

2 SEPTEMBER 2025

# MEMORANDUM

**To** Expert Panel, Tekapo Power Scheme project

**From** Vanessa Hamm, Holland Beckett

## Controlled activity rules - controlled activity status and ability to impose minimum flows

### Introduction

1. This memorandum relates to the application by Genesis Energy Limited (**Genesis**) for replacement resource consents to continue operation of the existing Tekapo Power Scheme (the **Scheme**), within the Waitaki Catchment.
2. Genesis has made a substantive application under the Fast Track Approvals Act 2024. Comments have been invited and received from several parties, including Canterbury Regional Council and the Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**).
3. You have asked us to review parties' submissions in relation to Rule 15A of the Waitaki Catchment Water Allocation Regional Plan (**WAP**), and provide the following advice:
  - (a) Consider and advise on whether the activity is controlled under Rule 15A;
  - (b) Evaluate whether the Panel has the authority to impose minimum flow conditions for the Upper Takapō River under Rule 15A; and
  - (c) Advise on the permissibility of setting environmental flow levels within the current consent framework.

### Summary of advice

4. In summary:
  - (a) The activity is a controlled activity under rule 15A. The Takapō River (also referred to as Tekapo River) between Lake George Scott and the confluence with Fork Stream (the **Stretch**) is captured by Table 3B Row ii and not Row xxii, and no minimum flow is specified for the Stretch.
  - (b) No *minimum flow* has been set for the Stretch, or the reach upstream of Lake George Scott (i.e. the Tekapo River (above the confluence with the Forks Stream)), in accordance with the provisions of the WAP. Accordingly it is within the scope of mitigation contemplated by rule 15A, matter of control (b). However, a *minimum flow* has been set for the Takapō River between Lake Benmore and the Forks Stream confluence, so it is not open to the Panel to change or alter this.
  - (c) Flow matters under rule 15A are considered in terms of their adverse effects (matter of control (a)), and mitigation (matter of control (b)) "except for changes or alterations to environmental flow and level regimes, minimum lake levels, annual allocation to activities, or the provision of flows into the Lower Waitaki River, set by this Plan". Accordingly the Panel will only be able to

set mitigation in the form of environmental flows where there are not already flows set by the WAP.

### Relevant background

5. We set out at Appendix 1 the relevant provisions of the WAP.
6. Appendix 2 provides a schematic showing the minimum flows for the relevant parts of the Upper Takapō River.
7. Forest and Bird submits that the proposal does not comply with the controlled activity standards, as no minimum flow is provided in the Stretch. Forest and Bird contend that flow in accordance with the 'catch all' provision contained within Row xxii. of Table 3B (**Row xxii**) is required to be provided, as a minimum flow for this section of the Takapō River is not specified elsewhere in Table 3B. As Genesis proposes no flow in this section, Forest and Bird consider the proposal does not meet Rule 2, which is required to be eligible for controlled activity status under the Rule 15A; therefore, the activity falls to be a non-complying activity under rule 16 of the WAP.<sup>1</sup>
8. In response, Genesis submits that the Tekapo River minimum flow specified in Table 3B(ii) is met and that the applications for the Scheme do comply with Rule 2 in the WAP, and are a controlled activity. This position is taken on the basis that the WAP does set a minimum flow as measured downstream in the Takapō River,<sup>2</sup> but not for the whole river from Lake Tekapo, in reliance on the development history of the WAP.<sup>3</sup> Genesis also submit that, while the Panel has the option to impose a minimum flow (as this is a matter of control), consideration of this is not a requirement (as submitted by Forest and Bird).<sup>4</sup>

### Relevant legal principles

9. The case law concerning how RMA plan provisions should be interpreted is extensive and long settled. Whilst the text of the provision is relevant, other relevant factors include the purpose of the provision, and the context and scheme of the plan, the history of the plan, and any other permissible guides to meaning (including the common law principles or presumptions of statutory interpretation).<sup>5</sup>
10. Our view of the rules in the WAP is formed based on a plain reading of the rules themselves. However, we have for completeness considered the development and change to the WAP, and relevant aspects of this are set out in Appendix 3.

### Issue 1: is the activity a controlled activity?

11. Rule 15A is clear that in order to attract controlled activity status, the activity must also comply with (amongst other rules), rule 2. Rule 2.a requires that 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.
12. Our understanding is that Table 3B is complied with, although Forest and Bird have suggested that it is not, because flow in accordance with the 'catch all' provision contained within Row xxii is required.
13. W do not agree with this because:

<sup>1</sup> Forest and Bird memorandum of counsel dated 25 August 2025 at paragraph 82.

<sup>2</sup> This being 3.4 m<sup>3</sup>/s from the Fork Stream confluence to Lake Benmore, measured immediately downstream of the Mary Burn confluence.

<sup>3</sup> As detailed in the planning memorandum of Richard Matthews, Appendix 1 to the Genesis Response to Comments, at paragraph 16.

<sup>4</sup> Genesis Response to Comments, dated 1 September 2025, at paragraph 95.

<sup>5</sup> *Brownlee v Christchurch City Council* [2001] NZRMA 539 (EnvC) at [25].

- (a) Row ii captures the Tekapo/Takapō River, and it is clear from the entries in the table/row that it is captured from Lake George Scott downstream.
  - (b) Row ii.a provides an *allocation limit* from Lake George Scott to the confluence with the Grays River of 0m<sup>3</sup>/s. It does not include a *minimum flow* from Lake George Scott to a downstream point. Our view is that this means a minimum flow is not prescribed (not that the Stretch would then default to Row xxii).
  - (c) Row xxii relates to “All *other* rivers and streams”. We do not consider that this includes the Tekapo/Takapō River which is already covered by Row ii.
  - (d) For completeness, the exception in Row xxii “(except for the Pūkaki River, lower Ōhau River and the Tekapo River upstream of Lake George Scott)” is consistent with this because Row ii only covers the Tekapo/Takapō River from Lake George Scott downstream.
14. As Row ii covers the Tekapo/Takapō River from Lake George Scott downstream and does not specify a *minimum flow* in the Stretch, we consider that the application complies with Rule 2 and is a controlled activity.
15. For completeness, we note that if flows in the Stretch *were* subject to the Row xxii. minimum flow, then this is as measured “at the downstream end of the catchment”, rather than in the Stretch itself. The upper catchment runs from Lake George Scott to Lake Benmore,<sup>6</sup> with the Stretch near the top of the catchment. There is no reference in submissions or evidence from the WAP development indicating that the minimum flow is not being complied with at the downstream end of the catchment. In fact, during PC3 the parties turned their mind to whether a minimum flow would frustrate a renewal of the Scheme consents, and concluded that, on the evidence, it would not. This supports the conclusion that any measurement would occur at a point downstream, and the Row xxii control would not to apply to the Stretch itself.

## Issue 2: can the Panel impose minimum flow conditions for the Upper Takapō River under Rule 15A?

16. The key matters of control in rule 15A which inform this issue are criteria (a) and (b).
17. We make two observations about criteria (a) and (b):
- (a) The criteria are framed to address firstly adverse effects, and secondly mitigation measures to address adverse effects. This is not a direct consideration of flow itself, as is the case with rules in other regional plans concerning scheme renewals.<sup>7</sup>
  - (b) Both criteria have exclusions which require working through.
18. With respect to criteria (a), adverse effects in respect of flows into the Pūkaki River, the Lower Ōhau River or the Tekapo River (above the confluence with the Forks Stream), are within the Panel’s purview “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 become operative in accordance with clause 20 of Schedule 1 to the Resource Management Act”. We do not understand this to be the case. Accordingly adverse effects in respect of flows into the Tekapo River (above the confluence with the Forks Stream), are within the Panel’s purview.

<sup>6</sup> Map 2, WAP.

<sup>7</sup> See for example:

Bay of Plenty Regional Natural Resources Plan rule WQ R20, which allows the consideration of “the range, or rate of change of levels or flows of water” for schemes applying for controlled activity consent renewals.

19. With respect to criteria (b), any mitigation measures to address adverse effects are also within the Panel's jurisdiction, *except for* "changes or alterations to environmental flow and level regimes, minimum lake levels, annual allocation to activities, or the provision of flows into the Lower Waitaki River, set by this Plan".
20. The issue with respect to the Upper Takapō River is that *no minimum flow* is set in the WAP for the section above the confluence with the Forks Stream. In particular:
  - (a) Row ii does not specify a *minimum flow* for the Tekapo/Takapō River above the confluence with the Forks Stream. It specifies an allocation limit but not a minimum flow.
  - (b) Row xxii does not apply to the Tekapo/Takapō River upstream of Lake George Scott.
21. Accordingly, we do not consider that the exception in criteria (b) applies to the Upper Takapō River above the confluence with the Forks Stream.
22. We have considered whether Row ii can be interpreted to mean that the *minimum flow* is set at 0m<sup>3</sup>/s but we think this would be reading a provision into Row ii that is not there. Other rows in Table 3B specify both allocation limits and minimum flows for certain reaches, but Row ii does not.
23. For the remainder of the Takapō River, which would comprise Lake Benmore to the Forks Stream confluence, a minimum flow of 3.4 m<sup>3</sup>/s measured immediately downstream of the Mary Burn confluence is specified. Accordingly, the exception in criteria (b) applies and mitigation measures could not include changes or alterations to the minimum flow specified.

**Issue 3: is it permissible to set environmental flow levels within the current consent framework?**

24. We consider that the answer to this question is yes, subject to the constraints of criteria (a) and (b) in rule 15A (and of course subject to an assessment on the merits).
25. In particular we do not consider that it is open to the Panel to set environmental flow levels for reaches where Table 3B includes specified minimum flows. These are clearly excluded through the exception in criteria (b). An example would be the minimum flow discussed above of 3.4 m<sup>3</sup>/s measured immediately downstream of the Mary Burn confluence, for the reach from the Fork Stream confluence to Lake Benmore (Row ii).
26. Whilst we do not address the merits of providing for any environmental flows, we note that the term "adverse effects" will include the adverse effects of requiring or not requiring flow, consistent with the approach that the hearing panel for the WAP adopted (refer Appendix 3, paragraphs 2 and 3).

## Appendix 1: relevant provisions of the WAP

### Rule 15A

Any activity that 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:

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

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

The matters over which control is reserved are:

- 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 become operative in accordance with clause 20 of Schedule 1 to the Resource Management Act;
- 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 provision 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.

### Rule 2

(1) Except as provided in (2) (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 consent or in combination with the amount of water authorised to be taken by existing resource consents, does not exceed the allocation limits in Table 3B;...

**Table 3B extracts: Environmental flow and level regimes for water bodies in the Waitaki catchment**

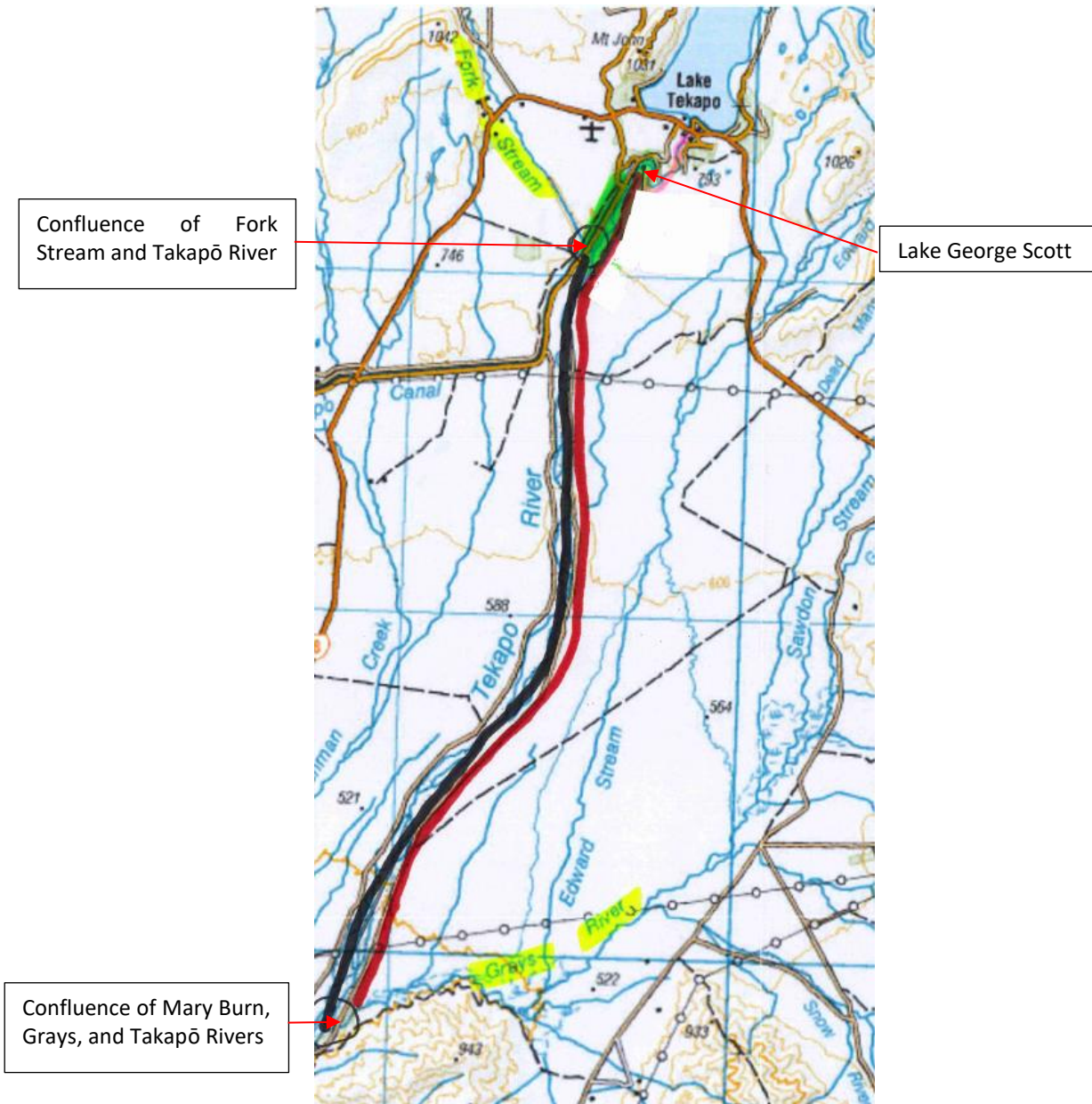
ii. Tekapo River	<ul style="list-style-type: none"> <li>a. An <u>allocation limit</u> from Lake George Scott to the confluence with the Grays River of 0 m<sup>3</sup>/s</li> <li>b. From the Fork Stream confluence to Lake Benmore, a <u>minimum flow</u> of 3.4 m<sup>3</sup>/s measured immediately downstream of the Mary Burn confluence</li> <li>c. An <u>allocation limit</u> from downstream of the Grays River confluence to Lake Benmore of 0.7 m<sup>3</sup>/s</li> <li>d. Any taking of water that has been released into the Tekapo River from Lake George Scott for <u>agricultural and horticultural activities</u> is in addition to the <u>allocation limits</u> in a and c above</li> <li>e. No flow-sharing regime</li> </ul>
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xxii. All other rivers and streams (except for the Pūkaki River, lower Ōhau River and the Tekapo River upstream of Lake George Scott)	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
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### **Definitions and abbreviations**

<i>Allocation limits</i>	<i>The limits on the cumulative rate of taking of water that are established by this Plan and are specified in Rule 2 of this Plan.</i>
<i>environmental flow and level regimes</i>	<i>The flow-sharing, Allocation limits, minimum flows and levels and flushing flows established by this Plan.</i>
<i>Flow-sharing</i>	<i>The apportioning of flow between in-stream uses and the cumulative taking and diverting of water, as specified in Rule 2(c).</i>
<i>flushing flows</i>	<i>Flows passing or released from a dam to prevent siltation and build-up of filamentous algae in the river downstream of the dam.</i>
<i>Minimum flow and level</i> <i>Minimum lake level</i>	<i>The flow or lake level at which the taking and diverting of water from a water body authorised by a resource consent must cease. In the case where a river is dammed, inflows and outflows must be managed to maintain or exceed the minimum lake level and the minimum flow downstream.</i>

## Appendix 2: map showing extent of minimum flow controls



Pink line:

Table 3B

- Row ii – not captured.
- Row xxii. – Takapō River upstream of Lake George Scott exempt.

Black line:

Table 3B row ii.b. – Takapō River from Fork Stream confluence to Lake Benmore - minimum flow of  $3.4\text{m}^3/\text{s}$ , as measured immediately below Mary Burn confluence.

Red line:

Table 3B Row ii.a. - Takapō River from Lake George Scott to confluence with the Grays River subject to *allocation limit* of  $0\text{m}^3/\text{s}$ .

Green line:

Section of Takapō River not covered by other Table 3B *minimum flow* limits.

### Appendix 3: development and change to the WAP

1. When it was first proposed, the WAP attracted submissions from a wide range of interested parties, including hydro-electric generators, water users, interest groups, tangata whenua and local authorities. Submissions on the proposed WAP were considered by the Waitaki Catchment Water Allocation Board, with reasons for their decisions recorded in their September 2005 report (the **Report**).
2. The Report records the tension between providing for the “nationally significant”<sup>8</sup> Waitaki Power Scheme, and the desire of submitters to achieve a continuity of flow in the Tekapo River “from the mountains to the sea”.<sup>9</sup>
3. The Board records its decision to decline submitters requests that a flow be established from Lake Tekapo directly into the Tekapo River as the costs outweighed the benefits.<sup>10</sup> Costs cited were:
  - the costs and other implications of forgone generation
  - costs of changes to structures to enable a permanent release
  - ecological issues
  - effects on existing trout habitat and angling
  - effects on amenity values
  - representations by Te Rūnanga o Ngāi Tahu.
4. The Report records the Board’s decision on a request from Meridian that flows in the Tekapo River upstream of Lake George Scott be specified at zero:

*Meridian Energy Limited requested the addition of two new policies that would include recognition of the national importance of hydro-electricity storage and generation of Lakes Tekapo, Pūkaki and Ōhau. Meridian Energy Limited further requested that the Plan specify zero minimum flows in the Pūkaki River, the Tekapo River (upstream of Lake George Scott) and the lower Ōhau River. The amendments made by the Board do not include the new policies, as it concluded that the matters raised are addressed elsewhere in the Plan. Although the Board accepted that the costs of returning water to these rivers may outweigh and be out of proportion with the benefits, it did not consider that the starting point for replacement consents should be a dry river. Consequently, the Plan does not specify an environmental flow for these rivers, and replacement consents will be considered as a discretionary activity in terms of Rule 19.<sup>11</sup>*

5. As indicated by the above paragraph, under the first version of the WAP replacement consents for the Scheme were a discretionary activity. In 2016, Plan Change 3 (**PC3**) to the WAP proposed to change this activity status to controlled.
6. PC3 attracted a significant number of submissions concerning proposed Rule 15A. The Independent Hearing Panel (**IHP**) decision report for PC3 (**IHP Report**) records the decision making process for two particular topics of note, concerning the decision on appropriate activity status, and the development of the Rule 15A wording.

#### *Controlled activity status*

7. The IHP Report records debate over whether a restricted discretionary or controlled activity status for renewal hydro electricity consents was appropriate. There was concern that, as the Pūkaki, Lower Ōhau

<sup>8</sup> “Waitaki Catchment Water Allocation Regional Plan: Annex 1 - Decision and principal reasons for adopting the Plan provisions”, prepared by the Waitaki Catchment Water Allocation Board, September 2005, at paragraph 66.

<sup>9</sup> At paragraph 133.

<sup>10</sup> At paragraph 133.

<sup>11</sup> Proposed Plan Change 3 to the Waitaki Catchment Water Allocation Regional Plan - report and recommendations of the Hearing Commissioners, 3 June 2016, at paragraph 143.



and Tekapo Rivers had no established environmental flow under the WAP, a condition limiting flows imposed as part of a controlled activity could frustrate the replacement of existing consents.<sup>12</sup>

8. Technical information provided by Meridian demonstrated that “a condition of consent requiring flows to be passed through the dams using numbers of the magnitude shown in the upgraded data in the order of the 5-year 7-day low flows as set out Table 3, line xxii, would not frustrate the grant of a future consent.”

9. The IHP commented on Table 3B flows in this context as follows:

*In relation to the above flows, we note that the [WAP] at [Table 3B] provides environmental flow and level regimes for water bodies in the Waitaki Catchment. The Table sets out the basis for calculating that flow for all rivers, with the exception of the three named rivers. Line xxii provides for a minimum flow of the 5-year 7-day low flow, with a flow sharing threshold at the mean flow (Rule 2, Table 3, line xxii). The three named rivers are not covered by Table 3, line xxii.*

10. Ultimately, the IHP concluded that the Row xxii limit would not frustrate future consent renewals if these were controlled activities as (emphasis added):

*Any environmental flow regime would **likely** be in the vicinity of the default minimum flow as set out in Rule 2. This provides for a minimum of the 5-year, 7-day low flow, with a flow sharing threshold at the mean low flow. We are satisfied from the data supplied that any minimum flow would not be of such a proportion that it would frustrate or negate the consent.*<sup>13</sup>

#### Rule 15A wording

11. Caucusing between parties resulted in agreed wording for Rule 15A being proposed to the IHP. Of relevance is the proposed controlled activity criteria (emphasis added):

*The matters of control are restricted to the following:*

*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;*

12. The IHP noted that the purpose of control matter a. was to address the three named rivers and ensures that there was sufficient control to be able to impose an appropriate environmental flow regime and to address adverse effects.<sup>14</sup>

13. In terms of control matter b. the IHP commented that this:

<sup>12</sup> At paragraph 647.

<sup>13</sup> At paragraph 659.

<sup>14</sup> At paragraph 667.

*relates to those rivers where the [WAP] has set an environmental flow and level regime. It is sufficiently wide ranging to ensure that mitigation measures necessary to address adverse effects may be considered in a consent process, **other than those effects that the Allocation Plan has already addressed through the setting of the environmental flow and level regime.***<sup>15</sup>

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<sup>15</sup> At para 668.