on its own fail to sustain the potential of the river to meet the reasonably foreseeable needs of future generations, fail to safeguard the life-supporting capacity of the water of the river, or have any adverse effects on the physical environment. There are two reasons for further restricting the amount. The first is that it does not recognise and provide for the relationship of Waikato-Tainui with the river, not so much for any physical effects, but because of their cultural and spiritual attitude to the river (a topic on which we have given our findings earlier in this decision). The second is the cumulative effect of numerous point-source and non-point-source discharges of phosphorus into the river, which can lead to a total amount in the river which can lead to formation of blue-green algae blooms in the lower river. All industries should be expected to take a share in reducing the total load, even at some cost to providing for economic well-being, and to efficient use and development of resources" (emphasis added).

9.32 In terms of question 11 the Court noted that "Because of the difficulty of controlling non-point source discharges of nutrients, control of point-source discharges is the more significant, and all industries should be expected to take a share in reducing the total load" (paragraph 157).

9.33 In terms of question 12 the Court noted that alternative methods of discharge (land disposal) would have deserved further consideration if the proposed discharge to the Waikato River from the expanded dairy factory would:

(a) have significant adverse effects on the quality of the water in the river; or

(b) fail to recognise and provide for the relationship of iwi with the river and their kaitiakitanga in respect of it.

9.34 However, those factors did not apply in this case, because consent conditions were able to prevent adverse effects on the river environment and the discharge had been designed specifically to recognise and provide for the relationship of iwi with the river and their kaitiakitanga.

*Tainui Hapu v Waikato Regional Council* (high significance, question 12)

9.35 This is an example of consideration of land and water disposal alternatives. The hapu had appealed against a 15 year duration for a permit to discharge treated wastewater to the Raglan harbour.
9.36 Tainui argued that the applicant's decision to discharge effluent into the harbour (which Tainui found culturally objectionable) was based on insufficient consideration of the alternative measure of discharging it into land. Tainui sought a five year term and a requirement that the applicant devise a scheme to discharge the effluent to land instead of the harbour. The Court disallowed the appeal and confirmed the 15 year duration of the permit.

9.37 The Court noted that there were two occasions for considering the adequacy of consideration of alternatives in this case: first as part of the process of consultation with tangata whenua, and secondly under the section 104(3) direction. It noted that its role is not to substitute its own judgement for that of the applicant, but to "find whether the District Council gave adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge and made a reasoned choice"\(^\text{100}\). In particular, the Court held that affordability is for the applicant to judge\(^\text{101}\).

9.38 The Court found that the extent of contaminants discharged under the proposed scheme would be negligible, and would actually be substantially less than that from the existing treatment plant. The applicant had given land-disposal options sufficient consideration, and the evidence suggested that it was simply not a feasible option given its affordability and the impermeable nature of surrounding land.

9.39 The Court found that the applicant had "made a genuine effort to respond [to tangata whenua concerns] as far as it considered practicable, and discharged any duty it had to consult with [tangata whenua]\(^\text{102}\). The Court concluded that thorough and business-like consideration of alternatives had occurred, and despite being unable to avoid discharge into the harbour, a reasoned choice was made by enhancing the quality of discharged treated wastewater to shellfish-gathering standard.

9.40 We note that there are some other decisions which suggest that where section 6(e) issues arise, there is a duty on an applicant to consider alternatives.

*Carter Holt Harvey Forests Ltd & Fletcher Challenge Forest Ltd (Weyerhaeusernz Inc) v Tasman District Council\(^\text{103}\) (moderate significance, question 16)*

9.41 This case has limited relevance to question 16 which relates to regional policy statements. The Court stated that the control of the land use for the purpose of maintaining water quantity is a relevant matter to be included in a regional policy statement.

9.42 In this case the appellants sought deletion of provisions of the proposed RPS which sought to control effects on water resources by restricting the establishment of tall vegetation. The Court held that the artificial establishment of tall vegetation (for example plantation forestry) is a land use subject to section 9 of the RMA. Further, if this form of land use had a significant effect on water resources then it is subject to Council intervention of an appropriate kind.

*Canterbury Regional Council v Banks Peninsula District Council\(^\text{104}\) (high significance, question 13 and question 14)*

9.43 This case has some relevance to questions 13 and 14. This was an appeal from the Planning Tribunal's decision in an *Application by Canterbury Regional Council\(^\text{105}\).*

\(^{100}\) Paragraph 148.
\(^{101}\) Paragraph 151.
\(^{102}\) Paragraph 127.
\(^{103}\) W007/98, (1998) 4 ELRNZ 93.
\(^{104}\) [1995] NZRMA 452 (CA).
\(^{105}\) [1995] NZRMA 110.
9.44 In the Planning Tribunal, Canterbury Regional Council sought declarations on the relationship between regional and district plans in relation to land use control. The Court held that regional councils were not superior to territorial authorities, and that there was no hierarchy in plans. The Court refused to make the declaration that territorial authorities did not have the authority to control the effects of the use of land for the purpose of water quality and water quantity.

9.45 This decision was appealed to the Court of Appeal with the overall result being that the Planning Tribunal decision was read subject to the Court of Appeal's decision. The Court held that a regional council can include rules regarding the activities for the purposes of section 30 and that a territorial authority can include rules about activities under section 31. Both authorities have overlapping powers but the powers of territorial authorities are also subject to section 75(2). The Court also held that controlling the use of land for the avoidance or mitigation of natural hazards is within the powers of both regional and territorial authorities. Similarly in our view it is clear that controlling the effects of land use on water quality is within the jurisdiction of both councils.

Walker v Hawke’s Bay Regional Council106 (low significance, question 12)

9.46 In this case the Court considered the requirement to consider alternative methods of discharge under the predecessor to section 105107. The appeal related to the removal of willow trees from a lake by aerial spraying. The Court confirmed that under section 104(3) "it is alternative methods of discharge that have to be examined, not alternative methods of removing the willows" (paragraph 58).

McKenzie v Southland District Council108 (low significance, question 10)

9.47 This was a case regarding the discharge of effluent into the Mataura River. The Court found a key consideration was the cumulative effects of the discharge. Although the evidence was that the discharge would be of a much better standard than the present sewage discharge, the Court stated that where the environment was already degraded, the proposal should if possible not make matters worse and it was imperative to set appropriate conditions of consent.

Cases about environmental flows, levels and rates of take in regional plans and policy statements

9.48 There is little RMA case law on setting environmental flows and other water quantity standards. The leading case under the equivalent provisions of the WSCA is the Whanganui Minimum Flows decision, discussed earlier in this report109. That decision is of limited relevance under the RMA because the purpose of the RMA is different from that of the WSCA. In particular, the purpose of the WSCA was to achieve the most beneficial use of water whereas the purpose of the RMA is sustainable management. Furthermore, the WSCA did not include any clear purpose and principles statement, whereas the RMA does. Arguably the RMA provisions require more weight to be given to so called "environmental bottom lines" and the RMA is more precautionary than the WSCA. The Whanganui case was essentially about what environmental limits should be set in the absence of statutory or policy guidance.

107 Section 104(3).
108 C096/08.
109 Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council HC (AP302/90).
Otago Minimum Flows case

9.49 A minimum flows regime was considered by the Environment Court in Minister of Conservation & Ors v Otago Regional Council\textsuperscript{110} (the Otago Minimum Flows case). In that case, the Court started by considering the Regional Policy Statement and the guide this gave to producing a "model water plan" – the Court concluded it was directive and in terms of minimum flows required:

(a) identification of water bodies where significant resource conflicts occur;

(b) setting of minimum flows where appropriate;

(c) investigation and monitoring of the effects of abstraction where appropriate;

(d) review of minimum flows where appropriate; and

(e) an orderly transition from mining privileges.

9.50 It set the minimum flow for scheduled catchments (i.e. those where investigation and recording were taking place) by taking into account all of the balancing mechanisms – the policies and objectives identified in the water plan and subsequently in the rules, as well as the MALF and 1999 drought figures. In each case it was an issue of what was appropriate for each catchment (or sub-catchment). It did not take a strict statistical analysis based on MALF. In relation to unscheduled catchments, the Court had no confidence in "default minimum flows" which relied on a statistical estimate of a catchment where no actual measurements were available. A regime was therefore required which would involve:

(a) prioritising catchments for review;

(b) undertaking investigatory work;

(c) setting of minimum flows for entire catchments;

(d) reviewing existing consents to have them comply with minimum flows; and

(e) considering whether further consents should be granted.

Kakanui Flows case

9.51 The leading decision under the RMA in relation to the setting of flow rules is Fish and Game New Zealand (Central South Island Region) v Otago Regional Council\textsuperscript{111}.

9.52 The Kakanui Flows case concerned references on the Proposed Regional Plan: Water for Otago regarding the supplementary allocation of water in catchments which were already over-allocated. Relevant rules were confirmed, notwithstanding the over-allocation that had already occurred. However, the supplementary allocation (the plan provides for primary, secondary and supplementary allocation – with different minimum flow levels for each) of water was to be a full discretionary activity to enable better environmental outcomes which the Court held are likely to be achieved if the consent

\textsuperscript{110} C71/2002.
\textsuperscript{111} C79/2002.
process is transparent and open to public interest groups (at page 37). The Council had proposed restricted discretionary activity status.

9.53 The Environment Court held that the flow rules in the proposed Plan should be directed at sustaining and safeguarding instream values and avoiding or mitigating any significant adverse effects of the taking or diversion of water. The Environment Court balanced the competing demands between in stream and out of stream use of water when setting minimum flows for the Kakanui River. In setting the minimum flows, the Court evaluated the following:

- "Economic effects on an irrigator through loss of water;
- Higher flow requirements for trout and salmon;
- Flow requirements of native fish;
- Adverse social effects of less water for irrigation on employment;
- Social and recreational benefits of an increase;
- Perceived benefits of various minimum flows; and
- Costs of various minimum flows."

9.54 The Court then stated:

"Some of these factors are monetary, others are intangible. Each benefit to one party is a cost to others. An overall s32 analysis of benefits and costs or effectiveness and efficiency does not assist us greatly in this case in weighing the various factors. Just because the effects on farms can be measured in monetary terms does not mean it has greater weight than non-monetary issues, such as native fish" (at page 48).

9.55 Interestingly, the Court also imposed a novel "bounce back" minimum flow provision despite this not having been asked for by any party. The Court described the bounce back provision as follows:

"…there should be provision in the Water Plan that all takes will be automatically suspended where the instantaneous flow at any time at Mills Dam and McCones goes below 250 l/s and such a suspension should continue until the flow reaches or exceeds 400 l/s again" (page 48)

9.56 This case has limited relevance to the Ministry's project. It follows the decisions relating to flows in the Kakanui River.

9.57 The case related to references on the Otago Regional Water Plan. The issue was notification of consent holders of expiring consents to prevent loss of primary allocation status. The Otago Water Regional Users Group was concerned at the potential for farmers to inadvertently lose their water take by default if they were unaware of the expiry of the consent and failed to make the application for renewal within time. The Court concluded that the Act worked on the presumption that holders of licences must be vigilant to protect their interest. Holders of water consents must be alert to protect them and failure to do so will lead to the lapsing of the consent.

9.58 This case has limited relevance to question 2 in terms of the setting of minimum flows.

112 C88/2003.
113 C043/98.
9.59 The issue in this case was whether or not the Council could impose a minimum acceptable flow regime more stringent than the one imposed in 1972 by the National Water and Soil Conservation Authority, pursuant to section 14(3)(o) of the WSCA and which had remained unchanged. A group of farmers in the Tai Tapu area sought a declaration under the RMA that the minimum flow levels set under section 14(3)(o) of the WSCA were deemed rules of the Transitional Regional Plan.

9.60 The Court held that the minimum acceptable flows set under section 14(3) of the WSCA would not be deemed rules of the Transitional Regional Plan and therefore declined to make the declaration sought.

Federated Farmers of New Zealand (North Canterbury Province Inc) v Canterbury Regional Council

9.61 This case has limited relevance to the Ministry's project. It involved an application for a declaration from Federated Farmers that a portion of the Cust River that flows through a man-made channel was not a river and therefore was not subject to minimum flows under the then proposed Waimakariri River Regional Plan. This application for declaration was strenuously opposed by Canterbury Regional Council and Fish & Game.

9.62 The Court concluded that the Cust main drain was a modified water course and that water flowing into the drain was water to which the RMA applied. The declaration sought was declined but the Court made a positive declaration that the Cust main drain is a “river” in terms of the RMA.

Federated Farmers of New Zealand (North Canterbury Province Inc) v Canterbury Regional Council

9.63 This case follows on from the above decision and has limited relevance. The Council sought further declarations in respect of the powers under section 31 of the RMA that:

(a) The powers contained in section 30(1)(e)(i) to (iii) apply both to the control of the taking, use, damming and diversion of water AND to the control of the quantity, level and flow of water in any water body. The powers in the first part of subparagraph (e) relate to water rather than a water body.

(b) The words following after 'including' in subparagraph (e) apply to BOTH powers of control of quantity, level and flow of water in any water body AND to the control of taking, use, damming and diversion of water.

(c) A regional council is able to impose maximum and minimum levels on water itself, in addition to the water body.

9.64 The Court held that the above determinations were not core to the determination in the above decision (C083/02) and that it would be inappropriate to make them.

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114 C083/02.
115 C132/02.
Cases about implementation of flow limits in resource consents

**Lynton Dairy Limited v Canterbury Regional Council**[^16] (moderate significance)

9.65 In this decision the Environment Court upheld an appeal against a decision of Environment Canterbury which had declined consent for a ground water take in Te Pirita, Central Canterbury, within the Rakaia-Selwyn zone. This zone was considered to be over allocated and was known as a “red zone” where the Council was of the view that no further consents should be granted.

9.66 The Court rejected the Council’s evidence that the resource was over allocated and found that for a variety of reasons the proposed take would not have a significant adverse effect on the flow of lowland streams. The decision has been criticised by Environment Canterbury since it goes against its policy in relation to the “red zones”.

9.67 This case is of little relevance in the context of setting and applying allocation limits. The decision related to a resource consent and at the time of the application for consent the Regional Council had not notified its Proposed Natural Resources Regional Plan which now contains the interim allocation limits. The PNRRP was notified before the decision but submissions had not been heard and the non-complying status for new takes did not apply to this take.

9.68 The outcome of the case may possibly have been different if the PNRRP had been at a more advanced stage, however even that is debatable. The Court did not accept that the proposed take would have more than minor adverse effects on the environment and in particular on the flows and ecology of lowland streams. Accordingly, even if the PNRRP had been more advanced, the application passed through one of the “gateways” for a non-complying activity and at the discretion of the Court could have been granted.

9.69 The key findings of the Court were as follows:

(a) Localised effects in the lowland areas, which are properly recognised in the regional plan, had been wrongly attributed by Regional Council witnesses to abstractions in the upland areas of the catchment (paragraph 152).

(b) The regional plan was a measured and responsible approach to water allocation within the region, and the plan approached the matter on a cautious basis (paragraph 172).

(c) While the plan was a generally robust and reliable document, the Regional Council officers’ evidence had become focused on “red zones” and preventing abstractions from upland areas while allowing continued abstractions from the lowland areas (paragraph 177).

(d) Any cumulative effects on the lowland streams would be best addressed by considering the wells in their vicinity (paragraph 185).

(e) The Council should impose a condition on all new and renewal consents and if possible on existing consents under section 128 as follows:

"The consent holder shall monitor and record the abstraction rate, monthly volumes and the seasonal volume extracted either by monitoring the discharge directly or by using records of power consumption by the pump. The results of monitoring shall be

[^16]: C108/05.

available for inspections by a Regional Council officer at any reasonable time."

(f) The most appropriate method to determine an annual allocation in this situation was 50% of the 150 day instantaneous take (paragraph 192).

(g) The Court rejected a condition sought by the Regional Council allowing a review in order to reduce the total allocation "should the reducing trends in lowland streams and deep aquifer levels continue". The Court indicated that such a condition would be misguided (paragraph 207).

**Lynton Dairy Ltd v Canterbury Regional Council**\(^{117}\) (low significance, question 2)

9.70 This case involved confirmation by the Court of final conditions (from the consent granted in the decision above) under which LDL was required to take and monitor water from bores at Te Pirita. It has some limited relevance to question 2. The principal changes to the conditions were to specify the period for monitoring the water take and establishing monitoring standards.

**DL Newlove Ltd v Northland Regional Council**\(^{118}\) (moderate significance, question 2)

9.71 This case has some relevance to question 2, in terms of the method of setting a minimum flow. The minimum flow was consistent with a proposed policy in the RPS but the RPS was not reflected in any limit in a regional plan.

9.72 This was an unsuccessful appeal against a decision granting the right to take 4,600 cubic metres per day of water from the Kaihu River for irrigation. The appellants sought cancellation of the consent or alternatively amendments to the conditions of the water permit. The appellants raised the following issues:

(a) the adequacy of the residual flow of the Kaihu River;

(b) the efficiency of the irrigation system proposed; and

(c) the availability of alternative water sources on the applicant's farm.

9.73 On appeal the Regional Council sought a minimum flow condition equivalent to 75% of the design (1 in 5 year) drought flow in the river. The appellants sought to replace that limit with a minimum flow of either the 7 day annual average low flow, with 50% of the remaining water allocated instream and 50% allocated for consumptive uses, or alternatively the residual flow of the annual monthly mean flow. The appellants did not call any expert evidence to justify those residual flows and the Tribunal upheld the Council's proposed conditions.

9.74 The Tribunal noted that a proposed regional policy statement was in existence proposing a general policy that as a minimum not less than 75% of the 1 in 5 year low flow and not less than 50% of the flow above that limit are to be retained as residual flows. Given the early stage in the schedule 1 process, the Tribunal noted that the policy's final form could not be predicted with certainty but that the respondent's decision had been consistent with the proposed policy.

\(^{117}\) C160/05.
\(^{118}\) A30/94.
**Mangakahia Maori Komiti v Northland Region**¹¹⁹ (moderate significance, question 1 and question 2)

9.75 This case has some relevance to question 2, in terms of the method of setting a minimum flow. It also has limited relevance to question 1 in terms of what consultation was required before section 36A was enacted in 2005.

9.76 This decision involved appeals against the grant of water permits to 17 farmers to extract water from the Mangakahia or Opotiki Rivers for farm irrigation. The Regional Council had made the allocation subject to restrictions in order to maintain the mean annual low flow (3,000 litres per second) at which flow level abstractions were to cease.

9.77 The applicants appealed the decision, seeking that the level at which abstractions would cease should be the design drought flow (2,200 litres per second) instead of the MALF.

9.78 The Iwi Authority appealed against the grant of the consents on grounds including that the river was a resource of the tangata whenua and that granting the permit would affect the fishing resource adversely. The Iwi Authority also contended that consultation had been substandard and that it was irresponsible to grant the consents in the absence of authoritative data about the river.

9.79 In terms of the minimum flow, the proposed regional policy statement at the time had a policy headed "maintenance of river and stream flows". That policy stated:

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(i) No less than 75% of the best available estimate of the natural one in five year low flow at any point on any river or stream be reserved as a minimum residual stream flow; and

(ii) no less than 50% of the flow over and above the one in five year low flow at any point on any river or stream be retained in stream; or

(iii) where existing allocations already comprised this regime, then no further allocations shall be made. Existing allocations exceeding this regime, that are being used, may be retained until the year 2004 unless there is a readily available alternative water source;

unless a comprehensive assessment of environmental effects establishes that some other flow regime is needed, or sufficient to preserve the natural character and water quality standard of a particular river or stream".
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9.80 The Tribunal commented that the general policy was less conservative than the mean annual low flow (3,000 litres per second) reflected in the minimum flow in the Council's decision. The Tribunal preferred the evidence of the appellants that a minimum flow of 100% of the design drought flow (2200) was appropriate.

9.81 The Tribunal also commented that the three paragraphs of RMA section 5(2) do not simply express bottom lines, but that each should be afforded full significance and applied according to the circumstances of the particular case.

9.82 In terms of consultation, Regional Council Officers had arranged a number of meetings with Iwi and other submitters. At one meeting arranged with Iwi the Iwi walked out on the basis that the venue was inappropriate to talk about the river. The Tribunal noted¹²⁰

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¹²⁰ Page 205.
that although a consent authority may encourage consultation between applicants and
tangata whenua, where the two sides are in clear opposition, the consent authority
cannot prejudice its own position as a quasi judicial body by seeking to reach an
understanding with one body of interest to the disadvantage of or at odds with another
body of interest. The Tribunal concluded that:

"the Council acted appropriately by leaving it to its officers to consult with the
Komiti, in order that the Komiti could fully advise on the concerns held by Maori
over the applications. Mr Elliott, as the Council Officer processing the
applications, was in the position of being able to detail those concerns in his
officers assessment for presentation to the Council when the hearing took
place".

9.83 This case illustrates the pre-2005 position that the Courts had adopted. This position
was that despite there being no obligation on an applicant to consult with tangata
whenua, the consent authority had to consult with tangata whenua through its officers.

**Lower Waitaki River Management Society Inc v Canterbury Regional Council**\(^{121}\) (moderate
significance, question 6)

9.84 This case has limited relevance to question 6 in that it relates to section 14 of the RMA.
However, there is no substantive analysis of section 14 in the decision.

9.85 This case was an unsuccessful appeal against water permits granted to Meridian
Energy Limited. These permits permitted part of Meridian's North Bank Tunnel Concept
to take water from the Waitaki Dam into a tunnel and discharge it into the lower river.
The appellant opposed the scheme on the grounds of the effects on river form, water
flora, fauna and recreation values.

9.86 The Court held that although the effects would be more than minor, Meridian's proposal
passed the second gateway test in section 104D of the RMA in that it was not
inconsistent with the Waitaki Catchment Water Allocation Regional Plan and Proposed
Natural Resources Regional Plan. Furthermore, that the consent conditions would
significantly improve the function, form, resilience and integrity of the river. The Court
concluded that the North Bank Tunnel Concept would achieve sustainable management
of the Lower Waitaki and enable communities to promote welfare by the provision of
electricity while also improving the vary degraded state of the river.

**Morfield Farms Limited v Southland Regional Council**\(^{122}\) (low significance, question 2)

9.87 This case has limited relevance to question 2 in terms of the method used to set
minimum flow conditions in resource consents. Two applicants for consent appealed an
11 cumec minimum flow restriction on their ground water abstraction permits.

9.88 The Court's decision turned on the evidence that the flows in the river were above the
11 cumec minimum flow around 99.4% of the time (on average the flows only dropped
below this level two days per year). The Court noted that such a low flow is rare and
extreme. In those circumstances it is very likely that the ecology and instream values of
the river will be under significant stress due to reduced habitat and oxygen depletion. It
might be said that such events are so rare that a restriction in those circumstances is
unnecessary.

9.89 The Court also accepted that the Regional Council had taken a cautious approach in
setting limits. There had been a significant increase in takes and there was no clear

\(^{121}\) C080/09.
\(^{122}\) C154/2005.
Case law on limits for freshwater quality and environmental flows

understanding of the effect of ground water abstractions upon the values of the Mataura River.123

9.90 The Court concluded that the 11 cumec minimum flow was a "considered and measured response to the demand for water in this river"124. On the basis of the information supplied, particularly the flow duration curve, a reasonable balance was achieved by:

(a) providing for certainty of supply for the abstractor for around 99.4% of the time; and

(b) imposing restrictions only in times of severe drought when the values of the Mataura River are likely to be compromised by its extreme low flow compared with its medium flows and annual low flows.125

Davidson v Otago Regional Council26 (low significance, question 2)

9.91 This case has limited relevance to question 2 in terms of the setting a minimum flow on a ground water take consent. The proposed minimum flow reflected a policy but not a standard in the operative Regional Plan: Water for Otago.

9.92 The applicant for a ground water take consent appealed condition 3 of that consent. Condition 3 indicated that the abstraction was linked to the surface flow of the Lindis River (a minimum of 600-700 metres from the take sites) and required a reduction in the take depending on the Lindis River flow at a particular recorded site approximately 2 km upstream.

9.93 The Court's decision turned on the evidence of links between the aquifer and the river. The Court concluded that there would be some ground water drawdown beneath and in the vicinity of the river. There would be a small consequential increase in the length of river in which there is no flow, during takes under the consent.127 However, the increase in effect caused by this particular take was so minimal that the Court found there was no connection of any significance between it and an adverse effect on the Lindis River.

Ngati Rangi Trust v Manawatu-Wanganui Regional Council128 (low significance, question 1)

9.94 This case has low, if any, relevance to question 1 in terms of consultation. It is the first of three decisions relating to the Tongariro power scheme.

9.95 This case was an appeal by Ngati Rangi Trust against water related consents allowing river diversion. The trust claimed that the diversions were culturally unacceptable to Maori as they affect their cultural traditions in a number of ways, including reducing the flow of the river. The essence of this case is the recognition of Maori cultural matters and how these matters can be accommodated and provided for under the provisions of the RMA. The Court allowed the appeals to the extent that the terms of consents were reduced from 35 years to 10 years. The prime reason for this was that a ten year term would provide time for a "meeting of minds" between the two parties in what the Court described as a "complex and difficult issue".

123 Paragraphs 47-48.
124 Paragraph 52.
125 Paragraph 53.
126 C003/07.
127 Paragraph 41.
Case law on limits for freshwater quality and environmental flows

**Genesis Power Ltd v Manawatu-Wanganui Regional Council**\(^{129}\) (low significance, question 1)

**9.96** This has case has low, if any relevance, to the Ministry's project. It was an appeal of the *Ngati Rangi Trust* decision above on points of law about the reduction in consent term from 35 years to 10 years.

**9.97** Genesis Power Limited appealed the Environment Court's decision alleging that it erred in law and departed from its RMA powers when it substituted a 10 year term to effect a meeting of the minds of the parties. The Court stated that the meeting of the minds construct which had lead the Environment Court to reduce the term of consent involved an error of law. The Court noted that there was no rational basis for the Environment Court to conclude that a further consultation process with Maori over the next 10 years would result in a "meeting of the minds". The Environment Court's decision was quashed and referred back to it for a new determination.

**Genesis Power Ltd v Manawatu-Wanganui Regional Council**\(^{130}\) (low significance, question 1)

**9.98** This was an unsuccessful appeal by Ngati Rangi Trust against the High Court decision above and has low relevance to the Ministry's project.

**9.99** The Court of Appeal had granted the trust the leave to appeal on two issues, namely whether:

(a) The evidential onus fell on the trust to demonstrate appropriate mitigation measures; and

(b) The "meeting of the minds" concept was directed not to sustainable management, but providing the trust with another chance to express its concerns.

**9.100** The Court held that an applicant applying to the Environment Court for action on a resource consent must always prove their case. In particular, the reference to "meeting of the minds" should be directed to sustainable management. The Court also stated that the sole reason for shortening the period of consents at the Environment Court was that the appellants had difficulty articulating their concerns and how they wanted them to be met. It was an incorrect approach for the Environment Court to give Genesis only a 10 year consent when they could have instead simply adjourned the hearing to allow the appellants to better articulate their concerns.

**Opiki Water Action Group Inc v Manawatu-Wanganui Regional Council**\(^{131}\) (moderate significance, question 9)

**9.101** This case related to ground water pressure and may have some relevance to question 9 in terms of the extent to which a reduction in flow pressure constitutes an adverse effect on other users.

**9.102** The Court held that adverse effects of relevant activities permitted by the Regional Plan should be disregarded as they cannot be sufficiently ascertained. In relation to whether a reduction in flow pressure constitutes an adverse effect on other users, the Court stated that existing bore users have no right to pressure giving flowing artesian water and that pressure is convenience whose loss is almost inevitable.

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\(^{129}\) [2006] NZRMA 536 (HC).

\(^{130}\) [2009] NZCA 222.

\(^{131}\) W64/2004.
Aoraki Water Trust v Meridian Energy Ltd\textsuperscript{132} (low significance)

9.103 This case is not really relevant to this particular project but it will be relevant to the water allocation project. The case discusses water allocation and competing priorities. However it does have some discussion of section 128(1)(b) in terms of the ability of consent authorities to review existing water permits to implement new restrictions introduced into regional plans. The Court accepted that section 128(1)(b) provides a limited exception to the principle that a consent authority should not derogate from consents it has granted.

Prosecutions for unconsented takes or breaches of flow restrictions

Hawke's Bay Regional Council v Morton Estate\textsuperscript{133} (moderate significance, question 20)

9.104 This case was a prosecution against a consent holder for breaches of flow restrictions imposed by way of consent conditions. One of the water permits (for the Matapiro Vineyard) had a minimum flow condition and a weekly volume cap condition in the following terms:

“The taking of water authorised by the consent shall cease when the flow in the Ngaruroro River, measured at the Fernhill Bridge measuring site, is less than 2800 litres per second and shall not resume until the flow exceeds 2800 litres per second.”

“The volume taken shall not exceed that required to replace soil moisture depleted by evapotranspiration over the irrigated area, up to a maximum of 8,200 cubic metres in any 7 day period.”

9.105 From 27 January 2009 to 13 February 2009 and from 2 April 2009 to 21 April 2009 the Regional Council announced water take bans for those periods and informed the Matapiro vineyard property manager of the ban on each occasion. The consent holder continued to take 17,408.1 cubic metres (an average of 828.96 cubic metres per day) of water between 28 January 2009 and 11 February 2009 for irrigation of vines. For the week ending 16 February 2009, the consent holder took 8,369 cubic metres of water, 2% over the allowable maximum volume.

9.106 A separate vineyard owned by the same consent holder had similar water permits with similar conditions. For a period of 7 days during a water ban the consent holder continued taking water for irrigation of vines (total of 3,723 cubic metres at an average of 531.9 cubic metres per day). For the week ending 26 January 2009, the consent holder exceeded its allowable maximum weekly volume by 11%.

9.107 The Court convicted the consent holder and imposed a fine of $50,000.

Canterbury Regional Council v Roy\textsuperscript{134} (moderate significance, question 20)

9.108 This was a sentencing decision following a guilty plea by a farmer who took water from a “fully allocated red zone” for irrigation without the necessary resource consent. The take had been deliberate and in full knowledge of the need to obtain a resource consent. A fine of $7,500 was imposed.

\textsuperscript{132} [2005] NZRMA 251 (HC).
\textsuperscript{133} Decision made in March 2010. As at the date of writing this report, the written decision was not yet available.
\textsuperscript{134} Decision made in March 2010. As at the date of writing this report, the written decision was not yet available.
Canterbury Regional Council v Holmes\textsuperscript{135} (moderate significance, question 20)

9.109 This case has some relevance to question 20 in relation to breaches of resource consents and plans.

9.110 This was a prosecution for taking water for irrigation in breach of a minimum flow condition. Mr Holmes pleaded guilty to a charge under section 14(1)(a) of the RMA for taking water when there was no rule or consent allowing him to do so. Mr Holmes held a resource consent authorising the taking of water from the Rakaia River for irrigation. The consent was subject to conditions which included that water could not be taken when the water fell below a minimum mean flow. Mr Holmes was aware that the flow of the river was significantly below the mean flow figure required to take water. However he still took the water for irrigation until spoken to by Council officers, after they had received a complaint through the pollution hotline.

9.111 The Judge concluded that an appropriate fine was $3,000, as the act was deliberate, but noted that Mr Holmes was fully cooperative with Council officers.

Water Conservation Order decisions

9.112 The principal focus of case law relating to Water Conservation Orders relates to their purpose and the relationship of that to the sustainable management purpose of the RMA. Given the different purpose of this part of the Act, these decisions are of limited relevance. The interim decision in the Buller case provides some guidance as to the need for certainty in setting conditions in a WCO. That largely reflects well known principles in relation to the drafting of consent conditions and rule standards.

Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council\textsuperscript{136} (moderate significance)

9.113 The Rangitata decision focuses on the purpose of WCOs. It has no direct relevance to any of the 21 questions, but the form of the flow and water quality restrictions is of some limited relevance simply as an example of drafting.

9.114 This case concerned an interim report on the proposed Rangitata Water Conversation Order. The Court discussed the correct legal test to apply when considering applications for WCOs. In particular, the Court stated its concern in this case about the ability of Part 9 of the RMA to deliver a regime that conforms to the requirement for sustainable management under Part 2, because the purpose of a WCO overrides any contrary indication under Part 2, and because all that is required of a WCO is the preservation or protection of the existing features or characteristics that are "outstanding". However the Court noted that a WCO cannot be used to halt any decline in the quality of a feature or characteristic or achieve its enhancement.

9.115 The Court also stated that if the feature or characteristic is "outstanding", the next step is to consider how to protect it. The Court noted that if a feature is outstanding despite the existing use being made of it (eg by a specified level of abstraction), that level is not relevant to assessing any extension of that use, because section 199(2) does not provide for enhancement, only protection, of the existing state of the outstanding feature or characteristic. In essence the Court adopted a precautionary approach to the minimum flow and maximum allocations in the Order, guided by the purpose of the Order which is to protect outstanding features as opposed to achieving sustainable management.

\textsuperscript{135} 27 June 2001, District Court, Christchurch.
\textsuperscript{136} C109/2004.
Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council\textsuperscript{37} (moderate significance)

9.116 This decision is the final report on the proposed Rangitata Water Conservation Order and has no direct relevance to any of the questions. There is further discussion of the correct legal test to apply when considering applications for WCOs.

Ashburton Acclimatisation Society v Federated Farmers of New Zealand\textsuperscript{38} (pre-RMA, low significance)

9.117 This case has no direct relevance to any of the Ministry's questions as it relates to WCOs. The Court held that the WSCA was a code for making WCOs where the primary object was the protection of water. The Planning Tribunal could impose conditions on the quality of the water to extend the order upstream of the waters requiring protection.

Drafting of rules and standards

9.118 In drafting rules and standards, clarity and precision are essential, so that those affected by the provisions and those administering them are able to easily identify the rules that affect them and the manner in which they are affected.\textsuperscript{139} In order to be valid, rules need to be clear and specific in their operation,\textsuperscript{140} and should be readily understandable by an ordinary, reasonable member of the public.\textsuperscript{141}

Review of consents based on new limits

9.119 The ability of consent authorities to retrospectively apply new water quality and quantity standards to existing consents is discussed earlier at paragraph 6.50. There has been limited case law discussion of this provision but the Aoraki\textsuperscript{142} decision provides some indications about how the Court might approach it.

Aoraki Water Trust v Meridian Energy Ltd\textsuperscript{143} (low significance)

9.120 This case will be more relevant to the water allocation project than to this project, as it discusses water allocation and competing priorities. However it does have some discussion of section 128(1)(b) in terms of the ability of consent authorities to review existing water permits to implement new restrictions introduced into regional plans.

9.121 The Court found that resource consents do have the characteristics of property rights and may be subject to legitimate expectations, subject to section 128(1)(b). The Court noted several RMA provisions that arguably conferred a power on consent authorities to derogate\textsuperscript{144} from the grant of a consent, albeit for very limited purposes. Those provisions include\textsuperscript{145}:

\textsuperscript{137} C135/05.
\textsuperscript{138} [1988] 1 NZLR 78 (CA); CA204/86.
\textsuperscript{139} Sandstad v Cheyne Developments Ltd (1986) 11 NZTPA 250 (CA).
\textsuperscript{140} Eg Murray v Tasman District Council W058/94 (PT); Haskett Investments Ltd v Waimakariri District Council C079/98; Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council (1993) 2 NZRMA 497 (PT).
\textsuperscript{141} Christchurch City Council v Aidanfield Holdings Ltd 17/7/09, Panckhurst J, HC Christchurch CIV-2008-409-2928.
\textsuperscript{142} Aoraki Water Trust v Meridian Energy Ltd [2005] NZRMA 251 (HC).
\textsuperscript{143} [2005] NZRMA 251 (HC).
\textsuperscript{144} In Southern Alps Air Ltd v Queenstown Lakes District Council [2008] NZRMA 47 the Court found that "to amount to derogation from a grant, the relevant interference must be at least substantial. Mere interference with convenience or amenities does not suffice" (paragraph 50).
\textsuperscript{145} Paragraph 52.
(a) “the power to include in a regional plan a rule relating to maximum or minimal levels of flows or rates of use of water even though it may affect the exercise of existing consents (s 68(7))”;

(b) “a power to review conditions of a resource consent when a regional plan setting rules relating to maximum or minimal levels or flows or rates of use of water or minimum standards of water quality has been made operative and, in the regional council’s opinion, it is appropriate to review the permit conditions in order to enable the levels, flows, rates or standards set by the rule to be met (s 128(1)(b))”;

(c) “a power to change or cancel a resource consent if, in the Environment Court’s opinion, information made available to the consent authority by the applicant contains inaccuracies which materially influenced the decision to grant the consent (s 314(1)(f))”; and

(d) “a power to apportion water where a regional council considers that there is a serious temporary shortage in its region or any part of its region (s 329(1)).”

9.122 The Court went on to note that section 128: 146

“and the following related provisions were enacted to govern a clearly defined set of circumstances. They are triggered by a consent authority’s opinion that the conditions of the permit [including terms, standards, restrictions and prohibitions] should be reviewed in order to enable standards set by a rule in a regional council to be met. The statute has created a discrete procedure to deal with such an application.”

General case law principles about non-complying activities

9.123 This topic is relevant to question 17 and question 18. Section 104D(1) of the RMA sets out particular restrictions for non-complying activities and provides that a consent authority may only grant a resource consent for a non-complying activity 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)(b) applies) will be minor; or

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

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

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

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

9.124 Section 104D(1)(a) and (b) have been described by the Court as “gateways”. 147 If neither gateway is satisfied, the application fails. If the application satisfies either gateway, then the application is considered under section 104.

146 Paragraph 53.
147 Dye v Auckland Regional Council [2002] 1 NZLR 337.
9.125 The widely accepted approach to addressing relevant considerations for non-complying activities is set out in *Baker Boys Ltd v Christchurch City Council*. This approach requires the decision maker to:

(a) identify the relevant section 104 matters for consideration;

(b) then consider whether the jurisdictional hurdles in what is now section 104D(1) are met having regard to the relevant (and rejecting the irrelevant) matters under section 104;

(c) as part of the overall discretion in what is now section 104B, to weigh the relevant matters under section 104 – depending on the Court's opinion as to how they are affected by the application of sections 5(2)(a), (b), and (c) and sections 6 to 8 – to the particular facts of the case, and then in light of the above;

(d) allowing for comparison of conflicting considerations, the scale or degree of conflict, and their relative significance or proportion in the final outcome.

9.126 In terms of question 18, both parts of the section 104D gateway test allow activities to breach limits. If the effects of the activity are no more than minor then the activity has passed through that gateway and could be consented despite a breach of a policy, unless there is some Part 2 or precedent reason to decline consent. Conversely, even if the effects of the activity are more than minor, the activity could still get through the gateway if the objectives and policies in the plan are weak (eg the ECan red zone policy).

9.127 In *Hopper Nominees Ltd v Rodney District Council*, the High Court rejected an argument that if the effects are minor, significant weight ought not to be attached to the plan provisions. There is no reason for giving primacy to either of the two alternative conditions referred to in section 104D(1). Even if one of the constraints imposed by section 104D(1) is overcome, the discretion to grant or refuse consent remains. For example, even if the adverse effects will be no more than minor, there remains a broad discretion to decline consent based on the finding that a proposal was contrary to the plan's objectives and policies.

9.128 In *Price v Auckland City Council*, the Environment Court stated that the purpose of section 104D is not to create a type of *de facto* prohibited activity, but to allow for activities that are acceptable in the sense that they do not oppose or challenge objectives and policies and therefore qualify for further examination under section 104. However, a non-complying activity, if granted a consent, must not effectively change the rules for all comers (ie set a precedent for the grant of other non-complying activities). It must be clearly restricted to the facts that set the application apart from the norm.

9.129 For non-complying activity status to be effective, the regional plan's objectives and policies need to be robust and clear in their intention. A proposal is not contrary to the plan provisions simply because those provisions do not actively support the proposal. A proposal could be said to be contrary to objectives or policies even if it does not actually cut across or contradict those objectives or policies. However, a regional council intending to rely on the section 104D(1)(b) gateway should ensure that its plan

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150 McKenna v Hastings District Council (2009) 15 ELRNZ 41 (HC).
151 (1996) 2 ELRNZ 443.
152 Arrigato Investments Ltd v Auckland Regional Council [2001] NZRMA 481 (CA).
153 Shell Oil NZ Ltd v Wellington City Council (1992) 2 NZRMA 80 (PT).
provisions are drafted in a manner that makes it clear what is envisaged as acceptable and what is unacceptable.

**General case law principles about plan integrity/precedent**

9.130 Closely related to non-complying activity status is the issue of plan integrity. Non-complying activity status is often used to signal that a particular type of activity is not generally envisaged in the zone or area. Before granting consent for such an activity, consideration should be given to the question of whether granting consent "against" the objectives and policies will weaken those provisions by creating a precedent for that type of activity (despite the fact that the grant of consent does not create a precedent in the legal sense).

9.131 The Court of Appeal in *Dye v Auckland Regional Council*\(^{155}\) held that the precedent "effect" of granting a resource consent (in the sense of like cases being treated alike) is not an effect on the environment, but is a relevant factor for a consent authority to take into account when considering an application for a consent to a non-complying activity. This specifically arises in terms of section 104D(1)(b), and is also a relevant factor under section 104(1)(b)(iv) and 104(1)(c) which can apply to discretionary activities. For example, in the case of *Plifu v Hutt City Council*\(^{155}\), the precedent effects of a discretionary activity proposal were considered relevant under section 104(1)(c) because of their potential to undermine the plan’s integrity. The precedent of allowing a development is a permissive rather than mandatory consideration.\(^{156}\)

9.132 The test for an adverse precedent is whether the activity can be readily distinguished from others that might arise in the area. This raises fairness and equity considerations in terms of the Council’s treatment of similar applications, which was apparent in the case of *Doherty v Dunedin City Council*.\(^{157}\) In that case, the fundamental principle that like should be treated with like was at the heart of the Court’s concern with issues of precedent and integrity of the plan. This was because an almost identical subdivision had been consented to in the immediate neighbourhood.

9.133 In *Stark v Auckland Regional Council* (W008/06)\(^{158}\), the Planning Tribunal held that it was relevant to have regard to the fact that the plan specifically made provision for rest homes in other zones, while omitting to do so in the rural zone. It held that even if the proposed activity would not produce any actual or potential environmental effects likely to affect the surrounding area in any significantly adverse way, the grant of consent to the rest home’s location would militate against the plan’s integrity. The Tribunal noted that the effect of main concern was the potential that consent would have to signal a further trend of non-rural land use in the area.

9.134 As was noted in *Annette v Franklin District Council*\(^{159}\), where non-complying activities raise precedent/plan integrity issues, there need to be some features of the application which are outside the norm, representing a true exception or an unusual quality\(^{160}\).

**General case law principles about prohibited activities**

9.135 Section 77A of the RMA authorises local authorities to categorise activities as permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited activities. The power to classify activities by way of rules is subject to the section 32 duty to
evaluate "whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives" in the plan. Prohibited activity status should not be used unless that is the most appropriate way to achieve the specified objectives. This means that the objectives need to be worded strongly.

9.136 In *Thacker v Christchurch City Council*\(^{161}\) the Court emphasised the severity of imposing prohibited status on an activity. Section 87A(6) of the RMA sets out the consequences of such a classification, namely that:

\[(6) \text{ If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a prohibited activity,—} \]
\[\quad (a) \text{ no application for a resource consent may be made for the activity; and} \]
\[\quad (b) \text{ the consent authority must not grant a consent for it.} \]

9.137 In *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*\(^{162}\) the Court of Appeal held that a local authority can use the prohibited activity status for activities where the authority could rationally conclude that prohibited activity status was the most appropriate status. That does not mean that local authorities need to reach the conclusion that an activity should be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate. However, prohibited activity status may not be appropriate for an activity where the local authority has sufficient information to undertake the evaluation of the activity.

\(^{161}\) C026/09.
\(^{162}\) [2008] NZRMA 77 (CA).
10. COMMENTS ON SOME FIRST INSTANCE DECISIONS

Decisions about water quality limits

*Milton waste water decision*\(^{163}\) (decision of independent commissioners for Otago Regional Council)

10.1 The operative Regional Plan: Water for Otago contains a policy to the effect that the regional council will manage the river for contact recreation purposes. The plan does not include any water quality standards for contact recreation waters nor any guidelines.\(^{164}\) In a decision by independent commissioners on an application by Clutha District Council for the expansion and upgrade of a long existing waste water treatment facility which discharges to the Tokomairiro River, the commissioners:

(a) did not accept that discharge quality conditions should apply at the end of the pipe and allowed for a 70m mixing zone in relation to the section 107 requirements (the plan contains guidelines for setting reasonable mixing zones);

(b) accepted the proposed discharge standards instead of receiving water standards (other than for section 107); and

(c) accepted that the policy of working towards achieving contact recreation standards could not be treated as a standard.

*Masterton waste water decision* (decision of a committee of Greater Wellington Regional Council)\(^ {165}\)

10.2 The operative Wellington Regional Freshwater Plan contains policies indicating that the river is to be managed for contact recreation and aquatic purposes and the plan contains guideline "standards" that apply after reasonable mixing.\(^{166}\)

10.3 In a decision on consent applications for the upgrade of the Masterton wastewater treatment plant, the hearing panel accepted that the section 107 standards should be applied after reasonable mixing. It accepted that there was no need for receiving water standards by way of condition, in relation to the plan guidelines; since the plan guidelines could be achieved by way of discharge (end of pipe) standards aimed at achieving contact recreation and aquatic purposes guidelines after reasonable mixing. The conditions required upstream and downstream monitoring and made it clear that the guidelines would not be regarded as breached unless it was shown that the sewage discharge caused the guidelines values to be breached when they would not otherwise have been breached.

10.4 There was much debate regarding the application of the Microbiological Guidelines for Marine and Freshwater Recreation (MfE/MoH 2003). It was agreed that these guidelines and the classification system in the guidelines required revision. In particular they do not deal well with the issue of causation nor with intermittent discharges. The panel accepted that the proposal to discharge pond treated, non disinfected effluent,
only at higher flows when contact recreation is not occurring, would not breach the guidelines and would be a significant improvement on the current continuous discharge.\textsuperscript{167}

**Decisions about flows, levels and rates of take**

**Canterbury groundwater "red zones"**

10.5 The Canterbury Proposed Natural Resources Regional Plan illustrates one way of setting flow limits through the use of "red zones".\textsuperscript{168} In those zones, new takes are non-complying activities because they exceed the interim allocation limits in the PNRRP. New takes can only be granted if the consent authority determines that the effects of the take will be no more than minor, or the grant of consent will not be contrary to the objectives and policies of the PNRRP. Even if one or other of these thresholds are satisfied, the Council may decline consent if it finds the take to be unsustainable.

10.6 The key policy in the plan is that further consents should not be granted unless the applicant satisfies the Council that the additional take will not have more than minor adverse effects on its own or cumulatively with other takes.

10.7 Subsequent to the \textit{Lynton Dairy} decision there have been a series of decisions by independent commissioners that have granted further ground water consents in the Rakaia Selwyn and Waimakariri Selwyn red zones. These decisions have been controversial because they were all contrary to recommendations by ECan officers, which in turn were in large part based on the Red Zone rules and policies in the PNRRP.\textsuperscript{169} To illustrate some of the challenges with applying these provisions, factors relevant to those decisions included:

(a) The Council officers argued that because significant adverse effects are already occurring, any further takes will necessarily have more than minor cumulative effects even if their individual effect is minimal.

(b) There was conflicting evidence as to whether all of the aquifers in question are in fact over allocated. There was also considerable contention as to whether further takes from deeper aquifers would have significant adverse effects on flows in lowland streams.

(c) There was considerable contention regarding the Council's methodology in setting the interim allocation limits and in particular its "bath tub" approach. The applicant argued that different parts of the zone and aquifers at different depths respond differently to takes and recharge.

(d) In the both of the grouped applicant decisions, differently constituted panels preferred the applicant's evidence to the Council's evidence. In particular they found that:

- Limited weight could be given to the red zone provisions because they are not well advanced through the first schedule process.

\textsuperscript{167} The applicant argued that the contact recreation guidelines were only relevant at times when contact recreation would be likely to occur. It also argued that the guidelines should not be regarded as being breached by the consent holder unless it was shown that the guidelines would not otherwise have been met (ie if they would be breached as a result of upstream water quality then that is not being caused by the discharge).

\textsuperscript{168} There are significant challenges to the provisions.

\textsuperscript{169} Philip Milne chaired the hearing of the applications for resource consent by Canterbury Meatpackers (Rakaia) Limited to take and use groundwater, discharge wastewater to land and discharge stormwater into land, and the applications by 59 applicants to take water from the Rakaia Selwyn Ground Water Zone.
Although they accepted that the shallow aquifer is fully allocated and the next aquifer is at or approaching full allocation they did not accept that the deeper aquifers were fully allocated in every year.

With adaptive management the deeper takes would not have significant adverse effects and accordingly passed one of the gateways.

In light of that conclusion, the grant of consent would also not be contrary to the objectives and policies of the zone (in particular the policy that the applicant must prove that adverse effects will be no more than minor). The policy’s reference to minor effects tends to merge the section 104D gateways into one.

10.8 In the recent Canterbury Meat Packers decision the commissioners found that the take was from a sub area of the zone which they found was not over allocated. They concluded that the decision would not affect the integrity of the plan because it was not yet operative and because there were a number of factors which made the application exceptional. In particular the predominant direction of ground water flow, the mounding caused by the nearby border strip irrigation system, the industrial purpose of the application and the fact that there was little evidence that the down gradient streams were under stress.

10.9 In all of these decisions the consents were granted for relatively short terms and with adaptive management conditions attached.