

# **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

**Waitaki Catchment Water Allocation Board**



**Te Poari Tiaki Wai o Waitaki**

## Waitaki Catchment Water Allocation Board



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Cover images (clockwise from top left):

1. Aoraki/Mt Cook and Lake Pūkaki
2. Small stream near Clearburn
3. Lower Waitaki River and mouth (Photo courtesy of the *Otago Daily Times*)
4. Lower Waitaki River at Kurow Bridge

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# Introduction

- 1 The Board is required to include in the Plan its reasons for adopting the provisions of the Plan,<sup>1</sup> including the policies, rules and other methods,<sup>2</sup> and the relevant matters it considered relating to matters raised in submissions.<sup>3</sup> The Board intends this section of the Plan to fulfil those duties. It starts with general topics that explain the context in which the Board is adopting the provisions of the Plan. The next section covers ‘plan-wide topics’ that relate to provisions throughout the Plan. The final section follows the general topic areas within the structure of the Plan. The list of reports that the Board has considered is included in Appendix 1.<sup>4</sup>

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<sup>1</sup> Waitaki Act, s26(3)(a); See also RMA, s67(1)(e).

<sup>2</sup> Ibid, s19(2); and partly in the Section 32 Report.

<sup>3</sup> RMA, Sched 1, cl 10(2).

<sup>4</sup> Waitaki Act, s26(3)(b).

# General Topics

## The Board's function

- 2 The Board's function is to develop and approve a regional plan,<sup>5</sup> including objectives, policies, and methods (including rules, if appropriate), to provide for allocation of water as described in section 13 of Resource Management (Waitaki Catchment) Amendment Act 2004 (the Waitaki Act)<sup>6</sup> as if it were a regional plan developed by a regional council (except as expressly provided otherwise by the Waitaki Act).<sup>7</sup>
- 3 The purpose of a regional plan is to assist a regional council to carry out any of its functions in order to achieve the purpose of the Resource Management Act (the RMA).<sup>8</sup> The relevant functions of a regional council for giving effect to the RMA include integrated management of the natural and physical resources of the region;<sup>9</sup> the control of the taking, use, damming, and diversion of water, and the control of the quantity, level and flow of water in any water body (including the setting of any maximum or minimum levels or flows of water); the control of the range, or rate of change, of levels or flows of water;<sup>10</sup> and maintaining indigenous biological diversity.<sup>11</sup>
- 4 The purpose of the RMA is to promote the sustainable management of natural and physical resources.<sup>12</sup> The term 'sustainable management' is given this meaning:

*In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while —*

- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) *Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*<sup>13</sup>

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<sup>5</sup> Ibid, s6(1).

<sup>6</sup> Set out in Section 2 of the Plan.

<sup>7</sup> Ibid, s18(1).

<sup>8</sup> RMA, s63(1).

<sup>9</sup> Ibid, s30(1)(a).

<sup>10</sup> Ibid, s30(1)(e).

<sup>11</sup> Ibid, s30(1)(ga).

<sup>12</sup> Ibid, s5(1).

<sup>13</sup> Ibid, s5(2).

- 5 The RMA has a single purpose, and whether a particular provision serves that purpose may involve a judgement of conflicting considerations, the scale or degree of them, and their relative significance or proportion in the final outcome.<sup>14</sup>
- 6 The amendments to the RMA made by the Resource Management (Energy and Climate Change) Amendment Act 2004, which require functionaries to have particular regard to the effects of climate change, and to the benefits of the use and development of renewable energy, do not apply to the development of the Plan.<sup>15</sup>

## The prescribed process

- 7 Although in general the RMA applies to the Board's Plan as if it were a regional plan developed by a regional council, in some respects the Waitaki Act prescribes a different process. In particular:
- the Board has had to complete its function within 12 months after the day on which all the members of the Board were appointed;<sup>16</sup> and the normal provision to extend a specified period does not apply to the development of the Plan;<sup>17</sup>
  - the normal provision for further submissions in support of or opposition to submissions on the draft Plan was not available;<sup>18</sup>
  - the normal provision for submitters to appeal to the Environment Court in respect of provisions of the Plan or matters excluded from it, did not apply.<sup>19</sup>
- 8 Several submitters were critical of the Board progressing the carrying out of its task so that it could be completed by the prescribed day; of the absence of provision for further submissions in support of or opposition to submissions; and of the absence of provision for appeals to the Environment Court on the contents of the Plan.
- 9 To the extent that those criticisms relate to the provisions of the Waitaki Act, the Board decided that they are beyond the scope of its function, and did not consider them further.
- 10 The obligation to complete development of the Plan within 12 months affected the extent of the investigations which the Board was able to make, and the procedures by which it developed the Plan. The Plan is one that could be developed in that time, not one that might have been developed over a significantly longer period. Even so, the Board considers that the Plan satisfies the relevant requirements of the law.

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<sup>14</sup> *Green & McCahill Properties v Auckland Regional Council* [1997] NZRMA 519 (HC).

<sup>15</sup> Waitaki Act, s18(2)(b).

<sup>16</sup> The members of the Board were appointed on 30 September 2004.

<sup>17</sup> Waitaki Act, s18(2)(a).

<sup>18</sup> *Ibid*, s20. The draft Plan differs from a proposed plan under the RMA, as it has no effect until approved and operative: Waitaki Act, s 25.

<sup>19</sup> *Idem*.

## No presumption in favour of draft Plan

- 11 A difference arose between submitters on whether, in deciding on submissions, the Board should apply a presumption in favour of provisions of the draft Plan. The Board understands that it is well established in planning law that in considering submissions on a proposed plan, there is no presumption in favour of the policies or provisions contained in it.<sup>20</sup> The Board considers that this practice is particularly applicable to its consideration of submissions on the draft regional Plan for these reasons:
- there was no provision for further submissions;
  - there was only a limited opportunity for cross-examination at the hearing of submissions;
  - the Board had to make decisions on submissions on a draft plan that it had produced itself;
  - there is no appeal to the Environment Court in respect of provisions of the Plan or matters excluded from it.
- 12 So the Board has applied no presumption in favour of the draft Plan, nor any onus on any submitter to show that any of its provisions are inappropriate. Rather the Board has understood its task as being to consider the submissions and evidence to find what are the most appropriate provisions of the Plan.

## The purpose of the submission process

- 13 The purpose of the submission process was for submitters to propose amendments to the draft Plan; to state reasons, to make representations, and to provide evidence to show that those amendments would be appropriate; or to show that amendments requested by another submitter would not be appropriate. In essence, it was intended to be a constructive process, designed to lead to improvements to the draft Plan. The process was not an appropriate opportunity for venting grievances. The Board is grateful for the many helpful suggestions and relevant information that it received from submitters.

## Limit on alterations to draft Plan

- 14 Submissions on the draft Plan were required to state the alterations asked for.<sup>21</sup> The Board was limited to considering submissions that are ‘on’ the draft Plan to the extent that it changes the draft Plan.<sup>22</sup> If the effect of accepting a submission would be to amend the draft Plan appreciably without real opportunity for participation by those potentially affected or interested, that would be a powerful consideration against finding that the submission was truly ‘on’ the draft Plan.<sup>23</sup> This was particularly valid under the

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<sup>20</sup> *Wellington Club v Carson* [1972] NZLR 698 (SC), applied to the RMA regime in *Leith v Auckland City Council* [1995] NZRMA 400 and *Eldamos v Gisborne District Council* Environment Court decision W047/05.

<sup>21</sup> See form of submission made available by the Board and attached to its Guide for Submitters; and compare Resource Management (Forms, Fees and Procedure) Regulations 2003 (SR 2003/153), Form 5.

<sup>22</sup> *Clearwater Resort v Christchurch City Council* (HC Christchurch, AP34/02; 11 March 2003 William Young J).

<sup>23</sup> *Idem*.



Waitaki Act, where the usual provision for lodging further submissions in support of, or opposition to, the original submissions did not apply.

- 15 The Board's authority to amend the draft Plan was limited to making amendments which were reasonably and fairly raised by and within the ambit of the submissions<sup>24</sup> approached in a realistic workable fashion,<sup>25</sup> and taking into account the whole relief package detailed in each submission.<sup>26</sup>

## The Board's submission procedures

- 16 The Board was required to hold a public hearing into submissions.<sup>27</sup> In conducting the hearing the Board was authorised to allow cross-examination of witnesses.<sup>28</sup>
- 17 Because the Waitaki Act makes provisions for making and deciding on submissions that differ from those made by the RMA, the Board adopted and published procedures for its hearing of submissions. The objectives of the Board's procedures were:
- to provide an efficient and effective opportunity for the Board to receive and probe information relevant to the Plan
  - to provide a fair and orderly opportunity for everyone who made a submission on the draft Plan and stated that they wished to be heard to put their point of view before the Board and give relevant information for its consideration.
- 18 In setting its procedures for hearing submitters, the Board was guided by its duty to complete the hearing, consider the submissions and evidence, make its decisions, complete the Plan, and approve it within the time prescribed by law.
- 19 The Board's procedures included lodging statements of evidence no later than 10 working days before the start of the hearing, and publication of them; a time limit of 15 minutes for a submitter's representations and evidence, and provision for the Board to allow a longer time on application made not less than 5 working days prior to the start of the hearing. The procedures also limited cross-examination to disputed questions of primary fact, with provision for leave to cross-examine more broadly on application made not less than 5 working days prior to the scheduled time for the witness to give evidence.

## Consultation

- 20 The Board was required, during preparation of the draft Plan, to consult the Minister for the Environment, other Ministers of the Crown who may be affected, local authorities who may be affected, and the tangata whenua of the area who may be affected, through iwi authorities and tribal rūnanga.<sup>29</sup> It could also choose to consult anyone else.

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<sup>24</sup> *Countdown Properties v Dunedin City Council* [1994] NZRMA 145; 1B ELRNZ 150 (FC).

<sup>25</sup> *Royal Forest and Bird Protection Society v Southland District Council* [1997] NZRMA 408 (HC).

<sup>26</sup> *Shaw v Selwyn District Council* [2001] 2 NZLR 277; [2001] NZRMA 399 (HC).

<sup>27</sup> Waitaki Act, s24(1).

<sup>28</sup> *Ibid*, s24(3)(b).

<sup>29</sup> RMA, Sched 1, cl 3.

- 21 Because of its duty to complete its function within 12 months without extension, the Board decided that it would issue a general invitation to anyone to provide information that might assist it in preparing the draft Plan, and that it would only consult directly with the persons and bodies it was obliged to consult with.
- 22 The Board received considerable information in response to its general invitation. The Board consulted the Minister for the Environment, and several other Ministers of the Crown.<sup>30</sup> The Board held consultation meetings with the affected local authorities;<sup>31</sup> and also held public meetings at which many members of the public took active parts.<sup>32</sup> The Board also held a consultation meeting with Māori at Waihao Marae, which was attended by representatives of the papatipu rūnanga Te Rūnanga o Arowhenua, Te Rūnanga o Waihao, and Te Rūnanga o Moeraki, and of Te Rūnanga o Ngāi Tahu.
- 23 Some submitters (in particular Te Rūnanga o Ngāi Tahu) complained that they had not been consulted, or that the consultation had not been adequate.
- 24 The Board did invite Te Rūnanga o Ngāi Tahu to meet with it for consultation, but received no response about a convenient time for the purpose. Representatives of Te Rūnanga o Ngāi Tahu were present at the meeting at Waihao Marae, but they chose not to take an active part in the discussion. That consultation meeting included an invitation from the Board for the rūnanga to subsequently provide further information or views that they thought may assist the Board in its task. Because of its obligation to complete its function within 12 months, with no extension, the Board had to continue with preparation of the draft Plan for publication, without awaiting any longer for a response from Te Rūnanga o Ngāi Tahu to its invitation. The Board then offered for its staff to meet with Te Rūnanga o Ngāi Tahu, but received no response to that offer.
- 25 The Board is satisfied that it complied with its consultation obligations to the full extent practicable in the time available.

## Evaluative judgements

- 26 Some submitters criticised provisions of the Plan on the ground that they are not ‘science-based’, or that judgements underlying them are not transparent.
- 27 Rules and other methods of implementation of policies for achieving the objectives of the Plan call for evaluative judgements<sup>33</sup> on conflicting considerations, and their relative significance or proportion in the final outcome.<sup>34</sup> They are not generally the result of computation, or application of scientific principle or method, but are judgements on which reasonable and informed people (including members of the Board) might reasonably differ. In making those judgements, the Board has considered all the submissions, and all the representations and evidence presented at the public hearing.

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<sup>30</sup> The Ministers of Conservation, of Agriculture, Forestry and Rural Affairs, of Economic Development, of Energy, of Māori Affairs, of Local Government, of State Owned Enterprises, and of Tourism.

<sup>31</sup> The Canterbury and Otago Regional Councils; the Mackenzie, Waitaki, Waimate and Timaru District Councils; and the Dunedin City Council.

<sup>32</sup> Public meetings were held at Twizel, Kurow and Glenavy.

<sup>33</sup> See *Murphy v Rodney District Council* (2004) 10 ELRNZ 353 (per Baragwanath J at para 11).

<sup>34</sup> *NZ Rail v Marlborough District Council* [1993] 2 NZLR 641.

## Significance of previous rights

- 28 Some submitters sought that the Plan be amended to assure them of continued benefit of rights or expectations previously given under earlier statutes (such as the Water and Soil Conservation Act 1967) or other instruments (such as the Order in Council of 1969<sup>35</sup>).
- 29 The Board's function is to develop a plan under the RMA, with the purpose of assisting the regional councils to carry out their functions to achieve the purpose of that Act. The functions of authorities under, and the purposes of, the previous legislation and instruments were different. The Board is to have regard to existing natural and physical resources (including for instance electricity generation and irrigation works), but is to develop the allocation plan in terms of the RMA and the Waitaki Act. Rights, consents and expectations previously given under earlier regimes would not necessarily qualify in terms of the current legislation.

## Departure from status quo

- 30 Some submitters urged that the evaluation should show that the status quo is departed from only where the benefits of doing so are shown to exceed the costs. The Board does not understand that there is a presumption in favour of the status quo, particularly where it reflects the previous statutory regime. Rather the Board's task is to consider the submissions and evidence and find what are the most appropriate provisions of the Plan in the current regime.

## The relevance of existing alterations to natural resources

- 31 Some submissions were based on acceptance of the existing alterations to the natural environment, including hydro-electricity generation and irrigation structures. The Board understands that the Plan should manage the use, development and protection of natural and physical resources in a way that avoids, remedies or mitigates adverse effects on the environment that would be cumulative on those adverse effects of existing development and activities, sustains their potential to meet reasonably foreseeable needs of future generations, and safeguards the life-supporting capacity of air, water, soil and ecosystems.<sup>36</sup>

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<sup>35</sup> *NZ Gazette*, 21 August 1969, No 6, p1560.

<sup>36</sup> RMA, s5(2).

## Section 32 evaluation

- 32 Some submitters raised concerns about the approach the Board took to fulfilling its duties under section 32 of the RMA. The Board's duties are defined in sections 32(3) and (4) of the RMA (by section 19 of the Waitaki Act), as amended by the Resource Management Amendment Act 2003<sup>37</sup>, and remain unaffected by the Resource Management Amendment Act 2005.
- 33 The Board's duties under section 32(3) of the RMA are to form overall judgements about the extent to which each objective is the most appropriate to achieve the purpose of the RMA, and whether having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives. The Board understands that the judgements required are, for objectives, relative to the purpose of the RMA, and for policies, rules, or other methods, relative to the regional plan objectives. The Board considers that, in forming those judgements, it is not necessary or helpful to undertake a comparative analysis of other means or principal alternative means.<sup>38</sup> However, in evaluating the benefits and costs, and consequently efficiency, comparison with a reference point is required. This reference point is the current environment, including effects that are cumulative with the adverse effects of the existing development and activities.
- 34 The Board fulfilled its section 32 duties when preparing the draft Plan and in publishing a Section 32 Report. Some submitters misunderstood the nature of that report. It is a report summarising its evaluation and providing reasons. The Board considered all the information available to it during the preparation of the Plan. This included the reports received by the Board relevant to the development of the Plan (listed at the end of Annex 1); information provided to it by the public in the Board's consultation process; all the submissions lodged on the draft Plan; and all the material presented and produced as part of the hearing process.
- 35 Some submitters criticised the Board's evaluation as not conforming with the expectations of a cost-benefit analysis in economics. The Board does not understand that the evaluation required by section 32 of the RMA has necessarily to conform with cost-benefit analysis. It is to meet the prescription in the section, in the context of an instrument that has to conform with the requirements of other provisions of the Act and made for the purpose stated in section 5 of the RMA.
- 36 Some submitters requested that the Plan make no allocation among activities, on the ground that a more efficient allocation could be achieved through other mechanisms, such as a water trading regime or effects-based consent decisions. However by section 13 of the Waitaki Act, the Board is required to allocate water to activities, as appropriate. The Board considered that the appropriate approach for the Waitaki catchment is to make allocations between the activities listed in Objective 2. The Board acknowledges that making such allocations may not match current and future market demand, but it does not accept that an alternative mechanism would necessarily provide an improved outcome or ability to meet the purpose of the RMA.

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<sup>37</sup> Section 11 of the Resource Management Amendment Act 2003 (2003 No 23).

<sup>38</sup> A previous requirement to do so was repealed by the 2003 Amendment Act.

# Plan Wide Topics

## Adequacy of data, and further work required

- 37 A number of submitters questioned whether there was sufficient information available to the Board to carry out its functions, and sought that the Plan be delayed until further research had been completed.
- 38 In order to carry out the duties set out in the Act, the Board required sufficient information to identify:
- the resources in question,
  - the requirements for water, and
  - the consequential effects of the range of allocation options.
- 39 The Board had access to a significant body of technical information on the physical and natural resources of the Waitaki catchment, existing and proposed uses, and economic analyses of the various uses.
- 40 The Board found that the information available to it was sufficient to provide a sound basis for the allocation decisions, and to identify appropriate relevant matters to be addressed when considering applications under the provisions of the Plan.

## Recognition of status of tangata whenua

- 41 Ngāi Tahu submitters requested amendment to the manner in which the tangata whenua values associated with the Waitaki catchment were identified in the Plan to reflect the matrix of interests that collectively represent Ngāi Tahu in its entirety. This requires a definition that is inclusive of all whanau, hapū and iwi who have whakapapa connection to the Waitaki catchment, and that is consistent in its recognition of the organisational framework by which Ngāi Tahu exercise their collective roles and functions.
- 42 The Board's response has been to adopt the statutory definition of Ngāi Tahu from the Te Rūnanga o Ngāi Tahu Act 1996 (as amended by section 9 of the Ngāi Tahu Claims Settlement Act 1998) which states that the terms 'Ngāi Tahu' and 'Ngāi Tahu Whānui' each mean the collective of individuals who descend from the primary hapu of Waitaha, Ngāti Mamoe, and Ngāi Tahu, namely Kāti Kuri, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki. In that submitters preferred the use of 'Ngāi Tahu' instead of 'Ngāi Tahu Whānui', this request has been accepted.
- 43 Consequential changes were requested to insert "Ngāi Tahu values" instead of "tangata whenua values" or "cultural values", the reason being that the people who are tangata whenua is clearly known, and also defined in legislation. In addition Ngāi Tahu submitters questioned the absorption of Ngāi Tahu cultural values under the broad cover-all term of "cultural values" which in their view would cause confusion and dilute the Ngāi Tahu values.
- 44 Where specific values are clearly only those of Ngāi Tahu, the Board accepted that submission. Where the cultural values referred to extend to a wider interest, the Board has avoided specifically identifying the cultural interests of Ngāi Tahu.

45 Ngāi Tahu submitters requested inclusion of a range of Ngāi Tahu interests in economic, social matters, and for reference to rangatiratanga in specific parts of the Plan. Such requests fall outside of the scope of allocation of water to a class of activity, enabling the whole community to provide for their social, economic and cultural wellbeing while being subjected to a range of constraints to protect environmental and cultural values of Waitaki water bodies. Where the amendment proposed would fall outside the scope of the Plan (for example, matters of a political nature), the Board has made no change to the Plan.

## Incorporation of private agreement into Plan

46 Mackenzie Irrigation Company Limited (MIC) and Meridian Energy Limited (MEL) had entered into an agreement by which, on certain conditions, MEL would make water available to holders of shares in MIC for irrigation, and allow access to its canals for that purpose. MIC and MEL submitted that the Board should take this agreement into account, and should incorporate the agreement in the Plan.

47 The Board has had regard to the agreement, but for four main reasons does not consider that it should be incorporated in the Plan.

48 First, the agreement is between private parties, following private negotiations, and to serve their perceptions of their own private interests. It may, but does not necessarily, promote the purpose of the RMA, and the parties could agree to cancel or amend it without opportunity for public participation.

49 Secondly, although the RMA contemplates that no person or class of persons has preferential entitlement to resource consents,<sup>39</sup> the agreement accords benefits for access to water for irrigation to holders of shares in MIC that would not be available to anyone else. The Board does not accept MEL's submissions that an exception to the general principle of equality is warranted on the basis that the water has already been fully allocated, and that the proposal is in the nature of a quasi-transfer or assignment of part of it. If MEL is lawfully able, and wishes, to assign part of the benefit of its water permits to MIC shareholders, an agreement to do so would not need to be incorporated in the Plan.

50 Thirdly, although the general policy of the RMA is that better substantive decision making results from public participation,<sup>40</sup> the agreement restrains MIC from exercising rights accorded by the RMA to apply for or support applications for take water, and obliges it to use its best endeavours to procure that none of its shareholders exercises such rights. Although, as MEL submitted, the Full Court has held<sup>41</sup> that there is no public policy reason why a person could not surrender the right to freedom of expression, a planning instrument under the RMA should not endorse individuals bargaining away elements of the general public interest in the Act's participation processes.<sup>42</sup>

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<sup>39</sup> Except as provided by s 67 of the Resource Management Amendment Act 2005.

<sup>40</sup> *Westfield v North Shore City Council* [2005] NZSC 17; [2005] NZRMA 337; para 25 (per Elias CJ); paras [45], [46] (per Keith J).

<sup>41</sup> *Christchurch International Airport v Christchurch City Council* [1997] 1 NZLR 573; [1997] NZRMA 145 (Tipping & Chisholm JJ).

<sup>42</sup> *Westfield* (above), para [156] (per Tipping J).

- 51 Fourthly, the purpose for which MEL has consent to take, use and divert water is for electricity generation, yet the agreement contemplates it allowing water taken or diverted for that purpose to be made available to holders of shares in MIC for agricultural or horticultural irrigation.
- 52 The Board considers that in those respects it would be inappropriate for the agreement to be incorporated in a plan under the RMA. Even so, the Board is making an allocation in the Plan that may enable effect to be given to the substance of the agreement.

## **Incorporation by reference**

- 53 The Board considered the range of views expressed by submitters about whether the Plan should stand alone, or whether it should incorporate material by reference. Some technical matters and some material that is too large or impractical to include as part of the Plan have been incorporated by reference as provided for by clause 30 of Schedule 1 of the Resource Management Act).<sup>43</sup>
- 54 Some submitters contended that it is inappropriate to incorporate material from the proposed Canterbury Natural Resource Regional Plan (NRRP) that could yet be changed in the submission and decision making process. The Board considers that incorporating material such as administrative matters from the NRRP would provide consistency on such matters between the Waitaki catchment and the rest of the Canterbury Region. It is expected that the NRRP will not be operative until more than two years after the Plan becomes operative. There would be sufficient time for the Canterbury Regional Council to make any consequential changes to the material in the Waitaki Plan if needed. Clause 31 of Schedule 1 of the Resource Management Act provides a process for such amendment or replacement of material incorporated by reference.

## **Interpretation of the Plan**

- 55 Some submitters brought to the Board's attention various provisions of the draft Plan that they asserted were ambiguous, or difficult to understand. The Board has revised the wording of unclear provisions, so that each of them unmistakably expresses the intent.

## **Application to existing consents and extent of the principle of non-derogation**

- 56 Meridian Energy Limited contended that the Plan cannot, as a matter of law, make provisions that would have the effect of derogating from consents that it already holds until they expire, relying on the High Court Judgment in *Aoraki Water Trust v Meridian Energy & others*.<sup>44</sup>

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<sup>43</sup> RMA Sched 1 cl 30 was added by s131(10) of the Resource Management Amendment Act 2005, and applies to the development and approval of the plan by s 132(2) of that Act.

<sup>44</sup> [2005] NZRMA 251; 11 ELRNZ 207 (Chisholm & Harrison JJ).

- 57 The Board does not consider that the permitted activity rules derogate from existing consents, as the nature and extent of the activities permitted reflect those permitted under prior instruments.
- 58 Although (not having been a party to the proceedings) the Board may not be bound to apply any findings of fact in that Judgment, it is bound by the reasoning in it for the propositions of law contained in it. The statement of the non-derogation principle in the Judgment is expressed to be subject to an exception where specifically empowered by the RMA.<sup>45</sup> The Court expressly identified the combination of sections 68(7) and 128 to 132 in that respect.<sup>46</sup>
- 59 Accordingly the Board held that to the extent that an obligation to comply with rules in the Plan relating to minimum levels or flows or rates of use of water would derogate from existing consents, the application of those rules to the exercise of those consents prior to their expiry may depend on the regional council having reviewed the conditions of those consents and changed them to enable the rule to be met. Some elements of the Plan, that are not subject to sections 68(7) and 128 to 132 of the RMA, may not be fully implemented until existing consents expire.
- 60 Some submitters urged that the Plan should not state that the rules are to affect the exercise of existing resource consents for activities that contravene those rules. However, as some resource consents have many years to run, the Board considered that to allow the rules no effect for so long a period would be inconsistent with Parliament's intention that the Plan be developed and approved within 12 months.
- 61 Other submitters urged that the times prescribed in the draft Plan when the rules are to affect existing consents were too short to allow consent holders to make preparations to comply and sought longer periods. Having considered the evidence in that regard, the Board judged that in the Maerewhenua catchment a period of 7 years would be appropriate, and elsewhere in the catchment a period of 5 years (the maximum sought by a submission) would be appropriate.
- 62 So, to enable the regional council to perform its review function, the Plan states those times when the rules are to affect the exercise of existing resource consents for activities which contravene the rules.
- 63 Some submitters sought that the Plan provide more direction of the exercise of the regional council's powers of review in sections 128 to 132 of the RMA. However the RMA entrusts the conduct of review of existing consent conditions to the judgement of the consent authority, and the Board considered that it should not itself include directions on how the consent authority is to carry out its duties in that respect.
- 64 Some submitters requested that the Plan prevent the processing of applications for new or replacement consents until existing consents have been reviewed and the environmental flow regimes are effective. However the Board considered that, except to the extent that section 124C(4) of the RMA applies, it has no power to provide in the Plan for a suspension of the processing of resource consent applications as sought by those submitters.

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<sup>45</sup> Ibid, para [46] and [52].

<sup>46</sup> Ibid, paras [64] and [65].



## Hydro-electricity infrastructure

- 65 Some submitters sought changes to the Plan to provide for:
- recognition of the Waitaki Power Scheme, its role in the New Zealand electricity system and its operating requirements.
  - recognition of existing consents for the Waitaki Power Scheme and provision for future consent renewals.
  - avoidance of competing demands for water in various parts of the catchment.
  - provision for new large-scale hydro-electricity generation in the Lower Waitaki River.
- 66 Substantial evidence was presented, from which the Board found that the Waitaki Power Scheme is nationally significant, and that potential exists for further hydro-electricity generation on the Lower Waitaki River. Accordingly, the Board has made appropriate amendments to the Plan which address the concerns raised. An allocation to hydro-electricity generation is not an endorsement by the Board that further hydro-electricity infrastructure can be constructed there. But as adverse effects of activities to which water is allocated may be able to be adequately avoided, remedied or mitigated, an allocation for hydro-electricity generation is appropriate.
- 67 Key provisions include:
- Minimum lake levels in Lakes Tekapo, Pūkaki, Ōhau, Ruataniwha, Benmore, Aviemore and Waitaki which are the same as those of existing resource consents.
  - Provision for an extreme minimum lake level in Lake Tekapo from October to March during a national power shortage as identified by reference to the Electricity Commission's second (emergency) zone.
  - No minimum flow in the Tekapo River directly below Lake Tekapo.
  - A minimum flow below Waitaki Dam of 150 cubic metres per second measured as a 1 hour rolling average.
  - Provision for an extreme minimum flow below Waitaki Dam during winter months following times of low summer inflows.
  - Adoption of a spatial-sharing concept below Waitaki Dam, allowing for an allocation for hydro-electricity generation above Black Point.
  - An allocation limit of 90 cubic metres per second below Black Point.

## Takes and diversions that return water to the same water body in the same vicinity

- 68 A number of submitters requested changes to the way the Plan treats activities that involve the taking or diversion and return of water to a water body in the same vicinity. Examples of those activities include micro hydro-electricity generation, and fisheries and wildlife activities (such as the diversion of water to create a wetland habitat for the Black Stilt Recovery Programme).

- 69 The Board considered that there is merit in providing for these activities throughout the catchment outside the allocation to activities. The Board amended the Plan to exempt them from any allocation limits set within the environmental flow and level regime for a water body, provided that the water is returned to the water body in the vicinity of the take or diversion point and in the same condition and quality as when taken. Amendments to Rules 2 and 6 have been made accordingly.
- 70 If the water is not returned to the same water body in the vicinity of the take or diversion point, and in the same condition and quality, the water is included in the relevant allocation to activities in Table 5, micro hydro-electricity generation to “hydro-electricity generation”, and fisheries and wildlife activities to “any other activities”; and the activity has to comply with the environmental flow and level regime set for the water body.
- 71 A new definition has been added for “Fisheries and Wildlife Activities” as “activities relating to the management and enhancement of habitats for fish and indigenous wildlife”.
- 72 Requests by submitters to increase the capacity of generation in the definition of micro hydro-electricity generation were accepted by the Board. The capacity has been raised from 1000 watts continuous output to 50 kilowatts continuous output to better reflect the actual capacity of such schemes.

## **Relationship of the Plan with section 14(3) of the RMA**

- 73 Some submitters did not appear to understand the relationship between the provisions of the Plan, including those for permitted activities, and those of section 14(3) of the RMA.
- 74 By section 14(3), the taking and using of freshwater for an individual’s reasonable domestic needs, or for the reasonable needs of an individual’s animals for drinking-water, does not require a resource consent if the taking or use does not, or is not likely to, have an adverse effect on the environment.<sup>47</sup> Also, water for fire-fighting can be taken and used without resource consent.<sup>48</sup>
- 75 The Plan cannot, and is not intended to, regulate the exercise of the rights conferred by section 14(3). Depending on the circumstances, taking water in conditions that are classified as permitted activities by the Plan may overlap with entitlements under section 14(3), or may be additional to them. An example may be providing for water taken for communal water supply systems, rather than for the individual’s stock or domestic needs (to which section 14(3) applies).

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<sup>47</sup> RMA, s14(3)(b).

<sup>48</sup> RMA, s14(3)(e).

## Activity status for applications outside environmental flow and levels regimes, and allocation to activities

- 76 Some submitters sought amendments to the rules so activities that do not comply with the environmental flow regimes or the allocations to activities are either discretionary or prohibited activities. The Board did not accept either alternative. The environmental level and flow regimes, and the allocations to activities, are two key components of the allocation framework established by this Plan. They should be binding except in specific cases where it can be established that the adverse environmental effects of the proposal are minor, and where the activity is not contrary to the objectives and policies of this Plan. The Board cannot be confident that such circumstances will never arise, so it did not make these prohibited activities<sup>49</sup>. It retained the non-complying activity classification, which requires that one of those conditions be satisfied before such an application can be granted.

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<sup>49</sup> *Coromandel Watchdog v Ministry of Economic Development* (HC Auckland; 2/09/05 Simon France J)

# Plan Provisions

## Changes to Sections 2, 3 and 4 of the Plan

- 77 Many submitters requested changes to Sections 2, 3 and 4. One submitter sought inclusion of a table of flow statistics at Waitaki Dam, including actual and modelled flows over different time periods. The Board noted that flow data for the full period of record, including data on natural inflows to the glacial lakes, had been available during preparation of the draft Plan. Therefore, the submitter's reference to the period January 1980 to December 2003 as the period of record used by the Board in preparing the draft Plan was not correct. The Board decided not to include the proposed table. The nature of the other changes requested was either to make factual corrections or to add more detail to the descriptions included in the draft Plan.
- 78 The Board considered all submissions and dealt with them as follows:
- Submissions on matters of fact (eg precipitation rates, irrigation area) were accepted and the Plan amended accordingly.
  - Submissions on the detail of the Plan content were accepted where:
    - The level of detail was comparable to the draft Plan as a whole.
    - The changes sought improved the clarity of the Plan.
    - The changes sought did not result in an imbalance in the descriptive parts of the Plan.

Table 2 was also modified on the same basis.

## The scope of the Plan (Section 5)

- 79 The Board's duty is to develop and approve a plan to provide for the water allocation matters described in section 13 of the Waitaki Act, and set out in Section 2 of the Plan.
- 80 In Section 5 of the Plan, the Board acknowledges that water allocation has relationships with other aspects of resource management, and that the Plan does not provide for them. The Board has developed the Plan on the assumption and expectation that there will be parallel management provisions that address those related aspects of resource management.
- 81 Some submitters urged that the Board should extend the scope of the Plan to some of those related aspects of resource management, particularly rights under the Treaty of Waitangi, effects of allocating water on water quality, and on the coastal environment, and property rights.
- 82 A number of submitters requested that provisions relating to administrative matters be included in the Plan, rather than incorporated by reference to provisions of the Canterbury NRRP. In particular, submitters requested specific provisions on monitoring (both under sections 35 and 67(1)(i) of the RMA), and financial contributions and bonds.

- 83 The Board decided not to amend the Plan in those ways for four main reasons:
- The Board’s function is to provide for the matters described in section 13 of the Waitaki Act and the Board is not satisfied that any of the related resource management aspects referred to is within the matters described:
  - The Board’s function is to prepare a plan for the Waitaki catchment as defined in section 4 of the Waitaki Act, including the Waitaki River to its confluence with the sea at a particular grid reference. Matters relating to the coastal area are clearly outside the definition of the catchment. The Board was satisfied that environmental effects on the coastal environment will be considered in resource consent decisions, and included consideration of such matters in a number of policies.
  - No submission stated the text of the provision sought for inclusion in the Plan, so that substantial drafting would have been required without real opportunity for participation by those potentially affected or interested:
  - The time available to the Board for hearing and considering submissions and evidence, making decisions, completing the Plan, and approving it did not allow for the Board to prepare new sections of the Plan on any new substantive topic.
- 84 So in completing and approving the Plan, the Board did not include in it any provisions on the additional topics sought by submitters. The scope of the Plan remains as proposed, leaving provision for related resource management aspects to be made by the relevant elected local authorities. The Board has added financial contributions and bonds to the matters that are incorporated in the Plan by reference to the NRRP, to make it clear that these are available to be included in conditions of resource consent granted under this Plan.

## Objectives of the Plan

### The relationship of Objectives 1 and 2

- 85 The draft Plan made Objective 2 subject to Objective 1. Although that was supported by some submitters, others sought that the two objectives be merged, or the subordination of Objective 2 to Objective 1 removed.
- 86 The Board understood that it is entitled to subordinate one objective to another if it judges that appropriate in the particular case. However, having considered the submissions and evidence, the Board concluded that as general objectives for the Plan as a whole, the appropriate relationship between Objectives 1 and 2 should reflect the Board’s judgement on the counterpoint between the enabling provisions and the sustaining provisions in s5(2).
- 87 Accordingly the Board has deleted from Objective 2 the words “subject to Objective 1”; and has replaced them with the words “To the extent consistent with Objective 1”.

## **Amendments to Objective 1**

- 88 Submitters also sought various amendments to Objective 1, including the addition of various matters. Many of the additional matters are already covered more generally by existing items in the objective; and with the counterpoint between Objectives 1 and 2, others are included in general terms in Objective 2, where they appropriately fit. The Board accepted proposed amendments to the wording of Objective 1 that respond to the language of the legislation, and more clearly explain the intent.
- 89 The Board did not allow a submission that the Local Government Act 2002 be reflected in the objectives, because the Plan is specifically developed under the Resource Management Act, not the Local Government Act.

## **Amendments to Objective 2**

- 90 The Board did not allow a submission that hydro-electricity generation be deleted from Objective 2, finding on the evidence presented that provision of water for that activity is a realistic and appropriate way (among others) of enabling people and communities to provide for their wellbeing.
- 91 A submitter sought amendment of Objective 2 by “the expression of rangatiratanga” and another by “an allocation in perpetuity as per Article 2 of the Treaty”. Neither submission was specific about the provision sought.
- 92 In developing the Plan, the Board has taken into account the principles of the Treaty of Waitangi. As well as in more general ways, the Plan identifies in Objective 1 recognising the importance of maintaining the integrity of the mauri in meeting the specific spiritual and cultural needs of the tangata whenua.
- 93 But the Board does not have authority to impose on a regional council specific obligations of the Crown, as Treaty partner, in response to the claim to rangatiratanga in respect of the waters of the catchment; nor does it have authority to decide on any particular claim under the Treaty to an allocation of water. Further, the submissions were not sufficiently specific for the Crown to be expected to respond to them.
- 94 So the Board held that its consideration of submissions on the draft Plan was not an appropriate forum for deciding on those claims by submitters, and decided that the Plan is not the appropriate instrument for giving effect to any decision to accept them.
- 95 The Board allowed a submission questioning whether the item “future unknown activities” should be retained in Objective 2, to the extent that it re-worded item f to read “any other activities”. The Board also responded to a submission for clarification of whether items a to f are set out in order of importance, by adding a footnote that this is not implied.

## **Objective 3**

- 96 Some submitters wanted Objective 3 altered to give a weighting to local costs and benefits higher than is given to national costs and benefits. Others sought that the reference to national and local costs and benefits should be amended by including regional costs and benefits. Other submitters wanted the objective recast to give priority to recognition of beneficial and adverse effects on the environment over national and

local costs and benefits in order of importance: environment, social/cultural and economic; and another submitter wanted to introduce, after reference to the effects on the environment, specific reference to promoting soil conservation and water-holding capacities.

- 97 The Board considered that Objective 3 does not give any weighting to national costs and benefits higher than is given to local costs and benefits, and that the requests for amendment in that respect were based on a misreading of the objective. The Board considered that amending the objective to include regional costs and benefits is not necessary, and that introducing a priority for environmental costs and benefits over social, cultural and economic costs and benefits would be inappropriate. The Board also considered that singling out promoting soil conservation and water-holding capacities would leave uncertainty whether other environmental qualities are intended to be given less weight.
- 98 Some submitters asked the Board to add to Objective 3: "... and require financial compensation and mitigation to remedy these adverse effects".
- 99 The Board considered that these alterations would not be appropriate because the RMA does not authorise a regional council to include provision in a regional plan for financial compensation for adverse effects; and requiring financial compensation and mitigation are policies, not objectives.

#### **Objective 4**

- 100 Several submitters proposed a variety of amendments to Objective 4. Having reviewed the objective and the submissions, the Board concluded that some of the proposed amendments would detract from the clarity of the intent by extending the scope of the objective; but that it would be improved by inserting the word "allocated" to qualify the word "water".

#### **Objective 5**

- 101 Several submitters proposed amendments to Objective 5. Having reviewed the objective and the submissions, the Board concluded that rewriting the objective as proposed would detract from the clarity of the intent, introduce unnecessary reference to taking of water for purposes not governed by the Plan, and diminish the incentive for rural industries to make appropriate provision for their own needs when water is short. The Board also considered that extending the objective to apply at all times, and adding reference to environmental impacts, would also detract from the clarity of the intent to provide for times when water is short. However, the Board agreed that it would be appropriate to confine the objective to the sharing of allocated water.

#### **New objectives**

- 102 Some submitters sought the addition of new objectives. These objectives were considered by the Board to be about matters that were either not within the scope of, or already addressed in, the Plan. The Board made no changes in those respects.

## Catchment-wide approach (Policy 1)

- 103 There were a large number of submissions both in support and opposition to Policy 1 overall and to specific details of the policy and its explanation.
- 104 In particular, a number of submitters felt that the term ‘holistic’ was not appropriate in the context; and there was a proposal to add social and economic concepts to the policy.
- 105 The policy was included because the integrity and mauri of a braided river system depends on the integrated management of all constituent parts of the system including wetlands, riparian margins, backwaters, tributaries and main channels.
- 106 The Board carefully considered the matters raised and decided to amend the wording of the policy to more precisely state its intent, by using the phrase ‘whole-catchment’. It decided that adding social and economic concepts to this policy would confuse the distinct description of it, and would reduce the clarity of it in the context of all the catchment-wide policies.

## Environmental flow and level regimes

- 107 The Board received extensive submissions on the environmental flow and level regimes. These included submissions on the Board’s overall approach to setting the regimes, on the individual components of the regimes established in the draft Plan, on the structure and components of the principal rule (Rule 2), and on the specific policies and rules for each water body.
- 108 Of the latter, the Lower Waitaki River received the most attention from submitters, and they provided views and considerable evidence on various approaches given the managed but dynamic nature of the river. The Tekapo River minimum flow and Lake Tekapo level also attracted many submissions. The submissions were both in support of and against the provisions in the draft Plan.
- 109 The sections which follow move through general approaches and policies, then on to location-specific policies and rules, starting at the top end of the catchment and finishing with the Lower Waitaki River. Aspects of the approach taken in Rule 2 are then considered. The high natural-character water bodies are addressed later.

## Information and values used to set environmental flow regimes

- 110 Some submitters requested that the Board alter its approach and not set environmental flow and level regimes, because they considered that there was insufficient information on the hydrology and values of many water bodies to achieve a workable result. The Board was not persuaded that it had insufficient information to set these regimes, and held that it had a duty to develop the Plan on the best information available, and to increase certainty to existing and potential users as to the circumstances under which they can take, use, dam or divert water. The Board noted that there is nothing in the Plan that would stop detailed investigations from occurring in the future and results being incorporated by plan changes.



- 111 In general, environmental flow and level regimes were set on the following basis:
- a minimum flow or level as specified in existing consents, or set as the 5-year 7-day low flow
  - allocation limits are used where the removal of only a small proportion of water is considered appropriate; where further allocation is considered inappropriate (small spring-fed streams like Waikakahi Stream); in Fork Stream to maintain flows in the Tekapo River; and in areas where there are no flow recorders and it will be difficult to effectively manage minimum flows (the eastern part of the Mackenzie basin)
  - flow sharing below the mean in those rivers that are important spawning tributaries of the Lower Waitaki River.

### **Policies 3 – 6**

- 112 Submitters requested changes both to wording and to the effect of these policies.
- 113 Many changes were sought to Policy 4. The Board considered that none of the matters a – o should be deleted, but decided to add two further matters: “effects on water quality” and “existing flow and level regimes, physical resources and activities”, as these are relevant matters considered in setting environmental flow and level regimes. Some additional matters proposed are outside the scope of the Plan (eg effects on coastal processes), or are already covered by a more general statement, and the Board decided not to make those changes. The Board made wording changes to several of the ‘matters for consideration’ to incorporate parts of proposed changes, or to clarify the intent of the Plan by describing matters that were considered in setting environmental flow regimes.
- 114 The Board accepted that a criterion in Policy 5 relating to naturally occurring dry river and stream beds applies to setting both surface and groundwater regimes. It re-worded the criterion for clarity and moved it to Policy 4 accordingly. The explanation of Policy 5 refers to groundwater regimes that are not set in this Plan.
- 115 A submitter requested that the concept of ‘shallow groundwater’ (Policy 6) be removed from the Plan. The Board did not accept that the concept of shallow groundwater should be removed from the Plan, but clarified the definition of the term.

### **Monitoring sites and point of achieving minimum flow**

- 116 Submitters requested that the Plan be clear that minimum flows must be achieved over the full reach, not just at a particular point. Requests that monitoring sites be identified in the Plan were also considered. Some monitoring points have been identified, but the Board considered that, in general, the Plan should provide flexibility to the regional council to select the most appropriate site to give effect to the environmental flow regimes set by this Plan. Amendments were made to Rule 2, Table 3 to clarify that minimum flows are to be achieved at the downstream end of water bodies.
- 117 Requests were also made to set minimum flows in additional tributaries. The Board declined to include additional minimum flows, but noted that the regional council can still do this in the resource consent process in order to achieve the environmental flow regimes set in the Plan. The amendments made respond to submissions about implementation problems, but also leave some aspects of implementation to the regional council.

- 118 Submitters had various interpretations of the application of minimum flows below control structures. To clarify this, the Board accepted the suggestion to add the following sentence to the definition of minimum flows: *Where a river is dammed, outflows and inflows must be managed to maintain or exceed the minimum lake level and minimum flow downstream.*

## **Policy 7 – small streams**

- 119 Some submitters requested that Policy 7 refer to a consent authority granting a consent on a small stream if there is no viable alternative. Submissions sought changes to direct the consent authority's discretion, by making reference to other matters, including viability of alternatives, application to replacement of existing consents and water harvesting. One submitter sought an amendment that would have the effect of incorporating a minimum flow into the policy, and others wanted a prohibition on takes from small streams.
- 120 The Board noted that this policy, like many others in the draft Plan, does not have a directly associated rule; rather it is referred to in a number of rules as a matter for discretion. The specifics of an individual application would be considered, in relation to the policy, by the consent authority. The Board considered that this approach is appropriate, and the policy was not altered. The consent authority has full discretion over whether or not to grant the resource consent, and in imposing conditions of consent if granted. A submission to clarify the policy by altering “larger streams” to “larger water bodies” was accepted.

## **Policy 8 – Water harvesting / flow sharing**

- 121 The purpose of Policy 8 (and of Rule 2(1) c which implements it), is to provide for water harvesting while allowing natural variations in water bodies to be mimicked. That purpose was not challenged by submitters, but some provided information on practical issues around implementation, particularly in the Hakataramea, Maerewhenua and Lower Waitaki Rivers. The Board altered the policy to more clearly reflect the intent, and also provide flexibility for consent applicants and the consent authority to determine suitable regimes that maintain flow variability. Flow-sharing above the mean was removed from the environmental flow regime rules for the Hakataramea, Maerewhenua and Lower Waitaki Rivers. Flow-sharing rules were altered for the Maerewhenua and Hakataramea Rivers (refer to the sections on specific changes for these rivers).

## **Lakes Tekapo, Pūkaki and Ōhau**

- 122 The Board was not persuaded that a request to include maximum lake levels and operating rules for these lakes in the Plan is either justified or within the scope of this water allocation plan, and considered that these are matters appropriately managed through the consent process.
- 123 Minimum lake levels were included in the Plan to avoid compromising the amenity, intrinsic and cultural values. Only essential domestic and stock drinking-water were made exempt from the rule, because of their importance and relatively small size. Other activities were classified as prohibited activities.

- 124 In response to submissions, the Board considered that it would be appropriate to classify as discretionary activities, rather than as prohibited activities, the temporary lowering of levels in these lakes for infrastructure maintenance purposes. It added a new Policy 37, and amended Rule 3 accordingly.
- 125 Submitters sought various changes to Policy 35 and Rule 3 regarding uses that might continue when these lakes are at or below their minimum levels. The Board noted that the exemptions from minimum lake levels in Rule 3 (2) are in addition to essential uses under section 14(3) RMA.
- 126 On balance, the Board considered that the activities that should be exempt from the minimum lake levels (in addition to essential uses) are:
- town and community water supplies
  - stock drinking-water
  - tourism and recreational facilities
  - maintaining fire-fighting capacity
  - processing and storage of perishable produce.
- 127 The Board considered that the effects on lake levels from continuation of these activities would be minor, as their water requirements are generally small, but that not providing an exemption could be severely detrimental. However, the Board considered that taking water from the hydro-electricity canals should not be exempt from the minimum lake levels, nor should taking water for other purposes directly from the lakes. The Board amended Policy 35 and Rule 3 (including Table 4) to give effect to these decisions.
- 128 The Board also considered that activities taking water from the tributaries to these lakes should be exempt from the minimum lake levels. These tributaries are high natural-character water bodies, and have an allocation limit of 10% mean annual low flow. These takes would also have no more than a minor effect on the lake levels.

### **Lake Tekapo environmental level regime**

- 129 The minimum levels of Lake Tekapo set in Rule 3 (Table 4) were amended to reflect the existing levels set by the current consents, as requested, this having been the Board's original intention. The levels in the draft were clearly inconsistent with the explanation to Policies 35 and 36, and Table 50 of the Section 32 report.
- 130 Submitters requested identification of a statutory agency that would be responsible for defining a national power shortage in Policy 36 and Table 4. The Board decided that an appropriate test would be when the aggregate storage for the nation or the region that includes the Waitaki catchment is below the second (emergency) zone established by the Electricity Commission. The Board changed Policy 36 and Table 4 (Rule 3) accordingly.

## Lakes Pūkaki and Ōhau environmental level regimes

- 131 A submitter requested that the Plan be amended to enable Lake Pūkaki levels to be raised to provide further storage. There was insufficient information provided on the storage gains that could be achieved, or on the environmental effects. Accordingly, the Board decided not to give effect to the submission.

## Tekapo River environmental flow regime

- 132 Submitters requested minimum flows ranging from 0 to 4 cubic metres per second in the upper section of the Tekapo River, and that the minimum flow vary between reaches of the Tekapo River. Some abstraction was sought from sections of the Tekapo River.
- 133 On balance, after considering the further information and evidence provided to it by submitters, the Board judged that the costs of requiring water to be released directly from Lake Tekapo into the upper Tekapo River to achieve a continuity of flow from the mountains to the sea outweighed the benefits. Factors that the Board took into account in reaching this conclusion included:
- 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.
- 134 The Board amended Policy 39 (formerly Policy 38) and Rule 2 accordingly.
- 135 Information provided gave further detail on the flows in the lower Tekapo River, and the demand for irrigation adjacent to the lower river. The Board agreed to amend Table 3 ii to provide an allocation for abstraction of 0.7 cubic metres per second below the Grays River confluence, and also set a minimum flow between the Fork Stream confluence and Lake Benmore. The minimum flow was set at 3.4 cubic metres per second measured immediately downstream of the Mary Burn confluence.
- 136 As one of the ways of enabling effect to be given to the MIC-MEL agreement (already referred to) the Board also amended Rule 2 Table 3 ii by adding:

*“d. Any taking of water that has been released into the Tekapo River from Lake George Scott for agricultural and horticultural activities is in addition to the allocation limits... above”*

## Pūkaki and Ōhau Rivers environmental flow regime

- 137 Submitters sought minimum flows ranging from 0 to 4 metres per second in these rivers. In consideration of the range of flows sought the Board took into account a wide range of information provided. The Board was not persuaded that the benefits of releases from the dams to the Pūkaki or lower Ōhau Rivers would outweigh the costs, in part because of the magnitude of the release required to achieve reasonable benefits.

- 138 In reaching this conclusion the Board considered—
- the costs and other implications of forgone generation
  - costs of changes to structures to enable a permanent release
  - effects on amenity values
  - representations by Te Rūnanga o Ngāi Tahu.
- 139 Some submissions proposed that in the upper Ōhau River, the environmental flow regime recognise Benmore Irrigation Company's consent to take. The Board agreed that this would be appropriate, and an amendment to Table 3 was made.

### **Tekapo, Pūkaki and Ōhau Rivers**

- 140 Some submitters provided evidence on the importance of vegetation control for providing habitat for native bird species, and their desire not to jeopardise funding for Project River Recovery.
- 141 Without belittling the value of Project River Recovery or the importance of continued funding for it, decisions whether to continue donations for that project are for the donors to make. The Board held that its decisions about the contents of the Plan should not be influenced by concern that one or more donors may discontinue funding if dissatisfied with those decisions.
- 142 Some submitters sought the deletion of the policy acknowledging the association of these rivers with the mana of the glacial lakes, others supported its concept of connectedness. The Board was not convinced that a case had been made for deletion, and the policy was retained, now Policy 38.
- 143 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. Similar proposals for other new policies were also not given effect for the same reasons. 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.

### **Mary Burn and Irishman Creek**

- 144 For these water bodies, submitters provided consistent and detailed information on environmental flow regimes that have been negotiated and agreed through the consent process. The Board concluded that these regimes provided for the environmental values identified, and Rule 2, Table 3 was amended accordingly.

## **Wairepo Creek and tributaries**

- 145 On considering the submissions and evidence, the Board decided to make separate provisions for the parts of the catchment upstream and downstream of State Highway 8. The environmental flow regime remains otherwise unchanged.

## **Twizel River and tributaries**

- 146 Submitters requested separate provisions for the Bendrose and Fraser tributaries of the Twizel River. The Board found that the groundwater losses downstream of State Highway 8 warranted a separate minimum flow for that reach. However it considered that an additional minimum flow upstream of the State highway would be unnecessarily detailed for the Plan. On a resource consent application, a consent authority could set additional minimum flows on the tributaries as a means of ensuring compliance with the downstream flow set in the Plan.

## **Lakes Ruataniwha, Benmore, Aviemore and Waitaki**

- 147 In relation to Lakes Ruataniwha, Benmore, Aviemore and Waitaki, submitters requested changes, including that “Ngāi Tahu values” be added, and that these lakes be described in the policy as “artificial hydro-electricity storage lakes”. The Board was not persuaded to make any changes, except those required for clarification.
- 148 Submitters requested an allocation from Lake Ruataniwha to Lake Waitaki for uses other than hydro-electricity generation. The Board noted that the minimum lake levels set in Rule 2, Table 3, and the allocation to activities upstream of the Waitaki Dam contained in Rule 6, Table 5, address the taking, damming, diverting or using water from these lakes. Those provisions do not prevent new takes or diversions from these lakes. Similar submissions were concerned about takes from the tributaries of these lakes, for which there was not a specific entry in Table 3 of the draft Plan. An example is the Otematata River, where submitters were concerned that takes from these tributaries would be related to the controlled levels of Lake Benmore. The Plan addresses takes from these tributaries in Table 3 (row xxii), and establishes an environmental flow regime relating to flow in the river, rather than to the lake levels.
- 149 The Board was not persuaded that any change was needed, as the submitters’ concerns are already provided for. It left the rules relating to these lakes unchanged.

## **Hakataramea River**

- 150 Submitters requested changes to matters relating to fish habitat and fishing in the policy for the Hakataramea River. The Board amended Policy 43 (formerly Policy 42), with alterations to c and d, to give effect to submissions. It was not persuaded to make the other changes, but noted that changes elsewhere in the Plan might achieve, in part, the change sought to the application of the environmental flow regime at a downstream point in a water body. Consequential and clarification changes were also made.

- 151 Angling and conservation interests sought higher minimum flows, especially in the salmon spawning months (April – June). Farming interests provided information on their requirements for water, and on current investigations into water storage options. There was evidence that the economic cost of the proposed environmental flow regime for the Hakataramea River, particularly the requirement for flow sharing at high flows, would be very high. Various alternative regimes were suggested. On balance, the Board decided to amend the environmental flow regime to better meet the specific needs of salmon spawning and water harvesting.
- 152 The minimum flow from April to August was increased to 0.75 cubic metres per second for passage of salmon for spawning. The Board noted that this was outside the main irrigation-demand period, and retained the minimum at 0.5 cubic metres per second for the rest of the year. Flow-sharing requirements were reduced, and do not apply when the flow is over 4.5 cubic metres per second. In removing from the rule the requirement for flow-sharing at higher flows, the Board noted that Policy 8 would still apply to consent applications for water harvesting, and the applicant would need to ensure that sufficient flow variability is maintained.

### **Maerewhenua River**

- 153 Submitters who requested changes were concerned that the rule did not make it clear that the minimum flow should apply over the whole reach. Some also sought higher minimum flows. Farmers described their water requirements, and potential for water harvesting.
- 154 The Board decided to clarify the rule by specifying that the minimum flow needs to be met at State Highway 83, at the lower end of the catchment. The Board did not specify where the flow should be measured, leaving the implementation to the regional council.
- 155 Provisions for flow-sharing were amended in a similar manner to those for the Hakataramea catchment, to provide more flexibility for water harvesting.

### **Awakino River**

- 156 Submitters sought that the minimum flow in the Awakino River be increased to recognise its importance in providing habitat and spawning areas for the Lower Waitaki River fisheries. The Board increased the minimum flows (to be achieved at State Highway 83) to 0.4 cubic metres per second from October to April and 0.5 cubic metres from May to September, but was not persuaded to add additional minimum flows in each branch. The Board judged that the revised environmental flow regime appropriately recognises the fish spawning and habitat in the Awakino River, and is at a level of detail appropriate in a plan. The consent authority can add further minimum flows in tributaries if necessary to ensure compliance with the downstream flows set in this Plan.

## Lower Waitaki River environmental flow regime

- 157 Submitters presented in considerable detail their views and information on the components that should be incorporated in to an environmental flow regime for the Lower Waitaki River. The Board noted that, with respect to allocation issues, there are four key components:
- minimum flow.
  - variability in flows above minimum (ie duration and frequency of minimum or low flow). Submitters made various suggestions for achieving these, including flow-sharing above the minimum and capping an allocation to abstraction (allocation limit).
  - base and flood flows including providing for release of flushing and flood flows. Submitters provided evidence of work that had been carried out to determine an appropriate flushing flow, its duration and frequency.
  - implications for availability of water for irrigation and hydro-electricity generation.
- 158 Many submitters emphasised that the environmental flow regime for the Lower Waitaki River has effects on other aspects of the water allocation process, including:
- operation of upstream hydro-electricity infrastructure
  - potential for new hydro-electricity generation
  - new abstractions
  - existing abstractions.
- 159 The Board found that the regime proposed in the draft Plan would have disadvantages, including the environmental effects of extended periods when the river would sit at the minimum flow; significant loss of reliability of water supply for irrigation; reduction of flexibility in operating the hydro-generation system; and losses in the value of the system for hydro-electricity generation.
- 160 The Board received extensive evidence on the water required for different uses and values in the Lower Waitaki River. The Board found that habitat requirements are generally well provided for if flows are between 80 and 250 cubic metres per second, and that connectedness to riparian margins, wetlands and backwaters requires flows of at least 150 cubic metres per second. Closing of the river mouth is avoided at flows above 80 cubic metres per second. The flow requirements to sustain the physical characteristics of a dynamic braided river are subjective. Most uses and values require or are enhanced by flow variability and flushing flows.
- 161 The Board was persuaded by evidence that holding the flow constant for weeks at a time (flat-lining the flow) in the Lower Waitaki River would create adverse ecological and physical effects on the river. The Board found that when the amount taken or diverted exceeds 90 cubic metres per second, there is potential to flat-line the river between flushing flow events.
- 162 The Board found that the use of two environmental flow regimes would enhance opportunities for providing for competing demand for water of the Lower Waitaki River.
- 163 The Board amended Policy 45 (formerly Policy 44) by splitting the environmental flow regime into reaches upstream and downstream of Black Point to better provide for competing demands for different activities. Two different environmental flow regimes



have been set in the Lower Waitaki River, both of which provide minimum flows. For the reach downstream of Black Point, flow variability above the minimum flow is provided for by an allocation limit of 90 cubic metres per second. In the reach between Waitaki Dam and Black Point, variability above the minimum flow is provided for by flushing flows, and by the addition of Policy 45(2). Policy 45(2) requires consideration of these effects on flow variability if more than 90 cubic metres per second is to be abstracted upstream of Black Point.

- 164 The Board reduced the minimum flow (from that set in the draft Plan) to 150 cubic metres per second. The Board considered that, on balance, a lower minimum would reduce the flat-lining effect of a higher minimum, and better provide for irrigation and for hydro-electricity generation. A requirement has been added for flushing flows for the Lower Waitaki River upstream of Black Point to allow for an environmental flow regime with a minimum flow. A flushing flow of 450 metres per second at least seven times per year was adopted. The Board noted (among other matters) that a flow of 150 cubic metres per second is between the mean annual 7-day low flow of 134 cubic metres per second that would have occurred over the period 1920 – 2003 had there been no artificial storage, and one of 186 cubic metres per second that would have occurred had the current storage and hydro-electricity operating rules been in place for the same period.
- 165 Submitters proposed that there should be provision to allow a lower minimum flow during dry years. One suggestion was to qualify “minimum flow” with “or the natural flow of river, whichever is the lesser.” The evidence showed that the absence of an exception to the minimum flow requirements in times of naturally low inflows to the catchment would result in reducing flexibility in the operation of the upstream hydro-electricity infrastructure, and affect implementation of the environmental flow regime. The Board made provision for an extreme minimum flow in winters when inflows the previous summer were less than or equal to the 1-in-20 year low inflows. The extreme minimum flow reduces the need for water to be stored to provide for naturally occurring dry years.
- 166 Meridian Energy Limited also sought that the minimum flow be measured as a rolling hourly rate of discharge, and explained that an instantaneous flow measurement for a minimum flow would require release of a buffer of 20 – 30 cubic metres per second to ensure that brief and infrequent machine outages do not result in breach of the minimum flow requirement. The Board accepted that, and altered Table 3 accordingly.
- 167 Some submitters sought that the ramping rates for the flow releases at the dam be included in the Plan, and noted the adverse environmental effects of rapid increases and decreases in flows. The Board was not persuaded that ramping rates should be included in the Plan, and considered that these are appropriately provided for as consent conditions, as at present.
- 168 Some submitters asked that the Plan provide for a river management strategy. The Board accepts that the concept could be worthwhile, but considered that many elements of a strategy would be outside the scope of the Plan. So the Board decided against including provision for it in the Plan, but notes that the Plan does not preclude development of a river management strategy.

## Other water bodies

- 169 Some submitters sought amendments to the policy on other rivers and streams in the upper catchment and clarification, including deletion of the policy and reference to “the natural, amenity and recreational values” of the streams of the upper catchment. Submitters sought changes to the policy on tributaries of the Lower Waitaki River that would have the effect of altering the application of the environmental flow regime. For both policies, inclusion of a new point “the relationship of Ngāi Tahu with the river” was requested. The Board was not persuaded to expand the policies but made amendments for clarification.
- 170 The Board made no changes to the provisions in respect of the Fork Stream and its tributaries; the Grays River and its tributaries; the Hen Burn and its tributaries; or the Otematata River. The Board found that it had no information on different values. Nor did it have evidence that changing the minimum flows would increase value, or that allowing more abstraction would outweigh the benefit of the minimum flows to instream values. The allocation limit on the Quail Burn was increased to provide for existing consents.

## Rule 2

- 171 Many submitters proposed a variety of alterations to Rule 2 and Table 3, including deletion of the table altogether, and adding other rivers and streams to it. The Board reviewed the table and concluded that it is integral to the rule for implementing the policies. The Board was not persuaded to add further rivers and streams to the table, as those requested are already included in provision for “all other rivers and streams”, or are tributaries of a sub-catchment already listed.
- 172 In allowing another submission the Board added fisheries and wildlife to the exemption from the allocation limits; and also made other amendments to the rule consequential on changes to policies, or for clarity.
- 173 Submitters requested that when existing resource consent expire and replacements are sought, applicants should not be restricted by the allocation limits in Table 3. The existing allocation exceeds the allocation limit in the Wairepo Creek, Mistake River and Waikakahi Stream. The Board’s intention for takes or diversions from these water bodies is to maintain their inclusion in allocation limits but expect consent holders to meet the efficiency policies of the Plan (refer Policy 28). The Board accepted that to exempt such consents from the allocation limits set in Table 3 would be consistent with its policy, and adjusted Rule 2(1)b accordingly.
- 174 Some submitters asked that flushing flows be added to all rivers listed in Table 3. Flushing flows can only be provided if water is stored upstream. The allocation limits and the flow sharing thresholds are intended to keep a natural pattern of high flow events. So the Board did not add flushing flows to the environmental flow regime of any rivers other than the Lower Waitaki River.

# High Natural-Character Water Bodies

## Delineation of High Natural-Character Water Bodies

- 175 Submitters asked for deletions, additions and clarifications to the high natural-character water bodies identified in Policy 2. Regarding additions, the Board considered that none is justified, nor was it persuaded to treat High Natural-Character Water Bodies in the same manner as the remainder of the catchment.
- 176 The Board made these amendments:
- The Ōhau River was removed as it had not been intended to be a High Natural-Character Water Body
  - The wetlands to which the policy applies have been restricted to those of “moderate or higher significance”, as being appropriate for inclusion as High Natural-Character water bodies
  - Policy 2 g (relating to certain tributaries of the Ahuriri and Ōhau Rivers) was deleted, in part because the high natural-character features are mostly wetlands that are covered separately, and partly because the evidence showed that the watercourses have been modified over a long period.
- 177 The Board concluded that Map 3, which had been included to depict the High Natural-Character Water Bodies, had not clarified the descriptions in Policy 2, and noted that it did not depict the high natural-character wetlands. Map 3 had been interpreted by some submitters as a judgement on the land, rather than the water bodies, as was the clause in Policy 2 “or are part of iconic landscapes”. These words, and Map 3, have been removed from the Plan.

## Ahuriri Water Conservation Order

- 178 The RMA directs that a plan is not to be inconsistent with any water conservation order.<sup>50</sup> To avoid possible confusion between the application of this Plan and the National Water Conservation (Ahuriri River) Order 1990, the Board removed the area covered by that Order from Policy 2.
- 179 However, except for those relating to the environmental flow regime, the policies and rules of the Plan, including allocation of water to activities, do apply for the water bodies covered by the Order.

## Wetlands

- 180 Some submitters asked for a definition of ‘wetland’ to be included in the Plan. However as the Plan uses the definition of wetland in the RMA, the Board decided not to insert a separate definition of wetland.

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<sup>50</sup> RMA, s67(2)(a).

- 181 While only wetlands that are of “moderate or higher significance” are High Natural-Character Water Bodies, the Board has retained an interim protection of wetlands that have not been assessed and classified. The Board considered that it is consistent with Part II of the RMA that before water in a wetland can be taken, used, dammed or diverted, the significance of the wetland should be assessed, and different rules apply depending on the classification of the wetland.
- 182 Submitters requested that the reduction or loss of a moderate or higher significance wetland be able to be offset by an enforceable arrangement as provided for in the proposed NRRP. The Board considered that it is not appropriate for wetlands of this significance to be able to be destroyed through a private agreement process.

### **Locality-specific policies for high natural-character water bodies**

- 183 Many submitters supported Policies 29 – 34 giving a high level of protection for High Natural-Character Water Bodies. A few asked for changes, including deletion of one or more policies to reduce the level of protection. The Board considered that the high natural-character policies are appropriate and should be retained. Many of the concerns related to issues around landscape, land use, and allocation to activities. The Board made changes consequential on other changes, or for clarification of the intent of the Plan.
- 184 Numerous submitters asked for clarification of the effect of these policies on the modified glacial lakes. The Board responded by clarifying Policy 2, and deleting Map 3.

### **Lakes Alexandrina, McGregor and Middleton**

- 185 There was evidence that water is currently taken from a tributary of Lake Alexandrina for water supply to huts at the north end of the lake, but the amount being taken for this purpose is very small. The Board concluded that water supply for the huts can be considered as a discretionary activity under the provision for taking small amounts of water from High Natural-Character Water Bodies.

### **Environmental flows in high natural-character water bodies**

- 186 Some submitters suggested that the allocation for high natural-character water bodies of 10 percent of the mean annual low flow (MALF) is too low an allocation and does not allow for existing resource consents. The Canterbury Regional Council had calculated MALF, one-in-five-year low flows and one-in-ten-year low flows at various points of the catchment.
- 187 Submitters suggested that it would be more appropriate to use the one-in-ten-year flow, rather than the MALF, to calculate the allocation limit in the high natural-character water bodies. A one-in-ten-year low flow is a lower flow than the MALF, and adopting it would represent a smaller amount of water able to be used than would be allowed by the draft Plan. The environmental flow regime in the draft Plan for High Natural-Character water bodies did not contain a minimum flow.

- 188 Submitters who questioned this provision were predominantly concerned about continued access to water for existing consent holders, and about access to stock drinking-water. The Board amended the Plan to clarify that it does not further constrain access to water for those cases. The Board was not convinced that increasing the amount of water would provide any further benefits that could outweigh the potential adverse effects on the high natural-character values of these water bodies.

## Mixing of waters (Policy 9)

- 189 Some submitters contended that mixing of waters was not a water allocation issue, and that this matter should be left to the regional councils to manage through plan or discharge consent processes on a case-by-case basis. Others requested that it only apply to the upper catchment.
- 190 The Waitaki Act requires the Board to provide for water that is or may be taken from, or used in, the Waitaki catchment, and to sustain in the Waitaki River intrinsic and amenity values. The mixing of waters policy discourages further taking and mixing, and provides direction to consent authorities on how to mitigate the adverse effects of this activity when they are more than minor. The Board considered that the nature and extent of existing mixing of waters, and potential for applications for further mixing, requires a coherent policy to guide consideration of replacement and or new consent applications. The connectedness framework of the Plan requires Policy 9 to be applicable across the whole of the catchment. So the Board decided that the policy should remain.
- 191 Submitters requested that a separate clause be inserted to recognise Ngāi Tahu or tangata whenua cultural values, in addition to the existing clause on cultural values in Policy 9. This was accepted in part by inserting the expression '(including tangata whenua)'. This indicates that there are specific tangata whenua values to be considered, while retaining the more general reference to cultural wellbeing, an inclusiveness which the Board considered is important in achieving the overall objective of discouraging mixing of waters.
- 192 Some submitters also requested that existing out-of-catchment use be recognised and provided for on a permanent basis, and that existing resource consents should be excluded from the provisions of Policy 9. However, there is no right of renewal of consents under the RMA. The Board considered that the process of applying for replacement resource consents is an important opportunity to implement new policies or restrictions existing at the time of application. The Board decided not to make the requested amendments.
- 193 Some submitters proposed that consents for mixing of water outside of the Waitaki catchment be classified as a discretionary or prohibited activity. The Board considered that having a policy to guide consideration of replacement or new consent applications would be consistent with mitigating the adverse effects of mixing waters. It accepted evidence of significant investment in reliance on existing consents which result in mixing water, and responded to the submissions to the extent that it re-classified mixing of water as a discretionary activity. The Board also inserted an item in the list of anticipated environmental results that the adverse effects of mixing waters would be mitigated.

## Allowing small amounts of water as a permitted activity

194 Many submitters asked for increases in the amounts of water able to be taken as a permitted activity under Policy 10 and Rule 1. The justification for an increase was to allow enough water for domestic use and stock drinking-water. As already mentioned, these are provided for by s14(3)(b) of the RMA. The intent of Policy 10 is to specify an “amount of water so small” that the effects are so minor that a resource consent process is unnecessary. The Board was not convinced that any increase in the amount of water would meet the intent of the policy. Further, in high natural-character water bodies, the Board considered that the natural values are such that it is appropriate to require resource consents even for these small amounts of water. The wording of Rule 1 was changed to clarify that both the 5 litres per second and the 10 cubic metres per day limits need to be complied with.

## Allocation to Activities

- 195 The Plan provisions on allocation to activities were adopted because allocating an amount of water for each of a diverse range of activities provides for social and economic wellbeing across the catchment community, the local community and the nation. If any one activity was to use all water, it could prevent the local community providing for their reasonably foreseeable needs. Allocation to activities had regard to existing and foreseeable demands, and to the national and local effects of the allocation. Uses within the catchment are given priority.
- 196 The allocation to activities is made upstream of each glacial lake because of the natural and cultural and hydro-electricity values of the lakes. A further division is provided at Waitaki Dam to recognise the existing hydro-electricity infrastructure in the catchment.
- 197 Rule 6, Table 5 of the Plan sets out the annual allocation to activities and provides for:
- increased use of water for town and community water supply, and tourism and recreation facilities in the upper catchment, based on the rate of tourism growth in the upper catchment and the rate of population growth in the lower catchment and the coastal towns of South Canterbury and North Otago.
  - growth in agricultural and horticultural uses provided water quality considerations can be addressed.
  - growth in industrial and commercial activities consistent with increased agricultural and horticultural activities.
  - growth in use of water for hydro-electricity generation downstream of Waitaki Dam.
- 198 Submissions and representations regarding the annual volumetric allocations of water in the draft Plan under Rule 6, Table 5, sought a range of amendments, the majority relating to the annual allocations provided for Agricultural and Horticultural Activities. After consideration of these submissions, the Board made no changes to the allocations for Town and Community Water Supplies, Industrial and Commercial Activities, or Tourism and Recreational Facilities (with the exception that the existing consent for a water-bottling plant located upstream of the Lake Pūkaki outlet is now accommodated). The Board was not persuaded to include any additional allocation to Town and Community

Water Supplies to accommodate the representations made by the Dunedin City Council.

- 199 One submitter requested the addition of another category of activity – Fisheries and Wildlife – to accommodate a number of relatively small takes associated with consents held by the Department of Conservation to maintain wetlands. The Board accommodated that concern by amending Rule 6(2) by adding fisheries and wildlife to the purposes for which water may be taken or diverted without being accounted for in the annual allocation to activities. But the Board did not provide for a specific category of Distributed Energy (as proposed by another submitter), because distributed energy is part of the broader category of Hydro-electricity generation.
- 200 The Board received many submissions on the definition of the local area set out in Policy 11. The Board has extended the local area to include all of the Waitaki District so that the allocation to activities includes water for town and community water supply for settlements south of the Shag River catchment. The Board appreciated that the Timaru District could benefit from using water from the Waitaki catchment, particularly for irrigation. In establishing the allocation to activities, the Board needed to find a “community of interest” for which it would consider local (distributional impacts) as well as economic efficiency (benefits and costs) considerations. The Board found that the Timaru District does have some access to alternative water sources, and judged that it should not be included in the local area for the purposes of allocating water to activities. Benefits arising to the Timaru District are treated in the same way as those arising in the rest of New Zealand.
- 201 The Board also allowed a submission seeking recognition of the importance of Lakes Ruataniwha, Benmore, Aviemore and Waitaki to New Zealand’s electricity system by amending Policy 12. Similarly, recognition of the importance of irrigation was also added to that policy. These changes clarify the matters considered by the Board in allocating water to activities.
- 202 The Board accepted a submission that Policy 13 should refer to the water quality objectives, rather than to the standards in the NRRP, because reference to the objectives is more appropriate to the management of non-point source pollution. Although comprehensive provision for water quality is outside the scope of the Plan, the Board was aware of potential water-quality implications of intensification of land use in the catchment, so despite submissions asking for its removal, it decided to keep Policy 13 in the Plan.
- 203 Many submitters supported Policy 14, although there were requests to widen the area to include land outside the catchment. The Board decided not to widen the area because it considers in-catchment uses should have priority. It amended the policy so that a consent authority would have regard to the extent to which a consent would reduce availability of water to current needs as well as reasonably foreseeable needs.

## **Agricultural and horticultural activities**

- 204 The Board found from the evidence that the existing resource consents for irrigation, horticulture and stock water from takes above the Waitaki Dam total a volumetric requirement of nearly 125 million cubic metres (made up from existing irrigation of 77 million cubic metres, the Upper Waitaki Irrigation Scheme with its take above the Waitaki Dam of 19.4 million cubic metres, and single-purpose stock-water takes of 27.5 million cubic metres). On the submissions of a number of land-owners, the Board was persuaded that taking water for irrigation upstream of the outlets of Lakes Tekapo, Pūkaki and Ōhau should be discretionary, with allocation limits assisting in mitigating

any adverse effects on these water bodies and their tributaries. The Board also found that currently the volumes drawn from above the outlets total an estimated 2.4 million cubic metres, and decided that provision should be included in the Plan for this take, plus an allowance for likely expansion.

- 205 Mackenzie Irrigation Company, on behalf of a large number of land owners in the upper Waitaki catchment, submitted that through the MEL-MIC Agreement, MEL had agreed to make available a maximum quantity of 150 million cubic metres of water per annum to be used for additional irrigation of some 25,000 hectares in the upper catchment. The Board accepted that this is a realistic estimate of an area for future irrigation in the upper Waitaki catchment.
- 206 The Board had regard to this agreement, and decided to make an allocation in the Plan that would allow effect to be given to the substance of the agreement. With this allocation provision, the total water allocated to irrigation and horticulture upstream of the Waitaki Dam for present and future requirements is 275 million cubic metres. Based on the evidence of possible expansion in irrigation as proposed by the owners of land situated above the outlets of Lakes Tekapo, Pūkaki and Ōhau, as well as evidence of the additional areas of land that might be serviced by takes directly from these three lakes, the Board decided to allocate volumes of 8 million cubic metres from each of Lakes Tekapo and Pūkaki (including their tributaries), and 12 million cubic metres from Lake Ōhau (including its tributaries), within the total allocation of 275 million cubic metres to agriculture and horticulture in the upper catchment.
- 207 Evidence from the community irrigation schemes with takes from the lower catchment, together with the submissions of individual irrigators and evidence from a number of experts enabled the Board to gain a comprehensive appreciation of the extent of the current irrigation infrastructure in that area<sup>51</sup>. Based on this information, the Board has based its peak flow requirement estimates on a currently irrigated area of around 46,000 hectares, while recognising that Stage 1 of the proposed development of 10,000 hectares by the North Otago Irrigation Company Ltd. is currently under implementation, with the company also having consent<sup>52</sup> for an additional 4 cubic metres per second which could potentially irrigate a further 10,000 in Stage 2. The assessed peak-rate take associated with this total irrigation is around 60 cubic metres per second<sup>53</sup> (including the 4 cubic metres per seconds take which forms part of the Lower Waitaki Irrigation Company Ltd. consent and is for stock water, Oamaru town supply, the Pukeuri freezing works and other commercial users). The annual volumetric requirement associated with this take for agricultural and horticultural activities has been assessed by the Board at 900 million cubic metres, reflecting, in part, the individual scheme volumetric estimates provided in evidence to the Board.
- 208 There were a number of submissions to the Board describing possible further expansions of irrigation based on takes from the lower catchment. It was asserted that there is potential for development of a further 70,380 hectares of spray irrigation, including a large area on the coastal plains to the north of Waimate extending as far as Timaru, coupled with further areas to the south of the river. On reviewing all this material in the context of the policy framework of this Plan, it is the Board's judgement that there is realistic potential for further development of some 53,000 hectares of spray irrigation in the foreseeable future, with an associated annual volumetric requirement of 350 million

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<sup>51</sup> While the irrigation infrastructure associated with the Upper Waitaki Community Irrigation Company Ltd is in the lower catchment, the take is from the upper catchment (ie above the Waitaki Dam).

<sup>52</sup> As part of the consents held by the Lower Waitaki Irrigation Company Ltd.

<sup>53</sup> Lower Waitaki from mainstem and tributaries.



cubic metres based on a peak take of 0.45 litres per second per hectare over 158 days.<sup>54</sup> The total annual provision in the Plan for agricultural and horticultural activities in the lower catchment is therefore 1,250 million cubic metres.

## Hydro-electricity generation

- 209 Meridian Energy Limited proposed that Table 5 contain an allocation for hydro-electricity generation equivalent to the total of the existing consents held for the purpose plus an additional provision for that activity in the reach between the Waitaki Dam and Black Point.
- 210 The Board was not persuaded by this approach, in that the aggregate of the specified volumes would exceed that available, and reflect the capacity of the installations to pass periodic higher flows, rather than an apportionment of available volumes of water. Allocating “all other inflows” as in the draft Plan (excepting that required for environmental flow regimes where applicable) recognises the variability of the inflow patterns between years, and more closely reflects existing operational practice.
- 211 The Board concluded that, by allocating water to hydro-electricity generation in this way, together with the environmental flow regimes set in this Plan, it has made reasonable provision for the long-term continued operation of the existing infrastructure, and has provided opportunity for some further development of hydro-electricity generation between the Waitaki Dam and Black Point, though with greater constraints than had been sought by MEL and some other submitters.

## Reliability of supply in the Lower Waitaki River

- 212 A number of submitters requested relief in terms of amendments to Policy 45 in the draft Plan, seeking increased reliability for takes by consent holders downstream of the Waitaki Dam, recognising that the consent holder for the Waitaki Dam effectively “manages” releases downstream of the dam. Meridian Energy Limited proposed deletion of Policy 45 of the draft Plan in its entirety in that it (a) derogates from MEL’s existing rights; and (b) it is difficult to implement when flows are instantaneous and reliability indices are not.
- 213 The Board was persuaded by the submissions, representations and expert evidence on the very high level of reliability of supply (close to 100 percent) that is currently experienced by existing consent holders downstream of the Waitaki Dam. The Board accepted the need for the Plan to provide a high level of certainty of supply to these consent holders, many of whom had made considerable investments based on such a supply regime, and the high level of risk faced by these users in the event that supply reliability is reduced. The Board also accepted that supply reliability could be reduced for new consent holders,<sup>55</sup> in that investment decisions would then be made in full knowledge of the effects of such supply restrictions. In this context, Policy 46 (Policy 45 of the draft Plan) has been amended to provide surety of supply to existing consent holders, while recognising the requirement that such flows downstream of the Waitaki Dam must also be sufficient to maintain the components of the associated environmental flow regime for this section of the river.

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<sup>54</sup> Including an allowance for stock drinking-water. The period of 158 days is not to be confused with the length of the irrigation season.

<sup>55</sup> To a reliability that allows 95 percent of the peak rate to be taken.

- 214 There was evidence in support of a demand regime, by which the amount of water released is adjusted to match demands at the time. The Board accepted that this method is efficient. Although The Board did not make detailed provision for it in the Plan, it included provisions to facilitate it.
- 215 Rule 7 and the associated Table 6 provide the monthly envelope of the required releases by the consent holder for the Waitaki Dam to the Lower Waitaki River (in addition to the environmental flow regime), while providing that the consent holder may provide lower flows if these are sufficient to meet the actual requirements of the consent holders (at the reliability specified in Policy 46). This rule responds to the need for certainty requested by a large number of submitters, while accepting that actual monthly volumetric requirements, particularly for irrigation, vary significantly over the year. However the Board was not able to include enhanced release provisions that would apply during the term of the current consents for the Waitaki Power Scheme, as the relevant consent conditions could not be amended under sections 68(7) and 128 to 132 of the RMA.

## Efficient and effective use

- 216 The Plan provides for access to a public resource, and resource users have a responsibility of stewardship in respect of that resource. The Plan objective and policies on efficient use show that this ethic of stewardship is an expectation for resource consent holders, so that waste is avoided and economic, social and cultural wellbeing is maximised through water being used efficiently and effectively.
- 217 There were a number of submissions relating to efficient and effective use of water, some supportive of the policies and some seeking a number of amendments. There were many requests to ensure the efficiency policies applied to hydro-electricity generation. Although hydro-electricity generation does not have a separate policy, Policies 15, and 18 to 20 apply to this activity.
- 218 Policy 16 attracted many submissions, in particular relating to the reference to Schedule WQN 9 of the NRRP. The Board was persuaded to remove the term “irrigation return period” from Policies 15 and 16, and replace it with “irrigation system operation and management”. Policy 16(b) in the draft Plan required the consent authority to include, as part of a reasonable use test, an assessment of applications on the basis of an irrigation-application efficiency of 80 percent (even if the actual system being used has a lower application efficiency). Some submitters interpreted the reasonable use tests as prohibiting those proposals that fell outside of the reasonable use tests. However these policies did not have an associated rule, so that the consent authority would have full discretion over whether or not to grant the resource consent after considering a number of factors, including this policy. The Board remained of the view that the Plan should retain an expectation of high level of irrigation-application efficiency to provide a level of guidance to consent authorities, but in response to the submissions, decided to incorporate amendments to provide more specific guidance on the considerations appropriate to reasonable use tests. Applications that fall outside of the efficiency expectations in the policies are still classified as discretionary activities.

- 219 Policy 16(c) has been altered to refer to the May update of Schedule WQN 9 (Table A1 in Environment Canterbury Report U05/15). The Board was concerned that this Table does not include the Mackenzie basin or rainfall for parts of the lower catchment. It therefore adjusted the policy to allow for site-specific data to be used, if available, in place of Table A1.
- 220 Some submitters requested that the efficiency policies be accompanied by rules, and be applied to existing consents. While the Board strongly supported a high level of technical efficiency, it was cognisant of the costs of upgrading infrastructure, particularly during the term of an existing consent. The Board considered it appropriate to address efficiency by assuming a high level of technical efficiency in the allocation to activities (Policy 18), and through Policy 28 on replacement consents.
- 221 Submitters sought that the efficiency requirements not be applied to existing resource consents. The Plan does not require the application of these efficiency benchmarks during the term of existing resource consents. These provisions of the Plan can only be implemented when consents expire and a new/replacement application is lodged, or if the current consent conditions include a provision for review for these matters. Similarly, the Board did not consider it necessary to alter the policies to include matters such as energy use and existing infrastructure, because these are matters a consent authority can properly consider during the resource consent processes. However, the Board has added text to the explanation to clarify the application of these policies.

## Water metering

- 222 The Board considers that water metering can provide the information necessary to manage the water bodies of the catchment both for their life-supporting capacity and to protect the integrity of the allocation regime.
- 223 Submissions to the Board on Policy 21 on water metering were, in the main, supportive. The Board was persuaded, however, by those submissions that questioned the cost and practicality of “continuous” recording systems, and the policy has been amended accordingly.

## Transfers of resource consents

- 224 The Board was not persuaded by submissions requesting that the policy on transfers of consents should be amended to permit transfers between activities, because it did not accept that the transfer provisions of the RMA authorise it. Sections 136(2) and 136(2A) of the RMA already provide for the transfer of consents in whole or in part and for limited periods, accommodating the request of a number of submitters.
- 225 Submitters requested changes to the rules on transfer of resource consents to prevent any potential effects on existing water users at or below the new point of take. Suggestions included: changing the activity status of a transfer from a controlled to a restricted discretionary activity; restricting transfers so that they can only occur in a downstream direction; to require the existing consent-holder’s permission; or to require a judgement by the consent authority on the potential effects on existing consent holders as part of classifying an activity. The Board included provisions on transfer of resource consent in the draft plan to provide opportunities and flexibility in the utilisation of allocated water.

Similarly, the Board restricted transfers across Waitaki Dam to limit major effects on existing consents. The Board did not find any of the relief sought in submissions would result in a practical and useful transfer regime that would meet the intent of the policy, provide certainty, and be administratively workable. The Board did not alter the transfer rules other than for purposes of clarification.

## Restrictions during times of low water availability

- 226 The water bodies in the Waitaki catchment cannot supply all the water that is demanded by abstractive uses at all times during the year. The objective and policies of the Plan on water-short times seek to establish a known level of reliability to give users confidence about the level of access to water.
- 227 Submitters asked that the policy on restrictions in water-short times (Policy 24) would provide for high visitor populations in towns, and for a larger amount per person. There were requests made to add other activities to the exemptions from restrictions.
- 228 The Board expected that visitors and holiday populations should be supplied with essential water during times of restrictions, and reworded Policy 24 to clarify that it applies to the “population being supplied at that time”. The Board also agreed that the storage and processing of perishable produce should be added as an essential use exempt from restrictions. The Board was not persuaded to amend Policy 23 and 24 in other respects, having received no evidence to support increasing the amounts contained in the policy in times of water shortage.
- 229 Policy 25 (water user groups) was not changed following submissions. The Board considered that submissions relating to implementation of such groups were matters to be addressed by resource consent processes.
- 230 Submitters sought clarification, and changes to the application of priority bands set out in Policy 26 of the draft Plan. In particular, submitters requested an alternative approach on the Lower Waitaki River to recognise the managed nature of its flows. Many submitters interpreted the wording of Policy 26 to restrict the irrigation season to mid-March to mid-October, and sought recognition of a longer irrigation season.
- 231 The Board was persuaded to adopt an alternative approach for the Lower Waitaki River, and amended Policy 26 to only apply to tributaries in the upper and mid-catchment, and to tributaries of the Lower Waitaki River (as shown in Map 2 of the Plan). The reference to Policy 26 in Policy 45 of the draft Plan (Lower Waitaki River) was removed.
- 232 Policy 26 was amended to provide an extended period (August to May) over which reliability of supply is to be assessed, and to insert the words “to be taken in any 14-day period” to avoid reducing the reliability over the critical summer months. The Board was not persuaded to change the approach set out in Policy 26 in other respects, but provided additional text to the explanation to assist understanding of the implementation of this policy. The approach in this policy is also adopted in the NRRP.
- 233 The Plan does not contain any rules to implement Policy 26, as the Board considered that the application of priority bands would be better addressed during resource consent processes. This approach allows consideration of the detailed flow patterns in any sub-catchment, and the combination of activities, to be addressed when specific resource consent applications are considered.

## Replacement of existing consents

- 234 There were a number of submissions relating to Policy 28 of the draft Plan on consent replacement, primarily seeking security of replacement and protection of existing investment. There was also concern that the policies in the draft Plan on efficient and effective use and, in particular, Policy 16, may have the effect of giving undue weight to meeting irrigation-application efficiency criteria. Sections 124A, 124B and 124C (which were inserted into the RMA by the Resource Management Amendment Act 2005) will apply to applications for replacement from 10 August 2008, and the recognition that s104(2A)<sup>56</sup> gives to considerations of the value of the investment of the existing consent holder is now reflected in the Plan. Further, meeting the irrigation-efficiency expectations of the Plan has been made a criterion of replacement consents in Policy 28.

## Changes to the Regional Plan: Water for Otago

- 235 Submitters requested that consequential changes be made to the Regional Plan: Water for Otago to ensure consistency with any changes made as a result of requests in the balance of the Waitaki Catchment Water Allocation Regional Plan. Consequential changes for consistency were accepted as a matter of good practice.
- 236 Requests that Welcome Creek be added to “Schedule 9 – Significant Wetlands” were accepted in part by adding Welcome Creek Wetland to Schedule 9 Wetlands, in recognition of the significance of Welcome Creek Wetland to Ngāi Tahu. A request that the Ngāi Tahu values associated with Welcome Creek be better recognised was met by replacing in Policy 6.6A.6 “mahika kai” with “relationship of Kāi Tahu” so that Ngāi Tahu can provide for their cultural needs.
- 237 Requests to remove the provisions for taking and diverting water, and the allocation tables for the Waitaki catchment because they are in Canterbury Regional Council’s jurisdiction were declined on the basis that a consistent approach would provide clarity for all relevant users of the Plan. Another submission was that the Plan should adopt a total water volume instead of an allocation to specific activity approach, to be consistent with the Regional Plan: Water for Otago. This request was also declined for consistency within the catchment.

## Anticipated environmental results and definitions and abbreviations

- 238 A relatively small number of submitters made quite specific requests for changes to the anticipated environmental results, or to the definitions. Most were consequential matters relating to other aspects of the submissions, and the alterations the Board has made generally follow from its consideration of those matters. Changes to the definitions were made where this would improve clarity.

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<sup>56</sup> Inserted by s59 of the Resource Management Amendment Act 2005.

**DATED** at Christchurch this 30th day of September 2005.

Approved by the Waitaki Catchment Water Allocation Board:

David Sheppard (Judge)    Chairperson

Sheila Watson                Deputy Chairperson

Dr Nick Brown

Edward Ellison

Claire Mulcock

**Waitaki Catchment Water Allocation Board**  
 **Te Poari Tiaki Wai o Waitaki**

# Appendix 1:

## List of reports received by the Board

Reports received by the Board before the notification of the draft Waitaki Catchment Water Allocation Regional Plan:

1. Potential Demands for Waitaki Catchment Water (non-hydro, irrigation or stock). Tonkin and Taylor Ltd (2005).
2. Final Report: Regional Economic Analysis – Uses of Water in the Waitaki Catchment. Harris Consulting, New Zealand Institute of Economic Research and Taylor Baines and Associates (2004).
3. Waitaki Catchment Recreation and Tourism Activities – Collation, Synthesis and Presentation of Existing Studies (written report). Leisure Matters (2004).
4. Waitaki Catchment Recreation and Tourism Activities – Collation, Synthesis and Presentation of Existing Studies (GIS report). Leisure Matters (2004).
5. Freshwater Ecological Values of the Waitaki Catchment. Kingett Mitchell Ltd (2004).
6. Waitaki Catchment Called-in Submissions – An Analysis of Information. Davie, Lovell-Smith; and Caddie (2004).
7. Project Aqua Submissions – An Analysis of Information Relevant to a Waitaki Water Allocation Regional Plan. Davie, Lovell-Smith (2004).
8. Numerical Analysis of Project Aqua and Called-in Waitaki Submissions. Davie, Lovell-Smith (2004).
9. Waitaki Catchment – Summary of Resource Management Planning Documents. Consensus Environmental Consulting (2004).
10. Compilation of Information Provided to the Waitaki Catchment Water Allocation Board. Davie, Lovell-Smith (2004).
11. Waitaki Catchment Groundwater Information. Sinclair Knight Merz (2004).
12. Option and Existence Values for the Waitaki Catchment. Sharp and Kerr (2005).
13. Economic, Social and Environmental Impacts of Irrigation in the Mackenzie Basin. Ian Brown Consulting Ltd and Harris Consulting Ltd (2005).
14. Waitaki Catchment – Hydrological Information. Tonkin and Taylor Ltd (2005).
15. Te Rūnanga o Ngāi Tahu Freshwater Policy. Te Rūnanga o Ngāi Tahu.
16. Investigation into the Merits of Integrating Hydro-Electric Generation with Irrigation Proposals for North Otago. Whitston Consultants (2004).
17. Upper Waitaki Catchment – Review of History and Basis of 1969 Order in Council Allowance for Irrigation Opportunities and Compiled Attachments (MAF Information Paper No: 51). Opus International Consultants Ltd for Ministry of Agriculture and Forestry (2004).
18. Project Aqua – An Evaluation of the Economic Impact. Concept Consulting Group (2004).
19. National Cost Benefit Analysis of Proposals to Take Water from the Waitaki River. Sinclair Knight Merz (2004).
20. Nature, Culture and Heritage Tourist and Associated Leisure Activities in the Waitaki District. Kearsley and Middleton (2004).

21. Freshwater for a Sustainable Future: Issues and Options, Sustainable Development New Zealand Programme of Action. Ministry for the Environment and Ministry of Agriculture and Forestry (2004).
22. National Energy Efficiency and Conservation Strategy. Energy Efficiency and Conservation Authority (2001).
23. Inventory of In-stream Values for Rivers and Lakes of Canterbury, New Zealand. Canterbury Regional Council (2004).
24. Reliability of Supply for Irrigation in Canterbury. Lincoln Environmental (2001).
25. Reliability of Supply for Irrigation in Canterbury Part 2. Lincoln Environmental (2004).
26. Sustainable Energy – Creating a Sustainable Energy System, Sustainable Development New Zealand Programme of Action. Interdepartmental report to the Minister of Energy (2004).
27. Report to the Commissioner of Works by an Interdepartmental Committee on the Water Resources of the Mackenzie Basin. Ministry of Works (1966).
28. Government Objectives for the South Island High Country: Report Backs. Unpublished paper for the Cabinet Policy Committee, Office for the Minister of Land Information (2004).
29. Mackenzie Country Water Resources Interim Report on Aspects of Irrigation. Waitaki Catchment Commission (1972).
30. Mackenzie Basin Irrigation Takes – Consent Review. Aqualinc Research Ltd (2004).
31. Lower Waitaki River Hydropower Potential. Maunsell Ltd (2004).
32. Proposed Canterbury Natural Resources Regional Plan (Chapters 1, 2, 4 and 5). Canterbury Regional Council (2002 and 2004).

Reports received by the Board after the notification of the draft Waitaki Catchment Water Allocation Regional Plan:

33. Visitor Survey of the Lower Waitaki Valley. Kearsley (2005).
34. Officers' Report on Submissions on the Draft Waitaki Catchment Water Allocation Regional Plan (May 2005).

Information provided to the Board by the Canterbury Regional Council after the notification of the draft Waitaki Catchment Water Allocation Regional Plan:

35. Seven day mean annual low flow data for the Waitaki Catchment (revised since May 2005).
36. Existing resource consents and allocations for the Waitaki Catchment (revised since November 2004).



# Appendix 2: Abbreviations

CJ	Chief Justice
cl	Clause
ELRNZ	Environmental Law Reports of New Zealand
FC	Full Court (more than one Judge sitting)
HC	High Court of New Zealand
Ibid	The same work as mentioned in the previous footnote
Idem	The same place as mentioned in the previous footnote
J	Justice (of the High Court)
MEL	Meridian Energy Limited
MIC	Mackenzie Irrigation Company
NRRP	Proposed Canterbury Natural Resources Regional Plan as defined in Section 10 of this Plan
NZLR	New Zealand Law Review
NZRMA	New Zealand Resource Management Appeals
p	page
para	paragraph
Plan	Waitaki Catchment Water Allocation Regional Plan
RMA	Resource Management Act 1991 (including amendments)
s	section
SC	Supreme Court of New Zealand
Sched	Schedule (to an Act of Parliament)
SR	Statutory Regulations
Waitaki Act	Resource Management (Waitaki Catchment) Amendment Act 2004