

Practice Note: Plan Change 7 Decision and Processing of Applications

The following advice note outlines how the Environment Court's decision on Plan Change 7 to the Regional Plan: Water for Otago (PC 7) relates to the processing of applications already lodged with Otago Regional Council. The advice considers how and when the activity status of the application may change, when Council can consider provisions precluding notification and how other applications associated with a water permit replacement application may be processed.

Activity status

What is the activity status?

The activity status of an application is crystallised at the date of lodgement. It is based on the activity proposed and applicable planning provisions (rules) at lodgement date. The activity status can be controlled, restricted discretionary, discretionary or non-complying¹.

For applications lodged prior to 18 March 2020, the activity status is as provided by the operative Regional Plan Water (oRPW) rules, although the objectives and policies of both the oRPW and PC 7 are relevant when considering the application.²

For applications lodged from 18 March 2020 until the decision on PC 7 (once PC 7 is amended by the Council as directed by the Court) both the operative RPW and PC 7 (notified version) rules apply and the relevant activity status is the most restrictive activity status, in accordance with the usual principles of bundling applications.

For applications lodged once the rules in PC 7 are beyond legal challenge or when PC 7 is operative, only the rules in PC 7 apply.

What happens when the PC 7 rules are beyond challenge?

The PC 7 rules are now beyond challenge. Once the rules are beyond challenge, they are treated as operative in accordance with section 86F RMA and any corresponding rules in the oRPW are treated as inoperative.

The following table explains what happens for existing applications and new applications once the rules are beyond challenge but before PC 7 is made operative.

¹ Permitted activities do not require consent and consent cannot be applied for prohibited activities. S87A and s104A-s104D of the RMA outline the key differences of each activity status.

² Consent is also required under the PC 7 rules, as these have legal effect on notification, but the application will be assessed under the activity status of the RPW rules rather than those in PC 7.

	Activity Status at lodgement	Activity Status after rules are beyond challenge ³
Existing applications	See above table – depends on when the application was lodged	<p>Although the activity status at the time the application was lodged may be crystallised if the activity status was more lenient, the new PC 7 rules will apply (to the take and use) and the oRPW rules fall away. Consent will only be required under the PC 7 rules.</p> <p>If the new PC7 rule is more enabling (has a more lenient activity status) than the previous relevant PC 7 or RPW rule, the applicant can benefit from the new rule and more lenient activity status.</p> <p>If the new PC 7 is more stringent than the previous relevant PC 7 or RPW rule the application should be decided based on the original activity status (at lodgement).</p>
New applications	Activity status determined by new PC 7 rule only	N/A

For all of the applications above, although only the PC 7 rules are considered for water permits to take and use water, the objectives and policies of the oRPW and PC 7 will need to be considered when making a decision on the application until PC 7 is made operative by the Council.

What happens once PC 7 is made operative?

PC 7 will no longer be a 'proposed plan' once it is made operative by the Council. PC 7 will then be part of the RPW (as Chapter 10A).

The activity status of an application (existing or new) will solely be decided by the rules in Chapter 10A.

What if I amend my application to align with the rules in the PC 7 decision once the PC 7 rules are beyond challenge?

Once the rules in PC 7 are beyond challenge and/or operative then we no longer need to consider the rules in the operative RPW. Council can process the application under the PC 7

³ Treated as operative under 86F of the RMA

rules only (although we can have regard to the activity status of the application at the time it was lodged if it was more lenient).

If PC 7 was not operative when Council makes its decision on the application, the Council would need to consider and weigh the operative RPW objectives and policies (alongside the objectives and policies of PC 7) when making its decision. However, they may be given limited weight.

Example: If an application is currently non-complying overall but is amended to meet the controlled activity rule in PC 7 (beyond challenge version) it would be processed as a controlled activity. Until PC 7 is made operative, the relevant objectives and policies of the operative RPW would need to be considered when deciding the application.

Notification decision

Will there be preclusion of limited notification/public notification of my application?

PC 7 controlled and restricted discretionary rules have a preclusion on limited notification and public notification. This means that there will be no ability to limited or publicly notify the water take and use application if the activity meets the controlled or restricted discretionary rules in PC 7.

What if my deemed/water permit application has been lodged with other applications (e.g. damming of water, diversion of water)?

Where there is a notification preclusion on the controlled/restricted discretionary activity to take and use water, the aspects of the proposal not relating to the controlled/restricted discretionary activity are able to be considered for notification purposes (e.g. if the damming is a restricted discretionary activity under the oRPW with no preclusion on limited/public notification the preclusion does not apply to this part of the proposal).

However, this depends on whether or not the applications are processed as a bundle. The Council needs to consider if it processes the applications as a bundle, as in some cases the effects of the activities may not overlap. In those circumstances, the Council may proceed with a 'hybrid' activity status – see the section below on bundled applications. This will be assessed on a case-by-case basis.

What if a notification decision has already been made on my application?

If a notification decision has already been made on an application, the notification decision stands (except in very limited circumstances). This means that if your application has been publicly notified or limited notified, any submissions are still valid (despite a notification preclusion later coming into effect). Depending on the nature of the submissions (i.e. if

submitters wish to be heard), a hearing will need to be held and a decision made by a delegated decision maker.

There is the opportunity for a submitter to withdraw their submission or seek not to be heard prior to a hearing. Some submitters may consider this if an application is amended to meet the controlled/restricted discretionary rules of PC 7.

Although the notification decision stands, the s104 substantive decision on the application will consider the amended activity status and the direction of the policies and objectives of PC 7 as the discretion of the decision maker will be restricted to the relevant matters of control or discretion.

Multiple activities and the operative RPW

For some applications, multiple activities have been applied for. These additional activities may enable the water take or support the water take activity. Examples of such other applications include instream or offline damming, retakes of water from reservoirs and water races, diversion of water, discharge of water/contaminants, activities in/near natural inland wetlands and/or the placement of weirs, culverts and passive flap gates.

If additional activities form part of the application and require consent only under the operative RPW or other legislation (e.g. National Environmental Standard for Freshwater Management) then this may affect the overall activity status of the application due to bundling principles.

The bundling principles apply where the activities for consents being sought overlap and are intrinsically linked with one another such that they cannot be realistically or properly separated and should be assessed together as a whole. In that case, the most restrictive activity status will apply to the application and any preclusions on limited notification only apply if the preclusion relates to all the activities that consent is required for. Applications generally should be bundled so that the effects of the proposal can be considered holistically, except for some limited circumstances.

While the RMA does not require the bundling of applications, the concept of bundling is well-established by case law, such that there are only limited circumstances in which not bundling the applications is considered acceptable. Case law indicates that this is when:

- (a) one of the consents sought is a controlled or restricted discretionary activity;*
- (b) the scope of the Council's control or discretion in respect of one of the consents is relatively confined; and*
- (c) the effects of exercising the two consents would not overlap, impact or have flow-on effects on each other.*

This may be relevant for some applications.

Can I unbundle my water permit application under PC 7 from my other consent applications?

If you seek to have the water take and use unbundled and processed separately from other parts of the application, you will need to state this and include supporting documentation/assessment with the application (addressing the above factors). However, it is for the Council to determine whether bundling is required in each circumstance.

Example: Where one application is for a controlled activity, recent Environment Court authority suggests that it may be more appropriate for the effects of the activity to be considered together, but statutory limits must be observed (i.e. a controlled activity must be granted). Nonetheless, if controlled activities require additional consents to be granted, then the controlled aspect could be granted while other consents are declined, and the overall proposal is still unable to be implemented.

How will PC 7 be considered if I do not unbundle my applications?

Each individual activity will be assessed in accordance with the objectives and policies of the relevant planning document and relevant higher order documents. PC 7 is likely to only be a relevant consideration for the water permit to take and use.

Example: A damming permit forms part of the proposal and consent for the damming is only required under the RPW. Will Council consider or assess any of PC7 provisions in relation to the damming activity given the wording of PC7 (being a standalone section of the RPW)?

Using the above as an example, although PC7 contains standalone provisions specific to replacement permits to take and use surface water, it is still part of the RPW, which is the relevant planning document for both applications (in accordance with section 104). In some cases, the wording of the policy in question will determine which application / aspect of the activity it is primarily relevant to.

The provisions of PC7 limit the policies' application to applications to take and / or use freshwater. For the other activities (e.g. damming that is not the replacement of a deemed permit) the Council will assess the specific objectives and policies relevant to that aspect of the proposal. This may mean that the PC7 policies are only relevant to applications to take and / or use freshwater, or replace deemed permits, and that other aspects of the proposal as a whole will assess the relevant oRPW provisions.

It is noted that as Policy 10A.2.1 and Policy 10A.2.3 applies to all replacements of deemed permits, any damming permit that is sought as a replacement of a deemed permit (for example) will need to address and consider Policy 10A.2.1 and Policy 10A.2.3.

It is appropriate to limit the consideration of policies for the controlled aspect of the activity to those that are relevant to the matters of control, as even if the other policies are considered there is no ability to decline the consent to that aspect of the proposal as a result.

Amendments to applications

We have advice on amendments to applications available in a separate practice note, which is available on our website [practice-note-amendments-to-applications.pdf \(orc.govt.nz\)](https://www.otago.govt.nz/practice-note-amendments-to-applications.pdf)

An amendment to a consent application can be made at any point prior to the decision being made by the consent authority. However, an amendment must be within the scope of the original application, as defined by the original application. An amendment would be considered to go beyond the scope of the original application if it is significantly different in terms of the scale or intensity of the proposed activity, or the altered character or effects/impacts of the proposal. This will be determined on a case-by-case basis.

How do I consider my other activities/applications when I am preparing my amendment documentation?

When you are completing the amendment form you will need to consider whether you are seeking any changes to any activities that require consent under our other plans and other parts of the oRPW and let us know if you are making changes to those parts of your application, including why the changes are in scope of the original application lodged.

Will you ‘re-make’ a notification decision on an application?

Amendments to an application can be made before or after the application has been notified, and an amendment to an application could result in additional persons being required to be notified. However, once a notification decision has been made, the Council is functus officio. This means that once a notification decision has been made, the duty of the decision-maker has been discharged and the ability to vary the decision is lost. While there are some statutory exceptions, these are generally restricted to the correction of errors. This means that once a notification decision has been made, it is generally not able to be reconsidered by the Council.

Example: if the Council has made a notification decision on an application and following notification the applicant amends the application (e.g. amends the consent duration sought), the Council cannot re-make its notification decision on the amended application. If the applicant wanted the Council to remake its notification decision, it would need to lodge a fresh application. This means that persons notified of a resource consent application are unable to be “un-notified”.

The above applies despite any notification preclusions that could apply in the event that the activity is amended to fall under a different rule / activity status, as the right to participation has already been granted and cannot be taken away by the Council.