General guidance note 1: Summary of legal advice obtained for consent processing

Purpose

The purpose of this guidance note is to summarise legal advice obtained by the Otago Regional Council Consents Team that is used to inform resource consent processing. This guidance note is intended to set out the Council's current position on the specified matters and is shared in order to assist resource consent applicants. A resource consent applicant may choose to adopt an alternative view to that shared in this document, however it is recommended in these circumstances this alternative view is supported by separate legal advice.

The topics covered in this guidance note are:

- The criteria to be met in order to obtain s124 continuation rights, and in particular, what can be considered to be the "same activity" under s124(1)(b).
- Whether water quality effects associated with the use of water for irrigation are required to be assessed in the replacement consent applications.
- If the effects of damming or diverting water under s14 of the Resource Management Act 1991 (RMA) as a result of the presence of existing structures such as dams or weirs, forms part of the existing/receiving environment.
- How the National Policy Statement for Freshwater Management 2020 (NPSFM 2020) is to be applied to proposals seeking to take water for long (greater than 6 years) consent durations.

S124 continuation rights

Section 124 of the RMA

Section 124 of the RMA provides the ability for consent holders to exercise their existing resource consent while applying for a replacement resource consent. This right applies when the following criteria (set out in s124(1) RMA) is met:

"...(a) a resource consent is due to expire; and

(b) the holder of the consent applies for a new consent for the same activity; and

(c) the application is made to the appropriate consent authority; and

(d) the application is made at least 6 months before the expiry of the existing consent."

What is meant by "same activity":

ORC has received some legal advice to understand the meaning of "same activity" under s124(1)(b).

Following this advice, it is ORC's position that a replacement resource consent application does not have to be for *exactly* the same activity as that authorised by a deemed permit or existing resource consent in order to obtain s124 continuation rights. Rather, the proposed activity should be *substantially* the same as the currently authorised activity.

What is meant by *substantially* the same:

Whether an activity is substantially the same will be a matter of judgement in each case. ORC will make an assessment on each consent application, taking into account the following factors:

(a) Will the proposed activity use any existing investment that the Council is required to have regard to under section 104(2) of the Act.

(b) If there is a change in the nature or character of effects of the activity.

(c) If there is a change to the use of the water (including the purpose and location of the use).

(d) Any large degree of overlap between the existing take and use and the new application.

(e) Whether the nature of changes sought are more appropriately dealt with under a separate provision of the RMA. For example, it may be more appropriate to consider significant changes to the take location separately under section 136 of the Act, rather than through the replacement process.

What does s124 protect?

Section 124 only protects the *existing* activity authorised under the current resource consent while a new consent is being applied for. The section does not authorise any changes to the activity while the replacement resource consent is being processed.

Any changes applied for under the replacement consent will only be authorised once the new resource consent is granted. Section 124 cannot be used to authorise a new location, rate of take or use in the interim.

What does this mean for my application?

Change to the rate of take of water

- Some increase or decrease in the rate of take is allowed while still meeting the criteria of section 124, however the extent of the change will depend on a case-by-case assessment. Potential factors to consider include whether the proposed take will significantly increase the level of effects on the environment, or if it will enable different uses to take place (including a substantially larger area to be irrigated).
- Note that any changes to the rate of abstraction may impact the rules that apply to the activity.

Change to the use of water

- For section 124 to be applicable to an application that includes a change in the use of water, the primary use of the water (such as irrigation) should remain the same and water should be used in a similar vicinity to the current use.

- For example, adding or changing paddocks that are being irrigated would likely be covered by s124, whereas using water on a different property would likely be a different activity.

- Applications which include smaller secondary uses of water that are not authorised by the existing permit (such as dairy shed wash down water) may be allowed, although this will depend on the exact consent being replaced.

Change to the location of the take of water

- For s124 to be applicable to an application that includes a change in the location of the take of water, there is some flexibility in the location of the new take of water. For example, moving the location of the take to another location on the watercourse within the same property such as for the purpose of facilitating water measuring.

- ORC will need to carefully consider if s124 applies to applications that change the take location to a different property, or from a waterbody to a water race (and vice versa) or different waterbody. The following factors will be considered:

  (a) the distance between the current and the proposed take locations;

  (b) whether the new take will utilise existing infrastructure; and

  (c) whether there are any other changes proposed to the activity.

What if the consent holder is currently taking water from a different location to what is authorised on their deemed permit – and is seeking to rectify that in the replacement consent application?

If the applicant is already taking water from the new take location (which is not authorised) then it may be more appropriate to deal with the change of location separately from the replacement consent process by way of a transfer under s136 of the RMA. Under s136, you are only able to transfer a current consent, meaning that a replacement consent and a transfer of the point of take cannot occur at the same time.

An application to transfer the permit **must** be made before the expiry of the existing deemed water permit. As the duration of a permit cannot be extended under section 136, a replacement resource consent will also need to be applied for.

What if the change in take location is not covered by s124?

Replacement consents are new consents, meaning that changes from the existing consent are allowed. However, if the location applied for in the replacement consent is sufficiently different to the current permit, s124 may not apply to your activity.

Consent holders have other options to change the location of the abstraction, including transferring the location of the take before the deemed permit expires, or after the replacement consent has been granted. If the change in location is going to be significantly diffferent and may not qualify for s124, it is recommended that a s136 transfer occurs before the consent expiry. s124 continuation rights may then apply to the transferred consent.

Assessment of water quality effects for water use permits

ORC has obtained legal advice to understand if, and to what extent, they are required to assess the effects of using water for irrigation on water quality. This advice has considered if effects of water use on water quality is a relevant "effect" for consideration when determining a consent application and how the plan framework constrains any assessment.

Due to the broad definition of "effect" this can include any consequential effect provided it is not too uncertain or remote. The effects on water quality from using water for irrigation may be a relevant consideration when determining a water use permit seeking water for irrigation purposes as:

- The effects on water quality have a causal relationship with the use of water for irrigation: they would not occur to the same extent if water was not used for irrigation;
- Given the limitations of the policy and rule framework for addressing water quality as a result of the use especially in respect of nutrients and pathogens, there would be no other forum through which effects on water quality could be addressed; and
- Policy support in a plan is not required to assess an effect, as the assessment of effects under section 104 is independent of the assessment of relevant policies.

Whether the effects of using water on water quality can be considered when determining an application is dependent on the activity classification of the consent and any relevant matters of discretion or control. If effects on water quality are not captured in the matters of control or discretion, then water quality effects cannot be considered.

If the replacement water permit applications are made as a ***discretionary or non-complying*** activity, then the applications will need a full assessment of the consequential effects from the use of the water for irrigation. This will require assessing sources of diffuse discharges and determining how those discharges affect

groundwater and surface water quality, which will likely involve some form of nutrient modelling.

If an application is made currently under the ***controlled*** activity rule (and is bundled to ***restricted discretionary*** under the operative Regional Plan: Water (RPW) framework) then there is some ability to consider effects of the use on water quality but this would be limited to the effects on groundwater based on the matters of discretion. Rule 12.1.4.8 has the following clause *(xv) Any actual or potential effects on any groundwater body.*

If the rules in PC7 are retained as notified and become operative and an application is made under the ***controlled*** activity rule then water quality effects would not be an effect to be assessed by applicants/ORC as there is no relevant matter of control.

Water Permits for taking, damming and diverting water and the 'existing/receiving environment'

Why do we need to define the "existing/receiving environment"?

When processing a resource consent regard must be had to what constitutes the "environment". An understanding of the environment is necessary to inform the assessment of the effects of a proposal. Section 95A(8) and section 104(1)(a) each require an assessment of the adverse effects or actual and potential effects on the environment to make the public notification decision and determining whether a consent should be granted or declined.

What constitutes the environment has been subject to several court cases and case law has confirmed that the "environment" includes the environment as it may be modified by permitted activities and the implementation of resource consents which have been granted and which are likely to be implemented. For resource consents issued by regional councils, which are of limited duration, this approach differs slightly. Case law has confirmed that in situations where consents granted by a regional council are being reconsented, the activities subject to those consents should not form part of the environment. The Court has noted that it should not be assumed that existing consents with finite terms will be replaced or replaced on the same conditions.

Unlawful activities also do not form part of the receiving environment, therefore even if there is a known activity occurring, if it is not lawful, it must not be considered.

What constitutes the existing/receiving environment for take and use activities?

Water permits for take and use only form part of the environment prior to their expiry and whether they are part of the receiving environment is not influenced by any s124 continuation rights. Therefore, when assessing the taking of water as part of the replacement process for deemed permits and water permits, the effects on the environment from the take need to be considered as if the take were not occurring. Consideration will need to be given to the naturalised flows of the waterbody and the

existing values (natural and human use) of the waterbody and how these values will be affected by the proposed take.

In addition, other Deemed Permits do not form part of the receiving environment. This is because Deemed Permits will all expire at the same time, therefore the future environment is not modified (in theory) by deemed permits past 1 October 2021.

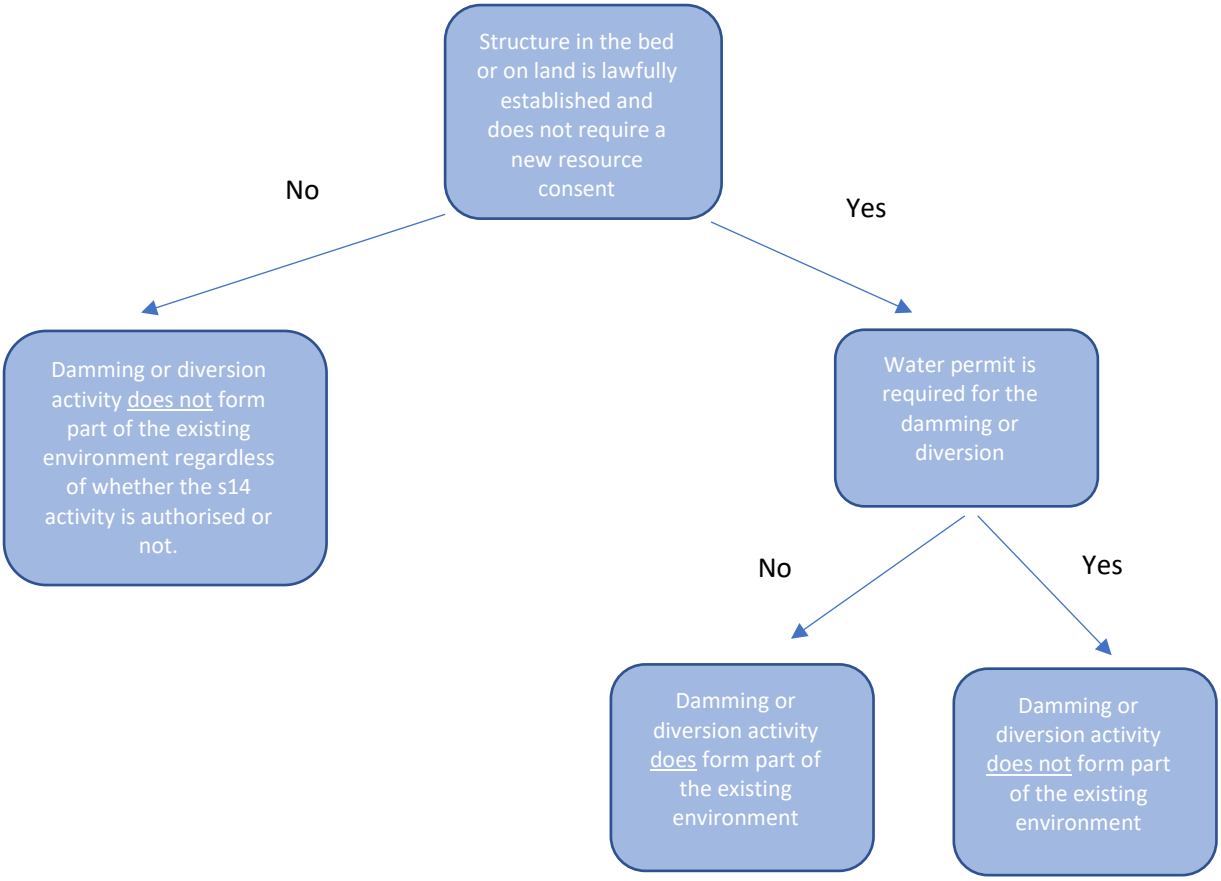
What constitutes the existing/receiving environment for damming and diversion activities?

In the case of structures in riverbeds such as dams and weirs, this means that where a resource consent is required to reconsent the structure, the dam or weir should not be considered as part of the "environment".

Where the structure is not being reconsented, whether the structure forms part of the existing environment depends on whether consent is also required under section 14 for the damming or diversion as a result of the structure. If consent is also required under section 14, the structure does not form part of the existing environment, as an additional consent is necessary for the activity to be authorised. This means that the assessment of the effects required for the activity to renew the damming or diversion activity will need to address the effects of damming or diverting water, including matters such as inundation of land and a hydrological assessment. That assessment must be based on a scenario where the damming or diversion is not already occurring.

If a water permit is not required for the damming or diversion and the structure (dam or weir) is otherwise lawfully authorised, then the structure and damming or diversion does form part of the existing/receiving environment. In this case, assessing a water take from that dam, or arising from the use of the weir, is assessed on the basis of those activities forming part of the environment.

In the case of a dam that is not within the bed of a river, where a water permit is required to authorise the damming activity, the structure would not form part of the existing/receiving environment. While the actual effect on the environment of this damming may be minimal, a full assessment as if the activity is new, is still required. The flow chart below can assist with identifying when the structure is considered part of the environment.



How does the existing/receiving environment influence the assessment of effects for damming and diverting water?

For proposals where the damming or diversion activity does not form part of the receiving environment, a more thorough assessment of effects will be necessary as the impoundment of water, or diversion does not form part of the receiving environment. As such, it will be necessary to assess the influence of the structures on waterbodies including assessing the effects of inundation, or the potential effects of diverting water away from its natural course. The environment used to inform these assessments will not be that which existed prior to those structures and activities being in place, rather it should be assumed that the damming or diversion activities cease which would allow for the environment to revert back to a more natural state. For example, when re-assessing a damming proposal, the environment would be determined as being what would exist if the impounded water and dam structure where no longer present, but the environment as it has been affected by those historic activities.

The National Policy Statement for Freshwater Management (NPSFM) 2020 came into force on 3 September 2020. The NPSFM must be given regard when considering an application for resource consent under section 104 of the RMA. To implement the NSPFM Council is required to complete various steps set out in the statement, including consulting with tangata whenua on the local approach to Te Mana o Te Wai, engaging with communities to determine how Te Mana o Te Wai is to be implemented, and the limits to be included in freshwater plans that will achieve Te Mana o Te Wai.

Council is yet to give effect to the NPSFM, but the objective and policies can still be given weight under section 104. How much weight given to the objective and policies will depend on the circumstances of each particular resource consent. Some policies have more relevance to plan-making processes, rather than resource consents, this will inform the weight that is ultimately placed on those policies.

The objective and policies will also need to be considered together with the other considerations under section 104, such as the objectives and policies of regional plans. Policies that are more directive, will provide decision makers with greater guidance when determining individual applications.

Te Mana o Te Wai

Te Mana o Te Wai is the fundamental concept of the NPSFM 2020. This includes a hierarchy of obligations which is enshrined in the objective of the NPSFM 2020. Council is yet to determine with tangata whenua what Te Mana o Te Wai means for the Otago Region. However, guidance may be taken from the relevant Iwi Management Plans to assist in weighting certain NPSFM policies.

The objective of Te Mana o Te Wai sets out a hierarchy of obligations that prioritises, first the health and well-being of water bodies and freshwater ecosystems, second the health needs of people (such as drinking water) and third, the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future.

Prioritising the obligations in the order set out does not mean that Councils will ignore health needs or economic needs, however the primary consideration of Council when implementing the NPSFM is the health and wellbeing of freshwater bodies. In a resource consent context, prior the implementation of the NPSFM requirements in a regional plan, this means that significant weight must be placed on the health and well-being of the water body.

Prior to the limit setting process being completed, it is not certain what would constitute a “healthy” freshwater body. Some guidance may be able to be taken from the policies and implementation methods of the NPSFM such as Policy 5 which requires freshwater is managed through a National Objectives Framework (NOF) to ensure the health and well-being of **degraded water bodies** and freshwater

ecosystems **is improved,** and the health and well-being of **other water bodies** and freshwater ecosystems **is maintained, or improved** (if communities choose to do so).

Appendices 1A, 1B and 2A of the NPSFM set out compulsory and other values to be considered and the attribute limits when undertaking the NOF process. Significant weight cannot be placed on the numeric values for different attribute bands ahead of community processes to determine the appropriate limits, however these values will be informative for determining whether the health and well-being of a freshwater body or ecosystem is being prioritised. Additionally, more weight may be applied to the numeric values where the proposal goes beyond a national bottom line.

How the NSPFM 2020 may influence the term of resource consents

Regard will need to be given to the NSPFM in the consideration of resource consent applications, requiring an assessment of whether granting an application will achieve the hierarchy of obligations. Prior to Council implementing the NOF and identifying the local approach to Te Mana o Te Wai and based on the strong direction on proposed Plan Change 7 to the Regional Plan: Water for Otago, it will likely be difficult for decision-makers to grant replacement water permits for long durations.