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*in the matter of:* the Resource Management Act 1991

*and*

*in the matter of:* an application CRC021091 by the Ashburton Community Water Trust and Central Plains Water Trust to take water from the Rakaia River

*and* applications to Environment Canterbury by the Ashburton Community Water Trust to use water from the Rakaia River and all associated consents required for the construction and operation of a hydro-electric power scheme

*and* an application to the Ashburton District Council for the works associated with, and the operation of a utility, namely construction of intake, settling pond, first canal with hydro generation facilities installed within the canal, second canal, storage pond, and hydro-generation power station and returning of the water to the Rakaia River

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Second summary of submissions on behalf of the Ashburton  
Community Water Trust

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Dated: 15 September 2008

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## SECOND SUMMARY OF SUBMISSIONS ON BEHALF OF THE ASHBURTON COMMUNITY WATER TRUST

### INTRODUCTION

- 1 This hearing is now in the process of hearing and determining the specific applications made by the Ashburton Community Water Trust (ACWT) to Environment Canterbury and the Ashburton District Council for the construction and operation of the ACWT hydro-scheme. These will be determined alongside the joint application with the Central Plains Water Trust (CPWT) seeking to take up to 40 m<sup>3</sup>/s of water from the Rakaia River (the '*joint take application*').
  
- 2 The Commissioners have already heard submission from ACWT in relation to the joint application.<sup>1</sup> In submissions I advised that pursuant to an agreement between ACWT and CPWT the responsibility for producing the joint case in relation of taking up to 40 m<sup>3</sup>/s of water from the Rakaia primarily lay with CPWT. My submissions were accordingly relatively short and discussed:
  - 2.1 an outline of the ACWT scheme;
  - 2.2 the scope or notification issues between the 2001 joint take application and the 2007 ACWT hydro applications;
  - 2.3 the other "*southern entities*" relevant to the ACWT proposal; and
  - 2.4 the particular legal/statutory matters relevant to the take application – with emphasis on the requirements under section 104 and the National Water Conservation Order (Rakaia River) 1988 (the *NWCO* or *the Order*).
  
- 3 Since my original appearance CPW has called further evidence and delivered their right of reply in relation to the CPW applications. In so far as the evidence and submissions are relevant to the joint take application, they are adopted for these applications.
  
- 4 Turning to today, a more detailed introduction (or 're-introduction') to the ACWT scheme will be provided by **Steven Woods**. I will address:

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<sup>1</sup> Summary of submissions for the Ashburton Community Water Trust dated 23 April 2008.

- 4.1 The importance of more electricity generation, and particularly renewable generation as will be delivered by ACWT;
- 4.2 The nature of ACWT's integration with other schemes on the south (true right) bank of the Rakaia River. These parties (ACWT, Barrhill Chertsey Irrigation Limited (*BCI*) and Electricity Ashburton Limited (*EAL*)) are colloquially referred to as the 'southern entities';
- 4.3 The legal and planning framework – including particular issues with respect to the NWCO.
- 4.4 The assessment of the application – including more specific matters under sections 6(c) and (b) and other matters under sections 7 (ba), (i) and (j).

#### **ACWT AND THE NEED FOR ELECTRICITY**

- 5 Over the last 20 years demand for electricity has grown significantly and is likely to continue to grow in response to GDP growth and an increasing population. This is particularly true in the South Island where local growth in absolute terms has been higher than that in the North Island; and also where, during this last winter security of supply has been at risk.
- 6 ACWT will make a significant contribution to demand growth and the need for security of supply. The scheme is also well positioned in terms of transmission to support both the Ashburton District and the wider Canterbury Region.
- 7 In addition, ACWT, in conjunction with the other southern entities offers a very real opportunity for increased efficiency in the use of water through the integration of hydro electricity generation with irrigation. Although ACWT is not in itself seeking consents for the use of water for irrigation, it shares an intake and canal infrastructure BCI and through EAL the 'southern entities' will both generate and irrigate off the same point of supply.
- 8 Turning back specifically to generation, the government has identified that two significant long term energy challenges that New Zealand faces. These are relevant to the ACWT scheme and the Ashburton community.

- 9 The first challenge to the wider New Zealand economy is the requirement to deliver a secure, clean and reliable energy supply at affordable prices in an environmentally responsible manner. The second major long term energy challenge identified is responding to climate change and carbon emissions from our energy production and use.<sup>2</sup>
- 10 From this it is apparent that our Government is committed to promoting renewable energy. There is a very clear policy direction reflected in a number of documents including the New Zealand Energy Strategy (NZES) which sets out the Government's vision of a sustainable, low emissions energy system and describes the actions that will be taken to make this vision a reality.
- 11 The energy efficiency and renewable energy sections in the NZES are in turn supported by the New Zealand Energy Efficiency and Conservation Strategy (NZECS). The NZECS is an action plan to help New Zealanders increase their uptake of energy efficiency and conservation measures and renewable energy and contains a target of 90% renewable energy generation by 2025<sup>3</sup>.
- 12 Building on the above, the Government has also recently proposed a National Policy Statement for Renewable Electricity Generation. It would establish, as a matter of national significance under the terms of the RMA, "*the need to develop, upgrade, maintain and operate renewable electricity generation activities throughout New Zealand*".
- 13 The proposed objective of this statement is:
- To recognise the national significance of renewable electricity generation by promoting the development, upgrading, maintenance and operation of new and existing renewable electricity generation activities, such that 90 per cent of New Zealand's electricity will be generated from renewable sources by 2025 (based on delivered electricity in an average hydrological year).
- 14 There are also legislative initiatives consistent with Government Policy such as the Climate Change Response Act 2002 which is to enable New Zealand to meet its international obligations and amendments to the RMA in 2004 which make explicit provision for

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<sup>2</sup> *New Zealand Energy Strategy to 2050*, Ministry of Economic Development, October 2007, sections 2.1 and 2.2.

<sup>3</sup> Final versions released October 2007.

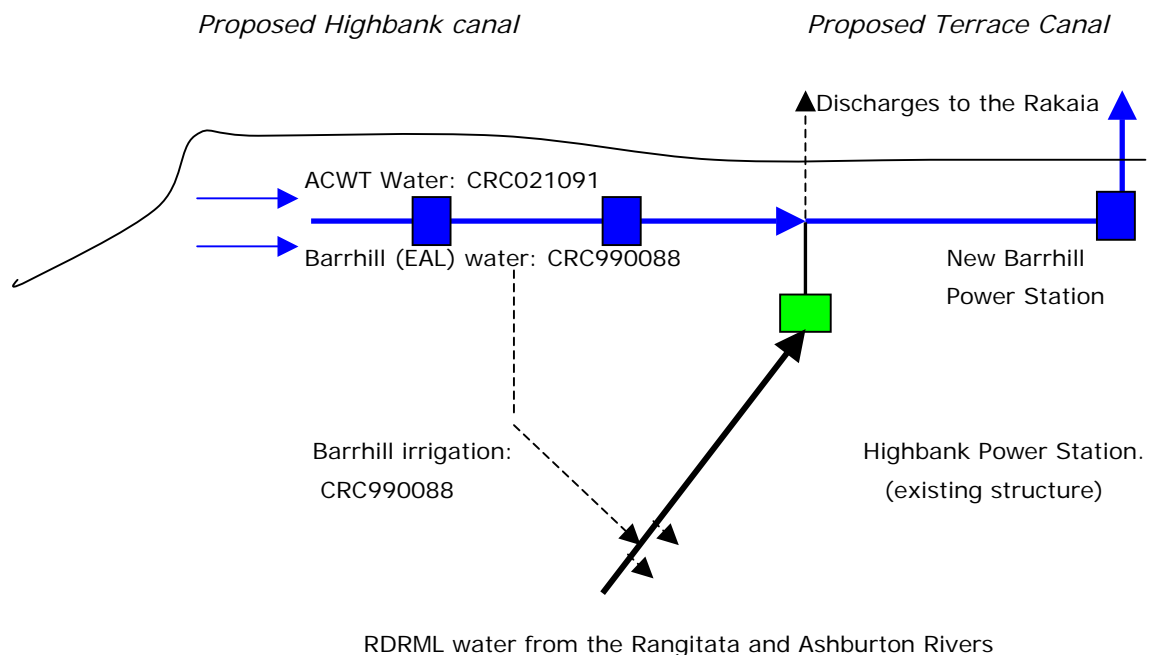
decision makers to have "*particular regard*" to the efficient use of energy, the effects of climate change and the benefits associated with the use and development of renewable sources of energy.

- 15 Compounding the drive to renewable energy and to reduce greenhouse gas emissions is the recently introduced 10-year moratorium on new thermal generation. This makes the ACWT scheme, as an integrated renewable generation resource even more important.
- 16 Overall, it is ACWT's case that its proposal will not only assist New Zealand to meet its obligations in terms of climate change issues, but will also ensure that the Ashburton District and wider Canterbury Region makes a contribution to its own renewable energy needs and that it is an efficient use of the Rakaia River resource.

#### ACWT AND WHERE IS THE WATER COMING FROM?

- 17 This was comprehensively described in my previous set of submissions. For context, and to remind the Commissioners of previous submission I discuss this only briefly here:

#### Schematic of flows on south bank with ACWT



### **The Southern entities and RDRML**

- 18 There are a number of entities that are directly relevant to or that may be integrated into the ACWT scheme. These are as follows:

#### ***Barrhill***

- 18.1 In 2001 Barrhill obtained a suite of consents to enable the take and use of 17 m<sup>3</sup>/s of water (along with associated consents) for irrigation and hydro-electricity generation.
- 18.2 The Barrhill intake site is the same as that proposed by ACWT.
- 18.3 As previously noted the Barrhill irrigation (and EAL hydro) scheme has not yet been constructed but significant progress is being made towards this. A contract has been entered into for construction of the scheme.
- 18.4 As I understand you heard from Mr Leo Fjetie, Barrhill is currently awaiting a decision from the Environment Court on an application for declarations which will confirm that the water Barrhill takes can be utilised in the wider area between the Rangitata and the Rakaia Rivers. This will also determine the ability of BCI to, with the agreement of RDRML, use of the Rangitata Diversion Race (*RDR*) as a conveyance mechanism to get water across the plains.
- 18.5 Eventually water will flow through the ACWT intake for use in the BCI/EAL & ACWT hydro and irrigation scheme. The 'off-take' for the BCI irrigation scheme is located between the first and second drop structures in the Highbank canal.
- 18.6 BCI has also entered into a commercial arrangement with EAL to give effect to the BCI take and its associated consents.

#### ***Electricity Ashburton Limited***

- 18.7 When I last appeared EAL had just been granted consent in relation to the EAL hydro-scheme. This will utilise 17 m<sup>3</sup>/s of water authorised to be taken by BCI through the previously consented BCI intake for the purposes of hydro-electricity generation through the first and second drop structures (with the water being discharged into the Highbank canal).
- 18.8 Under the EAL/BCI hydro-scheme water will pass through two drop structures on the lower terrace before being discharged into the Highbank tailrace canal. This is the same intake

location, canal route, and drop structure arrangement currently proposed by ACWT. Most, but not all of the infrastructure has been designed so that the canal and power stations can accommodate 40 m<sup>3</sup>/s of water, i.e. a combination of water authorised to be taken by Barrhill and/or ACWT.

18.9 In simple terms the EAL scheme comprising an intake, the Highbank canal and two power stations forms the first 'stage' of the ACWT proposal.

18.10 However, in technical terms there are some minor differences between the EAL hydro-scheme and that proposed by ACWT along the Terrace Canal. In particular I refer to the layout and size of the intake (17 m<sup>3</sup>/s versus 40m<sup>3</sup>/s) and the fact that the EAL/BCI scheme has a smaller pond. On the other hand, the canal and power stations consented as a part of the EAL proposal are able to accommodate the ACWT take.

18.11 **Mr Steven Woods** will discuss this in more detail. He will also address the different possibilities in terms of discharges or 'sluicing' and the treatment of sediment.

18.12 As I will address below, it is my submission that this integration process is not material to the consideration of the current consents. Despite considerable overlap between the two proposals, ACWT is still applying for consents to take and use water for hydro-generation and to construct the infrastructure associated with the Rakaia terrace hydro proposal as a standalone proposal:

- (a) so that it holds the necessary consents should EAL not proceed with construction of its scheme; and
- (b) to ensure it is also able to take and use all of the water sought under the joint take application in the wider Rakaia terrace hydro scheme.

***RDRML***

18.13 Rangitata Diversion Race Management Limited (*RDRML*) hold consents to take water from the Rangitata and Ashburton Rivers for the purposes of irrigation in three sub-schemes - Mayfield-Hinds, Ashburton-Lyndhurst and Valetta; and for the purposes of hydro-electricity generation.

- 18.14 There are two hydro-generation structures along or at the end of the race i.e. Highbank and Montalto. These are controlled by TrustPower (and not EAL as stated by Mr Fjetie).
- 18.15 Due to the nature of irrigation the majority of flows from the Rangitata and South Ashburton to the Highbank Power Station occur across the winter months when electricity demand increases and the need for irrigation water reduces.
- 18.16 Water used at Highbank is discharged to the Rakaia. Under the ACWT proposal, water passing down the tailrace (theoretically up to 40 m<sup>3</sup>/s) would be taken into the Terrace Canal instead of discharging to the Rakaia.
- 18.17 RDRML is not integrated to the same extent as BCI, EAL and ACWT. However, pursuant to an agreement between the Ashburton District Council and TrustPower, TrustPower has no direct interest in the water in the Highbank Power Station tailrace once it has passed through Highbank Power Station.

***TrustPower***

- 18.18 TrustPower operates Highbank Power Station but does not hold the consents to take, use and discharge water.

***Central Plains***

- 18.19 As was appended to the first brief of evidence of **Mr Ian Mackenzie**, the latest memorandum of variation between CPW and ACWT provides that ACWT will receive 44% of the water available to be taken at any given time as granted under CRC021091 and the Glenroy consents.
- 18.20 This will give a 'first call' entitlement to about 16 m<sup>3</sup>/s (based on all currently available water in the Rakaia). However, pursuant to the original memorandum of agreement, ACWT can take any water that is not being on a particular day by Central Plains so seeks authorisation to take up to 40 m<sup>3</sup>/s through its intake.

***Synlait Limited***

- 18.21 Synlait has been granted consent to take 6 m<sup>3</sup>/s of water not used (or, by its argument 'not allocated') to existing users in band 2 & 3.
- 18.22 A few days after the consent was issued the Environment Court declared that Synlait could not access that water in

band 2 & 3. This aspect was not reversed on appeal and leave has not been granted for this issue to proceed to the Court of Appeal.

18.23 Dairy Holdings Limited & Ors (*Dairy Holdings*) have appealed the grant of consent and now maintain the position that because of the declaration decision the application can't proceed.

18.24 In addition, an agreement has been entered into between Dairy Holdings, BCI and Synlait under which Synlait has agreed to support BCI and the southern entities (defined to include ACWT) in relation to any application that relates to the BCI consent. Clause 8 of the agreement provides:

8 Dairy Holdings and Synlait will not do or omit to do (and will each use their reasonable endeavours to have any Wider Alliance not do or omit to do) anything that may reasonably be expected to adversely affect:

8.1 CRC990088 or the EAL Application; or

8.2 BCI's ability to take or continue to take its Current Proposed Take; or

8.3 any interest of any Southern Entities in any of the matters specified in clauses 8.1 and 8.2.

18.25 I note that Synlait is a submitter to this process and at this stage I flag that ACWT, BCI, EAL and Dairy Holdings whom I represent reserve their rights in respect of any opposition to the ACWT applications by Synlait.

#### **Overall water flows**

19 To summarise the above, in the Highbank Canal ACWT will potentially be able to access 17 m<sup>3</sup>/s from BCI and another 40 m<sup>3</sup>/s (but in most instances around 16 m<sup>3</sup>/s) under the joint take application.

20 In theory this could result in a maximum take through the intake of 57 m<sup>3</sup>/s but in practice ACWT will be constrained to the use of:

20.1 the 17 m<sup>3</sup>/s under BCI consent CRC990088 that will always be taken first due to its higher priority; and

20.2 a further 23 m<sup>3</sup>/s under the joint take application to bring the flow up to the maximum rate that can be taken through the Highbank Canal (i.e. 40 - 17 = 23m<sup>3</sup>/s).

- 21 Notwithstanding the availability of BCI water, ACWT wishes to retain an interest in the whole 40 m<sup>3</sup>/s being sought under the joint take application to cover the possibility of something happening to BCI (or even CPW in which case ACWT might consider its own use for the water under the joint application).
- 22 Once water enters the Terrace Canal ACWT will again be constrained to the use of 40 m<sup>3</sup>/s capacity as this is the proposed capacity of this section of canal. This could potentially made up with the flows coming down the Highbank Canal (i.e. BCI's 17 m<sup>3</sup>/s plus up to a further 23 m<sup>3</sup>/s under CRC021091) and/or up to 40 m<sup>3</sup>/s that can be discharged by RDRML through the Highbank Power Station.

### **INTEGRATING THE PROPOSALS**

- 23 As I noted above, in simple terms the BCI/EAL scheme can be the first 'stage' of the ACWT proposal.
- 24 However, the ACWT proposal could still be constructed in its entirety in the absence of EAL and this is the basis upon which ACWT is seeking its consents. But if the EAL/BCI scheme is built first then his raises an integration issue in relation to the building of infrastructure that will either need to be addressed now or otherwise dealt with at the time ACWT decides to build the balance of the wider scheme.
- 25 To recap on some of the differences:
- 25.1 If the BCI/EAL scheme was developed before the ACWT scheme then the intake would need to be upgraded from 17 m<sup>3</sup>/s (BCI) to 40 m<sup>3</sup>/s (ACWT). This will involve an enlargement of the river intake, an additional set of fish screens and enlargement of the on-land settling pond and channels. This would put the ACWT intake/screen structure *per se* in a slightly different location from that originally proposed although the actual point of take on the River would remain the same;
- 25.2 The BCI/EAL scheme has a smaller and differently orientated settling pond, however the consented BCI/EAL pond is

roughly within the general footprint of that proposed for ACWT;

- 25.3 The most significant difference is the method with which sediment is dealt with. Under the ACWT scheme sediment is manually excavated from the settling pond with the option of depositing this material back onto the river bed to be eroded and taken away under flood conditions. Under the BCI/EAL consents the majority of sediment is returned to the river by flushing or sluicing sediment through an artificial channel during flood conditions.
- 26 The most significant issue is therefore the removal of sediment.
- 27 In relation to the removal of sediment the relevant ACWT application descriptions are:
- CRC072642 – To discharge material excavated from the storage / settling pond and deposited on the bed of the Rakaia River, being an area adjacent to the storage / settling pond, in a manner that may enter water, between approximate map references NZMS 260 K36: 058-396 and NZMS 260 K36: 068-387.
- CRC072649 – To use land to place material (principally sediments) containing water excavated from the storage/settling pond onto the bed of the Rakaia River, between approximate map references NZMS 260 K36: 058-396 and NZMS 260 K36: 068-387 being an area adjacent to the settling pond.
- 28 In my submission if ACWT decided to adopt BCI's slicing method then sluicing is still covered by the "*discharge material*" notified in respect of CRC072642. The nature of the activity remains the same. There are also no significant implications in terms of the proposed Natural Resources Regional Plan (*NRRP*) or any other equivalent statutory documents.
- 29 Overall, it will be well known to the Commissioners that an applicant is not bound by the content of their original application. In *Darroch v Whangarei District Council*<sup>4</sup> the stock capacity for the subject sale yards was increased from "*two and three hundred head of mixed stock*" to "*350 head*" after the submission period. The Environment Court commented that:

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<sup>4</sup> Unreported, Planning Tribunal Auckland, A018/93, 1 March 1993, Sheppard J

“Counsel submitted that as a matter of commonsense it would be unduly restrictive to insist that nothing in the original application could be amended or varied as circumstances require.

**We hold that it is the original application and any documents incorporated in it be reference which defines the scope of the consent authority’s jurisdiction. In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of the hearing.** However, they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application” [Emphasis added]

- 30 Another case that is useful is *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*<sup>5</sup>. In *Wakatipu* the Environment Court noted that some fairly extensive amendments of a subdivision application still fell within the scope of the original application as:

“[ 11] It will be seen from plan ‘3’ first that 15 residential building platforms are still sought - there is no increase in the total number to be placed on the LSL land. Secondly, more extensive landscaping (and related covenants) is proposed. Thirdly there are now more lots (Lots 2, 5 and 7) closer to the Shotover River. Fourthly the lot boundaries are completely different. **We regard those changes as (just) sufficiently minor in jurisdictional terms to come within the original description since it is difficult to see that there are other potential parties who may be adversely affected ...** [Emphasis added]

- 31 It is also submitted on the basis of *Haslam v Selwyn District Council*<sup>6</sup> that there would not have been any difference in the number or nature of submissions received in response to the application.
- 32 Given that the submission is presented on the basis that there is no legal significance to the amendments, it is my submissions that it would be much more prudent to have the Commissioners determine the application on the basis of being able to integrate more readily

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<sup>5</sup> Unreported, Environment Court Christchurch, C135/02, 30 October 2002, Jackson J

<sup>6</sup> (1993) 2 NZRMA 628

with the BCI/EAL scheme. It would otherwise be an unfortunate time requirement and financial cost to obtain the necessary amendments through an application/variation process that would probably be determined on an un-notified basis.

- 33 If accepted then it might be appropriate to widen the definition of discharge under CRC072642 to refer more explicitly to the ability for this to also occur via the sluicing of sediment. There may also need to be some associated amendments to the proposed conditions.

## **LEGAL AND PLANING FRAMEWORK AND ACTIVITY STATUS**

### **Activity status**

- 34 The discretionary activity status of the applications does not appear to be in issue.
- 35 All the resource consents applied for (both Regional and District Council) are for discretionary activities.<sup>7</sup> The Commissioners have also heard submissions and evidence on the discretionary nature of the take application which is still relevant to determining the wider status of the ACWT proposal.
- 36 On this point I should also repeat my previous submission on the more extreme argument that through some form of non-compliance within the CPW scheme the joint take application (and therefore the wider ACWT scheme) should be regarded as non-complying as well.
- 37 As noted, this, would really be drawing a long bow. The ACWT "*proposal*" is in my submission properly defined as the application to take water together with the other applications notified in July 2007 relating to the use of water for hydro-generation and the construction of infrastructure. The proposal defined in that way does not encompass any application for a non-complying activity which would render the Rakaia terrace hydro proposal non-complying overall.

### **National Water Conservation Order (Rakaia River) 1988**

- 38 Under section 217 a consent authority cannot grant an application if there is an operative water conservation order and the grant of consent would in anyway be contrary to any restriction or

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<sup>7</sup> As I noted in my previous submissions a couple of peripheral applications relating to divers and discharges were identified in the AEE as possibly non-complying activities by virtue of non-compliance with the TRP. However, this was incorrect and based on section 77C these are actually discretionary activities.

prohibition or any other provision of the order. The section also requires that if consent is granted, it is only granted with such conditions that ensure compliance with the Order.

- 39 The NWCO establishes minimum water quality and water quantity standards to protect the outstanding features of the river.
- 40 However, "outstanding" in this context is within a water conservation order which expressly provides for the allocation of water to activities. In this way the NWCO can be contrast to other Orders (such as the Mohaka or the Kawarau) which are intent on preserving waters in their natural state.
- 41 Other than one issue raised by Commissioner Milne during my last appearance (for ACWT), I do not propose to go into detail of how and what is relevant in terms of applying the Order. In brief, the core considerations are set out below

***Water quality and outstanding natural landscape provisions***

- 42 The relevant provisions of the NWCO in terms of what I have briefly summarised in the title above, include:

42.1 Clause 3 that states the outstanding characteristics and features of the Rakaia River and its tributaries provide for:

- (a) an outstanding natural characteristic in the form of a braided river; and
- (b) outstanding wildlife habitat above and below the Rakaia Gorge, outstanding fisheries, and outstanding recreational, angling and jet boating features.

and

42.2 Clause 9 that refers to water rights and general authorisations, and states in sub-clause (2) that water rights and general authorisations shall not be granted or made for any discharge into the Rakaia River downstream of its confluence with the Wilberforce River, if the effects of the discharge would be to breach the following provisions and standards:

- (a) any discharge is to be substantially free from suspended solids, grease and oil;
- (b) after allowing for reasonable mixing of the discharge with the receiving water –
  - (i) the natural water temperature shall not be changed by more than 3°C.

- (ii) the acidity or alkalinity of the water as measured by the pH shall be within the ranges 6.5 to 8.3, except where due to natural causes.
  - (iii) the waters shall not be tainted so as to make them unpalatable, nor contain toxic substances to the extent that they are unsafe for consumption by humans or by farm animals, nor shall they emit objectionable odours.
  - (iv) there shall be no destruction of natural aquatic life by reason of a concentration of toxic substances.
  - (v) the natural colour and clarity of the water shall not be changed to a conspicuous extent.
  - (vi) the oxygen content in solution in the water shall not be reduced below 6mg/L.
  - (vii) based on not fewer than 5 samples taken over not more than a 30-day period, the median value of the faecal coliform bacteria content of the waters shall not exceed 200 per 100ml.
- 43 It is ACWT's case that, with appropriate conditions, the grant of consents is not contrary to the NWCO. In particular, the evidence presented by **Mr Steven Woods** notes that, if anything, there will be a slight incremental improvement in water quality as a result of ACWT scheme diversion itself and Mr Compton-Moen will address issues of natural character.
- 44 It is also noted that the consents granted to BCI (taking at the same site) were granted against the backdrop of NWCO and were seen to be consistent with it in terms of water quality, natural character, effects on wildlife, fisheries, recreation, angling and jetboating. In terms of water quality, the ACWT application is similar to the BCI consent.
- 45 The sluicing and/or sediment disposal and associated discharge may however contain suspended solids which requires consideration in light of clause 9(2)(a).
- 46 Setting aside for one moment exactly what is meant by "substantially"; if applied strictly then clause 9(2)(a) could arguably limit any discharge associated with irrigation in the Rakaia River.
- 47 As was submitted by **Mr Casey** for Central Plains' I also submit that this might properly be an instance where it is appropriate to place emphasis on section 5 of the Interpretation Act 1999. This provides that "*the meaning of an enactment must be ascertained from its text and in the light of its purpose*" and as I noted above the Rakaia is a little different than some other rivers subject to water

conservation orders in that there is an expectation of the allocation of water to activities and therefore of the authorised associated activities to facilitate such allocation.

48 It is emphasised that here what is being discharged is sediment that is captured from the River in the first place. The presence of sediment is consistent with both the natural flow in the River and the wider purpose of water conservation orders as set out in section 199 of the Act.

49 I also share a similar position with **Mr Casey** on the *ejusdem generis* principle and proper reading of clause 9(2)(a) which I do not propose to repeat here.

50 Finally, I should also note the inherent nature of the sediment and sluicing operations proposed by ACWT (and the consented operations of BCI/EAL):

50.1 Under the BCI/EAL proposal the sluicing of sediment would only occur when there was significant flow in the river to such an extent that there would be a reasonable expectation that the River would already be in a turbid natural state (like Central Plains). As noted above, ACWT may also like to undertake a similar process; and

50.2 In terms of the originally proposed sediment management for ACWT, sediment would actually manually placed on dry riverbed above the 300 cumec flood line – this would then be eroded in accordance with the natural erosion processes of the river. In this instance although arguably still within the definition of discharge under the Act (“emit, deposit, and allow to escape”), it could also be argued that the primary activity is not the discharge to water – rather it is the placement of sediments in a riverbed where they may form part of river’s natural erosion process.

51 Finally, it is submitted that the word “substantially” in cl 9(2)(a) must be applied in a purposive way. This is particularly given the actual nature and duration of the intended discharges.

**RDRML and existing consents to discharge to the Rakaia**

52 Under the ACWT proposal, the use of water in the ACWT ‘terrace canal’ will have the potential to reduce the flow discharged from the Rangitata Diversion Race (*RDR*) via Highbank Power Station into the Rakaia River.

- 53 Although any reduction in discharge will eventually be made up at Barrhill, it is inevitable that through the operation of ACWT there will be a change to the nature of 'Rangitata discharge' to the Rakaia.
- 54 During my previous appearance Commissioner Milne raised the issue as to whether this was a matter of relevance in terms of the Order. We undertook to review the decision of the Special Tribunal to see whether the gains to the Rakaia River from the Highbank discharge were material in setting the terms of the NWCO
- 55 I can confirm that there was no discussion of discharges back to the Rakaia in the Special Tribunal decision.

***Nature of the NWCO***

- 56 To begin with I note that in my previous submission I raised a point of difference in comparison to **Dr Wylie's** submission in terms of what ACWT considered to be the appropriate application of the National Water Conservation Order (Rakaia River) 1988 (the *NWCO*) with Part II of the Act.
- 57 I noted that the overall purpose of a water conservation order as set out in section 199 is "*to recognise and sustain outstanding amenity or intrinsic values afforded by the waters in their natural state*"<sup>8</sup> or to recognise waters which warrant protection even where they are no longer in their natural state.<sup>9</sup> However, I also emphasised that this applies "*notwithstanding anything to the contrary in Part II*".
- 58 On this basis it was my submission that the effect of a water conservation order was to create a 'jurisdictional requirement' that had to be met – albeit in the Rakaia context with relatively comprehensive provision for the allocation of water to activities it would be difficult to show circumstances in which the grant of consent was not appropriate.
- 59 Subject to these comments it is my submission that overall the Order does not give any sort of directive to require consents that are in accordance with it to be granted. In this sense it is **not** an allocation plan or quasi allocation regime. It does not closely prescribe the way in which consents can be granted and nor does it purport to recognise the existence of certain irrigation and discharge

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<sup>8</sup> RMA, s 199(1)(a)

<sup>9</sup> RMA, s 199(1)(b)

activities – matters that might commonly be discussed under a more comprehensive allocation or plan regime.

- 60 On this basis it is my primary submission that provided the 'jurisdictional requirement' is met then the Commissioners are not entitled to read in other considerations into the Order. I do however accept that it is a matter that can be taken into consideration under section 104 of the Act.

***RDRML and the right not to discharge***

- 61 The more fundamental reason why the Highbank discharge should not assumed for the Rakaia is the nature of the RDRML consents.
- 62 The consents held by RDRML include CRC011277 (TrustPower only holds consents in relation to minor activities e.g. stormwater – all other consents are held by RDRML). This authorises RDRML to take water from the Rangitata River and to use that water for stockwater, irrigation and hydroelectric generation.
- 63 Historically CRC011277 has been operated so that irrigation has occurred across three 'subschemes' – Mayfield Hinds, Valleta and Ashburton Lyndhurst, with the balance of flows (principally during the winter months) arriving at Highbank power station. However, there is nothing in the conditions of consent for CRC011237 or any other consent held by RDRML that would in any way imply or require RDRML to ensure any water arrives at Highbank at all. Theoretically it could all be taken for irrigation.
- 64 The obvious point is that the discharge consent is simply a permission and not a requirement. As noted in the Barrhill declaration proceedings, Highbank is now dated in terms of its technology and its continued existence cannot be assumed.
- 65 Further than this, the point of 'take' from the Highbank tailrace by ACWT is such that the water has not been discharged into the Rakaia. Accordingly the position of take is not covered by the Order. RDRML could if it wanted to by the terms of its consents elect to use all its water within the Ashburton District and not discharge anything at Highbank.

**Flow cut-offs and the 70 cumec allocation cap**

- 66 As the Commissioners have already heard, Environment Canterbury's approach to the Rakaia and various agreements

between existing irrigators has resulted in what is referred to as an “*ad hoc administrative system to group ‘like’ consents*”.<sup>10</sup> This is usually referred to as the banding system. A summary of the banding system was set out in the *Central Plains v Synlait* decision:

[32] We now need to briefly identify the genesis and rationale of the current management regime on the Rakaia. It is one which commenced under the Water and Soil Conservation Act (or perhaps even earlier). The Water Conservation Order was incorporated into the overall management regime, while dealing with existing consents and renewals considered about that time. Subsequently the Council on being the appointed controlling authority, has developed an ad hoc administrative system to group ‘like’ consents being described as **banding**.

[33] Over a long period of time consents granted to take water from the Rakaia River have accumulated to the point where shortages occur during summer low flows. The Rakaia River Water Conservation order requires specified flows to be maintained in the river over specified months. Only the excess of these flows is available for abstraction. As river flows naturally decrease over the summer months consents to abstract water are restricted in order to maintain the specified low flows.

- 67 In short, as subsequent applicants have applied for resource consent then, principally with the agreement of abstractors, consents have been organised into “*bands*” with differing cut-offs to ease management of the resource and to recognise (at least to an extent) the actual priority structure of the river.
- 68 You have already heard submissions and evidence from Central Plains on appropriate conditions for the joint take application. I do not intend to provide significant detail on this but do note that:
- 68.1 Regardless of whether or not there is 40 cumecs of water available under the NWCO, ACWT still seeks to take 40 cumecs – not only will it be potentially taking the 17 cumecs already held by Barrhill; but also, in the future it may explore the possibility of entering into agreements with downstream irrigators to use their water on a non-consumptive basis prior to it being abstracted from the river (the wording under the

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<sup>10</sup> *Central Plains Water Trust v Synlait Investments Limited*, C045/07

68.2 The conditions of consent will need to contain some provision to facilitate the above, including the potential to, via agreement take water (such as BCI) at a lower minimum flows.

69 If conditions are appropriately structured the ACWT proposal will comply with the Order.

### **ASSESSMENT OF THE APPLICATION**

70 The assessment of the application will obviously involve consideration of the legislative requirements of Part II (sections 5, 6, 7 and 8) and the more specific sections relevant to this application that are contained in Part VI of the Act (sections 104, 104B, 105 and 107). It must also include the relevant planning instruments being the Ashburton District Plan, the TRP, the PNRRP and the Canterbury Regional Policy Statement.

71 Given the fact that the operation of Part II (and Part VI) will be well known to the Commissioners, I do not intend to address the more general matters to be considered as a part of the decision making process. There are however two particular areas that merit further discussion:

71.1 The application of section 6(c)<sup>11</sup> and to a lesser extent section 6(b)<sup>12</sup> in the context of the vegetation clearance along the Terrace Canal route; and

71.2 The application of sections 7(ba)<sup>13</sup>, (i)<sup>14</sup>, and (j)<sup>15</sup> in the context of the ACWT hydro scheme.

72 Both will also be discussed further in the evidence presented in support of the applications.

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<sup>11</sup> The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna

<sup>12</sup> The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development

<sup>13</sup> The efficiency of the end use of electricity.

<sup>14</sup> The effects of climate change.

<sup>15</sup> The benefits to be derived from the use and development of renewable energy.

**Sections 6(c) and (b): vegetation**

- 73 As a matter of initial emphasis it appropriate to note that in respect of the intake and Highbank canal the existing consents held by BCIL and EAL provide a permitted baseline against which the current applications can be assessed.
- 74 The main focus of these submissions and the Commissioners' assessments is accordingly the Terrace Canal rather than the wider ACWT proposal.
- 75 While the ACWT terrace is dominated by invasive exotic plant pests, sparse and degraded remnants of native dry woodland and shrubland vegetation communities are also present. Features of these remnants are considered to be significant (when assessed against Ashburton District Council criteria) with regard to rarity, distinctiveness / special ecological characteristics and representativeness values. However, **Adam Forbes** will give evidence that he considers that terrestrial ecology values affected by the proposal can be adequately addressed through the proposed mitigation.
- 76 Similarly the area, while not identified as an Outstanding Natural Landscape or Significant Landscape may be regarded as having a visual amenity of some value. **David Compton-Moen** give evidence that he considers that the mitigated proposal would over time appear to be in character, both in form and scale, with the receiving landscape. Subject to a minor exception, it is suggested that the proposal will have a less than minor impact on the landscape character, natural character, landscape values and visually sensitive receivers.
- 77 These issues must be considered in light of the appropriate treatment of section 6 (particularly s 6(c)) under the Act. As **Janan Dunning** will explain, the Ashburton District Plan provides for the felling or clearance of vegetation in some circumstances as a permitted activity.
- 78 Particular specimens of significance (e.g. the *Melicytus aff. flexuosus* described by **Adam Forbes** could therefore be cleared as of right under the Plan. However, it is accepted that such removal is still an adverse effect and needs to be considered as such under section 104(1)(a) of the Act.
- 79 I simply point out that s6(c) does not require "*preservation*" of habitat in the absolute sense. In the decision of *New Zealand Rail*

*Ltd v Marlborough District Council*<sup>16</sup> the High Court stated at page 86 that:

**“It is certainly not the case that preservation of the natural character is to be achieved at all costs.** The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision...In the end I believe that the tenor of the appellant’s submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was necessary or essential to depart from it. That is not the wording of the Act or its intention.” [emphasis added]

80 Although the decision in *NZ Rail* is concerned with section 6(1)(a) of the RMA, the Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Manawatu-Wanganui Regional Council* held that the same proposition can be extended to section 6(c).<sup>17</sup>

81 This was developed further within the *Kate Valley* decision.<sup>18</sup>

[196] It appears to us that the suggestion of a primacy of section 6 matters is misconceived. This has now been stated in a number of decisions, including that of *New Zealand Rail* [fn6 [1994] NZRMA 70] and *Maguire v Hastings District Council* [fn7 [2001] NZRMA 557] and most recently in the decision of *Auckland Volcanic Cone Society v Transit* [fn8 HC [2003] NZRMA at 316 paras 27-36]. The matters under section 6 are to be recognised and provided for in the context of achieving the purpose of the RMA under section 5. Put more pointedly in *Ngai Tumapuhiaaranga Hapu Me Ona Hapu Karanga v Carterton District Council* [fn9 AP6/01, (HC) Chisholm J, para 35]:

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<sup>16</sup> [1994] NZRMA 70 (HC).

<sup>17</sup> Planning Tribunal, A86/95, 26 September 1995, partly reported at [1996] NZRMA 241. In *Royal Forest and Bird*, the Court held that although there would be some potential adverse effects on the environment where there was proposed logging in native bush, these effects would be minimised, and logging would still accord with the principle of sustainable management.

<sup>18</sup> *Canterbury Too Good To Waste Incorporated v Canterbury Regional Council* (Unreported, Environment Court, C029/04, Smith J).

*I am afraid it is difficult to escape the conclusions that in this instance the appellant is pinning its hopes on an interpretation of ss 6, 7 and 8 that would confer a power of veto over an otherwise legitimate proposal. I do not believe that was the purpose of those sections, or any of them.*

[197] In *Auckland Volcanic Cones* the High Court then went on to discuss the effect of section 6 if the project is not of national importance. The Court noted [fn10 Above at paragraph 36]:

*. . . Section 6 and for that matter the balance of Part II (ss 7 and 8) fall to be considered in the context of assessing whether the purpose of the RMA has been met. The wording of section 5 includes reference to the need for "people and communities to provide for their social, economic and cultural wellbeing and . . . safety." People and communities in that context must include issues at a regional or even district level as submitted by Mr Enright.*

And later at paragraph 38:

*The Environment Court accepted, as we do, that ss 6, 7 and 8 must be considered against the stated purpose of the Act, that of sustainable management referred to in s 5. The Environment Court considered that the SH20 motorway extension was a matter of sufficient importance that to approve the notice of requirement satisfied the purposes of sustainable management.*

[198] At paragraph 39 the Court stated:

*That a s 6 matter is one of the factors to be recognised and provided for, but is not determinative was recognised by the Court of Appeal in *Watercare Services Limited v Minhinnick* [1998] NZRMA 113.*

*The Court must weigh all relevant competing considerations and ultimately make a value judgement on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues . . . While the Maori dimension, whether arising under section 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole decides whether the subject matter is offensive or objectionable under s 314.*

[199] And at paragraph 40:

*Whether the proposed development in each case satisfies the purposes of the Act after recognising and providing for section 6 matters will be a question of fact and degree involving the exercise of broad judgement by the Environment Court, which is a specialist Court.*

[200] In our view section 6 properly highlights that the protection of areas of significant indigenous vegetation is a matter of national importance. Even if we determine that this area is not an area of significant indigenous vegetation, the adverse effects of its removal must be taken into account. This is, of course, subject to the proviso that it is mandatory for the Court to take into account as a permitted baseline any activity which is permitted. In our view this brings into clear play the interface between the operative District Plan and section 6(c).

- 82 The Environment Court in the Kate Valley matter overturned the Commissioners' finding and held that in the overall framework of Part II the removal of the in issue "*Remnant A*" was consistent with the overall purpose of sustainable management described in the Act.
- 83 From the *RFBS v Buller District Council* decision<sup>19</sup> it is clear that the requirements of s6(c) can also be achieved through relocation, protection and management. Section 6(c) does not exclude 'replacement habitat' and the line of cases concerning environmental compensation are analogous with this objective.<sup>20</sup> Like Kate Valley, ACWT proposes a native plant nursery as a part of its proposal. This will provide plants for the wider scheme and will also be a habitat in its own right.
- 84 It is also emphasised that section 5(2)(c) of the RMA clearly contemplates that some adverse effects can be acceptable by its use of the concept of 'mitigation'. In *Trio Holdings v Marlborough District Council* the Court held at page 116 that:

"The idea of "mitigation" is to lessen the rigour or the severity of effects. We have concluded that the inclusion of the word in s5(2)(c) of the Act, contemplates that some adverse effects from developments such as those we have now ascertained may be considered acceptable, no matter what attributes the site might

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<sup>19</sup> [2006] NZRMA 193

<sup>20</sup> For example: *JF Investments Limited v Queenstown Lakes District Council*<sup>20</sup>

have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree.”

- 85 In this case, given the importance of renewable energy, and the difficulty in finding appropriate site for this purpose, some adverse effect in the form of the removal of vegetation is justified. However it is also clear that ACWT’s proposal will mitigate the adverse effects associated with any loss.

**Sections 7(ba), (i) and (j): renewable electricity**

- 86 Section 7(ba), (i), and (j) are matters that the Commissioners are required to have particular regard to in determining the ACWT application. These matters include the efficiency of the end use of energy (7(ba)) and the effects of climate change (7(i)) and the benefits to be derived from the use and development of renewable energy (7(j)). A useful summary of the importance of these subsections was discussed in the *Genesis Power Limited v Franklin District Council* matter (the *Awhitu* decision).<sup>21</sup> The Environment Court commented that:

“[65] In summary, climate change and renewable electricity generation are key issues for New Zealand. This project, if approved, would provide clean and renewable energy to provide essential electricity and to prevent CO2 emissions that would have been created by generating electricity through the burning of coal or gas.

[66] These are all matters which need to be considered and put into the crucible containing the evidential material to be weighed against the alleged and more site specific potential effects. The agreed statement of fact also underlays some recent changes to legislation in New Zealand including the addition of the provisions of sections 7(i) and 7(j) to the Resource Management Act. The positive effects that would result from the proposal reflect many of the provisions in the statutory instruments, particularly the regional instruments, which promote the benefits of infrastructural development and renewable energy.”

- 87 In *Awhitu*, the Court had considered a windfarm with an 18 MW generation capacity. On these issues the Court identified the contribution the Genesis scheme would make to the attainment of section 7(ba), (i) and (j).

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<sup>21</sup> [2005] NZRMA 541.

88 In the present matter the ACWT scheme enables the Ashburton District and the wider Canterbury Region to develop their own renewable energy resources. This also includes the possible integration of irrigation through the BCI scheme (or the development of future irrigation by ACWT).

89 Overall, it is submitted that the proposal is entirely consistent with the enabling of provisions and wider Part II of the Act.

### **CONCLUSION**

90 With public campaigns calling for electricity demand reductions during the winters of 1992, 2001, 2003 and 2008, the need for electricity is clear. It also clear that the government is very direct in its desire to promote renewables, and this adds to the importance of the ACWT proposal.

91 Although effects are acknowledged, in most instances and with appropriate mitigation these can be adequately addressed. These must also be balanced against the significant benefits that will accrue through granting all applications.

### **WITNESSES**

92 ACWT will call evidence from:

- **Mr Ian Mackenzie** on ACWT;
- **Mr John Small** on renewables and electricity generation;
- **Mr Steven Woods** on the design features of the scheme;
- **Mr Neal Borrie** on flows and sediment;
- **Mr David Rowe** on freshwater ecology
- **Mr Jim Jolly** (presenting on behalf of **Dr Katrina Hale**) on avifauna
- **Mr Adam Forbes** on terrestrial ecology;
- **Mr David Compton-Moen** on landscape; and
- **Mr Janan Dunning** who will cover the planning aspects of the proposal.

Dated: 15 September 2008

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Jo Appleyard / Ben Williams  
Counsel for Ashburton Community  
Water Trust