

IN THE MATTER

of the Resource Management Act
1991

AND

IN THE MATTER

of applications for resource
consents to take and use water in
the Upper Waitaki Catchments

**MEMORANDUM OF COUNSEL ON BEHALF OF CANTERBURY REGIONAL
COUNCIL**

9 July 2010

MAY IT PLEASE THE COMMISSIONERS

INQUIRY

1. Advice has been requested on the following two questions presented as follows:

Question 1

Can the Chief Executive provide more than one assessment (if he has more information available to him) without going through a formal plan change process with regards to the requirement in Table 3, row xxii of the WCWARP which sets the minimum and mean flows "as assessed by Canterbury Regional Council."

Question 2

What does the absence of an allocation limit mean when considering compliance with the provisions in Rule 2 and Table 3?

Does the absence of an "allocation limit" in Table 3, row xxii of the WCWARP suggest that there should be no abstraction from those waterbodies unless the flow in that waterbody is above the mean flow and complying with "flow sharing"?

In preparing this I have referred to the following:

- Waitaki Catchment Water Allocation Regional Plan;
- Waitaki Catchment Water Allocation Regional Plan Annex 1 Decision and principal reasons for adopting the Plan provisions;
- Memorandum dated 26 August 2009 Gillian Ensor (Consents Project Leader) to Dr Bryan Jenkins Chief Executive entitled Minimum and Mean flows for Upper Waitaki Tributaries.

CONCLUSIONS

2. My conclusions are summarised as follows:

Answer 1: Yes

The methods of the Waitaki Catchment Water Allocation Regional Plan (the Plan) for implementing the flow and level regimes are by way of rules. The rule at issue does not specify a value for the flow statistic but requires an assessment. It is silent on whether the assessment can be made more than once under the existing Plan.

More data acquired over time may give a more accurate assessment of the statistic but if the rule applies, the assessment of the 5-year 7-day mean annual low flow (first limb of the rule); or if relevant the mean (second limb); has to be made before an application can be decided.

Over time more data may enable another more accurate assessment to be made of the relevant hydrological statistic. It is not inconsistent with the terms of the Plan to repeat the assessment again at a later stage. If further

assessments provide a more accurate representation of the hydrological statistic, then the objectives of the Plan may be better served. There is no statutory bar to a further assessment being done and applied to subsequent applications without going through a formal plan change process.

Answer 2: No

The Plan rules specify only certain requirements for determining activity classes in catchments. For example the activity must comply with any specified minimum flow in Table 3. If there is an allocation limit then the activity must remain within it to be classed as discretionary. The absence of reference to an allocation limit should not be used to read in other unspecified requirements. The second arm of the rule specifies only what occurs for takes above the mean flow. Takes below the mean flow, which are classed as discretionary, can otherwise be exercised down to the 5-year 7-day low flow when they must cease.

BACKGROUND

Rule 2 Line xxii

3. The interpretation of the Plan's Rule 2, in regard to waterbodies covered by Table 3 line xxii, is considered. That part of the rule is as follows:

Rule 2 (2) Except as provided in (2) and (3), no person shall take, use, dam or divert surface water or groundwater unless:

*Cross-ref:
Policies 1-5,
33, 24, 23, 22, 32
and 33-45*

- a. the flow in the relevant river or stream, or the level in the relevant lake, is above the minimum flow or level in Table 3; and
- b. the amount taken or diverted from the relevant river or stream is for a replacement consent¹⁷ or in combination with the amount of water authorised to be taken or diverted by existing resource consents, does not exceed the allocation limits in Table 3; and
- c. the take or diversion complies with a flow-sharing regime such that no more than half of the water above or between the thresholds in Table 3 can be taken or diverted; and
- d. the consent holder provides the flushing flows in Table 3 xvii(b) where applicable.

(2) Water taken for essential drinking, stock drinking-water, maintaining fire-fighting capacity, and for the processing and storage of perishable produce is exempt from minimum flow and level and flow-sharing regimes.

(3) Water taken or diverted and returned to the same water body in the vicinity of the take or diversion point, in the same condition and quality as taken, for micro hydro-electricity generation or fisheries and wildlife, is exempt from the allocation limits in Table 3.

Water bodies	Environmental Flow regimes
xxi. All other rivers and streams (except for the Pūkaki River, lower Ōhau River and the Tekapo River upstream of Lake George Scoti)	<ol style="list-style-type: none"> a. A <u>minimum flow</u> of the 5-year, 7-day low flow as assessed by the Canterbury Regional Council set at the downstream end of the catchment b. A <u>flow-sharing</u> threshold at the mean flow as assessed by the Canterbury Regional Council

Definitions under Plan

4. The rule incorporates reference to a number of terms defined in the Plan. Those definitions in Chapter 10 are as follows:
 - **Minimum flow and level**
The flow or lake level at which the taking and diverting of water from a water body authorised by resource consent must cease.
 - **Allocation limits**
The limits on the cumulative rate of taking and diverting of water that are established by this Plan and are specified in Rule 2 of this Plan.
 - **Flow sharing regime**
The apportioning of flow between in-stream uses and cumulative taking and diverting of water, as specified in Rule 2(c).
 - **MALF** -mean annual low flow.
 - **Mean annual low flow**
The average, for a number of years, of the annual lowest daily flows. This is determined by selecting the lowest daily flow (average over 24 hours) for each year of record, summing those values and then dividing the total by the number of years of record.
 - **Environmental flow and level regimes** are defined as
The flow sharing, allocation limits, minimum flows and levels and flushing flows established by the Plan.
5. The Plan at line xxii refers to the “5-year 7-day low flow”. This is not defined in the Plan. Based on the definition of the MALF this is understood to be the lowest seven day average natural flow that occurs on average once every five years.

Activity status

6. The value of the hydrological statistic affects the status of the activity. Activities that are not compliant with the Rule are non-complying. Rule 16 of the Plan applies to non-complying activities and states *“In considering an application to which this rule applies the consent authority will have regard among other matters to all the policies of this Plan”*. If the activity is compliant with the Rule it is discretionary and is subject to Rule 15. The range of policies that must be taken into consideration is narrower for a discretionary activity.

QUESTION 1

Part of Rule at issue

7. An issue has arisen as to whether the Council, having made one assessment for any water body for the purposes of implementing Rule 2 Line xxii, (“the Rule”), could make another assessment for that water body. If only one assessment can be made for each hydrological statistic, then it will be used to classify every application until a new plan is notified that has a numerical value specified in the relevant rule.

8. Clearly there is an interpretation issue with the Rule as this Hearing Committee has sought advice. If the meaning is not clear from plain words of the Rule then the context of the Plan may be used to interpret the Rule.

Why did the Board not set the numbers?

9. The Board refers at page 3 of Annex 1 to the Plan being developed within 12 months. It states: "*that affected the extent of the investigations which the Board was able to make*".
10. The Rule refers to surface water bodies not covered by the prior parts of the rule. It is a catchall provision. Whereas most other water bodies have actual values cited in Rule 2, the part numbered xxii has a hydrological statistic specified in the first limb as the "5-year 7-day low flow". In addition, a flow sharing regime is specified in the second limb for takes above the "mean flow".
11. Presumably the Board had sufficient confidence in the data presented for other catchments that it specified numbers for catchment restrictions. The Board has left it to the Council to establish a figure for surface water bodies caught by the Rule, presumably because better data or some data may then be available.
12. The Board has provided a degree of certainty for the Rule by choosing the 5-year 7-day low flow and the mean as the values to be assessed. Those are hydrological statistics used by hydrologists for analysing flows. The Board has not retained for the Council a discretion to apply the objectives and policies of the Plan in determining the value.

Plan considerations

13. The purpose of a rule is to implement the policies and achieve the objectives of the Plan. In this case they are achieved through rules that specify low flows, annual allocations and flow sharing regimes.
14. The objectives and policies of the Plan can be considered to see if they assist with interpretation, i.e. whether the option of one assessment or successive assessments without the need to wait for a Plan change, better implements the policies and achieves the objectives of the Plan. Objective 2 clearly includes that its achievement must be consistent with Objective 1.
15. A clear implication of the Board's statement in Annex 1, (refer para 9) is that more investigation is possible with more time. It is a fair assumption that the more data the more accurate the representation of the flow statistic.
16. If a lack of data resulted in an under-estimate of the flow statistic, i.e. a minimum flow lower than it should be, then the persistent use of that value, could undermine the achievement of Objective 1. On the other hand, if the lack of data resulted in an over-estimate of the flow statistic, i.e. a minimum flow higher than it should be, that could undermine the achievement of the outcomes anticipated by Objective 2. Either possibility can generate an outcome that is inconsistent with the intent of the Plan.
17. The ability of the statistic to be representative will crystallise over time. Both Objective 1 and Objective 2 of the Plan will be better served by the accumulation of as much data as possible. A one-off assessment done after

there have been a number of measurements may give a reliable fix on the relevant hydrological statistic.

18. In so far as most other water bodies to which the Rule 2 applies have values fixed in the Plan for its duration, the persistent use of a one-off assessment mirrors a Plan approach. However the figures fixed by the Plan were generated through the planning process where the Board could apply its discretion and it clearly had enough confidence to establish those values for the duration of the Plan.
19. It appears contrary to the intent of Objective 1 and Objective 2 to apply a one-off assessment to subsequent applications, if use of additional new data could produce a more accurate assessment of the hydrological statistic. Therefore it seems consistent with the intent of the Plan to revise an assessment if there is more data available.

When is an assessment made?

20. The first application in the catchment, after the implementation of the Plan, generates the need for an assessment. Without it the application cannot be decided because the activity cannot be classified.
21. The Resource Management (Waitaki Catchment) Amendment Act 2004 (the Waitaki Act) states at s31:

Consideration and decision on applications deferred

- (1) A local authority must not consider and decide an application unless the regional plan developed and approved under Part 3 is operative.*
- (2) Section 88A of the principal Act does not apply to an application*

Included at s3 of the Waitaki Act as part of the Act's purpose is: "*to defer the hearing of certain applications for resource consents relating to the Waitaki catchment until the regional plan for the allocation of water is operative*". The purpose is also stated to require allocation "*on a basis consistent with the purpose and principles of the principal Act*".

22. Deferred applications are listed in the second schedule of the Waitaki Act. Processing of those deferred applications resumed once the Plan was in place. Section 88A of the RMA is suspended in relation to those applications so until an assessment is done water bodies caught by the Rule have no classification.
23. Section 87(1) of the RMA provides that applications for Part 3 activities, for which there is no relevant plan or rule, are discretionary. However s87(1) does not apply in this instance because there is a relevant plan and relevant rule for these Part 3 activities (being Rule 2 xxii). Therefore the activities do not default to discretionary if no assessment has been made. So an assessment must be made to classify the activity so it can be decided.
24. Once it receives an application, to which the Rule applies, the Council has to consider the timeframe of the application and the assessment. In addition it will assist a 42A report writer prepare the report or an applicant that may wish to submit on that aspect of the application at any hearing.

25. Unless the applicant agrees in accordance with s37 and 37A of the RMA to an extension of time limits, there is no provision under the Waitaki Act, the Plan or the RMA for the Council to delay the processing of an application in order for an operative plan matter to be clarified. The assessment may be based on limited data, but its use is nevertheless compelled by the combined effect of the Plan, the RMA and the Waitaki Act.
26. Therefore there may be a need to prepare an assessment, when there is a limited amount of data available, which may not be the best assessment.

Other statutory considerations

27. After an assessment has been made applications can be classified and decided. If further data becomes available another assessment can be made and applied without going through a plan change. If an application, made since the Plan was operative, is being processed when the second assessment is made which changes the status of the activity, s88A of the RMA can apply. The Waitaki Act only suspends the effect of s88A for "deferred applications".
28. The application can be processed and decided on the basis of its initial status under the first assessment. The decision-maker can take account of a changed assessment as part of the s104 considerations. (s88A(3))
29. By way of further explanation section 88A (pre 2009 amendment) states:
 - (1) Subsection (1A) applies if-
 - (a) an application for a resource consent has been made under s88; and
 - (b) the type of activity (being controlled, restricted, discretionary or non-complying) for which the application is made under section 88, or for which the activity is treated under s77C, is altered after the application was first lodged as a result of-
 - (i) a proposed plan being notified; or
 - (ii) a decision being made under clause 10(3) of the First Schedule; or
 - (iii) **otherwise***
 - (2) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.
 - (3) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with s104(1)(b).

(*emphasis added)
30. The present form of 88A is similar. The status of the activity is changed by an assessment which could be attributed to the "otherwise" category.
31. Further assessments can be made and incorporated into the use of the Rule for processing and deciding successive applications. This is consistent with the objectives of the Plan if it results in more accurate fix of the relevant hydrological statistic. It is consistent with the processing requirements of the RMA. There does not appear to be any procedural bar in either the Plan or statute to that approach.
32. A process issue may arise for the processing of a deferred application if it gained an activity status with a first assessment and that status was changed by a second assessment.

33. Even if s88A is not applied directly, a call must be made by the decision-maker as to how to process the application. One purpose of the Waitaki Act is already achieved because the Plan is now operative. The Principle Act (the RMA) may provide process guidance through s88A. The decision-maker still has discretion under s104 to take into account all relevant matters and to give each the appropriate weight. The key point is that the classification of the activity at the time of decision-making is known and based on the best available data.

Consequences of more than one assessment

34. Whether or not there is a further assessment will not affect a party whose consent has been granted. More than one assessment may however result in consent holders in same catchment having different low flow conditions if their consents are granted at different times under different assessments. If successive grants lead to less restrictive conditions, those with earlier grants and more restrictive conditions may apply under s127 of the RMA for a change of condition. If on the other hand the statistic is revised upwards and is eventually incorporated into an operative Plan, and consents are inconsistent with the Plan's minimum levels or flows, those consents can be reviewed under s128(1)(b).
35. If there are a number of consents in a catchment it may become more critical to have an accurate assessment. A repeat assessment for further applications will enable Objective 1 to be achieved and promote the achievement of Objective 2 as being consistent with Objective 1. Repeat assessments based on better data will lead to a more accurate representation of the statistic and promote the intent of the Plan.

QUESTION 2

36. Similar arguments will apply to the requirement that the flow sharing threshold commence at the mean flow. If there is an application relating to the Rule the Council needs to make an assessment as soon as possible with whatever information it has. That one assessment may later prove to be based on less than accurate information. That may run counter to the Plan's specification for it to be the mean flow.
37. The introduction to Rule 2 provides that the activity must comply with:
- (a) minimum flows; and
 - (b) allocation limits; and
 - (c) flow sharing; and
 - (d) flushing flows.
38. Despite the conjunctive nature of the wording clearly not all of these matters are relevant to all parts of Rule 2. That is evident from reading the entire rule. For example allocation limits are not taken into account in determining if a take from the Twizel River is discretionary.
39. The Plan must be read to give effect to its words. Words that are unclear can be considered and interpreted. No additional words can be read in which clearly go beyond the intent of the Plan, as evidenced by the context of the surrounding words.

40. Therefore each take need only comply with the specified requirement for each water body. The *absence of an "allocation limit"* in Table 3, row xxii does not lead to an ability to read in *"that there should be no abstraction from those waterbodies unless the flow in that waterbody is above the mean flow and complying with "flow sharing"*. There is no confusion about the meaning of the Rule other than the inquiry raised. There is no basis for reading in those other words.

DELEGATION

41. While the Rule refers to the Canterbury Regional Council making an assessment, the Council has delegated the making of the assessment to the Chief Executive. Therefore the question refers to the Chief Executive. Whether or not more than one assessment can be done under the current delegation depends on its words. My understanding is that this power was not given to the present Hearing Commissioners and therefore cannot be exercised by them as Hearing Commissioners.
42. The form of delegation to the Chief Executive cannot limit the scope of what the Plan intended. If it only allows one exercise by the Chief Executive then the Council can itself exercise the power or provide another delegation to the Chief Executive.

Dated 9 July 2010



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