MEMORANDUM

Date: 26 September 2019

To: Section 42A officers, Otago Regional Council

From: Lucy de Latour

APPLICATIONS FOR WATER PERMITS – CRIFFEL WATER LIMITED - LUGGATE IRRIGATION LIMITED AND LAKE MCKAY STATION

Introduction

1. The Otago Regional Council (**Council**) is currently processing two different applications to take and use water in the Luggage Catchment. One of these is an application by Criffel Water Limited (**Criffel**) for a resource consent to take and use water from Luggate Creek. The other is an application by Luggate Irrigation Limited and Lake McKay Station (together referred to as **Luggate Irrigation**) to take and use water, also from Luggate Creek.

2. Criffel currently hold six water permits authorising the take and use of water.[1] Criffel's application was filed on 11 April 2016. The original application sought to take water at a rate of 601.8 l/s from the North Branch of Luggate Creek for irrigation purposes, stock water supply and hydro-electricity generation. The application has subsequently been amended and now Criffel seeks consent for a primary allocation of 358L/s and two supplementary allocations of 170L/s and 80L/s.

3. Luggate Irrigation currently hold six deemed water permits/mining privileges authorising the take and use of water.[2] Under its existing permits, Luggate Irrigation is able to take up to 423 litres per second (l/s). Luggate Irrigation's application RM18.345 was filed on 25 September 2018. The application originally sought to take 362 l/s of water as primary allocation. The application has also been amended and now the applicant is seeking 180L/s as primary allocation with two supplementary allocations of 80L/s and 86L/s.

4. The Council's Reporting Officers are preparing a joint section 42A report into the two applications by Criffel and Luggate Irrigation. In order to assist with the preparation of the section 42A report, you have asked us to provide a legal opinion addressing:

    a. What constitutes the environment for the purpose of assessing the applications under section 104;

    b. How priority principles apply to the two applications; and

    c. The application of section 104(3)(d).

5. This advice has been prepared on the basis that it will be included in the Reporting Officer's joint section 42A report on the two applications.

Executive summary

6. The "environment" against which effects must be assessed under section 104 of the RMA, includes the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activities. It also includes the environment

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1 97629.V1, 94201, 95541, 95560, 96588, 20001.011.V1.

2 97803.V1, 2008.519, WR7284, WR7285, WR7286 and WR7298.

as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

7. In the context of considering applications to take and use of water to replace existing water permits, which are finite in term, the environment should be considered as if the take and use of water authorised by the existing deemed permits is not occurring, unless it would be fanciful or unrealistic to do so.

8. Given that the Criffel application was lodged first in time, applying the priority rule it should be determined first. The issue of priority is not affected by whether the evidence relating to both applications is given at one combined hearing, or at separate hearings. In practice, this means the decision-maker will be required to make a decision on the Criffel application before deciding the Luggate Irrigation application. Whether the Criffel application is granted or not will determine whether it should be regarded as part of the environment on the Luggate Irrigation application.

9. In particular:

    a. In making a decision on Criffel's application, effects arising from the Luggate Irrigation application do not form part of the environment against which the section 104 assessment should be carried out. When deciding whether to grant Criffel's application, the decision-maker can only consider the effect of that application on Luggate Irrigation's deemed permits, rather than Luggate Irrigation's resource consent application currently being processed by the Council.[3]

    b. When making a determination on Luggate Irrigation's resource consent application, Criffel's water permit, if it is granted by the Council, will form part of the environment which must be considered by the decision-maker if the decision maker determines that it is likely to be implemented.[4]

10. Section 104(3)(d) does not require the decision-maker at a substantive hearing to undertake a notification assessment for each application. Instead, section 104(3)(d) is only of relevance to decision-makers in scenarios where the decision-maker considers that the application has:

    a. a more than minor effect on the environment and was not publicly notified; or

    b. a minor or more than minor effect on any person who was not notified of the application.

11. Section 104(3)(d) operates as a jurisdictional bar to granting a resource consent where an application was limited notified, when it should have been should have been publicly notified.

12. Although the law is less clear on this point, in our opinion, section 104(3)(d) also operates to prevent the granting of a resource consent where an application was limited notified, but not all affected persons were notified.

13. Our detailed advice follows.

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3 To the extent that these effects fall within the matters of discretion relevant under Rule 12.1.4.4 of the Regional Plan.

4 If the decision-maker considers Criffel's resource consent is likely to be implemented. This assessment will be subject to the matters of discretion relevant under Rule 12.1.4.4 of the Regional Plan.

Existing environment on reconsenting

14. When a decision-maker assesses an application for resource consent under section 104 of the RMA, it must consider the "actual and potential effects [of the activity applied for] on the environment."

15. "Environment" is defined in the Resource Management Act 1991 (**RMA**), as:

> Environment includes –
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> (a) Ecosystems and their constituent parts, including people and communities; and
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> (b) All natural and physical resources; and
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> (c) Amenity values; and
>
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

16. The scope of what it encompasses has been the subject of numerous decisions in the Courts (particularly in the context of activities authorised under district plans).

17. The leading case on what constitutes the environment is the Court of Appeal decision in *Queenstown-Lakes District Council v Hawthorn Estate Limited*.[5] In that case, the Court stated that consent authorities should consider the reasonably foreseeable future environment:[6]

> In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

18. This calls for a "real world" approach, not an artificial approach, to what the future environment will be.[7] A consent authority must not minimise the effects of a proposed activity, either by comparing it with an unrealistic possibility allowed by the relevant plan, or by ignoring its effects on what is, or undoubtedly will be, part of the environment in which the activity will take place.[8]

Consideration of the existing environment in a regional consenting framework

19. There is some uncertainty as to how *Hawthorn* (which was decided in the context of district plan consents) applies in the context of resource consents granted by a regional council, given that regional consents will generally have an expiry date and their renewal is not guaranteed, despite section 124 of the RMA.

20. There has previously been conflicting Environment Court authority regarding what constitutes the "environment" in the context of regional consents. However, the High Court decision of *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*[9] has clarified the position. Before addressing the High Court's findings in *Ngāti Rangi*, we

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5 *Queenstown District Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

6 *Queenstown District Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [84].

7 *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [64] adopting Fogarty's J's approach in *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, (2013) 17 ELRNZ 585 at [85].

8 *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [64].

9 *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.

consider it useful to set out some of the previous differing positions of the Environment Court:

a. In *Marr v Bay of Plenty Regional Council*[10], the Environment Court considered whether the effects from the discharges from Tasman Mill under existing consents that were sought to be renewed could be taken into account. The Court held that the existing environment of the river must take into account the effects which have already occurred from lawful discharges from the Tasman Mill to date.[11]

b. In *Bay of Plenty Regional Council v Fonterra Cooperative Group Ltd* the Environment Court held that assumptions about future expiry of consents and/or their replacement is beyond the range of activities that should be contemplated as part of the existing or future environment and the environment should be taken as it exists at the time, including all operative consents and any consents operating under section 124, overlain by any future activities which were permitted activities and also unimplemented consents (which could be considered at the discretion of the consent authority).[12]

c. However, in *Port Gore Marine Farms v Marlborough District Council* the Environment Court observed that it must imagine the environment as if the three marine farms (seeking renewal) were not actually in it, as if the application was for a new activity, not the renewal of an activity.[13] The Court considered that if it had to take the continued presence of the farms on site into account it would undermine any persons' claims to being adversely affected.[14]

21. The Environment Court decisions in *Marr* and *Port Gore* were both considered by the Environment Court in *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council*[15] in the context of applications for new resource consents, as well as variations to the conditions of existing consents, to expand the Raetihi Hydroelectric Power Scheme's capacity and implement other additional upgrades. The Court held that under normal circumstances of renewal of consents for water take the 'environment' must be determined as the environment that might exist if the existing activity to which the consent relates was discontinued.[16] However, the specific circumstances of the case led the Court to a contrary conclusion that the existing environment should be assessed as including the Scheme as currently operated.[17]

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10 *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347; (2010) 16 ELRNZ 197; 34 TCL 89.

11 *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347; (2010) 16 ELRNZ 197; 34 TCL 89 at [62].

12 *Bay of Plenty Regional Council v Fonterra Cooperative Group Ltd* [2011] NZEnvC 73; (2011) 16 ELRNZ 338 at [48].

13 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [140].

14 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [140].

15 *New Zealand Energy Ltd v Manawatu-Whanganui Regional Council* [2016] NZEnvC 59.

16 *New Zealand Energy Ltd v Manawatu-Whanganui Regional Council* [2016] NZEnvC 59 at [47] – [48].

17 *New Zealand Energy Ltd v Manawatu-Whanganui Regional Council* [2016] NZEnvC 59 at [48]. The circumstances included:

- The fact that the take has been in place for nearly 100 years;
- The provisions of Objective 5-3(a)(ii) and Policies 5-14(b) and 5-15(b) of One Plan which seek to provide for existing electricity takes and flow regimes prior to other allocations;
- The fact that the allocation regime established in One Plan has been set after recognition of the effects of existing electricity takes;

22. The Environment Court decision was appealed to the High Court in *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*[18] where the Court held that the Environment Court had erred in its approach. The High Court stated:

> [62] Mr Ferguson, senior counsel for the Trust, and Mr Jessen, for the Regional Council, distinguished *Marr v Bay of Plenty Regional Council* and *Rodney District Council v Eyres Eco-Park Ltd* on the grounds that Allan J was considering whether activities benefiting from existing use rights under s 10A of the Act formed part of the existing environment in the particular context of a land use and subdivision application. That is quite different from the present case. Water take permits are not permanent and do not carry existing use right protections.
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> [63] Applying the approach taken by the Environment Court in *Marr v Bay of Plenty Regional Council* to the circumstances of this case would cut across the sustainable management objectives of the Act. The effect of not following the approach adopted by the Environment Court in *Port Gore Marine Farms Ltd v Marlborough District Council* when assessing the environmental impacts of a proposed consent is to lock in hydro-electricity water takes and flow rates for so long as the controlled activity status is retained thereby preventing adverse effects being avoided or mitigated.
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> [64] I therefore agree that the approach taken by the Environment Court in *Port Gore Marine Farms Ltd v Marlborough District Council* was the approach which the Environment Court should have adopted in the present case.
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> [65] I am reinforced in my conclusions by two reasons. First, the learned authors of *Environmental and Resource Management Law* note a principle has emerged in which it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions. The text says:
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> > Accordingly, the existing environment cannot include, in the context of a renewal application, the effects caused by the activities for which the renewal consents are sought, unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist…
> >
> > [Derek Nolan *Environmental and Resource Management Law* (5th ed, Lexis Nexis, Wellington, 2015) at 610] …
>
> [68] In my view, the controlled activity rule is more appropriately applied when the effects on the existing environment are considered without weighing the existing consents in the balance. To analyse the existing environment as excluding the scheme as it currently operates in these circumstances is also feasible. The Makotuku River can be assessed immediately upstream of the NZEL take in order to disregard the current scheme.

23. The High Court focused on the fact that in a re-consenting process, new consents are granted rather than renewed. In the context of the Hydroelectric Power Scheme, the High Court found that the Environment Court's reasoning for departing from the usual consideration of the existing environment as not including the Scheme in current operation was not particularly compelling:[19]

> … The fact that the take has been in place for nearly 100 years is less relevant when it is appreciated that the resource consents issued in 2003 were granted for a period of five years. The relevant consents have not been granted in perpetuity as recognised in the One Plan and the controlled activity rule. They are not in relation to permitted activities. The context is a re-consenting application and in my view the 2003 consents should have

- The controlled activity status given to renewal applications for hydroelectricity takes.

18 *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.

19 *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 at [66].

> been treated as having expired when determining the appeal. The context is different to the line of authorities on the existing environment that has evolved from the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Limited*, where it was determined that the existing environment may include activities in which a decision-maker has no control over, such as granted resource consents that are likely to be implemented.

24. Although the High Court concluded that the context was not sufficiently unusual as to warrant departing from the approach in *Port Gore*, it did not go so far as to say that it was incorrect to undertake that assessment as to whether any unusual circumstances exist. This reflects the position articulated in the commentary cited above, namely that in the context of a renewal application, the existing environment cannot include effects caused by the activities for which the renewal consents are sought, unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist.[20]

The existing environment in this context

25. While *Ngāti Rangi* related to water permits granted under the RMA, in our opinion the same approach is applicable to deemed permits.

26. Therefore, when assessing the effects of each application on the environment, the environment must be imagined as if the current water takes are not part of it (subject to the priority issues which we addressed in the following section of this advice). As such, it is necessary to consider all effects associated with the take and use of water for which consent is sought.

27. We note that the existing physical infrastructure associated with the deemed permits (insofar as it is authorised under section 9 of the RMA, either by not requiring resource consent, or as allowed under a resource consent from the relevant territorial authority) would form part of the existing environment.[21]

Application of the priority rule to the environment

28. The application of the "environment" in this situation is further complicated by the fact there are two separate applications for water from the same catchment being considered by the Council.

29. In *Fleetwing Farms Ltd v Marlborough District Council*,[22] the Court of Appeal held that the scheme of the RMA requires decision-makers to hear appeals in the order in which they are lodged. This principle has been upheld in multiple decisions by the courts,[23] and has commonly been referred to as the "priority rule". The normal priority rule means that, when it comes to processing two resource consent applications for the same resource under section 104 of the RMA, the first application received by the local authority must be heard and decided first.[24]

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20 Bal Matheson and Daniel Minhinnick "Water" in Derek Nolan (ed) *Environmental and Resource Management Law* (6th ed, LexisNexis, Wellington, 2018), at [8.43].

21 In the context of mussel farms, where the permits were to be treated as if they had expired it was considered that these should be treated as if the existing farms did not exist (*Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [34]). However this was a case where the infrastructure was also governed by the regional council.

22 *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257.

23 See, for example, *Geotherm Group Ltd v Waikato RC* [2004] NZRMA 1; *Kemp v Queenstown-Lakes DC* [2000] NZRMA 289.

24 *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257; *Geotherm Group Ltd v Waikato RC* [2004] NZRMA 1; *Unison Networks Limited v Hawke's Bay Windfarm Ltd* [2007] NZRMA 340. It is

30. In this case, there are not two applications for the same resource as was the case in *Fleetwing Farms.* In theory, both the Criffel and Luggate applications could be granted. However, there is still a question concerning the application of the priority rule when considering what constitutes the "environment" that each of the applications must be assessed against.

31. The Court of Appeal's reasoning in *Hawthorn* is clear that the decision-maker may only consider the effect of the application on activities which are currently authorised by a resource consent, where the resource consent is likely to be implemented (if it has not already been implemented), or which are permitted under the Plan.[25] In our opinion, applying the priority rule to the reasoning in *Hawthorn* means that a second-in-time application does not form part of the environment relevant to the determination on the first application.[26]

32. The impact of the priority rule on defining the 'environment' when determining a second-in-time application was considered by the High Court in *Unison Networks Limited v Hawke's Bay Windfarm Limited*. In *Unison*, two applications for windfarms were lodged within three weeks of each other, with the two resource consent applications being heard "back-to-back". The High Court, applying the decision in *Hawthorn*, found the priority rule should be applied and that the intended structures flowing from the first wind-farm proposal be properly regarded as part of the environment for the second wind-farm proposal.[27] The reasoning in *Unison* has been followed by the Environment Court in *Marlborough Aquaculture Limited v Marlborough District Council*.[28]

33. The issue of priority is not affected by whether the evidence relating to both applications is given at one combined hearing, or at separate hearings.[29] In practice, this means the decision-makers will be required to make a decision on the Criffel application before deciding the Luggate Irrigation application. Whether the Criffel application is granted or not will determine whether it should be regarded as part of the environment when determining the Luggate Irrigation application

34. In addition, in a situation where two applications for the same resource were lodged contemporaneously, the Environment Court has rejected an argument that the applications should be considered together as a package.[30]

35. Although the first in, first served approach determines the priority afforded to competing applications, there are no substantive rules in the RMA to determine the basis on which competing or contemporaneous applications should be decided. While matters in relation to section 7(b) in terms of the efficiency of the resource use will be relevant, each application must be assessed in light of the relevant RMA and plan provisions and be decided on its own merits. There is no ability to effectively compare competing applications to decide which is the more efficient use of water.

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also noted that Section 124A to 124C have a bearing on priority, when there are further applications in the "queue". However, these are not directly relevant in this situation.

25 *Queenstown District Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [80].

26 *Unison Networks Limited v Hawke's Bay Windfarm Ltd* [2007] NZRMA 340; *Marlborough Aquaculture Limited v Marlborough District Council* [2008] NZEnvC 332.

27 *Unison Networks Limited v Hawke's Bay Windfarm Ltd* [2007] NZRMA 340 at [66].

28 *Marlborough Aquaculture Limited v Marlborough District Council* [2008] NZEnvC 332.

29 *Marlborough Aquaculture Limited v Marlborough District Council* [2008] NZEnvC 332 at [10].

30 *Unison Networks Limited v Hastings District Council* [2006] NZEnvC 249 at [11]. This decision was affirmed by the High Court in *Unison Networks Limited v Hawke's Bay Windfarm Ltd* [2007] NZRMA 340.

Although not in a water allocation context, the High Court has confirmed that there is no obligation on a project to be "the best" option in terms of net benefit in order to comply with section 7(b).[31]

Application of section 104(3)(d)

36. We understand that some submitters have raised the question of the application of section 104(3)(d) to the processing of the two applications. In particular we understand that a question regarding section 104(3)(d) has arisen in relation to the Criffel application, which was limited notified to a smaller group of affected parties than the Luggate Irrigation application.

37. Section 104(3)(d) of the RMA provide:

> (3) A consent authority must not,-
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> […]
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> (d) grant a resource consent if the application should have been… notified and was not.

38. Case law is clear that section 104(3)(d) is applicable in situations where an application is processed by the consent authority on a non-notified basis, but should have been notified.[32] However, there is some uncertainty as to whether section 104(3)(d) requires a decision-maker to decline to grant a resource consent where:

    a. the application was limited notified, when it should have been should have been publicly notified; or

    b. the application was limited notified, but not all affected persons were identified and notified.

39. The approach taken by the Courts to section 104(3)(d) is outlined in more detail below.

Approach to section 104(3)(d)

40. As an initial point, section 104(3)(d) does not require the decision-maker at a substantive hearing to undertake a notification assessment for each application. Instead, section 104(3)(d) is only of relevance to decision-makers in scenarios where the decision-maker considers that the application has:

    a. a more than minor effect on the environment and was not publicly notified; or

    b. a minor or more than minor effect on any person who was not notified of the application.

41. As a result, although section 104(3)(d) contains a strong directive, it is not a relevant factor in many resource consent decisions.

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31 *Meridian Energy Limited v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477 (HC), at [120].

32 See, for example, *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, (2009) 15 ELRNZ 100, [2009] NZRMA 453 at [100]; *Mount Victoria Residents Association Inc v Wellington City Council* [2009] NZRMA 257 at [30], [46]; *Urban Auckland v Auckland Council* [2015] NZHC 1382 at [158]; *McMillan v Queenstown Lakes District Council* [2017] NZHC 3148 at [15].

Is section 104(3)(d) applicable to applications which were limited notified, but should have been publicly notified?

42. The application of section 104(3)(d) in its current form was considered by the Environment Court in *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council*.[33] The Environment Court rejected a submission from the applicant in that case that the requirements of section 104(3)(d) were met as long as one of the two forms of notification was undertaken. The Court commented that section 2AA of the RMA identifies two types of notification, "public" or "limited". The relevant provisions of the RMA[34] establish a process requiring a consent authority to determine if one of those two types of notification are required and then undertake that type of notification. The Court found the requirement to publicly notify cannot be satisfied by limited notification, as the two processes are two different things. As a result, the Court was of the view that section 104(3)(d) should be read as requiring a decision-maker to refuse to grant a resource consent where it finds an application was limited notified but should have been publicly notified.[35]

43. Therefore, in our opinion, section 104(3)(d) operates as a jurisdictional bar to the grant of a resource consent where the decision-maker finds the application was limited notified, when it should have been should have been publicly notified.

Is section 104(3(d) applicable to applications which were limited notified, where not all affected persons were identified?

44. There is some uncertainty as to whether section 104(3)(d) requires a decision-maker to decline to grant a resource consent where an application was limited notified, but not all affected persons were identified and notified. We are not aware of any clear authority from the Courts directly on this point. However, in several decisions the Environment Court has made comments which leave open the possibility that section 104(3)(d) can be used in when application was limited notified, but not all affected persons where notified. We briefly outline these decisions below:

45. In *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council*,[36] the appellant contended that, although the application was limited notified, it should have been notified to a wider group of people, or publicly notified.[37] Although the primary discussion of the Environment Court was focussed on whether section 104(3)(d) could be used when the application was limited notified, but should have been publicly notified, the Court expressly considered whether there were other persons affected by the application who were not notified, but should have been notified.[38] However, the Court concluded the regional council in that case was entitled to reach its conclusion concerning notification and thus section 104(3)(d) was not engaged.[39]

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33 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147.

34 RMA, sections 95A and 95B.

35 *Maungaharuru-Tangitu Trust v Hawke's Bat Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [200].

36 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147.

37 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [197].

38 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [207].

39 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [207]-[208].

46. The Environment Court decision in *Fright v Christchurch City Council*,[40] also appears to suggest that failure to notify all affected persons as part of the limited notification process is within the scope of section 104(3)(d).

47. When section 104(3)(d) is read incorporating the full definitions of public notification and limited notification,[41] it reads:

> A consent authority must not grant a resource consent if the application should have been publicly notified, or notice of the application served on any person affected by the application, and was not.

48. A literal reading of section 104(3)(d), incorporating the full definitions of public notification and limited notification, supports the view that the section is engaged where an application is limited notified, but not all affected persons are notified. This is because, in the event the decision-maker finds that not all affected persons were notified of the application, those affected persons should have been served with notice of the application,[42] but were not.

49. Therefore, in our opinion, it is arguable that section 104(3)(d) operates as a jurisdictional bar to the grant of a resource consent where the decision-maker finds the application was limited notified, but not all affected persons were notified. However, as noted above, there is no definitive Environment Court authority on this point.

Application of section 104(3)(d) in this case

50. The Hearing Commissioners will need to be satisfied that section 104(3)(b) is met for both applications.

51. We do not consider that this requires (or entitles) the Hearing Commissioners to directly re-visit the notification decision.

52. The assessment of effects, and factual findings on the effects, will be relevant to the Commissioner's decision on this issue. We note in particular that the Criffel application was lodged first in time and so when considering the effects of this application, the Commissioners will not be able to consider any effects associated with the exercise of any consent granted to Luggate Irrigation (beyond the expiry of the deemed permits).

Wynn Williams

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40 *Fright v Christchurch City Council* [2018] NZEnvC 111. See also, *Craddock Farms Limited v Auckland Council* [2016] NZEnvC 51 at [18].

41 See RMA, s 2AA(2).

42 See RMA, s 95B(9).