

**BEFORE A HEARING PANEL OF THE CANTERBURY REGIONAL COUNCIL**

**BEFORE** Independent Commissioners under the Resource Management Act 1991

**AND**

**IN THE MATTER OF** Plan Change 3 to the Waitaki Catchment Water Allocation Regional Plan

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**LEGAL SUBMISSIONS OF COUNSEL FOR MACKENZIE DISTRICT COUNCIL  
ON CONTROLLED ACTIVITY ISSUE**

**9 OCTOBER 2015**

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## LEGAL SUBMISSIONS OF COUNSEL FOR MACKENZIE DISTRICT COUNCIL

### Introduction

1. These submissions are lodged on behalf of the Mackenzie District Council (**MDC**) and are in response to the Hearing Panel's Minute of 21 September 2015.
2. MDC's preference is for the restricted activity status be retained (as notified) for new Rule 15A for the taking, damming, diversion and use of water for hydro-electricity generation and for assets directly associated with electricity generation. On that basis, MDC does not support the wording proposed by Meridian Energy Limited in its submissions of 30 September 2015.
3. MDC considers controlled activity status is not appropriate for inclusion in Plan Change 3 (**PC3**), particularly given the Waitaki Water Allocation Plan is due for review pursuant to section 79 of the RMA. Again it is MDC's position that should controlled activity status be considered, it is more appropriately addressed as part of the overall review, rather than being addressed in what is a reasonably discrete plan change, one which is clearly focused on achieving outcomes in the Lower Waitaki River.
4. As discussed with the Hearing Panel on 25 June 2015, MDC seeks a level of assurance for its communities that they will not be disadvantaged by the Rule which in any way pre-empts the overall review, particularly given the importance of water for those in the Upper Waitaki Catchment.
5. During the presentation of those submissions, and discussions with Chairperson Whiting, it was made clear by the Panel that the law does not enable an activity status to in any way impede a full review of the Plan, including allocation to differing activities.
6. These submissions therefore do not address that issue further but rather focus on the other issues in relation to controlled activity status.

### **Controlled Activity Status does not implement the Policy**

7. Section 67 of the Resource Management Act 1991 provides (relevantly):

*“(1) A regional plan must state-*

*(a) The objectives for the region; and*

- (b) The policies to implement the objectives; and*
- (c) The rules (if any) to implement the policies.*

...

8. Section 68 provides:

*“(1) A regional council may, for the purpose of –*

*(a) Carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and*

*(b) Achieving the objectives and policies of the Plan, -*

*include [rules in a regional plan].*

...

9. As notified, no amendments (apart from the inclusion of reference to Policy 46 in the explanation) were proposed to Policy 28 which reads:

*“In considering whether to grant or refuse applications for replacement of existing consents, the consent authority will:*

*a. consider whether all reasonable attempts to meet the efficiency and expectations of this Plan have been undertaken;*

*b. recognise the value of the investment of the existing consent holder; and*

*c. maintain the inclusion of the consent, if granted, in any allocation limits and priority bands on the water body concerned.*

10. Policy 28 does not anticipate controlled activity status. The proposed controlled activity status cannot implement that Policy.

11. Genesis sought the addition of a Clause “d” to Policy 28 as follows:

*“... Consider existing hydro-electricity generation schemes as part of the existing environment, and focus on how the hydro-electricity schemes manage their effects on the environment, rather than the merits of their continued existence.”*

12. In addition to the issue of scope which has been raised by CRC, which is supported, what Genesis is proposing is essentially to have an amendment to the Policy, to create a framework for either the restricted discretionary activity status or its proposed controlled activity. With respect, that is the tail wagging the dog<sup>1</sup>.
13. It is submitted there is nothing in the objective or policy framework of the Plan, or PC3, that supports controlled activity status. Objective 2 does not attribute any order of importance or priority. Likewise, neither the NPSREG, nor the Canterbury Regional Policy Statement in any way mandate controlled activity status, above restricted discretionary.
14. Mr Ensor in his rebuttal evidence of 22 May 2015 provides, by way of review, a section 32 analysis in response to the evidence of Mr Richard Matthews which discusses the effectiveness and efficiency of Rule 15A amended to have a controlled activity status.<sup>2</sup>
15. Mr Ensor comparatively to Mr Matthew's analysis included an evaluation of the option proposed in the submission of MDC, being to defer Rule 15A until the relevant parts of Rules 2, 3, 6 and 7 had been reviewed and the outcome made operative.<sup>3</sup>
16. Mr Ensor's evaluation concluded that in terms of effectiveness in implementing Policy 28, Rule 15A as notified and Rule 15A "deferred" to be highly effective as there is an option to grant or refuse an application.<sup>4</sup> Additionally, the rule status and certainty surrounding the application of flow and level regimes recognise the value of existing investment.<sup>5</sup>
17. Mr Ensor's evidence noted that there was no opportunity for an application under Rule 15A with a controlled activity status to be refused and that will therefore have a lower effectiveness in terms of implementing Policy 28.<sup>6</sup>
18. Mr Ensor agreed that controlled activity status contributes to increased security of supply through the fact that applications for resource consent must be granted but noted that the allocation of flow regimes have a critical role to play in supply security. His opinion was that the benefits attributed to the security of supply need to be tempered by the fact that

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<sup>1</sup> *L and M Newman-Hall v Marlborough District Council* Decision No. C135/2006.

<sup>2</sup> Statement of Evidence of Richard John Matthews, 1 May 2015, para 4.12 and 4.13.

<sup>3</sup> Statement of Evidence in Rebuttal of Tim Ensor, 22 May 2015, para 9.

<sup>4</sup> *Ibid.*, at para 13.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, at para 14.

allocation and flow regimes are beyond the reach of Rule 15A in any of the proposed forms and are subject to potential change through review.<sup>7</sup>

19. On a controlled activity the Council must grant a resource consent<sup>8</sup> (with limited exceptions).
20. The Council's power in relation to the imposition of conditions is restricted to only the matters over which control is reserved;<sup>9</sup> the activity must of course comply with the requirements, conditions and permissions, if any, specified in the RMA, regulations, plans, or proposed plan.<sup>10</sup>
21. The respondent Council's ability to impose conditions is of course subject to the principle that a condition on a resource consent cannot negate the consent itself.
22. Further, an issue which may arise from a controlled activity status is the degree that it would enable any modification to an application for renewal to be made without negating the activity or altering it to such a degree that it is not what is applied for. The issue is the degree to which one can modify the activity by conditions before effectively declining the consent.
23. On the basis of Mr Ensor's evaluation, considering the somewhat limited nature of PC3, MDC's position remains that the controlled activity status is inappropriate.

Dated 9 October 2015



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<sup>7</sup> Ibid, at para 15 and 16.

<sup>8</sup> Sections 87A(2)(a) and 104A(a) of the RMA.

<sup>9</sup> Section 87A(2)(b) and 104A(b) of the RMA.

<sup>10</sup> Section 87A(2)(c) of the RMA.