Before the Hearings Panel
At Wellington

Under	the Resource Management Act 1991 (**RMA**)
In the matter of	Proposed Natural Resources Plan for the Wellington Region (Hearing Stream 5)

Wellington Regional Council legal submissions for Hearing Stream 5: Beds of Lakes and Rivers, Wetlands and Biodiversity, Discharges to Land

Date: 23 March 2018

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MAY IT PLEASE THE PANEL:

Introduction

1 These submissions address the legal framework relevant to the subject matter of Hearing Stream 5. Hearing Stream 5 covers Beds of Lakes and Rivers, Wetlands and Biodiversity, and Discharges to Land.

2 As with the legal submissions presented at the start of other Hearing Streams, these submissions provide an overview of the main legal issues identified through preparation of the section 42A Reports. It is anticipated that the Panel will have other specific questions arising throughout the hearing which can either be answered orally, or through written legal submissions in reply.

3 These submissions cover the following topics:

3.1 The structure of the Wellington Regional Council (**Council**) presentation.

3.2 Caselaw commentary on terms used by the Council officers.

3.3 The relevant case law on the meaning of 'offsetting' (compared to mitigation).

3.4 Consistency with the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (**NES-PF**).

3.5 Whether a drain is a 'river' under the RMA.

4 We address each issue in turn below.

COUNCIL PRESENTATION

5 Hearing Stream 5 consists of three topics: Beds of Lakes and Rivers, Wetlands and Biodiversity, and Discharges to Land. The provisions covered by the three section 42A Reports are as follows:

Objective	**Policy**	**Rules**	**Methods**	**Report**
No one objective is specific to this topic. The following are relevant: O5, O14-16, O17, O19, O20, O25-O30, O31-O35	P102-104, P106	R112-R135	M14	Beds of Lakes and Rivers
O18, O28-O31, O35	P22, P23, P31-43, P105	R104-R111	M7, M9, M20, 21	Wetlands and Biodiversity
O46, O49	P84, P85, P91-P96	R70-R91, R93	M17	Discharges to Land

Beds of Lakes and Rivers

6 Ms Pam Guest will present on Beds of Lakes and Rivers. She prepared the section 42A Report on Beds of Lakes and Rivers.

7 Ms Guest is supported by Mr Paul Denton, Ms Heidi Andrewartha, Dr Michael Greer and Mr Dave Grimmond:

7.1 Mr Denton (Senior Policy Advisor): Mr Denton has considered the impact of the NES-PF on the wetlands and biodiversity sections of the proposed Plan. In particular, where there is a conflict or duplication between the NES-PF and the Proposed Plan. Mr Denton has provided input into the section 42A report (as opposed to a separate brief of

evidence). However, he will be available for questioning by the Panel.

7.2 Ms Andrewartha (Resource Management Consultant): Ms Andrewartha has provided the section 42A assessment of activity rules R112-R120, R124 -R126 and R129-R135. Ms Andrewartha has provided input into the section 42A report (as opposed to a separate brief of evidence). However, she will still be available for questioning by the Panel.

7.3 Dr Greer (Senior Environmental Scientist): Dr Greer has provided the expert statement on the ecological value of drains and highly modified watercourses. This statement has been relied upon by Ms Guest in completing her section 42A report and was included as Appendix F to that report.

7.4 Mr Grimmond (Greater Wellington Regional Council Economist): Mr Grimmond has provided the expert statement on the environmental and economic costs and benefits of the proposed Plan stream piping provisions. This statement has been relied upon by Ms Guest in completing her section 42A report and was included as Appendix F to that report.

Wetlands and Biodiversity

8 Ms Guest will also present on wetlands and biodiversity. She prepared the section 42A Report on Wetlands and Biodiversity.

9 Ms Guest is supported by the expert evidence of Mr Denton, Dr Philippa Crisp, Mr Alton Perrie, Dr Adam Canning and Mr Nikki McArthur.

9.1 Mr Denton (Senior Policy Advisor): Mr Denton has considered the impact of the NES-PF on the wetlands and biodiversity sections of the Plan, in particular where there is a conflict or duplication between the NES-PF and the proposed Plan. Mr Denton has provided input into the section 42A report as opposed to a separate brief of evidence, however, he will be available for questioning by the Panel.

9.2 Dr Crisp (Council Team Leader, Terrestrial ecosystems and quality): Dr Crisp has provided the expert statement on wetland types, wetland health, and wetlands included in Schedules A and F. This statement has been relied upon by Ms Guest in completing her section 42A report and was included as Appendix H to that report.

9.3 Mr Perrie (Council Senior Environmental Scientist): Mr Perrie has provided the expert statement on fish spawning, significant rivers and lakes (including rivers and lakes included in Schedules A and F). This statement has been relied upon by Ms Guest in completing her section 42A report and was included as Appendix H to that report.

9.4 Dr Canning (Freshwater Ecologist): Dr Canning has provided the expert statement on important trout fishery rivers and spawning waters (criteria for, and rivers included in, Schedule I). This statement has been relied upon by Ms Guest in completing her section 42A report.

9.5 Dr McArthur (Ecologist): Dr McArthur has provided the expert statement on indigenous bird habitat. This statement has been relied upon by Ms Guest in completing her section 42A report and was filed in advance.

Discharges to Land

10 Mr Barry Loe has prepared the section 42A Report on Discharges to Land.

DEFINITIONS

11 As we have done for previous Hearing Streams, we consider that the Panel may find it helpful for us to provide case law on the following terms as they are relevant to this hearing:

11.1 'Restore' (used in paragraphs 162 to 166 of Ms Guest's section 42A Report on Wetlands and Biodiversity).

11.2 'Practicable' and 'reasonably practicable' (used throughout Ms Guest's section 42A Report on Wetlands and Biodiversity and in paragraph 268] of Ms Guest's section 42A Report on Beds of Lakes and Rivers).

11.3 'Manage' (used throughout Ms Guest's section 42A Reports).

12 In addition, at **Appendix 1**, we provide a summary of all of the terminology we have previously defined for the Panel.

Restore

13 The term 'restore' has not been specifically considered in the resource management context, although it has been raised without adverse or positive comment in resource management cases.

14 Outside of the resource management context, the term 'restore' was considered by the New Zealand Supreme Court in *Mobil Oil New Zealand Ltd v Development Auckland Ltd (Formerly Auckland Waterfront Development Agency Ltd)*.[1] The case dealt with the requirement to restore premises to a clean and neat condition at the end of a lease. The Court commented that:

> … the obligation to "restore the Demised Premises" obviously went beyond mere delivery up of the demised premises (that is returning them to the lessor) and necessarily envisaged the carrying out of work (which was required to be to the satisfaction of the lessor)...[2]

15 In the United Kingdom case of *R v Birmingham & Gloucester Railway*,[3] the obligation to 'restore' a road was to make it as nearly as possible identical to the road before the interference.

16 In terms of dictionary definitions, the Concise Oxford English Dictionary defines 'restore' as: [4]

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[1] *Mobil Oil New Zealand Ltd v Development Auckland Ltd (Formerly Auckland Waterfront Development Agency Ltd)* [2016] NZSC 89 at [72].

[2] At [72]

[3] *R v Birmingham & Gloucester Railway* 2 QB 47 in Stroud's Judicial Dictionary 9th Ed.

[4] The Concise Oxford English Dictionary (2009) Oxford University Press.

> (v.) **1** bring back (a previous right, practice, or situation); reinstate. > return to a former condition or opinion
>
> **2** repair or renovate
>
> **3** give (something stolen or removed) back to the original owner.

17 The New Zealand Oxford Dictionary defines 'restore' as: [5]

> (v.) **1** bring back or attempt to bring back to the original state by rebuilding, repairing, repainting, amending, etc.
>
> **2** bring back to health, etc.; cure
>
> **3** give back to the original owner etc.; make restitution of
>
> **4** reinstate; bring back to dignity or right
>
> **5** replace; put back; bring back to a former condition.

18 The above commentary that the meaning of 'restore' is not to leave the thing as it is. It requires some form of action, which will return the subject of the action to its original condition, or as close to that original condition as possible.

Practicable

19 Our legal submissions in reply for Hearing Stream 1 (11 August 2017) have already addressed the meaning of the word 'practicable' and the phrase 'reasonably practicable'. We have repeated our submissions here as the terms are relevant to this Hearing Stream as well.

20 The word 'practicable' is used in multiple places throughout the RMA. It is used in respect of timing (ie 'as soon as practicable' in section 32), in respect of action (ie in terms of 'taking all practicable steps' (new section 18A)), in respect of options identification ('if practicable' in section 32) or in the sense of best practicable options (in sections 16, 70 and 108, with its own clearly defined meaning in section 2). The term 'reasonably practicable' is also used throughout the RMA.

21 'Practicable' and 'reasonably practicable' are two different, although closely related, concepts.

22 The Panel has been previously referred to the case of *New Zealand Airline Pilots Association Industrial Union of Workers Incorporated v*

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[5] The New Zealand Oxford Dictionary (2005) Oxford University Press.

Director of Civil Aviation and Wellington International Airport Limited and its interpretation of 'practicable'.[6] The Court stated that:[7]

> The word "practicable" has a well-known meaning, as confirmed by this Court, as something that is feasible or able to be accomplished according to known means and resources; it links the feasibility or practicality of something to the availability of resources. When dealing with the construction of an aerodrome runway, "practicable" must refer to what is actually able to be constructed, importing considerations of practical issues such as the nature of the site and surrounding physical environment, available engineering technology and potential construction options.

23 The Court also commented that:[8]

> The meaning of "practicable" must be coloured by its legislative text and context.

24 In terms of the addition of 'reasonably' to a practicable option, the Court comments that:[9]

> … the word "practicable" imports a stricter or higher standard than "reasonably practicable," which is seen as affording greater latitude to adopt a cost-benefit analysis.

25 This decision was appealed to the Supreme Court, and a decision has been released. The Supreme Court commented on the meaning of practicable:[10]

> "Practicable" is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the

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[6] *New Zealand Airline Pilots Association Industrial Union of Workers Incorporated v Director of Civil Aviation and Wellington International Airport Limited* [2017] NZCA 27, referred to in HS1 Reply Legal Submission at [31]

[7] At [52], [53] and [63].

[8] *New Zealand Airline Pilots Association* at [51].

[9] *New Zealand Airline Pilots Association* at [51].

[10] *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc* [2017] NZSC] 199 at [35]

> relevant airport, including the context in which the request for the Director's acceptance is made.

26 The Supreme Court did not specifically comment on the qualifier 'reasonably'.

Manage

27 Our legal submissions for Hearing Stream 4[11] (12 January 2018) have already addressed the meaning of the phrase 'manage'. We have repeated our submissions here as the terms are relevant to this Hearing Stream as well.

28 The most relevant case law guidance on the term 'manage' comes from the Hazardous Substances and New Organisms Act 1996 regime. In *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, the Court observed:[12]

> When there is a reference, as in this statute, to "managing effects" the position becomes more obscure. Whatever the purity of concepts, it is possible within the ordinary use of language to say one can "manage" adverse effects inter alia by preventing those effects. If an official is required by statute to "manage" the effects of tuberculosis in New Zealand one avenue for such "management" of effects - and it might well be thought the prime avenue - is to prevent the disease arising. The official can of course also "manage" by seeing to a stock of vaccines, arranging hospitalisation in isolation, arranging detection screening and the like; but it does not strain language to say one way of manging the adverse effects is to ensure the disease does not arise.
>
> In that light, I construe s7 reference to "managing adverse effects" as including managing by reduction of risk such effects will ever arise. "Management" of effects foes to risk reduction as well as to damage control…

29 Manage can therefore be a reference to a range of actions including, but not limited to, avoidance or reduction of the relevant effect, harm or risk.

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[11] At [10]

[12] *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213at [156]-[157].

OFFSETTING AND MITIGATION

30 The distinction between offsetting and mitigation has been raised in the section 42A Report on Wetlands and Biodiversity, particularly from paragraph 411, where the Report discusses the mitigation hierarchy for protecting biodiversity. Ms Guest states that:[13]

> The mitigation hierarchy is considered to be one of the most important procedural instruments for protecting biodiversity in development (Brown, 2016). The order of the mitigation hierarchy is specific and critical. Avoidance is the first preference. Minimising the impacts of development, followed by remediation of any harm are the second and third preferences, with offsetting to be considered only if the prior three steps have been applied and are not sufficient to prevent biodiversity losses.

31 Ms Guest points out that the mitigation hierarchy is central to Policies P32, P40- P45 in the Plan. However, the meaning of offsetting in the mitigation hierarchy, and its distinction from minimise or mitigate, has been the subject of some confusion. Ms Guest sets out the meaning of offset, and how it compares with the meanings of minimise and mitigate. She correctly notes that an important distinction between mitigation and offsetting is that mitigation must occur at the point of impact, whereas offsetting is a process that seeks to counter-balance any unavoidable impacts of development activities on biodiversity by enhancing the state of biodiversity elsewhere.

32 To assist the Panel, we have prepared a summary of the case law on the meaning of offsetting, and how it compares with the phrase 'offsetting'.

33 The leading case on offsetting is the 2014 High Court decision of *Royal Forest and Bird v Buller District Council*.[14] In that case, the High Court considered an appeal from the Environment Court on an interim decision concerning consents to establish an open cast mine on the Denniston Plateau. The applicant had proposed a mitigation and remediation programme, but accepted that the programme would not completely avoid or mitigate the adverse effects of the mining. To address this, the application also offered to carry out additional

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[13] Section 42A Report on Wetlands and Biodiversity at [411].

[14] *Royal Forest and Bird v Buller District Council* [2013] NZHC 1346.

biodiversity enhancement, to offset the adverse environmental effects and to result in a net conservation gain. The issue before the Court was not whether offsetting could be taken into account, but when and how it could be taken into account under the RMA.

34 The High Court made a clear statement that the additional biodiversity enhancement *offset* the adverse environmental effects, but it did not *mitigate* those effects, providing the following commentary on the distinction between offset and mitigate: [15]

> The term "offset" naturally has a different normal usage from the term "mitigate". The term "offset" carries within it the assumption that what it is offsetting remains. So, for example, if there is an adverse effect that continues, but those adverse effects can be seen as being offset by some positive effects.
>
> …
>
> The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

35 The High Court determined that offsets can be viewed as a positive environmental effect, but not as a reduction or mitigation of an adverse effect. The final view of the Court was that:[16]

> [T]he RMA keeps separate the relevant considerations of mitigation of adverse effects caused by the activity for which resource consent is being sought, from the relevant consideration of the positive effects offered by the applicant as offsets to adverse effects caused by the proposed activity.

36 *Royal Forest and Bird v Buller District Council* was preceded by the 2012 decision of *Day v Manawatu-Wanganui Regional Council*, in which the Environment Court made the following comments on offsetting: [17]

> … [W]e do not consider that offsetting is a response that should be subsumed under the terms *remediation* or *mitigation* in the POP in such a way. We agree with the Minister that in developing a planning framework, there is the opportunity to clarify that offsetting is a possible response following minimisation - or mitigation - at the point of impact.

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[15] At [54] and [72].

[16] *Royal Forest and Bird v Buller District Council* at [74] and[122].

[17] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

37 Following *Royal Forest and Bird v Buller District Council*, in 2014, the Environment Court briefly considered the issue in *P & I Pascoe Limited.*[18] The case dealt with an application for a new cleanfill site, which would result in the stopping of an existing stream. To offset the effects, the applicant proposed fish rescue and transfer of the inhabitants, and the formation of a wetland at an alternative site.

38 The Environment Court observed that the removal of the stream would mean the permanent loss of that actual and potential aquatic habitat, insignificant and degraded as it was. In terms of offsetting that adverse effect, the Court commented that:[19]

> For the sake of clarity, on this point we do not take account of the proposed off-site compensatory work - that is not to be regarded as *mitigation* in considering the extent of degree of adverse effects.

39 In making its final decision, the Environment Court continued the distinction made by the High Court in *Royal Forest and Bird v Buller District Council* between adverse effects and the positive effects of the proposal, finding that:[20]

> [W]e are satisfied that the adverse effects of the proposal could be managed to the point where they are acceptable, and that the positive effects of the proposal will outweigh the disadvantages that will remain.

40 In *Minister of Corrections v Otorohanga District Council*[21] the Court commented on the distinction between 'off-set' and 'compensation'. The Court cited the decision of the Board of Inquiry in *Transmission Gully*[22] (set out below) with approval:[23]

> Offsetting which related directly to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.

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[18] *Re P & I Pascoe Limited* [2014] NZEnvC 255.

[19] At [86].

[20] *Re P & I Pascoe Limited* at [135].

[21] *Minister of Corrections v Otorohanga District Council* [2017] NZEnvC 213

[22] Final decision of the Board of Inquiry into the New Zealand's Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072) at [210]

[23] *Minister of Corrections* at [27]

PLANTATION FORESTRY (NES-PF)

41 Paragraph 98 of the section 42A Report on Wetlands and Biodiversity, and paragraph 822 of the section 42A Report on Beds of Lakes and Rivers provides commentary on the provisions in the proposed Plan which conflict or duplicate the NES-PF. The section 42A Report of Wetlands and Biodiversity also provides recommendations to the Panel for the changes required to remove conflict or duplication between the proposed Plan and the NES-PF.

42 To assist the Panel, we provide below a summary of the sections of the RMA, and the regulations in the NES-PF, which determine how such conflict or duplication between the NES-PF and the proposed Plan are defined, and how they should be dealt with by the Panel.

43 Section 44A of the RMA sets out what the Council should do if the proposed Plan contains a rule that duplicates or conflicts with a regulation in the NES-PF. Where there is a duplication or conflict, sections 44A(3), (4) and (5) of the RMA require that the Council must amend the proposed Plan to remove the duplication or conflict, without using a Schedule 1 process.

44 Section 44A(2) of the RMA (supported by section 43B(2)(a) of the RMA) specifies that a rule in the proposed Plan conflicts with a provision in the NES-PF if:

44.1 the rule prohibits or restricts an activity that the NES-PF permits or authorises, and the NES-PF does not specifically say a rule may be more stringent, or

44.2 the rule in the proposed Plan is more lenient than a provision in the NES-PF and the NES-PF does not expressly specify that a rule may be more lenient than the provision in the NES-PF.

45 Section 43B of the RMA states that a rule that is more stringent than a NES prevails over that NES, provided the NES specifically says that a rule can be more stringent.

46 Regulation 6 of the NES-PF provides that a rule in the proposed Plan may be more stringent that the NES-PF in three circumstances:

46.1 if the rule gives effect to the NPS-FM, or Policies 11, 13, 15 and 22 of the New Zealand Coastal Policy Statement (**NZCPS**),

46.2 if the rule recognises and provides for the protection of outstanding natural features and landscapes from inappropriate use and development or significant natural areas, or

46.3 if the rule recognises a unique and sensitive environment, as listed in 6(3)(a) - (d) if the NPS-PF.

47 Rules in the proposed Plan cannot be more lenient than the NES-PF, as the NES-PF does not expressly specify that a rule may be more lenient.

48 The section 42A Report of Wetlands and Biodiversity identifies where there is a conflict or duplication, and where a rule is more stringent than the NES-PF. Where this has occurred, there is then an assessment as to whether this rule meets the requirements of regulation 6. Where the rule is either in conflict, or a duplication, or is more stringent but not allowed under regulation 6, there are recommended amendments to bring the proposed Plan into compliance with sections 43B and 44A of the RMA, and regulation 6 of the NES-PF.

49 While it is acknowledged that the Council could, in reliance on section 44A of the RMA, amend the proposed Plan outside this process (and without using a Schedule 1 process), the Council's preference is for the Panel to make any changes required to the proposed Plan. In the Council's view, this will be more efficient and result in a more cohesive outcome than the proposed Plan being subject to two amendment processes that are being run in parallel.

ARTIFICIAL DRAINS AND THE RMA

50 Ms Guest raises the point (at paragraph 73 of the section 42A Report on Beds of Lakes and Rivers) that some confusion has arisen over whether an artificial watercourse (including artificial drains) is subject to the controls on waterbodies and rivers under the RMA.

51 'River' is defined in section 2 of the RMA as:

> means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal)

52 'Water body' is defined in section 2 of the RMA as:

> means fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area

53 The case law is clear that an artificial watercourse is subject to the controls under the RMA. We discuss the case law below.

54 *Johnston v Dunedin City Council* dealt with the application of section 230 of the RMA, regarding the need to provide an esplanade reserve (strip of land not less than 20m along the bank of any river) when subdividing land.[24] The applicant asserted that 'Silverstream' (the relevant waterbody) was not a river, and therefore section 230 of the RMA did not apply.

55 It was not disputed by either party that Silverstream was a continually flowing body of fresh water with a bed with an average width of 3m or more. However, it was contended by the applicant that Silverstream was an artificial watercourse and not a river, because Silverstream had been diverted from its original position through the cutting of a channel to stoop Silverstream meandering and causing flooding. The Court agreed that Silverstream had been diverted through an artificial channel, but

[24] *Johnston v Dunedin City Council* PT Dunedin C64/94, 6 July 1994

disagreed that this meant that Silverstream was not a river. The Court found that:[25]

> The waters within that channel or diversion remain part of the continually or intermittently flowing body of fresh water.

56 In *Federated Farmers of New Zealand (North Canterbury Province Inc) v Canterbury Regional Council* the Court considered an application for a declaration that for the portion where the water of the Cust flows through a manmade channel (Cust main drain) it was not a river and therefore was not subject to control as to minimum flows in the Proposed Waimakariri River Regional Plan (the plan). [26]

57 The key argument of Federated Farmers was that although there was a flow of water in the Cust main drain, it was not in a water body. As set out above, 'Water body' is defined in section 2 of the RMA as:

> fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof that is not located within the coastal marine area.

58 The relevant portion of the definition was to the case was 'fresh water...in a river'. It was not in dispute that the water within the Cust main drain was fresh water.

59 The issue became whether the Cust main drain was a modified watercourse, or an artificial water course in the context of the RMA's definition of 'river'. The Court found that it was a modified watercourse, stating that: [27]

> Of the two available categories of watercourse that the Cust main drain could fall within in the [RMA], the only one that is consistent with the purpose and wording of the [RMA] is as a modified watercourse. Finding in favour of an artificial watercourse would have unforeseen and unworkable consequences.

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[25] At page 17.

[26] *Federated Farmers of New Zealand (North Canterbury Province Inc) v Canterbury Regional Council* EnvC Christchurch C83/2002, 11 July 2002 at [2]

[27] *Federated Farmers of New Zealand (North Canterbury Province Inc) v Canterbury Regional Council* at [46].

60 *MacLaurin v Gisborne District Council* also considered the issue of whether a drain was a river as defined in the RMA. [28] The drain was described in the decision as follows:[29]

> The flow from the spring enters a system of pipes and tanks, with the overflow from this system forming a small channel. …
>
> Prior to the abstractions and modifications of the watercourse, there is likely to have been a natural watercourse flowing from the spring. Currently, this is more in the nature of a drain. The channel has been extensively modified through straightening, repetitive weed control, stock grazing and other land management practices that have significantly reduced the ecological value of the watercourse. I understand that the flow in this channel is ephemeral, with the channel between the spring and the Taruheru River running dry for extended periods most years. It is unclear to me whether the ephemeral nature of the water flow is a result of the existing abstractions.

61 The Court considered the issue and concluded that the drain was a modified watercourse, and therefore a river as defined in the RMA. The Court stated: [30]

> We are satisfied, on the evidence we have heard, that the drain is a modified watercourse. Ms Freeman told us, that prior to the abstractions and modifications, there was likely to have been a natural watercourse flowing from the spring. While there has been extensive modifications and currently "it is no more than a drain" according to Ms Freeman, it is nevertheless intermittently, a body of freshwater. It therefore comes within the definition of "river" in the Act.

62 The cases above were considered in *Warburton v Porirua City Council*, where the court stated[31]:

> While we have considered the outcome of those cases in each instance, they are of little assistance in determining whether the Watercourse might be a modified or an artificial watercourse in this case. We do not think that any of the cases laid down an overarching test which determines whether or not any particular watercourse is modified or artificial. Ultimately that will be determined by facts and context in any particular case. There will be some instances where a watercourse is clearly modified and others where it is equally clearly artificial. It is the cases which fall in between which cause the problem.

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[28] *MacLaurin v Gisborne District Council* EnvC Auckland A159/2003, 18 September 2003

[29] At [52].

[30] At [57].

[31] *Warburton v Porirua City Council*[2013] NZEnvC 179 at [39] and [40

> This case does not fall into the grey area between modified and artificial. The evidence is overwhelming that the Watercourse is an artificial watercourse. 91.3% of it is piped and significant parts of it were established quite independently from the original natural watercourses which Ms Anderson contended had been … basically piped beyond recognition [13] in any event. We concur with that description. The Watercourse is a piped urban storm water reticulation system which has subsumed the previously existing natural watercourses in the Catchment.

63 As commented above, we consider that the case law discussed above is clear that an artificial watercourse is subject to the controls under the RMA.

Date: 23 March 2018

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Kerry Anderson/Kate Rogers
Counsel for Wellington Regional Council

APPENDIX 1

DEFINITIONS / ADVICE FROM REGIONAL PLAN HEARINGS 1 - 4

Term	Definition - Advice
Avoid (Hearing Stream 1)	Means do not allow or prevent the occurrence of. In isolation, 'avoid' sends a clear signal that activities which result in the effects to be avoided will not be allowed.[32] However, the use of the word avoid must be considered in the context and framework in which it is used, and does not necessarily always result in a blanket prohibition. In *New Zealand King Salmon* the Court considered that 'avoid' in the NZCPS meant 'do not allow' or 'prevent the occurrence of', it considered that it was possible for minor and transitory effects to be acceptable even where the avoid language was used:[33] Note: Discussed further below under the term 'minor and trasitory'.
Discharge and (Hearing Stream 4)	Discharges are addressed by section 15 of the RMA. That is, generally no person can discharge water into water or a contaminant onto land where it may enter water, unless allowed by a rule in the regional plan (among other things). Under section 2 of the RMA discharge includes 'emit, deposit, and allow to escape'. Accordingly, allowing channelled stormwater to enter a stormwater drain will be a 'discharge' because the person is at that point allowing it to escape (ie, there is no means of getting it back once it enters the stormwater drain). There will also be a further 'discharge' where that drain ends.

[32] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38, at [62] (**King Salmon**).

[33] *King Salmon* [2014] NZSC 38 at [145].

Discharge of uncollected animal effluent (Hearing Streams 1 - Response to Panel Minute of 30 May 2017)	There is no judicial guidance directly the discharge of uncollected animal effluent to land. The key question is whether the discharge of uncollected animal effluent meets the requirements of section 15 of the RMA. That is, is it a 'discharge' of a contaminant into water or onto land in circumstances where it may result in that contaminant entering water? 'Discharge' is defined under the RMA as: > Discharge includes emit, deposit, and allow to escape. We note that this issue was partially considered by the Court in *Carter Holt Harvey v Environmental Defence Society*.[34] The issue arose due to concern that 'non-point source discharges from animal emissions and nitrogen fixing plants may well be unlawful under section 15(1)(b) of the RMA.'35 However, the Court declined to make a determination, stating: > [175] … While the arguments were interesting, we have formed the clear view that this is not the appropriate occasion to make such a ruling. We say so for the following reasons: > (i) This is an issue that could affect every pastoral farmer in New Zealand and every Regional Council. Perhaps due in part to earlier scientific understanding, pastoral farming in New Zealand has traditionally been regulated on a permissive basis as a land use activity, rather than a discharge activity (albeit that a farmer may also carry out specific activities that require discharge permits, such as dairy shed discharges). A finding in this case that non-point source discharges arising from pastoral farming are discharges under section 15(1)(b) would have significant implications for farmers and Regional Councils throughout New Zealand. Given the significance of any such finding, it should more properly have been sought by way of an application for a declaration with supporting affidavit

[34] A123/08.

[35] At [167].

	evidence. While it appears that Forest and Bird lodged an application for declarations with the High Court on this issue,36 the application for declaration does not appear to have progressed. In *McKnight v NZ Biogas Industries Ltd* the Court held that:[37] > Section 15(1) contemplates discharge by a person. The definition extends the meaning to include emit and allow to escape. The former suggests that it therefore encompasses the consequence of activities carried out by a person - it would be absurd to suggest that it is confined to such contaminants as are personally emitted. Moreover the extension to allowing escape suggests something broader than direct action by the person. Clearly, a person has not directly discharged uncollected effluent. Rather, a person has brought stock of some type onto land, and consequently there has been a discharge from that stock to land. This could be described as 'allowing to escape', but there will be arguments around the level of 'control' or connection an owner has over this:[38] > Plainly however a person could not be said to discharge the contaminant unless there is a causal connection between the person and the discharge. > … > This means that because of its context the word discharge is to be construed as extending to cause to discharge. That accords with the natural and ordinary meaning of discharge as engaging in an activity which results in the emission or discharge of contaminant. It is consistent with the policy of the provisions to prevent contamination of waterways. In this case, the activity that results in the discharge is the locating of stock on land. The foreseeable result of that activity

[36] https://duncancotterill.com/publications/dairy-matters.

[37] [1994] 2 NZLR 664; [1994] NZRMA 258, at 6.

[38] Ibid, at 8.

	is that stock then discharges effluent directly to land. In the absence of clear judicial guidance, it is a difficult matter to determine in this forum. There is certainly an argument that the discharge of uncollected animal effluent to land is likely to be caught by the requirements of section 15 of the RMA because on its face: • Allowing animals onto your land will result in you allowing effluent to be 'emitted' or 'deposited'. • Effluent is a 'contaminant'. • If that is the case, the activity must be either permitted under the proposed Plan (and operative Regional Plan), NES, Regulations or resource consent. This is supported by the fact that the NPS-FM does include 'diffuse discharges by any person or animal' in A4 (Policy 66 in the proposed Plan). As that policy requires the consent authority to have regard to various matters 'when considering any application for a discharge', this suggests it anticipates discharges by animals to be caught by section 15 of the RMA. In terms of whether it makes any difference whether the animals are stock or otherwise, this will come down to whether the animal is under human control or not (eg: wild animals will not be caught as the causal connection between the owner of the land and animal will not exist).
Discourage (Hearing Stream 2 reply)	There is no case law directly on the meaning of the word 'discourage' in the RMA context. However, our submission is that discourage does not mean avoid. It is something less than avoid and relates to a state of tolerance for or attitude towards the appropriateness of an activity as opposed to being direction as to required action. This position is supported by case law to the extent that the Courts have separately considered policies that require avoidance, and ones that seek to discourage, eg *Save Wanaka Lakefront Reserve Incorporated v Queenstown Lakes District Council* [2017] NZEnvC 88. Although not directly commenting on the difference between avoid and discourage, the Environment Court stated at [121]: > There is a further direction to discourage development within an ONI. The noncomplying activity status of activities on the banks of lakes is an aspect of this. That implies that a decision-maker ought to closely examine whether a proposal has a strong functional

	justification for its choice of siting and whether in terms of assessment matters in s 2.2.2(1), it is a truly exceptional case. However, it does not mean that every non-complying activity should be declined. This is clearly something less that 'avoid', which has been judicially defined by the Supreme Court to mean 'not allow' or 'prevent the occurrence of'.[39] This position is supported by the dictionary definition of 'discourage'. The Shorter Oxford English Dictionary defines discourage as: 1. Deprive of courage, confidence, hope or the will to proceed; dishearten, deject 2. Dissuade or deter from 3. Inhibit or seek to prevent (an action etc.) by expressing disapproval We consider that avoid is more directive than discourage. Avoid is a clear directive to ensure an activity does not occur (i.e. is prevented). It is an absolute. Discourage is less directive, referencing an intolerance for an activity, but not absolute requirement for it not to occur (i.e. you seek to prevent it). Discouraging something only seeks to prevent it, as oppose to requiring its prevention. We note that discourage is still a strong work, but less directive than avoid. Accordingly, while it needs to be treated differently to policy direction using the 'avoidance' language it is a strong requirement.
Divert (Hearing Stream 4)	The Court has found 'divert' to mean 'turning aside, deflecting or changing the direction of water'. In *Chantham Island Seafoods Ltd v Wellington Regional Council* the Environment Court considered the situation where excavation took place, which had the effect that groundwater was intercepted and collected in the excavated area.[40] The Court held that a diversion of water took place to which section 14 applies, commenting that due to the excavation the:[41] …water followed a path that was different from that preceding the excavation. The channel and excavation had the effect that the groundwater was intercepted and collected in the excavation that

[39] *King Salmon* [2014] NZSC 38, at [96].

[40] EnvC Auckland A018/2004, 13 February 2004.

[41] Ibid, at [35].

	would not have done if the work had not been done. The result is that water was turned aside and displaced to take a different position than it would if the excavation and channel had not been made. This tends to suggest that any circumstances that alter the path of stormwater will be a diversion that would need resource consent, unless the proposed Plan provides for it as a permitted activity. Channelling stormwater into a stormwater drain will most likely divert the path it would have taken without that channelling and therefore, meeting the definition of diversion.
Domestic needs (Hearing Stream 3 reply)	The terms 'domestic needs' has not been considered by the Court in the context of the RMA. However, the requirements of section 14(3)(b) of the RMA are that the take is *required* for the *reasonable domestic needs* and the take does not, or is not likely to have an adverse effect on the environment. The dictionary defines domestic as: 'of the home, household or family affairs'.[42]
Give effect to … (Hearing Stream 1)	'Give effect to' simply means 'implement'.[43] On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. However, the implementation of such a direction will be affected by what it relates to, that is, what must be given effect to; e.g. a requirement to give effect to a NPS which is framed in a specific and unqualified way (i.e. which creates as 'environmental bottom line') may, in a practical sense, be more prescriptive than a requirement to give effect to a NPS which is worded at a higher level of abstraction.
Have regard to … (Hearing Stream 4)	The meaning of 'have regard to' has been judicially considered and its meaning is well defined:[44] By way of starting point, the High Court refers to *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* where Wylie J saidL

[42] The New Zealand Oxford Dictionary (2005) Oxford University Press.

[43] *King Salmon* [2014] NZSC 38, at [77].

[44] *Taggart Earthmoving Ltd v Heritage New Zealand Pouhere Taonga* [2016] NZEnvC 123 at [51] - [52].

	> "We do not think there is any magic in the words 'have regard to'. They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with is statutory functions." Similar observations are made by the Court of Appeal in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* and by the High Court in *Foodstuffs (South Island) Ltd v Christchurch City Council*. Provided that the Court gives genuine attention and thought to the matters in question it is free to allocate weight as it sees fit but does not necessarily have to accept them.
Manage (Hearing Stream 4)	The most relevant case law guidance on the word on the term 'manage' comes from the Hazardous Substances and New Organisms Act 1996 regime. In *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, the Court observed:[45] > When there is a reference, as in this statute, to "managing effects" the position becomes more obscure. Whatever the purity of concepts, it is possible within the ordinary use of language to say one can "manage" adverse effects inter alia by preventing those effects. If an official is required by statute to "manage" the effects of tuberculosis in New Zealand one avenue for such "management" of effects - and it might well be thought the prime avenue - is to prevent the disease arising. The official can of course also "manage" by seeing to a stock of vaccines, arranging hospitalisation in isolation, arranging detection screening and the like; but it does not strain language to say one way of manging the adverse effects is to ensure the disease does not arise. > In that light, I construe s7 reference to "managing adverse effects" as including managing by reduction of risk such effects will ever arise. "Management" of effects foes to risk reduction as well as to damage control… Manage can therefore be a reference to a range of actions including,

[45] At [156]-[157].

	but not limited to, avoidance or reduction of the relevant effect/harm/risk.
Minimise (Hearing Stream 1)	In the New Zealand Oxford dictionary minimised is defined as: to reduce (something, especially something undesirable) to the smallest possible amount or degree. There is no relevant case law on the definition of 'minimise'. However, the term is frequently used in the RMA context with no adverse comment by the Environment Court. It is worth noting that the difference between minimise and **mitigate** is that minimise is to make (something) as small or as insignificant as possible while mitigate is to reduce, lessen, or decrease.
Minor and transitory (Hearing Stream 4)	In *New Zealand King Salmon* the Court considered that 'avoid' in the NZCPS meant 'do not allow' or 'prevent the occurrence of', it considered that it was possible for minor and transitory effects to be acceptable even where the avoid language was used:[46] > Third, it is suggested that this approach to polices 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this. > The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character of the coastal environment with outstanding natural character") relates back to the overall policy

[46] *King Salmon* [2014] NZSC 38 at [145].

	stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area. Since that decision several cases have considered whether effects are in the category of minor or transitory: • In *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 260, following the release of the *King Salmon* decision, the Court reassessed its interim decision under section 104 to:[47] … see whether they might fit within the evidently narrow compass of "minor or transitory adverse effects" • The Court in *A & A King Family Trust v Hamilton City Council* [2016] NZEnvC 229 implicitly endorsed the *New Zealand King Salmon* approach. In considering submissions on whether an overlay would give effect to a particular policy (which was an 'avoid' policy), it accepted the submission as to the law, but not the facts when it said:[48] We do not accept there is any certainty in Mr Lang's propositions that the proposed overlay would involve minor or transitory effects on the efficiency, safety and function of the transport network, or be an enhancement. The decision references Mr Lang's submission as relying on the passage from *New Zealand King Salmon* quoted above.
Minor effect (Hearing Stream 1)	The test for 'minor effect' under Clause 16 is whether the amendment affects the rights of some members of the public, and therefore might have drawn a submission, or whether it is merely neutral.[49] Only if it is neutral, and therefore would not have drawn a submission, may such an amendment be made.
Mitigate	Mitigate is defined in the New Zealand Oxford dictionary - to make

[47] *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 260 at [17].

[48] *A & A King Family Trust v Hamilton City Council* [2016] NZEnvC 229 at [164].

[49] *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 at p440.

(Hearing Stream 1)	something milder or less intense or severe. Regarding mitigation, the Environment Court has stated that:[50] > The idea of 'mitigation' is to lessen the rigour or the severity of effects.
Objective (Hearing Stream 1)	The Environment Court has commented on the meaning of an objective: > The Concise Oxford is simple and direct: – an objective is … a goal or aim. That simplicity sits perfectly well here – an objective in a planning document sets out an end state of affairs to which the drafters of the document aspire, and is the overarching purpose that the polices and rules of the document ought to serve. Objectives are to be the 'most appropriate' way to achieve the purpose of the RMA. The 'most appropriate' method does not need to be the superior method. The Court has held that 'appropriate' means suitable. There is no need to place a gloss upon the word by requiring that it be superior. Whilst each objective must be examined, it is not necessary that each objective individually be the most appropriate way of achieving the purpose of the RMA. This is because objectives may interrelate and have overlapping ways of achieving sustainable management of natural and physical resources. It is about the objectives as a whole being the most appropriate. In *Art Deco Soc (Auckland) Inv v Auckland Council*[51]the Court held that an 'holistic' approach should be taken rather than a more focused, vertical or 'silo' approach to objectives, polices and methods.
Practicable (Hearing Stream 1 reply)	'Practicable' and 'reasonably practicable' are two different, although closely related, concepts. The Panel was referred to the case of *New Zealand Airline Pilots*

[50] *Trio Holdings v Marlborough District Council* [1997] NZRMA 97, p36.

[51] [2012] NZRMA 451 at [108].

	Association Industrial Union of Workers Incorporated v Director of Civil Aviation and Wellington International Airport Limited and its interpretation of 'practicable' - that decision needs to be carefully approached. As warned in that case:[52] > The meaning of "practicable" must be coloured by its legislative text and context. The express statutory purposes provide powerful guidance. Further, the case is also under appeal to the Supreme Court on the broad question of 'whether the Court of Appeal was correct to allow the first respondent's appeal to that Court'. However, the following base principles are considered to be relevant to any inquiry as to what is practicable or not:[53] > The word "practicable" has a well-known meaning, as confirmed by this Court, as something that is feasible or able to be accomplished according to known means and resources; it links the feasibility or practicality of something to the availability of resources. When dealing with the construction of an aerodrome runway, "practicable" must refer to what is actually able to be constructed, importing considerations of practical issues such as the nature of the site and surrounding physical environment, available engineering technology and potential construction options. > … the word "practicable" imports a stricter or higher standard than "reasonably practicable," which is seen as affording greater latitude to adopt a cost-benefit analysis. > The adverbs "reasonably" and "physically" add a qualifying gloss to the ordinary meaning of "practicable" - the former supports a closer focus on economic analysis and the latter on the practical feasibility of construction. The word 'practicable' is used in multiple places throughout the RMA. It is used in respect of timing (ie, as soon as practicable in section 32),

[52] [2017] NZCA 27 at [51].

[53] Ibid, at [52], [53] and [63].

	in respect of action (ie, in terms of taking all practicable steps (new section 18A)), in respect of options identification (if practicable in section 32) or in the sense of best practicable options (in sections 16, 70 and 108 with its own clearly defined meaning in section 2). The term 'reasonably practicable' is also used throughout the RMA.
Protect (Hearing Stream 1)	Protect has been used in the proposed Plan to require something stronger than recognising and providing for a matter. It has been used in the sense of its dictionary definition which is 'to keep safe, defend, guard' etc. This interpretation has been supported by the Environment Court in *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 20 at [63].
Reasonably practicable (Hearing Stream 1)	Whether a measure is or is not reasonably practicable is one which requires a value judgment in light of all the facts. Three general propositions from case law are as follows:[54] - Reasonably practicable means something narrower than physically possible or feasible. - What is reasonably practicable is to be judged on the basis of what was known at the relevant time. - To determine what is reasonably practicable it is necessary to balance the likelihood of risk occurring against the cost, time and trouble necessary to prevent that risk. There is no 'bright line' test and what is, and what is not, considered to be reasonably practicable will depend on a case by case analysis. It is something less than 'impracticable' and incorporates an element of reasonableness.
Recognise and provide for (Hearing Stream 1)	This phrase has been used within the proposed Plan as a strong policy direction to highlight the important of the matters that are to be recognised and provided for. To recognise and provide for something requires the decision maker to both recognise a factor, and then make a provision for that factor.[55] Some action is required, as one does not 'provide for' a factor by considering and then discarding it. This phrase can be contrasted against the lesser 'take into account', which only requires the decision maker to consider a factor, and weight it up with other factors whilst retaining the ability to give it

[54] *Slivak v Lurgi (Australia) Pty Ltd* (2001) 177 ALS 585 at [53].

[55] *King Salmon* [2014] NZSC 38, at [26].

	considerable, moderate, little, or no weight at all as deemed appropriate.
Restore (Hearing Stream 5)	The term 'restore' has not been specifically considered in the resource management context, although it has been raised without adverse or positive comment in resource management cases. Outside of the resource management context, the term 'restore' was considered by the New Zealand Supreme Court in Mobil Oil New Zealand Ltd v Development Auckland Ltd (Formerly Auckland Waterfront Development Agency Ltd). The case dealt with the requirement to restore premises to a clean and neat condition at the end of a lease. The Court commented that: > … the obligation to "restore the Demised Premises" obviously went beyond mere delivery up of the demised premises (that is returning them to the lessor) and necessarily envisaged the carrying out of work (which was required to be to the satisfaction of the lessor)... In the United Kingdom case of R v Birmingham & Gloucester Railway, the obligation to 'restore' a road was to make it as nearly as possible identical to the road before the interference. In terms of dictionary definitions, the Concise Oxford English Dictionary defines 'restore' as: > (v.) 1 bring back (a previous right, practice, or situation); reinstate. > return to a former condition or opinion > 2 repair or renovate > 3 give (something stolen or removed) back to the original owner. The New Zealand Oxford Dictionary defines 'restore' as: > (v.) 1 bring back or attempt to bring back to the original state by rebuilding, repairing, repainting, amending, etc. > 2 bring back to health, etc.; cure > 3 give back to the original owner etc.; make restitution of > 4 reinstate; bring back to dignity or right > 5 replace; put back; bring back to a

	former condition. The above commentary that the meaning of 'restore' is not to leave the thing as it is. It requires some form of action, which will return the subject of the action to its original condition, or as close to that original condition as possible.
Safeguard (Hearing Stream 4)	The term 'safeguard' is used in Objective O25 of the proposed Plan. This is consistent with the language used in both the National Policy Statement for Freshwater Management (**NPS-FM**) and the Regional Policy Statement. The New Zealand Oxford Dictionary defines safeguard as: (v.) guard or protect right (rights etc.) by a precaution or stipulation While not a RMA case, *Ralph v Henderson and Pollard Ltd* [1968] NZLR 759 did consider the meaning of 'efficient safeguard' under previous health and safety legislation and said:[56] All I can say about it is that the test of an efficient safeguard is the same as the test which I have explained for the meaning of the word 'securely' - that the purpose of this provision is to protect both the careful and inadvertent or inefficient employee from foreseeable - that is, reasonably foreseeable - risk of injury … As I understood Mr Tompkins' argument, he contends that, in effect, I told the jury that nothing can amount to an "efficient safeguard" unless it is as effective a protection as a secure fence would be. In his submission, there may be an efficient safeguard which affords a lesser degree of protection than would a secure fence. With this latter proposition I do not disagree but, reading my summing-up as a whole, I am satisfied that all that I said to the jury was that a safeguard would not be "efficient" unless it had the effect of protecting workmen against reasonably foreseeable risk of injury, having regard not only to the foreseeable conduct of a skilled workman intent on his task but also to the foreseeable conduct of careless, inattentive workers. [Emphasis added]

[56] At 761-762, line 46.

	Based on the above, we believe that 'safeguard' does not have the same meaning as 'provide for'. The ordinary meaning of 'safeguard' is to protect or prevent and to change this to 'provide for' would be reading down the requirements of the higher order documents.