

## **CANTERBURY WATER CONSERVATION ORDER CHANGES**

### **What are Water Conservation Orders**

1. Water Conservation Orders (WCO) were established to preserve and protect water bodies that are proven to be in their natural state and/or nationally outstanding for a range of values. WCOs have the same status as National Environmental Standards (NES) and National Policy Statements (NPS). Where a WCO and an NES address the same matter, the most stringent of the two prevails.
2. It is mandatory that Regional Plans and District Plans not be inconsistent with terms of WCOs. Resource consents must not be granted on terms that would cause a breach of WCOs.
3. If evidence establishes that specified values stand out on a national basis, the presumption is that a WCO should be imposed to either preserve the water body in its current state, or manage the water body so as to protect identified features.
4. “Preservation” Orders are generally imposed for water bodies largely in their natural state, that support outstanding values that cannot be sustained with any modification. Other levels of Order determine what flow regime, level or water quality is needed to sustain identified outstanding values, rather than simple natural state preservation.
5. The specific values that a WCO can protect are:
  - Wild and scenic;
  - Habitat for aquatic species;
  - Fishery;
  - Scientific and ecological;
  - Recreational
  - Historic;
  - Spiritual;
  - Cultural; and
  - Tikanga Maori.
6. Just like Regional Plans, WCOs go through a submission process, a hearing in the first instance, and appeal rights to the Environment Court. Just like regional plans, any person can apply for a change to a WCO.
7. WCOs are like National Parks, the purpose for which is:

*preserving in perpetuity as national parks, for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality, ecological systems, or natural features so*

*beautiful, unique, or scientifically important that their preservation is in the national interest (Section 4 National Parks Act 1980)*

Just like National Parks, WCOs are made to preserve and protect nationally outstanding wild and scenic values, recreational values, ecosystem values and cultural values. They currently protect some of New Zealand's most significant and important water bodies.

### **What does the ECan (TCAWM) Act do to WCOs – In summary**

8. The statutory test for any application to grant, amend or revoke WCOs in Canterbury, including the Hurunui WCO application, applies significantly less weight to the requirement to preserve and protect nationally outstanding water bodies, gives more weight to the potential use of the water and applies a more regional rather than national focus. The test is now also more complicated with the addition of the Vision and Principles of the Canterbury Water Management Strategy (CWMS). This test will apply to the Hurunui WCO application and any applications to amend or revoke existing WCOs in Canterbury such as the Rangitata, Rakaia and Ahuriri Rivers.
9. WCO applications will not be heard by a Special Tribunal or the Environment Court, they will instead be heard by the new ECan Commissioners, with no power to allow cross-examination, and then appeals to the High Court may be on points of law only.
10. These changes will last until the day on which Canterbury is allowed to elect Councillors again, which may be 2013, after which normal RMA provisions apply.

### **Change to statutory test for granting, amending or revoking WCOs**

11. The first aspect of WCOs the ECan Act changes is the statutory test for the granting, amending or revoking of WCOs.
12. The standard water conservation order regime sits a little outside of the purpose and principles of the Act as contained in Part 2 of the RMA. Section 199 RMA applies "notwithstanding anything to the contrary in Part 2", which has been held by the Courts and Special Tribunals as meaning that only the provisions of Part 2 that accord with the purpose of WCOs have weight. Part 2 provisions that are contrary to protection and preservation of outstanding values do not need to be weighed and balanced in the standard way.
13. The WCO part of the Act, Part 9, sets a bottom line. A WCO **must** achieve protection of the values found to be outstanding. Then, over and above this, Part 2 of the RMA is relevant, and other matters can arguably be addressed or allowed for in the Order, as long as that bottom line is not breached, and the purpose of the Order is achieved.
14. The purpose of WCOs in section 199 is not the only relevant statutory consideration. Section 207 must also be applied in the process of the Inquiry. Regard must be had to:
  - (a) *The application and all submissions; and*
  - (b) *The needs of primary and secondary industry, and of the community;*  
*and*

(c) *The relevant provisions of every national policy statement, New Zealand coastal policy statement, regional policy statement, regional plan, [district plan, and any proposed plan].*

15. In summary, in terms of relative importance and weight, the test and purpose for a WCO is as follows:
  - a. Priority or particular emphasis must be given to:
    - i. Recognition and sustaining of outstanding water bodies.
    - ii. Provisions of Part 2 consistent with recognition and sustaining of outstanding water bodies.
  - b. Once that primary purpose is provided for, other matters should also be had “regard” to; specifically:
    - i. Needs of primary and secondary industry, and of the community.
    - ii. National Policy Statements, NZ Coastal Policy Statements, Regional Policy Statements, Regional Plans and District Plans.
  - c. A WCO can preserve water bodies in their natural state, or protect characteristics that are outstanding by setting limits on flows, levels, water quality and allocation.
16. Under the ECan Act, all decisions in respect of WCOs will be subject to quite a different test:
  - a. Most importance and weight is given to Part 2 of the RMA. All considerations are now subject to Part 2.
  - b. Second most importance are the matters to which “particular regard” is to be had:
    - i. Recognition and sustaining of outstanding water bodies; and
    - ii. Vision and principles of Canterbury Water Management Strategy.
  - c. Third ranked weighting goes to the matters to which “regard” is to be had:
    - i. Needs of primary and secondary industry, and of the community.
    - ii. National Policy Statements, NZ Coastal Policy Statements, Regional Policy Statements, Regional Plans and District Plans.
17. The main impacts of these changes is that the “use” related provisions of Part 2 may take precedence over the recognition and sustaining of outstanding water bodies, depending on the facts of a case. The protection of outstanding water bodies is no longer the primary purpose. The requirement to “have particular regard” now applies both to all section 7 matters, (which includes the efficient use and development of natural resources, and the benefits to be derived from renewable energy), the recognition and sustaining of outstanding water bodies, **and** the vision and principles of the CWMS. All these matters now have equal weight in the test.
18. The other main impact is that the Vision and Principles of the CWMS which have a regional origin and a regional focus is included in the test. This significantly complicates the test, as there are four pages of Vision, Primary Principles and

Supporting Principles to be “had particular regard to” in addition to all the other factors. This also further weakens the original primary presumption that nationally outstanding water bodies should be protected.

### Changes to process and rights of appeal

19. The second substantive change relates to the hearing and decision making process for WCOs. Under the RMA WCO applications are to be heard firstly by a Special Tribunal appointed by the Minister, with any appeals (known as “submissions”) on the Special Tribunal’s decision going to the Environment Court.
20. Under the ECan Act, the Huruui WCO application, and any other applications for new WCOs or amendments and revocations for existing WCOs will be heard by the new ECan Commissioners. In respect of the Huruui WCO specifically, it appears that no weight at all is to be given to the Special Tribunal’s Report from 2009. Appeals on the Ecan Commissioners’ decisions may only be made to the High Court on points of law.
21. This means that only the Commissioners will ever consider the evidence. The ECan Act does not give the Commissioners the power to allow cross examination of evidence. Any expert evidence will therefore not be properly tested under this new process.

### Term of changes

22. The majority of the ECan Act applies up to a date referred to as the “resumption day”. Resumption day is defined as *“the day after the day on which the candidates for membership of ECan in the next election are declared to be elected or, if there is more than 1 day, the last of those days.”* The “next election” is defined as 2013 or next election, whichever is earlier.
23. The section on WCOs expires and is repealed on the day before resumption day except for sections 52 to 55 and 60. The ECan Act will however continue apply to WCO applications in respect of which the ECan Commissioners have issued a decision, in terms of rights of appeal and the legal test.
24. If on resumption day ECan has received an application in respect of a WCO, but has not commenced any hearing, then the application is to be returned to the Minister and dealt with under the standard, unamended Part 9 RMA provisions.

### Changes in respect of the Huruui WCO process specifically

25. Clause 8 requires that 20 working days after the ECan Act commences the Minister will forward to ECan the Huruui WCO application and all submissions made to the Special Tribunal. Then after an unspecified period of time (i.e. as soon as practicable) ECan is to give notice to the applicant and submitters about the removal of the Environment Court from the process and the fact that the applicant has 30 working days to submit a revised application, taking into account the new legal test. After the expiry of that 30 working day period submitters may make additional submissions on the revised application. If submitters do not lodge a revised submission their original submission will still stand. ECan is then required to conduct

a hearing in respect of the revised application subject to the standard powers of a regional council when conducting a hearing. The ECan Commissioners are then to provide their report to the Minister. This report may only be appealed to the High Court on a point of law.

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