

Appendix 4



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To

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From

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Dear all

LWRP Legal Review – Groundwater Takes

1. You have advised that Christchurch City Council (**CCC**) and Waimakariri District Council (**WDC**) have encountered difficulties in progressing resource consent applications with Canterbury Regional Council (**ECan**) involving the interception and drainage of groundwater from fully allocated or overallocated groundwater zones for the following types of infrastructure projects:
 - (a) **Stormwater Basins** constructed for the primary purpose of treating and attenuating stormwater, but with groundwater seeping into those basins. The groundwater is then removed from the Stormwater Basin by conveying and discharging that water (along with any stormwater collected) to a surface water body (e.g. stream) with no intervening use by a person as part of the system design (e.g. no irrigation, electricity generation, water bottling). For the remainder of our opinion, we refer to the interception, conveyance and drainage of groundwater through this type of infrastructure project as "**Stormwater Basin Activity**".
 - (b) **Sub-Soil Drainage Infrastructure** (e.g. drainage infrastructure beneath roads or under stormwater basins) constructed for the primary purpose of deliberately lowering the water table, with groundwater intercepted within that infrastructure being removed by discharging to a surface water body (e.g. stream), possibly with some intervening conveyance of the water, but with no intervening use by a person as part of the system design. For the remainder of our opinion, we refer to the interception and drainage (possibly with intervening conveyance) of groundwater through this type of infrastructure project as "**Sub-Soil Drainage Activity**".
2. ECan staff have advised CCC and WDC that both Stormwater Basin and Sub-Soil Drainage Activities are now prohibited activities in overallocated or fully allocated groundwater zones pursuant to rule 5.130 of the Canterbury Land and Water Regional Plan (**LWRP**). Although ECan previously considered these activities to be capable of being consented under rule 5.6 of the LWRP,

you have advised that ECan changed its position following a reconsideration of how the LWRP provisions should be interpreted in light of:

- (a) Plan Change 7 to the LWRP (**PC7**) which adjusted various groundwater allocation limits in Waimakariri District downward so that the "take and use" of groundwater is a prohibited activity in groundwater zones that are (now) considered overallocated or fully allocated under the revised allocation limits; and
 - (b) The Court of Appeal's recent decision *Aotearoa Water Action Inc v Canterbury Regional Council* (**AWA decision**) which held that ECan does not have the ability to grant a resource consent limited to the use of water for water bottling purposes separately to the authorisation to take the water to be used for that purpose.¹
3. There is a shared understanding between CCC, WDC and ECan that outrightly prohibiting Stormwater Basin and Sub-Soil Drainage Activities in overallocated or fully allocated groundwater zones is an unintended and undesirable outcome, with numerous beneficial and critical/essential infrastructural projects capable of providing good environmental outcomes now unable to be progressed. For example, Stormwater Basins are critical for achieving the LWRP's water quality and quantity outcomes, and prohibiting these cause material harm to the environment and communities. There is general agreement that a change to the LWRP should be pursued so that such critical and essential projects are not prohibited.
 4. However, as a plan change is a time-consuming process, CCC and WDC wish to investigate whether ECan's interpretation of the LWRP groundwater "take and use" provisions is correct, and whether Stormwater Basin and Sub-Soil Drainage Activities might be capable of being consented by alternative means.
 5. Accordingly, you have asked us to advise whether Stormwater Basin and Sub-Soil Drainage Activities involve a "taking and use" of groundwater that would be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130.

Summary

6. In summary, we consider that Stormwater Basin and Sub-Soil Drainage Activities do not involve a "taking and use" of groundwater to be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130. LWRP rule 5.130 does not apply to Stormwater Basin and Sub-Soil Drainage Activities because those activities involve a "taking" only, with no intervening use by a person.
7. We provide the reasons for our opinion below.

Approach to plan interpretation

8. This matter raises issues of plan interpretation. Accordingly, we summarise our approach to plan interpretation below.

¹ *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, at [132].

9. The Courts generally attempt to give a plain ordinary meaning to a plan provision, having regard to the immediate context. However, where any ambiguity, obscurity or absurdity arises, it becomes necessary to refer to the other sections of the plan (such as the objectives and policies) in order to derive a purposive interpretation.²
10. The Court of Appeal decision *Powell v Dunedin City Council*³ contains guidance on the interpretation of district plans as follows:

In this case, the appellants argued that the Court should look to the plain meaning of the access rule and, having found that there is no ambiguity, interpret that rule without looking beyond the rule to the objectives, plans and methods referred to in the earlier parts of section 20 of the plan. While we accept it is appropriate to seek the plain meaning from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this court made clear in Rattray, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, where any obscurity or ambiguity arises, it may be necessary to refer to the sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in Rattray or with the requirements of the Interpretation Act.

11. Where competing interpretations of a district plan are available, the interpretation ought to:
 - (a) avoid absurdity or anomalous outcomes;
 - (b) be consistent with the expectation of property owners; and
 - (c) promote administrative practicality (e.g. rather than requiring lengthy historical research to assess lawfulness or otherwise).⁴

Assumption about water seeping into infrastructure

12. For the purpose of this opinion, you have asked us to assume that the water beneath the ground that seeps into Stormwater Basins and Sub-Soil Drainage Infrastructure is "groundwater" as defined in the LWRP, being:

"means all water beneath the surface of the earth contained within the saturated zone, but excludes the water chemically combined in minerals"

[our underlining for emphasis]

13. This assumption has been made because if all water seeping into Stormwater Basins and Sub-Soil Drainage Infrastructure from beneath the surface of the earth is exclusively from outside the saturated zone, then such water will not be groundwater as defined in the LWRP, and thus will not be captured by prohibited activity rule 5.130 which applies only to "groundwater".⁵ Rule 5.130 states:

² *Powell v Dunedin City Council* [2005] NZRMA 174 (CA); *Lower Hutt City Council (Re an Application)* (W46/07); *Nanden v Wellington City Council* [2000] NZRMA 563, 573.

³ [2005] NZRMA 174 (CA).

⁴ *Nanden v Wellington City Council* [2000] NZRMA 563; *Mount Field Limited v Queenstown Lakes District Council* 31 October 2008, Heath J, HC Invercargill CIV 2007-425-700.

⁵ The likely reality is that water beneath the surface of the earth which seeps into Stormwater Basins and Sub-Soil Drainage Infrastructure would be either water from within the saturated zone, or from outside the saturated zone, or a combination of both. For the purposes of this opinion, we have assumed all seepage water is groundwater.

"The taking and use of groundwater that does not meet one or more of conditions 2 or 3 in Rule 5.128 is a prohibited activity."

[our underlining for emphasis]

Do Stormwater Basin and Sub-Soil Drainage Activities involve a "taking and use" of groundwater that would be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130?

14. You mentioned that ECan historically interpreted the LWRP provisions as not requiring groundwater resource consents for taking "drainage water" when a site is operational. ECan then shifted its interpretation so that taking "drainage water" is also subject to the rules for taking "groundwater". On that basis, ECan considered that Stormwater Basin and Sub-Soil Drainage Activities:

- (a) involved a water "take" and a "discharge" but without a "use";
- (b) do not involve a "taking and use" of groundwater for rules 5.128 to 5.130 to apply; and
- (c) could be considered under "catch-all" rule 5.6 where they did not fall within the scope of other LWRP rules. Rule 5.6 states:

"Any activity that—

(a) would contravene sections 13(1), 14(2), s14(3) or s15(1) of the RMA; and

(b) is not a recovery activity; and

(c) is not classified by this Plan as any other of the classes of activity listed in section 87A of the RMA

— is a discretionary activity."

[our underlining for emphasis]

15. However, ECan has further changed its position so that Stormwater Basin and Sub-Soil Drainage Activities in overallocated or fully allocated groundwater zones can no longer be considered under catch-all rule 5.6, but are now prohibited activities under the "taking and use" of groundwater rule 5.130 (quoted at paragraph 13 above).

16. We apprehend from our discussions and the technical advice notes issued by ECan that ECan appears to have two main reasons in support of its changed position:

- (a) **First reason:** The effect of the AWA decision is that any activity that either takes or uses groundwater must be considered under LWRP "taking and use" groundwater rules 5.128 to 5.130.⁶ Thus, prohibited activity "taking and use" rule 5.130 will apply to any take or use of groundwater in overallocated or fully allocated groundwater zones, including any Stormwater Basin and Sub-Soil Drainage Activities where there is a taking, but no use, of groundwater.
- (b) **Second reason:** Stormwater Basin and Sub-Soil Drainage Activities will be considered as involving a use of groundwater for the "taking and use" groundwater rules 5.128 to 5.130 to apply, if there is evaporation or evapotranspiration and/or plants using water to grow, while seepage groundwater is being conveyed from point of interception to point of discharge.

⁶ See page 2 of ECan's Technical Advice Note entitled "*Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents*", dated 19 August 2022.

17. We comment on these reasons below.

Considering the first reason – Does the AWA decision require an activity that genuinely involves only a "take" of groundwater, and no associated "use" of that groundwater, to be considered under LWRP "taking and use" groundwater rules 5.128 to 5.130?

18. We understand ECan's position in reliance on the AWA decision is that "take" and "use" of groundwater are intrinsically linked under the LWRP, and therefore it is not possible to apply for a stand-alone use or a stand-alone take consent for groundwater *in all circumstances*. Accordingly, ECan considers that LWRP "taking and use" groundwater rules 5.128 to 5.130 (including prohibited activity rule 5.130) apply to Stormwater Basin and Sub-Soil Drainage Activities, even if those activities genuinely involve no "use" of groundwater.⁷
19. We disagree. For the reasons given below, we consider that the AWA decision does not require LWRP "taking and use" groundwater rules 5.128 to 5.130 (including prohibited activity rule 5.130) to apply to a proposal that genuinely involves only a take of groundwater that has no associated use.
20. In the AWA decision, the Court of Appeal set aside ECan's decision to grant resource consent for the use of water for water bottling activities in circumstances where no associated resource consent was sought and granted to take water for that same use. It is notable that the Court of Appeal accepted that there was no reason under section 14 of the RMA to treat a take as necessarily combined with a use.⁸ Accordingly, it is open for regional planning documents to have rules that specifically apply to just a take, or just a use, of water.
21. The Court of Appeal considered that the terms of a regional plan rule could dictate whether the Council can grant to a particular activity, a separate consent for a take and a separate consent for use. The Court observed that where a plan rule uses the expression "taking or use", then the rule contemplates that there might be an activity involving one, or the other, or both. However, a rule drafted as applying to "taking and use" anticipates an activity that involves both a taking and a use of water. As the Court states at paragraph [113]:

*"In this case, the LWRP as has been seen refers variously to "taking or use" and "taking and use". We consider the different wording is important and must have been intended. Thus, where the expression used is "taking or use of water" the plan contemplates that there might be **an activity involving one or the other or both**. Where the expression used is "taking and use" the intent appears to be that **the activity will involve both**."*

[our underlining and bold text for emphasis]

22. Thus:
- (a) A "taking or use" rule can apply to **an activity** involving a take, or a use, or both a take or a use.
 - (b) However, a "taking and use" rule applies to **an activity** that involves both a take and use.

⁷ ECan's Technical Advice Note entitled "Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents", dated 19 August 2022.

⁸ *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, at [110].

23. For an activity that involves both a take and use (such as a proposal to take and use groundwater for water bottling) the Court concluded that under the LWRP "taking and use" rules:
- (a) A "taking" cannot be consented separately from the "use", or vice versa.⁹
 - (b) It was necessary to consider both the taking and use of water.¹⁰
 - (c) It was not open to ECan to utilise "catch-all" LWRP rule 5.6 to consider a stand-alone application for consent for only one of a "taking" or a "use".
24. The Court of Appeal was careful to communicate that its decision is applicable to the specific context that was present before it, which was a proposal that involves both a take and use of water. In that specific context, the Court considered that ECan's application of "catch-all" rule 5.6 was wrong. As the Court states at paragraph 130:
- "We note that the Council proceeded on the basis that because there was no rule specifically governing a stand-alone use of water, the application was properly considered by the Council under what Dr Burge described as the "catch-all" r 5.6 as a discretionary activity. We have quoted that rule above. We consider that was a wrong approach in the present context."*
- [our underlining for emphasis]
25. The AWA decision was not concerned about an activity or a proposal that genuinely involves a take of water, but with no associated use.
26. For the above reasons, we consider the AWA decision only makes it necessary for activities or proposals genuinely involving both a taking and use of groundwater to have both the taking and use of water considered together under LWRP "taking and use" groundwater rules 5.128 to 5.130, with no ability to grant a consent for a take separate from a use (or vice versa). However, the "taking and use" rules do not apply to activities or proposals that do not involve both a taking and use, such as Stormwater Basin and Sub-Soil Drainage Activities where no "use" is involved. In short, we consider ECan's position incorrectly applies the AWA decision to activities and contexts that were not intended by, and not before, the Court of Appeal.
27. Support for our interpretation of the "taking and use" rules can also be found in written legal submissions presented to the Supreme Court that heard the appeal against the AWA decision on 22 and 23 March 2023.¹¹ None of those submissions sought to argue that prohibited activity status rule 5.130 applies to activities involving a genuine groundwater "take" only, where there is no intervening "use" by a person. Rather, AWA supported a conclusion that rule 5.130 only applies where the reality of a particular proposal involves both a taking and use of groundwater (e.g. a water bottling activity that requires both take and use), but not where a proposal genuinely involves only a "take" with no "use". In summary, the position of the five parties to the Supreme Court were:
- (a) **Cloud Ocean Water Limited** and **Southridge Holdings Limited** (previously Rapaki Natural Resources Limited) argued that the "taking and use" rules do not apply to them because their

⁹ Ibid, at [116].

¹⁰ Ibid, at [132].

¹¹ *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* (SC 82/2022).

proposed activity does not involve both "taking and use", but rather their groundwater take is already consented and they are proposing a use only.

- (b) **AWA** submitted that "taking and use" rules do apply to Cloud Ocean and Southridge because the *reality* of what the applicants were doing is to take and use water, not using it only. AWA agreed with our interpretation that "taking and use" rules (including rule 5.130) would not apply to an activity that is truly a take only (e.g. Stormwater Basin and Sub-Soil Drainage Activities where no "use" is involved). AWA's legal submissions state:

*"if there were a situation where an activity was truly only a take or use of groundwater, then that activity would not be classified by the plan and r 5.6 would be engaged"*¹²

*"there may be circumstances where an activity is only a "take" or only a "use" and as such it would not be regulated by a "take and use" rule meaning that the [sic] those standalone activities are not otherwise classified by the LWRP and r 5.6 is engaged. The problem for the appellant in the present case is that the appellant's activity is one that involves both take and use, and so is not one of these activities"*¹³

- (c) **ECan** took a neutral position, and indicated it would abide by the Supreme Court's decision on how the groundwater "taking and use" rules are to be applied.
- (d) **Te Ngāi Tūāhuriri Runanga Incorporated** did not specifically submit on the issue.

28. As no party argued in written submissions for an interpretation of "*taking and use*" rules (including prohibited activity rule 5.130) that requires those rules to apply to a genuine "take" only proposal (e.g. Stormwater Basin and Sub-Soil Drainage Activities), then it is highly unlikely the Supreme Court would make a ruling to that effect. Rather, it is highly likely that any ruling by the Supreme Court will provide for genuine "taking" only proposals to be capable of being consented under LWRP rule 5.6.

Considering the second reason – Are evaporation, evapotranspiration, or plants extracting water to grow, a "use" controlled by the LWRP?

29. You mentioned that ECan appear to have a view that even though Stormwater Basin and Sub-Soil Drainage Activities involve no use of groundwater by a person, there will still be a "use" of water for the purposes of the LWRP rules if there will be evaporation, evapotranspiration and/or plants extracting water conveyed by Stormwater Basins and Sub-Soil Drainage Infrastructure. This reasoning suggest ECan considers that Stormwater Basins and Sub-Soil Drainage Infrastructure in overallocated or fully allocated zones will be prohibited under rule 5.130 regardless of the AWA decision.
30. We disagree. For the reasons given below, we consider that evaporation, evapotranspiration and plants extracting water being conveyed by Stormwater Basins and Sub-Soil Drainage Infrastructure are natural processes that do not, in and of themselves, constitute a "use" that would trigger the application of the LWRP "taking and use" groundwater rules. We outline our reasons below.

¹² Legal submissions on behalf of Aotearoa Water Action Incorporated Limited dated 14 March 2023, at paragraph 36.

¹³ Ibid, at paragraph 75.

31. The LWRP does not provide a definition of "use". However, as a matter of jurisdiction, the LWRP cannot control uses of water that the RMA does not empower or authorise regional councils to control.
32. The purpose of a regional plan is to assist a regional council to carry out its functions in order to achieve the purpose of the RMA.¹⁴ Section 30(1)(e) provides that one of ECan's functions "for the purpose of giving effect to this Act", is to control the "use" of water. Although the RMA does not provide a definition of "use" as it relates to water, a "use" under the RMA must be understood having regard to the purpose and context of the RMA.
33. The purpose of the RMA is concerned about "use" undertaken by people and communities. Section 5(1) provides that the purpose of the RMA is to promote the "sustainable management" of natural and physical resources, while section 5(2) defines "sustainable management" by reference to managing "use" of natural resources (such as water) in a way, or at a rate, which enables "people and communities" to provide for their well-being and health and safety. Sustainable management of the use of water is therefore concerned about use of that water by people and communities.
34. Section 14 of the RMA also provides relevant context, as it reinforces that the RMA is concerned about use of water by people. Section 14(2) states that no "person" may "use" water, while section 14(3)(a) confirms the "person" is not prohibited from "using" water if allowed by (amongst other things) a regional plan or resource consent.
35. Accordingly, the "use" of water that regional councils are empowered to control under section 30(1)(e) of the RMA "for the purpose of giving effect to this Act" must be a use by people. Natural processes such as evaporation, evapotranspiration and the use of water by plants are not a use of water by people. As natural processes are not themselves "uses" a regional council can control under the RMA through its LWRP, they cannot cause Stormwater Basins and Sub-Soil Drainage Infrastructure in overallocated or fully allocated zones to be a "use" prohibited under "taking and use" rule 5.130.¹⁵
36. By contrast, uses by people such as the use of water for irrigation purposes will constitute a use that a regional council can control. Accordingly, if a proposal involves the taking and use of groundwater for irrigation purposes, then it can be caught by prohibited activity rule 5.130 in overallocated or fully allocated zones.

Conclusion

37. For the above reasons, we consider that neither the AWA decision, nor the natural occurrence of evaporation, evapotranspiration, or use of water by plants, would cause Stormwater Basin and Sub-Soil Drainage Activities to be prohibited in overallocated or fully allocated groundwater zones under

¹⁴ Section 63 of the RMA.

¹⁵ While speculative, it is possible there may be some confusion within ECan regarding the distinction between treating evaporation, evapotranspiration and plants extracting water as a "use" in and of itself, rather than an "effect" of a person using water. Loss of water from evaporation, evaporation and plant extraction has the potential to be considered as an effect arising from a use of water by a person (e.g. when a person applies for resource consent to use water for irrigation, efficiency considerations might involve a consideration of water losses through evaporation, evapotranspiration and irrigated plant extraction). However, if there is no use of water by a person, then evaporation, evaporation and plant extraction of water are not, in and of themselves, a use of water controlled by the RMA.

LWRP rule 5.130. Prohibited activity rule 5.130 does not apply to Stormwater Basin and Sub-Soil Drainage Activities because they genuinely do not involve a "use" of water by a person. However, any proposal involving the taking and use of groundwater for irrigation purposes can be caught by prohibited activity rule 5.130 in overallocated or fully allocated zones.

38. While the implication of our views is that Stormwater Basin and Sub-Soil Drainage Activities will not be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130, that does not necessarily mean that any resource consent application for such activities will be granted. ECan retains an ability to consider a resource consent application on its merits, and thus there remains a prospect that an application involving a take (but no use) of groundwater in overallocated or fully allocated groundwater zones might still be declined.
39. Please do not hesitate to contact us if you have any further queries.

Yours faithfully
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