

25 June 2012

Otago Regional Council
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Dear Sir/Madam

**Otago Fish and Game Council v Otago Regional Council - Proposed Plan
Change 2 (Regionally Significant Wetlands)**

1. We act for Otago Fish and Game Council.
2. Please find enclosed by way of service Notice of Appeal for the above proceedings.
3. This Notice has been sent to all parties to proceedings.

Yours faithfully
Anderson Lloyd

A handwritten signature in cursive script, appearing to read "Maree Baker-Galloway".

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**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH**

	ENV-
IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under schedule 1, clause 14 of the Act
BETWEEN	OTAGO FISH AND GAME COUNCIL
	Appellant
AND	OTAGO REGIONAL COUNCIL
	Respondent

**NOTICE OF APPEAL ON THE REGIONAL PLAN: WATER FOR OTAGO -
PROPOSED PLAN CHANGE 2**

**ANDERSON LLOYD
LAWYERS
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TO: The Registrar
Environment Court
Christchurch

1. The Otago Fish and Game Council appeal against a decision of the Otago Regional Council on the following plan change:
 - a. Proposed Plan Change 2 (Regionally Significant Wetlands) ("the Proposed Plan").
2. The Otago Fish and Game Council made a submission and further submission on that plan change.
3. The Otago Fish and Game Council received notice of the decision on 14 May 2012.
4. The decision was made by the Otago Regional Council.
5. The Otago Fish and Game Council is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991.
6. The parts of the decision that the Otago Fish and Game Council is appealing are:
 - a. The removal of introduced gamebirds as a value associated with regionally significant wetlands in policy 10.4.1 and the absence of acknowledgement of regionally significant recreation values associated with wetlands. Policy 10.4.1 A8 now only refers to "indigenous waterfowl" as a regionally significant wetland value, rather than "waterfowl" as it referred to previously, and states:

10.4.1 *[Incorporates 10.4.3] Otago's regionally significant wetland values are:*

- A1 *Habitat for nationally or internationally rare or threatened species or communities;*
- A2 *Critical habitat for the life cycles or indigenous fauna which are dependent on wetlands;*
- A3 *High diversity of wetland habitat types;*
- A4 *High degree of wetland naturalness;*
- A5 *Wetland scarce in Otago in terms of its ecological or physical character;*
- A6 *Wetland which is highly valued by Kai Tahu for cultural and spiritual beliefs, values and uses, including waai toaka and mahika kau;*
- A7 *High diversity of indigenous wetland flora and fauna; [changed from 10.4.3]*
- A8 ***Regionally significant habitat for indigenous waterfowl; and [changed from 10.4.3]***
- A9 *Significant hydrological values including maintaining water quality or low flows, or reducing flood flows. [changed from 10.4.3].*

b. The change to Objective 10.3.1:

Otago's wetlands and their individual and collective values and services will be maintained or enhanced for present and future generations. To maintain or enhance the following values of Otago's remaining wetlands:

- ~~(a) — Habitat for flora and fauna;~~
- ~~(b) — Natural character;~~
- ~~(c) — Hydrological values; and~~
- ~~(d) — Kai Tahu cultural and spiritual beliefs, values and uses.~~

c. The removal of the list of values associated with each Regionally Significant Wetland from Schedule 9 to the Proposed Plan;

d. The replacement of the list of values in the Proposed Plan referred to above with a non-regulatory inventory held by the Otago Regional Council;

e. The decision to not require resource consents for the continued taking, diversion and damming of the water and associated works in the bed within Regionally Significant Wetlands, when that taking, diversion and damming was lawfully established as a permitted activity prior to 2 July 2011. This decision relates to several provisions, namely:

- i. At a policy level, the explicit allowance for adverse effects on regionally significant wetlands for lawfully existing activities in policy 10.4.2:

Policy 10.4.2 Avoid the adverse effects of an activity on a Regionally Significant Wetland or a regionally significant wetland value, while allowing remediation or mitigation of an adverse effect only when:

- (a) *The adverse effects cannot be avoided; and*
- (b) *The activity:*
 - (i) *Is lawfully existing; or*
 - (ii) *Has the purpose of maintaining or enhancing a Regionally Significant Wetland or a regionally significant wetland value.*

- ii. Rules that allow for the continuation of activities in Regionally Significant Wetlands:

*Rule 12.1.2.6 Unless prohibited by Rules 12.1.1.1 or 12.1.1.2, the taking of surface water for the purpose of land drainage is a **permitted** activity, providing:*

- (a) *Any taking within a Regionally Significant Wetland was lawfully established prior to 2 July 2011; and*
- (b) *There is no change to the water level range or hydrological function of any Regionally Significant Wetland;*
- (c) *There is no damage to fauna, or New Zealand native flora, in or on any Regionally Significant Wetland; and*
- (d) *The taking does not result in the lowering of the level of water in any lake or river; and*
- (f) *The taking does not cause flooding of any other person's property, erosion, land instability, sedimentation or property damage.*

*Rule 12.3.2.1 Unless prohibited by Rules 12.3.1.1 to 12.3.1.4, the damming or diversion of water is a **permitted** activity, providing:*

- (a) *The size of the catchment upstream of the dam, weir or diversion is no more than 50 hectares in area; and*
- (b) *In the case of damming, the water immediately upstream of the dam is no more than 3 metres deep, and the volume of water stored by the dam is no more than 20,000 cubic metres; and*
- (c) *In the case of diversion, the water is conveyed from one part of any lake or river, or its tributary, to another part of the same lake, river or tributary; and*

- (d) No lawful take of water is adversely affected as a result of the damming or diversion; and
- (e) Any damming or diversion within a Regionally Significant Wetland was lawfully established prior to 2 July 2011; and
- (f) There is no change to the water level range or hydrological function of any Regionally Significant Wetland; and
- (g) There is no damage to fauna, or New Zealand native flora, in or on any Regionally Significant Wetland; and
- (h) The damming or diversion does not cause flooding of any other person's property, erosion, land instability, sedimentation or property damage; and
- (i) The damming or diversion is not within the Waitaki Catchment.

Rule 12.3.2.2 The diversion of water, for the purpose of land drainage, is a **permitted** activity, providing:

- (a) Any diversion within a Regionally Significant Wetland was lawfully established prior to 2 July 2011; and
- (b) There is no change to the water level range or hydrological function of any Regionally Significant Wetland;
- (c) There is no damage to fauna, or New Zealand native flora, in or on any Regionally Significant Wetland; and
- (d) The diversion does not result in the lowering of the level of water in any lake or river; and
- (e) The diversion does not cause flooding of any other person's property, erosion, land instability, sedimentation or property damage.

Rule 12.3.2.3 Unless prohibited by Rules 12.3.1.1 to 12.3.1.4, the diversion of water carried out for the purposes of allowing the erection, placement, repair or maintenance of a lawful structure, is a **permitted** activity, providing:

- (a) The course of the water always remains within the bed of the lake or river; and
- (b) The course of the water is returned to its normal course following the completion of the repair or maintenance, and no more than one month after the diversion occurs; and
- (c) No lawful take of water is adversely affected as a result of the diversion; and
- (d) Any structure within a Regionally Significant Wetland was lawfully established prior to 2 July 2011; and
- (e) There is no change to the water level range or hydrological function of any Regionally Significant Wetland; and
- (f) There is no damage to fauna, or New Zealand native flora, in or on any Regionally Significant Wetland; and
- (g) The diversion does not cause any erosion, land instability, sedimentation or property damage.

Rule 13.5.1.5B The disturbance of any Regionally significant Wetland, for the purpose of drain maintenance, is a permitted activity, providing:

- (a) *The disturbance is limited to that necessary to address water accumulating on land outside of any Regionally Significant Wetland; and*
- (b) *The drain was lawfully constructed on or before 2 July 2011; and*
- (c) *The drain has been maintained within the preceding 15 years; and*
- (d) *There is no increase in the drain dimensions from the last maintenance; and*
- (e) *All reasonable measures are taken to minimise the release of sediment to any water body during the disturbance, and there is no conspicuous change in the colour or visual clarity of any water body beyond a distance of 100 metres downstream of the disturbance; and*
- (f) *All reasonable steps are taken to minimise damage to fauna and New Zealand native flora; and*
- (g) *At least ten working days prior to the commencing the maintenance, the Otago Regional council is given notice of the location and date of the drain maintenance; and*
- (h) *Within ten working days after the drain maintenance is carried out, the Otago Regional Council is provided with:*
 - (i) *Photographs of:*
 - (a) *The drain immediately before and after the maintenance; and*
 - (b) *The wetland adjoining the drain being maintained, showing vegetation cover; and*
 - (ii) *Dimensions (longitude and cross-section) of the drain immediately before and after maintenance.*

f. The incorrect identification of boundaries on the maps for the Diamond Creek Wetland.

g. The total preclusion of public and limited notification in the following rules:

- 12.1.3.1 *Controlled activity: taking and use of surface water*
- 12.1.4.2-8 and 12.2.3.1A *Restricted discretionary activities: taking and use of water*

12.2.2.A1	<i>Controlled activity: taking and use of groundwater</i>
12.2.3.4 and 12.2.3.2A	<i>Restricted discretionary activity: taking and use of groundwater</i>
13.2.2.1	<i>Restricted discretionary activity: fences, pipes, lines, cables, whitebait stands, eel traps, mai mais, jetties, bridges and crossings in, on, under or over lakes, rivers and Regionally Significant Wetlands</i>
13.3.2.1	<i>Restricted discretionary activity: extension, alteration, replacement or reconstruction of any structure fixed in, on, under or over the bed of any lake, river or Regionally Significant Wetland</i>
13.4.2.1	<i>Restricted discretionary activity: Demolition or removal of structure or any part of structure that is fixed in, on, under or over the bed of any lake or river, or any Regionally Significant Wetland</i>
13.5.2.1	<i>Restricted discretionary activity: extraction of alluvium within the bed of a lake, river or Regionally Significant Wetland.</i>

- h. The absence of recognition of positive effects of potential enhancement works within Regionally Significant Wetlands.

7. The reasons for the appeal are as follows:

- a. New Zealand now has less than 10 per cent of the wetlands that were present in pre-European times. Wetlands provide important habitat for birds and fish, and are home to rare and endangered animals and birds. They also provide waterfowl/gamebird habitat and recreational hunting opportunities.
- b. Section 6(a) of the Resource Management Act requires the Otago Regional Council to recognise and provide for the preservation of the natural character of wetlands. Introduced gamebirds have been part of the natural character of rural New Zealand since the birds were released and acclimatised. Acknowledgement and protection of gamebird habitat values is consistent with section 6(a).
- c. Protection of introduced gamebird habitat is consistent with giving effect to section 7(c) in respect of amenity values and section 7(f) in respect of the quality of the environment.

- d. Schedule 1 A of the Plan identifies the natural values supported by Otago's lakes and rivers, which include introduced gamebirds. Some of these areas, particularly on river margins, are parts of Regionally Significant Wetlands. If an introduced gamebird is on a lake or water margin it has value under Schedule 1 A, but if it then passes on to a Regionally Significant Wetland this value is not acknowledged. This situation indicates an inconsistency between the proposed changes and Schedule 1 A.
- e. Due to interbreeding it is not practical to make a distinction between introduced and indigenous waterfowl. The only introduced gamebirds are mallard ducks, but this species has interbred and hybridised with the native New Zealand grey duck.
- f. The decision did not give appropriate weight to the Otago Sports Fish & Gamebird Management Plan ("the Management Plan") prepared under the Conservation Act 1987, pursuant to section 66(2)(b)(i) of the RMA. Part 5.6 of the Management Plan states that "*introduced gamebirds, such as mallard ducks, are highly valued by the community for their intrinsic and amenity values, and these values need to be reflected in statutory planning documents*".
- g. The use of a non-statutory inventory rather than listing known values of Regionally Significant Wetlands lacks clarity and transparency, both in respect of accessing information, and in terms of how values may be added to or removed from the records of important wetlands.
- h. Wetlands that qualify as being "regionally significant" should be protected. However currently the rules enable certain activities

within Regionally Significant Wetlands to continue as permitted subject to thresholds specified such as water level, flora, fauna and other effects. However there is no way to realistically monitor compliance, or changes to the wetland's quality and habitat values. For Regionally Significant Wetlands a higher level of protection is justified. One method to protect them is to ensure lawfully established (i.e. previously permitted) activities that have potential to adversely affect wetland values are managed through the requirement to obtain resource consents, pursuant to appropriate rules and the operation of section 20A.

- i. The current wetland boundaries, as defined in the Proposed Plan, have largely been identified based on expert opinion according to criteria that appears to be largely based on determining a distinguishing line between wet and dry vegetation, or between existing developed pasture and what may remain of a wetland. Otago Fish and Game submits that this assessment criteria is narrow, and ignores other critical aspects that can determine a wetland environment. These include:
 - i. Water levels across the full range of hydrological states present within a catchment over a period of time;
 - ii. The presence of waterfowl;
 - iii. Historical records of wetland extent;
 - iv. Any other statutory boundaries of a wetland, such as wildlife management reserves.

- j. This is a particular problem with the Diamond Lake and Lake Reid wetland, which are designated as a Wildlife Management Area under the Wildlife Act 1953. The riparian margins of Diamond Creek and the Earnslaw Burn have now been excluded, whereas both of these areas were included in the original Schedule 9. As the values on these riparian margins have not changed, Otago Fish and Game requests that the

original Schedule 9 boundaries be restored and amended slightly, as outlined in Appendix 2.

- k. The decision makes changes to the rules listed in paragraph 6(g) which will require Otago Regional Council to process applications under those rules on a non-notified basis. The decision of the Council refers to the change in notification requirements as a "minor and consequential change" at page 37. To the contrary, these changes have a major impact on public participation and participation of directly affected parties. Under the Plan prior to the decision the wide range of controlled and restricted discretionary activities for the take, use, diversion and damming of water and activities on the beds of waterways could be processed by full, limited or no notification, at the Otago Regional Council's discretion. The decision on the Proposed Plan removes the Otago Regional Council's discretion altogether.

- l. Otago Fish and Game has statutory obligations and duties under the Conservation Act 1987, the Wildlife Act 1953 to manage gamebirds, sports fish and wildlife values relevant to water bodies, as well as to advocate for the habitats of trout and salmon under section 7(h) of the RMA. It should therefore be notified of any activity that may be relevant to those statutory management functions as a directly affected party.

- m. There is no scope for such a wide ranging change to the notification status of the activities listed. No change to the notification status was indicated in the Proposed Plan as notified at all. The Proposed Plan as notified was in respect of wetlands only, not lakes, rivers or groundwater as well. It is not apparent from the summary of submissions that any submitter sought such a wide ranging change in respect of notification.

- n. The Otago Fish and Game Council currently undertake and have a programme for future ongoing enhancement works on wetlands. Such works can involve activities such as damming and diversion. Under the Proposed Plan such activities are likely to be classified as non-complying, with no acknowledgement or credit given for the positive effects of such works. The Proposed Plan provides no incentive for proactive enhancement works in Regionally Significant Wetlands.
- o. A current example of this is in respect of the Takitōa Swamp (I47). It requires active management in order to restore and protect its potential values. Such works are treated as non-complying activities which is inhibiting the enhancement works.

8. The Otago Fish and Game Council seek the following relief:

- a. The reinsertion of introduced gamebirds as a value associated with regionally significant wetlands. Policy 10.4.1 A8 should read "regionally significant habitat for waterfowl", as opposed to "regionally significant habitat for indigenous waterfowl".

Otago's regionally significant wetland values are:

- A1 *Habitat for nationally or internationally threatened species or communities;*
- A2 *Critical habitat for the life cycles of indigenous fauna which are dependent on wetlands;*
- A3 *High diversity of wetland types;*
- A4 *High degree of wetland naturalness;*
- A5 *Wetland scarce in Otago in terms of its ecological or physical character;*
- A6 *Wetland which is highly valued by Kai Tahu for cultural and spiritual beliefs, values and uses, including waahi taoka and mahika kai;*
- A7 *High diversity of indigenous wetland flora and fauna;*
- A8 **Regionally significant habitat for waterfowl; and**
- A9 *Significant hydrological values including maintaining water quality or low flows, or reducing flood flows.*
- A10 **Wetland which is regionally significant for recreation including waterfowl hunting**

- b. The amendment of objective 10.3.1 to read:

To recognise and provide for the protection of the natural character, biodiversity and other values of wetland in the region.—Otago's

~~wetlands and their individual and collective values and services will be maintained or enhanced for present and future generations.~~

- c. The retention of the list of values associated with Regionally Significant Wetlands in Schedule 9. The list of values The Otago Fish and Game Council wishes to be retained is attached as **Appendix 1**.
- d. The corresponding deletion of reference to the inventory in the preamble to Schedule 9:

~~This schedule lists Otago's identified Regionally Significant Wetlands and Wetland Management Areas. An identified Regionally Significant Wetland or Wetland Management Area is one that has been mapped in Maps F1-F68 and contains one or more regionally significant wetland values (see Chapter 10).~~

~~The Otago Regional Council holds information on wetlands listed in this schedule in an inventory of wetlands which will be made freely available. In addition, GIS (geographical information systems) data on wetland extents can be made available on request.~~

- e. Insertion of new rules making the continued, and previously permitted, taking, damming and diversion of water, and associated maintenance of structures a restricted discretionary activity, with the council's discretion restricted to:
- i. The water level range or hydrological function;
 - ii. Effects on flora or native fauna;
 - iii. Effects on flooding of any other person's property, erosion, land instability, sedimentation or property damage;
 - iv. Monitoring;
 - v. Applications subject to this new rule may be notified to affected parties.
- f. Wetland boundaries are to be re-defined in accordance with The Otago Fish and Game Council maps attached as **Appendix 2**. The wetland boundaries to be changed are:

- i. Diamond Creek wetland and Lake Reid wetland. The Otago Fish and Game Council seeks the restoration of the original Schedule 9 boundaries, plus the small additional areas to the east of Diamond Lake that have recently been surveyed and are currently mapped.
- g. Delete the following words from applying to rules 12.1.3.1, 12.2.2A.1, 12.2.3.4, 12.2.3.2A, 13.2.2.1, 13.3.2.1, 13.4.2.1 and 13.5.2.1:

~~"The Consent Authority is precluded from giving public notification and limited notification of an application for a resource consent under this rule."~~

And replace with the wording that gives the Otago Regional Council the discretion to choose whether or not public, limited or no notification is required on a case by case basis. All extractive activities should have the requirement of a limited notification.

- h. Delete the following words from Rule 12.1.4.8 (as it applies to rules 12.1.4.2 – 8 and 12.2.3.1A):

~~"(a) For applications for resource consent to which this Rule applies, to take and use water from a river, the consent Authority is precluded from giving public notification and limited notification if the application is to take and use water from:~~

- ~~(i) A river for which a minimum flow has been set by or under this Plan; or~~
- ~~(ii) A river for which it is not necessary for the Council to consider whether, if consent is granted, the taking should be subject to a condition requiring a residual flow to remain in the river at the point of take, or a condition requiring other provision for native fish, other than a condition requiring fish screening.~~

~~Other applications for resource consent to take and use water from a river may be considered without notification as allowed by the Resource Management Act.~~

~~(b) For applications for resource consent to which this rule applies, to take and use water from a water body other than a river, the Consent Authority is precluded from giving public notification and limited notification."~~

And replace with wording that gives the Otago Regional Council the discretion to choose whether or not public, limited or no notification is required on a case by case basis.

- i. Introduce a new rule to the following effect or similar:

"The taking, damming, diversion, drainage and associated disturbance of the bed of any Regionally Significant Wetland undertaken by the Otago Fish and Game Council or Department of Conservation for an environmentally beneficial activity is a controlled activity".

- j. Delete Takitooa Swamp from Schedule 9.

- k. Such other alternative relief as gives effect to the concerns raised in this appeal.

- 9. The Otago Fish and Game Council attach the following documents to this notice:

Appendix 1 Schedule 9 Identified Regionally Significant Wetlands and Wetlands Management Areas.

Appendix 2 Wetland boundary maps for replacement of existing maps in Schedule 9.

Appendix 3 A copy of Otago Fish and Game Council's submission and further submission.

Appendix 4 A copy of the Decision

Appendix 5 Proposed Plan as amended by the Decision.

Appendix 6 A list of names and addresses of persons to be served with this notice.

DATED this 25th day of June 2012



Maree Baker-Galloway
Counsel for Otago Fish and Game Council

Address for service of appellant:

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Barristers and Solicitors
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Contact person: Maree Baker-Galloway

Advice to recipients of copy of notice of appeal

How to become a party to proceedings

If you wish to be a party to the appeal, you must lodge a notice in form 33 with the Environment Court within 15 working days after this notice was lodged with the Environment Court. Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

How to obtain copies of documents relating to appeal or inquiry

The copy of this notice served on you does not attach a copy of the relevant application, or submission, or the relevant decision (or recommendation, or part of the decision or recommendation). These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this Appeal, contact the Environment Court Unit of the Department for Courts in Wellington.

Contact Details of Environment Court for Lodging Documents

Documents may be lodged with the Environment Court by lodging them with the Registrar.

The Christchurch Address of the Environment Court is:

Postal:

Environment Court

P O Box 2069

Christchurch

Physical:

99-101 Cambridge Terrace

Christchurch 8013

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