



## Further advice on Rakaia WCO Declarations

Date Submitted:	24/03/2023	Tracking #: BRF-2948	
Security Level	In Confidence	MfE Priority:	Urgent

	<b>Action sought:</b>	<b>Response by:</b>
Hon David PARKER, Minister for the Environment	Agree to join declaratory proceedings on the Rakaia WCO to reinforce the extent of your powers and duties under the RMA.	27 March 2023 (date to file with Court is 29 March)

Actions for Minister's Office Staff	<b>Return the signed report to MfE.</b>
Number of appendices and attachments # 3	<ol style="list-style-type: none"> <li>1. Appendix 1: BRF-2808</li> <li>2. Appendix 2: F&amp;G and EDS Application for Alternative Declarations</li> <li>3. Appendix 3: Summary of Declarations</li> </ol>

### Key contacts

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# Further advice on Rakaia WCO Declarations

## Key Messages

1. You, as Minister for the Environment, have been served as an affected party in declaratory proceedings brought by Environment Canterbury (ECan) seeking to clarify its role in the monitoring and enforcement of the National Water Conservation (Rakaia River) Order 1988 (Rakaia WCO). BRF-2808 (refer **Appendix 1**) summarised ECan's declarations and provided initial advice and recommendations <sup>9(2)(g)(i)</sup>

9(2)(g)(i)

<sup>9(2)(g)(i)</sup> We have since received applications for further declarations and now recommend that you join these proceedings, as further explained below.

2. On 15 March 2023, North Canterbury Fish and Game Council (F&G) and the Environmental Defence Society Incorporated (EDS) jointly filed seeking nine alternative declarations (refer **Appendix 2 and 3**). Most of the alternative declarations relate to ECan's monitoring and enforcement functions under the Resource Management Act 1991 (RMA). However, one declaration also specifically relates to your powers and duties as Minister for the Environment (the Minister) under the RMA, in relation to the Rakaia WCO.
3. In summary, F&G and EDS seek declarations stating that ECan has a wide range of functions under the RMA that require monitoring and enforcement of the Rakaia WCO, whilst the Minister's functions are limited to monitoring the effect and implementation of the WCO and do not include enforcement powers.
4. The New Zealand Federation for Freshwater Anglers Incorporated (NZFFA) also filed seeking three further declarations, which focus on ECan's consenting functions in relation to the Rakaia WCO.

5. <sup>9(2)(g)(i)</sup>

6. <sup>9(2)(g)(i)</sup>

7. <sup>9(2)(g)(i)</sup>

9(2)(g)(i)

## Recommendations

We recommend that you:

- a. **Agree** you will join the declaratory proceedings relating to the monitoring and enforcement of the Rakaia WCO, and notably your powers and duties under the RMA.

Yes/No

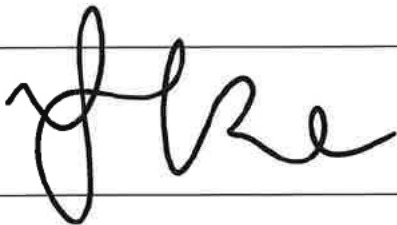
- b. **Agree** officials will work with Crown Law to determine the extent of evidence required in these proceedings.


Yes/No

- c. **Note** officials will work with Crown Law to provide you with regular updates on the progress of the litigation proceedings.

Yes/No

## Signature

Sara Clarke Director - Implementation 23 March 2023	
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Hon David PARKER, Minister for the Environment	
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[Date field]	27/3/23
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*I would like to meet with the MEE & Crown Law counsel to discuss (not as a prerequisite to joining)*

## Purpose

1. The purpose of this briefing is to provide advice further to BRF-2808 (**Appendix 1**) following receipt of alternative declarations filed by other parties, on the merits of joining declaratory proceedings relating to ECan's role and responsibility in monitoring and enforcement of the National Water Conservation (Rakaia River) Order 1988 (Rakaia WCO). Officials have received applications for further declarations and now recommend that you join these proceedings, as further explained below.

## Context

2. The Rakaia WCO was approved in 1988. The WCO protects outstanding braided river characteristics, wildlife habitats, fisheries, recreational, angling and jet boating features of the Rakaia River, as well as the quality and rate of flow of certain waters to be retained in their natural state, and others to be retained in their existing state (as at 1988).
3. The implementation of the Rakaia WCO has been previously brought to the attention of the Ministry for the Environment (the Ministry) by the NZFFA who were concerned that the Rakaia WCO was not effectively protecting the Rakaia River, and that there was a lack of oversight of water take consents by ECan.
4. As outlined in previous briefing BRF-2808, the Rakaia WCO was amended in 2013 under the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010<sup>1</sup> (ECan Act) to provide for the use of water for irrigation purposes, inserted as new clause 9A of the WCO. The new clause allows water to be stored and released for both hydro-electricity generation and irrigation, termed 'stored water'.
5. In the years following the 2013 WCO amendments, it became apparent to Manawa Energy that much more water was available to be stored for irrigation than allowed by constraints of the accounting system within the WCO and consent conditions, and instigated the 'warehouse stored water' concept. It is the monitoring and enforcement of the storage and release of water by Manawa Energy from Lake Coleridge, including the 'warehouse stored water' approach, that has led to disagreement and these proceedings by ECan.

6. <sup>9(2)(h)</sup>


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<sup>1</sup> Section 58, Applications to revoke or vary WCOs, Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

### *Alternative declarations*

7. On 15 March 2023, F&G and EDS jointly filed an application with the Environment Court for alternative declarations (**Appendix 2**). The majority of the further declarations relate to ECan's monitoring and enforcement functions under the RMA, however one declaration sought directly relates to your powers and duties, as Minister for the Environment, under the RMA in relation to the Rakaia WCO.

8. <sup>9(2)(h)</sup>



9. Please refer to **Appendices 2 and 3** for the full scope of the F&G and EDS alternative declarations. To summarise, F&G and EDS consider that:

- ECan has a duty to monitor and enforce the observance of, and compliance with, the Rakaia WCO, including issuing enforcement orders in the circumstance of a breach of the provisions of the Rakaia WCO.
- The Minister for the Environment has a duty to monitor the effect and implementation of WCOs but is not empowered to enforce the observance of, or compliance with, WCOs.
- The warehouse stored water approach was not a concept contemplated during the 2013 amendments and therefore cannot be interpreted as 'stored water' as per clause 2 of the Rakaia WCO, and is therefore inconsistent with the Rakaia WCO.

10. The NZFFA is also seeking 3 additional declarations (refer **Appendix 3**). The alternative declarations sought by NZFFA focus on ECan's consenting functions in relation to the Rakaia WCO and are therefore not particularly relevant to the Ministry. This may instead be a wider implementation matter that may need to be considered once the declarations are resolved. We are currently considering what position to adopt in relation to those declarations.

## Analysis and advice

11. The alternative declarations sought by F&G and EDS focus on three key matters:
- What are the Minister's powers and duties under the RMA in relation to the monitoring and enforcement of WCOs?
  - Is ECan responsible for the monitoring and enforcement of the Rakaia WCO?
  - Whether Manawa Energy's stored water approach is inconsistent with the purpose of the Rakaia WCO?

### *Minister's powers and duties*

12. Alternative declaration 8 sought by F&G and EDS directly relates to your role as Minister for the Environment under the RMA in relation to the Rakaia WCO (and WCOs more generally). F&G and EDS correctly identify that your function is limited to monitoring the effect and implementation of RMA, including WCOs<sup>2</sup>. Furthermore, F&G and EDS state that you are not empowered to enforce the observance of, or compliance with, WCOs.
13. In the case of non-performance of a local authority's functions, powers and duties (in this case ensuring consistency and compliance with the Rakaia WCO), you have powers to investigate and make recommendation if necessary<sup>3</sup>. F&G and EDS also correctly identify that the Minister has powers, if necessary, to appoint other persons to exercise or perform all or any of the relevant functions, powers, or duties in place of the local authority, or direct a regional council to prepare a change or variation to its regional plan<sup>4</sup>.

14. <sup>9(2)(g)(i)</sup>

15.

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<sup>2</sup> Section 24(f).

<sup>3</sup> Section 24A.

<sup>4</sup> Sections 25 and 25A.

*Is ECan responsible for the monitoring and enforcement of the Rakaia WCO?*

16. The proposed declarations from F&G and EDS outline ECan's various functions under the RMA relating to their monitoring and enforcement responsibilities. They are summarised as:

- *The control of taking, use, damming, and diversion of water, and the control of the quantity, level and flow of water in any water body, for the purposes of giving effect to and/or ensuring compliance with the Rakaia WCO.*
- *Duty to enforce the observance of, and compliance with, the provisions of the RWCO arising from the status of WCOs as secondary legislation under the RMA, including under section 314.*
- *Monitoring duties under section 35 of the RMA include directly monitoring compliance with, gathering information on, and keeping records under, the RWCO (including clause 9A).*
- *The duty to enforce observance of the Canterbury Land and Water Plan pursuant to section 84(1) includes a duty to enforce the observance of the Rakaia WCO.*

17. <sup>9(2)(g)(i)</sup>

*Is Manawa Energy's warehouse stored water approach consistent with the purpose of the Rakaia WCO?*

18. F&B and EDS state that Manawa Energy's 'whole lake storage' concept (previously referred to as 'warehouse stored water') which was implemented in 2015, enables greater manipulation of natural flow rates than would otherwise be possible, and has the potential to impact the outstanding characteristics and features of the Rakaia River. Furthermore, they declare that the effects of the 'whole lake storage' approach was not contemplated in 2013 as the decision to approve the Lake Coleridge Project was made on the basis of evidence at the time, and therefore this newer approach cannot be interpreted as 'stored water' as defined in clause 2 of the Rakaia WCO.

19. We have sought preliminary technical advice from Ministry scientists, who believe the 'whole lake storage' approach may be inconsistent with the Rakaia WCO as it could have the effect of changing the lake's normal operating range and suggest a more detailed assessment of this concept would be needed to establish a better view on this matter.

20. As part of the proceedings, officials will investigate further to determine if it is a matter of concern and whether it is a matter that the Ministry should provide evidence on.

*NZFFA alternative declarations*

21. The alternative declarations sought by NZFFA relate to ECan's consenting functions under the RMA, and are therefore not of particular relevance to the Ministry. We are currently considering what position to adopt in relation to those declarations.
22. It is possible that further investigations into whether ECan is doing a sufficient job in relation to its responsibilities for planning and consenting functions may be necessary, once the declarations are resolved. If ECan is not performing well in this area, the Minister may consider using the powers under s24/25 of the RMA.

9(2)(g)(i)

23.

9(2)(g)(i)

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26.

*Natural and Built Environment Bill*

27. Previous briefing BRF-2808 advised that officials are currently preparing advice for the Select Committee and is looking to clarify the monitoring responsibility of Regional Councils for WCOs through the draft Departmental Report, and that current thinking was to recommend clarification that local authorities with jurisdiction in a region or district affected by a WCO are responsible for the monitoring and enforcement of those WCO provisions.
28. Given proceedings are ongoing and there is uncertainty around whether clarification is needed or not on this matter, updated thinking since BRF-2808 is no recommendation to amend or clarify monitoring and enforcement responsibilities. Instead, direction as to the

monitoring and enforcement of WCO's could be included in the National Planning Framework.

29. Furthermore, Clause 398 now requires a plan to be amended to incorporate changes in relation to a WCO. Once changes are incorporated into the plan then the relevant monitoring and enforcement requirements of a local authority with respect to the relevant plan will apply. Officials now consider, given the new mechanism in the NBE for WCO's to be inserted into plans without a hearing process, that this ambiguity is unlikely to arise under the new system.

## Other considerations

### *Consultation and collaboration*

30. We have been working with Crown Law in relation to these proceedings. If you agree to join the proceedings, we would file a notice of intention to be heard by Wednesday 29 March 2023. We would then work with Crown Law and the other parties in relation to timetabling in respect of any evidence that needs to be filed.

### *Legal issues*

31. <sup>9(2)(h)</sup>

### *Financial, regulatory and legislative implications*

32. There would be Crown Law costs if you choose to join the ECan proceedings.

## Next steps

33. If you agree to join these proceedings, we will instruct Crown Law to file the appropriate documents in the Environment Court by 29 March. We will then work with Crown Law and the other parties in relation to timetabling in respect of any evidence that needs to be filed, and to provide you any significant updates on the proceedings.
34. If you choose not to join these proceedings, we will advise Crown Law that you will not be participating.

## Appendix 1: BRF-2808

## **Appendix 2: F&G and EDS Application for Alternative Declarations**

## Appendix 3: Summary of Declarations

Party seeking declaration	Para	Declaration sought
ECAN	1	<p>Canterbury Regional Council has no statutory duty to enforce the provisions of the National Water Conservation (Rakaia River) Order 1988 (WCO) beyond observance of the following requirements:</p> <p>(a) its regional plan(s) must not be inconsistent with the WCO pursuant to section 67(4)(a) of the Resource Management Act 1991;</p> <p>(b) as a consent authority, it shall not grant a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the WCO pursuant to section 217(2)(a) of the Resource Management Act 1991;</p> <p>(c) as consent authority it shall not grant a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the WCO can remain without change or variation pursuant to section 217(2)(b) of the Resource Management Act 1991; and</p> <p>(d) as consent authority it shall, in granting any water permit, coastal permit, or discharge permit to discharge water or contaminants into water, impose such conditions as are necessary to ensure that the provisions of the WCO are maintained pursuant to section 217(2)(c) of the Resource Management Act 1991.</p>
ECAN	2	<p>Canterbury Regional Council's duty to enforce the observance of the Canterbury Land and Water Regional Plan pursuant to section 84(1) of the Resource Management Act 1991 does not extend to a duty to enforce the observance of the WCO.</p>
ECAN	3	<p>Canterbury Regional Council's monitoring functions under section 35 of the Resource Management Act 1991 do not extend to directly monitoring compliance with, gathering information on, and keeping records under the WCO, beyond</p>

		the Canterbury Regional Council's obligations with respect to monitoring the efficiency and effectiveness of policies, rules, or other methods in its policy statement or plan, under section 35(2)(b) and monitoring the exercise of the resource consents that have effect in its region under section 35(2)(d).
ECAN	4	<p>The WCO:</p> <p>(a) Does not prescribe any maximum volume of water that can be classified as Stored Water and stored within Lake Coleridge;</p> <p>(b) Does not require water classified as Stored Water on its entry to Lake Coleridge to be stored within Lake Coleridge in a manner that is physically separate from water that is not classified as Stored Water.</p> <p>(c) Enables Stored Water to be stored by the operator of the Lake Coleridge Project below the extreme minimum operating level of 505.35 metres as specified in Resource Consent CRC173092.</p>
<b>Party seeking declaration</b>	<b>Para</b>	<b>Declaration sought</b>
F&G and EDS	1	Any reference to the "Act" within the Resource Management Act 1991 includes secondary legislation made under the Act, and ergo, includes the RWCO.
F&G and EDS	2	<p>Canterbury Regional Council's functions include 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—</p> <p>(a) the setting of any maximum or minimum levels or flows of water;</p> <p>(b) the control of the range, or rate of change, of levels or flows of water; and</p> <p>(c) the control of the taking or use of geothermal energy</p> <p>for the purposes of giving effect to and / or ensuring compliance with, the RWCO.</p>
F&G and EDS	3	Canterbury Regional Council has a statutory duty to enforce the observance of, and compliance with, the provisions of the RWCO arising from the status of water conservation

		orders as secondary legislation under the Resource Management Act 1991.
F&G and EDS	4	Canterbury Regional Council's statutory functions and powers include enforcing the observance of, and compliance with, the provisions of the RWCO") arising from the status of water conservation orders as secondary legislation under the Resource Management Act 1991.
F&G and EDS	5	<p>Canterbury Regional Council's monitoring duties under section 35 of the Resource Management Act 1991 include directly monitoring compliance with, gathering information on, and keeping records under, the RWCO including in relation to:</p> <p>(a) The state of the outstanding characteristics and features recognised and protected by the RWCO;</p> <p>(b) How much "stored water" is flowing into Lake Coleridge and being stored, ordered and released to irrigators in accordance with clause 9A(3) of the RWCO.</p> <p>(c) The cumulative effect of all permitted activities and activities authorised by resource consents issued for abstraction or diversion of water from the Rakaia River which may have an effect on the outstanding characteristics and features recognised and protected by the RWCO.</p> <p>(d) The minimum gorge flow vis a vis the flow in the river reduced by abstraction or diversion within the Rakaia River between the Rakaia Gorge Bridge and the sea, and in accordance with clause 7 of the RWCO.</p>
F&G and EDS	6	Canterbury Regional Council's duty to enforce the observance of the Canterbury Land and Water Regional Plan pursuant to section 84(1) of the Resource Management Act 1991 includes a duty to enforce the observance of the RWCO.
F&G and EDS	7	Canterbury Regional Council has a duty to enforce compliance with the RWCO, including under section 314 of the Resource Management Act 1991.
F&G and EDS	8	<p>The Minister for the Environment has functions and / or powers under sections 24, 24A, 25 and 25A of the Act including:</p> <p>(a) Monitoring the effect and implementation of the RWCO, including Canterbury Regional Council's exercise or performance of its functions, powers and duties under the</p>

		<p>Act (and the RWCO specifically) as referenced in Declarations 2-7 above;</p> <p>(b) Investigating any failure or omission by Canterbury Regional Council to exercise or perform any of its functions, powers, or duties under the Act (and including under the RWCO specifically) as referenced in Declarations 2-7 above;</p> <p>(c) Making recommendations to Canterbury Regional Council in respect of any failure or omission to exercise or perform those functions, powers, or duties as expressed in Declarations 2-7 above;</p> <p>(d) Taking any action under section 25 or section 25A, if Canterbury Regional Council's failure or omission to act on a recommendation gives the Minister grounds to take action under one or both of those sections; and</p> <p>(e) Subject to sections 25(2) – (4), making any appointment under section 25(1) where Canterbury Regional Council is not exercising or performing any of its functions, powers, or duties as expressed in Declarations 1-7 above.</p>
F&G and EDS	9	<p>Stored Water as defined in clause 2 of the RWCO cannot be interpreted in such a way as to provide for:</p> <p>(a) Water to be stored by the operator of the Lake Coleridge Project below the extreme minimum operating level of 505.35 metres as specified in Resource Consent CRC173/092; and / or</p> <p>(b) Using the entire lake as storage capacity “whole lake storage” being a method of accounting for waters beyond the physical capacity in the lake to store water within the lake’s normal operating range;</p> <p>Such interpretations being inconsistent with the purpose of the RWCO, including the maintenance and protection of recognised outstanding characteristics and features, and the decision to amend the RWCO in 2013.</p>

Party seeking declaration	Para	Declaration sought
NZFFA	1	<p>In respect of clauses 4(2) and 5(2) and 6(2) of the National Water Conservation (Rakaia River) Order 1988 (WCO):</p> <p>(a) ECan has a discretion as consent authority as to whether or not to grant or renew a resource consent in respect of the relevant natural waters referred to in each of clauses 4(1) and 5(1) and 6(1) of the WCO (Replacement Consent), provided that:</p> <ul style="list-style-type: none"> <li>(i) in the case of a grant, the purpose is to replace a resource consent in force on the commencement of this order; or</li> <li>(ii) (ii) in the case of a renewal, the purpose is to renew a resource consent in force on the commencement of this order— and the new resource consent or renewed resource consent is made subject to similar terms and conditions to which the former resource consent was subject</li> </ul>
NZFFA	2	<p>In exercising that discretion, before granting any Replacement Consent, ECan must be satisfied that the consent will not, in itself or in combination with other consents, breach any of the environmental bottom lines set in each of clauses 4(1) and 5(1) and 6(1) of WCO as relevant (environmental bottom lines).</p>
NZFFA	3	<p>In order to be so satisfied, the ECan must have sufficient information before it as to the state of the relevant environment and the effects of granting any Replacement Consent, in itself or in combination with other consents, provided either by the applicant or through ECan's own monitoring.</p>