

PART L: APPROVALS RELATING TO COMPLEX FRESHWATER FISHERIES ACTIVITIES

The context

[1] OGNZL proposes to create to stream diversions, the Northern Uphill Diversion Drain and the Southern Uphill Diversion Drain. The Northern Uphill Diversion Drain is a proposed diversion of 1,389 m length of an Ohinemuri River tributary (TB1) around the Northern Rock Stack, to form 695 m of diverted watercourse. The Southern Uphill Diversion Drain is a proposed diversion of 2,118 m of Ruahorehore Stream and associated tributaries and canals to form 2,503 m of diverted watercourse around the Tailings Storage Facility 3 (TSF3). This diversion will be an extension to the existing Southern Uphill Diversion Drain which currently starts behind TSF1A and runs behind the Eastern Stockpile.

The statutory background

[2] Part 6 of the Freshwater Fisheries Regulations 1983 deals with fish passage. Regulation 43(1) provides:

43 Dams and diversion structures

(1) The Director-General may require that a dam or diversion structure proposed to be built include a fish facility, except if the dam or diversion structure is subject to a water right issued before 1 January 1984 under the Water and Soil Conservation Act 1967.

(2) A person proposing to build a dam or diversion structure must—

(a) notify the Director-General; and

(b) forward a submission seeking the Director-General's approval or dispensation from the requirements of these regulations; and

(c) supply to the Director-General any information that is reasonably required to assist the Director-General in deciding any requirements that may apply (including plans and specifications of the proposed structure and any proposed fish facility).

[3] The scheme of the regulations is that where a diversion is proposed, the Director-General may impose requirements which may include a fish facility.

[4] The FTTA defines “complex freshwater fisheries activity” as including:

(b) a permanent dam or diversion structure

[5] Under s 42(1)(j) of the FTAA, an application for fast-track approvals may seek:

.. an approval or a dispensation that would otherwise be applied for under regulations 42 or 43 of the Freshwater Fisheries Regulations 1983 in respect of a complex freshwater fisheries activity

What OGNZL is seeking

[6] OGNZL is separately seeking approvals under the RMA for consents for structures in rivers (s 13, RMA) and diversion of water (s 14, RMA). In relation to the approval now under consideration, OGNZL is seeking what in effect is confirmation that it is not required to provide a fish facility.

The criteria

[7] Clauses 5 and 6 of Schedule 9 provides:

5 Criteria for assessment of applications for complex freshwater fisheries activity approval

For the purpose of section 81, the panel must take into account, giving the greatest weight to paragraph (a),—

- (a) the purpose of this Act; and
- (b) the alignment of the proposed activity with best practice and the New Zealand Fish Passage Guidelines; and
- (c) how the proposed activity will manage risks to freshwater values or habitat, including prevention of access to or spread of invasive species; and
- (d) the availability and quality of the habitat upstream and downstream of the proposed activity; and
- (e) the presence of threatened, data-deficient, or at-risk species under the New Zealand Threat Classification System in the vicinity of the proposed activity; and
- (f) the advantages and disadvantages of providing fish passage upstream or downstream of the proposed activity.

6 Conditions on complex freshwater fisheries activity approval

A panel may impose conditions on an approval that the panel considers necessary to manage the effects of the activity on freshwater fish species, taking into account—

- (a) best practice standards; and
- (b) the New Zealand Fish Passage Guidelines.

The Northern Uphill Diversion Drain

[8] Fish populations were assessed by the Applicant at two sites along TB1, with only shortfin eels (a non-threatened species) detected). The New Zealand Freshwater Fish Database indicates that longfin eel, Cran's bully, common bully and kōura are present in the catchment (in nearby reaches of Ohinemuri River). Introduced rainbow trout, brown trout and rudd have also been recorded. Only the longfin eel is At Risk.

[9] A large natural waterfall downstream is a significant natural barrier to migration to the site.

[10] OGNZL's position is that the stream diversion will be ecologically functional:¹

The design of the diversion channel is planned to replicate aquatic habitat attributes with a range of suitable stable microhabitats for fish and invertebrates, including the creation of stable pool habitats, the inclusion of gravel and cobble riffle habitats, and provide for the passage of climbing fish, especially eels.

[11] The stream gradient may make it difficult to maintain fish passage for general fish species. Fish salvage is proposed before diversion works are undertaken.

[12] The catchment area above the diversion is limited (around 1,000 m²).

Southern Uphill Diversion Channel Extension / Ruahorehore Stream

[13] Fish species detected in the Ruahorehore Stream and tributaries were common bully, shortfin eel, longfin eel, kōura and rainbow trout. The longfin eel is classified as "At Risk – Declining.

[14] The lower 1,800 m of the diversion will replicate a fully formed ecologically functional watercourse connected to the Ruahorehore Stream proper. The upper part of the diversion will enable fish passage for eels and "some climbers".

¹ Application, B.43, section 18.1.7

[15] In relation to this diversion too, the stream gradient may make passage for general fish species difficult to manage. So the diversion is intended to allow passage of migrating eels and other “native fish with climbing abilities”. Fish salvage is to take place before works are undertaken.

[16] As with the proposed Northern Uphill Diversion Drain, there is a natural waterfall below the proposed diversion that forms a barrier to the passage of “swimming fish” and the catchment area upstream of this diversion is limited (around 500 m²),

[17] The New Zealand Freshwater Fish Database (NZFFD) indicates that three other native freshwater fish species have been recorded nearby in the wider catchment. These are banded kōkopu (*Galaxias fasciatus*; Not Threatened), kōaro (*Galaxias brevipinnis*; At Risk - Declining) and Cran’s bully (*Gobiomorphus basalis*; Not Threatened). Introduced species brown trout (*Salmo trutta*), rudd (*Scardinius erythrophthalmus*) and goldfish (*Carassius auratus*) have also been recorded.

The primary area of controversy

[18] Conditions that are not in dispute manage risks to freshwater values or habitat (clause 5(c) of Schedule 9.

[19] The only substantial area of dispute is whether the conditions should incorporate the New Zealand Fish Passage Guidelines. DOC’s position is that they should whereas OGNZL’s position is that since the diversions will provide for fish passage that is consistent with what is already available, no additional requirements should be imposed.

[20] On this issue, we prefer the view of OGNZL.

[21] The formal decision is set out in Appendix 1 of this Decision.