IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 255

IN THE MATTER	of the Resource Management Act 1991
AND	an application for declarations under ss 310 and 311 of the Act
BETWEEN	P S AND P E ABRAHAMSON, CENTRAL PLAINS WATER TRUST, AND CENTRAL PLAINS WATER LIMITED
	(ENV-2022-CHC-57)
	Applicants
AND	CANTERBURY REGIONAL COUNCIL
	Respondent

Court:	Environment Judge P A Steven
Hearing:	24-25 August 2023, 15 September 2023
Appearances:	A C Limmer, E Everingham for the applicants
	L F de Latour and K H Woods for the respondent
Last case event:	15 September 2023
Date of Decision:	28 November 2023
Date of Issue:	28 November 2023

DECISION OF THE ENVIRONMENT COURT

A: The application for a declaration is declined.

B: Costs are reserved.

REASONS

Introduction

The application

[1] This is a decision on an application for a declaration sought by Central Plains Water Trust, Central Plains Water Limited ('CPW') and Mr and Mrs Abrahamson ('the applicants'). The declaration pertains to the application of a regulation of the National Environmental Standards for Freshwater 2020 ('NES-F') to Mr and Mrs Abrahamson's proposal to convert 150ha of their farm at 321 Elmhurst Road, Darfield, to dairy farm land.

[2] Since 2017, the Abrahamsons have been developing plans to use the farm as a milking platform. They were motivated to bring this proceeding following an exchange of correspondence and meetings with Canterbury Regional Council ('the Regional Council') staff, having been advised that further land use consent would be required under the NES-F before the plans could be brought into fruition. They were advised that there would be no certainty of being granted that further land use.

[3] The application is made pursuant to ss 310(c), (d), (h) and 311 of the Resource Management Act 1991 ('RMA' or 'the Act'). The applicants have sought the following declaration:

> The Abrahamsons do not require a section 9 land use consent pursuant to Regulation 19(1) of the National Environmental Standards for Freshwater[1] (NES-

[1] Formally described as the Resource Management (National Environmental Standards for Freshwater) Regulations 2020.

FW), to lawfully convert 150 hectares of dairy support land[2] to dairy farm land.[3]

[4] The application focuses on s43B(6) of the Act which states:

> The following permits and consents prevail over a national environmental standard:
>
> (a) a coastal, water, or discharge permit:
>
> (b) a land use consent granted in relation to a regional rule.

Background facts

[5] The factual context giving rise to the declarations is undisputed:

(a) the Abrahamsons' farm is approximately 160ha and the current farming activity is dairy support;

(b) the farm is fully irrigated with water sourced from the Central Plains Water Enhancement Scheme;

(c) the Abrahamsons want to convert their farm from dairy support to dairy farm land as a milking platform;

(d) prior to introduction of the NES-F, CPW obtained all of the resource consents that were required to operate the Central Plains Water Enhancement Scheme. CPW then relied on a permitted activity status for the use of land which would have allowed the Abrahamsons to proceed with the conversion without obtaining any further land use consent.

[6] The two CPW permits of most relevance to the application are:

(a) CRC 165686 – granted in 2016 and referred to as the discharge permit; and

(b) CRC 165680 – also granted in 2016 and referred to as the current

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[2] As defined in the NES-FW.

[3] As defined in the NES-FW.

water use permit.

[7] The current water use and discharge permits have connections to and origins in:

(a) the water use permit first granted to CPW in 2010; and
(b) notification of, submissions to, the hearings and decision on Variation 1[4] to the Canterbury Land and Water Regional Plan ('LWRP').

[8] The parties further agree that:

(a) CPW's discharge permit is also, expressly, a land use consent for some land – being land referred to as the "associated properties" in condition 1(b) of the discharge permit which is land not irrigated by water provided by CPW;
(b) aside from condition 1(b) of the discharge permit, neither the current permits held by CPW or the original water use permit expressly authorise activity that would otherwise contravene s9 RMA. While the parties agree on this fact, they differ on its legal significance;
(c) the current permits held by CPW each require preparation and implementation of a Farm Environment Plan ('FEP') for each of the farms within the scheme, which (in simple terms) manages how certain aspects of the farming activities are to be undertaken;
(d) CPW's consenting processes for its current permits identified farming activities, including future dairy farm conversion, that might occur under new irrigation. A 979 tonne nitrogen load was derived from an assumed (future) land use mix of 40:40:20 split between dairy; arable; and beef, sheep and dairy support operations;
(e) this nitrogen load was based on 621 tonnes per year coming from

[4] Variation 1 became a plan change (referred to as PC1) when the LWRP became operative.

existing dryland farming and 358 tonnes per year from farming activities undertaken with new irrigation water;

(f) CPW's discharge permit requires further reductions in the nitrogen discharges over time, in accordance with percentage reductions and timeframes outlined in conditions which are aligned with requirements in the LWRP;

(g) properties not irrigated by CPW water but which are regulated by CPW's discharge permit, are required to discharge up to the nitrogen baseline.

Legal framework

[9] Part 5, subpart 1 of the RMA sets out the provisions relating to national environmental standards (relevantly):

(a) section 43 provides for the making of regulations, by Order in Council, to be known as national environmental standards. Such regulations are able to prescribe technical standards, methods or requirements for matters referred to in ss 9, 11, 12, 13, 14 or 15 of the Act;

(b) a national environmental standard may apply to "any specified district or region of any local authority" and is secondary legislation, in terms of the Legislation Act 2019;

(c) section 43A provides that a national environmental standard may allow a resource consent to be granted for an activity and may state that the activity is a discretionary activity;

(d) section 43B(3) provides that a rule that is more lenient than a national environmental standard prevails over the standard if the standard expressly says the rule may be more lenient than it;

(e) section 43B(6) provides that the following permits and consents prevail over a national environmental standard:

(i) a coastal, water, or discharge permit:

(ii) a land use consent granted in relation to a regional rule.

(f) section 43B(6A) provides that the consents or permits identified in s43B(6) only prevail over a standard if they were granted prior to the date on which the relevant national environmental standard is published under the Legislation Act 2019.

[10] The NES-F is the relevant national environmental standard in this statutory context and was published on 3 September 2020. The NES-F was introduced as part of the Essential Freshwater work programme introduced in October 2018 to address issues with freshwater quality and ecosystem health in New Zealand.

[11] There are three objectives of that work programme, the first being to "stop further degradation of New Zealand's freshwater resources and start making immediate improvements so that water quality is materially improving within five years".

[12] The NES-F is the primary implementation tool to achieve that first objective. The second and third objectives are achieved through the National Policy Statement for Freshwater Management 2020 ('NPS-FM'). These objectives provide a longer term policy direction and are to:

(a) reverse past damage to bring New Zealand's freshwater resources, waterways and ecosystems to a healthy state within a generation; and

(b) address water allocation issues having regard to all interests including Māori, and existing and potential users.

Relevant regulations in the NES-F

[13] By Regulation 5, the NES-F deals with the functions of regional councils under s30 and not with the functions of territorial authorities under s31.

[14] The NES-F only enables a regional rule to be less stringent in relation to Regulations 70 to 74. These provisions apply to culverts, weirs and passive flap

gates, and then only in specific circumstances.

[15] In all other cases, where the NES-F is more stringent than a rule in a regional plan, that standard will prevail.[5]

[16] The regulations introduce standards that apply to farming activities. Regulation 19(1) is directly relevant to this application and states:

> The conversion of land on a farm to dairy farm land is a discretionary activity if it does not comply with the applicable condition in regulation 18(3) or (4).

[17] Regulation 19(2) provides relevant context to the application as it addresses discharge of a contaminant associated with the conversion of land on a farm to dairy farm land. This states:

> (2) The following discharge of a contaminant is a discretionary activity if it does not comply with the applicable condition in regulation 18(3) or (4):
>
> (a) the discharge is associated with the conversion of land on a farm to dairy farm land; and
>
> (b) the discharge is into or onto land, including in circumstances that may result in the contaminant (or any other contaminant emanating as a result of natural processes from the contaminant) entering water.

[18] Regulations 18(3) and (4) state:

> (3) If the farm included dairy farm land at the close of 2 September 2020, the condition is that, at all times, the area of the farm that is dairy farm land must be no greater than–
>
> (a) the area of dairy farm land at the close of 2 September 2020; plus
>
> (b) 10 ha.
>
> (4) In any other case, the condition is that, at all times, the area of the farm that is dairy farm land must be no greater than 10 ha.

[19] Regulation 24 is relevant to an application for a discretionary activity in

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[5] Regulation 6.

relation to activities restricted by Regulations 19(1) and (2) and states:

> (1) A resource consent for an activity that is a discretionary activity under this subpart must not be granted unless the consent authority is satisfied that granting the consent will not result in an increase in either of the following:
>
> (a) contaminant loads in the catchment, compared with the loads as at the close of 2 September 2020:
>
> (b) concentrations of contaminants in freshwater or other receiving environments (including the coastal marine area and geothermal water), compared with the concentrations as at the close of 2 September 2020.
>
> *Term of resource consent*
>
> (2) A resource consent granted for the discretionary activity must be for a term that ends before 1 January 2031.

Overview of parties' position

The Regional Council

[20] The Regional Council's case is that the suite of resource consents held by CPW do not expressly allow use of the land for farming, including conversion to dairy farm land except in relation to the associated properties referred to in condition 1(b) of the discharge permit, where there is an express grant of consent to that effect. Otherwise, CPW's discharge permit cannot be treated as a land use consent that prevails over Regulation 19(1).

The applicants

[21] The applicants' position is that s43B(6) does not require a "like for like" approach as the Regional Council contends. The applicants further contend that there is no justification for a requirement that the relevant land use (farming) must be expressly allowed by CPW's resource consents.

[22] The applicants say that it would be wrong to treat the use of land for

irrigated farming and the resultant effects of those activities (on water quality) as separate activities, as in reality farming is the single use.

[23] The applicants produced evidence in support of the application that illustrated how the effects of allowing a range a farming activity on CPW's land were considered, firstly when the water use permits were granted, and more relevantly, when the discharge permit was granted under the LWRP. That evidence was said to establish that farming activities proposed to be carried out on land within the scheme are an essential component of each of these resource consents, particularly the discharge permit.

[24] Essentially, Ms Limmer submitted that the discharge cannot be implemented in the absence of any farming use of the land. Moreover, used to its fullest extent, CPW's discharge permit contemplates further conversions of farm land, including of land used as dairy support to a dairy farm.

[25] Accordingly, Ms Limmer urged the court to approach the question raised by the application consistent with the holistic, integrated and coordinated approach to the management of natural resources under the RMA. Counsel observed that the NES-F regulation of relevance addresses the same water quality effects, although using different language.

[26] Ms Limmer argued that s43B(6) would serve no purpose if a permit only prevails when it expressly allows the activity in issue. Counsel submits that this test is the same as that in s9(1)(a) – namely, a person cannot do something that would contravene the NES-F unless it has a consent that *expressly allows* the activity.

[27] If this requirement is found to apply in the context of a consent or permit referred to in s43B(6), counsel argues that s9(1)(a) would effectively become redundant.

[28] Ms Limmer's written submissions capture the essence of the reasoning as to why the CPW permits should prevail over Regulation 19(1) in the following

passages:[6]

> If the Court accepts s43B(6):
>
> (a) Does not necessarily require a s9 land use consent for the Abrahamsons to avoid the effect of Regulation 19(1); and
>
> (b) Does not necessarily require the Water Use and/or Discharge Permits to *expressly allow* the conversion of irrigated dairy support land to irrigated dairy farm land, for the Abrahamsons to avoid the effect of Regulation 19(1); then
>
> it is left for the Court to assess whether, in the particular circumstances of this case, the Water Use and/or Discharge Permits are sufficient to *prevail* over Regulation 19(1).

The Applicants submit the factual matrix surrounding CPW's Permits is highly unusual, if not unique, and supports a finding the Permits should prevail. This matrix includes:

(a) The lengthy, thorough and inclusive consenting process (including the Variation 1 process).
(b) The Permits and their conditions, in particular the extent to which they impact on farming activities.
(c) The policy context in which the Permits were granted, and Variation 1 was decided;
(d) The regulatory context pursuant to which the Permits were granted.
(e) The environmental rationale for requiring the Abrahamsons to obtain another resource content.
(f) The peculiar situation that would result if the Council's position is found to be correct.

At the heart of the Applicants' case is the submission these consents relate to a single activity – irrigated farming – and the Act is concerned with consenting activities, not breaches of rules.[7]

In pursuance of this activity CPW already has:

(a) A take [P]ermit;

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[6] Synopsis of legal submissions for the applicants, dated 21 July 2023, at [44]-[48].
[7] *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236 at [36].

(b) The Water Use Permit[;]

(c) The Discharge Permit.

On Council's interpretation CPW can take water for the purpose of irrigating the Abrahamson farm; it can use its water to irrigate the Abrahamson farm and the Abrahamsons can discharge contaminants from their farming activities into the environment. But the Abrahamsons are not authorised to do the farming activity that uses the irrigation water and discharges the contaminants – despite it being sandwiched in the middle of what CPW has consents for.

The LWRP

[29] It is useful to have an understanding of the framework in which the discharge permit was granted to CPW in order to understand the applicants' reasons for making this application.

[30] Relevant rules are located in the section of the plan that applies to the Selwyn Te Waihora sub-region.

[31] Rules that regulated the use of land for farming activities when CPW's discharge permit was granted are Rules 11.5.15 and 11.5.16. Rule 11.5.15 provides for the use of land for farming activity as a permitted activity provided the following conditions are met:

1. The property is irrigated with water from an Irrigation Scheme and the discharge is a permitted activity under Regional Rule 5.41; or
2. The property is irrigated with water from an Irrigation Scheme and the Irrigation Scheme holds a discharge consent under Rule 11.5.16 or 11.5.17 or Rule 5.62.

[32] Rule 11.5.16 provides for the discharge of contaminants as a discretionary activity, provided the following conditions are met:

1. The applicant is an Irrigation Scheme; and
2. If the Irrigation Scheme is described in Table 11(j) the nitrogen loss calculation for land that was not irrigated (other than by effluent) prior to

> 1 January 2015 will not exceed the Irrigation Scheme Nitrogen Limits in Table 11(j).

[33] However, for individual farmers not supplied with water supplied by an irrigation scheme,[8] the LWRP takes a reverse approach; a land use consent is required for any farming activity. Once land use consent has been granted, the need for a discharge consent is avoided by Rules 11.5.8[9] and 11.5.18. These rules state:

> 11.5.8 From 1 January 2017, the use of land for a farming activity in the Selwyn Te Waihora sub-region is a permitted activity, provided the following conditions are met:
>
> 1. The nitrogen loss calculation for the property does not exceed 15 kg per hectare per annum; and
> 2. No part of the property is located within the Phosphorus Sediment Risk Area as shown on the Planning Maps; and
> 3. No part of the property is located within the Lake Area in the Cultural Landscape/Values Management Area; and
> 4. The practices in Schedule 24 are being implemented and the information required is recorded in accordance with Schedule 24 and supplied to Canterbury Regional Council on request.
>
> 11.5.18 Within the Selwyn Te Waihora sub-region, the discharge of nitrogen, phosphorus, sediment or microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene s15(1) of the RMA, is a permitted activity, provided the following condition is met:
>
> 1. The land use activity associated with the discharge is authorised under Rules 11.5.6 to Rule 11.5.14.

[34] In an exchange with the court, Ms de Latour explained that the rationale for the LWRP rule framework reflects the reverse statutory presumption that applies to s15 discharges in comparison to land use activities under s9. It also

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[8] Because the land is not irrigated, or an alternative water supply is used.

[9] This is one of three permitted activity rules, although it is the relevant rule that applied to farmers of associated properties in this case.

recognises the integrated nature of land use and water quality.

[35] I was also told that prior to drafting the LWRP there had been uncertainty within the Regional Council as to whether animal dung and urine on dryland farm land results in a discharge for the purpose of meeting s15(1)(b).

[36] Accordingly, the land use consent requirement was considered to be the more effective method for capturing outputs of dryland farming which would be managed by conditions of that land use consent rather than under a discharge permit. As drafted, this land use rule will also capture irrigated farming where the water is not supplied by an irrigation scheme.

[37] Relevantly, the focus of all these rules and resulting resource consents/permits is directed at the effects on water quality (primarily) associated with discharges of contaminants onto land in circumstances where that contaminant may enter water.

[38] For completeness I note that introductory material in the LWRP refers to the fact that bundling is used in the LWRP. Section 2.3 explains that:

> [r]ule bundling is used in this Plan to combine permissions which may be required under section 9 and sections 13 to 15 of the RMA. One application for resource consent can therefore be made and the CRC will assess and determine the component activities separately, in accordance with the provisions of the RMA relevant to that activity, and any resource consents granted will specify the relevant provisions of the RMA under which the different resource consents have been issued. Resource consents for activities that would otherwise contravene sections 13 – 15 need to expressly allow the relevant activity by reference to the relevant provision.

[39] That provision was not referred to in Counsels' submissions on the application despite being of potential relevance to the applicants' argument, although as I comment towards the end of this decision, the rules that applied to CPW consented activities are not drafted so as to allow a bundling approach to be

applied.

[40] The rules implement policies directed at discharges of nitrogen, phosphorous, sediment and microbial contaminants from farming activities (Polices 11.4.7; 11.4.13 to 11.4.16).

[41] Further policies focus on the land use activity involving the establishment and disestablishment of farming enterprises to address nutrient management and associated discharges (Policies 11.4.17 and 11.4.18).

[42] Policy 11.4.19 is particularly relevant as it applies to the management of discharges associated with farming within an irrigation scheme and is that:

> Irrigation schemes efficiently manage nutrient discharges, by requiring any discharge consent issued to an Irrigation Scheme described in Table 11(j), to include conditions that:
>
> (a) Require that the relevant Irrigation Scheme Nitrogen Limits in Table 11(j) are not exceeded; and
>
> (b) Where the Irrigation Scheme Nitrogen Limits in Table 11(j) are set in order to provide for a Scheme to establish or expand in area, enable the discharge of nitrogen only in proportion to the area of the Scheme that is operational; and
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> (c) For land that was not irrigated prior to 1 January 2015, require the Irrigation Scheme to account for all nutrient losses from farming activities that are partly or fully supplied with water by the Scheme; and
>
> (d) For land that was not irrigated prior to 1 January 2015, require the irrigation scheme to:
>
> (i) limit the initial nitrogen loss on any dryland property converting to irrigation to the good management practice level that is appropriate for the farming system undertaken following irrigation; and
>
> (ii) by 1 January 2022, manage each property supplied with water, in accordance with the overall nitrogen loss rate reduction set out in Policy 11.4.16(1).

CPW's consents

[43] I was taken through a history of the planning documents of relevance to the permits held by CPW and to stages of the scheme's consenting history. At the court's request, counsel filed a joint memorandum setting out the chronology of the key dates for the promulgation of the relevant instruments in the consents held by CPW. It suffices to note that CPW had extensive involvement in and influence over the LWRP content on matters of interest to it.

[44] CPW obtained its first water take and use permits in 2012. At that time, intensification and use of land for farming, including dairy farming was unregulated.[10]

[45] The evidence produced by CPW to support the water permits included considerable expert evaluation as to the land use changes that would occur as a result of farming practices shifting from dryland to irrigated, and otherwise intensifying. Evidence addressed the environmental effects of those land use changes on water quality.

[46] Categories of land uses evaluated in the evidence included dryland livestock, mixed livestock/arable, finishing livestock/arable, dairy, arable and process crop, and arable/winter finishing.[11]

[47] Conditions imposed on CPW's water use permit, managed the effects on water quality resulting from farming activities arising from the use of water for irrigation primarily through the Farm Management Plan, now referred to as an FEP.

[48] The proposed LWRP was notified shortly after the Environment Court

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[10] The joint memo regarding chronology dated 8 September 2023 states Original Water Use Permit CRC061972 was granted by CRC on 28 May 2010, although appeals to that decision were not resolved until 2012.

[11] Pizey at [41].

issued a consent order finalising conditions of the water use permit in 2012. CPW submitted on the proposed LWRP and a later variation (Variation 1). The nutrient management, sediment and microbial contaminant provisions were the most substantial component of this variation and were of interest to CPW.

[49] Variation 1 was of interest to CPW because its water use permit included a condition requiring CPW to apply for a variation of that permit within six months of a regional plan becoming operative that set a catchment-wide nutrient discharge allowance. Variation 1 proposed to do that.

[50] Enabling full development of CPW was identified as one of the major issues in contention in the officer's report produced under s42A for the hearing. Once again, CPW called evidence from a number of experts on the topic of water quality and contaminant discharges from farming activities within the scheme area addressing the issue of future land use change and resultant effects on water quality.

[51] Mr Pizzey's affidavit (for CPW) discusses in further detail the nature of the evidence given to the independent commissioners, noting that overall CPW had sought certainty that full development of the scheme would be able to occur under the LWRP, as amended by Variation 1.

[52] The LWRP had been made operative on 1 September 2015, at which point Variation 1 had become a plan change (referred to thereafter as PC1). PC1 was made operative 1 February 2016.

[53] CPW was the only irrigation scheme to secure a nitrogen load through the Variation 1/PC1 process. The nitrogen load given to CPW is that which was sought by the scheme through its original submission. CPW sought a nutrient allowance for discharges that would enable full development of the scheme which included future conversions.

[54] Land within the CPW scheme area that had not been irrigated before

1 January 2015 was given a nitrogen load of 979 tonnes of nitrogen so that it could be converted from dryland to an irrigated land use.[12] Properties that converted from dryland and those that were irrigated before January 2015 were required to make percentage reductions from 2022.

[55] On the date that PC1 was made operative, CPW made an application for a change to its original water use permit, together with an application for a discharge permit as required under the new LWRP rules. CPW's application had been prepared in anticipation of the outcome of the PC1 process.

[56] The application sought to transfer the conditions managing the effects of the use of water for irrigation from the original water use permit to the discharge permit, thereby bringing these consents into line with the new management regime specified under the LWRP.[13]

[57] Nitrogen allocation zones for discharges had previously been managed through the consenting of water use permits. However, the new LWRP framework is now reflected in conditions of CPW's discharge permit which together with the amendments proposed to the water use permit were processed and granted concurrently given the very close linkage.

[58] Many conditions in the original water use permit were removed and either placed in or superseded by conditions on the discharge permit granted to CPW. Remaining conditions of the amended water use permit required compliance with conditions contained in the discharge permit, including in relation to the need for FEPs to be prepared and complied with.

[59] Under the LWRP, farmers using water supplied by an irrigation scheme that is the holder of a discharge permit granted under Rule 11.5.16, did not need to obtain a land use consent for the use of land for farming, at least not under the

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[12] Agreed statement of facts, opinions and issues, dated 17 July 2023.
[13] Pizey, at [62] and [65].

LWRP. This is because the grant of the discharge permit to CPW satisfied the condition of permitted activity status pertaining to (any) farming use of the land within the scheme.

[60] Conversely, farmers using water not supplied by an irrigation scheme (or dryland farming) required a land use consent for the use of the land for any farming activity. Once granted, the discharge associated with those farming activities became a permitted activity, because the grant of a land use consent under (any of) Rules 11.5.6 to 11.5.14 is a condition of permitted activity status pertaining to the discharge associated with that farming use (under Rule 11.5.18).

[61] CPW had offered landowners within the scheme who farmed land that was not supplied with scheme water the option of including that land within CPW's overall control when seeking its discharge permit. This was to be achieved by including that land within the FEPs prepared for all of the farming properties within the scheme.

[62] A number of landowners within the scheme opted into that management regime. They are referred to in CPW's discharge permit as the "associated properties" in respect of which the land use consent was granted at the same time.[14] All properties managed under the discharge permit are assigned property NDAs, although the associated properties have their own nitrogen allowance rather than utilising the 979 tonnes of additional nitrogen allowance given to CPW under the LWRP and its discharge permit.

[63] The land use consent for the associated properties finds its complete expression in condition 1(b) of CPW's discharge permit which states:

> The use of land for farming on those properties specified in Condition 1(a)(ii).

[64] Both the water use permit and the discharge permit require that an FEP be

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[14] Under Rule 11.5.9 LWRP.

prepared and implemented for farming activities across the total farm area of properties coming within the scope of the discharge permit. The FEP is required to address a number of matters including:

(a) Nutrient Management – to maximise nutrient use efficiency while minimising nutrient losses to water;
(b) Irrigation Management – to operate irrigation systems efficiently ensuring that the actual use of water is monitored and is efficient;
(c) Soils Management – to maintain or improve the physical and biological condition of soils in order to minimise the movement of sediment, phosphorous and other contaminants to waterways;
(d) Collected Animal Effluent Management – to manage the risks associated with the operation of effluent systems to ensure effluent systems are compliant 365 days of the year;
(e) Waterbody Management (wetlands, riparian areas, drains, rivers, lakes) – to manage wetlands, riparian areas and surface waterbodies to avoid damage to the bed and margins of a water body, and to avoid the direct input of nutrients, sediment. and microbial pathogens;
(f) Point Sources Management (offal pits, farm rubbish pits, silage pits) – to manage the number and location of pits to minimise risks to health and water quality;
(g) Water-Use Management (excluding irrigation water) – to use water efficiently ensuring that actual use of water is monitored and efficient; and
(h) Native Plants and Animals – to avoid, remedy or mitigate effects on native plants and native animals and their habitats on individual farm properties.

[65] I had initially been puzzled by the interpretation of the CPW discharge permit (as it was referred to) in relation to the associated properties for two reasons; firstly because in opposing the declaration the Regional Council made much of the fact that the need for CPW to obtain a discharge permit was a function

of the LWRP rules. Counsel argued that a resource consent could not be granted for the use of the land for farming as that became permitted when the discharge permit was granted to CPW.

[66] Secondly, in relation to the associated properties, under the LWRP rule regime (Rule 11.5.18 in particular), discharges associated with farming also became permitted once land use consent was granted for farming, although despite this, application for land use consent (for farming) was included within the application for the discharge permit lodged by CPW.

[67] CPW's application for the discharge permit encompassed all discharges from farming within the scheme, including on the associated properties, despite the discharges associated with farming on those properties being a permitted activity upon grant of the land use consent.

[68] I was directed to the original application lodged by CPW and note that land use consent was only sought for the associated properties. Ms de Latour emphasised that this was due to the fact that a resource consent could not be sought for an activity that is permitted under the rules.

[69] I had also been unclear as to which resource consent the conditions appearing on CPW's discharge permit applied. Counsel agreed that all the conditions imposed on CPW's discharge permit (with the exception of condition 1(b)) are to be treated as discharge permit conditions which apply to discharges associated with farming use of all properties within the scheme area, and to the associated properties, and that none of the conditions applied to the land use consent.

[70] As Ms Limmer emphasised, the LWRP uses the resource consent 'labels' interchangeably to manage the same resultant effects of farming, and that appeared to be reflected in the terms of the discharge permit granted to CPW. However, while I broadly agree with that proposition, for reasons I shortly get to, that does not support the declaration sought.

Relevant authorities

[71] The application of s43B(6) has not yet been considered by this court. Section 43B(5) has been considered in a 2013 decision on a declaration in an application by *Hastings District Council* ('*Hastings*')[15] which I discuss below.

Principles of interpretation

[72] In construing s43B(6) I am to ascertain the meaning from its text and in light of its purpose and context. Other relevant principles were referred to in submissions for the applicant (at [25]-[30]), including the approach cited in *Marlborough District Council v Zindia Limited* ('*Zindia*')[16] and the following:[17]

> … the task of the interpreter is to interpret the text of the statute: to say what that text means … even if one relaxes that extraordinary literalism [of the past] and takes into account purpose and context, one is still doing so with the objective of discerning the best interpretation of the statutory words. One is no longer confined to the words of the statute, but one is … confined by them.

An application by Hastings District Council (Hastings)

[73] *Hastings* involved a declaration as to whether activities associated with the construction of a dwelling, along with associated disturbance of the soil on an allotment created under a subdivision consent, required a further resource consent under the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health ('NES-CS').

[74] Activities covered by the NES-CS included disturbing the soil of Hazardous Activities and Industries List ('HAIL') land for a particular purpose, including for construction of a dwelling.

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[15] *Re Hastings District Council* [2013] NZEnvC 102.
[16] *Marlborough District Council v Zindia Limited* [2020] NZRMA 216.
[17] Burrows & Carter, *Statute Law In New Zealand* (5th ed, LexisNexis, 2015) at 395.

[75] The subdivision consent was granted by the Council prior to notification of the NES-CS. The question arose as to whether activities associated with disturbance of the soil, which would be captured by the NES-CS, were authorised by the subdivision consent.

[76] For the purposes of s43B(5), the court held that a subdivision or land use resource consent granted before 13 October 2011 will, if the two conflict, prevail over the NES-CS. However, that was qualified by the further qualification that the activities authorised by the resource consent are those which the NES-CS prohibits or restricts.

[77] The court held that this required an assessment of whether construction and occupation of dwellings is "expressly allowed" by a resource consent granted prior to notification of the NES-CS.

[78] The court made observations as to the differences between a land use requirement for houses and a subdivision:

(a) construction of a house on land that is part of a subdivision consent will generally be a permitted activity, subject to compliance with prescribed requirements, conditions and permissions;
(b) generally, a subdivision consent does not authorise construction of a house, although "… if it does, it will actually be both a subdivision and a land use consent";[18] and
(c) the statutory regime for a land use consent, which is a consent to depart from s9; and a subdivision consent, which is a consent that permits a departure from s11, are separate and distinct.[19]

[79] The relevant district plan afforded permitted activity status to earthworks

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[18] *Re Hastings District Council* [2013] NZEnvC 102, at [10].
[19] As discussed in *Meadow 3 Limited v van Brandenburg and Queenstown Lakes District Council* HC Christchurch CIV-2007-409-001695, 30 May 2008.

for residential development on land for which a subdivision consent has been granted. However, the court held that a resource consent could not approve permitted activities included within a development proposal for which a subdivision consent is granted.

[80] *Hastings* cannot be construed as recognition that the absence of a s9 consent is not an automatic impediment to the engagement of s43B(5), as Ms Limmer contends. The court's observations go no further than recognising that there is often a degree of overlap between a subdivision and land use consent, particularly where earthworks are involved.

[81] The court accepted that construction of a dwelling may require soil disturbance beyond what is authorised by the subdivision consent. This is reflected in the declaration made by the court:

> The construction and occupation of a dwelling and any associated disturbance of soil on an allotment created in accordance with a subdivision consent … may be lawfully carried out under s9(1) of the Resource Management Act 1991 without further resource consent, notwithstanding contravention of the NES if, and only if, the subdivision consent specifically authorises the disturbance of soil for the purpose of constructing and occupying the dwelling.

[82] Moreover, the court's observation (at [10]), recognises that it is a matter of interpretation as to whether the resource consent is only a subdivision consent or (jointly) a subdivision consent and land use consent. Whether a resource consent is to be construed in that way may require resort to the original application if it is not sufficiently clear from the resulting resource consent.

Zindia

[83] I was referred to cases decided since *Hastings* concerning the interpretation of a resource consent (in terms of its scope) as opposed to the relationship between the resource consent and a national environmental standard, including *Zindia*. *Zindia* was concerned with a commercial forestry harvesting activity being

undertaken in circumstances where the Council alleged it was in breach of its plan and s9 RMA.

[84] *Zindia* was cited by the Regional Council as further authority that a resource consent cannot authorise an activity that is permitted under the relevant plan, even where that activity is a component of an overall proposal comprising integrated activities for which resource consent has been granted.

[85] The *Zindia* decision (in the Environment Court) had made three determinations on issues of relevance to the case before me:

(a) as to the scope of the application and resulting consent incorporating a permitted activity, that being the purpose for which enabling works were being sought; and
(b) that where the activity comprises a bundle of interrelated component activities, the bundling approach can be extended to apply to permitted and discretionary activities; and
(c) on the approach of *Arapata Trust* where the permitted activity status of one component of those interrelated activities changes under a new rule coming into force after the resource consent is granted, those activities continue to be authorised under that resource consent.

[86] On my reading of the decision the determinations were compounding.

High Court and Court of Appeal Zindia decisions

[87] The Environment Court's decision was reversed in the High Court ('HC') by a decision of Doogue J.[20] A number of questions of law were raised for determination, essentially capturing the issues of relevance to the application before this court.

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[20] *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765.

[88] Questions included whether the Environment Court erred in finding that forestry harvesting was expressly allowed by the resource consent for the purpose of s9(2)(a). A further question encompassed consideration of whether the court erred in its finding that bundling can apply to a permitted activity.

[89] Doogue J referred to the court's discussion of *Arapata Trust Ltd v Auckland Council* ('*Arapata Trust*'),[21] including the HC's endorsement of that decision in *Duggan v Auckland Council*.[22] Doogue J upheld the Environment Court's extension of the court's approach in *Arapata Trust* to a resource consent for the purposes of s9(2)(a), noting that *Arapata Trust* involved the interpretation of s9(3)(a).

[90] Doogue J then considered the court's approach to the bundling of multiple activities, including a permitted activity, traversing relevant authorities dating back to *Rudolph Steiner v Auckland City Council* ('*Rudolph Steiner*'),[23] an early RMA decision. *Rudolph Steiner* had endorsed application of the approach in *Locke Avon Motor Lodge Ltd* ('*Locke*')[24] under the RMA.

[91] *Locke* was referred to as the earliest case that dealt with the concept of bundling under the then applicable Town and Country Planning Act 1953. In *Locke*, Cooke J had rejected use of a hybrid concept to the consenting process for a building that was otherwise permitted, except that side yard requirement could not be met. As a consequence of that non-compliance, the entire building required a planning permission. That approach was held to be applicable under the RMA in *Rudolph Steiner* where a building required consent because part of the building roof exceeded the maximum building height control.

[92] Doogue J then referred to more recent decisions on bundling including *Aley v North Shore City Council* ('*Aley*').[25] *Aley* involved a development proposal that

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[21] *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236.
[22] *Duggan v Auckland Council* [2017] NZHC 1540, [2017] NZRMA 317, at [28] and [37].
[23] *Rudolph Steiner School v Auckland City Council* (1997) 3 ELRNZ 85, at 87.
[24] *Locke Avon Motor Lodge Ltd* (1973) 5 NZTPA 17 (SC).
[25] *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC).

encompassed a range of activities, some of which were permitted activities under the district plan. The HC held that a land use is either wholly predominant (or permitted) or wholly conditional (discretionary) and that a hybrid activity is not possible under the RMA, following *Locke* and *Rudolph Steiner*.

[93] Doogue J then went on to consider the court's discussion of the concept of bundling in *Bayley v Manukau City Council* ('*Bayley*'),[26] noting that:[27]

> *Bayley* is therefore authority for the proposition that where a proposed land use encompasses multiple classes of activity, the local authority should consider whether there is sufficient overlap between the activities such that the consent applications for each class of activity be considered together. In such an instance, the most restrictive activity status is applied to all the consent applications. This latter point embodies the principle established in Locke.

[94] Doogue J then refers to the court's adoption of *Locke* in *Southpark Corporation Ltd v Auckland City Council*.[28] This case discusses circumstances where 'unbundling' can occur. Doogue J makes the observation that subsequent decisions to consider the concept of bundling do not discuss that in the context of its application to permitted activities.

[95] Doogue J then considered the authorities addressing the permitted baseline test, concluding that "at least from a practical perspective, permitted activities can be bundled with other classes of activity",[29] that being the conclusion of the Environment Court in the decision under appeal.

[96] However, Doogue J observed that it would be preferable not to use the term bundling when discussing permitted activities, referring to its orthodox use. Doogue J then endorsed the Environment Court's holistic approach to an

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[26] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).
[27] *Marlborough District Council v Zindia Limited* [2020] NZRMA 216, at [51].
[28] *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350 (EnvC).
[29] *Marlborough District Council v Zindia Limited* [2020] NZRMA 216, at [64].

assessment of resource consent involving discretionary and permitted activities together.

[97] Ultimately, the issue of scope was central to an outcome of the appeal. On that issue Doogue J disagreed with the Environment Court's interpretation of the scope of the application and resulting resource consent. The Environment Court was found to be in error in its conclusion that harvesting was included within the scope of the application and resulting resource consent.

Cable Bay Wine

[98] Doogue J's decision in *Zindia* was referred to by the Court of Appeal ('CA') in *Cable Bay Wine Ltd v Auckland Council* ('*Cable Bay Wine*').[30] That was a decision declining an application for leave to appeal a decision of the HC.

[99] The CA clarified that Doogue J had not stated that a resource consent granted for a proposal that includes components that are permitted, results in an authorisation of the components that are permitted.

[100] The CA referred to s87 as giving meaning to the terms of a resource consent; that being a consent to do something that otherwise would contravene s9. It held that where a resource consent is granted for any proposal which includes some activities that are permitted, such activities will be protected against any subsequent changes to the plan as an existing land use under s10.

[101] The HC decision in *Cable Bay Wine*[31] had also referred to Doogue J's discussion of the bundling concept in *Zindia*, noting that bundling applied in the orthodox sense cannot be construed as meaning that where resource consent is granted for a proposal that includes both permitted and non-permitted activities,

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[30] *Cable Bay Wine Ltd v Auckland Council* [2022] NZCA 189.
[31] *Cable Bay Wine Ltd v Auckland Council* [2021] NZHC 2596.

consent is also granted for the activities that are permitted.

[102] In refusing leave to appeal the HC decision, the CA rejected the argument that the HC decision was inconsistent with that of Doogue J's in *Zindia* on that issue.

My consideration

[103] On the authority of the decisions in *Hastings*, *Zindia* and *Cable Bay Wine*, CPW's discharge permit cannot be construed as authorising farming on land within the scheme. Land use consent is restricted to farming on the associated properties where that land use consent was a requirement under rules in the LWRP. That land use consent been expressly authorised in condition 1(b).

[104] Ms Limmer had also relied on the court's decision *Arapata Trust* in response to the Regional Council's submission that CPW's need for the discharge permit had been driven by the framework of the LWRP. On the authority of *Arapata Trust*, Ms Limmer said that it is the activity that is consented that counts not the breach of the rules.

[105] That proposition underpinned the applicants' overall argument that the use of the land for farming is the single relevant activity that gives rise to the discharges that are the subject of the discharge permit granted to CPW. In delivering her submissions to the court, Ms Limmer also noted that farming is the purpose for which CPW's water use permits had been sought and granted.

[106] However, that submission begs the question; what is the activity that is authorised under CPW's discharge permit? *Arapata Trust* can only be of any assistance to CPW if the resource consent being examined expressly grants a land use consent for farming on all of the land within the scheme in addition to the associated properties.

[107] That leads me to return to Ms Limmer's argument as to the approach that

I was urged to take to the meaning of s43B(6), in particular, counsel's submissions that:

(a) there is nothing in the wording of s43B(6) that requires a 'like for like' consent; that is, that the use of land for farming has been expressly allowed by a land use consent granted prior to gazettal of the NES-F; and

(b) there would be no need for s43B(6) if a permit only prevails when it expressly allows the activity at issue, because this is the test of s9(1)(a) – a person cannot do something that would contravene the NES-F unless it has a consent that expressly allows the activity.

[108] The first proposition necessarily involves acceptance that activities can be impliedly authorised by a resource consent (a discharge permit on this occasion).

[109] As earlier noted, the parties agree that the discharge permit does not expressly allow the use of the CPW scheme land for farming other than in relation to the associated properties. The parties differ on the materiality of that in the context of s43B(6). However, *Gillies Waiheke Ltd v Auckland City Council* ('*Gillies*'),[32] is authority for the proposition that there is no room for an argument that an activity can impliedly be allowed by a resource consent.

[110] I accept that not all resource consents will describe every component of the bundle of interrelated activities that may have been consented in express terms. Where this occurs, issues of scope arise. When the scope of the resource consent is in issue, the answer will inevitably be answered by interrogating the original application and accompanying information, and the relevant district or regional plan. *Zindia* is one of many cases where the court has considered this wider context in which the resource consent was granted to determine its lawful scope.

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[32] *Gillies Waiheke Ltd v Auckland City Council* HC Auckland A131/02, 20 December 2002.

[111] *Gillies* is another. In *Gillies*, the question related to the interpretation of a resource consent for a development involving earthworks, in circumstances where the resource consent was silent on the actual volume of earthworks that had been approved. The question was answered by referring to the plans included with the application, as the plans contained a table addressing compliance with relevant rules of the district plan. This table stated an approximate volume of intended earthworks against that which was permitted under the relevant rule.

[112] However, other information depicted on the plans indicated that an additional volume of earthworks would be undertaken beyond that stated in the table. The HC held that the resource consent had authorised the volume of earthworks stated in the table and not that capable of being inferred from other information contained on the application plans.

[113] The question in this case is not strictly one of scope of the discharge permit. As I understand Ms Limmer's argument, the question is whether CPW's discharge permit can be construed as authorising a use of land for farming in circumstances where the conditions of that permit contemplate and manage the resultant effects of that use (on water quality), including the effects of future conversions to a dairy farm.

[114] While I can agree that this is the basis upon which the discharge permit was granted, I am unable to ignore the relevance of the definition of a discharge permit under s87(e); being a consent to do something that would otherwise contravene s15.

[115] At this juncture, it is relevant to refer back to *Hastings*, where the statutory distinction between the various resource consents was noted with reference to observations made in *Meadow 3 Ltd v van Brandenburg and QLDC* that:[33]

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[33] *Meadow 3 Ltd v van Brandenburg and Queenstown Lakes District Council* HC Christchurch CIV-2007-409-001695, 30 May 2008, at [21]-[24].

> … It is typical in comprehensive developments for there to be the need for more than one type of resource consent. In this case there plainly had to be at least a land use consent and a subdivision consent.
>
> The RMA creates a separate regime for land use consents and subdivision consents, subject to the qualification that there can be a degree of overlap.
>
> A land use consent is a consent to depart from s9. All uses of land are permitted unless a rule in a plan or a proposed plan states otherwise.
>
> A subdivision consent permits a departure from s11. The reverse presumption applies. With limited exception (some matters are specifically excluded from s11), no survey plan may deposit under the Land Transfer Act without following the s11, survey plan, s223, s224 deposited plan process.

[116] That distinction underpins the Environment Court's observations in *Hastings* that if a subdivision consent does authorise construction of a house, "it will actually be both a subdivision and a land use consent".[34]

[117] In this case, the CPW discharge permit is actually both a discharge permit and a land use consent, although only in relation to the associated properties. That reflects the basis on which the application was originally made.

[118] This distinction between different types of consents and permits is also recognised in s43B(6) and in the NES-F regulations. These provisions do require a "like for like" approach for the purpose of determining which is the prevailing authorisation under s43B(6).

[119] Regulations 19(1) and (2) each apply to "conversions of land on a farm to dairy farm land", however the land use and associated discharge are separately addressed. The applicants' position would mean that CPW's discharge permit would prevail over both of these regulations in the s43B(6) context. However, that cannot be correct.

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[34] At [10]. And that outcome could only arise where that is what was sought in the original application.

[120] As to the distinction between s43B(6) and the test in s9(1)(a), the first point is that a land use activity is potentially restricted by a regional rule or district rule. However, by s43B(6)(b) only a land use consent granted in relation a regional rule is capable of prevailing over a national environmental standard.

[121] In any event, s43B(6) must also be read with the requirement in s43B(6A) to consider the "relevant national environmental standard" in determining whether a resource consent or permit prevails. The NES-F is the relevant national environmental standard for the purposes of considering the meaning of ss 43B(6) and 43B(6A) in the context of this case.

[122] The NES-F regulations are only concerned with the regional council's functions by Regulation 5. Accordingly, for the purposes of identifying relevant resource consents or permits capable of prevailing over a national environmental standard, consideration of a land use consent granted in relation to a district rule is necessarily precluded despite coming within the ambit of s9(1)(a).

[123] Accordingly, I disagree with Counsel's submission that s43B(6) would serve no purpose beyond that achieved by s9(1)(a) if the permit is required to expressly allow the activity that is restricted by the national environmental standard.

[124] The Regional Council also refuted the suggestion that it was taking a form over substance approach. Ms de Latour emphasised that the Regional Council's position "is not a matter of form over substance. The Applicants' own evidence is that resource consent for a conversion may not be able to be obtained".[35]

[125] Counsel is here referring to Regulation 24 of the NES-F. This regulation would prevent the grant of a land use consent for agricultural intensification activities if the activity will result in an increase in contaminant loads in the

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[35] Legal submissions on behalf of Canterbury Regional Council, dated 4 August 2023, at [4(e)].

catchment, freshwater or other receiving environments beyond those that existed on 2 September 2020.

[126] Ms de Latour emphasised that the NES-F introduced immediate controls on high-risk farming activities, including controls on agricultural intensification as a "hold the line" measure until freshwater regional plans and other planning documents are developed to give effect to the NPS-FM 2020.

[127] However, while that is relevant background context to the issue, it has little bearing on the question of whether CPW's discharge permit is able to be construed as allowing the use of land for farming, such that it is capable of prevailing over Regulation 19(1) of the NES-F. Moreover, the reasons for introducing the NES-F cannot influence my interpretation of an enactment (in this instance, s43B(6)).

[128] I have given careful consideration to all of the arguments advanced for the applicants in favour of the declaration, many of which were (initially) quite persuasive. While I agree that the discharge permit contemplates and manages all effects of full development of the scheme, including future dairy farm conversions (on water quality at least), s87(e) and s15 stand in the way of a finding that a discharge permit is capable of authorising a use of land. On that basis, it is incapable of prevailing over Regulation 19(1) NES-F in the s43B(6) context.

[129] I also agree that the resource consent categories are used interchangeably under the LWRP and seemingly under the NES-F as well. During the hearing Dr Burge for the Regional Council had referred to land use consents granted to Ngāi Tahu under Regulation 19(1), which at the court's request were produced to the court. The land use consents granted under this regulation allow conversion from dairy support to dairy farm on one of the 20 farms owned by Ngāi Tahu, and dairy support grazing on a number of others.

[130] Although expressed as land use consents, the primary focus is on the discharges associated with the land use, as are the resource consents issued under the LWRP. The management approach for resource consents issued under the

NES-F adopts many of the methods used in consents issued under the LWRP. However, I was told that the NES-F land use consents include localised discharge limits rather than using an area-wide nutrient load, that being a feature of the LWRP.

[131] A supplementary affidavit of Ms Crombie for the applicants was also filed in response to the further affidavit from Dr Burge. Ms Crombie produced a number of land use consents for farming issued under the LWRP at a more proximate time to CPW's discharge permit, and these show a lack of substantive difference between the CPW discharge permit and the land use consents.

[132] Accordingly, I agree with the applicant that many of the conditions on CPW's discharge permit could equally serve as conditions of a land use consent issued under the LWRP and/or consents issued under the NES-F regulations.

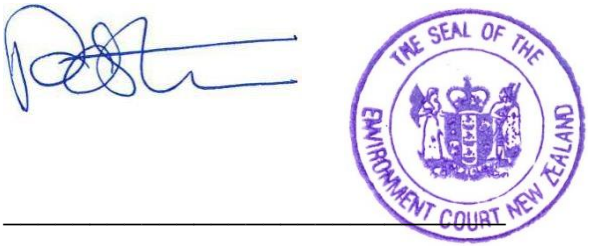
[133] For completeness I note that Ms Limmer had referred to the Regional Council's powers under s128 which could be used to amend conditions of CPW's discharge permit to bring that into line with the conditions now imposed on consents and permits issued under the NES-F Regulations 19(1) and (2).

[134] Although the Regional Council refuted that this power could be invoked, it is noted that by s43B(6A), a resource consent or permit of a kind identified in s43B(6) will only prevail over a national environmental standard until a review of the conditions of the permit or consent under s128(1)(ba) results in some or all of the standards prevailing over the permit or consent.

[135] Accordingly, s43B(6A)(b) contemplates the review mechanism under the act being used to resource consents and/or permits to bring them into line with a later national environmental standard. That review may yet occur in the case of CPW's discharge permit. However, the availability of the review mechanism does not overcome requirement for a land use consent to be sought by CPW under Regulation 19(1).

[136] Accordingly, and for reasons set out in this decision the application for a declaration is declined.

[137] Costs are reserved.



P A Steven
Environment Judge