



Waitaki Water Allocation Regional Plan

ARCHIVED MATERIAL

MEETING INFORMATION

Legal Advice

Legal advice: relationship between draft water allocation plan rules and the review of existing resource consents

Memorandum

To: Marilyn Bramley
From: Simon Berry
Date: 11 January 2005

Re: Waitaki Water Allocation Board - Board's Question for Counsel (Question 1):
Limited Response

1. Introduction

1.1 The purpose of this memorandum is to provide a response to the Board's Question 1 for Counsel (dated 23 December 2004). The question was framed in the following terms:

The Waitaki Catchment Water Allocation Board's function is to make a regional plan, but it does not have the function of administering that plan. That would be the responsibility of the regional council.

The High Court has held that a consent authority cannot derogate from its grant unless it is acting pursuant to a specific statutory power. It cited the powers conferred by s. 68(7) and ss 128 to 132 as an example of such a power.

The Board is considering making rules of the kind described in s 68(7), and is considering whether pursuant to paragraph (a), the plan should state that those rules should affect the exercise of existing resource consents which contravene the rule.



The Board is also considering including in the plan a statement pursuant to paragraph (b) that the holders of resource consents may comply with the rules in stages or over specified periods.

Given the division of functions between the Board and the regional councils, counsel's opinion is sought on the question:

Whether, on the true interpretation of the legislation, it is for the Board, or for the regional councils, to set the stages or periods within which they are to comply.

In practice, if the Board does that, it would have to be general in application; and if the regional councils do it, they would be able to do so on a case by case basis in exercising the powers conferred by ss 128-132."

Scope of memorandum

1.2 In providing this limited response, it is proposed to:

(a) Make some brief comments on context, in light particularly of the decision of the High Court in *Aoraki Water Trust et ors v. Meridian Energy Limited* (CIV 2003 476 0007733) ("the 'Aoraki Trust case'") (Section 2).

(b) Analyse the provisions of the RMA and Resource Management (Waitaki Catchment) Amendment Act 2004 ("Waitaki Act") relevant to the question posed and comment on the issues raised by the Board's question, and related issues relevant to the division of functions between the Board and the regional councils (Section 3).

(c) Set out the qualifications (as to further research and analysis which may be necessary) to which this limited advice is subject (Section 4).

Executive summary

1.3 My detailed comments follow. At the outset, my response to the question posed by the Board can be summarised as follows:

(a) It is the Board's function to develop and approve a regional plan for water allocation which will have effect as if it were a regional plan developed and approved under the RMA by the CRC. It is then the CRC's responsibility to administer the plan. The CRC is empowered to review and change the Waitaki Plan but only after the plan has been operative for two years.

(b) The Board is empowered by section 18(3) of the Waitaki Act to make rules relating to maximum or minimum flows, etc., as provided for by section 68(7) of the RMA.

(c) To the extent that it is feasible to do so, it is appropriate for the Board to specify in the Waitaki Plan the stages or periods within which existing consent holders will be



affected by the rules introduced pursuant to section 68(7). In that regard, the Board should be as specific as possible about these stages when the plan as notified (and during public consultation, if any is undertaken), so that this issue can be the subject of submissions and fully canvassed at the hearing convened under Part 3, subpart 2 of the Waitaki Act.

(d) If rules specifying the stages or periods within which holders of resource consents can comply with new rules in terms of section 68(7) were not included in the Waitaki Plan at the time the plan was promulgated, such rules could only be included in the plan by way of plan change. The CRC would have jurisdiction to promulgate such rules but would not be able to introduce such rules for two years after it becomes operative. Such rules would therefore need to be the subject of a separate submission, hearing and appeal process. It is thus considered more appropriate that such be introduced at the time the Waitaki Plan is notified, if feasible.

(e) To the extent that the implementation of rules introduced in terms of section 68(7)(a) will affect the exercise of existing resource consents so that the conditions of those consents need to be changed, a formal review of conditions in terms of sections 128 -130 of the RMA would be necessary. Such a review can only be undertaken once the plan is operative and therefore falls within the jurisdiction of the CRC to consider in terms of sections 128(1)(ba) and 130(5) of the RMA.

(f) If such rules are included in the Waitaki Plan, the plan should indicate in terms of section 68(7)(a) that any specific changes to conditions will be the subject of notice of review under section 129 and a possible hearing in terms of section 130(5).

(g) If the Board was unable or unwilling to promulgate rules pursuant to section 68(7) at this stage, it may nevertheless be feasible to enunciate a policy that minimum flows or rates of use (for example) should be introduced over time and that the conditions of existing consents (or suites of related consents) should be revisited by way of review pursuant to section 128 of the RMA or rules introduced pursuant to section 68(7) in order to achieve that objective. Preferred time frames and the rationale for them could be specified. This would provide some guidance (and an ability to lodge submissions) to both the CRC and existing consent holders as to the periods or stages in which the Board considers such measures should be implemented but would fall short of constituting a rule in terms of section 68(7). Having said that, to the extent that the Board is able to be specific, it is considered more appropriate for the Board to promulgate rules at the outset.

(h) To the extent that the implementation of rules introduced in terms of section 68(7)(b) do not directly affect the exercise of existing resource consents such that a formal review of conditions in terms of sections 128 -130 of the RMA is necessary (it is not clear at this stage whether this is feasible or proposed), the importance of the Board being as specific as possible as to times or periods in which the new requirements arise is even more important, so that potentially affected parties can exercise their right to lodge a submission.



(i) It is not considered appropriate for the Board to consider specific changes to conditions in context of the Waitaki Act hearings on the basis that such a function would be beyond the jurisdiction of the Board in terms of the Waitaki Act - any overlay on the plain words of the RMA to enable this to occur would fall outside the scope of "necessary modifications" when applying the provisions of the RMA in the context of the Waitaki Act. Such reviews would need to be undertaken by the Canterbury Regional Council ("CRC") once the Waitaki Plan is operative.

1.4 Thus, having regard to these comments, my advice in response to the basic question posed by the Board is that, in the context of the Waitaki Plan, it is for the Board rather than the regional councils to set the stages or periods within which consent holders are required to comply with new requirements as to minimum flows, rates of use, etc. Such rules could be introduced by the regional councils but not until two years after the Waitaki Plan becomes operative. The Board could provide policy guidance (falling short of rules) to the regional councils as to the time frames within which such requirements could be introduced or implemented by the councils via rules promulgated under section 68(7) of the RMA or the review of consent conditions under section 128-132 of the RMA. However, in my view it would be more consistent with sound resource management practice and the purpose and intent of the Waitaki Act if (to the extent feasible) such rules were introduced by the Board at the time the Waitaki Plan is promulgated.

2. Context

2.1 The members of the Board will obviously be thoroughly familiar with the background to and purpose of the legislation. It is therefore only proposed here, for completeness; to make some general observations about the background to and purpose of the Waitaki Act. Having not been directly involved in this matter to date, these observations are based on material available from the press, MfE's Website, Parliamentary bills and the High Court decision. I look forward to receiving a fuller briefing in due course, as per our pre-Christmas emails.

2.2 The following key points are noted:

(a) There is no regional plan for the allocation of water in the Waitaki catchment. It is understood that a number of consents in the catchment include minimum flow conditions but that there is no plan-based minimum flow regime for the Waitaki River.

(b) Meridian holds numerous resource consents relating to the diversion and use of water from Lake Tekapo, originally dating back to a 1929 Order in Council and a subsequent Order in Council under the Water and Soil Conservation Act 1967 and most recently consents granted by the CRC in 1991 which superseded the Order in Council. With a natural mean flow of only 82 cumecs, Lake Tekapo provides less water than Meridian requires to satisfy its permit. All water in Lake Tekapo is therefore assigned to Meridian and other lawful users.



(c) There are presently in excess of 60 resource consent applications for the use of water in the catchment, quite aside from the now abandoned "Project Aqua" proposal. These need to be considered on a "first come, first served" basis, which does not enable applications to be considered together in order to determine allocation between categories of use.

(d) The Waitaki Act was enacted:

"to require the allocation of water in the Waitaki catchment on a basis consistent with the purpose and principles of the Resource Management Act 1991. To that end the Waitaki Act provides for the establishment of a board which is to develop and approve a regional plan for the allocation of water in the Waitaki catchment. The Waitaki Act does not, however, provide any direct guidance as to the status or effect of existing water permits in the context of the regional plan." (Aoraki Trust decision, para 17.)

(e) A draft water allocation plan for the catchment (referred to in this memorandum as "the Waitaki Plan") must be prepared and approved within 12 months of the members being appointed, i.e., by September 2005. A draft plan is being prepared. This advice is sought in that context.

The *Aoraki* Trust case

2.3 The scope of the relevant provisions of the RMA and the Waitaki Act were considered by the High Court in the *Aoraki* Trust case. The entire decision is highly significant but insofar as relevant for present purposes it is noted that the High Court held that:

(a) There is nothing in the RMA which would authorise the CRC to grant any party a water permit for Lake Tekapo that "would have the effect of reducing the amount of water available to satisfy the terms of Meridian's consents" (para. 55). In effect, the High Court made clear that a consent authority cannot derogate from the allocation in a previous water permit by granting a water permit in respect of water that has already been allocated - "where Parliament has conferred power on a consent authority to interfere with an existing grant, it has acted expressly and for very limited purposes" (para 52), including rules relating to maximum or minimum levels, etc., in terms of section 68(7); power to review conditions (section 128); etc.

(b) There is nothing in the Waitaki Act which would authorise the Board to make provision for other parties to take, divert or use the waters of Lake Tekapo for irrigation purposes, notwithstanding that it may reduce the amount of water available to satisfy Meridian's needs. (para 66 *Aoraki* Trust).'

(c) In enacting the Waitaki Act, Parliament was effectively taking a neutral stance on the issue of priority - "it was not intending to accord priority to consents held by Meridian or anyone else... nor was it intending to influence the determination of future applications" (para 61.)



(d) In making that observation, the High Court cited the Parliamentary speech of the Hon. Marion Hobbs at the second reading of the Waitaki Bill that:

"Nothing in the Bill is intended to alter the rights of existing consent holders to operate their existing consents. The Water Allocation Framework once operative is simply a regional plan and as such is forward looking. In allocating water under the Framework the Board must consider any de facto allocation and may allocate water to whatever uses it considers beneficial. However, as with the development of any regional plan where the water may be currently allocated by consents, **the allocation will not override existing consents and so will not have effect until those consents expire, except through any review of consent conditions. Any such review is conducted under the existing provisions of the RMA** and is a review of conditions for environmental matters only."

(Emphasis mine.)

(In citing this passage, it is acknowledged that such comments are only a factor in interpreting the legislation, but nevertheless provides a helpful indication of what the drafters of the legislation intended. In that context, it was obviously seen as helpful by the High Court in the *Aoraki Trust* case.)

3. Analysis

3.1 As noted at the outset, the memorandum from the Chairman notes that:

"The Board is considering making rules of the kind described in s 68(7), and is considering whether pursuant to paragraph (a), the plan should state that those rules should affect the exercise of existing resource consents which contravene the rule.

The Board is also considering including in the plan a statement pursuant to paragraph (b) that the holders of resource consents may comply with the rules in stages or over specified periods.

Given the division of functions between the Board and the regional councils, counsel's opinion is sought on the question:

Whether, on the true interpretation of the legislation, it is for the Board, or for the regional councils, to set the stages or periods within which they are to comply"

3.2 Counsel is not aware of the precise nature of the rules being considered by the Board. However, given the factual context, it is assumed that the rules being contemplated relate to maximum levels or rates of use of water. Further, given the nature of the question posed and the fact that the waters upstream of the Waitaki Dam are fully allocated to Meridian, it is assumed that the rules would result in the introduction of additional restrictions on existing water permits, held by Meridian or others. (Any advice which is provided must necessarily be general in nature until the

precise nature of the proposed rules is known. This represents a limitation on the advice provided.)



3.3 In addressing these issues, it proposed to address:

- (a) The relevant provisions of the the Waitaki Act.
- (b) The purpose and scope of rules promulgated under section 68(7) of the RMA and the related provisions relating to review of consent conditions (sections 128-132).
- (c) A possible alternative policy response.
- (d) Whether the ability to interpret the provisions of the RMA "with the necessary modifications" alters the conclusions reached.

Relevant provisions of the Waitaki Act

3.4 It is the Board's function to develop and approve a regional plan for water allocation which will have effect as if it were a regional plan developed and approved under the RMA by the CRC. In that regard, section 14 of the Waitaki Act states:

"(1) The regional plan developed and approved under this Part, when it is operative in accordance with section 27,-

- (a) is the Canterbury regional plan for the allocation of water in that part of the Waitaki catchment that is within the Canterbury region;
- (b) may be reviewed and changed by the Canterbury Regional Council in accordance with the provisions of the principal Act, but not sooner than 2 years from the date when the regional plan referred to in this subsection becomes operative.

(2) All the provisions of the principal Act that apply to regional plans apply to regional plan referred to in this subsection becomes operative."

(Emphasis mine.)

3.5 Thus, once the Waitaki Plan is operative, it is the CRC's responsibility to administer the plan. The CRC is empowered to review and change the Waitaki Plan but only after the plan has been operative for two years.

3.6 The Waitaki Act specifically contemplates the making of rules of the nature being considered by the Board. The provisions of Part 5 of the RMA do not apply to the development of the Waitaki plan (section 18(2)(a)) but section 18(3) provides that section 68(7) inter alia, applies "with the necessary modifications" to the preparation of the Waitaki Plan.

3.7 So far as relevant, section 68(7) of the RMA states:



"Where a regional plan includes a rule relating to maximum or minimum levels or rates of use of water, or minimum standards of water quality ... the plan may state-

(a) Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and

(b) That the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

(Emphasis mine.)"

3.8 As noted by the High Court:

"The board is specifically authorised to exercise this power as if it were a regional council (s 18(3)). The matters that can be provided for in the plan to be prepared by the board are wide enough to include rules falling within s 68(7) (s 13). (para 64.)"

3.9 It follows that the type of rules contemplated by the Board are prima facie valid.

3.10 It also follows that if rules specifying the stages or periods within which holders of resource consents can comply with new rules in terms of section 68(7) were not included in the Waitaki Plan at the time the plan was promulgated by the Board, such rules could only be included in the plan by way of plan change. The CRC would have jurisdiction to promulgate such rules but would not be able to introduce such rules for two years after it becomes operative. Such rules would therefore need to be the subject of a separate submission, hearing and appeal process.

3.11 It is therefore considered more appropriate in terms of the purpose and intent of the Waitaki Act and sound resource management practice that such rules be introduced at the time the Waitaki Plan is notified, if feasible based on the information now available or that which be derived from the hearing process.

Scope and operation of section 68(7) and related powers to review conditions

3.12 Section 68(7) empowers regional councils to make provisions in the event that a regional plan may introduce a rule in relation to maximum or minimum levels or flows, rates of use, etc.

3.13 The effect of section 68(7)(a) is that a plan may state whether a rule shall affect "**under section 130**" the exercise of existing resource consents which contravene the rule. Section 130 is the provision which provides that the normal notification provisions of the RMA apply to the review of resource consent conditions initiated under sections 128 and 129 of the RMA. These provisions and the manner in which they refer to section 68(7) provide useful insights into the purpose and scope of that provision.



3.14 Section 128 sets out the circumstances when a consent condition can be reviewed. So far as relevant for present purposes, it states:

"(1) A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent-

...

(ba) In the case of a water, coastal, or discharge permit, **when a regional plan has been made operative** which sets rules relating to a maximum or minimum levels or flows or rates of use of water...and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met.

(Emphasis mine.)"

3.15 It is noteworthy that section 128(1)(ba) (inserted by section 54 of the Resource Management Amendment Act 2003) specifies the time at which the notice under section 129 can be given, i.e., "when a regional plan has been made operative" and the regional council takes the view that the consent conditions should be reviewed to enable the flows, etc., set by the rule to be met.

3.16 In turn, section 130(5) (inserted by section 56(3) of the Resource Management Amendment Act 2003) states:

(5) If a regional plan...states that a rule will affect the exercise of existing resource consents under section 68(7), a consent authority-

(a) is not required to comply with section 93(2) or section 94(1) [both of which relate to the notification of resource consent applications]; but

(b) **must hear submissions** only from the consent holder **if the consent holder requests** (within 20 working days of the service of the notice under section 129) **to be heard**.

(6) [Relates to restricted coastal activities.]

(7) Notwithstanding subsections (5) and (6), if a consent authority considers special circumstances exist, it may require that a review be notified and a hearing be held even if a plan expressly states that a rule affect the exercise of the existing consents under section 68(7)."

(Emphasis mine.)

3.17 In terms of section 128(1)(ba) of the RMA, the requirement to hear submissions from a consent holder, should the consent holder request to be heard, arises once the plan is operative. In my opinion, the effect of section 68(7)(a) is that if it is proposed to include rules a regional plan in relation to minimum flows, etc., which may affect



the exercise of existing resource consents, the plan may indicate that that is so, but the clear implication of the reference to section 130, read alongside the provisions outlined above, is that in the plan should also indicate that the right to be heard under section 130(5) will arise at the time it is proposed that the existing consents will be affected by the new rule. Were that not the case, the reference to section 130 would be otiose.

3.18 Section 68(7)(b) is a further empowering provision that makes clear that the plan may indicate that the holders of resource consents can comply in stages or over specified periods. In other words, where it is proposed that a plan will contain rules that will alter the exercise of existing consents, the plan can state how that will arise in the future. To that extent, any indication given in terms of section 68(7)(b) could be seen as qualifying or ameliorating the effect of the rules referred to in terms of section 68(7).

3.19 I have considered whether the two subparagraphs can or should be interpreted conjunctively or disjunctively. In my view, use of the term "and" between the two subsections and the fact that section 68(7) is referred to without differentiation elsewhere in the RMA (e.g., sections 128 and 130) suggests that section 68(7)(b) needs to be read alongside section 68(7)(a) and that the obligation to hear from affected consent holders (should they wish to be heard) applies whether or not the rules are introduced in stages. In other words, in my opinion, the fact that a consent holder may have a specified period of time to comply with a new rule in relation to minimum flows, etc., does not obviate the need to undertake a specific review if compliance with that rule requires a change to that consent holders consent conditions.

3.20 Having said that, it may be feasible that the holders of existing resource consents may be required to comply with the requirements of a new rule promulgated in terms of section 68(7)(b) in circumstances in which existing conditions will not be affected. To the extent that that is possible (and in the absence of more specific information it is not possible to assess this), I see no reason in principle why the Board should not specify that stage or period in the draft Waitaki Plan when it is notified - indeed that would be appropriate to give those consent holders the opportunity to lodge submissions and be heard, especially if it not clear that they will have the opportunity to be heard in terms of section 128(1)(ba) later. The likelihood or possibility of that arising is something which may need to be considered further.

3.21 Having regard to the above analysis, the effect of these provisions is that:

(a) A regional plan can include a rule relating to maximum or minimum flows, rates of use, etc., which will affect the exercise of existing consents.

(b) The plan can indicate that it is contemplated that the holders of existing resource consents will be affected and that compliance may be required in stages.

(c) If it is contemplated that the exercise of existing resource consents will be affected, the plan should indicate in terms of section 68(7)(a) that the optional right to



be heard under section 130(5) of the RMA arises once the plan is operative and the relevant regional council decides to bring the conditions of the

relevant resource consents into line with the new rules. That requirement arises whether or not compliance is required in stages.

(d) Even if the Waitaki plan were to specify that compliance with the relevant rules is deferred or is to be introduced in stages, that the need to give consent holders whose consent conditions will be affected the opportunity to be heard arises in any event as a result of the combined effect of sections 68(7)(a), 128(1)(ba) and 130(5) of the RMA.

3.22 In the context of the Waitaki Plan, I consider that it would be appropriate (to the extent that it is feasible to do so based on the information available) for the Board to specify the stages or periods within which existing consent holders will be affected by the new rules but that, prima facie (subject to the scope of the phrase "with the necessary modifications" in section 18(3) of the Waitaki Act - see below), any specific changes to the conditions of existing resource consents still need to be the subject of notice of review under section 129 and a possible hearing in terms of section 130(5). This conclusion is consistent with the observations of the High Court on the *Aoraki Trust* case:

"The Act describes the contents of the notice of review (s 129); the requirements as to public notification, submission and hearing (s 130); the matters to be considered in the review (s 131); and the scope of the consent authority's decision (s 132). **Depending on the contents of the plan prepared by the board, these powers will be available to CRC once the plan has been approved and handed over.**" (para 65.)

(Emphasis mine.)

3.23 The requirement that any rules which will affect the exercise of existing consents will be the subject of specific review is also consistent with the Minister's speech to Parliament (see above).

An alternative policy approach

3.24 The Board may be unable or unwilling to promulgate rules pursuant to section 68(7) of the RMA at this stage. If so, it may nevertheless be feasible to enunciate a policy and set out provisions in terms of section 13 of the Waitaki Act to the effect that minimum flows or rates of use (for example) should be introduced over time in order to achieve the purpose of the Waitaki Act and Part 2 of the RMA.

3.25 In terms of objectives, preferred or indicative time frames and the rationale for them could be specified in the Waitaki Plan when promulgated. In terms of methods to achieve those objectives, the Waitaki Plan could specify that the conditions of existing consents (or suites of related consents) should be revisited by way of review pursuant to section 128 of the RMA or rules introduced pursuant to section 68(7).

3.26 Such an approach would provide some guidance to both the CRC and existing consent holders, as to the periods or stages in which the Board considers such

measures should be implemented but would fall short of constituting rules under section 68(7).



3.27 Having said that, to the extent that the Board is able to be specific, it is considered more appropriate for the Board to promulgate rules at the outset.

Application of these provisions "with the necessary modifications" in the context of the Waitaki Act

3.28 I have expressed the view that it is appropriate for the Board to set the stages or periods within which rules which will affect the exercise of existing consents are to be complied with. The regional councils could promulgate such rules once the Waitaki Plan has been operative for two years and it is the regional councils' function to review the conditions of consents which may be affected. The next question which arises is whether in applying section 68(7) in the context of the Waitaki legislation, this conclusion is altered by the need to apply the relevant provisions of the RMA "with the necessary modifications" to the Waitaki Act.

3.29 The key issue in this context is whether it can be argued that, applying section 68(7) "with the necessary modifications", that if the Board specifies the stages or periods within which existing consent holders are required to comply with new rules relating to minimum flows, then the need for the regional council to undertake a specific review at a later stage can be dispensed with so that these issues (i.e., changes to consent conditions) can be addressed in the context of the Board's hearing of submissions on the Waitaki Plan itself.

3.30 In my view, such an interpretation would extend beyond the scope of the phrase "with the necessary modifications" and should not be adopted, for the following main reasons:

(a) The Board's functions relate to the preparation of a regional plan. Schedule 1 of the RMA is excluded (section 20 Waitaki Act) but certain clauses do apply (section 21). If the Board were to have power to consider the review of specific consent conditions, the Waitaki Act would in my view need to confer such powers in more specific terms - this power cannot be implied or inferred by reference to "necessary modifications".

(b) Related to (a), section 128(1)(ba) makes clear that the exercise of a review arises once the plan is operative. It is considered that a more specific amendment (beyond applying "the necessary modifications") would be necessary before this power could be assumed to arise in the context of a proposed plan.

(c) Such an interpretation could be seen as giving the Board powers to derogate from consents already granted beyond that contemplated by Parliament in the Waitaki Act or the RMA, contrary to the thrust of the High Court's decision in the *Aoraki Trust* case.



(d) Such an interpretation would be contrary to the assumption that it will be for the regional council to review consent conditions, recognised by both the High Court and referred to by the Minister in Parliament.

3.31 It is therefore recommended that the Board does not adopt this interpretation in developing the Waitaki Plan or its procedures for hearing submissions on the plan.

Summary

3.32 This section of this memorandum can be summarised as follows:

- (a) The Board is empowered by section 18(3) of the Waitaki Act to make rules relating to maximum or minimum flows, etc., as provided for by section 68(7) of the RMA.
- (b) To the extent that it is feasible to do so, it is appropriate for the Board to specify in the Waitaki Plan the stages or periods within which existing consent holders will be affected by the rules introduced pursuant to section 68(7). Indeed, it is considered appropriate to do so, so that this issue can be fully canvassed at the hearing convened under Part 3, subpart 2 of the Waitaki Act.
- (c) If the Board does not introduce such rules, the CRC could do so but only two years after the Waitaki Plan becomes operative.
- (d) An alternative open to the Board is for it to develop objectives and policies which contemplate the introduction of further restrictions on existing resource consents at a later stage, either via section 68(7) rules or the review of existing resource consents. However, it is considered preferable to specify such stages or periods at the time of the promulgation of the Waitaki Plan if that is feasible on the basis of the information available.
- (e) It is for the regional councils to consider in terms of section 128(1)(ba) of the RMA any specific changes to the conditions of existing resource consents the exercise of which may be affected by a rule introduced in terms of section 68(7). If such rules are included in the Waitaki plan, it is recommended that the plan should therefore indicate in terms of section 68(7)(a) that any specific changes to conditions will be the subject of notice of review under section 129 and a possible hearing in terms of section 130(5).
- (f) It would not be appropriate for the Board to consider changes to conditions under the Waitaki Act on the basis that such a function falls outside the scope of "necessary modifications" and would be beyond the jurisdiction of the Board in terms of the Waitaki Act.

4. Limited Advice - Qualifications

4.1 Counsel's time and resources are limited given the time of year and time frame for providing this advice. Further, I have not previously been involved in the Waitaki



catchment issues and I am currently operating in somewhat of a vacuum. Thus I am happy to provide this advice but provide this memorandum on a limited basis. Specific caveats or qualifications to which my advice is subject are as follows:

- (a) I look forward to receiving a more specific briefing in due course. It is possible that my advice is affected by misconceptions as to the precise nature of the issues arising.
- (b) Related to (a), I am not aware of the specific nature of the rules under section 68(7) which the Board is contemplating. This advice may need to be revisited in light of more specific advice from the Board in that regard.
- (c) The scope and operation of sections 128(1)(ba) and 130(5) of the RMA represents an important element of this advice. Both were introduced by the Resource Management Amendment Act 2003. It would be beneficial to review the genesis of those amendments to determine whether that provides any useful insights in terms of the operation of section 68(7). I have not had the opportunity to do that.
- (d) Whether these conclusions are affected if the Board is able/intends to promulgate rules that require compliance with the Waitaki Plan in stages but does not require specific changes to consent conditions. (At this stage, I do not consider that this would alter the thrust of the advice given.)
- (e) I have not reviewed any case law which may assist in the interpretation of the relevant provisions of the relevant provisions.

Simon Berry, Barrister
11 January 2005

Schedule A - Resource Management (Waitaki Catchment) Amendment Act 2004: Statutory Scheme

1 This section provides an overview of the scheme of the Waitaki Act and its relationship with the RMA.

Part 1 - Preliminary

2 The purpose of the Waitaki Act is "to require the allocation of water in the Waitaki catchment on a basis consistent with the purpose and principles" of the RMA (section 3).

3 To that end the Act sets up the Board, requires it to "develop and approve a regional plan for water allocation" ...to have effect as if it is a regional plan developed by CRC under the RMA (section 3(a)) and to deal with certain other matters (section 3(b)). It also defers the hearing of applications (listed in Schedule 2) relating to the allocation of water within the catchment until the new plan is operative.



Part 2 - The Board

4 This Part establishes the Board (section 5), confers its functions (section 6) and powers and privileges (section 7). The key function is to develop and approve the regional plan within 12 months of appointment.

Part 3 - Regional plan for allocation of water in the Waitaki Catchment

5. This Part contains the main substantive provisions of the Waitaki Act.

6. Section 13 is a key provision. It requires that the regional plan to be prepared and approved:

"...must include objectives, policies and methods (**including rules, if appropriate**) in the regional plan, to provide for-

(a) water that is or may be taken from, or used in, the Waitaki catchment in accordance with section 14(3)(b) and (e) of the principal Act; and

(b) water to sustain the intrinsic values and amenity values that the Board identifies...;and

(c) the allocation of water to activities, as appropriate; and

(d) the management of allocated water, including methods that provide for dealing with periods of time or seasons when the level or flow of water is low."

7. The regional plan developed by the Board will have the same status as one promulgated in the normal manner and can be amended by normal RMA procedures, but not within two years of it becoming operative (section 14).

Subpart 1 - Development of regional plan

8. The Board is required to develop and approve a plan and has the same powers as a regional council (section 17).

Matters relevant to regional plan

9. Section 18(1) provides that the RMA, including Part 2, applies "with the necessary modifications, to the development, contents, and approval" of the regional plan, except as expressly provided (section 18(1)).

10. The effect of the first part of section 18(2) (a) is that section 37(1) (a) of the RMA does not apply. This means that the Board cannot extend the 12 month time frame for producing a plan.



11. The second part of section 18(2) (a) provides that Part 5 of the RMA, i.e., the entire part of the RMA dealing with standards, policy statements and plans,

does not apply to the development of the regional plan for the Waitaki catchment, except as provided in section 18(3). In turn, section 18(3) refers to a number of sections of the RMA in that part which do apply "with the necessary modifications". These provisions comprise:

(a) Section 63(1) - Purpose of regional plans, i.e., to assist a regional council to carry out its functions.

(b) Section 66(2A) - Need to take account of iwi planning documents.

(c) Section 67(1) - The normal provisions as to the content of regional plans apply.

(d) Section 67(2) (a) - The Waitaki regional plan must not be inconsistent with any water conservation order.

(e) Section 68(1) - Rules can be included in a regional plan.

(f) Section 68(2) - Rules in the Waitaki plan will have the force and effect of a regulation.

(g) Section 68(3) - In making rules, the Board is required to have regard to the effects of activities on the environment, especially adverse effects.

(h) Section 68(5) - The rules in the Waitaki plan may apply throughout the region or to different parts of the region; make provision for different classes of effects arising from an activity; apply all the time or for stated periods or seasons; be specific or general in application. These general provisions need to be seen alongside sections 15 and 16 which deal with the relationship between the new Waitaki plan and the Canterbury and Otago regional plans.

(i) Section 68(7) is an important provision in terms of the advice sought by the Chairman in Question 1. Insofar as relevant, it states:

"Where a regional plan includes a rule relating to maximum or minimum levels or rates of use of water, or minimum standards of water quality ... the plan may state-

(a) Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and

(b) That the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods."

(j) Section 69 - The normal RMA provisions relating to water quality standards for waters being managed in terms of the water quality classes in the Third Schedule to the RMA, i.e., they must require compliance with water quality classes or better.



(k) Section 70 - Any rules in relation to discharges must not breach the "bottom lines" in section 70(1) (c) - (g) of the RMA (which reflect the requirements of section 107(3)).

(l) Sections 77A - 77D - Rules may specify types of activity as specified in section 77B (permitted, controlled, etc.)

12. Given the specificity in section 18(3), it is to be presumed that all other aspects of Part 5 are specifically excluded.

Evaluation

13. The effect of section 19 is that the Board is required to evaluate the alternatives, costs and benefits of the Waitaki Plan in terms of section 32 of the RMA.

Subpart 2 - Procedures

14. The effect of section 20(1) is that the First Schedule procedures for plan preparation do not apply, but section 20(2) specifies those that do apply with necessary modifications, namely:

(a) Clause 3(1) - duty to consult MfE, etc.

(b) Clause 3(2) - May consult more broadly.

(c) Clause 5(1) - Public notification necessary.

(d) Clause 5(1C) - (5) - Provisions relating to service and public notification apply.

(e) Clause 7(1)(a), (b) - Summary of submissions to be notified, etc.

(f) Clause 10(2) - Consequential alterations can be made in making decisions.

(g) Clause 10(3) - Public notice that decisions have been made.

(h) Clause 16(2) - Amendments can be made to address minor errors.

(i) Clause 16A - 17 - Provisions relating to initiation of variations, merger with existing planning instruments, etc., apply.

15. Section 21 provides that the Board can require reports and information, including information from existing permit holders and applicants in terms of Schedule 2 (section 21(1)(b)). The Board may have regard to any information it receives including submissions on existing applications and information that came into being before the legislation came into force. The existence of such reports must be publicly notified in advance of the hearing of submissions on the Waitaki plan (section 22).



16. Any person may make submissions on the Waitaki plan (section 23) and the Board is required to hear them (section 24). The Board may allow cross-examination of witnesses. This is a departure from the normal procedure for regional plan processed and reflects the Parliamentary intention to hold a first instance hearing that will dispense with the need for an appeal to the Environment Court and enable an appeal directly to the High Court on questions of law.

17. After hearing submissions, the Waitaki plan must be approved by the board (section 26) and it will come into force 15 working days after that unless there is an outstanding appeal (section 28).

Subpart 3 - Right of appeal

18. Submitters on the Waitaki plan (section 29(1)) or local authorities in the Waitaki catchment (in whole or part) (section 29(2)) can lodge an appeal on a question of law and the normal provisions of the RMA (sections 300 - 308) apply.

Part 4 - Processing of applications

19. This Part of the Waitaki Act deals with the processing of applications originally called in by the Minister for the Environment (Schedule 2) and now put on hold by the Waitaki Act until the Waitaki plan is operative (section 31).

20. Section 33 relates to the powers of local authorities in terms of public notification of and consideration of applications. The provisions of the Resource Management Amendment Act 2003 apply (section 34), but the Resource Management (Energy and Climate Change) Amendment Act 2004 does not (section 35).

21. Sections 36-38 deal with appeals on resource consent applications to be dealt with as priority fixtures (section 36), including procedures for lodging appeal documents (section 37) and powers in relation to judicial conferences (section 38).