

**BEFORE THE HEARINGS PANEL
FOR THE PROPOSED WAIMAKARIRI DISTRICT PLAN**

UNDER the Resource Management Act 1991 (RMA)
IN THE MATTER of the Proposed Waimakariri District Plan
AND
IN THE MATTER of Hearing Stream 3: Natural Hazards, Hazardous
Substances and Contaminated Land

**LEGAL SUBMISSIONS ON BEHALF OF THE CANTERBURY REGIONAL
COUNCIL – HEARING STREAM 3**

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MAY IT PLEASE THE PANEL

Introduction

- 1 Canterbury Regional Council (**CRC** or **Regional Council**) made a submission (and further submission) on Waimakariri District Council's (**WDC**) proposed Waimakariri District Plan (**pWDP**) primarily in order to ensure that the pWDP gives effect to the Canterbury Regional Policy Statement (**CRPS**).
- 2 The Regional Council's position in relation to the provisions subject to Hearing Stream 3 is that the amendments suggested by the section 42A officers generally address the Regional Council's concerns, but that to assist plan users, as well as to ensure that all relevant effects are addressed by the provisions, further amendments (particularly to the natural hazards provisions) should be made.
- 3 The Regional Council's submission on these provisions (summarised further in Ms Mitten's evidence) generally:
 - (a) Supported the provisions that it considered give effect to the CRPS and other relevant higher-order documents;
 - (b) Sought further amendments regarding the Urban and Non-Urban Flood Assessment Overlays and Kaiapoi fixed minimum floor level, in order to more accurately reflect areas at risk from natural hazards;
 - (c) Sought an additional objective specifically in relation to climate change;
 - (d) Sought a more straightforward consenting pathway to enable the Regional Council's natural hazard mitigation works in the District; and
 - (e) Sought an additional permitted activity rule (or in the absence of this, amendments to the rule framework) to comprehensively address offsite flood effects.
- 4 The section 42A authors are now recommending changes to the provisions that address a number of CRC's submission points, and these submissions focus on the key outstanding issues. These submissions, first, provide an overview of CRC's interests and the statutory framework and then address the key issues from CRC's perspective being:

- (a) The new Urban and Non-Urban Flood Assessment Overlay;
 - (b) The High Hazard Area definition and the Natural Hazard Sensitive Activity definition;
 - (c) The rules regarding activities that may affect natural hazards, particularly in relation to offsite flood effects;
 - (d) Rules governing natural hazard mitigation activities, including those undertaken by CRC's river engineering team for flood control purposes; and
 - (e) Provisions regarding hazardous substances and contaminated land (in particular, alignment with the recommended High Hazard Area definition and overlays, and provision for the disposal of soil from contaminated land).
- 5 The Regional Council has filed evidence from:
- (a) Nick Griffiths, Natural Hazards Scientist at CRC;
 - (b) Jolene Irvine, Rivers Planning Advisor at CRC; and
 - (c) Joanne Mitten, Principal Planner at CRC.
- 6 Mr Griffiths, Ms Irvine and Ms Mitten will be present at the hearing to answer any questions that the Hearing Panel may have.

The Regional Council's interest in Hearing Stream 3 of the pWDP

- 7 The CRC has a number of functions relating to the integrated management of natural resources,¹ and is required to prepare and administer the CRPS,² to which a district plan (including the pWDP) is required to give effect.³
- 8 The purpose of CRC's participation in the pWDP process is to assist WDC in achieving alignment between the relevant planning instruments, where possible.
- 9 CRC's particular areas of interest are:

¹ RMA, s 30(1)(a).

² RMA, s 60(1).

³ RMA, s 75(3).

- (a) ensuring that all relevant effects of natural hazards are governed by the provisions (e.g. through ensuring that all offsite flood effects are able to be addressed through the provisions, and that all areas of land or buildings potentially subject to effects are adequately identified); and
- (b) ensuring that its activities in terms of natural hazard mitigation (e.g. stopbanks) are able to continue in as permissive a framework as possible, to continue to seek to protect the community from effects of natural hazards.

Statutory framework

- 10 The statutory framework in which the pWDP is being decided under has been set out in detail in Ms Mitten's evidence.⁴ In summary:
- (a) A district plan must give effect to any national policy statement, any New Zealand Coastal Policy Statement, a national planning standard and any regional policy statement;⁵ and
 - (b) The relevant CRPS provisions to the matters at issue in this case are largely contained within Chapters 11, 17 and 18. Policy 11.3.1 of the CRPS seeks the avoidance of inappropriate development within high hazard areas, other than in specific circumstances (e.g. that it is not likely to result in the loss of life, serious injury or suffer significant damage, or is not likely to exacerbate the effects of the natural hazard). While these areas are not specifically required to be mapped in district plans, they are required to be identified, and their risks managed.⁶
- 11 The other key statutory test that these submissions touch on is that found in section 32. In particular, CRC considers that in relation to some of the additional amendments that it is seeking, that its relief sought on the rules are the most appropriate way to achieve the objectives, considering the obligations in section 32(1)(b).

⁴ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [26].

⁵ RMA, s 75(3).

⁶ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [41] – [42].

Urban and Non-Urban Flood Assessment Overlay

- 12 As noted in the section 42A report, prior to the release of Mr Willis' report witnesses for the Regional Council and WDC met to further clarify the outcomes sought by the Regional Council's submission, and consider technical amendments, such as to the high hazard overlays.
- 13 Mr Griffiths (for CRC) and Mr Bacon (for WDC) signed a joint witness statement regarding their positions on the revised Urban and Non-Urban Flood Assessment Overlays. This Joint Witness Statement addressed the limitations of the notified overlays (including the limitations of the modelling meaning that not all areas of the District that are potentially subject to flooding were captured), as well as proposing revised overlays.
- 14 Mr Bacon and Mr Griffiths consider that the revised overlays (compared to the notified overlays) will help to reduce the likelihood of future buildings being flooded.⁷
- 15 The section 42A report recommendation to adopt these revised overlays (as well as to delete the Kaiapoi Fixed Minimum Floor Level and replace it with the Urban Flood Assessment Overlay) is therefore supported by the Regional Council.⁸
- 16 The adoption of revised overlays achieves the ultimate relief sought by the Regional Council in its submission, in capturing the areas of the District susceptible to flooding. The identification of the areas potentially subject to flooding gives effect to Policy 11.3.1 of the CRPS, by highlighting areas that may be subject to high hazards and within which development should be avoided.
- 17 As the Regional Council's original submission sought amendments to the overlays to capture all areas in the District subject to flooding (extending to covering the entire plains area or entire District), the Regional Council considers the amendments now proposed and

⁷ Joint Witness Statement dated 9 June 2023, at [25].

⁸ Statement of Evidence of Nick Griffiths dated 10 July 2023, at [16] - [19]; Statement of Evidence of Joanne Mitten dated 10 July 2023, at [86].

recommended by Mr Willis and Ms Mitten are within the scope of the submissions.⁹

- 18 The evidence of Ms Dale on behalf of Kāinga Ora seeks that the overlays are included outside of the pWDP, and reference in the provisions is instead made to the specific hazard type that is sought to be managed.¹⁰ This approach would also require the addition of two new definitions into the pWDP which seek to set out the areas that are captured by the non-statutory maps.¹¹ These definitions appear to rely on the modelling and parameters previously used by the WDC to inform the notified flood assessment overlays.
- 19 It is noted that the Regional Council's concern (and reason for seeking updated overlays) is not solely with the flood modelling becoming outdated; the concern is with the accuracy of the modelling, and limitations of the modelling in predicting flood risk.¹²
- 20 For this reason, the Regional Council continues to hold concerns regarding any definition that sought to determine whether it was met (and therefore a rule triggered) based on modelling results, such as that suggested by Kāinga Ora. However, the Regional Council takes a neutral position on where the maps of the overlays themselves should be located.

Other definitions in the Natural Hazards Chapter

- 21 In addition to the new Urban and Non-Urban Flood Assessment Overlay definitions, CRC's evidence also addresses the "high hazard area" definition and the "natural hazard sensitive activity".
- 22 The amended definition of "high hazard areas" as recommended by Mr Willis is also generally supported by the Regional Council, on the basis that it gives effect to the CRPS (while providing further clarity in respect of coastal inundation in particular).¹³

⁹ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [86].

¹⁰ Statement of Evidence of Clare Dale, dated 10 July 2023, at [5.1].

¹¹ Statement of Evidence of Clare Dale, dated 10 July 2023, at [5.11].

¹² Joint Witness Statement dated 9 June 2023, at [12] - [15].

¹³ Statement of Evidence of Nick Griffiths, dated 10 July 2023, at [11].

- 23 However, the definition as included in the provisions recommended in the section 42A report uses “and” between the subclauses, instead of “or”. As noted in the evidence of Ms Mitten, this is an error,¹⁴ as the intention behind the definition was always that the subclauses would be triggered independently. A minor change to amend the recommended decision from “and” to “or” is therefore sought.
- 24 Mr Griffiths’ evidence also outlines a further change he considers is necessary to the definition of “natural hazard sensitive activity” recommended by Mr Willis. Mr Griffiths considers that attached garages should be included as part of a natural hazard sensitive activity, as they have the same potential for flood damage as the rest of the building, are integral to the structure and use of the building, and often contain items of value.¹⁵
- 25 For this reason, the Regional Council seeks an additional change to remove the exclusion for attached garages from this definition.

Rules regarding activities that may affect natural hazards – offsite flood effects

- 26 CRC’s submission sought alignment between the policies and rules that manage offsite flood effects. In a submission point on EW-R5, the Regional Council sought that the applicability of that rule was amended from the overland flow paths to the flood assessment overlays, and sought that the rule captured all activities that have the potential to cause offsite flooding effects. The Regional Council suggested a rule such as one proposed in the Kaikoura natural hazards plan change to resolve these issues.
- 27 While the amendments recommended by Mr Willis to the rules governing offsite flood effects go some way towards achieving the relief sought by the Regional Council, Mr Griffiths’ evidence identifies two remaining concerns with the rule structure, in that it:
- (a) Does not address or regulate all activities that can cause offsite flood effects; and

¹⁴ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [77].

¹⁵ Statement of Evidence of Nick Griffiths, dated 10 July 2023, at [25].

- (b) Is inappropriate to specify a single magnitude flood event for effects to be assessed against.
- 28 To indicate his first concern with the rules identified above, Mr Griffiths has outlined the current rule framework and the effects it covers, noting that this leaves the pWDP with a gap where the rules:¹⁶
- ...do not address the potential for offsite flood effects associated with 'natural hazard sensitive activities' outside of overland flow paths, earthworks unrelated to infrastructure outside of overland flow paths, or other activities (such as buildings that do not meet the definition of 'natural hazard sensitive activities', certain types of earthworks and structures).
- 29 Mr Griffiths notes that "more than minor offsite effects can still occur from the displacement or diversion of floodwater in areas that do not meet the overland flow path definition".¹⁷
- 30 To address this concern, Mr Griffiths has suggested a single permitted activity rule similar to that recently incorporated into the Kaikoura District Plan. This rule would also have the added benefit of simplifying the rule framework, with all activities being dealt with under one rule (rather than across NH-R4 – R6, R17 and R18, as well as the earthworks rules), while also ensuring that all activities that could cause offsite flood effects are regulated.¹⁸ The rule proposed would allow, as a permitted activity, in all zones within both the Urban Flood Assessment Overlay and Non-Urban Flood Assessment Overlay, above ground earthworks, buildings and new structures that:
- (a) Will not exacerbate flooding on another property through the diversion or displacement of floodwaters; or
- (b) Meet the definition of land disturbance.
- 31 The Regional Council considers that the permitted activity rule sought (or in its place, the rule framework recommended by Mr Willis) is sufficiently certain such that it is *vires*.
- 32 The requirements for certainty in permitted activity rules are well-established, with case law identifying that permitted activity rules should "be capable of consistent interpretation and implementation by lay

¹⁶ Statement of Evidence of Nick Griffiths, dated 10 July 2023, at [39].

¹⁷ Statement of Evidence of Nick Griffiths, dated 10 July 2023, at [40].

¹⁸ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [40].

people without reference to council officers,”¹⁹ or “sufficiently certain to be capable of objective ascertainment”.²⁰

- 33 It is submitted that the rule in this case does achieve this outcome. The outcome sought is that development will not worsen flood effects on other land. This is capable of objective ascertainment, as whether flood effects have been worsened by development is able to be determined.
- 34 The Environment Court has also previously acknowledged that conditions of permitted activity rules will not necessarily be ruled out merely because they require an exercise of judgment.²¹
- 35 The Regional Council considers that this is the approach that should be applied to this rule (or if Mr Willis’ approach is preferred, the natural hazards rule framework as he has recommended through the condition requiring that “the activity does not exacerbate flooding on any other property by displacing or diverting floodwater on surrounding land”). It is considered that the need for expert judgment is reduced as far as possible (although some expert input may still be required, consistent with the technical nature of determining flood effects, and in proportion to the potential consequences if the rule is not complied with). Providing a single permitted activity rule to regulate all offsite flood effects also provides WDC with a method for enforcement where the rules are not complied with, and development does worsen offsite flood effects (particularly for those activities not currently subject of a condition that the activity does not exacerbate flooding on other properties).
- 36 Describing the effect as having been “exacerbated” assists in the comprehensibility of the rule by all plan users, by avoiding a more technical standard that may be seen as unnecessarily complex. CRC considers that the rule proposed would be the most appropriate way to achieve the objectives of the pWDP, in particular, NH-O1 which seeks to avoid or mitigate natural hazard risk such that any increased risk to people and property is acceptable. A permitted activity rule that addresses all offsite effects would be the most efficient and effective

¹⁹ *Carter Holt Harvey Ltd v Waikato Regional Council* ENC Auckland A123/08, 6 November 2008 at [120].

²⁰ *Carter Holt Harvey Ltd v Waikato Regional Council* ENC Auckland A123/08, 6 November 2008 at [117].

²¹ *Twisted World Ltd v Wellington City Council* ENC Wellington W024/2002, 8 July 2002 at [64].

provision, in order to enable WDC control of all relevant effects, as well as being simpler for plan users.

- 37 It is noted that a rule of this nature has recently been successfully adopted by Kaikoura District Council, through the natural hazards plan change. The Regional Council is not aware of any challenge on the basis of *vires* being made in respect of this rule, at any stage during the hearing process.
- 38 A similar standard was also suggested by the Regional Council through the Selwyn District Plan hearing process. While decisions on those provisions have not yet been made, the suggested amendment was recommended to be made in the section 42A report, and no concerns as to the *vires* of that standard were raised in that report.
- 39 Given the interrelated nature of the pWDP provisions, and the hearing of those provisions as part of separate streams, there may also need to be consequential changes made to other chapters of the pWDP as a result of the Regional Council's submission on matters subject to Hearing Stream 3. As is apparent through the evidence (and submission) of the Regional Council, some of its submission points if adopted will mean that other rules in other hearing streams may be rendered redundant (e.g. EW-R5).²²
- 40 In the event that the Panel does not favour the Regional Council's preferred approach of the inclusion of a single permitted activity rule, amendments are sought by the Regional Council to the rule framework recommended by Mr Willis.
- 41 While Mr Griffiths supports the intent of the changes recommended by Mr Willis to NH-R4, NH-R5, NH-R6, NH-R17 and NH-R18, he has suggested the inclusion of wording of "in a 0.5% AEP event or more" into each of the rules. This is on the basis that offsite flood effects may actually be further exacerbated by development in a more frequent event (as the development may divert floodwater onto properties that would otherwise be unaffected), than they would in a large event, where there may be severe flooding irrespective of the development.²³

²² Statement of Evidence of Nick Griffiths, dated 10 July 2023, at [38] – [42].

²³ Statement of Evidence of Nick Griffiths, dated 10 July 2023, at [34] - [36].

- 42 For this reason, an amendment to refer to a range of flood events provides the pWDP with the ability to holistically address the potential offsite flood effects of development.

Rules governing natural hazard mitigation activities

- 43 The Regional Council has a number of roles and responsibilities in terms of natural hazard mitigation. A detailed description of its works within the Waimakariri District is included in the evidence of Ms Irvine.
- 44 While rules NH-R8 – R10 seek to provide a permissive framework to enable maintenance development of community scale natural hazard mitigation works, Ms Irvine’s evidence demonstrates that this will not often be the case – a number of the schemes managed by the Regional Council would require resource consent, including under other chapters of the pWDP.²⁴
- 45 In order to enable these important works to continue with the most permissive pathway possible (given their importance to the local community), the Regional Council seeks that amendments are made to the provisions to ensure that only the natural hazards rules apply to these activities. As noted by Ms Mitten, this would ensure that “the maintenance and effective operation of schemes is not held up by provisions that do not fully capture the full and complex requirements to manage flood hazard”.²⁵
- 46 From a section 32 perspective, it is submitted that the relief sought by CRC is efficient and effective and the most appropriate way to achieve the objectives of the pWDP (in particular, NH-O3 which seeks that adverse effects on people, property, infrastructure and the environment from methods used to manage natural hazards are avoided or (where not possible) mitigated).

Hazardous substances and contaminated land

- 47 In terms of both hazardous substances and contaminated land, the Regional Council’s position is largely aligned with the position of the section 42A authors of each report. The main amendments sought include the following:

²⁴ Statement of Evidence of Jolene Irvine, dated 10 July 2023, at [34] - [35], [39].

²⁵ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [128].

- (a) An amendment to HS-P3 to cross-refer to the definition of High Hazard Area recommended by Mr Willis, so as to capture all areas potentially subject to natural hazards (not just coastal areas), in order to give effect to the provisions of the CRPS (and consequential amendments to HS-R1 to also refer to the general high hazard overlay);²⁶
- (b) An amendment to the recommended version of CL-P2, in order to address the disposal of contaminated soil, as CL-P2 currently seeks to ensure the best practice management of contaminated land, as opposed to the soil from contaminated land itself.²⁷

48 These amendments, if made, would ensure that the provisions of the pWDP give effect to the CRPS policy direction on these matters.

Further amendments to the pWDP not addressed in legal submissions

49 The Regional Council's position continues to be that all amendments identified in the evidence of Ms Mitten should be made to the pWDP provisions (for the reasons set out in Ms Mitten's evidence as well as the evidence of Mr Griffiths and Ms Irvine). However, for efficiency these legal submissions address only the key overarching points.

50 A number of the Regional Council's submission points have been addressed through the amendments recommended by the section 42A officer, including in relation to:

- (a) An additional objective relating to climate change;
- (b) The definition of "community scale natural hazard mitigation works";
- (c) The removal of the Kaiapoi Fixed Minimum Floor Level Overlay;
- (d) Amendments to the Liquefaction Hazard Overlay;
- (e) Amendments to the introduction of the Natural Hazards chapter;
- (f) Amendments to NH-O1 and NH-O4;
- (g) Amendments to NH-P14, P15, P16, P17 and P19 (other than minor suggested changes to correct errors);

²⁶ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [152] – [154].

²⁷ Statement of Evidence of Joanne Mitten, dated 10 July 2023, at [160] - [161].

- (h) Amendments to NH-R1 and NH-R15 in relation to the reference to “consent decision” in place of “consent notice”;
- (i) Amendments to NH-MD1 and MD4;
- (j) Amendments to HS-O1 and HS-MD1; and
- (k) Amendments to CL-P1, CL-P3 and in relation to the additional policy previously sought in the Regional Council’s submission.

51 While these points have not been further addressed in legal submissions, it is noted that the Regional Council supports the recommended changes as well as the reasoning of the section 42A officers for those recommended changes.

52 There are also a number of technical amendments sought in evidence on behalf of the Regional Council, either to improve the functionality of the provisions or to more accurately capture the intent of the provision. This includes amendments to:

- (a) NH-P2, P3, P4 and P7 to insert the word “increased” when referring to flood effects caused by development;
- (b) NH-S1 and NH-S2 to describe the flood scenarios more generally, consistent with the recommended “high hazard area” definition, and to ensure a corresponding amendment to NH-S2 regarding coastal flood mitigation.

53 While these also have not been addressed further in legal submissions, the reasoning for these proposed amendments can be found in the evidence of Mr Griffiths and Ms Mitten.

Ms Mitten’s suggested amendments to the provisions

54 Ms Mitten’s evidence provided (as Appendix 1 to her evidence) her recommendations for amendments to the provisions in order to achieve the CRC’s intended outcome.

55 These amendments have been referred to throughout Ms Mitten’s evidence, and in line with the Regional Council’s position are intended to provide further clarity to the reader of the pWDP, or in some cases assist the pWDP to better give effect to the higher order documents, including the CRPS.

Conclusion

- 56 The Regional Council reiterates that the amendments it proposes are to fulfil its intent of ensuring clarity and consistency between the relevant planning and regulatory documents in the region.
- 57 The provisions of the pWDP are required to give effect to the CRPS. While on the whole this is achieved throughout the relevant provisions of the proposed plan, there are further suggested amendments that could be made to achieve greater alignment, particularly in relation to the Natural Hazards provisions.

Dated this 18th day of July 2023



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K T Dickson

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