

IN THE ENVIRONMENT COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

I TE KŌTI TAIAO O AOTEAROA  
ŌTAUTAHI ROHE

ENV-2023-CHC-

**UNDER** the Resource Management Act 1991 (Act)

**IN THE MATTER** of an application for declarations under section 311 of the Act

**AND**

**IN THE MATTER** of the National Water Conservation (Rakaia River) Order 1988

**BETWEEN** **CANTERBURY REGIONAL COUNCIL** being a regional council constituted pursuant to the Local Government (Canterbury Region) Reorganisation Order 1989 having its principal office at 200 Tuam Street, Christchurch 8011

**Applicant**

*(Continued next page)*

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**APPLICATION FOR DECLARATIONS**  
**15 February 2023**

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Applicant's Solicitor  
PO Box 4341 CHRISTCHURCH 8140  
DX WX11179  
Tel +64 3 379 7622  
Fax +64 3 379 2467

Solicitor: P A C Maw  
(philip.maw@wynnwilliams.co.nz)

**WYNN WILLIAMS**

**AND** **MANAWA ENERGY LIMITED** being a company duly registered under the Companies Act 1993 having its registered office at 108 Durham Street, Tauranga 3110

**First Respondent**

**AND** **NORTH CANTERBURY FISH AND GAME COUNCIL** being a body corporate established under the Conservation Act 1987, having its registered address at PO Box 50, Woodend 7641

**Second Respondent**

**AND** **ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED** being an incorporated society duly registered under the Incorporated Societies Act 1908 having its registered address at PO Box 91736, Victoria Street West, Auckland 1142

**Third Respondent**

**To:** The Registrar  
Environment Court  
Christchurch

**CANTERBURY REGIONAL COUNCIL** applies for the following declarations pursuant to sections 310(a) and (h) of the Resource Management Act 1991 (**Act**):

- 1 Canterbury Regional Council has no statutory duty to enforce the provisions of the National Water Conservation (Rakaia River) Order 1988 (**WCO**) beyond observance of the following requirements:
  - (a) its regional plan(s) must not be inconsistent with the WCO pursuant to section 67(4)(a) of the Resource Management Act 1991;
  - (b) as a consent authority, it shall not grant a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the WCO pursuant to section 217(2)(a) of the Resource Management Act 1991;
  - (c) as consent authority it shall not grant a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the WCO can remain without change or variation pursuant to section 217(2)(b) of the Resource Management Act 1991; and
  - (d) as consent authority it shall, in granting any water permit, coastal permit, or discharge permit to discharge water or contaminants into water, impose such conditions as are necessary to ensure that the provisions of the WCO are maintained pursuant to section 217(2)(c) of the Resource Management Act 1991.
- 2 Canterbury Regional Council's duty to enforce the observance of the Canterbury Land and Water Regional Plan pursuant to section 84(1) of

the Resource Management Act 1991 does not extend to a duty to enforce the observance of the WCO.

- 3 Canterbury Regional Council's monitoring functions under section 35 of the Resource Management Act 1991 do not extend to directly monitoring compliance with, gathering information on, and keeping records under the WCO, beyond the Canterbury Regional Council's obligations with respect to monitoring the efficiency and effectiveness of policies, rules, or other methods in its policy statement or plan, under section 35(2)(b) and monitoring the exercise of the resource consents that have effect in its region under section 35(2)(d).
- 4 The WCO:
  - (a) Does not prescribe any maximum volume of water that can be classified as Stored Water and stored within Lake Coleridge;
  - (b) Does not require water classified as Stored Water on its entry to Lake Coleridge to be stored within Lake Coleridge in a manner that is physically separate from water that is not classified as Stored Water.
  - (c) Enables Stored Water to be stored by the operator of the Lake Coleridge Project below the extreme minimum operating level of 505.35 metres as specified in Resource Consent CRC173092.

**This Application is made on the following grounds**

- 1 The National Water Conservation (Rakaia River) Order 1988 (**WCO**) applies to the Rakaia River and its tributaries, which is located within the Canterbury Region administered by the Canterbury Regional Council (**Council**) pursuant to the Local Government (Canterbury Region) Reorganisation Order 1989.
- 2 As a regional council, the Council has various regulatory functions, including with respect to compliance, monitoring and enforcement action. Specifically, the Council has the ability to issue abatement notices pursuant to section 322 of the Act:
  - (a) requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer,—

- (i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, or a resource consent; or
  - (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
- (b) requiring that person to do something that, in the opinion of the enforcement officer, is necessary to ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan or a proposed plan, or a resource consent, and also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment—
- (i) caused by or on behalf of the person; or
  - (ii) relating to any land of which the person is the owner or occupier:
- (c) requiring that person, being—
- (i) an occupier of any land; or
  - (ii) a person carrying out any activity in, on, under, or over a water body or the water within the coastal marine area,—

who is contravening section 16 (which relates to unreasonable noise) to adopt the best practicable option of ensuring that the emission of noise from that land or water does not exceed a reasonable level.

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- 3 In addition, the Council also has the ability to apply to the Environment Court for enforcement orders to, relevantly, and among other things, require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Court, contravenes the Act, any regulations, a rule in a plan or proposed plan, or a resource consent,<sup>1</sup> require a person to do something that, in the opinion of the Court, is necessary to ensure compliance with the Act, any regulations, a rule in a plan or proposed plan, or a resource consent,<sup>2</sup> and require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person.<sup>3</sup>
- 4 It is an offence under section 338(1)(b) and (c) of the Act to contravene an enforcement order or abatement notice.
- 5 Notably, there is no ability to issue an abatement notice or commence enforcement action in circumstances where a person may be contravening a water conservation order. Rather, it is a function of the

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<sup>1</sup> RMA, s 314(1)(a)(i).

<sup>2</sup> RMA, s 314(1)(b)(i).

<sup>3</sup> RMA, s 314(1)(c).

Minister for the Environment to monitor the effect and implementation of water conservation orders.<sup>4</sup>

- 6 The WCO states that the Rakaia River and its tributaries include and provide for:<sup>5</sup>
- (a) An outstanding natural characteristic in the form of a braided river:
  - (b) Outstanding wildlife habitat above and below the Rakaia River Gorge, outstanding fisheries, and outstanding recreational, angling, and jet boating features.
- 7 The WCO contains a number of restrictions to protect the outstanding characteristics and features identified, including with respect to quantity and rate of flow in the Rakaia River.
- 8 The WCO was amended by the National Water Conservation (Rakaia River) Amendment Order 2013. The amendments provide for the use of water stored in Lake Coleridge for irrigation purposes downstream through the Lake Coleridge Project. The use of water in this way is controlled by Manawa Energy Limited (**Manawa** or **First Respondent**), currently utilising the existing conveyance infrastructure associated with the operation of the Lake Coleridge Hydroelectric Power Scheme.
- 9 The Environmental Defence Society Incorporated (**EDS** or **Second Respondent**) is a non-profit organisation advocating for environmental protection in New Zealand.
- 10 North Canterbury Fish and Game Council (**Fish and Game** or **Third Respondent**) was established pursuant to the Conservation Act 1987 for the purposes of the management, maintenance, and enhancement of sports fish and game, and with functions in relation to the management, maintenance and enhancement of the sports fish and game resource in the recreational interests of anglers and hunters.<sup>6</sup>
- 11 All parties have a shared interest in the ongoing management of the Rakaia River, including with respect to the management of water stored in Lake Coleridge and used for irrigation purposes, in accordance with the 2013 amendments to the WCO.

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<sup>4</sup> RMA, s 24(f).

<sup>5</sup> National Water Conservation (Rakaia River) Order 1988, cl 3.

<sup>6</sup> Conservation Act 1987, ss 26P and 26Q.

- 12 In respect of Declaration 1, the Council considers that it does not have a statutory duty to enforce the provisions of the WCO, beyond the requirements of sections 67 and 217 of the Act. Specifically:
- (a) Section 67(4)(a) of the Act provides that a regional plan must not be inconsistent with a water conservation order.
    - (i) When preparing regional plans in accordance with section 67(4)(a), the Council can develop provisions intended to achieve consistency with the WCO through objectives, policies, and/or rules, and has done so through the development of the Canterbury Land and Water Regional Plan.
    - (ii) The Council is required to enforce the observance of the provisions of the Canterbury Land and Water Regional Plan and has the ability to commence enforcement action where plan rules are not being complied with, in accordance with sections 314 and 322 of the Act.
    - (iii) The Council does not have the same ability to commence enforcement action where the provisions of the WCO are not being complied with. Rather, a direct link is required to rule in a plan.
  - (b) Section 217(2) of the Act sets out the effect of a water conservation order with respect to resource consents.
    - (i) Section 217(2)(a) of the Act prevents the Council from granting a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the WCO.
    - (ii) Section 217(2)(b) of the Act prevents the Council from granting a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the WCO can remain without change or variation

- (iii) Further, where the Council does grant a water permit, coastal permit, or discharge permit to discharge water or contaminants into water, the Council is required to impose such conditions as are necessary to ensure that the provisions of the WCO are maintained, in accordance with section 217(2)(c) of the Act.
- (iv) There is a statutory prohibition on the grant of certain resource consents in certain circumstances under section 217 of the Act. Where resource consents are able to be granted, the necessary conditions must be imposed to ensure the provisions of the WCO are maintained. Clauses 8, 9 and 9A of the WCO in turn articulate the circumstances in which resource consents may, or may not, be granted. Therefore, if an individual carries out an activity in the absence of having obtained a resource consent, or carries out an activity that is authorised by a resource consent but does not comply with the conditions of that resource consent, the Council has the ability to commence enforcement action.
- (v) The Council does not have the same ability to commence enforcement action where the provisions of a WCO are not being complied with. Rather, a direct link is required to a condition in a resource consent.

13 In respect of Declaration 2, the Council considers that its duty to enforce the observance of its plans, including the Canterbury Land and Water Regional Plan, does not extend to a duty to enforce the observance of the WCO:

- (a) Section 84(1) of the Act provides that a regional council must observe and enforce the observance of an operative policy statement or plan.
- (b) This obligation does not extend to a duty to enforce a water conservation order, unless the provisions of the planning documents specifically incorporate provisions of a water conservation order (for example, with respect to a minimum flow).
- (c) Any duty on the Council to enforce the WCO is limited by the content of the Canterbury Land and Water Regional Plan.

- 14 In respect of Declaration 3:
- (a) Section 35 of the Act outlines a local authority's duty to gather information, monitor and keep records. While the Council is under a general obligation to gather such information, and undertake or commission such research, as is necessary to carry out effectively its functions under the Act in accordance with section 35(1) of the Act, there is no express obligation on the Council to monitor compliance with the WCO specifically.
  - (b) Rather, the Council is under an obligation to monitor its plans and the resource consents in the Canterbury region. Specifically:
    - (i) section 35(2)(b) requires the Council to monitor the efficiency and effectiveness of policies, rules, or other methods in its policy statement or its plan (in this case, relevantly, the Canterbury Land and Water Regional Plan); and
    - (ii) section 35(2)(d) requires the Council to monitor the exercise of the resource consents that have effect in the Canterbury region.
  - (c) The Council's obligations do not extend to directly monitoring compliance with, gathering information on, and keeping records under the WCO.
- 15 In respect of Declaration 4:
- (a) Clause 9A of the WCO was inserted in the WCO by the National Water Conservation (Rakaia River) Amendment Order 2013. Clause 9A provides for the Lake Coleridge Project, a project intended to facilitate the use of "stored water" from Lake Coleridge for irrigation purposes downstream utilising the existing conveyance infrastructure associated with the operation of the Lake Coleridge Hydroelectric Power Scheme.
  - (b) The WCO does not prescribe any levels for Lake Coleridge. Rather, resource consent CRC173092 authorises the damming of water in Lake Coleridge and requires the consent holder (being Manawa) to manage the diversion and discharge of water to Lake Coleridge to maintain the level of the Lake within certain operating ranges, one of which is an extreme minimum range of 505.35 metres.

- (c) Clause 9A(3) requires the operator of the Lake Coleridge Hydroelectric Power Scheme to keep records enabling the calculation of stored water within Lake Coleridge, stored water that has been discharged from Lake Coleridge, and water (including stored water) being diverted into any canal from Lake Coleridge.
- (d) Stored water is defined under the WCO in clause 2:  
**stored water** means water that has been taken or diverted into Lake Coleridge which is no greater than:
- (a) half of the excess gorge flow (the excess gorge flow is that part of the gorge flow that exceeds the minimum gorge flow specified in clause 7 by more than 140 cubic metres per second); plus
  - (b) any water that could have been taken or diverted from that part of the Rakaia River between the Rakaia Gorge Bridge and the sea by the holders of resource consents listed on the register and subject to the conditions of those resource consents listed on the register, but which was not taken or diverted.
- (e) Beyond this definition, the WCO does not address the concept of stored water further. There is no maximum volume of water that can be classified as stored water and stored within Lake Coleridge. Nor is there any requirement on the face of the WCO for stored water to be stored within Lake Coleridge in a manner that is physically separate from other waters within Lake Coleridge. Further, the WCO does not prevent or restrict the operator of the Lake Coleridge Hydroelectric Power Scheme from storing stored water below the extreme minimum operating level of 505.35 metres.

#### **Attached documents**

- 16 The following documents are **attached** and filed in support of this Application:
- (a) Affidavit of Richard George Purdon in support of the Application (**Appendix A**); and

- (b) A list of names and addresses of persons to be served with a copy of this Application (**Appendix B**).

Dated this 15<sup>th</sup> day of February 2023



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P A C Maw

Solicitor for the Applicant

**Address for service of Applicant:**

This document is filed by Philip Andrew Charles Maw, solicitor for the Applicant whose address for service is at the offices of Wynn Williams, Level 5, Wynn Williams House, 47 Hereford Street, Christchurch 8013.

Documents of service may be:

- (a) Left at that address; or
- (b) Posted to PO Box 4341, Christchurch; or
- (c) Emailed to philip.maw@wynnwilliams.co.nz and imogen.edwards@wynnwilliams.co.nz; or
- (d) Left at Document Exchange for direction to DX WX11179, Christchurch.

Telephone: +64 3 379 7622

**Appendix A - Affidavit of Richard George Purdon in support of the  
Application**

**Appendix B – Persons to be served with a copy of the Application**

<b>Persons served</b>	<b>Addresses</b>
Manawa Energy Limited	108 Durham Street, Tauranga 3110 Email: 9(2)(a)
North Canterbury Fish and Game Council	PO Box 50, Woodend 7641 Email: 9(2)(a)
Environmental Defence Society Incorporated	PO Box 91736, Victoria Street West, Auckland 1142 Email: 9(2)(a)
Minister for the Environment	PO Box 10362, Wellington 6143 Email: d.parker@ministers.govt.nz and vicky.robertson@mfe.govt.nz