



## Westpower Ltd – Waitaha Concession Decision Report

**To:** THE MINISTER FOR THE ENVIRONMENT, Hon David Parker

**Date:** 12 June 2019

**Subject** WESTPOWER LIMITED – EASEMENT, LICENCE AND LEASE APPLICATION FOR A RUN-OF-RIVER HYDRO SCHEME

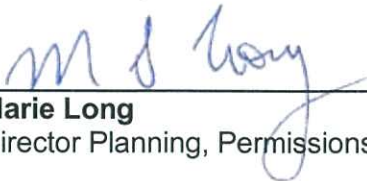
**Action sought** To make a decision on the concession application as described in this Decision Report

**Time frame** There is no statutory timeframe for your decision

**Paper type:** Statutory **Department's priority:** High

**Risk assessment:** Possible judicial review of your decision (whether you grant or decline the application) **Level of risk:** High

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12/6/2019  
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## Executive Summary

1. Westpower Limited (Westpower) has applied for concessions to construct, operate and maintain a run-of-river hydro-electric power scheme (Scheme) on the Waitaha River, which is located within conservation land on the West Coast of the South Island 38 km south of Hokitika. The Scheme infrastructure is comprised of a weir and intake channel at the headworks to divert the majority of the river's flow through a tunnel on the true right of the river to the powerhouse site located 2.6 km downstream.
2. This report and its appendices provide you with all material information regarding the Scheme and sets out the legal steps and relevant matters you are required to consider in making your decision.
3. The process for concession applications is set out in Part 3B of the Conservation Act 1987 (Act). In this case the process has included seeking expert reviews, requesting further information, and publicly notifying the intention to grant the concessions formed by the Deputy Director-General Operations. In response, 3,264 submissions were received and a hearing was held.
4. The Hearing Chairman has prepared a report (Hearing Report) containing recommendations on the extent to which you should accept and allow each of the submissions received. The Hearing Chairman recommends that you decline the application on the bases that it is inconsistent with the purposes for which the land is held and the provisions of the Act (s 17U(3)), and that there are adverse effects on landscape, visual amenity, natural character and recreational kayaking and tramping that cannot be reasonably or adequately avoided, remedied or mitigated (s 17U(2)(b)). The Hearing report also concluded the proposal was inconsistent with the relevant Conservation Management Strategy (s 17W(1)).
5. Westpower expressed concerns with the Hearing Report. It says the Hearing Report is founded on material errors of law on the statutory scheme, fails to record accurately Westpower's case, and does not explain adequately, or on occasions at all, the reasons for having reached certain conclusions. Despite DOC amending the Hearing Report in light of these comments, Westpower's underlying concerns remain.
6. Westpower has since proposed additional measures to address the adverse effects of the proposal on kayaking and tramping. DOC invited comments on these additional measures from submitters on the application and iwi, and commissioned further advice from its recreation expert on the impact of the additional measures on his prior assessment. In summary, the additional measures proposed by Westpower do not change the submitters' previous concerns regarding the effects of the proposal on kayaking and tramping. Nor do the additional measures change DOC's expert's conclusion that the effects on kayaking will be "high". A number of submitters also raised issues with the additional measures being taken into account as part of the assessment after the close of the hearing process. Although invited, no comment has been received from iwi on the further measures.
7. You are not bound by the recommendations or findings in either the intention to grant or the Hearing Report. You must reach your own conclusions on the application and the issues it raises. The ultimate question you must decide is whether the concessions are consistent with the Act's purpose of promoting the conservation of New Zealand's

natural and historic resources. There is a hierarchy of specific matters that you must consider on your way to this determination.

8. First, you must determine whether the proposal is contrary to the provisions of the Act or the purposes for which the land concerned is held. If it is, then you must decline the application.
9. You must also decline the application if you conclude that:
  - the proposal could reasonably be undertaken in another location that —
    - (i) is outside the conservation area to which the application relates; or
    - (ii) is in another conservation area or in another part of the conservation area to which the application relates, where the potential adverse effects would be significantly less; or
  - the proposal is not consistent with the relevant Conservation Management Strategy or not in accordance with the Conservation General Policy.
10. Following that, you may grant the application but also have the discretion to decline the application if you consider that:
  - the information available is insufficient or inadequate to enable you to assess the effects (including the effects of any proposed methods to avoid, remedy, or mitigate the adverse effects) of the proposal; or
  - there are no adequate methods or no reasonable methods for remedying, avoiding, or mitigating the adverse effects of the proposal; or
  - it would be inappropriate to grant the concessions, having regard to the matters set out in s 17U.
11. All of the relevant documents have been provided to you in hard copy. You are entitled to rely on the summaries of these documents contained in the Departmental Reports (and Westpower's responses to these Reports (or drafts thereof)). However, you ought to consider the original materials where you consider this necessary. In addition to Westpower's application materials, other documents of particular relevance are signposted throughout this Report. In considering your decision you should also refer to the copy of the Act provided to your office.
12. We suggest that, in order to navigate your way through the material, after reading the Department's Decision Report, you start with Volume 1, which contains Appendices 2–12, before moving to the base application material (Appendix 1) contained in Volumes 2–8.

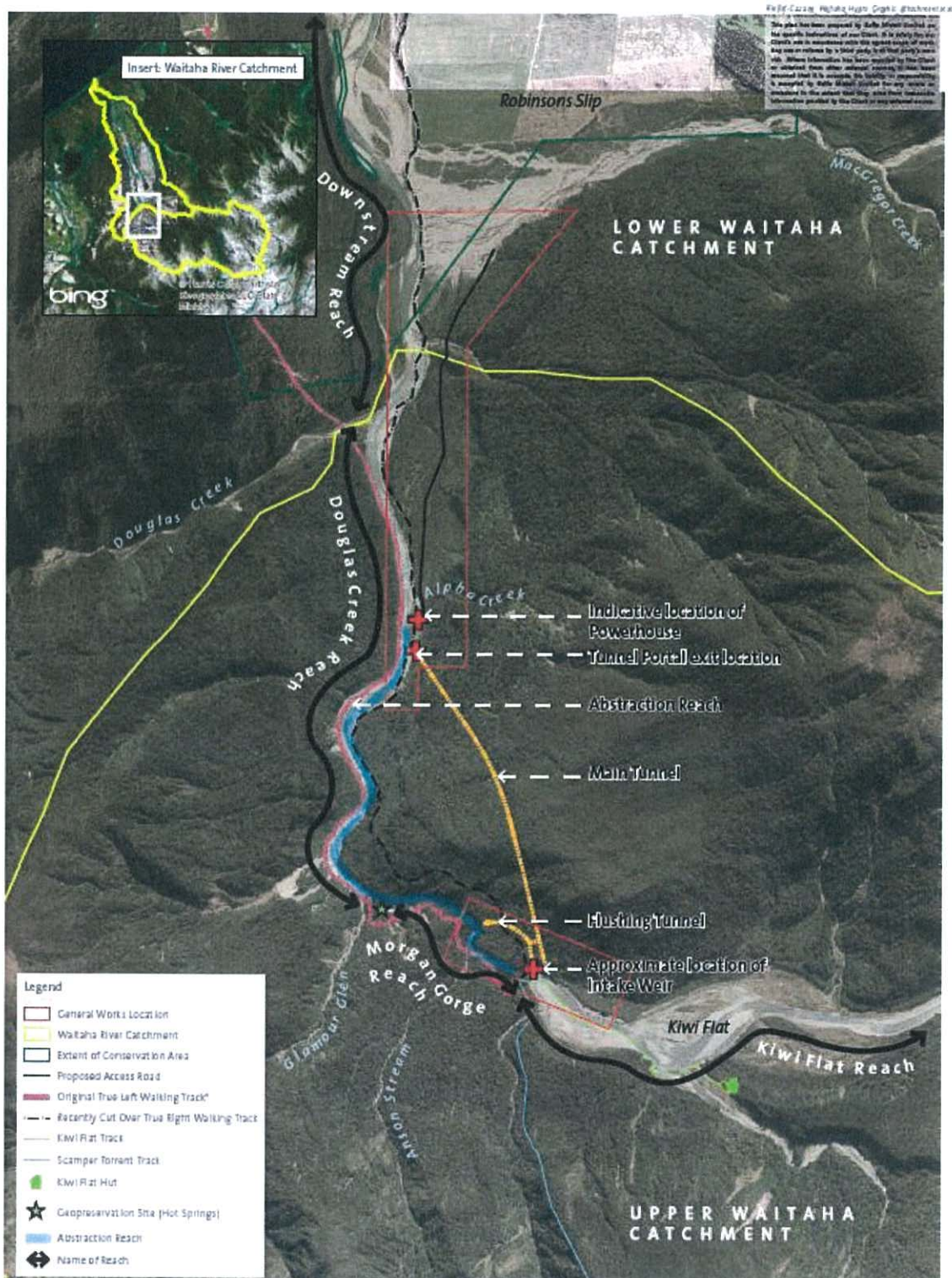
## Section 1 – The Application and Supporting Information

### 1.1 The Proposal

13. Westpower proposes to construct a run-of-river scheme on the Waitaha River (with no instream storage) that would be capable of producing 110–120 Gwh per annum (approximately 12,000 households). The Waitaha River is located in a stewardship area 38 km south of Hokitika and extends from the Main Divide of the Southern Alps to the Tasman Sea on the West Coast. The Waitaha Catchment falls 2640 m over a length of 40 km with a total area of 223 km<sup>2</sup>.
14. The Scheme consists of two separate and discrete surface installations. The first is a 4 to 5 m high weir and a diversion structure at the upstream end of a section of the river known as Morgan Gorge. A tunnel approximately 1.5 km long and 8 m wide would provide for settling basins and a penstock to convey water from the intake to a powerhouse located below Morgan Gorge and above Douglas Creek, on the true right of the Waitaha River. The powerhouse is proposed to be 15 m x 30 m with a 20 x 20 m switch yard. The diverted water would be returned to the Waitaha River via a tailrace from the powerhouse.
15. The maximum project surface footprint is proposed to be 4.94 ha, with an operational footprint of 3.87 ha (3.69 ha would include permanent vegetation clearance). The Scheme is designed to be predominantly on the stewardship land managed by DOC, with some sections of the proposed access road located on private land and/or land managed by Land Information New Zealand.
16. An access road, 2 km of which would be located on public conservation land, is required to access the powerhouse site from the end of the existing public Waitaha Road. This road would provide access for the construction of the tunnel, powerhouse and associated structures which would be all located on the true right of the river. If the Scheme is commissioned, this proposed road will be retained for routine maintenance and inspection of the Scheme infrastructure, and would be open for public use, subject to safety considerations. The sections of the proposed transmission route within public conservation land would follow this access road route.
17. The maximum volume of water to be diverted will be up to 23 cumecs (23 m<sup>3</sup>/s) depending on the minimum residual flow. That is approximately 87% of the river's mean flow at the point of the diversion. A minimum residual flow of 3.5 cumecs (3.5 m<sup>3</sup>/s) or approximately 13% of the mean flow is proposed for immediately below the intake. Side streams that enter the Waitaha River below the intake will increase the residual flow before full flow is restored to the river at the outlet of the tailrace below the powerhouse.
18. The abstraction reach would include approximately 2.6 km of the Waitaha River, including the Morgan Gorge and the section of river below Morgan Gorge referred to by Westpower as the "Lower abstraction reach", being part of the "Douglas Creek Reach". Map 2 (labelled "Figure 2") on page 8 shows the various sections of the river up and downstream of the proposed Scheme, as well as the Waitaha River Hot Springs referred to by submitters and discussed in the various reports, and the location of the components of the Scheme. Map 2A shows the boundaries of the relevant conservation area – the Waitaha Forest Conservation Area.

19. A term of 49 years is sought. Westpower considers that the size of the overall capital investment (construction cost being estimated at \$80–\$100 million) and the life of the proposed Scheme require a concession of long term duration to provide for adequate security of the asset for the community.

Map 1 – General Overview



<b>Waitaha Hydro Scheme Component</b>		<b>Concession Type</b>
<b>Headworks</b> – located upstream of Morgan Gorge (see Map 3 below)		
Permanent structures	Weir, diversion, intake channel, intake portal and upper tunnel portal.	Lease
	Short intake access road between tunnel portal and intake and associated protection works.  Foot access track between existing DOC foot access track on the true right and main tunnel entrance.	Easement
Temporary structures	A raised platform for staff facilities and work area.  A site for assembly and storage of machinery above flood levels.  Access route between intake site and storage/assembly areas.  Foot access from existing DOC foot tracks on true right and contractor's facilities platform.	Licence
Subsurface structures	Tunnels and sediment settling basins.	Lease
<b>Powerhouse site</b> – located below Morgan Gorge and above Macgregor Creek (see Map 4 below)		
Permanent Structures	Tunnel portal, penstock, powerhouse and surrounds, switchyard, tailrace, stop-bank and flood protection works.	Lease
Temporary structures	Staging/storage areas and treatment pond.	Licence
<b>Access road and transmission line</b>		
Permanent structures	Access road from tunnel to power house across Macgregor Creek, including associated drainage and protection works.	Easement
	Overhead power lines.	Easement

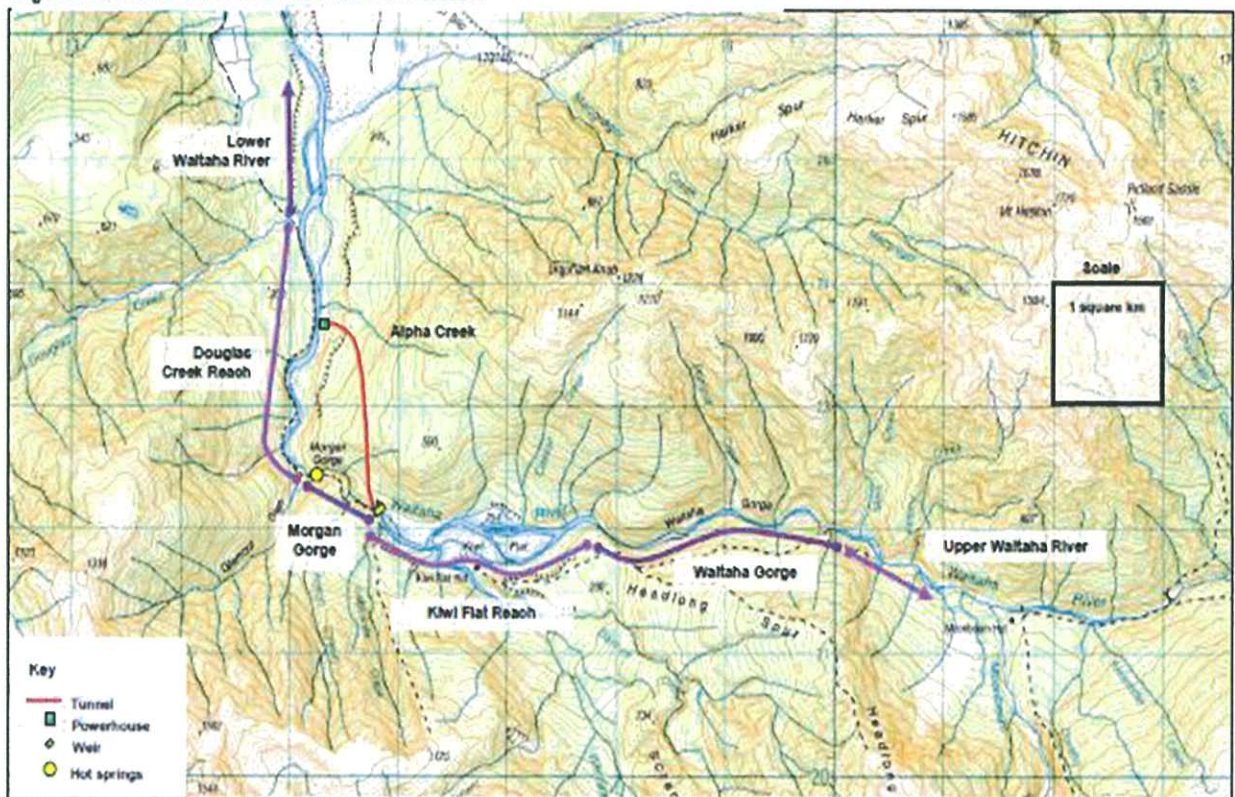
20. Morgan Gorge is nationally and internationally significant for extreme whitewater kayaking. As DOC's technical Recreation Assessment (**Appendix 1, Ref 13**) records (page 13), paddling the upper Waitaha River and the Morgan Gorge is described by kayakers as the pinnacle of hard whitewater kayaking experiences available in New Zealand and around the world.
21. With the significant reduction in flow, the Scheme would reduce the opportunities for kayaking Morgan Gorge and the remainder of the 2.6 km abstraction reach, and also would potentially affect the opportunities for kayaking the Waitaha river below those reaches. This is because some kayakers may be less likely to paddle the river at all due

to the additional challenge of the 1.5 km of portage being required to bypass the affected section of the river which will become unkyakable due to insufficient flow.<sup>1</sup>

22. The Scheme's infrastructure would also be visible to the public walking along the current DOC track located on the true right side of the river. This includes the structures at the powerhouse site, which both DOC's and Westpower's experts assess to have a high effect on natural character, landscape and amenity values at a local level. Westpower proposes to construct an alternative track avoiding the powerhouse site, should the concessions be granted.

## Map 2 – Topographical map showing recreational aspects

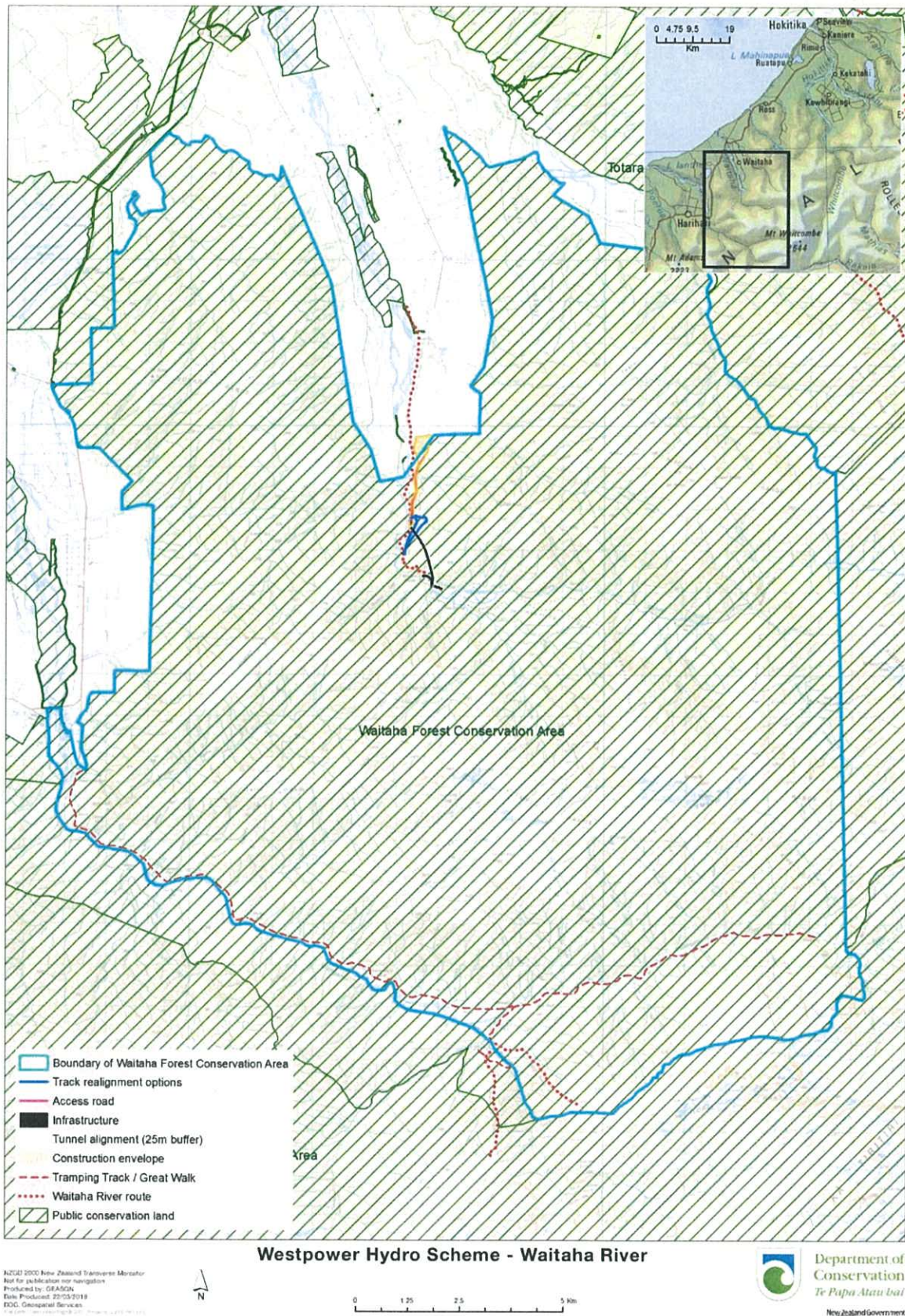
Figure 2: Location of Scheme and definition of river reaches



<sup>1</sup> Hearing Report at page 85.



**Map 2A – The Waitaha Forest Conservation Area**



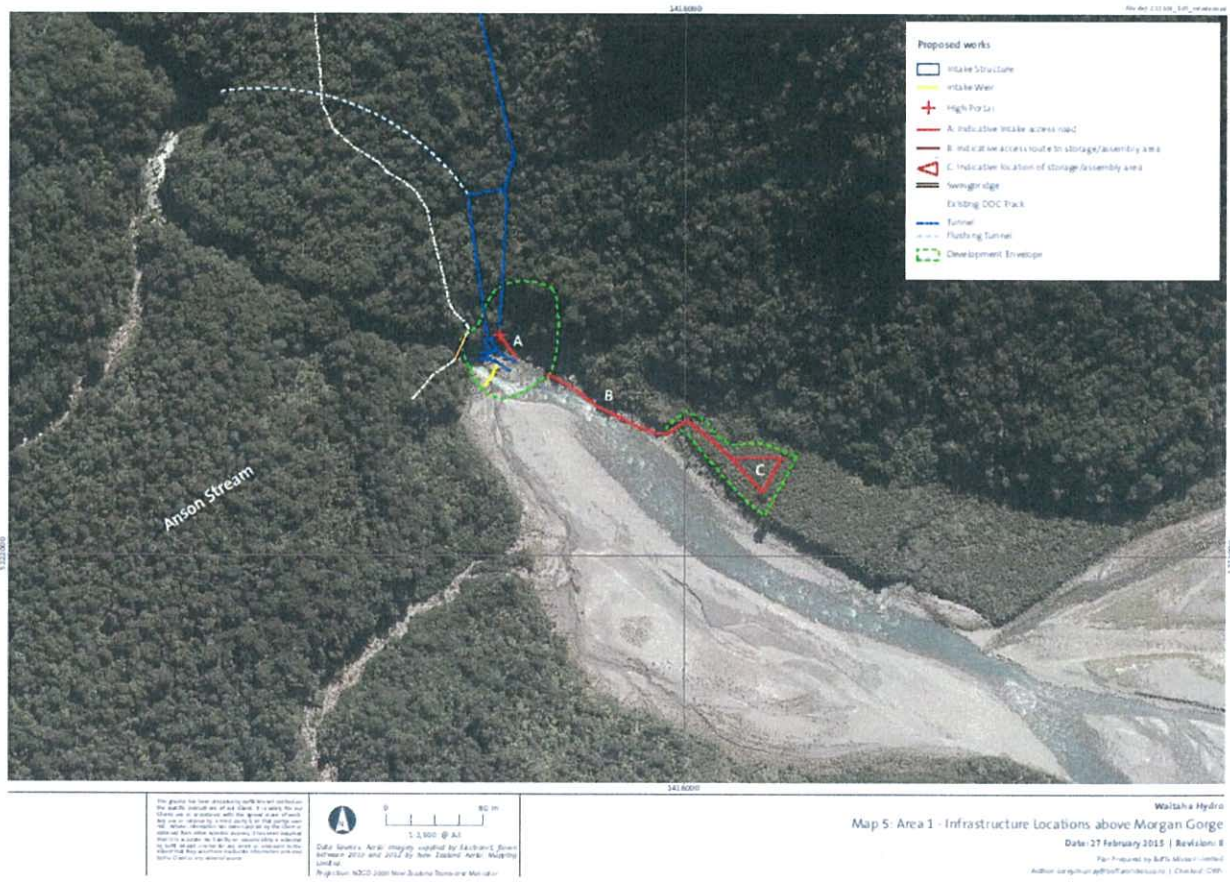
## 1.2 Development Envelope Approach

23. Westpower is seeking the concessions within a series of “development envelopes”. Westpower considers this would allow for construction to adjust to a range of site factors

such as topography, geology, waterways and vegetation, and for fine tuning of the efficiency of design and the means to avoid, remedy or mitigate localised effects.<sup>2</sup>

24. Maps 3 and 4 (Westpower's maps 5 and 6) below show the envelopes within which Westpower is seeking the flexibility to construct -
- the headworks and associated infrastructure and activities immediately upstream of Morgan Gorge (Area 1);
  - the access road, powerhouse, tunnel portal exit and associated infrastructure and activities in Area 2 (approximately 2.6km downstream in the Douglas Creek Reach); and
  - the underground structures (including the 1.5km diversion tunnel that would carry the water to the powerhouse) running between Areas 1 and 2.
25. Concessions for a major development such as this have not yet been granted on the basis of the envelope approach. While Westpower considers an envelope approach to be well-accepted, it does present particular challenges because construction and other specifications would not be finalised until after the grant of the concessions. This in turn will make it difficult to identify and quantify all potential effects with certainty before a decision to grant is made. However, you may approve the concessions on the basis of the envelope approach if you are satisfied the associated uncertainties will not lead to a development that ought not to occur in the conservation area, or if you are satisfied this can be guarded against by the development of conditions which meet your concerns in this regard.

**Map 3 – Infrastructure above Morgan Gorge**



<sup>2</sup> Westpower Application, for example see pages iii, 2, 12, 32 (Appendix 1, Ref 1).



### 1.3 Management Plan Approach

26. To allow flexibility for contractors to advise on final design, construction and operational methods, a series of management plans has been proposed. These management plans would set out the objectives, how the construction works would be staged, the timing and duration of the various stages, methods of construction and how effects will be avoided, remedied or mitigated. Westpower proposes that the plans be required to be approved by DOC.
27. Proposed additional Special Condition 1.1 set out in Appendix 1 to the Officer’s Report (at page 132) clarifies what approval of these management plans would involve. That condition provides that the management plans could be required to be independently audited, and the approval process would be by way of certification, approval meaning that DOC would:
 

“Certify that the Management Plan meets the requirements of the relevant conditions and have been prepared in accordance with best practice for the relevant discipline and that the final construction does not differ in location, scale or level of effect to the Concession application lodged by the Concessionaire.”
28. This is similar to the approach taken to management plans in Resource Management Act 1991 (RMA) resource consents. The approval process, being in the nature of certification, would not provide “another bite at the cherry” for DOC to effectively provide a “red light” to the project, provided the management plans are fit for purpose.
29. The proposed management plans include a Construction Management Plan, supported by a Wastewater, Groundwater, Erosion and Sediment Management Plan, Construction

Noise Management Plan, Landscape Management Plan, Rehabilitation Management Plan, Pest and Weed Management Plan, Safety Plan, Protection of Terrestrial and Aquatic Fauna Management Plan, and an Environmental Monitoring Plan.

#### 1.4 Application Process

30. Following the lodgement of Westpower's application in July 2014, DOC undertook a detailed assessment of the application, including requesting further information and seeking additional expert reports. Once satisfied it had sufficient information DOC then prepared its initial assessment of the proposal. This is set out in the "*Notified Concession Officer's Report to Decision Maker*" (Officer's Report) attached as **Appendix 3**.
31. The Officer's Report assessed the application against the statutory tests and gave the Minister's delegate two options—
  - *option 1, to decline under 17U(2) (a) and (b) 17U(3) and 17W(1) of the Conservation Act; or*
  - *option 2, to approve in principle subject to the standard and special concession conditions identified in that report (and the public notification process).*
32. The Minister's delegate considered the report and selected option two above, and approved in principle the granting of the concessions and to publicly notify this "Intention to Grant" in accordance with s 49 of the Act. The Minister's delegate considered there was sufficient information on the effects of the proposal in most sections. However, he also said that in those instances where it is not so clear the decision-maker will have to consider whether to decline the application on the basis of s 17U(2)(b) and added the following comment into his decision: "*[I] would like the Hearing Commissioner to explore further the impact on kayaking and whether the mitigation proposed is adequate.*"
33. The Intention to Grant was publicly notified in accordance with s 49 of the Act on 16 September 2016. Submissions were invited over a 40 working day period until Monday 14 November 2016.
34. 3264 submissions were received, including 2864 template submissions from Forest & Bird members and 74 template submissions from Whitewater New Zealand (WWNZ) members. One submission from the Green Party had 2343 signatures on it.
35. Of the submissions received, 23 were in support, 3240 were in opposition, and one was neutral.
36. A Hearing Panel was appointed and a hearing was held in Hokitika from 5 to 8 December 2016. Fifty-five individual submitters and groups were heard, including a number of additional expert witnesses for both WWNZ and Westpower.
37. The Hearing Chair, as the Director-General's delegate, has provided a Hearing Report (**Appendix 5**) in accordance with s 49(2)(d) of the Act, which requires the Director-General (in this case his delegate) to send to you a recommendation and a summary of all objections and comments received and a recommendation as to the extent to which they should be allowed or accepted.
38. Following his consideration of submissions and information provided at the hearing, the Hearing Chairman has made a number of recommendations (pages 8–12,

paragraphs 27–50), and has recommended that you decline the concession application (para 41). This recommendation therefore differs from the initial “in principle” decision to grant the concessions as set out in the publicly notified “Intention to grant” referred to above.

39. A draft of the Hearing Report was provided to Westpower for comment, prior to it being finalised. Westpower’s response to the draft Hearing Report is attached in **Appendix 4**.
40. The comments in red in the Hearing Report track the changes made by the Hearing Chairman to address Westpower’s response. Westpower’s comments did not cause the Hearing Chairman to change his recommendations. Westpower has provided further comments on the finalised Hearing Report (**Appendix 6**), and has also proposed additional measures to address the effects of the proposal (**Appendix 7**). Section 17U(1)(f) requires you to consider relevant oral and written submissions on the proposal, and s 49(2)(e) requires you to consider the Hearing Chairman’s summary of all submissions. You must consider all relevant submissions in accordance with s 17U(1)(f) but you may be guided by the Hearing Chairman’s summary when assessing what submissions are relevant. If there is anything in the report or summary that you are unclear about, we recommend you refer back to the specific submission. If anything is unclear in this report that you cannot resolve by referring to the submissions or the summary of comments, we recommend you seek further information or advice from Departmental officials.
41. In a letter sent to DOC on 10 November 2017 Westpower proposed additional measures that it considered would mitigate some of the effects of the proposal. This occurred after the conclusion of the hearing process and these measures have not been considered in any of the earlier reports. DOC decided that, in order to ensure a fair process, those persons who submitted under the s 49 process should also have the opportunity to comment on proposed additional measures. Comments were invited from the submitters on the proposal by email on 13 June 2018, and 418 comments were received. A summary of the comments as relevant to the additional measures is attached as **Appendix 8**. DOC’s recreation expert Ian Wightwick also provided a report on the impact of the extra measures. This is attached as **Appendix 9**. The additional measures have generally not changed submitters’ views, nor have they changed Mr Wightwick’s conclusions. The submitters’ comments and Mr Wightwick’s report were provided to Westpower for response. Westpower’s response is attached as **Appendix 10**.
42. Given the timing of Westpower’s proposal to include the additional measures, the Hearing Chairman’s recommendations in respect of effects on kayaking and tramping did not take those measures into account. You therefore need to consider the Hearing Chairman’s recommendations in light of the additional measures and the comments and advice we provide later in this report.
43. A draft of this Decision Report was provided to Westpower on 5 October 2018. Westpower responded on 26 November 2018.
44. Westpower’s response (attached as **Appendix 12**) made various criticisms and alleged various shortcomings with the draft report. The Department has made several changes to the report in response to some of Westpower’s comments that related to inaccuracies and other errors. However, the Department does not accept or agree with all of Westpower’s comments

and these have not been included. Nor has the Department included Westpower's comments that go beyond correcting inaccuracies and other errors.

45. The key concerns raised by Westpower, and the Department's response include:
- The need for the report to be accurate and balanced. This was accepted to the extent there was actual inaccuracy or incorrect quoting in parts of the draft report.
  - The language, tone and approach in the report. This was accepted to the extent that parts of the draft report used tone or language that could be interpreted as being not neutral.
  - Consistency with planning documents. This was accepted to the extent that it is accepted that the draft report included inappropriate guidance to the interpretation of planning documents.
  - The "envelope approach" to the proposal and whether this does in fact create uncertainty around potential adverse effects. This was already addressed at paragraphs 23–25 of the report. The draft report accurately recorded the issues raised by such an approach.
  - Renewable energy, New Zealand's goals, and the weight to be afforded to positive effects of the proposal. These matters are already addressed in relevant sections throughout this report. The draft report already correctly reflected that you must assess the proposal against the statutory criteria, including the impact on the status of the land and the extent to which the effects can be avoided, remedied or mitigated.
  - The weight to be afforded to the evidence of expert witnesses over the evidence of lay people. This was already addressed by the report at paragraphs 268–275. The evidence of lay people is admissible and relevant where it relates to peoples' experiences and perceptions.
  - The weight to be afforded to the additional "mitigation" offered by Westpower. The draft report already provided analysis of and guidance on how to treat the elements of the additional mitigation.
46. While several amendments have been made to the report, the report has not been materially changed.
47. Westpower provided a letter addressed direct to you. This letter provides an overview of Westpower's position and their view that: the scheme is essential to the Government's objectives on climate change and renewable energy; there are few residual issues or effects and no statutory impediment to granting the proposal; the Department reports and hearing report need to be approached with caution; and a fair decision-making process should involve a meeting with Westpower. Westpower advocate that you, as decision-maker, should take into account the broader context and reach a pragmatic 'real world' decision with respect to their application. The Department has carefully considered the Westpower position, and to the extent there has been a need for adjustment to this report it has been made. With respect to the legislation, we consider this is accurately described for your consideration against the relevant background material for you to reach a decision on whether to grant the concession.

48. If the concessions are granted, this will not remove the need for Westpower to obtain resource consents and approvals under other enactments for the Scheme, such as under the Wildlife Act 1953.

## Section 2 – The decision-making framework and applicable statutory tests<sup>3</sup>

### 2.1 The overarching consideration

49. An activity cannot be carried out in a conservation area without authorisation by a concession (s 17O(1)). Concessions may be granted in the form of a lease, licence, permit, or easement (s 17Q(1)).
50. The lodestar for any concession application is the Act's purpose: the concession must be consistent with the promotion of the conservation of New Zealand's natural and historic resources. "Conservation" and the associated definitions of "preservation" and "protection" in the Act are -

*conservation means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations*

*preservation in relation to a resource, means the maintenance, so far as is practicable, of its intrinsic values*

*protection in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes—*

- (a) its restoration to some former state; and*
- (b) its augmentation, enhancement, or expansion*

51. Part 3B of the Act contains several matters that must be determined in considering whether the concessions are consistent with the Act's purpose. In some instances, explained below, these will lead to a situation where you must decline the concessions. Otherwise the discretion whether to grant the concession is yours (subject to the purpose of the Act). This is underscored by s 17T(3):

*"Nothing in this Act or any other Act shall require the Minister to grant any concession if he or she considers that the grant of a concession is inappropriate in the circumstances of the particular application having regard to the matters set out in section 17U."*

### 2.2 Mandatory considerations — s 17U(1)

52. Section 17U(1) of the Act requires you to have regard to the following matters, amongst others, when considering a concession application:
- the nature of the activity and the type of structure proposed to be constructed (para (a));
  - the positive and adverse effects of the activity and structure (para (b));
  - any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity (para (c));
  - any information received under ss 17S and 17T (para (d));
  - any relevant environmental impact assessment (para (e));
  - any relevant oral or written submissions received as a result of the hearing process (para (f)); and

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<sup>3</sup> Note the Act is to be applied as it was in July 2014 at the time of Westpower's application.



- any relevant information that may be withheld from any person in accordance with the Official Information Act 1982 or the Privacy Act 1993 (para (g)).

53. However, these considerations are only relevant insofar that they relate to the Act's purpose of promoting the conservation of New Zealand's natural and historic resources.

54. The following table refers you to the key information in respect of these matters:

<b>Provision</b>	<b>Reference</b>
17U(1)(a)	<p>A summary of the activity is provided in the Officer's Report paragraphs 1.1 – 1.21 and 4.10 - 4.11.</p> <p>Section 4.10, in turn refers to sections 5 &amp; 6 of Volume I of Westpower's application.</p> <p>Further iterations have been developed throughout the consideration process as described in the supporting documents.</p>
17U(1)(b)–(c)	<p>A comprehensive assessment of these matters can be found in the following documents –</p> <ol style="list-style-type: none"> <li>Westpower's application.</li> <li>The Officer's Report paragraphs 4.12 to 4.442. A summary is provided in 4.443 to 4.473.</li> <li>The Hearing Report.</li> </ol>
17U(1)(d)	<p><b>Appendix 1</b> to this report identifies all the information received as part of the application, and as further information provided to the Department or provided under section 17S.</p>
17U(1)(e)	<p>See Westpower's Application, supporting appendices and further information provided throughout the consideration process.</p>
17U(1)(f)	<p>All submissions have been provided to your office accompanying this report for your consideration (<b>Appendix 1, Ref 25</b>). The Hearing Notes include the verbal comments and supporting information papers provided at the hearing. (<b>Appendix 1, Ref 27</b>)</p>
17U(1)(g)	<p>4.479 of the Officer's Report identifies three items regarding financial viability that Westpower has requested remain confidential, being -</p> <ul style="list-style-type: none"> <li>• a report entitled 'Waitaha Hydro Scheme – Response to the Department of Conservation – The New Zealand Electricity Industry and Market', 21 September 2015;</li> <li>• a report on the financial viability of the proposed hydro scheme and entitled 'Waitaha Hydro Scheme Financial Performance Analysis', 23 September 2015; and</li> <li>• A report entitled 'Review of the Financial Viability of the Waitaha Hydro Project', September 2015.</li> </ul>

### 2.3 The conservation area — s 17U(3) threshold

55. The first question you must answer is whether the concession is contrary to the provisions of the Act or the purposes for which the land concerned is held (s 17U(3)). If it is, then you must decline the application. When assessing whether the activity is contrary to the provisions of the Act, your decision will be informed by considering the activity against the criteria in Part 3B. When assessing whether the activity is consistent with the purposes to which the land is held, you are limited to the impact of the activity on the particular conservation area at issue, and offsite positive and negative effects are not relevant. All s 17U(1) considerations are relevant at this stage, but only insofar that they relate to the conservation area in which the activity is proposed to occur.
56. In this case the land concerned is part of a stewardship area. "Stewardship areas" are defined in the Act as areas what are not subject to a special category of protection.
- "stewardship area means a conservation area that is not—*
- (a) a marginal strip; or*
  - (b) a watercourse area; or*
  - (c) land held under this Act for 1 or more of the purposes described in section 18(1); or*
  - (d) land in respect of which an interest is held under this Act for 1 or more of the purposes described in section 18."*
57. Stewardship areas are "conservation areas", and s 25 of the Act requires that every stewardship area is managed so *"that its natural and historic resources are protected"*.
58. "Natural Resources" is defined in the Act as -
- (a) plants and animals of all kinds; and*
  - (b) the air, water, and soil in or on which any plant or animal lives or may live; and*
  - (c) landscape and landform; and*
  - (d) geological features; and*
  - (e) systems of interacting living organisms, and their environment; and includes any interest in a natural resource.*
59. If you decide the concessions are not inconsistent with the provisions of the Act or the purposes for which the land concerned is held, you must consider the remainder of Westpower's application insofar that it relates to the conservation of New Zealand's natural and historic resources generally and to the conservation area in which the activity is to occur.

### 2.4 Adequacy of means of addressing adverse effects — s 17U(2)(b)

60. You may decline the application if you consider there are no reasonable or adequate methods for addressing adverse effects of the activities on the conservation of New Zealand's natural and historic resources.
61. Being a discretionary power however, you may elect not to decline the application under this section of the Act even though the adverse effects of the proposal are not

able to be adequately addressed. Similarly, you are entitled to decline the application even if there are substantial positive effects.

## **2.5 Sufficiency and adequacy of information to assess the effects — s 17U(2)(a)**

62. You may decline the application if the information is insufficient or inadequate to enable you to assess the effects of the activity, including the means to avoid, remedy or mitigate any adverse effects. You will have to consider whether Westpower's approach of applying for concessions within an envelope prevents the information from being adequate and sufficient.
63. Being a discretionary power, you may decide that any uncertainty is acceptable or can be guarded against through conditions.

## **2.6 Need to give effect to the Conservation General Policy and Conservation Management Strategy**

64. Section 17A of the Act requires the Department to administer all conservation areas in accordance with statements of general policy approved under ss 17B and 17C, conservation management strategies and conservation management plans.
65. Section 17N(2) reinforces the binding nature of these documents, and this was also confirmed by the Supreme Court's *Ruataniwha* decision.<sup>4</sup>
66. The relevant CMS is also a mandatory relevant consideration under s 17W, which provides that a concession cannot be granted unless the concession and its granting is consistent with the CMS.

## **2.7 Other matters**

67. You may only grant a lease in the circumstances set out in s 17U(5)–(6).
68. You must not grant an easement if a lease, licence, or permit is more appropriate (s 17Q(2)).
69. You must decline to grant a concession for a structure if the activity could be undertaken at another location where the adverse effects would be significantly less (s 17U(4)).

## **2.8 Section 4 Conservation Act – Principles of the Treaty of Waitangi**

70. Section 4 of the Conservation Act requires the Act to "be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".
71. The principles of the Treaty of Waitangi require -
  - partnership - mutual good faith and reasonableness: the Crown and Maori must act towards each other reasonably and in good faith;
  - informed decision-making: both the Crown and Maori need to be well informed of the other's interests and views;
  - active protection: the Crown must actively protect Maori interests retained under the Treaty as part of the promises made in the Treaty for the right to govern; and

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<sup>4</sup> *Hawkes Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of NZ Inc* [2017] NZSC 106, [2017] 1 NZLR 1041.

- redress and reconciliation: the Treaty relationship should include processes to address differences of view between the Crown and Maori.

## **2.9 Ability to impose conditions – s 17X**

72. It is necessary for you to consider the extent to which measures which are able to be imposed through the proposed conditions would avoid, remedy or mitigate the adverse effects of the proposal.
73. If you are minded to grant the concessions, the conditions would need to be worked through, mindful that conditions need to be reasonable, related to the activity (including the effects of it), and certain.

### Section 3 – Key Technical Issues

74. The Hearing Report identifies two key issues that the Hearing Chairman considered particularly relevant in coming to his overall recommendations, namely -
- adverse effects on natural character, landscape and visual amenity; and
  - adverse effects on recreational values, particularly tramping and kayaking;
75. In addition to the above, there are several other matters which submitters considered significant, including their views on –
- the inadequacy of information on adverse effects;
  - adverse effects on vegetation; and
  - adverse effects on blue duck, bats, lizards, invertebrates and freshwater habitats and species.
76. Notwithstanding these views of submitters, the Hearing Chairman concluded and the Officer's report recorded that there was sufficient information on the adverse effects of the proposal on vegetation, blue duck, bats, lizards, invertebrates and freshwater habitats and species, and that these adverse effects could be mitigated through conditions.
77. The Hearing Chairman also noted that while there are potential impacts on tourism and hot spring users, he attributed those matters little weight for the reasons he has provided on pages 92 and 97 of the Hearing Report.

#### 3.1 Effects on Natural Character, Landscape and Visual Amenity

##### Context

78. The adverse effects of the proposal identified by Westpower on the natural character, landscape and visual amenity values of the Upper Waitaha Catchment are -
- natural character effects on river flow through the abstraction reach, specifically within Morgan Gorge from reduced river flows;
  - broad scale landscape effects on the whole Upper Waitaha Catchment as an Outstanding Natural Landscape and on Morgan Gorge as an Outstanding Natural Feature;
  - local scale landscape effects on the Scheme areas within the Upper Waitaha catchment as an Outstanding Natural Landscape; and
  - visual amenity effects at the intake and powerhouse sites from tracks, including the access road.
79. DOC contracted independent landscape architect Mr Jeremy Head (Landscape Architect Limited) to provide a peer review of the assessment of effects on the natural character values of the proposed hydro scheme. Following this, further information from Westpower was requested, and Westpower refined its conceptual design.
80. Examples of photo-simulations prepared for Westpower are provided with the maps in **Appendix 2**. The full series are also provided to you (**Appendix 1, Ref 6**).

### Officer's Report

81. Paragraphs 4.36–4.105 and 4.445–4.453 of the Officer's Report provide further background on the natural character, landscape and visual amenity assessment.
82. Paragraph 8.2 in the Summary and Conclusions section of the Officer's Report concludes -

*"The Department considers that there would be high adverse effects from: the industrial nature of the intrusion on the natural character of the area in the Waitaha River Valley at the top of Morgan Gorge; from the decrease in water through the abstraction reach; and from the industrial intrusion at the powerhouse site."*

### Hearing Report

83. In the Hearing Report (page 63) the Hearing Chairman found the following submissions persuasive -
- that the area is located within an outstanding natural landscape and the Morgan Gorge itself is an outstanding natural feature;
  - that the area's values are of national significance;
  - that submitters value the river's wild character and the fact it is currently unmodified by human activity;
  - that the area has high intrinsic values, not just values from the perspective of human use;
  - that the area's values should be preserved for future generations;
  - that the proposed scheme would be an unacceptable "industrial intrusion" into the landscape; and
  - that no mitigation would compensate for the change from an outstanding wild and remote landscape to one that is modified and industrialised as a result of the reduced water flow, weir and infrastructure.
84. The Hearing Chairman noted (page 68) that DOC's expert considered the visual effects at the intake site (given the improvements from what was originally proposed) were 'acceptable', and the improvements were such that DOC's expert agreed with Westpower's expert's overall conclusion regarding the refinements.
85. However, the Hearing Chairman went on to note (pages 69 to 70) that -
- even with improved design and proposed mitigation, Westpower's experts had concluded that local effects on landscape, visual amenity and natural character remain high;
  - he did not accept that the high adverse effects at the local scale, or the moderate effects at a broader scale are acceptable, given that the area is held under the Act for protection of its natural resources (including landscape) and the high values of this area;
  - even with the proposed mitigation, the impact of the intake and power house structures are an "industrial intrusion" into a remote backcountry landscape that submitters and experts alike agree is outstanding; and

- in terms of the natural character effects within the abstraction reach, realistically, there is no mitigation that Westpower can propose to avoid these effects, as they are a direct result of the Scheme's operation.

86. In conclusion (page 70), the Hearing Chairman recommends you accept submissions that -

- a) the area that would be affected by the activity holds very high natural character, landscape and visual amenity values, including intrinsic values;
- b) the activity would have significant adverse effects on those values; and
- c) those adverse effects cannot be adequately mitigated.

#### Westpower's Position

87. In the Hearing Right of Reply provided to Westpower at the conclusion of the hearing, Westpower's expert Mr James Bentley provided his conclusions on landscape issues in his report entitled "Waitaha Hydro Landscape Submission Responses – James Bentley". (**Appendix 1, Ref 28.5**)

88. Mr Bentley's conclusions focussed on the difference between assessments of the effects at a "local scale" versus a "broad scale" approach. His view was that in terms of landscape issues, while there would be a high level of effects at a local scale, it would be lower at a broad scale.

89. In its comments on the final Hearing Report (**Appendix 6**), Westpower confirmed the crux of its position regarding natural character, landscape and visual amenity values, namely that the effects on landscape, natural character and visual amenity at a broad scale would be moderate, and at the local scale would be high, but the mitigation measures proposed and the iterative design process has enabled the scheme to sit well within its landscape, and conditions would ensure that effects do not reach a level that is inappropriate.

#### Summary

90. A summary of the findings on natural character, landscape and amenity is as follows:

Hearing Chairman	Westpower
<ul style="list-style-type: none"> <li>• The proposal would cause high adverse effects at the local scale and moderate effects at a broader scale.</li> <li>• The Area holds very high natural character, landscape and visual amenity values, including intrinsic values.</li> <li>• The proposal would cause significant adverse effects on those values, and those adverse effects cannot be adequately mitigated.</li> </ul>	<ul style="list-style-type: none"> <li>• High adverse effects at a local scale and low, to moderate to low at a broad scale.</li> <li>• Landscape values will largely be retained. A sense of wild and remoteness will still be retained, and landscape will still be outstanding.</li> <li>• Special conditions avoid, remedy and mitigate the potential effects, including development of a landscape development plan.</li> </ul>

## References

91. Further supporting information on these issues provided as follows –

- Westpower's Application, section 7.3 (Natural Character and Amenity) and Appendix 9 – Graphic Supplement, Landscape Report (Mr James Bentley), Landscape External Peer Review (Mr Gavin Lister) and Photo Simulations Supplement (**Appendix 1, Ref 1**), Addendum – Amended Headworks Proposal March 2015 (**Appendix 1, Ref 4**).
- Westpower Response to Request for Further Information – Cover Letter and Revised Landscape Proposal April 2016 - Photograph Simulations (**Appendix 1, Ref 6**).
- DOC Assessment Reports – Natural character/landscape and visual amenity - assessment of further information required, initial comments and updated comments following changes to application (**Appendix 1, Ref 14**).
- Officer's Report sections 4.36 to 4.105 and 4.445 to 4.453. (**Appendix 3**)
- Westpower's Response to draft Hearing Report – Cover Note and Response Table – Landscape Effects (**Appendix 4**).
- Hearing Report paragraphs 27 to 29, pages 62 to 72 and 130-135 (**Appendix 5**).
- Westpower Letter, 30 November 2017 (**Appendix 6**).

### **3.2 Recreational Values – General**

92. Westpower's application includes a recreation assessment report by its expert Mr Rob Greenaway (Greenaway & Associates). Mr Greenaway's assessment is that, despite low use levels, the catchment is an important recreation setting due to its accessible but 'remote' natural setting, and the characteristics of its whitewater resource. He concludes the kayaking resource is likely to be of sufficient interest to off-shore paddlers, and of international significance to highly advanced kayakers, as part of the West Coast kayaking complex. He concludes the Waitaha Valley is also -

- internationally and nationally significant for extreme kayaking (Morgan Gorge, upper Waitaha Gorge) and high-grade kayaking (Waitaha Gorge) as part of the West Coast kayaking complex;
- regionally significant in the lower valley (Kiwi Flat area) for tramping but nationally significant in the upper valley, particularly at Ivory Lake. Low use throughout;
- regionally significant for hunting;
- regionally significant for hot springs in the Morgan Gorge (mostly an element of the tramping and kayaking experience but identified as a specific destination by some visitors);
- regionally significant for angling (lower Waitaha River only, outside the Scheme footprint); and



- locally significant for jet boating (lower Waitaha River only, outside the Scheme footprint).<sup>5</sup>

### 3.3 Effects on Recreational Values – Tramping

#### Context

93. It is estimated that approximately 50 hunters use the Waitaha Valley area annually and fewer than 150 trampers and day visitors access Kiwi Flat annually.
94. The powerhouse and other infrastructure at Macgregor Creek and the weir and other intake structures upstream of Morgan Gorge will be visible to trampers using the current DOC track which runs along the true right bank of the river, and those accessing the river. This will change the experience from an undeveloped backcountry remote setting to one where industrial-style structures will be present.
95. A condition is proposed in the Officer's Report requiring Westpower to provide alternative track access that is to avoid the powerhouse site construction area<sup>6</sup>.
96. Map 2 in **Appendix 2** (Map 2 above at page 8) shows the proposed track options provided as potential mitigation for trampers to avoid the powerhouse.<sup>7</sup> You will note a red dotted line on the true right of the river bank, this is the current track maintained by DOC. The map also shows an old abandoned track on the true left bank. Kiwi Flat is upstream of the proposed intake structures and is the site proposed for contractor facilities and access road to the upper portal area and intake structures (bottom right of Map 3). The Kiwi Flat Hut is found adjacent to Kiwi Flat, and there are a number of other tracks, routes and Huts in the Valley. Ivory Lake is noted as being nationally significant, however you will not see this on the maps as it is located well upriver from the proposed area.
97. You will also note references to the Waitaha Hot Springs or Hot Pools. These are located on the true left of the Waitaha River near the bottom end of Morgan Gorge. Access to the hot springs is quite challenging and requires either fording the Waitaha River below Morgan Gorge or tramping up to the Morgan Gorge swingbridge and back down the true left bank of the gorge. People are required to climb down a steep section of rock, immediately beside the river to access the pools. Westpower says that the proposal will not affect the public availability or use of the hot springs<sup>8</sup>.

#### Officer's Report

98. Paragraphs 4.337–4.365 and 4.426–4.431 of the Officer's Report discuss the effects of the proposal on trampers and walkers in this part of the Waitaha Valley.
99. The Officer's report paragraph 4.428 notes -

*"The Department agrees with Westpower's assessment that the effects on most trampers and hunters accessing the Waitaha Valley would largely be localised changes to what is currently an undeveloped backcountry-remote setting. Access from Macgregor Creek to near the power house would be improved but overall the tramping and hunting experience would remain 'hard won', the*

<sup>5</sup> Rob Greenaway Recreation Assessment (Appendix 19 to Westpower Application), page 7 (**Appendix 1, Ref 1**).

<sup>6</sup> See Condition 17(2)(a) in the proposed draft conditions (**Appendix 11**).

<sup>7</sup> For background, see the Officer's Report at [4.92].

<sup>8</sup> Greenaway Recreation Assessment, page 49.

*experience may be diminished by the presence of a functioning hydro scheme and associated infra structure.”*

### Hearing Report

100. In the Hearing Report at pages 73 and 74, the Hearing Chairman records he found submissions persuasive that -

- the intactness and integrity of the Waitaha Valley in its entirety is important, rather than parcelling up the experience into individual segments. For example, while the Ivory Lake Hut would not be directly affected by the proposed activity, the overall experience of tramping to the Hut would be;
- the Waitaha has high intrinsic values, outstanding natural beauty, remoteness, solitude and wilderness qualities;
- tramping in the Waitaha is a ‘pinnacle experience’ for back country tramping in New Zealand. The experience should not be judged on the basis of the numbers of trampers. Even trampers who may never visit the Waitaha treasure it, in the same way that people who will never climb Mt Everest value it;
- for a back country area, the Waitaha is relatively accessible. It also offers different levels of tramping experiences; and
- the proposed activity would have significant adverse effects on the values of the area and on the tramping experience, and these effects cannot be mitigated.

101. The Hearing Chairman considers the indirect effects on the overall experience of tramping throughout the Waitaha Valley to be at least moderate, if not higher due to the perceptual/experiential effects of the Scheme. As he notes at page 76, this has been informed by submissions provided at the hearing.

102. The Hearing Chairman included a comment in his report to the effect that, if you are minded to grant the concessions, then the mitigation measures suggested by submitters Mr Spearpoint and Ms Jackson should be investigated further.<sup>9</sup>

### Westpower’s Position on the Hearing Report

103. In its comments on the final Hearing Report (**Appendix 6**) Westpower stated that, in terms of the impacts of the proposal on tramping<sup>10</sup> -

*“...[I]rrespective of Westpower’s recreation expert concluding that the effects of the scheme on trampers would range from moderate to [n]il in the Waitaha Valley (with the exception of Kiwi Flat where the effects are acknowledged to be high), the revised report states that the overall effects on tramping throughout the Waitaha Valley would be “at least at the moderate end of Westpower’s expert’s scale and maybe even higher due to the perceptual/experiential effects of the scheme” (page 76). The revised report goes on to conclude that the scheme would have “significant adverse effects on the values of the area and on the tramping experience” (page 78)*

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<sup>9</sup> See the table at pages 78 and 79 of the Hearing Report. The Hearing Chairman notes that, for example, the issues raised by Mr Spearpoint in regard to access over the outflow outlet would need further consideration, and Ms Jackson’s comment in regard to landowner access on the true left of the River would require further consideration.

<sup>10</sup> Westpower letter of 30 November 2017, paragraphs 38 to 40 (**Appendix 6**).

*There is an absence of reasoning for this conclusion and for why the views of persons without expertise are accepted over those of Westpower's recreation expert."*

104. Westpower's position is the proposal will have net positive impacts on tramping and recreation. Their position is set out in more detail at paragraph 45 of its comments on the draft hearing report (**Appendix 4**).

Summary

105. A summary of the findings on the potential impacts on tramping is as follows -

Hearing Chairman	Westpower
<ul style="list-style-type: none"> <li>• Local effects at Kiwi Flat are high.</li> <li>• Indirect effects on the overall experience of tramping throughout the Waitaha Valley to be at least moderate, maybe higher.</li> <li>• There is not adequate mitigation for the adverse effects on the remote and unspoilt character of the area.</li> </ul>	<ul style="list-style-type: none"> <li>• Local effects at Kiwi Flat are high.</li> <li>• Only indirect effects on all land based recreational activities.</li> <li>• Effects on tramping and hunting in the Upper Waitaha Valley through a change in perception of control of a river in an otherwise undeveloped valley setting will be low to nil.</li> </ul>

Mitigation

106. Mitigation proposed by Westpower for trampers included<sup>11</sup> -

- alternative track access between Macgregor Creek and Kiwi Flat located to avoid the powerhouse. This would be to a higher track standard than that currently;
- provision of construction information that might affect recreational users on Westpower's website and other user groups' websites if they agree;
- appropriately located signage; and
- the mitigation measures for landscape and visual amenity effects (including the revised headworks and powerhouse proposal of 15 April 2016).

107. In response to concerns raised by submitters at the hearing, Westpower offered further mitigation measures—

*"Westpower has been in discussion with the farmer on the true right to purchase a strip of land from him to gain access around the boundary of his property on the hill side and around to the proposed crossing on Macgregor Creek. This access will be formed into a road for construction purposes and also for future access for maintenance of the scheme. Westpower would make this road available for trampers and kayakers to use post construction, subject to any safety considerations."*

108. Westpower has since informed the Department that it has secured an option for the access road and confirms this mitigation can be provided.

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<sup>11</sup> See Hearing Report pages 76 and 77.

109. Comments from submitters on these further measures include:<sup>12</sup>

- One submitter (Mr Spearpoint) commented that he supports better access to the Waitaha Valley and sees the Scheme as providing this opportunity, however, the proposal needs certainty (through a condition) requiring enduring legal public 2WD vehicular access to Macgregor Creek or a carpark near the powerhouse.
- One submitter (Ms Jackson) commented about the shortcomings with the current foot access along the true right of the river, and that access along the true left would be better.
- One submitter supported improved legal public access (but not at the cost of the modification to the river, and access along the true left bank would be a better option).
- One submitter noted concerns with the safety aspects for kayakers and trampers using the road, and how prior notice arrangements would affect users.
- Three submitters commented to the effect that the provision of improved access would not be of any value and would not compensate for the compromised views.
- One submitter commented that experienced trampers should not require a road to ease their passage.
- One submitter commented that there is currently no issue with access as the farmer allows people to use his land to access the river.
- One submitter commented that making the new access road available to trampers is a detraction, as it would reduce the physical and emotional journey for trampers.

110. Mr Wightwick's report on the additional measures (**Appendix 9**) notes that it is not clear from Westpower's proposal whether access for public use is intended for vehicles, or for foot access only. Mr Wightwick's conclusion is that the proposal to purchase land and allow foot access on the newly constructed road to the power house will provide a positive benefit for recreationists. He also suggests a new condition also be included that Westpower manage and maintain a 2wd vehicle road and car park for the public access to Macgregor Creek for the life of the concession.

111. In Westpower's response (**Appendix 10**), it comments that it supports Mr Wightwick's conclusion that access to the true right bank of Waitaha River will provide a positive benefit for recreationists and also supports his proposed condition to give effect to the proposal.

112. In your final consideration regarding the effects of the proposal on tramping, you must also consider the benefits (positive effects) that would be provided by making the access road available for use by the public. This would also include the extent to which you are satisfied Westpower is able to ensure the road is operated in a way that is appropriate for public foot and vehicular access.

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<sup>12</sup> See the summary in **Appendix 8** which has a column for each additional measure.

## References

113. Further information can be found in the following documents -

- Westpower's Application, section 7.13 (Recreation and Tourism) and Appendix 19 – The Recreation Report, Mr Rob Greenaway and Peer Review of the Recreation Report by Mr Dave Bamford of TRC Tourism Ltd (**Appendix 1, Ref 1**).
- Westpower Response to DOC Request for Further Information – Recreation (**Appendix 1, Ref 3**).
- DOC Recreation Assessment Reports – Recreation assessment and Updated Assessment (**Appendix 1, Ref 13** and **Ref 38**).
- Officer's Report sections 4.337 to 4.365 (**Appendix 3**).
- Westpower's Hearing Response – Cover Note and Response Table – Tramping (**Appendix 1, Ref 28.1**).
- Westpower's Response to draft Hearing Report – Cover Note and Response Table – Tramping (**Appendix 1, Ref 30, Appendix 4**).
- Hearing Report paragraphs 30 to 33 and pages 74 to 81 (**Appendix 5**).
- Westpower's Hearing Response (**Appendix 1, Ref 28.4**).
- Westpower's comments on the final Hearing Report (**Appendix 6**).
- Westpower's letter of 10 November 2017 proposing additional "mitigation" (**Appendix 7**).
- Summary of comments from submitters on the additional measures (**Appendix 8**).
- Response from Westpower to the comments from submitters (**Appendix 10**).
- Proposed draft conditions (**Appendix 11**).
- Westpower's response to Draft Decision Report (**Appendix 12**).

### **3.4 Effects on Recreational Values – Kayaking**

#### Context

114. The report from Whitewater NZ (**Appendix 1, Ref 20**) describes the Waitaha river as follows<sup>13</sup> –

*"The Waitaha River flows west from the main divide through three gorges; the Windhover Gorge, the longer Waitaha Gorge down to the short braided river section at Kiwi Flat, and then the Morgan Gorge. After this the river gradually opens out before meeting the coastal plain and flowing down to the Tasman Sea. To the South is the Wanganui River and to the North are the Whitcombe and Hokitika Rivers".*

115. In Map 2 on page 8 above, and Maps 2 and 3 in **Appendix 2**, you can see the Waitaha Gorge, upstream of Kiwi Flat. Morgan Gorge is located slightly downstream of the proposed intake structures at the lower end of Kiwi Flat.

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<sup>13</sup> Whitewater NZ report, page 2.

116. The Waitaha River offers a variety of kayaking levels. The DOC Recreation Report by Mr Ian Wightwick (**Appendix 1, Ref 13**) explains the most common run is from above Moon beam Hut to the head of Morgan Gorge (7.5 km), to then undertake a 2 hour portage around Morgan Gorge, and then put back in again below the Gorge (where the kayaker feels comfortable as the river difficulty decreases), and then a further approximate 5 km paddle to the take out point below Robinson slip. As noted in pages 11 and 12 of Mr Wightwick's report, Morgan Gorge is limited to the experts, and since 2010 only a few strong and experienced kayakers have made the descent of Morgan Gorge.
117. Westpower estimates approximately 50 kayakers use the Waitaha River per year, with fewer than 10 individuals kayaking the upper Waitaha Gorge and/or Morgan Gorge in any one year, due to the advanced skill level required for this section. Morgan Gorge is however highly valued, as demonstrated by the submissions discussed in the Hearing Report.
118. The Scheme would reduce the opportunities for kayaking Morgan Gorge and the remainder of the 2.6 km abstraction reach. Kayaking below these reaches may also be affected because kayakers may be less likely to paddle the river due to the additional challenge of the 1.5 km of portage being required to bypass the affected section of the river which will become un-kayakable due to insufficient flow.

#### Officer's Report

119. Paragraph 4.318–4.322 of the Officer's Report summarises Westpower's position on the potential effects of the proposal on kayaking. The following effects are mentioned –
- the introduction of control and generation structures on an otherwise free-flowing river;
  - the introduction of permanent (albeit removable) structures in a backcountry-remote landscape setting otherwise developed only for recreation;
  - an additional 1530 m of portage when flows between the top of Morgan Gorge and the Scheme tailrace are inadequate;
  - a reduced opportunity to kayak the Morgan Gorge;
  - a new information regime with, potentially, more live data about flow characteristics;
  - a new requirement to communicate with a management agency (Westpower) if ceases to abstraction are sought for the Morgan Gorge and/or the Douglas Creek reach; and
  - the potential constraint on the kayaking opportunity for those portaging Morgan Gorge (in terms of a longer distance to walk) as well as those kayaking it.
120. Westpower states the effect of the scheme on the West Coast's recreation and tourism will be very slight due the alternatives available and the low level of use. The Morgan Gorge and the remainder of the Waitaha River will still challenge kayakers albeit with restrictions on its use. However, it was recognised that the change from an

uncontrolled river may remove a key quality that makes the Morgan Gorge internationally significant for kayaking.

121. The Officer's report, paragraph 4.419 notes whitewater kayakers spoken to in 2014 by DOC, commented that other than the Waitaha River, only one other river (the Hokitika) and some of its tributaries offers such a range and variety of extremely challenging white water for the most expert of kayakers. However, because a number of the Waitaha runs are more challenging still, thus resulting in its pinnacle status, there is no other resource offering the same mix and level of extremely challenging white water that can substitute for the Waitaha River.

122. Paragraphs 4.430 to 4.431 of the Officer's Report noted -

*"The Department considers that both national and international visitors, and in particularly kayakers, regardless of whether or not they have the ability to paddle the Morgan Gorge, highly value and appreciate the intrinsic worth of retaining rivers on the West Coast and around the world that can flow uninterrupted and are free of hydro schemes and their associated structures.*

*The Department notes Westpower's conclusion that mitigations are available to avoid and mitigate the scale of effects on kayaking through a number of the proposed conditions including no take days/ceases to abstraction. The Department nevertheless has reservations about the adequacy of that mitigation in light of the fact that the river would change from its natural state and would no longer be available to kayakers except on a very small number of 'cease to abstract' days. The Department agrees with Westpower that the scheme would likely result in net 'high' adverse effects on kayaking the Morgan Gorge."*

123. In paragraph 8.3 in its overall summary and conclusions, the Officer's Report notes -

*"The Department also considers there would be significant adverse effects on kayakers through the change from the river being in a natural state to one where there would be a significantly reduced opportunity to kayak the Morgan Gorge and the stretch below the Gorge to the proposed the tailrace."*

124. The Officer's Report at paragraphs 4.386 to 4.388 noted that Mr Greenaway's Recreation Assessment prepared for Westpower states that making river flow information publicly available would enable kayakers to better judge optimal kayaking periods and take advantage of suitable natural flows which augment the residual flow. While this information would help kayakers make an informed judgement on whether or not to paddle the Waitaha River, including Morgan Gorge, the situation would remain that, when the Scheme is operating at capacity, no days may be suitable for kayakers to complete a run of the Waitaha River, including Morgan Gorge.

125. In forming his Intention to Grant, the decision maker made the following notation to the Hearing Chairman - "[I] would like the Hearing Commissioner to explore further the impact on kayaking and whether the mitigation proposed is adequate".

## Hearing Report

126. In considering the adequacy of the information regarding kayaking, the Hearing Chairman notes in the Hearing Report at page 33, that submissions contributed to a greater understanding of the values and potential impacts on kayaking. In particular -

- The submissions on the Waitaha River and particularly the Morgan Gorge being the 'Jewel in the Crown' or the 'Pinnacle' of whitewater kayaking opportunities in New Zealand have added to the understanding of the significance of the values of the kayaking resource both nationally and internationally. Likewise the submissions from kayakers who have paddled throughout the world and note that the Waitaha rates as world class internationally.
- The information on how a kayak trip through the Waitaha River and the Morgan Gorge is run is considered new information and also contributes to understanding the effects on kayakers, particularly the information around the advanced planning required to plan a trip, including needing to scout the river and rapids on days prior to the planned trip.
- In addition, the submission on the additional portage of 1.5 km potentially coming at the end of a long day's paddling for these types of trips has added to the understanding of effects.
- The significance of Kiwi Flat at the entrance to Morgan Gorge in terms of being a focal point for the next stage of the kayak trip is also new information to consider.

127. In the Hearing Report at page 83 the Hearing Chairman noted -

*"It is clear from submissions that while few people presently kayak the Morgan Gorge itself, more people kayak the abstraction reach below the gorge and others kayak the whole river starting at a location above Morgan Gorge and portage the Morgan Gorge, putting in again below it. Kayakers also develop their skills by kayaking different parts of the abstraction reach below the Gorge piece by piece until the whole run can be linked together."*

128. Pages 82–92 of the Hearing Report, along with a number of the supporting documents, demonstrate the differing views on the impacts on kayaking, particularly by both WWNZ and Westpower's experts. This includes suitability of the proposed mitigation, access and portage impacts, measuring flow levels, flow levels required for kayaking and the frequency with which they would occur.

129. While WWNZ estimated there would be no additional days suitable for kayaking over and above the two no-take days (now four no-take days), Westpower's hydrologist considered even using WWNZ's flow range information, the minimum opportunities for kayaking would be 20 x 5 hour windows and 10 x 7 hour windows in a six year period. The Hearing Chairman considers that the number of additional days available for kayaking the Morgan Gorge, over and above the no-take days, is uncertain, and prefers to take a conservative view, namely that there are likely to be few such days.

130. In respect of the merits of the proposed two no take days, the Hearing Chairman summarised his assessment of this at page 84 of his report, as follows.

*"First, offering "no take" days does not line up with the way trips are planned. Planning seems to vary, but it is clear that for the more difficult descents the kayakers have to not only plan to be on the West Coast at the right time of the*



*year and during the right weather conditions, but also to check the conditions of the gorge rapids (and other difficult rapids) prior to starting. This can involve paddling the river within the weeks or days before the trip to 'scout' it out and/or - when flying in - stopping to check rapids. Also the time it takes to carry out a trip seemed to vary, with one submitter describing his example as a 6-9 hour adventure. The Hearing Chairman does not consider that a relatively inflexible regime of "no take" days lines up with the flexibility required to plan and execute a trip down the Morgan Gorge.*

*Second, as noted above, it is not just use of the gorge that will be reduced. The scheme would considerably reduce use of the abstraction reach below the gorge. It would also reduce the use of the rest of the river as kayakers would be less likely to paddle the river at all due to the extra 1.5 km of portage that would likely be required. The Hearing Chairman does not consider two 'no take' days to be adequate mitigation for these losses of opportunity.*

*Third, the Hearing Chairman considers that the adverse effect on kayaking goes further than simply reducing the number of days that the river can be used. It is not just a matter of numbers. The Hearing Chairman accepts submissions (summarised at section 2.3 of the table) that kayakers' experience would be diminished by their knowledge that the river is no longer unencumbered and wild. And also, that that the river's intrinsic values would be diminished."*

131. On page 86, the Hearing Chairman concludes he does not consider the "no take" days would compensate for the current unfettered access, even if the number of such days was increased somewhat. He acknowledges the "real time" flow information could potentially be useful for kayakers in planning trips, but this in itself does not adequately mitigate for the adverse effects on kayaking.
132. On page 91 of the Hearing Report, the Hearing Chairman recommends you accept submissions that -
- the adverse effects of the Scheme on kayaking would be significant, both in terms of the quality of the experience and its availability;
  - the Scheme would reduce kayaking opportunities for the whole river, but particularly for the gorge and the lower part of the abstraction reach; and
  - two "no take" days (or even an increased number) would not be adequate mitigation for these effects.

#### Westpower's Position on the Hearing Report

133. In its comments on the final Hearing Report (**Appendix 6**) Westpower makes various points regarding the Hearing Chairman's conclusions on the adverse effects of the proposal on kayaking including, that –
- a) Westpower considers the measures it has proposed appropriately mitigate the effects of the Scheme on kayaking;<sup>14</sup>
  - b) Westpower's advice is that while the flows in the abstraction reach below Morgan Gorge will be lower once the Scheme is constructed, there will still be times following rain events (which occur on average every 7–8 days) when the flow is

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<sup>14</sup> Westpower letter of 30 November 2017, paragraph 21 (**Appendix 7**).

similar to that which would be experienced without the Scheme, and with good planning, the abstraction reach could still be kayaked by those who do not kayak the upper reach above Morgan Gorge, but just access the lower river;<sup>15</sup>

- c) the “no-take” day regime will be highly responsive and flexible and will provide a means of ensuring the Morgan Gorge remains available to those elite kayakers wishing to attempt its descent. Westpower recognises the importance elite kayakers place on having the flexibility to plan and make real-time decisions about whether to attempt the gorge. The “no-take” day regime does require careful planning by kayakers and the operators of the Scheme. However, the regime does provide elite kayakers with the flexibility and responsiveness they require. Shut downs are able to be put in place at short notice, and are able to be cancelled at very short notice, subject only to a set of strict safety related protocols being adhered to. This will provide elite kayakers with an opportunity to kayak the gorge when they need to;<sup>16</sup>
- d) in terms of the divergence in views by Westpower’s hydrologist and advice from WWNZ, there is no reasoning provided in the Hearing Report as to why the views of people without expertise have been accepted rather than Westpower’s expert hydrologist’s views on this issue;<sup>17</sup> and
- e) despite Westpower’s and DOC’s experts concluding that the final effects on the kayaking on the Waitaha River and in the Morgan Gorge would be “high” (Hearing Report page 90), the final Hearing Report concludes the adverse effects of the Scheme on kayaking would be “significant” (page 91). There is a lack of reasoning for this conclusion.<sup>18</sup>

Summary

134. A summary of the findings on potential effects on kayaking is as follows -

<b>Hearing Chairman</b>	<b>Westpower</b>
<ul style="list-style-type: none"> <li>• The adverse effects of the Scheme on kayaking would be significant, both in terms of the quality of the experience and its availability.</li> <li>• The Scheme would reduce kayaking opportunities for the whole river, but particularly for Morgan Gorge and the lower part of the abstraction reach.</li> <li>• Two “no take” days (or even an increased number) would not be adequate mitigation for these effects.</li> </ul>	<ul style="list-style-type: none"> <li>• At the regional level the effect on recreation and tourism generally will be very slight.</li> <li>• Regional effects on kayaking of the Scheme are low due to the availability of alternatives. Even without the Waitaha the West Coast would remain a kayaking mecca.</li> <li>• Morgan Gorge will retain its ability to challenge highly skilled kayakers albeit with additional restrictions on its use.</li> </ul>

<sup>15</sup> Westpower letter of 30 November 2017, paragraph 27 (Appendix 7).  
<sup>16</sup> Westpower letter of 30 November 2017, paragraph 30 (Appendix 7).  
<sup>17</sup> Westpower letter of 30 November 2017, paragraph 35 (Appendix 7).  
<sup>18</sup> Westpower letter of 30 November 2017, paragraph 36 (Appendix 7).

## Mitigation

135. Westpower's proposed mitigation for kayaking included -

- a minimum of two "no take" days each year, subject to a protocol (including 7 days' notice, and the requests to be made through WWNZ);
- a possibility of additional "no take" days on request from WWNZ;
- DOC's ability to review the number of "no take" days and their management on a 5-yearly basis;
- a protocol being developed for the "no take" days, and that it would be reviewed annually;
- safety features of the weir to be designed in consultation with WWNZ, to enable kayak access;
- track access to bottom of the gorge being retained; and
- maintenance of foot access from the existing track on the true right of the Waitaha River to the area where the intake structures will be.

136. Westpower also offered to provide "real time" flow data and camera footage on a website to assist kayakers to plan trips, and proposed a condition to this effect.

137. The further measures Westpower proposed in respect of adverse effects on kayaking can be summarised as -

- a) Establishing a Trust in partnership with local outdoor educational specialist Tai Poutini Polytechnic. Westpower would establish the Trust and make an initial contribution of \$250,000. The purpose of the Trust would be for promoting and enhancing kayaking on the West Coast, through the provision of funds to the local kayaking community to assist kayakers of varying ages and abilities (from beginners through to elite kayakers) with their kayaking needs.
- b) Providing four (as opposed to the original two) "no take" days per year. This would provide more opportunities for the Morgan Gorge to be utilised by elite kayakers than the two "no take" days previously proposed would.
- c) Exploring a regime which would allow the hydro scheme to be shut down at short notice for short periods to allow the conditions in the lower abstraction reach to normalise so that kayaking training could take place in the lower abstraction reach.
- d) Investigating securing access to the river for trampers and kayakers by purchasing a strip of land on the true right bank of the river to gain access around the boundary of an adjoining property on the hill side, and around to the proposed crossing on Macgregor Creek. This access would be formed into a road for construction purposes and future access for maintenance of the Scheme, and would be made available to trampers and kayakers to use following construction, subject to any safety considerations.

(a) *Proposed Westpower Tai Poutini Kayaking Trust*

138. Westpower suggests the Trust could fund activities such as –

- the purchase of kayaks and other equipment for Tai Poutini Polytechnic and schools;
- school holiday and community programmes;
- refresher courses and health and safety courses relating to kayaking;
- targeted funding to support kayaking trips (for example, for more advanced kayakers to access more challenging rivers such as the Waitaha River); and
- the promotion of kayaking as a tourism activity on the West Coast.

139. Submitters have made a range of comments on the Trust proposal, including that -

- the Trust's objectives are already happening successfully;
- the amount of funding proposed is insufficient/would only provide token benefit;
- the amount of funding proposed is meaningless and does not compensate for the loss of, or do anything to conserve, natural wilderness values;
- the Trust proposal "misses the point" as kayaking opportunities and training venues are not scarce on the West Coast;
- Te Tai Poutini Polytechnic is not an appropriate organisation to be in partnership with, it does not represent the national collective of kayaking organisations, and it already receives adequate funding and runs successful kayaking programmes, and there is no certainty what would happen if the Polytechnic ceased to operate;
- the establishment of the Trust would not provide mitigation;
- the Trust does not represent the kayaking community in terms of age and diversity; and
- the Trust would have an undesirable and likely unworkable stigma attached to it, and has already given the Polytechnic a bad reputation, given several Te Tai Poutini Polytechnic instructors are also WWNZ members who are opposed to the Scheme because of its effects on kayaking and natural values, and were not consulted on the Trust proposal.

140. Mr Wightwick's report on the additional measures (**Appendix 9**) notes that the proposal to establish a Trust and make financial contributions to activities will complement existing outdoor programmes. Mr Wightwick concludes that financial contributions to a Trust do not mitigate the broader effects of the proposed hydro scheme on kayaking or make up for the loss or change to the whitewater opportunity on the Waitaha River. This means the final effect on kayaking on the Waitaha River remains 'high' in his view.

141. In Westpower's response (**Appendix 10**), it comments that in its view the Trust will provide a significant additional benefit for kayaking. The work programme for the Trust will be determined by the Trustees, providing "an even greater opportunity to ensure promotion of the sport [kayaking] on the West Coast".

(b) *Two additional "no take" days*

142. Submitters' comments on this proposal included that -

- the four no-take days are insufficient to address effects on kayakers, and may coincide with adverse weather, resulting in no days being available to kayak;
- only having four no-take days in total would result in a lottery and it would depend on luck as to whether kayaking opportunities would eventuate. A recent example of an overseas experience regarding a similar situation, is that kayaking was provided for by the power scheme not operating each weekend during the kayaking season;
- four days is better than two, but there is no guarantee that weather conditions could allow kayaking during any of those four days. From experience with other schemes, no-take days are not always guaranteed;
- providing four no-take days does not minimise the effects as required by the CMS. Water could just be extracted at night instead;
- four no-take days is a mockery and does not reflect what it takes to get a team of kayakers in there; and
- the two extra days (and periodic shutdowns) are inadequate to address the loss of another wild river.

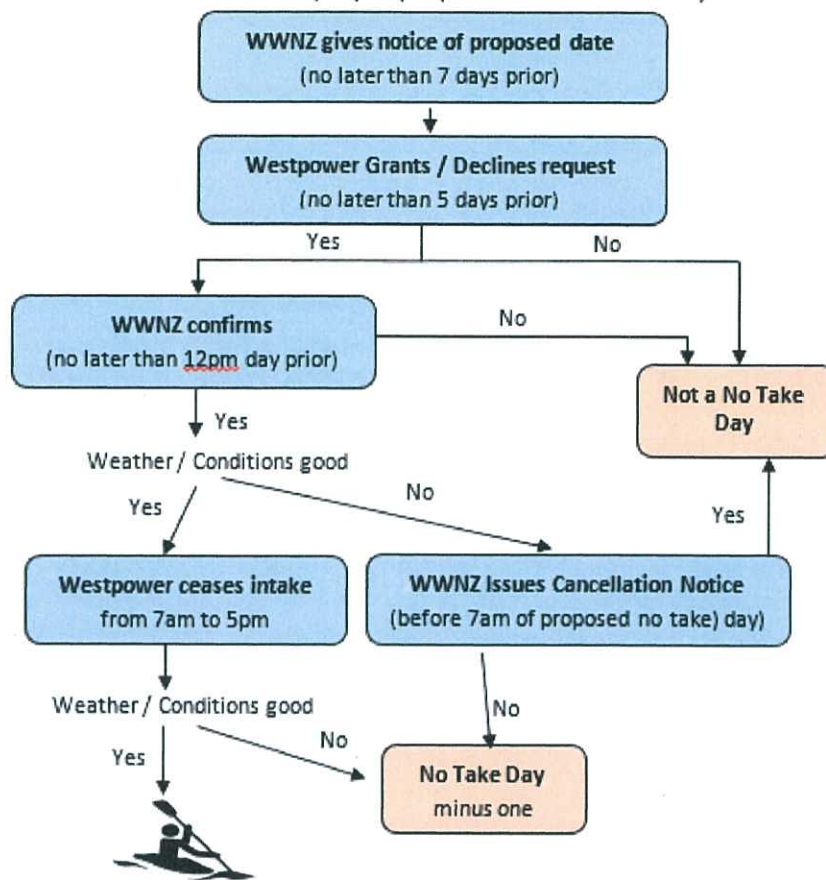
143. Mr Wightwick's report on the additional measures (**Appendix 9**) notes the offer seems reasonable, given that only six or seven attempts have been made to kayak Morgan Gorge over the past 13 years. However, his conclusion remains that the final effect on kayaking on the Waitaha River is 'high'. He recommends a protocol to implement the no take days and says that two additional no take days is a reasonable way to ensure kayakers continue to have access to the Morgan Gorge and lower abstraction section of the Waitaha River.

144. In Westpower's response (**Appendix 10**), it comments that there is a degree of flexibility around the number of no take days and there may be days when the Scheme does become available for kayaking because it is shut down for routine maintenance for example) and this information could be made available to recreational users. Westpower says it intends for the protocol to be a 'living' document that can evolve as experience is gained through operation of the "no take" day regime.

145. The "no take" day regime proposed is set out in proposed Condition 17.4 of the draft conditions (**Appendix 11**). This is relatively complex, and for your convenience we set out the proposed regime in a flowchart below. It is possible for there to be no days available for kayaking in any one year, given the prescribed notice requirements. This could occur, for example, if bad weather occurs after the notice requirements have passed.

## Proposed Process for No Take Days

(As per proposed Conditions 17.4)



### (c) Periodic shutdowns for kayaking training in the lower abstraction reach

146. Three submitters commented on the periodic shutdowns for kayak training proposal, as follows -

- the ability to shutdown often would be welcomed by kayakers, but a more concrete proposal about how this would work would be needed. There would be benefits in Westpower ensuring the design of their plant would allow it to start up and shut down regularly and at short notice;
- shutdowns in the lower reach are opposed due to it being incomparable to having a natural flow, and it does not recognise the diversity in the kayaking community; and
- two extra days and periodic shutdowns are inadequate to address the loss of another wild river.

147. Mr Wightwick's report on the additional measures (**Appendix 9**) notes the number of days that the lower abstraction reach is used for training, whether by the Tai Poutini Polytechnic or others, has not been quantified. However, he comments that if Westpower is willing and able to implement a regime which would allow the Scheme to be shut down for short periods for increased use of the lower reach, this would help to mitigate the effects of the hydro Scheme for all kayakers who wish to use the lower abstraction reach.

148. In Westpower's response (**Appendix 10**), it comments that it is willing and able to implement a regime that would allow the Scheme to be shut down for short periods for increased use of the lower reach.

*(d) Availability of the new access road for kayakers and trampers*

149. The additional measure of making the new access road available to kayakers and trampers, submitter comments, Mr Wightwick's assessment, and Westpower's response, are discussed in paragraphs 106–112 in **Section 3.3** above. This measure needs to be treated as a positive effect of the proposal. You may afford it the degree of significance and weighting you consider appropriate in your decision.

*DOC's conclusions on the proposed additional measures*

150. The large majority of comments received from submitters on kayaking issues indicate the additional measures proposed by Westpower do not satisfy their concerns regarding the effects of the proposal, and the measures are generally viewed by those submitters as inadequate.

151. The additional measures also do not change Mr Wightwick's conclusion that the effects on kayaking will be "high". This is in essence due to the fact that it is not simply the loss of the opportunity to kayak the affected parts of the river, but also the nature of both the experience being lost and the changes to what would remain as a result of the Scheme.

References

152. Further information to support your assessment can be found in the following documents –

- Westpower's Application, section 4.14 (Recreation and Tourism) and Appendix 19 – Recreation Report, Mr Rob Greenaway and Peer Review of the Recreation Report by Mr Dave Bamford, TRC Tourism Ltd (**Appendix 1, Ref 1**).
- Response to DOC Request for Further Information - Recreation (Kayaking) (**Appendix 1, Ref 5**).
- DOC's Recreation Assessment Reports – Recreation assessment and Updated Assessment (**Appendix 1, Ref 13 and Ref 38**).
- Report submitted by Whitewater New Zealand - Impacts of the proposed Waitaha River Westpower Hydro Scheme on white water and kayaking values (**Appendix 1, Ref 20**).
- Westpower response to Impacts of the proposed Waitaha River Westpower hydro Scheme on white water and kayaking values (**Appendix 1, Ref 21**).
- A supplementary Report submitted by Whitewater New Zealand – *[Note only relevant parts of this report have been accepted]* (**Appendix 1, Ref 22**).
- Westpower response to the supplementary report from Whitewater NZ on the proposed Westpower hydro Scheme (**Appendix 1, Ref 23**).
- Officer's Report sections 4.337 to 4.365 and 4.470 to 4.471 (**Appendix 3**).
- Westpower's Hearing Response – Cover Note and Response Table – Kayaking (**Appendix 1, Ref 28.1**).

- Westpower's Response to draft Hearing Report – Cover Note and Response Table – Kayaking (**Appendix 1, Ref 30, Appendix 4**).
- Hearing Report paragraphs 34 to 36 and pages 82 to 92 (**Appendix 5**).
- Westpower's comments on the final Hearing Report (**Appendix 6**).
- Westpower's letter of 10 November 2017 proposing additional "mitigation" (**Appendix 8**).
- Summary of comments from submitters on the additional measures (**Appendix 8**).
- Response from Westpower to the comments from submitters (**Appendix 10**).
- Proposed draft conditions (**Appendix 11**).
- Westpower's response to Draft Decision Report (**Appendix 12**).
- Westpower Expert Submission presented by Martin Doyle - White Water New Zealand submission – *Waitaha Hydro Project; Martin Doyle, Hydrologist. 7/12/2016 presented at the Hearing* (**Appendix 1, Ref 28.2**).

### 3.5 Effects on indigenous flora and fauna

#### Officer's Report

153. The Officer's report at paragraph 4.163 states -

*"Westpower suggests only a low number of threatened species are present however the Department does not agree with this statement. The site contains significant habitat of threatened and representative bird and bat species. Impacts potentially include loss of breeding and/or feeding habitat through felling of trees and clearance of habitats mainly for the road development, and locally about the portal, weir and other workings. The greatest potential impact would be the potential loss of a bat roost during felling, if this happened this would be a significant effect. However, if Westpower could avoid felling any bat roosts then the potential effects on bats would be considered minor. Effects on forest birds would also be considered negligible if Westpower could avoid important food source trees. If Westpower adheres to the proposed conditions it is considered that effects on fauna values would be adequately avoided, remedied and mitigated."*

154. In regard to lizards, the Officer's report's conclusions are set out in paragraphs 4.185–4.188, and are that -

- The site is considered significant for lizards.
- The amount of loss is described by the applicant's specialist as both "negligible" or "of very little adverse effect on the lizard fauna of the project area". However, DOC considered this is not the case if the Westland green gecko or a unique clade of the speckled skink is present.

155. At paragraph 4.188 the Officer's Report notes that -

*"The Department considers that the likely presence of a threatened gecko species and total removal of less well represented "At Risk" skink habitat would*



*be considered to be a significant local negative effect and potentially a nationally significant negative effect and would cause a loss of biodiversity values."*

#### Hearing Report

156. The Hearing Report at pages 30 to 32 refers to various sections in the Officer's Report on potential effects of the proposal on indigenous flora and fauna, and notes that –

*"A range of mitigation measures are proposed at para 4.183 and concludes that the minister needs to decide whether the proposed mitigation measures would avoid, remedy and mitigate adequately the effects on lizards or whether the information available on lizards is insufficient or inadequate to assess the effects."*

157. The Hearing Chairman concludes at page 30 of his report that he –

*"... is satisfied that the information on threatened species is adequate to enable the effects to be assessed and that (were the application to be granted) the effects on threatened species would be adequately addressed through the proposed conditions. The Hearing Chairman accepts Westpower's response that its application was very detailed, appropriately reflecting the significance of the proposal. He recommends that you not accept submissions as to inadequacy/insufficiency of information on species."*

#### References

158. Should you be minded to grant the concessions, this will have to be subject to the resolution of satisfactory conditions that are able to be imposed, including to adequately address the potential adverse effects on indigenous flora and fauna.

159. The proposed draft conditions attached to the Officer's Report and reproduced in **Appendix 11** require a suite of management plans and include various measures to address effects on indigenous vegetation and fauna, as follows -

- Construction - Conditions 1.1-1.2, 4.3, 5.16, 6.3, 7.1-7.4, 8.1-8.7, 8.14-8.17, 8.20, 18.1-18.4, 18.9, 18.10, 19.1-19.2;
- Vegetation - Conditions 1.1-1.2, 4.1-4.5, 4.10, 5.1-5.8, 5.11, 5.13-5.16, 7.1-7.4, 8.10, 11.1-11.6, 12.1-12.5, 13.2, 18.1-18.4, 18.21;
- Birds and bats - Conditions 1.1-1.2, 4.1, 4.4-4.7, 4.10, 5.8-5.10, 5.16, 7.1-7.4, 12.1-12.3, 15.1-15.6;
- Lizards - Conditions 1.1-1.2, 7.1-7.4, 15.8;
- Invertebrates - Conditions 1.1-1.2, 5.16, 7.1-7.4, 12.1-12.7, 18.21;
- Aquatic Ecology/Benthic Communities and Freshwater fish - Conditions 1.1-1.2, 4.1, 4.3, 5.14-5.16, 6.1-6.3, 7.1-7.4, 8.1-8.10, 8.12, 8.14-8.18, 11.1-11.6, 12.1-12.7, 14.1-14.5, 15.5-15.6, 18.1-18.4, 18.9-18.14; and
- Blue duck – whio - Conditions 1.1-1.2, 4.8-4.9, 5.16, 7.1-7.4, 8.1-8.12, 9.1-9.4, 12.1-12.7, 14.1-14.5, 15.1-15.7, 15.10 -15.11, 18.1-18.4, 18.15-18.20.

## Section 4 – Analysis

### 4.1 Consistency with the Act and the purpose for which the land is held

160. As set out above, the first question you must ask is whether the Scheme is contrary to the purposes for which the land is held and/or the provisions of the Act. Considering the purpose of the land will involve, among other things, you determining -

- the adverse (conservation-related) effects of the proposal on the conservation area;
- whether the adverse effects on the conservation area are adequately addressed; and
- the positive (conservation-related) effects of the proposal on the conservation area.

161. When considering the overall activity, it is open to you to find that granting concessions for the proposal will not meet the requirement in s 25 of the Act to protect the land's natural and historic resources, and as such the activity would be contrary to the purposes for which the land is held. Relevant to reaching this conclusion, is whether, in terms of the relevant conservation area at issue, the activity's effects can be adequately avoided, remedied or mitigated, and whether such adverse effects are outweighed by positive effects on that area.

#### Officer's Report

162. Paragraphs 4.498 – 4.502 of the Officer's Report note-

*“4.498 The emphasis in the Conservation Act 1987 is on preservation and protection of natural resources for the purpose of maintaining intrinsic values, providing for public appreciation and recreational enjoyment, and safeguarding the options of future generations.*

*4.499 The mandatory nature of the wording in section 25 of the Conservation Act 1987 suggests that it would not be lawful under the Act to allow an activity to occur which undermines the protection (i.e. undermines the maintenance as far as practicable in its current state) of natural and historic resources of the land.*

*4.500 However, the provisions of the Act require the Minister also to consider a number of other matters as set out in part 3B of the Act, including the effects of the proposed activity, and the possible safeguards and mitigation measures proposed. The Minister must also consider the natural and historic resources the stewardship area status seeks to protect and to question whether the granting of the application, with or without conditions, would provide appropriate protection of those resources.*

*4.501 The effects of the proposed hydro scheme and measures proposed to avoid, remedy and mitigate the effects on the natural and historic resources of the Waitaha Conservation Area are discussed above in this report. This analysis concludes that there are a number of significant adverse effects on natural resources from the proposed hydro scheme.*

*The key issue is whether there are adequate or reasonable methods for mitigating these adverse effects.*

4. 502 *If you consider the significant adverse effects (especially the effects on the natural landscape character at the intake and power house sites and the effects on recreational users, especially kayakers, in the abstraction reach) are not able to be adequately mitigated, you should consider declining the proposal on the basis that it is contrary to the Act and the purposes for which the land is held pursuant to section 17 U (3)."*

#### Hearing Report

163. In addition to the analysis discussed above in relation to the specific key issues, on page 105 of the Hearing Report the Hearing Chairman notes -

##### *"Natural resources*

*The Hearing Chairman notes that the purpose includes protection of the area's natural resources, which include landscape, landform and geological features (section 25 and section 2).*

*At section 3.3 above, the Hearing Chairman has recommended that you accept submissions that the activity would have significant adverse effects on natural character, landscape and visual amenity which cannot be adequately mitigated.*

##### *Recreation*

*At sections 3.51 and 3.52 above, the Hearing Chairman has recommended that you accept submissions that the adverse effects of the scheme on kayaking and tramping would be significant and cannot be adequately mitigated.*

##### *Conclusion on "purpose"*

*Protection of landscape and recreation are part of the purpose for which this land is held. The Hearing Chair[man] agrees with Westpower that infrastructure is not inherently contrary to the purpose for which public conservation lands are held. In this instance, however, the Hearing Chairman considers that the adverse effects on the scheme on landscape and recreation are sufficiently high that the scheme would be contrary to those aspects of the purpose. He does not consider that the positive effects of the scheme, for example the improved track standards and the real-time flow information, outweigh the negative effects.*

*He therefore recommends that you accept submissions that the activity would be contrary to the land's purpose.*

*The Hearing Chairman recommends that you decline the application pursuant to 17(U)(3)."*

164. On page 108 of the Hearing Report, the Hearing Chairman records the following conclusions -

*"For the reasons set out in other sections of this report, the Hearing Chairman recommends that you accept submissions that the activity would be contrary to sections 17U(2)(b) ("effects"), 17U(3) ("purposes"), and 17W(1) ("CMS") of the Act. More broadly, focussing on the Act as a whole rather than individual sections, he considers the activity would be contrary to the 'conservation' purpose of the Act."*

165. Given the Hearing Chairman's view on s 17U(2)(b) is largely based on effects that occur within the conservation area, his conclusions on that section are relevant to your analysis of the s 17U(3) test.

#### Westpower's position

166. In Westpower's response to the finalised Hearing Report (**Appendix 6**), it recorded its view that the proposal is not contrary to the Act. This is principally on the basis that<sup>19</sup> -
- a) positive effects of the proposal on the social and economic environment are relevant and need to be taken into account, and the Act does not permit an exclusive focus on conservation effects. Part 3B of the Act gives the same meaning to "effects" as that under the RMA;
  - b) the Act's long title provides that it is an Act to "promote the conservation of New Zealand's natural and historic resources", not "to ensure that there is no change to them";
  - c) the statutory scheme is founded on the principle of striking an appropriate balance between protection and use of places and resources; and
  - d) climate change is a significant threat to biodiversity, and the benefits of small renewable energy schemes must be relevant to decisions under the Act. It is only through a proliferation of schemes of this nature that New Zealand has any chance of meeting its obligations under the Climate Change Response Act 2002 and under the Energy Efficiency and Conservation Act Strategy 2017.
167. Westpower is also of the view that the adverse effects are sufficiently mitigated.
168. Westpower has indicated in its response to the draft report (**Appendix 12**) that it has modified its position in respect of the "balance" concept. Westpower's modified position is that while conservation legislation is based on a protection purpose, there are express provisions within the legislation that also provide for use (such as through Part 3B of the Act). Westpower emphasises that the Act is not premised on absolute preservation or protection with no provision for use of public conservation land or resources. There is thus nothing inherently unlawful about granting this concession. Consideration of the effects of the concession, including the extent to which these can be avoided, remedied or mitigated and any positive effects, is a key part of the decision. While Westpower considers that broader positive effects of the scheme should be taken into account, it says it does not rely on those broader positive effects to justify the grant of the concessions and says there is ample justification in their view for the Minister to grant the concession should he wish to do so because all negative effects are avoided, remedied and mitigated.

#### DOC Comment

##### *a) Relevance of s 17U(2)(b) reasons*

169. In its response to the draft Hearing Report (**Appendix 4**), Westpower asserted the Hearing Chairman's findings and recommendations were in error, as the Hearing Chairman had concluded that, because the adverse effects could not be mitigated adequately, this would "*lead inevitably to his recommending also that the decision*

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<sup>19</sup> Westpower letter of 30 November 2017, paragraphs 5 to 12 (**Appendix 6**).

maker accept submissions that the activity would be contrary to the Act's purpose" and to "certain provisions of the Conservation Management Strategy".<sup>20</sup>

170. The Hearing Chairman responded to this matter on page 131 of the Hearing Report, noting that he -

*"... considers it appropriate for there to be a close linkage between his findings on "effects" and his findings on these other statutory tests. While each test has a different immediate focus, each reflects the Act's conservation purpose. Because the Hearing Chairman considers there to be certain adverse effects on conservation values that cannot be adequately mitigated, it is not surprising that in turn he considers the other tests not to be satisfied. For example, taking the "purpose for which the land is held" test (17U(3)), the Hearing Chairman has concluded that there are high adverse effects on landscape, at the local level, even after the proposed mitigation. That being so, he concludes that the 'purpose' test is not met as this requires "protection" of "natural resources" which include landscape. Similarly, he concludes that these effects make the proposal inconsistent with the CMS provision which requires the protection and preservation of landscapes. (3.3.4.3 Objective 1 and Policy 1)."*

171. The link between "effects" and the statutory tests of "purpose" and "consistency with the CMS" is not "inevitable". However, for the reasons expressed by the Hearing Chairman, there is a strong linkage between adverse effects and other considerations, given the provisions of the Act, the purpose for which the land is held, and the CMS provisions, all essentially seek to achieve the same result.

172. There are differences between the two statutory tests relating to adverse effects and consistency with the CMS (see also Section 4.3 below). Section 17(U)(2) (consideration of effects) contains a discretion, i.e. you are not required to decline the application even if you consider there are no adequate or reasonable methods for remedying, avoiding, or mitigating the adverse effects of the proposal. However, you must decline to grant the application if you consider the proposal is contrary to the provisions of the Act or the purposes for which the land concerned is held (s 17U(3)).

173. It follows that all of the technical issues arising from the application discussed in the previous section, and the Hearing Chairman's conclusion on these, will be relevant to your assessment under s 17U(3) insofar that they relate to the conservation area. As you will have seen the vast majority of the effects on natural character, flora and fauna, and recreation (kayaking and tramping in particular) occur within the conservation area itself, thus even though the Officer's Report and Hearing Report discussed these issues in more detail in the context of s 17U(2)(b), that analysis is relevant to s 17U(3).

*b) Positive social and economic effects are not relevant*

174. Westpower's case is that the Scheme will

- improve the reliability and security of electricity supply within the West Coast; and
- provide investments that will generate returns for Westpower consumers.

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<sup>20</sup> Draft Hearing Report, pages 79 to 84.

175. These benefits cannot be taken into account as positive effects of the proposal. The High Court's decision in *Buller Electricity Ltd v Attorney-General*<sup>21</sup> provides authority that they are not relevant considerations, as they are not conservation-related.

176. The Hearing Chairman correctly took into account the positive effects of the proposal that are relevant to conservation values. At page 130 the Hearing Report records –

*“The Hearing Chairman accepts that the government’s renewable energy strategy is relevant. But the contribution of this scheme to achieving the strategy is small, whereas the negative effects of the scheme on the area are high. In those circumstances, given the statutory criteria for the Minister’s decision, the Hearing Chairman recommends the Minister give little weight to any contribution the scheme might make to the energy strategy.”*

177. Also relevant will be the extent to which the production of renewable energy has an overall positive effect on the conservation of New Zealand’s natural and historic resources. In light of these points, it is relevant for you to consider the scheme’s impact on achieving renewable energy goals, the positive impact for natural and historic resources; and the weight to be placed on this positive effect when assessing the effects of the activity.

c) *The Conservation Act is not a “no change” or “no effects” statute*

178. Part 3B contemplates that, at least in some circumstances, a concession may be granted where there are residual adverse effects from an activity. This can be inferred from the reference in s 17U(1)(c) to measures to mitigate adverse effects. However, if the effects cross the threshold to render the concessions inconsistent with the purposes for which the conservation area is held, you must decline the application.

179. The “conservation” purpose of the Act is founded on protection and preservation. This is reflected in the definitions, the various prohibitions against the use of natural and historic resources where the specified bottom lines in ss 17U to 17W are not met, and the requirements in the Act, including s 25 which requires stewardship areas to be managed so as to protect their natural and historic values. The High Court summed this up in the *Buller Electricity* decision<sup>22</sup> -

*“It is further to be noted that under s. 25 of the Act every stewardship area is to be managed so that its natural and historic resources are protected. The long title to the Act emphasises that conservation is the principal objective of the Act. The definitions of “conservation”, “conservation area”, “preservation” and “protection” all underline that conservation is the objective of the statute, as do the functions of the Department itself under s. 6 of the Act.”*

180. This is also reflected in s 6(e) of the Act which directs that recreational use of natural and historic resources is only to be fostered by DOC “to the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation”.

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<sup>21</sup> *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC).

<sup>22</sup> See *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) at 351

d) *The NZ Energy Efficiency and Conservation Strategy 2017–2022 and the benefits of renewable energy (including NZ's obligations under the Climate Change Response Act 2002)*

181. With regard to the Government's Energy Efficiency and Conservation Strategy (Energy Strategy), it is open to you to take into account the fact that the proposal might make a small contribution to achieving the Government's Energy Strategy.<sup>23</sup>

182. This is because the application is for an activity for the development of renewable power generation, which is likely to have a positive effect on New Zealand's natural and historic resources as a whole. The Government's energy strategy is relevant to the extent it encourages renewable energy generation for the same reason. You should therefore consider the significance of this factor and afford it the degree of weight you consider appropriate. However, this consideration cannot justify the granting of the concessions if you are not satisfied that the proposed activity meets the thresholds in ss 17U and 17W of the Act.

### References

183. Further information on this issue can be found in the following documents -

- Westpower's Application, section 10 (Statutory Provisions) (**Appendix 1, Ref 1**).
- Westpower's Hearing Right of Reply – Statutory Paper, prepared Mr Paul Radich QC (**Appendix 1, Ref 28.8**).
- Officer's Report sections 4.489–4.502 and 8.5–8.6 (**Appendix 3**).
- Westpower's Response to draft Hearing Report, Letter Mr Paul Radich QC (**Appendix 4**).
- Hearing Report paragraphs 37–38 and 104–110 and pages 130–135 (**Appendix 5**).
- Westpower comments on final Hearing Report, 30 November 2017 (**Appendix 6**).
- Westpower's additional measures (Letter of 10 November 2017 (**Appendix 7**)).
- Summary of comments from submitters on the additional measures (**Appendix 8**).
- The Department's Expert Recreation Report on additional measures (**Appendix 9**).
- Response from Westpower to the comments from submitters (**Appendix 10**).
- Westpower's response to Draft Decision Report (**Appendix 12**).

## **4.2 Consistency with the Conservation General Policy 2005**

### Context

184. The Conservation General Policy 2005 (CGP) was prepared under s 17C of the Act and provides guidance for the implementation of the Act and other conservation related legislation. Part 3B of the Act does not expressly make consistency with the

<sup>23</sup> DOC therefore prefers the Hearing Chairman's conclusion at page 22 of the Hearing Report over his conclusion at page 129.

CGP a criterion for considering a concession application. However, the requirement for consistency is implicit, because of -

- section 17A, which requires DOC to manage conservation areas in accordance with the CGP;
- section 17D(1), which requires CMS's to implement general policies, which are found in the CGP;
- section 17D(4), which requires CMS's to "not derogate from" the CGP. CMS's must therefore be consistent with the CGP; and
- section 17N(2) which confirms that the Minister of Conservation is bound by the general policies such as those found in the CGP.

185. In addition, the CMS incorporates the CGP into concession decision-making (Objective 1, page 112 of CMS).

#### Westpower's position

186. Westpower's position is the application is consistent with the CGP. In particular it says that the scheme complies with policies 4.5, 4.6, 8, 9.1, 9.5, 11 and 11.3. It notes the CGP provides for utilities to be established on conservation land and requires an analysis of effects and design of utilities with particular regard to landscape matters. It says the scale, design and colour of the scheme have been the subject of specific landscape assessment to assist integration into the landscape. These matters have been taken into account in terms of location, design and suggested conditions relating to the Scheme and concession in order to avoid or mitigate effects. It is the conclusion of the Landscape Report that whilst there are some residual "high" levels of effect from the establishment of the structures and Scheme, the Scheme is not inappropriate to the location with respect to natural character, landscape and visual amenity. For these reasons Westpower considers that the Scheme and concession sought, including design, location and suggested conditions, is consistent with the CGP.

#### Officer's Report

187. Relevant provisions of the CGP are summarised in the Officer's Report at paragraphs 4.517 to 4.542. These include -

- CGP Policy 2(e) - Consultation with Tangata whenua;
- CGP 3(e) - Consultation with interested organisations;
- CGP Policy 4.5 - Geological features, landforms;
- CGP Policy 4.6 - Ecosystem Services;
- CGP Policy 9 - People's Benefit and Enjoyment;
- CGP Policy 11 - Activities Requiring Specific Authorisation; and
- CGP Policy 11.3 – Utilities.

#### Hearing Report

188. On pages 124 – 125 of the Hearing Report the Hearing Chairman records his findings as to whether the proposal would be consistent or inconsistent with the following provisions of the CGP, as follows.



CGP Policy 4.5 - Geological features, landforms, and landscapes

Policy 4.5(b) - *“Activities which reduce the intrinsic values of landscape, landform and geological features on public conservation lands and waters should be located and managed so that their adverse effects are avoided or otherwise minimised.”*

“Intrinsic value” - *“A concept which regards the subject under consideration as having value or worth in its own right independent of any value placed on it by humans.”*

189. In the Hearing Report, page 124, the Hearing Chairman refers you to his recommendations in prior sections of that report to -

*“accept the submissions on the effects on natural character, visual amenity, landscape, tramping and kayaking and the Hearing Chairman’s comments that the effects on these values cannot be adequately avoided, remedied, or mitigated. The Hearing Chairman recommends that you accept submissions that there is a conflict with CGP 4.5(b) as the effects on the activity on the intrinsic values of landscape, landform and geological features cannot be avoided or otherwise minimised.”*

CGP Policy 9.1 – Planning and management for people’s benefit and enjoyment

Policy 9.1 (a) – *“Recreational opportunities will be provided on public conservation lands and waters. Where provided, they should be consistent with the values of and outcomes planned for places”.*

190. The Hearing Chairman notes –

*“The Hearing Chairman also recommends that you accept the submission that the hydro scheme would be inconsistent with CGP 9.1 (a) which requires consistency with the values of and outcomes planned for places.”*

CGP Policy 11.3 (a) and (d) – Utilities

Policy 11.3 (a) – *“Utilities may be provided for on public conservation lands and waters where they cannot be reasonably located outside public conservation lands and waters, or if specifically provided for as a purpose for which the place is held.”*

Policy 11.3(d) – *“Utilities should, wherever possible, be located in, or added to, an existing structure or facility and use existing access options.”*

191. The Hearing Chairman –

*“considers that the assessment of alternatives provided by Westpower were adequately addressed”.*

DOC comment

General Policy 1 – Interpretation of Policies - how to interpret “will”, “should” and “may” in the Objectives and Policies

192. The Policies in the CGP use either the term “will”, “should”, or “may” in terms of the outcome referred to in them. General Policy 1(d) describes how these terms in the CGP are to be interpreted. Policy 1(d) provides:

“The words ‘will’, ‘should’ and ‘may’ have the following meanings:

- i. Policies where legislation provides no discretion for decision-making or a deliberate decision has been made by the Minister to direct decision-makers, state that a particular action or actions 'will' be undertaken.
  - ii. Policies that carry with them a strong expectation of outcome without diminishing the constitutional role of the Minister and other decision-makers, state that a particular action or actions 'should' be undertaken.
  - iii. Policies intended to allow flexibility in decision-making, state that a particular action or actions 'may' be undertaken."
193. The Hearing Chairman found the proposal would be inconsistent with a number of the policies in the CGP (and the CMS) which are "should" policies, i.e. those carrying a strong expectation of the outcome stated in the policy.
194. As noted above, s 17A requires the Department, subject to the Act, to administer and manage all conservation areas in accordance with the CGP. Conservation management strategies are developed to implement general policies (s 17D)). In line with this, you cannot then grant a concession unless the concession is consistent with the CMS (17W(1)).
195. Westpower says that the application is consistent with each of the relevant individual policies of the CMS and the CGP. In essence, your decision should be consistent with both documents at the relevant policy level. This requires an assessment of the relevant planning provisions (and what specifically they require to be addressed) against the elements of the proposal and its positive and negative effects. It does not enable a holistic balancing whereby consistency can be met by balancing inconsistency with certain relevant policies against other policies that have arguably been met.
196. You need to consider the Hearing Chairman's recommendations (and the reasons for them, including his findings), and if you do not agree with them, it is open for you to decide the proposal is not contrary to some or all of the policies in the CGP. However, if you do agree with the findings of the Hearing Chairman, then you will need to decline the application given the above legal requirements.
197. You also need to consider whether the further measures proposed by Westpower after the hearing and completion of the Hearing Chairman's report, have any effect on whether the proposal is consistent with the CGP.

#### References

198. Further information to support your assessment can be found in the following documents -
  - Westpower's Application, section 10 (Statutory Provisions) (**Appendix 1, Ref 1**).
  - Westpower's Hearing Right of Reply – Statutory Paper, prepared Mr Paul Radich QC (**Appendix 1, Ref 28.8**).
  - Officer's Report sections 4.489–4.502 and 8.5–8.6 (**Appendix 3**).
  - Westpower's Response to draft Hearing Report, Letter Mr Paul Radich QC (**Appendix 4**).
  - Hearing Report paragraphs 37–38 and 104–110 and pages 130–135 (**Appendix 5**)

- Westpower comments on final Hearing Report, 30 November 2017 (**Appendix 6**).
- Westpower's additional measures (Letter of 10 November 2017) (**Appendix 7**).
- Summary of comments from submitters on the additional measures (**Appendix 8**).
- Further/updated Recreation Report of Ian Wightwick (**Appendix 9**).
- Response from Westpower to the comments from submitters (**Appendix 10**).
- Westpower's response to Draft Decision Report (**Appendix 12**).

### 4.3 Consistency with the Conservation Management Strategy (CMS)

#### Context

199. Section 17W(1) of the Act states – *“Where a conservation management strategy or conservation management plan has been established for a conservation area and the strategy or plan provides for the issue of a concession, a concession shall not be granted in that case unless the concession and its granting is consistent with the strategy or plan.”*

#### Westpower's position

200. Westpower's position is the application, subject to the suggested conditions, is consistent with the CMS objectives and policies.<sup>24</sup> In particular it refers to sections 3.3–3.8 and 4.2.6.

#### Officer's Report

201. The Officer's report paragraphs 4.543–4.630 provides a full assessment of the relevant policies and objectives of the West Coast *Te Tai o Poutini* CMS.

202. While the Officer's report concluded the application was consistent with many of the relevant policies and objectives,<sup>25</sup> in its overall summary and conclusions at paragraph 8.7 the following is noted -

*“A number of ... CMS policies rely for consistency on the effects being adequately mitigated. You need to consider whether as discussed in this report the proposed hydro scheme is consistent with ... CMS section 3.3.4.3 - Management of Geodiversity and landscapes policy 1, and 3.7.2 – Activities on or in Beds of Rivers of Lakes policy 1 a) and e) and 3.5 Authorised uses of Public Conservation Lands objective 3. If you consider that the proposed hydro scheme is inconsistent with these policies then to grant a concession for the proposed hydro scheme would be inconsistent with 17 W(1) of the Conservation Act.”*

#### Hearing Report

203. On page 115 of the Hearing Report the Hearing Chairman records he found submissions persuasive in relation to some of the CMS provisions, namely that the activity would be inconsistent with the following provisions -

- 3.3.4.3 - Management of Geodiversity and Landscapes;
- 3.5 - Authorised uses of Public Conservation Lands - objective 3;

<sup>24</sup> See section 10 of the AEE for Westpower's full assessment.

<sup>25</sup> See paragraphs 4.546, 4.566, 4.566, 4.573, 4.577, 4.614, and 4.628–4.630.

- 3.7.2 - Activities on or in Beds of Rivers of Lakes policy 1 (a) and (e);
- 3.7.11 – Utilities; and
- 4.2.6.3 - (Desired Outcomes for Hokitika Place) Geodiversity, landform and landscapes in 2020.

Section 3.3.4.3 – Management of Geodiversity and Landscapes

Objective 1 - *“To protect geodiversity and landscapes from adverse effects of human use or management”*

Policy 1 - *“The Department should seek to protect and preserve the natural character, integrity and values of landscapes, landforms, geological and soil features and processes in all aspects of conservation management”*

204. The Officer's Report notes at paragraph 4.573 –

*“In terms of CMS Section 3.3.4.3, policy 1, it is important to separate local scale landscape effects from broad scale landscape effects. With respect to the latter, Westpower considers the adverse effects to be low or moderate to low. The Department agrees with the Isthmus report that the adverse effects are greater than low rather than low. With respect to the former both Westpower and the Department consider the adverse effects of the Scheme would be significant at the top of Morgan Gorge, through the abstraction reach and at the powerhouse site. You will need to consider whether the measures proposed to mitigate effects would ensure consistency with policy 1 above or not...”*

205. On page 116 of Hearing Report the Hearing Chairman provides his assessment –

*“This policy seeks to protect and preserve landscape. The application would have significant adverse effects on landscape at the local scale, despite the considerable effort Westpower has put into mitigation. Therefore, the Chairman considers the scheme would be inconsistent with this policy.”*

Section 3.5 - Authorised uses of Public Conservation Lands

Objective 3 - *“To protect recreational opportunities from adverse effects of authorised uses of public conservation lands.”*

206. The Officer's report, paragraph 4.577 notes -

*“The Department agrees with Westpower that the effects on kayaking on the Waitaha River would be high even after the proposed mitigation measures. You will need to consider given the above discussion whether you think the adverse effects are sufficiently mitigated to be consistent with objective 3 above...”*

207. The Hearing Report, page 116 provides the overall finding as follows –

*“This policy prioritises protection of recreational opportunities over the adverse effects of ‘authorised activities’ (such as concessions). The application would have high adverse effects on kayakers’ use of the whole Waitaha River, the Morgan Gorge and the abstraction reach below the gorge. Therefore he considers the scheme would be inconsistent with this policy. The scheme’s high effects on trampers’ experience also make the scheme inconsistent with this policy.”*

CMS 3.7.2 – Activities on or in Beds of Rivers of Lakes policy 1 (a) and (e)

208. Section 3.7.2 (page 149) provides guidance for all types of activities that occur on and in beds of rivers and lakes managed as public conservation land. Policy 1 provides a list of guidelines for assessing applications -

1. *When assessing applications for any activity on or in the bed of a river or lake, consideration should be given to (but not limited to) the following guidelines:*
  - a) *Adverse effects on freshwater and terrestrial species, habitats and ecosystems, historical and cultural heritage values, public access, recreation opportunities and amenity values should be avoided or otherwise minimised;*
  - b) *Riparian vegetation should be maintained or enhanced;*
  - c) *Activities should not damage riverbanks;*
  - d) *No pests, weeds or other unwanted organisms (e.g. Didymo) should be likely to be introduced to, or become established within, the area as a result of the activity; and*
  - e) *The natural character within the setting of the activity should be maintained.*

209. The Officer's report, paragraph 4.601 notes -

*"You will need to consider in regards to policy 1 e) "the Natural character effects within the setting of the activity should be maintained" whether the proposed mitigation measures reduce the potential adverse effects to the degree where the activity is consistent with this policy or whether the proposal would be inconsistent with policy 1(e) of this section and therefore inconsistent with section 17W (1) of the Conservation Act 1987 with the result that the application could not be granted."*

210. The Hearing Report, page 118 finds –

*"Policy (a) requires "consideration" of adverse effects on recreation and amenity, while policy (b) [sic] (should have referred to (e), not (b)) requires natural character to be maintained. The Hearing Chairman has concluded that the adverse effects on recreation, natural character and visual amenity are such that the scheme should be declined under section 17U(2)(b)[sic – (e)]. Therefore he considers the scheme would also be inconsistent with the above policies."*

211. Policy 1(c) is discussed at paragraph 4.598 of the Officer's Report, where it is noted that it was considered the measures proposed to avoid, remedy and mitigate effects on the river banks at the intake and power house site where considered adequate.

212. The proposal is assessed in both reports as being inconsistent with Policy 1(a) and (e). Policy 1 provides guidelines for assessing the activity against, so the assessment is more properly described as whether the proposal is consistent with the *relevant guidelines contained in Policy 1 (a) to (e)*. While not expressed exactly like this in the Officer's Report or Hearing Report, the discussions should be read in this way.

CMS 3.7.11 - Utilities

213. Policy 3 is –

*“The development, installation, maintenance and management of utilities on public conservation lands should be consistent with the desired outcome for the relevant place/s.” (see Geodiversity outcome 4.2.6.3 stated below).*

Section 4.2.6.3 (Desired Outcomes for Hokitika Place) Geodiversity, landform and landscapes in 2020

214. Section 4.2.6.3 provides that –

*“The overall character of geodiversity, landforms and landscapes in Hokitika Place is maintained in its 2010 condition ...”*

215. The Officer’s report, paragraph 4.623 & 4.624 states -

*“At a local landscape level both Westpower and the Department consider the effects on natural character, landscape and visual amenity to be high. At a broad landscape scale, the effects on landscape character (catchment based) are considered by the Department to be ‘moderate’.*

*The outcome statement for the Hokitika Place envisages that the overall character of geodiversity, landforms and landscapes will be maintained. You will need to consider whether the methods proposed to reduce effects from this proposal would be sufficient to ensure this would be the case if the proposed hydro scheme was granted, if not the proposal would not be consistent with this outcome and therefore inconsistent with section 17W(1).”*

216. The Hearing Report findings on page 118 are -

*“Given the Hearing Chairman’s view on the scheme’s effect on landscape, he also considers the scheme would be inconsistent with this policy.”*

217. Westpower says in its right of reply at the hearing (**Appendix 1, Ref 28.8**) that the proposal is consistent with the relevant objectives and policies in the CMS. In paragraph 53 of that paper Westpower provides the following summary position -

*“Westpower’s position is that the proposed activity is not inconsistent with West Coast Conservation Management Strategy. The Department’s report largely supports that view, but also presents an option to the decision-maker to decline the application under section 17W(1). With respect, the decision-maker appropriately did not select that option. There has been no new information provided through submissions or the hearing that should lead the Department to changing its view on this matter.”*

218. In the Hearing Report at pages 115 to 119, the Hearing Chairman makes his recommendations with regard to the CMS policies on natural character, landscape and visual amenity, and the protection of recreational opportunities from adverse effects of authorised uses of public conservation lands, and the other policies relevant to the proposal. He states there that he found submissions persuasive that the proposal would be inconsistent with these provisions.

219. The Hearing Chairman did not find submissions in relation to the following provisions persuasive, and considers the application is either consistent with them or they are not relevant (pages 118–119) -

- 3.3.3.5 - Threatened Species Management objectives 1 and 2 and policy 3;
- 3.8.4 - Public Access objective 1 and policy 3 a), b), c) and d);
- 3.5 - Authorised Uses of Public Conservation Lands policy 1;
- 3.6.1.1 Provision and Management of Recreational Opportunities, objective 1;
- 3.6.1.4 Back Country Remote objective 1;
- 3.6.4.1 - Recreation and Tourism Activities, objective 1;
- 3.8.4 - Public Access objective 1 and policy 3 a), b), c) and d); and
- 3.8.6 - To Prepare, review or amend conservation management plans as required.

220. In conclusion, the Hearing Chairman considered policies that were consistent with the proposal as set out above, and those that were inconsistent with the proposal. Notwithstanding the more consistent policies, the Hearing Chairman (paragraph 39 on page 10, and in the table on page 119) states that, given his recommendations on natural character, visual amenity landscape, tramping and kayaking values, the proposed hydro Scheme is not consistent with the CMS and therefore must be declined pursuant to 17W(1). The following policies were key to this consideration:

- 3.3.4.3 – Management of Geodiversity and landscapes policy 1;
- 3.5 – Authorised uses of Public Conservation Lands – objective 3;
- 3.7.2 – Activities on or in Beds of Rivers of Lakes policy 1(a) and (e);
- 3.7.11 – Utilities – policy 3; and
- 4.2.6 Desired Outcome for Hokitika Place, in particular policy 4.2.6.3 – Geodiversity, landform and landscapes in 2020.

#### DOC comment

221. You need to consider the relevant planning provisions against the elements of the proposal and its positive and negative effects to decide whether the proposal is consistent with the CMS.

222. You also need to consider whether the further measures proposed by Westpower after the hearing and completion of the Hearing Chairman's report, have any effect on whether the proposal is consistent with the CMS.

#### **4.4 No adequate or reasonable methods for remedying, avoiding, or mitigating the adverse effects**

223. In the event that you decide the application does not meet the threshold set out in s 17U(3), and is not precluded by the CGP or CMS, you may still decline the application under s 17U(2)(b) if you are of the view that there are adverse effects that cannot be adequately or reasonably avoided, remedied or mitigated. This may be on the basis of the adverse effects within the conservation area on conservation generally, or a combination of both.

### Officer's Report

224. In most sections of the Officer's report it was considered the range of methods proposed to avoid, remedy or mitigate effects are adequate and reasonable. However, there was also recognition that in the instances where it is not so clear the decision-maker will have to consider whether the application ought to be declined pursuant to s 17U(2)(b).

### Hearing Report

225. The Hearing Chairman recommends that the application be declined pursuant to 17U(2)(b) as there are no adequate or reasonable methods for remedying, avoiding or mitigating the adverse effects on natural character, visual amenity and landscape values.

226. While the Hearing Chairman considers that improved access into the valley would be a positive effect on recreation, he does not consider this is adequate mitigation for the adverse effects on the remote and unspoilt character of the area. The Hearing Chairman recommends that the application be declined pursuant to 17U(2)(b) as there are no adequate or reasonable methods for remedying, avoiding or mitigating the adverse effects on tramping or kayaking values.

### DOC comment

227. Westpower asserts that a broader lens must be applied to your consideration of adverse effects, rather than the focus being on the localised effects<sup>26</sup>. For example -

- in relation to natural character, landscape and visual amenity - Westpower encourages you to consider the broader context of the Waitaha Valley as a whole; and
- in relation to kayaking – Westpower -
  - a) encourages you to focus on the use of the Waitaha River as a whole;
  - b) suggests that you should consider the regional (West Coast) context, not just the local context; and
  - c) argues that adverse effects on kayaking at the “broader” scale are low due to the presence of alternative rivers on the West Coast which offer similar challenges.

228. You are required under s 17U(2)(b) to consider the broader (offsite) effects of the proposal on conservation as well as those onsite, given both constitute the “effects” of the proposal.

229. As a matter of logic, any localised onsite effects are bound to be assessed as more severe than the adverse effects at a wider scale. However, the Act does not enable a “high” level of localised adverse effect to be “discounted” or given less weight as Westpower suggests, on the basis that effects at a broader scale are less severe.

230. As the Court of Appeal commented in *Reay v Minister of Conservation*<sup>27</sup> (which Westpower refers to in its response to the draft Hearing Report (**Appendix 4**))

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<sup>26</sup> Westpower submissions in reply, pages 11, and 18 to 20 (Appendix 1, Ref 28.7).

<sup>27</sup> *Reay v The Minister of Conservation* [2015] NZCA 461, above n 21, at [33].



concerning DOC's functions in considering a concession for eel fishing (and the Ministry of Fisheries' functions under the Fisheries Act 1996) -

*"... the focus of [the Department] when exercising its concession function is very much site-specific with a mandate that covers the full range of natural resources. It considers the effect of the proposed activity on the particular water body and land in respect of which a concession is being sought."*

231. A purely broad-scale assessment approach is not open to you, as it would result in you not properly considering "the adverse effects", which is a mandatory relevant consideration under s 17U(1)(b) of the Act.
232. You must therefore consider the effects at both the local and broader scale.

#### **4.5 Alternative sites – s 17U(4)**

233. Section 17U(4) provides that -

*"(4) The Minister **shall not** grant any application for a concession to build a structure or facility, or to extend or add to an existing structure or facility, where he or she is satisfied that the activity (Emphasis added)—*

*(a) could reasonably be undertaken in another location that—*

- (i) is outside the conservation area to which the application relates; or*
- (ii) is in another conservation area or in another part of the conservation area to which the application relates, where the potential adverse effects would be significantly less; or*

*(b) could reasonably use an existing structure or facility or the existing structure or facility without the addition."*

234. Discussion on alternative locations can be found in the Officers Report at paragraphs 4.503 to 4.509; and page 111 of the Hearing Report.
235. Some submitters argued that "alternatives" for the purposes of s 17U(4) includes alternative forms of energy generation. The Hearing Chairman recommends that most of the submissions relating to alternative locations not be allowed, as he agrees with Westpower that the submitters' have taken an incorrect approach to the issue of alternatives.
236. The Hearing Chairman does not consider that the "activity" in question is the "activity of generating electricity" as submitters argued. Therefore, he does not consider that alternative locations for alternative forms of generating electricity are relevant under section 17U(4). The Hearing Chairman also does not consider that alternative sites owned and operated by third parties are relevant under s 17U(4), as these are outside Westpower's control.
237. In regard to a submission that there are other rivers more appropriate on Conservation Land, the Hearing Chairman recommends that this submission also not be accepted, as Westpower did consider alternative sites on public conservation land, and he considers that assessment was adequate.
238. The Hearing Chairman does not consider that s 17U(4) prevents you from granting the concessions.

#### 4.6 Restriction on granting a lease or licence

239. Sections 17U(5) to (7) restrict your ability to grant a concession in the form of a lease or licence. Subsections (5) to (7) state -

*“(5) The Minister **may** grant a lease or a licence (other than a profit à prendre) granting an interest in land **only if** (Emphasis added)—*

*(a) the lease or licence relates to 1 or more fixed structures and facilities (which structures and facilities do not include any track or road except where the track or road is an integral part of a larger facility); and*

*(b) in any case where the application includes an area or areas around the structure or facility, -*

*(i) either -*

*(A) it is necessary for the purposes of safety or security of the site, structure, or facility to include any area or areas (including any security fence) around the structure or facility; or*

*(B) it is necessary to include any clearly defined area or areas that are an integral part of the activity on the land; and*

*(ii) the grant of a lease or licence granting an interest in land is essential to enable the activity to be carried on.*

*(6) No lease may be granted unless the applicant satisfies the Minister that exclusive possession is necessary for—*

*(a) the protection of public safety; or*

*(b) the protection of the physical security of the activity concerned; or*

*(c) the competent operation of the activity concerned.*

*(7) For the purposes of subsection (6), the competent operation of an activity includes the necessity for the activity to achieve adequate investment and maintenance.”*

240. The applicability of these sections is covered in paragraphs 4.510–5.513 of the Officer’s Report.

#### 4.7 Term of Concession – s 17Z

241. In considering the term of the application, s 17Z of the Act applies -

##### **“17Z Term of concession**

*(1) A lease or a licence may be granted for a term (which term shall include all renewals of the lease or licence) not exceeding 30 years or, where the Minister is satisfied that there are exceptional circumstances, for a term not exceeding 60 years.*

*(2) A permit may be granted for a term not exceeding 10 years but shall not be renewable.*

*(3) An easement may be granted for a term not exceeding 30 years, but—*

*(a) in exceptional circumstances, the Minister may grant a term not exceeding 60 years:*

- (b) where the easement provides a right of way access to a property to which there is no other practical access, the term may be for such longer period as the Minister considers appropriate:
- (c) where the easement is for a public work (as defined in the Public Works Act 1981), the term may be for the reasonably foreseeable duration of that public work.”

242. Section 6.4 of the Officer’s report noted the following with regard to exceptional circumstances –

*“Westpower has applied for a term of 49 years on the basis that the level of financial investment that is required for a hydro scheme of this nature is very large. Westpower has stated the total construction cost is estimated at between \$80-\$100 million and also comments on the need to plan for the long term needs of the community. The Department considers that these matters are of such a high level of investment and planning for community needs in terms of power provision are exceptional and that a term of 49 years is considered reasonable and appropriate.”*

DOC comment

243. There were no submissions on the proposed term, and consequently the Hearing Chairman has not provided comment on this.

244. If you are minded to grant the concessions, you may wish to note that the Officer’s Report at paragraph 6.4 notes that a term of 49 years would be reasonable and appropriate.

**4.8 Need to consider whether it is inappropriate to grant the concessions – s 17T(3)**

245. Section 17T(3) of the pre-October 2017 of the Act which is applicable to this application,<sup>28</sup> provides that -

*“Nothing in this Act or any other Act shall require the Minister to grant any concession if he or she considers that the grant of a concession is inappropriate in the circumstances of the particular application having regard to the matters set out in section 17U.”*

246. Therefore, if you decide the proposal is not required to be declined under s 17U(3) or 17U(4), or s 17A or s 17W, you may still decline the application if you consider it inappropriate to grant the concessions sought, having regard to the matters in s 17U.

247. The question of whether granting a concession in this case would be appropriate or inappropriate requires you to have regard to all the matters in s 17U, namely -

- the matters in s 17U(1) (set out at paragraph 52 above);
- written submissions received under the s 49 public process; and
- the matters in ss 17U(2) to (7), also discussed above.

248. Accordingly, if you decide that the proposal passes through the gateways in ss 17U(3), 17U(4), s 17A, and s 17W, you may grant the concessions if you think it appropriate to

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<sup>28</sup> Section 17T(3) was repealed and replaced with new s 17U(8) under the Resource Legislation Amendment Act 2017, which re-ordered and amended various provisions in Part 3B of the Conservation Act. There is no substantive change through this amendment, and the same considerations apply.

do so, or decline the application if you consider it would be inappropriate to grant the concessions sought.

#### **4.9 Section 4 Conservation Act – Principles of the Treaty of Waitangi**

249. As noted above, s 4 requires the Act to “be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. The principles of the Treaty of Waitangi include: partnership, informed decision-making and active protection.
250. For this application, while it does not provide a partnership opportunity in itself, the Department has recognised and upheld these principles through consultation, and engages in informed decision-making by engaging early with and seeking iwi comment on any concerns they may have with the proposal.
251. No cultural concerns have been raised by the relevant iwi, however should the concessions be granted, active protection will be effected through the imposition of conditions to ensure any potential effects on iwi-related issues are well-managed.
252. As the Officer’s Report explains, the application area is in the Takiwa of both Te Runanga o Ngati Waewae and Te Runanga o Makaawhio. Notification of the application was sent to Ngati Waewae and Makaawhio on the 19 August 2014.
253. Comment was received from Ngati Waewae on the application on 23 September 2014. Ngati Waewae stated that they had received a copy of the application and they supported the application and that any concerns have been addressed directly with the applicant.
254. The Department met with both iwi on 1 December 2015 and provided an update of the process. Ngati Waewae reconfirmed their comment in July 2016. Makaawhio also confirmed a neutral position in respect of the application in July 2016.
255. Acknowledging the time that has elapsed since the initial consultation, DOC has continued to regularly update iwi on the process and progress of the proposal. DOC also sought iwi’s views on the further measures proposed by Westpower following the close of the hearing, informing them of the themes of the comments received from submitters and requesting any further comments from iwi.
256. To date, no further comment has been received on the further measures from iwi.

#### **4.10 Reconsideration**

257. Section 17ZJ of the Act provides a “reconsideration” process for an applicant. An applicant may seek a reconsideration of a decision either to decline or approve an application (in the latter case the applicant would likely be seeking a change to a condition).
258. Westpower may seek a reconsideration if dissatisfied with your decision. If this occurs the reconsideration could be carried out by you personally or by another Minister. This decision can be made in due course if an application for reconsideration is made.

## Section 5 – Process Matters

259. During consideration of the application some process matters have arisen as detailed below.

### 5.1 Submissions by Westpower that there are flaws in the Hearing Report

260. In its comments on the finalised Hearing Report (**Appendix 6**) Westpower acknowledged the inclusion of additional material into the revised Hearing Report, but recorded previously stated concerns, recording its view that:

- while additional material had been added to the Hearing Report, much of it has not been discussed and the recommendations have not changed;
- not referring to all material information in the process is flawed;
- the Hearing Chairman has come to conclusions that cannot be reconciled with Westpower's expert evidence, and this cannot be preferred in favour of persons without expertise; and
- when considering adverse effects it is not sufficient to decline the application on the basis of high localised effects. The proposal must also be viewed in the broader context.

#### 5.1.1 Additional information has been included in the Hearing Report, but the recommendations have not changed

261. Westpower's submission here appears to be that, in referring to the additional information highlighted by Westpower, but not changing the recommendations in his revised report, the Hearing Chairman has shown his conclusions were predetermined,<sup>29</sup> and he did not properly take the additional information from Westpower into account.

262. The Hearing Chairman had already taken those matters into consideration in coming to his conclusions and recommendations. The Hearing Chairman came to his own conclusions and recommendations on the basis of all the information he had before him. The fact that he did not refer to or summarise all of it, does not in of itself lead to the conclusion that his recommendations would change when he updated his report.

#### 5.1.2 Submission that all material information has not been referred to in the Hearing Chairman's Report

263. The Hearing Chairman notes in his report (at page 133) in relation to a similar submission made by Westpower earlier, that he -

*"...does not consider it necessary to refer, in his report, to the numerous documents that make up Westpower's application. Nor is it necessary for the HCR to summarise and record all aspects of Westpower's application. This was the purpose of the Decision in Principle Officer's Report."*

264. In respect of this statement, Westpower alleges that it is a fundamental public law principle that if a report writer for a decision-maker excludes reference to material information presented by a party, then the process will be flawed.

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<sup>29</sup> An allegation of predetermination was also made in Westpower's letter of 5 July 2017, paragraph 5 (**Appendix 4**).

265. Westpower's concern appears to be that the Hearing Chairman's conclusions as set out in his report are not sound because material was not referred to. However, the Hearing Chairman and the members of the Hearing Panel did have this material before them, and did refer to it, even though it was not all summarised.
266. It needs to be borne in mind that the Hearing Chairman's role is prescribed by s 49 of the Act, which governs the public hearing process. The principal purpose of the Hearing Chairman's report is to summarise the objections and recommend the extent to which they should be allowed (as relevant) and accepted (as correct). It is not to summarise all evidence and information. What is required is a fair, accurate and adequate report of the hearing, to assist you in forming a balanced judgement on the strength of the objections and the merits of the proposal.
267. In some instances, the Hearing Chairman's Report does only provide bare references to material he has relied on, without providing reasons. This is not particularly helpful to you in determining whether the submissions and the Hearing Chairman's recommendations are sound. You may find it helpful or necessary to consider Westpower's responses and the specific submission or document at issue to ensure you understand the Hearing Chairman's recommendations clearly. It is also important to give reasons for your conclusions reached, particularly in respect of issues where the Hearing Chairman's Report could be criticised for not doing so.

5.1.3 The Hearing Chairman's recommendations do not align with Westpower's expert evidence, and evidence of witnesses without expertise has been preferred

268. Westpower has commented that there was a lack of reasoning as to why the Hearing Chairman preferred the evidence of those in opposition to the Scheme over the evidence of Westpower's experts.
269. The Hearing Chairman responded to this criticism at page 134 of the Hearing Report. He noted -

*"With regard to the matter of preferring submitters' views over experts, the Hearing Chairman considers he is entitled to do this. However he notes with respect to adverse effects on natural character, landscape, visual amenity and recreation that there is considerable common ground between Westpower's experts, the Department's experts and submitters opposing the scheme.*

*For example, both Westpower's and the Department's experts conclude that the effects on kayaking remain high even after mitigation: a conclusion submitters also reach (though they express this in different ways)."*

270. Here, the Hearing Chairman's conclusions being addressed by Westpower relate to matters where expert evidence was led for Westpower, but where the Hearing Chairman has preferred the views expressed by submitters or the evidence led by persons who it claims are "without expertise" on behalf of submitters. These matters include natural character, landscape and visual amenity<sup>30</sup>, kayaking<sup>31</sup>, and tramping<sup>32</sup>.

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<sup>30</sup> At paragraph 18 of Westpower's 30 November 2017 letter (Appendix 6).

<sup>31</sup> Westpower's letter, Paragraph 35.

<sup>32</sup> Westpower's letter, Paragraph 40.

271. There is no reason why the presentation of opinion evidence in a hearing process should be limited to experts who hold academic credentials on the particular topic. The s 49 hearing process is a relatively informal non-judicial process, and it is up to the Hearing Chairman to set the procedures. The evidence of lay people is admissible and relevant where it relates to peoples' experiences and perceptions.
272. In terms of the evidence led on the key issues at the hearing before the Hearing Chairman, in addition to that led by Westpower's experts:
- regarding adverse effects on landscape, visual amenity and natural character, the Hearing Chairman heard evidence from a range of submitters including experienced photographers, kayakers and trampers, and a landscape architect, who spoke about their experiences and what they perceived the impacts of the concessions would be based on their experiences and how they perceive the area (Hearing Chairman Report pages 63 to 72);
  - regarding adverse effects on tramping, the Hearing Chairman heard evidence from a range of submitters who had extensive tramping experience in the Waitaha Valley, who spoke about the effects the proposal would have on tramping values, based on their own experiences (pages 73 to 78); and
  - regarding adverse effects on kayaking, the Hearing Chairman heard evidence from a range of submitters with extensive personal whitewater kayaking experience including in the Waitaha River as well as other NZ and overseas rivers, who spoke about the requirements for whitewater kayaking, and in particular commenting on the value of the mitigation measures proposed at that time (pages 73 to 87).
273. All of this evidence is able to be taken into account when assessing the application and can be preferred to other, qualified submitters.
274. It is also important to note, as above, that the Hearing Chairman's conclusions and recommendations were also informed by independent expert evidence on behalf of the Department, as well as the evidence presented on behalf of Westpower and submitters:
- in respect of adverse effects on landscape, visual amenity and natural character at a local scale, Westpower's experts agreed with DOC's expert that these would be "high" (Hearing Chairman's Report, page 68, 69);
  - the Hearing Chairman recorded that the expert view of Westpower's experts considered that at a broad scale, the proposal would have low, or moderate to low, adverse natural character, landscape and visual amenity effects, while the Department's landscape expert concluded that at a broad scale effects on landscape and natural character would be greater than low (page 64);
  - in respect of local effects on tramping, all experts agreed that adverse effects at the local scale would be "high" (page 75); and
  - in respect of kayaking, Westpower's experts and the Department's expert concluded that even with the mitigation proposed at the time the Hearing Chairman was preparing his report, the adverse effects on kayaking the Morgan Gorge, the abstraction reach and the whole river would be "high". The Hearing Chairman agreed with these conclusions (page 90).

275. The Hearing Chairman took into account the expert evidence, and the submissions in coming to his conclusions on adverse effects. The Hearing Chairman was entitled to make his conclusions and recommendations on the basis of the evidence he found most compelling, whether or not the expert giving evidence had a formal qualification in that area of knowledge. The fact that Westpower's witnesses had expert qualifications, while others had experience but may not have had formal academic qualifications in that area, does not in itself mean that the Hearing Chairman could not prefer those witnesses' evidence over that presented for Westpower.

## **5.2 Are additional measures offered by Westpower able to be taken into account?**

276. As noted Westpower proposed additional measures in a letter sent to DOC on 10 November 2017. This was after the conclusion of the hearing process and these measures have not been considered in any of the earlier reports. The additional measures are required to be considered in coming to your decision, but only to the extent they are relevant.

277. In order to be relevant to your decision, the measures need to relate to conservation values. They also need to be proximate in order to have any bearing on the application. If they are not proximate, and are for example, a "nice to have" rather than in fact a measure to reduce the scale of adverse effects or remedy them, they cannot be regarded as "mitigating" or "remedying" adverse effects for the purposes of s 17U(3).

278. Relevance aside, some submitters have stated they are "concerned that this 'extra consultation' is biased in favour of the company." Forest & Bird has also commented that the process adopted by DOC is prejudicial to submitters, a 'box ticking exercise' and it 'seems likely that, the details will be the subject of further negotiations between DOC and Westpower, negotiations to which submitters are not a party'.

279. There is no bias in favour of Westpower in terms of this process. An applicant is free to respond to concerns in respect of its proposal at any time before the decision is made on it. There is nothing in Part 3B of the Act preventing an applicant from providing additional information or amending its application before the decision on it is made, but the usual administrative law principles apply. In this case, DOC considered that the changes are not such that the application needed to be re-notified. However, in the interests of natural justice, submitters were provided the opportunity to comment on the impact of the additional measures on the relevant concerns raised by them, prior to your overall consideration.

280. The purpose of this extra consultation is to ensure a fair process is followed regarding the additional measures proposed. Had they been proposed before or during the hearing, the submitters would have had the opportunity to comment on them, and it is fair that submitters be given the opportunity to do so. Westpower agrees with this approach.

281. The general thrust of the comments received from submitters is the additional measures make very little, if any, impact of their concerns on the effects of the proposal on kayaking and tramping. This supports DOC's view that the application did not need to be re-notified, and that providing an opportunity for submitters to comment is sufficient. DOC also provided Westpower with the opportunity to respond, in



accordance with the standard practice adopted at the hearing of providing the applicant with a right of reply.

### 5.3 How should the additional measures be categorised?

282. In the context of the RMA it has been held that a measure can only be treated as mitigation if it addresses an adverse effect at the point of impact.<sup>33</sup> Given that the Act uses the same terminology and definitions for "effects", the same principle could equally apply under the Act. Taking this approach, measures relating to the wider area (i.e. offsite measures) which are proposed to address onsite adverse effects, cannot be treated as "mitigation". They may however be able to be treated as "positive effects" if they relate to conservation values. Only where the measure reduces the scale of an adverse effect at the point of impact will it be mitigation.
283. Where a measure could not be properly described as mitigation or a positive effect, it may be considered as "compensation", which may be required as a condition under s 17X(d), but this would not be relevant to the various thresholds in Part 3B of the Act.
284. Categorising the measures correctly is important to ensure the level of adverse effects is appropriately reflected in your findings on effects, and your decisions that flow from those findings.
285. The additional measures proposed by Westpower can be categorised as follows:
- Additional no-take days — this is mitigation because it reduces the scale of the effect of the concessions on kayaking at the site of the concessions.
  - The Trust — this is mitigation insofar as it mitigates the adverse effects of the concessions on kayaking in the region as a whole. Otherwise it is a positive effect.
  - Data — this is mitigation because it assists kayakers to plan descents notwithstanding the concessions.
  - Access road — this is a positive effect because it would provide an opportunity to increase recreation in the area.
286. In considering the potential positive effects of the Trust in providing opportunities for kayaking on the wider West Coast region, any loss of natural resources used for recreation (kayaking) in the West Coast as a whole due to the reduced availability of the Waitaha river for kayaking, is also a relevant consideration.
287. In addition, DOC is required by s 6(e) of the Act -
- "to the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism"*
288. The provision of potential positive effects of the proposal on recreation (through the proposed Trust and access road) would necessarily come at the cost of adverse effects on natural resources<sup>34</sup> (i.e. on natural character and landscape values, and

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<sup>33</sup> *Royal Forest & Bird Protection Soc. of New Zealand Inc. v Buller District Council* [2013] NZHC 1346, [2013] NZRMA 293 at [74].

<sup>34</sup> "Natural resources" is defined by s 2 of the Act to mean:

(a) plants and animals of all kinds; and

(b) the air, water, and soil in or on which any plant or animal lives or may live; and

flora and fauna). In this case, it could be considered as contrary to DOC's function in s 6(e) of the Act for it to "foster" the use of the natural resources of the wider West Coast for kayaking (through the Trust and access road) where this would be inconsistent with the preservation and protection of the natural resources associated with the Waitaha River.

289. You may therefore be minded to treat the proposal to establish the Trust and access road as being neutral in terms of the scheme of the Act.
290. In conclusion the additional measures (both onsite and offsite) and the additional positive effects must be factored into your decision, to the extent that these are related to conservation, and provided you are satisfied that you are not required to decline the proposal under s 17U(3). It is up to you to determine the degree of significance and the amount of weight you give to the positive effects, and the extent to which they may be regarded as balancing against the adverse effects of the proposal. As is discussed above (paragraphs 49, 156), positive offsite effects of the proposal are not relevant to your consideration as to whether the proposal is contrary to the purposes for which the land is held.

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(c) landscape and landform; and  
(d) geological features; and  
(e) systems of interacting living organisms, and their environment;—  
and includes any interest in a natural resource

## **Section 6 – Options**

291. This report has outlined the matrix of information that needs to be considered in coming to a decision on the proposal. The detailed noting and decision points are set out in a table in the next section this report.

292. The matrix of information points to three broad options:

### **Option 1**

Approve the application in principle on the basis of being minded to grant the concessions, but subject to the satisfactory resolution of conditions.

### **Option 2**

Decline the application.

### **Option 3**

Defer making a decision and request further information.

293. When you have made a decision, advise the Department of your reasons, and the Department will prepare a decision letter reflecting those reasons.

## Section 7 – Your Decision

### Noting Recommendations

The following table sets out the steps that the Department recommends you take in making your decision.

Notings	Para Refs.	Yes/No
1. <u>Note</u> that that you must read this report and other relevant documents.	11	Yes.
2. <u>Note</u> that it is recommended that if anything is unclear in the Hearing Report or this report regarding submissions or comments from submitters, you refer to the submission itself or the summary of comments by submitters on Westpower's additional proposed measures in <b>Appendix 1, Ref 25</b> and <b>Appendix 8</b> respectively.	40	Yes
3. <u>Note</u> that it is recommended that if anything is unclear in this report that you cannot resolve by referring to the submissions or the summary of comments in Note 2 above, you seek further information or advice from Departmental officials.	40	N/A
4. <u>Note</u> that the Officer's Report assessed the application against the statutory tests and gave the Minister's delegate two options– <ul style="list-style-type: none"> <li>• <i>option 1 to decline under 17U(2) (a) and (b) 17U(3) and 17W(1) of the Conservation Act; and</i></li> <li>• <i>option 2, to approve in principle subject to the standard and special concession conditions identified in that report (and the public notification process).</i></li> </ul>	31	Yes
5. <u>Note</u> that the Minister's delegate selected option two above and made the following request " <i>would like the Hearing Commissioner to explore further the impact on kayaking and whether the mitigation proposed is adequate</i> ".	32	Yes
6. <u>Note</u> that the Intention to Grant the application was notified on 16 September 2016 for public comment.	33	Yes
7. <u>Note</u> that 3264 submissions were received, 23 were in support, 3240 in opposition and one neutral.	34, 35	Yes
8. <u>Note</u> that a hearing was held on 5 to 8 December 2016.	36	Yes
9. <u>Note</u> the attached Hearing Report outlining a summary of all objections and comments received and a recommendation as to the extent to which they should	37	Yes

Notings	Para Refs.	Yes/No
be allowed or accepted as required under s 49(2)(d) of the Act.		
<p>10. <u>Note</u> that the Hearing Chairman recommends that you decline Westpower's application, as he concludes that-</p> <ul style="list-style-type: none"> <li>• there are no adequate or reasonable methods for remedying, avoiding or mitigating the adverse effects on natural character, visual amenity and landscape values; trampers and kayakers (s 17U(2)(b));</li> <li>• the proposed activity is contrary to the provisions of the Act and/or the purposes for which the land is held (s 17U(3)); and</li> <li>• the activity is not consistent with the West Coast Conservation Management Strategy and the Conservation General Policy (s 17W).</li> </ul>	<p>4, 225–226</p> <p>4, 163–165</p> <p>203–220</p>	<p><i>Noted</i></p>
<p>11. <u>Note</u> that Westpower does not agree with the Hearing Chairman's conclusions and seeks you to refer specifically to its response to the draft Hearing Report dated 6 July 2017 in full provided in <b>Appendix 4</b> and its response to the final Hearing Report (letter of 30 November 2017) in <b>Appendix 6</b>.</p>	<p>89, 103–104, 133, 166–168</p>	<p><i>Noted</i></p>
<p>12. <u>Note</u> that notwithstanding the absence of detailed reasons provided by the Hearing Chairman for some of his recommendations, he did consider all the relevant information, and it is open to you to consider that his conclusions and recommendations are reasonable.</p>	<p>262, 263–267</p>	<p><i>No comment</i></p>
<p>13. <u>Note</u> that you need to consider whether the proposal is consistent with the relevant provisions of the Conservation General Policy and/or the Conservation Management Strategy.</p>	<p>196–197, 221–222</p>	<p><i>Noted</i></p>
<p>14. <u>Note</u> that the Hearing Chair recommends that, if you are minded to grant the concessions, you should seek further advice on -</p> <ul style="list-style-type: none"> <li>• Mitigation for tramping suggested by submitters (pages 78 &amp; 79 of the Hearing Report)</li> <li>• Effects on angling and canyoning (page 99 of the Hearing Report)</li> <li>• Risks to hot springs users and users of the abstraction reach (pages 102 and 103 of the Hearing Report)</li> </ul>	<p>102</p>	<p><i>Noted</i></p>
<p>15. <u>Note</u> that Westpower proposed further measures to</p>	<p>41, 137–151,</p>	

Notings	Para Refs.	Yes/No
address adverse effects, after the Hearing Chairman completed the Hearing Report including his recommendations.	276–290	<i>Noted</i>
16. <u>Note</u> that 418 submitters have commented on the extra measures and that most of those submitters do not consider the measures would adequately address the effects of the proposal on kayakers and trampers.	41	<i>No Comment.</i>
17. <u>Note</u> that the conditions appended to the Officer's Report require further work to achieve acceptable thresholds and standards for effects.	73	<i>Noted</i>
18. <u>Note</u> the statutory criteria upon which you – <ul style="list-style-type: none"> <li>• may grant consent; and</li> <li>• may (or must) decline consent.</li> </ul>	49–73	<i>Noted</i>
19. <u>Note</u> that you may grant concessions in the form of leases, licences and easements (s 17Q(1)).	49	<i>Noted</i>
20. <u>Note</u> that you must have regard to the following considerations in considering the application (s 17U(1)) – <ul style="list-style-type: none"> <li>• the nature of the activity and the type of structure or facility (if any) proposed to be constructed;</li> <li>• the effects of the activity, structure, or facility;</li> <li>• any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity;</li> <li>• any information received by the Minister under s 17S or s 17T;</li> <li>• any relevant environmental impact assessment, including any audit or review;</li> <li>• any relevant oral or written submissions received as a result of any relevant public notice issued under s 49; and</li> <li>• any relevant information which may be withheld from any person in accordance with the Official Information Act 1982 or the Privacy Act 1993.</li> </ul>	52	<i>Noted</i>
21. <u>Note</u> that you must not grant an easement if a lease, licence or permit is more appropriate (s 17U(2)). <i>17 Q(2)</i>	68	<i>Noted</i>
22. <u>Note</u> that you are not required to grant a concession if you consider it inappropriate having regard to the matters in s 17U (s 17T(3)).	10, 51, 245–248	<i>Noted</i>
23. <u>Note</u> that if you consider that the information is insufficient or inadequate, you may decline (s 17U(2)(a)).	10, 62–63	<i>Noted</i>
24. <u>Note</u> that if you consider there are no adequate or	10, 60–61	

Notings	Para Refs.	Yes/No
reasonable methods for avoiding, remedying or mitigating adverse effects you may decline the application (s 17U(2)(b)).		<i>Noted</i>
25. <u>Note</u> that if the activity is contrary to the provisions of the Act or the purposes for which the land is held you must decline the application (s 17U(3)).	55–59	<i>Noted</i>
26. <u>Note</u> that if you are satisfied that the activity could reasonably be undertaken in another location outside the conservation area, or in another conservation area, or another part of the same conservation area, with significantly lesser adverse effects, you must decline the application (s 17U(4)(a)).	9, 69, 234–238	<i>Noted</i>
27. <u>Note</u> that if you are satisfied that the activity could reasonably use an existing structure or facility you must decline the application (s 17U(4)(b)).	233	<i>N/A</i>
28. <u>Note</u> that (in relation to the lease concessions only) you may only grant the leases if they either relate to fixed structures or facilities (s 17U(5)(a)) or to areas around those structures or facilities where the requirements of s 17U(5)(b) are met.	67, 239–240	<i>Noted</i>
29. <u>Note</u> that (in relation to lease concessions only) you may only grant the lease if you are satisfied that exclusive possession is necessary (s 17U(6)).	67, 239–240	<i>Noted</i>
30. <u>Note</u> that if the concessions are not consistent with the CMS or CGP, you must decline the application (ss 17W(1), 17A, 17D and 17N).	9, 66, 184–197, 199–222	<i>Noted</i>

### Decision Recommendations

**Option 1 – Approve the application in principle but subject to the satisfactory resolution of conditions**

Decision	Yes/No
<u>Reject</u> the Hearing Chairman’s recommendations in full or in part, and Approve the application in principle, but subject to the satisfactory resolution of conditions.	<i>No</i>

**Option 2 – Decline to grant the concessions**

Decisions	Yes/No
<u>Accept</u> the Hearing Chairman’s recommendations in full or in part, and <u>Decline</u> the application pursuant to -	<i>Yes</i>

Decisions	Yes/No
a) Section 17U(3) on the basis that the proposal is contrary to the provisions of the Act and/or the purposes for which the land is held and / or	Yes
b) Section 17A on the basis that the proposal is not in accordance with the Conservation General Policy and / or	NOT NECESSARY TO DECIDE
c) Section 17W(1) on the basis that the proposal is inconsistent with the West Coast Te Tai Poutini Conservation Management Strategy and/or	Yes
d) Section 17W(3) on the basis that the effects of the activity are such that a review of the Conservation Management Strategy is more appropriate and / or	No
e) Section 17U(2)(b) on the basis that there are no adequate or no reasonable methods for remedying, avoiding or mitigating the adverse effects of the activity, structure or facility and/or	Yes
f) Section 17T(3) on the basis that it would be inappropriate in the circumstances to grant the concessions, having regard to the matters in s 17U.	NO YES

**Option 3 – Defer making a decision and request further information.**


Decisions	Yes/No
<u>Do not make a decision</u> on the application and	No
a) Request further information on the matters where you do not consider you have adequate information.	No



**Next Steps**

Decision	Yes/No
<u>Advise DOC</u> of your reasons when you have made a decision and direct DOC to prepare a decision letter outlining those reasons.	MY RESPONSE IS INCLINING TOWARDS MY DECISION
<u>Direct DOC</u> to prepare appropriate draft proposed conditions, in the event you decide to grant the concessions in principle but subject to the preparation of appropriate conditions.	N/A

Signed 

Dated   
27 August 2019

Hon David Parker

Minister for the Environment

[transferred from the Minister of Conservation in accordance with section 2.74(c) of the Cabinet Manual and section 7 of the Constitution Act 1986]

## **List of Appendices**

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Appendix 3 – Officer's Report (recording the intention to grant)

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Appendix 11 – Proposed conditions (as attached to the Officer's report)

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