

**IN THE MATTER OF** the Resource Management Act 1991

**AND**

**IN THE MATTER OF** a joint application by Central Plains Water Trust and Ashburton Community Water Trust to:

Canterbury Regional Council for resource consents to take water from the Rakaia River for use by the Central Plains Water Enhancement Scheme and the Rakaia Terrace Hydro Scheme

**IN THE MATTER OF** applications by Central Plains Water Trust to:

Canterbury Regional Council for resource consents to take and use water from the Waimakariri River and to use water from the Rakaia River for the Central Plains Water Enhancement Scheme and for associated consents required for the construction and operation of the Central Plains Water Enhancement Scheme; and to

Selwyn District Council for resource consents to construct and operate the Central Plains Water Enhancement Scheme

**AND**

**IN THE MATTER OF** a notice of requirement by Central Plains Water Limited to:

Selwyn District Council for the designation of land for works associated with the construction and operation of the Central Plains Water Enhancement Scheme

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**SUBMISSIONS OF APPLICANTS IN REPLY ON CONDITIONS**

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## Introduction

1. CPW would like, at the outset, to thank both the Commissioners and the Reporting Officers involved in this process of devising conditions of consent, for the constructive and iterative approach that has been taken. This approach has allowed a number of issues to be worked through and resolved in a manner which meets the objectives articulated by the decision makers, while ensuring that the conditions are practicable from CPW's view.
2. As a result of this constructive consultative process, there are now very few issues remaining where CPW has residual concerns about the condition proposed which it wishes to raise in these submissions in reply. The remaining issues which CPW has with the conditions as circulated by Environment Canterbury and the Selwyn District Council are as follows:

### Canterbury Regional Council condition

#### *CRC102330 – Condition 22*

3. CPW accepts that the word "*hinder*" that is used in condition 22 for this consent is the word used in the condition which was originally discussed and agreed with TrustPower. However, that condition has been subsequently developed and, for the reasons set out in Ms Dean's memorandum dated 25 April 2010, CPW concurs with her explanation of why the words "*shall not prevent*" fish passage is preferable.

#### *CRC061972 – Condition 3(a)(iv)*

4. CPW considers this condition should retain the 21 day interval for allowing additional flows through rather than the 14 days now adopted in the condition. CPW's evidence identified the 21 day interval as an appropriate time period beyond which low flows should be avoided (see, for example, the 2008 evidence of Mr Burrell at paragraph 6.16) and that appeared to be generally accepted as an appropriate mitigation in the evidence presented at the hearing. The 14 day provision will, of course affect reliability, and CPW does not consider this should be imposed without compelling reasons, particularly given the additional mitigation of the one-for one sharing rule.

#### *CRC061972 – Condition 4*

5. Condition 4(a)(ii) requires CPW to, in effect, to reduce its flow to zero at a flow of 95 cumecs. CPW considers that this is a mistake, and has previously raised this issue with the Regional Council Officers and had understood that they agreed. Condition 3(a)(i) already provides for the one-for-one sharing of the B permit take. Condition 4(a)(ii) is assumed to be intended to reinstate one-for-one sharing at flows of 95 m<sup>3</sup> and above after the modifications of the holiday rule cease applying. However it does not succeed in doing this and CPW considers condition 4(a)(ii) should be deleted.

*CRC061972 – Condition 7*

6. CPW's concern with condition 7 is that it restricts CPW at times, from taking "B permit water" as that is defined in the plan, in order to allow certain "A permit" consent holders to exercise their consents as fully as they do now. The Regional Council has confirmed that the affected consent holders were all applicants for "A permit" water takes (so they could have had no expectation of being granted access to B permit water when they obtained consent), and it is only as a result of the particular conditions on their consents, (which are based on actual flows at the Old Highway Bridge rather than "unmodified flows" as defined in the plan), that they will be affected if CPW begins to abstract B permit water. As a matter of law, CPW considers that, as these A permit consent holders did not apply for B permit water, it would be inappropriate to impose a condition on an applicant like CPW, which has applied for B permit water, which, in effect, restricts it from taking it from available B permit water, in order to secure continuity of take for A permit water holders. For this reason, CPW believes condition 7 should not be included, as to do so effectively takes away access to B permit water which should be available to it. The concerns that the relevant A permit water holders have about their consents should be resolved by the Regional Council potentially as part of the WRRP plan change 1.

*CRC061972 – Condition 10(g)(ii)*

7. The Regional Council Officers propose that the screen material shall be "a mesh". CPW considers that a wider range of mediums was recommended previously, including profile bars. It would prefer that the wording of this clause was amended to say "the screen material voids shall be a mesh, wedge-wire or similar material, with a maximum width of 4 mm". This ensures some flexibility for construction of the screen without amending the requirement for the maximum void size.

*CRC061972 – Condition 14(n)*

8. This condition requires modifications to the intake design to be adopted within 40 working days. CPW considers the timetable could be too tight depending on the scope of measures required. In order to provide some capacity for flexibility, it believes the words "or such other timetable as may be approved by the Canterbury Regional Council" after the words "40 working days".

*CRC061972 – Condition 15(d)*

9. This condition requires telemetry data to be collected and stored with an "independent network provider". CPW considers this is unnecessary and this can be managed by itself, subject to audit. Discussions with John Young of the Regional Council have confirmed that, as long as audited and accessible records as required by this condition are available, then the method of acquisition can be CPW's commercial decision. CPW therefore recommends that the words "with an independent network provider who" are replaced with the word "and".

*CRC021091 and CRC061972 - Allocation of Winter water*

10. CPW has read Ms Dean's memorandum dated 25 April 2010 on this issue. CPW concurs with Ms Dean's reasoning and considers that a condition imposing a volumetric limit is not necessary.

*CRC021091 – Condition 17*

11. The condition, as currently drafted, requires telemetry of other abstractors. CPW understands this was not required by Commissioners (as discussed in their Minute 15), for the reasons outline in Mr Tipler's evidence of March 2010 at paragraph 13 and following. CPW recommends that the words "*tamper-proof data loggers to determine*" is used in place of "*that the abstraction authorised by the associated consent listed in table 1 is connected to a telemetry system*".

*CRC061949 – Condition 3*

12. The condition as presently worded requires losses not to exceed 20% of the water taken. CPW notes that it is not clear whether this is 20% of the instantaneous flow rate or 20% of the seasonal volume. CPW's evidence on anticipated losses was based on expected maximum losses over a season. For that reason, at the end of this condition CPW suggests that the words "*from the time the scheme starts taking water at the start of the irrigation season in Spring until it ceases taking water at the end of the same irrigation season in the follow Autumn*" are added or, alternatively, the words "*over a 12 month period from 1 July to the following 30 June*". This amendment is suggested because, at times, it is possible that the losses could exceed the instantaneous rate of take when that is very small, but over an annual season it is expected that losses would be under the maximum level of 20% of the total take.

*Schedule 2 – Environmental Management Fund*

13. CPW is particularly concerned about the suggestion that a further independent Environmental Management Fund Committee is established for the purpose of managing the Environmental Management Fund ("EMF"). The applicant believes it is the proper body to manage the EMF for the following reasons:
- (a) There will be fewer administrative costs leaving more funds for practical use;
  - (b) The Trust is accountable to the public;
  - (c) The interests suggested to be represented on the EMFC are already largely represented by the make-up of the Trustees of the Trust (for example the district councils already appoint trustees);
  - (d) As Trustees, no matter what their affiliations are, they are obliged to discharge their obligations in accordance with the terms of the Trust Deed and that is an obligation which is supervised by the Court if need be.

14. The whole function of establishing the Trust was to undertake such activities as ensuring that the EMF was expended in appropriate ways. CPW is happy to have the Trust consult with, say, the community liaison group, on the appropriate application of the EMF, but it is strongly opposed to taking away the responsibility for managing the EMF from the Trust.
15. CPW is also strongly opposed to Condition 6 under the heading Environmental Management Fund. CPW wants a starting date for the requirement for irrigators to pay into the EMF to be aligned with when each irrigator signs an agreement for the supply of water. Requiring \$300,000 to be placed in the EMF at the point 10,000 hectares is irrigated will require the company to raise that money from shareholders when they are not exercising the consent or contributing to the environmental effects of the scheme. In CPW's view, aligning the requirement to contribute to the fund with the commitment to supply and take water to an individual irrigator more fairly reflects the relationship between the effects of the use of the water, and the mitigation/environmental compensation that the EMF represents.

### **Selwyn District Council Conditions**

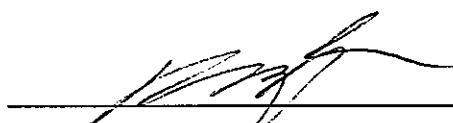
#### *Bond Condition*

16. Central Plains does not accept that the proposed bonding condition is either *intra vires*, nor is it reasonable in the circumstances for such an all encompassing bond to be imposed in the exercise of the Commissioners' discretion.
17. The legal advice to the Selwyn District Council, relies on the decision in *Solid Energy New Zealand Limited v West Coast Regional Council and Buller District Council* ("the Cypress case") to suggest that a bond can cover "*unexpected risk events*". The proposed bond therefore covers two categories of potential costs: one related to performance of conditions, and one related to "*unexpected risk*".
18. However, when the bond condition actually imposed in the Cypress case is reviewed (copy **attached**), it is clear that the bond is entirely related to ensuring performance of conditions and does not include a separate component of covering "*unexpected risk events*". Condition A7.1 of the bond expressly says that the bond is to "*secure the compliance by the consent holder with the conditions of these consents*" and to "*secure the completion of rehabilitation and closure in accordance with the rehabilitation management and mine closure plan;*" and "*enable the consent authorities to monitor any adverse effects on the environment that may arise from the exercise of the consents including monitoring everything which is to be done to avoid, remedy or mitigate an adverse effect*". Condition A7.1(a) also makes it clear that it is only intended to cover the cost of complying with conditions. In Central Plains' view that is consistent with the jurisdiction to impose a bond condition provided for in sections 108(2)(b) and 108A of the RMA.
19. In deciding whether to grant a resource consent or, subsequently, a building consent for the headrace canal, the relevant authorities must consider the potential risks arising, and, to the extent considered reasonable, manage those with conditions of

consent. Ensuring compliance with those conditions of consent should, therefore, adequately manage the potential risks envisaged.

20. Other unexpected risks, will still be covered by public liability insurance and it is a common incident of everyday business conduct that parties with a legitimate interest in the other's performance of certain obligations will require, and be satisfied with, an obligation to take out and maintain a policy of insurance. That is a common practice of Councils in their dealings with contractors and others.
21. The assertion in the legal advice received by the Selwyn District Council that the terms are between the parties to the insurance contract and could be changed, and that the Council has no control over whether the insurance company pays out, do not reflect commercial reality. For example, it could be that a condition of consent is that CPW hold a public liability policy which is on the usual terms for such policies, and the Council can have the right to approve or withhold approval if it does not cover the intended eventualities. Furthermore, the insurance can be in the names of the consent holder and the Council so that the Council is a beneficiary and can enforce its terms. In those situation any terms could therefore not be changed without the Council's consent as a co-ensured and any significant changes (especially those that Mr Rogers expresses concerns about) can trigger a review process under section 128.
22. If Central Plains is required to duplicate what is effectively insurance for risk by way of a bond, this has a potentially prohibitive cost to the project and the advice received has not considered the commercial implications of this. This is a major project and the Commissioners can reasonably expect that there will be comprehensive insurance protection. A bank bond usually costs between 1% - 1.5% annually of the bonded amount. A bond required to be posted now, for an eventuality that is not expected for another 35 years, could therefore easily cost more than the whole cost of that contingency if that contingency was a certainty to occur. The proper and sensible way to avoid this is by accepting that insurance is just a common feature of the commercial arrangements of major projects and should not be disregarded just because there is(at least in the Selwyn District Council's view) another mechanism in the RMA.

23. In Central Plains' submission, the proposed bond condition should be modified to remove all aspects of the second limb of the bond which provides for an "*unexpected risk event bond*", leaving just that part of the bond which relates to performance. If it is nevertheless thought there is a jurisdictional basis for providing a bond for matters beyond simply securing performance of consent obligations then that can be met by requiring the cosnet holder to carry appropriate public liability insurance.



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**Matthew Casey QC / Rachel Dunningham**  
Counsel for Central Plains Water

30 April 2010

account the results of monitoring carried out pursuant to condition C38(c) and the matters referred to in condition A14.4(i).

#### A7. Performance Bond

A7.1 At all times the Consent Holder shall provide and maintain in favour of the Consent Authorities (jointly for their respective interests) a bond or bonds to:

a. secure the compliance by the Consent Holder with the conditions of these consents;

b. secure the completion of rehabilitation and closure in accordance with the Rehabilitation Management and Mine Closure Plans; and

c. enable the Consent Authorities to monitor any adverse effect on the environment that may arise from the exercise of the consent including monitoring anything which is to be done to avoid, remedy, or mitigate an adverse effect.

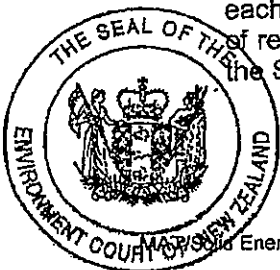
A7.1A The amount (quantum) of the bond may vary from time to time but at any given time shall be sufficient to cover the estimated cost at that time (including any contingency) of compliance with all conditions, including (but not limited to):

- a. demolition and removal of plant and buildings;
- b. site clean up, including removal and disposal of contaminated soil;
- c. rehabilitation by re-contouring, spreading sub-soils and topsoil, re-vegetation and weed control until the closure criteria in 7.11a are met;
- d. stabilisation of earthworks and landforms;
- e. ensuring that PAF material in the Cypress backfill is maintained in a saturated state and covered with NAF material;
- f. construction and erosion protection of drainage facilities;
- g. maintenance of roads;
- h. environmental and geotechnical monitoring;
- i. staff costs;
- j. administration and operating costs.

A7.1B The bond quantum shall be determined using a methodology, generally in accordance with that outlined in section 3 of the report "Cypress Mine – Financial Assurances" prepared by Lane and Associates Limited dated 5 November 2004 (Attachment 5), and shall be set at the 80% level of confidence based on probabilistic calculations using the Monte Carlo simulation technique.

A7.1A The Consent Holder shall not exercise or shall cease to exercise these consents until the bond or bonds referred to in Condition A7.1 is executed by the Consent Holder and guarantor and deposited with the Consent Authorities.

A7.2 Notwithstanding condition A7.4, the Consent Holder shall provide a bond or bonds for the quantum for a minimum term of a three years, such term to be renewed for a minimum of a further three years (or such other term as the parties may agree) on each annual anniversary of the date of commencement of these consents (the "date of renewal"). The term of the bond shall be renewed until "Completion of Closure of the Site" in accordance with condition A7.11.



- A7.3 Unless the bond is a cash bond, the performance of the conditions of the bond shall be guaranteed by a guarantor acceptable to the Consent Authorities. The guarantor shall bind itself to pay for the carrying out and completion of any condition in the event of any default of the Consent Holder.
- A7.4 If the Consent Holder is unable at any time to arrange a guarantor for the quantum as set out in condition A7.2, the Consent Holder will provide a cash bond or bonds for the quantum within 60 days of the date of the renewal referred to in condition A7.2.
- A7.5 The bond shall be in a form acceptable to the Consent Authorities.
- A7.6 The bond shall provide that the Consent Holder remains liable under the Resource Management Act 1991 for any breach of these consents which occurs before expiry of these consents and which become apparent during or after the expiry of the relevant consent.
- A7.6A The Consent Holder shall provide the Councils with a report which recommends the amount of the initial bond within 30 days from the date of issue of these consents.
- A7.7 The amount of the bond shall be reviewed and fixed by the Consent Authorities, within 30 days of receipt of the report required by condition A7.6A, and within 30 days of each annual anniversary of the commencement of these consents. Notification of the amount of the bond under this condition shall be advised by written notice (the "review date") by the Consent Authorities to the Consent Holder. In reviewing and fixing the bond the Consent Authorities shall take into account any calculations and other matters submitted in the Annual Work Plan, Rehabilitation Management Plan, Mine Closure Plan, or otherwise, by the Consent Holder which are relevant to the determination of the bond amount. Any calculation or estimates of the costs of the bond or bonds required by Condition A7.1 shall be prepared by an independent advisor, with expertise in mining bond calculation, mutually acceptable to the Consent Holder and the Consent Authorities and shall be supplied to the Consent Authority at least by the annual anniversary of the commencement of these consents.
- A7.8 Should the Consent Holder not agree with the amount of the bond fixed by the Consent Authorities under condition A7.7 then the matter shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1996. Arbitration shall be commenced by written notice ("notice of arbitration") by the Consent Holder to the Consent Authorities advising that the amount of the bond is disputed, such notice to be given within 14 days of the review date under condition A7.7. If the parties cannot agree upon an arbitrator within 7 days of the notice of arbitration, then an arbitrator shall be appointed by the President of the Institute of Professional Engineers of New Zealand. Such arbitrator shall give an award in writing to the parties within 30 days after his or her appointment (the "date of arbitration decision"), unless the parties agree that the date of arbitration decision shall be extended. The Consent Holder shall bear the full and reasonable costs of the parties in connection with this arbitration. In all other respects, the provisions of the Arbitration Act 1996 shall apply. Pending the outcome of that arbitration, and subject to condition A7.9, the existing bond shall continue in force. That sum shall be adjusted in accordance with the arbitration decision.
- A7.9 If the decision of the arbitrator is not made available by the date of arbitration decision referred to in condition A7.8, then the amount of the bond shall be the sum fixed by the Consent Authorities under condition A7.7, until such time as the arbitrator does give an award in writing to the parties. At that time, the amount of the bond shall be adjusted in accordance with the arbitration decision.



A7.10 The bond may be varied, cancelled, or renewed at any time by agreement between the Consent Holder and the Consent Authorities provided that cancellation will not be agreed to unless a further or new bond acceptable to the Consent Authorities is available to replace immediately that which is to be cancelled.

A7.11 The Consent Authorities shall release the bond on the Completion of Closure of the Site.

"Completion of Closure of the Site" means rehabilitation of the Site such that conditions (a) to (e) below have been demonstrated by the Consent Holder, to the satisfaction of the Consent Authorities and the Peer Review Panel provided for in Condition A.18, to have been met:

**(a) Rehabilitation**

Closure of the Cypress Mine shall be achieved when the vegetation within each major landform is self-sustaining in nature as set out in the table below and it is demonstrated that these closure aims have been achieved and maintained for a minimum period of 5 years.

