

Replacement consents required for expiring mining privileges

Water permits granted in the Otago Region under previous mining legislation, referred to as 'mining privileges' or 'deemed permits', are due to expire. If your current water take is under a deemed permit for the taking, damming or discharging of water, you will need obtain a new resource consent before the permit expires on 1 October 2021.¹

Do you have a deemed water permit?

When the Resource Management Act 1991 (RMA) was enacted, all mining privileges that had been granted under previous mining laws became 'deemed permits' under the RMA², and were treated as water permits that allowed the holder to continue to use water authorised by the mining privileges until 2021.

Deemed permits are subject to rules in the regional plan³, and this includes the ability for a regional council to restrict the amount of water that may be taken or discharged from any surface or groundwater within its region. When deemed permits are replaced by resource consents they may be subject to additional restrictions, for example current deemed permits are not subject to volume limits or residual flow requirements, but new consents are likely to be. It is important to ensure that you apply to replace your water rights well before they expire, and are adequately informed about the process.

Historically, deemed permits were issued without comprehensive knowledge of what effects abstraction

and use of water would have on a particular water body. Now there is much more data available as to what effects abstraction has, and more recently, regional councils are also required to give effect to the National Policy Statement Freshwater Management, which requires them to safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the taking, using, damming, or diverting of fresh water⁴. The combination of these aspects could result in some rights under deemed permits not being retained in replacement resource consents. Good advice and a well-prepared application and strategy is highly recommended.

Retaining rights to use water

Should you be part of a group, or reapply for a permit as an individual?

To retain rights to take and use water, you will need to apply to the ORC to replace your deemed permit. You may do this as an individual, or in a group that shares a global consent.

If you choose to reapply for your water rights as part of a global consent,⁵ you may do so by forming a Water Management Group (WVG). The benefits of being part of a WVG include shared application costs, and once the consent is in place, flexibility to manage how allocated water is managed between members in the group and sharing of monitoring costs. Regional councils are also encouraging WVG's for the replacement process so as to facilitate cooperative use and sharing of water. Within a WVG, users can either hold individual water permits within the group's legal structure, or take water under a group permit.

If you choose to reapply for your water rights as an individual, you will follow similar steps, but will have a set

¹ Section 413(3) of the RMA provides that "[e]very deemed permit resulting from a mining privilege under subsection (1)(c) or (d) shall be deemed to include a condition to the effect that it finally expires on the 30th anniversary of the date of commencement of this Act."

² Section 413(1) RMA

³ Section 414 RMA.

⁴ National Policy Statement Freshwater Management, Objective B1.

⁵ There is no limitation on minimum and maximum numbers for a group application.

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water allocation that it is less straight forward to share and ration (and receive reciprocal sharing in return).

Scheme Structure

A company structure is common for community irrigation schemes holding global consents. The company constitution creates a contract between the company the shareholder, a key provision of which is the requirement for the shareholder to enter into a water supply agreement.

The water supply agreement can set out the shareholders key rights previously set out in the individual permit/consent such as the point of extraction, abstraction rate, total volume and priority.

A key decision is whether there is a need to maintain priorities to protect historical rights or whether priorities can be and the complexity they bring can be abolished because there is sufficient reliability and goodwill in the new scheme. This is a difficult decision that will need to be addressed on a scheme by scheme basis.

With a company structure also comes the ability to have all the benefits of a company with a well understood and regulated governance structure and the ability to borrow against the company assets and grow and improve the schemes reducing average costs per shareholder. This is particularly useful with increased compliance costs and the need to improve infrastructure and reliability e.g. storage.

How do I get a replacement resource consent?

To secure your ability to take water before the deemed water permits expire, you will need to apply to ORC for resource consent. This process may be complicated, and may take a significant amount of time and resource, so we recommend that you seek advice as soon as possible. Any applications must also be made at least six months prior to the expiry of a deemed permit, otherwise the deemed permit will lapse and those rights will be lost. The

application may require a reasonable amount of information including:

- a) Consultation with any affected parties and interested groups such as Iwi via KTKI Ltd, DOC, and Fish and Game;
- b) Irrigation footprint, maps and photos;
- c) Particular land use and soil types;
- d) Climate;
- e) Proof of use (by way of at least five years of continuous reliable data).

The regional council also places importance on the efficiency of any proposed water transport, storage and application system so as to ensure that the quantity of water granted to take is no more than that required for the purpose of use. This may have the effect of requiring infrastructural upgrades to irrigation systems as part of a consent application.

In some cases, deemed permit holders may also be drawing water from water races which span over multiple properties. Rights to use such races will also expire in 2021 at the same time as deemed permits if those rights are not preserved before then. This will require the line of the race to be surveyed and registered on relevant property titles to preserve occupation of land by the race where easements do not already exist.⁶

Minimum flows and allocation

The Otago Regional Council is going through the process of setting allocation limits and minimum flows and providing more guidance on the setting of residual flows in rivers and tributaries across Otago, including the Lindis, Manuherikia, Cardrona and Arrow Rivers, the Clutha, Lowburn and Bengier Burn catchments.

⁶ Section 417 RMA.

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The minimum flow restricts when water can be taken from the catchment under low flow conditions as measured at a set point. Water permits may also impose individualised residual flows that have to be complied with at the point of take.

Depending on the location of particular deemed permits, these plan change processes may also have implications for the replacement process and future use of resource consents.

Our expertise

Anderson Lloyd advise major industry in sectors such as hydroelectricity, primary industry, mining and irrigation that are reliant on water. Our resource management team in particular has significant institutional knowledge and depth of understanding of the technical, scientific, legal and practical issues relating to the management and use of water, including the consenting process. Our commercial team can assist with agreements which govern the operation of WMGs.

Want to know more?

If you have any questions about your existing water rights, and what you need to do before 1 October 2021, please contact our specialist [Environment, planning and natural resources](#) and [Irrigation](#) teams.