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

AND

IN THE MATTER **of an objection under s357(3) RMA in relation to an application for resource consents**

BETWEEN **SOUTH ISLAND RESOURCE RECOVERY LIMITED**

Objector

AND **CANTERBURY REGIONAL COUNCIL**

WAIMATE DISTRICT COUNCIL

COMMISSIONER DECISION ON OBJECTION UNDER S357AB and s357D RMA

12 MAY 2023

Decision

1 In summary, and for the reasons set out below, I have decided (by a narrow margin) to uphold the Objection by SIRRL, and I direct that Canterbury Regional Council and Waimate District Council should accept the Application as complete under s88 RMA, with the relevant statutory processing timeframes commencing 1 working day after notification of this decision to the Objector.

2 This finding is made under delegated authority, pursuant to ss357AB and 357D RMA. My reasons are set out below.

Introduction

3 This is a decision on an Objection lodged by SIRRL under s357(3) RMA and dated 31 January 2023 (**the Objection**).

4 The Objection relates to a Decision by Environment Canterbury and Waimate District Council (**the Consent Authorities**) to reject an Application for resource consents as incomplete under ss88(3), (3A) RMA on (essentially) the following grounds:

> "Given the scale and significance of the potential effects, it is our view that to fulfil Schedule 4 and s88(2) of the Resource Management Act 1991 a site-specific Cultural Impact Assessment is required to be completed either by, or in close consultation with Te Rūnanga o Waihao."[1] (**the Decision**)

5 Further detail on the Application, Objection, and the Decision, are set out below.

6 I was appointed by the Consent Authorities, with delegated authority to hear and determine the Objection, on 09 March 2023.

7 By agreement of the Objector,[2] the relevant statutory timeframes were extended to enable a hearing on the Objection to take place on 11 April 2023. That hearing involved presentation of legal submissions by Counsel for the Objector, and Counsel for the Consent Authorities.[3] Following the hearing, and at my request, further information was lodged by Counsel.[4]

8 At the time of the hearing, I indicated that a decision was likely to be issued by 05 May. I extended that timeframe until 12 May 2023, for reasons identified in Minute 3.

9 I have set out below the principal issues and reasons for upholding the Objection. In making the Decision, I have had regard to all of the

[1] Consent authority correspondence dated 20 December 2022
[2] In the main, and for convenience, I have referred to the Objector as **the Applicant** (for resource consents) or **SIRRL**.
[3] Counsel appearing for SIRRL was Mr Mark Christensen; and Counsel appearing for the Consent Authorities was Ms de Latour.
[4] This included further factual and background material, and additional submissions on the relevant planning provisions.

relevant information provided to me by Counsel for the parties. This includes a full set of the Application, AEE, and related technical reports, relevant correspondence, evidence lodged by the Applicant in support of the Objector, legal submissions of Counsel, and the relevant planning framework, particularly Clause 4.3.7 of the Canterbury RPS, and Policy 4.14B of the Canterbury Land and Water Regional Plan. I have not found it necessary to refer to all of this material in my Decision, but I have considered all information provided to me.

10 My delegated authority is limited to consideration of the Second Application and the related Decision to reject that Application under s88 RMA. But I have had regard to the wider context of both Applications, in particular, both the First and Second Applications were rejected on the same grounds, being the absence of a CIA prepared by, or in close consultation with, Te Rūnanga o Waihao.

Application

11 The Application seeks resource consents from Environment Canterbury and Waimate District Council to authorise construction and operation of an **Energy from Waste Plant** in the Waimate District of the Canterbury Region.

12 According to the Applicant, the proposal has overall discretionary status, on a bundled basis, for both regional and district consents. The Applicant requested public notification, to enable full public participation. The proposal is evidently large-scale infrastructure, with construction cost of the Plant estimated at $350 million.

13 The planning assessment prepared by Ms Singh (of Babbage Consultants) asserts that the overall actual and potential adverse effects of the proposal will be minor, with commensurate regional benefits from reducing the amount of residual waste disposed to landfill (with "..landfills sitting at the bottom of the waste

hierarchy..").[5] Consistent with the scale of the proposal, the Application included 19 Technical Reports.

14 There is some suggestion in the Applicant's materials, and evidence, that the proposal should not be considered to be novel or complex, merely because it is new technology for NZ (as distinct from certain overseas jurisdictions, where Waste to Energy plants are relatively common).[6] Despite this assertion, I have no difficulty in finding that the proposal is potentially complex, and merits an assessment of effects (including cultural effects) proportionate to the scale and significance involved, under Schedule 4 RMA. This reflects the assessment made by the Consent Authorities. It is not a finding on the merits, but scale and significance are relevant to the question of completeness under s88(3) RMA.

15 On the Applicant's own assessment, Project Kea (if granted consent) may be of a sufficient scale to consume approximately 20% (365,000 tonnes) per annum of the estimated 1,800,965 tonnes of waste material theoretically available as "feedstock" in the South Island (being waste otherwise sent to Class 1, Class 2 landfills and farm dumps).[7]

16 As a large infrastructure proposal that may well be of regional significance (if ultimately granted), I agree with the Consent Authorities that substantially greater information is required to satisfy the s88(3) RMA threshold for completeness, in relation to the actual and potential cultural effects of the proposal.

Principal issues for determination

17 The principal issue for determination is whether to uphold the Objection under s357D RMA, in whole or part, or to reject the

[5] Planning Report (Executive Summary)
[6] The Planning Assessment acknowledges that "..Project Kea is the first of its kind proposed in NZ and there will be initial concerns around accepting this technology.." (Planning Report, Executive Summary, at p(x)).
[7] This hypothetical assessment was based on 2021 data: refer Planning Report at p31.

Objection. To make this determination, I have considered the following issues and sub-issues:

17.1 Whether the proposal was complete (in terms of s88(3) RMA) as at 20 December 2022. If the proposal was "complete", then I have no discretion (or only a residual discretion) and should grant the Objection;

17.2 Whether the finding of the High Court in the *Transpower* decision[8] (and related case law) that mana whenua are "**best placed**" to undertake an assessment of the actual and potential effects on mana whenua of a proposal makes it **mandatory** for the CIA to be prepared by, or in close consultation with, Te Rūnanga o Waihao, failing which the Application must be rejected as incomplete under s88(3) RMA ? If it is not mandatory, then whether an Applicant can provide their own assessment of the relevant cultural effects, provided that they have first taken reasonable steps to obtain a CIA from the mana whenua party (including agreement to meet the reasonable costs associated with preparation of the CIA) ?

17.3 If the Application is not complete, then whether I should exercise my discretion to allow (or refuse) the Objection, based on discretionary considerations. These considerations include:

(a) Public interest factors including the statutory functions of consent authorities (i.e. ss30 and 31 RMA), statutory purpose in Part 2 RMA (which includes the multi-faceted consideration of cultural values in ss6(e), 7(a) and 8 RMA[9]); the plain meaning (read in their proper context) of s88 RMA and Schedule 4, and the wider factual and planning context.

[8] *TEPS v Tauranga City Council* [2021] NZHC 1201; also cited in *(inter alia) SKP Inc v Auckland Council* [2018] NZEnvC 81
[9] *McGuire v Hastings DC* [2002] 2 NZLR 577 (Privy Council) refers to these as "..strong directions, to be borne in mind at every stage of the planning process.."

(b) Factors relevant to context and discretion may also include:

- an assessment of the relevant cultural effects was provided by Ms Singh, in the Planning Report, and in her capacity as an independent planning expert. Both Ms Singh, and SIRRL, accept that this assessment is sub-optimal, because mana whenua are "best placed" to undertake the assessment, but this is not a situation in which there is no assessment, simply an assessment that may be considered inadequate or limited in scope;

- whether s88 RMA envisages that an Application will be rejected when the information gap (incompleteness) cannot be remedied by the Applicant, because it is reliant on provision of information by (or voluntary engagement with) a 3rd party (in this case, Te Rūnanga o Waihao, as mana whenua), and reasonable steps have been taken by the Applicant to secure that information, or undertake that engagement, including provision of all information reasonably requested by Te Rūnanga, standing offers to meet and engage with Te Rūnanga, and contractual agreement to pay the reasonable costs of Te Rūnanga in providing the CIA;

- Whether the position would be different if the Applicant had simply refused to engage with Te Rūnanga, or had not offered to meet their reasonable costs associated with preparation of a CIA, or had not allowed sufficient and reasonable time to engage or consult over provision of a CIA, including provision of all information reasonably requested that can be supplied under the statutory framework as it applies at the s88 RMA completeness phase.

Statutory framework

18 Part 6 RMA sets out the requirements of an application for resource consent and the statutory responsibilities of a consent authority in relation to applications for resource consent.[10] A consent authority may receive an application for resource consent under s88 RMA. Section 88 relevantly states:

> **88 Making an application**
> (1) A person may apply to the relevant consent authority for a resource consent.
> (1A) …
> (2) An application must—
> (a) be made in the prescribed form and manner; and
> (b) include the information relating to the activity, including an assessment of the activity's effects on the environment, that is required by Schedule 4.
> …
> (3) A consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not—
> (a) include the information prescribed by regulations; or
> (b) include the information required by subsection (2)(b).
> (3A) The consent authority must immediately return an incomplete application to the applicant, with written reasons for the determination.
> (4) If, after an application has been returned as incomplete, that application is lodged again with the consent authority, that application is to be treated as a new application.
> (5) Sections 357 to 358 apply to a determination that an application is incomplete.
> …

(c) Where an application is determined to be incomplete, an Applicant has a right of objection to the consent authority, and (if the Objection is not upheld), may appeal to the Environment Court against the decision on the objection.

(d) Schedule 4 specifies the information required by s88(2)(b) and 88(3)(b) RMA for a resource consent application; this must be specified in sufficient detail to satisfy the purpose for which it is required. Clause 2 of Schedule 4 relevantly states:

[10] Discussed by Clark J in *New Zealand King Salmon Co Ltd v Marlborough District Council* [2018] NZHC 1357

2 Information required in all applications

(1) An application for a resource consent for an activity (the activity) must include the following:
  (a) a description of the activity:
  (b) a description of the site at which the activity is to occur:
  (c) the full name and address of each owner or occupier of the site:
  (d) a description of any other activities that are part of the proposal to which the application relates:
  (e) a description of any other resource consents required for the proposal to which the application relates:
  (f) an assessment of the activity against the matters set out in Part 2:
  (g) an assessment of the activity against any relevant provisions of a document referred to in section 104(1)(b).

(2) The assessment under subclause (1)(g) must include an assessment of the activity against—
  (a) any relevant objectives, policies, or rules in a document; and
  (b) any relevant requirements, conditions, or permissions in any rules in a document; and
  (c) any other relevant requirements in a document (for example, in a national environmental standard or other regulations).

(3) An application must also include an assessment of the activity's effects on the environment that—
  (a) includes the information required by clause 6; and
  (b) addresses the matters specified in clause 7; and
  (c) **includes such detail as corresponds with the scale and significance of the effects that the activity may have on the environment. [emphasis added]**

19 Clause (3)(c) has been identified as requiring a proportionate response: greater detail may be required, where the actual or potential effects of a proposal are, or may be, significant.[11]

20 If the consent authority does not determine under s88(3) RMA that the application is incomplete, it may request further information under s92 RMA. The High Court has confirmed that s88 RMA is directed at

[11] Cull J in *Aspros* [2019] NZHC 1684 at [31]: "..the material provided under s88(2) of the RMA should be proportionate to the potential effects of the activity.."

the issue of completeness; whereas s92 RMA relates to the question of adequacy. "Adequacy" requires a merits-based assessment. A decision-maker must know the essential facts and information before making a decision on the merits.[12]

21 A consent authority has discretion to accept an Application, even when incomplete. Use of the word "may" in s88(3) confers a discretion whether to accept or reject an incomplete application.[13] As noted by Clark J in the High Court decision of *King Salmon*, s92 RMA is relevant:

> "[28]..the ability to rectify deficits in an application after it is accepted is consistent with a discretion to accept applications which the consent authority appreciates at the time will require to be supplemented with further information or detail.."

22 In that same decision, Clark J also confirmed that:

> "[40] A decision to accept an application as complete has no such substantive impact. The decision is preliminary in nature. It may be that further information is yet to be sought. The decision to accept an application occurs prior to the notification process…The consent authority is not committed at this early stage to any final determinations about the consent…"

23 In a separate High Court decision, Cull J confirmed that s88 confers a discretion on the Consent Authority to decide whether or not an application is complete for the purposes of accepting the Application for processing. The discretion to decide whether an Application is complete is an administrative decision to be made in light of that particular application. It is not a merits-based consideration, which comes later in time.

[12] *Aspros* [2019] NZHC 1684 at [29], [34]
[13] *King Salmon (ibid)* at [24]-[31]

24 There is no direct authority on the circumstances in which the discretion may be exercised.[14] That is perhaps not surprising as the discretion will be exercised on a case-by-case basis.

Background and factual matrix

25 I was provided with a substantial amount of material on the timeline of events, relevant to the Application. This included:

- Timeline of consultation and engagement in Planning Report prepared by Ms Singh (Babbage Consultants)
- Evidence of Paul Taylor on behalf of SIRRL dated 02 March 2023
- Memorandum from Environment Canterbury dated 22 March 2023 (Richard Purdon, Principal Consent Planner)
- Memorandum from Waimate District Council dated 21 March 2023 (Kim Seaton, Consultant Consent Planner)
- Full set of the Application, AEE, and related Appendices, including (of most relevance) the Planning Assessment, which included an assessment of relevant cultural effects, which was provided expressly on the basis that a request for a CIA had been made to Te Rūnanga o Waihao, and that Te Rūnanga was best placed to provide the assessment of cultural and relational effects.

26 In addition, I received and have considered legal submissions as follows:

- Submissions of Counsel for Objector dated 02 March 2023 and 05 April 2023

[14] This was confirmed by Counsel for the Consent Authorities during our hearing on 11 April 2023.

- Submissions of Counsel for Consent Authorities dated 23 March 2023 and 14 April 2023

27 While there was extensive factual information, there was (on the whole) no material dispute (as between SIRRL and the Consent Authorities) on factual matters. Messrs Purdon and Taylor provided the relevant paper trail, of dealings between SIRRL, the two Councils, and Te Rūnanga o Waihao.

28 I am cognizant that Te Rūnanga o Waihao is not a party to this objection process, and may have a different perspective on the evidence. In addition, Te Rūnanga is obviously entitled to change or alter their assessment of the proposal, in light of more or updated information.

29 The High Court has confirmed (on several occasions) that the assessment of completeness under s88 RMA is a limited exercise, and does not involve any merit-based assessments of the proposal.[15]

30 I have not found it necessary to make findings on potentially contentious issues raised in the paper trail.[16] These are merits-issues that will be assessed by the Consent Authorities, once the Application is accepted as complete, exercising powers under (inter alia) ss92, 104 and 104B RMA.

31 I therefore adopt, without repeating, the timeline of events identified by the evidence and reports noted above. Material events are set out in **Appendix A** to this Decision.

[15] Discussed above.
[16] For example, there is not (or may not be) complete agreement on the minutes recording matters discussed at various times between parties; the nature and extent of actual and proposed cultural effects (including spiritual and relational matters) arising from the proposal; whether and the extent to which the mauri of air and water are affected by the proposal; whether and the extent to which the proposal is consistent with the relevant planning instruments and the Iwi Management Plans; whether there are "red flags" on the subject site in terms of sites of cultural significance.

Commentary on timeline

32 While the timeline in Appendix A is self-explanatory, I have set out below a summary of my key findings and observations. These are based on the paper trail and evidence provided to me, and do not bind or necessarily reflect the perspective of 3rd parties to this process, such as Te Rūnanga o Waihao and Aukaha.

33 SIRRL has sought to engage with Te Rūnanga o Waihao, as the identified mana whenua, from at least October 2021, to the present. This has included standing offers for kanohi ki te kanohi (face to face) meetings, and ongoing provision of information to Aukaha. It has also included (from August 2022), an executed agreement (on Aukaha's standard terms and conditions) that SIRRL will fund a CIA to be prepared by Aukaha.

34 With the exception of the peer review reports (which are likely to be commissioned by the Regional and District Councils once the Application is accepted as complete under s88 RMA), SIRRL's evidence was that it has provided all relevant information requested by Te Rūnanga or Aukaha. This includes (most recently) a Human Health assessment and ecological report, both provided in March 2023.[17]

35 It is clear from the paper trail that Te Rūnanga has reserved their ability to seek further information, or to modify their assessment, in light of independent peer reviews likely to be required by the Consent Authorities. Put another way, an early precondition identified by Aukaha for preparation of the CIA, is that they have access to independent peer reviews of relevant technical issues.

[17] Counsel for the Applicant confirmed that it was not necessary for me to consider these Reports, for the purpose of my Decision, other than to be advised that the Reports were provided to Aukaha. These Reports did not form part of the Application as at the time that the Decision was made in December 2022.

36 On SIRRL's evidence, there are no outstanding information requests from Aukaha, except that they require access to the independent peer review reports to be commissioned by the Consent Authorities. Absent agreement between SIRRL and the Consent Authorities, these peer review reports cannot be commissioned unless and until the Application is accepted as complete under s88 RMA.

37 It is theoretically possible for SIRRL to agree to fund peer review reports by the two Councils, prior to acceptance under s88 RMA, as a type of pre-lodgment process. This would have to be on the basis of a side agreement or *Augier* basis. I consider that SIRRL should not be prejudiced, in terms of the Objection, if it has not volunteered to undertake a non-statutory process that may incur significant time and cost.

38 Between the date of the First and Second Applications, SIRRL has provided additional information in support of the proposal, such that the sole remaining issue of (alleged) incompleteness under s88 RMA relates to assessment of actual and potential cultural effects of the proposal by way of a CIA.

39 It is common ground that an assessment of cultural effects is required for the proposal to be "complete"; and that Te Rūnanga o Waihao are "best placed" to undertake the CIA, because they are the acknowledged mana whenua, with the proposal being located in their rohe.

40 While there is no dispute that Te Rūnanga is "best placed" to undertake the assessment, there is a dispute as to whether the Objector can by their planning expert undertake an assessment of cultural effects, in circumstances where (having taken reasonable steps to seek Te Rūnanga input), they are unable to secure a CIA from Te Rūnanga within a reasonable timeframe.

41 SIRRL asserts that the planning assessment, in reliance on technical assessments (particularly in relation to discharges to air, water and ecology related matters) is sufficient for the purposes of the completeness assessment under s88 RMA. SIRRL has indicated that it is their preference that a CIA be provided by Te Rūnanga, and has (on their evidence) taken all reasonable steps to obtain a CIA including the standing offer to pay for a CIA from August 2022 to the present day (on the standard terms requested by Te Rūnanga).

42 The position of Te Rūnanga (in terms of the paper trail before me) has been essentially consistent in relation to both the First and Second Applications. Their view is that the Application should not be considered complete under s88 RMA unless and until a CIA is prepared that is mandated by Te Rūnanga o Waihao. This must be provided prior to acceptance under s88 RMA.

43 It appears from the paper trail that the relationship between SIRRL and Te Rūnanga is under significant strain. Board members have been unable to engage on a kanohi ki te kanohi (face to face) basis because they have not been able to agree on the provision of a CIA.

44 The extent of delay is now material – nearly 9 months have passed since a contract was first signed between SIRRL and Aukaha, and almost 6 months have passed since the Council decision to reject the Application under s88(3) RMA. There is no indication as to when (or if) a CIA will be provided that is prepared by Te Rūnanga o Waihao or in close consultation with them. It is unclear what further information should reasonably be provided by SIRRL to Aukaha, so as to advance preparation of the CIA. There is no evidence that Te Rūnanga has finalized, or will be providing, a CIA at this time.

45 As noted, approximately 9 months has passed since SIRRL first executed an agreement with Aukaha requesting provision of a CIA (in August 2022). This includes a nearly 6-month delay, from the date of

lodgment of the second Application (28 November 2022), and the date of this decision (12 May 2023).

46 The correspondence confirms that Aukaha, and Te Rūnanga, will not be providing a CIA pending further engagement. No criticism is made of Aukaha or Te Rūnanga for the position that they have adopted.

Assessment

47 In assessing completeness, it is common ground that:

(a) It is not for the Applicant to determine which Rūnanga holds mana whenua for the subject proposal.

(b) Te Rūnanga o Waihao have identified themselves as mana whenua in the takiwā within which the project is proposed,[18] and they have authority to assess the relevant cultural effects, including whether there are cross-boundary effects that may affect other Rūnanga or Kai Tahu more broadly. [19]

(c) Aukaha (environmental consultancy) is the authorized representative of Te Rūnanga o Waihao, in relation to the proposal.[20]

(d) Te Runanga are **best placed** to undertake an assessment of the actual and potential effects of the proposal on them. As noted by Palmer J in the *Transpower* decision:

"..persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them.." [21]

[18] Email from Aukaha dated 09 November 2022
[19] Evidence of Paul Taylor at [23];
[20] Aukaha Record of Discussion dated 24 January 2023
[21] This decision was cited by both Counsel: *TEPS v Tauranga City Council* [2021] NZHC 1201; also cited in *(inter alia) SKP Inc v Auckland Council* [2018] NZEnvC 81

48 There is a dispute as to whether Te Rūnanga are "solely placed", as distinct from "best placed" to undertake a CIA of the proposal. As noted below:

48.1 From the perspective of Te Rūnanga o Waihao, only Waihao can determine the effects of the proposal on their cultural values in accordance with the principles of mana whakahaere and kaitiakitanga; a CIA should be an integral part of the application for this proposal and cannot be produced after lodgment; and must be informed through appropriate engagement with Waihao whānau. [22]

48.2 Relevant to that dispute, the planning instruments require that an Applicant provide (at minimum) a planning assessment of consistency of the proposal with the relevant cultural effects.

48.3 The assessment of cultural effects provided by Ms Singh, as the independent planning consultant engaged by SIRRL, addresses the relevant cultural effects identified by the planning framework. For the most part, Ms Singh has appropriately qualified her assessment of actual and potential effects by identifying that it is for Te Rūnanga o Waihao to identify their cultural values and relationships. Counsel for the Applicant conceded (during the hearing), that Ms Singh's planning conclusions on effects on mauri should be read as qualified, because effects on mauri involve spiritual and relational issues, as well as biophysical ones.

49 The parties have reached a stalemate of sorts. SIRRL is unable to meet the requirements of the Decision, which are reliant on actions of a 3rd party (preparation of a CIA by Te Rūnanga, or preparation of a CIA that involves close consultation with Te Rūnanga).

50 There is material prejudice to SIRRL from continued delay, identified in Mr Taylor's evidence.

[22] Letter Te Rūnanga o Waihao dated 24 January 2023; Aukaha Record of Discussion dated 24 January 2023

51 There is a difference between an Application that is rejected as incomplete because (for example) the proposal has geotechnical or traffic effects, and the Applicant refuses to provide a geotechnical or traffic assessment; and where the Applicant provides an expert assessment of geotechnical or traffic issues, but the Consent Authority disagrees with the assessment, or considers that it has not adequately assessed relevant matters.

52 Here the comparison is between an Applicant that has provided an assessment of cultural impacts which (on their own admission) is sub-optimal; and an Applicant that refuses to provide any assessment of cultural effects at all. There is a material difference.

53 If the Consent Authorities were to accept the Application under s88 RMA, then SIRRL does not oppose Council reliance on s92 RMA to require provision of a CIA from Te Rūnanga, if they are willing to provide an assessment. SIRRL acknowledges the risk of a s92 requirement.

54 In summary, SIRRL accepts that it is sub-optimal that Ms Singh has provided an assessment of cultural effects, and SIRRL would welcome a CIA provided by Te Rūnanga, as soon as that assessment is available. As stated by Mr Taylor (a Director and authorized representative of SIRRL):

> "[4] SIRRL has always been committed to undertaking meaningful consultation with manawhenua, beginning with the intial planning and design phases of Project Kea.."
>
> "[31] This background cultural values work performed by SIRRL's consultants is in no way an attempt to undermine the importance of a full CIA being prepared by or on behalf of Nga Rūnanga in due course.."
>
> "[69] In the absence of a CIA, and without certainty as to the timeframes for completion of the CIA, SIRRL has carefully considered its statutory obligations on how to assess the effects

> of the proposal on cultural values, and what information could be relied on to complete this assessment. SIRRL's reasons for taking this approach are set out in section 6.16 of the Planning Report and in SIRRL's Notice of Objection dated31 January 2023."

55 This is reflected in the planning assessment prepared by Ms Singh, which relevantly states that:

> "It is anticipated that a CIA will be completed by Aukaha post lodgement of this resource consent application.." (Planning Report at p169)
>
> "..The applicant recognizes that it is for the Runanga to identify the relevant cultural values, and accordingly, they may wish to add to, or amend, the description of cultural values as they apply to the Project Kea site.."

56 Finally, I note that there is no definition of "Cultural Impact Assessment" in the District or Regional planning instruments. However, the Canterbury Land Water Regional Plan identifies 2 specific circumstances where a resource consent must include both a CIA and written comments from the relevant papatipu rūnanga. This implies that it is not mandatory for a CIA to be prepared or mandated by the relevant Rūnanga in other circumstances.[23]

57 Put another way, the assessment of cultural effects may well be considered inadequate, but I accept Counsel for SIRRL's assertion that the Application is complete.

Conclusion & summary of findings

58 In summary, my findings are that:

(a) The Application is complete and (in the circumstances of this proposal) it was not mandatory for the Applicant to obtain a CIA that was mandated by, or prepared in close consultation with, Te Rūnanga o Waihao.

[23] See *contra* submission made by Counsel for the Consent Authorities in Memorandum dated 14 April 2023

(b) To the extent relevant, discretionary factors largely favour granting the Objection;

(c) The Applicant has acknowledged that a CIA may be provided by Te Rūnanga o Waihao following acceptance under s88(3) RMA and may involve the exercise of a requirement for a CIA under s92 RMA.

59 My decision to uphold the Objection was, as noted, made by a narrow margin. Based on my review of the factual material, the position adopted by the Consent Authorities (in rejecting the application) was reasonably adopted, given the focus of case law on mana whenua being best placed to identify their relationships and beliefs with their ancestral lands, waters, sites, wāhi tapu, and taonga; and the acknowledgment by SIRRL that in hindsight they could (and should) have adopted a more constructive approach in their dealings with Te Rūnanga o Waihao, to secure a CIA as part of their Application.

60 One relevant factor, available to me, but that was not available to the consent authorities at the time of their decision to reject the Applicaiton as incomplete (in December 2022) is the effluxion of time, with no progress having been made in SIRRL's request for the Rūnanga to provide a CIA. Given that my decision is being made in May 2023, the Objector has had to wait a further 6-months for (effectively) no progress. This delay is (as noted) relevant to my assessment of the discretion.

61 Where an Applicant takes reasonable steps to secure a Cultural Impact Assessment from the relevant mana whenua, and is unable to secure an Assessment, within a reasonable timeframe, it must in principle be able to undertake its own assessment of the actual and potential cultural effects, through an independent expert.

62 Such an assessment is unlikely to be adequate, because it is not (and cannot be) informed by the mana whenua assessment of biophysical, spiritual, and relational effects, but it is capable of being "complete" to enable the Application to be accepted for processing. This is precisely what has happened here.

63 In reaching this conclusion, I have had regard to Clause 4.3.7 of the Canterbury Regional Policy Statement (which was relied on by Counsel for both parties).[24] Clause 4.3.7 explicitly applies on a case by case basis. It is not directive that the CIA must be prepared by mana whenua prior to acceptance as complete, in circumstances where a CIA cannot be reasonably obtained after appropriate steps have been taken by the Applicant.[25] Clause 4.3.7 remains relevant to the exercise of Council powers under s92, and the merits assessment under s104 RMA.

64 I emphasise however that the outcome would likely be different for an Application of this scale and complexity (and with obvious potential for cultural effects) that failed to take all reasonable steps to engage with the relevant mana whenua party, including agreement to meet their reasonable costs, before undertaking their own cultural effects assessment (for the purposes of s88 RMA).

[24] Clause 4.3.7 states:
"Seek a cultural impact assessment or cultural value assessment as part of an assessment of environmental effects under Schedule 4 of the RMA, where an application is likely to impact on a significant resource management issue for Ngāi Tahu. Iwi management plans can be used as a tool to guide consideration of a need for a cultural impact assessment or cultural value assessment as part of an assessment of environmental effects."
[25] A hypothetical example being, if a hapū refused (without giving reasons) to provide a CIA, what then should an Applicant do ?

Directions

65 For the reasons set out above, I uphold the Objection and direct that Canterbury Regional Council and Waimate District Council should accept the Application as complete under s88 RMA, with the relevant statutory processing timeframes commencing 1 working day after notification of this decision to the Objector.

Dated this 12th day of May 2023

Rob Enright
Independent Commissioner

Appendix A
Timeline

October 2021
First meeting between SIRRL and representatives of Te Rūnanga o Ngai Tahi

09 November 2021
First meeting between SIRRL and representatives of Te Rūnanga o Waihao

28 April 2022
SIRRL public announcement of purchase of Project Kea site

29 April 2022
Email advice from Te Rūnanga o Waihao to Babbage advising that Te Rūnanga will take the lead role as mana whenua; SIRRL should liaise with Aukaha as authorized representative for Te Rūnanga; Project Kea being a significant project, requires resourcing for engagement, and that Aukaha will provide engagement terms.

26 May 2022
Meeting with Aukaha, with Babbage providing meeting minutes in email dated 01 June 2022. Discussion on what the engagement process with Mana Whenua would entail and when the CIA might be prepared. Aukaha indicated their information requirements for preparation of a CIA.

22 August 2022
SIRRL signs an agreement with Aukaha to fund preparation of a CIA. The agreement is on Aukaha's standard terms and conditions.

21 September 2022
SIRRL lodges its First Application for resource consents in respect of the Project to the Consent Authorities (**First Application**).

20 October 2022
First Application returned by Consent Authorities under s88 on the basis that it was incomplete. Grounds included effects of air discharge on human health, effects of stormwater, groundwater and cultural effects, and absence of CIA.

09 November 2022
Email from Aukaha (on behalf of Te Rūnanga o Waihao) to Consent Authorities and copied to SIRRL. The email supported the decision to

reject the First Application under s88 RMA, and relevantly noted the position of Te Rūnanga that:

- A CIA was required due to the scale and significance of the proposal, and to enable an assessment of the relevant cultural effects. This assessment "..must be mandated by Te Rūnanga o Waihao and informed by genuine engagement…"; and that "..any cultural impact assessment submitted with the application that was not mandated by Te Rūnanga o Waihao and informed through appropriate engagement with Waihao whanau..", would not satisfy the requirements of s88..".

- Acknowledging that a project proposal for preparation of a CIA was accepted by the Applicant on 22 August 2022.

- Aukaha required further time to prepare the CIA and "..the cultural impact assessment will not be completed until the New Year.."

28 November 2022
Second Application lodged by SIRRL (reference numbers CRC232714-CRC232720; RM220058) (**Second Application**)

20 December 2022 (**the Decision**)
Second Application rejected by Consent Authorities under s88 RMA on basis that it was incomplete. In contrast to the First Application, there was only one issue identified as incomplete, as follows:

> "Given the scale and significance of the potential effects, it is our view that to fulfil Schedule 4 and s88(2) of the Resource Management Act 1991 a site-specific Cultural Impact Assessment is required to be completed either by, or in close consultation with Te Rūnanga o Waihao."

16 January 2023
Aukaha issues record of discussion with SIRRL

24 January 2023
Letter from Te Rūnanga o Waihao to SIRRL confirming that:

Te Rūnanga was "..not in a position to meet with [SIRRL] at this point..";

The position of Te Rūnanga was "..that a cultural impact assessment should be an integral part of the application for this proposal..

particularly..where you propose establishing a large-scale (new to New Zealand) and complex industrial waste incineration plant in a culturally sensitive catchment..";

Noting concern that "..SIRRL lodged resource consent applications with EC and WDC without an assessment of the impacts of this proposal on our values, rights, and interests.."

and proposing to meet with SIRRL, once SIRRL had "..demonstrated a commitment to meaningful engagement..and [SIRRL] have provided us with the information that we need to assess this proposal.."

31 January 2023 **(the Objection)**
Section 357 Objection lodged by SIRRL in relation to Decision under s88 RMA

02 February 2023
Email from Aukaha (on behalf of Te Rūnanga) outlining requirements for a CIA, and stating that the cultural impact assessment process "..may take 2-3 months to complete depending on the availability of information.."; that SIRRL has not provided all previously requested information; that the process of assessing cultural impacts is as important as the outcome; that the CIA assessment should inform the other technical assessments and overall project design, and that Te Rūnanga "..does not agree that it is permissible to provide the assessment after lodgment of the application.."

07 February 2023
Letter SIRRL to Aukaha, which reiterated SIRRL's support of "..the important role of the CIA.."; SIRRL's request to "..work with you and Iwi on the Cultural Impact Assessment in good faith and provide the further research and information that you require as soon as we can.."; and stating that "..our door is always open to building a positive and enduring relationship.."

10 February 2023
Email from Babbage to Te Rūnanga noting that "..all of the information requested (except the ecological report and the human health assessment by ethnicity) is detailed in the application package.." (i.e. as lodged with Council in November 2022);

And inviting further meetings with Aukaha.

11 February 2023
Detailed response from Babbage to Aukaha responding to alleged information gaps, and cross-referencing earlier assessments provided as part of the AEE lodged with the Consent Authorities. Babbage confirmed that a Human Health Assessment would be provided to Aukaha in 4 weeks.