

In the Environment Court of New Zealand
Christchurch Registry

I Mua 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

Between **North Canterbury Fish and Game Council and
Environmental Defence Society Inc**

Applicants

And **Canterbury Regional Council**

Respondent

And **The Minister for the Environment**

Respondent

Application for declarations

20 December 2023

Fish and Game's solicitors:

Maree Baker-Galloway | Rosie Hill
Anderson Lloyd
Level 2, 13 Camp Street, Queenstown 9300
PO Box 201, Queenstown 9348
p + 64 3 450 0700
maree.baker-galloway@al.nz | rosie.hill@al.nz

**anderson
lloyd.**

To: The Registrar

Environment Court

Christchurch

North Canterbury Fish and Game Council (**Fish and Game**) and the Environmental Defence Society Incorporated (**EDS**) jointly apply for declarations concerning the National Water Conservation (Rakaia River) Order 1988 (“**RWCO**”) pursuant to sections 310(a) and (h) of the Resource Management Act 1991 (“**RMA**” or “the **Act**”):

Declarations

Gathering information and record keeping – Declarations 1 and 2

- 1 It is the responsibility of the Canterbury Regional Council to monitor, gather information, and keep records in relation to:
 - (a) The state of the outstanding characteristics and features recognised and protected by the RWCO, as specified in clause 3 of the RWCO;
 - (b) The individual and cumulative effect of all water takes and diversions not prohibited by clause 7 of the RWCO, and which may have an effect on the outstanding characteristics and features recognised and protected by the RWCO;
 - (c) How much “stored water” is flowing into Lake Coleridge and being stored, ordered and released to irrigators in accordance with clause 9A(3) and / or 7(5) of the RWCO;
 - (d) Whether stored water is being correctly classified in accordance with the RWCO; and
 - (e) The minimum gorge flow *vis a vis* the flow in the river reduced by abstraction or diversion within the Rakaia River between the Rakaia Gorge Bridge and the sea, and in accordance with clause 7 of the RWCO.

- 2 Section 24(f) of the RMA does not require the Minister for the Environment to directly monitor (independently of receiving and reviewing information provided by the Canterbury Regional Council):
 - (a) The state of the outstanding characteristics and features recognised and protected by the RWCO, as specified in clause 3 of the RWCO;

- (b) The cumulative effect of all water takes and diversions not prohibited by clause 7 of the RWCO on the outstanding characteristics and features recognised and protected by the RWCO;
- (c) How much “stored water” is flowing into Lake Coleridge and being stored, ordered and released to irrigators in accordance with clause 9A(3) and / or 7(5) of the RWCO;
- (d) Whether stored water is being correctly classified in accordance with the RWCO; and
- (e) The minimum gorge flow *vis a vis* the flow in the river reduced by abstraction or diversion within the Rakaia River between the Rakaia Gorge Bridge and the sea, and in accordance with clause 7 of the RWCO.

Observance – Declaration 3 and 4

- 3 Canterbury Regional Council's duty to ensure the observance of the Canterbury Land and Water Regional Plan (“**CLWRP**”) pursuant to section 84(1) of the RMA includes a duty to enforce the observance of / compliance with the RWCO.
- 4 Canterbury Regional Council's statutory functions and powers include enforcing the observance of / compliance with, the RWCO arising from the status of water conservation orders as secondary legislation under the RMA.

Granting and replacement of consents under the RWCO – Declaration 5

- 5 For resource consent applications to which clauses 4 (2), 5 (2) or 6 (2) of the RWCO apply, due to the fact that the consent will replace a consent that was in force on the commencement of the RWCO, and where the consent application is for consent on 'similar terms and conditions to which the former consent was subject', the Canterbury Regional Council is required to:
 - (a) consider effects on the outstanding values identified in clause 3 of the RWCO in the granting of consents;
 - (b) consider all the matters of discretion under the relevant rules of the CLWRP;
 - (c) exercise discretion as to whether or not to grant consent; and

- (d) exercise discretion to impose terms and conditions that are more restrictive than those to which the former consent was subject.

Grounds for application

Background

- 6 Water conservation orders are the highest protection offered under the Act to water bodies of outstanding value. Section 199 of the RMA provides that:

“...the purpose of a water conservation order is to recognise and sustain—

(a) outstanding amenity or intrinsic values which are afforded by waters in their natural state:

(b) where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.”

- 7 The RWCO was the second water conservation order applied for under the Water and Soil Conservation Act 1967.
- 8 The application was lodged in 1985 and was hard fought between farming interests, on the one hand, and environmental interests, recreational users and iwi, on the other.
- 9 In a landmark ruling¹ that can be seen as a precursor to King Salmon, the Court of Appeal confirmed the RWCO, determining that if a water body qualified to be the subject of a national water conservation order, then other proposed activities needed to be considered as subject to, and subsidiary to, that purpose, thus overriding, in that context, the “balancing test” developed by the courts in the context of the Water and Soil Conservation Act 1967 in *Keam*.² The upshot when Part 9 of the RMA brought through the water conservation order framework from the predecessor legislation³ was that the purpose of water conservation orders were the only exception to Part 2 of the RMA. Section 199 states:

¹ *Ashburton Acclimatisation Society v Federated Farmers* CA204/86.

² *Keam v Ministry of Works and Development* [1982] 1 NZLR 319.

³ Water and Soil Conservation Act 1967.

“Notwithstanding anything to the contrary in Part 2, the purpose of a water conservation order is to recognise and sustain...”

- 10 The Court described the outstanding characteristics of the Rakaia River and the pressures on those characteristics as follows:

“Salmon spawn in the upper Rakaia. The Tribunal say that the lower Rakaia provides the best recreational salmon fishing in New Zealand and is the second best jetboating river in New Zealand. The latter is a recreation for which few rivers are entirely suitable and braided rivers are undoubtedly the best. The river is also used by trampers and canoeists. The lower Rakaia provides an outstanding breeding habitat for the wrybill plover. The waters of the Rakaia are also in demand for water supply and irrigation purposes. The basic contest is between conservationists, who wish the flow, depth and characteristics of the river to be conserved because of the recreational, fishery and wildlife features just mentioned, and farmers, who wish to take water for irrigation.”⁴

- 11 The decision granting the RWCO was made on the basis that the demand for water for abstraction did not outweigh the need to protect the outstanding characteristics and features of the river.

- 12 Clause 3 of the RWCO identifies the outstanding characteristics and features of the Rakaia River as follows:

“It is hereby declared that the Rakaia River and its tributaries include and provide for—

(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.”

- 13 The provisions of the RWCO (including its 2013 amendment) are intended to:

⁴ *Ashburton Acclimatisation Society v Federated Farmers* CA204/86 page 6.

...continue to preserve and protect the outstanding natural characteristics habitats and features.⁵

- 14 Evidence lodged by Canterbury Regional Council (in the context of previous declaratory proceedings that were lodged but withdrawn before being determined)⁶ indicates that notwithstanding the protection for the river afforded by the RWCO, it:
- (a) Has insufficient data to determine whether the outstanding values of the river are being sustained⁷; and
 - (b) Has very limited oversight of how the stored water regime operates and whether it is compliant with the RWCO.⁸
- 15 As the regional council with responsibility for controlling water quality and quantity for the purpose of giving effect to the Act, Canterbury Regional Council is best placed, and statutorily obliged, to:
- (a) Monitor and keep records on the extent to which the outstanding amenity and intrinsic values of the Rakaia River are being recognised and sustained; and
 - (b) Enforce the observance of, and compliance with, the provisions of the RWCO, including (by way of example) the diversion, storage, discharge and taking of 'stored water' in accordance with the definition of stored water and clause 7(5) of the RWCO.
- 16 The Applicants understand it is uncontentionous that the Canterbury Regional Council's statutory duties and / or functions and / or powers to uphold or observe the provisions of the RWCO include:
- (a) Its regional plan(s) must not be inconsistent with the RWCO pursuant to section 67(4)(a) of the RMA;
 - (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 RMA;

⁵ Affidavit of Richard Purdon dated 14 February 2023, Exhibit E, page 1388, at [207].

⁶ ENV-2023-CHC-7 CRC v EDS & Ors.

⁷ Affidavit of Richard Purdon dated 14 February 2023, paragraph 47.

⁸ Affidavit of Richard Purdon dated 14 February 2023, paragraph 50.

- (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 RMA; 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 RMA.
- 17 The Applicants understand it is uncontentious that the Minister for the Environment has the following functions and / or powers under sections 24, 24A, 25 and 25A of the Act:
- (a) Monitoring the effect and implementation of the RWCO, including Canterbury Regional Council's exercise or performance of its functions, powers and duties under the Act (and the RWCO specifically);
 - (b) Investigating any failure or omission by Canterbury Regional Council to exercise or perform any of its functions, powers, or duties under the Act (and including under the RWCO specifically);
 - (c) Making recommendations to Canterbury Regional Council in respect of any failure or omission to exercise or perform those functions;
 - (d) Taking any action under section 25 or section 25A, if Canterbury Regional Council's failure or omission to act on a recommendation gives the Minister grounds to take action under one or both of those sections; and
 - (e) Subject to sections 25(2) – (4), making any appointment under section 25(1) where Canterbury Regional Council is not exercising or performing any of its functions, powers, or duties as expressed in Declarations 1-5 above.

Declarations 1 and 2 - Gathering information and record keeping

- 18 Declarations 1 and 2 seek clarity as to the extent of the information gathering and record keeping responsibilities of the Canterbury Regional

Council and the Minister for the Environment for the purpose of oversight of the RWCO.

- 19 Section 35 of the Act imposes a broad duty on local authorities to monitor the state of the environment as necessary to effectively carry out their functions under the Act, including their functions under section 30.
- 20 The duty of regional councils to gather information, monitor, and keep records under section 35 is broad and is not limited to monitoring compliance with resource consents or the relevant plans. In order to undertake its functions under section 30, including ensuring compliance with the RWCO, it is necessary to gather information, monitor, and keep records that are sufficient to enable an understanding of (inter alia):
 - (a) The extent to which compliance with the RWCO is being achieved; and
 - (b) The extent to which the outstanding characteristics and features of the Rakaia River are being sustained and protected in accordance with a water conservation order's purpose as per section 199 of the Act.
- 21 Specific examples of where the oversight functions, duties, and / or powers informed by the above information are important include:
 - (a) Ensuring compliance with the minimum gorge flow for each month set out in clause 7 of the RWCO;
 - (b) Ensuring compliance with the abstraction limits set out in clauses 7(3) and (4) of the RWCO;
 - (c) Ensuring compliance with the diversion, storage and then abstraction of 'stored water' as defined, and as set out in clause 7(5); and
 - (d) Determining whether the outstanding characteristics and features identified in clause 3 of the RWCO continue to be maintained.
- 22 This particular function in 'd' above is effectively ground-truthing whether the terms of the RWCO (based on the evidence and findings that supported the original grant of the RWCO, and subsequent amendment in 2013), remain sufficient to protect the outstanding characteristics. The Applicants acknowledge that there may be a number of factors influencing or affecting the state of outstanding values identified in clause 3, but the key issue for determination is whether the Canterbury Regional Council is charged with oversight of whether those values are being maintained, to understand and inform whether the RWCO continues to be fit for its legislative purpose. If

there is no oversight of those matters identified in clause 3, the RWCO risks becoming an obsolete instrument, whether by way of its ineffective implementation, unlawful interpretation, or because of changed environmental circumstances, including cumulative effects.

- 23 Declarations 1 and 2 seek clarity in terms of where the Canterbury Regional Council's functions, duties, and / or powers 'end' under in terms of oversight, and therefore where the Minister for the Environment's functions, duties, and / or powers under s 24(f) of the Act might 'start'.
- 24 The Applicants consider section 24(f) provides for a general function of the Minister for the Environment to monitor the effect and implementation of water conservation orders, in particular through the relevant regional council upholding its various duties, functions, and powers under a water conservation order.
- 25 Section 24A provides specific powers for the Minister to investigate and make recommendations to local authorities in particular circumstances. The circumstances are broadly framed, including the ability for the Minister to investigate and / or make recommendations in the instance of non-performance of a local authority's functions, powers, or duties, or otherwise, generally, in respect of the local authority's exercise of such requirements under the Act.
- 26 The Applicants consider that the Minister's functions encompass general supervisory oversight of the implementation of the RWCO. Sections 24, 24A, 25, and 25A of the RMA do not contemplate that the Minister is responsible for undertaking the day-to-day and on-the-ground monitoring, enforcement, or observance of the RWCO.

Declarations 3 and 4 – Observance

- 27 In order to undertake its functions under section 30 of the Act, the Canterbury Regional Council must ensure compliance with all relevant regulations, rules, and provisions under the Act itself, including the RWCO.
- 28 The CLWRP includes sub-region-specific provisions and rules, which include reference to specific water conservation orders, including the RWCO within Section 11 Selwyn – Te Waihora (**Section 11**) and Section 12 - Central Canterbury Alpine Rivers (**Section 12**).
- 29 Section 11.2 states:

**“Water Conservation Orders that apply to
the Selwyn Te Waihora Subregion**

National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990 National Water Conservation (Rakaia River) Order 1988.”

- 30 In section 11.5 which contains the rules, under the heading "taking and using surface water and groundwater" note 2 states:

“The taking and using of surface water from the Rakaia River that does not comply with the region-wide rules of this Plan is subject to the rules in Section 12 of this Plan and any requirements of the National Water Conservation (Rakaia River) Order 1988.”

- 31 Rule 11.5.33 for the restricted discretionary take and use of water includes, as a matter of discretion, clause 6 (iii) *the provisions of any relevant Water Conservation Order*.

- 32 Section 12.2 states:

“Water Conservation Orders that apply to the Central Canterbury Alpine Rivers Sub-region

National Water Conservation (Rakaia River) Amendment Order 2013. National Water Conservation (Rangitata River) Order 2006.”

- 33 Section 12.6.2 Allocation Limits states:

“12.6.1 Environmental Flow and Allocation Limits

See Waimakariri River Regional Plan 2004 and the National Water Conservation (Rakaia River) Amendment Order 2013 and National Water Conservation (Rangitata River) Order 2006.”

- 34 Region wide rules that refer to water conservation orders include rules 5.112, 5.115, 5.117 and 5.123 for the taking and use of surface water from rivers or lakes or various uses. These rules are for restricted discretionary activities, and the provisions of any relevant water conservation order are a matter of discretion.⁹

⁹ Affidavit of Rasmus Michael Gabriëlsson, affirmed 20 December 2023, at Exhibit RMG02.

- 35 Under Rule 5.118 taking and using water from any river subject to a water conservation order that does not meet one or more of the conditions in Rule 5.116 is a discretionary activity.
- 36 Therefore, the Canterbury Regional Council's duty to ensure the observance of the CLWRP pursuant to section 84(1) of the RMA includes a duty to enforce the observance of / compliance with the RWCO.
- 37 The interpretation and application of legislation is governed by the Legislation Act 2019. Under that Act, legislation means the whole or a part of an Act or any secondary legislation. Any reference to the "Act" within the RMA includes secondary legislation made under the Act, and therefore includes the RWCO.¹⁰
- 38 Provisions of the RMA that require compliance with the "Act" also require compliance with secondary legislation made under the Act, including water conservation orders.
- 39 Therefore, Canterbury Regional Council's statutory functions and powers include enforcing the observance of / compliance with the RWCO, through the status of water conservation orders as secondary legislation under the RMA.
- 40 The Canterbury Regional Council is therefore empowered to seek an enforcement order within the scope of section 314(1)(a) of the Act, or serve an abatement notice under s322(1)(a)(i) of the Act, for the purposes of enforcing the observance of the RWCO, because all provisions of the RMA that require compliance with the "Act" also require compliance with secondary legislation made under the Act, including water conservation orders (and the RWCO in this case). The Applicants acknowledge that the Canterbury Regional Council does have discretion as to how it exercises an enforcement duty.
- 41 Any absence of specific direction in the RMA to enforce the RWCO does not mean that no such obligation exists. The Applicants acknowledge that there is no alleged breach / non-compliance of the RWCO at the time of preparing this declaration; however, there is a question to be tried in terms of how the RWCO, in and of itself, may be capable of direct enforcement. Particularly whether the Canterbury Regional Council is charged with the ability to enforce the observance of the RWCO in the instance of non-compliance, including (by way of example) the diversion, storage,

¹⁰ Sections 13 and 21, Legislation Act 2019.

discharge and taking of 'stored water' in accordance with the definition of stored water and clause 7(5) of the RWCO.

- 42 The RMA authorises a water conservation order to fetter the exercise of regional councils' powers in fulfilment of s 30 'functions' (rather than just being limited to those section 30 functions)¹¹. It follows that a water conservation order may set the bottom lines or outcomes / objectives to be achieved pursuant to all 'associated measures' of regional councils to give effect to the purpose of section 199.
- 43 While enforcement provisions of the RMA do not specifically refer to water conservation orders, an inability to enforce the observance of water conservation orders on the same footing as the Act, regulations, or rules, would be anomalous in the statutory hierarchy of instruments under the RMA.
- 44 It would undermine the legislative intent for water conservation orders to be high in the order of RMA planning and policy instruments, but not provide for powers of enforcement in the instance of breaches. The Applicants consider such an interpretation would be a legislative 'gap' in the necessary powers of enforcement if water conservation orders were not considered to be within the definition / ambit of the 'Act' yet enforcement may occur for breaches against any regulation, plan, proposed, plan, or consent.

Declaration 5 - Granting and replacement of consents under the RWCO

- 45 Clauses 4(2), 5(2) and 6(2) of the RWCO specify that the RWCO does not prohibit the Regional Council from granting replacement consents on similar terms and conditions to those of the relevant former consents.
- (a) Clause 4 (2) is in relation to the quantity and rate of flow in the Rakaia River upstream of its confluence with the Wilberforce River.
- (b) Clause 5(2) is in relation to the quantity and rate of flow in the Wilberforce River and all its tributaries, and the quantity and level of water in Lake Coleridge and its tributary streams.
- 46 Clause 6 (2) is in relation to the quantity and rate of flow of the Rakaia River downstream of its confluence with the Wilberforce River and upstream of the Rakaia Gorge Bridge. The rules in the CLWRP under which a clause 4(2), 5 (2) or 6(2) replacement consent would be considered, listed in paragraphs 28 to 35 above, are either full discretionary, or include as

¹¹ *Report and Recommendations to the Minister for the making of a Water Conservation Order for Te Puna Waiora o Te Waikoropupū and Wharepapa Arthur Marble Aquifer* Dec No [2023] NZEnvC 157 at [830 and 831].

matters of discretion *the provisions of any relevant water conservation order.*

- 47 This declaration is included because the Applicants perceive that there is uncertainty over the approach that the Canterbury Regional Council would take to exercising discretion in its assessment of replacement consent applications, the subject of the above RWCO clauses. Declaration 5 is focused on establishing that the Regional Council has discretion to decline consent, or impose more stringent conditions, even if the terms of the RWCO in respect of minimum flows and abstraction are complied with, on the basis of an assessment of the merits and cumulative effects on outstanding values, for example. The Applicants signal that this declaration may become non-contentious / admitted by consent, depending on the position of the respondents.
- 48 In order to resolve whether or not to grant a replacement consent and, if so, on what conditions, the Canterbury Regional Council must assess the state of outstanding characteristics and features declared in clause 3 of the RWCO, and the effects of granting the replacement consent on those characteristics and features, including in combination with other consents. If the Regional Council does not have that information, then it cannot assess whether the granting of consent is consistent with the protection of the outstanding characteristics and features recognised in clause 3 of the RWCO.

Dated this 20th day of December 2023

Maree Baker-Galloway

Maree Baker-Galloway/Rosie Hill
Counsel for Fish and Game

SSIMONS

Sue Simons
Counsel for EDS