

Practice Note: What is the 'existing' or 'receiving' environment and what effects can be considered for a proposal

Introduction

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

The topics covered in this practice note are:

- Whether consequential effects associated with an activity can be considered.
- If the effects of damming or diverting water under s14 of the Resource Management Act 1991 (RMA) as a result of the presence of existing structures such as dams or weirs, forms part of the existing/receiving environment.

Consequential Effects Considerations

ORC obtained legal advice to understand if, and to what extent, the effects of using water for irrigation on water quality could be considered. The advice considered if effects of water use on water quality is a relevant "effect" for consideration when determining a consent application and how the plan framework constrains any assessment. The outcome of this advice may be applicable to other activities where there are consequential effects from an activity. The key outcome of the advice was as follows:

Due to the broad definition of "effect" this can include any consequential effect, provided it is not too uncertain or remote.

The effects on water quality from using water for irrigation may be a relevant consideration when determining a water use permit seeking water for irrigation purposes as:

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

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

For example: For replacement surface water takes and hydraulically connected groundwater takes, water quality effects are not a matter of control or discretion under the controlled and restricted discretionary rules in Chapter 10A. Water quality effects are not able to be assessed and considered for those applications.

If the application is for a new water take or a replacement groundwater take that is a **discretionary** activity, then the applications should include an assessment of the consequential effects from the use of the water for irrigation. The level of detail would need to be commiserate to the term of consent sought. An assessment may include assessing sources of diffuse discharges and determining how those discharges affect groundwater and surface water quality, which may involve some form of nutrient modelling.

the application is for a new water take or a replacement groundwater take that is a **restricted discretionary** activity and Rule 12.1.4.8 of the RPW applies then there is some ability to consider effects of the use on water quality but this would be limited to the effects on groundwater based on the matters of discretion. Rule 12.1.4.8 has the following clause (xv) *Any actual or potential effects on any groundwater body.*

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

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

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

What constitutes the environment has been subject to several court cases and case law has confirmed that the "environment" includes the environment as it may be modified by permitted activities and the implementation of resource consents which have been granted and which are likely to be implemented. For resource consents issued by regional councils, which are of limited duration, this approach differs slightly.

Case law has confirmed that in situations where consents granted by a regional council are being re-consented, the activities subject to those consents should not form part of the environment. The Court has noted that it should not be assumed that existing consents with finite terms will be replaced or replaced on the same conditions.

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

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

Water permits for take and use only form part of the environment prior to their expiry. Whether they are part of the receiving environment is not influenced by any s124 continuation rights.

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

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

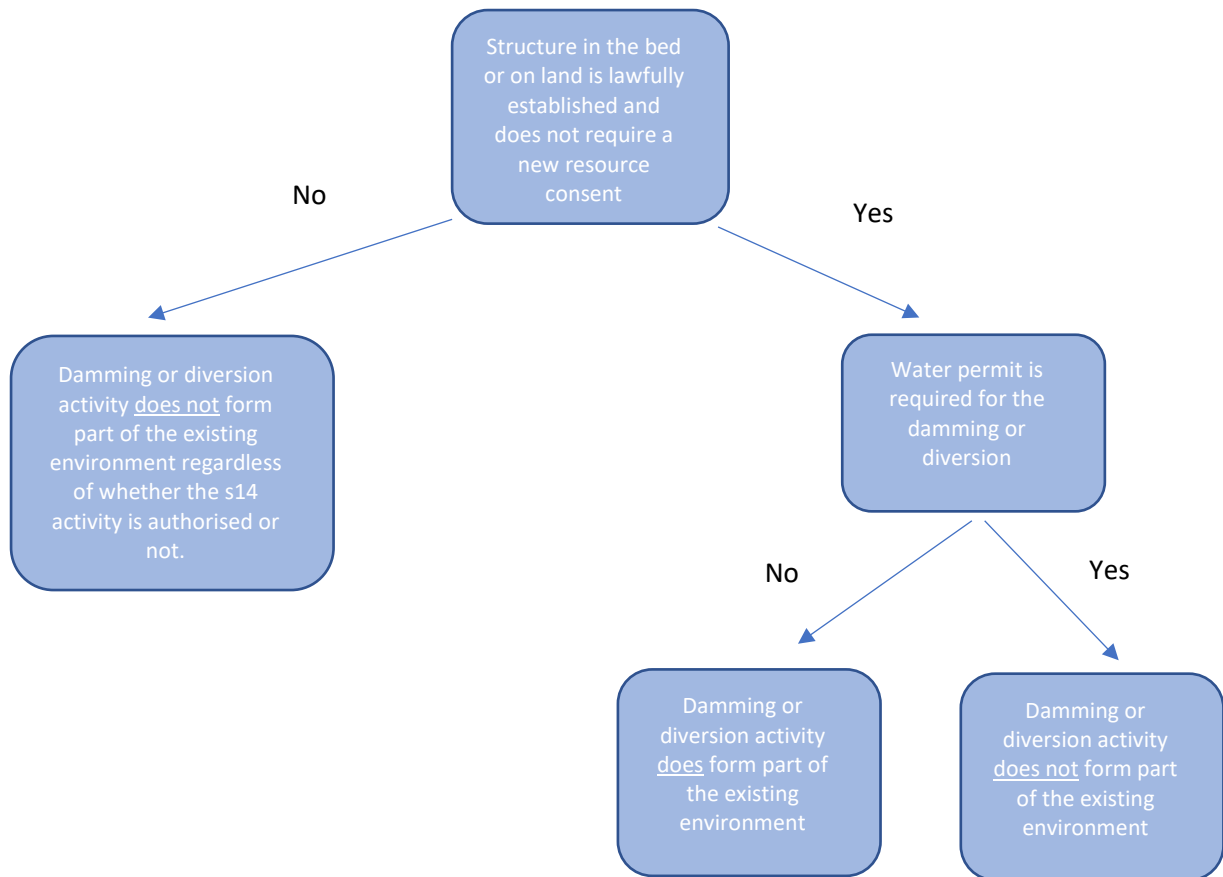
Where the structure is not being re-consented, whether the structure forms part of the existing environment depends on whether consent is also required under section 14 for the damming or diversion as a result of the structure.

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

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

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

The flow chart below can assist with identifying when the structure is considered part of the environment.



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

For proposals where the damming or diversion activity does not form part of the receiving environment, a more thorough assessment of effects will be necessary.

An application would need to assess the influence of the structures on waterbodies including assessing the effects of inundation, or the potential effects of diverting water away from its natural course. The environment used to inform these assessments will not be that which existed prior to those structures and activities being in place, rather it should be assumed that the damming or diversion activities cease on the expiry of the permit and it is the environment that exists at that point.

For example, when re-assessing a damming proposal, the environment would be determined as being what would exist if the impounded water and dam structure were no longer present, but also an environment that has been affected by those historic activities.