IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2022-409-309
[2024] NZHC 612

BETWEEN	ENVIRONMENTAL LAW INITIATIVE Applicant
AND	CANTERBURY REGIONAL COUNCIL First Respondent
	ASHBURTON LYNDHURST IRRIGATION LIMITED Second Respondent

Hearing: 23 and 24 May 2023

Appearances: D A C Bullock and A W McDonald for Applicant
P A C Maw and E R M Maassen for First Respondent
B G Williams and R E Robilliard for Second Respondent

Judgment: 20 March 2024

JUDGMENT OF MANDER J

This judgment was delivered by me on 20 March 2024 at 3.30 pm
pursuant to Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

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[1] Ashburton Lyndhurst Irrigation Ltd (ALI) is a farmer owned cooperative that operates an irrigation scheme in Mid Canterbury receiving and supplying water to its shareholders. As a result of a decision by an independent hearings commissioner (the Commissioner) acting under delegated authority, the Canterbury Regional Council (the Council) granted ALI's application for a resource consent to discharge nutrients onto or into land from farming activities between the Hakatere/Ashburton and Rakaia Rivers (the discharge consent).

[2] The Environmental Law Initiative (ELI)[1] has applied to judicially review the Council's decisions regarding its notification of the application and the grant of the discharge consent. It claims the Council made errors of law in making its notification decision for the discharge consent, misapplied the requirements of the Resource Management Act 1991 (RMA), and failed to consider and apply relevant planning instruments. On the basis of these alleged errors, ELI seeks declarations and orders quashing the notification and discharge decisions. The Council and ALI refute there are grounds for review and deny the notification and discharge consent decisions were the subject of errors of law.

Background

[3] ALI is an irrigation scheme as defined under the Canterbury Land and Water Regional Plan (the Land and Water Regional Plan).[2] It receives water from the wider Rangitata Diversion Race Scheme that was developed in the 1940s by the Public Works Department and on-supplies it to its shareholders. The Crown divested the scheme to ALI in 1991, and in recent times it has upgraded the scheme from a gravity-fed open channel system to a network of pressurised pipes, and from a system involving border dyke flood irrigation to a more efficient spray irrigation method.

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1 ELI is an incorporated charitable trust board. Its charitable purposes are stated as including the preservation, conservation, protection and enhancement of natural and cultural resources in order to prevent their harm, misuse, depletion, unsustainable use and destruction. ELI describes its main activities as researching and reviewing environmental legislation and policy, and funding scientific research. It states its specialist areas include law and policy affecting New Zealand's wetlands and freshwater.

2 Canterbury Regional Council *Canterbury Land and Water Regional* Plan (2017) [Land and Water Regional Plan]. Under the Land and Water Regional Plan, an irrigation scheme "means a trust, company, incorporated society or other legal entity that holds a resource consent to take and supply water to more than one property". Such schemes are common in Canterbury as they allow its landowning shareholders to achieve economies of scale in relation to the infrastructure, consenting, monitoring, and auditing required to irrigate the land.

[4] ALI has water supply agreements with its 238 shareholders, who are required to comply with the rules and obligations of the irrigation scheme.[3] In addition to delivering water and managing irrigation infrastructure for its shareholders, ALI holds the resource consent to irrigate shareholder land and carries out environmental management and self-auditing of its shareholders to assess whether they are complying with their environment plans and assists with improving their farm management practices.

[5] In mid-2018, ALI applied for a resource consent to replace its existing discharge permit which it jointly held at that time with another irrigation scheme operated by MHV Water Ltd (MHV). This consent was due to expire in May 2019. An extensive process followed that included the Council deciding in September 2020 that the discharge consent application would be notified on a limited basis to only one party, Te Rūnanga o Ngāi Tahu (the notification decision). Te Rūnanga o Ngāi Tahu opposed the discharge consent application with the support of Te Rūnanga o Arowhenua. The substantive consent application was heard in February 2021 by the Commissioner and a decision was issued in June of that year (the discharge consent decision).[4]

[6] The application for the discharge consent was made pursuant to the Land and Water Regional Plan, which provides objectives, policies and rules concerning the management of water quality and activities that involve the discharge of contaminants from farming activities onto or into land that may enter water. Irrigation schemes are specifically provided for under this plan. Rule 5.62 enables an irrigation scheme to apply for a resource consent to discharge nutrients onto or into land in circumstances that may result in a contaminant entering water. Such applications are assessed as a discretionary activity.

[7] Subject to the fulfilment of certain prerequisites, rr 5.41 and 5.60 of the Land and Water Regional Plan provide that the use of land for a farming activity is a

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3 ALI farms currently cover approximately 31,486 ha within a total proposed nutrient discharge area of 177,000 ha. The farming activities within ALI's nutrient discharge area in 2019 included arable farming (22 per cent), commercial vegetable production, dairy support (12 per cent), dairy farming (51 per cent), horticultural farming, intensive winter grazing, and pastoral farming (15 per cent).

4 *Resource Consent Application CRC185469 – Ashburton Lyndhurst Irrigation Ltd* Report and Decision of the Hearing Commissioner (3 June 2021) [Discharge Consent decision].

permitted activity for properties managed by an irrigation scheme with a resource consent under r 5.62. By ALI securing a resource consent to discharge nutrients, the land use for farming activities of all its shareholders was also able to be authorised.

The discharge consent

[8] The discharge consent "authorises the discharge onto or into land where contaminants may enter water arising from farming land use activities" on specified properties listed in a schedule to the consent (the property schedule), the owners of which are shareholders in ALI. These properties are in an area variously described as "the Command Area" or the "Nutrient Discharge Area" (the Discharge Area) that is bordered by the Rakaia River to the northeast and extends a short distance beyond the Hakatere/Ashburton River to the southwest.[5] It encompasses the entire plains area between these boundaries, from the foothills of the Southern Alps to the sea.

[9] The boundary of the Discharge Area is illustrated in the annexed plan which is included in the discharge consent. The shaded area, described as "ALI farms", represents the properties listed in the schedule to the discharge consent. The Hakatere/Ashburton River runs between the southern boundary and the ALI farms.[6] The scope of the discharge consent is stated as extending beyond the properties listed in the schedule to what is described in the discharge consent as the "expansion of dairy support land and irrigated dairy farm land, conversion of land to dairy farm land and the undertaking [of] intensive winter grazing" located within the Discharge Area.

[10] The primary contaminant with which the discharge consent is concerned is nitrogen, although it authorises the discharge of other contaminants, including phosphorous and sediment, entering water as a result of farming land use activities. These contaminants are the subject of surface water quality monitoring, but the measurement and management of nitrogen is recognised as the established approach to regulating the effects of discharges of nutrients from farming land uses.[7]

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5 This area is referred to in the discharge consent as "the Command Area".

6 Plan CRC185469A — see Appendix A.

7 See s 42A report prepared for the purpose of hearing the discharge consent application — long-term groundwater quality monitoring focuses on nitrate nitrogen as an indicator parameter of the effects of intensive land use on groundwater quality.

[11] The discharge consent provides for a Nitrogen Discharge Allowance (NDA) which sets a total limit on the amount of nitrogen that can be discharged for the whole scheme. As noted, the discharge consent authorises discharges onto or into land where contaminants may enter water as a result of farm use in respect of the properties listed in the property schedule. ALI is permitted to add or remove properties from the property schedule so long as the NDA is not exceeded. Any such additions may be made by ALI without further regulatory approval or assessment. However, an updated property schedule is required to be provided to the Council each year, should any properties be added or removed, together with an updated map and nitrogen calculations. The Council submitted this allows it to monitor the effects of the discharge consent and maintain oversight.

[12] ELI highlighted that properties within the Discharge Area may be joined to ALI's scheme, even if not irrigated by ALI supplied water, and have their nutrient discharge managed by ALI under the discharge consent. These properties, which are included in the property schedule, are defined in the discharge consent as "Associated Properties".[8] Because this associated land may form part of a shareholder's overall farming operation, it was considered the whole farming operation should be covered by the same discharge consent.

[13] As noted, the discharge consent sets an NDA and requires the properties to operate in accordance with the requirements of the Land and Water Regional Plan. ALI must prepare and implement an "Environment Management Strategy" and an "Audited Self-Management Program" to ensure compliance with the discharge consent. Each of its properties must implement good management practices and make necessary reductions to its nutrient losses over time. The discharge consent also requires ALI to have audit reporting procedures that ensure a high level of compliance with farm environment plans and annual nutrient loss audits of properties, the results of which are required to be made available to the Council to inspect upon request. Further requirements are a surface and groundwater monitoring programme and an environment monitoring plan that includes the preparation of a remediation and

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[8] **Associated Properties** are defined in the discharge consent as:
Properties which are not Authorised Properties and which do not receive irrigation water from the Ashburton Lyndhurst Irrigation Scheme, but which are Properties where the nutrient losses are managed by the Consent Holder:

response plan in consultation with Te Rūnanga o Arowhenua in the event water quality outcomes deteriorate.

[14] Most significantly, the discharge consent requires the NDA to be reduced from 1 January 2025 by 10 per cent from the current 2020 nitrogen leaching load; and from 1 January 2030 by 20 per cent from the current 2020 load.[9] This required reduction is reflective of key changes to ALI's resource consent application, which was modified to include a commitment to making staged reductions in the NDA over the duration of the consent. The efficacy of this proposal, in terms of whether it would improve groundwater and surface water quality in the wider receiving environment, including the Hakatere/Ashburton River and hāpua (lagoon) over the period of the consent, was the subject of considerable focus at the hearing of the discharge consent. The degree to which ALI's proposed reduction in nitrogen *loads* by its shareholders would have on the nitrogen *concentrations* in the groundwater and the anticipated improvements in both groundwater and surface water quality over the 10-year term of the consent became a critical factor for the decisionmaker.[10]

[15] The Commissioner accepted ALI's evidence that the proposed nitrogen load reductions from current levels could be achieved within the stated timeframes and that this would result in measurable improvements in water quality and ecological values in the receiving environment within the term of the discharge consent. The legality of the reliance placed on that finding to support the grant of the discharge consent is a significant issue raised by these proceedings.

Description of the affected environment

[16] For the purposes of her decision, the Commissioner adopted the description of the affected environment set out in the assessment of environmental effects that accompanied the application and the Council prepared reports prepared pursuant to s

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9 **Current 2020 Load** is defined in the discharge consent as:
> The nitrogen leaching load at the end of 2020, calculated using the Matrix Method or any other equivalent method approved by the Chief Executive of Environment Canterbury.

10 The terms *concentration* and *loads* were explained in evidence as:
> "**Nitrogen concentration**" — the concentration of nitrogen in soil drainage water discharged from beneath the root zone, usually expressed as mgN/L or PPM.
>
> "**Nitrogen load**" — the total amount of nitrogen emitted below the root zone, usually expressed as t N/yr.

42A of the RMA.[11] The natural ecosystems affected by the permitted discharge include the Rakaia and Hakatere/Ashburton Rivers. The latter is an alpine and hill fed river which flows over 100 km before it reaches the sea at the Hakatere hāpua. The river gains water from groundwater in its downstream reaches and follows a course adjacent to ALI farms. There are a number of spring fed tributaries that flow directly into the Hakatere/Ashburton River and small coastal dongas located to the north of the Hakatere/Ashburton River mouth. Both the Rakaia and Hakatere/Ashburton Rivers are described as providing outstanding habitat for many rare birds, fish, plants, and other species, as well as a wide range of recreational values.

[17] In regard to the groundwater environment, the s 42A reports recorded that the direction of the overall groundwater flow was toward the coast and that there was an overall increasing trend in nitrate-nitrogen concentrations, particularly in bores close to the coast. Groundwater is expected to discharge via offshore seepage and springs in the area north of the Hakatere/Ashburton River.

[18] The Hakatere hāpua was described as an important downstream receiving environment:

> The Hakatere hāpua is a predominantly freshwater coastal lagoon with a mouth that is generally open to the sea. It is a dynamic environment influenced by the tide, and its physical habitat and morphology, including the location of the mouth opening, is heavily impacted by the amount of flow in the Hakatere/Ashburton River. It supports breeding, rearing and feeding habitat for numerous native bird and fish populations, including those classified as threatened. It also supports sports fisheries, and therefore contains high recreation as well as ecological and cultural values.

[19] The s 42A report highlighted that the hāpua is currently in a vulnerable ecological state. This was reflected in the Commissioner's decision by reference to a supplementary s 42A report:

> 92. Mr Arthur's technical review noted that the key adverse effects on the surface water receiving environment related to increased periphyton growth, which can smother aquatic habitat stressing aquatic invertebrates and fish communities. He highlighted the vulnerable

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[11] Resource Management Act 1991, s 42A(1) provides:
> At any reasonable time before a hearing or, if no hearing is to be held, before the decision is made, a local authority (as local authority is defined in section 42(6)(b)) may require preparation of a report on information provided on any matter described in section 39(1) by the applicant or any person who made a submission.

> state of the Hakatere hāpua to worsening eutrophication and declines in ecological health, due to total nitrogen concentrations being below [The National Policy Statement for Freshwater Management] national bottom lines. ...

The discharge consent decision

[20] The Commissioner accepted agricultural land use was the primary source of nutrients leaching into groundwater and the ALI scheme, together with other irrigation schemes in the area, were significant contributors to nitrogen loads in the catchment. The Commissioner held it was clear the ALI scheme contributed to the widespread degradation in the groundwater receiving environment. The Commissioner found on the evidence groundwater quality is degraded and that nitrate-nitrogen concentrations in many bores at a range of depths are impacted by past and current land use activities in the Discharge Area. The Commissioner further found that the degradation of groundwater quality is closely linked to the degradation of downstream surface water quality and declining ecological values in the lower Hakatere/Ashburton River and its hāpua.

[21] The Commissioner accepted nitrate-nitrogen concentrations in monitored bores under the ALI scheme have generally increased over the period 1992 to 2018, with significant increases since the early 2000s coinciding with large conversions to spray irrigation and dairy production.

[22] The Commissioner acknowledged ALI's modified application that proposed staged reductions in nitrate-nitrogen concentrations based on the current 2019/2020 levels increased the prospect of there being no further increase in nitrogen inputs into the catchment in the ALI scheme. However, the Commissioner observed it was difficult to determine what these staged reductions will translate to in the groundwater quality and ecological health of the receiving environment. The Commissioner explained the difficulty in the following way:[12]

> 125. Dr Treweek's calculated reduction in nitrate-nitrogen concentrations show the proposed nitrogen load reductions will not result in commensurate reductions in drainage concentrations. In fact, the amended estimates illustrate the very small (2% and 1.2%) reductions in nitrate-nitrogen concentrations expected from the 10% and 20%

[12] Discharge Consent decision, above n 4.

> reductions in nitrogen loads. This indicates the implications of the 'legacy' nitrogen loads that are present in the soil beneath the [Discharge Area] that have been discharged under the previous consents and have continued to increase over recent years. It also indicates any small decreases [in] concentrations from reductions in nitrogen loads will occur over relatively long timeframes and that built-up concentrations of contaminants are likely to continue to be discharged into groundwater and surface water. Mr Callander's evidence regarding 20-45 year long groundwater flow paths increases my concern regarding the movement of these nitrogen loads through the system.
>
> 126. It is clear from the evidence of Dr Treweek and Ms Harris that to achieve the required 10% reductions by 2025, all [ALI] farms will need to be operating at an 'A' audit grade by 2025 with no land use changes that could increase nitrogen losses; and that the required 20% reductions by 2030 can only be achieved by a number of farms implementing advanced mitigation and operating at an 'A+' audit grade, again with no increases in nitrogen losses. I accept this is achievable.

[23] Despite the Commissioner's acceptance the proposed reductions are achievable, she acknowledged the uncertainty as to whether they would be sufficient to result in measurable improvements in groundwater and surface water quality over the 10-year term of the discharge consent. After noting the steps necessary to ensure improvements would be achieved, the Commissioner observed these requirements would effectively give ALI five years to prove the proposed reductions would be sufficient to demonstrate that measurable improvements in the receiving environment would be made within the 10-year consent term, or whether more substantial reductions would be required to achieve this.

[24] The Commissioner, in summarising her decision to grant the discharge consent, stated:[13]

> 142. I am satisfied that this application acknowledges the magnitude of the changes required and sets realistic staged reductions. This is consistent with the clear requirements to reduce nutrient inputs into the receiving environment from land use activities and improve ecological values. The uncertainty is how soon this improvement will occur (in both groundwater quality and surface water quality) and how great the nitrogen reduction (load) will need to be to significantly reduce nitrate-nitrogen concentrations in groundwater and surface water. However, I accept the Applicant's evidence that the volunteered nitrogen load reductions from current levels can be achieved within five years and again in 10 years, and that this will result in measurable

[13] Discharge Consent decision, above n 4.

improvements in water quality and ecological values in the receiving environment within the term of the consent.

[25] The Commissioner's overall conclusion was:[14]

> 158. The previous consent to discharge contaminants within the scheme's [Discharge Area] was granted on the basis that it would avoid significant adverse effects and mitigate adverse environmental effects. This has proven to be untrue and land use activities have resulted in significant adverse cumulative effects on water quality and ecological values.
>
> 159. This consent is granted on the basis that the significant adverse cumulative effects on the receiving environment will be reduced and there will be measurable environmental improvements within the consent term. It also gives the Applicant sufficient time to demonstrate that land use practices can change to significantly reduce nutrient inputs and to address existing environmental degradation. It is a significant step in the right direction and it is now up to the Applicant to demonstrate that the necessary reductions can be made and that these staged reductions are sufficient to result in meaningful environmental improvements. I accept the evidence that this will be challenging, but achievable.

The grounds for judicial review

[26] ELI brings its application for judicial review on the basis of three alleged errors of law that affected the decision to grant the discharge consent:

(a) a misapplication of the requirements of s 107 of the RMA which, properly applied, prohibited the granting of the consent;

(b) a failure to consider and apply, in accordance with s 104 of the RMA, relevant provisions of the New Zealand Coastal Policy Statement (NZCPS),[15] the Regional Coastal Environment Plan for the Canterbury Region (RCEP),[16] and the Land and Water Regional Plan;[17] and

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14 Discharge Consent decision, above n 4.

15 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

16 Canterbury Regional Council *Regional Coastal Environment Plan* (2005) (reprinted August 2020) [RCEP].

17 Land and Water Regional Plan, above n 2.

(c) a failure to consider whether special circumstances existed warranting public notification or wider limited notification, including a failure to give reasons and other errors of law in making that decision.

[27] On the basis of these alleged errors, ELI seeks declarations and orders quashing the notification decision and grant of the discharge consent. I address each ground of judicial review in the order they were presented in the parties' written submissions and in oral argument at the hearing of the application.

The alleged misapplication of the requirements of s 107 of the RMA

[28] ELI alleged that in making her discharge consent decision the Commissioner erred in her application of s 107 of the RMA. It was submitted the Commissioner:

(a) Failed to recognise s 107 contains a series of prohibitions, or "environmental bottom lines", that were engaged which prevented the grant of a resource consent in the absence of statutory exceptions having application.

(b) Having found as part of her determination that past and current land use practices have caused "significant adverse cumulative effects on aquatic life", failed to recognise she was unable to grant the discharge consent if those effects were likely to continue or the limited statutory exceptions did not otherwise apply.

(c) Failed to consider relevant matters, namely the significant adverse effects on aquatic life from agricultural nutrient discharges in the receiving environment, and instead proceeded on a basis that considered irrelevant matters including a desire to avoid an outcome that required existing farming activities to cease.

Relevant statutory provisions

[29] ELI submitted the Commissioner misapplied s 107 of the RMA which prohibits the grant of a discharge permit that is likely to give rise to any significant adverse effects on aquatic life. The RMA relevantly provides:

> **15 Discharge of contaminants into environment**
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> (1) No person may discharge any—
>
> (a) contaminant or water into water; or
>
> (b) 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
>
> (c) contaminant from any industrial or trade premises into air; or
>
> (d) contaminant from any industrial or trade premises onto or into land—
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> unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.
>
> ...
>
> **107 Restriction on grant of certain discharge permits**
>
> (1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—
>
> (a) the discharge of a contaminant or water into water; or
>
> (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.

[30] There is no dispute the present case involves the discharge of a contaminant that is not otherwise expressly allowed by a national environment standard or plan. A resource consent is required to discharge contaminants onto or into land in circumstances where they may enter water.

ELI's argument

[31] ELI argued s 107 of the RMA establishes a series of "environmental bottom lines" which, if not met, prevent the grant of a resource consent. It submitted s 107(1)(g) prohibits the grant of a discharge permit where if, after reasonable mixing, the contaminant or water discharged is likely to give rise to "any significant adverse effects on aquatic life".[18] The term "effect" includes any past, present, or future effect,

[18] Resource Management Act, s 2, **aquatic life** has the same meaning as in s 2(1) of the Fisheries Act 1996, which provides: (a) means any species of plant or animal life that, at any stage in its life history, must inhabit water, whether living or dead; and (b) includes sea birds (whether or not in the aquatic environment).

be it positive or adverse, that is temporary or permanent and includes any cumulative effect which arises over time or in combination with other effects.[19] ELI emphasised that, in accordance with the RMA's protective approach to water and species that depend on water, for the purposes of s 107, a decisionmaker need only be satisfied that any effects would be *likely* to occur.

[32] The prohibition on a consent authority granting a discharge permit that would allow the consequences set out in s 107(1), including discharges that are likely to give rise to any significant adverse effects on aquatic life, is subject to the exceptions provided by subs (2), namely:

(a) "exceptional circumstances" justifying the granting of the permit;

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

(c) the discharge is associated with necessary maintenance work.

[33] ELI maintained these qualifying exceptions provide the only pathways by which the s 107(1) prohibition can be avoided if the discharge is likely to give rise to significant adverse effects on aquatic life.[20] There is no dispute the exceptions provided by subs (2) are not engaged. The Commissioner did not consider whether any exceptional circumstances existed, nor was it contended for the purpose of these proceedings they had application. There can also be no controversy that the Commissioner determined that past and current land use practices in the Discharge Area have contributed to significant adverse cumulative effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and hāpua.

Commissioner's findings

[34] The Commissioner found that agricultural land was the primary source of nutrients leaching into water and that ALI's scheme had contributed to the widespread degradation in the groundwater receiving environment which was sensitive to nutrient

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19 Resource Management Act, s 3.

20 Citing *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council* [2013] NZEnvC 250 at [25], [55] and [183].

inputs from farming activities. The Commissioner further found that surface water quality in the Hakatere/Ashburton River and its hāpua was degraded and this had resulted in declining ecological values. Notably, the Commissioner observed what she described as the "legacy" nitrogen loads, that had built up over the years and been discharged under previous consents, had continued to increase over recent times.

[35] It was likely these "legacy" nitrogen loads would continue to be discharged into the water for many years as they leached through the soil. The Commissioner considered there was no evidence that ongoing increases of nitrogen in the receiving waters had stabilised. To the contrary, it was found this was unlikely in view of ongoing increases in irrigation, stock numbers and fertiliser use in the area. The Commissioner held there were cumulative significant adverse effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and hāpua that had been contributed to by past and current land use practices in the Discharge Area.

Analysis

[36] A marked feature of ALI's application for the discharge consent was that it was sought in replacement of the previous resource consent that was found to have given rise to the prohibited effects that trigger the restriction imposed by s 107. It was evident a continuation of that activity in the same terms, or at the same level, would result in the perpetuation of the same significant adverse effects and be rejected.

[37] Absent the s 107(2) exceptions having application, it is difficult, at least at first blush, to discern how the prohibition on the grant of a consent that would allow the discharge of a contaminant or water that is likely to give rise to any significant effects on aquatic life would not apply. The Commissioner appears to have appreciated that outcome when she accepted that past and current land use practices have contributed to significant adverse cumulative effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and hāpua, and that the receiving environment would be highly sensitive to any increase in nutrient discharges because of the currently degraded state of groundwater and surface water in the lower catchment. However, leaving aside any increase in nutrient discharges, it must follow that a continuation of

the present level of nutrient discharges will likely, for the time being, continue to result in significant adverse effects on aquatic life.

[38] The Commissioner, in addressing s 107, sought to reconcile her factual findings with the requirements of s 107(1) by relying on ALI's "commitment to staged nitrogen reductions and continuous improvement". This was a reference to the proposed reductions in nitrogen losses set out in ALI's revised application that were to be incorporated as conditions of the discharge consent. The Commissioner considered that without those reductions, s 107 would have prevented her from granting consent. The Commissioner held that with the imposition of these and other proposed conditions, the cumulative effects on aquatic life in the receiving waters would be "monitored, reduced and, with time, remedied".[21] However, until these improvements have been achieved and substantial improvements made to the receiving environment, the current significant adverse effects on aquatic life will endure.

[39] The Commissioner described the proposed conditions requiring future staged reductions in nitrogen loads by ALI as effectively giving it five years to prove that the proposed reductions will be sufficient to demonstrate that measurable improvements in the receiving environment will be made within the 10-year discharge consent term, or whether more substantial reductions would be required to achieve this. The discharge consent conditions that require a reduction in nitrogen loads do not apply until the halfway stage of the permit, but to achieve the five-year targeted reductions there is an obvious need to implement improvements and immediately reduce nitrogen losses.

[40] Notwithstanding the Commissioner's acceptance that it was difficult to determine whether these staged reductions would result in improvements to the ecological health of the receiving environment, ALI was permitted to continue to operate on the basis of anticipated, albeit uncertain, improvements from reduced nitrogen loads that are to be achieved by 2025 and 2030. On the Commissioner's own findings, this must mean that, at least in the interim, until there is some discernible and

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21 Discharge Consent decision, above n 4, at [154].

sustainable reduction in nitrogen loads the significant adverse effects on aquatic life will continue.

[41] The discharge consent was granted on the basis of the modified application that included optimum good management practices relating to water quality and the achievement of staged reductions in nitrogen losses after five and 10 years, in the anticipation the adverse cumulative effects on the receiving environment would be mitigated and reduced. It was envisaged there would be measurable environmental improvements over the term of the discharge consent. However, the discharge consent imposed no mandatory requirement for immediate reductions in nitrogen losses. On its face, it permitted, at least in the interim, a continuation of the past discharge of contaminants that cumulatively and causally contributed to significant adverse effects on aquatic life which the Commissioner had found to be subsisting in the Hakatere hāpua. The term "effect" under the RMA extends to any past effect and any cumulative effect which arises over time.[22] It is thus difficult to avoid the conclusion that, in the absence of any prescribed immediate reductions in the permitted level of discharge, this activity would likely sustain or contribute to the continuation of the present significant adverse effects on aquatic life, at least in the short term, whatever ultimate improvements may be achieved over the life of the consent.

[42] ALI submitted the Commissioner's decision involved an evaluative judgment of whether the grant of a consent in the terms sought would likely give rise to significant adverse effects on aquatic life. ALI argued that such an assessment was not amenable to judicial review. While I accept the Commissioner undertook an analysis across the life of the permit, s 107(1) is focused on the issue of whether granting a permit to discharge contaminants is likely to give rise to a prohibited outcome. Because of the Commissioner's findings as to the state of the receiving environment, a consent that, at least initially, permits the continuation of the same previously authorised activity that has been found to have contributed to the existing prohibited consequence must inevitably breach that prohibition. Applying the Commissioner's own evidential findings to the statutory requirements of s 107 and the terms of the discharge consent as granted does not involve an evaluative assessment

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[22] Resource Management Act, s 3.

of the merits of the decision but an analysis of whether the discharge consent could be lawfully granted.

[43] The current state of the receiving environment is the product of the legacy of the unsustainable discharge of contaminants. While this is sought to be arrested by the introduction of required staged reductions over the course of a new discharge permit, the discharge consent decision allows for the continuation of discharges at a level that will likely continue to give rise to the maintenance of ongoing significant adverse effects. This will continue at least until such time as the anticipated benefits of the five and 10-year reductions may improve the significant deleterious effects on the receiving environment. That being the case, s 107(1) applied.

Does s 107(3) apply as another exception?

[44] In the absence of any of the subs (2) exceptions having application, the grant of a discharge permit in such circumstances would contravene s 107 of the RMA. However, the Council disputed the qualifying exceptions listed in subs (2) provide the only pathway by which compliance with s 107 can be achieved once it is established the discharge is likely to give rise to any significant adverse effects on aquatic life. Reliance was placed on s 107(3) which, for ease of reference, is repeated:

> (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.

[45] The Council argued subs (3) enabled the Commissioner to grant the discharge consent on the basis of ALI's staged nitrogen reductions. It was submitted a plain reading of s 107(3) means the discharge consent could be granted if conditions were imposed to ensure the requirements of subs (1) will be met by the end of the term of the discharge consent. The Council submitted it was implicit from the Commissioner's reasoning that she was relying on subs (3) in the way she approached her final decision regarding s 107. In response, ELI maintained the Council's position was misconceived and subs (3) cannot validate the grant of a resource consent where there is non-compliance with subs (1).

[46] It is unclear whether the Commissioner's reliance on the imposition of conditions requiring staged reductions in nitrogen loads rested on the application of subs (3) when addressing the question of compliance with s 107. ELI argued subs (3) cannot be deployed in that way and that the statutory scheme prohibits the grant of a discharge permit that would otherwise contravene s 15 if it is likely to give rise to the effects described in s 107(1), unless one of the three exemptions specified in subs (2) apply and the grant of the discharge permit is consistent with the purposes of the RMA. ELI submitted subs (3) is limited to empowering the imposition of conditions in a resource consent only after it has been determined it can be granted pursuant to one of the stipulated exemptions.

[47] Support for that view was taken from the wording of s 107(1), which states, "*[e]xcept as provided in subsection (2), a consent authority shall not grant a discharge permit ...* to do something that would otherwise contravene s 15...". It was submitted these introductory words contemplate the only exceptions to the prohibition created by subs (1) are those found in subs (2), which explicitly empower the grant of a discharge permit, that would otherwise contravene s 15.

[48] ELI argued subs (3) is limited to empowering the decisionmaker to impose conditions to mitigate the detrimental effects of discharges permitted by granting a permit in the restricted circumstances allowed by subs (2). It submitted subs (3) provides the means by which the decisionmaker can regulate the permitted activity by requiring works to be undertaken across the term of the permit to address the adverse consequential effects described in subs (1). ELI argued that, by this means, the consenting authority can impose on the consent holder obligations to ensure these detrimental effects are resolved by the expiry of the discharge permit.

[49] ELI also referred to the legislative history of s 107 in support of its position. Section 107(3) as it currently exists was enacted as a result of a 1993 amendment to the RMA that also introduced an additional exception to s 107(2), namely, a discharge associated with necessary maintenance work.[23] It submitted Parliament's decision to introduce subs (3) in its current form, together with a further exception provided in

[23] Resource Management Amendment Act 1993, s 57(3) and (4).

subs (2), is consistent with subs (3) applying to a situation where a permit has been granted as a result of a subs (2) exception to the prohibition contained in subs (1) having application, and is limited to that situation.

[50] ELI also referred to the explanatory note to the relevant amending bill in support of this argument. The relevant part of the explanatory note reads:

> Clause 53 amends s 107 of the principal Act which sets out restrictions on the granting of certain discharge permits.
>
> The first two amendments extend the provision to coastal permits.
>
> The third amendment allows discharge permits to be granted if the discharge is associated with necessary maintenance work.
>
> The fourth amendment repeals subs (3) and substitutes a new subsection. The matters provided for in the old subs (3) are dealt with more fully in the new s 113(2) (see clause 55).
>
> The new subs (3) allows conditions to be imposed allowing the holder of a permit to undertake works in stages.[24]

[51] ELI argued the explanatory note refers to the new subs (3) as being a provision allowing conditions to be imposed on a permit holder who has otherwise been granted a permit in accordance with s 107. This is to be contrasted with the explanatory note's description of the amendment to subs (2), which added a maintenance work exemption (described as "the third amendment") as a clause that "allows discharge permits to be granted ...". It is implicit therefore that had Parliament intended to allow permits to be granted (that did not comply with s 107(1) or fall into the explicit exceptions listed in subs (2)) by the imposition of conditions to permit work to be undertaken in stages to ensure the requirements of subs (1) would be met at the permit's expiry, it would have explicitly referred to the amended subs (3) as being a route by which discharge permits could be granted on such terms.

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[24] Resource Management Amendment Bill 1992 (212-1). The previous s 107(3) provided that where, in accordance with sub (2), a consent authority grants a discharge permit which allows any of the effects described in subs (1), the authority shall include in its decision its reasons for doing so.

Analysis of application of s 107(3)

[52] There is little authority regarding the application of s 107. The Environment Court considered the provision in *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council.*[25] That case involved an application by Fonterra for a consent to discharge condensate from its milk processing plant into a stream. Section 107(1) was engaged. However, the discharge was categorised as falling within the "exceptional circumstances" and "temporary" categories of subs (2) because of Fonterra's commitment to establishing new processes and systems that would be operational within a stipulated period of "1 year or so from the date of the decision".[26]

[53] ELI referred to the Environment Court's description of s 107 as precluding a consent authority from granting a discharge permit which breaches certain environmental standards, unless the proposal falls within the identified exemptions. No reference is made to subs (3). While the case appears to have some similarities with the present, insofar as it involves the imposition of conditions where an ongoing discharge may have significant adverse effects on aquatic life that would otherwise preclude a discharge permit being granted, the issue was dealt with solely on the basis of subs (2). Little assistance can therefore be gleaned from that decision.

[54] It is not necessary for me to come to any concluded view regarding whether the application of subs (3) is limited to discharge permits that would otherwise contravene subs (1) but which fall within an exception provided by subs (2). Subsection (3) is capable of being read consistently with the exceptions to the subs (1) "baseline" but also with subs (1) itself. In regard to the latter application, the cumulative effects of a discharge over the duration of a permit may likely give rise to the prohibited detrimental effects identified in subs (1)(c)–(g) at some point across its term. Subsection (3) provides a consent authority with the ability to grant a discharge permit that will meet the requirements of subs (1) throughout its duration. Conditions can be imposed to ensure that by the expiry of the permit the holder will still be meeting the requirements of subs (1). By the use of conditions the discharge can be assessed as one that is not likely to give rise to the prohibited effects in the receiving

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25 *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council*, above n 20.
26 At [31].

waters, which may not otherwise have been the case in the absence of certain requirements being imposed on the holder of the permit to undertake works "in such stages throughout the term of the permit".

[55] Subsection (3) may have been enacted for the purposes of subs (2), but subs (3) also provides a means by which permits can be granted in respect of discharges that are likely to give rise to prohibited detrimental effects in the receiving waters over the term of the proposed consent unless works are undertaken to ensure the requirements of subs (1) are not breached during the life of the permit. Subsection (3) can be read in a manner that is consistent with the prohibition contained in subs (1) that prevents a discharge permit from being granted if the contaminant or water is likely to give rise to the stated detrimental effects.

Conclusion regarding application of s 107(3)

[56] The prohibition contained in subs (1) was expressly made subject to the exceptions set out in subs (2). If subs (3) was intended to provide an additional exception, it is not clear why it would not have similarly been expressly provided for in subs (1). As already discussed, subs (3) can be read consistently with subss (1) and (2). As I have observed, subs (3) provides a means by which a consent authority can satisfy itself that adverse effects are not likely to arise if a discharge permit is granted on conditions requiring the holder to undertake "such works in such stages throughout the term of the permit", which will ensure that by its end the permit holder can (still) meet the requirements of subs (1). Equally, the imposition of conditions may be the basis upon which a consent authority is willing to grant a permit in the limited circumstances provided by subs (2).

[57] However, it does not follow from that analysis that a permit can be granted by a consent authority where none of the subs (2) exceptions apply if from the outset the consented activity would breach subs (1). Such an outcome is not reconcilable with s 107 when that provision is read in context and as a whole. The grant of a discharge permit is premised on compliance with subs (1) unless the consent authority can be satisfied the statutory exceptions set out in subs (2) apply. I do not consider Parliament intended that subs (1) could be avoided by a consent authority granting a discharge

permit on terms that were likely to contribute to the continuation of the prohibited effects (if only in the interim or short to medium term) in the anticipation that by the permit's end there would be compliance with the statutory requirements, at least not in the absence of the explicit exceptions provided by subs (2) having application.

Irrelevant considerations

[58] The challenge to the Commissioner's assessment of s 107 was also framed as an alleged error of law by taking into account irrelevant matters, namely conditions requiring the monitoring and reduction of nitrogen loads from 1 January 2025. It was submitted those considerations were irrelevant to whether the continued discharge of a contaminant into or onto land or water was likely to give rise to significant adverse effects on aquatic life after the consent was granted.

[59] In light of my finding that s 107 was misapplied, it is not strictly necessary to address this related alternate argument. However, based on the Commissioner's own factual findings, in the absence of any of the exceptions listed in s 107(2) having application and the continuation of the cumulative significant adverse effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and hāpua after the purported grant of the discharge consent, conditions requiring a reduction in the nitrogen load that was to be achieved years after the permit's grant appears to be an irrelevant consideration when assessing whether s 107(1) prohibited the issue of a resource consent.

[60] ALI argued that, to the extent the discharge consent conditions required staged nitrogen reductions and continuous improvements to form part of the consented activity, they cannot have been an irrelevant consideration. I accept that would be so if the terms of the discharge consent prevented s 107(1) from being breached. However, that submission overlooks that the discharge consent from its outset permits the continuation of an activity that is giving rise to prohibited consequences and the need to assess the effects of the discharge permit, for the purpose of s 107(1), from its commencement, rather than on the basis of what could be achieved in the future over the duration of the discharge consent.

[61] ELI also submitted the Commissioner placed apparent reliance in her decision on a stated desire to avoid an outcome that abruptly required existing farming activities to cease. It argued it was not open to the Commissioner to take a normative view of whether the activity ought be allowed to continue or not given the requirements of s 107. While the Commissioner did aver to the potential effect on existing farming land use, it is not apparent this observation was factored into her consideration of s 107 which, as previously discussed, placed reliance on ALI's proposal to make staged nitrogen reductions and a program of continuous improvement.

Failure to consider relevant matters

[62] ELI was critical of the Commissioner's decision as being largely devoid of analysis of the impact on aquatic life. It was submitted the decision focused on the state of the receiving environment generally instead of specifically considering adverse effects on relevant aquatic life. This critique was somewhat surprising given the challenge previously traversed rested on the Commissioner's findings there were significant adverse effects on aquatic life from agricultural nutrient discharges in the receiving environment. Such a finding is a prerequisite to the prohibition set out in s 107(1).

[63] This argument appears to have been made in justification of further evidence about the range of aquatic life in the receiving environment and as an alternative challenge to the Commissioner's finding that s 107 did not prevent the grant of the discharge consent. ELI argued that in the absence of a focused consideration of the effects on aquatic life and specific evidence regarding such impacts, the Commissioner could not reach such a conclusion. It submitted the evidence sought to be introduced demonstrated the significant adverse effects on aquatic life, even if nutrient discharges are reduced, as required by the discharge consent conditions, and that this type of evidence should have been before the Commissioner and considered by her but was not.

[64] Objection was taken to the admissibility of the expert evidence sought to be tendered for the purposes of the judicial review proceeding. The Council referred to the Court of Appeal's decision in *Roussel Uclaf Australia Pty Ltd v Pharmaceutical*

Management Agency Ltd, that held it was not appropriate to permit affidavits to be read which contain material that had not been before the decisionmaker and which had largely been brought into existence after the decision had been made for the purpose of casting doubt on its merits.[27] While the Council acknowledged some expert evidence can legitimately be received for the purposes of judicial review proceedings, it submitted such material should be confined to matters of fact relating to the decision-making process and its background, and not opinion going to the substance of the proceeding. The Council argued that significant parts of the evidence sought to be adduced strayed beyond that which is permissible in the context of judicial review proceedings and that the Court should exercise caution in respect to the weight sought to be placed on certain opinions expressed by the experts in their respective affidavits.

[65] Whether this additional evidence should be received turns on whether it provides substantial assistance to the Court in addressing the grounds of review upon which the applicant relies, which in the present case includes issues of illegality and procedural error.[28] The Council took particular issue with the admission of Dr Michael Joy's affidavits. He is a scientist with expertise in the bioassessment of water and habitat quality in flowing waters and opines there will be adverse effects on aquatic life in the Hakatere hāpua, even with staged reductions. The Council emphasised that Dr Joy's opinion was not before the Commissioner, and that his evidence represents a "post facto analysis" which goes to the merits of the Commissioner's decision and is therefore impermissible in the context of an application for judicial review.

[66] I accept, to the extent Dr Joy's additional evidence supplements that which was before the Commissioner and bears on the substance of her decision, it is not material to which I should have regard. It is not the function of the Court on an application for review to assess the merits of the resource consent application or, indeed, the decision relating to its notification.[29] However, insofar as the evidence is tendered in an

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27 *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 at 658 per Richardson P.

28 *CCSU v Minister of Civil Service* [1985] AC 374 (HL).

29 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442 at [40] [*Coro Mainstreet HC decision*]; C*oro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73 at [50] [*Coro Mainstreet CA decision*]; *Sutton v Canterbury Regional Council* [2015] NZHC 313, [2015] NZRMA 93 at [34]; and *Colley v Auckland Council* [2021] NZHC 2365 at [91].

endeavour to demonstrate an alleged failure by the decisionmaker to take into account relevant matters, and in particular, as alleged here, the adverse effects on aquatic life and the affected receiving environment, the evidence can be legitimately received. It was submitted as being the type of evidence that should have been before the Commissioner and considered by her, but was not.

[67] I do not consider this criticism is sustainable given the material that was available to the Commissioner led to her conclusion that past and current land use practices within ALI's Discharge Area had contributed to significant adverse cumulative effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and hāpua.

[68] The Assessment of Environmental Effects (AEE) that accompanied the discharge consent application referred to the receiving environment as including aquatic life. It was recorded the Hakatere/Ashburton River supported diverse native fish populations, including species that were "at risk – declining".[30] The river's catchment was also described as supporting a regionally significant sports fishery. After noting that many of the native species found in the river catchment must undertake a period of migration to the sea to complete their lifecycle, it was noted the nature of the lower reaches of the river offer fairly poor habitat for large fish because of various physical characteristics and there was a need to maintain sufficient flow for upstream fish passage and river mouth openings to allow for the described migration of fish. Notably, the consolidated AEE identified a primary concern from land use as being the degradation of instream habitat that included sedimentation, increased algal biomass, reducing habitat and food resources for macroinvertebrates and fish.

[69] For the purposes of the s 42A report, a senior scientist specialising in water quality and ecology for the Council provided an audit of the application that addressed the existing surface water environment and effects on surface water quality and ecology. After noting the applicant's AEE accurately described the relevant waterways (including the Hakatere/Ashburton River), their physical characteristics and the

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[30] Longfin eel/tuna (Anguila dieffenbachia), torrentfish (Cheimarrichthys fosteri), inanga (Galaxias maculatus), Canterbury galaxias (galaxias vulgaris), and bluegill bully (Gobiomorphus hubbsi); and what was described as "threatened – nationally critical" – Canterbury mudfish (Neochanna burrowsius).

ecosystem values they support, including a habitat for invertebrate, fish and birds, the report writer referred to the Hakatere hāpua. It was described as being heavily impacted by the amount of flow in the Hakatere/Ashburton River, and that it supports a breeding, rearing and feeding habitat for numerous native bird and fish populations, including those classified as threatened, in addition to sports fisheries, and therefore contains high recreational as well as ecological and cultural values.

[70] The s 42A report then identified the relationship between nitrogen concentrations and effects on aquatic species:

> The Hakatere/Ashburton River is extensively monitored across the plains. This monitoring shows that nitrate-nitrogen concentrations increase from the top of the plains (where concentrations in the North Branch are generally below 0.1 mg/L) towards State Highway 1 and the coast (median concentrations of approx. 1.0 mg/L). There is a strong likelihood that concentrations of inorganic nitrogen (e.g., nitrate and nitrite) have increased over the last 5-15 years. Despite increases in nitrogen both spatially and temporally in the Hakatere/Ashburton River on the plains, toxicity impacts to fauna are likely to be minimal. Nutrients are more likely to be exacerbating the growth of periphyton in the river and the downstream receiving environment of the hāpua. Nuisance growths of periphyton can smother bed habitat and are not uncommon in the lower river during the summer months. These nuisance growths may therefore be stressing aquatic invertebrate and fish communities including eels (longfin and shortfin species), torrentfish, bullies (common, bluegill, upland and giant), galaxiids (e.g., inanga) salmonids (trout and salmon) and others. Eutrophication (i.e. increased nutrient status and therefore increased plant and algal growth) of the hāpua can also decrease the oxygen content of water, increase sedimentation, and reduce water clarity. The Hakatere Hāpua is currently in a vulnerable state with total nitrogen concentrations below the NPSFM national bottom line and has very likely increased over the last 10 years.

[71] After ALI modified its application and included a proposal for staged reductions of nitrogen leaching loads, a supplementary s 42A report was prepared. In relation to the effect of the proposed reductions, that report opined:

> Given that the monitoring and understanding of spring-fed streams in and down gradient of the [ALI] command area is poor, it is difficult to quantify or even qualify what benefit these proposed reductions will have on improving the health of spring-fed ecosystems. In regard to larger receiving environments such as the Hakatere/Ashburton River and hāpua, I can say that any proposed reductions will reduce the risk of further decline to the health of these aquatic ecosystems.

And that:

> ... The proposal to further reduce nutrient losses by 20 per cent over the 10 year duration of the consent will help reduce any cumulative impact that their land use is having on the health of the catchment.

[72] In summarising the evidence provided by the senior scientist's audit of the application that addressed the existing surface water receiving environment and effects on surface water quality and ecology, the Commissioner recorded in her decision:[31]

> ... He noted the Hakatere/Ashburton River and hāpua are significantly impacted by land use and water flow stressors, and that [ALI] contributes to groundwater source nutrients from the plains. He concluded that if increasing trends of nitrate-nitrogen concentrations in groundwater over time continue or concentrations remain high, then the current effects of nutrification in the Hakatere hāpua may persist or worsen. He noted that nitrate-nitrogen toxicity will likely be an issue for sensitive aquatic fauna in the spring-fed streams.
>
> ...
>
> Mr Arthur's technical review noted that the key adverse effects on the surface water receiving environment related to increase periphyton growth, which can smother aquatic habitat stressing aquatic invertebrates and fish communities. He highlighted the vulnerable state of the Hakatere hāpua to worsening nutrification and declines in ecological health, due to total nitrogen concentrations being below NPSFM national bottom lines. He noted the paucity of water quality in stream habitat information for the spring-fed streams given the likelihood these streams support significant ecosystems such as invertebrates and native and sports fish. Without this information, he noted that the impact of the [ALI] scheme on the receiving environment cannot be measured.

[73] The Commissioner went on to consider the effects of the land use activity and the proposed staged reductions on nutrient concentrations and how that may impact on arresting further degradation of freshwater and damage to waterways and ecosystems. That analysis is in issue, but I do not consider it was undertaken without proper regard to the adverse effects on aquatic life, including that supported by the habitats provided by the Hakatere/Ashburton River and hāpua. Finally, I consider the obvious correlation between the effects of nutrients and their adverse effect on aquatic life formed part of the Commissioner's analysis, particularly when assessing the potential effect of staged reductions of nutrients in the water and the consequential effects on aquatic life, and was properly based on the evidence before her.

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[31] Discharge Consent decision, above n 4, at [58] and [92].

[74] As already observed, there is some inconsistency in ELI's reliance on the Commissioner having found there to currently be significant adverse effects on aquatic life which would breach the s 107 prohibition and its secondary submission that the Commissioner failed to sufficiently focus on an analysis of the effects on relevant aquatic life. For the purposes of making this submission, ELI appears to differentiate between the decisionmaker's finding that significant adverse effects on aquatic life already exist in the receiving environment, and the Commissioner's apparent conclusion that conditions imposed as part of the discharge consent meant continued discharges were not likely to give rise to significant adverse effects on that aquatic life over the period of the consent. To that extent, I accept there is a dichotomy between the Commissioner having found that current land use practices in the scheme's Discharge Area have contributed to significant cumulative adverse effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and hāpua, and the proposed conditions that impose future required reductions as a means to achieve compliance with s 107 over the life of the discharge consent but require no immediate changes.

[75] I have found, as a matter of law, that such an approach was not available. It follows that this part of ELIs case becomes redundant. In any event, I am satisfied the Commissioner adequately considered how aquatic life in the receiving environment, including in particular the Hakatere/Ashburton River and hāpua would be affected. Because of my earlier finding that the decisionmaker erred in her approach to the application of s 107, it is not necessary for this ground to be canvassed further.

Conclusion

[76] The Commissioner found past and current land use practices in the scheme Discharge Area have contributed to "*significant adverse cumulative effects on aquatic life* in the lower reaches of the Hakatere/Ashburton River and hāpua".[32] That evidential conclusion regarding the effects of the existing discharge permit cannot be reconciled with compliance with s 107(1). The Commissioner herself recognised that a continuation of this state of affairs would prevent the grant of a discharge permit because of the s 107 prohibition.

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[32] Discharge Consent decision, above n 4, at [154].

[77] The existing cumulative significant adverse effects on aquatic life are ongoing. The Commissioner accepted ALI was a significant contributor of nitrogen loads in the catchment which has resulted in the widespread degradation of the groundwater receiving environment, which is closely linked to the degradation of downstream surface water quality and the decline of ecological values in the lower Hakatere/Ashburton River and its hāpua. This, in turn, the Commissioner accepted had contributed to the significant adverse cumulative effects on aquatic life at those locations.

[78] Notwithstanding a degree of uncertainty, the discharge consent was granted on the basis the proposed conditions that require staged reductions in nitrogen leaching loads would over time remedy non-compliance with s 107(1). The unavoidable corollary of such an approach is that, despite the need for reductions in nitrogen losses, the discharge consent permits the continuation of discharges that would inevitably, in the terms of s 107(1), likely give rise to the continuation of significant adverse effects on aquatic life. Such discharges would contribute to those continuing adverse effects. This is anticipated as being the case at least until 1 January 2025, by which time a 10 per cent reduction in the nitrogen leaching load is required to have been achieved. Even then, as recognised by the Commissioner, there is no certainty any such reduction will have improved the receiving environment.

[79] On the Commissioner's own findings, it appears indisputable there will likely be continuing significant adverse effects on aquatic life for the time being. I do not consider the grant of a discharge consent on the basis of the conditions imposed, albeit in anticipation that over time there will be a reduction in nitrogen leaching loads and some mitigation of the adverse effects that are likely to continue from the current activity, avoids breaching the s 107(1) prohibition. It follows from this finding that the Commissioner's decision to grant the discharge consent on the basis of the imposition of the proposed conditions requiring reductions in the nitrogen leaching load at five year periods over the duration of the permit was based on a material error of law.

Failure to consider relevant plans and policies

[80] In her discharge consent decision, the Commissioner referred to having considered all of the objectives and policies — what was referred to as the relevant provisions of the Resource Management (National Standards for Freshwater) Regulations 2020 (NESF), National Policy Statement for Freshwater Management 2020 (NPSFM),[33] the National Environmental Standards for Sources of Human Drinking Water (NZSDW),[34] the Canterbury Regional Policy Statement (RPS),[35] and the Land and Water Regional Plan.[36]

[81] ELI alleges the Commissioner, in making her decision to grant the discharge consent, failed to consider other relevant provisions of plans and policies that deal with the coastal environment. In particular, the Commissioner failed to have regard to the NZCPS; the RCEP; and policy 4.81 of the Land and Water Regional Plan. ELI argued the discharge consent includes and affects elements of the coastal environment and so relevant provisions of these policy documents were mandatory relevant considerations that needed to be taken into account when the discharge consent decision was made.

[82] Section 104 of the RMA prescribes mandatory considerations to which the consent authority must have regard. It relevantly provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

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33 Ministry for the Environment *National Policy Statement for Freshwater Management* (2020) [NPSFM].

34 Ministry for the Environment *National Environmental Standards for Sources of Human Drinking Water* (2008) [NZSDW].

35 Canterbury Regional Council *Canterbury Regional Policy Statement* (2012) [RPS].

36 Land and Water Regional Plan, above n 2

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

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

(vi) a plan or proposed plan; and

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

...

[83] When considering an application for resource consent, a consent authority must have regard to *relevant* provisions of the NZCPS and regional policy statements and plans.[37] The NZCPS and "lower order planning documents that give effect to it" were described as being highly relevant to resource consent applications, particularly so where a proposed activity conflicts with an NZCPS policy, in which case recourse to pt 2 of the RMA that sets out the general purposes and principles of that legislation will likely be unnecessary.[38] The approach to be taken by a consent authority was summarised by the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council*:[39]

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

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37 *Port Otago Ltd v Environmental Defence Society Inc* [2021] NZCA 638, [2022] NZRMA 165, at [33].

38 At [33].

39 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 (CA), citing *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

> pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal.
>
> [72] On the other hand, if a proposal were affected by different policies so that it was unclear from the NZCPS itself as to whether consent should be granted or refused, the consent authority would be in the position where it had to exercise a judgment. It would need to have regard to the regional coastal plan, but in these circumstances, we do not see any reason why the consent authority should not consider pt 2 for such assistance as it might provide. As we see it, *King Salmon* would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the NZCPS, and second the application under consideration is for a resource consent, not a plan change.
>
> [73] We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans. In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".[40]

[84] ELI maintained the discharge consent application engaged the NZCPS and the relevant regional coastal plan, and that the consent authority was required to have regard to its provisions, in accordance with s 104(1)(b)(iv) and (v) of the RMA. It submitted the Commissioner failed to carry out this mandatory assessment. The Council and ALI disputed the provisions of the NZCPS or the RCEP were engaged or were otherwise required to be considered as part of the Commissioner's assessment of the application for the discharge consent.

[85] ELI alleged that, because parts of the Discharge Area form part of the coastal environment and the discharge consent application gives rise to potential effects on the coastal environment, the Commissioner was obliged to have regard to the NZCPS, the RCEP, and policy 4.81 of the Land and Water Regional Plan. The Council and ALI deny the application for the discharge consent gave rise to any discharge to the coastal environment, or sought authority for such an activity, and that any indirect

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[40] *Dye v Auckland Regional Council* [2002] 1 NZLR 337, [2001] NZRMA 513, at [25].

effects to the coastal environment were adequately addressed by way of the freshwater policy documents to which the Commissioner had regard.

Is the Discharge Area part of the coastal environment?

[86] ELI points to the eastern boundary of the Discharge Area that runs along the coastline and the fact there are properties situated within the Discharge Area that abut the coast. It emphasised that properties (or land) may be added to the schedule of properties from which discharges onto or into land where contaminants may enter water are authorised by the discharge consent. It emphasised that, while presently there are no shareholders in the irrigation scheme with land proximate to the coast, under the terms of the discharge consent a property situated on the coast could potentially be added to the scheme which is contiguous with the coastline and forms part of the coastal environment.

[87] What constitutes the coastal environment has not been statutorily defined. However, the RMA sets out the limits of what is referred to as the "coastal marine area":[41]

> **coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water—
> (a) of which the seaward boundary is the outer limits of the territorial sea:
> (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
> (i) 1 kilometre upstream from the mouth of the river; or
> (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

[88] The guidance provided in the NZCPS, as to the extent and characteristics of the coastal environment, reflects the contextual approach previously adopted in the case law to that term. What will constitute the coastal environment may vary from one place to another.[42] Policy 1 of the NZCPS provides:

> **Extent and characteristics of the coastal environment**
>
> (1) Recognise that the extent and characteristics of the coastal environment vary from region to region and locality to locality; and the issues that arise may have different effects in different localities.

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41 Resource Management Act, s 2.

42 For example, *Northland Regional Planning Authority v Whangarei County* (1977) 6 NZTPA 216 (TCPAB).

(2) Recognise that the coastal environment includes:

(a) the coastal marine area;

(b) islands within the coastal marine area;

(c) areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, salt marshes, coastal wetlands, and the margins of these;

(d) areas at risk from coastal hazards;

(e) coastal vegetation and the habitat of indigenous coastal species including migratory birds;

(f) elements and features that contribute to the natural character, landscape, visual qualities or amenity values;

(g) items of cultural and historic heritage in the coastal marine area or on the coast;

(h) interrelated coastal marine and terrestrial systems, including the intertidal zone; and

(i) physical resources and built facilities, including infrastructure, that have modified the coastal environment.

[89] The parameters of the coastal environment are described in the RCEP in similar terms, being:[43]

> an environment in which the coast usually is a significant part or element. The coastal environment will vary from place to place depending upon the extent to which it affects or is (directly) affected by coastal processes and the management issue concerned. It includes three distinct but interrelated parts: the Coastal Marine Area; the active coastal zone; and the land backdrop.
>
> The coastal environment includes: at least the Coastal Marine Area, the water, plants, animals, and the atmosphere above it; and all tidal waters and the foreshore whether above or below mean high water springs; dunes; beaches; areas of coastal vegetation and coastal associated fauna; areas subject to coastal erosion or flooding; salt marshes; sea cliffs; coastal wetlands, including estuaries; and coastal landscapes.

[90] ALI disputed that any of its shareholder farms comprise part of the coastal environment. It submitted the discharge consent only provides for discharges onto or into land of farms listed in the schedule to the consent. The nearest property serviced by the irrigation scheme is approximately 17 km inland from the coastal foreshore.

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[43] RCEP, above n 16, Appendix 1 Definition of Terms.

ALI argued that, because of that distance, planning instruments dealing with the coastal environment are simply not relevant to the discharge consent decision.

[91] ELI, on the other hand, distinguished between the site of current ALI farms and the Discharge Area itself and submitted the discharge consent applies to discharges anywhere in the Discharge Area, including in respect of any properties brought into the consent in accordance with its terms. While the present farms listed in the schedule to the consent are many kilometres inland from the coast and therefore not subject to coastal influences of the kind described in NZCPS olicy 1, it was argued the discharge consent applies not only to current ALI farms but potentially to the whole Discharge Area.

[92] It followed, in ELI's submission, that when considering the relevance of the coastal policy instruments it is the parameters of the Discharge Area that must be considered, not the specific farms that were presently part of the scheme at the time the consent was granted. It re-emphasised the discharge consent permits any property within the Discharge Area to become part of the scheme without any further regulatory action or consideration, and therefore provides for the possibility of direct discharges on or into the coastal environment should properties adjacent to the coast join the scheme and thereby have their discharges consented by the discharge consent.

[93] In reply, ALI argued the infrastructure constraints to which the irrigation scheme is subject and the requirements of conditions imposed by the discharge consent means there is very limited opportunity for expansion beyond the location of existing irrigation. In particular, it noted there is no scope to exceed the NDA which sets the combined or aggregated NDA for all ALI properties and which must reduce over the term of the discharge consent. When combined with the audited self-management programme imposed by the discharge consent, ALI argued it was not realistic for any new property to be added to its discharge consent regime within the Discharge Area anywhere near the coastal environment. For its part, ELI did not accept the requirements of the discharge consent imposed sufficient oversight or monitoring to prevent the possibility of properties being added to the irrigation scheme that could directly discharge on or into the coastal environment.

[94] For the reasons to be canvassed, it is not necessary to conclusively resolve whether the irrigation scheme encompasses the coastal environment. Presently, there are no farms that form part of the coastal environment or which are sufficiently proximate to it to be physically included in such a description. However, the short point is that the discharge consent could not authorise a discharge into the coastal environment. Notwithstanding the ambit of the Discharge Area, any farmland added to properties listed in the schedule to the discharge consent that might border the coastal boundary and, as a result of its location, form part of the coastal environment, could not have its nutrient loss or surface runoff authorised by the discharge consent. As was acknowledged by the Council, should a farm adjacent to the coast seek to join the irrigation scheme and discharge any contaminant or water onto or into land which may result in the contaminant entering water in a coastal marine area, it would require a coastal permit in accordance with the RCEP.[44]

[95] The term *discharge* "includes emit, deposit, and allow to escape".[45] The point at which a discharge occurs is that where the discharger loses effective control of the discharge.[46] The Land and Water Regional Plan defines nutrient discharges as "nutrient loss from the property by surface runoff or by leaching below the root zone".[47] It follows that, in the case of the discharge of nutrients onto or into land as a result of the irrigation of farming land, a discharge will occur where such nutrients leach below the root zone and enter groundwater and where nutrients run off the land and enter nearby surface water.

[96] ALI applied for a discharge permit, which is defined as "a consent to do something ... that would otherwise contravene s 15" of the RMA,[48] namely the discharge of any "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".[49] ALI did not apply for, nor does the

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44 Resource Management Act, s 87(c).
45 Section 2.
46 *Re Manawatu-Wanganui Regional Council* [2013] NZEnvC 213 at [33]; *Manawatu-Wanganui Regional Council v Downer EDI Works Ltd* [2010] NZRMA 360, [2010] DCR 657 (DC) at [35]; *Southland Regional Council v Southern Delight Ice Cream* (1995) 2 ELRNZ 34.
47 Land and Water Regional Plan, above n 2, s 2.9.
48 Resource Management Act, s 87(e).
49 Section 15(1)(b).

discharge consent authorise, a discharge to a coastal marine area, at least not where the point of that discharge occurs in or to such an area. ALI applied for a discharge permit. It did not apply for a coastal permit.

[97] It is well-established that a consent authority cannot grant a resource consent for an activity that has not been applied for.[50] I accept the Council's submission that, while the boundary of the Discharge Area extends to the coast, the discharge consent application did not seek authority to discharge onto or into a coastal marine area and the discharge consent cannot authorise such a discharge. ALI did not apply for resource consent under the RCEP to discharge contaminants to a coastal marine area. That would have required a coastal permit pursuant to s 87(c) of the RMA. ALI's application was for the continuation of an existing consent, in respect of which none of its shareholder farms had a discharge point that could be construed as being in or to the coastal environment, which would otherwise be regulated by the RCEP.[51]

[98] Both the Council and ALI accepted that, should a farm adjacent to the coast seek to join the irrigation scheme and discharge into the coastal environment, a separate resource consent would be required under the RCEP. As a matter of law, the discharge consent cannot authorise a discharge in or to the coastal marine area. The coastal policy instruments were not therefore relevant to the Commissioner's assessment of the consent application, at least not because of the ambit of the Discharge Area that extended to a boundary with the coast and the potential for new farming properties to be added to the discharge consent in a location directly abutting to the coastal environment. However, that conclusion does not address the relevance of those policies and plans as a result of the flow on or consequential effects on the coastal environment of upstream discharges from existing ALI farms.

Consequential downstream effects

[99] There is no dispute the Hakatere hāpua falls within the description of the coastal environment described in policy 1 of the NZCPS and is part of the coastal area.

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50 *Darroch v Whangarei District Council* AO18/93 (PT) at 27; *Mills v Queenstown Lakes District Council* [2005] NZRMA 227 (NZEnvC) at [9]; and *Re Waiheke Marinas Ltd* [2015] NZEnvC 66 at [8]–[13].

51 See Land and Water Regional Plan, above n 2, s 2.8.

As noted earlier, the Commissioner accepted that evidence showed past and current land use practices in the Discharge Area have contributed to significant adverse cumulative effects on aquatic life in the lower reaches of the Hakatere/Ashburton River, including the hāpua, which was acknowledged as currently being in a vulnerable ecological state. The question, therefore, is whether the natural processes of the effects of leaching and inflows into the waterway down to the coastal hāpua required the coastal policy instruments to be had regard to by the consent authority as part of the applicable planning framework.

[100] While the discharge consent is limited to the direct discharge onto or into land where contaminants may enter freshwater, it is apparent the indirect effects of such a discharge can extend to the coastal environment by groundwater discharges either entering surface water bodies or remaining underground and flowing towards the coast; alternatively, as a result of surface water discharges that enter freshwater bodies such as the Hakatere/Ashburton River that flow to the coast. The Commissioner was concerned about the ongoing effects of these processes on aquatic life on the lower reaches of the Hakatere/Ashburton River and hāpua, albeit indirectly from discharges into and onto the land as a result of the irrigation of shareholder farms.

The NZCPS

[101] ELI argued the Commissioner had failed to have regard to relevant provisions of various coastal policy and planning instruments, and in particular the NZCPS. The NZCPS is a national policy statement which, in furtherance of the purpose of the RMA, sets out policies relating to the coastal environment. ELI submitted that, because the discharge consent affects elements of the coastal environment, relevant provisions of the NZCPS were mandatory relevant considerations required to be taken into account by the Commissioner when making the discharge consent decision.

[102] Provisions of the NZCPS that were identified as relevant to the Commissioner's assessment of the application which ought to have been taken into account and applied included:

Objective 1

To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;

- protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and

- maintaining coastal water quality and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;

- ...

- encouraging restoration of the coastal environment.

[103] ELI placed some emphasis on policy 3, which provides:

Policy 3 Precautionary approach

(1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.

(2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:

(a) avoidable social and economic loss and harm to communities does not occur;

(b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and

...

[104] ELI submitted the Commissioner had concluded there was a high level of uncertainty regarding the adverse effects of the proposed activity on the receiving environment and this ought to have triggered the adoption of a precautionary approach. It argued that, at a minimum, the Commissioner was required to consider whether a precautionary approach was appropriate in view of this uncertainty, having regard to the requirements of the NZCPS.

[105] Reliance was also placed on "***Policy 4 Integration***", which provides for "the integrated management of natural and physical resources in the coastal environment" and activities that affect that environment. It was submitted this relevantly requires, in terms of the policy:

> (a) co-ordinated management or control of activities within the coastal environment, and which could cross administrative boundaries, particularly:
>
> (i) the local authority boundary between the coastal marine area and land;
>
> (ii) local authority boundaries within the coastal environment, both within the coastal marine area and on land; and
>
> ...
>
> (c) particular consideration of situations where:
>
> ...
>
> (iv) land use activities affect, or are likely to affect, water quality in the coastal environment and marine ecosystems through increasing sedimentation; or
>
> (v) significant adverse cumulative effects are occurring, or can be anticipated.

[106] ELI submitted policy 4 provides that the coastal environment, including the coastal marine area, must be the subject of proper consideration where activities occur outside those immediate areas but which have effects on the coastal environment. It argued this was of particular importance in the present case, in light of policy 4(c)(v), when regard is had to the Commissioner's finding that past and current land use practices in the Discharge Area have contributed to significant adverse cumulative effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and the hāpua.

[107] ELI submitted policy 11 of the NZCPS was also engaged. This provides as follows:

> **Policy 11 Indigenous biological diversity (biodiversity)**
>
> To protect indigenous biological diversity in the coastal environment:
>
> (a) avoid adverse effects of activities on:
>
> (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
>
> (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
>
> (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;
>
> (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
>
> (v) areas containing nationally significant examples of indigenous community types; and
>
> (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:
>
> (i) areas of predominantly indigenous vegetation in the coastal environment;
>
> (ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;
>
> (iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
>
> (iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

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

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

(footnotes omitted)

[108] It was argued policy 11 applied because of evidence that the Hakatere hāpua is home to indigenous taxa that are listed as threatened or at risk under the New Zealand Threat Classification system; and taxa that are listed by the International Union for Conservation of Nature and Natural Resources as vulnerable, threatened, or endangered. It was submitted policy 11(a) uses mandatory or directive language requiring adverse effects on such threatened species must be *avoided*, thereby imposing a stricter threshold than that set by s 107 of the RMA, which prohibits the granting of a discharge permit that is likely to give rise to any significant adverse effects on aquatic life.

[109] It was noted the Supreme Court, in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*), held that "avoid" policies in the NZCPS provide "something in the nature of a bottom line".[52] The term "avoid" as used in s 5(2)(c) of the RMA — the purpose provision — and in various provisions of the NZCPS was described in that case as having its ordinary meaning of "not allow" or "prevent the occurrence of".[53] It was argued the Commissioner's decision, that made no mention of the NZCPS, had the effect of substituting the mandatory bottom line "avoid" language of the NZCPS with a less restrictive "avoid, remedy or mitigate" approach which the Court of Appeal has recently determined is not permissible. [54]

[110] In *Port Otago Ltd v Environmental Defence Society Inc*, the Court of Appeal addressed the question of whether a proposed regional policy statement had given effect to a requirement in the NZCPS that adverse effects in areas of outstanding natural character were to be "avoided" by providing that such effects be "avoided, remedied or mitigated". The Court held this alternative wording failed to give effect

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52 *King Salmon*, above n 39, at [132].
53 At [96].
54 *Port Otago Ltd v Environmental Defence Society Inc*, above n 37, at [79].

to the environmental bottom lines set by the NZCPS avoidance policies in the manner required by the Supreme Court's decision in *King Salmon*. It was held that a bottom line requiring adverse effects to be "avoided" could not be substituted with "avoid, remedy or mitigate", as they are "altogether distinct concepts".[55] The latter formulation was described as fundamentally diluting the former.

[111] ELI also referred to policy 13 of the NZCPS which provides:

> **Policy 13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; ...
>
> (2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:
>
> (a) natural elements, processes and patterns;
>
> (b) biophysical, ecological, geological and geomorphological aspects;
>
> (c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;
>
> ...

[112] ELI noted the Ashburton River/Hakatere mouth, which includes the hāpua, is identified in the RCEP as being an "Area of Significant Natural Value" and an "Area of High Natural, Physical, Heritage or Cultural Value".[56] It was submitted these

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55 *Port Otago Ltd v Environmental Defence Society Inc*, above n 37, at [19].

56 RCEP, above n 16, sch 1, Listing of Areas of Significant Natural Value; Environment Canterbury Regional Council website, Regional Coastal Environment Plan for the Canterbury Region, Volume 2 — Planning Maps, https://www.ecan.govt.nz/your-regional/plans-strategies-and-bylaws/regional-coastal-environment-plan-for-the-Canterbury-region/>>map7.25 which shows the area of significant natural value as including the hāpua and as extending into the ocean; and sch 2, Identified Areas of High Natural Physical, Heritage or Cultural Value.

descriptors recognise the outstanding natural character of the area and that it was therefore necessary for the Commissioner to have had regard to the directive "avoid" policies concerning adverse effects on these important environments laid down by policy 13 of the NZCPS.

[113] EDS further argued, in light of the Commissioner's acceptance that receiving waters had become so degraded as to cause significant adverse cumulative effects on aquatic life in the lower reaches of the Hakatere/Ashburton River, including the hāpua, that in accordance with policy 21 of the NZCPS, priority was required to be given to restoring water quality. That policy provides:

> **Policy 21 Enhancement of water quality**
>
> Where the quality of water in the coastal environment has deteriorated so that it is having a significant adverse effect on ecosystems, natural habitats, ..., give priority to improving that quality by:
>
> ...
>
> (c) where practicable, restoring water quality to at least a state that can support such activities and ecosystems and natural habitats;
>
> ...

[114] A further policy identified by ELI as relevant, but which the Commissioner had failed to consider, was policy 23. This policy concerns the discharge of contaminants. It provides:

> **Policy 23 Discharge of contaminants**
>
> (1) In managing discharges to water in the coastal environment, have particular regard to:
>
> (a) the sensitivity of the receiving environment;
>
> (b) the nature of the contaminants to be discharged, the particular concentration of contaminants needed to achieve the required water quality in the receiving environment, and the risks if that concentration of contaminants is exceeded; and
>
> (c) the capacity of the receiving environment to assimilate the contaminants; and

(d) avoid significant adverse effects on ecosystems and habitats after reasonable mixing;

(e) use the smallest mixing zone necessary to achieve the required water quality in the receiving environment; and

(f) minimise adverse effects on the life-supporting capacity of water within a mixing zone.

...

The RCEP

[115] The RCEP sets out objectives, policies and methods for the coastal environment, which is described as including the coastal marine area. The RCEP's purpose is described in the document as promoting "the sustainable management of the natural and physical resources of the Coastal Marine Area and the coastal environment and to promote the integrated management of that environment".[57]

[116] The RCEP was prepared by the Council in accordance with its statutory duty to prepare a regional coastal plan for the coastal marine area.[58] However, the RCEP is designed to extend to the broader "coastal environment" and to promote the integrated management of the coastal marine area and any related part of the coastal environment. As articulated in the RCEP itself, there are a number of "concerns which connect the landward aspect of the coastal environment with the Coastal Marine Area, which require a measure of integrated management".[59] These were considered crucial to the purpose of the RMA in promoting the sustainable management of natural and physical resources.[60] Two relevant concerns identified were:

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57 RCEP, above n 16, at 1.2.

58 Resource Management Act, s 2; **coastal marine area** means the foreshore, seabed, and coastal water, and the airspace above the water: —
(a) of which the seaward boundary is the outer limits of the territorial sea;
(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of —
(i) 1 kilometre upstream from the mouth of the river; or
(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.

59 RCEP, above n 16, at 1.3.

60 At 1.3.

(a) areas of high natural, physical or cultural value where such areas are within or landward of the coastal marine area; and

(b) coastal water quality.

[117] The Hakatere/Ashburton River mouth, which incorporates the hāpua, is listed in the RCEP as an "Area of Significant Natural Value"[61] and as an "Area of High Natural, Physical, Heritage or Cultural Value".[62]

[118] ELI identified other provisions of the RCEP which it submitted were relevant to the Commissioner's decision. These included objective 7.1 and policy 7.10 that are concerned with coastal water quality:

> **Objective 7.1**
> **Enable present and future generations to gain cultural, social, recreational, economic, health and other benefits from the quality of the water in the Coastal Marine Area, while:**
>
> **a. maintaining the overall existing high natural water quality of coastal waters;.**
>
> **b. safeguarding the life-supporting capacity of the water, including its associated: aquatic ecosystems, significant habitats of indigenous fauna and areas of significant indigenous vegetation;**
>
> **...**
>
> **Policy 7.10**
> **Promote measures that avoid, remedy or mitigate the adverse effects of point and non-point source discharges of contaminants outside the Coastal Marine Area where the discharge can adversely affect the quality of water in the Coastal Marine Area.**

[119] ELI submitted that, because the discharge consent affects elements of the coastal environment, relevant provisions of the RCEP were mandatory matters that were required to be taken into account by the Commissioner when assessing the discharge permit application, but were ignored.

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61 Schedule 1, Listing of Areas of Significant Natural Value; Environment Canterbury Regional Council website, Regional Coastal Environment Plan for the Canterbury Region, Volume 2 — Planning Maps, https://www.ecan.govt.nz/your-regional/plans-strategies-and-bylaws/regional-coastal-environment-plan-for-the-Canterbury-region/>>map7.25 which shows the area of significant natural value as including the hāpua and as extending into the ocean.

62 Schedule 2, Identified Areas of High Natural Physical, Heritage or Cultural Value.

The Land and Water Regional Plan

[120] ELI argued that, while the Commissioner listed the Land and Water Regional Plan as being a planning instrument to which she had regard pursuant to s 104(1)(b) of the RMA, there was no express reference made to policy 4.81, which it was submitted had not been analysed in either the s 42A reports or in the evidence. Policy 4.81 of the Land and Water Regional Plan requires:

> Any take, use, damming or diversion of water, any discharge of contaminants onto land or into water, or any earthworks, structures, planting, vegetation removal or other land uses within a wetland boundary, do not adversely affect the significant values of wetlands, hāpua, coastal lakes and lagoons except for:
>
> (a) a temporary and/or minor adverse effect where that activity is part of installing, maintaining, operating or upgrading infrastructure, pest management, or habitat restoration or enhancement work; or
>
> (b) the artificial opening of hāpua, coastal lakes or lagoons to assist in fish migration or achieving other conservation outcomes, customary uses, or to avoid land inundation.

[121] ELI submitted policy 4.81 relates specifically to hāpua, coastal lakes and lagoons, and that its existence underscores the unique ecological significance of such features. Importantly, it submitted the policy is framed with the directive in mandatory language of "do not", which is that of a bottom line and consistent with the "avoid" policies in the NZCPS as previously discussed. It was submitted that, having regard to the Commissioner's findings as to the significance of the Hakatere hāpua and its already degraded state, the failure to consider this specific policy in the Land and Water Regional Plan was a significant oversight and amounted to an error of law.

The respondents' position

[122] The respondents accepted there was no direct reference to the NZCPS or the RCEP in the Commissioner's discharge consent decision. However, it was submitted those policy instruments were not directly engaged and that neither the application itself, nor the s 42A reports, or any of the evidence presented by qualified planners, including Te Rūnanga o Ngāi Tahu , in opposition to the application, had referred to the NZCPS or RCEP as being relevant. It was suggested this was likely because the application did not seek authority to directly discharge in or to the coastal environment and therefore did not engage those policies.

[123] ALI and the Council argued that, insofar as discharges to the freshwater environment were relevant to the coastal environment in terms of their downstream effects, these were adequately addressed and assessed through the lens of the freshwater policy documents to which the Commissioner had regard. It was emphasised the NPSFM extends to receiving coastal environments. It provides:

> **1.5 Application**
>
> (1) This National Policy Statement applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area).

[124] An integrated approach to the management of freshwater is expressly recognised in the NPSFM:

> **3.5 Integrated management**
>
> (1) Adopting an integrated approach, ki uta ki tai,[63] as required by Te Mana o te Wai,[64] requires that local authorities must:
>
> (a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the sea; and
>
> (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and
>
> ...
>
> (footnotes added)

[125] Similarly, it was submitted the Land and Water Regional Plan sets out objectives and policies that address the effects of activities in freshwater environments on hāpua and the coastal environment:

> (a) Objective 3.2 provides that water management applies the ethic of ki uta ki tai — from the mountains to the sea — and land and water are to be managed as integrated natural resources recognising the

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63 Ki uta ki tai is the concept of mountains to the sea — the whole-systems approach to the sustainable management of water.

64 Te Mana o te Wai is a well-established tea o Māori concept that recognises the mana and mauri of water, its fundamental importance and the relationship between water and tangata whenua.

connectivity between surface water and groundwater, and between freshwater, land and the coast.

(b) Objective 3.14 provides that high naturalness water bodies and hāpua and their margins are maintained in a healthy state or improved where degraded.

(c) Objective 3.17 provides that significant indigenous biodiversity values of rivers, wetlands and hāpua are protected.

(d) Objective 3.19 provides that natural character values of freshwater bodies, including braided rivers and their margins, wetlands, hāpua and coastal lagoons, are protected.

(e) In relation to wetlands and riparian margins, policy 4.81 provides that any take, use, damming or diversion of water, and discharge of contaminants onto land or into water, or any earthworks, structures, planting, vegetation removal or other land uses within a wetland boundary, do not adversely affect the significant values of wetlands, hāpua, coastal lakes and lagoons, other than for limited specified reasons.

[126] Having considered the NPSFM, the Council and ALI submitted that it was not necessary for the Commissioner to expressly consider the NZCPS. The discharge consent was granted only on the basis there would be a continuous measurable improvement in the receiving environment within the term of the consent, and this was expressly recognised by the Commissioner as being consistent with the direction of the NPSFM and Te Mana o te Wai. It was further argued that, to the extent provisions of the NZCPS may have been indirectly relevant to the consequential discharges into the coastal environment, those provisions had been incorporated and particularised in the Land and Water Regional Plan, which was the policy instrument pursuant to which the application had been made.

[127] It was submitted the Land and Water Regional Plan had given effect to higher order documents such as the NZCPS, and that a regional plan was required to give effect to any national policy statement, explicitly to the NZCPS, and any regional policy statement.[65] It was noted the NZCPS was gazetted on 3 December 2010 and predated the Land and Water Regional Plan that was notified on 11 August 2012. Because the current NZCPS predates the Land and Water Regional Plan and its subsequent plan changes, it was submitted that its objectives and policies were required to be consistent with and give effect to the NZCPS. It was argued this consistency meant there was no need to specifically refer to that higher policy instrument.

[128] In advancing this argument, the Council and ALI placed much emphasis on Plan Change 5 to the Land and Water Regional Plan which introduced the main nutrient management regime that applies to irrigation schemes in the Canterbury region. Plan Change 5 represented the latest iteration of the region-wide nutrient management rules contained in the Land and Water Regional Plan which applied at the time the discharge consent was considered. It was noted the s 42A report for Plan Change 5 to the Land and Water Regional Plan and the decision itself granting that change were required to give effect to the NZCPS. That obligation was recorded in the hearing Commissioner's decision on the plan change when it was observed that under s 67(3) of the RMA a regional plan is required to give effect to any national policy statement, any NZCPS, and any regional policy statement.[66]

[129] The Plan Change 5 decision includes a thorough review of the objectives and policies of the NZCPS that were identified as being particularly relevant to the decisionmaker's assessment of that application. Having undertaken that extensive analysis, the decisionmaker returned to its consideration of the NZCPS when assessing the extent to which the plan change would give effect to various superior instruments:[67]

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65 Resource Management Act, s 67(3).

66 Report and recommendations of the hearing Commissioners in the matter of the proposed Plan Change 5 to the Canterbury Land and Water Regional Plan, dated 1 June 2017, at paras 35 and 83.

67 Discharge Consent decision, above n 4.

> [576] A number of the objectives and policies of the NZCPS have some relevance to an evaluation of proposed Plan Change 5, particularly the Part B provisions. In particular, we note
>
> - a directive to maintain coastal water quality in Objective 1;
> - recognition in Objective 6 of the interrelationship between activities on land and the potential to protect natural and physical resources in the coastal marine area;
> - the need to provide for the integrated management of natural and physical resources in the coastal environment and activities that affect that environment, as set out in Policy 4;
> - a directive to protect indigenous biological diversity in Policy 11;
> - a directive, in Policy 21, to improve water quality in the coastal environment where it has deteriorated to the extent that it is having a significant adverse effect on a number of identified areas; and
> - the need to reduce sediment loadings in runoff arising from land use activities (Policy 22).
>
> [577] To the extent that they are applicable to our consideration and our recommendations we consider that Plan Change 5 would enable giving effect to these objectives and policies of the New Zealand Coastal Policy Statement.

[130] It was submitted the decision on Plan Change 5, the plan change itself, and therefore the Land and Water Regional Plan, gave effect to and had further particularised the obligations set out in the NZCPS. It followed in the Council's and ALI's submission that, insofar as that national policy instrument was relevant to the indirect discharge of contaminants into the coastal environment, its provisions had been properly taken into account by the Commissioner when assessing the application for the discharge consent by considering and applying the objectives and policies of the Land and Water Regional Plan, which incorporates and provides for the requirements of the NZCPS.

The RCEP

[131] With respect to the RCEP, the Council submitted that, because no consent had been sought under that plan and no discharge permit granted pursuant to it, its objectives and policies were not relevant to the consideration of the discharge consent. It argued that under s 67(4)(b) of the RMA, the Land and Water Regional Plan was required not to be inconsistent with any other regional plan for the region. It submitted the Land and Water Regional Plan regulates the point of discharge for the activity in

respect of which the consent was required and no inconsistency had been identified with other policy instruments. In any event, in accordance with the submissions previously made regarding Plan Change 5 to the Land and Water Regional Plan which had regard to the NZCPS, the Council submitted it was not apparent the RCEP gave rise to any further relevant considerations that were not otherwise the subject of consideration by the decisionmaker.

[132] In conclusion, the Council and ALI submitted the Commissioner had not applied the wrong legal test by omitting to consider relevant coastal policy documents, pursuant to s 104(1)(b) of the RMA. To the contrary, it was argued the consent authority had properly applied that provision when regulating the activity the subject of the discharge consent application at the point of discharge, pursuant to the Land and Water Regional Plan which itself gives effect to and further particularises the objectives and policies of the NZCPS.

Analysis

[133] The Council submitted that whether certain provisions of policy instruments and plans referred to in s 104(1)(b) are to be had regard to is determined by the question of "relevancy". Because the discharge consent application was for consent to discharge onto or into land that would result in contaminants entering freshwater, it argued the relevant documents were those considered by the Commissioner that related to freshwater, and in particular the Land and Water Regional Plan, the RPS, and the NPSFM. By doing so, it was said the Commissioner had regard to and gave genuine attention and thought to the relevant provisions of the appropriate planning documents when assessing the application.[68] It was noted the Commissioner referred to having considered all of the objectives and policies of the listed statutory documents, including the Land and Water Regional Plan and necessarily policy 4.81 of that instrument.

[134] ELI submitted the Council had taken an unduly narrow approach to the relevancy of the policy instruments listed in s 104(1)(b). It emphasised the RMA

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[68] *Foodstuffs (South Island Ltd) v Christchurch City Council* (1999) r ELRNZ 308, [1999] NZRMA 481 (HC) at 487; and *Progressive Enterprises v North Shore City Council* HC AucklandCIV-2008-457-2584, 25 February 2009 at [15].

provides for an effects based regime and, where elements of the coastal environment were affected by the discharge consent, relevant provisions of the NZCPS and other planning documents became mandatory relevant considerations that needed to be taken into account when assessing the application for the discharge consent.[69] In support of its position that the Commissioner was required to have regard to policy documents and planning instruments that concern the coastal environment because of the natural processes at work and downstream flow-on effects, ELI sought to rely on the approach taken by the Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[70]

[135] In *Trans-Tasman*, the appellant sought marine discharge consents to undertake offshore seabed mining for iron sands in an area governed by the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act). The proposed mining area was adjacent to but not within the coastal marine area governed by the RMA and the NZCPS. However, the effects of the discharge would be felt largely within the coastal marine area. Section 59 of the EEZ Act provided decision-making criteria that included as an explicit factor the nature and effect of other marine management regimes.[71] In considering whether the consent maker was required to consider inconsistencies between the applicant's proposal and the NZCPS as a part of the marine management regime governing the coastal marine area which abutted the area of proposed seabed mining, the Supreme Court observed:[72]

> [178] The context for the consideration of the approach to s 59(2)(h) of the EEZ Act is the practical reality that the effects of a proposed activity in a particular part of the marine environment may well spill over into other areas. Here for example, as the Court of Appeal said, the effects of the sediment plume will in fact be felt mostly within the [coastal marine area]. There are good policy reasons for not ignoring the fact that if the proposed activity took place on the other side of an arbitrary line between two regimes, its proposed effects would be assessed differently.
>
> (footnotes omitted)

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69 *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 at [64]; and *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, (2020) 21 ELRNZ 911 at [121].

70 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

71 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 59(2)(h).

72 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 70.

[136] The Supreme Court agreed with the Court of Appeal's conclusion that the decisionmaker had erred in law in not assessing whether the proposal will produce outcomes inconsistent with the objectives of the RMA and NZCPS. Further, that the decisionmaker had not identified relevant environmental bottom lines under the NZCPS and had not considered whether the effects of the discharge proposal would be inconsistent with those bottom lines.[73]

[137] While the Court was unanimous in this conclusion, it was divided as to how the NZCPS was to be applied. The majority's view was captured in the following passage of Glazebrook J's judgment:[74]

> [280] I agree with Ellen France J's general approach to s 59(2)(h) and other marine management regimes. I agree that the way the New Zealand Coastal Policy Statement 2010 (NZCPS) was dealt with by the [decisionmaker] was an error of law. My reasons for this differ from those of Ellen France J. She says that, although the NZCPS was not directly applicable to [the applicant's] proposed activities, the [decisionmaker] needed to confront the effect of the environmental bottom line in the NZCPS and explain briefly why that factor was outweighed by other s 59 factors. I agree that the NZCPS was not directly applicable and that the [decisionmaker] nevertheless needed to take into account the environmental bottom line in the NZCPS. I do not, however, consider this environmental bottom line can be outweighed by other s 59 factors. This is because, on the approach I take, s 10(1)(b) itself provides an environmental bottom line that cannot be overridden. There must be synergy in the approach to the NZCPS bottom line and s 10(1)(b).
>
> (footnotes omitted)

[138] The reference to s 10 is to the purpose of the EEZ Act. Section 10(1)(b) provided that, in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, a purpose of the EEZ Act is to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

[139] A distinguishing aspect of *Trans-Tasman* was the specified statutory decision-making criteria which the decisionmaker was required to take into account that included "the nature and effect of other marine management regimes".[75] There is no

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73 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 70, at [187].
74 Glazebrook and Williams JJ, and Winkelmann CJ.
75 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act, s 59(2)(h).

equivalent provision in the RMA, although a recognised objective of the legislation and various planning and policy instruments is the integrated management of the constituent elements of the environment. As observed by the Supreme Court, s 59(2)(h) of the EEZ Act gives statutory effect to the "practical reality" that the effects of a proposed activity in one part of the environment may impact on another.[76]

[140] Whether the provisions of the policy statements and planning instruments listed in s 104(1)(b) will be considered relevant to an application for a resource consent will be a fact-dependent assessment that will turn on the particular circumstances of the individual case and the issues to which the application gives rise. However, the requirement of relevance imposed by s 104 is not an onerous threshold.

[141] The effects on the lower reaches of the Hakatere/Ashburton River and hāpua was but one aspect of the effects of the activity on the receiving environment as a result of contaminants being discharged into ground and surface water with which the Commissioner was concerned. The consequential effects on the coastal environment may be described as indirect or secondary. However, on the evidence accepted by the Commissioner, the degradation of groundwater quality was found to be closely linked to the degradation of downstream surface water quality and declining ecological values in the lower Hakatere/Ashburton River and its hāpua. It must follow from that explicit connection that s 104(1) required the consent authority to have regard to relevant provisions of the NZCPS and RCEP. This is particularly so when regard is had to the continuing or extant nature of this downstream impact on a specific part of the local coastal environment. I do not consider the absence of a direct discharge, other than to a freshwater environment, excludes provisions of planning instruments and policy documents concerned with the coastal environment from being relevant to an activity that has been established as having such an effect.

[142] I accept there is a considerable degree of overlap between the freshwater policy documents to which the Commissioner had regard and those instruments focused on the coastal environment. The need for an integrated approach to management that takes into account the interconnectedness of the environment that extends to

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[76] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 70, at [178].

interactions between freshwater and receiving environments and include hāpua and estuaries is recognised by the NPSFM and in the objectives and policies of the Land and Water Regional Plan. However, I do not consider that absolves the consent authority's obligation to have regard to the relevant provisions of other planning instruments despite the argument they have substantially been incorporated into the freshwater documents to which the Commissioner had regard, including the Land and Water Regional Plan pursuant to which the application had been made.

[143] As submitted by ELI, the application of relevant provisions of the NZCPS and the assessment of the proposed activity against what were argued to be relevant environmental bottom lines based on the prescriptive language used by that instrument may produce or require different outcomes. The effect of such relevant provisions cannot be avoided because they are considered to have been adequately or materially encompassed in other applicable planning documents. Factual findings regarding the impact of an activity need to be measured against the relevant provisions of the planning and policy instruments listed in s 104(1)(b).

[144] Considerable emphasis was placed on how the Land and Water Regional Plan had given effect to documents higher in the hierarchy such as the NZCPS, in accordance with the statutory requirement to give effect to such national policy statements. It was argued it followed from that framework that there was no need to specifically refer to the higher policy instrument. However, there can be no assurance that plans made by local authorities will inevitably reflect the provisions of higher order documents such as the NZCPS. Despite that being the desired and anticipated outcome, it will not necessarily always be achieved.[77] In *R J Davidson Family Trust v Marlborough District Council*, the Court of Appeal referred to the need that, where the NZCPS is engaged, it follows from s 104(1)(b)(iv) that any resource consent application will necessarily be assessed having regard to the NZCPS provisions.[78] Importantly, the Court observed that in such instances there will also be consideration under the relevant regional coastal plan.[79]

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77 *R J Davidson Family Trust v Marlborough District Council*, above n 39, at [70].
78 At [71].
79 At [71].

[145] As earlier noted, the Council and ALI sought to rely on Plan Change 5 to the Land and Water Regional Plan which introduced the main nutrient management regime that is to apply to irrigation schemes in the Canterbury region. It was submitted that, in accordance with the RMA, the plan change was required to give effect to national policy instruments, including the NZCPS. The conclusion by the decisionmaker charged with assessing the plan change that a number of objectives and policies of the NZCPS were relevant to the evaluation of the proposed plan change and, to the extent they were applicable to its consideration, would be given effect to by the plan change was emphasised. However, notably, no specific reference was made in that decision to the NZCPS requirement that a precautionary approach be adopted to proposed activities the effects of which, on the coastal environment, are uncertain. A theme of the Commissioner's decision was an acknowledgement of the uncertainty regarding whether the conditions, which were integral to the grant of the discharge consent, would be effective over the term of the discharge consent.

[146] Similarly, the plan change decision made no reference to policy 13 of the NZCPS which imposes an obligation to avoid the adverse effects of activities in areas of the coastal environment with outstanding natural character. The Hakatere/Ashburton River Mouth which includes the hāpua is identified in the RCEP as being an "Area of Significant Natural Value" and of "High Natural, Physical, Heritage or Cultural Value".[80] The use of the directive language of "avoid" in policy 13 and the adverse effects on such environments was emphasised. It is difficult to gauge how effectively the plan change which catered for irrigation schemes in the Canterbury region was able to take into account such considerations which relate to the specific character of a particular coastal location.

[147] A similar observation could be made regarding the absence of any explicit reference in the discharge consent decision to policy 4.81 of the Canterbury Land and Water Regional Plan regarding the effect of the discharge of contaminants onto land

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[80] RCEP, above n 16, sch 1, Listing of Areas of Significant Natural Value; Environment Canterbury Regional Council website, Regional Coastal Environment Plan for the Canterbury Region, Volume 2 — Planning Maps, https://www.ecan.govt.nz/your-regional/plans-strategies-and-bylaws/regional-coastal-environment-plan-for-the-Canterbury-region/>>map7.25 which shows the area of significant natural value as including the hāpua and as extending into the ocean; and sch 2, Identified Areas of High Natural Physical, Heritage or Cultural Value.

or into water that adversely affect the significant values of hāpua and lagoons. The strength of the argument regarding a lack of regard to policy 4.81 is necessarily more limited because of the Commissioner's express reference to the Land and Water Regional Plan pursuant to which the application was made. However, the mandatory language in which the policy is framed requires the discharge of contaminants to not adversely affect the significant values of hāpua and lagoons, and can be likened to the "avoid" policies of the NZCPS. The absence of any direct consideration of this specific policy leaves the decision open to the criticism that the policy was either not adequately engaged with or otherwise ignored.

Conclusion

[148] Because the past and current land use practices of the irrigation scheme were found by the Commissioner to have contributed to significant adverse cumulative effects on the lower reaches of the Hakatere/Ashburton River and hāpua, and specifically on the aquatic life of that particular area of the coastal environment, it was incumbent on the decisionmaker to consider the relevant provisions of the NZCPS and the RCEP. Having regard to the known existing deleterious effects on that area of the coastal environment that the activity the subject of the discharge consent application had causally contributed to, provisions of both instruments were relevant to the continued authorisation of that activity. The failure to take into account or have regard to these relevant provisions constituted an error of law.

The notification decision

[149] In September 2020, the Council determined that ALI's application for the discharge consent would be notified on a limited basis. That decision was made by its principal consent planner who agreed with recommendations set out in a memorandum (the recommendation memorandum) prepared by two consent planning officers tasked with examining the issue. By that process, the principal consent planner, acting under delegated authority from the Council, decided the application for the discharge consent would not be publicly notified but would be notified on a limited basis to Te Rūnanga o Ngāi Tahu. ELI argued the Council, in making its notification decision, erred in law in several respects and that its notification decision should be quashed.

The legislative framework

[150] Sections 95A and 95B of the RMA set out the steps a consent authority must follow when determining whether to publicly notify (s 95A) or give limited notification (s 95B) of an application for a resource consent. It is necessary to set out ss 95A and 95B in full:

> **95A Public notification of consent applications**
>
> (1) A consent authority must follow the steps set out in this section, in the order given, to determine whether to publicly notify an application for a resource consent.
>
> *Step 1: mandatory public notification in certain circumstances*
>
> (2) Determine whether the application meets any of the criteria set out in subsection (3) and,—
>
> (a) if the answer is yes, publicly notify the application; and
>
> (b) if the answer is no, go to step 2.
>
> (3) The criteria for step 1 are as follows:
>
> (a) the applicant has requested that the application be publicly notified:
>
> (b) public notification is required under section 95C:
>
> (c) the application is made jointly with an application to exchange recreation reserve land under section 15AA of the Reserves Act 1977.
>
> *Step 2: if not required by step 1, public notification precluded in certain circumstances*
>
> (4) Determine whether the application meets either of the criteria set out in subsection (5) and,—
>
> (a) if the answer is yes, go to step 4 (step 3 does not apply); and
>
> (b) if the answer is no, go to step 3.
>
> (5) The criteria for step 2 are as follows:
>
> (a) the application is for a resource consent for 1 or more activities, and each activity is subject to a rule or national environmental standard that precludes public notification:
>
> (b) the application is for a resource consent for 1 or more of the following, but no other, activities:
>
> (i) a controlled activity:

(ii) *[Repealed]*

(iii) a restricted discretionary, discretionary, or non-complying activity, but only if the activity is a boundary activity.

(iv) *[Repealed]*

(6) *[Repealed]*

Step 3: if not precluded by step 2, public notification required in certain circumstances

(7) Determine whether the application meets either of the criteria set out in subsection (8) and,—

(a) if the answer is yes, publicly notify the application; and

(b) if the answer is no, go to step 4.

(8) The criteria for step 3 are as follows:

(a) the application is for a resource consent for 1 or more activities, and any of those activities is subject to a rule or national environmental standard that requires public notification:

(b) the consent authority decides, in accordance with section 95D, that the activity will have or is likely to have adverse effects on the environment that are more than minor.

Step 4: public notification in special circumstances

(9) Determine whether special circumstances exist in relation to the application that warrant the application being publicly notified and,—

(a) if the answer is yes, publicly notify the application; and

(b) if the answer is no, do not publicly notify the application, but determine whether to give limited notification of the application under section 95B.

95B Limited notification of consent applications

(1) A consent authority must follow the steps set out in this section, in the order given, to determine whether to give limited notification of an application for a resource consent, if the application is not publicly notified under section 95A.

Step 1: certain affected groups and affected persons must be notified

(2) Determine whether there are any—

(a) affected protected customary rights groups; or

(b) affected customary marine title groups (in the case of an application for a resource consent for an accommodated activity).

(3) Determine—

(a) whether the proposed activity is on or adjacent to, or may affect, land that is the subject of a statutory acknowledgement made in accordance with an Act specified in Schedule 11; and

(b) whether the person to whom the statutory acknowledgement is made is an affected person under section 95E.

(4) Notify the application to each affected group identified under subsection (2) and each affected person identified under subsection (3).

Step 2: if not required by step 1, limited notification precluded in certain circumstances

(5) Determine whether the application meets either of the criteria set out in subsection (6) and,—

(a) if the answer is yes, go to step 4 (step 3 does not apply); and

(b) if the answer is no, go to step 3.

(6) The criteria for step 2 are as follows:

(a) the application is for a resource consent for 1 or more activities, and each activity is subject to a rule or national environmental standard that precludes limited notification:

(b) the application is for a controlled activity (but no other activities) that requires a resource consent under a district plan (other than a subdivision of land).

Step 3: if not precluded by step 2, certain other affected persons must be notified

(7) In the case of a boundary activity, determine in accordance with section 95E whether an owner of an allotment with an infringed boundary is an affected person.

(8) In the case of any other activity, determine whether a person is an affected person in accordance with section 95E.

(9) Notify each affected person identified under subsections (7) and (8) of the application.

Step 4: further notification in special circumstances

(10) Determine whether special circumstances exist in relation to the application that warrant notification of the application to any other persons not already determined to be eligible for limited notification

under this section (excluding persons assessed under section 95E as not being affected persons), and,—

(a) if the answer is yes, notify those persons; and

(b) if the answer is no, do not notify anyone else.

Recommendation analysis

[151] The consent planning officers, when addressing the issue of public notification under s 95A, concluded that none of the criteria set out under step 1 required mandatory public notification. That finding is not disputed. It was then determined under step 2 that the application for the discharge consent was for an activity that is subject to a rule that precludes public notification. That rule is r 5.62 of the Land and Water Regional Plan, which provides as follows:

> **5.62 The discharge of nutrients onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene s15(1) of the RMA is a discretionary activity, provided the following condition is met:**
>
> 1. The applicant is an irrigation scheme or a principal water supplier, or the holder of the discharge permit will be an irrigation scheme or a principal water supplier.
>
> ***Notification***
>
> Pursuant to sections 95A and 95B of the RMA an application for resource consent under this rule will be processed and considered without public or limited notification, provided that:
>
> 1. The nutrient loss is equal to or less than that currently authorised through conditions on a water permit to take and use water; or
>
> 2. The nutrient loss is equal to or less than the aggregation of the nutrient baseline across properties within the command area, calculated on a surface water catchment basis.

[152] The consultant planners concluded that the preclusion of notification in r 5.62 applied because ALI is an irrigation scheme, and they were satisfied the nutrient loss the subject of the discharge consent application was equal to or less than the aggregation of the nutrient baseline across properties within the Discharge Area. It followed, as a result, that step 3 was redundant. Proceeding directly to step 4 (special circumstances), the planning officers considered there were no special circumstances that existed that warranted public notification of the discharge consent application. As

a result of this analysis, it was concluded that public notification was not required under s 95A.

[153] Turning to the question of limited notification under s 95B, it was noted that the Hakatere/Ashburton River is the subject of a statutory acknowledgement under the Ngāi Tahu Claims Settlement Act 1988, which is an Act specified in sch 11 of the RMA. As a result, the planning officers concluded they needed to consider, under step 1, whether Te Rūnanga o Ngāi Tahu is an affected person under s 95E of the Act, which provides that a person will be so designated if a consent authority decides the activity's adverse effects on the person are minor or more than minor (but not less than minor). After noting the water quality in the receiving environment to be poor and likely directly attributable to agricultural activities, including those by ALI's shareholders properties, and the high cultural values of the receiving environment, the effects on Te Rūnanga o Ngāi Tahu were assessed as being more than minor. Having made that determination, it was recommended the application for the discharge consent by ALI be notified on a limited basis to Te Rūnanga o Ngāi Tahu under s 95 of the RMA.

[154] Upon receipt of the consent planners' memorandum, the principal consent planner adopted those officers' recommendations and made a notification decision in the following terms:

> I have considered all relevant matters regarding this proposal and I agree with the officer's recommendation that public notification is not mandated under Step 1 of s95A and is precluded under the rule 5.62 in the Land and Water Regional Plan (Step 2). I also agree that this application does not meet the special circumstances test that would require public notification required by step 4. However, I note the officers have concluded due to the potential adverse effects of nutrients leaching from this activity into on the [sic] Hakatere / Ashburton River statutory acknowledgement area, Te Rūnanga o Ngāi Tahu can be considered an affected person and therefore the application should be limited notified to them in accordance with s95B. I agree with that assessment.
>
> In conclusion, having considered s95A to 95C of the RMA, and under the authority delegated to me by Council, I have decided under s95B to limited notify the application to Te Rūnanga o Ngāi Tahu because the effects of the activity on the Hakatere / Ashburton River statutory acknowledgement area.

[155] ELI alleged that the Council, in making its notification decision, made several invalidating errors of law:

(a) It failed to properly apply ss 95A and 95B by concluding criteria for step 2 — that the resource consent application was subject to a rule that precluded notification — was incorrect.

(b) It failed to consider whether special circumstances existed under step 4, warranting broader notification, and failed to provide reasons for concluding there were none.

(c) Contrary to the assessment in the recommendation memorandum and notification decision, special circumstances did exist.

Alleged erroneous determination that broader notification precluded

[156] ELI argued the discharge consent application sought authorisation to discharge into or onto land from farming land use activities which engaged the provisions of the Land and Water Regional Plan, but that it also sought a resource consent for discharges from land use activities that engaged the provisions of the NESF. It was submitted the consent goes further than authorising the discharge of nutrients onto land where contaminants may enter water arising from farming activities. It extended to the authorisation of discharges arising from changes to land use, namely "the expansion of dairy support land and irrigated dairy farm land, the conversion of land to dairy farm land, and the undertaking [of] intensive winter grazing".

[157] The NESF was described by ELI as a national directive that marked a shift in the management of discharges from farming activities which came into force in September 2020, prior to the making of the notification decision. The regulations in the NESF set out requirements for carrying out certain land use activities. Of relevance are the regulations concerning the conversion of land to dairy farm land,[81] irrigation of dairy farm land,[82] use of land as dairy support land,[83] and intensive winter grazing.[84] Where an application is made for a land use activity that is regulated by the NESF, an assessment of the activity is required to be undertaken under the regulations.

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81 Resource Management (National Standards for Freshwater) Regulations 2020, regs 18 and 19.
82 Regulations 20 and 21.
83 Regulations 22 and 23.
84 Regulations 26, 26A, 26B and 27.

[158] ELI submitted that, because the NESF was engaged, the preclusion at "step 2" of ss 95A(5) and 95B(b) of the RMA was not triggered. ELI emphasised the criteria for preclusion required the application for a resource consent be for one or more activities, and that *each activity* "is subject to a rule or national environmental standard that precludes public notification". It argued that, while the preclusion notice set out in r 5.62 of the Land and Water Regional Plan applied in respect of the discharge consent that sought authorisation to discharge into or onto land from farming land use activities, it did not attach to *other* land use activities governed by the NESF, which were not subject to any presumption that notification will be precluded.

[159] It followed on ELI's argument that, because each activity the subject of the discharge consent application was not subject to a rule that precludes public notification, step 3 was engaged. This required the consent authority to decide whether the activities the subject of the application will have, or are likely to have, adverse effects on the environment that are more than minor in accordance with s 95B of the RMA. The omission to engage with step 3, it was submitted, applied equally to the question of both public and limited notification under ss 95A and 95B of the RMA.

[160] There are some anomalous aspects to this part of ELI's challenge to the notification decision. First, this issue is not a pleaded challenge to the notification decision that forms part of the first cause of action of ELI's application for judicial review. ELI's pleaded claim is limited to the issue of special circumstances and the alleged lack of reasons provided to support the Council's decision regarding their non-existence. Both the Council and ALI objected to the belated widening of the scope of the pleaded challenge to the notification decision. However, I heard argument on the point and, as matters emerged, it is an issue that can be readily disposed of, albeit not without the benefit of some clarification of the acknowledged scope of the discharge consent by the Council and ALI.

[161] Both respondents made it clear that ALI had only applied for a resource consent under the Land and Water Regional Plan for resource consents to discharge nutrients from farming activities. The notification decision was made on the basis of a consolidated AEE that was issued on 23 September 2019. It made no reference to the NESF, which did not come into force until the following year, on 3 September 2020.

While ALI sought to amend its application after the notification decision had been made to incorporate the NESF requirements, this proposed amendment to its application was not pursued. The Commissioner's decision explicitly states:[85]

> 7. Any authorisation required under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NESF) which came into effect after the application was lodged, will be applied for and considered separately to this application.

[162] Confusingly, the discharge consent document, under the heading "Scope", refers to the consent authorising the discharge onto or into land where contaminants may enter water arising from farming land use activities on properties located within the Discharge Area, "including the expansion of dairy support land and irrigated dairy farm land, the conversion of land to dairy farm land and the undertaking of intensive winter grazing". ALI, in its submissions, acknowledged that the resource consent purportedly authorises discharges from those activities but formally accepted that, for those activities to actually occur, a separate resource consent would be required, in respect of which a consideration of the NESF requirements would be a necessary prerequisite.

[163] Having regard to the Commissioner's explicit statement in her decision that any activities requiring authorisation under the NESF would have to be applied for and considered separately to the discharge consent application before her, and the respondents' concession this is indeed the position, I am satisfied the application was sought solely pursuant to the Land and Water Regional Plan and that r 5.62 of that planning instrument was correctly applied when making the notification decision. It follows that the planning officers, when working through the requirements of ss 95A and 95B of the RMA, having concluded the preclusion in r 5.62 applied, correctly determined that step 3 was redundant and that a determination was required under step 4 as to whether special circumstances existed that warranted public notification or greater limited notification to any other persons beyond Te Rūnanga o Ngāi Tahu.

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[85] Discharge Consent decision, above n 4.

Alleged failure to consider special circumstances and provide reasons that no special circumstances existed

[164] ELI is critical of the Council's notification decision that no special circumstances existed that warranted public notification. The decision itself contained no analysis or reasons for that finding, which was limited to a conclusionary statement by the principal consent planner that he agrees "that this application does not meet the special circumstances test that require public notification required by step 4". It is noted the recommendation memorandum provides no elaboration, being limited to a statement by the planning officers that: "[I]n consideration of step 4, we consider that there are no special circumstances that warrant public notification of the decision." ELI is similarly critical of the notification decision as it relates to further limited notification. It does not address whether special circumstances exist, while the recommendation memorandum is confined to a statement that the officers did not consider "that special circumstances exist that warrant the limited notification to any other persons".

[165] ELI submitted the wholly conclusionary nature of the statements in the notification decision and recommendation memorandum mean it is not possible to discern what, if anything, was considered by the decisionmaker and its advisors, or what approach was taken to identifying and analysing potential special circumstances. ELI submitted the Council had provided no evidence from any competent witness as to what was considered in determining whether special circumstances existed when the notification decision was made, or how the issue was approached, and that there was an onus on the consent authority to establish that proper consideration was given to that issue.[86] It was submitted a decisionmaker has a duty to explain the reasons for their decision and that a bare assertion relevant matters have been considered will not discharge the consent authority's public law responsibilities.

[166] ELI submitted the failure to provide reasons regarding whether special circumstances existed to warrant broader notification of the discharge consent application in either the recommendation memorandum or the notification decision

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86 Citing *Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346, [2010] 3 NZLR 826 (CA) at [74].

amounted to an error of law.[87] No evidence had been provided by the Council from any decisionmaker involved in the notification decision process and the Court was invited to draw an adverse inference that there was no lawful basis for the conclusion that no special circumstances existed. Alternatively, that it could be inferred, in the absence of reasons in the evidential record, that the matter had not been properly considered by the decisionmaker.

[167] As a preliminary matter, I accept the Council's submission that the recommendation memorandum and the notification decision should be read together as the record of the decision the subject of the challenge. The principal consent planner, in reaching his notification decision when acting under the delegated authority of the Council, had regard to the reasoning and analysis set out in the recommendation memorandum. The Council submitted that, by so doing, the notification decisionmaker had given proper consideration to the matters raised by the planning officers.

[168] In response to ELI's critique that the Council had failed to provide evidence from any competent witness of what had been considered when determining whether special circumstances existed, or how the issue had been addressed, it was submitted that any such evidence would amount to an ex-post facto rationalisation of the notification decision of the type that has been criticised by this Court.[88] It was submitted the decision must stand and fall on its own terms, as recorded at the time, and that the Council could not be criticised for not having elaborated on its reasons by way of further affidavit evidence.[89]

[169] The present case is distinguishable from *Whakatane District Council v Bay of Plenty Regional Council*, where a dearth of information that the Regional Council had complied with its statutory obligations to comply with all stages of a four-stage consultation process regarding community views and preferences left the Court of Appeal unable to assume, as this Court had done in that case, that there had been

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87 Citing *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597 at [56].

88 Citing *Hanna v Whanganui District Council* [2013] NZHC 1360, (2013) 17 ELRNZ 314 at [14].

89 *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) at 48.

sufficient compliance.[90] Nor can the present situation be compared with that considered by the Supreme Court in *Ririnui v Land Corp Farming Ltd*, where it was reiterated that, because of the fact-dependent nature of judicial review, decisionmakers have a duty to explain the decision-making process and the relevant factual and other circumstances in the reasons for the decision, which was described as the "duty of candour".[91]

[170] Where such evidence is not provided, a court may well draw adverse inferences. However, the Supreme Court's observations were made in the context of an allegation of a decisionmaker having acted in bad faith and the difficulty the courts had in addressing that issue in the absence of members of the decision-making body having provided evidence about that issue. The subject of focus in the present case is whether what was recorded by the planning officers in the recommendation memorandum and by the principal consent planner in his notification decision about special circumstances was sufficient, in the absence of any other explicit reasoning justifying those statements.

[171] ALI submitted it was clear from the statements contained in the recommendation memorandum and the notification decision that the Council had turned its mind to whether there were special circumstances for the purposes of step 4 under ss 95A and 95B. It submitted there could be no requirement for a decisionmaker to set out and dismiss a range of circumstances that had been found not to meet the threshold of special circumstances as it would be an unrealistic burden to expect a decisionmaker to list all factors it took into account that were determined not to be special circumstances — in effect to prove a negative.[92] Nevertheless, the adequacy of the reasoning provided in a notification decision, in terms of whether it sufficiently addresses the mandatory matters required to be assessed in accordance with ss 95A and 95B may lead to a finding of invalidity. The absence of recorded reasons that demonstrate the proper exercise of a power may make that exercise of power vulnerable to challenge by way of review.[93]

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90 *Whakatane District Council v Bay of Plenty Regional* Council, above n 86.
91 *Ririnui v Land Corp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [105].
92 Citing *Murray v Whakatane District Council* [1999] 3 NZLR 276, [1997] NZRMA 433 (HC) at 310–311.
93 *Palmer v Tasman District Council* HC Nelson CIV-2009-442-331, 30 March 2010, at [150].

[172] The Council submitted that, beyond the explicit statements recording that no special circumstances existed warranting any broader notification, the content of the recommendation memorandum demonstrated there had been an awareness of the matters contended by ELI to be special circumstances that can justifiably be accepted as factors the decisionmaker had regard to as part of the notification assessment. It is therefore necessary to review in greater detail the content of the recommendation memorandum that sets out the information the consulting planners must have been aware of at the time, and ultimately the principal planning officer when making the notification decision pursuant to his delegated authority.

The recommendation memorandum

[173] The nine-page recommendation memorandum provides background to the discharge consent application that includes the history of ALI's involvement in the irrigation scheme and its relationship with other entities, including Rangitata Diversion Race Management Ltd. It records that ALI is seeking a replacement consent for an irrigation scheme in respect of a Discharge Area comprising some 177,000 ha and that it will involve the use of the Matrix method that had recently been approved by the Council as a means by which to estimate nitrogen leaching from agricultural activities.

[174] The recommendation memorandum draws on the consolidated AEE and references the NDA that will be aggregated across properties authorised in a schedule to the proposed consent, and calculated on the basis that farms will be required to operate on the basis of "good management practice", in accordance with an environmental management strategy that will apply to each property. Other aspects of the irrigation scheme in respect of which consent is sought include an audited self-management programme, the need for all properties to have a farm management plan that will be audited to ensure implementation of good management practice measures, and required further reductions in nitrogen loads. It was noted that community drinking water supplies would be managed using a "risk based approach" developed in consultation with the Council's groundwater scientists.

[175] The recommendation memorandum records the state of the water quality in the receiving environment:

> 33. The water quality in the receiving environment is poor, which is likely directly attributable to agricultural activities, including those by shareholder properties. Considering this and the high cultural values of the receiving environment, we consider that the effects on [Te Rūnanga o Ngāi Tahu] are more than minor.

[176] In addressing r 5.62 of the Land and Water Regional Plan, and in particular the notification contained in that rule that precludes public or limited notification, the planning officers refer to the necessary requirements relating to the discharge of nutrients onto or into land in circumstances that may result in a contaminant entering water where the applicant is an irrigation scheme:

> 24. ...We are satisfied that the nutrient loss is equal to or less than the aggregation of the nutrient baseline across properties within the [Discharge Area]. [ALI] proposes an NDA reflective of the aggregated baseline [good management practice] loss rate, which is less than the aggregated nutrient baseline that the rule refers to.
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> 25. The matrix method, a model used to estimate nitrogen leaching from agricultural activities, was approved by Environment Canterbury as an equivalent method to Overseer in April 2020. Since approval of the Matrix Method there have been further amendments to the application and further work to calculate the nitrogen baseline for the scheme area.

[177] It follows from this part of the recommendation memorandum that there was an awareness of the scale of the application, the effects past activities have had on the environment, the state of the receiving environment, and the potential further effects of the activity in respect of which the discharge permit was being sought. It is also clear there was an awareness the Matrix method was to be used to estimate nitrogen loads, and that the application potentially involved effects on community drinking water.

[178] The planning officers applied themselves to each of the steps set out in the statutory regime. Notwithstanding their prior determination that the preclusion contained in r 5.62 applied, consideration was given to the issue of special circumstances as a discrete step in the decision-making process. Having regard to the matters recorded in the recommendation memorandum, I also consider it reasonable

to conclude that, when reaching their view regarding the presence or otherwise of special circumstance, the planning officers had in mind the matters they had earlier canvassed before making their notification assessment.

[179] The Council submitted that when the recommendation memorandum and notification decision were read together as a whole, it was apparent the matters now raised by ELI as factors that should have been considered as special circumstances were substantially reviewed in the recommendation memorandum that forms part of the decision record. It is acknowledged there were two matters that were not mentioned in the recommendation memorandum raised by ELI (which will be considered later in this judgment), namely the NPSFM and the Parliamentary Commissioner for the Environment's Report, but these were submitted as being insufficiently material to require explicit consideration or capable of rendering the Council's process invalid.

Allegation that special circumstances did exist

[180] Before determining whether the Council's approach to the existence of special circumstances was adequate, it is necessary to review in greater detail the matters which ELI contend were special circumstances at the time the notification decision was made and it says should have resulted in wider notification of the application for the purposes of ss 95A and 95B.

[181] It is also necessary to bear in mind the legitimate framework for review of such a decision. The ambit of judicial review does not extend to the substitution of the Court's own conclusions for that of the consent authority. Rather, it requires the Court to determine, as a matter of law, whether proper procedures were followed, whether all relevant and no irrelevant considerations were taken into account, and whether the decision-maker's decision could have reasonably been made on the basis of the information available to it.[94]

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94 *Pring v Wanganui District Council* [1999] 5 ELRNZ 464, [1999] NZRMA 519 (CA) at 523; *Coro Mainstreet HC decision*, above n 29, at [40]; and *Coro Mainstreet CA decision*, above n 29, at [50].

[182] The assessment required under step 4 of ss 95A(9) and 95B(10) was whether there were special circumstances that *warranted* the application being publicly notified, or notified to other persons not already determined to be eligible for limited notification. The assessment was a mandatory one, but one that involved the Council's evaluation of the factual position based on its expertise and judgment. It is not the Court's function to substitute its own appraisal for that of the consent authority or assess the merits of the notification decision regarding whether there were special circumstances that *warranted* notification.

[183] Arguably, whether something constitutes a special circumstance in any given case is a question that can only result in an answer that is either right or wrong as the presence, or otherwise, of such a factor involves the fulfilment of a statutory threshold or prerequisite. However, the statutory step required to be assessed by the Council was whether any such special circumstances *warranted* notification of the application, and it was that issue to which it addressed itself. ELI's challenge focused on the presence or otherwise of special circumstances, rather than whether, if present, they would warrant notification. I proceed on the presumption its challenge implicitly extended to a submission these were special circumstances which warranted broader notification. Necessarily, however, that issue involves considerations of fact and degree that require evaluation and the exercise of judgment. Scope for judicial review of such a decision is therefore necessarily more limited.

[184] The Council and ALI, when addressing the issue of the intensity of review of notification decisions relating to special circumstances, placed reliance on the views expressed in *Urban Auckland v Auckland Council*, where Venning J remarked:[95]

> [137] I accept there is a limited scope for judicial review of a decision as to whether there are special circumstances. It involves the exercise of a discretion based on the Council's assessment of the factual position and use of its expertise and judgment: *S&M Property Holdings Ltd v Wellington City Council*.[96] ...

[185] However, the Court in that case was concerned with the predecessor to the current s 95A that provided a consent authority with a discretion to publicly notify an

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95 *Urban Auckland v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235.
96 *S&M Property Holdings Ltd v Wellington City Council* [2003] NZRMA 193 (HC) at [48].

application "if it decides that special circumstances exist in relation to the application". The test was therefore different and couched in discretionary terms. Despite that being the case, in the more recent decision of *Colley v Auckland Council*, which was decided pursuant to the current statutory notification scheme provided by ss 95A and 95B, Wylie J remarked:[97]

> ... The presence or absence of special circumstances is a discretionary matter, in respect of which reasonable people might reasonably disagree. The scope for judicial review of such decisions is limited. Judicial review does not involve an inquiry into the merits of the decision that has been made and the burden of establishing manifest unreasonableness is a heavy one. ...

[186] This Court was not persuaded in that case that a notification decision was manifestly unreasonable because a Commissioner had decided there were no special circumstances. The Commissioner charged with making the notification decision had found there were no special circumstances. A different decision had been reached in relation to a different (albeit similar) application by a different Commissioner. Wylie J held the fact another Commissioner considered there were special circumstances that applied to an earlier application did not compel the conclusion that a different Commissioner dealing with a different application should have reached the same conclusion.[98]

[187] I proceed on the basis that whether or not the presence or absence of special circumstances can be categorised as a discretionary issue for the decisionmaker, the wider statutory question of whether there are special circumstances that warrant any broader notification of the application is a matter of assessment and judgment in respect of which reasonable views may differ. It follows that, if ELI is to succeed on this issue, it would need to establish that the special circumstances it contends for were such that the *only* reasonable decision that could have been reached was that the application warranted wider notification than that decided by the decisionmaker.

[188] There was no dispute that "special circumstances" in the present context are circumstances that are "outside the common run of things which is exceptional,

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97 *Colley v Auckland Council*, above n 29, at [120].
98 At [120].

abnormal or unusual, but less than extraordinary or unique".[99] They are circumstances that would make notification desirable despite general provisions existing that exclude the need for notification.[100]

[189] A body or combination of circumstances, when considered collectively, may amount to special circumstances that could warrant public or limited notification. However, it will remain necessary, whether individually or in combination, for the "exceptional, abnormal or unusual" threshold to be met. The presence of a number of particular factors relating to the application will not by itself be sufficient, and whether the cumulative effect of a group of circumstances will warrant public or a broader form of notification will remain an assessment of fact and degree.

[190] ELI raised a number of features of the discharge consent application which it argued should have been considered to be special circumstances warranting a wider notification decision.

Scale and effect of the activity

[191] ELI submitted that the discharge consent application concerned a large-scale consent that involved an environment that had already become significantly degraded by similar activities. Further, despite the previous consent that allowed for the discharge of contaminants having been granted on the basis it would avoid and mitigate adverse environmental effects, it was demonstrable the consent had failed to achieve that outcome.

[192] I do not consider, in the circumstances of this case, that the scale of the activity could be categorised as unusual or exceptional, at least not in the Canterbury region where such irrigation schemes are common. There was evidence of some 26 irrigation schemes or principal water suppliers operating in the region, and the recommendation memorandum provided relevant background regarding the operation of the irrigation scheme, which is of a type anticipated by the Land and Water Regional Plan, a plan

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99 *Far North District Council v Te Rūnanga-Ā-Iwi O Ngāti Kahu* [2013] NZCA 221 at [36]; and *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 (CA) at 536.

100 *Murray v Whakatane District Council*, above n 92, at 310.

that provides policies and rules applying to such irrigation schemes. The ALI scheme is of a similar size and scale to other irrigation schemes in Canterbury.

[193] Notably, r 5.62 of the Land and Water Regional Plan enables irrigation schemes of this type to apply for resource consents as a discretionary activity and precludes notification if an application meets certain conditions. Those conditions were assessed by the planning officers in the recommendation memorandum and found to have been met. Having regard to the way the Land and Water Regional Plan provides a regime that addresses discharges from irrigation schemes and includes provisions providing for nutrient management and the non-notification of resource consent applications of this type, it is apparent that such applications themselves could not be described as unusual or exceptional.

[194] What gives greater pause is the apparent failure of the previous consent to avoid or mitigate adverse environmental effects on the receiving environment. ALI maintained there was insufficient evidence for ELI to assert that the consent application related to a "significantly degraded environment". It noted the monitoring proposed as part of the consent was intended to align with the recently promulgated NPSFM requirements over time, and that when the notification decision was made, data relating to those standards to determine compliance (or otherwise) were not to hand. However, it is apparent from the Commissioner's ultimate findings that the degradation in the groundwater receiving environment was known at the time.

[195] Findings that past land use practices in the Discharge Area have contributed to significant adverse cumulative effects on aquatic life in the lower reaches of the Hakatere/Ashburton River and hāpua were not made until a much later stage in the consent process. Care is required when deploying that information for the purposes of assessing the notification decision and the presence of special circumstances. However, the water quality of the receiving environment was a subject about which the planning officers were aware.

[196] The planning officers noted in their recommendation memorandum that the water quality was poor and was likely directly attributable to agricultural activities, including those by ALI properties. It was this consideration, together with the high

cultural values of the receiving environment, which led them to conclude that the effects on Te Rūnanga o Ngāi Tahu were more than minor and required it to be the subject of limited notification as an affected person. It follows that, in making the notification decision, regard was had to the existing state of the receiving environment and an assessment made about the appropriate level of notification in light of that factor. This aspect resulted in the affected iwi being the subject of limited notification.

Discharge consent application made shortly before NPSFM came into force

[197] ELI submitted the 2020 version of the NPSFM had only recently come into being and it asserted that it had not been considered as part of the notification decision process. It was argued the NPSFM 2020 introduced new and different considerations, including the creation of a hierarchy of priorities which represented a significant shift in emphasis and approach. In this regard, reference was made to the objective of this national policy statement to ensure resources were managed in a way that prioritised the health and wellbeing of water bodies and freshwater ecosystems, the health needs of people (such as drinking water), and the ability of people in communities to provide for their social, economic and cultural wellbeing, now and in the future. The policy statement also stressed as a fundamental concept Te Mana o te Wai.

[198] The NPSFM took effect on 3 September 2020, after the discharge consent application had been made but prior to the notification decision that was made later that month on 23 September. There is no express reference to the NPSFM 2020 in either the recommendation memorandum or the notification decision. However, ALI submitted the decisionmaker could be taken to have been aware of the promulgation of this recent national policy statement at the time of the notification decision, and it was a matter to which the Commissioner certainly had regard in the discharge consent decision.

[199] I do not consider the recent coming into effect of the NPSFM 2020 gave rise to a special circumstance that bears on the question of notification. I accept the Council's submission that the focus of a notification decision is largely on the potential effects of a proposal,[101] rather than any measurement of the proposal against a high

[101] Resource Management Act, ss 95-95G.

end policy instrument. Viewed against the statutory framework provided by the RMA for making notification decisions, I do not consider the introduction, into what is an often evolving regulatory environment, of a new policy statement of itself gives rise to a special circumstance that can be categorised as unusual or exceptional.

Community drinking water supplies

[200] ALI submitted the discharge consent application gave rise to special circumstances because of the potential adverse effects on community drinking water supplies through contamination of groundwater, which points towards the public having a particular interest in the application about which they should have had an opportunity to comment.

[201] The Land and Water Regional Plan contemplates the issue of community drinking water supplies in the context of irrigation schemes. It identifies community drinking water protection zones that are located within the ALI irrigation scheme. There was evidence that, as a result of discussions with the Council's groundwater scientists about how to assess effects on community drinking water supplies, ALI changed its proposed management of effects on community drinking water supplies to what is called a "risk-based approach". It included a proposed condition that would prevent further intensification (relating to stocking rates and use of nitrogen fertiliser) within community drinking water protection zones and additional requirements to farm environment plans to maintain a record of fertiliser use and stocking rates, and an obligation to notify the Council of any event that may result in the contamination of drinking water. These particular measures would apply to four shareholders' properties that fell partially or fully within a community drinking water protection zone.

[202] Leaving aside questions as to the adequacy of these steps, it is apparent from the recommendation memorandum that the decisionmaker was aware of the issue of community drinking water supplies and the proposals regarding how they were to be managed. It is not apparent this factor which was taken into account as part of the notification decision process was unusual, abnormal or exceptional, it being an issue that was reviewed in the s 42A report and made the subject of recommendations. It

was a factor that appears to have been considered by the Council in determining whether or not to notify. In the context of an application for a discharge consent by an irrigation scheme, in the absence of evidence of any concerns that potential effects on community drinking water were out of the ordinary, it is not apparent this feature should have been recognised as a special circumstance or as contributing to such a finding.

Alleged significant public interest

[203] ELI submitted the application for the discharge consent gave rise to a matter of significant public interest because of the scale of the activity in respect of which the consent was being sought, the size of the Discharge Area, and the already degraded state of the environment. These features, which are contended as likely to cause the application to be a matter of significant public interest, have been considered previously. However, likely public interest in a proposal can be a contributing factor when assessing the existence of special circumstances, although not a determinative one.[102]

[204] In *Classic Developments NZ Ltd v Tauranga City Council*, Venning J remarked that even major levels of public interest cannot of itself give rise to special circumstances.[103] The Judge observed if that was so, every application where concern was expressed by people claiming to be affected would have to be notified.[104] Whether public interest is capable of giving rise to special circumstances in a particular case is informed in part by the special circumstances that are contended for.[105] The size of the irrigation scheme is relied upon as a special circumstance. However, as noted earlier, this is not an unusual feature. As already observed, it is an activity contemplated by the Land and Water Regional Plan, and in particular by r 5.62, that provides for such schemes to apply for consent approval without public or limited notification.

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102 *Classic Developments NZ Ltd v Tauranga City Council* [2020] NZHC 945 at [53].
103 At [53].
104 At [53], citing *Urban Auckland v Auckland Council,* above n 95, at [137].
105 *Urban Auckland v Auckland Council,* above n 95, at [141].

[205] As submitted by ALI, r 5.62 and the Land and Water Regional Plan itself were approved through a public process. It was argued the potential influence of public interest as contributing to special circumstances has to be considered in the context of the statutory scheme. Insofar as public concerns may arise from the degraded state of the receiving environment, that consideration, which legitimately focuses on the potential ongoing effects of a new discharge consent, resulted in the requirement that Te Rūnanga o Ngāi Tahu be notified as an affected person. While there is undoubtedly wide public interest in the quality of freshwater, when regard is had to the circumstances and parameters of the present application, it is not apparent that public notification would have resulted in the receipt of further relevant information that was not otherwise made available to the decisionmaker.[106]

[206] Given the intended effect of r 5.62 of the Land and Water Regional Plan, it is not apparent on the available evidence that public interest in the application was a factor that could be described as unusual or exceptional so as to qualify as a special circumstance.

Employment of the "matrix method"

[207] ALI raised the employment by the irrigation scheme of the "Matrix method" for the purpose of aggregating nitrogen discharge allowances which, it was submitted, had not been envisaged at the time of the promulgation of the Land and Water Regional Plan. However, while the Land and Water Regional Plan refers to the use of what is described as the "overseer model" as the default method of estimating nitrogen losses from farming activities, it provides for the use of an equivalent model approved by the Council's Chief Executive as a means of making relevant calculations, including determining a nitrogen baseline and a "nitrogen loss calculation".

[208] There was evidence that the use of "equivalent models" have been approved in the past as alternatives to the "overseer model". The use of the "Matrix method" is expressly noted in the recommendation memorandum and its employment by the

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[106] *Associated Churches of Christchurch Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, [2015] NZRMA 113 (HC) at [67].

irrigation scheme cannot be considered as either unusual or exceptional in the context of the Land and Water Regional Plan.

Use of the "overseer model"

[209] Finally, ELI argued that the use of an "overseer-based", or "overseer-equivalent" nitrogen loss model, which was included in ALI's proposal for calculating a scheme-wide nitrogen load and for the ongoing auditing of on-farm practices in accordance with farm environment plans, gave rise to a special circumstance. Reliance was placed on a report on the overseer model by the Parliamentary Commissioner for the Environment issued in December 2018. In that report, the Parliamentary Commissioner observed that "overseer" had not been subject to "the rigorous formal scrutiny that those who are being regulated might expect" and that its assessment had revealed that a significant amount of information required to confirm its use in a regulatory setting was lacking.[107]

[210] However, the Parliamentary Commissioner did not recommend the prohibition of the use of overseer. He recommended a comprehensive evaluation of it be undertaken by Government. In terms of what should occur in the meantime, it was noted that the overseer model is utilised by many regional councils to determine compliance with nitrogen limits. The Parliamentary Commissioner stated:[108]

> ... [M]ost if not all the regional councils currently using Overseer to determine compliance with nitrogen limits do so because of the nature of the challenge they face. Overseer, in conjunction with catchment-scale modelling, provides a defensible quantitative basis for charting a pathway towards a lower environmental nutrient burden. And Overseer, by itself, provides a defensible basis for engaging land users on how they can, in a quantifiable way, reduce their share of that burden.

[211] The Parliamentary Commissioner acknowledged a comprehensive evaluation of overseer would take time and that, in the meantime, regional councils would have to work with the model under current arrangements.[109] The concerns raised by the Parliamentary Commissioner regarding the efficacy of the overseer model apply

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107 *Report of the Parliamentary Commissioner for the Environment : Overseer and Regulatory Oversight : Models, Uncertainty and Clearing Up Our Waterways*, December 2018, at 118.
108 At 118.
109 At 122.

widely across the regulatory framework and are not specific to this particular resource consent application or region. As is apparent from the report, the use of an overseer is widespread across the country and remains a primary assessment tool which, as acknowledged by the Parliamentary Commissioner, will have to remain in use pending any comprehensive evaluation by central government. In the circumstances, therefore, it is not a factor that is unusual or unique to this discharge consent application but a systemic issue that is unlikely to be advanced, at least in a substantive way, in the context of individual consent applications before separate consent authorities.

Conclusion

[212] From the matters canvassed in the recommendation memorandum, it is reasonable to conclude the planning officers were cognisant of the majority of matters contended to give rise to special circumstances. I accept that bare conclusionary statements by responsible officers charged with analysing and determining the issue of notification leaves such decisions vulnerable to the criticism they are unsupported by reasons. However, when regard is had to the content of the recommendation memorandum, I am satisfied the matters the decisionmaker and his advisers took into account and which informed their conclusions when applying the statutory notification framework, including the question of special circumstances, can be reasonably discerned.

[213] The material features of the discharge consent application, which is argued should have been considered as giving rise to special circumstances, were referred to in the recommendation memorandum. They can reasonably be accepted as having been taken into account when determining whether special circumstances existed to warrant any wider notification of the application. It was not necessary for all potential special circumstances to be exhaustively identified for the purpose of discounting or disqualifying them.

[214] Having reviewed the matters raised as giving rise to special circumstances, I am satisfied that neither individually, nor when taken together, do they give rise to special circumstances that warranted public or further limited notification. The Council, through its officers acting under delegated authority, was entitled to

reasonably conclude there were no special circumstances that applied that warranted either public notification or further limited notification of the application.

Overall conclusion

[215] As a result of my findings that the Commissioner made a material error of law in her approach to the application of s 107 of the RMA and failed to consider mandatory statutory considerations, the application for judicial review is granted. I find no error of law arises in respect of the notification decision and that part of the judicial review application is dismissed.

Relief

[216] The decision of the Council granting the discharge consent is set aside and ALI's application remitted back to the Council for reconsideration.

Costs

[217] Costs are reserved. If the parties are unable to agree on costs between them, they may file memoranda sequentially.

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Appendix A

PLAN CRC185469A: Nutrient discharge area and ALIL Farms