

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

**AND**

**IN THE MATTER OF** Applications by **Canterbury Regional Council** for land use consent Applications 040181 & R 306908 to the Christchurch City Council and the Selwyn District Council;

**and**

Applications CRC 012086 & CRC 042860 to undertake works in the bed of a lake, coastal hazard zone and coastal marine area, and to discharge water and contaminants into the coastal marine area to the Canterbury Regional Council.

## **Decision of the Hearing Commissioner Dr Brent Cowie**

### **1 Introduction**

1. This is the decision of an independent hearing commissioner, Dr Brent Cowie, appointed to decide applications to the Christchurch City Council (CCC), Selwyn District Council (SDC) and the Canterbury Regional Council (CRC; commonly known as ECan) for the consents necessary to authorise the periodic opening of Lake Ellesmere to the sea.
2. The Applicant is the river engineering section of the CRC. The appointment of an independent commissioner was to ensure that there is no conflict of interest in the CRC, operating in its regulatory role, granting its operational wing two of the resource consent applications considered here.
3. These decisions are issued solely on the basis of the papers before me. The conditions on which the consents are granted reflect an agreement negotiated between the Applicant and various submitters who wished to be heard on the present applications. All these submitters subsequently agreed to withdraw their right to be heard, and so no hearing was necessary.
4. Elements of the negotiated agreement are somewhat novel, and some of the conditions agreed differ from how I would have drafted them. I will discuss these matters later in this decision.
5. I am familiar with the site, having visited it several times in the past, including occasions when the lake was open to the sea.
6. The applications before me have a somewhat convoluted history. It is not necessary to detail all that here; suffice to say:

- The consents sought are to continue to authorise activities that have occurred for about 150 years, and which anecdotally may have pre-dated European occupation.
  - Land use consent application 040181 was made originally to the Banks Peninsula District Council (BPDC). That council no longer exists, having recently been incorporated into the CCC. This means that while the application is now to the CCC, it is the planning instruments of the former BPDC that are relevant here.
  - Land use consent application R 306908 to the SDC has been made on the grounds that the opening of the lake to the sea may occasionally occur on land under the administrative control of the SDC.
  - The original application to the CRC to discharge water from the lake was made in 2001, and the lake has continued to be opened to the sea in the meantime under the provisions of s 124 of the Act.
7. I have read and reviewed very comprehensive officer's reports prepared under Section 42A of the Act on the applications. These reports were prepared respectively by Mr Leo Fietje, on behalf of the CRC, and Mr Bob Nixon, on behalf of the (now) CCC and SDC. Mr Nixon prepared an initial report in 2004, and a short supplementary report looking explicitly at proposed consent conditions in 2006. I will refer frequently to these reports in my evaluation of the present applications. In particular, the reports have listed comprehensively the relevant planning provisions in regard to these applications, and I will not repeat those here.

## **2 Background**

### **2.1 *The Present Environment***

8. Lake Ellesmere (which is often known by its Maori name Te Waihora) is a large, shallow, brackish lake immediately to the south of Banks Peninsula. It has a surface area of some 20,000 hectares when the lake is 1m above sea level (asl), and about 25,000 hectares when it is 1.6m asl.
9. Along its eastern shores the lake is separated from the sea by Kaitorete Spit, which is a gravel beach barrier some 25km long and 5m high. The gravel spit varies in width from about 200m at Taumutu in the south, to up to 5km further north.
10. Surface water inflows to the lake include rivers and streams such as the Kaituna, Halswell, L2, Selwyn and Irwell. Inflows have declined over recent decades due to increasing abstractions of groundwater further inland for irrigation. The water quality of the lake is poor, characterised by high nutrient levels, high levels of suspended sediment and associated low clarity and high turbidity. Poor water quality is partly due to the shallowness of the lake allowing sediment to be resuspended during windy conditions. Another contributing factor is the loss of former reed beds in the lake, which were destroyed by events including the 1968 Wahine storm, and which have not recovered.
11. Lake Ellesmere is an internationally significant wetland for wildlife. It supports large populations of waterfowl and other wetland birds, and there are extensive wetland plant communities, dominated by reeds and sedges, around its margin. A National

Water Conservation Order (NWCO) gazetted in 1990 seeks to protect the outstanding wildlife habitat that the lake provides. In particular, the NWCO prescribes when and at what levels the lake can be opened to the sea, and at what minimum level it may be closed. It also prohibits any further drainage around the margins of the lake below the 1.13m asl contour.

12. The bed of Lake Ellesmere was returned to Ngai Tahu by the Crown as part of the Ngai Tahu Claims Settlement Act 1998. The lake is of great significance to Ngai Tahu, and particularly to the local runanga, Ngai Taumutu. It long acted as a major source of mahinga kai for tangata whenua. The lake still supports a commercial fishery for species such as eels, mullet and flounder, but the value of the eel fishery in particular has declined substantially in recent decades.

## **2.2 Description of the Proposed Activities**

13. The Applicant seeks the resource consents necessary to be able to continue to open the lake to the sea. This is achieved by excavating a “pilot cut”, some 15m wide, 1.8m deep and up to 300m long across the gravel bar at the south end of Kaitorete Spit. This cut may be formed anywhere along a length of spit of about 500m covering about 13ha, of which some 95% is in the (former) Banks Peninsula District, but the very southern end of which is in the Selwyn District. The cut can take several days or even weeks to become successfully established. Once the lake is open, the rate of discharge to the sea can initially be as high as 175 m<sup>3</sup>/s.
14. Historic records from 1901 on show the lake has been opened between 1 and 7 times per year, with 3.7 openings per year on average. The Applicant states that the activity has taken place since at least 1851.
15. The average time of the lake being open to the sea is around three weeks. The lake has invariably “closed naturally” once levels fall. The NWCO allows the lake to be closed once the level has fallen to 0.6m asl, but once flows decline the large seas often characteristic of the coast will rework the gravels of the spit to close the lake “naturally”. On occasions, a large southerly swell will close the lake when the levels have fallen relatively little versus the level at which the lake was opened.
16. The lake would “open naturally” at levels of between about 2.7m and 3.5m asl, but at this level would flood large tracts of land and parts of SH 75.
17. It is not cost effective, nor practical, to construct a “permanent” opening for the lake.

## **2.3 The Applications**

18. On 26 March 2001 the river engineering section of the CRC applied to the regulatory department of the CRC for a resource consent to discharge water and contaminants into water following the opening of Lake Ellesmere. This application was given the processing number CRC 012086. The application was to replace the existing consent NCY 710157, which had been granted as a water right under the former Water and Soil Conservation Act in 1971. I assume that the conditions on this existing consent are consistent with the provisions of the NWCO made in 1990, particularly as I understand the present “operating levels” of the lake have been in place since 1947.
19. Two further applications were made to the CRC in 2004 and 2005. These have subsequently been combined into one application, CRC 042860, which is to carry

out works in the bed of the lake, a coastal hazard zone and the coastal marine area for the purpose of opening the lake to the sea.

20. A duration of 35 years was sought initially for both the applications to the CRC.
21. Subsequent to the original application being made to the CRC it was determined that land use consent is also required from both SDC and (the then) BPDC to authorise the volume of gravel being disturbed as part of the excavation necessary to cut the lake to the sea. Those applications were made in 2003 and 2004 respectively.

## **2.4 Notification and Submissions Received**

22. All four applications were publicly notified. The two applications to the CRC were notified on 10 and 13 July 2004. The land use consent application to the SDC was also notified on 13 July 2004, and the application to the BPDC was notified on 11 September 2004.
23. Submissions received were as follows:
  - The Department of Conservation (DoC) submitted on all four applications. They conditionally supported the applications, but sought changes to the proposed conditions of the applications to the CRC.
  - The Lake Settlers Association, Akaroa Salmon (NZ) Ltd and Mr Alan Reid submitted in support of the two applications to the CRC.
  - Te Runanga o Ngai Tahu and Te Taumutu Runanga submitted jointly in opposition to the two applications to the CRC.
  - Ngai Tahu Development Group and Te Taumutu Runanga submitted separately on the two land use consent applications.
  - The Lake Ellesmere Fishermans Association submitted on the application to the SDC.
24. I need not detail those submissions further here given that a negotiated agreement has been reached between the parties and the applicant.

### 3 Evaluation

#### 3.1 Status of the Applications

25. I have received advice from Mr Feitje and Mr Nixon on the status of the applications before me. While there is a little ambiguity about the status of application CRC 012086 and R 306908 to the SDC, I have decided the most appropriate courses of action are as follows:
- Application CRC 012086 is one for a **discretionary activity** under Rule 7.2 of the Regional Coastal Environment Plan.
  - Application CRC 042860 to undertake works in the bed of a lake, the coastal marine area and a coastal hazard zone is a **non-complying activity** under Rule 8.10 of the operative Regional Coastal Environment Plan. This is because the proposed activity is being undertaken in an area of “significant natural value”.
  - Application 040181 to the former BPDC is for a **restricted discretionary activity** under Rule 2.3 of the Proposed District Plan. The activity is **permitted as a predominant use** under the Transitional District Plan.
  - Application R 306908 to the SDC is **discretionary** under the Proposed District Plan but **non-complying** under the Transitional District Plan.

#### 3.2 Matters to be Considered

26. The applications were made in the period from 2001 to 2004. During that time the assessment criteria under s 104 of the Act changed significantly from as of 1 August 2003. My understanding is that this evaluation should be based on the criteria in the Act at the time the applications were notified, which is as amended by the Resource Management Amendment Act 2003 (but not the more recent amendments that came into effect in July 2005). At the time these applications were notified, the relevant provisions of s 104 read as follows:

*“When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part II, have regard to”:*

- a) *any actual or potential effects on the environment of allowing the activity; and*
- b) *any relevant provisions of-*
  - (i) *a national policy statement;*
  - (ii) *a New Zealand Coastal Policy Statement;*
  - (iii) *a regional policy statement or proposed regional policy statement;*
  - (iv) *a plan or proposed plan; and*
- c) *any other matter the consent authority considers relevant or reasonably necessary to determine the application.*

27. I will consider the four applications at one time when making this evaluation. This is because three of the applications – those to the District Councils and that to the CRC to undertake works – are for identical or very similar activities. I will refer separately to the discharge permit application to the CRC where appropriate.

28. In the case of these four applications the relevant planning provisions that have to be considered are comprehensive. They are those of the:
- New Zealand Coastal Policy Statement 1994.
  - Operative Canterbury Regional Policy Statement.
  - Operative Canterbury Regional Coastal Environment Plan.
  - Proposed Banks Peninsula District Plan.
  - Proposed Selwyn District Plan.
29. Very strictly I should also consider the provisions of variation 1 to the Proposed Natural Resources Regional Plan, which was notified on 3 July 2004. As this was however notified just prior to the various consents sought for the opening of Lake Ellesmere being publicly notified, I can have very little regard to its Objectives and Policies.
30. Clearly the other “relevant or reasonably necessary matter” to determine the applications is the National Water Conservation (Lake Ellesmere) Order made in 1990. The relevant provisions which must be taken into account are in Section 217(2) of the Act. In summary, this prohibits the granting of any water, coastal or discharge permit that would be contrary to the provisions of an NWCO, and similarly requires that the conditions of any such permit granted be consistent with the provisions of the NWCO.

### 3.2.1 Actual and Potential Effects

31. I consider the actual and potential effects of granting the present applications to be:
- effects on the values of Kaitorete Spit;
  - effects on coastal erosion;
  - effects of the discharge of water on the marine environment;
  - effects on fish migration;
  - effects on the values held by Ngai Tahu;
  - effects on the outstanding wildlife values of Lake Ellesmere, and its associated wetland values; and
  - positive effects for land drainage and agricultural production.

I will address these in turn

32. In the location where Kaitorete Spit is excavated to provide for the lake opening the site is characterised by bare gravels with no significant vegetation. The gravels become re-established once the opening to the sea closes naturally. If there are any effects on the values of the spit, these are temporary, occurring only when the lake is open to the sea.
33. The opening of the lake may be causing accelerated coastal erosion along this section of the Canterbury coast. The coastline in the area is eroding in any case, but it is unclear the extent to which opening the lake is exacerbating this erosion. Concern has also been expressed that the opening of the lake is causing infilling of a small extension of Lake Ellesmere near Taumutu called Te Koura.
34. I note that the consent conditions agreed between the parties commit the applicant, together with Te Runanga o Ngai Tahu and Te Taumutu Runanga, to agree a

programme to investigate the effects of the lake opening on coastal erosion and on Te Koura. Given this, I am satisfied that this potential effect is taken account of in consent conditions.

35. Akaroa Salmon raised concerns about the effects of the discharge from the lake on water quality in the marine environment. As part of their Assessment of Environmental Effects, the applicant commissioned the National Institute of Water and Atmospheric Research (NIWA) to examine whether the discharge has any adverse effects on the marine environment. NIWA indicated that there was no correlation between the discharge and effects on the rock lobster fishery or algal blooms (although they could not conclusively exclude the possibility).
36. There appears to be anecdotal evidence that the “plume” from the discharge may spread north towards Banks Peninsula and may at times enter Akaroa Harbour. I have no evidence that this causes any adverse effects. From first principles, it seems unlikely that what would (after mixing) be saltwater slightly diluted by (poor quality) freshwater would have any significant adverse effects on marine life, or that it would be a significant factor promoting algal blooms along the south side of the Peninsula. I also note that discharges from the Rakaia River, particularly when it is in flood, and Lake Forsyth/Wairewa could also be contributing to any “plume” observed on the south side of the Peninsula. Further, the discharge is to a high energy coast that I would expect to support only sparse benthic communities that could potentially be adversely affected by the discharge. Accordingly, I am satisfied that on the balance of probabilities the discharge of water from the lake has no more than minor effects on the marine environment.
37. The opening of the lake to the sea will have positive effects for fish migration, particularly by allowing the recruitment of juvenile glass eels to freshwater. It will also allow species such as black flounder, mullet and perhaps inanga to enter the lake. Several of these species are fished commercially.
38. Ngai Tahu regard Te Waihora as being of immense cultural significance. The opening of the lake is acknowledged to have benefit for fisheries, including commercial fisheries. Ngai Tahu are very concerned however that the openings of the lake are driven by the need to provide efficient drainage rather than the protection of natural values. They are also concerned about the effects of the opening on coastal erosion, which I have already discussed in paragraphs 33 and 34 above.
39. I note that these matters have largely been addressed in the consent conditions and associated protocol agreed between the parties. As a result of this Te Runanga o Ngai Tahu and Te Taumutu Runanga have withdrawn their right to be heard on the present applications.
40. The NWCO has set lake levels to protect the outstanding wildlife values, and the associated wetland values, of the lake. I must assume those levels are appropriate, and that they do protect those wildlife values. Clearly however there will always be compromises between the need to provide ongoing drainage of agricultural and other land around the margins of the lake, and the protection of wetlands around the margins of the lake and their associated outstanding wildlife values. The levels set in the NWCO are provided for in the conditions of the consents granted.
41. In conclusion, in relation to actual and potential effects I am satisfied that:

- The effects of the activities associated with the two land use consents, and with the application to the CRC to disturb the lake bed, a coastal hazard zone and the coastal marine area, are generally no more than minor. A possible exception is effects on coastal erosion, but there is an agreement that this be studied further.
- The conditions negotiated between the parties, along with the associated protocol, substantially address the potential adverse effects of application CRC 012086 to discharge water containing contaminants to the coastal environment. The most important of these effects are upon the values Ngai Tahu associate with the lake, upon the outstanding wildlife values and associated wetland values of the lake, and the positive effects on fish migration, and of land drainage on agricultural production.

### **3.2.2 Provisions of Statutory Instruments**

#### **The New Zealand Coastal Policy Statement (NZCPS)**

42. The NZCPS was gazetted in 1994. It is presently being reviewed. It generally states only “high level” policies, except in regard to matters such as the discharge of human sewage to the marine environment when it becomes rather prescriptive.
43. In his Section 42A report Mr Fietje stated that he had considered all the policies in the NZCPS and concluded that the proposed activities are not inconsistent with any of those policies. I have similarly examined those policies, and I concur fully with the officer’s view.

#### **Canterbury Regional Policy Statement (RPS)**

44. In his report Mr Fietje has comprehensively appraised the provisions of the operative RPS. He notes that there are relevant provisions in:
- Chapter 8, dealing with landscape, ecology and heritage.
  - Chapter 9, which deals with water, where he focuses on discharges to water.
  - Chapter 10, which deals with the beds of rivers, lakes and their margins.
  - Chapter 11, which considers matters relating to the coastal environment.
45. Mr Fietje concluded that given the proposed mitigation (in agreed consent conditions) the proposed activity will not compromise any of the Objectives or Policies listed in Chapters 8-11 of the RPS.
46. I agree broadly with this assessment. I note particularly that the proposed activities are consistent with the NWCO, which sought to protect wildlife habitat and associated wetlands. Accordingly I conclude that the activities granted on the conditions agreed will not have significant adverse effects on wildlife or wetland values associated with Lake Ellesmere.
47. I have also examined the provisions of Chapter 6 of the RPS, which deals with the provision for the relationship of tangata whenua with resources. I am similarly satisfied that with the proposed mitigation (in agreed consent conditions) the proposed activity will not compromise any of the Objectives or Policies in Chapter 6. I note particularly that the river engineering section of the CRC has worked closely with tangata whenua to reach agreement on consent conditions consistent with

Policies 1-3, and that provision is made for an accidental discovery protocol consistent with Policy 4.

### **Canterbury Regional Coastal Environment Plan (RCEP)**

48. In his report Mr Fietje has comprehensively appraised the provisions of the operative RCEP. He notes that there are relevant provisions in:
- Chapter 7, dealing with coastal water quality.
  - Chapter 8, which deals with activities in the coastal marine area.
  - Chapter 9, dealing with activities in the coastal hazard zone.
49. Mr Fietje concludes that the proposed activities will not compromise the relevant Objectives and Policies in the RCEP. I agree broadly with this assessment, noting particularly that the information available suggests that the proposed activities will not adversely affect coastal ecosystems. I do have some reservations about the extent to which the proposed activities may be exacerbating coastal erosion, but note that provision for more comprehensive studies of this is made in the negotiated conditions of consent.

### **Proposed Natural Resources Regional Plan (PNRRP)**

50. Mr Fietje considers that the only relevant provision is that relating to the duration of the consent sought, which is addressed in Section 1.3.5. I agree with his conclusion that the duration of five years now sought is not inconsistent with these provisions of the PNRRP.

### **Proposed Banks Peninsula District Plan (BPDP)**

51. Mr Nixon in his original s 42A report addressed the relevant provisions of the BPDP. He considered that both this plan and the Transitional District Plan should be given weighting. He noted the relevant policies of the BPDP were focused more on lake levels, the setting of which is a function of the CRC, than matters directly under the control of the BPDC. I have confirmed with Mr Nixon that he considers that the negotiated conditions of consent are not inconsistent with the Objectives and Policies of the BPDP.

### **Proposed Selwyn District Plan (PSDP)**

52. Mr Nixon also considered in his s 42A report the relevant provisions of the PSDP. He considered that most weighting should be given the provisions of this plan, as the Transitional District Plan dates back to 1981. He noted the relevant Objectives and Policies of the PSDP were focused more on the functions of the CRC than matters directly under the control of the SDC. I have confirmed with Mr Nixon that he considers that the negotiated conditions of consent are not inconsistent with the Objectives and Policies of the PSDP.

### 3.2.3 Part II of the Act

#### Section 5

53. This section of the Act defines sustainable management. Case law requires that in looking at s 5 I make a “broad overall judgement” as to whether the activities for which consents are sought are consistent with the definition in the Act. I consider that this is the case, and I note particularly that:
- The proposed activities will help the farming community around the margins of the lake provide for their social and economic needs, and their health and safety by allowing the effective drainage of land.
  - The proposed activities will not compromise the reasonable needs of future generations.
  - On balance, the proposed activities will not have significant adverse effects on the life supporting capacity of water or ecosystems.
  - Any adverse effects of the proposed activities can be adequately avoided or mitigated through the conditions recommended on the consent sought.

#### Section 6

54. Section 6 lists seven matters of national importance that must be recognised and provided for in my decision on these applications. Three of these matters are particularly relevant to the present applications, and three other matters are of some lesser relevance.
55. With regard to Section 6(a) of the Act I am satisfied that granting the applications on the conditions negotiated will adequately preserve the natural character of the coastal environment, and Lake Ellesmere and its margins. I am further satisfied that the activities are not “inappropriate” use or development in the context of this subsection.
56. Similarly I consider the provisions of the NWCO, which are reflected in the negotiated conditions of consent, will ensure that areas of significant indigenous vegetation and significant habitats of indigenous fauna will be protected consistent with s 6(c).
57. The negotiated conditions of consent provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga consistent with s 6(e).
58. I do not consider the current negotiated conditions of consent are an inappropriate use or development of Kaitorete Spit, and I note that any adverse effects on public access along the spit are only temporary. The protection of historic heritage is provided for by the accidental discovery protocol.

#### Section 7

59. This section of the Act lists 11 matters that must be had particular regard to. Granting the applications will not affect existing environmental quality, and will I think have net benefits for the habitat of trout in Lake Ellesmere. None of the other matters listed in s7 are particularly relevant to the present applications.

## Section 8

60. In my view the applications are not inconsistent with the Principles of the Treaty of Waitangi. I note particularly in relation to this that extensive consultation has taken place with Te Runanga o Ngai Tahu and Te Taumutu Runanga, and that this has resulted in agreed consent conditions being negotiated between the parties. In this regard I consider that the river engineering section of the CRC has met its obligations to negotiate “in good faith” with tangata whenua.

### 3.2.4 Non-Complying Activity “Gateway” Tests

61. Two of the applications before me are for non-complying activities. These can only be granted if I consider that either the adverse effects of the activity on the environment will be minor, or if the activities are consistent with the Objectives and Policies of the relevant plan(s).<sup>1</sup>
62. In relation to application CRC 042860 to undertake works in the bed of a lake, the coastal marine area and a coastal hazard zone the proposed activity is being undertaken in an area of “significant natural value”. I am satisfied that the effects of the works are minor, given that the opening to the sea is only ever temporary and the gravel spit re-establishes itself following a lake opening.
63. The land use application to the SDC is also non-complying under the Transitional District Plan. Again, I am satisfied that the effects of the works are minor, given that the opening to the sea is only ever temporary and the gravel spit re-establishes itself following a lake opening. It is also only infrequently that the lake is opened on the land under the jurisdiction of the SDC.

### 3.2.5 Section 105 of the Act

64. As one of the applications is for a discharge to the environment regard must be had to the criteria in Section 105(1) of the Act, which are
- (a) *“the nature of the discharge and the sensitivity of the receiving environment to adverse effects;*
  - (b) *the applicant’s reasons for the proposed choice; and*
  - (c) *any possible alternative methods of discharge, including discharge into any other receiving environment”.*
65. Case law requires the consent authority to find whether, in proposing a discharge of contaminants, the Applicant has given adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge of contaminants, and then made a reasoned choice.
66. In this case there is no alternative receiving environment into which excess water from Lake Ellesmere could be discharged, so s 105 cannot sensibly be applied in this instance. I am satisfied that its criteria are met.

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<sup>1</sup> At the time these applications were notified the relevant provisions were in s 105 2(b) of the Act. They are presently listed in s 104D. In relation to the current activities the “gateway” tests are very similar.

### **3.2.6 Section 107 of the Act**

67. Section 107(1) prohibits the granting of discharge permits that breach particular narrative standards, unless one of the exemption provisions listed in s 107(2) is met.
68. In the case of the discharge from Lake Ellesmere, the discharge could on occasions have “conspicuous effects on colour and clarity” in the offshore marine environment after reasonable mixing. However as the discharge is only temporary, and in my view is associated with essential maintenance, two of the three exemption criteria can be met. Accordingly, I am satisfied that the discharge meets the criteria in s 107 of the Act.

### **3.2.7 Consistency with the National Water Conservation Order**

69. I have examined carefully the negotiated conditions of consent to ensure that they are consistent with the provisions of the NWCO, as is required by s 217(2) of the Act. I am satisfied that the conditions that have been negotiated are consistent with the provisions of the NWCO.

### **3.2.8 Conclusion re Evaluation**

70. Having considered all the statutory matters listed to determine the applications, and having regard to the conditions of consent agreed by the Applicant and the submitters, I am satisfied that the applications can be granted.

## **4 Term and Conditions**

71. As already noted the Applicant has agreed to a term of five years. I have granted the consent applications to the CRC for five years expiring on 31 July 2011.
72. It is unusual for land use consents granted by a District Council to be for a finite term. They are usually granted in perpetuity. However, the provisions of s 108(1) of the Act appear to authorise such a term, at least by implication. As the Applicant has agreed to a five year term for the two land use consents, I have granted them for that duration. This will also provide time for the Applicant to collect further information on the effects of opening the lake to the sea.
73. I have made some minor grammatical changes to the agreed conditions. I have also specified dates by which certain steps must be taken; these simply replace terms such as “within three months of this consent being granted”.
74. I was initially puzzled as to how the agreed “protocol” could be attached to the consents in such a way that it has some legal effect. I have decided that the best way of providing for this in a way that is binding is to include it as an advice note attached to the consents granted. In that protocol I have removed some of the repetitive material at the beginning, and I have replaced the title ECan or Environment Canterbury with the legal name of Canterbury Regional Council.

## 5 Decisions

**Land use consent application 040181 by the Christchurch City Council, land use consent application R 306908 by the Selwyn District Council and coastal permit application CRC 042860 by the Canterbury Regional Council for a term expiring on 31 July 2011 on the following terms and conditions:**

- 1) The works required to form the opening between Lake Ellesmere/Te Waihora and the coastal marine area shall be undertaken, and the discharge of water and contaminants from Lake Ellesmere/Te Waihora into the coastal marine area authorised by consent CRC 012086, shall occur between map references NZMS260 M37:5958-0537 and NZMS260 M37:6026-0552, as shown on attached plan CRC042860 (Amended Opening Area 10/04), and as outlined in the attached document *"Protocol for Opening and Closing Lake Ellesmere/Te Waihora"*.
- 2) Lake Ellesmere/Te Waihora is able to be artificially opened and allowed to discharge to the coastal marine area when its level is no less than:
  - (a) 1.05 metres above mean sea level in the period 1 August to 31 March; or
  - (b) 1.13 metres above mean sea level in the period 1 April to 31 July; or
  - (c) At any level in the period September 15 to October 15, for the purposes of enhancing outstanding wildlife values by minimising the occurrence of low lake levels over the summer period.

Levels will be determined by readings from recorder sites at Taumutu and Nutts Cut.

- 3) Lake Ellesmere/Te Waihora is able to be artificially closed to the sea when the lake level is at or below 0.6 metres above mean sea level during the period 1 December to 28 February, for the purposes of enhancing outstanding wildlife values by minimising the occurrence of low lake levels over the summer period.

Levels will be determined by readings from recorder sites at Taumutu and Nutts Cut.

- 4) The parties as listed in the attached document, *"Protocol for Opening and Closing Lake Ellesmere/Te Waihora"*, shall be consulted when the level of the lake is 1.0 metres above mean sea level, over the intention to artificially open Lake Ellesmere/Te Waihora. Timing of an opening may be changed as a result of consultation.
- 5) The parties as listed in the attached document, *"Protocol for Opening and Closing Lake Ellesmere/Te Waihora"*, shall be consulted when, within the period 01 December – 28 February, the level of the lake is 0.8 metres above mean sea level and dropping, over the intention to artificially close Lake Ellesmere /Te Waihora. A decision to close and timing of a closing may be changed as a result of consultation.
- 6) The consent holder shall erect signage at the Taumutu and Timber Yard boat ramps and on the *Macrocampa* tree (at or about map reference M37: 597-058) at Taumutu advising the public of the works and place appropriate signage at the entrance to the opening or closing site when works are occurring to either artificially open or close Lake Ellesmere/Te Waihora.
- 7) Works shall be undertaken in a manner such that disturbance to birds, which are nesting or rearing their young, is minimised.
- 8) Works at the opening site shall not cause the stranding of fish in pools or channels.

- 9) All practicable steps shall be undertaken to minimise adverse effects on property, wildlife, biodiversity values, aquatic ecosystems, vegetation, cultural and amenity values.
- 10) In the event of any disturbance of Koiwi Tangata (human bones) or taonga (treasured artefacts) the consent holder shall follow the following steps:
- (a) Works shall cease immediately; and
  - (b) Immediately contact the New Zealand Historic Places Trust; and
  - (c) The consent holder will follow the guidance of The New Zealand Historic Places Trust and Te Taumutu Runanga on how to address the find, and the correct process to take.
- 11) The Canterbury Regional Council, Selwyn District Council and the Christchurch City Council shall be notified of the intention to artificially open or close Lake Ellesmere (Te Waihora) at least one day prior to works commencing.
- 12) (a) By 31 October 2006 the consent holder shall, in consultation with Te Rūnanga O Ngāi Tahu and Te Rūnanga O Taumutu and with the advice of an expert agreed on by between itself and Te Rūnanga O Ngāi Tahu and Te Rūnanga O Taumutu, draw up a programme of on-going monitoring to be undertaken to indicate any effects of the works on the rate of coastal erosion at the opening site. This programme will include provisions for the reporting of results to Te Rūnanga O Ngāi Tahu and Te Rūnanga O Taumutu.
- (b) Within two weeks of it being drawn up, a copy of the monitoring programme shall be forwarded to the Canterbury Regional Council for the attention of the RMA Compliance and Enforcement Manager.
  - (c) The monitoring programme prepared under 12 (a) shall be implemented and carried out by the consent holder by 31 January 2007.
- 13) As far as is practicable, the majority of spoil from the works undertaken to form the lake opening shall be deposited on the west side of the opening site/cut.
- 14) The Canterbury Regional Council may, once per year, on any of the last five working days of May or November, serve notice of its intention to review the conditions of this resource consent for the purposes of dealing with any adverse effect on the environment which may arise from the exercise of the resource consent and which it is appropriate to deal with at a later stage, including:
- (a) dealing with adverse effects as a result of discharging water and contaminants from Lake Ellesmere/Te Waihora into the coastal marine area; and/or
  - (b) amending the lake levels at which Lake Ellesmere/Te Waihora may be artificially opened and closed; and/or
  - (c) to better reflect the objectives of the Te Waihora Joint Management Plan (2005); and/or
  - (d) an applicant initiated review resulting from consultation with the parties listed in the attached document, "*Protocol for Opening and Closing Lake Ellesmere/Te Waihora*"; and/or
  - (e) any other adverse effect that may arise from the exercise of this consent.

**Advice Note**

*The reason for determining lake level between the two recorder sites in Conditions 2 and 3 is to take into account any wind effect, and so provide a more accurate reading of the lake level.*

**Discharge permit application CRC 012086 by the Canterbury Regional Council for a term expiring on 31 July 2011 on the following terms and conditions:**

- 1) The discharge shall only be water and contaminants from Lake Ellesmere/Te Waihora, and shall only occur at times when the lake has been artificially opened to the sea as authorised by resource consents 040181 granted by the Christchurch City Council, R 306908 granted by the Selwyn District Council and CRC 042860 granted by the Canterbury Regional Council.
- 2) The Canterbury Regional Council may, once per year, on any of the last five working days of May or November, serve notice of its intention to review the conditions of this resource consent for the purposes of dealing with any adverse effect on the environment which may arise from the exercise of the resource consent and which it is appropriate to deal with at a later stage, including:
  - a) dealing with adverse effects as a result of discharging water and contaminants from Lake Ellesmere/Te Waihora into the coastal marine area; and/or
  - b) amending the lake levels at which Lake Ellesmere/Te Waihora may be artificially opened and closed; and/or
  - c) to better reflect the objectives of the Te Waihora Joint Management Plan (2005); and/or
  - d) an applicant initiated review resulting from consultation with the parties listed in the attached document, "*Protocol for Opening and Closing Lake Ellesmere/Te Waihora*"; and/or
  - e) any other adverse effect that may arise from the exercise of this consent.
- 3)
  - (a) By 31 October 2006, the consent holder shall, in consultation with Te Rūnanga O Ngāi Tahu, draw up a programme of monitoring to be undertaken to indicate any effects of the discharge on the cultural health of selected wetlands around Te Waihora. This programme will include provisions for the reporting of results to Te Rūnanga O Ngāi Tahu.
  - (b) Within two weeks of it being drawn up, a copy of the monitoring programme shall be forwarded to the Canterbury Regional Council for the attention of the RMA Compliance and Enforcement Manager.
  - (c) The monitoring programme prepared under (a) shall be implemented and carried out by the consent holder by 31 January 2007.

## **Advice Note**

**The below protocol applies to each of resource consents 040181 granted by the Christchurch City Council, R 306908 granted by the Selwyn District Council, and CRC 012086 and CRC 042860 granted by the Canterbury Regional Council.**

## **Protocol for the Opening and Closing of Lake Ellesmere/ Te Waihora**

### **1. Purposes of this Protocol**

1.1 *The purposes of this protocol are to provide for the maximum flexibility in managing the level of Lake Ellesmere / Te Waihora while:*

- a) *Preserving the natural character of Lake Ellesmere / Te Waihora as part of the coastal environment and as a nationally important wetland.*
- b) *Protecting Lake Ellesmere / Te Waihora as an outstanding natural feature and landscape and as an area of significant indigenous vegetation and significant habitat of indigenous fauna including fish, birds and invertebrates.*
- c) *Recognising and providing for the relationship of Ngāi Tahu with Te Waihora, including for mahinga kai.*
- d) *Recognising and providing for as many of the Ngāi Tahu and other cultural, farming, commercial fishing, tourism and conservation values as is practical.*
- e) *Establishing the principles to be taken into account and the consultation to be undertaken when deciding to start a mechanical opening or closing of Lake Ellesmere / Te Waihora.*
- f) *Complying with the provisions of the resource consents for the opening and closing activities and the National Water Conservation (Lake Ellesmere) Order 1990.*

### **2. Background**

*Lake Ellesmere/ Te Waihora has no permanent natural outlet and is opened mechanically to the sea by excavating a pilot channel which then scours and allows the lake to drain until the channel is closed by sea-moved gravels. This activity allows the lake level to be maintained within a range of about 0.3 m. amsl to 1.8 m. amsl. If not mechanically opened this range could be 0 m. amsl to 4.0 m amsl.*

2.1 *The opening work is funded by a three tiered rating system (total rates \$130,000 2004):*

- a) *A targeted rate on the land occupiers adjacent to the lake who benefit from the openings by being able to farm the land which would otherwise be covered at times by the lake waters = 70% of total rates.*
- b) *A targeted rate on all properties in the Selwyn and Banks Peninsula Districts in recognition of the benefits to infrastructure and services = 15% of total rates.*
- c) *A general rate on all properties in the Canterbury region recognising the wider commercial, environmental and recreational values of the Lake = 15% of total rates.*

- d) *Plus income from land around the perimeter of the lake vested in Canterbury Regional Council and leased for farming purposes = ~\$13,000 pa.*
- 2.2 *The Lake and its surrounds have significant value to Ngāi Tahu and is very important for mahinga kai. The lake is recognised as a wildlife habitat of international importance, has nationally important threatened wetland habitats and supports a significant commercial fishery.*
- 2.3 *Most of the bed of the Lake is vested in Te Runanga o Ngāi Tahu and with additional lake bed administered by the Department of Conservation is jointly managed for mahinga kai and conservation purposes. Other lake bed land below the 1.13m contour is owned or managed by Canterbury Regional Council), private landowners, District Councils, North Canterbury Fish and Game Council and Land Information New Zealand, with a variety of management purposes.*
- 2.4 *This Protocol aims to take into account the different values expressed above so as to minimise any adverse effects of lake level control while still maintaining a lake level within an agreed operating range at an acceptable cost.*

### **3. Consultation**

- 3.1 *Canterbury Regional Council is responsible for managing the special rating district which funds works to control the level of Lake Ellesmere / Te Waihora and therefore for the works and decisions associated with lake level control.*
- 3.2.1 *Canterbury Regional Council will consult with the following organisations in the operation of this Protocol:*
- *Lake Settlers Association*
  - *Te Rūnanga o Ngai Tāhu*
  - *Te Taumutu Rūnanga*
  - *Waihora /Ellesmere Trust*
  - *North Canterbury Fish and Game*
  - *Department of Conservation*
  - *Lake Ellesmere Commercial Fishermens Association*
  - *Selwyn District Council*
  - *Christchurch City Council*
- 3.3 *The Director Operations will be the Canterbury Regional Council officer responsible for the operation of this Protocol. Each of the above organisations will advise the Director Operations of their contact person/representative. Invitations to the meetings provided for in this Protocol shall be sent to those contact persons/representatives but there shall be no restrictions on who each organisation delegates to attend the meetings.*
- 3.4 *Any of these organisations may at any time make a request to the Director Operations to call a meeting of the above organisations to discuss any issue relating to the control of the level of the lake.*
- 3.5 *The following consultation will occur between the organisations:*
- a) *The Director Operations (or representative) will advise each organisation of the level of the lake weekly by e-mail. This will cease if and when this information is available on Canterbury Regional Council's web site, except for those organisation contact persons who do not have web site availability.*

- b) *The Director Operations will advise each organisation when it is proposed to start an opening, where possible giving at least seven days notice of the intention to start work.*
- c) *Where a delay in opening is being considered the Director Operations will advise all the organisations of the issues being considered and will seek their comments or may call a meeting to discuss the issues. Of necessity these meetings could be called at very short notice.*
- d) *A meeting of all the organisations will be called whenever an artificial closing of the lake is being considered.*

#### **4. Decisions**

- 4.1 *All discussions will attempt to reach a consensus among the organisations but where consensus is not achieved, the Director Operations shall, within three working days, make the decision while taking into account the Purpose of the proposed activity and the purposes of this Protocol. The decision will be made taking into account all the values and issues identified and also the predicted weather forecast.*
- 4.2 *Where any of the organisations disagree with the decision of the Director Operations, they may request a facilitated meeting of all the organisations to discuss and debate the issues.*

#### **5. Opening Protocol**

- 5.1 *Lake opening work will generally be started once the lake level is no less than:*
  - (a) *1.05 metres above mean sea level in the period 1 August to 31 March; or*
  - (b) *1.13 metres above mean sea level in the period 1 April to 31 July; or*
  - (c) *At any level in the period September 15 to October 15 for the purposes of enhancing outstanding wildlife values by minimising the occurrence of low lake levels over the summer period.*
- 5.2 *A start on opening work may be delayed after consultation with the organisations identified in 3.2 above when:*
  - *Weather conditions are predicted to be unfavorable for a successful opening. Both long range and short range weather forecasts will be used for this.*
  - *A delay could enable an opening in a period beneficial for fish recruitment to the lake (Note: This may only be considered if it will not adversely affect outstanding wildlife values).*
  - *A delay is requested by one of the organisations identified in 3.2 above.*
  - *An opening is being considered in December, January or February and there is a slow rate of lake level rise and a delayed opening would reduce the prospect of a low lake level during summer when inflows are low and evaporation rates are high (Openings in December, January or February should be avoided if practicable).*

- 5.3 *A start on opening preparation work may be made below the opening levels identified in the resource consents, after consultation with the organisations identified in Section 3.2 above. For this option consideration will be given to the probability of a successful opening within the normal opening cost range given the lake level and the weather and sea condition forecasts.*
- 5.4 *If new weather forecasts or other relevant information become available prior to an opening occurring, but post decision to open, that are significantly different to the information that the decision was based on, another meeting will be called with the stakeholders listed in Section 3.2 to determine whether the opening should proceed. As before, the Director Operations shall, within three working days, make the decision while taking into account the Purpose of the proposed activity and the purposes of this Protocol.*

## **6. Closing Protocol**

- 6.1 *An artificial closing of the lake will be considered when all of the following conditions all apply:*
- a) *During the period 1 December – 28 February; and*
  - b) *When the lake level is below 0.6 metres above mean sea level and falling or the salinity of the lake water measured at the monitoring site south of Timberyard Point exceeds 15 parts/thousand (approx 45% sea water); and*
  - c) *There is enough gravel available within the works site that is deemed appropriate to use; and*
  - d) *No southerly wind conditions and/or high sea swells sufficient to close the lake are predicted for the next seven days; and*
  - e) *It is predicted that the lake opening could be closed over a single tide cycle; and*
  - f) *The best indications are that it will help achieve the Purposes of this Protocol.*

## **7. Information Provision**

- 7.1 *For the meeting described in 3.4 above a report will be circulated with the notice of meeting, giving for the past year:*
- a) *A summary of lake opening and closing information (times, lake levels, costs).*
  - b) *Any available water quality information, including salinity levels.*
  - c) *Any issues that have arisen.*
  - d) *The predictions from the Lake Ellesmere/Te Waihora Water Balance Model 1992 (and any further updates of this model) developed by Graeme Horrell.*

**8. Review**

- 8.1 *This Protocol shall be reviewed yearly in consultation with the organisations listed in 3.2 above. These reviews will include a consideration of any need for the resource consent holder to request a review of the conditions of the consents, pursuant to section 127 Resource Management Act 1991.*

Dated this 31<sup>st</sup> day of July 2006

Dr Brent Cowie  
**HEARING COMMISSIONER**