

**BEFORE THE INDEPENDENT HEARINGS PANELS APPOINTED TO HEAR AND MAKE
RECOMMENDATIONS ON SUBMISSIONS AND FURTHER SUBMISSIONS ON PLAN CHANGE 1 TO THE
NATURAL RESOURCES PLAN**

UNDER Schedule 1 of the Resource Management Act
1991 (the Act)

IN THE MATTER OF Hearing Submissions and Further
Submissions on Plan Change 1 to the Natural
Resource Plan

REPORTING OFFICER RIGHT OF REPLY OF SAMUEL O'BRIEN

ON BEHALF OF WELLINGTON REGIONAL COUNCIL

HEARING STREAM 1 – Beds of Lakes and Rivers

20 December 2024

TABLE OF CONTENTS

RIGHT OF REPLY AUTHOR	3
SCOPE OF REPLY.....	3
RESPONSE TO MATTERS RAISED IN MINUTE 3 – Beds of Lakes and Rivers - General	3
RESPONSE TO MATTERS RAISED IN MINUTE 3 – Beds of Lakes and Rivers – Rule R128	4
RESPONSE TO MATTERS RAISED IN MINUTE 3 – Beds of Lakes and Rivers – Rule R151A.....	6
APPENDIX 1 – Response to Request for Information in Minute 3 Paragraph 16 and 17	10
INTRODUCTION.....	10
Scenarios Raised in Hearing Stream 1	10
Consenting Examples.....	11
Plan Consistency and Consent Pathway	16
Determining which existing resource consents will be captured by Rule R151A	17

RIGHT OF REPLY AUTHOR

- 1 My full name is Samuel Nicholas O'Brien. I am a Policy Advisor at Greater Wellington Regional Council.
- 2 I prepared the Beds of Lakes and Rivers, Air Quality, and Threatened Species Objectives and Schedules section 42A reports for hearing stream 1. My qualifications and experience are set out in Section 1.3 of my Beds of Lakes and Rivers Section 42A Report.
- 3 I confirm that I am continuing to abide by the Code of Conduct for Expert Witnesses set out in the Environment Court's Practice Note 2023, as applicable to this hearing.

SCOPE OF REPLY

- 3.1 This Reply follows the Hearing Stream 1 hearing, which was held from 4-6 November 2024. It addresses the specific questions raised in Minute 3, that the Panels have asked me to address in my written Right of Reply for Hearing Stream 1. My Reply covers my responses to the questions raised in Minute 3 as relevant to the Beds of Lakes and Rivers topic. Specifically, the matters I respond to in this statement are those raised in paragraphs 10 to 11 of Minute, 3 as well as providing a response to the information received from the Environmental Defence Society in respect of Rule R128 and other submitters in respect of Rule R151A.

RESPONSE TO MATTERS RAISED IN MINUTE 3 – Beds of Lakes and Rivers - General

- 4 In Minute 3, at paragraph 10, the Panel requests confirmation of which provisions in the Beds of Lakes and River topic are freshwater provisions. I can confirm that in my opinion, all Beds of Lakes and Rivers provisions relate to Freshwater and therefore are Freshwater Provisions that should be allocated to the Freshwater Planning Process.
- 5 I note that the Freshwater icon was omitted from the *Beds of Lakes and Rivers General Conditions and Rule R145: All other uses of river and lakes beds – discretionary activity* in the notified plan change document. I consider that this was an error. Further, I consider that this error was repeated with the provisions mistakenly allocated to the Schedule 1 process in the Beds of Lakes and Rivers Appendix 3 - Assessment of the categorisation of provisions in the Freshwater Planning Instrument component of PC1, and page 31 and 32 of the s32 Report.
- 6 I recommend that these provisions be re-classified as freshwater provisions, with the Freshwater icon being added to these provisions.
- 7 At paragraph 11 the Panels requested that the Council confirm how sites of significance that have not been scheduled by mana whenua be considered by permitted activities. The Panels have asked that I

refer to submission S85.3 from Rangitāne o Wairarapa in my response. Sites with significant mana whenua values are included in the NRP in Schedule C. These Schedule C sites do not represent the entirety of significant sites for mana whenua.

8 I have reconsidered the relief sought by Rangitāne o Wairarapa regarding an additional mechanism to consult with mana whenua. I consider that there are no direct mechanisms that can be included in the plan to provide additional protection for unscheduled sites. Rules need to be clear as to the activity status of an activity, and permitted activity rules that make a requirement for a consent dependent on affected or third parties do not provide this clarity. However, consistent with NRP Policy P19, all resource consent applications are sent to our mana whenua partners. This provides an opportunity for a mana whenua partner to identify if an activity may have adverse effects on an unscheduled site of significance.

9 For permitted activities that are compliant with all conditions of the relevant rule, there is no resource consent application required, and therefore no opportunity to consider if the activity may impact an unscheduled site of significance for mana whenua.

RESPONSE TO MATTERS RAISED IN MINUTE 3 – Beds of Lakes and Rivers – Rule R128

10 At paragraph 14 of Minute 3, the Panels requested that the Environmental Defence Society provide the specific relief it was seeking in respect of amendments to Rule R128. In response to a request from the Panels in Minute 3, Environmental Defence Society provided specific drafting amendments sought to Rule R128. The amendments sought are outlined below:

R128: New structures – permitted activity

..is a permitted activity, provided the following conditions are met:

(f)...

(x) the activity does not occur within an area identified in Schedule A (outstanding water bodies) or Schedule F (ecosystems and habitats with significant indigenous biodiversity)

11 The effect of this proposed change is that new structures previously permitted by this rule, inside a Schedule A or Schedule F site would not be permitted under this rule, and would instead be a discretionary activity under *Rule R145: All other uses of river and lake beds*.

12 I do not consider that excluding Schedule A sites from the *Rule R128: New structures – permitted activity* is the most efficient or effective option. Rule R128 has a range of conditions to ensure that the effects of new structures are acceptable as a permitted activity. Further, the general conditions provide additional protections for beds of lakes and rivers. Structures with the potential for greater adverse

effects such as *Rule R127: Establishing a dam – permitted activity* exclude Schedule A (outstanding water bodies). However, other permitted structures with minor adverse effects do not exclude Schedule A sites such as *Rule R126: Culverts and ancillary culvert structures – permitted activity*. In my view Rule R128 should take a consistent approach with other permitted activity structure rules established in the Natural Resources Plan.

13 Through Plan Change 1 the scope of structures permitted under Rule R128 is proposed to be further restricted to cables, water measuring devices and similar small structures. Therefore, I have increased confidence that the rule will appropriately manage the adverse effects on beds of lakes and rivers. In light of this, I do not consider it necessary to exclude Schedules A sites.

14 I also do not consider Schedule F sites (ecosystems and habitats with significant indigenous biodiversity) should be excluded from Rule R128. Schedule F is comprised of a range of different schedules for different lacustrine and riverine habitats, including rivers, streams and lakes with high macroinvertebrate community health, habitats for indigenous fish species and river birds, and inanga spawning habitat. These areas cover many of the Wellington region rivers and streams in particular, and some lakes.

15 Rule R128 already excludes particularly vulnerable inanga spawning habitats identified in Scheduled F1 (rivers/lakes).

(h) the activity does not occur in or on any part of the river bed identified as inanga spawning habitat in Schedule F1 (rivers/lakes), and

16 In addition, the Beds of Lakes and Rivers general conditions provide protections for river and lake birds identified Schedules F2a or Schedule F2b. This condition has also been improved through Plan Change 1 to achieve more comprehensive protections for the scheduled bird species.

(n) in any part of a river or lake bed identified in Schedule F2a (birds-rivers) or Schedule F2b (birds-lakes), no structure shall be constructed, and no disturbance shall take place, ~~during the critical period~~ if the named birds identified in Schedule F2a (birds-rivers) or Schedule F2b (birds-lakes) if the named birds are identified as nesting, roosting ~~and/or~~ foraging at the work site, and

17 The small structures proposed to be permitted by R128 are not considered to adversely affect MCI or habitats of indigenous fish species when undertaken in accordance with the conditions of R128. I do not consider excluding the extensive range of sites in Schedule F is the most efficient or effective approach.

18 For the reasons set out above, I do not recommend any change to Rule R128 as notified in PC1.

RESPONSE TO MATTERS RAISED IN MINUTE 3 – Beds of Lakes and Rivers – Rule R151A

19 As instructed by the Panels in paragraphs 16 and 17 of Minute 3, further analysis on the application and circumstances in which Rule R151A would apply was provided. I prepared and provided a statement of evidence, that was uploaded on the Hearings webpage. A copy of that evidence is provided in Appendix 1 to this statement for ease of reference. Submitters were directed to provide any further comments on Rule R151A by 12 December 2024. Further comments have been received from Ms Ami Coughlan for Wellington Fish and Game Regional Council (Fish & Game)(S188) and Thomas Kay for Royal Forest and Bird Protection Society NZ (Forest & Bird) (S261). I will respond to these comments in this section.

Fish & Game

20 In the comments received from Fish & Game, Ms Coughlan disputes the statement made by the Council that there is no discharge element to any part of the proposed diversion in Rule 151A. Ms Coughlan states that the *“literature would disagree with the premise stated here: it has been well documented over decades that channel straightening, in and of itself, has negative impacts on water quality and flow, instream habitat, and aquatic flora and fauna (Horsak et al., 2009, Brierley et al., 2022)”*.

21 While I agree that channel straightening can have negative impacts on stream elements, I do not consider that this consequently means there is any discharge element associated with the activity.

22 Ms Coughlan also states that *“Fish and Game’s request to not allow stream diversions to necessarily be permitted activities based on the norms of today’s engineering and urban design; allowing these structures “locked in” is likely to increase the difficulty allowing for better design and engineering in the future, and perpetuates two potentially wrong and harmful beliefs: firstly that channelised and straightened streams are identical to their original state except for their new positioning, and secondly that where waterways have adapted to a degraded state, that this should now be considered their normal or baseline state”*.

23 In response to the concern raised that proposed Rule R151A may allow structures to be ‘locked in’, I reiterate that the rule excludes diversions associated with structures. As such, there will be no ‘locked in’ structures as a result of this proposed rule. The rule is intended to apply to stream alignments in open channels and diversion associated with reclamation, where new stream length is created.

24 With respect to the broader concern around the negative impacts of channelised and straightened streams I consider that this assessment is made during the original resource consent when the works to change the stream flow path are proposed. At the time of this original assessment, the effects of this activity would have been mitigated or offset and determined to be no more than minor so that consent

could be granted. This rule is to provide a permitted activity for the diversion to remain in place, not for the establishment of the diversion itself.

25 Ms Coughlan requests discretionary activity status for proposed Rule R151A to allow for impact analysis to occur. As outlined in the further information provided in response to Minute 3 (and repeated in Appendix 1) the effects in a resource consent assessment as a discretionary activity would be difficult to ascertain. I expand on this issue further in response to the evidence of Forest & Bird.

26 Finally, Ms Coughlan disagrees stating that *“that there is enough information on the nature of the activity proposed by R151A to allow for permitted activity status without analysis or listing of consents required”*. To provide clarification, as summarised in paragraph 21 of the further evidence, the total number of diversion consents in the consents database is significant. Most of these are temporary diversions during stream works (to allow works to be done ‘in the dry’) or are associated with the placement of a structure, such as a culvert or bridge. The parameters to determine which of the diversion consents would be captured under proposed Rule R151A is not recorded in the consents database. Therefore, every diversion consent would have to be individually assessed to determine whether it meets the requirements of the rule.

27 Regardless, I do not consider reviewing every resource consent is necessary to understand the nature of the activities provided for under Rule R151A. Whether an activity should be permitted or require resource consent should be based on the potential effects of the activity, not on the number of times that permitted activity rule may be relied upon. In the further information provided in response to Minute 3 I have provided an example of the types of resource consents that would be captured by Rule R151A. My conclusion is that the effects of continuing existing diversions are able to be appropriately mitigated through the proposed conditions of Rule R151A.

Forest and Bird

28 In the comments provided by Mr Kay he states at paragraph 3 *“Forest & Bird consider that the information provided is not sufficient to justify giving ongoing diversions a permitted activity status. In light of the uncertainty in information and the extent of adverse effects, a cautious approach would be to assign higher activity status.”*

29 As stated above, the uncertainty only exists in identifying the number of resource consents captured by the proposed Rule R151A. The adverse effects of the activity are understood and in my view are likely to be *de minimus* as outlined in paragraph 14 of Appendix 1. This is regardless of the number of permitted diversions.

30 I agree with the view of Mr Kay at paragraph 4 that “*stream diversions and engineering still have impacts on ecosystem beyond those that might be observable to most people*” and that the level of remediation for streams or rivers that have been diverted may vary.

31 As highlighted by Mr Kay, at paragraph 5 many of the Highly Modified Streams identified in Figure 2 of Forest and Bird’s comments are likely to have been modified prior to the RMA and therefore are not relevant to Rule R151A. He goes on to state at paragraph 7 that “*this is especially the case when associated with water takes*”. I can confirm that there is no take aspect of proposed Rule R151A. With respect to the case law referenced by Mr Kay, these decisions relate to water allocation water permits and do not appear to be relevant to Rule R151A.

32 Forest & Bird have proposed matters of discretion in the event that the Panel reclassifies Rule R151A as a restricted discretionary activity. I have assessed how the matters of discretion proposed by Forest & Bird would be used in practice. As there is no discharge or take component that removes water from the stream, in my view, the following proposed matter of discretion is not relevant:

(a) *the volume and rate of water taken, used, diverted or discharged and the timing of any take, diversion, or discharge*

33 Further, there would be no effect on river flows or wetland and lake water levels as the volume of water in the stream remains the same. I consider that any adverse effects of retaining the stream in the established location are likely minor relative to the stream being disturbed (and any associated reclamation) to return it to the original site.

34 Overall, I consider that it is not efficient or effective to require consents for this activity, given that the risk of environmental harm as noted above is low. The effects of the ongoing diversion have positive effects in terms of allowing the use of the land for purposes that would otherwise not be enabled such as housing developments or to remedy natural scour or erosion. As such, I consider the diversion of water should be enabled to remain without requiring a further consent process provided the conditions of R151A are able to be met.

35 Mr Kay also raises concerns that water races may be captured Rule R151A. I can confirm that water races are not captured by proposed Rule R151A. Water races are not considered streams and therefore not managed by diversion rules under the NRP.

36 For the reason set out in this evidence, and in Appendix 1 I do not recommend any changes to Rule R151A.

Date: 20 December 2024

SAMUEL O’BRIEN

**POLICY ADVISOR, GREATER WELLINGTON REGIONAL
COUNCIL**

APPENDIX 1 – Response to Request for Information in Minute 3 Paragraph 16 and 17

INTRODUCTION

1 My full name is Samuel Nicholas O’Brien. I am a Policy Advisor at Greater Wellington Regional Council. I have prepared this evidence response to a request for information contained in Minute 3 paragraphs 16 and 17.

“16. We ask that the Council:

a. provide more analysis of the circumstances in which the proposed permitted activity rule would apply, and the typical circumstances in which the diversions that would be captured by the rule are undertaken.

b. provide a summary of the known existing permanent diversions, lawfully established by way of resource consent and not associated with existing structures, that could be subject to this rule;

c. an assessment of the nature and scale of environmental effects of the diversions; and

d. further consideration of whether the proposed PA status is appropriate.

17. We note that the diversion of water also includes the subsequent discharge of water back into a waterway. We request consideration of how ss105 and 107 of the RMA can be given effect to under R151A.”

2 My qualifications and experience are set out in Section 1.3 of my Air Quality Section 42A Report.

3 I repeat the confirmation given in that report that I have read and agree to comply with the Code of Conduct for Expert Witnesses.

Scenarios Raised in Hearing Stream 1

4 As clarified through rebuttal evidence and in Hearing Stream 1, rule R151A applies only to permanent existing diversions not associated with structures.

5 Concern was expressed in the hearing that rule R151A may conflict with RPS Change 1 direction seeking the daylighting of rivers, where practicable. I can clarify that given Rule R151A only applies to diversions not associated with structures, the rule is not relevant to this direction in the RPS as the diversion is already within an open channel.

6 There was also concern raised about whether water races diversions would continue to be permitted. Water races typically require an intake structure and would therefore not be captured by new Rule R151A. Further, there is a take aspect to these water permits which also requires regulating.

7 In relation to clause (d) of paragraph 17 in Minute 3, there is no discharge element to any part of proposed diversion Rule R151A. The water in the river upstream of the diversion is the same flow as downstream, the river is only changing path.

Consenting Examples

8 The most common circumstances of a permanent diversion of an open channel that would be covered by Rule R151A are outlined below.

- A minor stream realignment to move an open channel to the left or right – often this is as a result of erosion of a stream bank, and the stream remains largely in the same location.
- Diversion associated with a reclamation, where new stream length is created.

9 In both cases a resource consent is required to undertake this activity, with a water permit for diversion required under Rule R151, and the associated works to shift the channel, reclaim the channel and in some cases to create new stream length, requiring an additional land use consents.

10 Through this initial resource consent process the following assessments are typically undertaken in relation to the proposal including the diversion aspect.

- An assessment of the actual or potential effects on the environment
- Consistency with high order national direction such as the National Policy Statement for Freshwater Management 2020
- Objectives and Policies in the NRP
- Objectives and Policies in the RPS and RPS Change 1

11 An example of the diversion process associated with a reclamation and the creation of new stream length is Wai-o-hata (Duck Creek) in the suburb of Whitby. Resource consent was obtained to divert several sections of Wai-o-hata for residential development and associated infrastructure. As highlighted above this included a water permit for the diversion component and other land use consents for the reclamation works. As part of this consent the bed material from the diverted stream extent was transferred to the new channel to encourage recolonization of the new sections of stream.

12 The first reach of the Wai-o-hata diverted was shifted to provide roading access for the development. Figure 1 shows the stream prior to diversion with the relocated channel shown in Figure 2.



Figure 1: Wai-o-hata (Duck Creek) 2012



Figure 2: Wai-o-hata (Duck Creek) 2024

Figure 3 below shows the old stream channel which the road now runs over to provide access for houses within the development.



Figure 3: Wai-o-hata (Duck Creek) showing the historical stream path (Blue) and the current stream path (Red)

The following photos show the new stream extent created as a result of the diversion carried out approximately 10 years ago.



Figure 4 and 5: Wai-o-hata (Duck Creek) New Stream Extent (2024)

The second reach of the Wai-o-hata diverted was associated with reclamation for residential development.



Figure 7: Wai-o-hata (Duck Creek) 2012

Figure 8: Wai-o-hata (Duck Creek) 2024

Figure 9 below shows the old stream channel where approximately 32 private properties, reserves areas, and roads are now located.

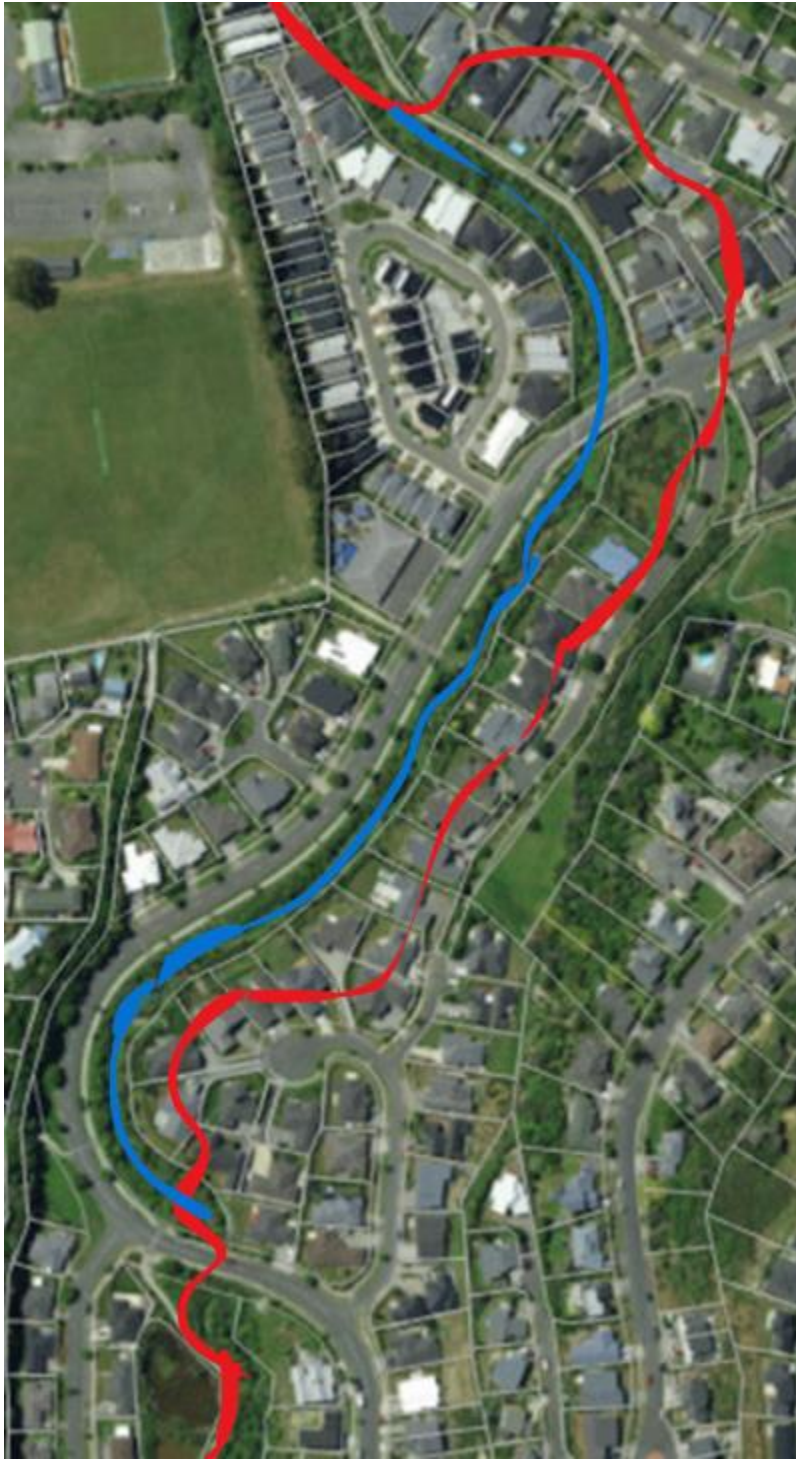


Figure 9: Wai-o-hata (Duck Creek) showing historical stream path (Red) and current stream path (Blue)

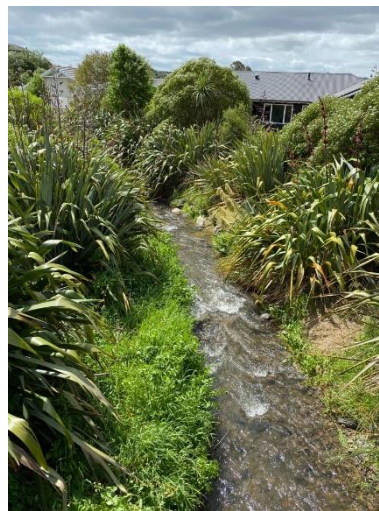


Figure 10,11,12, and 13: Wai-o-hata (Duck Creek) New Stream Extent (2024)

- 13 Water permits for the diversion aspect of a resource consent under Rule R151 generally expire after a minimum of 10 years and typically around 35 years.
- 14 Requiring a new resource consent application as a discretionary activity (as is the status quo under the Operative NRP) would require an assessment of the actual or potential effects on the environment of continuing to divert the stream. As there are no proposed works to be undertaken, any adverse effects are likely to be *de minimus* or unable to be observed.
- 15 This is the situation for the Wai-o-hata and likely for any other diversions not associated with structures. Through this reconsenting process, there would be no need to require daylighting (the channel is already open), there are no structures to be removed, and no ability to consider consent compliance issues, or effects from any earthworks (as there are none proposed). After a relatively short period of time (generally less than 10 years) the river becomes part of the environment and if the consent were declined there would likely be, in fact, significant adverse effects associated with reinstating the original course of the stream.
- 16 Also, it is often impracticable to reinstate the original course of the stream as further resource consents (water permit and land use consent) for these works as well as landowner approvals would be

required. In the case of the Wai-o-hata this would involve over 30 landowner approvals, as well as the removal of a number of houses and sections of road.

17 It could also be argued that it is ‘fanciful or unrealistic’ to assess the existing environment as if the diversion were not in place¹. Case law has confirmed that for activities that are seeking to be reconsented, the activities subject to those consents should not form part of the existing environment. However, in this situation, the channel is already constructed and does not need to be reconsented. With the diversion proposed to continue as before, it could be concluded that there are, in fact, no adverse effects as a result of the diversion, because the assessment of effects would be of the existing environment, where the diversion is already in place.

Plan Consistency and Consent Pathway

18 Rule R151A also provides plan consistency for the approach to permanent surface water diversions. Figure 14 shows the relative pathways for diversions associated with structures and those not associated with structures.

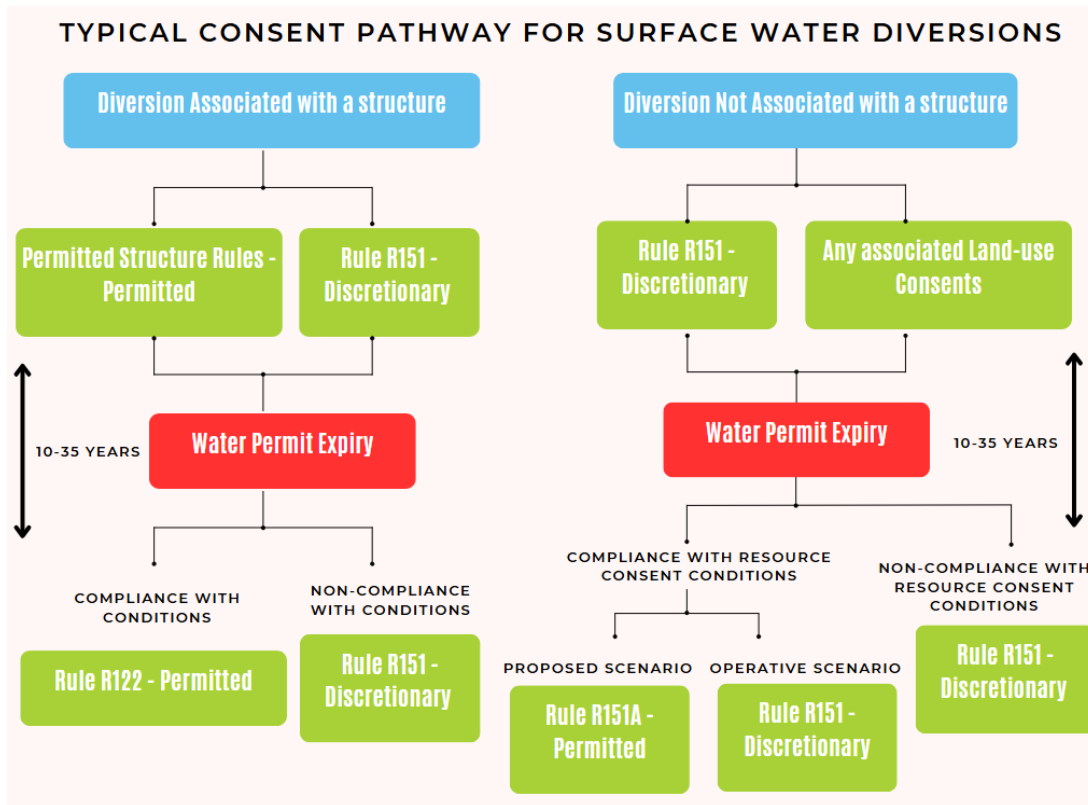


Figure 14: Typical Consent Pathway for Surface Water Diversions

¹ Port Gore Marine Farms Ltd v Marlborough District Council [2012] NZEnvC 72.

19 Currently through the Operative NRP, diversions associated with structures are typically managed by Rule R151 as a discretionary activity or through one of the individual permitted structure rules. When the water permit expires, the diversion is managed through the following permitted activity rule.

Rule R122: Maintenance, repair, replacement, upgrade or use of existing structures (excluding the Barrage Gates) – permitted activity...including any associated... (c) diversion of water...provided the following conditions are met.

20 This means that diversions associated with the use of an existing lawfully established structure do not generally require a further water permit following the expiry of the original resource consent. However, for diversions not associated with structures a similar pathway does not exist. Rule R151A seeks to address this issue by providing a permitted pathway following the expiry of the original diversion water permit.

Determining which existing resource consents will be captured by Rule R151A

- 21 In the consents database, existing water permits for permanent diversion resource consents are not easily differentiated between those associated with structures and those that are not. In addition, the database does not allow us to readily determine whether the diversion is located within a Schedule C (mana whenua) site. The total number of diversion consents is significant, and it is not feasible to undertake an assessment of every consent. The vast majority of these will be associated with a structure or be of a temporary nature while stream works are being undertaken.
- 22 The 75 consents referenced in the Section 32 Report was a very conservative estimate from the officer at the time. The likely number is significantly lower than 75. In my view there is enough information on the nature of the activity proposed by Rule R151A to provide for a permitted activity status, without an analysis of every resource consent.

