

## Practice note– s124 and s124 in the ‘discretionary’ period

### 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. Council is currently processing resource consent applications to authorise the taking and use of water following the expiry of the deemed water permits in October 2021. As part of processing the replacement resource consents, several questions have arisen regarding the application of section 124 of the Resource Management Act 1991 (RMA or Act) from 1 April 2021 to 30 June 2021.

### Section 124(e) – use of discretion

There are no specific matters that must be considered by the Council when exercising its discretion under section 124(2)(e). However, Council must exercise its discretion in a way that recognises the nature and purpose of section 124 and promotes the broader purposes and principles of the RMA.

Section 124(2)(e) allows the Council to decide whether consent holders can exercise their existing consent where consent holders:

- a) are applying for a new consent for the same activity; and
- b) make the application for the new consent between 3 – 6 months of the expiry of the consent.

In line with the above principles, Council will exercise its discretion in a way that:

- a) is consistent with the nature and purpose of section 124; and
- b) promotes the purposes and principles of the RMA.

The Council is aware that providing continuance rights is important to applicants as:

- protects the existing activity while the new water permit is applied for;
- affords the new water permit application priority over the same resource; and
- means that in accordance with section 104(2A), when considering an application for a replacement water permit the Council must have regard to the value of the investment of the existing consent holder.

For Council to provide continuance rights the proposed activity should be *substantially* the same as the currently authorised activity. Section 124 does not preclude changes to the rate of take (including a greater rate of take). However, a wholesale change to the use is unlikely to meet the test.

Please be aware that Section 124 only protects the *existing* activity authorised under the current resource consent while a new consent is being applied for. It does not authorise any changes to the activity while the new resource consent application is being

processed. As a replacement permit is an application for a new resource consent, we are required to assess the effects of the new application.

## Will s124 rights be approved?

In general, s124 rights in this 3-6 month period will be approved when:

- the decision is consistent with the nature and purpose of section 124; and
- promotes the purposes and principles of the RMA; and
- the application is for an activity which is substantially the same as the currently authorised activity.

The above decision will be made on an application by application basis and the decision will not be made until the application is in with Council. The above is also not a guarantee that s124 rights will be provided. It is recommended that all applications are lodged as soon as possible to avoid the need for the application of s124 rights. Please note that this is not a policy and all decisions will be made against the criteria in s124 and relevant case law.

## 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 different 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.