

**BEFORE THE TIMARU DISTRICT COUNCIL**

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

**AND**

**IN THE MATTER OF** hearing of the submissions and further submissions on the proposed Timaru District Plan: Hearing D – Open Spaces, Hazards and Risk and Natural Environment.

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**LEGAL SUBMISSIONS ON BEHALF OF RANGITATA DIVERSION RACE MANAGEMENT LIMITED**

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**Introduction**

1. I appear today on behalf of Rangitata Diversion Race Management Limited (**RDRML**) in connection with its submission on the Proposed Timaru District Plan (**Plan**). RDRML owns and manages the Rangitata Diversion Race scheme (**RDR**), which is primarily located in the Ashburton district but maintains a rock weir in the bed of the Rangitata River. In particular, our client is concerned with the Outstanding Natural Landscape (**ONL**) and Visual Amenity Layer (**VAL**) overlays as these cover the area of its rock weir.
2. In these submissions I address the following key issues:
  - (a) Timaru District Council's (**Council**) jurisdiction to create planning provisions in the bed of a river;
  - (b) Whether it is appropriate for Council to impose rules in the bed of a river; and
  - (c) Amendments to the Proposed Timaru District Plan.

3. RDRML's Chief Executive Officer, Mr Tony McCormick, has provided a statement of evidence regarding the RDR scheme and the process involved with the ongoing maintenance, repair and replacement of the rock weir.

### **Council's jurisdiction**

4. In my submission the Council does not have clear jurisdiction to create planning provisions in respect of the bed of the Rangitata River given that this is a function that falls within the jurisdiction of the Canterbury Regional Council.
5. This issue turns on the definition of "land" in s 2 of the RMA which is defined as:

**land—**

- (a) includes land covered by water and the airspace above land; and
- (b) in a national environmental standard dealing with a regional council function under section 30 or a regional rule, does not include the bed of a lake or river; and
- (c) in a national environmental standard dealing with a territorial authority function under section 31 or a district rule, includes the surface of water in a lake or river

6. Since the definition of "land" includes "land covered by water", the section could apply to the bed of a river.<sup>1</sup> Accordingly there is some 'overlap' between territorial authorities and regional councils, however if both ss 9 and 13 of the RMA apply then any rules must relate to the functions assigned to territorial authorities and regional councils under ss 30 and 31 of the RMA.<sup>2</sup>

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<sup>1</sup> *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2018] NZCA 573 at [75].

<sup>2</sup> *Wanaka Landfill Limited v Queenstown-Lakes District Council* [2010] NZEnvC 299 at [22]-[24]; *R v Woolley* [2014] NZCA 178 at [34]-[39].

7. The rules which are proposed in connection with ONL and VAL overlays are rules relating to earthworks. The standards in the relevant rules relate to matters such as depth of fill and area of earthworks. These are precisely the same matters addressed in the Canterbury Regional Council resource consent attached to Mr McCormick's evidence. Conditions 1 and 2 of consent CRC011239 regulate, for example, the average height of the rock weir and the reach of riverbed disturbed by maintenance works.
8. In other words, it is not clear how the proposed rules (which would apply to RDRML's rock weir) would address territorial authority functions as opposed to regional council functions.
9. For those reasons, I submit that there is no clear jurisdiction to create rules in respect of the bed of the Rangitata River.

### **Merits**

10. Even if Council's proposed planning provisions in respect of riverbeds are lawful, RDRML questions whether it is appropriate for the overlays to apply to the bed of the Rangitata River.

### *Only half of the Rangitata River is in the Timaru district*

11. The only possible functions in s 31 that could engage the overlays in this matter (and related rules) are ss 31(a) and (b):

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

...

(b) the control of any actual or potential effects of the use, development, or protection of land

12. However, the regional council has similar functions in respect of land at a regional level. Under s 31(1)(b) it has the function of the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance.
13. Given that the Rangitata River sits wholly within the Canterbury region, but only partially within the Timaru district (with, it is understood, the district boundary running down the centre of the Rangitata River), it is my submission that it is preferable to leave the creation of rules in relation to the riverbed to the regional council.

*Confusion and unnecessary duplication*

14. I further submit that to have rules in both regional and district plans that can apply to the same aspect of an activity in a riverbed is likely to give rise to confusion due to the double up of planning provisions. Where there is no distinction between the aspects of the activity and there is nothing to substantiate any suggestion that the activities engage different environmental effects it would be inappropriate to require rules relating to different sections of Part 3 RMA.<sup>3</sup> In my submission, the doubling up of rules between Council's plan and Canterbury Regional Council's plan should be avoided.<sup>4</sup> I submit that the Canterbury Regional Council is better positioned to address activities in the riverbed and that to include provisions in the Timaru District Plan which would address the same aspect of an activity is not appropriate given that it would be confusing, unnecessary and can lead to inconsistencies (such as in the conditions of a resource consent).
15. In this case, our client has an existing consent from Canterbury Regional Council for earthworks in the bed of the Rangitata River associated with the

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<sup>3</sup> *R v Woolley* [2014] NZCA 178 at [34] and [41] – [42].

<sup>4</sup> *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2018] NZCA 573 at [73] - [74].

maintenance and reconstruction of its existing rock weir.<sup>5</sup> The current provisions of the proposed Timaru District Plan could potentially require RDRML to obtain a further consent from Council for the same activity (or at least prove existing use rights), and in our submission this is inappropriate duplication as the effects associated with its weir are not expected to change following maintenance, repair or replacement.

*Existing rock weirs already accounted for in determining the overlays*

16. Additionally, the Council has presumably taken into consideration all existing features of the 'land', including existing rock weirs, when determining the 'outstanding natural landscape' and 'visual amenity' overlays. If the areas in question are outstanding (or of visual amenity) in their existing state, it does not follow that the maintenance, repair or replacement of existing rock weirs should then be subject to the rules in the NFL section, given that they are an established part of the 'outstanding natural landscape' and 'visual amenity' that these provisions are seeking to protect.

**Section 42A Report**

17. Ms White's s 42A Report recommends that earthworks associated with the maintenance and repair of existing rock weirs should be included in NFL-R2 and treated the same way as other existing items located within the ONL and VAL overlay.<sup>6</sup> If the Panel is minded to make this amendment I submit that further changes will be required to the NFL rules to give effect to Ms White's intention:

- (a) 'replacement' should be added to the permitted activity conditions as there are situations where up to 65% of the rock weir needs to be replaced following flooding events.<sup>7</sup> We note that the draft SASM rules

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<sup>5</sup> Resource Consent CRC011239.

<sup>6</sup> Section 9.2.27 s42A Report, Liz White

<sup>7</sup> Statement of Evidence of Tony McCormick at paragraph 12.

provide that earthworks associated with replacement of certain existing infrastructure is permitted and there is no justification for not including replacement in the ONL and VAL provisions;<sup>8</sup> and

- (b) the 1m height limit in the earthworks standards needs to be amended to provide an exemption for rock weirs. Rock weirs, by their nature, exist above the original surface of the ground (usually by more than 1m) so would not comply with this standard.

## Relief

18. RDRML seeks the following relief in descending order of priority:

- (a) that the ONL and VAL overlays are removed from the bed of the Rangitata River; or
- (b) that the NFL provisions are amended to provide that, with respect to the bed of the Rangitata River, the ONL and VAL overlays are for information only and do not have any rules attaching to them. I suggest the following wording:

*Notwithstanding that the overlays may cover the riverbed, the provisions of this section [Natural Features and Landscapes] do not apply to the bed of any river and are for information only.*

- (c) that the ONL and VAL overlays are amended to acknowledge that existing rock weirs are part of the existing environment and exempt them from any rules. For example:

*Lawfully established existing rock weirs, which existed at the time this District Plan was made operative, are established*

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<sup>8</sup> Proposed Timaru District Plan, SASM-R1(2), PER-1.

*infrastructure. Maintenance, repair or replacement of lawfully established existing rock weirs is a permitted activity and is not subject to the planning provisions in this section [Natural Features and Landscapes].*

- (d) that the following condition is added to the NFL provisions to provide that maintenance of existing rock weirs already consented to by Canterbury Regional Council are exempt from the rules (this mirrors the wording in the Water Conservation (Rangitata River) Order 2006):

*The provisions of this section [Natural Features and Landscapes] do not apply to the maintenance authorised by the Canterbury Regional Council of existing rock weirs and river works to the same level and extent as occurring as at 1 January 2000 or to the placing of raw rock works and the carrying out of river engineering works necessary for flood and asset protection purposes.*

- (e) the inclusion of a specific rule providing that maintenance, repair or replacement of existing rock weirs is a permitted activity in the NFL provisions as outlined at Appendix One.
- (f) amendments to the current ONL and VAL rules and standards to allow the maintenance, repair and replacement of existing rock weirs as an existing activity. I suggest wording for these changes at Appendix Two.

## **Conclusion**

19. Council lacks clear jurisdiction to impose planning provisions in respect of the bed of the Rangitata River and any provisions that currently apply to the bed of the river will need to be removed or amended.

20. Notwithstanding this jurisdictional argument, I submit that it is inappropriate to apply the ONL and VAL overlays, provisions and rules to the bed of the Rangitata River in the Timaru district as this creates a double up with Canterbury Regional Council's functions. This can lead to confusion for applicants, consent holders, Council and Canterbury Regional Council.

**DATED** at Tauranga this 1<sup>st</sup> day of November 2024.



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Vanessa Jane Hamm / Cory Lennon Lipinski

Counsel for Rangitata Diversion Race Management Limited



### Appendix One

<i>NFL-R10</i>	<i>Existing rock weirs</i>	
<b>ONL overlay</b> <b>VAL overlay</b>	<b>Activity Status: Permitted</b>	<b>Activity status when compliance not achieved:</b> <b>Not applicable.</b>

## Appendix Two

Provision	Text
NFL-R2 (1)	<p><b>Activity Status: Permitted</b></p> <p><b>Where:</b></p> <p><b>PER-1</b> The earthworks are for the purposes of maintenance, <del>and</del> repair and replacement of any of the following:</p> <ol style="list-style-type: none"> <li>1. Existing fencing; or</li> <li>2. Existing farm tracks; or</li> <li>3. existing walking/cycling tracks; or</li> <li>4. existing roads; or</li> <li>5. existing reticulated stock water systems including water troughs; or</li> <li>6. existing natural hazard mitigation works; or</li> <li>7. existing rock weirs; or</li> </ol> <p><b>PER-2</b> The earthworks are for the purpose of sealing existing roads; and</p> <p><b>PER-3</b> NFL-S6 is complied with.</p>
NFL-R2 (2)	<p><b>Activity Status: Permitted</b></p> <p><b>Where:</b></p> <p><b>PER-1</b> The earthworks are for the purposes of maintenance, <del>and</del> repair and replacement of any of the following:</p> <ol style="list-style-type: none"> <li>1. Existing fencing; or</li> <li>2. Existing farm tracks; or</li> <li>3. existing walking/cycling tracks; or</li> <li>4. existing roads; or</li> <li>5. existing reticulated stock water systems including water troughs; or</li> <li>6. existing natural hazard mitigation works; or</li> <li>7. existing rock weirs; or</li> </ol> <p><b>PER-2</b> The earthworks are for the purpose of sealing existing roads; and</p> <p><b>PER-3</b> NFL-S6 is complied with.</p>
NFL-S6 (1)	Earthworks shall comply with all of the following:

	<ol style="list-style-type: none"> <li>1. the depth of the earthworks shall not exceed 1m below the original surface of the ground; and</li> <li>2. the depth of the fill shall not exceed 1m above the original surface of the ground; and</li> <li>3. the area of the earthworks shall not exceed 1000m<sup>2</sup> in any 12 month period.</li> </ol> <p>If the earthworks are associated with the maintenance, repair or replacement of existing rock weirs the standard at 2. above is substituted with the following:</p> <ol style="list-style-type: none"> <li>2. <i>the depth of the fill shall not exceed the existing height of the rock weir either when it was first constructed or following the most recent maintenance, repair, or replacement whichever is the later.</i></li> </ol>
<b>NFL-S6(2)</b>	<p>Earthworks shall comply with all of the following:</p> <ol style="list-style-type: none"> <li>1. the depth of the earthworks shall not exceed 1m below the original surface of the ground; and</li> <li>2. the depth of the fill shall not exceed 1m above the original surface of the ground; and</li> <li>3. the area of the earthworks shall not exceed 1000m<sup>2</sup> in any 12 month period.</li> </ol> <p>If the earthworks are associated with the maintenance, repair or replacement of existing rock weirs the standard at 2. above is substituted with the following:</p> <ol style="list-style-type: none"> <li>2. <i>the depth of the fill shall not exceed the existing height of the rock weir either when it was first constructed or following the most recent maintenance, repair, or replacement whichever is the later.</i></li> </ol>