IN THE MATTER OF the Resource Management Act 1991

AND

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

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MEMORANDUM BY COUNSEL FOR THE DIRECTOR-GENERAL OF CONSERVATION IN RESPONSE TO THE COMMISSIONERS MINUTE OF 1 APRIL 2009 AND THE APPLICANTS MEMORANDUM OF 1 MAY 2009

Dated: 08 May 2009

Director-General of Conservation
Department of Conservation

Torrens House
195 Hereford Street
PO Box 4715
Christchurch 8011
Tel +64 3 371 3700
Fax +64 3 365 1388

Counsel: P. N. Rutledge

SUMMARY OF MEMORANDUM BY COUNSEL FOR THE DIRECTOR-GENERAL OF CONSERVATION (THE DEPARTMENT)

1. INTRODUCTION

1.1 In the Commissioners Minute/Directions and Request for Further Information dated 1 April (The Minute) the Commissioners provided the Applicant (CPW) with the opportunity to make submissions on the procedural issue of whether the hearing should be closed and a decision issued or whether the hearing should be kept open to enable CPW to provide further evidence in support of an amended proposal in the event key components such as the storage dam were declined. The Minute requested further information from CPW in respect to a number of issues para 28 and provided an opportunity for counsel for submitters to respond (para 29-31).

1.2 In particular the Commissioners were seeking information to assist them with the decision as to whether :

- If the recommendation is to not confirm the dam, upper intake and tunnel and decline the associated consents could consents still be granted for water takes, the lower intake and associated distribution network (para 28(b))?
- Would such an approach be contrary to the holistic approach established in case law and s103 of the Act para 28(c) & (o)?
- Further questions were asked in respect of various aspects of such an approach para 28(d) & (n).

1.3 In response CPW filed a Memorandum dated 1 May 2009 (the Memorandum). The Memorandum provides a number of arguments and case law to support a view that a scheme even without the storage aspects is still within the scope of the Hearing Committees jurisdiction.

1.4 I have had the opportunity to read the submissions in response filed on behalf of the Royal Forest and Bird Protection Society of NZ Inc (RF&B) and adopt those submissions in respect of the ‘commonsense approach’. I will also adopt

submissions of counsel for Fish and Game and other submitters to the extent they raise legal matters relevant to the Department's concerns.

1.5 The Departments' concerns focused on the proposed effects of the storage on the endangered mudfish population of the Wainiwaniwa and the effects in the reduction of water flows on the significant braided river habitat and native fish (Opening Submissions para 1.5-6). However there were other effects of concern (paras 1.7-9).

1.6 Clearly a decision to recommend against confirming the designations and associated consents for water storage and to retain the flows in the braided rivers necessary to protect the habitat of birds and native fish will meet the Departments' major concerns. In respect to the designation for the Headrace however it still affects a conservation area. If it is to stand alone it will need to pass the s171 tests on its own merit.

1.7 In respect to any applications to take water for irrigation the Departments' concerns relate to the effects of the take and use not the identity of the consent holders. The comments that follow are therefore offered to assist the Commissioners to determine a process which is a fair one for all parties and which is appropriate to the allocation of a scarce public resource – fresh water.

1.8 The Department's view is that the Hearing should be closed and a decision issued. This is the same approach adopted by the Commissioners for Manawatu-Wanganui Regional Council and Tararua District Council dealing with Contact Energy's proposed Waitahora wind farm on the Puketoi Range. The reasons are given below.

2. DISCUSSION – Scope/holistic approach/alternatives

2.1 Scope/holistic approach: There is plenty of case law to support the proposition that, in principle, an application may be amended during the course of the process provided the amendment is within the scope of the original application. Whether any particular amendment is within scope becomes a matter of fact and degree. Others have covered the case law in their submissions and I will not duplicate them. Instead I propose to focus on other aspects of the issue.

2.2 There have already been considerable alterations to the proposal. As late as March/April 2007 additional applications were sought and the notice of requirement amended. These were all notified and considered as part of the application as a whole.

2.3 At this stage of the process however it is my submission that the change from a storage scheme to a run-of-the-river scheme with the consequent uncertainties in respect of the amount of water required, area to be irrigated, reliability etc means this is not a smaller Central Plains Water Enhancement Scheme but a completely different scheme altogether.

2.4 The CPW Memorandum argues that the scheme has not been presented as an "integrated package" in every respect (para 24) and goes on to state the dam was an "adjunct" to the water take and use consents. That does not appear to be the case.

2.5 The Central Plains Water Ltd web site states (my emphasis):

<u>Because it involves water storage</u>, the Central Plains Water (CPW) scheme is designed to:

- *provide a reliable irrigation supply, even during droughts*
- *meet the irrigation needs of farmers within the scheme area for the next 100 years*
- *bring balance back to the groundwater system*
- *provide security against climate change*
- *promote the most efficient, economic and environmentally sensitive farming practices*
- *future proof the region's economic base*
- *enhance the region's ecological and recreational resources.*

2.6 The CPW leaflet "ANSWERING YOUR QUESTIONS ON CENTRAL PLAINS WATER " (attached to Richard Budd's evidence) states "*The Central Plains Water scheme will consist of a main headrace canal, a network of distribution races and a storage lake …*". It has a section headed "WHY IS THIS DIFFERENT FROM A RUN-OF-THE-RIVER SCHEME?" which includes the

statement "*It is the lake that makes Central Plains Water different from a run-of-the river scheme. The storage component means for the first time landowners will have a reliable source of water throughout the summer…"*

2.7 The CPW Opening submissions state at paras 28 & 37-9 (my emphasis) :

28. *At its simplest level, the scheme seeks to enhance the availability of water in the central plains area between the Waimakariri and Rakaia Rivers. It seeks to put in place an irrigation scheme which will be able to reliably provide water for farms and other users within its command area.*

37. *Irrigation is of limited use to farmers if it is not reliable.*

38. *A critical component of CPW'S scheme is its ability to provide very reliable supply, even during dry periods when river flows are low and water is not available from either the Rakaia or the Waimakariri under what might loosely be called an allocation or sharing regime put in place by the Regional Council in respect of the Waimakariri and by the National Water Conservation (Rakaia River) Order 1988 in respect of the Rakaia.*

39. *To provide reliability it is proposed to store water in a reservoir to be created by damming the Waianiwaniwa River at the mouth of the Waianiwaniwa valley in the Malvern Hills, approximately 1.5 km north-east of Coalgate. The proposed dam structure will be approximately 2km wide, up to 55m high, and with a footprint of some 250 m. The maximum storage volume proposed is some 280,000,000 m^3 of water. The reservoir will flood much of the Waianiwaniwa Valley - an area of approximately 12 km^2. The dam will have a mean depth of around 24 m and a maximum depth of approximately 50 m around the southern margin of the reservoir next to the darn. The maximum length of the reservoir will be approximately 5.9 km when it is full. It is proposed that the surface level, of water in the reservoir will be approximately RL280 m (although it may be possible to achieve sufficient storage with a lower water level).*

2.8 It is not therefore correct to say that the storage was merely *"…an adjunct to the consents to take and use the water."* (the Memorandum para 24) which could be considered on their own merits. In fact as shown above CPW had identified that reliability of supply was critical to the scheme and that it would be provided by the storage component. Storage was therefore always critical to the scheme. If you remove a critical component of a scheme it is a different proposal. The CPW scheme in its own words was "*different from a run-of-the-river scheme.."*

2.9 Judging by CPWs own words therefore a storage based irrigation scheme is quite different from a run-of-the-river scheme. Its evidence was consistent with that. Deleting the storage aspect will not merely reduce the adverse effects it will markedly alter the positive effects and the rationale for the whole scheme. CPW acknowledges that any s104 assessment of the scheme as run-of-the-river is likely to involve "..*some additional evidence* .."(Memorandum para 6(b)).

2.10 Leaving aside CPW's own description of its scheme it seems to me that the best way to determine whether the proposed amendment is within scope or not is the need for further evidence. If the Hearing Committee has sufficient evidence to assess the effects of a run-of-the river irrigation scheme then it could be a reduction in scale. If further evidence (and possibly consents) are required then it is likely the amendment is a change in the nature of the scheme not its scale.

2.11 It clearly will need additional evidence because as the Memorandum states "*A scheme without storage would have different effects and may involve some different considerations."*

2.12 A similar issue arose in respect of the recent hearing for Contact Energy's proposed Waitahora wind farm. As can be seen from the Commissioners decision they considered whether the hearing should be adjourned to allow the applicant time to do further work and provide further information on the effect of earthworks on natural flows (para 10.5.2). As becomes clear from the analysis in para 11.7 they felt they had insufficient information to assess these effects with any confidence. In respect to the turbine size while it was clear the proposed 150m turbines would significantly detract from the landscape a reconfigured proposal (and in particular shorter turbines) might have lesser impact (para 11.8.8).

2.13 In that case the Applicant argued there was sufficient information about ground water effects in any case. The Committee decided:

11.15.2 As will be apparent from the foregoing assessments, we concluded that there is not sufficient evidence to fully understand the effects on groundwater (or perhaps more accurately sub-surface water). We also concluded, from the evidence we heard, that there is a possibility of

significant adverse effects on that water resource. If there were no other concerns with the proposal or difficulties with the process, we might well be inclined to adjourn the hearing for further evidence to be gathered, if possible, to address those adverse effects.

11.15.3 However, apart from Contact's view that no further information was required, two factors dissuade us from following this course. They are as follows.

11 .I5 .4 First, it is highly likely, on the evidence we have heard, that two or more further consents would be required in relation to sub-surface water. Neither of these consents has been sought by Contact. Mr Alexander and Dr Brown agree that it is inevitable that some silt would enter subsurface water, and given the proposed volume of earthworks, and the geology of the site, it seems most likely that this would require a discretionary activity discharge to water permit. Then there is the likelihood that the proposed filling of underground hollows, caves or waterways would divert or impede existing flows: that would require a water permit. It seems to us, on balance, that these possibilities are not merely speculative, but arise out of evidence from both Contact and the Guardians. Any such consent applications would require thorough assessment by relevant experts.

11.15.5 We then have to consider whether these applications could be adjourned until the further applications which are required reach the same stage in terms of process. In a simple case, that option might be open and sensible. However, where there must at least be a reasonable possibility that further applications will be notified, and that the 'pool' of submitters might be different, it appears impractical. The applications must be heard as an integrated application to allow an integrated assessment of the effects on the environment. If further applications were to bring in new submitters, we think that they could expect to be heard on all aspects of the proposal, and the hearing of all applications might have to start again.

11 .I5 .6 The second complicating factor which will again be apparent from our discussion above, is that if the proposal by Contact were to be consented, it is likely that significant modifications to it would be required. We have signalled the aspects of the proposal that cause us concern. We do not see any benefit to any party in requiring further work to be carried out on aspects of a proposal which would be unlikely to receive consent in any event.

11.15.7 The decisive factor is, finally, that we do not think that the applications, as made and supported through evidence, satisfy the overall purpose of sustainable management, and we now turn to outline our conclusions on this point.

2.14 In my submission the same factors are relevant here. Integrated management requires a scheme to be assessed as a whole rather than part by part. The Minute has already signalled that significant modifications to the scheme (i.e. the deletion of the storage and reduction in take) and further evidence will be required to enable it to be granted even in part. If a critical component (i.e. the

storage) is to be deleted then the effects of the scheme both adverse and positive will change markedly as the Minute acknowledges in para 15.

2.15 Given therefore that further evidence would be required before the Commissioners have sufficient evidence to assess the consents to take and use water independently in my submission the scale of the proposed amendment puts it outside the scope of a permissible amendment. Instead the amendment is one which changes the nature of the proposal in a fundamental way. At this stage of the process it is not fair to effectively commence a new hearing for a new proposal. On the other hand the evidence on the original CPW scheme does not enable the Commissioners to be satisfied that reduced consents to take and use the water would constitute sustainable management.

2.16 Adjournment for further information; The recent Environment Court decision *Marlborough Aquaculture Limited & Ors V Marlborough District Council* W27/09 concerns a number of appeals relating to proposed marine farms in Admiralty Bay. That decision related to applications where in response to uncertainty as to the effects of the farms on dolphins the applicants had proposed novel mitigation measures including a 3 year programme of baseline monitoring (para 15). The Court concluded that effects on habitat cannot be adequately assessed until after the completion of the baseline study the purpose of which is to establish whether or not there is a period of the year when the absence of the dolphins enables the area to be used for aquaculture. Further the effect on other factors, especially landscape could only be assessed once the proposal for subsurfacing is developed and explained. The Court therefore concluded that it would defer resolution until the outcome of the baseline study was completed which would also allow time for the subsurfacing concept to be developed.

2.17 The particular circumstances that lead the Court to agree to the adjournment do not apply to this case. It is not the case here that an adjournment is needed to enable further scientific study to be undertaken, rather the delay is proposed to allow CPW to provide more evidence about a different proposal.

2.18 Alternatives: The Memorandum at para 8 notes *"...the option of a reduced scheme, absent the storage component, could be classed as an alternative*. This option is then explored at paras 28-33. However the Memorandum does

not refer to any evidence to show that the CPW AEE did consider a run-of-the-river scheme as an alternative. Nor can I find any reference in Mr Tipler's evidence–in-chief (para 51-76) to a non-storage option as an alternative.

2.19 The Concise Oxford says "alternative" means: of two things - mutually exclusive; of 1 or more things - available in the place of another. The case law cited in the Memorandum indicates the term as used in the Resource Management Act means mutually exclusive. In my submission an alternative proposal is by definition beyond the scope of this hearing. The amended run-of-the-river scheme is a different scheme from a storage scheme as CPW have always argued.

2.20 What however the Memorandum does not do is to discuss the effect of the amended scheme on the headrace designation and the s171 requirements. Clearly changes to a run-of-the-river scheme will need new evidence to support a recommendation for the remaining designations. A further reason therefore why this alteration would be beyond the scope of this hearing. Meanwhile the notice of requirement continues to affect the land subject to it until the matter is resolved.

2.21 Para 33 notes "*As no matters of national importance arise in this case..".* Given the evidence in respect of s6 matters of national importance and the effects on the mudfish and braided river habitat this is clearly wrong.

3. OTHER MATTERS

3.1 Viability. I note the reference in para 38 to the case of *Minister of Conservation v Tasman District Council*. No reference is given for the comment so it is not altogether clear which particular part of the case they rely on. As counsel for the Minister in the Environment Court and junior counsel in the High Court I am familiar with that case. The reference to viability was in the context of the scope of powers under s128 to implement adaptive management techniques and the extent that activities could be limited or reduced once consent was granted. The High Court comments re viability at para 43 were merely a quote from the Environment Court decision. The High Court agreed with the Environment Court that a combination of provisions and not merely s128 gave the necessary

controls for adaptive management purposes. I do not however see this as being relevant to this situation.

4. CONCLUSION

4.1 During this hearing CPW has had the opportunity to call supplementary evidence to address issues raised in submissions which should have been covered in their evidence in chief. They have also had the opportunity to request the Commissioners to adjourn the hearing and to allow them to provide further evidence to support a run-of-the-river scheme. The hearing process has therefore been more than fair to CPW.

4.2 In my submission the Commissioners have sufficient evidence to determine that critical aspects of the CPW scheme would not constitute sustainable management. They do not have sufficient evidence to determine a run-of-the-river scheme would be sustainable. In my submission the answer to the question at para 28(b) of the Minute must therefore be no as it would be contrary to the case law on the holistic approach. Without storage this is a different scheme which needs to be considered on its merits.

4.3 For the reasons given above it is my submission that the only process that is fair to all parties is to close the hearing and issue a decision.

P. N. Rutledge
Counsel for the Director General

Dated: 08 May 2009