



# Recommendation and decision on notification of resource consent application(s) under sections 95-95G of the Resource Management Act 1991 (RMA)

## Summary

I recommend the application is processed on a publicly notified basis. This is because:

- The potential adverse effects of the land use as a result of the variation could result in actual and potential adverse effects that are more than minor.

## The application

### Particulars

Applicant:	Southland District Council (Wilson Contractors on behalf of SDC)
Application reference:	APP-20171214-01-V2
Site address or location:	Hubbers Tributary in Oreti River Catchment Waianiwa-Oporo Road
New consent(s) for new activity(ies) (s88)	<input type="checkbox"/>
New consent(s) for existing activity(ies) (s88)	<input type="checkbox"/>
Change to conditions of existing consent(s) (s127)	<input checked="" type="checkbox"/>

### The proposal

Wilson Contractors, on behalf of SDC (the applicant) have applied to vary a condition of their consent authorising the disturbance and placement of a structure on the bed of a watercourse. Specifically, the application is to vary Condition(4)(e) of AUTH-20171214-01 which relates to the depth that the culvert is to be placed in the bed of Hubbers Tributary located at Waianiwa Oporo Road.

The applicant has proposed the following changes to the conditions:

#### Condition 4:

The Consent Holder shall ensure that:

- (a) contaminants, other than sediment, but including cement and oil are prevented from entering the waterway during the construction works;
- (b) all reasonable steps shall be taken to minimise the release of sediment to water;
- (c) the structure and approaches are constructed so that run-off from the structure is discharged to land rather than directly to the stream/river;
- (d) fish passage is not impeded as a result of the construction works;
- (e) the invert of the structure is installed 300 millimetres or one third of the culvert diameter, whichever is lesser, below the natural bed level of the stream/river, **except for the culvert on Waianiwa Oporo Road where the invert of the culvert shall be 240 millimetres above the bed level;**
- (f) all construction equipment, machinery, plant, and debris are removed from the site on completion of the works;

- (g) silt disturbance and instream works are kept to a minimum;
- (h) no washing or refuelling of equipment occurs in the stream/river; and
- (i) any stream banks disturbed or eroded during the construction works are to be restored and resown upon completion of the works.

## Background

This application is the second variation to AUTH-20171214-01, the first variation was sought on the basis that the invert of the culvert on Waianiwa Oporo Road was installed at natural bed level. Variation AUTH-20171214-01-V1 was granted on 11 June 2018. When works were signed off by engineers working on behalf of the applicant, it was identified that the culvert was installed 240mm higher than the natural bed level at the site. As a result, the applicant seeks the variation subject of this application to reflect the current situation at the site.

During the processing of this application the applicant has sought advice from two resource management consulting firms. The application was prepared by Ms Bridgett Aitkin of Bonisch Environmental. Following issue of the Request for Further Information in accordance with s92 of the Act, the applicant engaged Mr Tim Muller of Landpro Limited as their representative.

While processing this variation application, it was identified the incorrectly installed culvert could result in damming as defined in the RWP and pSWLP. The applicant has been made aware of this and is yet to apply for a resource consent to cover this aspect of the proposal.

## Activity classification

Resource consent is required under s.127 of the RMA 1991 for the variation application.

Pursuant to that section of the Act, an application to change or cancel a condition of a resource consent is to be treated as if it were an application for a **discretionary activity**.

## Public notification consideration

### 1. Is notification mandatory?

<b>1.1</b>	<b>Has the applicant requested that the application be publicly notified? (s95(3)(a))</b>	<input type="checkbox"/> Yes	Application must be publicly notified. Go to 10.2
		<input checked="" type="checkbox"/> No	Go to 1.2
<b>1.2</b>	<b>Was further information, or commissioning of a report, requested under s92?</b>	<input checked="" type="checkbox"/> Yes	Go to 1.3
		<input type="checkbox"/> No	Go to step 2.1
<b>1.3</b>	<b>If yes, was the request refused, or did the applicant fail to respond or fail to provide the information by the deadline?</b>	<input type="checkbox"/> Yes	Public notification is required by s95C. Go to 10.2
		<input checked="" type="checkbox"/> No	Go to step 2.1

### 2. Is notification precluded?

<b>2.1</b>	<b>Is each activity subject to a rule or NES that precludes public notification?</b>	<input type="checkbox"/> Yes	Rule(s): enter rule Go to 4.1
		<input checked="" type="checkbox"/> No	Go to step 2.2
<b>2.2</b>	<b>Is each activity a controlled activity?</b>	<input type="checkbox"/> Yes	Application must not be publically notified unless there are special circumstances. Go to 4.1

	<input checked="" type="checkbox"/> No	Go to 2.3
<b>2.3 Is each activity a residential activity <u>and</u> a discretionary activity or a restricted discretionary activity?</b>	<input type="checkbox"/> Yes	Application must not be publically notified unless there are special circumstances. Go to 4.1
	<input checked="" type="checkbox"/> No	Got to 3.1

### **3. Is notification required?**

<b>3.1 Are any of the activities subject to a rule or NES that requires notification?</b>	<input type="checkbox"/> Yes	Application must be publicly notified. Go to 10.2
	<input checked="" type="checkbox"/> No	Go to 3.2
<b>3.2 Will the activity have, or is it likely to have, adverse effects on the environment that are more than minor? (see Note)</b>	<input checked="" type="checkbox"/> Yes	Application must be publicly notified. Complete 3.3 and go to 10.2
	<input type="checkbox"/> No	Complete 3.3 and go to 4.1.

**Note:** In forming this opinion (a) to (e) apply:

- (a) we must disregard any effects on persons who own or occupy the land on which the activity will occur or any land adjacent to that land (section 95D(a));
- (b) we may disregard an adverse effect of the activity if a rule or NES permits an activity with that effect (subject to Policy 36 of the pSWLP) (95D(b));
- (c) in the case of a restricted discretionary activity, we must disregard any adverse effects that do not relate to the matters over which the rule or NES restricts discretion (95D(c));
- (d) we must disregard trade competition and the effects of trade competition - 95D(d); and
- (e) we must disregard any effect on a person who has given written approval - 95D(e)

### **3.3 Reasons adverse effects on the environment are less than minor / minor / more than minor**

#### ***The existing environment***

The Hubbers Tributary is classified under the RWP and pSWLP as a spring-fed waterbody. The New Zealand Fisheries database identifies the following species as being present:

- Longfin eel;
- Brown Trout;
- Common Bully
- Short fin eel;
- Common galaxias.

No data is available on macroinvertebrates at the site.

The applicant has provided some information regarding site flows. The applicant states that:

- The catchment above the culvert is approximately 17km<sup>2</sup>;
- The majority of the catchment is in the Central Plains groundwater zone that is drained by numerous streams that flow out of the area.
- The watercourse is sustained by groundwater flow but will also respond to rainfall events.
- There is no information to suggest that the stream is ephemeral but during dry periods flows will be low.
- At the time of a site visit on 26 April 2018, it had not rained for at least 24 hours and the depth of water in the culvert was 770mm. At the time the culvert was installed in mid-March 2018, the depth of water was estimated to be 300mm.

The applicant consulted with Jacob Smyth of Fish and Game while preparing the application for the first variation application (AUTH-20171214-01-V1) who states that:

*“The Oreti catchment, where Hubbers Tributary is located, is exclusively a brown trout fishery. Hubber’s Tributary upstream of the culvert is unlikely to provide significant brown trout spawning habitat or juvenile rearing habitat – mainly due to the lack of run-riffle-pool sequences and clear gravels; and is unlikely to provide habitat that supports a population of resident adult brown trout.”*

### **Adverse effects of the proposed activities on the environment**

#### ***Fish Passage and instream ecology***

The applicant states that the amendment is required as during construction works an error with level measurements was uncovered and the culvert was not installed at natural bed level. The culvert has been installed at approximately 240 millimetres above the natural bed level of Hubbers tributary.

The applicant considers fish passage will be maintained despite the incorrect installation. It is considered by the applicant that a ‘backwater effect’ would occur as a result of “water being held up further downstream”. The ‘backwater effect’ coupled with lowering of the stream bed as a result of mechanical clearing undertaken in accordance with Environment Southland’s Flood Control Management Bylaw will result in sufficient water depth in the tributary to maintain fish passage.

Advice was sought from Mr Roger Hodson (Environment Southland, Environment Scientist – Surface Water Quality) to determine the validity of the mitigation measures proposed in the application. Mr Hodson considered the information provided in the application was insufficient and the applicant was requested via s.92 of the Act to provide further information on this matter.

Further information was received from the applicant on the 28 August 2018. Following review of the further information, Mr Hodson still expressed concern with the conclusions made by the applicant. Specifically, lack of evidence provided regarding the protection of fish passage. In addition to the further information provided, the applicant also sought to include conditions requiring the collection of data on water levels within/discharging from the culvert over the summer, to confirm whether water levels remain at a level which is sufficient to provide for fish passage (response from applicant 14 November 2018). The applicant proposed to undertake this by collecting a regular photographic record and undertaking an assessment of the appropriate minimum level above which fish passage should not be inhibited. Mr Hodson considered the approach proposed would fail to provide sufficient information to determine whether the actual and potential adverse effects on fish passage are less than minor or whether fish passage will be maintained. Mr Hodson also cited concerns relating to the potential impact on instream habitat as a result of the incorrectly installed culvert which the applicant has not addressed.

The applicant provided a follow up response to concerns raised (response from applicant 29 November 2018), the applicant concludes in this response that there is no reason to expect the culvert presents an immediate threat to fish populations in the stream and further monitoring over the summer (via photographic record) is required to determine whether or not there is any significant barrier to fish passage at all. If a period of low flow occurs, resulting in a visible lip being present at the downstream edge of the culvert for a period of greater than one week, the applicant will carry out a fish survey. If a fish survey indicates the culvert is resulting in a barrier to fish passage, the applicant proposes to produce a report to recommend the appropriate fish passage options.<sup>1</sup>

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<sup>1</sup> Information provided on 29/11 suggests ramps or grinding out a shallow channel in the base of the culvert as potential mitigation options.

On the basis of the information provided thus far, it is unable to be determined, with certainty, that the actual and potential adverse effects on fish passage are less than minor. With respect to the advice provided by Mr Hodson, I consider the consent variation could result in actual and potential adverse effects on fish passage that could be more than minor.

### ***Land drainage and flood carrying capacity***

The applicant considers the culvert is large enough to not restrict flows and does not anticipate there will be any adverse effects in terms of flows through the culvert structure. In high flow scenarios (due to flooding or otherwise) the applicant considers water will still be able to pass through the culvert.

The Environment Southland Catchment Division have provided comment that the incorrect installation of the culvert, in this area, is causing a higher water level at the upstream end of the culvert which is having an effect on the drainage of local field tiles of properties immediately upstream. The Catchment Division also noted that the boulders installed upstream and downstream of the culvert capture vegetation and debris, reducing flood carrying capacity of the tributary. Environment Southland have received complaints from property owners immediately upstream of the culvert.

The applicant provided a Flooding and Drainage assessment relating to the culvert (dated 29 November 2018). This assessment concludes that the adverse effects on flooding, drainage and erosion as a result of the culvert is less than minor, however the rocks placed across the channel at each end of the culvert are capturing vegetation and debris which is resulting in a minor effect on flood carrying capacity. While removal of the boulders may be an option to remedy the actual and potential adverse effects of land drainage, it is uncertain whether removal of the boulders would actually remedy the effects on land drainage and flood carrying capacity. Additionally, the Assessment of Fish Passage (provided by the applicant on 29 November 2018) notes that the “downstream boulders help to raise the water level of the stream immediately downstream of the culvert and provide an upstream fish passage pathway.” As such, while the removal of boulders may assist in remedying the flood carrying capacity and land drainage effects, the effects on fish passage may be exacerbated.

The applicant discussed the application with four nearby property owners (two upstream and two downstream). It was noted that only the property owner immediately upstream noted concern with land drainage as a result of the incorrectly installed culvert.

On the basis of the assessment provided by the applicant and comments sought from the Catchment Division at Environment Southland, I consider there is an adverse effect occurring which may not be due the culvert itself, but the boulders installed on the upstream and downstream of the culvert. According to the information provided to date, the boulders are collecting vegetation and debris, resulting in reduced flood carrying capacity of the tributary. Given this, I consider the effects on property owners immediately upstream of the culvert are likely to be minor.

### ***Cultural Values***

Fish are of great cultural, social and economic significance to Ngai Tahu ki Murihiku. Many of the species identified by the New Zealand fisheries database as being present in Hubbers Tributary are listed as Taonga Species in Appendix M of the pSWLP. Fish passage, culverts, weirs and dams that interfere with fish passage upstream and downstream is identified as an issue in Section 3.5.20 of Te Tangi a Tauria (The Cry of the People).

Similar to the assessment of actual and potential adverse effects on fish passage, the applicant has not provided sufficient information to determine, with certainty, that the actual and potential adverse effects on cultural values will be less than minor. With respect to the advice sought from Mr Hodson, I consider

the consent variation could result in actual and potential adverse effects on fish passage that could be more than minor. As such, I do not consider the proposal is consistent with the cultural values set out in Te Tangi a Taurira (The Cry of the People).

***Adverse effects that have been disregarded***

Any effects that do not relate to the installation depth of the culvert have been disregarded.

***Planning provisions (policies and objectives) relevant to adverse effects***

I have provided a brief assessment of the most relevant objectives and policies in the section below:

Regional Water Plan

**Policy 32:** *Manage structures and bed disturbance activities in the beds of rivers and lakes, to avoid, remedy or mitigate adverse effects on:*

- (a) water quality and quantity;*
- (b) habitats, ecosystems and fish passage where this is normally expected to occur;*
- (c) indigenous biological diversity;*
- (d) historic heritage, and the spiritual and cultural values and beliefs of the tangata whenua;*
- (e) public access (except in circumstances where public health and safety are at risk) and amenity values;*
- (f) natural character and outstanding natural features;*
- (g) river morphology and dynamics, including erosion and sedimentation;*
- (h) flood risk;*
- (i) infrastructural assets;*
- (j) navigational safety.*

**Policy 36:** *Promote good environmental practice for structures and bed disturbance activities.*

Proposed Southland Water and Land Plan

**Objective 18:** *All activities operate in accordance with “good management practice” or better to optimise efficient resource use, safeguard the life supporting capacity of the region’s land and soils, and maintain or improve the quality and quantity of the region’s water resources.*

**Objective 15:** *Taonga species, as set out in Appendix M, and related habitats, are recognised and provided for.*

**Policy 3:** *To manage activities that adversely affect taonga species, identified in Appendix M.*

**Policy 28:** *Manage structures and bed disturbance activities in the beds of rivers and lakes, to avoid, remedy or mitigate adverse effects on the listed features.*

- 1. water quality and quantity;*
- 2. habitats, ecosystems and fish passage;*
- 3. indigenous biological diversity;*
- 5. the spiritual and cultural values and beliefs of the tangata whenua;*
- 6. mātaītai and taiāpure;*
- 7. public access (except in circumstances where public health and safety are at risk) and amenity values;*
- 8. natural character values and outstanding natural features;*
- 9. river morphology and dynamics, including erosion and sedimentation;*
- 10. flood risk;*

- 11. *infrastructural assets;*
- 12. *navigational safety; and*
- 13. *landscape values.*

**Policy 32:** *Protect significant indigenous vegetation and significant habitats of indigenous fauna associated with natural wetlands, lakes and rivers and their margins.*

**Conclusion: significance of adverse effects on the environment**

The above policies have been used to inform and determine the level of adverse effects associated with the proposed activity, as the direction of the policies help establish what effects are acceptable and therefore whether the adverse effects of the proposed activities are less than minor, minor or more than minor.

On the basis of the information provided by the applicant, advice provided by Mr Hodson and Environment Southland’s Catchment Division, I consider there is potential for the proposal to result in adverse effects that are more than minor on fish passage and cultural values and effects that are minor on land drainage and flood carrying capacity. In coming to conclusion on the significance of adverse effects on the environment I have had regard to s. 95D and s. 95E of the Act.

**4. Special circumstances and public notification**

<b>4.1 Do special circumstances exist in relation to the application that warrant the application being publicly notified?</b>	<input type="checkbox"/> Yes	Application must be publicly notified. Explain reasons in 4.2 and go to 10.2
	<input checked="" type="checkbox"/> No	Explain reasons in 4.2. If each activity is a controlled activity go to 10.1. Otherwise go to 5.1

**4.2 Reasons why special circumstances do or do not exist**

Should the decision maker determine that public notification under S. 95A, I do not consider there to be special circumstances as the activity is not out of the ordinary and the circumstances around the application are not unusual or exceptional (*Peninsula Watchdog Group (Inc) v Minister of Energy [1996] 2 NZLR*). The recent Urban Auckland case clearly sets out the requirements for special circumstances with regards to the decision on notification under s95A(4) of the RMA. I do not believe that the proposed activity will trigger the requirement for special circumstances as the regional plans provide appropriate guidance which relate to this application. There is no conflict of interest between the parties and it is unlikely that public participation would elicit additional information that may be relevant for consent conditions.

**Affected Parties and Limited Notification**

**5. Protected Customary Rights Group or Customary Marine Title group**

<b>5.1 Is the activity in the coastal environment, within an area where it may adversely affect a protected customary rights group(s) or a customary marine title group(s) (see s95G)?</b>	<input type="checkbox"/> Yes	Go to 5.2
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	<input checked="" type="checkbox"/> No	Go to 6.1
<b>5.2 May the activity have adverse effects on a protected customary right carried out in accordance with the requirements of Part 3 of the Marine and Coastal Area (Takutai Moana) Act 2011?</b>	<input type="checkbox"/> Yes	The customary rights group(s) is an affected customary rights group(s). Application must be limited notified on them. Record in 5.3 and go to 6.1
	<input checked="" type="checkbox"/> No	Go to 6.1

**5.3 Adversely affect a protected customary rights group(s) or a customary marine title group(s):**

N/A

**6. Statutory Acknowledgement Areas**

<b>6.1 Is the activity on or adjacent to, or may it affect, a statutory acknowledgement area?</b>	<input type="checkbox"/> Yes	Go to 6.2
	<input checked="" type="checkbox"/> No	Go to 7.1
<b>6.2 Are the adverse effects on Te Rūnanga o Ngāi Tahu minor or more than minor?</b>	<input checked="" type="checkbox"/> Yes	Include TRONT in 8.2 and go to 6.3
	<input type="checkbox"/> No	Go to 6.3

**6.3 Reasons why adverse effects on Te Rūnanga o Ngāi Tahu are less than minor, minor or more than minor:**

The applicant has not provided sufficient information to determine, with certainty, that the actual and potential adverse effects on fish passage will be less than minor or minor. With respect to the advice provided by Mr Hodson, I consider the consent variation could result in actual and potential adverse effects on fish passage that could be more than minor. As such, the actual and potential adverse effects on Te Runanga o Ngai Tahu could be minor or more than minor.

**7. Is limited notification precluded?**

<b>7.1 Is each activity subject to a rule, NES or regulation that precludes limited notification?</b>	<input type="checkbox"/> Yes	Go to 9.1
	<input checked="" type="checkbox"/> No	Go to 8.1

**8. Are any people adversely affected? – Persons to serve notice on...**

<b>8.1 Are the adverse effects on a person minor or more than minor (but not less than minor)?</b>	<input checked="" type="checkbox"/> Yes	Go to 8.2
	<input type="checkbox"/> No	Go to 8.3

**8.2 Person(s) considered to be adversely affected (complete and go to 8.3)**

Person	Effect on person (see Note)	Reasons why effect is minor or more than minor	Has written approval been provided?
Beverly Diane Craze	Land drainage effect	Incorrectly installed culvert is causing adverse effects that are minor (in	No



accordance with s. 95E of  
the Act)

**Note:** In forming this opinion (a) to (c) apply:

- (a) We may disregard an adverse effect of the activity on the person if a rule or an NES permits an activity with that effect; and
- (b) We must, if the activity is a controlled activity or a restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule or a national environmental standard reserves control or restricts discretion; and
- (c) Must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11.

### **9. Special Circumstances – Limited Notification**

<b>9.1 Are there special circumstances that warrant limited notification of any other persons?</b>	<input type="checkbox"/> Yes	Application must be limited notified to those persons and any other affected persons. Go to 9.2
	<input checked="" type="checkbox"/> No	Go to 10

#### **9.2 Reasons special circumstances exist and persons to be notified**

I do not consider there to be special circumstances as the activity is not out of the ordinary and the circumstances around the application are not unusual or exceptional. I do not believe that the proposed activity will trigger the requirement for special circumstances as the regional plans provide appropriate guidance which relate to this application, there is no conflict of interest between the parties and it is unlikely that public participation would elicit additional information that may be relevant for consent conditions.

### **Recommendation and decision**

#### **10. Officer's recommendation**

<b>10.1 The application be processed non-notified</b>	<input type="checkbox"/>
<b>10.2 Public notification is required/recommended</b>	<input checked="" type="checkbox"/>
<b>10.3 The application be placed on hold while the applicant tries to obtain written approvals from the affected persons</b>	<input type="checkbox"/>
<b>10.4 Limited notification is required. Persons to be served notice are those listed in 8.2</b>	<input type="checkbox"/>



Hannah Goslin  
Consultant Consents Officer

Date: 06/12/2018

***Decision under Delegated Authority***

<b>11.1</b>	<b>I agree with the recommendation</b>	<input checked="" type="checkbox"/>
<b>11.2</b>	<b>The application will be processed non-notified</b>	<input type="checkbox"/>
<b>11.3</b>	<b>The application will be publicly notified</b>	<input checked="" type="checkbox"/>
<b>11.4</b>	<b>The application shall be placed on hold while the applicant tries to obtain written approvals from the affected persons</b>	<input type="checkbox"/>
<b>11.5</b>	<b>The application will be limited notified. The parties to be served notice are those listed in section 8.2</b>	<input type="checkbox"/>

This decision is made under delegated authority by:



Michael Durand  
**Consents Manager**

**Date:** 6/12/18