

**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 E – Infrastructure &  
Subdivision; Cultural Values.

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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 Sites and Areas of Significance to Māori (**SASM**) overlays, and in particular the Wai Taoka overlay as this covers 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, had provided a statement of evidence regarding the RDR scheme and the process involved with the ongoing maintenance, repair, and replacement of the rock weir as part of Hearing D – Open Spaces, Hazards and Risk and Natural Environment. Mr McCormick spoke to these submissions at Hearing D and does not intend to submit further evidence nor speak to his submissions again as his previous evidence remains relevant to this hearing.

### **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. This issue was traversed by me in my legal submissions associated with Hearing D but for completeness, I outline my submissions on this matter again. I note that Ms Vella disagreed with me in respect to Council's jurisdiction to impose rules in riverbeds but we maintain our position as set out above and below where there is no clear distinction in the activity being regulated (i.e. earthworks).<sup>1</sup>
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

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<sup>1</sup> Legal Submissions of Counsel on Behalf of Timaru District Council – Hearing D (4 November 2024), Jen Vella at [31] – [37].

(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>2</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>3</sup>
7. The rules which are proposed in connection with the SASM overlays relate to earthworks which is the same subject matter as is addressed in RDRML’s Canterbury Regional Council resource consent attached at Annexure A. 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. For those reasons, I submit that there is no clear jurisdiction for Council to create rules in respect of the bed of the Rangitata River.

## Merits

8. Even if Council’s proposed planning provisions in respect of riverbeds are lawful, I question whether it is appropriate for the overlays to apply to the bed of the Rangitata River. The merits discussed below are similar to those in my submission for Hearing D but for completeness I repeat them here.

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

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

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<sup>2</sup> *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2018] NZCA 573 at [75].

<sup>3</sup> *Wanaka Landfill Limited v Queenstown-Lakes District Council* [2010] NZEnvC 299 at [22]-[24]; *R v Woolley* [2014] NZCA 178 at [34]-[39].

- (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

10. However, the regional council has similar functions in respect of land at a regional level. Under s 30(1)(b) RMA 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.
11. 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*

12. 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>4</sup> In my submission, the doubling up of rules between Council's plan and Canterbury Regional Council's plan should be avoided.<sup>5</sup> I submit that

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<sup>4</sup> *R v Woolley* [2014] NZCA 178 at [34] and [41] – [42].

<sup>5</sup> *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2018] NZCA 573 at [73] - [74].

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).

13. 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 maintenance and reconstruction of its existing rock weir.<sup>6</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.

## Section 42A Report

14. Ms White's s 42A Report recommends that:

- (a) The Wai Taoka overlay is effectively merged into SASM-R1.1;
- (b) The following is included in SASM-R1.1 PER-1:<sup>7</sup>

*The activity is either:*

...

3. earthworks authorised by the Canterbury Regional Council for maintenance of existing rock weirs and river works to the same level and extent as occurring as at 1 January 2000;

- (c) SASM-R1.1 PER-2 is amended to provide that:

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<sup>6</sup> Resource Consent CRC011239.

<sup>7</sup> Text in green in additions suggested by Ms White and text in red is suggested deletions.

Except where an Archaeological Authority has been obtained from Heritage New Zealand Pouhere Taonga, the earthworks are undertaken in accordance with the Accidental Discovery Protocol ~~commitment form~~, contained within APP4 — ~~Form confirming a commitment to adhering to an~~ Accidental Discovery Protocol, ~~has been completed and submitted to Council, at least 2 weeks prior to the commencement of any earthworks.~~

15. RDRML generally supports the changes proposed by Ms White referred to at subparagraphs 14 (a) and (b) above.
16. Whilst the proposed change at paragraph 14 (c) goes some way towards addressing RDRML's concerns regarding the application of an accidental discovery protocol to earthworks in the bed of a river (as a form is no longer required to be submitted in advance), my submission is that it is inappropriate to have an accidental discovery protocol that applies to rock weir related earthworks in a riverbed.
17. Turning to Ms White's suggested changes to the accidental discovery protocol, I consider that these changes still do not make it so that the protocol lends itself to apply to earthworks in a riverbed. The accidental discovery protocol contemplates that where earthworks in a riverbed uncover potential archaeological material, the site would be secured (by being 'taped off') to ensure material is left undisturbed in order to allow Heritage NZ to confirm whether the material is archaeological.
18. The Rangitata River is a dynamic environment in the sense that the river is in a constant state of flux. This is illustrated by the various figures throughout Mr McCormick's evidence for Hearing D where different water levels and flow

rates are represented.<sup>8</sup> Areas of the riverbed are continuously covered by flowing water making it impracticable and somewhat impossible for sites to be 'secured' (particularly by tape) as any archaeological material discovered would be washed away by the river's current before Heritage NZ is able to attend the site.

19. Furthermore, as per Mr McCormick's evidence, the maintenance, repair and replacement of RDRML's rock weir is undertaken by reinstating dislodged rocks and infilling with gravel.<sup>9</sup> The earthworks undertaken by RDRML generally involves reusing already disturbed material in which there would be no archaeological material as this would have been discovered during previous maintenance, repair or replacement projects. Furthermore, any archaeological material in the area where RDRML has consent to undertake earthworks would have been found long ago as RDRML has since at least 1945 (this being the date the RDR was completed) being undertaking earthworks in this area.<sup>10</sup>

## **Relief**

20. RDRML seeks the following relief in descending order of priority:
  - (a) that the SASM overlays are removed from the bed of the Rangitata River; or
  - (b) that the SASM provisions are amended to provide that, with respect to the bed of the Rangitata River, the SASM overlays are for information only and do not have any rules attaching to them. I suggest the following wording:

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<sup>8</sup> Statement of Evidence of Tony McCormick on behalf of Rangitata Diversion Race Management Limited – Hearing D dated 25 October 2024.

<sup>9</sup> Statement of Evidence of Tony McCormick on behalf of Rangitata Diversion Race Management Limited – Hearing D dated 25 October 2024 at [12].

<sup>10</sup> RDRML is authorised by the Canterbury Regional Council land use consent CRC011239 to disturb the bed of the Rangitata River 1km up and downstream of the rock weir.

*Notwithstanding that the overlays may cover the riverbed, the provisions of this section [Sites and Areas of Significance to Māori] do not apply to the bed of any river and are for information only; or*

- (c) the inclusion of a specific rule providing that maintenance, repair or replacement of existing rock weirs is a permitted activity in the SASM provisions as outlined below:

| <b>SASM-R9</b>           | <b>Existing rock weirs</b>        |  |
|--------------------------|-----------------------------------|--|
| <b>Wai Taoka overlay</b> | <b>Activity Status: Permitted</b> | <b>Activity status when compliance not achieved: Not applicable.</b> |

- (d) that the amendments suggested by Ms White in her s 42A report are adopted with following additional amendment to SASM-R1.1 PER-2:

Except where an Archaeological Authority has been obtained from Heritage New Zealand Pouhere Taonga, the earthworks are undertaken in accordance with the Accidental Discovery Protocol contained within APP4 Accidental Discovery Protocol.

*This requirement does not apply if the earthworks are being undertaken in or on the bed of any river and are associated with the maintenance, repair or replacement of rock weirs.*


## Conclusion

21. Council lacks 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.



22. Notwithstanding this jurisdictional argument, I submit that it is inappropriate to apply the SASM 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 30<sup>th</sup> day of January 2025



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Vanessa Jane Hamm / Cory Lennon Lipinski

Counsel for Rangitata Diversion Race Management Limited

## Annexure A

10/2/24, 3:13 PM

Consent search | Environment Canterbury

## Details for CRC011239

|                                    |   |             |   |
|------------------------------------|---|-------------|---|
| Record number                      | CRC011239   | Client name | Rangitata Diversion Race Management Limited |
| Consent location                   | Rangitata River Bed, RDR KLONDYKE   | Status      | Issued - Active                             |
| To                                 | to deposit material on, excavate and disturb the bed of the Rangitata River, and divert water within the riverbed, for the purpose of maintaining and reconstructing the rock weir, Klondyke intake structure and causeway. |             |   |
| Commencement date                  | 12 Feb 2005   |             |   |
| Date this record number was issued | 12 Feb 2005   |             |   |
| Permit type                        | Land Use Consent (s13)  |             |   |
| Record type                        | New Consent   |             |   |
| Expiry date                        | 12 Feb 2040   |             |   |

**Please note** there has been a change to how we represent the date fields. The 'Date this record number was issued' is the date this version of the consent was issued. The 'Commencement date' is when the original version of this consent was issued as per [s116 of the Resource Management Act 1991](#).

- **1** The average height of the rock weir shall not exceed 365.5 metres above mean sea level (the height of the concrete intake caissons).
- **2** The reach of riverbed disturbed by maintenance works shall be restricted to 1000 metres upstream and 1000 metres downstream of the rock weir.
- **3** The Canterbury Regional Council shall be notified within 48 hours of exercising this consent on each and every occasion that his consent is exercised.
- **4** The activities shall not significantly impede the passage of fish in the main stem of the Rangitata River.
- **5** The term of this consent shall be 35 years.
- **6** Notwithstanding the provisions of section 125 of the Act, this consent may be first exercised up to 35 years after the date of commencement of the consent. If at any time the consent holder does not exercise this consent for a continuous period of two years, the consent shall not be cancelled under section 126 of the Act.

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