

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of applications for resource consent by the Central Plains Water Trust and a notice of requirement for the designation of land by Central Plains Water Limited associated with the construction and operation of the Central Plains Water Scheme

**LEGAL SUBMISSIONS ON BEHALF OF THE NEW ZEALAND
RECREATIONAL CANOEING ASSOCIATION, ARAWA CANOE
CLUB AND WHITEWATER CANOE CLUB
10 June 2008**

Introduction

1. These legal submissions introduce the case presented jointly for the kayaking submitters New Zealand Recreational Canoeing Association, Arawa Canoe Club and the Whitewater Canoe Club. The kayaking case is mostly in respect of the Waimakariri River, rather than the Rakaia.
2. The joint evidence to be presented by these submitters establishes the values of the Waimakariri to the kayaking community, and the likely adverse effects of the scheme. Both due to its proximity to Christchurch, suitable conditions and iconic reputation arising from the Speights Coast to Coast, the Waimakariri is arguably nationally significant for both use levels and reputation as a multisport kayaking river, and regionally significant as a general kayaking resource. The proposed scheme will significantly reduce the proportion of time the flows are suitable for kayaking, and will

potentially create unsafe hazards that will both deter kayakers from going on the river, and potentially injure or kill.

3. The Waimakariri currently receives a very high level of use from kayakers, not only in the individual events, but for the weekly (or often more frequent), training and recreating that hundreds of individual kayakers undertake on the river, throughout the year. Evidence will also be presented to show that kayaking on the Waimakariri is likely to become more popular in the future, if the river is retained in close to its current state.

Relevant Plan Provisions (section 104 (1) (b))

4. Rule 5.1 of the Waimakariri River Regional Plan makes the take of the water restricted discretionary, with the matters of discretion restricted too, amongst other things,

- a. The effect of the take on the flow (5.1 (d) (i)) and the effect of that flow on values identified in Objective 5.1.

- b. The relevant parts of Objective 5.1 state:

"Enable present and future generations to gain cultural, social, recreational, economic, health and other benefits from the rivers.....while:

...(e) preserving the natural character of rivers, lakes and wetlands and protecting them from inappropriate use and development.

...

(g) maintaining and enhancing amenity values"

5. The diversion of water is a discretionary under rule 5.2 (b).
6. The use of the water for irrigation is an inanimate activity in the plan and is therefore discretionary.
7. The landuse consents for intake structures and other in river works is discretionary under rule 7.4. Relevant to the implementation of this rule is Policy 7.1 which requires that the control of the river bed achieve (a) to (k) of Objective 7.1, amongst other matters. (a) to (k) of Objective 7.1 include, relevant to the kayakers case:

"Enable present and future generations to gain cultural, social, recreational, economic, health, and other benefits from river and lake beds in the Waimakariri River Catchment while:

...(e) preserving the natural character of rivers, lakes and wetland sand protecting them from inappropriate use and development;

...

(g) maintaining and enhancing amenity values..."

8. If these activities are to be unbundled from other activities of a more restrictive non complying status, at the very least they need to be looked at as a package because of their intimate connectivity, and as such classified as simply discretionary.

9. However, it is artificial and non-sensical in my submission to ignore the fact that the related discharges of some of the water that is diverted and taken by way of the above consents, and the method of transport of that water over the land may be non-complying activities. In this regard the reasoning and application of the binding Court of Appeal and High Court decisions as set out in Counsel for Fish and Games' submissions is adopted. I have been unable to find more recent decisions on this issue of bundling that promotes a contrary view and submit that those precedents cited be applied. (*Bayley v Manukau City Council 1999*) 1 NZLR 568 (CA), *King v Auckland City Council [2000] NZRMA 145*, *HC Randerson J, Tairua Marine Ltd and Pacific Paradise Limited v Waikato Regional Council CIV 2005 485 1490*, *HC Asher J.*)

Part II

10. The first aspect of Part II that is relevant to the issues identified is in section 5 (2), namely the requirement to enable people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety.

"...enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety..."

11. Ensuring the Waimakariri River provides a similar level of kayaking amenity to that it provides currently is consistent with giving effect to this aspect of sustainable management. Particularly relevant are:

- a. the social wellbeing benefits provided by the various events, club outings and individual social excursions that will be covered in evidence;

- b. The economic benefits that flow from events such as the Coast to Coast and the Brass Monkey, training courses, equipment sales etc;
 - c. The health benefits from having such a valuable recreational resource so close to a large population, that is used by a large number of people; and
 - d. The fact that the river is currently relatively safe, and the corresponding concern that the intake structure in particular is likely to be dangerous and unsafe.
12. It is also relevant under section 5 (2) (a) that the use of the Waimakariri for kayaking is likely to increase in the future – sustaining the potential for this growth in use will assist in giving effect to the sustainable management element of sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations:
- "Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations"*
13. In terms of section 6 matters of national importance, section 6 (a) is relevant, as it is the natural character of the Waimakariri that currently contributes to the kayaking amenity it provides:
- "The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:"*
14. Section 6 (d) is clearly relevant, as if the Waimakariri is changed to such an extent that its kayaking values are significantly reduced, this results in a loss of access to the river:
- "The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers"*
15. Particular regard must also be had to section 7 (c) and (f):
- "(c) The maintenance and enhancement of amenity values*
- (f) Maintenance and enhancement of the quality of the environment:"*

Recreation

16. In preparing its application and AEE this Applicant completely underrepresented the importance of the recreation values the Waimakariri supports in terms of kayaking, both in its complete absence of any consultation with the main kayaking stakeholders, and in its dismissive and incorrect assessment of effects on kayaking.
17. Such an approach therefore failed to adequately address the plan provisions highlighted above and the provisions of Part II that are relevant to recreational amenity, and the growing body of case law that gives significant weight to important recreational resources in the context of achieving sustainable management. Listed below are just some of the cases that give serious and considered weight to the importance of recreation and amenity values in the context of the Act. These values are relevant and important, and in the context of a popular, iconic resource such as the Waimakariri, should be given significant weight:

Back Country Skiers Alliance Inc and Federated Mountain Clubs of NZ v Brown and Central Otago DC C82/99

Director General of Conservation v Marlborough District Council W89/97

NZ Jet Boat Association v Queenstown Lakes District Council C109/2003

Save the Point Inc v Wellington City Council W027/07

18. Also, in a wider sense, consider that Part IX of the Act has been established to ensure the recognition and protection of outstanding water bodies that support, amongst other matters, outstanding recreation values. (section 199 (2) (b) (v)). While some may perceive recreation and amenity values as not being as "serious" or important as more development or progress orientated activities, it is submitted that this is not the approach taken in the RMA. On a case by case basis, depending on the facts, recreation and amenity values should be given serious consideration, and great weight, in order to achieve sustainable management.

Effects (s 104 (1) (a))

19. When considering the adverse effects on the amenity values and safety of kayakers, there are three further legal issues I will focus on:

- a. In respect of amenity values, the concepts of existing environment and cumulative effects need to be clarified;
- b. In respect of safety – concerns with respect to certainty, and potential for significant adverse effects (such as injury or death) are relevant.
- c. The future environment and future recreational use of the river needs to also be considered.

Cumulative effects

20. In terms of how to measure the effects of the proposed scheme on the river, it is submitted that this is not a case where we can simply measure effects against the "permitted baseline", being the existing river and what could lawfully be done there as of right and in accordance with existing consents. A river environment is not suitable for such an approach. The Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council CA 84/01* recognised that there will often be situations where strict application of the permitted baseline is not appropriate:

"[38] Reflecting on competing contention in this area has reinforced us in the view that there should be no rigid rule of law either way. That conclusion should relieve consent authorities of the anxieties expressed by counsel while also allowing an applicant for consent to seek a factually realistic appraisal. What is permitted as of right by a plan is deemed to be part of the relevant environment. But beyond that, assessment of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law."

21. Such an approach is now reflected in section 104 (2) which makes application of the permitted baseline test an optional consideration.
22. Use simply of the existing environment, rather than the permitted baseline, as a starting point is most appropriate – however even that is not necessarily easy to apply. Water permits have a finite term, and there is no presumption of continuity. As stated by the Environment Court in *DR Sampson and Others v Waikato Regional Council A178/2002* on this point:

"[33] We are also conscious of the distinction between land use consents, which are granted in perpetuity, and water consents, which are granted for

a defined term and not necessarily renewed. In relation to the latter, the existing environment must be determined as the environment that might exist if the existing activity to which the water consents relate, were discontinued."

23. A good summary of the relevant caselaw that has evolved the concept of existing environment, in the context of water permits, is set out in pages 37 and 38 of *Rotokawa Joint Venture Ltd and Mighty River Power Ltd v Waikato Regional Council A41/2007*, and is set out below. As held by Judge Jackson in both *Alexandra Flood Action Society Inc v Otago Regional Council C102/2005* at paragraphs 67 and 68 and *JF Investments Ltd v Queenstown Lakes District Council C48/2006* at 23 and 28 past effects previously authorised are not necessarily to be ignored – the Act's requirements to remedy effects, and enhance the quality of the environment means that we do not have to disregard existing effects from consented activities necessarily. These concepts from the *Alexandra Flood Action Society*, and *JF Investments* are all summarised in the *Rotokawa* quote below.

[106] The determination of the relevant environment is thus fundamental to the determination of the "effects". In order to determine what the "effects" will be, one must first establish what it is that they are effects upon. The existing environment therefore constitutes a fundamental starting point or reference point for the assessment of any application.

[107] Counsel referred to a number of cases which have discussed the meaning of the existing environment. A synthesis of those cases gives rise to the following principles:

- (i) The existing environment concept is quite different from the permitted baseline.¹ It is common ground that the latter has no relevance to the determination of these appeals.*

- (ii) The concept of an effect requires a reference point – effect on what or on whom?²*

¹ *Queenstown Lakes District Council v Hawthorne Estates Limited, CA45/2005* at paragraph 66.

² *Alexandra District Flood Action Society Inc. v Otago Regional Council*, Environment Court Decision C102/2005 at paragraph 70.

(iii) *Determining the existing environment is a matter which requires case specific consideration.*³

(iv) *There may be circumstances in which it is appropriate to look at past effects and take them into account as part of the decision-making process.*⁴ *But any conditions deigned to address past effects must satisfy the **Newbury** tests.*⁵

[108] *In applying the existing environment principle to the facts of this case, we accept that the best guidance remains that of the Environment Court in the **Tahara** decision.*⁶

We hold that consideration is to be given to the effects on the environment as it actually exists now, including the effects of past abstraction of geothermal fluid from the system, whether by Contact or anyone else. In considering the effects in the future of allowing the proposed abstraction, we hold that we have to consider the environment as it is likely to be from time to time, taking into account further effects of past extraction, and effects of further abstraction authorised by existing consents held by Contact or by others...

[109] *We agree with the above clear articulation. But in the light of the **Hawthorne** case we would add that we also have to consider the environment as it is likely to be from time to time having regard to the natural recharging process in the event of the consents not being granted.*

24. As inferred above, the existing environment is not simply to be taken at face value as the starting point. Existing effects of consented activities are relevant, as are the cumulative effects of a proposed activity, on top of those existing effects. The sum total of effects can be relevant. The High Court in *Herzog Investments v Waitaki*

³ *Contact Energy Limited v Waikato Regional Council*, Environment Court decision A04/2000 at paragraph 38.

⁴ For example see *Sampson v Waikato Regional Council*, Environment Court Decision A178/2002.

⁵ *Alexandra District Flood Action Society Inc. v Otago Regional Council*, Environment Court Decision C102/2005 at paragraph 187.

District Council CIV 2006-485-1061 discussed the cumulative effects. The High Court stated that the Environment Court had correctly considered the existing lawful consented activity:

"[24] The Environment Court did not consider the resource consent for the other seven lots in the original subdivision as not generating adverse effects. They properly did not consider that baseline analysis negated these adverse effects. The presence of those, potentially seven, house on the remaining lots was not by way of permitted use, it was by way of resource consent. Consistent with Hawthorn, paragraph 74, those uses cannot be assumed to not be creating adverse effects.

...

[29] The decision of the Court of Appeal in Hawthorn confirms the relevance of a broad definition of environment for the purposes of s 104 (1) (a) as including the subject site and the surrounding environment, sometimes called the receiving environment. The permitted baseline jurisprudence has never confined adverse effects analysis to adverse effects generated solely on the subject site. Plainly, the concept of cumulative effects (which is part of the RMA statutory concept of effect, see s 3 (3)(d)) allows taking into account effect generated by a proposed on the subject site in combination with other neighbourhood effects.

[30] it was because of the cumulative effect of the proposed subdivisions of lots 1 and 2 with the existing effects of the balance of the original subdivision that the Court found a "synergetic" effect."

25. Also of assistance on cumulative effects is the *Kuku Mara Partnership v The Marlborough District Council W 037/2005* decision which discussed the relevance of cumulative effects of a new marine farm, in a bay with existing marine farms. The discussion of cumulative effects summarises the case law.

"[51] ...In discussing the meaning of cumulative the Court in Dye [Dye v Auckland Regional Council [2001] NZRMA 481] said: The concept of cumulative

⁶ *Contact Energy Limited v Waikato Regional Council, Environment Court Decision*

A04/2000 at

effects 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...

[52] But the definition of effect in s 3 of the Act includes...any cumulative effect which arises over time or in combination with other effects...regardless of the scale, intensity, duration or frequency of the effect...So if the existing activity has adverse effects, and the proposed activity also has an adverse effect, even if only minor, which would add to the existing effects, then the definition requires a consideration of both. That is because the new effect will have an impact in combination with other effects even if its scale, intensity, duration or frequency is not, of itself, more than minor. That would comply with the ordinary meaning of cumulative. It would be an exception to the permitted baseline concept, but only to the extent that one could have regard to existing adverse effects when, and only when, taken together the new effect, they produce a synergetic impact on the environment.

[53] To hold otherwise would be contrary to the plain meaning of effects in s 3 and contrary to the purpose of the Act, as set out in s 5 – the sustainable management of natural and physical resources. If a consent authority could never refuse consent on the basis that the current proposal is the straw that will break the camel's back, sustainable management would be immediately imperilled. It is to be remembered that all else in the Act is subservient to, and a means to, that overarching purpose..."

26. Therefore, when considering the effect of CPW on the kayaking amenity it is correct to both just consider the effect of CPW compared to the status quo, but also to compare the cumulative effect of CPW and other existing takes, against the natural flow regime, to get a broad understanding of the effects of taking water from the Waimakariri on the kayaking amenity.
27. This legal argument is relevant to the issue of the kayaking amenity, and the opportunity to kayak on the Waimakariri in the flow range that is enjoyable and safe for kayaking. The evidence to be presented will show, in my submission, that kayakers value a range of flows. Variety in flow is important. The optimum flows for

paragraph 38.

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the range of kayakers (beginner to expert) are between 70/80 cumecs to 200 cumecs. The minimum "enjoyable" flow is between 60 – 70 cumecs. The proposed scheme will reduce the number of days in the optimum range, and draw the numbers down to at and below the minimum flow reducing variety, and reducing opportunity. There is no uncertainty with regards to this issue. If consent is granted on the basis sought, and exercised to its full potential, there will be a very significant reduction in the number of days that the Waimakiriri supports good kayaking, and a significant reduction in the quality of the experience.

28. It is appropriate at this point to make a diversion into an area of law that I understand the Commissioners are currently grappling with – and that is what is the relevance of the fact that the Rakaia WCO, sets a "baseline" in terms of minimum flow, in the context of these applications that propose to comply with that baseline. While the Rakaia river is not central to the kayakers concerns, I will touch on the issue of the WCO in respect of the most recent Environment Court discussion of this issue in *M A Talley and Others C 102/2007* in respect of an application to change the Buller Water Conservation Order (Gowan River).
29. We keep in mind, of course, that the conservation purpose does not encompass the enhancement or improvement of the waterway and thus potential for improvement to the riparian margins or the like are not matters which impact upon the conservation purpose. This is one of the significant differences between the Resource Management Act general provisions under Part 2 and the specific water conservation provisions under Part 9. This point was stressed by the Court in the **Rangitata** decision at paragraph 24 (already quoted).

*[42] We adopt the general discussion as to the meaning of section 199 outlined in the **Rangitata** decision at paragraphs [13] to [30]. In particular, we conclude that the effect of section 199(1) is to focus on the protection aspect of the conservation purpose by excluding consideration of matters which are inconsistent with that purpose. It was contended by Mr Crosby, for MAJAC, that paragraph [24] of the **Rangitata** decision provided that the purposes of Part 5 beyond the conservation purpose should be achieved unless they were contrary (i.e. repugnant) to section 199(1). Paragraph [24] of **Rangitata** states:*

[24] Whether the application of any part of section 5 to 8 of the RMA is contrary to section 199(1) is a matter of judgement of the facts in each case.

However it is more likely for example that the matters of national importance in section 6(a) to (c) should be recognised and recommendations made as to how to provide for them in (nearly) the normal way. That is because the preservation of the natural character of the margins of the Rangitata River, the protection of any outstanding natural feature and of any significant habitat of indigenous fauna are not repugnant to the section 199 purpose but entirely consistently with it. The exception – a point reiterated frequently by some counsel – is that it is not a part of the purpose of a water conservation order to enhance characteristics so they become outstanding or even to improve them if already outstanding.

[43] Paragraph [24] does not say that section 5 to 8 matters are to be applied unless they are repugnant to the purpose of the order under section 199(1).

30. Therefore, in the context of the Rakaia WCO, the provisions are designed to protect the specific values identified. There may be other values not explicitly protected by the WCO that simply get considered under Part II. There may be enhancements of the environment justified that should also be considered under Part II as the WCO cannot require enhancement, only protection. And finally, with the passing of time, there may be new facts evident that justify an even more cautious approach than applied by the WCO at the time it was gazetted, when considered under Part II.

Uncertainty, and probability of significant adverse effect

31. On the issue of safety, primarily in respect of the intake, there is considerable uncertainty. This is primarily due to the lack of specific information from the applicant about its proposed design. However from what we know about the applicant's proposal, and what we know about the safety issues in general of such artificial structures in moving water environments, the kayakers predict that there is a significant probability that the intake structure will pose a real danger to kayakers, with the potential to cause serious injury and death.
32. There are numerous unanswered questions about the intake structure relevant to safety. Even on a global scale, it is uncertain whether such a large intake, in a frequently used body of flowing water, could ever be designed and maintained so as to ensure safety to all river users. To place such a structure in a river that is known for its high use, by kayakers of a range of abilities, is going to be an accident waiting

to happen, in the worst sense. Evidence will be presented to illustrate the various risks the intake is likely to present.

33. It is submitted that because we cannot be confident that the intake will be safe, and because we cannot be certain that it will not cause injury or worse to river users, we must apply precaution to the weighting of this issue, and give it a great deal of weight in accordance with the application of the precautionary principle explained in cases such as *Sea-Tow Ltd v Auckland Regional Council A066/2006*.
34. And, the existence of such a hazard will not only have an adverse effect in terms of accidents causing injury or worse, it will also further detract from the current amenity values, by causing some paddlers to perhaps chose not to go kayaking on that section and take the risk, and causing others to be fearful in that location when they would not have been otherwise.

Future Environment

35. It is submitted that the importance of the Waimakariri as a recreational resource is likely to increase in the future. Therefore, this future state of the environment is relevant to your considerations. As stated by the Court of Appeal in the *Queenstown Lakes District Council v Hawthorn Estate CA45/06*:

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the Council or Environment Court on appeal makes its decision of the resource consent application.

...

[57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur."

Conclusion

36. It is submitted that the Applicant has not established to any degree of confidence that the proposed scheme, at the scale anticipated, will be viable and reliable and will provide the magnitude of benefits proposed. It is likely to leave in its wake a trail of significant adverse effects, including adverse effects on the iconic multisport kayaking amenity provided by the Waimakariri.
37. The evidence to be presented by the kayaking submitters today will, I submit, establish that the significant kayaking amenity, in terms of quality and opportunity, will be seriously adversely affected. The applicant has presented no direct or expert kayaking evidence to contradict this. In respect of the safety issue, it is submitted that the evidential burden is also placed back on the applicant to answer the serious doubts raised in the evidence, of the ability for the intake to be constructed in a manner that will be safe for river users.
38. In weighing the significant amenity and safety adverse effects, relevant to enabling people to provide for their social and economic well being and health and safety, both today and in the future, along with all the other adverse effects highlighted by other submitters, against the benefits of the proposal, it is submitted that the purpose of the Act will not be given effect to if consent is granted.

Witnesses

39. **Ken Livingston** – spokesman for Arawa Canoe Club, addressing river sections, flows, safety, club use levels, personal usage, equipment.
40. **Ian Huntsman** – expert kayaker, addressing optimum kayaking flows.
41. **Graeme Wilson** – spokesman for Whitewater Canoe Club, addressing Brass Monkey series, club usage, personal usage.
42. **Ian Gill-Fox** – expert kayaker, addressing optimum kayaking flows and safety
43. **Hugh Canard** – expert tourism and economic consultant, and qualified engineer, addressing 2 distinct topics – likely future usage and demand for recreational resource of the Waimakariri, and safety of the intake structure.
44. **Tony Ward-Holmes** – spokesman for the New Zealand Recreational Canoeing Association, addressing loss of kayaking opportunity (number of days), and general concerns regarding AEE.

Dated this 10th day of June 2008

Maree Baker

Counsel for New Zealand Recreational Canoeing Association, Arawa Canoe Club,
Whitewater Canoe Club