

Memorandum

Subject: Plan Change 3 - Minute 10

1. This memorandum has been prepared in response to Minute 10 of the Hearings Panel for Plan Change 3 to the Waitaki Catchment Water Allocation Regional Plan (the 'Plan'). Minute 10 addresses three matters:
 - drafting of the controlled activity rule (Rule 15A),
 - amalgamation of Tables 3A, 3B and 3C into one table, and
 - the consequences of not deleting Rule 25.
2. The Panel requested parties that are in support of a controlled activity rule to meet for the purpose of endeavouring to agree on an appropriate wording. The Panel further requested that any such wording should be supported by the statutory requirements including a s32AA evaluation. Minute 10 requests parties to consider:
 - the scope of the activities which a controlled activity status would apply to,
 - drafting that reflects the wording of the Act, and
 - the generality of the matters of control, and whether they should be more specific.
3. In respect of the last matter, the Panel provided examples of general matters of control to be considered. They also sought advice on how Council would evaluate efficiency gains in the use of water, and how localised flow effects would be evaluated.
4. Parties in support of the controlled activity rule have met and prepared a Joint Memorandum of Counsel, which sets out the proposed wording for the controlled activity rule. The draft rule is reproduced in **Attachment 1**.

A *Controlled Activity Rule 15A*

5. This section addresses the drafting of the rule and evaluates the activity status.
6. Council has reconsidered its position that a restricted discretionary rule is necessary for the three named rivers where the environmental flow and level regime has not been set in the Plan. It has concluded that, provided sufficient control is reserved to consider adverse effects, controlled activity status is more appropriate than restricted discretionary activity status. Further evaluation is set out below.
7. In the evaluation of activity status in the Response to the Minute dated 27 May,¹ the conclusion reached was that controlled activity status has a low effectiveness in achieving Plan objectives because the Plan has not established an environmental flow

¹ Responses to Questions of Hearing Commissioners on Expert Evidence & Council Reports (in response to Minute issued 27 May 2015).

and level regime for the three named rivers. Restricted discretionary activity status was considered more effective as the consent authority had greater opportunity to consider how best to implement the objectives of the Plan. This was based on there being a degree of uncertainty about the future environmental flow regime for those rivers, meaning that a controlled activity status may mean Plan objectives are not fully implemented.

8. Subsequent to that evaluation occurring, further information has been provided by Meridian Energy Ltd, which is supported by Genesis Energy Ltd (the 'Generation Companies'). In light of that further information, it is now considered appropriate to have a controlled activity status with matters of control that are sufficiently wide to address all adverse effects. The information addresses the degree of uncertainty about the possibility of conditions imposed on consent in respect of flows frustrating grant of consent.
9. The Generation Companies are of the view that were a condition imposed on a replacement consent that required flows of somewhere in the order of 30-40% of mean flows to pass through the dams into each of the three named rivers, this could not be considered open to challenge on the basis of frustration of consent.² Consequently, it is considered that the preference for restricted discretionary activity status for those rivers where the Plan does not currently set an environmental flow and level regime should be revisited.
10. In the replacement of consents for the three named rivers, Council must retain sufficient control to be able to impose conditions that address all adverse effects including the setting of a flow regime (which could include an environmental flow and flushing flows). This goes to the matters of control that are reserved in the rule rather than the activity status itself. In light of legal advice that the Act does not preclude a controlled activity rule having the same breadth of matters that a restricted discretionary activity does, then provided appropriate control is reserved, the activity status makes no difference to the extent of matters over which Council reserves control or discretion. Where the activity status does make a difference is that a restricted discretionary activity may be declined. Given the national significance of the Waitaki Power Scheme, and the strategic target of having 90% of electricity generated from renewable sources by 2025,³ this would be a highly unlikely outcome.
11. For these reasons, Council has concluded that, provided the matters of control are sufficiently wide enough to impose conditions in respect of the full range of adverse effects in rivers where the Plan has not established an environmental flow and level regime, controlled activity status is at least as effective in enabling Plan objectives to be implemented. It should be also noted that clause (d) of the matters of control in draft Rule 15A provides for a review condition to be imposed on consent. Should a

² Refer Joint Memorandum of Counsel dated 12 November 2015.

³ Refer National Policy Statement for Renewable Electricity Generation 2011.

subsequent plan review result in a different environmental flow regime from that consented, the relevant consents could be reviewed.

12. In summary, the previous evaluation⁴ concluded that controlled activity status is more *efficient* than restricted discretionary status. The foregoing evaluation considered that controlled activity status is at least as *effective* as restricted discretionary in achieving Plan objectives. All things considered, controlled activity status is more appropriate than restricted discretionary status. This is discussed further in the s32AA Evaluation.
13. Turning now to the draft rule itself, the revised wording about the subject matter of the rule provides greater clarity about the activities that are regulated. It incorporates generation and the assets that are fundamental to generation. The revised wording is more certain than the phrase *hydro-electricity generation*. This avoids debate about the scope of the rule thereby making consent processes more efficient. The revised draft reflects the wording of the Act and implements the National Policy Statement for Renewable Electricity Generation 2011 (NPSREG), particularly Policy Ba that considers generation output and recognises the role of assets in maintaining generation output. The activities identified in the rule address generation, and the protection of the assets that support generation output.
14. The rule uses appropriate and constrained wording to reflect the Act⁵ and to provide clarity about the activities that are to be captured by the rule. In the response to Minute 9, the phrase *Waitaki Power Scheme* was considered insufficiently clear by itself to determine the activities addressed by the rule.⁶ Using the phrase in conjunction with a constrained list of activities achieves the necessary clarity and certainty.
15. The addition of a matter of control has been made to reflect that one rule can address all rivers, including the three named rivers and ensuring there is sufficient control to be able to impose an appropriate environmental flow regime as a condition of consent, and any other conditions as are necessary to address adverse effects.
16. The second matter of control relates to those rivers where the Plan has set an environmental flow and level regime. It is intentionally wide-ranging to ensure that mitigation measures necessary to address adverse effects may be considered in a consent process, other than those that the Plan has already addressed through the setting of the environmental flow and level regime. It is sufficiently wide-ranging to include localised flow management effects that may arise from the flows themselves, such as public health safety concerns that could arise as a result of release of flows from a dam.

⁴ Responses to Questions of Hearing Commissioners on Expert Evidence & Council Reports (in response to Minute issued 27 May 2015).

⁵ Section 124 (1)(b) states *the holder of the consent applies for a new consent for the same activity*.

⁶ Officer's Reply to Minute 9 – hydro-electricity generation activity status, October 2015.

17. The phrase regarding Ngāi Tahu culture, traditions, customary uses and relationships with land and water also remains. While wide-ranging, public notification of the application will ensure that those values are identified. It is appropriate to retain a broad range of matters of control to ensure that all relevant values are identified and considered.
18. The Panel sought advice on the evaluation of efficiency gains in the use of water in the context of hydro-electricity generation. The Plan promotes a high level of technical efficiency, defined as *using a resource in a way that any given output is produced at least cost, including avoiding waste*.⁷ The Board noted in its Decision that Policies 15, and 18 to 20 applied to hydro-electricity generation.⁸ These policies ensure that the water allocated is reasonable for the intended end use, encourage the piping or otherwise sealing of water distribution systems, and promote the integration of multiple uses of water. Although efficiency is not specifically listed as a matter of control in the draft rule, waste occurring as a result of the take, use, damming or diverting of water is an adverse effect, and consequently Plan provisions that provide guidance on efficiency can be considered in the setting of conditions of consent.
19. No consequential amendments are required. For an application to be considered under Rule 15A, it must comply with Rules 2, 3, 6, and 7. The Plan already has rules in place to address failure to comply with the Rules 2, 3, 6 and 7.

Section 32AA Evaluation

20. A further evaluation is required only for those changes that have been, or are proposed to be made to the proposal since the evaluation report was completed.⁹ It must be undertaken in accordance with sections 32(1) to (4) of the Act and must be at a level of detail that corresponds to the scale and significance of the changes.¹⁰
21. The recommended amendments to Rule 15A since notification are:
- replacement of the restricted discretionary activity status with controlled activity status for all rivers; and
 - drafting that is more explicit about the purpose of the rule and the activities that are addressed.
22. The evaluation of activity status for the replacement of hydro-electricity consents has been recorded in this memorandum, in Council's response to the Minute dated 27 May 2015, and in the s32 Report. The range of alternative activity status' considered extends from controlled through to non-complying.

⁷ Refer definition of technical efficiency in the Plan.

⁸ Paragraph 217.

⁹ Section 32AA(1)(a).

¹⁰ Section 32AA(1).

23. The controlled activity rule that is proposed implements environmental flow and level regimes where these are set, and provides opportunity for environmental flows to be developed through a replacement consent process where the Plan has not set them. This will ensure that environmental flow and level regimes that are set to protect values and provide for abstraction (consistent with Objectives 1 and 2) will be adhered to. Compliance with Rule 2 is an entry condition to the rule and failure to meet this means the application will not be processed as a controlled activity.
24. The draft rule is efficient for all parties involved in a consent process because it provides for replacement applications to be bundled, and for a streamlined hearing process. This is beneficial for applicants, submitters, and the consent authority. It also allows the effects of the Scheme to be considered in an integrated manner and for consistent conditions to be applied.
25. For the three rivers where the Plan has not set a flow regime, the draft rule enables all the adverse effects to be addressed by conditions of consent, until such time that an environmental flow and level regime has been set through a plan review process. Once that occurs then the drafting of the rule provides for that regime to be protected in the consent process. This effectively supports the Plan and ensures that the key tool of environmental flow and level regimes will be implemented. The rule requires public notification which provides opportunity for all parties to participate and for all relevant values and concerns to be considered. The rule contains sufficient matters of control that it can effectively implement Plan objectives. It is recognised that a consent process for one activity cannot allocate water to a different activity however the activity status makes no material difference to this issue. Only a plan review process can allocate water to different activities simultaneously.
26. Given the extensive evaluation that has occurred in respect of activity status, and the breadth of matters of control in the draft rule, it is considered that there is sufficient information available for a decision supporting controlled activity status. It is further considered that controlled activity status is the most appropriate for the replacement of consents for specified activities associated with the Waitaki Power Scheme.
27. Turning now to the recommended amendments to the subject matter of the rule, this has been evaluated in Council's response to Minute 9. In summary that evaluation concluded that there was merit in narrowing the focus of the rule to a list of specified activities associated with the Waitaki Power Scheme. In the response to Minute 9, the rule listed the consents whereas the rule proposed by the parties in the Joint Memorandum lists the activities. This change is such that the evaluation in the Response to Minute 9 can continue to be relied upon. The rule proposed by the parties provides clarity about the activities that fall to be considered, and this in turn will provide for more efficient consent processes, and more certainty for all parties who may be associated with the replacement of consents. These amendments do not change the intent of the rule, and the drafting is appropriate in terms of section 32AA of the Act.

B Tables 3A, 3B and 3C

28. The Panel requested a simplified draft of Rule 2(4) by amalgamating Tables 3A, 3B and 3C into one table. In addition to doing this, clauses (4), (5), and (6) of Rule 2 have been merged into a single clause (Rule 2(4)), and the table ordered to make it easier to understand how the different parts of the table interact. The revised text is attached as **Attachment 2**. The changes are:

- a. An explanation of the meaning of cessation flows in the revised Rule 2(4).
- b. the term *adjusted cessation flow* is introduced into clause (4) to clarify that there are two possible cessation flows, and to better differentiate one from the other.
- c. the explanation of reserved water, previously a footnote to each table, has been removed as it forms part of Table 3B, and clause (4)(a) cross-references to it.
- d. the footnote to the tables about the water level recording site is unnecessary as it is listed in line xvii of Table 3B and cross-referenced in Rule 2(4)(a).
- e. Each row in the table is numbered for ease of cross-reference in the rule.
- f. The single table lists reserved water first (refer Rows 1-3) so that cross-references to row numbers in Rule 2(4) follow a numerical sequence.
- g. Rows of reserved water are placed together to clarify that the 11m³/s is available throughout the year.
- h. Each default cessation flow has been renamed to differentiate it from the others (refer Rows 4, 6, and 8).
- i. The default cessation flow for water reserved for mahinga kai (refer Row 6) has been amended to clarify that this row provides only some of the reserved water, the rest being in Row 8.
- j. The phrase *existing consent* has been replaced with reference to Schedule 3.
- k. The word *amount* has been replaced with *rate*.
- l. The same wording explaining adjusted cessation flow in Row 5 has been used in Row 9. Previously there was different wording that had the same meaning.
- m. A consequential renumbering of Table 3 to Table 3B in the rest of Rule 2, noting that there will be other references in the Plan that will also need to be renumbered.

29. Redrafted clause (4) could be further simplified by removing the explanation of cessation flows from the clause, and inserting it into the Definitions. This option is included in **Attachment 2**.

30. The Panel also requested any explanation necessary to understand how the amalgamated table would be applied by the consent authority.

31. Consents to take or divert water will be given a default cessation flow, or adjusted cessation flow if reserved water is consented. A condition will be placed on consent

whereby the cessation flow will be adjusted in response to reserved water being consented. Use of an appropriate condition will avoid the need for a review under section 128 of the Act.

C Consequences of not deleting Rule 25

32. Rule 25 provided a period of time within which the Council would not initiate a review of consents to ensure compliance with Rule 2 in the Plan. The period of times specified were 7 years for the Maerewhenua catchment, and 5 years for all other catchments covered by the Plan. Those time periods commenced from the day on which the Plan became operative.
33. Plan Change 3 included the deletion of Rule 25 because the time periods specified in the rule had expired, and it was considered to serve no purpose.
34. The Panel has invited the Council to consider whether the proposed deletion of Rule 25 has any unintended consequences. This has been considered in light of legal advice that indicates that there are unintended consequences of deleting Rule 25.
35. The unintended consequence is that the Council would need to consider whether to publicly notify any application to review existing water permits. This arises as a result of section 130(5) of the Resource Management Act 1991. That subsection states:

"(5) *If a regional plan or regional coastal 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 sections 95 to 95G; but*
 - (b) *must hear submissions only from the consent holder if the consent holder requests (within 20 working days of service of the notice under section 129) to be heard."*
36. If Rule 25 is retained, then the Council is not required to comply with section 95 to 95G (the notification provisions) if it initiates a review of consents that do not comply with Rule 2 in the Plan. If that occurs, the Council would only be required to hear submissions from the consent holder (if the consent holder requests to be heard). Without this rule in place Council must comply with the notification provisions of the Act.
37. In these circumstances, where the provisions have been through a public notification process associated with this Plan Change, it is considered that the retention of Rule 25 does serve an important purpose, and should not be deleted from the Plan.

Attachment 1 – Draft Rule 15A

Changes from Rule 15A as notified are shown marked up (additions underlined and deletions in ~~strikethrough~~)

Rule 15A

Any activity that ~~complies with Rules 2, 3, 6 and 7 and is the subject of an existing consent to take, dam, divert or use water for hydro-electricity generation~~ is part of the Waitaki Power Scheme, for which a consent is held and is the subject of an application for a new consent for the same activity and is:

- the use of water for the generation of electricity; or
- the taking, damming or diverting of water for storage; or
- the taking or diverting of water into canals; or
- the taking, damming, or diverting of water to protect the structural integrity of dams, power houses, canals and appurtenant structures;

is a controlled ~~restricted discretionary~~ activity provided the activity complies with Rules 2, 3, 6 and 7.

The matters of control are ~~exercise of discretion~~ is restricted to the following matters:

- a. In respect of flows into the Pūkaki River, the Lower Ōhau River or the Tekapo River (above the confluence with the Forks Stream), adverse effects, including effects on Ngāi Tahu culture, traditions, customary uses and relationships with land and water, unless the environmental flow and level regimes for these rivers have been reviewed after the public notification date of this rule and the outcome of the review has ~~been made~~ become operative in accordance with clause 20 of Schedule 1 to the relevant provisions of the Resource Management Act 1991;
- b. Any mitigation measures to address adverse effects (including effects on Ngāi Tahu culture, traditions, customary uses and relationships with land and water), except for changes or alterations to environmental flow and level regimes, minimum lake levels, annual allocation to activities, or the provisions of flows into the Lower Waitaki River, set by this Plan;
- c. Collection, recording, monitoring and provision of information concerning the exercise of consent; and,
- d. Lapse period, duration of consent and review requirements.

Any application made under Rule 15A will be publicly notified.

Attachment 2 Revised Tables 3A, 3B and 3C

Rule 2

Cross-ref:

Policies 1-8, 23,24,28, 29, 32 and 38-45

- (1) Except as provided in (2) ~~and (3), and (4)~~, no person shall take, use, dam or divert surface water or groundwater unless:
 - 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 3B; and
 - b. the amount taken or diverted from the relevant river or stream is for a replacement consent¹¹ 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 3B; 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 3B can be taken or diverted; and
 - d. the consent holder provides the flushing flows in Table 3B 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 3B.
- (4) Subject to Rule 2(2), Wwater taken or diverted from downstream of the Waitaki Dam, ~~as authorised by consents referred to in Schedule 2,~~ has the minimum flow cessation flows set out in Table 3A, ~~or that of the existing consent, whichever is the higher provided that:~~
 - a. ~~The amount of water taken as a percentage of the consented take complies with Table 3A;~~
 - b. ~~In the event that the daily average flow of the Lower Waitaki River is at or below 150m³/s for ten consecutive days, all takes must cease for a period of 48 hours~~
 - a. All relevant provisions of line xvii of Table 3B apply, except minimum flow;
 - b. Cessation flows are the flows at which all takes must cease, and comprises either:
 - i. the default cessation flow, being the cessation flow where no reserved water has been consented; or
 - ii. the adjusted cessation flow which is the default cessation flow less the volume of reserved water that has been consented.
 - c. Cessation flows for water taken or diverted by existing consents that are referred

¹¹ With the same or lesser amounts of water to be taken or diverted

to in Schedule 3, are set out in Rows 4 and 5 of Table 3A, provided that:

- i. The default cessation flow is either the number in Row 4 of Table 3A or the minimum flow that is recorded on the existing consent, whichever is the higher; and
- ii. in the event that the daily average flow of the Lower Waitaki River is at or below 150m³/s for ten consecutive days, all takes must cease for a period of 48 hours.
- d. Cessation flows for water taken or diverted for the enhancement of mahinga kai up to the maximum rate specified in Row 1 of Table 3A, are set out in Rows 6 and 7 of Table 3A.
- e. Cessation flows for water taken or diverted, that are not provided for in clauses (c) and (d) of this Rule, are set out in Rows 8 and 9 of Table 3A.

Alternative to Clause b – Delete clause b to Rule 2(4) and introduce a definition for cessation flows:

Cessation flows Cessation flows are the flows at which all takes must cease, and are:

(i) the default cessation flow, being the cessation flow where no reserved water has been consented; or,

(ii) the adjusted cessation flow which is the default cessation flow less the volume of reserved water that has been consented.

Table 3A: Reserved Water and Cessation flows for the Lower Waitaki River

Row	Reserved Water:	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
<u>1</u>	Amount <u>Rate</u> available for allocation to mahinga kai (m ³ /s)	0	0	0	5	6	6	6	6	5	0	0	0
<u>2</u>	Amount <u>Rate</u> available for allocation to mahinga kai (m ³ /s), from within the flows required by Rule 7	10	10	10	5	4	4	4	4	5	10	10	10
<u>3</u>	Amount <u>Rate</u> available for augmentation of Wainono Lagoon, from within the flows required by Rule 7	1	1	1	1	1	1	1	1	1	1	1	1
	<u>Cessation Flows:</u>												
<u>4</u>	Default Cessation Flow (m ³ /s) for existing consents <u>listed in Schedule 3</u>	111	111	111	120	142	148	148	142	120	111	111	111
<u>5</u>	<u>Adjusted</u> Cessation Flow (m ³ /s) if some or all of the reserved water is consented to be taken or diverted	<u>Adjusted</u> Cessation Flow equals the Default Cessation Flow less the <u>sum of the rate of</u> reserved water (m ³ /s) consented to be taken from Row 1, Row 2 and Row 3 up to a maximum of 11 m ³ /s.											
<u>6</u>	Default Cessation Flow for water reserved for <u>enhancement of mahinga kai in Row 1</u> (m ³ /s)				151	149	149	149	149	151			
<u>7</u>	<u>Adjusted</u> Cessation Flow (m ³ /s) if some or all of the reserved water is consented to be taken or diverted	<u>Adjusted</u> Cessation Flows equal the Default Cessation Flow less the amount of reserved water (m ³ /s) <u>consented</u> to be taken up to a maximum volume of water available for allocation as set out in Row 1.											
<u>8</u>	Default Cessation Flow (m ³ /s) <u>for water abstracted that does not have a cessation flow set by Rows 4 and 6</u>	164	164	164	156	155	155	155	155	156	164	164	164
<u>9</u>	<u>Adjusted</u> Cessation Flow (m ³ /s) if some or all of the reserved water is consented to be taken or diverted	<u>Adjusted</u> Cessation Flow equals the Default Cessation Flow less the <u>amount sum of the rate of</u> reserved water (m ³ /s) consented to be taken from Row 1, Row 2 and Row 3 up to a maximum of 11 m ³ /s.											