Index of cases referred to in the Legal Submissions on behalf of Te Rūnanga o Ngāti Waewae, Te Rūnanga o Makaawhio, and Te Rūnanga o Ngāi Tahu (Submitter 620 and Further Submitter 41)

Topic 12: Sites and Areas of Significance to Māori

	CASE
1.	*McGuire v Hastings District Council* PC43 2000, 1 November 2001
2.	*Population and Public Health Unit of the Northland District Health Board v Northland Regional Council* [2021] NZEnvC 96
3.	*Re Otago Regional Council* [2022] NZEnvC 101
4.	*SKP Incorporated v Auckland Council* [2021] 2 NZLR 94
5.	*SKP Incorporated v Auckland Council* [2018] NZEnvC 81
6.	*Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] 3 NZLR 882
7.	*Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277
8.	*Twisted World Ltd v Wellington City Council* EnvC Wellington W024 2002, 8 July 2002

Privy Council Appeal No. 43 of 2000

(1) M.A. McGuire and
(2) F.P. Makea *Appellants*

v.

(1) Hastings District Council and
(2) The Maori Land Court of New Zealand *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 1st November 2001

Present at the hearing:-

Lord Bingham of Cornhill
Lord Cooke of Thorndon
Lord Hobhouse of Woodborough
Lord Millett
Sir Christopher Slade

*[Delivered by **Lord Cooke of Thorndon**]*

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1. This case raises an issue about Maori land rights. The Hastings District Council (Hastings) was proposing at a meeting to be held at 1.00 pm on 29th April 1999 to issue notice of a requirement under section 168A of the Resource Management Act 1991 for the designation of a road (the northern arterial route) intended to link the Hastings urban area and Havelock North to a motorway between Hastings and Napier which was opened that month. The proposed route would run through *inter alia* Maori freehold lands known as Karamu GB (Balance), Karamu GD (Balance) and Karamu No 15B. On 23rd April 1999 representatives of the owners filed in the Maori Land Court applications for injunctions under section 19(1)(a) of the Te Ture Whenua Maori Act 1993 (the Maori Land Act 1993) preventing the Council from so designating their lands. The applications were heard by Judge Isaac, on short notice, on the morning of 29th April 1999. He had before him affidavits by the applicants Mr Frederick Pori Makea

and Mrs Margaret Akata McGuire, and from the Council's Policy Manager, Mr Mark Anthony Clews; and he heard the applicants in person and Mr Mark von Dadelszen of counsel for Hastings. He granted interim injunctions. They were only interim, until the further order of the court, to enable further discussion by the applicants with the Council: a substantive hearing was to be arranged if necessary. But on 22nd May 1999 Hastings filed a judicial review application in the High Court seeking declarations that the Maori Land Court had acted ultra vires and an order setting aside its decision.

2. In the High Court the judicial review application came before Goddard J. A brief agreed statement of facts and a series of agreed questions of law came to be placed before the judge. In a judgment delivered on 3rd September 1999 she decided these questions in favour of Hastings. The Maori applicants appealed to the Court of Appeal, where the case was heard by Richardson P, Henry, Thomas, Keith and Tipping JJ. In a judgment delivered by the President on 16th December 1999 the appeal was dismissed: [2000] 1 NZLR 679. The Maori applicants have appealed to Her Majesty in Council by leave granted by the Court of Appeal.

3. The case turns partly on the relationship between the Te Ture Whenua Maori Act (henceforth referred to as the MLA) and the Resource Management Act (the RMA). The directly or indirectly relevant provisions of both were reviewed very fully by Goddard J and to a large extent by the Court of Appeal; and the Board has had the advantage of helpful wide-ranging reviews of these and other enactments by Mr Majurey and Mr Whata for the appellants and Sir Geoffrey Palmer and Mr von Dadelszen for Hastings. (The second respondent, the Maori Land Court, abides the decision of the Board.) Their Lordships think that no good purpose would be served by their reciting and commenting on all the statutory provisions having arguably some degree of relevance. They will concentrate, rather, on the main provisions which they regard as of importance for this case.

The Maori Land Act

4. Certainly the Preamble to the MLA and the directions about interpretation in section 2 are important and should be set out in full. There are both Maori and English versions of the Preamble, and it is sufficient to quote the latter, with a preliminary explanation of some of the terms. Some meanings are or may be contentious, but for the purposes of the present case it is enough to say that kawanatanga approximates to governance, rangatiratanga

to chieftainship, and taonga tuku iho to land passed down through generations since time immemorial. Whanau may be rendered as family, and hapu as subtribe. The English version of the Preamble reads –

> "Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles:"

5. Section 2 reads:

> "2. **Interpretation of Act generally** -(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.
>
> (2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu and their descendants.
>
> (3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail."

6. The MLA is, by its long title, an Act to reform the laws relating to Maori land in accordance with the principles set out in the Preamble to this Act. Previous statutes relating to the Maori Land Court had tended to be seen as giving that court the role of facilitating the ascertainment and division of title, and the alienation of Maori land. The jurisdiction was perceived as linked with the former goal of assimilation. The Act of 1993 has

manifestly a different emphasis, which must receive weight in its interpretation.

7. Section 6 provides that there shall continue to be a court of record called the Maori Land Court. It is to have all the powers that are inherent in a court of record and the jurisdiction and powers expressly conferred on it by this or any other Act. Thus it is a specialised court of limited (though important) jurisdiction – a consideration which underlay the decision of the Court of Appeal in a case not otherwise closely relevant, *Attorney-General v Maori Land Court* [1999] 1 NZLR 689. Section 17(1), another section new in the Act of 1993, states that the primary objective of the court in exercising its jurisdiction shall be to promote and assist in:

> "(a) The retention of Maori land and General land owned by Maori in the hands of the owners; and
>
> (b) The effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori."

Some further objectives, which need not be quoted, are then set out in subsection (2).

8. In addition to any jurisdiction specifically conferred on the court otherwise than by this section, section 18(1) then lists in (a) to (i) a range of powers, including "(c) To hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land". None of these powers are expressed to include judicial review of administrative action or anything tantamount thereto. Subsection (2) provides that any proceedings commenced in the Maori Land Court may, if the judge thinks fit, be removed for hearing into any other court of competent jurisdiction.

9. Section 19 gives jurisdiction in respect of injunctions. Section 19(1)(a), whereunder the interim injunctions were sought and granted in the present case, empowers the court at any time to issue an order by way of injunction "Against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land". Thus it is the counterpart of section 18(1)(c) already mentioned. Historically section 19(1)(a) goes back to 1909 and Sir John Salmond; but until 1982 the jurisdiction was restricted to granting injunctions against any native or (in more contemporary language) any Maori. Originally "trespass or other injury" may well have had quite a restricted ambit, confined to traditional torts; but in its new context the phrase may well have a new reach. The

question is analogous to that which arose in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 as to the contemporary meaning of "public meeting", which was held to include a press conference such as occurred in that case. Lord Bingham of Cornhill put it at 292:

> "Although the 1955 reference to 'public meeting' derives from 1888, it must be interpreted in a manner which gives effect to the intention of the legislature in the social and other conditions which obtain today."

And Lord Steyn said at 296 that, unless they reveal a contrary intention, statutes are to be interpreted as "always speaking"; they must be interpreted and applied in the world as it exists today, and in the light of the legal system and norms currently in force. In law, he has said elsewhere, context is everything: *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622, 1636.

10. The Court of Appeal preferred to leave open the question whether section 19(1)(a) can be read as embracing conduct wider than actual or threatened physical damage to or interference with the possession of land. The Board is disposed to think that in the context of the Act of 1993, with its emphasis on the treasured special significance of ancestral land to Maori, activities other than physical interference could constitute injury to Maori freehold land. For example activities on adjoining land, albeit not amounting to a common law nuisance, might be an affront to spiritual values or to what in the RMA is called tikanga Maori (Maori customary values and practices). But it is indeed unnecessary to decide the point. Clearly if there were a physical interference, as by unlawful bulldozing in anticipation of the taking of Maori freehold land or as incidental to roadworks on adjoining land, the Maori Land Court would have jurisdiction under section 19(1)(a). The first respondent (Hastings) does not dispute this. Nor can it be disputed that a notice of designation, whether lawful or unlawful, and though appealable, can have a blighting effect which might well be described as an injury. The fundamental difficulty for the appellants lies deeper. It is that, as already mentioned, the Maori Land Court is not given judicial review jurisdiction. There are remedies under the RMA, to which their Lordships will turn later, and there is the residual judicial review jurisdiction of the High Court. But, like both the High Court and the Court of Appeal in New Zealand, the Board is unable to stretch the scope of the MLA so far as would be needed to uphold these interim injunctions.

11. For the appellants reliance was placed on *Boddington v British Transport Police* [1999] 2 AC 143 and the line of recent English cases there applied. In *Boddington* the House of Lords held that in a summary criminal prosecution the defendant was entitled to raise before the magistrates for adjudication a defence that the byelaw under which he was being prosecuted, or an administrative act purportedly done under it, was ultra vires. The actual decision does not apply to the present case, as the Maori Land Court was not exercising any criminal jurisdiction. What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil proceedings also, as when the defendant is being sued civilly by a public authority: see the observations of Lord Irvine of Lairg LC at 158 and 160-162, and Lord Steyn at 171-173. These passages are qualified, however, by recognition that a particular statutory context or scheme may exclude such collateral challenges, *Reg v Wicks* [1998] AC 92 being an example in the planning field. *Wicks* itself, a case of a criminal prosecution and statutory provisions different from those of the present case, is not particularly helpful for present purposes. Still, as will appear from the discussion of the RMA later in this judgment, there are strong grounds for regarding the RMA as an exclusive code of remedies ruling out any ability of the Maori Land Court to intervene in this case.

12. But in any event there is the earlier and more basic obstacle already discussed, that is to say the limited and specialised jurisdiction of the Maori Land Court. In the typical case where the *Boddington* principle applies, a collateral challenge arises incidentally to proceedings in a court of general (albeit often "inferior") criminal or civil jurisdiction. The width of the jurisdiction of magistrates in England was emphasised in *Boddington* by both the Lord Chancellor and Lord Steyn. The latter described them at 165-166 as "the bedrock of the English criminal justice system: they decide more than 95 per cent of all criminal cases tried in England and Wales". By contrast the Maori Land Court has a range of quite precisely defined heads of civil jurisdiction in matters pertaining to Maori land, a range not extending to issues of the invalidity of administrative action. Although dressed up as a claim for an injunction against a threatened injury to Maori freehold land, the pith and substance of the present proceeding is a contention that express or implied requirements of consultation in the RMA have not been or will not be complied with.

13. The Board does not consider that this can properly be described as a collateral challenge within the ambit of the reasoning in *Boddington*. It is essentially a direct challenge. The whole purpose of the injunction claim is to establish a breach of public law duties arising in the administration of the RMA. In *Boddington* at 172 Lord Steyn distinguished "situations in which an individual's sole aim was to challenge a public law act or decision". The facts of this case relating to Maori land and the structure of the New Zealand judicial system are remote from anything under consideration in the *Boddington* line of cases. In the opinion of their Lordships, both the substance of the proceeding in question and the background judicial system have to be taken into account in deciding whether those authorities apply; and this case is outside their purview and spirit.

The course of the litigation

14. The history of the case in New Zealand calls for some further explanation. When the injunction applications came on so suddenly before Judge Isaac, he correctly addressed himself to the questions appropriately considered at the interim stage, the first two of which are commonly described as whether there is a serious question to be tried and the balance of convenience. Apart from the fact that the owners were strenuously opposed to the proposal and were concerned that there might be actual or intended trespass or damage to the land, he gave no express indication of why he thought there was a serious question. The affidavits of the applicants alleged lack of consultation. Mr Clews countered in his affidavit by deposing to a wide-ranging consultative and publicity process, including the obtaining of a report from consultants suggested by Maori interests but paid for by the Council. He spoke also of unsuccessful attempts to arrange meetings with some of the applicant owners. The details of the affidavits were not canvassed in argument before the Board, but it is plain that there had been at least considerable consultation with Maori and that the evidence of insufficient consultation with the applicants was less than overwhelming. Moreover there was the argument for Hastings that the Maori Land Court lacked jurisdiction. At a minimum it was an argument requiring careful consideration. Nevertheless the judge's decision to grant interim injunctions is understandable. The Council's meeting was scheduled for that afternoon, but the route of the northern arterial road had been under debate for years and the matter may not have appeared particularly urgent. Also, as he stressed in his decision, the applicants were not that day represented by counsel, although it was said that counsel had been appointed and would be appearing at a substantive hearing.

Evidently the judge saw his decision as no more than a holding operation.

15. When the judicial review proceeding initiated by Hastings was before Goddard J the following agreed questions of law were propounded on behalf of the parties:

> "8. The questions of law to be determined in the proceeding can be characterised at several different levels of generality but the fundamental common element is *ultra vires*:
>
> (a) Does the Maori Land Court have jurisdiction to issue injunctions under section 19(1)(a) of Te Ture Whenua Maori Act 1993 that restrain a territorial authority from the purported exercise of its powers under the processes and procedures specified in the Resource Management Act 1991 to make designations where those designations if made under section 168A would apply to Maori freehold land?
>
> (b) Can preparation for a decision whether valid or invalid by a territorial authority to designate Maori freehold land under section 168A of the Resource Management Act 1991 amount to an 'actual or threatened trespass or other injury to Maori freehold land'?
>
> (c) Can a decision, whether valid or invalid, by a territorial authority to designate Maori freehold land under s168A of the Resource Management Act 1991 amount to an 'actual or threatened trespass or injury to Maori freehold land'?
>
> (d) Does the First Respondent have the power to determine the validity of a decision by a territorial authority to designate Maori freehold land under section 168A of the Resource Management Act 1991 on the ground that the action amounts to an 'actual or threatened trespass or injury to Maori freehold land'?
>
> Note: It is not intended that the adequacy of any consultation be determined in these proceedings. It is agreed by counsel that there will be no need for the Second Respondents to plead to the statement of claim."

16. In those questions the phrase "whether valid or invalid" in (b) and (c) was unhappily chosen. It was made crystal-clear in the argument before the Board that the appellants do not contend that implementation of a valid decision by a local authority can be restrained by an injunction from the Maori Land Court. It is common ground, furthermore, that Maori freehold land can be validly designated under the RMA and can be acquired compulsorily under the Public Works Act 1981. This accords with a proposition of Lord Denning, giving a judgment of a Judicial Committee of the Privy Council comprising Earl Jowitt, Lord Cohen and himself, in *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876, 880, which has been quoted previously in the Court of Appeal in Treaty of Waitangi litigation:

> "In inquiring ... what rights are recognised there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it ..."

Lord Denning was speaking in a case concerning a ceded territory (Nigeria), and whether New Zealand is in that category has long been the subject of academic controversy. There can be no doubt, however, that in the absence of some constitutional provision to the contrary the same must apply prima facie to a state with a legislature of plenary powers such as New Zealand.

17. As their Lordships understand it, the present appellants also accepted in the courts in New Zealand that the Maori Land Court could not question the lawful exercise of powers under the RMA. Goddard J said:

> "It is axiomatic that powers conferred under the RMA are lawful because they are legislatively provided. Therefore, a territorial authority cannot commit a 'trespass' or 'other injury' to land by the simple lawful exercise of its powers to notify requirements and propose designations. A prima facie unlawful exercise of powers, such as would merit injunctive relief and pose a serious question for trial, is therefore only likely if the Council's actions appear to be ultra vires. Conceivably, the appearance of ultra vires might arise if the process upon which the decision to notify or designate was based seemed demonstrably flawed. In the present case, however, the fact or adequacy of any consultation to date is

specifically exempt as an issue and there is no evidence that the procedure is flawed in any other way."

18. With regard to Goddard J's reference to the possibility of a decision to notify or designate seeming demonstrably flawed, their Lordships likewise reserve the possibility of a purported decision under the RMA so egregiously ultra vires as to be plainly not justified by that Act and conceivably within the scope of the Maori Land Court's injunctive jurisdiction. But that is no more than a hypothetical possibility. It is certainly not the present case.

19. In the Court of Appeal the confusion apt to be created by the phrase "whether valid or invalid" was also noticed. The court accordingly, with the agreement of counsel for the appellants, rephrased the issue as being "Whether the Maori Land Court has jurisdiction to entertain a collateral challenge to the validity of the decision by the council to make and notify a requirement under sections 168 and 168A of the RMA on the basis that such decision, if invalid, amounts to an 'actual or threatened trespass or other injury to Maori freehold land'". This is an alternative way of expressing the original question (d). The Board's opinion upon it has already been stated.

The Resource Management Act

20. While what has been said may be strictly enough to decide the case, it is desirable for two reasons to turn more particularly to the RMA. The first reason is that, with the possible exception of an extreme case such as the hypothetical one previously postulated, the Act of 1991 provides a comprehensive code for planning issues, rendering it unlikely that Parliament intended the Maori Land Court to have overriding powers. The second is that this code contains various requirements to take Maori interests into account. The Board considers that, faithfully applied as is to be expected, the RMA code should provide redress and protection for the appellants if their case proves to have merit. It would be a misunderstanding of the present decision to see it as a defeat for the Maori cause.

21. Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the

authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By section 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including "(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By section 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]". By section 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. Thus, for instance, their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

22. Some features of the RMA code will now be mentioned. By section 168A and sections thereby incorporated, when a territorial authority proposes to issue notice of a requirement for a designation, public notification is to be given, with service also on affected owners and occupiers of land and iwi [tribal] authorities. That stage has not yet been reached in the present case; the injunctions applied for were aimed at preventing its being reached. By section 168(e) notice of a requirement for a designation must include a statement of the consultation, if any, that the requiring authority has had with persons likely to be affected. There is provision for written submissions and for discretionary pre-hearing meetings. Persons who have made submissions have a right to an oral hearing. By section 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. Hastings has in effect the dual role of requiring authority and

territorial authority, so in a sense it could be in the position of adjudicating on its own proposal; but, by section 6(e), which their Lordships have mentioned earlier, it is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (section 7) and it must take into account the principles of the Treaty (section 8). Note that section 171 is expressly made subject to Part II, which includes sections 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in section 171 and indeed override them in the event of conflict.

23. The function of the territorial authority under this procedure, after having regard to the prescribed matters and all submissions, is to confirm or cancel the requirement or modify it in such manner or impose such conditions as it thinks fit. From the authority's decision there is a right of appeal to the Environment Court, available to any person who made a submission on the requirement (section 174). The Environment Court is specifically required by section 174(4) to have regard to the matters set out in section 171; but their Lordships have no doubt that the provisions thereby incorporated and the general scheme of the Act, including sections 6, 7 and 8, apply in the Environment Court and that a full right of appeal on the merits is contemplated. Under section 174(4) the Court has wide powers of decision. It may confirm or cancel a requirement or modify one in such manner or impose such conditions as the Court thinks fit.

24. Section 299 gives any party to any proceedings before the Environment Court a right of appeal to the High Court on a point of law. Section 305 enables a further appeal on law, by leave, to the Court of Appeal.

25. Provisions of significance in this case are to be found in section 296. In summary that section stipulates that, where there is a right of appeal to the Environment Court from a decision, no application for judicial review may be made and no proceedings for a prerogative writ or a declaration or injunction may be heard by the High Court unless that right of appeal has been exercised and the Environment Court has made a decision. Thus the administrative law jurisdiction of the High Court (or the Court of Appeal on appeal), though naturally not totally excluded, is intended by the legislature to be very much a residual one. The RMA code is envisaged as ordinarily comprehensive. In the face of this legislative pattern the Board considers it unlikely in the

extreme that Parliament meant to leave room for Maori Land Court intervention in the ordinary course of the planning process.

26. Before the Board counsel for Hastings also drew attention to sections 310 and 314 of the RMA. Section 310 gives an Environment Judge sitting alone or the Environment Court original jurisdiction in proceedings brought for the purpose to grant declarations, including in (c) whether or not a proposed act contravenes or is likely to contravene the RMA. Section 314 and the following sections similarly authorise enforcement orders. Under section 314(a) such an order may prohibit a person commencing anything that in the opinion of the Court (or the single Judge) contravenes or is likely to contravene the Act. While it may be that the more normal route – submissions to the local authority and, if necessary, a hearing at that level and a subsequent appeal to the Environment Court – would offer the best way of having this dispute determined on the merits, their Lordships accept the proposition of counsel for Hastings that, if there are any questions about whether Hastings is acting in accordance with the RMA, a declaration can be sought under section 310 or an enforcement order applied for under section 314.

27. Another factor to which the Board, like both the High Court and the Court of Appeal in New Zealand, attaches importance is the composition of the Environment Court. The relevant provisions are in Part XI (sections 247 to 298) of the RMA. The Court consists of Environment Judges (or alternate Judges) and Environment Commissioners (or Deputies). There are to be not more than eight Judges and any number of Commissioners. The quorum generally for a sitting of the Court is one Judge and one Commissioner, although (as already noticed) in declaration and enforcement proceedings a single Judge may sit, as may also happen with certain incidental matters. Of course a greater number than a bare quorum can sit, and commonly does; usually the Court comprises one Judge and two Commissioners; occasionally a larger Court is convened. A Judge must either be already a District Court Judge or be appointed as such at the time of appointment to the Environment Court. Appointments as Environment Judges and Commissioners are made by the Governor-General on the recommendation of the Minister of Justice, after consultation with the Minister for the Environment and the Minister of Maori Affairs. Section 253 states that the appointment of Commissioners is to ensure that the Court possesses a mix of knowledge and experience, including knowledge and experience in matters relating to the Treaty of Waitangi and kaupapa Maori. An alternate Environment Judge may act as an Environment Judge when the Principal Environment Judge (appointed under section 251), in

consultation with the Chief District Court Judge or Chief Maori Land Court Judge, considers it necessary for the alternate Environment Judge to do so (section 252). A Deputy Environment Commissioner may act in place of an Environment Commissioner when the Principal Environment Judge considers it necessary (section 255). Section 269, dealing with the powers and procedure of the Court, includes an express direction that the Court shall recognise tikanga Maori where appropriate. These various provisions are further evidence of Parliament's mindfulness of the Maori dimension and Maori interests in the administration of the Act.

28. Counsel for the appellants made the point that at present there are no Maori Land Court Judges on the Environment Court and only one Maori Commissioner out of five. In a case such as the present that disadvantage may be capable of remedy by the appointment of a qualified Maori as an alternate Environment Judge or a Deputy Environment Commissioner. Indeed more than one such appointment could be made. Alternate Environment Judges hold office as long as they are District Court or Maori Land Court Judges; Deputy Environment Commissioners may be appointed for any period not exceeding five years. It might be useful to have available for cases raising Maori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events their Lordships express the hope that a substantial Maori membership will prove practicable if the case does reach the Environment Court.

29. For these reasons their Lordships are satisfied that Maori land rights are adequately protected by the RMA and will humbly advise Her Majesty that the appeal ought to be dismissed. They adopt the suggestion of counsel that any question of costs may be raised by subsequent memoranda to the Board.

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 096

IN THE MATTER OF	an appeal under Clause 14 of Schedule 1 of the Resource Management Act 1991 (**the Act**) in relation to Topic 8 Agrichemicals of the proposed Northland Regional Plan
BETWEEN	POPULATION AND PUBLIC HEALTH UNIT OF THE NORTHLAND DISTRICT HEALTH BOARD (ENV-2019-AKL-126)
AND	HORTICULTURE NEW ZEALAND (ENV-2019-AKL-116) Appellant
AND	NORTHLAND REGIONAL COUNCIL Respondent

Court:	Judge J A Smith Commissioner S C Myers[1]
Hearing:	Whangarei on 27-28 April 2021
Last case event:	Signed joint consent memorandum of provisions agreed prior to hearing, filed 1 June 2021
Appearances:	MJ Doesburg and ES Lake for the Northland Regional Council (**the Council**) H A Atkins for Horticulture New Zealand (**Horticulture NZ**) W D McKean for the Northland District Health Board (Public and Population Health Unit) (**Health Board**) S T Shaw for LMD Wheelers (s 274 Party) H F Adams, A D Ross and C Smith in person (s 274 Party – referred jointly as **The Residents**) P R Gardner for Federated Farmers of New Zealand (**Federated Farmers**) (s 274 Party)
Date of Decision:	- 9 JUL 2021

[1] Although Commissioner S K Prime sat on the hearing, he is not available to finalise the decision.

Date of Issue: - 9 JUL 2021

DECISION OF THE ENVIRONMENT COURT

A: A: The parties' agreement as to the definition of Spray Sensitive Areas has been settled in terms of the Proposed Regional Plan. The parties have agreed that the permitted activity standards should be concluded by reference to those Spray Sensitive Areas.

B: The parties have reached agreement by consent memorandum dated 1 June 2021 as to the wording of the plan provisions that relate to:

(a) Rule C.6.5.1 Application of agrichemicals – permitted activity, in part;

(b) Rule C.6.5.2 Application of agrichemicals into water – permitted activity, in part;

(c) New appendix H.X Qualifications required for the application of agrichemicals; and

(d) The definition of "spray-sensitive area".

The wording agreed between the parties is annexed hereto as **A**.

This court concludes this wording is most appropriate under the Act including s 32AA, and the Court adopts that wording for the purposes of this decision. Such changes are to be incorporated within the Proposed Regional Plan forthwith. They are regarded as operative for current purposes.

C: The unresolved wording of Rules C.6.5.1 and C.6.5.2 was considered at this hearing. To the extent the wording is in dispute, the Court concludes that the most appropriate wording is that proposed by the Regional Council in the memorandum filed to the Court during the hearing as annexed in **B,** except to the extent we conclude alternative wording should be adopted as contained in

paragraph 73 and summarised in the table annexed in **C** of this decision.

D: In particular and for the avoidance of doubt, we conclude there shall be:

(a) General requirement for a Spray Assessment for all spray events;

(b) The content of that Spray Assessment should be similar to that proposed by Horticulture New Zealand, annexed as **D**;

(c) Different additional requirements should apply in most circumstances as proposed by the Regional Council (as set out in annexure **B** of this decision), except to the extent we conclude alternative wording which is contained in paragraph 72 and summarised in the table annexed in **C** of this decision. Those requirements should vary depending on various factors;

(d) The key requirement is that spray drift should be limited to avoid Spray Sensitive Areas.

E: The council is to make any amendments in accordance with this decision and circulate them to the parties for consideration within 20 working days.

(a) All parties are to advise the Council within a further 10 working days where any provision does not reflect the decision;

(b) The Council is then to provide a memorandum to the Court and parties within a further 10 working days, identifying the provisions that are in dispute and identifying those provisions that are now agreed and any provisions remaining in dispute. In respect of each provision in dispute, the Council shall provide its preferred wording and outline the position of each party in respect of that wording.

F: The court will then consider the memorandum and either issue a final decision

or convene a teleconference to address finalisation of the provisions.

REASONS

Introduction

[1] The proposed regional plan for Northland (**Proposed Regional Plan**) takes a wide-ranging approach to regional planning for Northland. It addresses water, biodiversity and air as just three examples. It includes the coastal areas covered by New Zealand Coastal Policy Statement and inland waterways as well as a wide range of biodiversity including indigenous, threatened and rare taxa.

[2] As part of this proposal, the Council has addressed the question of the application of agrichemicals within the region and has introduced objectives and policies, definitions and provisions to properly manage and control application.

[3] The general provisions for the plan are not in dispute and the parties have over the past period settled many of the provisions. Those that are the subject of this hearing are the two remaining provisions yet to be resolved in full being:

(a) Rule C.6.5.1, application of agrichemicals to air as a permitted activity; and

(b) Rule C.6.5.2 application of agrichemicals into water as a permitted activity.

The matters subject to consent order

[4] The settled provisions were not before us at hearing, and it was not until 1 June 2021 that they were filed with the Court in the form of a consent memorandum and a draft consent order.

[5] Annexed and marked hereto as **A** is a copy of the various amendments that parties have agreed to make to the plan.

Progress

[6] The consent order annexed as **A** resolves in part the wording of:

(a) Rule C.6.5.1 Application of agrichemicals – permitted activity; and

(b) Rule C.6.5.2 Application of agrichemicals into water – permitted activity.

[7] The parts of Rules C.6.5.1 and C.6.5.2 that remain unresolved relate to the use of agrichemicals in proximity to Spray Sensitive Areas.

[8] In addition, the parties have agreed on new Appendix H.X (in annexure **A**) relating to qualifications required for application of chemicals and the definition of "Spray Sensitive Area".

[9] As it turns out, the definition of spray sensitive areas was a matter of particular importance to resolving the remaining issues in dispute between the parties in relation to the rules. The provisions agreed to be changed and marked in annexure **A** have the changes shown in strike out and colour.

New provisions

[10] Broadly, the mediation produced the addition of Appendix H.X (contained in annexure **A**), which specifies the structure, content, competency and assessment requirements for the training programme for persons applying chemicals. Parties have also agreed on a wording of Spray Sensitive Area and have replaced the reference to wetland to natural wetland.

[11] The end result is that these changes are ones that follow logically from a more appropriate approach to the application of chemicals from both ground based and aerial spraying.

[12] The parties are satisfied that they are consistent with the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**) and do not create any conflict of duplication with the National Environmental Standards for Freshwater (**NES 2020**).

Evaluation of agreed changes

[13] All the changes and minor changes are now considered in terms of their cost and benefit under s 32AA. Interests of the various aspects of public interest were represented through the mediation process.

[14] We are satisfied from hearing the substantive case that these provisions are essentially a logical and consequential approach. The definition of "Spray Sensitive Areas" is of course a critical consideration for permitted activity status and standards. We conclude that the more comprehensive definition is more appropriate.

[15] Moving to the matters that have been agreed in respect to this substantive rule change, these were for the most part minor changes. They clarify and give a balanced position in respect of the public interest.

[16] Backpack spraying has been changed to handheld spraying because of the definition of that term in the Proposed Regional Plan. It also relates to the type of spraying rather than the fact the container is in a backpack. Overall, the changes in **A** are ones which we consider the most appropriate provisions in terms of the widespread interest represented at the hearing. It includes changes to the rules that were not disputed. We proceed on the basis these changes are operative.

Further changes in the course of the hearing

[17] In respect of the issues that were heard by the court, there was some degree of agreement between the parties. Firstly, on the definition of Spray Sensitive Areas. Moreover, the parties have agreed on certain other aspects of the wording which may overlap and include some of the items in **A**, being matters that they held in common. Accordingly, we attach as **B** a copy of the memorandum filed to the court during the hearing. This suggests the areas of agreement as to wording and areas of dispute.

Issues

[18] The issues remaining between the parties relate to the potential for spray to

leave the target area and affect other people, property or indigenous biota, i.e. non target application. The following issues arise:

(a) What conditions, particularly wind conditions, might trigger different responses for permitted activities?

(b) The separation distances that are appropriate for ground based or aerial spraying;

(c) What other intervening methodologies might be relevant to determining the separation distance or application. This transpired to include such items as shelterbelt, the height of the application, the droplet size, the toxicity of materials and the receiving environment itself; and

(d) Whether application should only occur when it is away from sensitive areas and what type of wind conditions particularly high wind conditions affect the application of the spray. We now consider these issues.

Spray Sensitive Areas

[19] Spray Sensitive Areas have now been resolved by definition in annexure **A** as follows:

Spray sensitive areas are:

(a) Residential buildings and associated garden areas; and

(b) Schools, hospital buildings and care facilities and grounds; and

(c) Amenity areas where people congregate including parks and reserves; and

(d) Community buildings and grounds, including places of worship and marae; and

(e) Certified organic farms; and

(f) Orchards, crops and commercial growing areas; and

(g) Water bodies used for the supply of drinking water and for stock drinking; and

(h) Natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland and apiaries.

The parties' positions

[20] As might be expected in an area with the degree of scientific complexity involved in agrichemicals, the position of the parties has been an iterative one. The position of the parties changed from these at the commencement of the hearing.

[21] The hearing panel's decision on the Proposed Regional Plan allowed for agrichemical application as a permitted activity provided that, within 100 m of a spray sensitive area:

(a) A risk assessment is carried out and measures are taken to minimise adverse effects on spray sensitive areas;

(b) Application only occurs when the wind direction is away from spray sensitive areas; and

(c) Application equipment spray quality is no smaller than "coarse".

[22] There is no dispute that agrichemical use that does not meet the permitted activity rules is a discretionary activity under Rule 6.5.5.

[23] Horticulture NZ, supported by Federated Farmers, seeks a relaxation of the rules by removing the restrictions on wind directions and droplet size. The Health Board seeks retention of the restrictions on wind direction and droplet size, with minor amendments and the inclusion of a new control on secondary spray drift.

[24] The s 274 parties seek the retention of the restrictions with some minor amendments.

[25] The Council's position was between those of the parties. They sought:

(a) That within 100 m of the spray sensitive area, a risk assessment is carried out and measures are taken to minimise adverse effects on spray sensitive areas;

(b) Application only occurs when the wind direction is away from spray

sensitive areas and instead of a blanket droplet size, a buffer distance is implemented depending on the method of spray application and the presence or absence of shelterbelt.

[26] During the hearing, the position of the parties developed, and the Regional Council sought leave to file a memorandum clarifying the areas of agreement and disagreement. The Regional Council filed a memorandum with the Court to update the position on the 24 May 2021; this is attached in annexure **B**. Clearly, Annexure **A** postdates and to some extent settles difference in Annexure **B**.

Agrichemicals in Northland

[27] The development of more intensive horticulture, particularly, at a major commercial/industrial scale is a relatively new phenomena in Northland.

[28] Although citrus fruit was particularly popular around Kerikeri though the 1960s and 1970s, the majority of these orchards had become economic by the 1980s and were subdivided to provide some income for the owners. This has led to relatively small rural landholdings with sites that are residential in nature (what we would describe as large scale residential) and smaller horticulture, or other specialist units.

[29] Throughout Northland as a whole, there has been a move in the last few years from dry stocking to cropping, but particularly towards more intensive cropping such as potatoes, kumaras and horticultural croppings such as avocados.[2] A recent example includes the Court's decision in relation to the Aupori Aquifer in the Far North.[3]

Biodiversity in Northland

[30] On the other hand, Northland contains a large percentage of the remaining significant indigenous biodiversity for New Zealand (along with the west coast of the South Island). This includes areas of sensitive vegetation and threatened species with large areas of native forest (kauri), manuka, mangroves and the like.

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[2] Recent moves to consent water storage and reticulation through fast track processes suggested more potential for crops such as berries and avocados.

[3] *Burgoyne v Northland Regional Council* [2019] NZEnvC 028

[31] The interrelationship of these species with both salt and freshwater has been the subject of previous decisions of this court, for example, biodiversity, and a number of other appeals including water quality (at this stage still reserved).

[32] By way of a general statement, there is a need to ensure that any development in Northland does not further marginalise the existing biodiversity or have unintended effects on the ecotones or ecosystems that are either adjacent or nearby.

[33] In this regard, the use of insecticides and weedicides can be seen as having a clear potential to adversely affect indigenous ecosystems and species and the range of biodiverse ecosystems. Without extreme care, there is a potential for agrichemical use to compromise these areas and lead to the need for greater restrictions.

[34] For our part, we do not think that the approach to agrichemical application that has been adopted overseas or in less biodiverse environments is necessarily appropriate for Northland. That said, we acknowledge that the plan has been through an extensive and iterative process and that we are focussed only on the provisions that are before us. Nevertheless, we repeat our earlier comments and other decisions about Te Mana o te Wai and the need to protect not only our waters but our biodiverse ecotones from further loss.

[35] Beyond this, the Health Board is particularly concerned at the potential for agrichemicals to affect humans. They note that the Northland population is among the most deprived in New Zealand and that many of these most deprived populations are near or adjacent to rural areas. Accordingly, the Health Board is concerned that there are already adverse health effects from such deprivation, and these could be significantly exacerbated by exposure to adverse levels of agrichemicals.

Common outcome

[36] All parties agree that the objective of these permitted activities rules seek to ensure that there are no adverse effects on either people or any other biodiversity (including plant, animal and fish species).

[37] The difficulty of course is in providing rules that provide sufficient surety that there will no measurable adverse effects (beyond those that could be regarded as transitory or minimal), while providing for an important economic contributor to Northland's future.

[38] For our part, we have worked from a basis of caution, which we conclude is inherent within the RMA. As we understand the evidence from all the expert witnesses, they too have worked on the same basis. The differences relate to honestly held opinions of those involved as to how this balance might best be achieved with minimal effects while allowing flexibility for economic benefit.

The expert evidence

[39] Fundamentally, the experts did not disagree on the principles applicable. They accept that:

(a) Sprays should be targeted to particular purposes;

(b) They should remain on target so far as is possible;

(c) That the application beyond the target spray area should be reduced to such an extent that those effects are minimal within a reasonable distance;

(d) That those effects should be at least 100 m separated from spray sensitive areas;

(e) That such separation would also ensure that secondary spray drift (arising after the spray has settled on its target) would also be reduced to minimal levels;

(f) The potential to reach off target is affected by both atmospheric and wind conditions;

(g) That a particular site risk assessment plan (We will call this a **Spray Assessment**) is required on each occasion spray is applied both prior to, and during, the spraying to ensure that conditions are appropriate and

that all potential risks are taken into account;

(h) The risk is minimised where wind directions are low but away from any sensitive areas;

(i) At wind speeds between 0 and 1 m/s inversion layers and ponding can be problematic and need to be given particular consideration;

(j) At wind speeds between 1 and 5 m/s agrichemical application is low risk, particularly if wind direction is away from any sensitive areas. Where wind direction is towards sensitive areas, particular steps would need to be taken if it was appropriate to undertake spraying. The experts differ as to whether or not this could be undertaken safely or if it is preferable to avoid this risk. The optimum condition for Agrichemical spraying is between 1 – 3 m/s with wind away from Sensitive Areas;

(k) At wind speed over 6 m/s, all parties agree that the wind strength is such that it cannot be confidently said that spray could be applied in a safe manner even with a risk assessment. Several experts seem to consider that it might still be appropriate provided there were no sensitive areas downwind. However, the distance to sensitive areas would need to increase significantly with increasing wind speed. The risk for aerial spray also increases significantly above 6 m/s and we are unsure that any expert suggested aerial spraying at these wind speeds.

[40] These comments related to the application of spray by land-based methods, and there are particular constraints by each of the experts in relation to it. Helicopter spraying is more problematic and there was disagreement as to whether or not it could be applied in any circumstances, except where wind speed is 1 to 3 m/s and away from sensitive areas. We note that the release height for the sprays is a matter of particular importance. This application height is equally important for helicopter application.

[41] We were advised by the experts that the risk is higher with aerial spraying as the spray plume is above the crop and there is high potential for spray drift. The risk increases for helicopter spraying as the spray release height is higher than for fixed

wing aircraft. It was considered that the use of coarse spray quality is particularly important for aerial application to reduce the risk of spray drift.

Industry background

[42] We now go on to address the background to the provisions and the issue particularly before us. We accept that agrichemical use is widespread in the horticulture, agricultural and forestry sectors. Sprays are also used by the Government and Local Authorities in public parks, reserves, domestic gardens and in road and rail corridors.

[43] In Northland, agrichemical spraying has been regulated in regional plans for some time. There have been levels of concern expressed by the public, particularly about the application of sprays in public areas but also in relation to spray drift from private application. The Section 32 report for the Proposed Regional Plan identified that notification prior to spraying was a key issue for agrichemical use.

[44] There were a number of concerns from residents reflected at this hearing around concerns about spray drift from application. In short, the position adopted both in the notified and now Proposed Regional Plan is that there be:

(a) No noxious, dangerous, offensive or objectionable odour, smoke, spray or dust or any noxious or dangerous levels of airborne contaminants beyond the boundary of the property;

(b) There be no damage to any spray sensitive area beyond the boundary of the property; and

(c) Requirements for notification, signage and training for sprayers.

[45] Council officers recommended that the Proposed Regional Plan be amended to require compliance with mandatory aspects of the New Zealand Agrichemical Standard and that the Regional Plan provides additional requirements for agrichemical use near spray sensitive activities.

[46] Overall, it appears to have been concluded that agrichemical spray could be administered as a permitted activity in certain circumstances. It also seems to be accepted that control is required beyond the standards to require risk assessmentand avoid offensive, objectional, noxious, dangerous and damaging agrichemical sprays. The objective of the relevant Rule 6.5.1 and 6.5.2 is clearly to avoid harm to people and the environment. The identification and clarification of the sensitive receptors (i.e. spray sensitive areas) assists in identifying the levels of care that must be taken to avoid any particular harm to spray sensitive areas.

The scope of the appeal

[47] We wish to make it very clear that no party before us sought to prevent the application of agrichemicals completely. The most restrictive outcome sought was that from the Health Board. Its position was that the question as to the most appropriate form of rules relating to agrichemical use in proximity to people or spray sensitive areas required consideration of mandatory buffer zones.

[48] The Health Board sought to retain the decision of the Council Commissioners who heard from the parties. They seek the following modifications to the decisions version:

(a) To distinguish aerial spraying from ground based spraying in setting the trigger distance to sensitive areas;

(b) Take into account particular risks with people beyond just the buildings or areas they occupy;

(c) To consider those who are particularly vulnerable such as:
   (i) Children;
   (ii) Pregnant women;
   (iii) Elderly;
   (iv) The health compromised;
   (v) People who live in high deprivation.

[49] The Health Board position (which was not disputed) is that many people who

live in residential buildings at the margins of agrichemical application areas are among the most vulnerable. The Health Board submits (and others agree) that the rules need to be clear, certain and enforceable. The Health Board says that some minor amendments to the current rule achieves that. They say that the safest way toachieve this is to distinguish aerial spraying from ground based spraying and require a risk assessment within 100 m of a sensitive area for ground based spraying and 300 m from a spray sensitive area for aerial spraying.

Spraying in different wind conditions

[50] A major issue that arose during the hearing was why a separation distance would be required for assessment of risk if the wind was away from the sensitive area.

[51] Initially, it was suggested that spray may travel upwind. However, it was later clarified by the experts that this could only occur between 0 and 1 m/s wind speed but could not occur between 1 and 5 m/s windspeed. This was also subject to the qualification that wind can change direction especially in lower wind conditions beneath 1 m/s.

[52] In respect of winds over 1 m/s, the experts were clear that the optimum conditions were between 1 – 3 m/s away from any sensitive area.

[53] At wind speeds up to 5m/s plus gusts and towards a spray sensitive area the experts advised that spraying may be acceptable. This acceptability was conditional on the use of appropriate management tools including whether there was "effective shelter", the rate and type of application, droplet size, use of shrouds, the toxicity of the chemical and whether there were particularly susceptible receivers (human or environmental). For the spray sensitive area, distance needed to be calculated from the down wind edge of the target area.

[54] Clearly, the objective of the rule would be to encourage people to spray away from spray sensitive areas and adopt a spraying regime within their property which

seeks to contain all spray. There are good environmental reasons for this but it also maximises the use of the spray itself, to ensure that it is not wasted.

[55] Although there is generally a preference for block spraying at the current time, this may encourage a spraying regime which seeks to spray on the upwind edge of the property when the wind direction is appropriate. This would mean that areas were sprayed more by the orientation to the wind than they are by the planted block areas.

Application requirements

[56] During the hearing several matters were covered which are extremely important for the application of spray and to minimise its deposition beyond the property. There are four main elements:

(a) The administration of the spray at least 1 metre below the height of the shelterbelt;

(b) A complete and full shelterbelt (**effective shelter**) that does not allow general permeability. This in turn requires the definition of effective shelterbelt;

(c) The spray droplet size, particularly with higher toxicity sprays;

(d) The toxicity level of the spray itself (and potential receivers).

Effective shelter

[57] We conclude that the spray can largely be contained within the site between 1 and 5 m/s (plus gusts) where the spray is administered below the shelterbelt height. This is more problematic with aerial spraying which generally has to occur above the shelterbelt. We are satisfied that there is a high level of certainty with light to moderate winds, 1 to 5 m/s (plus gusts), that these would be contained within the shelterbelt area if the target area is short of the boundary and is applied 1 m below the height of the shelterbelt.

[58] We therefore conclude the definition of shelterbelt needs to be addressed. There was some difficulty originally on this but by the end of the hearing the parties are agreed on the following definition of "Effective Shelter":

(a) Taller (at least > 1 m) than the height of the spray plume4 when the plume interacts with the shelter; and

(b) Have foliage that is continuous top to bottom; and

(c) Achieves in the order of 50% optical and aerodynamic porosity; and

(d) Has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and

(e) Is not deciduous; and

(f) Has a width to height ratio of 1:3.5.

[59] The Health Board and Residents sought a minimum height of 3.5m also.

[60] We conclude that a minimum height is an appropriate requirement given the need to establish growth. Shelter would typically be much higher than 4 -5 m and we consider 3.5 m is a modest height to ensure the functioning of the vegetation.

Pre-approval

[61] The next issue that arises in respect of spray application is whether or not there has been communication with the neighbours and whether approval can be obtained. A consent/approval under s 104(3)(a)(ii) would prevent the authority from taking into account any adverse effect on that person. For the same reason, we consider that such a consent should operate as part of a permitted activity standard where the other spray assessment steps are undertaken.

[62] This really would normally only arise in a situation where the wind is towards that person but could clearly also authorise a situation where the wind is away if appropriate. This is not a licence to pollute as clearly the obligation would remain with the applicator, both prior and during the spray to ensure there was no adverse effect beyond the boundary. All agrichemical applications require a Spray Assessment.

[4] This is not necessarily the same as the projected height (at point of discharge) as it will typically rise if it drifts

Consents

[63] Any consent would need to be an informed one and would need to note the nature of the spray sensitive area, the distance to the target application area and include an undertaking of provision requiring the applicator to comply with the spray assessment on each occasion. It would be helpful if the agreement also attached a copy of that document.

The spray assessment

[64] The question of a spray assessment is one that was discussed in various ways at the hearing. It transpired that Horticulture New Zealand already have, as part of their certification programme, a spray diary and risk assessment requirement that includes some but not all of the elements that have been discussed in this hearing. We conclude that the Spray Assessment required as part of these provisions should be similar to that proposed by Horticulture NZ and which is attached to the memorandum filed to the court during the hearing and annexed at **D** to this decision.

[65] We consider that the Spray Assessment should make it clear what outcomes of that assessment should be achieved. The particular applicator should turn their minds on every occasion to the particular issues arising. The Spray Assessment may not be entirely complete given the way in which the parties' agreement and subsequently this decision may affect the criteria. Nevertheless, there is no doubt that such criteria could be included as additional items. We envisage a document of this sort being used in the spray assessment on every occasion when spray is applied (not just where the sensitive areas are involved).

Buffers

[66] One of the issues that parties have used in part during this hearing although it was not the subject of particular wording, addressed before us was the question of a buffer. The definition of buffer was agreed by the parties (in Annexure **A**), as follows:

> *buffer zone distance means a specified horizontal distance from a downward spray-sensitive area, measured from the downward edge of the application area closest to the*

spray sensitive area.

[67] The Regional Council has proposed additional permitted activity requirements for buffer distances in their version of the provisions in Table X (in annexure **B**). These require different buffer distances with or without shelter for different wind speeds, and generally follow the buffer distances in the New Zealand Standard Management of Agrichemicals. We agree with this approach.

[68] We also agree that there needs to be a consideration of what the words "away from" mean. Various definitions are given in the parties' submissions. In our own view, "away from" should mean:

(i) Not towards;

(ii) It includes 45 degree either side of direction; and

(iii) The wind speed must be moderately steady over 1 m/s.

[69] One particular concern raised that we thought had been resolved before us was the issue as to whether there should be a buffer even where the wind is away from the site. It seems to have resurrected itself as a 50 m buffer in the proposals of the Health Board and residents. The experts have agreed that there cannot be a flow upwind provided the wind was moderately steady. We have taken it from their evidence that this is windspeeds above 1 m/s. The adoption of a figure of 2 m/s would create additional confusion and the suggestion that wind can nevertheless go upwind is inappropriate.

[70] For our part, we have concluded that provided the wind is moderately steady and over 1 m/s and away from the site the spray application can occur. We consider that the impacts of preventing owners applying spray even when the conditions are away with a 50 m buffer from the neighbouring property would be inappropriate. In practical terms, to create such a blight on neighbouring land when there is no identified adverse effect would not be reasonable and we are not prepared to impose this additional constraint without some scientific justification.

[71] Having discussed these preliminary matters, we now come to discuss in more

detail the remaining differences between the parties. As it can be seen, the areas of disagreement between the parties cover not only the preliminary issues. We do not understand there to be any significant difference in respect of Clause 1 and 2 of C.6.5.1 and overall prefer the Regional Council's wording of Clause 1 and Clause 2 in C.6.5.1.

Conclusions regarding ground and aerial spraying

[72] We have concluded that the requirements for ground based and aerial spraying of agrichemicals should vary depending on wind conditions. To be a permitted activity the following should be applied:

(a) Every spray activity must be undertaken in accordance with a Spray Assessment that is recorded in a spray diary and made available to the Council on request.

(b) The Spray Assessment must be carried out prior to the application and be re-evaluated during the spray application.

(c) The content of the Spray Assessment should be similar to that proposed by Horticulture New Zealand (annexure **D**), and

(d) Address all the elements listed by the Health Board, annexed in **B**, including the likelihood of spray drift occurring and ways of eliminating the risk of spray drift.

(e) For any spray activity the applicator must:

a. take all practicable steps to ensure that agrichemicals are used appropriately and accurately and are confined to target areas;

b. take all practicable steps to ensure that no adverse effects occur beyond the application area, and

c. ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded.

(f) Where a) to e) above is undertaken, the following requirements should apply:

Low risk, ground based spray

1. Where wind speeds are between 1-3m/s, plus gusts, and away from sensitive area(s) then there are no further requirements

Assessed risk, ground based spray

2. For wind speeds between 1-5m/s and towards sensitive area(s), or between 3m/s and 6m/s and away from sensitive area(s), the following additional requirements should be assessed:

i) The buffer on the downward boundary of the target application area and whether effective shelter is present.

ii) Sensitivity of receivers

iii) Spray quality

iv) Toxicity of spray

v) Whether agrichemical direct application methodology is used (e.g. shrouds).

3. If wind speeds are between 0-1m/s application should not occur if inversion or ponding conditions are present. If conditions are suitable spraying may occur and the following additional requirements should be assessed:

i) The buffer distance on all boundaries of the target application area and whether effective shelter is present.

ii) Height of spray release (for boom or blast spraying it should be below the shelter to prevent spray drift)

iii) Sensitivity of receivers

iii) Toxicity of spray

iii) Whether agrichemical direct application methodology is used (e.g. shrouds).

Aerial spraying – assessed risk

4. If wind speeds are 0-1m/s spray application should not to be undertaken in inversion or ponding situations.

5. If wind speed is 1-5m/s and away from sensitive area(s), the following additional requirements should be assessed:

i) Whether effective shelter is present

ii) Height of spray release and risk of spray drift

iii) Sensitivity of receivers

iv) Toxicity of spray

iv) Spray quality.

6. If the wind speed is 0-1m/s (and not inversion or ponding conditions), or 1-3m/s and toward sensitive area(s), the following additional requirements should be assessed:

i) The buffer distance and whether effective shelter is present.

ii) Height of spray release and risk of spray drift

iii) Sensitivity of receivers

iv) Toxicity of spray

v) Spray quality.

High risk – land based or aerial spraying

7. Spraying in wind speeds over 6m/s plus gusts is high risk and not

appropriate to be undertaken as a permitted activity

[73] We summarise this in the attached table annexed as **C** of the decision.

Analysis under s32 and 32AA

[74] We conclude that these provisions are the most appropriate way to achieve the objectives of the Proposed Regional Plan. Objective F.1.12 – Air quality seeks to ensure that human health, ambient air quality, cultural values, amenity values and the environment are protected from significant adverse effects caused by discharge of contaminants to air. Objective F.1.2 Water quality is relevant to Rule C.6.5.2 and seeks to ensure that water quality is maintained or improved, life supporting capacity, ecosystem process and indigenous species are maintained and drinking water sources are protected. If the application of agrichemicals is not managed near spray sensitive areas there is a risk that significant adverse effects will result particularly in relation to human health, water quality and the environment.

[75] Section 32AA requires a limited assessment given matters agreed in **A** and the scope of appeal. We conclude that the most appropriate permitted activity standards should protect humans and biodiversity while allowing the agricultural activities to continue where properly managed. We conclude our modified provisions meet this balance of cost and benefit and are therefore appropriate under the Act.

Overall conclusion

[76] There has been a high level of agreement on this matter and the differences between the parties have narrowed rather than being of significant substance. Nevertheless, the differences between the parties are clearly justified by their different levels of concern over impacts. We consider that the experts in this case will approach the matter in a full and fair way and this is not a case in which one could say that the differences between the parties are based upon any wrong matters, principle or law.

[77] Overall, we have tried to adopt an outcome which is both practical in terms of its benefits for the economic community, and safe for those who must live and operate within it. This of course includes those horticulturists who live and work within these orchards. In the long term, we consider that alternatives should be found to continue to reduce the application of sprays but we acknowledge the need for these permitted activity rules in the meantime as do all the parties. I commend the parties for their thoughtful and helpful approach.

[78] We accordingly conclude:

(a) **The parties' agreement as to the definition of Sensitive Areas has been settled in terms of the Proposed Regional Plan. The parties have agreed that the permitted activity standards should be concluded by reference to those Sensitive Areas.**

(b) **The parties have reached agreement by consent memorandum dated 1 June 2021 as to the wording of the plan provisions that relate to:**

(i) **Rule C.6.5.1 Application of agrichemicals – permitted activity;**

(ii) **Rule C.6.5.2 Application of agrichemicals into water – permitted activity;**

New Appendix H.X Qualifications required for the application of agrichemicals; and

(iii) **The definition of "spray-sensitive area".**

The wording agreed between the parties is annexed hereto as A. This court concludes this is most appropriate under the Act including s 32AA and adopts that wording for the purposes of this decision. Such changes are to be incorporated within the Proposed Regional Plan forthwith. They are regarded as operative for current purposes.

(c) **The unresolved wording of Rules C.6.5.1 and C.6.5.2 was considered at this hearing. To the extent the wording is in dispute, the court concludes that the most appropriate wording is that proposed by the Regional Council in the memorandum as annexed in B, except to the extent we conclude alternative wording should be adopted as set out in paragraph 72 and summarised in the attached table in annexure C.**

(d) In particular and for the avoidance of doubt, we conclude there shall be:

(i) General requirement for a Spray Assessment for all spray events;

The content of that Spray Assessment should be similar to that proposed by Horticulture New Zealand, which is annexed as D;

(ii) Different additional permitted activity requirements should apply in most circumstances as. proposed by the Regional Council (as set out in annexure B of this decision), except to the extent we conclude alternative wording in paragraph 72 and summarised in the attached table annexed as C of this decision;

(iii) The key requirement is that spray drift should be limited to avoid Spray Sensitive Areas.

(e) The council is to make any amendments in accordance with this decision and circulate them to the parties for consideration within 20 working days.

(i) All parties are to advise the council within a further 10 working days where any provision does not reflect the decision;

(ii) The Council is then to provide a memorandum to the Court and parties within a further 10 working days, identifying the provisions that are in dispute and to identifying those provisions that are now agreed and any provisions remaining in dispute. In respect of each provision in dispute, the Council shall provide its preferred wording and outline the position of each party in respect of that wording.

(f) The court will then consider the memorandum and either issue a final decision or convene a teleconference to address finalisation of the provisions.

For the Court:

J A Smith
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Annexure A

BEFORE THE ENVIRONMENT COURT

I MUA I TE KOOTI TAIAO O AOTEAROA

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under Clause 14 of Schedule 1 of the Act in relation to the Proposed Regional Plan for Northland
BETWEEN OF	PUBLIC AND POPULATION HEALTH UNIT THE NORTHLAND DISTRICT HEALTH BOARD (ENV-2019-AKL-000126) HORTICULTURE NEW ZEALAND (ENV-2019-AKL-000116) HANCOCK FOREST MANAGEMENT NZ (ENV-2019-AKL-000096) Appellants
AND	NORTHLAND REGIONAL COUNCIL Respondent

Environment Judge – sitting alone pursuant to section 279 of the Act

In Chambers at Auckland

CONSENT ORDER

[A] Under section 279(1) of the Resource Management Act 1991, the Environment Court, by consent, orders that the appeal is allowed in accordance with Annexure A to this Order.

[B] Under section 285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

1 The Appellants listed above have appealed provisions of the Proposed Regional Plan for Northland as they relate to Topic 8 Agrichemicals.

2 The Court has read and considered the memorandum of the parties dated 1 June 2021, which proposes to resolve the appeals that relate to:

a. Rule C.6.5.1 Application of agrichemicals – permitted activity;

b. Rule C.6.5.2 Application of agrichemicals into water – permitted activity;

c. new Appendix H.X Qualifications required for the application of agrichemicals; and

d. the definition of "spray-sensitive area".

3 The following people gave notice of their intention to become parties under section 274 of the Act and have signed the memorandum of the parties dated 1 June 2021:

a. Federated Farmers of New Zealand;

b. Horticulture New Zealand;

c. Heather Adams and Duncan Ross;

d. Cinna Smith;

e. Minister of Conservation;

f. Douglas and Linda Wheeler; and

g. Rayonier New Zealand Limited.

4 The Court is making this order under section 279(1)(b) of the Act; such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands that for the present purposes that:

a. All parties to the proceedings have executed the memorandum requesting this order;

b. All parties are satisfied that all matters proposed for the Court's endorsement are within the scope of submissions and appeals, fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Resource Management Act 1991, including in particular Part 2.

Order

5 Therefore, the Court orders, by consent, that the Proposed Regional Plan for Northland be amended as set out in **Annexure A** to this Order.

6 The order resolves new Appendix H.X and the definition of "spray-sensitive area".

7 The order resolves Rules C.6.5.1 and C.6.5.2 in part. The parts of Rules

C.6.5.1 and C.6.5.2 that remain unresolved relate to Horticulture New Zealand and the Public and Population Health Unit of the Northland District Health Board's appeal points relating to the use of agrichemicals in proximity to spray-sensitive areas. Rules C.6.5.1 and C.6.5.2 were heard in the week of 27 April 2021.

8 There is no order as to costs.

DATED this day of 2021

J A Smith
Environment Judge

ANNEXURE A

Rule C.6.5.1 Application of agrichemicals – permitted activity

The discharge of an agrichemical into air or onto or into land is a permitted activity, provided:

1) for all methods (including hand-held spraying, ground-based spraying and aerial application):
   a) the discharge does not result in:
      i. any noxious, dangerous, offensive or objectionable odour, smoke, spray or dust, or any noxious or dangerous levels of airborne contaminants beyond the boundary of the subject property or in the coastal marine area[1], or
      ii. damage to any spray-sensitive areas beyond the boundary of the subject property or in the coastal marine area, and
   b) there is no direct discharge into or onto water,
   and c) notification is given, either:
      i. other than for spraying in plantation forestry where notification must be given at least ~~20~~24 hours and no more than 60 working days before spraying commences, neighbouring properties receive notification no less than 24 hours and no more than three weeks before the spraying activity is to take place, as set out in Table 11: Spraying notification requirements, ~~and~~ or
      ii. according to an alternative notification agreement, that meets the requirements of Table 11: Spraying notification requirements; and
   d) if agrichemicals are applied within 100 metres of a public amenity area, prominent signs are placed prior to the commencement of the spraying and remain in place until spraying is complete. The signs must include the contact details of the property owner or applicator, details of the chemical to be sprayed, the time period during which the spraying is likely to take place, indication of any specific hazards and the application method. A record of the ~~notification~~ signage undertaken must be kept and made available to the Regional Council on request, and
   e) for spraying by any method in public road corridors and rail corridors:
      i. other than for ~~backpack~~ handheld spraying of roadside boundary fence lines adjacent to private land, a public notice must be placed in a newspaper, or a letter drop made to properties within 30 metres (or 200 metres for aerial ~~spraying~~ application) from the area to be sprayed, at least seven days and not more than one month before spraying is to take place, and

ii. the signs, public notice and letter drop must include the contact details of the property owner or applicator, details of the chemical to be sprayed, the time period during which the spraying is likely to take place, and the application method, and

iii. vehicles used for spraying must display prominent signs (front and back) advising that spraying is in progress, and

iv. a record of the ~~notification~~ signage undertaken must be kept and made available to the Regional Council on request.

Table 11: Spraying notification requirements

Spraying method	Properties to be notified	Notification requirements
Hand-held spraying	Nil (unless a public amenity area or public road corridor or rail corridor under the specific requirements above).	Nil (unless a public amenity area or public road corridor or rail corridor under the specific requirements above).
Ground-based spraying	Any property with a spray-sensitive area within 50 metres of the spraying, including when spraying is taking place in public amenity areas but excluding when the spraying is taking place in a public road corridor or rail corridor.	Either: 1. Notification: a) is to be undertaken by the owner or occupier of the property where agrichemicals will be applied unless delegated to the applicator, management company, forest manager, or pack house operator, and b) is to be in writing (which can include email or other electronic means) or by telephone, and c) includes: i. the days and times during which the agrichemical application is likely to take place, including alternative days and times if the weather is unsuitable, and ii. the contact details of the owner or occupier of the property, or
Aerial application	Any property with a spray-sensitive area within 200 metres of the spraying, including when spraying is taking place in public amenity areas, but excluding when the spraying is taking place in a public road corridor or rail corridor.	
Granules, gels and agrichemical baits	Any property with a spray-sensitive area within 30 metres of the agrichemical application, including when agrichemical application is taking place in public amenity areas, but excluding when the agrichemical application is	

Spraying method	Properties to be notified	Notification requirements
	taking place in a public road corridor or rail corridor.	applicator, or management company forest manager, or packhouse operator, and iii. the details of agrichemicals being applied, and iv. indication of any specific hazards (including toxicity to bees), and v. the application method. 2. Alternative notification agreement: (a) Notification is undertaken according to a notification agreement with the occupier. The notification agreement must: i. contain (as a minimum) method of notification and minimum time for notification prior to spraying ii. be recorded in writing and signed by all parties iii. be reviewed and re-signed annually.

2) for ground-based spraying and aerial spraying:

a) the activity is undertaken in accordance with the following sections of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004) as it relates to the management of the discharge of agrichemicals:

i. Use – Part 5.3, and

ii. Storage – Appendix L4, and

iii. Disposal – Appendix S, and

iv. Records – Appendix C9, and

b) a Spray Plan must be prepared annually for the area where the agrichemical is to be applied, and

c) where the activity is undertaken within 100 metres of a spray sensitive area (:

i. a risk assessment must be carried out prior to the application of an agrichemical and measures must be taken to minimise adverse effects on spray-sensitive areas. The risk assessment must include Table G1 of the New Zealand Standard. Management of (NZS 8409:2004), and

ii. agrichemicals must only be applied when the wind direction is away from the spray-sensitive area, and

iii. the application equipment must produce a spray quality no smaller than "coarse" according to Appendix Q Application Equipment of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004).

3) for ground-based spraying:

a) an applicator who is a contractor holds a current GROWSAFE Registered Chemical Applicators Certificate or a qualification that meets the requirements of Appendix H.X of this plan ~~(or equivalent)~~, and

b) an applicator who is not a contractor holds a current GROWSAFE Standard Certificate (or its equivalent) or is under direct supervision of a person with a GROWSAFE Registered Chemical Applicators Certificate or GROWSAFE Advanced Certificate or a qualification that meets the requirements of Appendix H.X of this plan ~~(or their equivalent),~~ and

4) for aerial application:

a) an applicator holds a current GROWSAFE Pilot Agrichemical Rating Certificate issued by the Civil Aviation Authority of New Zealand ~~(or their equivalent)~~, and

5) for agrichemicals containing 2,4-D:

a) the agrichemical is non-volatile or is slightly low volatile[2], or
b) application is by hand-held spraying, or
c) application by ground-based spraying or aerial ~~spraying~~ application only occurs between 1 May and 31 August.

Notes:

In addition to the requirements of Rule C.6.5.1 the agrichemical must be approved for its intended use by the Environmental Protection Authority under the Hazardous Substances and New Organisms Act 1996 and all other conditions set for its use must be complied with.

In relation to a non-aerial application, the applicator must hold an Agrichemical Certified Handler certificate (Worksafe New Zealand) where required by any Environmental Protection Authority approval for the agrichemical under the Hazardous Substances and New Organisms Act 1996,

or equivalent as recognised and required by the Environmental Protection Authority or Ministry for Business Innovation and

Employment, and be able to demonstrate competency using agrichemicals to avoid adverse impacts.

In relation to aerial application, the applicator and ground crew must hold qualifications and competencies as required by Environmental Protection Authority and Worksafe New Zealand.

For the avoidance of doubt this rule covers the following RMA activities:

- Discharge of an agrichemical onto or into land or into air (s15(1) and s15(2A)).

[1] Refer to Appendix H.7 Interpretation of noxious, dangerous, offensive and objectionable effects.

[2] Vapour pressure less than 1 x 10-4mmHg

Rule C.6.5.2 Application of agrichemicals into water –

permitted activity

The discharge of an agrichemical into water is a permitted activity provided:

1) other than for the control of plant pest species listed in the Regional Pest Management Plan or the National Pest Plant Accord, there is no discharge into coastal water, and

2) the discharge does not cause, beyond the zone of reasonable mixing in the receiving waters from the point of discharge:

   a) the production of conspicuous oil or grease films, scums or foams, of floatable or suspended materials, or

   b) an increase in the temperature by more than three degrees Celsius, or

   c) the pH to fall outside the range of 6.5 - 8.5 or change the pH by more than one pH unit, or

   d) the dissolved oxygen to be less than five milligrams per litre, or

   e) any conspicuous change in the colour or visual clarity, or

   f) the rendering of fresh water unsuitable for consumption by farm animals if the water is used for stock drinking water, and

3) an applicator holds a recognised application qualification (GROWSAFE with an aquatic component or a qualification that meets the requirements of Appendix H.X of this plan ~~its equivalent with an aquatic component~~), and

4) the activity is undertaken in accordance with the following sections of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004) as it relates to the management of the discharge of agrichemicals:

   a) Use – Part 5.3, and

   b) Storage – Appendix L4, and

c) Disposal – Appendix S, and

d) Records – Appendix C9, and

5) where the activity is undertaken within 100 metres of a spray-sensitive area:

a) a risk assessment must be carried out prior to the application of an agrichemical and measures must be taken to minimise adverse spray sensitive areas. The risk assessment must include reference to the Drift Hazard guidance chart in the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004), and

b) agrichemicals must only be applied when the wind direction is away from the spray-sensitive area, and

c) the application equipment must produce a spray quality no smaller than "coarse" according to Appendix Q Application Equipment of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004).

6) ~~the following notification takes place~~notification is given either:

a) other than for spraying in plantation forestry where notification must be given at least ~~20~~24 hours and no more than 60 working days before spraying commences, every person taking water for potable supply within one kilometre downstream of the proposed discharge is notified no less than 24 hours and no more than two weeks prior to the proposed commencement of any spraying, and

b) every holder of a resource consent for the taking of water for water supply purposes downstream of the proposed discharge is notified at least seven days before the discharge, and

c) notification must be undertaken by the owner or occupier of the property to be sprayed, unless delegated to the applicator, management company, forest manager or packhouse operator, and must be in writing (which can include email or other electronic means) or by telephone, and

d) notification must include:

i. the days and times during which the spraying is likely to take place, including alternative days and times if the weather is unsuitable, and

ii. the contact details of the property owner or applicator, and

iii. the details of agrichemicals being sprayed, and

iv. an indication of any specific hazards (including toxicity to bees), and

v. the application method, ~~and~~or

e) notification is undertaken according to a notification agreement with the occupier. The notification agreement must:

i. contain (as a minimum) method of notification and minimum time for notification prior to spraying

ii. be recorded in writing and signed by all parties

iii. be reviewed and re-signed annually; and

7) in addition, for aerial application into water:

a) an applicator holds a current GROWSAFE Pilot AgricChemical Rating Certificate (or equivalent qualification) issued by the Civil Aviation Authority of New Zealand ~~(or its equivalent)~~, and

b) there is no aerial application in urban areas, and

8) if agrichemicals are applied within 100 metres of a public amenity area, prominent signs are placed prior to the commencement of the spraying and remain in place until spraying is complete. The signs must include the contact details of the property owner or applicator, details of the chemical to be sprayed, the time period during which the spraying is likely to take place, an indication of any specific hazards (including toxicity to bees), and the application method. A record of the ~~notification~~ signage undertaken must be kept and made available to the Regional Council on request, and

9) in addition, for spraying by any method in public road corridors or rail corridors:

a) prominent signs are placed at the beginning and end points of the area to be sprayed, prior to the commencement of the spraying, and remain in place until spraying is complete, and

b) a public notice must be placed in a newspaper or a letter drop made to properties within 30 metres (or 200 metres for aerial ~~spraying~~ application) from the area to be sprayed at least seven days and not more than one month before spraying is to take place, and

c) the signs, public notice and letter drop must include the contact details of the property owner or applicator, details on the agrichemical to be sprayed, the time period during which the spraying is likely to take place, an indication of any specific hazards (including toxicity to bees), and the application method, and

d) vehicles used for spraying must display prominent signs (front and back) advising that spraying is in progress, and

e) a record of the ~~notification~~ signage undertaken must be kept and made available to the Regional Council on request.

Notes:

In addition to the requirements of Rule C.6.5.2, the agrichemical must be approved for its intended use by the Environmental Protection Authority under the Hazardous Substances and New Organisms Act 1996 and all other conditions set for its use must be complied with.

In relation to a non-aerial application, the applicator must hold an Agrichemical Certified Handler certificate (Worksafe New Zealand) where required by any Environmental Protection Authority approval for the agrichemical under the Hazardous Substances and New Organisms Act 1996, or equivalent (as recognised and required by Environmental

Protection Authority or Ministry for Business Innovation and Employment) and be able to demonstrate competency using agrichemicals to avoid adverse impacts.

In relation to an aerial application, the applicator and ground crew must hold qualifications and competencies as required by the Environmental Protection Authority and Worksafe New Zealand.

For the avoidance of doubt this rule covers the following RMA activities:

- Discharge of an agrichemical into water (s15(1)).

Appendix H.7 Interpretation of noxious, dangerous, offensive and objectionable effects

1) Several rules in this Plan use the terms 'noxious', 'dangerous', 'offensive', and 'objectionable', particularly rules relating to the discharges of contaminants into air. These terms are also included in section 17 of the RMA. Whether an activity is 'noxious', 'dangerous', 'offensive' or 'objectionable' depends on an objective assessment, based on the principles set out by case law. A Regional Council enforcement officer's views will not be determinative but may trigger further action and may be one factor considered by the Court if formal enforcement action is taken.

2) There is no standard definition of 'noxious', 'dangerous', 'offensive', and 'objectionable' terms because of the need to take account of case law precedent as it develops, that is, the Plan cannot override interpretations decided by the Courts. However, the following notes are intended to provide some guidance for interpreting these terms:

    a) NOXIOUS, DANGEROUS – the Concise Oxford Dictionary defines 'noxious' as "harmful, unwholesome". Noxious effects may include significant adverse effects on the environment (for example, on plant and animal life) even though the effects may not be dangerous to humans. 'Dangerous' is defined as "involving or causing exposure to harm". Dangerous discharges include those that are likely to cause adverse physical health effects, such as discharges containing toxic concentrations of chemicals. WorkSafe New Zealand's "Workplace Exposure Standards and Biological Exposure Indices, November 2018, 10th Edition" can be used for interpreting the terms 'noxious' and 'dangerous'.

    b) OFFENSIVE, OBJECTIONABLE – 'Offensive' is defined as "giving or meant to give offence; disgusting, foul-smelling, nauseous, repulsive". 'Objectionable' is defined as "open to objection, unpleasant, offensive". Case law has established that what may be offensive or objectionable under the RMA cannot be defined or prescribed except in the most general of terms. Each case will depend upon its own circumstances. Key considerations include:

i. location of an activity and sensitivity of the receiving environment – for example, what may be considered offensive or objectionable in an urban area, may not necessarily be considered offensive or objectionable in a rural area;

ii. reasonableness – whether or not an activity is offensive or objectionable should be determined by an ordinary person who is representative of the community at large and neither hypersensitive nor insensitive; and

iii. existing uses – it is important to consider what lawfully established activities exist in an area, that is, if a new activity requires a permit, the effect of existing discharges of contaminants into air should be considered.

The Regional Council's investigation of a complaint concerning offensive or objectionable discharges will depend upon the specific circumstances. However, for odour, the approach will generally be as follows:

3) An assessment of the situation will be made by a Council officer who has experience in odour complaints and has had his/her nose calibrated using olfactometry. This assessment will take into account the FIDOL factors – frequency, intensity, duration, offensiveness, location; and those matters identified below:

a) if the discharge is deemed to be offensive or objectionable by the Council officer, the discharger will be asked to take whatever action is necessary to avoid, remedy or mitigate the effects of the discharge;

b) if the discharger disputes the Council officer's assessment or the problem is ongoing, then a number of approaches may be taken, including one or more of the following:

i. assessments by other suitably qualified and experienced Council officers,

ii. asking people living and working in the subject area to keep a diary which notes details of any offensive or objectionable odours,

iii. promoting the use of community working groups and other means of consultation between the affected community and the discharger,

iv. using the services of an independent consultant to carry out an investigation, and/or community survey, v. using the services of the Council's odour panellists who have all had their noses calibrated by olfactometry and are deemed to have an average sense of smell,

v. undertaking an odour assessment using an olfactometer, or other appropriate technology, or

vi. leaving the matter to be determined by the Environment Court.

If the discharge is found to be offensive or objectionable, then enforcement action may be taken. This could be in the form of an abatement notice, infringement notice, enforcement order or prosecution. In the case of a permitted activity causing an offensive or objectionable discharge, a resource consent may be required to allow the discharge to continue.

4) Further information can be found in the following guidance documents produced by the Ministry for the Environment:

   a) Good Practice Guidance on Odour;

   b) Good Practice Guidance on Dust;

   c) Good Practice Guidance on Industrial Emissions.

Appendix H.X Qualifications required for the application of agrichemicals

A training programme, must meet the following specifications:

- Structure of the programme
- Content of the

Structure of the programme:

1. The training programme will include delivery of the contents set out below. 2. The training programme and provider of such training should be regularly
   reviewed and appraised by a suitably qualified external party to ensure ongoing quality and relevance of training;
3. The assessment process will be moderated to ensure that it adequately addresses matters covered in the course.
4. The programme will certify competency on the matters set out in the contents below for a period of five years which will then be reviewed through a refresher programme.
5. The programme provider will provide a copy of training materials to the Regional Council.

Content of the programme

A. 'Standard' qualification equivalent

The training programme will include the following content:

1. The hazard classifications of agrichemicals to be used and related requirements
2. Adverse effects that could be caused by agrichemicals
3. Agrichemical best practice for the safe, responsible and effective use of agrichemicals based on NZS8409:2004 Management of Agrichemicals as follows:

Topic	Relevant sections of NZS8409:2004
Managing environmental risks	Section 2 Management of Agrichemicals Section 5 Use of Agrichemicals Appendix F Environmental Management
Property spray plans	Appendix M Notification
Notification	Section 5 Use of Agrichemicals (5.3.1) Appendix M Notification and Signage for the application of agrichemicals
Signage	Section 5 Use of Agrichemicals (5.3.1) Appendix M Notification and Signage for the application of agrichemicals
Storage	Section 4 Storage and supply of Agrichemicals Appendix L General Storage Requirements
Emergency preparedness and management	Section 7 Emergency Preparedness and Management Appendix K Emergency Management
Operating equipment – nozzle selection and calibration, mixing sites	Section 5 Use of Agrichemicals (5.3.3) Appendix Q Application Equipment Appendix R Handling and Mixing Agrichemicals
Minimising spray drift	Section 5 Use of Agrichemicals (5.3.4) Appendix G Spray Drift Hazard and Weather Conditions
Record keeping – inventory, spray diaries, tracking	Section 2 Management of agrichemicals (2.6 Documentation and Licensing) and Appendix C (C9) Section 5 Use of Agrichemicals (5.3.5)
Agrichemical disposal	Section 6 Disposal of agrichemicals and containers Appendix S Disposal of Agrichemicals and Containers

4. Relevant regulatory requirements including under the Northland Regional Plan, EPA Notices and relevant regulations made under the Health and Safety at Work Act 2015
5. Working knowledge of operating equipment

Assessment of competency:

The training programme must include either a practical, verbal or written assessment to enable the participant to demonstrate knowledge and understanding of the contents of the course.

B. 'Advanced' qualification equivalent

In addition to the training content in A above, the training programme for more advanced users (which enables supervision of agrichemical application) must also include the following content:

1. Health and safety, and emergency response;
2. Hazardous Substances and New Organisms Emergency Management and Preparedness procedures;
3. Risk management, including undertaking a risk assessment prior to application; 4. Planning agrichemical applications;
5. Environmental effects, including spray drift minimisation; 6. Equipment calibration;
7. Product label interpretation.

The training programme must include being able to demonstrate:

1. Knowledge of agrichemicals, mode of action and use of additives and adjuvants;
2. Knowledge of developing and implementing spray plans; and 3. Calibration of one type of motorised equipment.

And, attainment of all of the following:

1. New Zealand Certificate in Agrichemical Application with relevant strand or New Zealand Qualifications Authority (NZQA) unit standard 21563 with one of: NZQA unit standard 23620, 28216, 23617, 6239, 6236 or 6242.
2. Certified Handler Test Certificate (only required if using class 6.1A or B products)

The renewal of this qualification must include both theory and practical assessments.

C. 'Contractor qualification equivalent'

In addition to the training content in A and B above, the training programme for Contractors must also include the following content:

1. preparing, implementing and monitoring spray plans; 2. supervision of staff and providing direction;
3. management of agrichemical applications; 4. managing the safety of people and livestock; 5. nozzle selection and drift reduction;
6. notification requirements including signage;

7. transport, storage and disposal of agrichemicals; and
8. selection, calibration and operation of application equipment for specific operations

And, attainment of all of the following:

1. New Zealand Certificate in Agrichemical Application with relevant strand or New Zealand Qualifications Authority (NZQA) unit standard 21563 with one of: NZQA unit standard 27216; unit standard 6237; or unit standard 6238.
2. Certified Handler Test Certificate (only required if using class 6.1A or B products)
3. evidence of 200 hours of practical spraying experience, including spray diary verification

The procedure for renewal of this qualification, required at an interval of no more than five years following certification, must include all of the following:

1. both theory and practical assessments;
2. be subject to an on-site audit by an independent third-party auditor;
3. confirm that a review of the commercial contractor operations has been undertaken; and
4. confirm that the commercial contractor has undertaken continuing professional development.

Additional qualification requirements for aquatic application under Rule C.6.5.2

For agrichemical spraying to water, an equivalent qualification must also include attainment of the New Zealand Certificate in Agrichemical Application with aquatic strand or Unit Standard 6240.

Advice note:

The Plan seeks to ensure that those using and applying agrichemicals are competent to undertake such applications. The plan has a training requirement that forms the basis of competency.

The requirements of this Plan only relate to those matters pertaining to the regional council functions for agrichemicals – discharge to air, land and water. A training programme may include other components relating to requirements of other agencies (for example, WorkSafe) and legislation, (for example, Health and Safety at Work Act 2015 and the Agricultural Compounds and Veterinary Medicines Act 1997). However, such components are not part of the competency required to meet the objectives, policies and rules of the Northland Regional Plan.

Definition of spray-sensitive area

1) Residential buildings and associated garden areas, and
2) schools, hospital buildings and care facilities and grounds, and
3) amenity areas where people congregate including parks and reserves, and
4) community buildings and grounds, including places of worship and marae, and
5) certified organic farms, and
6) orchards, crops and commercial growing areas, and
7) water bodies used for the supply of drinking water and for stock drinking, and

8) Natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and apiaries.

Annexure B

IN THE ENVIRONMENT COURT OF NEW ZEALAND AUCKLAND REGISTRY

I TE KŌTI TAIAO O AOTEAROA TĀMAKI MAKAURAU ROHE

IN THE MATTER of the Resource Management Act 1991

AND of an appeal under clause 14 of Schedule 1 of the Act

BETWEEN **PUBLIC AND POPULATION HEALTH UNIT OF THE NORTHLAND DISTRICT HEALTH BOARD**

HORTICULTURE NEW ZEALAND

Appellants

NORTHLAND REGIONAL COUNCIL

Respondent

MEMORANDUM OF COUNSEL FOR NORTHLAND REGIONAL COUNCIL REGARDING POST-HEARING DISCUSSIONS ON PROVISIONS

TOPIC 8: AGRICHEMICALS

24 MAY 2021

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MAY IT PLEASE THE COURT

1. During the Topic 8 – Agrichemicals hearing the Court observed that the parties' positions on the provisions relating to spray-sensitive areas in Rule C.6.5.1 Application of agrichemicals – permitted activity and Rule
C.6.5.2 Application of agrichemicals into water – permitted activity were narrowing.

2. In light of this, the Court directed the parties to confer and file by 21 May 2021 either:

   a. agreed provisions, if agreement could be reached; or

   b. a memorandum identifying the areas of agreement and disagreement.

3. On 21 May 2021 the Council requested a one day extension to the filing deadline, to allow further refinement in response to discussions between experts.

4. Full agreement on the provisions has not been reached. However, the parties have reached agreement on a number of issues, which are recorded below.

5. Attached in **Appendix 1** is a table summarising Northland Regional Council (**Council**), Horticulture New Zealand (**HortNZ**), Northland District Health Board (**NDHB**) and Mr and Mrs Wheeler's proposed wording of the provisions relating to spray-sensitive areas. Two proposed frameworks have arisen: the Council and HortNZ have taken a similar approach; as have the NDHB and Mr and Mrs Wheeler (though there are minor differences between each parties' approach).

6. Federated Farmers has confirmed that it is comfortable with the Council and HortNZ's position. Mr Duncan Ross and Ms Heather Adams have confirmed that they support Mr and Mrs Wheeler's position, subject to comments below regarding Figure 1 relating to cross-wind. Ms Cinna Smith supports Mr and Mrs Wheeler's position.

7. This memorandum has been prepared in consultation with the

parties that attended the Topic 8 hearing.

Areas of agreement

8. The parties generally agree on the following issues:

a. Clause 2(c) of the rule applies where agrichemical application is to be undertaken within 100 metres for ground-based methods and 300 metres for aerial application;

b. the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately and are confined to target application areas, to ensure that no adverse effects occur beyond the target application area, and to ensure that TELs and EELs are not exceeded;

c. the activity must be undertaken in accordance with a risk assessment that is documented and made available to Council on request;

d. a risk-based approach requiring increasing mitigation for agrichemical application risk factors ranging from low risk to high risk is a more nuanced approach than the decisions version of the rule;

e. additional requirements do not apply to agrichemical application if the occupier of the spray-sensitive area has provided (and not withdrawn) written approval for the type and method of agrichemical application;

f. agrichemical application must not occur if inversion conditions are present or likely to be present;

g. agrichemical application undertaken in a fully enclosed environment is not subject to the same requirements; and

h. the definitions of "spray-sensitive area" and "buffer"'.

9. In respect of the specifics of agrichemical application, the parties agree that:

a. all applications of agrichemicals subject to clause 2 (ground-based and aerial spraying) of C.6.5.1 (and the equivalent clause in C.6.5.2) require a risk assessment to be undertaken.

b. for agrichemical applications where the wind is away from spray sensitive areas and within 1-3 m/s, that no additional requirements need to be stipulated as permitted activity

conditions in the rule.

c. information on the measurement of wind speed should be added, as well as a definition for 'effective shelter' and 'away from', however the specific wording for these has not been agreed.

10. The parties agree that a risk assessment should include the measures set out in **Appendix 2** to this memorandum. The parties agree that the risk assessment be undertaken prior to and during application (some parties also seek this is required after the application); and records should be kept of the risk assessment, which should be made available to the Council on request.

Areas of disagreement

11. There are differences between the parties on matters of detail. In summary, the parties disagree on the following issues:

a. the detail of the proposed tiered approach to be incorporated into the provisions and the certainty that approach provides;

b. how the specific conditions (including application method, wind speed, wind direction, and additional requirements) should be included within the provisions and how those relate to the different risk levels, and in particular what the appropriate wind speed thresholds are and what standards (mitigation) should apply in each scenario;

c. whether application should be able to occur under any circumstances above windspeeds of 5m/s or 6m/s;

d. whether additional requirements should be included in the risk assessment, including:

i. the likelihood of spray drift occurring; and

ii. the ways of eliminating the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas;

e. whether written approval can be given for the application of agrichemicals with high or very high human toxicity;

f. how wind speed is to be measured;

g. the definitions of "effective shelter" and "away from" and whether a new definition of "agrichemical direct application methodology" should be included; and

h. other minor differences (e.g. the use of "must" vs. "shall" in the provisions, and whether wind speeds should be stated in both m/s and km/h)).

12. HortNZ also put forward, as an alternative to the list of items to be addressed in a risk assessment in Appendix 2 to this memorandum, a more detailed risk assessment framework as **Appendix 3**, which is set out in a table which would be included as an appendix to the plan, including:

a. the inherent hazards of the agrichemicals being used, and

b. consideration of key risk factors (high, medium, low) that could increase or decrease risks of spray movement onto sensitive areas, and guidance actions on how risks could be mitigated.

13. Mr Ross has concerns with Figure 1 in the definition of "away from". He seeks that the figure is amended to show the right-hand side of the diagram as a mirror image of the left and that the term "cross-wind" is replaced with a term like "the turbulent sideways spreading of the spray plume down-wind from the sprayed area". The Wheelers also consider that the diagram is less than clear, particularly the reference to "crosswind" which should perhaps be to "across the wind", and preferred a possible alternative diagram being discussed by the air quality experts.

DATED this 24th day of May 2021

M J Doesburg / E S Lake

Counsel for Northland Regional Council

Appendix 1: Table of parties' proposed provisions

Appendix 2: Measures to be included in risk assessment

1. A risk assessment must include:

   a. Confirmation of the target application area;

   b. Appropriateness of product for the weed, pest, or crop;

   c. Location of spray-sensitive areas;

   d. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability);

   e. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones;

   f. Presence and condition of shelter;

   g. Fit for purpose equipment and personal protective equipment;

   h. Confirmation that notification has been carried out and required signage is in place;

   i. Confirmation that any relevant regulatory requirements can be complied with;

   j. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan;

   k. Toxicity of the agrichemical to be applied;

   l. Application rate;

   m. Volatility;

   n. Timing and duration of operation; and

   o. Type of sensitive area and sensitivity of persons / animals / vegetation potentially exposed

Appendix 3: HortNZ Risk Assessment Table

PROPOSED ON-SITE RISK ASSESSMENT MATRIX
Table XX

SITE FACTORS		Risk assessment based on	Documentation requirements	Checklist	Notes
1	Application site (target)	Location and boundaries	Map showing the property and surrounds - this should be part of the property spray plan. **For each application event** the target application area(s) should be documented and referenced to the spray plan map.	☐ Spray plan map ☐ Application areas identified	
2	Sensitive areas	Nature of and location with respec to application area.	Potential sensitive areas should be recorded in the property spray plan with distance references noted for sensitive areas that require operational risk management.	☐ Human toxicity sensitive area(s) ☐ Other crops sensitive area(s) ☐ Aquatic ecotoxicity sensitive area(s) ☐ Terrestrial ecotoxicity sensitive area(s)	
3	Shelter belts	Nature of and location with respec to application area	Shelter between application area and sensitive areas noted and assessed for potential risk reduction relative to type of spraying operation.	☐ Shelter meets definition of effective shelter ☐ Shelter partial ☐ No shelter	

TOXICITY FACTORS			High hazard	Medium hazard	Low hazard	Considerations/Mitigations	
4	Product hazard HUMAN RISK	Products to be applied identified and the relevant HSNO hazard classification or GHS equivalent noted.	HSNO 6.1A, 6.1B	HSNO 6.1C	HSNO 6.1D, 6.1E or no 6.1 hazard rating	Product(s) selected according to application task, taking account of HSNO class, efficacy and other attributes and the at-risk sensitive locations. Select the lowest hazard products as possible.	*Hazard assessment should be based on the highest hazard classes of the products to be used.* *Risk is a function of hazard X application rate X risk of exposure. Mitigation in any of these three areas has an additive risk reduction effect.*
5	Product hazard ENVIRONMENTAL RISK	Products to be appliedidentied and the relevant HSNO hazard classification or GHS equivalent noted.	Aquatic HSNO 9.1A Terrestrial HSNO 9.2A OR 9.3A OR 9.4A	Aquatic HSNO 9.1B Terrestrial HSNO 9.2B OR 9.3B OR 9.4B	Aquatic HSNO 9.1C or D Terrestrial HSNO 9.2, 9.3,9.4 C OR D rating, OR unrated	Product(s) selected according to application task, taking account of HSNO class, efficacy and other attributes and the at-risk sensitive locations.	*Hazard assessment should be based on the highest hazard classes of the products to be used.* *Risk is a function of hazard X application rate X risk of exposure. Mitigation in any of these three areas has an additive risk reduction effect.*
			High risk factors	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
6	Secondary drift risks (Volatile products)	Vapour pressure of applied products	High vapour pressure >10 mPa	Vapour pressure between 0.1-10 mPa	Low vapour pressure <0.1 mPa	Check product label, SDS or manufacturer informatation and instructions for use and risk mitigation when using products with secondary drift risks.	*Specific controls according to the volatility of the product being applied - these include seasonal dates of no use for products like 2,4-D hormone herbicides.*
WEATHER CONDITIONS			**High risk factors**	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
7	Wind direction	Direction (bearing) at the application site at the time of application	Unpredictable	Possible wind direction changes during spraying	Predictable and away from sensitive areas	Tools to monitor wind direction before and during application are in place. Visual indicators and/or Weather station and/or hand held anemometer	*Spray areas closest to sensitive areas under best possible wind conditions - this is often early on a spraying day.* *Spray applicators have a documented set of rules eg SPRAY or NO SPRAY for application behaviour near sensitive boundaries under different wind conditions.*
8	Wind speed	Speed at the application site at the time of application	High speed > 6 m/s OR Very low 0 to 1 m/s	Variable and/or speeds 3 6 m/s	Stready Speeds 1-3 m/s		
9	Evaporative potential	Air temperature and humidity Delta T	Low humidity Delta T above 8 °C	Delta T between 4 and 8 °C	High humidity Delta T < 4 °C	Temperature and Humidity measured and recorded on site at the time of applicaiton	*Guidelines for spraying under different Delta T conditions are well established.*
10	Atmospheric stability	Inversion layer (smoke behaviour)	Inversion present	Potential inversion conditions (night time spraying with low wind speeds)	No inversion present	Wind and temperature data recorded on site indicate that no inversion layer is likely, and/or visual indictors (e.g. smoke) suggest no inversion risk.	*No machine applications should be undertaken outdoors under inversion conditions.* *If volatility risk is medium or high then an on-site test for an inversion layer should be undertaken.*
APPLICATION FACTORS			**High risk factors**	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
11	Application method and Maximum height ofspray release	Aerial Airblast orchard type Boom	>10 m above target >2 m above target >1m above target, and/or Travel speed > 15km/h	5-10 m above target 1-2 m above target 0.6-1 m above target and/or Travel speed 8 to 10 km/h	<5 m above target <1 m above target <=0.5 m above target and/or Travel speed <=8 km/h	Application equipment selected to minimise product losses between the point of release and the target all fully documented	
12	Spray droplet size	Physical properties of the product being applied	Very fine or smaller spray quality (Significant volumes in droplets <50 µm diameter)	Fine or medium spray quality	Coarse or greater spray quality (Most of output volume in droplets >250 µm diameter)	Refer to nozzle charts for spray quality, pressure related. Can use water sensitive paper to record/demonstrate droplet sizes of spray plume.	
13	Dritt reducing adjuvants				Only use provendrift reducing adjuvants.	Effects same as increasing droplet size and changing spray quality.	
14	Use of shrouds/screens				Shrouds or screens are used	Effect is as for reducing wind speed and should be scored there.	
15	Application targetting	Spray not directed downwind when treating downwind block edges	No adjusment tosprayer or spraying emission patterns.	Air blast sprayers - Inthe edge and second downwind side rows spray is only directedinto the block (upwind).	Boom spraying - Useof end boom nozzles. Air blast sprayers - In the three downwind siderows spray is only directed into the block (upwind).		
BUFFER ZONES			**High risk factors**	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
16	Proximity of sensitive areas to treated area	Downwind application free zone See buffer zone distances table for different application methods and wind conditions	Sensitive areawithin buffer zone. NO SPRAYING PERMITTED	Downwind sensitive area 1 to 3X recommended buffer zone distance away from downwind edge of treated area.	Downwind sensitive area> 3X the recommended buffer zone distanceaway from downwind edge of treated area.	Location of application target and sensitive area known and logged, communication/notification confirmed, spray quality, and wind direction known and drift modelling done	

Buffer zone guideance and responses

No risk of harmful effects and virtually no risk of detection of applied products beyond the buffer zone distance provided no high hazard factors identified in the risk assessment above

		No shelter	Shelter		
Aerial spraying	Windspeed <1 m/s	300 m	100 m	From all sprayed area edges	*Measurements taken from the downwind edge or corner of the treated area.* *Sensitive areas included for wind directions up to 45° downwind from the treated area*
	Windspeed 1-6 m/s	300 m	100 m	On downwind edges of sprayed area	
	Windspeed >6m/s	900 m	900 m	On downwind edges of sprayed area provided no high hazard factors	
Airblast spraying	Windspeed <1 m/s	30 m	10 m	From all sprayed area edges	*Measurements taken from the downwind edge or corner of the treated area.* *Sensitive areas included for wind directions up to 45° downwind from the treated area*
	Windspeed 1-6 m/s	30 m	10 m	On downwind edges of sprayed area	
	Windspeed >6m/s	90 m	30 m	On downwind edges of sprayed area provided no high hazard factors	
Boom spraying	Windspeed <1 m/s	10 m	2 m	From all sprayed area edges	*Measurements taken from the downwind edge or corner of the treated area.* *Sensitive areas included for wind directions up to 45° downwind from the treated area*
	Windspeed 1-6 m/s	10 m	2 m	On downwind edges of sprayed area	
	Windspeed >6m/s	30 m	10 m	On downwind edges of sprayed area provided no high hazard factors	

Outcomes driven risk assessment

Two desired outcomes

1) No risk of off target spray deposits at levels that could be expected to cause harm.
   This has to be related to the toxicity of the chemical(s) being applied to; humans (class 6), aquatic ecosystems (class 9.1) or terrestial ecosystems (classes 9.2, 9.3 and 9.4).
   The key areas of toxicity concern are human and aquatic ecosystems and highly sensitive terrestial ecosystems (as opposed to general land usage around sprayed areas).
2) No risk of contamination of adjacent crops or animals that could lead to market acceptability issues.
3) Minimal risk of contamination of drinking water sources - especially roofing for collection of drinking water.

Topic 8 – Agrichemicals

Table of parties' positions on revised spray drift provision – 24 May 2021

Northland Regional Council	Horticulture NZ	Northland District Health Board	Mr and Mrs Wheeler
Rule C.6.5.1 Application of agrichemicals – permitted activity The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: 1. for all methods (including hand-held spraying, ground-based spraying and aerial application): (aa) The following preconditions must be met for any discharge of agrichemicals into air or onto land: i) the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately, and are confined to target application areas; ii) the applicator shall take all practicable steps to ensure that no adverse effects occur beyond the application area; and iii) the applicator shall ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded. ... 2. for ground-based spraying and aerial application: (a) the activity is undertaken in accordance with the following sections of the *New Zealand Standard Management of Agrichemicals (NZS8409:2004)* as it relates to the management of the discharge of agrichemicals: i) Use – Part 5.3, and ii) Storage – Appendix L4, and iii) Disposal – Appendix S, and iv) Records – Appendix C9, and [References to be updated if 2021 Standard approved] (b) a Spray Plan must be prepared annually for the areas where agrichemicals are to be applied, which shall be made available to the Council on request; (c) Where the activity is undertaken within 100 metres of a spray-sensitive area or 300 metres for aerial application: i) a risk assessment must be carried out prior to the application to determine the site characteristics on the day, particularly wind speed and wind direction, the level of risk present, and use of appropriate methods to mitigate that risk; ii) the applicator must re-evaluate the risk assessment during the application to ensure that the situation has not changed and that the application methods and drift mitigations are still appropriate; iii) the risk assessment must be recorded in a spray diary (in the form that meets the requirements of Appendix X), which shall be made available to the Council on request; iv) the activity must be undertaken in accordance with the risk assessment, spray diary and the spray plan; and v) the application must meet the requirements in Table X; (d) agrichemical application must not occur if: i) wind speeds are greater than 6m/s; or ii) inversion conditions are present or likely to be present during application; (e) the requirements in (2) above do not apply to agrichemical application if: i) the occupier of the spray sensitive area has provided written approval for the type and method of agrichemical application and: 1) the written approval is re-signed annually;	**Rule C.6.5.1 Application of agrichemicals – permitted activity** The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: 1. [as per consent agreement] 2. for ground based spraying and aerial applications: a) the activity is undertaken in accordance with the following sections of the New Zealand Standard Management of Agrichemicals (NZS8409:2004) as it relates to the management of the discharge of agrichemicals: i) Use – Part 5.3, and ii) Storage – Appendix L4, and iii) Disposal – Appendix S, and iv)Records – Appendix C9, and [References to be updated if 2021 Standard approved] b) a Spray plan must be prepared annually for the areas where agrichemicals are to be applied, and made available to the Regional Council on request. c) Where the agrichemical application is to be undertaken by ground-based methods within 100 metres of a spray sensitive area, or by aerial application within 300 metres of a spray sensitive area the following conditions must be met: i) The applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately and are confined to target application areas, to ensure that no adverse effects occur beyond the target application area. ii) A risk assessment must be carried out prior to the application to determine the site characteristics on the day, particularly wind speed and wind direction, the level of risk present, and use of appropriate methods to mitigate that risk based on Table XX (Appendix 3) to ensure that condition 2 c i) is met. iii) An applicator should re-evaluate the risk assessment during the application to ensure that the situation has not changed and that the application methods and drift mitigations are still appropriate. iv) The application must be undertaken in accordance with the spray plan and risk assessment. v) The risk assessment must be documented and made available to the Council on request. vi) The application must meet the requirements in Table X The application is not permitted if the following conditions are present: i) Inversion conditions are present, or	**Rule C.6.5.1 Application of agrichemicals – permitted activity** The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: The following preconditions must be met for any discharge of agrichemicals into air or onto land: • the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately, and are confined to target application areas; • the applicator shall take all practicable steps to ensure that no adverse effects occur beyond the application area • the applicator shall ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded; 2. Where the activity is undertaken within 100 metres of a spray-sensitive area (or 300 metres for aerial application): a. The following risk assessment requirements are met: i) a risk assessment must be carried out prior to, during and after the application of an agrichemical by the person applying the agrichemical; ii) The risk assessment must include assessment of all the factors listed in Table Y; iii) the risk assessment and all actions undertaken to mitigate identified risks must be recorded in a spray diary; iv) the activity must be undertaken in accordance with the risk assessment and spray diary; v) the person completing the risk assessment must sign the entry in the spray diary; vi) the spray diary and electronic or paper records from the digital/electronic wind direction and wind speed measuring device shall be made available to the Council on request; and b. Agrichemical application is a permitted activity provided that the requirements in Table ZA are met: 3. The requirements in Table ZA do not apply to agrichemical application if: a) the occupier of the spray sensitive area has provided written approval for the type and method of agrichemical application and: i) the agrichemical to be applied is not high or very high human toxicity; and ii) the written approval is re-signed annually; and iii) the occupier is provided with a copy of the annual spray plan before signing (or re-signing) and that spray plan identifies the use of any agrichemicals with high human toxicity; and iv) the written approval has not been withdrawn, withdrawal only being effective if three months' notice has been provided; and v) a copy of the relevant spray diary is provided to the occupier of the spray sensitive area upon request. 4. Agrichemical application must not occur in the circumstances in Table ZB.	**Rule C.6.5.1 Application of agrichemicals – permitted activity** The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: The following preconditions must be met for any discharge of agrichemicals into air or onto land: • A Spray Plan must be prepared annually for the areas where agrichemicals are to be applied, which must be made available to the Council and the occupiers of spray sensitive areas on request; • the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately, and are confined to target application areas; • the applicator must take all practicable steps to ensure that no adverse effects occur beyond the application area; • the applicator must ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded; 2. Where the activity is undertaken within 100 metres of a spray-sensitive area (or 300 metres for aerial application): a) The following risk assessment requirements are met: i) a risk assessment must be carried out prior to, during and after the application of an agrichemical by the person applying the agrichemical; ii) The risk assessment must include assessment of all the factors listed in Table Y; iii) the risk assessment and all actions undertaken to implement the risk assessment must be recorded in a spray diary; iv) the activity must be undertaken in accordance with the risk assessment and spray diary; v) the person completing the risk assessment must sign the entry in the spray diary; vi) the spray diary and electronic or paper records from the digital/electronic wind direction and wind speed measuring device must be made available to the Council on request; and b) Agrichemical application is a permitted activity provided that the requirements in Table ZA are met: 3. The requirements in Table ZA do not apply to agrichemical application if: a) the occupier of the spray sensitive area has provided written approval for the type and method of agrichemical application and: i) the agrichemical to be applied is not high or very high human toxicity; and ii) the written approval is re-signed annually; and iii) the occupier is provided with a copy of the annual spray plan before signing (or re-signing) and that spray plan identifies the use of any agrichemicals with high human toxicity; and iv) the written approval has not been withdrawn, withdrawal only being effective if three months' notice has been provided; and v) a copy of the relevant spray diary is provided to the occupier of the spray sensitive area upon request. 4. Agrichemical application must not occur in the circumstances in Table ZB.

Northland Regional Council

2) the occupier is provided with a copy of the annual spray plan; and

3) the written approval has not been withdrawn, withdrawal only being effective if three months' notice has been provided;

(f) agrichemical application undertaken in a fully enclosed environment (for example a greenhouse) is not subject to the requirements of (2) above.

Agrichemical application that does not meet all of the preconditions and is not permitted under (2) above is a discretionary activity under Rule C.6.5.5.

3. [training requirements for ground based as per agreed provisions]
4. [training requirements for aerial as per agreed provisions]
5. [2,4-D provisions as per agreed provisions]

Application method	Wind speed	Wind direction	Additional requirements to be a permitted activity:
Boom spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 2 m with effective shelter, or • 10 m without effective shelter.
	1-6m/s	Wind away from sensitive area(s)	No additional requirements apply.
		Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 2 m with effective shelter, or • 10 m without effective shelter Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.
Airblast spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 10m with shelter, or • 30m without shelter.
	1-6m/s	Wind away from sensitive area(s)	No additional requirements apply.
		Wind toward sensitive area(s) or wind	There is a buffer distance on all boundaries of the target application area of: • 10m with effective shelter, or

Horticulture NZ

ii) Where a high human risk hazard (Table xx) is present, and the spray quality is fine or smaller, and the wind direction is towards a spray sensitive area; or

iii) Where a high human risk hazard (Table xx) is present, and the chemical has high vapour pressure (>10 mPa)

iv) The requirements in Table X are not met.

d) The requirements in 2 c) above do not apply to agrichemical applications if the occupier of the spray sensitive area has provided written approval for agrichemical applications and:

i) the written approval is re-signed annually

ii) the occupier is provided with a copy of the annual spray plan; and

iii) the written approval has not been withdrawn, withdrawal only being effective if three months notice has been provided.

e) The requirements of 2c) and d) do not apply to agrichemical applications undertaken in a fully enclosed environment (such as a greenhouse).

3. [training conditions as per consent document]
4. [training conditions as per consent document]
5. [2,4-D conditions as per consent document]

Table X – Permitted activity requirements under 2 (c)

Application method	Wind speed	Wind direction	Additional requirements to be a permitted activity:[x]
Boom spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 2 m with shelter, or • 10 m without shelter.
	1-6m/s	Wind away from sensitive area(s)	No additional requirements apply.
		Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 2 m with shelter, or • 10 m without shelter
	>6m/s	Wind away from sensitive area(s)	Use coarsest spray quality possible and implement mitigation controls identified in risk assessment.
		Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 10 m with shelter, or • 30 m without shelter And • no high human or high ecotoxic risk products as identified through Table XX to be applied. • use coarsest spray quality possible and implement

Northland District Health Board

5. Agrichemical application that does not meet all of the preconditions and is not permitted under (2) or (3) above is a discretionary activity under Rule C.6.5.5.

Table ZA – Permitted Activities	
Activity	**Standards**
A. Ground application	
Wind away from spray-sensitive area	
Wind speed 0-1m/s	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-3m/s	Nil
Wind speed 3-5m/s	**EITHER:** i. Effective shelter is present; and ii. Spray quality is as coarse as practicable; and iii. Spray is non-volatile **OR:** The agrichemical is applied using **Agrichemical direct application methodology**
Wind changeable or toward spray-sensitive area	
Wind speed 0-1m/s	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-3m/s	**EITHER:** i. Effective shelter is present; and ii. A 50m buffer is observed; and iii. Spray quality is medium or coarse; and iv. Spray is non-volatile; v. Spray is not high or very high human toxicity or ecotoxicity; and vi. Maximum height of spray release is <=0.5m (boom) or <1 m (airblast) above target.

Mr and Mrs Wheeler

5. Agrichemical application that does not meet all of the preconditions and is not permitted under (2) or (3) above is a discretionary activity under Rule C.6.5.5.

Table ZA – Permitted Activities	
Activity	**Standards**
A. Ground application	
Wind away from spray-sensitive area	
Wind speed 0-1m/s (0-3.6km/h)	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-3m/s (0-10.8km/h)	Nil
Wind speed 3-5m/s (10.8-18km/h)	**EITHER:** i. Effective shelter is present; and ii. Spray quality is as coarse as practicable. **OR:** **iii.** The agrichemical is applied using **agrichemical direct application methodology**
Wind toward spray-sensitive area	
Wind speed 0-1m/s (0-3.6km/h)	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-2m/s (3.6-7.2km/h)	**EITHER:** i. Effective shelter is present; and ii. A 50m buffer is observed; and iii. Spray quality is medium or coarse. **OR** **iv.** The agrichemical is applied using **agrichemical direct application methodology**
B. Aerial application	
Wind away from spray-sensitive area	

Northland Regional Council

		direction unpredictable	• 30m without effective shelter. Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.
Aerial spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 100m with effective shelter, or • 300m without effective shelter. Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.
	1-6m/s	Wind away from sensitive area(s)	No additional requirements apply.
		Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 100 m with effective shelter, or • 300 m without effective shelter Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.

Note: refer to Appendix Y for measurement of wind speed requirements.

Horticulture NZ

			mitigation controls identified in risk assessment.
Airblast spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 10m with shelter, or • 30m without shelter. No additional requirements apply.
		Wind away from sensitive area(s)	
	1-6m/s	Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer distance on all boundaries of the target application area of: • 10m with shelter, or • 30m without shelter. Use coarsest spray quality possible and implement mitigation controls identified in risk assessment.
		Wind away from sensitive area(s)	There is a buffer on the downwind boundary of the target application area of: • 30 m with shelter, or • 100 m without shelter
	>6m/s	Wind toward sensitive area(s) or wind direction unpredictable	And • no high human or high ecotoxic risk products as identified through Table XX to be applied. • use coarsest spray quality possible and implement mitigation controls identified in risk assessment.
Aerial spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 100m with shelter, or • 300m without shelter. No additional requirements apply.
		Wind away from sensitive area(s)	
	1-6m/s	Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 100 m with shelter, or • 300 m without shelter
		Wind away	Use coarsest spray quality possible and implement mitigation

Northland District Health Board

	OR The agrichemical is applied using **Agrichemical direct application methodology**
B. Aerial application	
Wind away from spray-sensitive area Wind speed 1-5m/s	i. Effective shelter is present; and ii Spray quality is as coarse as possible; and iii Spray is non-volatile.
C. Enclosed structure Agrichemical application undertaken in a fully enclosed structure (for example a greenhouse)	i. The structure remains entirely enclosed for the entire duration of the application of the agrichemical

Table ZB – Discretionary Activities	
Activity	**Exemptions (Permitted Activity)**
Wind speed greater than 5m/s	i. The agrichemical is applied using **Agrichemical direct application methodology** ii. The application of citric acid
i. Wind speed 3m/s or greater; and ii. Wind direction away from the spray sensitive area; and iii. The agrichemical has high or very high eco or human toxicity	i. The agrichemical is applied using **Agrichemical direct application methodology**
i. Wind direction changeable or toward the spray sensitive area; and ii. wind speed > 3m/s; or iii. The agrichemical has high or very high human toxicity or ecotoxicity.	i. The agrichemical is applied using **Agrichemical direct application methodology**

Mr and Mrs Wheeler

Wind speed 1-5m/s (3.6-18km/h)	i. Effective shelter is present
C. Enclosed structure Agrichemical application undertaken in a fully enclosed structure (for example a greenhouse)	i. The structure remains entirely enclosed for the entire duration of the application of the agrichemical

Table ZB – Discretionary Activities	
Activity	**Exemptions (Permitted Activity)**
Wind speed greater than 5m/s (18km/h)	**i.** The agrichemical is applied using **Agrichemical direct application methodology** ii. The application of citric acid
i. Wind speed 3m/s (10.6km/h) or greater; and ii. Wind direction away from the spray sensitive area; and iii. The agrichemical has high or very high eco or human toxicity	i. The agrichemical is applied using **Agrichemical direct application methodology**
i. Wind direction toward the spray sensitive area; and ii. The agrichemical has high or very high human toxicity; and iii. The spray-sensitive area is one of: 1. residential buildings and associated garden areas, 2. schools, hospital buildings and care facilities and grounds, 3. amenity areas where people congregate including parks and reserves, 4. community buildings and grounds, including places of worship and marae, 5. water bodies used for the supply of drinking water and for stock drinking, or 6. roofing for the collection of drinking water.	i. The agrichemical is applied using **Agrichemical direct application methodology**

Northland Regional Council	Horticulture NZ	Northland District Health Board	Mr and Mrs Wheeler
	<table><tr><td></td><td>></td><td>from sensitive area(s)</td><td>controls identified in risk assessment.</td></tr><tr><td></td><td>6m/s</td><td>Wind toward sensitive area(s) or wind direction unpredic table</td><td>There is a buffer on the downwind boundary of the target application area of: • 300 m with shelter, or • 1000 m without shelter And • no high human or high ecotoxic risk products as identified through Table XX to be applied. • use coarsest spray quality possible and implement mitigation controls identified in risk assessment.</td></tr></table> [x]Except that where an EPA approval for an agrichemical specifies a buffer distance, this prevails on any buffer distance requirements stated in Table X. Note: refer to Appendix Y for measurement of wind speed requirements.		<table><tr><td>i. Wind direction toward the spray sensitive area; and ii. The agrichemical has high or very high eco toxicity; and iii. The spray-sensitive area is one of: 1. *water bodies used for the supply of drinking water and for stock drinking,* 2. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, or 3. apiaries.</td><td>i. The agrichemical is applied using **Agrichemical direct application methodology**</td></tr><tr><td>Inversion conditions are present or likely to be present during application</td><td>i. The application of citric acid</td></tr></table>
Appendix Y **Measurement of wind speed and risk assessment requirements** **How to measure wind speed** 1. Wind speed for risk assessment is best measured onsite at the observed maximum projected height of the spray plume (ideally 0.5 – 1 m above the target), or at the release height of the spray for downward projected nozzles. 2. Wind speed during spraying operations is best measured onsite at the downwind edges of sprayed areas closest to potential sensitive areas. This can be achieved using remote monitoring, wind socks or other visual indicators where the applicator can see them. 3. Wind direction measurement during both risk assessment, spraying operations is best measured onsite at the downwind edges of sprayed areas closest to potential sensitive areas. This can be achieved using remote monitoring, wind socks, or other visual indicators where the applicator can see them. ***Risk assessment*** **Risk assessment** A risk assessment must include: 1. Confirmation of the target application area; 2. Appropriateness of product for the weed, pest, or crop; 3. Location of sensitive areas; 4. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability); 5. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones; 6. Presence and condition of shelter belts; 7. Fit for purpose equipment and PPE; 8. Confirmation that notification has been carried out and required signage is in place (see C3 and C4); 9. Confirmation that any relevant regulatory requirements can be complied with;	**Appendix Y** **Measurement of wind speed and risk assessment requirements** ***How to measure wind speed*** 1. Wind speed for risk assessment is best measured onsite at the observed maximum projected height of the spray plume (ideally 0.5 – 1 m above the target), or at the release height of the spray for downward projected nozzles. 2. 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Wind speed *for risk assessment* must be measured: i) Onsite; ii) at the observed maximum projected height of the spray plume (maximum 1 m above the target), or at the release height of the spray for downward projected nozzles. iii) using an electronic/digital monitoring device which produces an electronic or printed record. 2. Wind speed *during spraying operations* must be measured: i) Onsite; ii) at the downwind edges of sprayed areas closest to potential sensitive areas; iii) using an electronic/digital monitoring device which produces an electronic or printed record. 3. Wind direction measurement for both risk assessment and during spraying operations must be measured: i) Onsite; ii) at the downwind edges of sprayed areas closest to potential sensitive areas; iii) using an electronic/digital monitoring device which produces an electronic or printed record, together with wind socks or other visual indicators where the applicator can see them. 4. Wind speed and wind direction shall be averaged over a 10-minute period. 5. Wind gust should be measured as the strongest consecutive 3 second reading in any 60 second period. ***Table Y*** ***Risk assessment*** A risk assessment must include: 1. Confirmation of the target application area; 2. Appropriateness of product for the weed, pest, or crop; 3. Location of spray- sensitive areas;	**Measurement of wind speed and risk assessment requirements** 1. Wind speed *for risk assessment* must be measured: i) Onsite; ii) at the observed maximum projected height of the spray plume (maximum 1 m above the target), or at the release height of the spray for downward projected nozzles. iii) using an electronic/digital monitoring device which produces an electronic or printed record. 2. Wind speed *during spraying operations* must be measured: i) Onsite; ii) at the downwind edges of sprayed areas closest to potential sensitive areas; iii) using an electronic/digital monitoring device which produces an electronic or printed record. 3. Wind direction measurement for both risk assessment and during spraying operations must be measured: i) Onsite; ii) at the downwind edges of sprayed areas closest to potential sensitive areas; iii) using an electronic/digital monitoring device which produces an electronic or printed record, together with wind socks or other visual indicators where the applicator can see them. 4. Wind speed and wind direction must be averaged over a 10-minute period. 5. Wind gust should be measured as the strongest consecutive 3 second reading in any 60 second period. ***Table Y*** ***Risk assessment*** A risk assessment must include: 1. Confirmation of the target application area; 2. Appropriateness of product for the weed, pest, or crop; 3. Location of spray- sensitive areas;

Northland Regional Council	Horticulture NZ	Northland District Health Board	Mr and Mrs Wheeler
10. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan. Where it is necessary to deviate from the spray plan this must be recorded along with reasoning as to why deviation is necessary; 11. Toxicity; 12. Application rate; 13. Volatility; 14. Timing and duration of operation; and 15. Type of sensitive area and sensitivity of persons/animals/vegetation potentially exposed. 16. The likelihood of spray drift occurring. 17. The ways of minimising the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas		4. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability); 5. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones; 6. Presence and condition of shelter belts; 7. Fit for purpose equipment and personal protective equipment; 8. Confirmation that notification has been carried out and required signage is in place (see C3 and C4); 9. Confirmation that any relevant regulatory requirements can be complied with; 10. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan; 11. Toxicity of the agrichemical to be applied; 12. Application rate; 13. Volatility; 14. Timing and duration of operation; and 15. Type of sensitive area and sensitivity of persons/animals/vegetation potentially exposed. 16. The likelihood of spray drift occurring. 17. The ways of eliminating the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas	4. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability); 5. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones; 6. Presence and condition of shelter belts; 7. Fit for purpose equipment and personal protective equipment; 8. Confirmation that notification has been carried out and required signage is in place (see C3 and C4); 9. Confirmation that any relevant regulatory requirements can be complied with; 10. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan; 11. Toxicity of the agrichemical to be applied; 12. Application rate; 13. Volatility; 14. Timing and duration of operation; and 15. Type of sensitive area and sensitivity of persons/animals/vegetation potentially exposed. 16. The likelihood of spray drift occurring. 17. The ways of eliminating the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas
Definitions **Spray-sensitive** area 1. residential buildings and associated garden areas, and 2. schools, hospital buildings and care facilities and grounds, and 3. amenity areas where people congregate including parks and reserves, and 4. community buildings and grounds, including places of worship and marae, and 5. certified organic farms, and 6. orchards, crops and commercial growing areas, and 7. water bodies used for the supply of drinking water and for stock drinking, and 8. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and 9. roofing for the collection of drinking water; and 10. apiaries. **Effective shelter** Effective shelter must be: 1. taller (at least >1 metre) than the height of the spray plume[1] when the plume interacts with the shelter; and 2. have foliage that is continuous from top to bottom; and 3. achieves in the order of 50% optical and aerodynamic porosity;[2] and 4. has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and 5. is not deciduous; and 6. has a width to height ratio of 1:3.5. Artificial shelter can also be useful in reducing spray drift (for example overhead hail netting for kiwifruit and apples). *[1] NB: This is the not necessarily the same as the projected height (at point of discharge) as it will typically rise if it drifts.*	**Definitions** ***Spray-sensitive area*** 1. residential buildings and associated garden areas, and 2. schools, hospital buildings and care facilities and grounds, and 3. amenity areas where people congregate including parks and reserves, and 4. community buildings and grounds, including places of worship and marae, and 5. certified organic farms, and 6. orchards, crops and commercial growing areas, and 7. water bodies used for the supply of drinking water and for stock drinking, and 8. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and 9. roofing for the collection of drinking water; and 10. apiaries. ***Effective shelter*** Effective shelter must be: 1. taller (at least >1 metre) than the height of the spray plume[1] when the plume interacts with the shelter; and 2. have foliage that is continuous from top to bottom; and 3. achieves in the order of 50% optical and aerodynamic porosity;[2] and 4. has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and 5. is not deciduous; and 6. has a width to height ratio of 1:3.5. Artificial shelter can also be useful in reducing spray drift (for example overhead hail netting for kiwifruit and apples). *[1] NB: This is the not necessarily the same as the projected height (at point of discharge) as it will typically rise if it drifts.*	**Definitions** ***Spray-sensitive area*** 1. residential buildings and associated garden areas, and 2. schools, hospital buildings and care facilities and grounds, and 3. amenity areas where people congregate including parks and reserves, and 4. community buildings and grounds, including places of worship and marae, and 5. certified organic farms, and 6. orchards, crops and commercial growing areas, and 7. water bodies used for the supply of drinking water and for stock drinking, and 8. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and 9. roofing for the collection of drinking water; and 10. apiaries. ***Effective shelter*** Effective shelter means: 1. taller (at least >1 metre) than the height of the spray plume[1] when the plume interacts with the shelter; and 2. have foliage that is continuous from top to bottom; and 3. achieves in the order of 50% optical and aerodynamic porosity;[2] and 4. has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and 5. is not deciduous; and 6. has a minimum height of 3.5m; and 7. has a width to height ratio of 1:3.5. *[1] NB: This is the not necessarily the same as the projected height (at point of discharge) as it will typically rise if it drifts.*	**Definitions** ***Spray-sensitive area*** 1. residential buildings and associated garden areas, and 2. schools, hospital buildings and care facilities and grounds, and 3. amenity areas where people congregate including parks and reserves, public footpaths and 4. community buildings and grounds, including places of worship and marae, and 5. certified organic farms, and 6. orchards, crops and commercial growing areas, and 7. water bodies used for the supply of drinking water and for stock drinking, and 8. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and 9. roofing for the collection of drinking water; and 10. apiaries. ***Effective shelter*** Effective shelter means: 1. taller (at least >1 metre) than the height of the spray plume[1] when the plume interacts with the shelter; and 2. have foliage that is continuous from top to bottom; and 3. achieves in the order of 50% optical and aerodynamic porosity;[2] and 4. has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and 5. is not deciduous; and 6. has a minimum height of 3.5m; and 7. has a width to height ratio of 1:3.5. *[1] NB: This is the not necessarily the same as the projected height (at point of discharge) as it will typically rise if it drifts.*

Northland Regional Council

[2] The thicker the shelter belt, (e.g. multiple lines of plants), optically you can't see thought it but it's still aerodynamically porous.

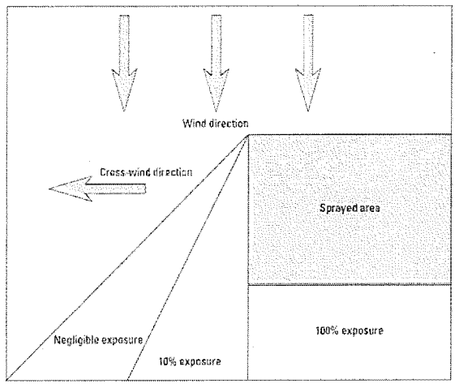
Buffer

Buffer zone distance means a specified horizontal distance from a downwind spray-sensitive area, measured from the downwind edge of the application area closest to the spray-sensitive area.

Away from

"Away from" means "not towards" and includes a 45° either side of 100%.

Figure 1: Exposures cross-wind from sprayed area



Horticulture NZ

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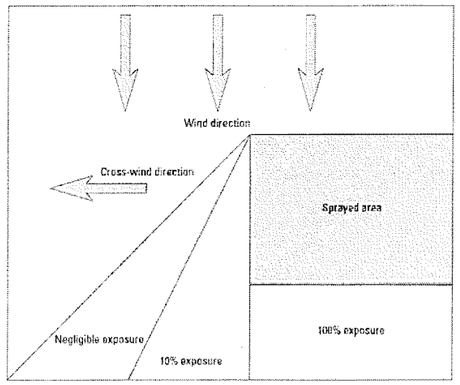
Figure 1: Exposures cross-wind from sprayed area



Northland District Health Board

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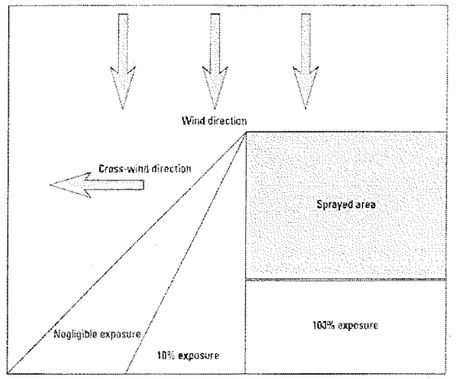
Away from

"Away from" means "not towards".

"Away from" includes 45° either side of 100% where all of the following requirements are met:

a) there is a buffer of at least 50 metres from the downwind edge of the sprayed area to the spray sensitive area;
b) wind direction is moderately steady; and
c) wind speed is at least 2m/s.

Figure 1: Exposures cross-wind from sprayed area



Agrichemical direct application methodology

Agrichemical direct application methodology means the use of a shroud, weed wiper or roller which directly applies the agrichemical to the target in a manner which avoids any spray drift

Mr and Mrs Wheeler

[2] The thicker the shelter belt, (e.g. multiple lines of plants), optically you can't see thought it but it's still aerodynamically porous.

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Buffer zone distance means a specified horizontal distance from a downwind spray-sensitive area, measured from the downwind edge of the application area closest to the spray-sensitive area.

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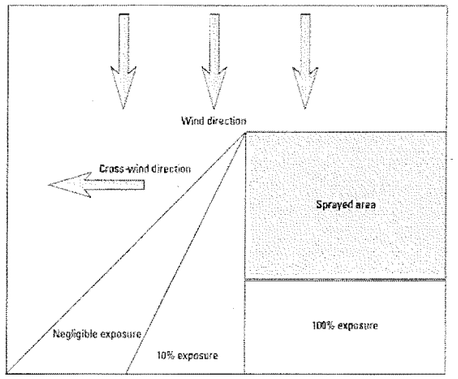
Figure 1: Exposures cross-wind from sprayed area



Agrichemical direct application methodology

Agrichemical direct application methodology means the use of a shroud, weed wiper or roller which directly applies the agrichemical to the target in a manner which avoids any spray drift

Annexure C

Table X Permitted activity requirements under 2(c)

Wind speed	**Wind direction**	**Additional requirements to be assessed**
Ground based – low risk		
1-3m/s	Wind away from sensitive area(s)	nil
Ground based – assessed risk		
0-1m/s	Any wind direction (not inversion or ponding conditions)	The buffer distance on all boundaries of the target application area and whether effective shelter is present Height of spray release (for boom or blast spraying it should be below the shelter to prevent spray drift). Sensitivity of receivers Toxicity of spray Use of agrichemical direct application methodology (e.g. shrouds).
1-5m/s	Wind toward sensitive area(s)	The buffer distance on the downward boundary of the target application area and whether effective shelter is present Spray quality Sensitivity of receivers Toxicity of spray
3-6m/s	Wind away from sensitive area(s)	Spray quality Sensitivity of receivers Toxicity of spray
Wind speed	**Wind direction**	**Additional requirements to be assessed**
Aerial spraying – assessed risk		

0-1 m/s	Any wind direction (not inversion or ponding conditions)	The buffer distance on all boundaries of the target application area and whether effective shelter is present Height of spray release and risk of spray drift Sensitivity of receivers Toxicity of spray Spray quality is as coarse as possible
1-5 m/s	Wind away from sensitive area(s)	Height of spray release and risk of spray drift Sensitivity of receivers Toxicity of spray Spray quality being as coarse as possible
1-3 m/s	Wind toward sensitive area(s)	The buffer distance on the downward boundary of the target application area and whether effective shelter is present Height of spray release and risk of spray drift Sensitivity of receivers Toxicity of spray Spray quality being as coarse as possible

Annexure D – Spray Assessment Guidelines (Horticulture New Zealand)

D

GROWsafe

Date and time:
Applicator's name:
Applicator's certification:
Location:
Target pest:
Method of application: Equipment: Nozzles: Speed: Pressure: Water rate:
PPE worn: Gloves Hat Boots Cotton overalls Spraysuit **(circle)** Eye protection Respirator Other _____

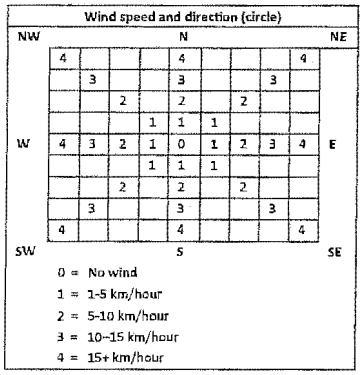
Agrichemicals used and rate: **(HSR number)**
Additives used and rate:
Total chemical used:

Sensitive areas:
Measures taken to avoid spraydrift:

Notification: **(who, when, how)**
Other notes: **(re-entry, withholding, signage, disposal, etc)**

Weather

Wind speed and direction (circle)



0 = No wind
1 = 1-5 km/hour
2 = 5-10 km/hour
3 = 10-15 km/hour
4 = 15+ km/hour

Temperature (circle)
0-5 °C
6-10 °C
11-15 °C
16-20 °C
21-25 °C
26+ °C

Humidity (circle)
Very high (almost drizzling)
High
Average
Low
Very low (dry)

Results achieved:

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 101

IN THE MATTER	of the Resource Management Act 1991
AND	of a notice of motion under s149T(2) to decide proposed Plan Change 8 to the Regional Plan: Waste for Otago (referred to the Environment Court by the Minister for the Environment under s142(2)(b) of the Act)
BETWEEN	OTAGO REGIONAL COUNCIL
	(ENV-2020-CHC-128)
	Applicant

Court:	Environment Judge P A Steven Environment Commissioner J A Hodges
Hearing:	In Christchurch and by audio visual link on 24 and 25 March 2022
Appearances:	L F de Latour and T Wadworth for Otago Regional Council P Williams for Director-General of Conservation B Watts for Queenstown Lakes District Council B Matheson and B Gresson for Willowridge Developments Ltd R Ashton for Remarkables Park Ltd R Bowman for Friends of Lake Hayes Society Inc
Last case event:	Closing submissions lodged 1 April 2022
Date of Decision:	14 June 2022
Date of Issue:	14 June 2022

DECISION OF THE ENVIRONMENT COURT

A: Amend Plan Change 8 as set out in 'Annexure 1: Final Plan Change 8 Parts A, G and H Provisions' attached to and forming part of this decision.

B: Pursuant to s149U(6) and cl 10(1) to (3) of Schedule 1 of the Resource Management Act 1991, the court makes the decisions shown in the record of decisions attached as 'Annexure 2: Final Plan Change 8 Parts A, G and H decisions on submissions'.

REASONS

Introduction

[1] The Regional Plan: Water for Otago ('RPW') was notified in 1998 and made operative on 1 January 2004, predating all versions of the National Policy Statement for Freshwater Management ('NPS-FM'). It has not been subject to a full review since it was notified.

[2] The entirety of the RPW is intended to be reviewed in the preparation of a new Land and Water Regional Plan ('PLWRP') which is to be notified by 31 December 2023.[1] Plan Change 8 ('PC8') introduced a range of new provisions and amendments to the RPW to strengthen its management of discharges, including diffuse rural discharges which were finalised in Environment Court decision *Re Otago Regional Council*[2] dated 13 January 2022.

[3] This second decision on PC8 addresses the following additional parts of PC8 not addressed in the first:

Part A: Discharge policies (Urban topics);

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[1] Letter from Hon David Parker (Minister for the Environment) to Hon Marian Hobbs and Councillors (Chair and Councillors of ORC) regarding Section 24A Report: Investigation of Freshwater Management and Allocation Functions at Otago Regional Council under section 24A of the Resource Management Act 1991, included in Ms Boyd's Statement of Evidence ('SOE') dated 17 December 2021, Appendix B.

[2] *Re Otago Regional Council* [2022] NZEnvC 6.

Part G: Earthworks for residential development;

Part H: Nationally or regionally important infrastructure.

[4] We note at this juncture, that the final form of provisions of Part A and Part H were not in dispute.

[5] Ms F Boyd, a planning consultant giving evidence on behalf of the Otago Regional Council ('the Regional Council'), described the purpose of PC8 as:[3]

> … to improve the management of specific activities likely to be adversely affecting water quality in Otago while a new land and water regional plan is prepared that gives full effect to the NPS-FM 2020. For the Urban topics, this includes policy direction for managing discharges of stormwater and wastewater, the management of earthworks for residential development, and a minor amendment to a policy managing adverse effects on wetlands.

[6] By way of background, Ms Boyd stated:

> Water quality is degraded in some parts of Otago, particularly in terms of bacterial contamination (*E.coli*) and sediment. Of the 78 monitored sites in Otago, 46 do not meet the national objectives framework bottom line for *E.coli* and 40 do not meet the national bottom line for suspended fine sediment.

[7] The Minister for the Environment had directed that PC8 be referred to the Environment Court under s142(2)(b) of the Resource Management Act 1991 (the RMA' or 'the Act') to give a decision on the provisions and matters raised in submissions.

[8] PC8 was notified as part of an omnibus plan change (with PC1) by the Environmental Protection Authority on 6 July 2020. A total of 96 submissions and 12 further submissions were made to these changes. Of these, 82 submitters requested to be heard, with the majority wanting to present a joint case.

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[3] Boyd, SOE dated 17 December 2021 at [11].

[9] Mediation took place on the urban topics, and for Parts A and H an agreement was reached by all the parties. For convenience we address the agreed provisions in Parts A and H before turning to dispute over provisions in Part G.

Resource management issues that PC8 is seeking to address

[10] The significant resource management issues that Parts A (and G) seek to address relate to:[4]

(a) the degraded water quality in some parts of Otago, particularly due to sedimentation arising from earthworks, but also discharges associated with reticulated stormwater and wastewater systems;
(b) the inadequacy of the current planning framework in terms of giving effect to the objectives and policies of the NPS-FM 2020; and
(c) the need to avoid undue delay to improving practices as a result of uncertainty in the regulatory environment.

Part A – Discharge policies (Urban topics)

[11] Part A contains:

(a) new and amended policies for managing discharges of stormwater and wastewater (by amendments to existing Policies 7.C.5 and 7.C.6, and new Policy 7.C.12);
(b) changes to policies for other rural discharges (by amendments to existing Policy 7.D.5 and new Policy 7.D.6).

Wastewater

[12] Part A introduces a new Policy 7.C.12[5] to reduce the adverse effects of

[4] Boyd, SOE dated 17 December 2021 at [42].
[5] Parties agreed at mediation to separate this policy into two: Policies 7.C.12 and 7.C.13.

discharges of human sewage from reticulated wastewater systems by implementing a series of actions; the intent being to provide stronger and clearer direction for decision-making on resource consent applications for wastewater discharges.

[13] Chapter 12 of the RPW contains the rules managing discharges. Section 12.A of the RPW contains a series of rules managing discharges of human sewage from different sources:

(a) discharges of human sewage from long-drop toilets and onsite wastewater treatment systems are permitted with conditions under Rules 12.A.1.1 to 12.A.1.4; and
(b) discharges of human sewage from other sources, and those which do not meet the conditions of the permitted activity rules, require resource consent as a discretionary activity under Rule 12.A.2.1.

[14] The policy direction proposed in Part A for wastewater discharges will apply to resource consent applications made under Rule 12.A.2.1, which includes any discharges of human sewage from a community wastewater system.

[15] As for stormwater discharges, there are a range of other policies in Chapter 7 that will also apply to applications involving wastewater discharges. Ms Boyd referred to these in her evidence (at paragraph [167]) although we need not refer to them here in this decision.

[16] As a result of mediation on Part A, agreement was reached between parties in relation to further amendments which were helpfully explained by Ms Boyd in her evidence.

[17] Before expanding on that, we note that submissions had been lodged to the PC8 by persons who did not later join as s274 parties. Accordingly, the position agreed at mediation was not a reflection of the position of all submitters. However, we address the submissions made by submitters who did not join as parties further in this decision.

Policy 7.C.5 (discharges from new or extended stormwater reticulation systems)

[18] Policy 7.C.5 applies to the discharge from any new stormwater reticulation system or any extension to an existing stormwater reticulation system. A group of 10 submitters[6] had supported this policy, although a further 7 had sought that it be strengthened.

[19] Central Otago Environment Society ('COES') considered that regulatory limits should be specified in relation to both stormwater and sediment discharges and that existing stormwater discharge systems should be progressively upgraded to meet these limits.[7] The submitter did not provide the specific limits.

[20] Similarly, Otago Fish and Game Council and the Central South Island Fish and Game Council ('Fish and Game') sought minimum ecosystem health thresholds for stormwater systems but did not specify what these were.[8] Fish and Game also considered the policy should be strengthened further and sought the following amendments:[9]

> ~~Minimise~~ Avoid the adverse environmental effects of
>
> …
>
> (d) Measures to filter, attenuate or prevent runoff being discharged during rain events.

[21] The Royal Forest and Bird Protection Society of New Zealand Inc ('Forest and Bird') considered that relying on minimisation was uncertain as it may be interpreted with respect to the feasibility for an activity to minimise rather than taking actions to avoid, remedy or mitigate adverse effects.[10] The following

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[6] 80011.05 Friends of Lake Hayes, 80013.01 SDHB, 80016.01 Horticulture NZ, 80019.05 L and A Bush, 80027.03 Matthew Sole, 80038.01 Horticulture NZ, 80038.03 Ravensdown, 80055.02 DOC, 80059.01 Kāi Tahu ki Otago, 80090.03 Federated Farmers.

[7] 80028.01 COES.

[8] 80080.08 Fish and Game.

[9] 80080.09 Fish and Game.

[10] 80082.01 Forest and Bird.

amendments were sought to the policy:[11]

> Avoid significant ~~Minimise the~~ adverse environmental effects and avoid where practicable, or minimize other adverse effects of discharges with respect to discharges from any new storm water reticulation system, or any extension to an existing storm water reticulation system by requiring:
>
> …
>
> (c) Measures to avoid, remedy and mitigate and minimise the presence of debris, sediments and nutrients runoff, including the ~~The~~ use of techniques to trap debris, sediments and nutrients present in runoff.

[22] In its submission Ngāi Tahu ki Murihiku stated that contamination of water bodies with wastes or wastewater can be considered culturally offensive regardless of prior treatment. The submitter supported discharging to land in preference to discharging to water in order to protect the mauri of the water body. This would recognise and give effect to Te Mana o te Wai. As relief, the submitter sought the following clause be added:[12]

> (d) The use of discharge to land options as a preference wherever practicable.

The parties' agreed position

[23] In response to the submissions by Forest and Bird and Fish and Game on the chapeau of the policy, parties agreed that there may be uncertainty about the extent of minimisation required and that it would assist implementation to instead require significant adverse effects to be avoided, and other adverse effects minimised.

[24] Ms Boyd agreed with this amendment. She considers that it gives better effect to Te Mana o te Wai by prioritising the health and well-being of water bodies and freshwater ecosystems. While she recognises that "avoidance" is a "high bar" to meet, in her opinion this is appropriate due to the need to give effect to Te mana

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[11] 80082.01 Forest and Bird.

[12] 80078.01 Ngāi Tahu ki Murihiku.

o te Wai. However, because the policy only applies to new systems or extensions to systems, the opportunity exists to design systems to meet the desired outcomes at the outset.

[25] While the parties agreed in principle that the additional clause sought by Fish and Game was appropriate, they preferred alternative wording to account for the likelihood that it would not always be possible to implement measures to filter, attenuate, or prevent run-off being discharged during rain events.

[26] They further agreed that some available techniques to trap debris, sediments and nutrients present in run-off may not be appropriate in all circumstances and agreed that clause (c) would be clarified by including "appropriate techniques".

[27] They also agreed that the new clause (d) should require consideration of appropriate measures to reduce and/or attenuate stormwater being discharged from rain events.

[28] In her evidence, Ms Boyd considers that the amended wording of this policy acknowledges the practical considerations required when designing stormwater systems while still ensuring that reducing or attenuating higher flows is a matter considered during design.

[29] Finally, parties recognised that wastewater discharges to water are culturally offensive to Kāi Tahu and agreed, in principle, with the new clause (e) sought by Ngāi Tahu ki Murihiku.

[30] Parties agreed on alternative wording of this clause to emphasise again that any consideration must be of appropriate measures and clarify that the reason for preferring discharges to land is to address adverse effects on Kāi Tahu cultural and spiritual beliefs, values and uses.

[31] While supporting all amendments agreed by the parties, in preparing her

evidence, Ms Boyd identified the need for additional minor grammatical corrections to clause (e) as follows:

(a) replacing "measures for discharge to land" with "measures for discharging to land"; and
(b) replacing "direct discharge to water" with "discharging directly to water".

Consequential amendments

[32] Under s149U(6) of the RMA, the court must apply clause 10(1) to (3) of Schedule 1 as if it were a local authority. Clause 10(2)(b) provides for a decision on provisions and submissions to include matters relating to any consequential alterations necessary arising from the submissions and any other matter relevant to the plan change arising from submissions. We agree that the grammatical corrections to clause (e) can be made as a consequential amendment.

[33] As a further consequential amendment, Fish and Game had also sought the following amendment to the principal reasons:[13]

> This policy is adopted to reduce the potential for ~~contaminants to be present in~~ adverse effects to arise from new stormwater discharges.

[34] When considering all agreed amendments to this policy, the parties also agreed to this minor amendment. They agreed that it was appropriate to recognise that the intent of the policy is to reduce the potential for adverse effects arising from contaminants to be present, rather than reducing the potential for contaminants to be present.

[35] We agree that this is an appropriate amendment.

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[13] 80080.10 Fish and Game.

Policy 7.C.6 (discharges from existing stormwater reticulation systems)

[36] Policy 7.C.6 applies to the discharge from any existing stormwater reticulation systems.

[37] Of the submissions made to Policy 7.C.6, eight supported the notified provision,[14] including Southern District Health Board ('SDHB') whose submission noted that it was aware of a number of existing urban localities in Otago that need to improve the way they manage stormwater to effectively address the risks to human health from existing stormwater reticulation systems.[15]

[38] Dunedin City Council ('DCC') submitted that the policy would not meet the outcome sought by the Regional Council and would benefit from improved clarity and sought amendments to provide clarity regarding the policy's intent.[16] DCC asked:

(a) what a "progressive" upgrade involves;
(b) how "minimise the volume of sewage" would be determined;
(c) when and how the policy would be applied to require stormwater upgrades that specifically address sewage overflows;
(d) whether there is a target or timeframe for reducing overflows; and
(e) how the Regional Council would "require" the implementation of Policy 7.C.6 given there are no proposed changes to rules, including those that permit stormwater discharges that do not contain human sewage.

[39] Additionally, DCC considered that common terminology should be used to support conversations around improvements and change and that the policy

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[14] 80011.06 Friends of Lake Hayes, 80013.02 SDHB, 80016.02 Horticulture NZ, 80019.06 L and A Bush, 80027.04 Matthew Sole, 80038.02 Ravensdown, 80059.02 Kāi Tahu ki Otago, 80090.04 Federated Farmers.
[15] 80013 SDHB (p 3).
[16] 80018.03 DCC.

would benefit from clarifying whether overflows includes both dry and wet weather overflows.[17] The submitter did not state the specific amendments it was seeking to the policy.

[40] Ngāi Tahu ki Murihiku submitted that the policy should recognise and give effect to Te Mana o te Wai and support cultural health by emphasising the avoidance of direct discharges of wastes and wastewater to water and discharge to land as a first preference.[18]

[41] The Director-General of Conservation submitted that clause (b) of Policy 7.C.6 needed to be strengthened to give effect to Policy 23(4) of the New Zealand Coastal Policy Statement because of cross-contamination with sewage systems. The submitter sought the following amendments:[19]

> (b) ~~Promoting~~ Requiring the progressive upgrading …; and
>
> …
>
> (iv) Reducing contaminant and sediment loadings at source through contaminant treatment and by controls on land use activities; and
>
> (v) Requiring integrated management of catchments and stormwater networks; and
>
> (vi) Promoting design options that reduce flows into stormwater reticulation systems at source.

[42] Alongside the Director-General of Conservation, Māori Point Vineyard Ltd and B P Marsh also sought to replace "promoting" with "require' or "requiring" in clause (b).[20]

[43] Forest and Bird broadly supported the policy although it sought the

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[17] 80018.03 DCC.
[18] 80078.02 Ngāi Tahu ki Murihiku.
[19] 80055.03 DOC.
[20] 80004.02 Maori Point Vineyard, 80022.03 B P Marsh.

following amendments:[21]

> Progressively ~~R~~reduce the adverse environmental effects and avoid increasing cumulative adverse effects from existing stormwater reticulation systems by:
>
> …
>
> (b) Promoting the progressive upgrading of the quality of water discharged from existing stormwater reticulation systems, including through:
>
> …
>
> (iii) Measures to prevent the presence of debris, sediments and nutrients in runoff through the use of techniques to trap debris, sediments and nutrients present in runoff~~.~~; and
>
> (iv) Measures to filter reduce or prevent runoff being discharged during rain events.

[44] COES considered that regulatory limits should be specified in relation to both stormwater and sediment discharges and that existing stormwater discharge systems are progressively upgraded to meet these limits.[22] The submitter did not specify the limits it was seeking.

[45] Following mediation, parties agreed to the following changes to this policy:

(a) that the chapeau be retained as notified as it recognised the more limited ability to manage adverse effects where infrastructure already exists;

(b) to amend clause (a) so that it is clear that the requirement is to implement appropriate measures to progressively reduce sewage entering the stormwater reticulation system. This provides some flexibility for situation-specific measures to be implemented, while still retaining the overall goal (to reduce sewage in stormwater reticulation systems). It also addresses the concern raised in DCC's submission about whether the notified wording was referring to wet

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[21] 80082.02 Forest and Bird.

[22] 80028.01 COES.

or dry weather overflows (or both);

(c) to amend clause (b) by adding "requiring consideration of appropriate measures". This addresses the concern of parties that the wording needs to be strengthened while recognising the need to consider the practical constraints on upgrading existing infrastructure;

(d) to delete clause (b)(i) and to retain (b)(ii) and (iii) as notified but renumbered as (i) and (ii); and

(e) to include two additional sub-clauses related to reducing and/or attenuating stormwater being discharged during rain events and preferring discharges to land.

[46] Ms Boyd recommended the same grammatical corrections as for Policy 7.C.5 referred to above.

Policy 7.C.12 and New Policy 7.C.13

[47] As notified, Policy 7.C.12 applied to all discharges of human sewage from reticulated wastewater systems and did not differentiate between new and existing systems.

[48] Of the submissions made to this policy, five sought to retain the policy as notified,[23] including SDHB which submitted that:[24]

(a) the policy mitigates health risks of improperly designed, maintained and operated wastewater systems;

(b) the policy mitigates the public health risks of sewage overflows into stormwater systems;

(c) the policy should ensure dry weather overflows are the exception rather than a "likelihood";

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[23] 80011.07 Friends of Lake Hayes, 80016.03 Horticulture NZ, 80019.07 L and A Bush, 80027.05 Matthew Sole, 80055.04 DOC; 80013 SDHB (p 3).

[24] 80013 SDHB (p 3).

(d) it supported the preference for discharges to land, recognising the predominance of municipal and industrial treated wastewater discharges to water in Otago at this time; and

(e) it supported having regard to any adverse effects on cultural values.

[49] DCC considered Policy 7.C.12 to be uncertain and ambiguous and sought that it be amended, although no specific amendments were requested.

[50] Ngāi Tahu ki Murihiku submitted that the policy should recognise and give effect to Te Mana o te Wai and support cultural health by emphasising the avoidance of direct discharges of wastes and wastewater to water and discharge to land as a first preference.

[51] Forest and Bird supported Policy 7.C.12 in part but considered that the required industry standards needed to be specified due to potential variation in those standards. The submitter also sought to require contingency measures that clearly apply to both sewage and stormwater facilities and for new systems to be designed to avoid, rather than reduce, adverse effects.

[52] Federated Farmers submitted that this policy would have significant cost repercussions for councils, and consequently water users and ratepayers, and that guidance may be required as to what are recognised industry standards. ,The submission stated that the requirement in clause (a) could be met for new systems but there would be practical difficulties with existing systems complying with industry standards and sought the following amendments:[25]

(a) ~~Requiring~~ Ensuring reticulated wastewater systems ~~to be~~ are designed, operated, maintained and monitored in accordance with recognised industry standards; and

[53] The submission also questioned how clause (b) would be implemented in

[25] 80090.05 Federated Farmers.

relation to existing systems or whether existing systems were excluded from the requirement. The submitter sought the following amendments:[26]

> (b) Requiring the implementation of reasonable measures to:
>
> …

[54] SDHB supported the policy in part and sought to retain clauses (a), (b)(i), (c) and (d) as notified. The submitter sought to amend clause (b)(ii) as follows:

> (ii) ~~Minimise the likelihood of~~ Eliminate as far as practicable dry weather overflows occurring; and

[55] Kāi Tahu ki Otago submitted that discharges of sewage to water (whether treated or not) are culturally offensive to Kāi Tahu and in the longer term mana whenua continue to seek stronger direction in rules to avoid discharges of sewage to water. The submitter supported the policy as an interim measure but sought amendments to clause (d) for consistency with other provisions in PC8:[27]

> (d) Having particular regard to any adverse effects on ~~cultural values~~ Kāi Tahu cultural and spiritual beliefs, values and uses.

[56] As a result of mediation, parties agreed that different approaches should be taken for new and existing systems in the same way as Policies 7.C.5 and 7.C.6 for stormwater.

[57] Agreement was reached to amend Policy 7.C.12 to focus on discharges from existing reticulated wastewater systems and introduce new Policy 7.C.13 for discharges from new reticulated wastewater systems.

[58] For Policy 7.C.12, parties agreed to:

> (a) amend the chapeau of Policy 7.C.12 to limit its application to existing

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[26] 80090.05 Federated Farmers.
[27] 80059.03 Kāi Tahu ki Otago.

reticulated wastewater systems and extensions to those systems as extensions are generally only of the collection infrastructure and continue to convey wastewater to the main treatment plant;

(b) make structural amendments to improve readability;

(c) make consequential amendments to clause (b) to recognise that for existing systems, it will not be possible to require them to be designed in accordance with recognised industry standards but the systems should still be operated, maintained and monitored in accordance with those standards;

(d) include a new clause (c) promoting the progressive upgrading of existing systems, to recognise that opportunities to improve systems should be encouraged when they arise;

(e) make minor amendments to clause (d) to clarify that measures to be implemented must be appropriate, recognising that different systems will have different constraints; and

(f) make consequential grammatical corrections to sub-clauses (i) and (ii).

[59] Ms Boyd advised that the submission by Forest and Bird had sought to include an additional clause relating to contingency measures, and although parties agreed this was appropriate given the use of wastewater overflows in some systems in Otago, they agreed to simplify the clause as sought by Forest and Bird to improve implementation.

[60] Parties agreed that clause (d) as notified was inconsistent with other wording adopted in PC8 related to Kāi Tahu values, including Policies 7.C.5 and 7.C.6, and agreed to replace it with "[r]ecognising and providing for the relationship of Kāi Tahu with the water body, and having particular regard to any adverse effects on Kāi Tahu cultural and spiritual beliefs, values, and uses".

[61] They further considered that stronger direction in relation to adverse effects was appropriate in the chapeau of new Policy 7.C.13 as there is more opportunity to consider effects management when designing new systems. The submission by

Ngāi Tahu ki Murihiku highlighted the cultural offense caused by discharges of human sewage to water.

[62] Parties agreed that, for new discharges and to give effect to Te Mana o te Wai and the NPS-FM 2020, adverse effects should be avoided in the first instance and otherwise minimised. This was considered to set a higher bar than for existing systems where there can be more constraints on the ability to manage effects.

[63] Amendments to clauses (a), (b), (c), and (d) mirror clauses (a), (b), (d), and (e) in Policy 7.C.12 which have been explained above, along with the supporting reasons.

[64] In her evidence, Ms Boyd explains that the RPW policies for managing stormwater and wastewater discharges have not been the subject of substantive review since the RPW was made operative in 2004. Accordingly, they fail to give effect to any of the versions of the NPS-FM. Current management of these discharges falls well short of mana whenua aspirations, as is evident in the submissions of Kāi Tahu Ki Otago and Ngāi Tahu ki Murihiku.

[65] The agreed changes clarify and strengthen the policy direction in the RPW for discharges of stormwater and wastewater by providing clarity to the requirements of the policies for infrastructure providers in order to reduce uncertainty and improve implementation, while recognising that there are different approaches required for new and existing systems.

[66] Ms Boyd further agrees that the Part A amendments give better effect to Te Mana o te Wai by strengthening expectations for acceptable levels of adverse effects, particularly in relation to new reticulated stormwater and wastewater systems. In her opinion, the changes agreed are to explicitly outline a preference for discharges to land over water, in response to the submissions of Kai Tahu ki Otago and Ngāi Tahu ki Murihiku.

Our decision

[67] We concur with Ms Boyd's assessment in relation to all changes to Part A of PC8 and duly make a decision approving these amendments as summarised above. However, we are also required to include a record of all submissions made under ss 149E and 149F, and not only those made by persons who joined the court process as a party under s274.

[68] A decision on submissions does not require the court to give a decision that addresses each submission individually[28] and decisions on submissions and reasons may address submissions by grouping them according to provisions or matters to which they relate.

[69] Ms Boyd's evidence of 18 February 2022 attached as Appendix 2, contains her recommended decisions on submissions for Part A. The court has considered and agrees with these recommendations and adopts those as the court's decision on the same.

[70] For the most part, matters raised in the submissions were addressed by the outcome agreed by parties to the mediation, along with the evidence of Ms Boyd who explains the reasons for, and provides her support to, the amendments.

[71] We will make our formal order in respect of the Part A provisions at the end of this decision.

[72] We now turn to consider the outcome agreed in relation to Part H.

Part H: Nationally or regionally important infrastructure

[73] Part H seeks to replace "regionally important infrastructure" with "regionally significant infrastructure" in Policy 10.4.2. This policy is important for

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[28] RMA, Schedule 1, cl 10(3).

considering applications for resource consent under a number of rules in section 13 of the RPW because whether or not an activity is "regionally important infrastructure" determines the approach to managing adverse effects.

[74] An explanation of the notified amendment and its intent is included in the Statement of Evidence of Ms Boyd dated 17 December 2021 at paragraphs [211] to [215].

[75] There were six submissions on Policy 10.4.2, with four seeking to retain the policy as notified.[29] The other two submitters seek amendments to what is defined as "regionally significant infrastructure" as follows:

(a) DCC considers provision needs to be made for Smooth Hill landfill to align with the Dunedin 2GP,[30] and
(b) Forest and Bird seeks to stipulate Otago's existing regionally significant infrastructure.[31]

[76] Policy 10.4.2 sits within Chapter 10 of the RPW which sets out the objectives and policies for Otago's wetlands. Policy 10.4.2 requires avoiding the adverse effects of activities on a Regionally Significant Wetland or a Regionally Significant Wetland Value, but to allow for remediation or mitigation only if the activity:

(a) is lawfully established; or
(b) is nationally or regionally important infrastructure and has specific locational constraints; or
(c) has the purpose of maintaining or enhancing a Regionally Significant Wetland or a Regionally Significant Wetland Value.

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[29] 80016.13 Horticulture NZ, 80055.28 DOC, 80082.29 Kāi Tahu ki Otago, 80090.51 Federated Farmers.
[30] 80018.08 DCC.
[31] 80082.29 Forest and Bird.

[77] Chapter 13 contains rules for uses of lakes or river beds or Regionally Significant Wetlands, including:

(a) 13.1: The use of a structure;
(b) 13.2: The erection or placement of a structure;
(c) 13.3: The repair, maintenance, extension, alteration, placement or reconstruction of a structure;
(d) 13.4: Demolition or removal of a structure;
(e) 13.5: Alteration of the bed of a lake or river, or of a Regionally Significant Wetland;
(f) 13.6: The introduction or planting of vegetation; and
(g) 13.7: The removal of vegetation.

[78] Many of these Chapter 13 rules require resource consent to be obtained, in which event Policy 10.4.2 becomes relevant to those applications; essentially determining whether effects must be avoided or whether remediation or mitigation is an option.

[79] Ms Boyd notes that currently Policy 10.4.2 uses the term "nationally or regionally important infrastructure" while the Partially Operative Otago Regional Policy Statement 2019 ('PORPS 2019') uses the term "nationally and regionally significant infrastructure" and provides a list of infrastructure meeting that definition.

[80] More relevantly, the proposed Otago Regional Policy Statement 2021 ('PORPS 2021') defines the terms "nationally significant" and "regionally significant" infrastructure separately.

[81] In order to remove debate through the resource consent process about whether "important" and "significant" are synonymous, and whether the RPW provisions should be interpreted with reference to the listed infrastructure in the regional policy statements, the Regional Council considered that consistency should be achieved with the regional policy statements.

[82] To achieve this, the parties agreed that the language in Policy 10.4.2 should be amended to substitute the word 'important' with 'significant' and although changes were sought in original submissions, the agreed outcome at mediation was that no amendments should be made to the notified version of this policy.

[83] Appendix 8 of Ms Boyd's evidence of 18 February 2022 contains her recommended decisions on submissions to Part H. There were two submissions that sought specific amendments included in this summary of submissions that are not considered to be within the scope of PC8 and which sought only a minor change to the existing wording, in order to align with the terminology of the PORPS 2019 and PORPS 2021.

[84] The court has considered the recommendations and concurs with the same. We will record our decision confirming the wording of this policy at the end of this decision.

Part G – Earthworks for residential development

[85] Part G is where the contest lies. This part proposes to introduce a new policy and two new land use and discharge rules (referred to by the Regional Council as hybrid rules) in relation to earthworks associated with residential development throughout the Otago region, along with a definition of earthworks.

[86] Agreement was reached by all parties in relation to most of these provisions, except in relation to:

(a) whether the rules should apply in the Queenstown Lakes district; and
(b) as to the amendment made to the definition of earthworks where a legal challenge was raised by one of the Submitters (on scope grounds).

[87] These unresolved issues are decided by the court in this decision.

Background to the Part G earthworks provisions

[88] By letter dated 16 May 2019, the Hon David Parker, Minister for the Environment, engaged Professor Peter Skelton, CNZM, to investigate whether the Regional Council was adequately carrying out its functions under s30(1) of the RMA in relation to freshwater management and allocation of resources.

[89] Professor Skelton identified water quality as one set of challenges, which he stated "… requires the management of nutrient discharges, sediment and other water contaminants that arise from human activity"[32] (our emphasis).

[90] He further stated that the operative RPW focuses on controlling contaminant and sediment discharges, rather than regulating or managing land use activities themselves. He identified "land environments (farm systems, irrigation, nutrient modelling, soil quality, sediment generation/transport)" as a high priority gap.

[91] In line with Professor Skelton's recommendations, the Minister made recommendations to the Regional Council under s24A RMA, including (relevantly) that the Regional Council puts in place an interim framework by 31 December 2025 pending completion of a comprehensive overhaul of the Regional Council planning framework.

Issues with current RPW provisions

[92] In her evidence, Ms Boyd expanded on the findings of Professor Skelton, and elaborated on gaps in the RPW in relation to earthworks associated with residential development[33] which are restricted to discharges rather than land uses

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[32] Professor Peter Skelton *Freshwater Management and Allocation Functions at Otago Regional Council: report to the Minister for the Environment* (Ministry for the Environment, Wellington, 1 October 2019).
[33] Noting that Part A contains new and amended policies for managing discharges of stormwater and wastewater.

and discharges in an integrated way.

[93] Earthworks are managed by the general provisions in Rule 12.C of the RPW which include:

(a) Rule 12.C.0.3 which prohibits the discharge of sediment from disturbed land to water in any lake, river, or Regionally Significant Wetland, or any drain or water race that flows to those water bodies, or the coastal marine area where no measure is taken to mitigate sediment run-off;
(b) Rule 12.C.1.1 which permits the discharge of contaminants (including sediment) to water or land where it may enter water, subject to conditions;
(c) Rules 12.C.2.1 and 12.C.2.2 which require resource consents as a restricted discretionary activity for short-term discharges that do not comply with permitted activity rule standards; and
(d) Rule 12.C.3.2 which requires resource consent as a discretionary activity for discharges not otherwise managed by the rules above.

[94] The permitted activity standards contain narrative water quality standards, which largely mirror those in s70(1)(c) to (g) RMA. Ms Boyd explained that these rules pose practical difficulties from a compliance perspective as the need for a resource consent for the discharge can only be determined when the discharge occurs. Only then is it apparent whether standards have been met.

[95] Ms Boyd referred to the objective of the NPS-FM 2020, which requires the health and well-being of the water bodies and freshwater ecosystems to be the first priority in decision-making on freshwater management, which she considered is unlikely to be delivered by the RPW in its current form.

[96] She also referred to Policy 1 of the NPS-FM 2020, which requires freshwater to be managed in a way that gives effect to Te Mana o te Wai, noting that the RPW does not acknowledge Te Mana o te Wai. She considers that the

RPW's general philosophy is unlikely to give effect to Policy 1, given the need to prioritise the health and well-being of water bodies and freshwater ecosystems.

[97] Policy 3 of the NPS-FM 2020 was also of particular relevance to Ms Boyd's assessment as this requires that freshwater be managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments. In her opinion, the RPW provisions do not give effect to this policy because the rules only consider the effects of the use and development of land to a very limited extent.[34]

Overview of PC8 changes

[98] PC8 includes amendments to existing provisions and introduces new provisions for improving management of sediment loss from earthworks for residential development to overcome some of the shortcomings with the RPW. The rules in PC8 are intended to apply to both the land use and discharge components of residential earthworks.[35]

[99] As notified, PC8 included:

(a) new Policy 7.D.10;
(b) new Rule 14.5.1.1 (land use and associated sediment discharge – permitted);
(c) new Rule 14.5.2.1 (land use and associated sediment discharge – restricted discretionary); and
(d) a new definition of "earthworks".

[100] Policy 7.D.10 as agreed by the parties requires avoiding the loss or discharge of sediment from earthworks or, where avoidance is not achievable, implementing

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[34] Boyd, SOE dated 17 December 2021 at [53], and referring to Chapter 14 of the RPW which contains rules for land uses other than in lakes or river beds. The rules manage the following activities: bore construction, drilling, defences against water, and structures.
[35] Boyd, SOE dated 17 December 2021 at [208].

best practice guidelines for minimising sediment loss. The policy will inform decision-making on resource consent applications to undertake earthworks from residential development under Rule 14.5.2.1, in addition to the general water quality policies in Section 7.B of the RPW.

[101] Rule 14.5.1.1 permits the use of land for, and associated discharge of sediment from, earthworks for residential development subject to conditions. Earthworks activities that do not meet the conditions of Rule 14.5.1.1 are restricted discretionary activities under new Rule 14.5.2.1.

[102] To assist with interpretation, Part G also introduces a definition of "earthworks" as required by the National Planning Standards (Planning Standards).

PC8 objectives

[103] The (unchallenged) objectives of the RPW are relevant to our consideration of the PC8 provisions, as this is an amending proposal in terms of s32(3)(b)(i) and (ii). Relevant objectives are:

(a) 7.A.1 – to maintain water quality in Otago's lakes, rivers, wetlands, and groundwater but enhance water quality where it is degraded;
(b) 7.A.2 – to enable the discharge of water or contaminants to water or land, in a way that maintains water quality and supports natural and human use values, including Kāi Tahu values; and
(c) 7.A.3 – to have individuals and communities manage their discharges to reduce adverse effects, including cumulative effects, on water quality.

Matters in dispute

[104] As a result of mediation, parties had agreed on a range of amendments to Policy 7.D.10, Rule 14.5.1.1, and Rule 14.5.2.1, as well as including a new definition

of "residential development".

[105] However, not all submitters agreed on whether the rules should apply in the Queenstown Lakes district. Opposition to that proposal was initially raised by:

(a) RCL Henley Downs ('RCL');
(b) Remarkables Park Ltd ('Remarkables Park');
(c) Vivian and Espie Ltd;
(d) Willowridge Developments Ltd ('Willowridge'); and
(e) Queenstown Lakes District Council ('QLDC').

[106] By the time of the hearing, QLDC had reserved its position, although Remarkables Park and Willowridge (the Submitters) continued to actively oppose the application of the PC8 rules within the district where an earthworks consent had been granted under the QLDC plan.

[107] As discussed further, their position was later refined.

The hearing

The Regional Council

[108] Helpfully, the Regional Council presented a joint case with Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku calling evidence from the following witnesses:

(a) Ms R Ozanne, an environmental resource scientist at the Regional Council whose evidence related to water quality of rivers and lakes in Otago;
(b) Dr S Thomas, a coastal scientist at the Regional Council whose evidence related to water quality of estuaries in Otago;
(c) Mr E Ellison (Kāi Tahu ki Otago), who gave cultural evidence in relation to Kāi Tahu whakapapa and status, and the relationship with freshwater in Otago;

(d) Mr D Whaanga (Kāi Tahu ki Otago), who gave cultural evidence in relation to the relationship of Ngāi Tahu ki Murihiku with the lands and waters of Te Mata-au and the Catlins;

(e) Mr J Davis (Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku) who gave cultural evidence in relation to impacts on wai māori from land and water use, in particular degradation of Waiwhakaata Lake Hayes and the importance of a united ki uta ki tai approach;

(f) Ms M Heather, acting team leader of compliance monitoring with the Regional Council who gave evidence in relation to challenges with the previous RPW provisions, workability of urban provisions, and addressed alleged duplication of the earthwork controls from a compliance officer's perspective;

(g) Ms K Strauss, team leader consents with the Regional Council, who gave evidence in relation to the workability of the urban provisions and the alleged duplication relating to the consenting of earthworks from the perspective of a council's consent planner; and

(h) Ms F Boyd, a planner employed as an associate with a planning consultancy, Incite, who gave planning evidence in relation to Parts A, G and H of PC8.

Director-General of Conservation/Dunedin City Council/Friends of Lake Hayes Society

[109] In addition to the Regional Council's witnesses, evidence was given by the following witnesses who supported the agreed position on PC8:

(a) Mr M Brass, for the Director-General of Conservation/Tumuaki Ahurei. Mr Brass is employed by the Department of Conservation Te Atawhai as a senior RMA planner;

(b) Ms Z Moffat who is the planning manager in 3 Waters at DCC; and

(c) Mr R Bowman who is secretary of the Friends of Lake Hayes Society Inc.

The Submitters

[110] Mr Ashton presented legal submissions for Remarkables Park on the scope issue associated with the definition of residential development, while the Submitters' substantive challenge was led by Mr Matheson with evidence being given by:

(a) Ms C Hunter, planning consultant;
(b) Mr Q McIntyre, environmental consultant; and
(c) Ms A Devlin, general manager – planning and development of Willowridge.

[111] QLDC was represented by Mr Watts who presented legal submissions, for the most part confined to an explanation of the consenting process for an earthworks proposal under the Queenstown Lakes Proposed District Plan ('PDP').

Need for the changes

[112] We heard evidence that 40 river monitoring sites across Otago (including within Queenstown Lakes district) did not meet the NPS-FM 2020 bottom line for suspended fine sediment.[36]

[113] The memorandum of Friends of Lake Hayes, which Mr Bowman spoke to, describes adverse effects associated with sediment discharges into Lake Hayes.

[114] Without saying any more about the evidence we received, it suffices that we note our unequivocal agreement that there is a need for improvements to be made in relation to management of discharges of suspended sediment associated with development, particularly in light of the evidence of the Friends of Lake Hayes.

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[36] Ozanne, SOE dated 11 February 2022 at [41].

Focus of the hearing

[115] The hearing focused on the Submitters' concerns as to duplication of the rules with those in the PDP.

[116] Witnesses for the Submitters addressed the implications of having to obtain land use under the PDP and from the Regional Council, under PC8, which would also issue a discharge permit for any sediment laden discharge.

[117] We heard that the earthworks rules in Chapter 25 of the PDP had been recently inserted into the PDP following mediation on appeals to decisions on the PDP and that the Regional Council had been a signatory to the consent order presented to the Environment Court. The Chapter 25 provisions were designed to provide for district-wide regulation in circumstances where the matter was not adequately addressed in the RPW; to bridge a gap in the RPW.

[118] Ms Hunter's evidence in particular contained a comparison of the permitted activity site standards which apply to all earthwork activities within the Queenstown Lakes district with the land use requirements of rules under PC8. In her opinion, the PC8 provisions effectively mimic those in the PDP.

[119] However, she considers that the PDP provisions are more comprehensive and go beyond the management of land use-based effects relating more to amenity and land stability issues, while addressing the potential effects of associated discharges into nearby waterways.[37]

[120] Ms Boyd, Ms Hunter and Mr Brass were all agreed that the PC8 and Chapter 25 provisions are not consistent.[38] They were agreed as to the differences between the two sets of permitted activity standards:

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[37] Hunter, SOE dated 25 February 2022 at [32].
[38] JWS Planning at [17] to [19].

(a) the Chapter 25 standards apply a slope threshold of 10 degrees or greater alongside an area threshold whereas PC8 only applies an area threshold;

(b) the Chapter 25 standards apply to "a contiguous area of land" whereas the PC8 standards apply to a "landholding";

(c) the Chapter 25 standards restrict earthworks within 10 m of a water body to a volume of 5 m^3 per consecutive 12-month period or 10 m^3 depending on whether 25.5.19.1 or 25.5.19.2 applies, whereas PC8 requires resource consent for any earthworks within 10 m of a water body;

(d) the Chapter 25 standards require erosion and sediment control measures to be implemented and maintained during earthworks (excluding in the coastal marine area), whereas PC8 requires:

(i) exposed earth is to be stabilised upon completion of the earthworks to minimise erosion and avoid slope failure;

(ii) that soil or debris is not placed where it can enter a water body, drain, race, or the coastal marine area; and

(iii) that earthworks do not result in flooding, erosion, land instability, subsidence or property damage at or beyond the boundary of the property where the earthworks occur.

(e) the Chapter 25 standards provide a permitted activity pathway for earthworks where there are contaminated or potentially contaminated soils, whereas any earthworks on contaminated or potentially contaminated soils requires resource consent under PC8; and

(f) the Chapter 25 standards require erosion and sediment control measures to be implemented and maintained during earthworks to minimise the amount of sediment exiting on the site, entering water bodies, and stormwater, whereas the PC8 standards are focused on the visual and physical effects on water bodies as set out in s70(1).

[121] Ms Hunter also noted a comparison of the matters over which discretion is reserved where a restricted discretionary activity consent is required under each

plan, which was acknowledged by witnesses for the Regional Council and the Director-General of Conservation. Our attention was drawn to the following clauses in the PDP which address:

(a) 25.8.6.1 The effectiveness of sediment control techniques to ensure sediment run-off does not leave the development site or enter water bodies;
(b) 25.8.6.2 Whether and to what extent any groundwater is likely to be affected, and mitigation measures are proposed to address likely effects;
(c) 25.8.6.3 The effects of earthworks on the natural character, ecosystem services and biodiversity values of wetlands, lakes and rivers and their margins; and
(d) 25.8.6.4 The effects on significant natural areas.

[122] Along with Ms Boyd and Mr Brass, Ms Hunter agreed that the PC8 matter regarding Kāi Tahu cultural and spiritual beliefs, values, and uses is broader than the Chapter 25 matter regarding cultural, heritage, and archaeological sites.[39]

[123] However, Ms Hunter concluded that there is no need for the additional controls in PC8 and stated:

> From a planning perspective, I do not consider that those rules, in their current form, are necessary, given the scope of the QLDC rules. In that regard I do not agree with the planning evidence from the ORC that there is a "gap" in the QLDC rules that needs to be filled by PPC 8.
>
> I conclude that the residential earthworks rules are not the most appropriate way of achieving the desired objective, when measured against the criteria in s 32, RMA, primarily because of the inefficiencies caused by this duplication.

[124] She further questioned the rationale for limiting the rules to residential

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[39] JWS Planning at [26].

development, stating that:

> In my opinion there is also no effects-based rationale as to why the plan change is limited to earthworks from residential activities. This is not an effective planning mechanism as sedimentation effects are clearly not only derived from earthworks for residential development. It seems inconsistent to me that the same site could be potentially developed for a large scale commercial or industrial activity without a regional council consent for earthworks, but this would likely result in similar outcomes in terms of potential for sediment discharges to occur.

Relief sought by the Submitters

[125] In its original submission, Remarkables Park sought relief, expressed in the alternative, that (relevantly):

(a) Rule 14.5.1 be amended such that earthworks already granted by QLDC are deemed to be a permitted activity; or

(b) Rule 14.5.2.1 be amended as follows:
Except as provided by Rule 14.5.1.1 or where Queenstown Lakes District Council has granted resource consent for the use or works, the use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for residential development is a *restricted discretionary* activity.
…

[126] Willowridge was a further submitter to the original submission of Remarkables Park and supported that relief.

[127] By the close of the case for the Submitters, four iterations of an alternative permitted activity rule had been proposed. The latest (and preferred) version of the rule was introduced in closing submissions of counsel, and we refer to this further on. For present purposes it suffices to note that the alternative permitted activity rule would only apply where a resource consent had been issued under newly inserted Chapter 25 of the PDP.

[128] We heard evidence that not all land within the district was subject to the rules in Chapter 25 and that land presently excluded some parts of the district, including land owned by Remarkables Park. The Submitters accordingly acknowledged that their alternative rule should not apply unless an earthworks consent had been issued specifically under Chapter 25 provisions.

Summary of Submitters' case

[129] In summary, the case for the Submitters is that:

(a) the proposed alternative rule is a valid permitted activity rule under the RMA; and
(b) the rule better gives effect to the NPS-FM 2020 and concepts of Te Mana o te Wai and Ki uta ki tai, and to the PORPS 2019; and
(c) it is more effective and efficient than PC8 in terms of s32.

Overview of the Regional Council's case for PC8

[130] The Regional Council contends that the rules proposed by PC8:

(a) are within the Regional Council's functions under s30;
(b) are needed in order to give effect to Te Mana o te Wai and the obligations under the NPS-FM 2020 and having regard to the provisions of the PORPS 2021 which clearly signals a shift towards the integrated management of land use and discharges associated with earthworks activities; and in terms of s32, are the most appropriate for achieving the objectives of PC8, taking account of the other reasonably practicable options and the efficiency and effectiveness assessment.

[131] Ms Boyd explained the rationale for focusing on earthworks associated with

residential development:[40]

> Future management of earthworks will be considered through the development of the new land and water regional plan and that plan may not seek to distinguish between earthworks for different purposes. In the interim period, it is important that as Otago's urban areas continue to grow, any sedimentation is managed as effectively as possible.

Director-General of Conservation's position

[132] The Director-General of Conservation was represented by Ms Williams, and supported the provisions in PC8, which were considered to provide an appropriate interim regime pending preparation of a new planning framework, and in particular the PLWRP.

[133] The Director-General of Conservation supported application of PC8 throughout the region, including in the Queenstown Lakes district. Counsel presented submissions that complemented the case for the Regional Council.

[134] Mr Brass gave evidence supporting PC8 along with the Regional Council's opposition to the alternative permitted activity rule proposed by the Submitters.

QLDC's position

[135] In opening, counsel for QLDC explained the rationale for the submission filed by QLDC to PC8. When notified, QLDC had concerns:

(a) as to whether, in light of s75(4) RMA, PC8 would necessitate a variation to the just-settled PDP earthworks rules (in Chapter 25);
(b) as to the potential for inconsistency between conditions imposed on earthworks consents by QLDC and the Regional Council; and
(c) about minimising the potential inefficient costs faced by those

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[40] Boyd, SOE dated 17 December 2021 at [193] to [203].

undertaking earthworks in the district, if fees are to be paid to both QLDC and the Regional Council.

[136] Counsel explained that following mediation, dialogue had continued between the Regional Council and QLDC, with the result that QLDC was satisfied that the first of their concerns was no longer an issue.

[137] As to the second of these, counsel referred to a memorandum of understanding ('MOU') entered into by the two councils which was only finalised on 18 March 2022. A copy was produced to the court at the commencement of the hearing. In summary, the MOU supports streamlining the processing and monitoring of resource consents for earthworks for residential development.

[138] Counsel explained that the objective of the streamlined process outlined in the MOU is to ensure that the councils work together effectively, in terms of consenting and compliance functions, through appropriate alignment of the processes and resulting consent conditions.

[139] A two-stage process has been agreed, the first of which can commence immediately and involves:

(a) regular meetings between the councils' consents teams, and compliance monitoring teams;
(b) reviewing processes and systems for each consent authority, advising the other when an earthworks consent is applied for that may require consent from the other authority; and
(c) reviewing processes and procedures for undertaking joint site inspections, and where appropriate, sharing information with the other council.

[140] The second stage is to commence once PC8 becomes operative and involves the councils reviewing:

(a) the alignment of consent conditions when consents are being processed (including the further development of standard conditions where appropriate), or where a consent has already been issued by one consent authority, alignment with that consent where appropriate;
(b) the process by which Erosion Management Plans and Erosion and Sediment Control Plans are reviewed and certified by the consent authorities; and
(c) information on earthworks application forms and 'how to' information that refers to the consent requirements of the other consent authority.

[141] Counsel explained in broad terms the scope of the provisions in Chapter 25 of the PDP, particularly in relation to the effects of sediment-laden discharges into water on water quality and other cultural or heritage effects.

[142] We were told that in relation to development within the Lake Hayes catchment, the PDP has a policy (Policy 24.2.4.2) to "[r]estrict the subdivision, development and use of land" unless it can contribute to water quality improvement in the catchment commensurate with the scale of development proposed.

[143] From QLDC's perspective, although not actively opposing PC8, it considered that there was no need for these provisions where Chapter 25 of the PDP was being applied. As explained in closing submissions, QLDC's approach to managing the effects of earthworks on water quality has been to employ the PDP to do all it can to control the land uses that might lead to discharges through implementation of Chapter 25 provisions. Counsel accepted that QLDC cannot authorise discharges of contaminants under s15 RMA, although he submitted that Chapter 25 of the PDP is appropriate and gives effect to:

(a) Clause 3.5 of the NPS-FM 2020, Policy 3.5 in particular; and

(b) Method 2.1 of PORPS 2019;

– which require (in summary), co-operation between the councils in the integrated management of the effects of land use and development on freshwater.

[144] While we broadly agree with counsel, we do not accept that there is no need for PC8, particularly when considering the Regional Council's statutory functions and its obligations under the NPS-FM 2020 for reasons addressed further on in this decision.

[145] However, we do agree with counsel that the MOU will in large measure resolve the issues raised by the Submitters in relation to duplication and inefficiencies of the two regimes operating together. That said, we are obliged to evaluate the merits of the Submitters' competing proposal.

Submitters' alternative rule

[146] As noted earlier, four iterations of the alternative permitted activity rule that would apply within the Queenstown Lakes district in place of PC8 provisions were presented to the court during the hearing. The differences between the various versions reflect the Submitters' attempts to cure problems identified with the Submitters' original form of relief over the course of the hearing.

[147] The latest version warrants setting out in full:

> **Permitted Activity Rule 14.5.1.1A**
>
> The use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for residential development where it is undertaken in general accordance with an existing resource consent granted by the Queenstown Lakes District Council under Chapter 25 of the Proposed Queenstown Lakes District Plan is a permitted activity providing:
>
> a. the consent has not lapsed, been surrendered or expired; and
>
> b. the Erosion and Sediment Control Plan (ESCP) prepared by a Suitably

Qualified and Experienced person for the Chapter 25 consent[41] has been submitted to and certified by the Otago Regional Council as including the following matters in (i)-(v) and being likely to achieve the outcome in (viii):

i. the works and area the consent relates to;

ii. the location of any surface water bodies on or adjacent to the site, the land areas to be subject to cut or fill activities, the extent of that cut or fill, property boundaries and other important features (including sensitive environmental receptors and contaminated sites);

iii. before and after contour lines and detail sufficient to show direction of water flow during and post the completion of the earthworks;

iv. the type and location of all erosion and sediment control measures, including, but not limited to:

1. specific erosion and sediment control works (including locations, dimensions, capacity);
2. supporting calculations and design drawings;
3. details of construction methods;
4. clean and dirty water drainage paths;
5. location of nominated discharge points;
6. site exit points and controls.

v. details relating to the management and rehabilitation of exposed areas;

vi. monitoring and maintenance requirements; and

vii. response strategy for managing significant rain events;

viii. how the standards in (d)-(j) will be met, including[42] by any discharge from the site;

c. the earthworks activity is carried out in accordance with the certified ESCP. Any proposed amendment to the ESCP after certification by the [Otago Regional Council] will require re-certification by the [Otago Regional Council] proper to that amendment taking effect.

d. earthworks do not occur within 10 m of a water body, a drain, a water race, ~~or the coastal marine area~~[43] (excluding earthworks for riparian planting);

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[41] To specify that the ESCP must be for the correlating Chapter 25 consent and prepared by a SQEP.

[42] As not all standards expressly relate to discharge.

[43] Not relevant because the Queenstown Lakes District does not contain any coastal marine area.

and

e. exposed earth is stabilised upon completion of the earthworks to minimise erosion and avoid slope failure; and

f. earthworks do not occur on contaminated or potentially contaminated land; and

g. soil or debris from earthworks is not placed where it can enter a water body, a drain, a race ~~or the coastal marine area~~; and

h. earthworks do not result in flooding, erosion, land instability, subsidence or property damage at or beyond the boundary of the property where the earthworks occur; and

i. the discharge of sediment does not result in any of the following effects in receiving waters, after reasonable mixing:

   i. the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials; or

   ii. any change in the colour or visual clarity; or

   iii. any emission of objectionable odour; or

   iv. the rendering of fresh water unsuitable for consumption by farm animals; or

j. the discharge of sediment does not result in an ~~significant~~[44] adverse effects on aquatic life, mahika kai, and drinking water supplies as set out in Schedule 1B;

K. a refundable certification and monitoring deposit of $1500 is paid to Otago Regional Council.

Where an activity complies with Rule 14.5.1.1A then Rule 14.5.1.1 does not apply.[45]

[148] Our decision focuses on this latest version without describing earlier versions, although we note that changes made to the third version produced by Ms Hunter are tracked. In summary, this latest version includes the additional requirements that:

(a) the Erosion and Sediment Control Plan ('ESCP') must be prepared by the Suitably Qualified and Experienced person ('SQEP') who

[44] Deleted to achieve a higher standard that better gives effect to Te Mana o te Wai.

[45] This clarifies the relationship between the two permitted activity rules in PC8.

prepared the documents for the Chapter 25 consent;

(b) in addition to the requirement that the ESCP is to be certified as including identified information about the earthworks proposal, it must contain information that enables the Regional Council to certify that the sediment control measures are "likely to achieve" outcomes specified in other limbs of the rule, and notably sub-clause (i) which is modelled on the requirements of s70 of the Act.

The Regional Council's involvement under the rule

[149] As to how the rule would operate, in summary, Ms Hunter gave evidence that the rule would leave the Regional Council with a discretion to determine whether the ESCP approved through the Chapter 25 consent process (by QLDC) is adequate in addressing sediment control measures and limits to sediment-laden discharges through the proposed certification regime.

[150] The structure of the rule requires that the Regional Council certifies that the ESCP includes certain matters specified in the rule, and that they are likely to achieve outcomes also specified in the rule. The matters that are required to be met in order for the Regional Council to certify the ESCP include whether or not the plan demonstrates that the standards in paras (d) – (j) will be met, including by any discharge from the site.

[151] Counsel notes that of these standards, (i) essentially describes outcomes the same as those set out in s70 of the Act, these being (more or less) the same as those set out in the existing permitted activity rule proposed under PC8. The exception is that to be permitted under PC8, earthworks must also be less than 2,500 m^2.

[152] Accordingly, counsel submits that if these matters are sufficiently certain to be a permitted activity under the proposed rule in PC8, they must also be sufficiently certain to be able to be certified under the alternative rule proposed by the Submitters.

[153] The Submitters' alternative rule proposes that the ESCP submitted to the Regional Council for certification must be prepared by a SQEP and that it must be applicable to the Chapter 25 consent. It also provides that any subsequent amendments to the ESCP must be recertified by the Regional Council and if that does not occur then the activity would cease to be permitted under that rule.

[154] Ms Hunter's evidence was that the Regional Council could require a discharge consent under the RPW if certification of the ESCP is refused.

The Regional Council's opposition

[155] The Regional Council maintained its opposition to all versions of the Submitters' alternative rule, including the latest, for reasons including that:

(a) the certification framework requires that the officers considering the ESCP exercise an arbitral function in relation to whether the sediment control measures in the ESCP are "likely to achieve" outcomes specified in (b)(viii) of the rule, particularly in relation to s70 matters, which is ultra vires the Regional Council's rule-making powers;

(b) concerns as to how the Regional Council could certify elements of the ESCP without an assessment of effects that would ordinarily accompany a resource consent application, given that the rule is intended to operate as a permitted activity rule which does not require an application to be made;

(c) factoring in the Regional Council's role as explained by the Submitters, the rule achieves little if any transactional efficiency in the operation of the rule as proposed by the Submitters compared to PC8; and

(d) there is no apparent lawful mechanism for recovery of the Regional Council's costs in implementing the rule.

Statutory considerations

[156] When considering any matter referred to it, the Environment Court must:

(a) have regard to the Minister's reasons for making a direction in relation to the matter; and
(b) consider any information provided to it by the EPA under s149G; and
(c) act in accordance with s149U(6).

[157] Section 149U(6) provides:

> If considering a matter that is … a change to a regional plan, the court–
> (a) must apply clause 10(1) to (3) of Schedule 1 as if it were a local authority; and
> (b) may exercise the powers under section 293; and
> (c) must apply sections 66 to 70, 77A, and 77D as if it were a regional council.

[158] Pursuant to s66, the plan change must be prepared in accordance with:

(a) the regional council's functions under s30;
(b) the provisions of Part 2; and
(c) any national policy statement and national planning standards, among other requirements.

[159] Relevantly, a regional plan:

(a) must give effect to any national policy statement and regional policy statement (s67(3) RMA); and
(b) may include rules for the purpose of carrying out its functions under the Act and also for achieving the objectives and policies of the plan, pursuant to s68(1).

Matters for the court to consider

Minister's reasons

[160] We make mention of this earlier, although it warrants noting that the Minister's recommendations followed an investigation by Professor Skelton of the Regional Council's freshwater management and allocation functions. Professor Skelton had found that the Council's instruments are not fit for purpose, and ought to be replaced by regional plans and an RPS that gives effect to the NPS-FM. PC8 is one of a number of interim measures that address some of the more problematic gaps in the current framework in relation to water quality pending that broader response.

The Regional Council's functions s30(1)

[161] Our consideration of the matters raised by the Submitters requires consideration of the Regional Council's functions under the Act. It is worth setting out the relevant RMA provisions. RMA s30(1) sets out the functions of regional councils as including:

> …
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
> (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
> …
> (c) the control of the use of land for the purpose of—
> (i) soil conservation:
> (ii) the maintenance and enhancement of the quality of water in water bodies and coastal water:
> (iii) the maintenance of the quantity of water in water bodies and coastal water:
> (iiia) the maintenance and enhancement of ecosystems in water bodies

and coastal water:

(iv) the avoidance or mitigation of natural hazards:

(ca) the investigation of land for the purposes of identifying and monitoring contaminated land:

…

(f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

…

[162] RMA s31(1) sets out the functions of district councils as including:

…

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

…

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

(i) the avoidance or mitigation of natural hazards; and

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

(iii) the maintenance of indigenous biological diversity:

[163] There was no dispute between the parties that the earthworks/discharge rules are within the Regional Council's functions under s30(1)(c), and similarly, that the Chapter 25 provisions are within the QLDC's functions in terms of s31. There was also agreement that only a regional council has scope to grant consent for the discharge to water (or to land where it may enter water).[46]

Overlapping functions – ss 30 and 31

[164] However, in opposing duplication of the earthworks rules in PC8, in opening submissions for the Submitters, counsel referred to the decision in

[46] JWS Planning dated 8 March 2022 at [12].

Winstone Aggregates v Matamata-Piako District Council.[47] That case was concerned with a proposal for rules in the district plan in relation to odour that sought to replicate existing provisions in a regional plan.

[165] In support of the relief being sought by the Submitters, counsel emphasised the following statements of the court:

> … We think it is wrong in principle for two governments to be regulating the same thing. There will be almost inevitable consequences in cost, duplication, potential inconsistency, blurred accountability and so on. Such a situation should have no place in a contemporary integrated resource management process, particularly given the provisions of s30 and s31 RMA.

[166] Counsel identified two important factual differences between that case and PC8 that supported the same approach here:

(a) in *Winstone*, the district council had overstepped its role in regulation of odour/particulate discharges, as the appropriate regulator of discharges was the regional council. In comparison the Chapter 25 rules fall squarely within QLDC's statutory function of controlling the actual or potential effects of the use, development or protection of land for the purposes of the maintenance and enhancement of the quality of water in water bodies; and

(b) the Chapter 25 rules are 'first in time' and the court has no jurisdiction to amend the same. Any duplication of these provisions within the RPW would have inevitable consequences in terms of cost, potential inconsistency, and blurred accountability which should be avoided.

[167] In essence, the Submitters contended that it is the Regional Council that has (in a sense) overstepped the mark on this occasion given the provisions in

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[47] *Winstone Aggregates v Matamata-Piako District Council* (2004) 11 ELRNZ 48 at [68].

Chapter 25 of the PDP which are earlier in time.

[168] However, in response to this, the Regional Council emphasised the differing functions of the Regional Council in relation to water quality matters, together with the importance of the managing of natural resources occurring in accordance with ki uta ki tai (connectedness and integrated management), which necessarily requires an integrated approach by the Regional Council to its functions under s30(1)(c)(ii).

[169] Counsel also referred to the seminal decision on the overlap of controls between regional councils and district councils, being the Court of Appeal decision in *Canterbury Regional Council v Banks Peninsula District Council.*[48] This authority had been referred to in submissions for the Director-General of Conservation as well.

[170] The case involved a proceeding where the Court made a declaration, which is applicable to the circumstances before us here. The Court held:

> A regional council may, to the extent allowed under section 68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 30(1)(c) to (h). A territorial authority may, to the extent allowed under section 76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 31. Neither a regional council nor a territorial authority has power to make rules for purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only, both have overlapping rule making powers, but the powers of a territorial authority are also subject to section 75(2).

[171] We agree that the Chapter 25 rules are appropriate and fall squarely within QLDC's function, although the PC8 rules are also within the Regional Council's s30(1) RMA functions. However, to the extent that there are overlapping

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[48] *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189.

functions and rule-making powers (in relation to earthworks) as emphasised in that decision, the powers of QLDC are subject to s75(2) RMA.

[172] The cases cited to us by the Submitters, including the *Winstone* case, do not preclude the possibility of two rule regimes applying to manage adverse effects consistent with each council's functions. We agree with the planning witnesses that although there are differences in the two rule regimes, these are not such that s75(4) would be triggered in the event that PC8 is confirmed.

[173] It is not unusual for there to be overlapping provisions in regional and district plans in the management of sediment from residential earthworks. We were referred to many other examples of that by witnesses for the Director-General of Conservation and the Regional Council.

[174] In the end, despite the similarities in the rule standards and matters of discretion, we accept the evidence of Ms Strauss for the Regional Council who stated:

> …the focus of the PC8 provisions is focussed on water quality, whereas the PDP (and the provisions of other district plans) are wider and do not specifically focus on water quality. As such, in my opinion, district and regional provisions complement each other.
>
> … the conditions of consent granted by ORC on its earthworks resource consents are predominantly focussed on water quality.
>
> … management plan conditions (such as Environmental Management Plan (**EMP**), Erosion and Sediment Control Plan (**ESCP**)) are generally common to both the ORC and QLDC consents, the focus of the ORC conditions is on monitoring water quality, often through other specific conditions that identify the type of monitoring and testing required as well as the levels that cannot be breached….
>
> QLDC conditions in relation to management plans often include a wider range of matters to be addressed, including (amongst others) noise, vibration, hours of operation, damage to roads due to construction activity, cultural heritage,

vegetation clearance, and waste management.

[175] We further refer to the evidence of Ms Heather who had referred to specific instances where potential effects were avoided by Regional Council consents and stated:[49]

> 76 QLDC's Guide for Environmental Management Plans outlines discharge criteria. This includes a limit of *"<50 mg/L Total Suspended Solids (TSS); unless specified otherwise by resource consent conditions or agreed with QLDC*". This limit of 50 mg/L TSS may not be appropriate for every receiving environment or water body.
>
> …
>
> 78 …Whilst QLDC's consents often refer to guidance regarding discharge criteria, such guidance is not enforceable as QLDC is ultimately unable to authorise the discharge to water. …
>
> …
>
> 80 …Given its functions under the RMA, ORC has a far better understanding of cumulative effects on the receiving environment and water bodies and can tailor conditions to suit.
>
> 81 ORC can tailor conditions to suit the site, discharge and receiving environment. …
>
> …
>
> 83 …While QLDC's Compliance team is an effective team, they do not have immediate on-site pH, turbidity or clarity testing equipment at their disposal. This is an important role that ORC is filling.
>
> (footnote omitted)

NPS-FM 2020

[176] There was common ground that PC8 must give effect to the NPS-FM 2020, despite not being fully achieved by these interim measures as the Regional Council accepts.

[177] We note that PC8 was publicly notified at a time when the NPS-FM 2014

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[49] Heather, SOE dated 11 February 2022 at [76]-[83].

(amended in 2017) was in force. NPS-FM 2020 came in to force on 3 September 2020. As has been noted in earlier related decisions, this instrument requires that "[e]very local authority must give effect to this National Policy Statement as soon as reasonably practicable".

[178] In accordance with s80A the Regional Council must notify a freshwater planning instrument, where that instrument has the purpose of giving effect to the NPS-FM 2020, by 31 December 2024.

[179] The consequences of the introduction of the NPS-FM 2020 'mid process' was addressed in the Environment Court decision on PC7.[50] As to the significance of that we concur with the following passage from that decision in the context of PC8:

> The plan change objective is to facilitate an efficient and effective transition from the operative freshwater planning framework to a new integrated regional planning framework and in that way the plan change *is* giving effect to the *concept* and therefore to the NPS-FM. In short, we agree with Ms McIntyre (Ngā Rūnanga) that giving effect to Te Mana o te Wai includes allowing time for its implementation through the appropriate planning instruments. This approach accords with the scheme of the Act, which envisages a cascade of planning documents, each intended to give effect to s 5, and to pt 2 more generally: per Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd.*
>
> (footnotes omitted)

[180] As in PC7, parties here were agreed that the NPS-FM 2020 and Te Mana o Te Wai represents a paradigm shift in the way in which freshwater management must be approached by the Regional Council, in respect of which the Regional Council is tasked with approaching environmental management in accordance with the fundamental concept of integrated management (ki uta ki tai). This concept was usefully explained in *Aratiatia Livestock Ltd v Southland Regional*

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[50] *Re Otago Regional Council* [2021] NZEnvC 164 at [91].

Council.[51]

[181] Part 3 of the NPS-FM 2020 sets out "a non-exhaustive" list of things that local authorities must do to give effect to Objective 2.1 and policies in Part 2 which includes Policy 3, amongst other policies. Policies 1, 2 and 3 are particularly relevant and are:

> Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.
>
> Policy 2: Tangata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for.
>
> Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.

[182] On implementation, relevantly, clause 3.2(2) states that:

> Every regional council must give effect to Te Mana o te Wai, and in doing so, must:
>
> …
>
> (e) adopt an integrated approach, ki uta ki tai, to the management of freshwater
>
> …

[183] This is expanded upon in clause 3.5(1) (a)-(c) which (relevantly) explains the concept of integrated management in the following terms:

> (a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the seas; and
>
> (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and
>
> (c) manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects,

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[51] *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [42].

> including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments; and
>
> …

[184] By clause 3.5(2), a regional council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of:

(a) the use and development of land on freshwater; and
(b) the use and development of land and freshwater on receiving environments.

[185] By clause 3.2(3), "every regional council must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to Te Mana o te Wai".

[186] However, for the Submitters, Ms Hunter gave evidence that having the Regional Council and QLDC work together in the management of earthworks, represents an integrated approach to managing water quality. She considers that the relevant NPS-FM 2020 policies are able to be jointly given effect to by the two councils whereby:

(a) the Chapter 25 rules would continue to regulate the land use activities associated with earthworks; and
(b) PC8 would be confined to the regulation of associated s15 discharges in circumstances where a land use consent had been issued by QLDC for the earthworks component in terms of Chapter 25.

[187] For the Submitters, counsel also described the NPS-FM as encouraging integrated management as between local authorities while imposing direct obligations on territorial authorities in respect of the management of land use to achieve water quality outcomes. Counsel put to the court that the alternative permitted activity rule *better* gives effect to the NPS-FM 2020.

[188] He questioned whether this instrument requires the imposition of land use controls by the Regional Council, contending that the integrated approach to land use and water quality could be achieved by a shared and co-operative approach of the two councils instead.

[189] We disagree with that contention. We refer back to our reference to Ms Boyd's discussion of the more relevant policies in the NPS-FM 2020, and notably Policy 3. This is that "[f]reshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments".

[190] By s67(3) RMA, a regional plan *must* give effect to a national policy statement and a regional policy statement. The direction to "give effect to" the relevant NPS-FM 2020 provisions, and particularly Policies 1-3 are not lawfully achieved in the manner contended for by the Submitters.

[191] By Policy 3 in particular, the Regional Council must be able to consider the land use and discharge components of earthworks activities in order to integrate the management of water bodies and their catchments. That is integral to the concept of ki uta ki tai. We note that we had received evidence of the importance of understanding this fundamental concept specifically in the context of water quality issues, including from Mr Ellison who attached the evidence he gave to court at hearings on PC8 primary provisions.

[192] The evidence of Mr Ellison explained the interconnectedness of environmental systems while noting that the interconnected nature of whenua, wai Māori and moana means that land-based activities have a direct consequence of rivers, lakes and the coastal environment.[52]

[193] We consider that integrated management understood in this way must be

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[52] Ellison, SOE dated 11 February 2022 Annexure 1.

given effect to by the regional plan provisions.

Relevant provisions of Otago Regional Policy Statements

[194] We first consider the argument for the Submitters in relation to the relevance of the PORPS 2019 which, in broad terms, is similar to the position it took in relation to the NPS-FM 2020:

(a) that in terms of the PORPS 2019, regional councils are directed to manage land use in certain situations, although they are not required to impose land use controls on earthworks to manage sedimentation;
(b) in contrast, territorial authorities within the region are directed to include provisions to manage the discharge of dust, silt, and sediment associated with earthworks and land use, to implement stated policies as they relate to their areas of responsibility;[53] and
(c) PC8 is inconsistent with the direction in the PORPS 2019 whereas the Submitters' preferred provisions, in conjunction with the Chapter 25 rules, better give effect to it.

[195] We note that prior to the notification of PC8, and as earlier noted, the RPW did not manage the land use component of earthworks, meaning that these activities are able to be undertaken as permitted activities under s9 of the RMA.[54]

[196] Ms Boyd, Ms Hunter and Mr Brass had agreed at expert conferencing that "… the partially operative Otago Regional Policy Statement 2019 directs territorial authorities to undertake that function".[55]

[197] In her evidence, Ms Boyd explained that "[h]istorically, the Council has taken the view that controls on earthworks should be restricted to district plans (as

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[53] Method 4.1.5.
[54] Boyd, SOE dated 17 December 2021 at [61].
[55] JWS Planning at [30].

a 'one-stop shop' approach), with the [Regional Council] limiting its intervention to the control of the discharge of sediment to water".

[198] We accept that there is clearly a lack of policy direction in the PORPS 2019 for the integrated approach to the management of land use and water quality by the Regional Council compared to that taken in the PORPS 2021. We note that PORPS 2019 only addresses the role of the district council in this particular context and states that:

> City and district plans will set objectives, policies and methods to implement policies in the RPS as they relate to the City or District Council areas of responsibility … by including provisions to manage the discharge of dust, and silt and sediment associated with earthworks and land use;
>
> (emphasis added)

[199] As earlier observed, Professor Skelton's report had highlighted the importance of the Regional Council prioritising an overhaul of the entire planning framework for the Otago region including the then current RPS (the PORPS 2019). This was a key part of a programme of work to put in place a fit for purpose freshwater management planning regime that gives effect to all relevant national instruments.

[200] We further note that this report had prompted notification of the PORPS 2021 on 28 June 2021.[56] Accordingly, we are not persuaded by the Submitters' arguments in favour of their relief based upon the PORPS 2019, given its identified flaws and pending replacement which we now consider.

PORPS 2021

[201] The PORPS 2021 is still under appeal, and is not yet at the stage where it is to be given effect to, although it is still an instrument to which we must have

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[56] Boyd, SOE dated 17 December 2021 at [117].

regard, by s66(2)(a) of the Act.

[202] We agree with the evidence of Ms Boyd that it should be given some weight in making a decision on PC8 despite being at a relatively early stage, in preference to the PORPS 2019.

[203] In contrast to the PORPS 2019, provisions are intended to give effect to the NPS-FM 2020. The PORPS 2021 contains policies of particular relevance to PC8, and notably:

(a) LF-WAI–P3(4) relating to the integrated approach to the management of the effects of the use and development of and the health and well-being of fresh water; and
(b) LF–LS–P18(1) relating to the minimisation of soil erosion, and the associated risk of sedimentation in water bodies, resulting from land use activities; and
(c) notably, LF-LS-M11(1)(d) which requires that the Regional Council's PLWRP manages uses that may affect the ability of environmental outcomes for water to be achieved by requiring earthworks activities to implement effective sediment and erosion control practices and setbacks from water bodies to reduce the risk of sediment loss to water.

[204] We agree that while PC8 does not give full effect to the PORPS 2021, it brings the RPW more in line with the new regional and national policy direction for managing freshwater, pending a full review of the RPW.

Statutory tests applying to duplication of/inconsistency between plan provisions

[205] The policy planners agreed that s32 of the Act will be relevant to the assessment of the proposed rules where there is duplication and/or inconsistency between the plans in relation to rules where there are overlapping functions as

arises here.

[206] However, we find that of the issues raised by the Submitters' perspective the only legitimate concern has to do with the overlapping nature of the plan provisions, leading to questions around efficiency of the rules, as opposed to inconsistencies in terms of s75(4)(b).[57]

[207] Ms Strauss, Ms Heather and Mr McIntyre had agreed on some areas where improvements could be made by the Regional Council in the consenting process in that:[58]

> ORC specifies within conditions what is to be included in the EMP (limited to erosion and sediment controls as they pertain to effects on water quality) whereas QLDC conditions reference the QLDC Guidelines for Environmental Management Plans (Guidelines). The Guidelines extend beyond the scope of what ORC EMPs require as QLDC has to manage all effects associated with the earthworks, including noise, vibrations, vegetation, i.e. all environmental elements and amenity effects.
>
> … there are benefits to having specific guidance for customers.
>
> … it is beneficial for customers in particular to have flexibility in the final implementation and revision of measures, after consent has been granted, that can help to drive efficiencies. QLDC's approach currently provides this flexibility by referencing the Guidelines when specifying EMP requirements whilst ORC is explicit in their conditions of what is required, thereby potentially necessitating a Section 127 application to allow for changes to the EMP and ESCP.
>
> … while ORC compliance staff have some discretion, they are limited by explicit conditions. QLDC's approach relies on SQEPs to formulate alternative solutions during implementation of the consent without the necessity for a s127 variation. For robustness, these solutions are usually peer-reviewed by another SQEP on the QLDC Supplier Panel.

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[57] See JWS Planning.
[58] JWS Regulatory Planning at [12].

[208] They agreed that there is merit to the QLDC approach in providing some flexibility in the final implementation of ESCP measures, and considered that a similar approach may be considered by the Regional Council during the PC8 implementation process.

[209] With regard to conditions requiring environmental induction, they also agreed that defining details to be included in an environmental induction as part of the consent condition is beneficial.[59] They note that QLDC currently achieves this by referring to their Guidelines. For higher risk sites, a SQEP is expected to carry out the induction for key staff. They note that the Regional Council currently does not provide any significant guidance, and that this could well be part of a future work programme for implementation of PC8 provisions.

[210] With regard to the "effectiveness and requirements of as-built confirmation conditions" they agreed that both QLDC and the Regional Council have as-built-type conditions for erosion and sediment controls, but QLDC requires a SQEP to check and confirm correct installation of controls on high-risk sites as determined by the Guidelines.[60]

[211] We find that the QLDC approach may have benefits and consider that consistency would be beneficial and easily achieved by the Regional Council under PC8 provisions without any drafting changes.

[212] QLDC has a definition of what a SQEP is whereas PC8 does not. Ms Strauss, Ms Heather and Mr McIntyre agreed that a definition that specifies the type of qualification and experience required is useful to increase the quality of the EMP and ESCPs as well as the implementation of control measures to ensure ongoing environmental performance.[61]

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[59] JWS Regulatory Planning at [14].
[60] JWS Regulatory Planning at [16].
[61] JWS Regulatory Planning at [18].

[213] Ms Strauss, Ms Heather and Mr McIntyre agreed that there is partial duplication in conditions, especially in terms of wording and timeframes, for submitting certain documents to the consent authorities after consent is granted, although they note that this is intentional, as the Regional Council developed their conditions while considering the QLDC conditions in order to prevent confusion and allow for greater consistency. They generally agree that conditions in relation to water quality are enforceable by the Regional Council.[62]

[214] Ms Strauss, Ms Heather and Mr McIntyre agreed[63] that having two consents from different authorities with two different sets of conditions can be confusing for contractors and persons associated with implementing these consents. An example of this is the different discharge limits imposed on QLDC consents and Regional Council consents. Mr McIntyre noted that any complexity/confusion is usually offset by having a dedicated environmental manager (usually the SQEP or a capable project manager), but this does not always happen in practice.

[215] Again, we find that these matters should be relatively straightforward and capable of resolution by having the same requirements for supervision and a single SQEP acceptable to both councils without making any drafting changes to PC8. We agree with counsel for QLDC that these and other processing and monitoring inconsistencies and overlaps identified in the evidence are very likely to be resolved by implementation of measures described in the MOU.

[216] We say nothing more about these complaints for that reason, other than to note that areas of duplication and the costs of that in terms of consenting and monitoring were somewhat overstated by the Submitters in the court's view.

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[62] JWS Regulatory Planning at [10].
[63] JWS Regulatory Planning at [24].

Specific issues with the drafting of Submitters' permitted activity rule

Does the rule reserve an unlawful discretion?

[217] The first of the Regional Council's specific concerns, is that the rule purports to reserve an unlawful discretion in determining compliance with standards to be met in order to attract permitted activity status in the RPW. This follows from the stipulation that the ESCP measures are achieved outcomes specified in the body of the rule. These outcomes include those that (essentially) replicate stipulations for a permitted activity rule in terms of s70 of the Act.

[218] We agree with the Regional Council's concerns in this regard and find that as drafted the rule is ultra vires the Regional Council's powers specifically in the context of s70 and more generally, under the Council's wider s68 rule-making powers. There are two fundamental reasons for this finding.

[219] First, because the rule contemplates that the Regional Council will undertake an evaluation of measures included in an ESCP, reserving a discretion to refuse to certify the same if the officers are not satisfied that measures described in the plan will achieve the s70 based outcomes, or are otherwise not considered adequate in the management of sediment laden discharges.

[220] In this regard, we are mindful of the evidence from Mr McIntyre in relation to application of QLDC guidelines, which, in terms of the Chapter 25 rules, inform the contents of an ESCP. Under these guidelines, sites are categorised in terms of whether they are low, medium or high-risk sites.

[221] Mr McIntyre's evidence illustrates the problem that could arise with the rule with reference to his experience with a previous application that had been lodged with the Regional Council in respect of a site categorised under the guidelines as a high-risk site.

[222] The application related to a development proposed by his client,

Willowridge, where a Chapter 25 earthworks consent had been issued by QLDC, in circumstances where there could potentially be a discharge of sediment-laden water into the headwaters of Bullock Creek. An ESCP had been approved by QLDC.

[223] However, the officer processing a later application to the Regional Council was not satisfied with the adequacy of the sediment control measures outlined in the ESCP that had been approved by QLDC, given the sensitivity of Bullock Creek. The dispute related to the design of the sediment control measures intended to prevent the discharge of sediment into the creek.

[224] An impasse was reached between Willowridge and the Regional Council, and rather than tolerating further delay to the earthworks programme while the Regional Council consenting process continued, Willowridge elected to withdraw the application and pumped the water into a water truck for disposal elsewhere.

[225] We agree that this could happen under the Submitters' proposal. This results in the possibility of a challenge to the Regional Council's power to act in an arbitral capacity in this certification context.

[226] We are mindful that the Submitters' proposal is premised on the Chapter 25 resource consent process first being pursued through to a grant of consent by QLDC and subsequent ESCP certification by a SQEP *before* the Regional Council's certification process is invoked under the alternative rule proposed by the Submitters.

[227] However, if certification is refused by the Regional Council, a further resource consent will be required for a restricted discretionary activity consent in terms of the RPW. Timing could be an issue for the developer implementing an earthworks programme, as it clearly had been for Willowridge in the Bullock Creek example earlier referred to.

[228] Counsel for the Submitters acknowledged that an activity cannot be

classified as a permitted activity if classification as such is ultimately left to the discretion of the consent authority, citing the decision in *Twisted World Ltd v Wellington City Council*.[64] Counsel accepted that any such rule would be clearly invalid although the Submitters do not consider that the rule they propose reserves an unlawful discretion to the Regional Council.

[229] Counsel further submitted that it is the fact of certification that determines activity status and referred to another permitted activity rule that is said to include similar elements which had been the subject of an Environment Court decision of *Population and Public Health Unit of the Northland District Health Board v Northland Regional Council* that approved in principle a similar permitted activity rule.[65]

[230] The rule in question contained a requirement that an activity be undertaken in accordance with a risk assessment that had to have been carried out before the spray application activity authorised under the permitted activity rule could be undertaken. A further condition of permitted activity status was that a written approval could be obtained and provided to the Northland Regional Council as a condition of permitted activity status where other conditions were also complied with.

[231] Counsel for the Submitters made much of the fact that the person whose approval is being sought has a discretion whether or not to give that approval, yet that was not fatal to inclusion as a permitted activity standard. However, that submission overlooks that the standard simply requires that the approval be provided to the Northland Regional Council in order to attract permitted activity status, in which event s104(3)(a)(ii) would be triggered.

[232] That is not the same as the situation where a regional council is being required to make an evaluative judgement as to whether measures included in the

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[64] *Twisted World Ltd v Wellington City Council* NZEnvC Wellington W024/2002, 8 July 2002.
[65] *Population and Public Health Unit of the Northland District Health Board v Northland Regional Council* [2021] NZEnvC 96.

ESCP are sufficient to achieve specified outcomes expressed as activity standards in order that permitted activity status can apply to the proposal..

[233] We refer to and respectfully concur with and adopt comments made by the Court in *Re Canterbury Cricket Assoc Inc* in relation to the function of a management plan.[66] Although the comments were directed at management plans required by conditions of a resource consent, the court's comments are equally applicable in this situation.

[234] The court said of this matter:

> [125] Where management plans are proposed, as is the case here, it is imperative that conditions of consent identify the performance standards that are to be met and that the management plans identify how those standards are able to be achieved: *Board of Inquiry: MacKays to Peka Extension*. The Board comments that if this is done, then generally speaking management plan conditions are acceptable.
>
> [126] While a condition of consent may leave the certifying of detail to another person (typically a Council officer) using that person's skill and experience, the court cannot delegate the making of substantive decisions: *Royal Forest and Bird Protection Society Inc v Gisborne District Council*. See also *Turner v Allison* (1970) 4 NZTPA 104 at 128 where the Court of Appeal held judicial duties cannot be delegated.
>
> [127] The conditions proposed by the applicant effectively delegated parts of the decision-making on this application to the City Council. It appears that Canterbury Cricket and the City Council considered this an appropriate process because the City Council administers the Park and for events proposed for North Hagley Park the City Council requires management plans to be prepared before a permit to hold the event is issued.
>
> (footnotes omitted)

[235] We also refer to the Environment Court decision relied upon by the

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[66] *Re Canterbury Cricket Assoc Inc* [2013] NZEnvC 184.

Regional Council in opening submissions, *Day v Manawatu-Wanganui Regional Council,* which is apposite. [67] In that case the court was considering proposed rules regulating the use of land for farming activities developed as part of the development of the Horizons Regional Council's One Plan. There had been extensive argument between the parties regarding whether or not the farming activities being regulated should be classified as permitted activities or controlled activities.

[236] Although the court was satisfied the developer-permitted activity rule could be drafted, it declined to classify the activity as a permitted activity relying on several factors:

> We accept these reasons arising from all of the material – evidence, joint statements and submissions – for not supporting a *permitted* activity rule:
>
> - Rule 13-1 proposes a one farm consent to manage all contaminant vectors (not just N) based on a systems approach to farm management commended by the Parliamentary Commissioner for the Environment.
> - Managing N leaching (effectively) would require significantly more interaction between a local authority and farmer than a *permitted* activity would allow.
> - There is limited transactional efficiency given the consent needed for discharges of effluent (an activity caught by Rule 13-1 as ancillary to dairy farming).
> - The *permitted* activity rules proposed would only really work on a fixed and not a graduated step-down in N leaching.
> - A consent provides much greater certainty for a farmer than *permitted* activity status (which could be changed at any time).
> - Control of land use to achieve water quality outcomes *of the commons* is best achieved by a consent identifying the metes and bounds of the farming activity, with explicit conditions, available for inspection as a public record, and with monitoring (at the expense of the consent holder) and enforcement.

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[67] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [5-199].

- A *permitted* activity rule would allow some farmers to leach up to the relevant threshold number without any control on management practices (with undesirable results).
- Mr Hansen acknowledged the benefits that having better on-farm information would have for future plan change decisions. Fonterra considered a *controlled* activity regime would deliver that information directly to the Council, allowing them to check and verify it within a resource consent process and a better approach.
- Section 70 requires that before a rule that allows, as a permitted activity, a discharge of a contaminant into water, or onto land in circumstances where it may enter water, can be included in a regional plan, the Court must be satisfied that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include, under s70(1)(g), … *any significant adverse effects on aquatic life*. There was no evidential basis on which we could conclude that the requirements of s70 would be met.
- The application of the OVERSEER model means there will be a level of discretion and uncertainty which is not appropriate for a *permitted* activity rule.
- It would not allow an iterative process between farmers and the Council, including the careful record keeping and auditing of the OVERSEER inputs and assumptions needed to ensure sound environmental outcomes.
- While the Council may have powers to impose a targeted rate under the legislation, that does not substitute for the direct recovery of the Council's actual and reasonable costs under the RMA from those parties carrying out an activity with actual and potential effects on the environment.

[237] We acknowledge that *Day* had been concerned with the use of the Overseer model which does not apply in the current context, although there were a range of other factors that are equally at play here.

Section 70 issues

[238] Section 70 is particularly problematic, and perhaps more so than other issues that the Regional Council identifies with the rule, as in terms of the requirements for a permitted activity rule for a discharge, s70 states that a regional council "… shall be satisfied than none of the … effects [in s70(1)(c)-(g)] are likely

to arise in the receiving waters, after reasonable mixing, as a result of the discharge …" *before* the rule is included in a regional plan.

[239] Accordingly, for a permitted activity rule to be lawfully included within a regional plan, the Regional Council would need to be satisfied that none of the effects identified in s70(1)(c)-(g) are likely to arise (after reasonable mixing), in relation to earthworks consented under the Chapter 25 rules – *before* the rule is included in the regional plan.

[240] We are mindful that the Regional Council's permitted activity rule in PC8 (Rule 14.5.1.1) also refers to these s70 outcomes although the rule will only apply to small-scale earthworks for residential development; that is, where the area of exposed earth is no more than 2,500m^2 in any consecutive 12-month period (in addition to achieving other conditions).

[241] As explained by the Regional Council, this area limit was considered to set an acceptable threshold beyond which a resource consent requirement would be triggered. The evidence of Ms Boyd addressed this limit and referred to permitted activity standards for earthworks in a number of other regional plans throughout the country, noting that the PC8 threshold was in line, if not more restrictive than, other plan provisions.

[242] We are satisfied that there is a sufficient evidential basis for the permitted activity Rule 14.5.1.1 proposed by the Regional Council in PC8, in terms of s70 in particular, and note that the Submitters' alternative rule would provide for earthworks as a permitted activity under the RPW regardless of the scale of the development, provided that a Chapter 25 earthworks consent had been granted by QLDC. However, we were not provided with an evidential basis to support this alternative permitted activity rule in the context of the s70 requirements for a rule in this regional plan.

[243] We do not accept that it is permissible to rely on the consenting process that is to be followed by QLDC in terms of a Chapter 25 consent, where it will be

required to impose conditions and certify the ESCP measures to get past the s70 requirements. Section 70 imposes the obligation on the Regional Council not QLDC.

[244] Moreover, we read s70 as requiring that the evidential basis for permitted activity status has to exist before the permitted activity rule is inserted into the regional plan and not during a later resource consent process.

Cost recovery not possible under the alternative rule

[245] A further concern of the Regional Council is that the costs incurred by the Regional Council in the implementation of the Submitters' alternative rule would have to be paid by ratepayers in the region, as there is no mechanism for recovery of implementation costs.

[246] The Submitters agree that the "user pays" principle ought to apply to the costs of regulatory administration of earthworks,[68] however, they assert that this can be addressed by a "refundable certification and monitoring deposit" of $1,500 being paid to the Regional Council when an ESCP is submitted for certification under their rule.

[247] In support of this mechanism, the Submitters referred to a consent order made in *House Movers' Section of the New Zealand Heavy Haulage Assoc Inc v Horowhenua District Council*[69] as providing authority for imposing such a deposit.

[248] However, in closing submissions for the Regional Council, counsel rejected this proposal for reasons we agree with. This included grounds that the imposition of such a fee can only occur as a result of a separate statutory process, which has not yet occurred.

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[68] Closing legal submissions at [34].

[69] *House Movers' Section of the New Zealand Heavy Haulage Assoc Inc v Horowhenua District Council* ENV-2013-WLG-091, 20 March 2015.

[249] Counsel referred to s150(3) of the Local Government Act 2002 ('LGA') which provides that a fee under s150(1) must be prescribed in bylaws or through following a special consultative procedure under s82 LGA. A decision on PC8 to include such a provision cannot pre-empt that statutory process; it has to happen first.

[250] It is in any event unclear to the Regional Council (and to the court for that matter) what the phrase "refundable" is a reference to, and whether the reference to "deposit" means that an additional fee might later be charged. We assume that the Submitters simply adopted the wording of the condition under the consent order approved in the *Heavy Haulage* decision without any real consideration of the differing context in which it is to proposed to apply.

[251] It is also unclear whether s150 LGA is sufficient to enable the recovery of both the costs of certification of the ESCP, and associated monitoring functions of the Regional Council contemplated by the alternative rule.

[252] Section 150(1) LGA provides that "a local authority may prescribe fees or charges payable for a certificate, authority, approval, permit, or consent form, or inspection by, the local authority".

[253] It remains unclear to the Regional Council, and to the court, to what extent an "inspection" would encompass monitoring, as that term would normally apply when a council is monitoring a resource consent, or in this case, compliance with an ESCP.

[254] We note that in the evidence of Ms Hunter and in closing submissions, it had been said from the perspective of compliance monitoring, that the Regional Council would be given notice of earthworks activities that are intended to be undertaken, enabling a proactive approach to monitoring by the Regional Council, rather than needing to wait until complaints are received, which is the present situation under the RPW.

[255] However, we agree with the Regional Council's concerns in relation to the suggested mechanism for recovery of costs of the certification process and note that in relation to cost recovery for monitoring, the RMA precludes a council from establishing a fee for the monitoring of permitted activities other than where allowed by a national environmental standard.[70]

[256] That being so, the key benefits promoted by Ms Heather in terms of Regional Council compliance officers being able to proactively monitor high-risk sites would be unlikely to arise.

Conclusions on alternative permitted activity rule

[257] We find that the alternative rule proposed by the Submitters does not achieve the (settled) objectives of the RPW. Nor does it adequately give effect to the NPS-FM 2021, and particularly Policy 3.

[258] More importantly, the alternative rule is not transactionally more efficient than that proposed by PC8; in fact it is inefficient and fails to bring many benefits to the Submitters or other persons undertaking residential development within QLDC, other than in terms of gains in consenting and monitoring costs.

[259] We return to our consideration of the MOU produced to the court. We find that this evinces a genuine willingness on the part of the Regional Council and QLDC to work collaboratively and to align their approaches to erosion and sediment controls. We strongly endorse that approach.

[260] We also agree with the QLDC that full implementation of MOU-staged processes will appropriately address the Submitters' concerns regarding inefficiencies of having overlapping rules.

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[70] RMA, s36(1)(cc).

The slope standard

[261] If the court does not accept Rules 14.5.1.1A and 14.5.2A.1 proposed by the Submitters (which we do not), alternative relief is sought which includes a slope threshold in relation to earthworks in the Queenstown Lakes district in Rule 14.5.1.1(a)(ii). This appears to be an afterthought on the part of the Submitters, whose opening legal submissions did not refer to seeking a slope standard.

[262] We assume that it is part of the alternative relief sought that the PC8 rules are aligned with the Chapter 25 provisions. Although the court asked for clarification in closing submissions, we received no submissions on this issue.

[263] However, Ms Boyd had addressed the question of the slope threshold in her evidence because the Regional Council's understanding was that the Submitters would be seeking to pursue this as a change to the PC8 rules. Ms Boyd addressed the potential difficulties with implementation and the need to take a precautionary approach, particularly in light of Te Mana o te Wai.[71]

[264] The only evidence offered by the Submitters' experts in support of a slope standard are two paragraphs in Mr McIntyre's evidence[72] and three paragraphs in Ms Hunter's evidence.[73] Ms Hunter supported a slope threshold being included in Rule 14.5.1.1(a), as it ensures the regional rules are appropriately targeted to managing water quality effects by only applying to higher risk areas where the risk of sedimentation and water quality effects are more likely to occur.[74]

[265] In response to the technical difficulties and uncertainties raised by Ms Boyd in relation to slope thresholds, Ms Hunter considered this could be addressed by

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[71] Boyd, SOE dated 18 February 2022 at [145]-[170].
[72] McIntyre, SOE dated 25 February 2022 at [43]-[44].
[73] Hunter, SOE dated 25 February 2022 at [53]-[55].
[74] Hunter, SOE dated 25 February 2022 at [53]-[55].

including either a definition or explanation note regarding slope.[75] No such definition or explanation was proposed to the court.

[266] As Ms Boyd explained in responding to questions from Commissioner Hodges, whilst a slope threshold was considered in workshops during the development of PC8, ultimately the Regional Council considered that it was appropriate to provide a permitted activity pathway for those smaller earthworks activities (less than 2,500 m^2) but that a resource consent should be required for larger activities where there is a greater potential for adverse effects.[76]

[267] We agree with the Regional Council that there is not a sufficient evidential basis for inclusion of these slope thresholds and we decline to approve the same.

Scope challenge by Remarkables Park

[268] Remarkables Park submits that there is no scope to amend the definition of residential development to include visitor accommodation, which would bring it within the ambit of the residential earthworks provisions of PC8. This would amount to an expansion of the scope of the notified plan change.

[269] It accepts there was a submission (from Fish and Game) to expand PC8 to apply the earthworks rules to all activities, "commercial and industrial", although it submits that the submission was not "on" the plan change. As such, it submits that the submission cannot afford jurisdiction to include visitor accommodation within the definition of 'residential development'.

[270] The issue for the court is to determine what was meant by residential development in the notified plan change. There was no such definition in the notified PC8 or in the RPW. The definition was added as an outcome of the

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[75] Hunter, SOE dated 25 February 2022 at [54].
[76] NOE, p 167-168.

mediation process that was agreed to by parties except Remarkables Park.

[271] As to the applicable legal principles, we refer to and apply, the summary of the law as recently re-stated in the annexure to the Environment Court decision on PC7.

[272] In summary, when considering a plan change the Environment Court must apply cl 10(1)-(3) of Schedule 1 to the Act as if it were a local authority.[77] Schedule 1 provides that the local authority must give a decision on the provisions and matters raised in the submissions.

[273] The court's PC7 decision observes that the sections of the RMA that empower the Minister to call-in plans do not use the language used in Schedule 1 where a council promotes a change to a plan. Instead of the public making a submission that is "on" the plan change, they are now able to make a submission "about" the called-in plan change.

[274] However, we note that the court in PC7 considered that there is no difference in meaning between "on" and "about". Accordingly, the principles established by the Senior Court decisions that identify principles to be applied when establishing jurisdiction to grant relief, were held to apply in a called-in plan change.

[275] Accordingly, we apply the two-part test emanating from the High Court decision in *Clearwater Resort Ltd v Christchurch City Council*[78] referred to and applied in PC7. A submission is 'on' a plan change if:

(a) the submission addresses the extent to which the plan change would alter the status quo; and
(b) the submission does not cause the plan changed to be appreciably

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[77] RMA, s149U(6).
[78] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

> amended without real opportunity for participation by those potentially affected.

[276] The first limb of the test is intended to act as a filter to ensure a direct connection between the amendment sought in the submission and the degree of alteration proposed by the notified plan change.

[277] As recorded in the PC7 decision, the s32 report is able to be referred to in defining the intended breadth of the change. If the submission raises matters that should have been addressed in the s32 report but which were not referred to, the matters are *unlikely* to fall within the ambit of the plan change. However, the s32 report does not operate as the test for determining scope.

[278] Remarkables Park contends that the s32 evaluation in this context is a key determinant of what is within the scope of PC8. Counsel refers to Ms Boyd's evidence of 17 December 2021, where she records the rationale for limiting the provisions to earthworks for residential development. Central to this was an analysis of building consent data that shows building consents, for residential buildings, make up the majority of building consents issued for buildings in every district of the region except Clutha.

[279] In closing, counsel referred to questions put to Ms Boyd in relation to the breakdown of building consents, where she stated that statistics New Zealand data contain two overarching categories for building consents; residential buildings and non-residential buildings. Within the residential building category there are a number of sub-categories which include dwellings, houses, townhouses, flats, retirement village units and apartments. The definition of 'houses' includes baches, cribs and chalets.

[280] Notably, Ms Boyd explained that 'non-residential' buildings include hotels, motels, and boarding houses. This latter category of buildings was not considered at the s32 evaluation stage. Accordingly, Remarkables Park submits that to include this now is outside the scope of the change as explained in the evaluation for

notification of PC8.

[281] Counsel submits that it would be impermissible to include this category of development within the definition of 'residential development' for the purpose of applying the provisions of PC8. In the alternative, the Submitters proposed a further drafting of the term 'residential development' that states:

> Residential development: Means the preparation of land for, and construction of, development infrastructure and buildings (including additions and alterations) for residential activities~~,~~ and includes ~~visitor accommodation and~~ retirement villages. It excludes camping grounds, motor parks, hotels, motels, backpackers' accommodation, bunkhouses, lodges and timeshares.

[282] The amended definition would capture residential development used (primarily) as such, whilst also applying to visitors' accommodation through Airbnb (for instance).

[283] After the close of the hearing we received a memorandum from counsel for the Regional Council stating that further consultation had occurred with parties to the mediation agreement, many of whom expressed support for the Submitters' alternative definition or would otherwise agree or abide by the court's decision,[79] although no response had been received from two.[80]

[284] We find that the extended definition originally agreed at mediation is not within scope, for reasons advanced by Remarkables Park, as summarised above, and agree that there are likely to have been many persons who would be disaffected by this change as there was nothing in the notified documents to hint at this as a potential outcome of the submission process, which could result in procedural

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[79] Director-General of Conservation; Kāi Tahu ki Otago; Ngāi Tahu ki Murihiku; Queenstown Lakes District Council; Dunedin City Council; Otago Fish and Game Council and Central South Island Fish and Game Council; Willowridge Developments Ltd; Vivian and Espie Ltd; RCL Henley Downs Ltd; and Friends of Lake Hayes Society Inc.

[80] Federated Farmers New Zealand – Otago and North Otago provinces; and Royal Forest and Bird Protection Society of New Zealand Inc.

unfairness.

[285] We find that the alternative proposed by the Submitters provides certainty as to the range of development to which PC8 applies. As the majority of parties who agreed to the mediated outcome are agreeable to the alternative (or will abide by the court's decision), we substitute this alternative definition for that which had been agreed through mediation.

Decisions on submissions

[286] There were a number of submitters seeking changes to Part G who were not involved in mediation. However, Appendix 2 to this decision sets out recommendations made by Ms Boyd on all submission points raised in all submissions. The court is broadly in agreement with those recommendations, and adopts them as reasons for decision on these submissions. However, this decision has addressed the outstanding issues on the contested provisions.

[287] We are satisfied that the recommended decisions broadly reflect the reasons for the court's decision in relation to the contested provisions, and this decision should be read alongside and prevail over reasons for the recommended decision in Appendix 2, in the event of any inconsistency. .

Outcome

[288] Pursuant to s149U(6) and cl 10(1)-(3) of Schedule 1 RMA, the court's decision on PC8 is to amend it as set out in the 'Annexure 1: Final Plan Change 8 Parts A, G and H Provisions' attached to and forming part of this decision.

[289] Pursuant to s149U(6) and cl 10(1) to (3) of Schedule 1 of the Resource Management Act 1991, the court makes the decisions shown in the record of decisions attached as 'Annexure 2: Final Plan Change 8 Parts A, G and H decisions on submissions'.

For the court

P A Steven
Environment Judge

Annexure 1: Final Plan Change 8 Parts A, G and H Provisions

PART A: URBAN DISCHARGES

Red text shows changes to the planning provisions proposed in the notified version of proposed Plan Change 8 (underline shows new wording and strike-through showing deleted wording).

Green text indicates further changes agreed to by the parties at mediation (underline shows new wording and strike-through showing deleted wording).

Blue text indicates further changes Ms Boyd recommended post-mediation (underline shows new wording and strike-through showing deleted wording).

Amended Policy 7.C.5

Avoid significant ~~Minimise the~~ adverse environmental effects and minimise other adverse effects on waterbodies, with respect to ~~of~~ discharges ~~With respect to discharges~~ from any new stormwater reticulation system, or any extension to an existing stormwater reticulation system, ~~to require:~~ by requiring:

(a) The separation of sewage and stormwater; and

(b) Measures to prevent contamination of the receiving environment by industrial or trade waste; and

(c) The use of appropriate techniques to trap debris, sediments and nutrients present in runoff; and

(d) Consideration of appropriate measures to reduce and/or attenuate stormwater being discharged from rain events; and

(e) Consideration of appropriate measures for ~~discharge~~ discharging to land, in preference to ~~direct discharge~~ discharging directly to water, to address adverse effects on Kāi Tahu cultural and spiritual beliefs, values and uses.

Explanation

In terms of the Plan's rules for permitted and discretionary activities for new discharges, or extensions to the catchment area of existing discharges from reticulated stormwater systems, the requirements of (a) to (c) will apply, as required.

Principal reasons for adopting

This policy is adopted to reduce the potential for adverse effects arising from contaminants ~~to be~~ present in new stormwater discharges. This is intended to mitigate the impact on the water quality of receiving water bodies in urbanised areas or other areas served by a stormwater reticulation system.

Amended Policy 7.C.6

Reduce the adverse environmental effects from existing stormwater reticulation systems by:

(a) Requiring the implementation of appropriate measures to progressively ~~upgrade of stormwater reticulation systems to minimise the volume of~~

reduce sewage entering the stormwater reticulation system ~~and the frequency and volume of sewage overflows~~; and

(b) ~~To promote~~ ~~Promoting~~ Requiring consideration of appropriate measures to ~~the~~ progressively improve ~~upgrading of~~the quality of water discharged from existing stormwater reticulation systems, including ~~through~~:

~~(i) The separation of sewage and stormwater; and~~

(i~~i~~) Measures to prevent contamination of the receiving environment by industrial or trade waste; and

(ii~~i~~) The use of techniques to trap debris, sediments and nutrients present in runoff; and

(iii) ~~m~~Measures to reduce and/or attenuate stormwater being discharged from rain events; and

(iv) ~~m~~Measures for ~~discharge~~ discharging to land, in preference to ~~direct discharge~~ discharging directly to water, to address adverse effects on Kāi Tahu cultural and spiritual beliefs, values and uses.

Explanation

The Otago Regional Council will ~~encourage~~ require the operator of any existing stormwater reticulation system to improve the quality of stormwater discharged from the system. ~~Measures that can be taken to achieve this improvement include:~~

~~(a) The separation of sewage and stormwater;~~

~~(b) Measures to prevent contamination of the receiving environment by industrial or trade waste; and~~

~~(c) The use of techniques to trap debris, sediments and nutrients present in runoff.~~

Priority will be given to improving discharges to those water bodies where natural and human use values are adversely affected. Such measures may not be necessary where an existing discharge is having no more than a minor adverse effect on any natural or human use value supported by an affected water body.

Principal reasons for adopting

This policy is adopted to reduce adverse effects arising from the level of contaminants present in existing stormwater discharges. This is intended to mitigate the impact on the water quality of receiving water bodies in urbanised areas or other areas served by a stormwater reticulation system.

New Policy 7.C.12

Reduce the adverse effects of discharges of human sewage from existing reticulated wastewater systems, including extensions to those systems, by:

(~~e~~a) Preferring discharges to land over discharges to water, unless adverse effects associated with a discharge to land are greater than a discharge to water; and

(~~a~~b) Requiring ~~reticulated wastewater~~ systems to be ~~designed,~~ operated, maintained and monitored in accordance with recognised industry standards; and

(c) Promoting the progressive upgrading of existing systems; and

(~~b~~d) Requiring the implementation of ~~measures to~~ appropriate:

(i) Measures to ~~P~~progressively reduce the frequency and volume of wet weather overflows; and

(ii) Measures to ~~M~~minimise the likelihood of dry weather overflows occurring; and

(iii) Contingency measures to minimise the effects of discharges of wastewater as a result of system failure or overloading of the system; and

~~(d) Having particular regard to any adverse effects on cultural values.~~

(e) Recognising and providing for the relationship of Kāi Tahu with the water body, and having particular regard to any adverse effects on Kāi Tahu cultural and spiritual beliefs, values, and uses.

New Policy 7.C.13

Avoid in the first instance, and otherwise minimise, the adverse effects of discharges from new reticulated wastewater systems by:

(a) Preferring discharges to land, unless adverse effects associated with a discharge to land are greater than a discharge to water; and

(b) Requiring systems to be designed, operated, maintained and monitored in accordance with recognised industry standards; and

(c) Requiring the implementation of appropriate:

(i) Measures to minimise the frequency and volume of wet weather overflows;

(ii) Measures to minimise the likelihood of dry weather overflows occurring; and

(iii) Contingency measures to minimise the effects of discharges of wastewater as a result of system failure or overloading of the system; and

(d) Recognising and providing for the relationship of Kāi Tahu with the water body, and having particular regard to any adverse effects on Kāi Tahu cultural and spiritual beliefs, values, and uses.

PART G: EARTHWORKS FOR RESIDENTIAL DEVELOPMENTS

Red text shows changes to the planning provisions proposed in the notified version of proposed Plan Change 8 (underline shows new wording and strike-through showing deleted wording).

Green text indicates further changes agreed to by the parties at mediation (underline shows new wording and strike-through showing deleted wording).

Blue text indicates further changes made by the court (underline shows new wording and strike-through showing deleted wording).

New Policy 7.D.10

The loss or discharge of sediment from earthworks is avoided or, where avoidance is not achievable, best practice guidelines for minimising sediment loss are implemented to maintain water quality.

Note Below Section 14.5

Note: 1. The rules in Section 14.5 do not apply to earthworks or soil disturbances covered by the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017.

2. Discharges resulting from earthworks for residential development are addressed only through rules in section 14.5.

New Rule 14.5.1.1

The use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for residential development is a ***permitted*** activity providing:

(a) The area of exposed earth is no more than 2,500 m2 in any consecutive 12-month period per landholding; and

(b) Earthworks do not occur within 10 metres of a water body, a drain, a water race, or the coastal marine area (excluding earthworks for riparian planting), and

(c) Exposed earth is stabilised upon completion of the earthworks to minimise erosion and avoid slope failure; and

(d) Earthworks do not occur on contaminated or potentially contaminated land; and

(e) Soil or debris from earthworks is not placed where it can enter a water body, a drain, a race or the coastal marine area; and

(f) Earthworks do not result in flooding, erosion, land instability, subsidence or property damage at or beyond the boundary of the property where the earthworks occur; and

(g) The discharge of sediment does not result in any of the following effects in receiving waters, after reasonable mixing:

(i) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials; or

(ii) any ~~conspicuous~~ change in the colour or visual clarity; or

(iii) any emission of objectionable odour; or

(iv) the rendering of fresh water unsuitable for consumption by farm animals; or

(v) any significant adverse effects on aquatic life.

New Definition "Residential development"

Residential development:

Means the preparation of land for, and construction of, development infrastructure and buildings (including additions and alterations) for residential activities~~,~~ and includes ~~visitor accommodation and~~ retirement villages. It excludes camping grounds, motor parks, hotels, motels, backpackers' accommodation, bunkhouses, lodges and timeshares.

The terms development infrastructure, residential activity, ~~visitor accommodation~~, and retirement village are defined in the National Planning Standards.

New Rule 14.5.2.1

Except as provided by Rule 14.5.1.1, the use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for residential development is a ***restricted discretionary*** activity.

In considering any resource consent under this rule, the Otago Regional Council will restrict the exercise of its discretion to the following:

(a) Any erosion, land instability, sedimentation or property damage resulting from the activities; and

(b) Effectiveness of the proposed erosion and sediment control measures in reducing discharges of sediment to water or to land where it may enter water; and

(c) The extent to which the activity complies ~~Compliance~~ with the *Erosion and Sediment Control Guidelines for Land Disturbing Activities in the Auckland Region 2016 (Auckland Council Guideline Document GD2016/005)*; and

(d) Any adverse effect on water quality, including cumulative effects, and consideration of trends in the quality of the receiving water body; and

(e) ~~Any adverse effect on any natural or human use value, and on use of the coastal marine area for contact recreation and seafood gathering; and~~

~~(f) Measures to avoid, remedy or mitigate adverse effects on Kāi Tahu cultural and spiritual beliefs, values and uses.~~

Any adverse effect on:

i. Kāi Tahu cultural and spiritual beliefs, values and uses;

ii. Any natural or human use value;

iii. Use of water bodies or the coastal marine area for contact recreation and food gathering;

and measures to avoid, remedy or mitigate these adverse effects.

New Definition "Earthworks"

Earthworks Means the alteration or disturbance of land, including by moving, removing, placing, blading, cutting, contouring, filling or excavation of earth (or any matter constituting the land including soil, clay, sand and rock); but excludes gardening, cultivation, and disturbance of land for the installation of fence posts.

Part H provisions

Amended Policy 10.4.2

Avoid the adverse effects of an activity on a Regionally Significant Wetland or a regionally significant wetland value, but allow remediation or mitigation of an adverse effect only when the activity:

(a) Is lawfully established; or

(b) Is nationally or regionally significant ~~important~~ infrastructure, and has specific locational constraints; or

(c) Has the purpose of maintaining or enhancing a Regionally Significant Wetland or a regionally significant wetland value.

Annexure 2: Final Plan Change 8 Parts A, G and H decisions on submissions[1]

Recommended decisions on submissions (general submissions)

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
Plan Change 8									
1	**Plan Change 8**	80070	80070.01 80070.02		**Jillian Sullivan**	Support	Approve plan change 8 with amendments: Amend to strengthened through a regulatory framework to ensure no further degradation of natural waterways and wetlands; Include measures to provide financial support to encourage farmers to move away from intensive animal agriculture to crops	Reject	To the extent the submission relates to the urban sector provisions, PC8 is intended to be an interim first step in ensuring no further degradation while the new LWRP is being developed. The proposed Otago Regional Policy Statement 2021 (PORPS 2021) and the new LWRP will continue that work. It is not appropriate to put financial support provisions in a regional plan however there are non-regulatory methods in the PORPS 2021 to enable this to occur, outside of the RMA.
2	**Plan Change 8**	80080	80080.01 80080.02		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Generally supports intent of Plan Change 8. Amend to ensure the interim framework is consistent with the documents identified as relevant to these plan changes; and that the interim framework is effective in managing activities which are having an immediate adverse effect on water quality in Otago, to guarantee that no further degradation of the health of water bodies occurs both generally, and in reference to the relevant numeric attribute states in the NPS-FM 2020 and water bodies which do not meet minimum contact recreation standards or provide for ecosystems are improved in the short term.	Reject	To the extent the submission relates to the urban sector provisions, PC8 does not have scope to amend the Regional Plan: Water (RPW) to fully give effect to the NPSFM 2020, and the NPSFM 2020 will be addressed through the new LWRP.
3	**Plan Change 8**	80084	80084.01		**Beef + Lamb New Zealand**	Oppose	That PC8 be amended and re-notified.	Reject	PC8 does give effect to the RMA. It is important to note that the PC8 does not have numerical limits set under the NPSFM 2020 yet and the plan change is an interim step to address the policy gaps left by PC6AA.
	Plan Change 8			*FS809.25*	***Public Health South***	*Oppose*		Accept	

[1] Boyd SOE, dated 18 February 2022, Appendices 1, 2, 5 and 8. The Court made decisions on general submissions to PC8 (to the extent that they related to the primary sector provisions) in *Re Otago Regional Council* [2022] NZEnvC 67.

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
4	**Plan Change 8**	80084	80084.02		**Beef + Lamb New Zealand**	Oppose	Amend PC8 by adding the attached principles for the allocation of nutrients.	Reject	PC8 is not about the allocation of nutrients.
	Plan Change 8			*FS804.76*	***Federated Farmers of New Zealand - Otago and North Otago Provinces***	*Oppose*		Accept	
5	**Plan Change 8**	80103	80103.05		**Rachel Napier**	Oppose	Amend PC8 by adding 10 year "license to farm" to give certainty about farming future. Uncertainty of rules changing means viability of farming is uncertain, as additional compliance costs may make farming stock uneconomical.	Reject	To the extent the submission relates to the urban sector provisions, this proposal is too broad for ORC to achieve the outcomes it is required to achieve.
6	**Plan Change 8**	80103	80103.06		**Rachel Napier**	Oppose	Base water reforms on catchments.	Reject	To the extent the submission relates to the urban sector provisions, this sort of planning does not fit with the RPW. However, Freshwater Management Units will be a focus in the new LWRP, which is currently being developed.
7	**Plan Change 8**	80108	80108.07		**Lynne Stewart**	Oppose	Amend PC8 to specify intention to identify critical source areas, and topographical conditions relating to runoff in specific properties	Reject	ORC is mindful that Freshwater Farm Plans (FFP) under the RMA will set out minimum criteria for managing contaminants. Controls over issues such as managing critical source areas are likely to either be in the FFP's or managed by FMU as ORC develops the new Land and Water Regional Plan, which is currently being developed.
8	**Plan Change 8**	80017	80017.06		**Springwater Ag Limited**	Oppose	Introduce provisions to PC8 to allow ORC to offer rates relief to offset regulatory compliance costs stemming from the plan change.	Reject	Rates reliefs is not a matter that can be included in a regional plan under the RMA and is outside the scope of PC8.
9	**Plan Change 8**	80005	80005.01		**W Thompson**	Oppose	Promote sustainable farming practices by promoting soil health.	Reject	To the extent the submission relates to the urban sector provisions, soil health is not an issue addressed PC8. ORC considers this submission is not "on" PC8 and therefore the relief requested is outside the scope of PC8.
10	**Plan Change 8**	80090	80090.02		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Oppose	Oppose Plan Change 8 on grounds that targeted consultation with community and stakeholders has not been undertaken	Reject	This is not a matter within scope of the plan change and is not "on" PC8. Targeted consultation was undertaken as outlined in Section 2 of the section 32 report for PC8.

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
	Plan Change 8			*FS806.14*	***New Zealand Pork Industry Board***	*Support*		Reject	
	Plan Change 8			*FS809.31*	***Public Health South***	*Oppose*		Accept	
11	**Plan Change 8**	80057 80093	80057.01 80093.01		**WAI Wanaka - Upper Clutha Lakes Trust** **Landpro Limited**	Not stated Support	Amend Plan Change 8 to be consistent with National Policy Statement for Freshwater Management, and the National Environmental Standards for Freshwater Management 2020.	Accept	PC8 was notified prior to the NPS-FM 2020 and NES-FW 2020 being notified. To the extent the submission relates to the urban sector provisions, some amendments have been proposed to the urban sector provisions of PC8 and the remainder of the NPSFM 2020 will be addressed through the new LWRP, which is currently being developed. PC8 does not have scope to amend the RPW to fully give effect to the NPSFM 2020. Alignment with the NPSFM is addressed in other specific submission points
12	**Plan Change 8**	80056	80056.01		**Two Farmers Farming Ltd**	Oppose	Decline Plan Change 8 in its entirety and align with the NPSFW	Reject	
13	**Plan Change 8**	80055 80004	80055.01 80004.01		**Director General of Conservation** **Maori Point Vineyard Ltd (Arthur)**	Support Oppose	The overall intent of PC8 is supported other than where specific changes are requested.	Accept in part	To the extent the submission relates to the urban sector provisions, some amendments have been proposed to the urban sector provisions of PC8 as a result of submissions and mediation.
14	**Plan Change 8**	80069	80069.01		**Wise Response Society Inc**	Not stated	Approve the plan change with amendments (specific relief not indicated)	Submission withdrawn	N/A
15	**Plan Change 8**	80025 80077	80025.01 80077.01		**R G Wright** **Shaping our Future Incorporated**	Support	Support the Plan Change	Reject	To the extent the submission relates to the urban sector provisions, some amendments have been proposed to the urban sector provisions of PC8 as a result of submissions and mediation.
16	**Plan Change 8**	80075 80089 80096	80075.01 80089.01 80096.01		**Nicola McGrouther** **Elizabeth Clarkson** **MF and DA Dowling**	Oppose	Decline Plan Change 8	Reject	To the extent the submission relates to the urban sector provisions, ORC has recommended changes to PC8 as notified.
17	**Plan Change 8**	80072 80072	80072.01 80072.02		**Te Runanga o Ngai Tahu**	Support	Te Rūnanga supports the submissions from Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou, Hokonui Rūnanga, Te Rūnanga o Waihōpai,	Reject	

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							Te Rūnanga Ōraka Aparima and Te Rūnanga o Awarua sent in as submissions from Aukaha and Te Ao Marama Inc. Te Rūnanga adopts the relief sought in those submissions.		
S32 Report									
18	**Section 32 Report**	80010	80010.02		**G F Dowling Ltd**	Oppose	Recognise the findings in the s32 report.	Reject	The relief requested is not applicable to the provisions of the plan change and the submission is not “on” PC8.
19	**Section 32 Report**	80090	80090.01		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Oppose	Oppose Section 32 report as it is not adequate in terms of alternative options available, and that consultation has not been adequate.	Reject	
	Section 32 Report			*FS806.13*	***New Zealand Pork Industry Board***	*Support*		Reject	
	Section 32 Report			*FS809.30*	***Public Health South***	*Oppose*		Accept	
20	**Section 32 Report**	80010	80010.03		**G F Dowling Ltd**	Oppose	Oppose Farm Environmental Plans being mandatory.	Reject	The relief requested is not applicable to the provisions of the plan change and the submission is not “on” PC8. The provision of Farm Environmental Plans is mandated under Part 9A of the RMA, with further direction still to come from central government.
Maps									
21	**Maps**	80097	80097.01		**Neil Grant**	Oppose	Correct existing maps of lower slope zones and minor creeks in the eastern Rock and Pillar Range in the Strath Taieri area	Reject	The relief requested is not applicable to the provisions of the plan change so the submission is not “on” PC8. PC8 does not include any new maps, or propose changes to existing maps.

Part A recommended decisions on submissions

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
Amended Policy 7.C.5									
1.	Policy 7.C.5	80018	80018.02		**Dunedin City Council**	Support	Provide a catchment-scale focus, clear and achievable standards and consideration of entire system requirements.	Reject	The relief requested is beyond the scope of PC8. However it is the intent of the Land and Water Regional Plan, which is currently being developed and will give full effect to the NPSFM 2020 by including limits and thresholds within Freshwater Management Units (**FMUs**).
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support*		Reject	
2.	Policy 7.C.5	80028	80028.01		**Central Otago Environment Society**	Support	Specify regulatory limits for urban stormwater and sediment discharges and stormwater systems are progressively upgraded to meet such regulatory limits	Reject	
				FS803	***Dunedin City Council***	*Oppose*		Accept	
3.	Policy 7.C.5	80108	80108.03		**Lynne Stewart**	Oppose	Specify regulatory limits for urban stormwater and sediment discharges and stormwater systems are progressively upgraded to meet such regulatory limits	Reject	
4.	Policy 7.C.5	80080	80080.08		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend Policy 7.C.5 to insert minimum ecosystem health thresholds for stormwater systems	Reject	
				FS803	***Dunedin City Council***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Reject	
				FS811	***Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kāi Tahu ki Otago)***	*Support*		Reject	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Reject	
5.	Policy 7.C.5	80082	80082.01		**Royal Forest and Bird Protection Society of New Zealand Inc**	Support in part	Amend Policy 7.C.5 as follows Avoid significant ~~Minimise the~~ adverse environmental effects and avoid where practicable, or minimise other adverse effects of discharges With respect to discharges ~~with respect to discharges~~ from any new stormwater reticulation system, or any extension to an existing stormwater reticulation system, ~~to require~~: by requiring: (a) The separation of sewage and stormwater; and (b) Measures to prevent contamination of the receiving environment by industrial or trade waste; and (c) Measures to avoid, remedy and mitigate and minimise the presence of debris, sediments and nutrients runoff, including the The use of techniques to trap debris, sediments and nutrients present in runoff.	Accept in part	At mediation, parties agreed it would assist implementation to require significant adverse effects to be avoided, and other adverse effects minimised. Parties also agreed that some techniques to trap debris, sediments and nutrients present in run-off may not be appropriate in all circumstances and therefore clause (c) would be clarified by including “appropriate techniques”.
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support in part*		Accept in part	
6.	Policy 7.C.5	80080	80080.09		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend Policy 7.C.5 as follows: Avoid ~~Minimise t~~he adverse environmental effects of discharges ~~With respect to discharges~~ from any new stormwater reticulation system, or any extension to an existing stormwater reticulation system, ~~to require~~ by requiring: ...	Accept in part	At mediation, parties agreed it would assist implementation to require significant adverse effects to be avoided, and other adverse effects minimised. At mediation, it was agreed to add a new subclause requiring

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							(d) Measures to filter, attenuate or prevent runoff being discharged during rain events.		consideration of appropriate measures to reduce or attenuate runoff being discharged during rain events as it may not always be possible to implement measures to filter, attenuate, or prevent run-off being discharged during rain events.
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Accept in part	
7.	Policy 7.C.5	80078	80078.01		**Ngāi Tahu Ki Murihiku**	Support	Add a new clause to Policy 7.C.5 to require discharges to land as a first preference to direct discharge of contaminants to water in order to protect the mauri of the waterbody: d) The use of discharge to land options as a preference wherever practicable.	Accept in part	At mediation, it was agreed to add a new subclause requiring consideration of appropriate measures for discharge to land, in preference to direct discharge to water, to address adverse effects on Kāi Tahu cultural and spiritual beliefs, values and uses. Two minor grammatical corrections are required to the mediated version.
				FS802	***Director General of Conservation***	*Support*		Accept in part	
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support in part*		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
8.	Policy 7.C.5	80080	80080.10		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend the **Principle reasons for adopting** from reducing the potential for "contaminants to be present" to reducing the potential for "adverse effects to arise from": This policy is adopted to reduce the potential for ~~contaminants to be present in~~ adverse effects to arise from new stormwater discharges.	Accept in part	At mediation, it was agreed that a minor amendment to the principal reasons was appropriate to recognise that the intent of the policy is to reduce the potential for adverse effects arising from contaminants to be present, rather than reducing the potential for contaminants to be present.
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
9.	Policy 7.C.5	80011 80019 80027	80011.05 80019.05 80027.03		**Friends of Lake Hayes Soc Inc** **L and A Bush** **Matthew Sole**	Support Support Support	Approve the plan change	Accept in part	Amendments are proposed to Policy 7.C.5 in response to other submissions.
10.	Policy 7.C.5	80013 80016 80038 80055 80059 80090	80013.01 80016.01 80038.01 & 03 80055.02 80059.01 80090.03		**Southern District Health Board** **Horticulture New Zealand** **Ravensdown Ltd** **Director General of Conservation** **Kāi Tahu ki Otago** **Federated Farmers of New Zealand - Otago and North Otago Provinces**	Support Support Support Support Support Support	Retain Policy 7.C.5 as notified	Reject	
Amended Policy 7.C.6									
11.	Policy 7.C.6	80018	80018.03		**Dunedin City Council**	Support	Provide a catchment-scale focus, clear and achievable standards and consideration of entire system requirements.	Accept in part	Taking a catchment scale approach is beyond the scope of PC8 and is

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							Amend as follows: (1) The policy would benefit from improved clarity to ensure the intent of the policy is well understood. The wording as proposed will not meet the outcome the ORC seeks, that the policy "strengthens the expectations regarding reductions in sewage overflows into stormwater systems" as the expectations are not quantified or timebound. (2) It would be useful to clarify: a) what a "progressive" upgrade involves. b) how "minimise the volume of sewage" will be determined. It is noted the frequency and volume of sewage overflows is dependent on weather patterns and the number of rainfall events, which are variable each year. c) when and how the policy will be applied to require stormwater upgrades that specifically address sewage overflows. d) whether there is a target or timeframe for reducing overflows. e) how the ORC will require the implementation of policy 7.C.6, given there are no proposed changes to rules. The current rules permit stormwater discharges provided the discharge does not contain any human sewage. The DCC considers with the proposed wording, the outcome the ORC seeks "to improve the quality of discharges" will not be achieved through requiring "the progressive upgrade of stormwater reticulation systems" because it has no targeted direction and guidance for how this will be achieved. (3) Common terminology should be used to support conversations around improvements and change. Policy 7.C.6 would benefit from clarifying whether "sewage overflows" includes both "dry weather" as well as "wet weather" overflows.		the intent of the proposed Land and Water Regional Plan, which is currently being developed and will give full effect to the NPSFM 2020. The changes agreed at mediation improve the clarity of the policy direction in relation to the reduction of sewage entering stormwater reticulation and requiring consideration of appropriate measures to progressively improve the quality of water discharged from existing stormwater reticulation systems.
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support*		Accept in part	
				FS809	***Public Health South***	*Support*		Accept in part	
12.	Policy 7.C.6	80028	80028.02		**Central Otago Environment Society**	Support	Specify regulatory limits for urban stormwater and sediment discharges and stormwater systems are progressively upgraded to meet such regulatory limits.	Reject	The relief requested is beyond the scope of PC8. However this is the intent of the proposed Land and Water Regional Plan, which is currently being developed and will give full effect to the NPSFM 2020.
				FS803	***Dunedin City Council***	*Oppose*		Accept	
13.	Policy 7.C.6	80078	80078.02		**Ngāi Tahu Ki Murihiku**	Support	Amend Policy 7.C.6 to give effect to Te Mana o te Wai, such as the following:	Accept in part	At mediation, the parties agreed to amend clause (a) so that it is clear that the requirement is to

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							Reduce the adverse environmental effects from existing stormwater reticulation systems by: (a) Requiring the progressive upgrade of stormwater reticulation systems to ~~minimise the volume of~~ avoid sewage entering the system and ~~the frequency and volume of~~ sewage overflows; and (b) ~~To promote~~ Promoting the progressive upgrading of ~~the quality of water discharged from existing~~ stormwater reticulation systems to protect the mauri of waterbodies, including through: (i) The separation of sewage and stormwater; and (ii) Measures to prevent contamination of the receiving environment by industrial or trade waste; and (iii) The use of techniques to trap debris, sediments and nutrients present in runoff; and (d) The use of discharge to land options as a preference wherever practicable.		implement appropriate measures to progressively reduce sewage entering the stormwater reticulation system. This provides some flexibility for situation-specific measures to be implemented, while still retaining the overall goal (to reduce sewage in stormwater reticulation systems), and recognising the more limited ability to manage adverse effects where infrastructure already exists. At mediation, it was agreed to add a new subclause requiring consideration of appropriate measures for discharge to land, in preference to direct discharge to water, to address adverse effects on Kāi Tahu cultural and spiritual beliefs, values and uses. Two minor grammatical corrections are required to the mediated version.
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support in part:*		Accept in part	
				FS809	***Public Health South***	Support in Principle		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
14.	Policy 7.C.6	80004 80022	80004.02 80022.03		**Maori Point Vineyard Ltd (Arthur)** **B P Marsh**	Oppose Support	Policy 7.C.6(b) needs to be strengthened by amending "promoting" to "requiring". (b) ~~To promote~~ ~~Promoting~~ Requiring the progressive upgrading of the quality of water discharged from existing stormwater reticulation systems, including through:	Accept	The changes agreed at mediation improve the clarity of the policy direction in relation to the reduction of sewage entering stormwater reticulation and requiring consideration of appropriate measures to progressively improve the quality of water discharged from existing stormwater reticulation systems.
				FS803	***Dunedin City Council***	*Oppose*		Reject	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Accept	
15.	Policy 7.C.6	80055	80055.03		**Director General of Conservation**	Support in part	Policy 7.C.6(b) needs to be strengthened to give effect to Policy 23 (4) NZCPS. This is because of the cross contamination with sewage systems, given the generally poor quality of discharges from existing stormwater reticulation systems. Add the following clauses: ~~To promote~~ ~~Promoting~~ Requiring the progressive upgrading of the quality of water discharged from existing stormwater reticulation systems, including through: (i) The separation of sewage and stormwater; and	Accept in part	The changes agreed at mediation improve the clarity of the policy direction in relation to the reduction of sewage entering stormwater reticulation and requiring consideration of appropriate measures to progressively improve the quality of water discharged from existing stormwater reticulation systems.

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							(ii) Measures to prevent contamination of the receiving environment by industrial or trade waste; and (iii) The use of techniques to trap debris, sediments and nutrients present in runoff;~~.~~ and iv) Reducing contaminant and sediment loadings at source through contaminant treatment and by controls on land use activities; and v) Requiring integrated management of catchments and stormwater networks; and vi) Promoting design options that reduce flows into stormwater reticulation systems at source.		It was also agreed at mediation to include a new clause to require measures to reduce and/or attenuate stormwater being discharged from rain events.
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support in part*		Accept in part	
				FS809	***Public Health South***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Accept in part	
16.	Policy 7.C.6	80080	80080.11		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend Policy 7.C.6 as follows: Reduce and progressively avoid the adverse environmental effects from existing stormwater reticulation systems by: ... (b) ~~To promote~~ ~~Promoting~~ Require the progressive upgrading of the quality of water discharged from existing stormwater reticulation systems, including through: (i)... (ii)... (iii)... (iv) Measures to filter, attenuate or prevent runoff being discharged during rain events.	Accept in part	At mediation, the parties agreed that the chapeau should be retained as notified as it recognised the more limited ability to manage adverse effects where infrastructure already exists. It was also agreed at mediation to include a new clause to require measures to reduce and/or attenuate stormwater being discharged from rain events.
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS809	***Public Health South***	*Support*		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Accept in part	
17.	Policy 7.C.6	80082	80082.02		**Royal Forest and Bird Protection Society of New Zealand Inc**	Support in part	Amend Policy 7.C.6 as follows: Progressively Reduce the adverse environmental effects and avoid increasing cumulative adverse effects from existing stormwater reticulation systems by: (a) Requiring the progressive upgrade of stormwater reticulation systems to minimise the volume of sewage entering the system and the frequency and volume of sewage overflows; and (b) ~~To promote~~ Promoting the progressive upgrading of the quality of water discharged from existing stormwater reticulation systems, including through:	Accept in part	At mediation, the parties agreed that the chapeau should be retained as notified as it recognised the more limited ability to manage adverse effects where infrastructure already exists. It was also agreed at mediation to include a new clause to require measures to reduce and/or attenuate stormwater being discharged from rain events.

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							(i) The separation of sewage and stormwater; and (ii) Measures to prevent contamination of the receiving environment by industrial or trade waste; and (iii) Measures to prevent the presence of debris, sediments and nutrients in runoff through the ~~The~~ use of techniques to trap debris, sediments and nutrients present in runoff; and (iv) Measures to filter reduce or prevent runoff being discharged during rain events.		
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support in part*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Accept in part	
18.	Policy 7.C.6	80080	80080.12		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend the **Principle Reasons for Adopting** from reducing the "level of contaminants to be present" to reducing "adverse effects arising from" existing stormwater discharges: This policy is adopted to reduce ~~the level of contaminants present in~~ adverse effects arising from existing stormwater discharges.	Accept in part	At mediation, it was agreed that a minor amendment to the principal reasons was appropriate to reflect that the intention of the policy is to reduce the adverse effects of discharges from existing stormwater reticulation systems.
				FS809	***Public Health South***	*Support*		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
19.	Policy 7.C.6	80019 80027 80011	80019.06 80027.04 80011.06		**L and A Bush** **Matthew Sole** **Friends of Lake Hayes Soc Inc**	Support 80027.04 80011.06	Approve the Plan Change.	Accept in part	Amendments are proposed to Policy 7.C.6 in response to other submissions.
20.	Policy 7.C.6	80013 80016 80038 80059 80090	80013.02 80016.02 80038.02 80059.02 80090.04		**Southern District Health Board** **Horticulture New Zealand** **Ravensdown Ltd** **Kāi Tahu ki Otago** **Federated Farmers of New Zealand - Otago and North Otago Provinces**	Support Support Support Support Support	Retain Policy 7.C.6 as notified	Reject	
New Policy 7.C.12									
21.	Policy 7.C.12	80018	80018.01		**Dunedin City Council**	Support	Provide a catchment-scale focus, clear and achievable standards and consideration of entire system requirements.	Reject	The relief requested is beyond the scope of PC8. However it is the intent of the proposed Land and Water Regional Plan, which is currently being developed and will give full effect to the NPSFM 2020 by including limits and thresholds within FMUs.
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support*		Reject	
				FS811	***Kāi Tahu ki Otago***	*Oppose in part*		Accept	
				FS807	***Ngai Tahu ki Murihiku***	*Oppose in part*		Accept	

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
22.	Policy 7.C.12	80018	80018.04		**Dunedin City Council**	Support	1. Provide clarity and guidance to ensure the intent of the policy is well understood and requirements are measurable, achievable, and targeted. 2. Provide clear guidance on expectations, targets and timeframes for improvement in wastewater overflows. 3. Policy 7.C.12(a) should focus on providing guidance on expectations around the quality of the discharge required. A water service provider needs certainty on the expectations for the quality of the discharge to enable the wastewater system to be designed, operated, maintained and monitored to meet those expectations. 4. Clarify Policy 7.C.12(b) so the "measures" that are applied are clear, and there are appropriate expectations for implementation of "measures" to reduce wet weather overflows and minimise dry weather overflows. 5. Clarify the meaning of "progressively reduce" in Policy 7.C.12(b). 6. Clarify technical terms in Policy 7.C.12 to avoid ambiguity – the proposed policy switches between discharges from a wastewater treatment plant 7.C.12(a) and (c), and network discharges (b). 7. Clarify the wording of policy 7.C.12(c) which is stronger than policy 7.B.1(g) of the operative Regional Plan: Water that promotes the discharge of contaminants to land in preference to water. Policy 7.C.12(c) should be clarified to include more guidance on the level of acceptable adverse effects and criteria used to determine when a discharge to water would be acceptable over a discharge to land. 8. The DCC's discharge consent monitoring often indicates no significant adverse water quality impacts, yet there is often a public expectation improvement must always occur. Clearer guidance on the expectations for information requirements and monitoring data required for a stormwater or wastewater discharge consent application would be helpful. 9. Policy 7.C.12(d) requires "particular regard" to be given to any adverse effects on cultural values. The policy would benefit from clarity on when the level of adverse effects become unacceptable, or the mitigation required. 10. Clarify how the ORC will require the implementation of Policy 7.C.12, given there are no proposed changes to rules and no methods associated with this policy to give guidance on how it will be implemented. The proposed policy provides little certainty on when or how it will be applied.	Accept in part	At mediation, the parties agreed that for clarity, two separate policies are required, one that relates to discharges from existing reticulated wastewater systems and another that relates to new reticulated wastewater systems. It was agreed by the parties to amend the chapeau of Policy 7.C.12 to limit its application to existing reticulated wastewater systems, including extensions, and the reduction of adverse effects from such systems. Changes were also agreed to the measure by which adverse effects are reduced. A number of structural amendments were agreed which the parties considered improved readability. New Policy 7.C.13 relates to new reticulated wastewater systems and directs that adverse effects are avoided in the first instance, and then otherwise minimised, from discharges from new systems. It also sets out a number of measures to achieve avoidance, and otherwise minimising, of adverse effects.

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support*		Accept in part	
				FS809	***Public Health South***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Oppose*		Reject in part	
				FS807	***Ngai Tahu ki Murihiku***	*Oppose*		Reject in part	
23.	Policy 7.C.12	80018	80018.06		**Dunedin City Council**	Support	Provide clear guidance on the management or application of biosolids to land, and for timeframes for making improvements.	Reject	The relief requested is beyond the scope of PC8 and is better addressed in the Land and Water Regional Plan, which is currently being developed.
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support*		Reject	
				FS811	***Kāi Tahu ki Otago***	*Oppose*		Accept	
				FS807	***Ngai Tahu ki Murihiku***	*Oppose*		Accept	
24.	Policy 7.C.12	80028	80028.xx		**Central Otago Environment Society**	Support	Specify regulatory limits for urban stormwater and sediment discharges and stormwater systems are progressively upgraded to meet such regulatory limits	Reject	The relief requested is beyond the scope of PC8. However it is the intent of the Land and Water Regional Plan, which is currently being developed and will give full effect to the NPSFM 2020 by including limits and thresholds within FMUs.
25.	Policy 7.C.12	80082	80082.03		**Royal Forest and Bird Protection Society of New Zealand Inc**	Support in part	Amend Policy 7.C.12 as follows: Reduce the adverse effects of discharges of human sewage from reticulated wastewater systems and avoid adverse effects of discharges from new reticulated system by: (a) Requiring reticulated wastewater systems to be designed, operated, maintained and monitored in accordance with recognised industry standards; and (b) Requiring the implementation of measures to: (i) Progressively reduce the frequency and volume of wet weather overflows; and (ii) Minimise the likelihood of dry weather overflows occurring; and (c) The implementation of contingency measures to minimise the risk of a discharge from a wastewater reticulation system to surface water in the event of a system failure or overloading of the system beyond its design capacity; and ~~(c)~~ (d) Preferring discharges to land over discharges to water, unless adverse effects associated with a discharge to land are greater than a discharge to water; and (d) Having particular regard to any adverse effects on cultural values; and ~~(d)~~(e) Having particular regard to any adverse effects on cultural values	Accept in part	Amendments are proposed to Policy 7.C.12 and a new policy proposed to enable different approaches for new and existing systems to address the practical constraints with applying some parts of Policy 7.C.12 to existing systems. At mediation, the parties agreed the addition of clause (c) was appropriate given the use of wastewater overflows in some systems in Otago but preferred alternative wording.
				FS803	***Dunedin City Council***	Oppose		Reject in part	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	Support in part		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Accept in part	
26.	Policy 7.C.12	80090	80090.05		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Support in part	Amend Policy 7.C.12 as follows: Reduce the adverse effects of discharges of human sewage from reticulated wastewater systems by: (a)~~Requiring~~ Ensuring reticulated wastewater systems are ~~to be~~ designed, operated, maintained and monitored in accordance with recognised industry standards; and (b) Requiring the implementation of reasonable measures to: (i) Progressively reduce the frequency and volume of wet weather overflows; and (ii) Minimise the likelihood of dry weather overflows occurring; and [adopt (c) and (d) as proposed]	Accept in part	Amendments are proposed to Policy 7.C.12 and a new policy proposed to enable different approaches for new and existing systems to address the practical constraints with applying some parts of Policy 7.C.12 to existing systems. At mediation, the parties agreed to amendments to clause (b) [now (d)] to clarify that measures to be implemented must be appropriate.
				FS809	***Public Health South***	*Support*		Accept in part	
27.	Policy 7.C.12	80013	80013.03		**Southern District Health Board**	Support in part	Amend Policy 7.C.12(b)(ii) from "minimise the likelihood" to "Eliminate as far as practicable" (ii) Eliminate as far as practicable ~~Minimise the likelihood~~ of dry weather overflows occurring; and	Reject	At mediation, the parties agreed to minor amendments to (b) [now (d)] to clarify that measures to be implemented must be appropriate.
				FS803	***Dunedin City Council***	*Oppose*		Accept	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support*		Reject	
				FS811	***Kāi Tahu ki Otago***	*Support*		Reject	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Reject	
28.	Policy 7.C.12	80059	80059.03		**Kāi Tahu ki Otago**	*Support in part*	Amend Policy 7.C.12(d) to read: (d) Having particular regard to any adverse effects on ~~cultural values~~ Kāi Tahu cultural and spiritual beliefs, values and uses.	Accept	At mediation, the parties agreed that clause (d) as notified was inconsistent with other wording adopted in PC8 related to Kāi Tahu values, and agreed to replace it with alternative wording consistent with Policies 7.C.5 and 7.C.6.
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support in part*		Accept	
				FS809	***Public Health South***	*Support*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept	
29.	Policy 7.C.12	80078	80078.03		**Ngāi Tahu Ki Murihiku**	Support	Ngāi Tahu ki Murihiku support discharges to land as a first preference to direct discharge of contaminants to water in order to protect the mauri of the waterbody. Amend Policy 7.C.12 to give effect to Te Mana o te Wai: Reduce the adverse effects of discharges of human sewage from reticulated wastewater systems by: (a) Promoting the progressive upgrading of reticulated wastewater systems to protect the mauri of waterbodies, including through: (i) preferring discharges to land over discharges to water, unless adverse effects associated with a	Accept in part	At mediation, the parties agreed to include new clause (c) requiring promoting the progressive upgrading of existing systems, to recognise that opportunities to improve systems should be encouraged when they arise. At mediation, the parties agreed that clause (d) as notified was inconsistent with other wording adopted in PC8 related to Kāi Tahu

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							discharge to land are greater than a discharge to water; and (ii) recognising and providing for the relationship of Kāi Tahu with Statutory Acknowledgement Areas and cultural values associated with waterbodies; and (iii) reducing the frequency and volume of overflows as an interim measure; and (~~a~~b) Requiring reticulated wastewater systems to be designed, operated, maintained and monitored in accordance with recognised industry standards; and ~~(b) Requiring the implementation of measures to:~~ ~~(i) Progressively reduce the frequency and volume of wet weather overflows; and~~ ~~(ii) Minimise the likelihood of dry weather overflows occurring; and~~ ~~(c) Preferring discharges to land over discharges to water, unless adverse effects associated with a discharge to land are greater than a discharge to water; and~~ ~~(d) Having particular regard to any adverse effects on cultural values.~~		values, and agreed to replace it with alternative wording consistent with Policies 7.C.5 and 7.C.6. At mediation, the parties agreed to amendments to (b) [now (d)]to clarify that measures to be implemented (including measures to reduce the frequency and volume of overflows) must be appropriate, recognising that different systems will have different constraints. A number of structural amendments were agreed at mediation, which the parties considered improved readability. This included retaining (c) regarding preferring discharges to land over discharges to water, as notified but moving it up to become clause (a).
				FS802	***Director General of Conservation***	*Support*		Accept in part	
				FS803	***Dunedin City Council***	*Oppose*		Reject in part	
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Support in part*		Accept in part	
				FS809	***Public Health South***	*Support*		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
30.	Policy 7.C.12	80019 80011 80027	80019.07 80011.07 80027.05		**L and A Bush** **Friends of Lake Hayes Soc Inc** **Matthew Sole**	Support Support Support	Approve the plan change.	Accept in part	Amendments are proposed to Policy 7.C.12 in response to other submissions.
31.	Policy 7.C.12	80016 80055	80016.03 80055.04		**Horticulture New Zealand** **Director General of Conservation**	Support Support	Retain Policy 7.C.12 as notified	Reject	
Regional Plan: Water for Otago									
32.	Policy 7.B.2	80018	80018.05		**Dunedin City Council**	Support	Revisit Policy 7.B.2 in light of the findings of the decisions panel on consent application RM19.051. Find a balance between the community's essential infrastructure needs and the management of discharges to the region's waterways.	Reject	The relief requested is out of scope and not 'on' PC8. Policy 7.B.2 is not part of PC8.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Accept	
				FS811	***Kāi Tahu ki Otago***	*Oppose*		Accept	
				FS807	***Ngai Tahu ki Murihiku***	*Oppose*		Accept	

Part G recommended decisions on submissions

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
Policy 7.D.10									
1.	Policy 7.D.10	80076	80076.03		**Queenstown Lakes District Council**	Support in part	Amend Policy 7.D.10 as follows: The loss or discharge of sediment from earthworks is avoided or, where avoidance is not achievable, best practice guidelines for minimising sediment loss are implemented to ensure water quality is maintained. Alternatively: Replace with the following: Ensure earthworks minimise erosion, land instability, and sediment generation and off-site discharge during construction activities associated with subdivision, use and development.	Accept in part	At mediation, the parties agreed to add the words "to maintain water quality" to the end of Policy 7.D.10 to clarify the purpose of the policy.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Reject in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Reject in part	
2.	Policy 7.D.10	80080	80080.22		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend Policy 7.D.10 as follows: The loss or discharge of sediment from earthworks and associated cumulative effects, is avoided or, where avoidance is not achievable, best practice guidelines for minimising sediment loss are implemented.	Reject	The decision requested does not add clarity or improve the policy.
				FS804	***Federated Farmers of New Zealand - Otago and North Otago Provinces***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Reject	
3.	Policy 7.D.10	80080	80080.23		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Insert provisions which defines or clarifies what is meant by "best practice guidelines" or the "best practicable option".	Reject	The decision requested is unnecessary in a policy. Rule 14.5.2.1(c) references the *Erosion and Sediment Control Guidelines for Land Disturbing Activities in the Auckland Region 2016 (Auckland Council Guideline Document GD2016/005) as a matter of discretion.* The guidelines are considered to be current best practice.
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Reject	
4.	Policy 7.D.10	80082	80082.26		**Royal Forest and Bird Protection Society of New Zealand Inc**	Support	Support Policy 7.D.10	Accept in part	Amendments are proposed to Policy 7.D.10 in response to other submissions.
5.	Policy 7.D.10	80011 80016 80055	80011.02 80016.09 80055.26		**Friends of Lake Hayes Soc Inc** **Horticulture New Zealand** **Director General of Conservation**	Support Support Support	Retain Policy 7.D.10 as notified	Reject	

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
		80059 80078	80059.27 80078.27		**Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kāi Tahu ki Otago)** **Ngāi Tahu Ki Murihiku**	Support Support			
Note 2									
6.	Note 2	80042	80042.22		**Otago Regional Council**	Support in part	Amend Note 2 to section 14.5 as shown: Discharges resulting from earthworks for residential development are addressed only through rules in section 14.5.	Accept	The decision requested clarifies that the rules in section 14.5 manage earthworks for residential development, and discharges from earthworks associated with activities other than residential development are still subject to the rule framework in other sections of the RPW.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Reject	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Reject	
Rule 14.5.1.1									
7.	Rule 14.5.1.1	80037	80037.01		**Vivian and Espie Ltd**	Oppose	Delete Rule 14.5.1.1	Reject	It is appropriate for ORC to have land use rules for activities that have an impact on water quality relating to the avoidance or mitigation of natural hazards. Regional councils and territorial authorities perform different (albeit interconnected) roles in managing earthworks.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
8.	Rule 14.5.1.1	80067	80067.01		**John Edmonds & Associates Ltd**	Oppose	Delete Rule 14.5.1.1	Reject	
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
9.	Rule 14.5.1.1	80071	80071.01		**RCL Henley Downs Ltd**	Oppose	Delete Rule 14.5.1.1	Reject	
				FS812	***Waterfall Park Developments Limited***	*Support*		Reject	
10.	Rule 14.5.1.1	80076	80076.01		**Queenstown Lakes District Council**	Support in part	Amend Rule 14.5.1.1 to exclude Queenstown Lakes District from application of rule 14.5.1.1, and clarify that land use erosion and sediment management is undertaken through Queenstown Lakes District Councils Proposed District Plan (PDP). OR Delete the rule OR Amend the rule to be consistent with Chapter 25 of the PDP, particularly Rules 25.5.11, 25.5.12 and 12.5.19.	Reject	It is appropriate for ORC to have land use rules for activities that have an impact on water quality. Regional councils and territorial authorities perform different (albeit interconnected) roles in managing earthworks. While QLDC and ORC have overlapping responsibilities in relation to the use of land, QLDC cannot manage the discharge of sediment to water as this is a regional council function under section 30(1)(f) of the RMA. The discharge of sediment from earthworks arises from a use of land, therefore it is necessary for ORC to manage both the land use and discharge components of the activity in order to manage the
				FS803	***Dunedin City Council***	*Oppose in part*		Accept in part	
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Accept	
				FS812	***Waterfall Park Developments Limited***	*Support*		Reject	

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
									potential adverse effects on water quality.
11.	Rule 14.5.1.1	80018	80018.09		**Dunedin City Council**	Support	Align the earthworks rules with those of the 2GP including to remove duplication.	Reject	It is appropriate for ORC to have land use rules for activities that have an impact on water quality. Regional councils and territorial authorities perform different (albeit interconnected) roles in managing earthworks. While DCC and ORC have overlapping responsibilities in relation to the use of land, DCC cannot manage the discharge of sediment to water as this is a regional council function under section 30(1)(f) of the RMA. The discharge of sediment from earthworks arises from a use of land, therefore it is necessary for ORC to manage both the land use and discharge components of the activity in order to manage the potential adverse effects on water quality.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
12.	Rule 14.5.1.1	80113	80113.01		**Remarkables Park Limited**	Oppose	Amend Rule 14.5.1.1 such that earthworks already granted by Queenstown Lakes District Council are deemed to be a permitted activity; OR amend 14.5.2.1 accordingly.	Reject	The effects that the rules in PC8 seeks to manage, i.e. the effects of sedimentation discharges on water quality and natural hazards such as flooding, erosion and land instability, are not specifically managed in the QLDC District Plan, therefore it is not appropriate that an existing land use consent granted by QLDC should result in a deemed permitted activity in PC8.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Accept	
				FS812	***Waterfall Park Developments Limited***	*Support*		Reject	
13.	Rule 14.5.1.1	80080	80080.24		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend Rule 14.5.1.1 to increase the relevance of this rule to all earthworks: as follows: The use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for ~~residential development~~ earthworks is a permitted activity providing:	Reject in part	At mediation, it was agreed to retain the focus of the rules on residential development. The parties agreed to include a new definition of "Residential Development" to improve clarity.
				FS804	***Federated Farmers of New Zealand - Otago and North Otago Provinces***	*Oppose*		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Reject in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Reject in part	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Reject in part	

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
14.	Rule 14.5.1.1	80080	80080.25		**Otago Fish and Game Council and the Central South Island Fish and Game Council**	Support in part	Amend Rule 14.5.1.1 to include water quality limits on the discharge consistent with direction in proposed Policy 7.D.10.	Accept in part	Setting limits for contaminants is a critical element of managing freshwater going forward. However this is the intent of the new proposed LWRP, and ORC is not in a position to do this across Otago as part of PC8. The proposed LWRP will give full effect to the NPSFM 2020. Work on identifying values and limits, including for suspended and deposited sediment, will be undertaken in the Freshwater Management Unit Process for the LWRP. At mediation, it was agreed to remove the word "conspicuous" from Rule 14.5.1.1(g)(ii) to aid implementation.
				FS802	***Director General of Conservation***	*Support*		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
				FS811	***Kāi Tahu ki Otago***	*Support*		Accept in part	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Accept in part	
15.	Rule 14.5.1.1	80082	80082.27		**Royal Forest and Bird Protection Society of New Zealand Inc**	Support in part	Amend Rule 14.5.1.1 to ensure Policy 7.D.10 can be met (as it currently does not).	Reject	
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Support in part*		Reject	
				FS811	***Kāi Tahu ki Otago***	*Support*		Reject	
				FS807	***Ngai Tahu ki Murihiku***	*Support*		Reject	
16.	Rule 14.5.1.1	80049	80049.03		**Phil Murray Resource Management Ltd**	Support	Apply sediment and discharge limits to urban areas.	Reject	
				FS803	***Dunedin City Council***	*Oppose*		Accept	
17.	Rule 14.5.1.1(b)	80018	80018.07		**Dunedin City Council**	Support	Amend the setback in Rule 14.5.1.1(b) to avoid conflict with the setback rules in the 2GP.	Reject	10m is considered suitable for a range of circumstances and is appropriate to apply regionally to manage discharges of sediment from earthworks to ensure that water quality is maintained.
				FS808	***Otago Fish and Game Council and the Central South Island Fish and Game Council***	*Oppose*		Accept	
18.	Rule 14.5.1.1(b)	80055	80055		**Director General of Conservation**	Support in part	Retain Rule 14.5.1.1(b) with following changes: (b) Earthworks do not occur within 10 metres of a water body, a drain, a water race, or the coastal marine area, marginal strip, esplanade strip and legal road; and	Reject	The decision requested does not contribute to achieving better environmental outcomes or fulfilling ORC's functions under s30 of the RMA. The purpose of marginal strips and esplanade strips is to protect water quality.
19.	Rule 14.5.1.1(g)	80016	80016.10		**Horticulture New Zealand**	Support	Provide greater clarity in the administration of Rule 14.5.1.1 and Rule 14.5.2.1 by either replicating all of clause (g) in Rule 14.5.2.1 or by removing it from Rule 14.5.1.1 and moving it to Rule 14.5.2.1. If Clause (g) is retained in Rule 14.5.1.1, insert new criterion as follows: (g) The discharge of sediment does not result in any of the following effects in receiving waters, after reasonable mixing: ... (v) any significant adverse effects on aquatic life.; or (vi) the rendering of fresh water unsuitable for the irrigation and processing of food crops.	Reject	It is unnecessary to replicate all of clause (g) in Rule 14.5.2.1 as the effects in clause (g) are covered by matter of discretion (d) in Rule 14.5.2.1. Standards in a permitted activity rule need to be sufficiently certain so that the Plan user knows whether they comply or not. It would be difficult for a Plan user to know whether the discharge from their activity renders the water unsuitable for irrigation for irrigation and processing of food crops.

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
				FS804	***Federated Farmers of New Zealand - Otago and North Otago Provinces***	*Support in part*		Reject	
20.	Rule 14.5.1.1(g)	80090	80090.46		**Federated Farmers of New Zealand – Otago and North Otago Provinces**	Oppose	Move Rule 14.5.1.1(g) to be under Rule 14.5.2.1	Reject	
21.	Rule 14.5.1.1	80011	80011.03 & 80011.11		**Friends of Lake Hayes Soc Inc**	Support	Approve the plan change Rule 14.5.1 and 14.5.1.1	Accept in part	Amendments are proposed to Rule 14.5.1.1 in response to other submissions.
22.	Rule 14.5.1.1	80059 80078	80059.28 80078.28		**Kāi Tahu ki Otago** **Ngāi Tahu Ki Murihiku**	Support Support	Retain Rule 14.5.1.1 as notified	Reject	
Rule 14.5.2.1									
23.	Rule 14.5.2.1	80037 80067	80037.02 80067.02		**Vivian and Espie Ltd** **John Edmonds & Associates Ltd**	Oppose	Delete Rule 14.5.2.1	Reject	It is appropriate for ORC to have land use rules for activities that have an impact on water quality. Regional councils and territorial authorities perform different (albeit interconnected) roles in managing earthworks.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
24.	Rule 14.5.2.1	80071	80071.02		**RCL Henley Downs Ltd**	Oppose	Delete Rule 14.5.2.1	Reject	
				FS812	***Waterfall Park Developments Limited***	*Support*		Reject	
25.	Rule 14.5.2.1	80076	80076.02		**Queenstown Lakes District Council**	Support in part	Amend Rule 14.5.2.1 to exclude Queenstown Lakes District from application of rule 15.4.2, and clarify that land use erosion and sediment management is undertaken through Queenstown Lakes District Councils Proposed District Plan (PDP) OR Delete the rule OR Amend the rule to be consistent with Chapter 25 of the PDP, particularly Rules 25.7 and 58.8.	Reject	It is appropriate for ORC to have land use rules for activities that have an impact on water quality. Regional councils and territorial authorities perform different (albeit interconnected) roles in managing earthworks. While QLDC and ORC have overlapping responsibilities in relation to the use of land, QLDC cannot manage the discharge of sediment to water as this is a regional council function under section 30(1)(f) of the RMA. The discharge of sediment from earthworks arises from a use of land, therefore it is necessary for ORC to manage both the land use and discharge components of the activity in order to manage the potential adverse effects on water quality.
				FS803	***Dunedin City Council***	*Oppose in part*		Accept in part	
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Accept	
				FS812	***Waterfall Park Developments Limited***	*Support*		Reject	
26.	Rule 14.5.2.1	80113	80113.02		**Remarkables Park Limited**	Oppose	Amend Part G: Rule 14.5.2.1 such that earthworks already granted by Queenstown Lakes District Council are deemed to be a permitted activity; OR amend as follows: Except as provided by Rule 14.5.1.1 or where Queenstown Lakes District Council has granted resource consent for the use	Reject	The effects that the rules in PC8 seeks to manage, i.e. the effects of sedimentation discharges on water quality and natural hazards such as flooding, erosion and land instability, are not specifically managed in the QLDC District Plan, therefore it is not appropriate that

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							or works, the use of land, and the associated discharge of sediment into water or onto or into land where it may enter water, for earthworks for residential development is a restricted discretionary activity. ...		an existing land use consent granted by QLDC should result in a deemed permitted activity in PC8.
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Accept	
				FS812	***Waterfall Park Developments Limited***	*Support*		Reject	
27.	Rule 14.5.2.1(c)	80090	80090.47		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Oppose	Delete Rule 14.5.2.1(c)	Reject	At mediation, parties agreed to replace "compliance" with "the extent to which the activity complies with" the *Erosion and Sediment Control Guidelines for Land Disturbing Activities in the Auckland Region 2016*. This acknowledges that the guidelines are not rigid and provide a range of tools and methods for erosion and sediment control which need to be selected based on the specific site and there will be variation in the way the guidelines are used.
28.	Rule 14.5.2.1(d)	80090	80090		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Oppose	Rule 14.5.2.1(d) Provide clarity on water quality guidelines.	Reject	As PC8 is an interim plan change, it is appropriate to refer simply to the water quality guidelines already in the RPW.
29.	Rule 14.5.2.1	80016	80016.11		**Horticulture New Zealand**	Support	Insert new clause in Rule 14.5.2.1 after (d) as follows: (e) The discharge of sediment does not result in any of the following effects in receiving waters, after reasonable mixing: (i) the production of conspicuous oil or grease films, scum or foams, or floatable or suspended materials; or (ii) any conspicuous change in the colour or visual clarity; or (iii) any emission of objectionable odour; or (iv) the rendering of fresh water unsuitable for consumption by farm animals; or (v) any significant adverse effects on aquatic life; or (vi) the rendering of fresh water unsuitable for the irrigation and processing of food crops. Consequential renumbering of notified clause (e) and (f). And:	Reject	The proposed clause reads more like a standard than a matter of discretion. These effects would also be considered under matter of discretion (d) which considers any adverse effect on water quality.

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							These rules could be strengthened by either replicating clause (g) in Rule 14.5.2.1 or by removing it from Rule 14.5.1.1 and moving it to Rule 14.5.2.1.		
30.	Rule 14.5.2.1	80090	80090.49		**Federated Farmers of New Zealand - Otago and North Otago Province**	Support in part	Amend by adding clause from Rule 14.5.1.1(g)	Reject	It is unnecessary to replicate all of clause (g) in Rule 14.5.2.1 as the effects in clause (g) are covered by matter of discretion (d) in Rule 14.5.2.1.
31.	Rule 14.5.2.1(e)	80059 80078	80059.29 80078.29		**Kāi Tahu ki Otago** **Ngāi Tahu Ki Murihiku**	Support in part	Amend Rule 14.5.2.1(e) as shown: Any adverse effect on mahika kai, on any natural or human use value, and	Accept in part	At mediation, it was agreed that clauses (e) and (f) could be combined into one matter of discretion with sub-clauses to improve clarity.
				FS802	***Director General of Conservation***	*Support*		Accept in part	
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Support in part:*		Accept in part	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Support*		Accept in part	
32.	Rule 14.5.2.1(f)	80090	80090.48		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Support in part	Amend Rule 14.5.2.1 (f) as follows: Measures to avoid, remedy or mitigate adverse effects on Kāi Tahu cultural ~~and spiritual beliefs,~~ values a~~nd uses.~~	Reject	The wording as notified is appropriate and consistent with the wording used in other provisions in PC8.
33.	Rule 14.5.2.1	80011	80011.04 & 80011.12		**Friends of Lake Hayes Soc Inc**	Support	Approve the plan change	Accept in part	Amendments are proposed to Rule 14.5.1.1 in response to other submissions.
34.	Rule 14.5.2.1	80082 80055	80082.28 80055		**Royal Forest and Bird Protection Society of New Zealand Inc** **Director-General of Conservation**	Support Support	Support Rule 14.5.2.1	Accept in part	
Definition: Earthworks									
35.	Definition: Earthworks	80082	80082.19		**Royal Forest and Bird Protection Society of New Zealand Inc**	Support in part	Amend definition of "Earthworks" to include root raking	Reject	At mediation, the parties agreed to retain the definition of "Earthworks" as notified. It is from the National Planning Standards 2019 and the inclusion of root raking is not consistent with the definition under the planning standards.
36.	Definition: Earthworks	80076	80076.04		**Queenstown Lakes District Council**	Support in part	Amend definition of "Earthworks" to exclude earthworks in Queenstown Lakes District OR Amend definition of earthquake to be consistent with the definition in the PDP as follows: Earthworks: Means the disturbance of land by the removal or deposition on or change to the profile of land. Earthworks includes excavation, filling, cuts, root raking and blading, firebreaks, batters and the formation of roads, access, driveways, tracks	Reject	At mediation, the parties agreed to retain the definition of "Earthworks" as notified.

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							and the deposition and removal of cleanfill. Earthworks for the following shall be exempt from the rules XXX Erosion a. and sediment control except where subject to Rule XXX setback from waterbodies. b. The digging of holes for offal pits c. Fence posts. d. Drilling bores. e. Mining Activity, Mineral Exploration or Mineral Prospecting. f. Planting riparian vegetation. g. Internments within legally established burial grounds. h. of existing vehicle and recreational accesses and tracks, excluding their expansion. i. Deposition of spoil from drain clearance work within the site the drain crosses. j. Test pits or boreholes necessary as part of a geotechnical assessment or contaminated land assessment where the ground is reinstated to existing levels within 48 hours. k. Firebreaks not exceeding 10 metres width. l. Cultivation and cropping. m. Fencing in rural zones/environments for farming where any cut or fill does not exceed 1 metre in height or any earthworks does not exceed 1 metre in width. n. Earthworks where the following National Environmental Standards have regulations that prevail over the District Plan: (i) Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009. (ii) Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011. (iii) Resource Management (National Environmental Standards for Telecommunication Facilities) Regulations 2016. (iv) Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2016.		
				FS803	***Dunedin City Council***	*Oppose in part*		Accept	
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	*Oppose*		Accept	
				FS810	***Royal Forest and Bird Protection Society of New Zealand Inc***	*Oppose*		Accept	
37.	Definition: Earthworks	80090	80090.50		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Support in part	Amend definition of "Earthworks" as follows: Means the alteration or disturbance of land, including by moving, removing, placing, blading, cutting, contouring, filling or excavation of earth (or any matter constituting the land including soil, clay, sand and rock); but excludes gardening,	Reject	At mediation, the parties agreed to retain the definition of "Earthworks" as notified.

Row	Provision	Submitter ID	Submission Point ID	Further submitter ID	Submitter Name	Support/Oppose	Decision requested	ORC planner recommendation	Reasons
							cultivation, pastoral farming activities and disturbance of land for the installation of fence posts.		
				FS803	***Dunedin City Council***	*Support in part*		Reject	
38.	Definition: Earthworks	80055 80016	80055.27 80016.12		**Director General of Conservation** **Horticulture New Zealand**	Support Support	Retain definition of "Earthworks" as notified	Accept	No amendments are proposed to the definition of “Earthworks”.

Part H recommended decisions on submissions

Row	Provision	Submitter ID	Submission Point ID	Further Submitter ID	Submitter name	Support/ Oppose	Decision Requested	ORC Planner recommendation	Reasons
Amended Policy 10.4.2									
1.	Policy 10.4.2	80018	80018.08		**Dunedin City Council**	Support	Include Smooth Hill as designated in the Dunedin 2GP as regionally significant infrastructure by including text beneath Policy 10.4.2 as: To provide for the Smooth Hill landfill as designated in the Dunedin 2GP as regionally significant infrastructure. OR Insert a new policy to identify Smooth Hill as regionally significant infrastructure.	Reject	The decision requested in not within the scope of PC8 and is not "on" PC8. PC8 proposes a minor change to Policy 10.4.2 in order to align with the terminology of the proposed Regional Policy Statement 2019. Policy 4.3.2 of the PORPS 2019 lists the infrastructure considered to be nationally or regionally significant "Nationally Significant Infrastructure" and "Regionally Significant Infrastructure" are also defined in the proposed Otago Regional Policy Statement June 2021. Neither of the RPSs include the Smooth Hill landfill as regionally significant infrastructure.
				FS807	***Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kāi Tahu ki Otago)***	Oppose		Accept	
				FS811	***Ngai Tahu ki Murihiku***	*Oppose*		Accept	
2.	Policy 10.4.2	80082	80082.29		**Royal Forest and Bird Protection Society of New Zealand Inc**	Oppose	Add definition of "Regionally significant infrastructure" to include airports, the port, telecommunications facilities, the rail network, storm water, sewage, systems, local authority water supply networks (for human consumption) and water treatment plants and other utilities, including energy generation, transmission and distribution networks, strategic telecommunications facilities as defined in section 5 of the Telecommunications Act 2001, the strategic Transport Network.	Reject	The decision requested is not within the scope of PC8 and is not "on" PC8. PC8 proposes a minor change to Policy 10.4.2 in order to align with the terminology of the proposed Regional Policy Statement 2019. Policy 4.3.2 of the PORPS 2019 lists the infrastructure considered to be nationally or regionally significant. "Nationally Significant Infrastructure" and "Regionally Significant Infrastructure" are also defined in the proposed Otago Regional Policy Statement June 2021.
				FS803	***Dunedin City Council***	Oppose		Accept	
				FS808	***Otago Fish and Game Council and Central South Island Fish and Game Council***	Support in part		Reject	
				FS811	***Kāi Tahu ki Otago***	*Oppose*		Accept	
				FS807	***Ngai Tahu ki Murihiku***	*Oppose*		Accept	
3.	Policy 10.4.2	80090	80090.51		**Federated Farmers of New Zealand - Otago and North Otago Provinces**	Support	Support Policy 10.4.2	Accept	No amendments are proposed for Policy 10.4.2
4.	Policy 10.4.2	80016 80055 80059 80078	80016.13 80055.28 T80059.30 80078		**Horticulture New Zealand** **Director General of Conservation** **Kāi Tahu ki Otago** **Ngāi Tahu Ki Murihiku**	Support	Retain Policy 10.4.2 as notified	Accept	

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-96
[2020] NZHC 1390

UNDER	the Resource Management Act 1991 ("Act")
IN THE MATTER	of an appeal under s 299 of the Act
BETWEEN	SKP INCORPORATED Appellant
AND	AUCKLAND COUNCIL Respondent
AND	KENNEDY POINT BOATHARBOUR LIMITED Consent Holder

Hearing: 2 June 2020

Appearances: JDK Gardner-Hopkins for the Appellant
M C Allan and R Smith for the Respondent
P F Majurey and V Morrison-Shaw for the Consent Holder

Judgment: 19 June 2020

JUDGMENT OF GAULT J

This judgment was delivered by me on 19 June 2020 at 4:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr JDK Gardner-Hopkins, Barrister, Wellington
Mr T Greenwood (appellant's instructing solicitor), Greenwood Law Ltd, Waiheke Island
Mr M C Allan and Ms R Smith, Brookfields, Auckland
Mr P F Majurey and Ms V Morrison-Shaw, Atkins Holm Majurey Ltd, Auckland

[1] SKP Incorporated (SKP) appeals against a decision of the Environment Court, dated 13 December 2019,[1] which refused SKP's application for a rehearing of its unsuccessful appeal against a resource consent granted by Auckland Council (Council) to Kennedy Point Boatharbour Ltd (KPBL) in May 2017 to construct, operate and maintain a 186 berth marina and associated facilities at Kennedy Point, Waiheke Island.

[2] SKP's application for rehearing (and its parallel application for leave to appeal out of time to this Court against the Environment Court's original decision)[2] raised issues relating to a representation or mandate dispute within Ngāti Paoa iwi,[3] acknowledged to be the principal mana whenua of Waiheke Island and its surrounding waters, as a result of which the Ngāti Paoa Trust Board (Trust Board) had not been consulted on the marina consent application and its opposition to the marina on cultural grounds had not been heard in the Environment Court appeal. In the original hearing the Environment Court had instead heard, and accepted, evidence on cultural effects from Mr Morehu Wilson, a rangatira, for the Ngāti Paoa Iwi Trust (Iwi Trust).

Factual background

[3] On 26 November 2009 the Trust Board obtained an order from the Māori Land Court under s 30 of the Te Ture Whenua Maori Act 1993 that it be the representative of Ngāti Paoa for resource management and local government purposes.

[4] In 2013 the process for establishing a Ngāti Paoa post-settlement governance entity was formally commenced. The Trust Board annual general meeting was held on 7 September 2013. There is a dispute between the Trust Board and the Iwi Trust as to whether the Trust Board resolved at that meeting to transfer the day-to-day management, operations and assets of the Trust Board to the Iwi Trust.

[5] The Iwi Trust was established on 9 October 2013.

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1 *SKP Inc v Auckland Council* [2019] NZEnvC 199.

2 *SKP Inc v Auckland Council* [2018] NZEnvC 81. The parallel application for leave to appeal was dismissed: *SKP Inc v Auckland Council* [2019] NZHC 900.

3 In the notice of appeal, Ngāti Paoa appears as "Ngāti Pāoa". However, in the appellant's submissions the second macron is omitted. Accordingly, it is omitted in this judgment.

[6] In November/December 2013 the Iwi Trust wrote to the Council asserting its mandate for Ngāti Paoa and the Council updated its website and iwi contact list to record the Iwi Trust as the representative body for Ngāti Paoa for Resource Management Act 1991 (RMA) matters.

[7] In 2014 the Trust Board met with the Council to discuss its mandate concerns, but the Council confirmed its decision to recognise the Iwi Trust as representative of Ngāti Paoa.

[8] In December 2015 consultation in relation to the Kennedy Point marina consent proposal began with the Iwi Trust.

[9] In April 2016 a hui-ā-iwi was held to confirm the Trust Board's settlement mandate. In May 2016 the Crown confirmed the Trust Board's settlement mandate.

[10] On 19 September 2016 KPBL lodged its resource consent application for the Kennedy Point marina. It was a non-complying activity application and so had to pass one of the RMA's s 104D 'gateway tests', before having regard to the usual s 104 matters.

[11] On 14 October 2016 the High Court determined that the Trust Board was not properly constituted and confirmed the process by which its membership was to be whakapapa verified and elections held for new trustees.

[12] On 19 November 2016 KPBL's resource consent application was publicly notified.

[13] In March 2017 new trustees were elected to the Trust Board.

[14] On 4 May 2017 the Trust Board wrote to the Council requesting a meeting regarding issues that were "unresolved with respect to the Board's landholdings".

[15] On 18 May 2017 the Council notified its decision to grant consent to the Kennedy Point marina proposal.

[16] On 7 June 2017 SKP was incorporated by a number of those who had been submitters opposing the consent application. SKP was incorporated partly to succeed to the rights of its founding members to appeal the resource consent decision. But its purposes also include environmental protection objectives relating to Waiheke Island and the wider Hauraki Gulf and recognising the importance of Te Ao Māori (the Māori world view), particularly in terms of kaitiakitanga and respect for the mauri and wairua of the living world.[4]

[17] On 9 June 2017 SKP filed an appeal against the Council decision. Piritahi Marae, an established marae at Blackpool on Waiheke Island, had not been a submitter on the application but joined the appeal opposing the application.

[18] On 3 July 2017 the Trust Board wrote again to the Council seeking to assert its mandate to represent Ngāti Paoa.

[19] The Environment Court heard the appeals against the resource consent from 26 February to 2 March 2018 and issued its decision refusing the appeals and confirming the resource consent on 30 May 2018.[5] In relation to cultural effects, KPBL had called evidence from Mr Wilson for the Iwi Trust. Representatives of Piritahi Marae had given evidence for SKP. The Environment Court noted the unfortunate division of evidence about Māori cultural effects. As indicated, the Environment Court accepted the evidence on cultural effects from Mr Wilson. This was essentially on the basis that he spoke for mana whenua.

[20] On 9 July 2018 the Trust Board wrote an open letter to KPBL, the Council and others regarding the lack of consultation with it on the marina proposal.

[21] Following a meeting with the Council on 7 August 2018, the Trust Board again wrote to the Council to assert its mandate on 8 August 2018. The Trust Board wrote again on 27 August 2018 following a further meeting on 21 August 2018. The Council responded on 31 August 2018.

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4 *SKP Inc v Auckland Council* [2019] NZHC 900 at [5].
5 *SKP Inc v Auckland Council* [2018] NZEnvC 81.

[22] On 31 August 2018 SKP filed its applications for rehearing and leave to appeal to the High Court against the Environment Court's original decision.

[23] On 12 December 2018 the Māori Land Court, on the application of the Iwi Trust, issued a decision concluding that the Trust Board was in legal abeyance between 2014 and 2017 and imposing an expiry date of 21 December 2018 on the 2009 s 30 order. The Māori Land Court referred the Trust Board and the Iwi Trust to mediation (and a further hearing, if necessary) on the question of "[w]ho is the most appropriate representative for Ngāti Paoa for the purposes of RMA and [Local Government Act] matters".[6]

[24] On 18 December 2018 the Council advised the Iwi Trust and the Trust Board that it would engage with both on an interim basis pending resolution of the representation dispute, and updated the Council website to refer to both entities.

[25] On 21 December 2018 the Trust Board filed a notice of appeal in the Māori Appellate Court against the Māori Land Court's decision.

[26] On 24 April 2019 the High Court declined SKP's application for leave to appeal out of time against the Environment Court's original decision.[7]

[27] Following various interlocutory applications, the Environment Court heard the application for rehearing from 18 to 20 September 2019 and issued its decision on 13 December 2019.

Environment Court's power to order rehearing

[28] Section 294 of the RMA provides:

> **294 Review of decision by court**
>
> (1) Where, after any decision has been given by the Environment Court, new and important evidence becomes available or there has been a change in circumstances that in either case might have affected the

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6 *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board* [2018] 173 Waikato Maniapoto MB 51 (173 WMN 51) at [76(b)].

7 *SKP Incorporated v Auckland Council* [2019] NZHC 900.

> decision, the court shall have power to order a rehearing of the proceedings on such terms and conditions as it thinks reasonable.
>
> (2) Any party may apply to the court on any of those grounds for a rehearing of the proceedings; and in any such case the court, after notice to the other parties concerned and after hearing such evidence as it thinks fit, shall determine whether and (if so) on what conditions the proceedings shall be reheard.
>
> (3) The decision of the court on any such proceedings shall have the same effect as a decision of the court on the original proceedings.

[29] It was common ground that there are three elements to the exercise of this power:[8]

> (1) does one of the two jurisdictional preconditions obtain – is there new and important evidence or has there been a change in circumstances?
>
> (2) might that have changed the decisions? and
>
> (3) if the answers to questions (1) and (2) are both positive, should the court exercise its discretion to order a rehearing and if so on what conditions?

Environment Court decision refusing rehearing

[30] In essence, on the primary issue of whether there was "new and important evidence" in relation to cultural effects, the Environment Court accepted that because the representation debate was unknown to the Court when it made its original decision, it was probably "new" and there might be "new" evidence, but the Court concluded that SKP had not demonstrated there was "important" evidence. The cultural matters set out in the Cultural Values Assessment by the Iwi Trust, accepted in principle by the Trust Board, and the evidence of kaumātua Mr Wilson for the Iwi Trust, had not been successfully challenged by SKP's rehearing application, even prima facie.

[31] The Environment Court also addressed the alternative criterion in s 294, that is whether there was a "change in circumstances", which it said was at best only faintly argued. The Court concluded that the mandate dispute was a steady state situation and not a determining factor.

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8 *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [25].

[32] The Environment Court's conclusions refusing a rehearing in relation to coastal processes/climate change and traffic issues were not challenged on appeal.

Approach on appeal

[33] This Court's approach on appeal from the decision of the Environment Court is not in dispute. Appeals are limited to questions of law,[9] where the role of the Courts of general jurisdiction "is confined to correction of legal error"; "an appellate court whose jurisdiction is limited to matters of law is not authorised under that guise to make factual findings".[10] This was emphasised by the Supreme Court in *Bryson v Three Foot Six Ltd*, in the employment context where there is a similarly limited appellate jurisdiction. The Supreme Court stated:[11]

> [25] An appeal cannot however be said to be on a question of law where the fact-finding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the court to weigh the relevant facts in the light of the applicable law. Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable.
>
> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".[12] Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test…

[34] The early RMA decision of a Full Court of the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* is often cited as the leading RMA

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9 Resource Management Act 1991, s 299.

10 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198] (overturned on appeal on other grounds, see *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

11 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

12 *Edwards v Bairstow* [1956] AC 14 (HL) at 36. Lord Radcliffe was adopting dicta of the Lord President (Normand) in *Inland Revenue v Fraser* [1942] SC 493 at 497 and Lord Cooper in *Inland Revenue Commissioners v Toll Property Co Ltd* [1952] SC 387 at 393.

judgment in this context.[13] It stated that this Court will interfere with decisions of the (former) Planning Tribunal only if it considers that the Tribunal:[14]

> (a) applied a wrong legal test; or
>
> (b) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
>
> (c) took into account matters which it should not have taken into account; or
>
> (d) failed to take into account matters which it should have taken into account.

[35] The error of law must also be material to the decision under appeal.[15]

Grounds of appeal

[36] The notice of appeal challenged not only the Environment Court's refusal to order a rehearing, but also its refusal to adjourn the rehearing application either to await the outcome of the appeal before the Māori Appellate Court or to allow the appointment of a Māori Land Court Judge to sit with the Environment Court to hear and determine the rehearing application, and an application by the Trust Board for a waiver of time to join the rehearing application. Mr Gardner-Hopkins, for SKP, did not pursue the waiver issue, acknowledging it was included merely to preserve the opportunity for the Trust Board to apply to join in the event that a rehearing is ordered.

[37] The notice of appeal identified four grounds of appeal in relation to the "new and important evidence" criterion, one ground in relation to "change in circumstances" and one ground in relation to the appointment of a Māori Land Court Judge. In total, the notice of appeal identified 14 questions of law to be decided. Helpfully, Mr Gardner-Hopkins' submissions sought to confine and group the questions of law.

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13 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC). See also *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]-[54].

14 At 153.

15 *Manos v Waitakere City Council* [1996] NZRMA 145 (CA) at 148.

Issues

[38] I consider that the issues can be further streamlined as follows:

(a) whether the Environment Court erred in its approach to "important" evidence;

(b) whether it erred in relation to "change in circumstances";

(c) whether any new and important evidence or change in circumstances might have affected the Court's earlier decision; and

(d) whether this Court has jurisdiction in relation to the Environment Court's refusal to adjourn and appoint a Māori Land Court Judge.

New and important evidence

New

[39] As a preliminary matter, Mr Gardner-Hopkins noted that the Environment Court had accepted there might be new evidence and there was no cross-appeal or notice to support the judgment on other grounds claiming that the evidence was not "new" whereas KPBL's submissions sought to reassert that position. Mr Gardner-Hopkins did, however, acknowledge that he could deal with the issue and therefore did not take the technical pleading point. Mr Majurey, for KPBL, explained that KPBL maintains the evidence was not "new" but he acknowledged that the Environment Court had said the debate was "probably" new and there "might be" new evidence and he did not take issue with those conclusions.

[40] Like the Environment Court, I consider it is appropriate to proceed on the basis that there may be "new" evidence. The evidence was unknown to SKP at the time of the original Environment Court hearing. It may well not have been reasonably discoverable at the time of the original hearing. Even if SKP could have discovered it earlier, as Mr Gardner-Hopkins pointed out, the "new" evidence threshold in s 294 may not import the requirement that the evidence could not with reasonable diligence

have been produced at the original hearing. In *Robinson v Waitakere City Council (No 13)* the Environment Court said:[16]

> … we comment, although we do not have to decide the issue here, that the question whether evidence could reasonably have been discovered before the original hearing is not, it appears, a jurisdictional precondition under s 294 (whereas it is under r 12.15 of the District Court Rules 2009). Rather it is a discretionary matter under the third test.

[41] In the appeals context, "[e]vidence is not regarded as fresh if it could with reasonable diligence have been produced at the trial".[17] But s 294 is silent on the point and I accept that, in the rehearing context, the availability of the new evidence may be better assessed at the discretionary stage rather than as a jurisdictional precondition. But it is also unnecessary for me to decide the issue.

Important

[42] The primary issue is whether the Environment Court's approach to "important" evidence set the bar too high at the application stage. Mr Gardner-Hopkins submitted that the Court erred, relying on the following questions of law:

(a) the true and only reasonable conclusion was that the new evidence was "important", including because it addresses an important matter relevant to the Court's original decision;

(b) the Court applied an erroneous test for determining whether the new evidence was "important";

(c) it wrongly treated the rehearing application as though it was the rehearing itself;

(d) it failed to give notice that it required full evidence on cultural effects at the rehearing application stage;

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16 *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [27].

17 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192; affirmed in *Paper Reclaim Ltd v Aotearoa International Ltd (further evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6], n 1. See also *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

(e) the true and only reasonable conclusion was that there was a very live issue as to the effects on cultural values;

(f) failing to see the mandate issue as a determining factor.

[43] Dealing first with the test, it was common ground that the approach is that stated by Heath J in *Shepherd v Environment Court*:[18]

> [37] I consider it is clear that the term "new and important evidence" is a composite phrase requiring both freshness and cogency to be considered. In many other areas of the law a retrial may be ordered if a Court were satisfied that course best serves the interests of justice. The more prescriptive terms of s 294 are justifiable on the grounds that decisions of the Environment Court tend to affect not only the immediate parties but members of the public. The Court's public function adds emphasis to the need for finality in litigation, thereby providing a solid foundation for a rehearing rule that is focussed on the establishment of particular criteria and an assessment of materiality.

[44] I am conscious that the statutory term is "new and important", rather than "fresh and cogent", evidence but I agree with Heath J that "important" in this context connotes cogency.

[45] I do not consider that "important" invokes the concept of materiality. I consider, and understand Heath J to have said in *Shepherd*, that materiality is invoked in the s 294 requirement that the new and important evidence or change in circumstances, as the case may be, "might have affected the decision".[19] I do not understand the Environment Court in this case,[20] approving *Re Queenstown Airport Corporation Ltd*,[21] to have meant otherwise when saying that the requirement to consider the preconditions "invokes the concept of materiality rather than one of miscarriage or interests of justice". In that context, I expect the Court's reference to "preconditions" also included the "might have affected the decision" requirement even though the passage later suggested "preconditions" might be limited to the "new and important evidence" or "change in circumstances" requirements given the Court's reference to "preconditions and the assessment of materiality". The Environment

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18 *Shepherd v Environment Court* HC Auckland CIV-2011-404-3091, 21 October 2011 (footnote omitted).
19 *Shepherd v Environment Court* HC Auckland CIV 2011-404-3091, 21 October 2011 at [36].
20 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [7].
21 *Re Queenstown Airport Corporation Ltd* [2018] NZEnvC 52 at [9].

Court in *Re Queenstown Airport Corporation Ltd* went on to say that "materiality informs what is meant by "important" evidence in s 294(1)".[22] I do not take that from what Heath J said in *Shepherd*.

[46] Mr Gardner-Hopkins did not suggest there was a different test of "important" evidence for cultural matters nor that there was any right of veto over an application under the RMA. But he emphasised the importance of the strong directions in Part 2 of the RMA. There was no dispute that, while this was not a single issue case, the issue of cultural effects was an important issue. This meant that the strong directions in Part 2 of the RMA to take Māori issues into account needed to be borne in mind at every stage of the process, substantively and procedurally.[23] Even so, the s 294 test requires that the evidence, rather than the issue, be important.

[47] I do not consider the Environment Court applied an erroneous test for determining whether the new evidence was "important". It quoted the reference to cogency in *Shepherd* and later referred to the lack of "probative" evidence.

[48] I also do not consider that the Environment Court wrongly treated the rehearing application as though it was the rehearing itself or failed to give notice that it required full evidence on cultural effects at the rehearing application stage. The relevant threshold in s 294(1) is that new and important evidence "becomes available". As Mr Allan submitted, this indicates the evidence must exist, not merely be anticipated. The onus is on a s 294 applicant to show that new and important evidence has become available. The Environment Court has a discretion under s 294(2) to hear such evidence as it thinks fit before determining whether the proceedings shall be reheard. But, unless the Environment Court were to indicate that it was satisfied that new and important evidence has become available without needing to hear all that evidence at the application stage, the new and important evidence must be adduced at that stage in order to meet the threshold before a rehearing is ordered. Absent such indication, the Environment Court was entitled to expect the new and important evidence to be addressed at the rehearing application, especially given the history of this matter.

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22 *Re Queenstown Airport Corporation Ltd* [2018] NZEnvC 52 at [11].

23 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21]; and *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [88]; referring particularly to ss 5, 6(e), 7(a) and 8 of the RMA.

The applicant cannot leave that evidence until the rehearing – whether due to resource constraints, the fact that the Trust Board was acting through the conduit of SKP without party status, or otherwise. As Mr Majurey submitted, the rehearing application is the time to bring forward new and important evidence – at the very least a qualified deponent should have detailed the type of evidence they would provide at any rehearing. Therefore, while there is a two stage process, I do not accept SKP's submission that it was unnecessary for more than an outline of the evidence to be adduced at the application stage and that it could defer decision on the witnesses to adduce evidence at the rehearing. It was insufficient for its witness to say that people would be available to give evidence of cultural, spiritual and technical matters at the rehearing.

[49] Before turning to Mr Gardner-Hopkins' submission that at the application stage there was nevertheless evidence that was probative and cogent, I address some preliminary matters concerning the mandate dispute.

[50] Earlier debate about the Council's role in relation to the mandate issue was the subject of concessions each way. Mr Allan, for the Council, accepted the Environment Court's observation that a counsel of perfection might suggest that the Council could have handled these complicated relationships better; and Mr Gardner-Hopkins accepted the Environment Court's finding that there was no plan of deception on the part of the Council. SKP maintains, however, that the Council should not have accepted that the Iwi Trust was the mandated entity representing Ngāti Paoa from late 2013 to late 2018.

[51] Mr Gardner-Hopkins submitted that the Māori Land Court's s 30 order should have been given important consideration by decision-makers while it was in force. He submitted that, as the Māori Land Court's decision was subject to appeal before the Māori Appellate Court, the Environment Court had to do its best to assess the competing claims for representative status, and he took issue with the Environment Court's consideration of the Trust Board's status during the period of the resource consent application.

[52] The Environment Court observed that complicating the mandate debate have been findings by two other Courts, the High Court in 2016 and 2019 and the Māori Land Court in 2018, to the effect that the Trust Board was legally in abeyance or inoperative during a period that equates more or less with a key period of the earlier Matiatia marina case in the Environment Court and the present case. In particular, as indicated, in October 2016 the High Court determined that the Trust Board was not properly constituted. In December 2018 the Māori Land Court concluded that the Trust Board was in legal abeyance between 2014 and 2017. In April 2019, in this Court on SKP's application for leave to appeal the Environment Court's original decision out of time, I also observed that the Trust Board ceased operating from 2014/2015 until early 2017.

[53] On the rehearing application in the Environment Court, Mr Gardner-Hopkins submitted that the High Court's 2019 finding was not central to its decision and so not binding on the Environment Court, and that the Environment Court had additional evidence relating to the Crown's recognition of the Trust Board in 2016.[24] The Environment Court considered that even if the High Court's 2019 findings were obiter, they must at least be accorded significant respect, and, in any event, the Environment Court found no evidence that would encourage it to call in question the High Court's findings. On appeal, Mr Gardner-Hopkins submitted that the Environment Court erred in this regard. The Trust Board does not accept that it was inoperative at the relevant time. Although Mr Gardner-Hopkins initially submitted that I should decide whether the Trust Board was inoperative, accepting on appeal the high hurdle in *Edwards v Bairstow*,[25] he ultimately accepted that this issue is relevant only to the Court's discretion if the threshold requirements of s 294 are made out. He also accepted that I need not determine the related issue as to the validity of the 2013 Trust Board resolution.[26] On an appeal limited to questions of law, and in circumstances where the status of the Trust Board during the relevant period remains in issue before the Māori Appellate Court, I see little scope, and no need, for this Court to seek to determine those issues unless the threshold requirements of s 294 are made

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24 See [9] above.
25 See [33] above.
26 See [4] above.

out. The same applies to whether the Iwi Trust was operative. It was not suggested there was new and important evidence in relation to that issue.

[54] I accept Mr Gardner-Hopkins' submission that, if the Environment Court had heard from two entities representing mana whenua with competing evidence on cultural effects, it would have needed to explore and understand each entity's claim for representative status as well as finer grained evidence as to the differences of position on cultural effects – as it did for example in *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*.[27] As that decision indicates,[28] in understanding claims for representative status, entity names and even phrases like "mandated authority" may be illusory. Mr Gardner-Hopkins submitted that, even though the Environment Court identified that the key issued raised in the application involved a dispute between the Iwi Trust and the Trust Board, the Environment Court did not think about such an approach to each entity's claim for representative status (as well the reasons concerning cultural effects) because it was side-tracked by Mr Roebeck's whakapapa, to which I will return below.

[55] I accept Mr Gardner-Hopkins' submission that representative status may well be relevant to the weight to be given to competing evidence on cultural effects, but representative status is not an end in itself. As Mr Majurey submitted, the Environment Court is not assisted in its merits evaluation by mere evidence on the identity of the correct Ngāti Paoa representative entity. Moreover, as the Environment Court observed, "the mandate debate does not…answer with finality the questions that must be posed concerning the two substantive criteria in s 294".[29]

[56] I turn to the evidence on the rehearing application, in particular the evidence of Mr Roebeck, the Principal Officer of the Trust Board. Mr Gardner-Hopkins submitted there was evidence that: (i) another entity representing Ngāti Paoa exists, namely the Trust Board; (ii) it has a different view about cultural effects; and (iii) the evidence included reasons or types of cultural effects of particular concern to it. Only (iii) is in issue.

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27 *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73.
28 At [171].
29 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [38].

[57] Mr Gardner-Hopkins submitted that the level of detail of Mr Roebeck's evidence about cultural effects was not altogether different from that of Mr Wilson in the original hearing. I accept that much of Mr Wilson's evidence at the original hearing was general in nature and focused on the positive aspects of the proposal. It did not address specific effects on mauri or waahi tapu. In a sense it was a statement of position by the Iwi Trust and, because it was taken to represent mana whenua, that resolved any cultural effects issue. But Mr Wilson was supporting the proposal. Opposition based on cultural effects must necessarily address the adverse cultural effects. It is insufficient for a party opposing merely to say: "I oppose on cultural (or other) grounds". For example, Mr Wilson's own evidence in opposition to the earlier marina proposal at Matiatia Bay – where Māori cultural matters were also an important issue – identified specific issues of concern. Moreover, on a rehearing application with a "new and important evidence" threshold, opposition based on cultural effects must indicate the evidence of adverse cultural effects. As indicated above, it would be insufficient at the application stage merely to signal that evidence on adverse cultural effects would be given at the rehearing itself. The key issue is whether Mr Roebeck gave important evidence relating to cultural effects on the rehearing application.

[58] The Environment Court acknowledged that the Trust Board strongly opposes the marina and that Mr Roebeck holds strong views to that effect, but the Court found that it had "been offered no evidence, let alone probative evidence, about the position of the Trust Board, with reasons".[30] The Court noted that decision-making under the RMA must be evidence-based and it was important in a case like this that the reasons for the attitudes of those presenting them should be discernible.

[59] The Environment Court said its concern was based on several factors. First, there was no evidence from any kaumātua of Ngāti Paoa in support of the Trust Board's opposition. Secondly, there was no evidence by any of the trustees of the Trust Board; Mr Roebeck was the Principal Officer of the Board. Thirdly, Mr Roebeck claimed no whakapapa to Ngāti Paoa. Fourthly, Mr Roebeck claimed no relevant cultural qualifications to allow the Court to assess his allegations of adverse effects on

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30 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [50].

cultural values, including kōiwi "possibly" buried in the foreshore and of the mauri of coastal waters. The Court also referred to the fact that the Trust Board did not disagree with most of the Iwi Trust's Cultural Values Assessment in terms of the background and identification of the issues of concern and cultural values important to Ngāti Paoa; it instead departs concerning the application of those values.

[60] The Environment Court said that in cross-examination, Mr Roebeck gave candid and succinct answers, confirming he was not Ngāti Paoa, that he had not been schooled in the whare wānanga of Ngāti Paoa, that however his wife is of Ngāti Paoa, that he knows Mr Wilson and that Mr Wilson is a kaumātua of Ngāti Paoa and fluent in Te Reo Māori, that Mr Wilson has great mātauranga or knowledge of Ngāti Paoa, that he is a widely respected representative of Ngāti Paoa, that Mr Wilson had been one of the mandated treaty settlement negotiators for Ngāti Paoa, and that Mr Roebeck agreed with Mr Wilson's evidence in principle and that there were no matters of culture and spiritual and mauri that he wished to bring to the Court's attention.

[61] In relation to specific cultural matters, I set out the relevant paragraphs of the Environment Court's decision in full:

> [54] Mr Majurey asked Mr Roebeck about reason (e) for the Trust Board agreeing to support SKP's application for a rehearing, which recorded:
>
> > (e) As an example, when Waiheke was occupied by Ngati Paoa, we didn't just reside in the populated areas of today, we occupied the whole island and different hapu buried their dead predominantly on the coastline. More koiwi than ever before are now being exposed around the coastline of Waiheke. The foreshore on the island is a waahi tapu environment and any disturbance in these areas is likely to uncover our tupuna. Modifications made and consequences of the KBPL [sic] proposal will impact on that waahi tapu.
>
> [55] Mr Roebeck was tested by Mr Majurey on those assertions and in our judgment was found wanting. In his initial answers to questions about the extent of koiwi, particularly as to whether he meant the whole of the foreshore of Waiheke being a waahi tapu, Mr Roebeck prevaricated with answers such as "*It depends who is considering it*". He then conceded "*Probably not the whole of the foreshore"*. He was then forced to concede concerning the foreshore in the application area that he was not qualified to say whether it was waahi tapu - but that some of their trustees certainly consider that [to be the case]. When pressed as to whether any disturbance in these areas is likely to uncover "*our tupuna"* [the wording in (e)] in the application area, he said that was not what he was saying, and "*I can't say that*".

> [56] Mr Roebeck was then questioned by Mr Majurey about reason (f) in his paragraph 53 which read:
>
> > (f) We also have concerns about the mauri of the waters, and how the KBPL [sic] proposal will impact on that mauri, whether it's disturbances, discharges and the like. That is an effect that can be related to, but is not dependant on western science saying about ecological effects.
>
> [57] On repeating in his answers that any physical activity or development in the waters would impact on the mauri, he said *"Quite possibly"*. His next answers were troubling. On being asked *"So if the Court grants a rehearing, how will it be assisted by evidence on behalf of the Trust Board?"*, Mr Roebeck said *"If the Court grants a rehearing, at that stage we will decide I guess"*. To the next question *"And we won't know-?"*, Mr Roebeck said *"Because right now it's hypothetical"*. Finally, to the question *"Yes and so you are saying we won't know until then"*, the witness responded, *"I don't know, I can't answer you"*.
>
> [58] It was confirmed in our minds that Mr Roebeck was not an appropriate person to give cultural evidence, and in the absence of any appropriately qualified witness from the Trust Board such as from a trustee, or a kaumatua of Ngati Paoa, or even at least anybody with whakapapa to Ngati Paoa, the "importance" element of the first criterion is simply not made out. Furthermore, Mr Roebeck's mostly honest and forthright answers in cross-examination cut all ground from under the assertions he had made about cultural matters in his affidavit.
>
> (footnotes omitted)

[62] The Environment Court concluded:[31]

> … on the evidence before us on this application SKP has not even got onto first base concerning alleged potential effects on Maori cultural values. Phrased in terms of the first criterion under s 294 RMA, while there might be "new" evidence (to us), it has not been demonstrated there is "important" evidence.

[63] Mr Gardner-Hopkins characterised the Environment Court as looking for evidence from someone whose whakapapa is to Ngāti Paoa and being disappointed. I accept that, as Principal Officer of the Trust Board, Mr Roebeck was authorised to express views on its behalf, and that he referred to "the mandate we hold as kaitiaki for Ngāti Paoa and our mana whenua interests on Waiheke". However, the Environment Court at the rehearing application was entitled to expect to hear evidence not merely as to the Trust Board's opposition but as to the cultural effects supporting that opposition.

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31 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [60].

[64] I accept that Mr Roebeck gave some evidence regarding cultural effects. Mr Gardner-Hopkins submitted that Mr Roebeck did not resile from his evidence in cross-examination and that he confirmed the impact on waahi tapu. But this evidence needed to come from someone qualified to give evidence on cultural effects. As Mr Roebeck acknowledged, he could not speak directly to those matters. In particular, he acknowledged in cross-examination that he was not qualified to say the foreshore of the application area was a waahi tapu. On that important point, he did resile from his evidence.

[65] Moreover, I do not consider the Environment Court's assessment of Mr Roebeck's evidence amounted to an error of law. Assessment of evidence is essentially a factual matter for the Environment Court. The Environment Court was entitled to conclude that it had not been offered probative evidence about the reasons for the Trust Board's position, namely as to adverse cultural effects. I do not consider that the true and only reasonable conclusion contradicts the Court's determination that there was not important evidence satisfying that precondition for a rehearing.

Change in circumstances

[66] Mr Gardner-Hopkins submitted that the Environment Court correctly recorded his submission that there has been a change in circumstance because at the time of the original hearing the Trust Board was not recognised by the Council as a mandated or representative authority of Ngāti Paoa; that since late 2018 the Trust Board has been so recognised by the Council and even while expressed as an interim position, it remains a change in circumstances that sees the Trust Board notified in respect of resource consent applications. However, he submitted that the Environment Court failed to address this question; instead considering a different question, namely whether the mandate dispute was a change in circumstances, and concluding that "[t]he mandate dispute between the two entities of Ngāti Paoa now brought to our attention in all its considerable sad detail, was in reality was a 'steady state' situation".[32]

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[32] *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [62].

[67] While the Environment Court acknowledged the Council's change of position in the early part of its decision, and may simply have ascribed little weight to that, I accept that the Environment Court appears to have answered a different question. The absence of a finding of fact will not generally give rise to an error of law,[33] but failing to address a relevant issue may do so.[34] But any error needs to be material. Thus, the real question is whether, as submitted, the Council's recognition of the Trust Board in December 2018 is a change in circumstances.

[68] Mr Gardner-Hopkins submitted the phrase "change in circumstances" in s 294 is deliberately open. As Mr Majurey acknowledged, s 294 is silent as to any temporal requirement in relation to a change in circumstances. Changes in circumstances are usually about post-hearing events.[35] It might be inferred that the "change" must occur after the original hearing or decision. Even if that is not always required, in this case I accept there has been a change in position by the Council since the original hearing, albeit expressed as an interim position pending resolution of the mandate dispute. But, as Mr Majurey asked, to what end? He submitted that the change would not make a difference because it was after the event – recognition would only have made a difference to the process if it had occurred earlier, in which case Mr Majurey submitted it would not then have been a change after the original hearing or decision. Mr Gardner-Hopkins submitted that a change in circumstances has to be approached as if it had occurred earlier. In a sense they are both correct, but I am conscious not to conflate the separate requirements of "change in circumstances" and "might have affected the decision". In *Robinson*, the Environment Court stated that, in a situation involving post-hearing events, these combined requirements must be read as requiring a change in circumstances that "might, if it had (counterfactually) occurred at or prior to the time of the hearing (or decision), have affected the decision".[36]

[69] I consider the underlying point is that a "change in circumstances" must be more than the Council's recognition of the status of a potential submitter. While that may ensure notification, as indicated, status is not an end in itself. What matters under

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33 *Rodney District Council v Gould* (2004) 11 ELRNZ 165 (HC) at [113]. See also *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [65].
34 *Tranz Rail Ltd v Wellington City Council* [1999] NZRMA 296 (HC) at 304.
35 *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [22].
36 At [22].

the RMA is a submitter's input in relation to effects. Also, the Council's recognition of the Trust Board was inherently prospective. Treating that as a change in circumstances would be giving it retrospective effect and tantamount to determining that the Council was wrong to recognise the Iwi Trust and should have continued to recognise the Trust Board from 2013 onwards. That would effectively be determining the mandate dispute, which I consider is beyond the scope of this appeal. I do not consider the Council's December 2018 prospective and interim recognition of the Trust Board for RMA purposes amounts to a change in circumstances.

Might have affected the decision / discretion

[70] If I had concluded there was new and important evidence or a change in circumstances, I would have needed to consider whether that evidence "might have affected the decision". It may be helpful to address this briefly.

[71] As Mr Gardner-Hopkins submitted, "might" have affected the decision does not require that a change in decision is likely. Although Mr Allan initially suggested that I could remit that question to the Environment Court on the basis that it was better placed to consider it, he acknowledged that I may need to deal with it. Mr Gardner-Hopkins and Mr Majurey both considered that it was necessary for me to address this requirement of s 294. I agree that it would not be appropriate to allow an appeal on a question of law without considering the materiality of the error.

[72] If I had concluded there was new and important evidence, I would have concluded that it might have affected the decision given the accepted importance of cultural effects to the Environment Court's original decision and the strong directions in Part 2 of the RMA.

[73] For the same reasons, I would also likely have exercised the discretion to order a rehearing.[37] It was suggested I remit that back to the Environment Court, which did not address discretion given its conclusion on the threshold requirements, but in the absence of some specific basis to refuse to exercise the discretion if the s 294

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[37] Outweighing other relevant factors referred to in *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [28].

preconditions were made out, it would be preferable for this Court to exercise the discretion to order a rehearing and avoid further delay. However, I would have remitted the matter to the Environment Court for it to consider the appropriate conditions of the rehearing. The Environment Court would be best placed to determine the scope of any rehearing.

[74] If I had concluded there was a change in circumstances due to the Council's recognition of the Trust Board in December 2018, I would nevertheless have concluded that it did not affect the decision. That is because, as already stated, the Council's recognition was prospective and interim, representative status is not an end in itself, and there was no new important evidence as to adverse cultural effects contradicting the evidence at the original hearing upon which the Environment Court relied. To conclude otherwise would inappropriately shift the balance in s 294 away from finality.

Adjournment and appointment of Māori Land Court Judge

[75] Mr Gardner-Hopkins submitted that the Environment Court erred in characterising the mandate dispute as centred on "western" processes and therefore not needing assistance from a Māori Land Court Judge. The Environment Court said:

> [80] For completeness, we recall that the applications for adjournment and for the appointment of a Maori Land Court Judge to sit with us in these proceedings must be finally disposed of. We refuse those applications. The application for appointment of a Maori Land Court Judge was, in summary, on the basis advanced by Mr Gardner-Hopkins that the application for rehearing would involve difficult Maori issues. That did not prove to be the case, because the main focus was on management and administration of incorporated entities pursuant to very "western" processes. The references to Maori cultural matters were prospective rather than based on actual evidence from relevant witnesses and we have not needed the sort of assistance that this Court sometimes engages from its own Maori Commissioners or from Maori Land Court Judges.

[76] Mr Gardner-Hopkins submitted that a Māori Land Court Judge would have assisted the Environment Court address the mandate issue, which he submitted was relevant to whether the new and important evidence or change in circumstances might have affected the decision, and to the Court's discretion. He accepted it was not relevant to whether the evidence was "important".

[77] Mr Gardner-Hopkins acknowledged s 266 of the RMA which provides:

> **266 Constitution of the Environment Court not to be questioned**
>
> (1) It is in the sole discretion of the member of the Environment Court presiding at a sitting of the court to decide whether the court has been properly constituted and convened.
>
> (2) The exercise of discretion under subsection (1) may not be questioned in proceedings before the court or in another court.

[78] Mr Gardner-Hopkins submitted that s 266 does not oust the jurisdiction of the Court here. He relied, by analogy, on this Court's jurisdiction to address a bias claim. Mr Allan acknowledged the Court's jurisdiction in relation to bias but submitted that s 266 does apply to the Environment Court's decision not to appoint a Māori Land Court Judge to sit on the rehearing application. Further, Mr Allan submitted that SKP's application for the appointment of a Māori Land Court Judge was intertwined with an adjournment application, refusal of which is not amenable to appeal under s 299.

[79] Section 266 provides for a discretion – the presiding member of the Environment Court may decide whether the court has been properly constituted and convened, and the exercise of that discretion may not be questioned in proceedings before the Environment Court or in another court. As Mr Gardner-Hopkins submitted, s 266 would not oust this Court's jurisdiction in relation to a bias challenge – the discretion referred to in s 266 does not appear expressly or by necessary implication to oust this Court's jurisdiction in relation to breach of natural justice such as actual or apparent bias. But I consider s 266 does provide that the presiding judge's decision as to which judges or commissioners sit on particular cases may not be questioned in proceedings. I consider that extends to the Environment Court's decision not to convene a court including a Māori Land Court Judge.

[80] In any event, I do not consider the decision to refuse to appoint a Māori Land Court Judge to sit on the rehearing application involved an error of law. The Court's reference to the main focus being on "management and administration of incorporated entities pursuant to very 'western' processes" referred to the focus being on the mandate dispute rather than cultural effects. Having heard the rehearing application by the time it finally disposed of the application to appoint a Māori Land Court Judge,

that view was open to the Environment Court. The Environment Court is a specialist court which frequently deals with cultural effects in the context of Part 2 of the RMA. In any event, the Court's reason for not needing the assistance of a Māori Land Court Judge was not material to its decision on the rehearing application.

[81] As to refusal to adjourn, I accept that the refusal, of itself, may not be a "decision" amenable to appeal under s 299.[38] However, where the refusal affects the outcome, "it can be challenged as part of an appeal against the ultimate result".[39] Here, the refusal to adjourn, whether to appoint a Māori Land Court Judge to sit or to await the decision of the Māori Appellate Court, did not affect the outcome, which largely turned on the lack of important evidence as to cultural effects.

[82] In any event, I do not consider the refusal to adjourn involved any error of law. I have already addressed the refusal to appoint a Māori Land Court Judge. The refusal to adjourn to await the decision of the Māori Appellate Court was also entirely open to the Environment Court in the circumstances given the Trust Board's status was relevant only to the weight to be afforded to its evidence on cultural effects, the fact that the Māori Appellate Court decision may not finally determine the mandate dispute for RMA purposes, and the delay that would occur.

Result

[83] The appeal is dismissed.

[84] If costs cannot be agreed, I will receive memoranda (not exceeding three pages) and deal with costs on the papers. Any party seeking costs is to file and serve a memorandum within 15 working days, and any memorandum in response is to be filed and served within 10 working days thereafter.

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38 *Island Bay Residents' Association (Inc) v Wellington City Council* [2001] NZRMA 63 (HC) at [38].

39 At [39].

Gault J

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 081

IN THE MATTER	of the Resource Management Act 1991
AND	of two appeals under s 120 of the Act
BETWEEN	SKP INCORPORATED
	(ENV-2017-AKL-000077)
	R A WALDEN
	(ENV-2017-AKL-000076)
	Appellants
AND	AUCKLAND COUNCIL
	Respondent
AND	KENNEDY POINT BOATHARBOUR LTD
	Applicant

Court:	Principal Environment Judge Newhook Commissioner ACE Leijnen Commissioner IA Buchanan
Hearing:	at Auckland, 26, 27 & 28 February, 1 & 2 March 2018
Appearances:	DA Nolan QC and KRM Littlejohn for Applicant MC Allan and R Ward for Respondent, Auckland Council DJ Sadlier for SKP Incorporated RA Walden for himself M McCullough for Auckland Transport, s 274 V Morrison-Shaw for Kennedy Point Marina Supporters' Gp, s 274 S Brown for herself, s 274 G Clendon for himself, s 274 M Webb for herself, s 274 D Rout for himself, s 274
Date of Decision:	30 May 2018
Date of Issue:	30 May 2018

DECISION OF THE ENVIRONMENT COURT

A: Consent is granted subject to conditions which are attached as annexure B.

B: Costs are reserved.

Contents

ENVIRONMENT COURT NEW ZEALAND
THE SEAL OF THE

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

REASONS

General Introduction

[1] The proposal by Kennedy Point Boatharbour Limited ('the Applicant') is to construct, operate and maintain a 186 (maximum) berth marina and associated facilities in Kennedy Point Bay on Waiheke Island.

[2] Consent was granted by independent hearing commissioners appointed by Auckland Council. Two parties, SKP Inc and Mr RA Walden, have appealed the decision and seek that the application be refused.

[3] The present application was brought subsequent to refusal of consent by this Court to a marina proposal at Matiatia, the other entry point into Waiheke Island, in *Re Waiheke Marinas Limited*.[1]

[4] While Matiatia is the principal passenger entry port to Waiheke, Kennedy Point can be described as the principal commercial entry port, handling as it does primarily vehicular ferries and freight.

Key Features of the Proposal

[5] An artist's impression of the proposed marina is attached as **Annexure A** to this decision. It offers a broad and reasonable idea of what consent is sought for.

[6] The key features of the proposal include:

- A marina basin created by two floating attenuators, piled in place, with no requirement for dredging, reclamation or breakwaters.
- Marina piers and associated fingers capable of providing up to 186 berths, all fully reticulated for power and fresh water (desalinated sea water), set back between 75m and 100m from the foreshore and predominantly located in an area of the coastal marine area zoned for moorings.
- New pile moorings and dinghy racks for up to 19 vessels.
- Public pick-up and drop-off berthage and day berthage for up to 30 trailer boats.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

[1] *Re Waiheke Marinas Limited* [2015] NZEnvC 218.

- A floating access and carparking pontoon, connected to the land via a hinged gangway and piled wharf structure, access directly from Donald Bruce Road.
- A floating marina office and berth user's facilities and a floating community use building, viewing deck and storage and launching facilities for kayaks and SUPs.
- Public grey and black water pump-out and temporary storage facilities.
- The upgrading of Donald Bruce Road to assist in segregating ferry traffic from other traffic accessing the Kennedy Point Wharf area, and improvements to the Kennedy Point carpark including providing for additional capacity.

The Principal Issues in Contention

[7] The parties supplied the Court with a lengthy and detailed statement of issues, somewhat broadly cast, and not all the subject of expert evidence.

[8] Counsel for the respondent observed[2] that the issues in contention in the present case were more confined than in the previous Matiatia case, because: traffic effects had been largely agreed amongst relevant experts; the present proposal involved floating attenuators rather than large permanent rock breakwaters; and parking in the present case was proposed on a floating deck rather than a reclamation or deck suspended on piles.

[9] The topics of applicable statutory instruments (Auckland Unitary Plan 'AUP', and the legacy Regional Coastal Plan 'RCP'), the overall activity status (non-complying), having been largely agreed, the issues in contention largely boiled down to the following:

(a) "Gateway" tests under s 104D RMA.

(b) Effects on the environment (positive and adverse):

- acoustic matters
- archaeology
- traffic/transport
- navigation/moorings
- visual/landscape
- lighting

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2 At paragraph 8 of their submissions.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

- ecology/coastal processes, particularly effects on Little Blue Penguins and other birdlife; terrestrial ecology; antifouling effects; effect on benthic community composition; cumulative effects; need or otherwise for further modelling; whether biological monitoring was required
- Māori cultural effects
- social effects including use of common water space
- planning issues including functional and operational needs
- potential impact on future expansion of the ferry terminal

(c) Matters arising under Part 2 RMA.

(d) Matters for consideration under s 290A RMA.

(e) Should consent be indicated as appropriate, proposed and other possible conditions of consent and mitigation.

The Parties

[10] The Applicant company is owned by a Mr Tony Mair and related interests who have developed other marina projects in New Zealand in recent decades.

[11] Auckland Council as consent authority, for whom the application was determined by experienced independent hearing commissioners.

[12] SKP Incorporated as appellant was a successor to an unincorporated group and did not itself make a submission to the Council. This party is not to be confused with Save Kennedy Point Incorporated which is a different legal entity which did make a submission and joined the appeals under s 274 RMA seeking that the application be declined.

[13] Mr RA Walden made a submission in opposition and his appeal seeks that the application be declined.

[14] Auckland Transport was an original submitter taking a neutral position, raising before the Court only one minor issue for determination.

[15] Kennedy Point Marina Supporters' Group is a s 274 party comprising 150 members, opposing the appeals and supporting the application on account of its members being interested in boating and recreational resources for Waiheke Island.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[16] Royal Forest and Bird Protection Society of New Zealand was not a submitter but joined the SKP Inc appeal under s 274(1)(d) RMA, primarily concerned about potential effects on Little Blue Penguins and their habitat at Kennedy Point; latterly not opposing the application being approved so long as certain conditions are imposed.

[17] Piritahi Marae is a party with an established marae at Blackpool on a Māori reservation for the physical, spiritual and holistic wellbeing of people of all tribes; the marae was not a submitter on the application but joined the SKP Inc appeal under s 274(1)(d) RMA, opposing the application. Its evidence (4 witnesses) was called by counsel for SKP.

[18] Mr Walden's appeal attracted three individual parties in support of his position, under s 274 RMA. The SKP Inc appeal attracted 24 individual s 274 parties supporting it, of whom five exchanged evidence.

A Cautionary Note

[19] The case was notable for enormous quantities of evidence, exhibits and supporting materials. A week of hearing was only just sufficient to cover all matters parties wished to raise, despite members of the Court having pre-read everything of relevance, with care[3].

[20] Parties should not expect to read in this decision a recitation of everything they wrote or spoke about. Not only would that produce an unnecessarily long decision, but sadly, there was far too much material presented by some expert witnesses which did not meet the rules about admissibility in s 25 Evidence Act 2006. Reduced to its essentials, s25(1) provides that expert evidence is only admissible if the fact-finder [here, the Court] is likely to obtain substantial help [with evidence and facts of consequence in the proceeding].

[21] As to non-expert evidence, we acknowledge the passion with which many views are held by members of the community. As is acknowledged in many ways in the AUP, community views run in many directions. The way in which we analyse the many views offered in a case like this must be principled and strongly informed or guided by the

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3 In fairness, the evidence called by the council was, in the main, succinct and to the point; that called by the applicant commendably so in the face of the range of issues and details advanced by opposition parties. It is also fair to record that Mr Sadlier for SKP maintained a measured and professional approach in his cross-examination given the limitations in the evidence of his own witnesses we identify in many places in this decision.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

statutory instruments, here the NZCPS, the RPS and the RCP in the AUP, and the HGI district plan. It would be impossible to record every point made by expert and lay witnesses in a case as involved as this one. Many are subsidiary to core elements of the case that we have focussed on. Others were of little or no importance to determining the outcome of the case.

[22] It might be useful to be reminded of a decision of the High Court in *Rodney District Council v Gould*[4] about objectives and policies to be considered by the Environment Court [indeed, we would add, any decision-maker under the RMA]. It was held that:[5]

> The Environment Court is not obliged to refer in its decision to every objective or policy of a district plan which might be of marginal relevance to its decision ... [and that to try to do so] would be unworkable and serve no useful purpose.

[23] That flavour of that message is not unlike the thrust of s 25(1) of the Evidence Act legislated 2 years later. While the findings in *Gould* are confined to examination of objectives and policies, s25(1) is of analogous practical effect. Relevance, focus, and providing substantial assistance to the decision-maker, must be the order of the day. Regrettably many cases before the Court in recent times have failed to adhere to these principles, and the present case was no exception.

Location and Zoning

[24] The marina is proposed for location in a bay adjacent to Kennedy Point on the south-west coast of Waiheke Island, and adjacent to the more populous western half of the island. The proposal is to be located entirely in the CMA.

Zoning in the Auckland Unitary Plan ('AUP')

[25] It is clear the bulk of the proposed marina would be located in the Coastal – Mooring Zone ('Mooring Zone') under the proposed regional coastal plan component of the AUP. A small eastern portion would be located in the Coastal – General Coastal Marine Zone ('GCMZ'). Nearby is the Coastal – Ferry Terminal Zone that applies to the Kennedy Point Wharf and which provides for reasonable future expansion of the ferry terminal.[6]

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4 *Rodney District Council v Gould* (2004) 11 ELRNZ 165 (HC) (Cooper J).

5 At [32].

6 See for instance evidence of Council's planning witness Mr D Wren, Evidence in Chief ('EIC'), paragraph 7.25.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[26] The substance of "overlays" in the AUP do not impinge on the location.

[27] Some little distance from the proposal is an Outstanding Natural Landscape (ONL 82) and a High Natural Character Area (HNC 121) located in respect of the Te Whau Islands across the far side of the Bay. We will discuss the relevance or otherwise of those features later in this decision.

[28] There are some Significant Ecological Areas ('SEAs') some distance away along the coast.

"Legacy" Regional Coastal Plan Zoning

[29] This instrument had not yet been entirely replaced by RCP provisions of the AUP at the time of writing this decision, so although attracting less weight than the AUP provisions, calls for consideration[7].

[30] In that Plan, the site is found in a General Management Area and a Mooring Management Area ('MMA 67'). The boundary of the latter is not contiguous with the mooring zone in the AUP, but the latter was said more accurately to reflect the location of moorings presently located in the Bay.[8]

Hauraki Gulf Island ('HGI') Plan Zoning

[31] The AUP does not apply to the land mass of Waiheke Island,[9] because the HGI Plan is a comparatively recent instrument. It is the latter that governs Waiheke Island. Given that a small quantity of work is proposed to take place on land, we note that Auckland Transport's land-based wharf facilities are zoned Commercial 7 (Wharf), beyond which to the north there is land zoned Rural 1 (Landscape Amenity). The coastal fringe is an esplanade reserve which carries Open Space 1 (Ecology and Landscape) zoning. Residential land on Kennedy Point Road overlooking the marina from the west, is zoned Island Residential 2 (Bush Residential).

The Existing and future environments

[32] We have already mentioned the adjoining ferry terminal facilities for the

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7 Counsel for the council has advised by memorandum dated 22 May that the new RCP has been approved in part by the Minister and will be operative in part from 31 May 2018.

8 See for instance evidence of Mr B Goff called by the Council (Maritime Officer) paragraph 3.5.

9 Section 120(2) of the Local Government (Auckland Transitional Provisions) Act 2010.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

transhipment of vehicles and bulk freight. There is also a public launching ramp and a dolphin pontoon together with moderately extensive carparking and manoeuvring areas, ramps, reclaimed areas and a large rock breakwater dated from about 2005. The northern edges of Kennedy Point Bay contain a small gravel and sand beach overhung by coastal vegetation, particularly pōhutukawa, and the western edge of the Bay is rocky. Swing moorings are found in the Bay, for which there are extant licenses, and some mooring holders stack their dinghies above the high tide line on the beach. Modest public use appears to be made of the Bay for recreational purposes such as swimming.[10]

[33] The council's planning witness Mr Wren provided us with helpful information about a possible future environment and the potential for change by reference to zoning provisions. Residential sites overlooking the Bay are generally between 800 – 1000m^2 in size, mostly developed for housing at the present time. He considered that there was little opportunity for further subdivision of land zoned rural to the north, but that there could be some further development of built form.[11] He noted that the Wharf Zone provides for the construction and relocation of buildings as a permitted activity, along with boat launching ramps and jetties, including boat trailer parks, carparking areas, marine fuelling facilities, passenger transport, public toilets, wharf administration and freight handling activities. He mentioned an unimplemented consent held by Auckland Transport to widen and lengthen the existing boat ramp located between the recreational boat ramp and the main wharf on the western side of the Kennedy Point ferry terminal.[12] Less certain, and not governing the existing environment, is an application by Auckland Transport still being processed, for consent to rebuild the existing wharf structure involving some repaving of the wharf and road and a slightly larger wharf footprint.

The Resource Consents Applied For

[34] The consents needed for the present proposal and applied for, under the legacy Coastal Regional Plan and the AUP are as follows:

- ACRP:C

  (a) A marina outside a Marina Management Area (discretionary activity;

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10 We have not sourced the evidence describing these things, because they are relatively uncontroversial, perhaps excepting information about public recreational use of the Bay, a matter we shall come to.

11 D Wren, EIC, paragraph 7.18.

12 D Wren, EIC, paragraph 7.26.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Rule 23.5.8).

(b) Structures not part of a marina, e.g. floating pontoon carpark and office, and pile moorings (discretionary activity; Rule 12.5.18).

(c) Pile moorings within a mooring management area (restricted discretionary activity; Rule 25.5.4).

(d) Pile moorings outside a mooring management area (discretionary activity; Rule 24.5.5).

(e) Occupation of the coastal marine area ("CMA") (discretionary activity; Rule 10.5.9).

(f) Activities in the CMA not otherwise provided for (discretionary activity; Rule 11.5.5).

- AUP

(g) Construction and disturbance not otherwise provided for (discretionary activity; Rule F 2.19.4(A37)).

(h) Use and occupation – parking structure (discretionary activity; Rule F 2.19.8(A94)).

(i) Use and occupation – public facilities (discretionary activity; Rule F 2.19.8(A108)).

(j) Use and occupation – marina (non-complying activity; Rule F 2.19.8(A112)).

(k) Vibratory piling (restricted discretionary activity; Rule F 2.19.8(A114)).

(l) Other structures (discretionary activity; Rule F 2.19.10(A121)).

(m) Pile moorings within mooring zone (restricted discretionary activity; F 4.4.2 (A5)).

[35] The planning witnesses[13] agreed, and we have no difficulty finding, that the

[13] Mr M Arbuthnot for SKP Inc; Mr D Wren for Auckland Council; Mr R Blakey for Applicant; Mr C Shearer for Kennedy Point Marina Supporters Group.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

proposal overall should be bundled and holistically requires consent as a non-complying activity.

[36] As an aside, but offering useful information in the round, the planners agreed that the works footnoted below are permitted activities as held in the decision appealed from.[14]

[37] The planners also considered that lighting proposed on the marina would comply with relevant lighting standards in both the operative district plan and the AUP; this was confirmed in the joint witness statement of the lighting experts.[15] We note however that lighting remained a controversial issue for some parties, and we shall deal with that in due course.

[38] The finding that the application is to be treated holistically as non-complying is consistent with decisions of the High Court in *Tairua Marine Limited v Waikato Regional Council*[16] and the Environment Court in *Waiheke Marinas Limited,* previously cited.

Statutory Framework

[39] Being a non-complying activity application, it must first pass one of the s 104D "gateway tests", that is either its adverse effects must be no more than minor, or it must not be contrary to the objectives and policies of any relevant plan or proposed plan.

[40] Should the proposal pass the s 104D gateway, the usual s 104 matters are to be had regard to:

> (a) any actual or potential effect on the environment of allowing the activity; and
>
> (b) any relevant provisions of [listed statutory instruments]; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

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14 Earthworks for the proposed access deck in the operative district plan; noise meeting standards set out in the operative district plan and in Chapter 35 of the ACRP:C; works on the road network under the operative district plan; earthworks in the carpark on Donald Bruce Road under the operative district plan; stormwater from the deck and wharf structure to the CMA under the ACRP:C; the proposal is a permitted activity under the Sediment Control provisions of the AUP.

15 Mr G A Wright called by the Council and Mr J Mckensey called by the Applicant.

16 *Tairua Marine Limited v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006 at [30] – [35] per Asher J.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[41] Pursuant to s 104B, we may grant or refuse the application, and if granting it, may impose conditions under s 108.

[42] Under s 290A we must have regard to the Council's decision on the application. We have done so; note that it was comprehensive; and consider that it was helpful in our deliberations on evidence we heard which we understand was not greatly different from that presented to the hearing commissioners.

[43] As to Part 2 RMA, there may be relevance of one sort or another from matters deriving from s 5, ss 6(a),(b),(d),(e) and (f) and s 7(b),(c),(d),(f) and (i), and s 8. We will address the current jurisprudential uncertainty about the manner in which the provisions of Part 2 are to be applied to resource consent applications, later in this decision.

[44] Many provisions of the RMA, in particular for present purposes ss 104,104D and 108, were amended by the Resource Legislation Amendment Act 2017. By Schedule 2 to that Amendment Act (amending Schedule 12 of the RMA) the new legislation does not however apply to applications for resource consent lodged before commencement of the amendment where they have not proceeded to the point where further appeal is possible. The present application was lodged and notified the year before the amended legislation was passed.

[45] We have considered as well, in the manner and to the extent required in them, the Hauraki Gulf Marine Park Act 2000 ('HGMPA'), ss 7 and 8 of which are to be treated as a New Zealand Coastal Policy Statement under the RMA.

Gateway test in section 104D RMA

[46] Subsection 1(a) of s 104D requires us to be satisfied that the adverse effects of the activity on the environment … will be minor. The other available gateway in subsection 1(b) is that the application should not be contrary to the objectives and policies of relevant plans and/or proposed plans.[17]

[47] Bearing in mind that the positions of the Applicant and the Council under s 104D(1)(a) are different (with Mr Wren giving his opinion that this limb of the gateway is not met because of some particular more-than-minor effects), it is worth noting a concession by the Council's counsel Mr Allen that the *Cookson Road* decision about an holistic approach is consistent with earlier authority on a predecessor provision to s 104D

[17] We have summarised the somewhat lengthy wording of subsection 1(b).

(s 105(2A)), citing *Stokes v Christchurch City Council.*[18] We appreciate Mr Allan's candid submission that ultimately the assessment will involve conclusions by the Court as to facts and the degree of effect. We find that Mr Wren has been unduly conservative, and prefer the legal analysis offered by his counsel.

[48] As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.

[49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the law is that the evaluation under this provision is to be undertaken on a "*holistic basis, looking over the entire application and a range of effects*",[19] not individual effects.

[50] The evaluation under subsection 1(b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach. As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.[20]

[51] We recorded that we have carefully considered all matters relevant to each aspect of the s 104D gateway; our analysis and reasons will appear in subsequent parts of this decision concerning effects on the environment and statutory instruments. Based on those later findings, we record here that our finding is that the proposal passes through both gateways.

Exercising the discretion under sections 104 and 104B RMA

[52] Before we move to consider matters in contention to be assessed under these sections, it is appropriate to note current jurisprudence concerning the words in s 104(1) "*... subject to Part 2*". Mention must be made of the decision of the High Court in *R J*

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18 *Stokes v Christchurch City Council* [1999] NZRMA 409 at p434.

19 See for instance *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC 194 at [46] and subsequent paragraphs.

20 See for instance *Cookson Road Preservation Society* decision; *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [73] – [74]; *Man O' War Station Limited v Auckland City Council* [2010] NZEnvC 248. Guiding this jurisprudence has been the seminal decision of the Court of Appeal, *Dye v Regional Council* [2002] 1 NZLR 337.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Davidson Family Trust v Marlborough District Council,[21] in which it might be said there was a partial extension of the law laid down by the Supreme Court in the *King Salmon* case,[22] to resource consent applications. Very much summarised, the High Court has held, extending the Supreme Court's findings about plan cases, to consent cases, that the formerly well understood "overall judgment approach" to decision-making is rejected, with resort to Part 2 occurring where there might be findings of invalidity, incomplete coverage or uncertainty of meaning within planning documents. The *R J Davidson* decision has been appealed to the Court of Appeal, and heard by that Court; a decision is awaited. We do not think a great deal turns on any dichotomy of approach in this case, because we consider that the same result is reached by either route. Essentially Part 2 will be served either by an overall judgment approach, or because there is no need to have resort to it for the sorts of reasons discussed by the High Court in *R J Davidson*.

Planning Framework (s 104(1)(b) RMA)

[53] In a previous section of this decision about zoning, we touched on relevant statutory instruments. For completeness, we record here that we have undertaken assessment under s104(1)(b) RMA against:

(a) The New Zealand Coastal Policy Statement (NZCPS) and its companion legislation HGMPA;

(b) The AUP, including its RPS; the proposed RCP components (key provisions being in Chapter F of the AUP);

(c) The legacy operative RCP;

(d) The HGI Plan, even though no consents are required under it.

AUP – Proposed Regional Coastal Plan

[54] The AUP was made significantly operative in November 2016, however the RCP components require approval from the Minister of Conservation under s 152(3)(b) of the LGATPA 2010 and Clause 18(3) of Schedule 1 of the RMA. Ministerial approval has been sought, and counsel for the council advised by memorandum dated 22 May 2018 that

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21 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC at [52].
22 *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

THE SEAL OF THE NEW ZEALAND ENVIRONMENT COURT

the new RCP will become operative in part on 31 May 2018.

[55] For completeness, we hold that the proposed instrument should be given significant weight, and the operative provisions limited weight, given the former's very advanced status in process terms. It will however be noticed from subsequent sections of this decision that our findings on the evidence support granting of consent under both RCPs, so the weighting issue is largely academic.

[56] A policy shift between the treatment of new marinas in the two RCPs is that in the legacy instrument, they had discretionary activity status, and in the proposed, they are non-complying.

[57] Counsel for the Applicant submitted[23] that the shift in policy was to ensure a thorough and detailed approach to assessment of new marina development proposals,[24] and wasn't an indication that new marinas are of themselves inappropriate coastal development. It was their submission that both regional plans expressly contemplate marinas despite the AUP classifying them as non-complying. They submitted that the appropriateness of any new marina development would be a function of its performance against relevant policy provisions, taking into account its potential effects and requiring it to meet relevant statutory tests.

[58] On behalf of the Council Mr Allan approached the issue more conservatively. He noted that the RPS within the AUP does not significantly address marinas, or issues about mooring.[25] It does however make provision about development in the coastal environment, requiring demonstration of a functional or operational need for an activity to be in the CMA.

[59] Coming to the RCP (as part of the AUP), Chapter F addresses marinas to some degree, as follows:

(a) Chapter F 1.2 provides for the development and operation of **existing** marinas in the Coastal – Marinas Zone.

(b) Chapter F 3 lists **existing** marinas (12 of them).

(c) Chapter F 2 relating to the General Coastal Marine Zone ("GCMZ")

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23 In paragraph 41 of their opening submissions.

24 This was also the expert evidence of the Applicant's planner Mr R Blakey at paragraphs 5.75 – 5.78.

25 See explanation at p. 13 of section B8 (Coastal Environment).

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

provides for **new** marinas as non-complying activities.

(d) The GCMZ activity tables apply to the Coastal – Mooring Zone and other coastal zones, such that a new marina is to be assessed against the detailed objectives and policies of the GCMZ and other applicable objectives and policies, for instance found in Chapters E 15, E 18, E 19, and others.

(e) Some objectives and policies in Chapter F 2 expressly refer to marinas, one of them, Policy F 2.4.3(6) concerning dredging, referring to the development of marinas **outside** the marina zone:

> Require the **development** or redevelopment **of marinas**, wharfs, piers and berths, **outside** of the Coastal – Minor Ports Zone, the Coastal – Defence Zone, the Coastal – Ferry Terminal Zone, **the Coastal – Marina Zone** and the city centre waterfront precincts, to be designed and located to minimise the need for dredging including by assessing whether there are reasonable practicable alternatives to provide for a use or activity which would avoid or reduce the need for dredging. [**emphasis supplied**]

(f) Mr Allan and his witness Mr Wren noted numerous objectives and policies in Chapter F 2 to guide consenting decisions on new marinas outside the marina zone, covering a broad range of matters, including use, development, occupation and structures in the CMA; and some other Auckland-wide provisions.

[60] We note, (of some relevance to the present proposal in relation to the policy quoted above), that there is no dredging intended.

[61] There is also some relevance to the issue of new marinas being non-complying, from both the GCMZ and the mooring zone expressly providing for the expansion of the existing marinas in those zones by no more than 15% as a discretionary activity.[26] Mr Allan submitted that these provisions might counter any suggestion from opposing parties that a mooring zone as such is sacrosanct, we think with justification.

[62] The Environment Court held in its *Matiatia* decision[27] that a provision <u>then</u> found in Chapter D of the PAUP, Clause 5.1.13, set a clear preference for assessing new marinas through a plan change process. Such preference is not now found in the AUP,

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26 Activity Table F 2.19.8(A113), GCMZ and Activity Table F 4.4.1(A2) in relation to the mooring zone.

27 At [644].

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

in consequence of which Mr Allan submitted that if a developer elected to take a consenting approach, it must pass a gateway test under s 104D, and would otherwise be subject to thorough assessment of all effects against relevant zones and relevant objectives and policies. We accept that submission.

[63] Mr Allan proceeded to submit that it is important not to treat a non-complying activity status for an activity as a de facto prohibited activity, citing a decision of the Planning Tribunal in *Price v Auckland City Council.*[28] We hold to the same effect because the proposition is trite; they are two very different activity types, one capable of attracting consent and the other not.

Policy issues concerning loss of swing moorings

[64] A concern of parties in opposition to the proposal was that it would involve the removal of most of the swing moorings presently in the Bay. Several parties and witnesses spoke of their wish to continue utilising a swing mooring, while individuals amongst the Kennedy Point Marina Supporters Group supported the agglomeration of berths consequent upon building a marina, and preferred the ease of access and security from the elements in a marina.

[65] Mr Allan and Mr Wren drew certain policy matters to our attention concerning this issue. They noted that the legacy RCP had a cap on the number of moorings, but that this has disappeared, not being replicated in the new instrument. They considered that this would pave the way for an increased number of moorings within mooring zones, making for more efficient use of them. They pointed as well to Policy F 4.3(4)(b) encouraging the replacement of swing moorings with bow-to-stern moorings where practicable. Again, an emphasis on efficiency.

[66] As to Chapter 24 of the legacy RCP, Mr Wren said:[29]

> ... the Proposal involves the development of a marina that is largely located within a MMA, and while a marina is a different activity to moorings, it occupies the same general location. It accords with the relevant objectives and policies insofar as it will avoid, remedy and mitigate adverse effects (as noted above), will avoid conflicts with other activities, and represents (to a greater degree than moorings themselves) a more efficient use of the CMA.

[67] Mr Wren observed that this theme is carried into Policy F4.3(3) and F4.3(4) in

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28 *Price v Auckland City Council* (1996) 2 ELRNZ 443, and 448.

29 D Wren, EIC, paragraph 7.162.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

the new RCP.

[68] Mr M N Arbuthnot, planning consultant called by SKP, focussed strongly on Policy F2.16.3(24) in Chapter F2(GCMZ). He considered that the policy had the purpose of ensuring that sufficient provision is made for future demand for moorings in suitable areas. It reads:[30]

> Avoid structures that will limit the ability to moor vessels in the Coastal – Mooring Zone, other than those structures necessary for infrastructure that have a functional or operational need to be located in the Coastal Marine Area and that it cannot practicably be located outside the Coastal – Mooring Zone.

[69] On behalf of the Council Mr Allan submitted that Mr Arbuthnot was reading the policy out of context.

[70] Policy 24 sits in a group starting at Policy 21, which address the ensuring of safe navigation. Mr Allan considered that Policy 24 had the intent of avoiding structures that might limit the ability to moor vessels in the Mooring Zone in navigation safety terms, and was not concerned with future demand for moorings. We agree that the thrust of policies 21 – 24 is as he describes.[31]

[71] The council's maritime witness Mr Goff was clear in his evidence that the marina would not have adverse effects on navigation. This was also the clear position reached in expert conferencing by the three navigation witnesses, Mr N Drake and Mr M Schmack called by the Applicant, and Mr Goff called by the Council.[32]

Effects on the Environment

Positive effects on the environment

[72] So long as the application passes through one of the available gateways under s 104D, it is appropriate to have regard to positive effects. It being a finding later in this decision that the gateway is passed (reasons will be recorded), we discuss potential positive effects.

[73] Something of the theme of positive effects was found in the legacy RCP

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30 M N Arbuthnot, EIC, paragraph 1.40.

31 Mr Allan offered an oral aside that the slightly strange wording of the policy might have arisen because it originally appeared in the Mooring Zone in the PAUP, and during the plan process focus was moved to the GCMZ.

32 Joint witness statement (Navigation Safety and Moorings Management), paragraphs 6 – 15.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

concerning marinas, at Clause 23.1 (Introduction):

> Marinas generally enhance amenity for boat users through the provision of a wide range of facilities and services, while providing economic opportunities and social facilities for parts of the community. Marinas also concentrate vessels and their associated effects into defined areas and provide for a more efficient use of harbour space, than other methods of securing vessels.

[74] The "efficiency" flavour of this has been carried through in part, if more indirectly, in the policies in the new instrument discussed in the previous section of this decision about moorings.

[75] Mr Wren gave evidence about positive effects,[33] supporting various claims by the Applicants' witnesses and counsel. The Council also called the evidence of Ms J H Woodhouse, a landscape architect, on this score. These witnesses considered that the proposal would provide a range of opportunities for recreational activity, for instance the storing of kayaks and small boats; bicycle racks on the carpark pontoon; public access during daylight hours onto floating marina structures; a building for use by community groups; a small café; public drop-off and pick-up berthage; and provision for short-stay public berthage of between one and 3 days. Mr Wren also considered that such opportunities would enhance public access to the coast consistent with the NZCPS, while promoting the efficient use of occupied space in the CMA, including by requiring that structures be made available for public or multiple use wherever reasonable and practicable.[34]

[76] The evidence of Mr M Pigneguy of SeaLink Travel New Zealand, ferry operator, discussed in more detail later in this decision, pointed to a potential positive effect of part of the marina structure offering facilities for small passenger ferries to dock without the need for expenditure of public funds on separate infrastructure.

[77] Ms A D Sharma is a scientist specialising in coastal processes, called by the Council. She offered the opinion that the marina's floating attenuators would reduce coastal erosion, particularly on archaeological resources in the Bay, because they would offer protection of cliffs and coastal edges including the Kennedy Point Reserve; also on private properties located along Kennedy Point Road. The location of archaeological sites was described in the evidence of the council's archaeology witness Ms R S

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33 D Wren, EIC, paragraph 7.95.

34 Policy 6(2)(e)(i) of the NZCPS.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Ramsay.[35]

[78] Improvements in roading and pedestrian facility design in the vicinity of the existing wharf and the proposed marina, were put forward by the Applicant, some of them on an ***Augier*** basis. These included proposals to widen the road carriage way, enhance the vehicular ferry queuing lane, provide a continuous traffic lane from the nearby intersection to the wharf, reinstate a footpath and provide a pedestrian refuge island; and upgrade the Kennedy Point Wharf carpark as recommended by Traffic Design Group Limited.

[79] The Applicant also offered on an ***Augier*** basis to provide new dinghy racks on the foreshore for storage of dinghies owned by owners of pile moorings. In addition, the Applicant submitted that it would be creating a sheltered swimming and small boat operation area.

[80] Once again on an ***Augier*** basis, the Applicant offered to establish a Kennedy Point Marina Maritime Trust to tangibly recognise the marina's occupation of public CMA, intended to operate through the management services of the Auckland Communities Foundation utilising funds the Applicant would donate. It anticipates that financial grants would be available for maritime environmental protection, safety and skills training for residents and mana whenua of Waiheke Island, including for equipment; sailing courses in maritime education for Waiheke Island youth and mana whenua; and fees for maritime related study proposals by resident mana whenua of Waiheke Island, or relating to the coastal environment of the Island.[36]

[81] These potential positive effects on the environment were not successfully challenged, and we find that they are present and we can have regard to them, which we do.

Adverse effects on the environment

[82] Understandably, given the cases brought by parties in opposition to the proposal, most of the evidence about effects concerned potential adverse effects. Each of the appellants and s274 parties in opposition brought different angles on these. SKP called most of the expert evidence in opposition. The Appellant Mr Walden (in addition to calling

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35 A Sharma, EIC, paragraph 7.5 and R Ramsay, EIC, paragraphs 7.20 and 7.21.

36 Draft conditions 113 and 114. It is noted that funding would be $5,000 upon establishment and $20,000 per year, CPI adjusted for 35 years.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

one witness) offered lengthy submissions that in places took on the character of evidence (non-expert) or assertions about his views on issues, for instance "unacceptable" threats and risks of various kinds.[37] Overall however, his submissions amounted to a wide-ranging review of evidence and submissions by others in opposition. He essentially confirmed such during his delivery, by adopting the submissions of Mr Sadlier for SKP.[38]

Acoustic effects

[83] Evidence was received from two expert witnesses, Mr C Fitzgerald called by the Applicant and Mr N Hegley called by the Council. Acoustic effects were of considerable concern to some lay witnesses and opposition parties.

[84] The expert witnesses reached an almost complete level of agreement about matters within their respective areas of expertise, concerning construction noise and noises from an operational marina.

[85] Mr Fitzgerald's construction noise assessment had focussed on piling as likely to generate the highest level of construction noise both in the air and under water. He used a software package "SoundPlan" to offer predictions of airborne piling noise, and considered that this noise would comply with relevant construction noise limits at the nearest dwelling. Predictions of undersea piling noise were carried out using another software package "dBsea", utilising international criteria concerning generation of anthropogenic sound on marine mammal hearing.

[86] Mr Fitzgerald recommended conditions of consent requiring the preparation of a Construction Noise Management Plan (CNMP) to mitigate airborne and underwater noise emissions, setting performance standards, predicted noise levels, mitigation and management strategies, monitoring, communication consultation and complaints-response procedures. We have considered the relevant draft conditions of consent[39] and consider that they suitably define performance standards and thresholds and methods to ensure that they are met.

[87] Mr Fitzgerald and Mr Hegley agreed in conferencing that noise levels from construction operation of the marina are predicted to comply with the relevant

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37 R Walden, Legal Submissions, paragraph 30. Of a similar character on other environmental issues, we identify paragraphs 52-54, 56, 57, 87, 88, 94, 95-97, 101, 103, 143 by way of example of many points made throughout.

38 Oral aside as he commenced reading paragraph 27 of his written submissions.

39 Draft conditions 27 to 31 (2 March 2018).

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

performance standards and that the noise effects would be reasonable. They approved of the conditions of consent that had been imposed by the hearing commissioners.

[88] Unlike Mr Hegley, Mr Fitzgerald did not offer expert evidence on potential effects on Little Blue Penguin, but offered general observations within his knowledge, which we shall return to.

[89] Ms M H Webb, a resident in Kennedy Point Road overlooking the Bay gave evidence (amongst other things) about construction noise for long hours six days a week.[40] Mr Hegley's response[41] noted that proposed condition 27 would set upper limits for construction noise, and that in practice it would be unlikely that such would be reached for more than a few days, and then only at the closest dwellings; that for the majority of time, construction noise would be well below the proposed limits generally within noise limits for a permitted activity during daytime (50 dB L_{Aeq}). We observe that the residents of Kennedy Point Road are living in an urban area and could face construction noise on new dwellings, extensions, or maintenance, in their environment.

[90] Ms Webb, and another Waiheke resident Mr S K Hood involved with the Waiheke Boating Club, expressed concern about noise from halyards slapping on masts in the marina. Mr Hegley noted that common practice requires halyards to be fastened away from masts. Proposed conditions 93 and 99 specifically require this noise source to be addressed.

[91] Ms Webb expressed concern about berth owners "coming and going, and possible noisy parties on boats in the marina." Mr Hegley considered that such issues would be addressed by marina management, and pointed to proposed conditions 93, 99 and 112 about the requirement to prepare a noise management plan, restrictions on people living on boats, and night-time restrictions on public access.

[92] Ms Webb expressed concern about whether complaints would be properly addressed. Conditions 30(k) and 93 make provision for this both during construction and subsequent operation of the marina; and the Council has a noise control service.

[93] These concerns are adequately addressed by the proposed conditions and are not reasons to decline the application.

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40 M Webb, EIC, paragraph 30.
41 N Hegley, EIC, paragraph 4.2.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Effects on ecology

[94] An expert witness conference was held amongst eight witnesses on ecological and coastal process issues, because the two topics are interrelated in part.

[95] As to marine ecology, the experts agreed that the Assessment of Effects on the Environment adequately characterises the existing environment as to marine benthic community, and contaminant levels (copper and zinc in water column and seabed sediments). They agreed that there might be some change in benthic community composition and structure over time due to the marina, and some increase in water column and benthic sediment contaminant levels, primarily copper and zinc and some increase in the settlement of fine sediments. They agreed that wash from vessel propellers might affect benthic communities. There were otherwise quite divergent views about potential effects.

[96] Dr Sivaguru, called by the Council, examined potential ecological effects, particularly inter-tidal habitat loss from the construction of the access wharf for pedestrians and vehicles from Donald Bruce Road. Habitat loss from the construction of the marina (mainly piles) and effects on Little Blue Penguin habitats on existing breakwater and effects on one site close to the existing breakwater.

Effects on Little Blue Penguins

[97] This issue proved one of the more contentious in the hearing. Little Blue Penguins (also called "Little Penguin") are identified as "At Risk – Declining" in the latest edition of the New Zealand threat classification system.

[98] There was agreement that a recent survey had detected seven burrows in the existing breakwater, one near a small pōhutukawa tree, one off the footpath, and one burrow with one large chick very close to the loading ramp of the car ferry.[42] Effects on these birds were, we were told the subject of considerable discussion at mediation (without of course the detail being reported to us), which at that stage had involved Royal Forest and Bird Protection Society Inc., as well as parties who appeared before us. Conditions of consent were revised and largely agreed at mediation amongst some parties including Forest and Bird which thereafter withdrew.

[99] The issue is one of importance given the requirements of Policy 11 of the NZCPS

42 K Sivaguru, EIC, paragraph 7.11.

about indigenous biological diversity including in particular the avoidance of adverse effects of activities on indigenous taxa listed as threatened or at risk in the New Zealand threat classification system lists; a step beyond the requirements of s 6(c) of the Act focussing on habitat, as discussed by this Court in *Pierau v Auckland Council*.[43]

[100] There was no evidence that known existing penguin burrows would be physically disturbed by the construction of the marina. Draft conditions 24A and 61 have been devised to deal with any scenario where penguins might establish new burrows in the small section of rock wall that will be disturbed (where no nests have been observed to date). The conditions include requirements for consent holder to maintain or enhance penguin nesting, roosting, and moulting habitat after construction. Draft condition 97 is, we were told by the applicant and its witnesses, designed to minimise potential adverse construction effects (noise, lighting, machinery movement, pest predation) on nesting and roosting penguins in the locality; along with regular monitoring.

[101] It was the evidence of Dr Sivaguru that there would be benefits from the presence of the marina creating a low speed environment within 200 metres of shore, lessening risk of vessel strike and propeller injuries.[44] It was submitted on behalf the council that condition 97(i) would require measures to be included in the Marina Management Plan ("MMP") to ensure that vessels approaching the marina at dawn and dusk would take special care to avoid collisions with penguins, through signage and advice.

[102] Dr M Bird called by SKP has experience working with Little Blue Penguins, particularly on Tiritiri Matangi Island. Amongst many things, he was concerned that there is a variety of habitat in the surrounding coastal margins that would be suitable for nesting and roosting sites for these birds, including on the steep hill slopes on the western side of the Bay, despite there having been no detection of them there to the present time.[45]

[103] Dr Bird gave the opinion that Little Blue Penguin habitat cannot effectively be enhanced, and that they generally return to areas of known burrows or adjacent areas; he considered that they generally only use artificial burrows as a last resort and that there had been limited success in this regard on Tiritiri Matangi Island. He considered that Little Blue Penguin nests cannot be translocated.[46] He offered a view that the proposed marina infrastructure and vessel activity might prevent nursing parents returning to nestlings,

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43 *Pierau v Auckland Council* [2017] NZEnvC 090.
44 K Sivaguru, EIC, paragraph 8.32.
45 M Bird, EIC, paragraph 6.1.
46 M Bird, EIC, paragraph 6.5.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

which could lead to abandonment of nests. He was very concerned about vessel and propeller strike.[47] Dr Bird was particularly pessimistic in his views about potential effects of young fledglings acclimatising; influences on breeding and moulting seasons and abandonment of nests; reliance on high site fidelity year on year; possible disturbance by lighting on communication and courtship behaviour; loss of a parent possibly causing a nest to be abandoned; the need for consistency of natural behaviour; delays to breeding seasons leading to delays in fledging, moulting, and foraging.[48]

[104] We were concerned that Dr Bird's evidence was in the main based on assertion or surmise, and offered very little in the way of empirical information. We record some rather striking examples of this in a later section on other birdlife. Dr Bird seemed relentlessly pessimistic in comparison to the other ecology witnesses, and unaccepting of their suggestions about avoidance of effects through the very thorough iterative approach to drafting conditions of consent. Regrettably he seemed quite unwilling or unable to accept that other witnesses have experience with these birds and might offer sensible points of view and reasonable solutions.

[105] We note that Mr M Poynter, called by the Applicant, acknowledged that he is not a specialist in this species, but he is nevertheless a marine ecologist of long experience, particularly in the Northland and Auckland regions, and has experience with the development of marine infrastructure including marinas in locations where ecological issues need carefully to be taken account of, and often avoided.

[106] Dr Sivaguru considered as a result of her investigations at Kennedy Point, that the penguins appear to prefer artificial habitat provided by the relatively recently constructed breakwater.[49] She was happy that the proposal avoids the breakwater. She was comfortable with assessment of the extent of proposed disturbance (not near any identified burrows or nests), and the conditions proposed to avoid effects, particularly condition 22, should things change.[50]

[107] As to dogs and other potential predators, we note the practical advice of Dr Sivaguru that considerable attention has been given to this topic in draft conditions of consent, particularly 90(b), 97(g), 97(h) and 118. Dogs being required to be kept under control at all times, and active plans for trapping of pests such as rodents and mustelids,

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47 M Bird, EIC, paragraph 6.2.
48 M Bird, EIC, paragraph 6.2.
49 K Sivaguru, EIC, paragraph 7.13.
50 K Sivaguru, EIC, paragraph 8.31 and 8.32.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

offer considerable promise for protection of the penguins and other bird species in the vicinity. She considered this a positive effect, pointing to proposed condition 118.

[108] In answer to criticism by SKP about draft conditions 24A and 61 involving phrases "as far as is reasonably possible", and "to the greatest extent practicable" respectively, the applicant submitted that in a practical sense the finding of all active penguin burrows might not be entirely possible despite best endeavours, and the latter is advanced in connection with preparation of the construction works programme component of the Construction Management Plan encouraging onsite construction works outside the penguin breeding season.

[109] For the reasons recorded in this section of our decision, and the later one on other birdlife, we have a distinct preference for the measured evidence of Dr Sivaguru and Mr Poynter over the evidence of Dr Bird which we found unduly alarmist, barely supported by empirical information, incapable of acknowledgement of reasonable contrary views, and generally overstated.

Lighting effects on penguins

[110] Dr Bird offered an opinion while discussing courtship and breeding behaviour of little penguins that "*it is probable that the noise and light emanating from the marina at night would disturb the courtship behaviour of little penguin*". No detail was offered from observations or other studies. Mr H E Ross, a volunteer and officer with the local branch of the Royal Forest and Bird Protection Society Inc., expressed concern about the potential impact of lighting on little penguins, amongst other effects. Ms S M Fitchett, a party under s 274 also having active involvement with that organisation, has also been involved in monitoring and working for the protection of little penguins on the Island. She observed[51] and expressed a view that penguins are known to be averse to strong light. Neither witness claimed scientific qualifications, but we accept the genuineness of expression of concern.

[111] Mr G A Wright is a consulting engineer specialising in lighting who was called to give evidence by the Council. He noted the concerns we have recorded, and offered advice from his knowledge and experience, including conducting research on possible effects of night-time light on little penguins. He acknowledged it was important to have appropriately designed night-time lighting that minimises spill light intensity to penguins'

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51 S Fitchett, EIC, paragraph 13.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

habitats and avoids high intensity horizontal lighting.[52] He considered that the lighting proposed for the marina would achieve these qualities, as it is to be well baffled and directed downwards to minimise spill.[53]

[112] Mr Wright offered a practical observation. He noted that penguins inhabiting burrows at Kennedy Point have chosen to inhabit an environment where night-time artificial lighting is present from the ferry terminal and wharf and also nearby residential dwellings.[54] He also expressed his view that foreshore vegetation, breakwater topography and burrow topography (depending on the nature and location of the burrow) would provide some mitigation of light effects.[55]

[113] Mr Sadlier questioned the applicant's lighting engineer witness Mr J K Mckensey about the effect of different light wavelengths on little penguins, and he conceded he was aware of it. No SKP witness exchanged evidence on it. In his answers to other questions, Mr Mckensey confirmed his earlier evidence that the lights proposed would be unobtrusive.[56] In the end, we rely on the evidence of Mr Wright, who confidently felt that the penguins' acknowledged sensitivity to certain spectra of light, could be addressed satisfactorily as to light levels and directions, through conditions of consent.[57]

[114] We have been provided with no reasoned evidence to support the expressions of concern. We have no basis for doing other than accepting Mr Wright's careful opinions from his research and observations. There is no basis for holding that there is a potential adverse effect on the environment in this regard that is more than minor.

Acoustic effects on penguins and other birds and wildlife

[115] In another brief assertion not backed by reasons, Dr Bird postulated that "*excessive noise or other significant disturbance may cause nursing penguins to abandon nests*".[58] He also stated, "*Little penguin and other avian species such as oystercatcher and red-billed gull will be affected by noise that is proposed for 10.5 hours*" [during construction].[59]

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52 G Wright, EIC, paragraph 8.3.
53 G Wright, EIC, paragraph 8.3.
54 G Wright, EIC, paragraph 8.5.
55 G Wright, EIC, paragraph 8.5.
56 Transcript p. 112
57 Transcript pp. 217-8
58 M Bird, EIC, paragraph 6.2(a)(v).
59 M Bird, EIC, paragraph 6.8.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

[116] The Council's acoustic engineering witness Mr Hegley gave evidence that he has studied the effects of noise on wildlife including penguin, by reading scientific publications which he named in his evidence.[60]

[117] It was his view that it is not the noise that generally disturbs penguins, but the association of an activity that goes with the noise. From his own experience, he said he had seen penguins coming to and following a powerful outboard motor and a passenger liner in a remote area with no other manmade noise at all in the area. He was aware that noise from gunshot has little effect on repelling birds at an airport or an orchard unless the noise is reinforced with the actual shooting of the birds.

[118] Mr Hegley noted from the evidence of Dr Sivaguru[61] that burrows are located relatively near the shoreline at Kennedy Point and the existing breakwater amongst other locations, so will be exposed to wave noise. Mr Hegley quantified the likely levels of wave noise (from 300 – 500mm waves) as typically being between 65 and 70 dB L_{Aeq}.

[119] Mr Hegley's views on these and related matters were tested by Mr Sadlier in cross-examination.[62] Mr Hegley maintained his opinions, added a little more detail, and appropriately conceded that he was unable to answer one question about penguin behaviour and perceptions while accessing burrows when surrounded by human-generated noise. His evidence in chief was not undone in any respect by the questioning.

[120] It appears to us that there exists very little problem for the penguins in the current environment, and we accept Mr Hegley's opinion that with controls on the various anticipated types of noise through conditions of consent, including during construction, adverse effects would be no more than minor.[63]

[121] Mr Hegley offered the opinion that there would be no adverse effects for other bird species. For instance, Oystercatchers nest just above the high tide level in areas where noise is generated by waves measured at even higher levels 70 – 75 dB L_{Aeq} with a typical sea. He is also aware of locations where Oystercatchers happily feed and rest within two to three metres of a state highway that carries approximately 2,000 vehicles per day and 8% heavy commercial vehicles; there are similar examples for Red-billed gulls where they happily forage for food at landfill amongst heavy landfill machinery and

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60 N Hegley, EIC, paragraph 4.8.

61 K Sivaguru, EIC, paragraph 7.11.

62 See two un-numbered pages of transcript created from notes taken and agreed by counsel on account of a short breakdown in digital recording at this time of the hearing.

63 N Hegley, EIC, paragraph 4.17.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

are difficult to move on. [64] We have no evidence to doubt this evidence, and accept it.

[122] Another of Dr Bird's assertions was "*noise from vessels and people using marina: noise as a hazard to marine species such as Bottlenose dolphin. Noise can disorientate marine species*".[65]

[123] Mr Hegley gave evidence[66] that there are numerous examples of dolphins following boats, from high-powered outboard motors to ocean liners, seemingly enjoying the conditions, and that he was not aware of any research demonstrating that there would be adverse effects generated by noise from boats such as those that would be located within the proposed marina.

[124] Considering other types of noise impacting on wildlife, we refer to the joint witness statement of the two acoustic witnesses, Mr Hegley for the Council and Mr Fitzgerald for the Applicant, referring to the proposed conditions of consent about construction noise and observing:[67]

> Underwater noise is unlikely to result in physical injury to marine mammals, with the largest potential risk radius of less than 10m for vibratory piling methods. The behavioural response 'zones of influence' threshold are considered the appropriate trigger for management measures, the largest of which extends 1,440m for vibratory piling methods.

[125] There is no aspect of any of the evidence that allows us to do other than find adverse effects on the environment under this head will be anything more than minor.

Other birdlife

[126] Dr Bird's wide-ranging concerns extended to other shore and wading birds. Once again, we felt that his concerns were often overstated and not grounded in empirical studies or in recorded, let alone verified, observations. But one of many examples was his suggestion that "*Kennedy Point is part of the Waiheke Island ecosystem(s) and the wider biome and ecotones of the Hauraki Gulf and Auckland Region.*"[68] He expressed concern that Kennedy Point is in an area of ecological corridors and flyways, and presented a map[69] as a "*representation of some of these possible corridors…*",[70] with one

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64 N Hegley, EIC, paragraph 4.15.
65 M Bird, EIC, paragraph 6.15(c).
66 N Hegley, EIC, paragraph 4.16 and 4.17.
67 Noise JWS, paragraph 9.
68 M Bird, EIC, paragraphs 5.1 to 5.3
69 M Bird, EIC, Figure 1.
70 M Bird, EIC, paragraph 5.3.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

possibly passing over the site of the marina proposal.

[127] The problem with this evidence was confirmed under cross-examination by Mr Littlejohn. The use of the word "*possible*" was confirmed as he hadn't undertaken observations here,[71] but were "indications" coming from some work he did for the council at Hibiscus Coast.[72] We are driven to observe that Dr Bird's evidence on these things became even more extraordinary when, under further cross examination, he spoke of concerns about birds flying into masts in the marina and the masts preventing them from landing on the beach, before being forced to concede that Kennedy Bay is not the only gravelly beach on Waiheke, and is not identified as an ecological area or as a feeding ground for wading or migratory birds.[73]

[128] There were unfortunately many other examples of assertion, surmise and lack of empirical evidence in Dr Bird's evidence in chief and answers under questioning. It would be unnecessary and tedious for us to describe them all. The difficulties with much of Dr Bird's evidence and many of his answers to questions included that they were mainly surmise or assertions lacking empirical backing. We were also troubled that his evidence was not backed by holding relevant tertiary qualifications. It was established under cross examination by Mr Littlejohn that Dr Bird's master's and doctorate studies were in branches of ecology other than avifauna, although he said that he had undertaken group studies in avian matters at Massey University, supervised others who had been studying terrestrial bird species on Tiritiri Matangi Island, been a member of a group studying little penguin on that island, but had not published or had any peer reviews undertaken.

[129] We much prefer the evidence of Dr Sivaguru to the effect that the location is not identified as having significant avifauna values, for instance it is not recognised in the AUP as a wading bird site or nesting area. From observation, she considered that there was no evidence of any established nesting population of coastal birds, except for the penguins.[74] Her evidence strongly matched that of Mr Poynter which we also much preferred over Dr Bird for the same reasons.

[130] To the extent that there might be other such species present, proposed condition 118 about a predator control programme, should offer a positive benefit.

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71 Transcript p. 321, lines 29 to 31.

72 Transcript p. 321, lines 13 to 16. We assume he means the western coast of the Hauraki Gulf near Orewa, which we measure on a chart to be over 25 nautical miles away to the northwest.

73 Transcript p. 322, lines 1 to 20.

74 K Sivaguru, EIC, paragraphs 8.2 and 8.3.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Terrestrial ecology

[131] Once again we felt that Dr Bird was overstated in his expression of concern, on this occasion to the effect that the full range of the terrestrial taxa had not been identified through detailed survey of reptiles.[75] Once again we preferred the detailed and sensible response by Dr Sivaguru that the marina is almost entirely located in the CMA; it is not identified in any relevant planning instruments as having significant terrestrial ecological values; and it is adjacent to an existing ferry terminal which presents as a highly modified environment. She considered that there would be unlikely to be any direct effects on terrestrial ecology from the marina, and that surveying the terrestrial environment would be unnecessary.[76]

[132] We feel comfortable in accepting Dr Sivaguru's advice about these things, and find for her evidence accordingly.

Effects on benthic community composition – movement of sediments, and effects from antifouling paints

[133] As a group, these issues attracted a good deal of evidence, but we were frankly left wondering why. We find they are best dealt with by means of a fairly practical short circuit. The extensive evidence about benthic community composition, reductions in current flow from the presence of the marina, fining, movement and settlement of sediment in the marina, and cumulative effects from contaminants discharged from the marina (particularly antifouling paints on boats), can largely be drawn back and resolved by way of draft and further-refined conditions of consent about the use of low-impact antifouling products.

[134] We note a proposed feature for this marina that breaks new ground. Conditions of consent are proposed innovatively to control the nature of antifouling paints and other potential contaminants in the marina. Draft conditions 39 – 45 provide for the creation, and approval by the Council, of a water and sediment quality monitoring programme ('WSQMP'); also, appropriate review provisions concerning water and sediment quality conditions in relation to possible discharges of trace metals and co-biocides from antifouling paints, and accidental discharges of human sewerage from boats. Baseline monitoring is proposed against certain stated objectives, water and sediment quality

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75 M Bird, EIC, paragraph 4.3.
76 K Sivaguru, EIC, paragraph 8.1.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

monitoring and sampling; preparation of the document against national and international published guidelines stated in the draft conditions; procedures to be stated for guideline exceedances; implementation; and subsequent monitoring and review.

[135] Of particular note is draft condition 99(c) requiring berth-holders not to use antifouling products incorporating the co-biocide diuron; requiring use of low impact antifouling products such as non-copper, low-copper formulation or low copper release antifouling paints; provision of information and advice to berth holders regarding NZEPA directions about antifouling paints on an ongoing basis; and provision of information and advice to berth holders concerning the use and availability of best practice antifouling paints; supported by provisions for compliance and enforcement.

[136] We were impressed by the sound methodological approach to the issues by the witnesses called by the Council, marine scientist Mr M J Cameron specialising in eco-toxicology and contaminant accumulation in marine invertebrates, Ms A D Sharma a marine scientist specialising in oceanography, and Dr Sivaguru. By reference to their expert knowledge and experience, and the draft conditions of consent, these witnesses offered the opinion that effects from antifouling paints from the present proposal should be no more than minor. Of note, Mr Cameron gave evidence that marinas and mooring areas are at present a direct source of copper and other antifouling contaminants in the marine environment due to the nature of antifouling paints on vessel hulls and marina structures. In particular, copper is found in most antifouling paints in use in New Zealand. Mr Cameron noted existing relatively elevated copper levels in the water column in the Putiki Bay area (which includes Kennedy Point Bay), but that existing copper levels in sediments of the proposed marina footprint are not considerably elevated, and occasional copper in the water column is not settling out substantially in the sediments of the proposed marina footprint.[77]

[137] Mr Cameron noted that the marina is of "porous design" due to the use of floating pontoons rather than solid rock walls and that there will continue to be substantial flushing through the marina and associated dilution and dispersal of contaminants from antifouling paints. He noted however that there would be a concentration of vessels. This caused him strongly to support the restrictions on use of antifouling paints other than those with no or low copper content.[78]

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77 M Cameron, EIC, paragraph 6.3.
78 M Cameron, EIC, paragraph 6.4 and 6.5.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

[138] Dr S T Mead is an environmental scientist, called by SKP, with experience in marine consulting and research, and a background in environmental science, coastal oceanography, numerical modelling, marine ecology and aquaculture.

[139] Despite making some quite important concessions, for instance that the lack of breakwaters would mean that tidal currents in the Bay will not be greatly affected,[79] he maintained focus on other aspects of design such as wave energy attenuation being likely to change benthic community composition and result in accumulation or increasing levels of contaminated sediment within the marina footprint.

[140] Ms Sharma generally acknowledged the latter point, but considered that due to low existing currents and little predicted change in current speeds within the marina, significant increases in sedimentation would not be expected; and that accumulation of fine material would be anticipated with slow rates of deposition over time.[80]

[141] Dr Sivaguru cited the Tonkin and Taylor (2017) report on borehole data as indicating that the majority of the sub-tidal area of the Bay is muddy and/or sandy, and that the soft sediment community that inhabits it would be tolerant to muddy and sandy sediment and would take an even longer period to show response to the changes in sediment composition.[81]

[142] In the joint witness statement on ecology and coastal processes[82] Mr Cameron, Dr Sivaguru and Mr Poynter agreed that if the proposed conditions about antifouling contaminants are adhered to, and further adapted should monitoring indicate an issue, the risk of adverse effects on benthic composition and structure should be low and acceptable.

[143] We developed a feeling that Dr Mead's concerns were overstated, especially considering his subtle acknowledgement that potential changes in community composition would be likely to be minor, albeit where the impacts of the marina are considered in isolation.[83]

[144] The latter concession appeared to cause a shift of concern by Dr Mead, to a focus that contaminants discharged from the marina might have adverse cumulative effects

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79 S T Mead, EIC, paragraph 9.
80 A Sharma, EIC, paragraph 7.2 and 8.4.
81 K Sivaguru, EIC, paragraph 8.25.
82 Ecology and Coastal Processes JWS, paragraphs 19(b) and 23(a).
83 S T Mead, EIC, paragraph 31.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

beyond the marina. This concern was not shared by the experts engaged by the applicant and the council. Again, we considered that Dr Mead was overstating things because[84] he accepted that in isolation it is possible to conclude that the proposed marina will have only minor impacts on the life supporting capacity of the Hauraki Gulf (before saying that in addition to other activities "it would add to the burden").

[145] We thought that Mr Cameron put matters in proper context when he said[85] that the additional effects of the marina on copper loading and the wider Hauraki Gulf would be relatively minor, given that there are already in excess of 8,000 boats resident in the Gulf. To which we would add our acknowledgement of the proposal for limitations on antifouling paints on boats resident in the marina, to low or no copper bearing products.

[146] Somewhat ironically in the context of these matters, SKP had sought an adjournment prior to the hearing to allow Dr Mead to undertake a modelling exercise concerning potential cumulative effects. The applicant, supported by the council, considered that further modelling was not necessary given the particular proposal about control of composition of antifouling paints. The adjournment application was refused.

[147] The respective positions of these witnesses, particularly what we considered to be the unsatisfactory stance of Dr Mead, showed up under cross examination by Mr Allan. It transpired that he had not read the relevant draft conditions, for instance as exhibited to the EIC of the applicant's planning witness Mr Blakey, before preparing his evidence. Indeed, he had not read them (at least in any detail) until the day before giving evidence in the appeal hearing.[86]

[148] Dr Mead proceeded to make further major concessions when taken by Mr Allan through relevant draft conditions, agreeing that there are rapid advances now being made away from toxic substances in antifouling paints to the likes of zinc, silicone, and other ablative substances. Dr Mead conceded that he supported a consent regime in which adaptation to new products in the future could be ensured. He said he "definitely agree[d]" that the approach to removing copper at source was sound.[87]

[149] Through the processes of expert conferencing and mediation, the relevant

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84 In his EIC, paragraph 36.

85 M Cameron, EIC, paragraph 8.2.

86 Transcript p. 363, lines 11 to 23.

87 Transcript p. 364, lines 5 to 34. The Court raised with parties during the hearing its having made a recent determination by consent on this topic in settling the new Kermadec Islands Regional Coastal Plan prepared by DOC, although the witness was not aware of it.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

proposed conditions of consent have been closely tested. Despite being, as described by Mr Allan, "ground-breaking", we ultimately failed to understand Dr Mead's insistence, despite certain concessions on his part, on ignoring the sensible approach proposed by the applicant and the council.

[150] Finally, on this topic, there arose a debate again initiated by Dr Mead suggesting that biological monitoring would be required in the future in relation to benthic ecology. (Comprehensive monitoring is already proposed for sediment and water quality).

[151] We consider that the short answer is supplied by Dr Sivaguru and Mr Cameron in their confident opinions that such monitoring would not be required because direct measurement of the most likely stressor to evoke ecological response (copper) would allow for quicker and more targeted management responses; difficulties of inherently invariable and problematic biological sampling; and the fact that management response to any noted change in ecology would result in the same course of action being taken as one to meet negative results of monitoring contaminants.[88]

Potential effects on archaeological sites

[152] Evidence on this aspect of the case was given by two expert archaeologists, Dr Hans-Dieter Bader for the Applicant, and Ms Rebecca Ramsay for the Council. In expert conferencing they agreed that the prior archaeological assessment by Dr Bader was accurate as to recorded archaeological and historic heritage in the immediate vicinity of the proposal; that works required for construction use and maintenance would not adversely affect them; there would be low likelihood of encountering previously unrecorded archaeological remains during the works for the proposed wharf and access ramp (underneath the existing surface of Donald Bruce Road); that potential effects on currently unrecorded sites can be adequately mitigated by the inclusion of the Applicant's revised conditions 63 – 65 in any consent granted, providing for the effective management of heritage sites in the vicinity during the construction period; and that aspects of marina design may alleviate the impact of coastal erosion of the archaeological resources within the Bay by reducing wave induced erosion on known sites.

[153] SKP called evidence of a member of the Waiheke community specialist in anthropology and linguistics, who is a member of the NZ Archaeological Association, Ms

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88 M Cameron, EIC, paragraph 8.7 and K Sivaguru, EIC, paragraph 7.6.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

A H Charters, and Mr P D Monin an historian also resident on Waiheke Island. Neither witness however purported to give evidence as an expert archaeologist. We acknowledge that Mr Monin is a noted historian on the Island, and Ms Charters claims "some knowledge of NZ Archaeology".[89]

[154] These two witnesses used evidence of recorded archaeological and historic heritage sites within the wider Putiki inlet and further afield, to undertake an exercise that was described by the Council's witness Ms Ramsay to "*frame their argument that the proposed marina will create a disconnect within the archaeological and historical landscape*".[90] We are concerned that Ms Charters and Mr Monin have endeavoured to stretch matters beyond archaeology and beyond their own fields of expertise, and for this reason prefer the evidence of Dr Bader and Ms Ramsay "sticking to the knitting" to put it somewhat colloquially. While interesting and wide-ranging, the claims by Ms Charters and Mr Monin are in our view adequately summed up by Ms Ramsay when she said "*there is presently not enough archaeological evidence to support the substantive claims and conclusions provided in Ms Charters' and Mr Monin's statements of evidence*".[91] We also have a concern about Ms Charters appearing to assign cultural values to archaeological sites, which we consider is for those who hold mana whenua to do, not archaeological witnesses, or Ms Charters.

[155] We note favourably Ms Charters's acknowledgement that the marina will not physically affect any recorded archaeological sites.[92]

[156] We reiterate our findings about coastal processes to the effect that attenuation of the wave climate in the Bay is likely to be of benefit to archaeological sites, a positive effect on the environment.

Cultural effects

[157] There was an unfortunate division of evidence about Māori cultural effects. The Council called no evidence in this area, submitting simply that persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and

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89 A Charters, EIC, paragraphs 2 – 6.
90 R Ramsay, EIC, paragraph 8.5.
91 R Ramsay, EIC, paragraph 8.21.
92 H Charters, EIC, paragraphs 12 and 13.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

findings in relevant case law on these matters. We approve of that approach.

[158] The Applicant, from an early stage of its emerging interest in the proposal, placed what we consider to be appropriate emphasis on gaining an understanding of Māori cultural values, and being guided by them. Of some interest was the involvement of one of its counsel Mr K R M Littlejohn in assisting it in its early preparations and subsequent steps right through to presentation of the case before us.[93]

[159] On Mr Littlejohn's advice, the Applicant initially contacted representatives of the Ngāti Paoa Iwi who they understood held mana whenua for Waiheke Island. Mr Mair of the Applicant evidently felt a reluctance to advance a proposal without a clear understanding of how local Iwi would receive it.[94]

[160] In addition to its understanding concerning the position of Ngāti Paoa, the Applicant actively sought cultural values assessments from it and other Iwi registered with the Council as having cultural values in the region. In the event, two detailed cultural values assessments were received, one by Ngāti Paoa Iwi Trust, and the other by Ngai Tai Ki Tamaki Tribal Trust. While the summary of the assessments was placed in the assessment of effects on the environment provided to us in the Common Bundle, the full assessments were also exhibited for us.

[161] Both assessments described relevant values held by the two Iwi, and offered a neutral stance on the proposal for the marina in Kennedy Bay.

[162] The Applicant called evidence from Morehu Wilson, Rangatira of Ngāti Paoa, authorised to speak on behalf of the Ngāti Paoa Iwi Trust. It is the position of Ngāti Paoa that it is the principal Mana Whenua of Waiheke Island and its surrounding waters.

[163] Mr Wilson's evidence was quite unequivocal as to views of Ngāti Paoa on the project; that is, it supported it subject to the conditions proposed by the Applicant. Five paragraphs of the evidence of Mr Wilson summarise the position of Ngāti Paoa, and we quote them here:[95]

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93 Mr Littlejohn adopted the unusual approach of undertaking two roles, one as a witness on these matters, and the other as junior counsel undertaking cross-examination of certain opposition witnesses. We felt some unease at this approach, but did not spend time trying to put our finger on why, because there seemed no overt conflict of interest and no unmanageable consequences for the progress of the hearing.

94 K R M Littlejohn, EIC, paragraph 2.1.

95 M Wilson, EIC, paragraphs 5.4, 5.6 – 5.9.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

5.4 Our ancestral connection to Waiheke is well known and documented...

5.6 Ngāti Paoa seeks to reclaim responsibility, control over, and the management of resources we traditionally had control over for the preceding thousand years.

5.7 This project allows us to do this and ensures that Ngāti Paoa values outlined above will be incorporated into all aspects of the design, development, construction, management and operation of the project on an ongoing basis.

5.8 Ngāti Paoa will hold KPBL to the highest standards possible in line with our obligations to uphold Ngāti Paoa values and preserve and protect the area within which the project will be developed.

5.9 We believe that the revised design (including breakwaters) preserves the mauri and wairua of Putiki Bay by allowing the waters to flow unimpeded. We will not tolerate uncontrolled waste in the waters of Tikapa Moana and believe the plans for collection and safe disposal of such waste meet our high standards. We will be vigorous in enforcing these standards.

[164] SKP called the evidence of four witnesses from and on behalf of the Piritahi Marae. The witnesses were concerned about, amongst other things, lack of consultation with them, impacts on the wairua and mana of Putiki Bay, breaches of tikanga and impacts on a cultural landscape.

[165] As to lack of consultation, we reiterate there is no duty under the RMA to consult, (but as held in many cases, risk of lack of consultation by an applicant is on it, because it might not discover things that are important to a proposal and its wider interests). Mr Littlejohn responded to this complaint[96] by acknowledging its correctness. He apologised for any personal slight that might have been felt by members of the marae, but noted the position understood by him on a continuing basis that consultation was undertaken with the party primarily understood to hold mana whenua on Waiheke Island, Ngāti Paoa, and was, on advice from the Council, extended to other mana whenua groups with interests in the wider region (correspondence being sent to no fewer than 17 recognised mana whenua groups). It was Mr Littlejohn's position that it was intended that the wider public consultation process would inform the rest of the community (which would include Piritahi Marae) and provide them with a point of contact if they wished to discuss the project. He noted that despite that, very little contact was made by anyone directly to the Applicant; also that Piritahi Marae did not make a submission on the application when it was notified.

[166] We hesitate to analyse and contrast the very detailed information offered by the marae witnesses and the mana whenua witnesses, and the conflicting conclusions drawn

96 K R M Littlejohn, EIC, Paragraph 7.1 – 7.5.

by those two groups. The issues can be quite shortly resolved without undertaking such a complicated exercise.[97] This is because while some of the members of Piritahi Marae, including witnesses, whakapapa to Ngāti Paoa amongst other Iwi, the policy framework that we must work with, particularly that in the AUP's Regional Policy Statement, Chapter B6 Mana Whenua, definitively addresses the provisions of Part 2 RMA on Māori cultural matters in the Auckland regional context. We think the matter was described well in the final report and decision of the Board of Inquiry into the East-West Link Proposal[98] where it was recorded:[99]

> [T]he RPS identifies Mana Whenua as the specialists in identification of cultural values and effects. [The Board] notes that the Unitary Plan also recognises Mana Whenua as specialists in tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, waahi tapu and other taonga.

[167] We rely on the information and overall stance offered by mana whenua, Ngati Paoa Iwi, so our findings on these issues favour the applicant.

Traffic and transportation effects

[168] This was an area in respect of which concerns were largely resolved amongst the experts by the conclusion of the hearing. No experts were called by opposition parties, so the expert evidence that was considered by us was advanced by the Applicant and the Council, and refined in the conference of traffic and transportation experts to the point of near resolution. Final resolution amongst them was achieved by the final day of the hearing.

[169] The AEE contained a detailed transportation effects assessment prepared by Traffic Design Group and supported by evidence in chief from its principal, Mr D J McKenzie. Evidence in chief was offered for the Council by Mr A C Mein, another specialist in traffic engineering and transportation planning.

[170] Concerns were expressed by lay witnesses in opposition to the marina, but these

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97 For the record, we have read the evidence of all witnesses closely, as well as relevant submissions. The relative standing of the two groups as discussed in the paragraphs of this decision on cultural effects was not challenged during the hearing. We note that Mr Sadlier's cross examination of Mr Morehu, recorded in the transcript between pages 185 and 195, was mostly focussed on certain matters largely in common between Ngāti Paoa and the Marae, or designed to clarify matters, or seek information about Ngāti Paoa governance entities. Importantly, it did not challenge matters on which the two groups disagreed. Lack of cross examination by the applicant's counsel of Marae witnesses conveys its reliance on its submissions that have in fact led to our core finding on this topic above.

98 See paragraph [408] of that document.

99 Citing in particular Policy B6.2.2(1)(e).

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

were comprehensively answered by the expert witnesses named above.

[171] Evidence was also called by Auckland Transport from Ms S D Radhamani.[100] SKP gained traffic advice from a consultant Mr Colin Macarthur, who participated in the joint witness conferencing, but did not present evidence. He was instrumental in gaining a concession relating to a pedestrian refuge on Donald Bruce Road.

[172] We do not need to cover the transport and transportation issues in great detail, because of the agreements arrived at. It is sufficient to note that the key issues for consideration were:

- access arrangements to and from Donald Bruce Road (location, width, pedestrian priority and signage);
- provision for queuing and loading off Donald Bruce Road (wharf design, one way control design, signage);
- gangway design (gradient, width, separate vehicle and pedestrian access);
- carpark design (vehicle size, number, layout and size of spaces, use of spaces, manoeuvring widths, turning and loading areas, disabled and cycle parking); and
- impacts of marina traffic on wider transport network.

[173] Agreement was reached amongst all experts in expert conferencing, save one relating to the extent of road upgrade works being offered by the Applicant.

[174] As to the unresolved item (later agreed), Ms Radhamani gave evidence that the main effect of the marina on the local road network was the potential effect it might have in traffic circulation on Donald Bruce Road which provides access to the ferry and public boat ramp. At present, there is only one through traffic lane which is occupied by ferry traffic queuing, albeit that this is an existing issue.[101] The witness was concerned that peak periods for the marina could coincide with peak ferry times.

[175] The argument came down to the length of roadway along which widening would

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100 AT is an Auckland Council controlled organisation and the road controlling authority for the Auckland region under the Local Government (Auckland Council) Act 2009. Its area of control includes Waiheke Island, where it manages the local road network and the Kennedy Point public carpark which is on road reserve. It also owns and operates the Kennedy Point Wharf and facilities and has an agreement with SeaLink to operate ferry services to and from Kennedy Point.

101 S Radhamani, EIC, paragraph 5.4.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

be undertaken pursuant to conditions of consent. Ultimately resolution was achieved by amendment to proposed condition 115(b) removing reference to queue length capacity and replacing it with a requirement that during detailed design, provision be made for a means to prevent overtaking of queued east-bound vehicles.

[176] Mr Mein suggested an amendment to proposed condition 115(d) to provide for a pedestrian refuge in the centre of Donald Bruce Road. A matter that required some further attention, now provided and agreed upon, was a suggestion by Ms Radhamani that the condition be amended to ensure the refuge did not decrease lane widths or interfere with the vehicles entering the existing public carpark.[102]

[177] We find that there are no further items of contention regarding traffic and transport, and all aspects are now at least in neutral territory; some are in fact in the territory of positive effects to the extent that some matters offered on an ***Augier*** basis by the Applicant that were not needed for mitigation, will improve some existing issues with traffic circulation and pedestrian safety.

Effects on navigation and existing swing moorings

[178] We have already touched on some aspects of this, particularly arising from a consideration of statutory instruments.

[179] Evidence was given by Mr M A Schmack, Director of a marina operating company Orakei Management Limited associated with the Applicant. He is also Mr Mair's son-in-law. He described the facilities proposed for the Kennedy Point Marina in some detail, noting amongst other things that no fuelling facilities are proposed.

[180] The marina if consented is likely to have a staff of four fully trained people to ensure safe and appropriate operation of the marina, and adherence to relevant conditions of consent.

[181] Mr Schmack gave evidence about contact with existing swing mooring holders (all but 7 of the 37), and has discussed with them options of outright purchase of moorings and removal of tackle by the Applicant at its cost; relocation of the mooring to another location at the Applicant's cost; rental of a new pile mooring; or a discounted 12m berth within the marina. To date the Applicant has acquired one mooring; 10 mooring owners have expressed interest in a berth; 15 have expressed interest in a pile mooring; 2 would

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102 S Radhamani, EIC, paragraph 8.1.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

like their swing mooring relocated; and 3 are considering their preferred option.[103]

[182] The witness pointed to a proposed condition of consent about the creation of a moorings management plan which would put the onus on the Applicant to demonstrate to relevant Council officials that it had achieved solutions concerning all existing swing moorings before it could proceed with the marina.[104]

[183] The Applicant called the evidence of Mr N F Drake a retired ship master and port services manager who is now a marine consultant, and a regular recreational boater.

[184] The Council called the evidence of Mr B Goff previously referred to, a maritime officer in the Harbour Master's Office at the Council. He gave us comprehensive evidence about the existing swing moorings, including mapping and details of the terms of swing mooring licenses. He firmly supported the draft conditions of consent and the decision of the hearing commissioners that directed imposition of them.

[185] These three witnesses provided a joint witness statement on navigation safety and moorings management, and reached full agreement. The agreement made reference to official information about wind and wave conditions, widths of channels and fairways measured against Australian Standard AS3962-2001 Guidelines for Design of Marinas; the presence of an existing rock break water; the likely new reduced width of the entrance to Putiki Bay (approximately 370m, a reduction of 70m); advice from the operators of the SeaLink ferries that they are not concerned with the presence of the marina and its proposed attenuators; that no hazards will be created that vessels would be unable to safely navigate, with the marina to be developed in accordance with the suggested conditions.

[186] The witnesses also agreed with the proposals for moorings management.

[187] Four witnesses in opposition to the marina offered evidence of concerns about navigation safety, Mr G Clendon, Ms R Gibbons, Mr S Hood and Mr R Morton. One of the themes of their evidence was that a marina would limit use of Kennedy Bay as a safe place to sail to, particularly in strong south west wind conditions; also that there would be difficulties in laying yacht race courses.

[188] Mr Drake considered the concerns of these witnesses. From information available

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103 M A Schmack, EIC, paragraphs 3.1 – 3.6.

104 M A Schmack, EIC, paragraphs 3.9 and 3.10.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

to him, he indicated that only a small number of yachts take part in racing in Waiheke waters, three or four of which come from Kennedy Point, and that races never take place through the existing mooring area, and are timed around ferry movements. He did not consider that the presence of the marina would mean local racing would have to cease.[105]

[189] Mr Drake accepted that the location of the proposed marina would preclude vessels entering Kennedy Bay to find shelter or avoid a ferry or other vessels as they navigated through the entrance to Putiki Bay, except into the marina entrance itself. He expressed the view that busy channels such as this are not places for vessels to dwell in, and they should clear the entrance as quickly as possible, if necessary under power.[106]

[190] We agree with the expert witnesses on these topics that adverse effects will be minor at worst. Very small numbers of people will potentially be affected; alternative actions and processes are available; and the effects themselves are very small.

Effects on Natural Character, Landscape and Visual Amenity Values

[191] In addition to evidence given by individuals (particularly people in the locality), evidence on these topics was provided by six expert landscape architects. The Applicant called evidence from Ms R Skidmore and Ms R de Lambert who had contributed to the design of the proposed marina and prepared assessments included in the AEE; Ms J Woodhouse and Mr S Brown gave evidence, called by the Council and the s 274 party Kennedy Point Marina Supporters Group respectively. Mr J Hudson and Ms S Peake provided evidence called by SKP.

[192] There was some limited agreement reached in the expert conference, including that appropriate scales for assessing effects of the proposal are three-fold, namely Kennedy Bay, Putiki Bay and Waiheke as a whole;[107] and that the introduction of a marina would result in substantial change to the appearance of Kennedy Point Bay, but the change is not in itself an adverse effect.[108]

[193] There was agreement also about the following:

- The plans in Schedule 1 of the Council decision are the relevant plans for the

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105 N F Drake, EIC, paragraph 5.2.
106 N F Drake, EIC, paragraph 5.3.
107 Landscape JWS, paragraph 21.
108 Landscape JWS, paragraph 16.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

assessments.

- Appendix 1 of the Landscape and Visual Effects Assessment by Boffa Miskell (23 February 2017) contains visual simulations which can assist in assessing the landscape and visual effects.

- Paragraphs 193 – 209 of the Council decision offer a summary of the relevant statutory context for landscape, natural character and visual amenity considerations.

- The relevant provisions are s 6(a) and (b) RMA.

- The NZCPS.

- The AUP.

- The ACRP: C.

- Neither the site nor adjacent parts of Kennedy Point are identified as areas of outstanding natural character or as outstanding natural features or landscapes in the AUP.

- The ACRP:C does not identify them as outstanding or of regional significance.

- The Te Whau Bay Islands on the opposite side of the entrance to Putiki Bay are identified as an ONL and an area of High Natural Character (HNC) in the AUP, and the end of Te Whau Peninsula nearby is also identified as having HNC.

- Section 2 of the Boffa Miskell Landscape and Visual Effects Assessment (23 February 2017) contains an accurate description of the proposed marina location and its wider context.

- The relevant landscape context for considering the proposal comprises:

    - an immediate setting comprising Kennedy Point Bay (the Bay immediately south west of the ferry terminal in which the marina is proposed to be located);

    - a larger landscape corresponding to the visual catchment comprising the main reach of Putiki Bay, the enclosing landforms and the entrance to the Bay from Tamaki Straight [sic]; and

- a broad context comprising the entire Putiki Bay catchment, Waiheke Island as a whole, and the relationship of Waiheke Island to the Hauraki Gulf and Auckland.

- Key features in the Kennedy Point Bay context include:

  - 37 swing moorings within the Bay;
  - a gently arching rocky beach that adjoins a manmade rock breakwater to the eastern transitions to a rock ledge beneath the steep pōhutukawa clad escarpment that extends to the south;
  - dwellings along Kennedy Point Road sit at the top of the Southern escarpment enclosing the Bay;
  - a vegetated escarpment extends from the public carpark on Donald Bruce Drive and towards the neighbouring unclaimed Bay;
  - open pastures punctuated by mature pōhutukawa trees at the Kennedy Point Vineyard on the slope to the north to the public carpark;
  - a public green space area located behind the beach (classified as road reserve); and
  - the transport hub of Kennedy Point Ferry terminal.

- Paragraph 2.3.7.1 of the Boffa Miskell report sets out a list of the key characteristics and features at Putiki Bay;

- Groups that comprise the public viewing audience:

  - people on the water within or around Putiki Bay;
  - people on the water entering Putiki Bay from the main Harbour;
  - people using the roads on Te Whau Peninsula;
  - people accessing the Kennedy Point ferry terminal on Kennedy Point Peninsula;
  - people travelling along Ostend Road, particularly between O'Brien

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Road and Erua Road;

- carpark and boat ramp at end of Wharf Road;
- people within the reserve, beach and foreshore area at Kennedy Point Bay;
- people visiting the Te Whau vineyard (the restaurant is now closed) and the Kennedy Point Vineyard; and
- people visiting the public reserve at Okoka Bay (Te Whau Peninsula).

- Groups comprising the private viewing audience include:
  - residents of certain properties on the north facing slopes of Te Whau Peninsula;
  - residents of certain properties on the south-eastern side of Kennedy Point Road; and
  - residents of certain properties at the end of the Ostend Peninsula.
- The introduction of a marina will result in substantial changes in the appearance of Kennedy Point Bay. **Change is not in itself an adverse effect**. [emphasis supplied].

[194] The experts agreed/disagreed on the following issues:[109]

(a) Effects on the ONL and HNC:

- The experts JWS B RS SP EY and RdeL agree that there will be less than minor effects on the ONL and HNC areas in and around Putiki Bay;
- JH considers that there will be adverse effects on the ONL in terms of the associated values, although this is not a significant effect;

[109] Landscape JWS, paragraphs 18 – 22.

- JH also considers that there will be a more than minor effect on the identified HNC areas in Putiki Bay.

(b) Scales of landscape consideration:

- The experts agree that there are three scales for consideration of effects:

  i. Kennedy Bay

  ii. Putiki Bay

  iii. Waiheke Island as a whole.

(c) Associated values:

- All experts agree that Waiheke Island is primarily accessed by boat and that Kennedy Point Bay is recognised as a transport hub for the Island and a gateway to and from Waiheke.

[195] The two witnesses for the Applicant found in summary that the proposed marina was appropriate development in this location; Mr Brown's opinion based on his long experience and detailed understanding of the coastal landscapes of Waiheke Island, was that the landscape in and around Kennedy Point Bay is exceptionally well suited for the marina proposal.[110]

[196] The Applicant's two witnesses also concluded that the proposal would have only minor adverse effects on the landscape and natural character of the environment (considered at the range of three scales); also that it would have a range of effects on the visual amenity values present at Kennedy Bay, from adverse to positive, depending on viewer attitude.

[197] As noted from the joint witness statement, Mr Hudson and Ms Peake variously express contrary views on some of these issues. Mr Hudson and Ms Peake consider that a marina of the type proposed in any location would be inappropriate in respect of the character and values of Waiheke as a whole. The other witnesses disagreed and find it suitable in the proposed location and in the context of the wider Waiheke landscape.

110 S Brown, EIC, paragraph 139.

[198] Mr Hudson and Ms Peake consider that there are significant adverse aesthetic and amenity effects in relation to Kennedy Point Bay, of visual dominance, the formality of the structure, intensity of activity, visual clutter (Ms Peake only) and incongruity of the carpark and buildings on the water.

[199] "Associative values" became a hot topic, with Mr Hudson and Ms Peake considering that there are significant adverse effects with these at all three scales, having regard to relaxed, not busy, informal, peace and quiet qualities of Waiheke; the appreciation of Kennedy Point Bay as a body of open water; recreation appeal of Kennedy Point Bay swimming, sailing and the like; and with Mr Hudson considering the Māori cultural values forming part of such values although he deferred to the marae witnesses to determine those values.

[200] Ms Woodhouse provided a detailed description of the existing landscape values of Kennedy Point Bay, and the broader Putiki Bay, finding high natural and landscape values, but not a pristine or even nearly pristine environment, noting that almost all of it has been modified.[111] Concerning Kennedy Point Bay, she noted dominant elements that are not natural features; the ferry terminal and its utilitarian structures, swing moorings, and breakwater; although she acknowledged that these features are softened and integrated into the landscape to a significant extent by native and exotic vegetation along the escarpment edge.[112]

[201] As to visual and landscape effects of the proposed marina, Ms Woodhouse considered that the wider Putiki Bay landscape, with its varied landform, extensive vegetation cover, and mixed land use, is capable of absorbing development such as the marina.[113] She considered that the nature of effects generated by the proposal would be neutral or benign because it would complement the scale, landform and pattern of the landscape, maintaining existing landscape and visual amenity values; that it would have minimal landscape and visual effects on the environment.[114]

[202] As to the ONL and HNC areas on the opposite side of Putiki Bay, she considered adverse effects would be avoided.[115]

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111 J Woodhouse, EIC, paragraph 28.
112 J Woodhouse, EIC, paragraphs 35 & 37.
113 J Woodhouse, EIC, paragraphs 13(a) & 137.
114 J Woodhouse, EIC, paragraphs 13(f) & 136.
115 J Woodhouse, EIC, paragraph 13(c).

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

[203] Ms Woodhouse considered that visual amenity effects on some viewers around Kennedy Point Bay would be moderate to high, but the number of people affected would be limited. She considered that some residents along Kennedy Point Road would see the marina as a minor intrusion into their view if their focus was on the wider Bay or because vegetation helped screen it. She also noted that the nature of effects would vary according to how viewers associate with a marina or perceive a marina, some liking a marina and some not.[116]

[204] We consider it important to note the variable responses on this visual amenity aspect.

[205] This variability of perception arises commonly in cases like this. Counsel for the Applicant quoted from one such case, a decision of the Environment Court *Schofield v Auckland Council,*[117]. The Court said (and we agree):[118]

> The topic of amenity can be emotionally charged, as this case has revealed. People tend to feel very strongly about the amenity they perceive they enjoy. Whilst s 7(c) of the RMA requires us to have particular regard to the maintenance and enhancement of amenity values, assessing amenity values can be difficult. The Plan itself gives some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised. In other words, the starting point for a discussion about amenity values will be articulated by those who enjoy them. This will often include people describing what an area means to them by expressing the activities they undertake there, and the emotions they experience undertaking that activity. Often these factors form part of the attachment people feel to an area or a place, but it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in this space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of this objective, it must be able to be tested objectively.

[206] The Courts have consistently held that there is no right to a view,[119] but that of course is not the whole story. Impacts on amenity values from particular places must still be assessed.

[207] We accept the submissions of counsel for the applicant and the Council,[120] to the effect that the variability of responses (including some support and some opposition) can in the overall assessment produce a result in which undue weight should not be given to

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116 J Woodhouse, EIC, paragraphs 136, 13(e) & 63. Also, evidence of local residents G Wake and P Richardson.

117 *Schofield v Auckland Council* [2012] NZEnvC 68.

118 At [51].

119 See for instance *Anderson v East Coast Bays City Council* (1981) 8 NZTPA 35.

120 Opening submissions of Applicant, paragraph 106; and submissions on behalf of the Council, paragraph 89.

this effect.

[208] From the perspective of one of the landscape architects, Mr Brown for KPMSG said this:[121]

> I recognise that the marina would have an adverse effect on some residential views across Putiki Bay. On the other hand, many local residents would be little affected by the marina and, in other cases the marina's encroachment into views would still leave large areas of the wider inlet and Te Whau Peninsula open to viewing – often in a quite panoramic fashion.

[209] We note the variability theme once again, and agree with Mr Brown's conclusion that these effects should not ultimately be determinative of this aspect of the marina application.

[210] As to natural landscape or natural character values, and mindful of the policy considerations in the AUP for instance from Policy F2.16.3(7), and leaving aside that the policy covers many matters in addition dredging and coastal hazards, we find that the proposal is overall not contrary.

[211] We accept that adverse effects on the ONL and HNC areas across Putiki Bay are avoided, and note that even Mr Hudson who was somewhat on his own about this, conceded that such effects would only be in terms of "associative values" and not significant, as we have noted from the landscape JWS.

[212] We agree with the witnesses including Ms Woodhouse and Mr Brown who thought the boundary of these areas around the Te Whau islands to be somewhat arbitrary (distant about 110m from the marina), but with the distance to the islands themselves approximately 400m, which we consider to be the important measure. The mapped boundary should, we consider, be taken as a cautionary signal rather than a mapping of the edge of the feature.

[213] Mr Hudson and Ms Peake placed stress on "associative values", and were concerned that they had received insufficient weight in the AEE and the hearing commissioners' decision. As to the latter we consider that the commissioners did indeed consider them appropriately.[122]

[214] It was clear to us from the submissions of Mr Sadlier on behalf of SKP that

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121 S Brown, paragraph 137.

122 See commissioners' decision, paragraph 231.

associative factors were of high importance to that party; he made an oral aside to that effect when introducing that topic at page 10 of his submissions. These had been identified by Mr Hudson particularly as values shared and recognised, value to tangata whenua, and historical associations, adding mention of the well-known "WESI" factors in analysis of landscape values, and generally accepting otherwise the Applicant's evaluation of biophysical factors.

[215] Mr Hudson and Ms Peake took a view through this lens in saying, in summary, that a particularly incongruous component of the proposal in landscape terms is the floating carpark.

[216] An intriguing aspect of Mr Hudson's evidence was his emphasis on a non-statutory document *Essentially Waiheke (Refresh)*, calling itself a non-statutory "Community Strategic Framework" (2016), albeit that he did acknowledge[123] that it would not represent the views of all residents and that individual views on the marina proposal (and future development on Waiheke) do vary across the Waiheke Island community. His analysis of the document is referable to the "Waiheke Island scale",[124] although he thought some of the values might translate down to the other two scales. He perceived the following values in the document:

- Community-focussed; inclusive.
- Simple, with an emphasis on the "basic" values of life; casual.
- Environmentally responsible.
- Low density; laid-back; slow; informal; "free-range"; "far enough behind to be ached"; no traffic lights on the island.
- Distinct in character – a contrast to urbane Auckland city.
- Diverse; unconventional.
- Creative, with a focus on arts and culture.

[217] Despite conceding that large parts of Waiheke Island have changed in recent years with upscale residential housing, and development focussed on tourism, he

123 J Hudson, EIC, paragraph 91.
124 J Hudson, EIC, paragraphs 40 – 42.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

nevertheless perceived those "core values" remaining true for the permanent community.

[218] While deferring to Māori witnesses – particularly those from Piritahi Marae, Mr Hudson tended to place significant stress on cultural and historical values coming from their evidence and that of Mr Monin earlier described.[125]

[219] Noting Mr Hudson's cautious acceptance of the evidence of others about biophysical effects, we were intrigued by his heavy emphasis on these associative matters.

[220] We consider that his needing to rely on the "Essentially Waiheke (Refresh)" document was an indication that he was needing to take some refuge in particular views of some people on Waiheke, in a rather narrow and somewhat unbalanced fashion. We recall the submission on behalf of the Applicant[126] noting from that document as exhibited, that it collected the views and aspirations of about 600 people associated with the Island (in comparison to a 2013 census record of resident population of 8,238, now probably over 9,000, plus around 3,400 additional second or holiday homes and between half and three quarters of a million visitors per year). We accept their submission that the views relied on by Mr Hudson should be interpreted as being of a relatively small minority. We also accept the submission of counsel that his evidence chose not to recognise or even mention support within part of the community for the marina, or evidence and submissions in support and the letters attached to the case for KPMSG.

[221] As to Māori cultural associations, even leaving aside the essence of our findings preferring mana whenua (Ngāti Paoa) evidence over marae evidence, Mr Hudson inappropriately ignores the former and utilises the latter. Balance is missing. His choice of information is not representative of the Waiheke community at large, and therefore cannot be said truly to be "shared and recognised". It is not possible to find on any objective basis that, to quote Mr Hudson,[127] that Waiheke Island is simply not an appropriate place for a marina at all for associative value reasons.

[222] Regrettably there was a similar problem with Mr Hudson's treatment of community views supporting the marina, where the Court intervened to elicit a direct answer.[128] Also

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125 J Hudson, EIC, paragraphs 43 – 50 and 53 – 56. We note an important concession by Mr Hudson under cross examination by Mr Nolan that he deferred to Mana Whenua to state their views about adverse effects: Transcript p. 377, lines 16 to 20.

126 Opening submissions for Applicant, paragraph 90.

127 J Hudson, EIC, paragraph 24.

128 Transcript pp. 379 – 380.

as to the relevance of a complete split, three to two, on the Waiheke Local Board, when considering the proposal.[129] Mr Hudson also had to concede under cross examination by Ms Morrison-Shaw for the Supporters Group, that his evidence had not expressly assessed any community or recreational benefits, having noted only (in paragraph 70 of his EIC) that "*there has been a suggestion that the new public recreation facilities will offer a degree of community benefit*".[130]

[223] Something of the same problematic flavour was found in one of the points in appellant Mr Walden's opening submissions. On the totality of the evidence before us, it is simply not a balanced view to assert that the opposition parties represent the "Waiheke ethic" of a heavy environmental emphasis. Waiheke is well-known for divergence of views about the environment and development, a feature of this case and many others.

[224] We accept Mr Wren's views[131] that the Essentially Waiheke document was not created as part of any RMA process; was not subject to formal public submissions and appeals; does not take into consideration significant change that has occurred on Waiheke in recent times or might even seek to "reverse" those changes; and that the aspirations of the document are not reflected in the AUP or the HGI District Plan.

[225] Mr Wren also picked up on the lack of reporting of balanced associative values of the Waiheke community.

[226] Mr Allan submitted that he could not find in the document any specific mention of the importance of boats and boating to the Island's community, an interesting observation concerning a small land mass with a resident population, surrounded by water.[132]

[227] We regret to say that we consider the strong emphasis on associative values in the case for SKP (carried right through to submissions by its counsel), to have been a strained attempt to portray more than minor adverse effects and factors running counter to objectives and policies in statutory instruments including NZCPS and AUP. We much prefer the balanced approach taken by the expert witnesses for the Applicant, the Council and the Supporters Group. The overall outcome concerning natural character, landscape and visual amenity values is that in the round, the proposal is appropriate development in this particular location; will have only minor adverse effects on the landscape and

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129 Transcript p. 379, lines 4 to 8.
130 Transcript p. 398, lines 3 to 24.
131 D Wren, EIC, paragraph 7.236.
132 Opening legal submissions for Auckland Council, paragraph 95.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

natural character of the environment; and will have a range of effects, the great majority of them minor, on visual amenity values present in Kennedy Bay and around Putiki Bay, and varying from positive to adverse depending on viewer attitude and visual perception. We consider that analysed in this way, the marina would fit well into the landscape of Kennedy and Putiki Bays, provide a largely positive contribution to the experience and amenities of Waiheke Island, and offer adverse effects that in the round will be no more than minor.

Night lighting

[228] This topic in some ways a subset of the previous one, but because it attracted strong comments and concerns from people in opposition to the marina, particularly those who would overlook it, it is a topic on which the Applicant and the Council introduced expert evidence, and on which we should specifically make findings.

[229] The Applicant called evidence from Mr J K Mckensey, an engineer specialist in lighting and a consultant on the subject to a number of public bodies.

[230] The Council called evidence from Mr G A Wright, an electrical engineer with experience in lighting design including as to exterior lighting for amenity, security and appearance in a wide range of locations, particularly public spaces.

[231] Drawing from their individual statements of evidence in chief, in which they assess potential effects as no more than minor, they met in facilitated expert conference and produced an agreed statement which demonstrated full agreement between them.

[232] As they had in their statements of evidence, the joint witness statement reviewed the details of the proposal and assessed it against provisions of the HGI District Plan, the AUP and the Auckland City Council Bylaw No 13 (Environmental Protection 2008) subsequently titled the Property Maintenance and Nuisance Bylaw 2015.

[233] The witnesses agreed that the lighting for the marina would satisfy all the requirements of the instruments.

[234] In terms of the concerns of elevated neighbours, the witnesses discussed and agreed about matters of spill light, glare, sky glow and general amenity.

[235] As to spill light, having assessed illuminance of neighbouring houses from the existing ferry terminal lighting, the witnesses considered that there would be similar lack of effects, that is no measurable illuminance from the marina lights.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

[236] As to glare, the witnesses noted that there is presently very little light from the ferry terminal, and that while the marina lighting would increase the lit area, the proposed lights would be well controlled such that there would be no direct glare sources visible to residents from their houses; hence no measurable effects or noticeable change in effects.

[237] As to sky glow, the witnesses considered that there would technically be an increase in the aura or glow visible above all outdoor installations at night, however as all the light would be directed downwards, the only contribution from the marina would be light reflected off the ground, marina structures and water, and the illuminance at ground level would be modest. They considered that sky glow would be negligible in real terms and less than that being contributed by the light spill from existing residential dwellings, and street and carpark lighting.

[238] As to amenity, the witnesses noted a concern raised by Mr Hudson about light on the surface of the water and structures. The witnesses considered that if surfaces were brightly lit, and were the lit area to form a significant portion of a typical view from a residence, there could potentially be an effect. However, in this instance the degree of intrusiveness would be minimal, given the modest illuminance levels proposed and the typical viewing angles.

[239] In summary, these witnesses considered that there would be little if any awareness of the lighting installations unless people were specifically looking out to the water and were close enough to the edge of their house or deck to be able to look down and see the marina. Even then, they considered the lighting effects would not be glary or obtrusive. Effects on visitors to the ferry terminal or marina would similarly be minimal. The lighting would cause very little if any loss of visibility of the night sky or other vistas.

[240] The experts agreed that the conditions imposed in the Council decision are reasonable and appropriate and would ensure the lighting effects of the marina on the environment would be less than minor.

[241] We understand the anxiety of some of the witnesses about possible lighting effects, but have no basis at all from the evidence advanced, to do other than hold that these effects are no more than minor.

Social effects, including use of common water space

[242] The Appellant Mr Walden called evidence from sociologist Dr K I B McNeill. She described herself as a sociologist specialising in the community implications of

environmental change, having previously been employed as an academic at both the University of Waikato and University of Auckland. She provided us with an extensive list of her previous academic positions, academic awards, and research and conference papers.

[243] By way of some background to her theses advanced to us, Dr McNeill described in broad terms media descriptions of lifestyle on Waiheke at various times, versus statistical portrayals of the Island's resident community, before giving us her opinion on "subjective deprivation" and "private use of public commons" (water space).

[244] Before considering her opinions on those two areas, we must record that we were troubled by Dr McNeill's apparently very high-level and largely anecdotal description of Waiheke Island and its population. She drew on 2013 Census data about population and income spread, the New Zealand Index of Deprivation 2013 measure of relative levels of socioeconomic deprivation; an article in Vogue magazine in 2017 comparing Waiheke Island with the Hamptons in New York State; reports about Waiheke Island in Condé Nast traveller magazine in 2016 and in Lonely Planet in 2015. She drew on research by others[133] allegedly describing progressive gentrification of the Island over the past two decades. She added her own broad description, we are not sure from what research or observations.[134]

[245] Quite apart from our own misgivings about extent and quality of research, there are also significant limitations to how this sort of opinion evidence can be advanced to decision makers under the RMA. Because of these concerns, we will give only two further brief indications of the nature of the evidence. She asserted that the proposed marina development would exacerbate the presence and visibility of socioeconomic disparities on the Island,[135] and an assumption/assertion that "*... the vast majority of births [sic] will be sold to non-residents of Waiheke Island, introducing a group of people who are visibly more affluent than the vast majority of the local population.*"[136]

[246] We can find no measurable evidence of the assumptions, presumptions and assertions that Dr McNeill employs to describe her potential effects.

[247] Even if it were to have probative value, the legal problems of entering into such a

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133 Smith, N. (1982). Gentrification and uneven development. *Economic Geography* 58(2), 139 – 155.

134 The above summary of Dr McNeill's evidence is found at paragraphs 22 – 27 of her EIC.

135 K McNeill, EIC, paragraph 16(a).

136 K McNeill, EIC, paragraph 30.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

domain are well known.

[248] While social effects have been accepted as a valid RMA concern in cases before the Environment Court and Boards of Inquiry[137] in *Contact Energy Limited v Waikato Regional Council,*[138] it was held that allegations [of the sort made here by Dr McNeill] should be treated with caution and that there is no place for the Court to be influenced by mere perceptions of risk which are not shown to be well founded.[139] In the Wiri Men's Prison Board of Inquiry Decision, Judge Harland and Board Members held:[140]

> ... we are only prepared to engage in an assessment of resource management effects that are measurable or otherwise well-founded and which will relate to the location of the proposed men's prison on this site.

[249] We agree also with comments of a similar sort by the Environment Court in *Living in Hope Inc. v Tasman District Council*[141] which concerned a proposal to establish a new crematorium, about which local residents gave evidence that they would feel discomfort, depression and sadness with the thought of the activities being conducted in their neighbourhood. The Court said:[142]

> We do not consider that discomfort on the part of some individuals to the mere presence alone of a particular facility amounts to an adverse effect on amenity values. If that was the case, any proposal would be vulnerable to the discomforts of its opponents no matter how irrational or ill-founded those discomforts might be.

[250] There can be no basis to find on the evidence before us that the presence of a marina will cause any adverse social effect relevant under the RMA. Neither can we find any basis to distinguish between those who live permanently on the Island and those who might visit it short term or long term and live elsewhere, when it comes to allocation of natural and physical resources.

[251] We have discussed elsewhere in this decision the policy issue of private occupation of public space, and the policy settings found in relevant statutory instruments about that. Marinas are of necessity somewhat exclusive facilities for reasons of safety and security, but the present proposal is actually and positively notable for the extent to

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137 See for instance the decision of the Board of Inquiry concerning the Wiri Men's Prison, Final Report and Decision September 2011, paragraph 292.

138 *Contact Energy Limited v Waikato Regional Council* (2000) 6 ELRNZ 1.

139 *Contact Energy* at [254].

140 Final report and decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011, EPA 0056, at [402].

141 [2011] NZEnvC 157.

142 At [124].

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

which it offers public access during hours of daylight and other facilities accessible to the public such as community rooms, a café, and carparking. We consider that the Applicant has found a good balance between the needs of safety and security on the one hand, and public access on a managed basis on the other.

Effects on Future Ferry Terminal Expansion

[252] Several of the Appellants' witnesses expressed concern that the presence of a marina might impact negatively on the ability to expand the existing Kennedy Point Ferry Terminal to allow for increased growth and demand for ferry and freight handling services. They urged this is another reason to refuse consent.

[253] We were told by the applicant, the council, Auckland Transport and the current ferry operator SeaLink Travel New Zealand, that the issue had been comprehensively dealt with upfront after which Auckland Transport and the ferry operator took a relatively neutral stance to the proposal, offering submissions and evidence before us, in which such concerns were effectively discounted. The focus of Auckland Transport in the proceedings was essentially confined to achieving good outcomes in relation to Donald Bruce Road, access to the ferry terminal and boat ramp, vehicle queuing, carpark and roadway upgrades, and pedestrian safety. The focus of Sealink was that if in future it were to contemplate expansion of services using small passenger vessels (similar to those serving Pine Harbour), it could do so from the marina structure as proposed without a public agency needing to create additional facilities; also that the applicant had worked well to assist in alleviation of traffic impacts from its proposal[143].

[254] In circumstances in which Auckland Transport as operator of the terminal, and the ferry operator, are not expressing concern about possible future constraints, we are unable to make findings advocated for by parties opposing the marina.

Planning Issues

[255] Some planning issues call to be addressed expressly, over and above other planning issues addressed in particular contexts throughout this decision. They are twofold:

- Functional and operational need to be located in the CMA.

143 M Pigneguy, EIC paragraphs [11] – [16].

- Part 2 of the RMA.

Functional and operational need to be in the CMA

[256] The planners in their joint witness conferencing had no difficulty in agreeing that there is a functional need for a boat marina to be located in the CMA, as held by this Court in the *Matiatia Marina* decision.[144] A question however arises from the joint witness session, and in our minds, as to whether there is a functional need to locate the floating carparking deck, and multi-use utility building and deck, within the CMA.

[257] Mr Mair gave detailed evidence about his endeavours to find land for parking in the near vicinity of the marina.[145] He was tested in cross examination by Mr Sadlier about distances, topographies, ownership, and control of areas by Auckland Transport,[146] and provided answers which satisfied us that appropriate land was not available anywhere reasonably near and suitable for the purpose.

[258] We were considerably assisted by the angle taken on this issue by Mr Wren, in particular his analysis of the issues against key provisions of the NZCPS, the RPS and the RCP.

[259] As to the NZCPS, Mr Wren identified relevant provisions including Objective 6 and Policy 6(2)(c) and (d).[147]

[260] Objective 6 is to "*... enable people and communities to provide for their social, economic and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that ... functionally some uses and developments can only be located on the coast or in the coastal marine area ...*".

[261] The aforementioned parts of Policy 6 are as follows:

> (c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;
>
> (d) recognise that activities that do not have a functional need for location in the coastal marine area <u>generally</u> should not be located there. [emphasis supplied]

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144 At [597].
145 A Mair, EIC paragraphs 7.1 – 7.7.
146 Transcript pp. 34 – 35.
147 D Wren, EIC, paragraph 7.97 – 7.102.

[262] We accept the opinion of Mr Wren that inclusion of the word "generally" indicates that there is not a complete prohibition on activities that do not have a functional need to locate there.[148]

[263] We look now at relevant provisions of the RPS, Objective B 8.3.1(4) and Policy B8.3.2(3). The Objective reads:

> ... rights to occupy parts of the coastal marine area are generally limited to activities that have a functional need to locate in the coastal marine area, or an operational need making the occupation of the coastal marine area more appropriate than land outside of the coastal marine area.

[264] The wording seems logically to flow from the NZCPS, including use of the word "generally", but adds cautious enabling words about related operational needs.

[265] Mr Allan drew our attention to findings of the Independent Hearing Panel of the then proposed AUP, in its report on topic 008 (Coastal Environment), where it stated:[149]

> In the Panel's view a clear distinction needs to be made between providing for activities which have a functional need to locate in the coastal marine area, and for other activities (including those which may have an operational need to do so). The Panel has incorporated policy supporting those objectives that have a functional need which require the use of natural and physical resources of the costal marine area. The Panel has also included a policy to support those activities that have an operational need to locate in the coastal marine area where that activity cannot practicably be located outside of the coastal marine area.

We think the approach taken by the Panel was sound.

[266] As to the RCP, there are Objectives F2.14.2(2), (3), (5) and (6), and Policies F2.14.3(1),(3) concerning use and occupation, and Objective F2.16.2(1) and Policy F2.16.3(1) concerning structures. In F2.14.2(5) and F2.14.3(3) there is reference to allowance for activities where there is no practical land based location.

[267] Mr Wren was supportive of the approach taken by the applicant that there is insufficient room within land near the marina to locate sufficient and appropriately positioned carparks on the basis that marina carparks require a location close to the marina itself.[150]

[268] The applicant argued that the carpark is so integral in these terms that it attains a functional need to be in the CMA. We think the point is not without merit. We certainly

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148 D Wren, EIC, paragraph 7.97.
149 At page 8.
150 D Wren, EIC, paragraph 7.99.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

accept the evidence that the applicant searched diligently for land in the vicinity of the marina, and could not locate any for the purpose.

[269] We consider that Mr Wren sensibly acknowledges the practicality that "*a certain number of people accessing their boats will come by car, especially if they are transporting luggage and supplies for longer boat trips*".[151] In the circumstances of this marina and the search for land-based areas which was not successful, we accept that there is at very least an operational need for the marina to have a carpark on a floating deck in the CMA, and arguably a functional need. The solution is also, incidentally, less obtrusive visually than a reclamation or a fixed carpark on piles over the CMA as were amongst the options explored at Matiatia.

[270] We also find it easy to accept Mr Wren's opinion that a floating office is "*similar to the carpark in that it is required for the marina and can't be located elsewhere*".[152] Even more importantly than administration, the provision of security functions from a marina office actually drives the need in the direction of a functional one.

[271] As to the community building, we are prepared to find an operational need, perhaps verging on a functional need, in that offers public benefit providing additional opportunities for the public to interact with the water.

[272] We hold that the proposal for the carpark and the other described facilities, is consistent with Policy 6(2)(d) of the NZCPS and the subsidiary instruments discussed.

[273] We do not disagree with the findings of the hearing commissioners that it might also be impracticable and unnecessary to separate the components out from being part of the overall marina.

[274] Counsel referred to the *Matiatia Marina* decision, and helpfully compared and contrasted it from their respective perspectives.

[275] As previously mentioned, in *Matiatia*, two of several proposals for a carpark involved a reclamation or a deck supported on piles, substantially in the CMA. The Court held in that case that the carpark and marina office elements had no functional need to locate in the CMA on the evidence before it in that case, which included possible land-

151 D Wren, EIC, paragraph 7.122.
152 D Wren, EIC, paragraph 7.123.

based options.

[276] We find favour with the approach taken by Mr Allan on behalf of the Council, in which he invites us to distinguish the *Matiatia* findings.[153] He first submits that the newly "minted" AUP contains specific provisions which give effect to the NZCPS, representing a carefully considered approach to achieve the NZCPS objectives and policies, and articulating when activities that do not have a functional need to be in the CMA can locate their (noting again the word "generally" used in Policy 6 of the NZCPS).

[277] He next submits that the evidence in the present case is clearer as to lack of land based alternatives for carparking than was the case in *Matiatia*, where the applicant had found a reasonably proximate alternative to CMA-based parking during the course of the hearing.

[278] Finally, Mr Allan submitted that the evidence before us was that this applicant's carparking design solution (a floating deck that rises and falls with the tide) is far superior to the designs offered in *Matiatia* just described. We accept the submission because we have accepted the evidence of Ms Woodhouse and Mr Wren to this effect, noting tidal rise and fall and visual shielding by the breakwater much of the time to the north and by moored boats to the south and east.[154]

[279] We confirm that it is appropriate to consider the floating carpark and office and community facilities from a policy point of view, starting as high up the chain as Objective 6 and Policy 6 of the NZCPS. We are therefore able to make findings on the evidence as just indicated. For completeness we stress the low-key, subtle and attractive architectural approach to the design of the buildings on the floating platform, assisting to create adverse effects on the environment that are no more than minor.

Section 290A RMA

[280] We have appreciated being able to consider the decision of the hearing commissioners, quite apart from doing so to meet our statutory duty under s 290A. We have not needed liberally to refer to it in this decision, because the outcome of the appeals is broadly the same overall on topics both panels heard about. The outcome is similar but not identical, because Court processes, particularly expert conferencing, and

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153 Opening submissions for Auckland Council, paragraph 179.

154 J Woodhouse, EIC, paragraph 128 and D Wren, EIC, paragraph 7.125.

no doubt some different or additional evidence on some issues, has resulted in changes in emphasis and considerable attention being paid to the draft conditions of consent at several stages, even just after the hearing concluded.

Exercise on the Discretion – Sections 104 and 104B, and Part 2 RMA

[281] We were addressed on these issues by counsel for the larger parties, with some particular focus on how to treat the Part 2 aspect. Mr Sadlier on behalf of SKP, and Mr Allan on behalf of the Council addressed the Part 2 aspect quite briefly, and the remaining parties almost not at all. The lead on the issue was effectively taken by Mr Nolan QC for the applicant.

[282] The "fly in the ointment", so to speak, is how we treat reference to the words "subject to Part 2" in s 104(1), since the decision of the High Court in *R J Davidson Family Trust v Marlborough District Council*[155].

[283] In *R J Davidson,* the High Court identified a partial extension of the decision of the Supreme Court in *King Salmon*[156] to the consideration of resource consent applications. In effect, the High Court rejected a submission that s 104 requires a decision-maker to have broad consideration for matters in Part 2, and rejecting the "overall broad judgment approach" to decision-making on resource consent applications. It further held that the relevant provisions of planning instruments give substance to the principles in Part 2, but resort could be had to Part 2 in circumstances where there is invalidity, incomplete coverage or uncertainty of meaning within those instruments.

[284] The decision has been appealed to the Court of Appeal, and a decision of that Court is awaited. The decision of the High Court is binding on this Court at the present time.

[285] The approach that we must take in light of that, is that we may have recourse to Part 2 when considering the application and all cases advanced to us, under s 104(1), but not subsequently as a separate exercise as had earlier been understood to be the proper approach ("overall broad judgement approach"). We say that a little advisedly however because as was drawn to this Court's attention and written about in *Pierau v*

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155 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

156 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Auckland Council,[157] it is possible having regard to another decision of the Environment Court *Envirofume Limited v Bay of Plenty Regional Council,*[158] that a rather contrary approach can possibly be spelled out of an earlier decision of the High Court in *New Zealand Transport Agency v Architectural Centre Inc and others*[159] (sometimes known as the "Basin Bridge" decision).

[286] Out of caution, pending hoped-for clarification from the Court of Appeal in *R J Davidson*, we have followed the approach directed by the High Court in *R J Davidson*, but undertaken an alternative exercise using the "overall broad judgment" approach as well.

[287] Approaching the decision-making exercise under s 104, and exercise of the overall discretion under s 104B, we draw on findings that we have made during the course of this decision. We make no apology for not repeating them here (in the interests of avoiding an already lengthy decision becoming even longer).

[288] Our consideration of each of the effects discussed extensively in evidence has been, viewed in the manner that we have held to be appropriate at law, and in light of the relevant proposed conditions of consent, will be minor. Of some importance, we note that the draft conditions of consent have been through a robust iterative process at all stages since the application was launched, and particularly before this Court through the expert conferencing and hearing processes.

[289] We have found that the marina will offer a variety of positive effects for people and communities, in particular providing new access to the CMA for recreational purposes, and also on the physical environment.

[290] We have found that the proposal adequately serves the higher order and regional policy frameworks and specific regional plan objectives and policies.

[291] The proposal therefore passes through both gateways in s 104D.

[292] We have also found consistency with the few other relevant documents.

[293] With conditions imposed as finally submitted by the Applicant on 2 March 2018, and as amended in respect of two conditions, 55 and 56 about lighting, on 9 March 2018,

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157 *Pierau v Auckland Council* [2017] NZEnvC 090.
158 *Envirofume Limited v Bay of Plenty Regional Council* [2017] NZEnvC 012.
159 *New Zealand Transport Agency v Architectural Centre Inc and others* [2015] NZHC 1991.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

we find the proposal suitable for approval through the s 104(1) appraisal, and are prepared to exercise the overall discretion in favour of it under s 104B, which we do.

[294] We do not find a need to resort to Part 2 on account of any invalidity, incomplete coverage, or uncertainty of meaning within the planning instruments. For completeness, however we record that if viewed through the lens of the overall broad judgment approach, we find that the purpose of the Act in s 5 would be promoted, and that there has been due consideration of all other relevant matters in Part 2 such as to enable consent to be granted, and as a check that consent would provide for or give effect to the Act and all statutory instruments in the hierarchy beneath it. We find that whether or not an overall broad judgment, or an environmental bottom line approach, is taken, the proposal is suitable for consent on the conditions we have referred to, and we do that. In particular in relation to the latter approach, we consider that s 5(2)(a) to (c) are met; that the proposal recognises and provides for the nationally important matters in s6(a),(b),(c),(e) and (f), and has particular regard to s 7(a),(b),(c),(f) and (g). To the extent that s 8 is relevant, we note that the Applicant has undertaken appropriate consultation with tangata whenua, whose participation in the proceeding has been properly enabled, and whose views have been appropriately taken account of.

[295] We attach the conditions of consent as finally submitted on 2 March, modified as to conditions 55 and 56 submitted on 9 March. Consent is granted to the proposal on the basis of them as now finally approved by us. They are attached as **Annexure B**.

[296] Costs are reserved. Any application is to be made within 15 working days of the date of this decision.

For the court:

LJ Newhook

Principal Environment Judge

ANNEXURE A.

INITIAL CONCEPT IMPRESSION OF KENNEDY POINT MARINA
(Design and Detail subject to change)

1. Sealink Ferry Wharf
2. Existing Breakwater
3. Existing Public Boat Ramp
4. Access Wharf
5. Access Gangway
6. Floating Carpark Structure
7. Marina Office
8. Multi Use Facility
9. Pile Moorings
10 & 11. New Breakwaters
12. Marina Basin (Approximately 200 berths, 10m - 25m)

KENNEDY POINT MARINA
WAIHEKE ISLAND

ENVIRONMENT COURT NEW ZEALAND

ANNEXURE B.

Conditions of Consent

Purpose	To construct, maintain and operate a marina within the Coastal Marine Area (CMA)
Location	Kennedy Point Bay - Waiheke Island
Consent Holder	Kennedy Point Boatharbour Limited
Consent Number	R/REG/2016/4270

General

Definition of Terms

1. In these conditions:

   (a) "approve", "approval" and "approved" in relation to plans or management plans means assessed by Council staff acting in a technical certification capacity, and in particular as to whether the document or matter is consistent with, or sufficient to meet, the conditions of this consent, and certified as such for the purposes of the conditions of this Consent;

   (b) "CMA" means the 'coastal marine area' or 'common marine and coastal area' as defined in the RMA;

   (c) "conditions" means the conditions of the Consents imposed under section 108 RMA, or offered by the consent holder and included in the Consents;

   (d) "consent" means the coastal permit to construct the marina (and occupy the CMA for that purpose) and the coastal permit to operate the marina (and occupy the CMA for that purpose);

   (e) "consent holder" means the applicant, Kennedy Point Boatharbour Limited, at Auckland;

   (f) "Council" means the Auckland Council;

   (g) "Harbourmaster" means the Harbourmaster's office within Auckland Transport;

   (h) "RMA" means the Resource Management Act 1991; and

   (i) "Team Leader" means the Team Leader – Central for the time being of the Council's Natural Resources and Specialist Input unit.

Coastal Permit – Marina Construction (Commencement & Expiry)

2. The Consent to construct the marina under section 12(1) of the RMA and to occupy the CMA for that purpose under section 12(2) of the RMA will commence in accordance with section 116(1) of the RMA and will expire pursuant to section 123(c)

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

of the RMA five (5) years from the date it commences, unless it has lapsed, been surrendered of been cancelled at an earlier time.

Coastal Permit – Marina Operation (Commencement & Expiry)

3. The consent to operate the marina under section 12(3) of the RMA and to occupy the CMA for that purpose under section 12(2) of the RMA will commence on the date the construction of the marina is complete (as notified to the Team Leader pursuant to condition 74), and expire pursuant to section 123(c) of the RMA thirty- five (35) years after it commences, unless it has lapsed, been surrendered of been cancelled at an earlier time. The rights of exclusive occupation able to be exercised under this occupation consent are set out in condition 112.

Access to the Site

4. The servants or agents of the Council shall have access to all relevant parts of the site at all reasonable times for the purpose of carrying out inspections, surveys, investigations, tests, measurements and/or to take samples.

Monitoring

5. The consent holder shall pay the Council an initial consent compliance monitoring charge of $3,000.00 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs that have been incurred to ensure compliance with the consents.

6. The $3,000.00 (inclusive of GST) charge shall be paid prior to the commencement of construction and the consent holder will be advised of the further monitoring charge or charges as they fall due. Such further charges are to be paid within one month of the date of invoice.

Review Condition

7. Pursuant to section 128 of the RMA, the conditions of the consent may be reviewed by the Council (at the consent holder's cost):

   (a) At any time during the construction period in relation to noise emissions and stormwater discharges from the impervious marina structures that are subject to the provisions in sections 15 and 16 of the RMA and where the best practicable option may be necessary to remove or reduce any adverse effect on the environment;

   (b) At any time during the construction period, and thereafter annually for 5 years, and thereafter at 5 yearly intervals, in relation to altering any monitoring requirements as a result of previous monitoring outcomes and/or in response to changes to the environment, and/or changes in engineering and/or scientific knowledge;

   (c) Within six months from the date the Team Leader is notified of completion of construction work (in accordance with condition 74), and thereafter annually for 5 years, and thereafter at 5 yearly intervals, to deal with any adverse effect(s) on the environment which may arise from the exercise of

the consent, including whether any restrictions need to be imposed by way of amended or additional conditions on marina traffic movements, or the management of such movements.

Development in Accordance with Plans and Application

8. Construction of the marina development shall be undertaken in accordance with the plans submitted with the application and listed in **Schedule 1**, referenced by the Council as R/REG/2016/4270.

9. Construction and operation of the marina development shall be undertaken in general accordance with the reports and application documents listed in **Schedule 2**.

10. In the event of inconsistency between the plans and documents listed in **Schedules 1 and 2** and the conditions of this consent, the conditions shall prevail.

Amendments to parking

11. Limit lines shall be included to indicate where a vehicle should wait to trigger the proposed traffic lights on the gangway to the parking area, with the limit lines positioned clear of approaching traffic

12. Sufficient space shall be provided at the south-eastern end of the floating pontoon for a vehicle to undertake a three-point turn at the end of the pontoon.

13. A minimum of four bicycle parking spaces shall be provided at each end of the proposed pontoon, totaling eight bicycle parking spaces

Mana Whenua Engagement

14. Prior to the commencement of any construction activities authorised by this consent, the consent holder shall provide evidence to the Council that it has prepared a Mana Whenua Engagement Plan (MWEP) for the project in collaboration with Ngāti Paoa iwi. As a minimum, the MWEP shall include details of the following matters:

    (a) How other mana whenua who have expressed an interest in the project because of their historic associations with Waiheke Island and its surrounding waters have been involved in the formulation of the MWEP and are to be involved in its implementation;

    (b) The process for involvement of mana whenua in the final preparation of the engineering design, construction management, public facilities and marina operational plans as they relate to:

        (i) Managing water quality in the bay during the construction and operation of the marina;

        (ii) Managing underwater noise during construction so as to protect marine animals;

        (iii) Protecting the waters of the bay from biosecurity risks;

        (iv) Providing cultural markers within the marina to recognise the historic

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

associations of mana whenua with the area and the significance of the land and seascapes of Tikapa Moana to mana whenua;

(v) Enabling use of the marina facilities for cultural activities.

(c) Cultural discovery protocols;

(d) Procedures for the cultural induction of marina construction workers and marina staff;

(e) Cultural monitoring procedures and protocols during construction activities; and

(f) Ongoing mana whenua engagement procedures.

Construction Conditions

Construction Management Plan

15. At least twenty (20) working days before the commencement of construction works, the consent holder shall provide to the Team Leader a Construction Management Plan (**CMP**) for written approval. The purpose of the CMP is to confirm final project details, ensure that the construction works remain within the limits and standards approved under the consent and to ensure that the construction activities are managed to avoid, remedy or mitigate adverse effects on the environment.

16. The CMP shall provide details of the responsibilities, reporting frameworks, coordination and management required for effective site management. The CMP shall provide information on the following matters:

(a) Construction quality assurance;

(b) Construction works programming;

(c) Construction traffic management;

(d) Site management;

(e) Management of affected moorings;

(f) Wharf construction;

(g) Donald Bruce Road and Kennedy Wharf Carpark upgrade works;

(h) Consultation; and

(i) Monitoring of Little Blue Penguins.

17. (Construction quality assurance). The Construction Quality Assurance part of the CMP requires the establishment of management frameworks, systems and procedures to ensure quality management of all on-site construction activities and compliance with the conditions of this consent. This section shall provide details on the following:

(a) Name, qualifications, relevant experience and contact details of an

appropriately qualified and experienced project manager, who shall be responsible for overseeing compliance with the CMP.

(b) Names, qualifications, relevant experience, and methods for contact of principal staff employed, along with details of their roles and responsibilities.

(c) Methods and systems to inform and train all persons working on site of potential environmental issues and how to avoid remedy or mitigate any potential adverse effects;

(d) Systems and processes whereby the public are informed of contact details of the project manager and person or persons identified above;

(e) Complaints register, response process, including resultant actions;

(f) Liaison procedures with Auckland Council.

18. (Construction Works Programme). This part of the CMP is to ensure that the consent holder has prepared a programme of works that will enable the marina and all other associated land based works (e.g., upgrade of Donald Bruce Road referenced at condition 115), to be constructed in a manner that is timely, adequately co- ordinated and minimises the adverse effects of construction on the existing users of the bay, the ferry terminal and the environment, residents and users of the area. This section shall, among other matters, provide details of the programme for the construction works throughout all stages of the marina development process, and how daily construction activities will be managed to ensure compliance with the requirements of condition 61.

19. (Construction Traffic Management). This part of the CMP is to ensure that construction traffic entering or exiting the site via Donald Bruce Road:

(a) Does not compromise the efficiency of scheduled public transport movements;

(b) Does not adversely affect the safety of pedestrians and cyclists using the other wharf and ferry facilities at Kennedy Point; and

(c) Avoids periods of peak congestion in the ferry queuing area.

20. (Site Management). This part of the CMP is to ensure that procedures are in place to ensure that the site is managed safely and in an appropriate condition throughout the entire construction process. This section shall provide details on the following:

(a) The clear identification and marking of the construction zone within the CMA and the provision of any necessary navigational aids and information to ensure safe and effective access by other parties through the construction zone;

(b) The extent to which barges and other machinery are expected to operate within the bay and the measures that will minimise the disruption to other craft and users;

(c) The measures to be adopted to maintain the construction zone and adjacent parts of the CMA in a tidy condition in terms of storage and unloading of

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

materials, refuse storage and disposal (so as to avoid attracting mammalian predators and undesirable species to the construction area) and other activities;

(d) The provision of any site office, parking for workers' vehicles and workers' conveniences (e.g. portaloos);

(e) The location of construction machinery access and storage during the period of site works, including any temporary mooring of the barge(s);

(f) Maintaining public pedestrian access along Donald Bruce Road during construction;

(g) The procedures for controlling sediment run off into the CMA, and the removal of any debris and construction materials from the CMA onto public roads or places; and

(h) The provision of any artificial lighting associated with construction works and the effects of any such lighting.

21. (Management of Affected Moorings). This part of the CMP shall identify all the moorings affected by the marina construction and outline the procedures that have been developed in consultation with the mooring holders and the Harbourmaster for the relocation, removal and/or storage of the moorings and vessels during construction. Unless otherwise agreed by the Council, all costs involved in temporary mooring and vessel relocation, removal and/or storage shall be met by the consent holder for the duration of the construction phase.

22. (Wharf Construction). The wharf construction component of the CMP is to ensure that construction activity in the inter-tidal area is managed in a manner that avoids or minimises adverse effects on water quality and coastal processes, avoids adverse effects on Little Blue Penguins, and incorporates opportunities to enhance Little Blue Penguin nesting, roosting and moulting habitat. This component of the CMP shall include the following:

(a) A detailed description of the construction methodology including type of plant and equipment to be used;

(b) Measures to manage increased levels of suspended sediments or turbulence during marina construction activity; ~~and~~

(c) Details of any temporary storage of material during construction;

(d) Details of how any active burrows and nests in the section of existing seawall to be rebuilt as part of the connection of the wharf to Donald Bruce Road will be managed to avoid disturbing breeding and nesting penguins during their breeding season; and

(e) Details of how artificial burrows or nest boxes for Little Blue Penguins are to be incorporated into the reinstated rock seawall over which the wharf will be constructed.

Advice Note: Management methods for (d) above may include a detailed inspection of this section of seawall by a suitably qualified and/or experienced penguin expert prior to construction and outside the breeding season to identify any active burrows

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

and nests.

23. (Donald Bruce Road and Kennedy Wharf Carpark upgrade works). This part of the CMP is to set out how the Donald Bruce Road and Kennedy Wharf Carpark upgrade works offered by the consent applicant as referred to in conditions 115 and 116 shall be undertaken (if approved by Auckland Transport and/or the Council) as part of the overall construction programme for the marina and how all other relevant construction relation conditions will be implemented for these works while they are being undertaken.

24. (Consultation). This part of the CMP is to outline the consultation undertaken in preparing the CMP with the following parties:

(a) Auckland Transport;

(b) SeaLink Travel Group Limited; and

(c) Affected mooring holders.

24A. (Little Blue Penguin Monitoring). This part of the CMP is to be prepared by a suitably qualified and experienced person and shall set out the programme for the monitoring of Little Blue Penguins (*Eudyptula minor*) within or adjacent to the construction area during the construction works. The monitoring programme shall provide, as a minimum, for:

(a) A pre-construction inspection of the area by a penguin expert (as agreed with the Team Leader) to detect active Little Blue Penguin burrows and nests;

(b) The clear marking (so as to be visually identifiable from no less than 5m away) of any active burrows and nests identified in the pre-construction inspection;

(c) Details of the monitoring of identified burrows and nests to be undertaken during construction (i.e., frequency; personnel; type of data collection);

(d) The reporting of monitoring information to the Team Leader.

The objective of the monitoring programme is, as far as is reasonably possible, to detect any impacts of the construction works on Little Blue Penguins at the site, and the construction programme thereafter adapted to avoid any detected impacts from construction works.

25. All works shall comply with the approved construction management plan at all times. All personnel working on the site shall be made aware of the requirements contained in the Construction Management Plan. A copy of the approved Construction Management Plan shall be held on site at all times while any activity associated with construction is occurring. The approved CMP shall be implemented and maintained throughout the entire period of the works to the satisfaction of the Team Leader.

26. No construction activity in the coastal marine area shall start until the Construction Management Plan is approved by the council and all measures identified in that plan as needing to be put in place prior to the start of works are in place.

Construction Noise

27. Construction activities shall not exceed the following noise levels when measured 1m from the facade of any building that contains an activity sensitive to noise that is occupied during the works.

Time of week	*Time Period*	*Maximum noise level (dBA)*	
		L_{eq}	L_{max}
Weekdays	*6:30am – 7:30am*	*55*	*70*
	7:30am – 6:00pm	*70*	*85*
	6:00pm – 8:00pm	*65*	*80*
	8:00pm – 6:30am	*40*	*70*
Saturdays	*6:30am – 7:30am*	*40*	*70*
	7:30am – 6:00pm	*70*	*85*
	6:00pm – 8:00pm	*40*	*70*
	8:00pm – 6:30am	*40*	*70*
Sundays and public holidays	*6:30am – 7:30am*	*40*	*70*
	7:30am – 6:00pm	*50*	*80*
	6:00pm – 8:00pm	*40*	*70*
	8:00pm – 6:30am	*40*	*70*

28. The noise from any construction work shall be measured and assessed in accordance with the requirements of New Zealand Standard NZS6803:1999 Acoustics – Construction noise.

29. At least twenty (20) working days prior to the commencement of construction works, the consent holder shall provide to the Team Leader a Construction Noise Management Plan (**CNMP**) for written approval, to be prepared by an appropriately qualified and experienced Acoustic Consultant. The Construction Noise Management Plan shall be generally in accordance with Section 8 and the relevant annexures of "NZS6803:1999 Acoustics – Construction Noise", which detail the relevant types of construction to which the Construction Noise Management Plan is to apply, and the procedures that will be carried out to ensure compliance with the Standard. The objectives of the Construction Noise Management Plan shall be to ensure construction works are:

    (a) Designed and implemented to comply with the requirements of "NZS6803:1999 Acoustics – Construction Noise", as measured and assessed in accordance with the long term noise limits set out in the Standard;

    (b) Implemented in accordance with the requirements of Section 16 of the Resource Management Act 1991, so as to adopt the best practicable option to ensure the emission of noise from the project site does not exceed a reasonable level.

30. The CNMP shall be prepared by an appropriately qualified and experienced acoustic consultant. It shall address terrestrial and underwater noise effects and include, as a minimum, provision for the following:

    (a) Details of the machinery and equipment to be utilised during construction works;

(b) Predictions of sound levels from the machinery and equipment to be utilised during the construction work;

(c) Identification of the most affected houses and other sensitive locations where there exists the potential for noise effects;

(d) Details of procedures for community liaison and notification of proposed construction activities including the reporting and logging of noise related complaints, including the need for additional monitoring following the receipt of noise complaints;

(e) Description and duration of the works, anticipated equipment and the processes to be undertaken;

(f) Hours of operation, including specific times and days when construction activities causing noise are expected to occur;

(g) Potential mitigation measures should include using a 'soft start' technique at the commencement of each pile being driven, by ensuring that piling does not commence if marine mammals are seen within 1,500metres of the piling barge, and implementation of any other physical mitigation measures that may be necessary, for example a reduced drop height for the piling hammer or the use of a 'dolly' between the hammer and the pile;

(h) Schedule and methods for monitoring and reporting on construction noise;

(i) Procedures to be followed in the event of the measured noise levels exceeding NZS6803:1999 Acoustics – Construction Noise, including that the Council must be notified, works shall cease, and further mitigation options shall be investigated and implemented prior to works re-commencing;

(j) Construction operator training procedures; and

(k) Contact numbers for key construction staff, staff responsible for implementation of the CNMP, and complaint receipts and investigations.

31. The CNMP shall be implemented throughout the entire period of the construction works.

Engineering Plans & Specifications

32. A minimum of 40 days prior to any construction works being undertaken, the consent holder shall provide to the Team Leader a detailed engineering design report and a set of construction plans, drawings and specifications of all CMA based marina structures and related facilities for written approval. The engineering plans and specifications shall cover the following matters:

(a) Specific design and adoption of a minimum sea-level rise freeboard;

(b) Layout of the marina piers and associated structures, including piles and associated navigation fairways, channels and markers, identifying the total number of marina berths and pile moorings;

(c) Design of floating breakwaters and their associated piling, any required temporary protection works and requirements for navigation marks;

(d) The expected design performance of the floating breakwaters including stability, wave run-up and overtopping responses taking into account climate change;

(e) The gangway and access and parking deck pontoon, and the final layout of car parking spaces showing no less than 6 public spaces and a maximum of 0.35 spaces per each marina berth (with no more than 75 parking spaces to be provided);

(f) The details of the design of the access to ensure that the footpath on Donald Bruce Road be retained at a constant level across the proposed driveway to the marina. Where the footpath intersects a new vehicle crossing, the overlapped area shall be designed and constructed at the same level, using the same materials, merging, paving, patterns and finish as the footpath, on each side of the crossing;

(g) The pile moorings and associated navigation fairways and markers;

(h) Details of the sewage pump-out and disposal facility, water supply and other services; and

(i) Detailed plans and specifications for the access and parking pontoon stormwater collection, treatment and discharge facilities.

33. The detailed engineering plans and specifications shall be prepared by a Chartered Professional Engineer and be in accordance with the plans and reports included in Schedule 1 and Schedule 2.

Wharf Access & Parking Pontoon –Stormwater System Design and Construction

34. The access wharf and car park stormwater collection and treatment system is to be designed and constructed in accordance with Technical Publication 10 (**TP10**) so as to ensure that any stormwater discharged into the CMA meets the discharge standards in the relevant regional coastal plan.

35. Where necessary, stormwater outfalls shall incorporate erosion protection measures to minimise the occurrence of bed scour and bank erosion in accordance with TP10.

36. In the event that any minor modifications to the stormwater management system are required, the following information shall be provided:

(a) Plans and drawings outlining the details of the modifications; and

(b) Supporting information that details how the proposal does not affect the capacity or performance of stormwater management system.

37. All information shall be submitted to and approved by the Team Leader prior to implementation.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Geotechnical Engineering Design Report

38. Prior to the commencement of any construction works, the consent holder shall provide to the Team Leader a Geotechnical Engineering Design Report (**GEDR**) from a Chartered Professional Engineer with appropriate geotechnical engineering expertise confirming that the detailed engineering plans and specifications provided in accordance with condition 32 are based on the consideration of ground/seabed conditions, foundation requirements and the engineering integrity of the structures.

Water & Sediment Quality Monitoring

39. At least sixty (60) working days prior to commencement of construction works, the consent holder shall submit to the Team Leader for approval a Water & Sediment Quality Monitoring Programme (**W&SQMP**) along with appropriate review provisions. The W&SQMP shall provide details of the water quality parameters that are to be monitored during operation of the marina with reference to pre- construction conditions, agreed 'indicator' or 'trigger' thresholds of acceptable effects, and the response procedures should those thresholds be breached.

40. The W&SQMP shall provide information on water and sediment quality conditions in relation to the following activities in the operating marina that could give rise to adverse effects:

    (a) Accidental discharges of human sewage from boats berthed in the marina or a failure of the sewage holding tank which is to be provided on the existing pontoon;

    (b) Discharges of trace metals and co-biocides from anti-fouling paints on the hulls of vessels berthed in the marina.

41. The W&SQMP shall provide for 'baseline' monitoring prior to commencement of works, and then monitoring during operation of the marina, as follows:

    (a) Pre-construction and annual post-construction measurement and analysis of:

    - bacteriological and viral indicators of human sewage;
    - water column monitoring for total and dissolved copper and zinc, and the co-biocide diuron;
    - sediment monitoring for total recoverable copper and zinc; and for High Molecular Weight Polycyclic Aromatic Hydrocarbons (HW-PAH);
    - sediment monitoring for total recoverable lead, arsenic, mercury, chromium, cadmium and nickel; and for the co-biocide diuron (or alternative co-biocide as agreed with the Team Leader);

    (b) The water and sediment quality monitoring shall be completed at three representative sites within the marina (inner, mid and outer); and for comparative purposes one site located adjacent to the existing commercial wharf, and one background site in the outer Kennedy Bay; and

    (c) All sampling shall be conducted during approximate peak occupancy on slack low tide after at least 48hrs of no rainfall or minimal rainfall (<3mm) using clean sampling techniques.

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

42. The W&SQMP shall be prepared with reference to the following guidelines:

(a) Ministry for the Environment (**MfE**) guidelines for contact recreation including summer (peak period) monthly microbiological indicators (baseline and operational);

(b) Water column metals: the ANZECC 90% trigger value for copper and the ANZECC 95% trigger value for all other metals;

(c) Co-biocides: European Chemical Agency (ECHA) Predicted No Effect Concentration (PNEC) for diuron or other agreed biocide in the water column (32 ng/L for diuron if commercial lab analysis can achieve this, otherwise 40 ng/L) and for diuron or other agreed biocide in the sediment (5.172 µg/kg for diuron); and

(d) Sediment: the TELs for the relevant metals and HW-PAHs as detailed in MacDonald et al. 1996.

43. The W&SQMP shall set out the procedures to be adopted for any guideline exceedances in the following manner:

(a) Exceedance of the MfE guidelines for contact recreation shall be reported in writing to the Team Leader within five (5) working days, along with any further monitoring or responses related to the significance of the exceedance, if it is related to discharge(s) from a vessel(s) berthed within the marina.

(b) Exceedance of any of the other guidelines outlined above by more than 20% (based on the average results for inside the marina, or the single result for outside the marina within the swing mooring area on the southern side of the commercial wharf), excluding where the preconstruction monitoring showed the guideline already to be exceeded, or in the event that the post construction background site is shown to exceed the guideline for any sampling run,) shall result in the following further course of action:

(A) If desired, confirm the result with one further round of sampling for the parameter breached, otherwise move directly to clause (F).

(B) If further sampling does not confirm guideline exceedance then report the results to the Team Leader. No further action is required.

(C) For the sediments, if further sampling confirms a greater than 20% exceedance of the Threshold Effects Level (TEL: see MacDonald et al. 1996) for metals or High Molecular Weight Polycyclic Aromatic Hydrocarbons (HW-PAHs) or of the European Chemical Agency(ECHA) Predicted No Effect Concentration (PNEC) for diuron (or any other agreed co-biocide) then move to clause (F).

(D) For the water column: if further sampling confirms a greater than 20% exceedance of the guideline then move directly to clause (F) or carry out a bioavailability assessment for metals using site specific chronic guidelines calculated from Dissolved Organic Carbon (DOC) (e.g. based

on Arnold et al. 2006) or from the saltwater Biotic Ligand Model (BLM) or similar if available.

(E) If the bioavailability assessment does not breach site specific guidelines then report the results to the Team Leader. No further action is required.

(F) If the bioavailability assessment for metals confirms a breach of site specific chronic guidelines, or a >20% exceedance of the sediment TEL or co-biocide ECHA PNEC guidelines are confirmed, then results are to be reported to Team Leader for written approval and options for reducing water column and sediment contaminant levels investigated.

44. The approved W&SQMP shall be implemented and the results shall be provided to the Team Leader on an annual basis within 3 months of the completion of the sampling and shall include any further requirements based on any guideline exceedance as detailed above.

45. After 5 years of monitoring, the consent holder may seek approval from the Team Leader to modify the regularity of sampling or matters to be sampled in the approved W&SQMP where the results support such a change (e.g., if the monitored levels are stable and/or are not of concern by reference to relevant trigger thresholds and/or by reference to sample data do not require continued sampling at the initial intensity).

Construction Biosecurity Management Plan

46. Prior to the first use of any construction equipment/vessel at the site pursuant to this consent, the consent holder shall ensure the equipment is free of infestation by any unwanted or biosecurity risk species and shall provide written certification of the equipment/vessel having been inspected and where necessary appropriately treated by way of best available practice. A copy of the certification shall be provided to the Team Leader. The consent holder shall not allow the use of any vessel under its control or direction, or otherwise associated with the construction of the marina:

(a) That is not certified as having been treated and inspected as required by this condition; or

(b) That is showing any indication of being infected with any unwanted or risk species, including but not limited to Undaria, seasquirts and Mediterranean fanworm.

47. Prior to the installation of any structures, the consent holder shall lodge a Biosecurity Management Plan (BMP) with the Team Leader for written approval. The consent holder shall implement the BMP following its approval. The BMP shall address measures to avoid the introduction of any unwanted or risk species, including but not limited to Undaria, seasquirts and Mediterranean fanworm, through the construction activity and to minimise any impacts through propagation on the marina if any such species are introduced, and shall include details regarding the cleaning and inspection of vessels brought into the subject site and immediate surrounding area.

The BMP shall have the following objectives:

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

(a) To avoid the introduction of any unwanted or risk species, including but not limited to Undaria, seasquirts and Mediterranean fanworm into Putiki Bay through the construction activities.

(b) To detect any introduced populations of any unwanted or risk species through construction/operation.

(c) To reduce any unwanted or risk species, spreading from the construction locations and structures to other areas of Waiheke Island should any such species establish in the marina.

(d) To ensure effective treatment of all the equipment used in association with the marina construction to ensure it does not become a vector for the spread of any unwanted or risk species, including but not limited to Undaria, seasquirts and Mediterranean fanworm.

48. The approved CBMP shall be implemented by the consent holder during the construction of the marina.

Navigation & Safety Aids

49. Prior to marina construction, the consent holder shall liaise with the Harbourmaster to evaluate the most appropriate location, number and type of aids to navigation associated with the marina. The aids to navigation will be provided and maintained by the consent holder at its cost in accordance with the Maritime New Zealand Guideline and Port and Harbour Safety Code.

50. Prior to marina construction, the consent holder shall, in consultation with the Harbourmaster, establish at its cost an 'exclusion zone' with special marker buoys to restrict recreational craft from the area of the bay during construction activities.

51. The consent holder shall provide the Harbourmaster with notice of all construction works within navigable waters.

Public Facilities Plan

52. At least one (1) month before commencing construction of the access wharf, pontoon and floating buildings a detailed Public Facilities Plan (**PFP**) shall be submitted to the Team Leader for approval. The PFP shall be based on the plans listed in condition 8 and cover both final design and maintenance of all proposed public facilities, landscaping, materials, pedestrian promenades and any seating, storage or other similar facilities.

53. The PFP shall be prepared by persons with professional qualifications and appropriate experience in building and landscape design and maintenance and include, but not be limited to, the following matters:

(a) Details of the finishing and layout of the wharf, access ramp, car park deck, walkways/promenades, pavilion and launching area and parking and loading areas, including materials, lighting and maintenance requirements;

(b) Exterior colours and finishes of the access pontoon and floating attenuators

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

(including the use of a recessive colouring or oxidised finish that is sympathetic to, and reflects that which exists within, the pebbles and rocks comprising Kennedy Point beach), and floating office and public facilities buildings;

(c) Location and design of rubbish collection and cycle parking facilities and signage (as required by these conditions);

(d) Details of the access ramps to be provided from the access pontoon to Kennedy Pier and the floating access walkway to be installed to enable access from Kennedy Pier to the Southeast Attenuator;

(e) Details of car parking signage including sufficient information on the operation of the carpark, including information emphasising that the car park is dedicated for marina related activities only. Any signage should also employ a "Car Park Full" sign visible from Donald Bruce Road prior to a vehicle turning into the marina access to avoid any unnecessary vehicle movements to and from the site if the parking is at capacity;

(f) Details of signage indicating that the public areas are available for access and use by the public; and

(g) The approved PFP shall be implemented by the consent holder during the construction of the marina and completed prior to the marina becoming available for the berthing of vessels, and thereafter maintained in accordance with the PFP.

54. The roof and exterior walls of the buildings within the marina shall be finished and maintained in colours that are compatible with the local environment. Colour palettes shall be within the BS5252 Total Colour Chart as follows:

(a) For walls, the following BS5252 colours or equivalent colour with a reflective value of no more than 40% (and 15% in the case of the marina office) be used:

Group A – A05 to A14

Group B – B19 to B29

Group C – C35 to C40, restricted to hue range 06-16

Group D – D43 to D45, restricted to hue range 06-12

Group E – Excluded.

Where walls are glazed, the glazing shall be of low reflectivity glass.

(b) For roofs, the following BS 5252 colours or equivalent colours with a reflectance value of no more than 25% (and 15% in the case of the marina office) be used;

Group A – A09 to A14

Group B – B23 to B29

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Group C – C39 to C40, restricted to hue range 06-16

Group D – Excluded

Group E – Excluded

Lighting Plans & Specifications

55. Prior to commencement of construction works, the consent holder shall submit final lighting plans and specifications for the marina facilities to the Team Leader for approval. The lighting plans shall be prepared by an appropriately qualified lighting expert and shall include details of the following matters:

(a) The purpose of any external lighting;

(b) The nature of the proposed light fittings and their placement, illuminance levels and means of ensuring their shielding (as appropriate) so as to avoid glare to nearby residential dwellings and minimise light spill onto the existing rock breakwater adjacent to the carpark pontoon;

(c) The use of 3000K LED luminaires for the carpark pole mounted lights to reduce the visible blue light component for little penguins;

(d) How the traffic light system is proposed to manage vehicle movements over the gangway between the wharf and the floating pontoon and the "Car park full" sign will be designed to achieve a night time maximum luminous intensity of 500 candelas for the traffic lights and maximum luminance of 800 candela/m^2 for the sign; and

(e) How the traffic lights and sign will be orientated so that they do not face in the direction of dwellings.

56. The consent holder shall install and maintain the lighting in the Council approved lighting plan.

Moorings Management Plan

57. Prior to any construction works, the consent holder shall submit to the Team Leader and Harbourmaster for approval, a plan showing where the holders of moorings within the Mooring Management Area are to be relocated. The consent holder shall procure the surrender to the Harbourmaster of any swing mooring based at Waiheke Island owned by a person wishing to acquire a berth in the marina.

58. The approved Moorings Management Plan shall be implemented by the consent holder.

Prevention of Damage to Donald Bruce Road

59. The consent holder shall take all reasonable measures to avoid any unauthorised damage to Donald Bruce Road and any roadside drainage or services during construction. Should damage occur, the consent holder shall promptly advise this to the Team Leader and arrange with the Council and/or Auckland Transport for any damage to be remedied at the expense of the consent holder. The road controlling

authority may also, at its discretion, appoint a suitably qualified professional to assess construction damage to Donald Bruce Road on a regular basis and require the consent holder to remedy identified damage at its expense.

Dust Control and Protection of Road Surfaces

60. All necessary measures shall be provided or implemented to minimise dust nuisance to neighbouring properties and roads, along with the deposition of any slurry, clay or other materials on the roads by vehicles entering or leaving the site. In the event that material is deposited upon the road this shall be removed immediately at the expense of the consent holder.

Limits on Construction

61. Construction work and associated noise generating activities shall only be carried out between the hours of 7:30a.m.to 6:00p.m. from Monday to Saturday, except that any driving of piles shall occur only between the hours of 8.00a.m.to 5.00p.m. Monday to Friday and Saturday 8.00a.m.to 1.00p.m, and during the breeding season of Little Blue Penguins (1 July to 31 December), all water based construction activities shall occur no earlier than 1 hour after nautical dawn and no later than 1 hour before nautical dusk. No construction work shall be undertaken on Sundays or public holidays and the construction work within the penguin breeding season will be reduced to the greatest extent practicable.

Limits on Vibration

62. Construction activities shall comply with the German Standard DIN 4150-3 (1999:02) Structural Vibration – Effects of Vibration on Structures referenced in Rule 4.6.3.1 of the Hauraki Gulf Islands Operative District Plan.

Archaeology and maritime heritage

63. A site works briefing shall be provided by the project historic heritage expert to all contractors prior to work commencing on the site. This briefing shall provide information to the contractors proposed to be engaged on the site regarding what constitutes historic heritage materials; the legal requirements of unexpected historic heritage discoveries; the appropriate procedures to follow if historic heritage materials are uncovered whilst the project historic heritage expert is not on site, to safeguard materials; and the contact information of the relevant agencies (including the project historic heritage expert, the Team Leader, the Auckland Council Heritage Unit and Heritage New Zealand Pouhere Taonga) and mana whenua. Documentation demonstrating that the contractor briefing has occurred shall be forwarded to the Team Leader prior to work commencing on the site.

64. All earthworks required for the proposed wharf and access ramp structures off Donald Bruce Road shall be monitored by the project historic heritage expert. A final monitoring report commensurate to archaeological monitoring and results shall be submitted to the Team Leader (for the Manager: Heritage Unit, heritageconsents@aucklandcouncil.govt.nz) within one calendar month of the completion of work on the site.

Advice Note:

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

Should the proposed earthworks result in the identification of any previously unknown archaeological site, the requirements of land disturbance – Regional Accidental Discovery rule [E11.6.1] set out in the Auckland Unitary Plan-Operative in Part (November 2016) shall be complied with.

65. In the event that any unrecorded historic heritage sites are exposed as a result of consented work on the site, then these sites shall be recorded by the consent holder for inclusion within the Auckland Council Cultural Heritage Inventory. The consent holders project historic heritage expert shall prepare documentation suitable for inclusion in the Cultural Heritage Inventory and forward the information to the Team Leader (for the Manager: Heritage Unit, heritageconsents@aucklandcouncil.govt.nz) within one calendar month of the completion of work on the site.

Advice Notes

Heritage New Zealand Pouhere Taonga Act 2014

The Heritage New Zealand Pouhere Taonga Act 2014 (hereafter referred to as the Act) provides for the identification, protection, preservation and conservation of the historic and cultural heritage of New Zealand. All archaeological sites are protected by the provisions of the Act (section 42). It is unlawful to modify, damage or destroy an archaeological site without prior authority from Heritage New Zealand Pouhere Taonga. An Authority is required whether or not the land on which an archaeological site may be present is designated, a resource or building consent has been granted, or the activity is permitted under Unitary, District or Regional Plans.

According to the Act (section 6) archaeological site means, subject to section 42(3),

(a) any place in New Zealand, including any building or structure (or part of a building or structure), that –

(i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and

(ii) provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and

(b) includes a site for which a declaration is made under section 43(1)

It is the responsibility of the consent holder to consult with Heritage New Zealand Pouhere Taonga about the requirements of the Act and to obtain the necessary Authorities under the Act should these become necessary, as a result of any activity associated with the consented proposals.

For information please contact the Heritage New Zealand PouhereTaonga Northern Regional Archaeologist – 09 307 0413 / archaeologistMN@historic.org.nz.

Protected Objects Act 1975

Māori artefacts such as carvings, stone adzes, and greenstone objects are considered to be tāonga (treasures). These are taongatūturu within the meaning of

the Protected Objects Act 1975 (hereafter referred to as the Act).

According to the Act (section 2) taongatūturu means an object that –

(a) relates to Māori culture, history, or society; and

(b) was, or appears to have been –

(i) manufactured or modified in New Zealand by Māori; or

(ii) brought into New Zealand by Māori; or

(iii) used by Māori; and

(c) is more than 50 years old

The Act is administered by the Ministry of Culture and Heritage. Tāonga may be discovered in isolated contexts, but are generally found within archaeological sites. The provisions of the Heritage New Zealand Pouhere Taonga Act 2014 in relation to the modification of an archaeological site should to be considered by the consent holder if tāonga are found within an archaeological site, as defined by the Heritage New Zealand Pouhere Taonga Act 2014.

It is the responsibility of the consent holder to notify either the chief executive of the Ministry of Culture and Heritage or the nearest public museum, which shall notify the chief executive, of the finding of the taongatūturu, within 28 days of finding the taongatūturu; alternatively provided that in the case of any taongatūturu found during the course of any archaeological investigation authorised by Heritage New Zealand Pouhere Taonga under section 48 of the Heritage New Zealand Pouhere Taonga Act 2014, the notification shall be made within 28 days of the completion of the field work undertaken in connection with the investigation.

Under section 11 of the Act, newly found taongatūturu are in the first instance Crown owned until a determination on ownership is made by the Māori Land Court. For information please contact the Ministry of Culture and Heritage – 04 499 4229 / protected-objects@mch.govt.nz.

66. [No condition 66].

Notice of Construction Start Date

67. The Team Leader shall be informed in writing at least twenty (20) working days prior to the start date of the works authorised by the consent.

Pre-Construction Meeting with Council

68. At least twenty (20) working days prior to commencement of construction works, the consent holder shall hold a pre-construction site meeting with the Council, Auckland Transport (as road controlling authority), and the primary contractor(s), including the project manager and project engineer. A written record of the meeting shall be provided to the Team Leader before construction commences.

69. The purpose of the pre-construction meeting is to ensure that all parties involved are

aware of what is required of them during the construction process. The consent holder shall provide the following information at the meeting(s):

(a) All approved (signed/stamped) construction and other management plans required by the consent conditions;

(b) Approved (signed/stamped) construction/engineering plans and specifications;

(c) Final contact details for the contractor(s), site/stage engineer, and project manager; and

(d) Construction timeframes for key stages of the works authorised under this consent.

70. The following requirements will need to be checked and signed off by the Team Leader prior to the commencement of works on site:

(a) That the CMP and all other relevant management plans are approved; and

(b) All measures provided in the CMP and other management plans are in place.

Advice Note: A subsequent meeting may be required prior to the commencement of construction to enable final checks and sign-offs for any outstanding matters identified at the meeting above.

Awareness of Consent Conditions

71. The consent holder shall ensure that all contractors, sub-contractors and work site supervisory staff who are carrying out any works on the site are advised of the conditions of the consent and the requirements of the approved management plans and act in accordance with the conditions and plans.

72. A copy of the conditions of consent and approved construction management plans shall be available at all times on the work site.

Financial Security

73. The consent holder shall confirm in writing to the Team Leader that adequate funding is available to complete all construction works prior to the commencement of any works on the site.

Notice of Completion of Works

74. The consent holder shall notify the Team Leader in writing of the expected date of completion of the works at the marina site, two weeks prior to the expected completion date.

Post Construction Requirements

Site Clearance

75. The Team Leader shall be notified in writing of the expected date of completion of the works at the marina site ten (10) working days prior to the expected completion

ENVIRONMENT COURT NEW ZEALAND THE SEAL OF THE

date.

76. Within five (5) working days of the completion of construction activity, all machinery, equipment, and construction materials shall be removed from the coastal marine area. The subject site shall be left such that any remaining disturbance of the foreshore and seabed is able to be remedied, to the satisfaction of the Team Leader by the operation of natural processes within seven (7) days of the completion of construction activity.

As Built Plans to Council & Chief Hydrographer

77. Within twenty (20) working days of the completion of the construction works, a complete set of 'as built' plans of the CMA based marina facilities shall be provided to the Team Leader. The 'as built' plans shall include a location plan, a plan which shows the area of occupation, structure dimensions, and cross sections.

78. Within twenty (20) working days of the completion of construction activity, the consent holder shall supply a copy of the 'as built' plans to the New Zealand Hydrographic Authority (Land Information New Zealand, Private Box 5501, Wellington 6011 or customersupport@linz.govt.nz).

Engineering Works Certification

79. Within two (2) months of completion of the construction works a Chartered Professional Engineer shall certify that the marina facilities have been constructed in accordance with the Council approved engineering plans.

80. All structures permitted to occupy the CMA by this consent shall be maintained at all times in a good and sound condition via a regular monitoring program which includes undertaking annual inspections of the marina structures and supporting components to identify any maintenance which may be necessary. This will ensure structural competence of the marina is maintained into the future. Any repairs that are necessary shall be undertaken subject to obtaining any necessary resource consents.

Lighting

81. Within 30 days of the commissioning of the marina lighting, the consent holder shall submit a report from a suitably qualified lighting expert accepted by Council, confirming the following:

(a) That the added luminance caused by marina lighting at any property boundary does not exceed 10 lux in a horizontal or vertical plane at any height;

(b) That there are no direct views of the light sources from any of the surrounding residential dwellings;

(c) That three traffic lights have a night time maximum luminous intensity of 500 candelas and the "car park full" sign has a maximum night time luminance of 800 candela/m^2.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Certification of Stormwater Management Works

82. Within 30 working days of practical completion of the stormwater management works, as-built certification and plans of the stormwater management works, which are certified (signed) by a suitably qualified registered surveyor or engineer as a true record of the stormwater management system, shall be provided to the Team Leader.

83. The as-built plans shall include, but not be limited to documentation of any discrepancies between the design plans and the as-built plans.

Stormwater Operation and Maintenance Plan

84. A final updated Stormwater Operation and Maintenance Plan (**SO&MP**) shall be submitted to the Team Leader within 30 working days of the completion of installation of the stormwater works required under the conditions of this consent.

85. The SO&MP shall set out how the stormwater management system is to be operated and maintained to ensure adverse environmental effects are minimised. The SO&MP shall include, but not be limited to:

(a) A programme for regular maintenance and inspection of the stormwater management system;

(b) A programme for the collection and disposal of debris and sediment collected by the stormwater management devices or practices;

(c) A programme for post-storm inspection and maintenance;

(d) A programme for inspection and maintenance of any outfalls;

(e) General inspection checklists for all aspects of the stormwater management system, including visual checks; and

(f) Details of who will hold responsibility for long-term maintenance of the stormwater management system and the organisational structure which will support this process.

86. The stormwater management and treatment system shall be managed in accordance with the approved SO&MP.

87. Any amendments to the SO&MP shall be submitted to and approved in writing by the Team Leader prior to implementation.

88. A written maintenance contract with an appropriate stormwater management system operator shall be entered into and maintained for the on-going maintenance of any proprietary stormwater management devices. Within 30 working days of practical the completion of the stormwater management works, a signed copy of the stormwater system maintenance contract required shall be forwarded to the Team Leader. An operative contract shall be provided to the Counciluponrequest throughout the term of the consent.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Post Construction Site Meeting

89. Within 30 working days of practical completion of the stormwater management works, a post-construction site meeting shall be held between Stormwater, Natural Resources and Specialist Input and all relevant parties, including the site stormwater engineer.

Pre-Occupation Conditions

Pest Management Plan

90. Prior to operation of the marina, the consent holder shall prepare for the Council's written approval (and thereafter implement) a Pest Management Plan (**PMP**) for the marina and all vessels moored within it and all land-based, loading storage and parking areas to address on-going pest management of terrestrial and marine plant and animal pests and shall incorporate (but is not limited to) the following:

Terrestrial

(a) Provision of vermin-proof garbage and recycling storage and collection facility on the site;

(b) Measures for the control of exotic pests (including brush tailed possums, cats, rodents, mustelids and rabbits) and measures to prevent them from entering Waiheke Island and other Hauraki Gulf islands; and

(c) Consultation with residents with regard to existing predator management programmes.

Marine

(a) Measures to avoid the introduction of any unwanted or risk species, including but not limited to Undaria, seasquirts and Mediterranean fanworm, into the Bay through the marina operational activities;

(b) Measures to detect any introduced populations of any unwanted or risk species during both the construction and operational period;

(c) Measures to reduce any unwanted or risk species, spreading from the construction works and completed marina to other areas of Waiheke Island should any such species establish in the marina; and

(d) Measures to ensure effective treatment of all the equipment used in association with the marina construction and operation to minimise vector risk associated with the spread of any unwanted or risk species, including but not limited to Undaria, seasquirts and Mediterranean fanworm.

91. The approved PMP shall be implemented on an ongoing basis by the consent holder.

92. The PMP shall be reviewed every five years by the consent holder or earlier as agreed between the consent holder and Team Leader for the purpose of determining whether its provisions remain adequate to meet the objectives set out in this condition having regard to any change in circumstances. Any amendments to the PMP shall

SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

be approved by the Team Leader.

Noise Management Plan

93. Prior to any vessels being berthed at the completed marina the consent holder shall submit to the Team Leader for approval a Noise Management Plan (**NMP**). The NMP shall include the following:

(a) Details of required procedures to minimise the effects of noise from marina activities including time restrictions, if necessary, on amplified music, and the use of septic tank pumps, and recycling facilities and prevention of halyard slap;

(b) Details of procedures for community liaison and handling of noise complaints;

(c) Schedule and methods for monitoring and reporting on marina noise; and

(d) Contact numbers for key staff responsible for the implementation of the NMP and complaint investigation.

94. The approved NMP shall be implemented on an ongoing basis by the consent holder.

Risk (Navigation and Safety) Assessment & Safety Management Plan

95. Prior to any vessels being berthed at the completed marina, the consent holder shall submit to the Harbourmaster for approval a Risk (Navigation & Safety) Assessment and Safety Management Plan (**RASMP**) relating to marina operations. The RASMP shall address, for example, the use of kayaks within the marina and fairways.

96. The approved RASMP shall be implemented on an ongoing basis by the consent holder.

Marina Management Plan

97. Prior to any vessels being berthed at the completed marina, the consent holder shall submit to the Team Leader a Marina Management Plan (**MMP**) for approval. The MMP shall address matters relating to the day to day operation of the marina and shall include the following:

(a) Oil Spill Contingency Plan;

(b) A Fire Contingency Plan;

(c) The refuse, recycling and waste oil collection facilities to be provided for marina berth users, including their location and the frequency of servicing;

(d) The provision for and location of storage and loading facilities and any associated equipment;

(e) The management of public access to the marina structures during daylight hours (by reference to the occupation zones referred to in condition 112);

(f) The provision of vermin-proof refuse and recycling storage and collection facilities serving the marina;

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

(g) Measures to trap, poison or use other suitable methods to control pests (cats, rodents, mustelids) at the marina access; ~~and~~

(h) Measures to ensure that all dogs accessing the marina are under control/leashed at all times;

(i) Measures (e.g., signage, advice) to ensure vessels accessing the marina at dawn and dusk do so with special care to avoid collisions with Little Blue Penguins; and

(j) Implementation of the Marina Rules.

98. The MMP shall be implemented on an ongoing basis by the consent holder.

Marina Rules

99. Prior to any vessels being berthed at the completed marina, the consent holder shall provide proposed Marina Rules to the Team Leader for approval. As a minimum, the Marina Rules shall include rules dealing with the following matters:

(a) Biosecurity, where that can be reasonably controlled by the consent holder, including:

(i) A rule which enables exclusion from the marina of vessels or equipment which become advised to the consent holder by Council or a Government agency as known to harbour unwanted or risk species, until such vessels/equipment can be certified as having been appropriately treated;

(ii) A rule which addresses restrictions on boat maintenance and repairs able to be undertaken within the marina; and

(iii) A rule which prohibits deliberate discharge of bilge water, fuel, sewage, waste oil and litter into marina waters.

(iv) A rule which prohibits the cleaning of boat hulls within the marina.

(b) Noise and lighting, where that can reasonably be controlled by the consent holder, including;

(i) The measures to be taken to prevent halyard slap:

(ii) A prohibition on the use of wind-driven electricity generators on all vessels whilst berthed in the marina;

(iii) That trolleys shall be fitted with rubber tyres, wherever practicable;

(iv) The management of lighting; and

(v) Restrictions on people living on boats.

(c) Use of best practice with respect to antifouling by berth holders:

(i) A rule requiring berth holders in the marina not to use antifouling

products incorporating the co-biocide diuron;

(ii) A rule requiring berth holders to use low impact antifouling products such as non-copper, low copper formulation or low copper release antifouling paint (e.g. Petit Vivid low copper formula);

(iii) Provision of information and advice to berth holders regarding all NZEPA directions concerning anti fouling paints on an ongoing basis;

(iv) Provision of information and advice to berth holders concerning the use and availability of best practice antifouling paints.

(d) Compliance with the rules, and the mechanism(s) for their enforceability by the consent holder.

100. The Marina Rules shall be reviewed on the anniversary of the occupation of the marina berths, and there after every five years by the consent holder or earlier as agreed between the consent holder and Team Leader for the purpose of determining whether they remain adequate to meet their objectives having regard to any change in circumstances. Any amendments to the Marina Rules shall be approved by the Team Leader.

Advice Note: Approval of Marina Rules by Auckland Council is limited to those rules addressing the matters specified above.

Provision of Sewage Holding Tank & Related Facilities

101. The sewage pump-out facility to be provided in the marina shall be in operation before any marina berths are occupied by vessels (excluding temporary berthing arrangements during marina construction). The facility shall be available for use by the general public but operated only under the supervision of trained marina staff, and the consent holder shall be entitled to recover a reasonable fee for the use of the facility.

102. All wastewater produced from the marina shall be stored on site for subsequent removal to a licensed facility. Storage tanks shall have sufficient capacity to suit the proposed frequency of removal off-site plus a minimum of three (3) days emergency storage. The tanks shall be fitted with alarms to warn that the normal operating level in the tanks has been reached. The consent holder shall take immediate action to have tanks emptied that are at imminent risk of overflow.

Operating Marina

Operation of Public facilities building

103. The public facilities building shall be limited to a maximum occupancy of 30 persons (including staff), and shall be subject to the following operating times:

(a) 7a.m.-4p.m. – café activity; and

(b) 4p.m.-10p.m. – community/club meetings.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Maintenance of Structures

104. All structures permitted to occupy the CMA by this consent shall be maintained at all times in a good and sound condition and must be subject to a regular monitoring programme, including annual inspections of the marina structures to identify any maintenance which may be necessary.

105. Any repairs necessary to marina structures shall be promptly undertaken subject to obtaining any necessary resource consents and unavoidable delay in the supply of purpose-built fittings or parts.

Limits on Noise from Marina Activities

106. The Consent Holder shall ensure that noise from the operation of the marina complies with the following noise levels as measured within the boundary of any residential site or the notional boundary of any dwelling.

(a) 50 dB LA_{eq} between 7 a.m.-10 p.m.; and

(b) 40 dB LA_{eq} and 75 dB LAF_{max} at all other times.

107. Noise shall be measured and assessed in accordance with the provisions of New Zealand Standards NZS 6801:2008 Acoustics – Measurement of Environmental Sound and NZS 6802:2008– Acoustics Environmental Noise.

Provision of Refuse, Recycling and Waste Oil Collection Facilities

108. The consent holder shall provide refuse, recycling and waste oil collection facilities for marina berth users in accordance with the approved Marina Management Plan.

Signage on Marina Office, Manager and Emergency Public Access

109. The consent holder shall through signage and other publicity measures advise the public of the marina office hours of operation, how to contact the marina manager if the office is unattended, and how to contact the marina manager or any security personnel employed by the consent holder if any emergency access is required.

Marina Removal

110. Prior to any vessels being berthed at the completed marina the consent holder shall submit to the Team Leader for approval a plan outlining the methods to be used for the removal of the marina should the activity cease or the consent not be renewed at the end of its term. This plan should include reference to how the various components of the marina will be removed, which components may be left in place and any remediation likely to be required.

Marina Coastal Occupation Conditions

Marina Coastal Occupation

111. In condition 112 'daylight hours' are:

- During Daylight Savings Time (DST) – from 6a.m. to 8p.m.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

- Outside DST – from 7a.m. to 5p.m.

112. By reference to the Marina Occupation Plan dated February 2017, public access to, and the consent holder's rights of exclusive use of, the coastal spaces within the marina are as follows:

(a) Zone 1 – Southwest Attenuator: No public access or use at any time.

(b) Zone 2 – Marina Berth Areas: No public access or use at any time, except with the agreement of the consent holder.

(c) Zone 3 – Marina Operations Areas: No public access or use at any time, except with the agreement of the consent holder, provided that the southern side of the Southeast Attenuator shall not be used for boat mooring and the consent holder shall not be entitled to licence any other part of this area for berthing by individual boats for more than 30 days at a time.

(d) Zone 4 – Access Wharf, Pontoon (including Viewing and Launching Deck), Southeast Attenuator & Piers:

(i) Public pedestrian access during daylight hours except that with the approval of the Team Leader the consent holder may from time to time implement access measures and restrictions to ensure the health and safety of the public, the proper operation of the marina facilities and the security of berth holders' vessels.

Note 1: Zone 4 includes the Viewing and Launching deck that forms the roof of the Public Facilities building.

Note 2: Public access by bicycle is allowed in Zone 4, but restricted to the Access Wharf and Pontoon only.

(ii) Public vehicular access to the Access Wharf and Pontoon only during daylight hours, except that with the approval of the Team Leader the consent holder may from time to time implement access measures and restrictions to ensure the health and safety of the public, the proper operation of the marina facilities and the security of berth holders' vessels.

(iii) Public car parking on the Pontoon only during daylight hours on the basis that:

- Parking is allowed in the designated "Public Car Parks" (6 to be marked out) for a maximum of 2 hours.
- Parking is allowed in the designated "Marina Carparking" areas, provided that any reasonable, stipulated parking fee is paid, or a Parking Permit issued by the consent holder is displayed. Parking fees for car parking in these car parks shall be set in consultation with the Council.
- No parking is allowed in the designated "Berthholder Reserved

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Carparking" areas (which areas shall be reserved for use by berthholders only). No more than 32 parking spaces shall be designated as "Berthholder Reserved Carparking."

- All car parks shall be clearly marked or signed to indicate their intended use.

(e) Zone 5 – Marina Buildings: No public access or use at any time except with the agreement of the consent holder.

(f) Zone 6 – Public Drop-Off Berthage:

(i) Recreational boats only shall be entitled temporarily to access the public drop-off area and tie up to the adjacent pier for the purposes of loading and unloading passengers and goods for recreational purposes. With the approval of the Team Leader the consent holder may from time to time implement access management measures and restrictions to ensure the health and safety of the public and the proper operation of the marina facilities;

(ii) Commercial boats (e.g., charters, water-taxis) shall be entitled temporarily to access the public drop-off area and tie up to the adjacent pier for the purposes of loading and unloading passengers and goods, but only with the prior agreement of the consent holder.

(g) Zone 7 – Day Berthage Area: No public access or use at any time, except with the agreement of the consent holder, provided that the consent holder shall not be entitled to allow the space to be occupied by any individual boat for more than 72 hours at a time, except in cases of emergency or vessel disablement. The consent holder may require a reasonable berthing fee to be paid for use of this area, which fee shall be set in consultation with the Team Leader.

(h) Zone 8 – Navigation: Public access by vessel at any time, except that with the approval of the Team Leader the consent holder may from time to time implement access measures and restrictions to ensure the health and safety of the public, the proper operation of the marina facilities and the security of berth holders' vessels.

Augier conditions offered by consent applicant

Kennedy Point Marina Maritime Trust

113. The consent applicant (now consent holder) has offered to establish and maintain the Kennedy Point Marina Maritime Trust.

114. Prior to the occupation of the marina by boats, the consent holder shall provide evidence to the satisfaction of the Team Leader that it has established the Kennedy Point Marina Maritime Trust in accordance with the Statement of Intent dated September 2016. The consent holder shall maintain the Trust for the term of the marina occupation permit.

Donald Bruce Road Upgrade

115. The consent holder has offered to upgrade Donald Bruce Road to the extent shown in Traffic Design Group Limited Plan 13828A4D, dated 14 February 2017. Subject to obtaining approval from Auckland Transport (as road controlling authority) to the final detailed engineering design plans for the upgrade works, the consent holder shall complete the works prior to the marina being completed (or at such other later date as agreed by Auckland Transport). The detailed engineering plans shall incorporate the following:

(a) Widening of the carriageway on the Northern side of Donald Bruce Road for a length of 110m;

(b) Provision of a means to prevent the overtaking of queued eastbound vehicles (such as, but not limited to, establishment of a solid central median).;

(c) Provision of an extended right hand lane to provide a continuous traffic lane from the intersection of Kennedy Point Road to the wharf for the traffic visiting the proposed marina and the ferry terminal; and

(d) Reinstatement of footpath on the north side, east of the car park entrance, and installation of a suitable pedestrian refuge "island" in an appropriate location within the carriageway of Donald Bruce Road to enable pedestrians to cross Donald Bruce Road safely.

Advice Notes:

(i) Any change to the road reserve shall be finalised by engineering plan approval process. Any modifications to the road reserve will require compliance with Auckland Transport's engineering standards. The plans showing modifications to the road reserve are considered indicative only.

(ii) Any permanent traffic and parking changes within the road reserve (alteration of traffic lanes and flush median, and installation of NSAAT restrictions, if any) as a result of the development will require Traffic Control Committee (TCC) resolutions. The resolutions, prepared by a qualified traffic engineer, will need to be passed so that the changes to the road reserve can be legally implemented and enforced. The resolution process may require public consultation to be undertaken in accordance with Auckland Transport's standard procedures. It is the responsibility of the consent holder to prepare and submit a permanent Traffic and Parking Changes report to AT TCC for review and approval.

(iii) The consent holder shall submit a Corridor Access Request prior to undertaking works in the road reserve. This should be done viahttps://www.submitica.co.nz/Applications

Kennedy Point Wharf Carpark Upgrade

116. The consent holder has offered to upgrade the Kennedy Wharf Carpark to the extent shown in Traffic Design Group Limited Plan 13828A4D, dated 14 February 2017. Subject to obtaining approval from Auckland Transport (as road controlling authority) to the final detailed engineering design plans for the upgrade works (and for engineering plan approval, and obtaining any resource consents that may be reasonably necessary to undertake the works), the consent holder shall complete the works within 6 months of the marina being completed (or at such other later date as

agreed by Auckland Transport).

Advice Notes:

(i) Affected Party Approval from Auckland Transport is required for the proposed carpark upgrade works.

Details of application can be obtained from: https://at.govt.nz/about-us/working-on-theroad/road-processes-for-property-owners/consent-from-affected-parties/

(ii) Any modifications to the public carpark will require compliance with Auckland Transport's engineering standards. Parking space dimensions shall comply with ATCOP standards.

(iii) The proposed retaining structures within the public car park may require building consent.

(iv) The parking changes which will be brought about to the carpark shall be resolved by Auckland Transport Traffic Control Committee. AT recommends that the current parking restriction mix be retained which is approximately P24 hours – 55% of the spaces; P72 hours – 45% of the spaces.

The proposed parking changes within the road reserve will require Traffic Control Committee (TCC) resolutions. The resolutions, prepared by a qualified traffic engineer, will need to be passed so that the changes to the public car park can be legally implemented and enforced. The resolution process may require public consultation to be undertaken in accordance with Auckland Transport's standard procedures. It is the responsibility of the consent holder to prepare and submit a permanent Traffic and Parking Changes report to AT TCC for review and approval.

(v) The consent holder shall submit a Corridor Access Request to cover the construction. This should be done via https://www.submitica.co.nz/Applications.

New Dinghy Racks

117. The consent holder has offered to provide purpose-built racks on the foreshore for the storage of dinghies owned by pile mooring users within the marina. Subject to obtaining approval from Auckland Transport and/or the Team Leader to the location and design of the dinghy rack plan(s) for the upgrade works, and obtaining any resource consents that may be reasonably necessary to erect the racks, the consent holder shall establish the dinghy racks prior to the marina being completed (or at such other later date as agreed by Auckland Transport and/or the Team Leader).

Little Blue Penguin Predator Control & Monitoring Plan

118. The consent holder shall submit a Predator Control & Monitoring Plan in relation to the Little Blue Penguin population resident at Kennedy Point. The purpose of the plan is to protect the colony of Little Blue Penguins in the vicinity of the site. The plan shall be prepared by a suitably qualified person experienced in predator control and penguin monitoring and shall include the following matters:

(a) The type and extent (quantity and location) of predator control measures to be

employed;

(b) Frequency of predator control monitoring and re-setting;

(c) Reporting on predator control outcomes;

(d) The nature and frequency of Little Blue Penguin monitoring to be undertaken and the reporting of results.

The plan shall be provided in draft to the Royal Forest & Bird Protection Society for comment/input before being finalised and submitted to the Team Leader for approval prior to the marina commencing operation.

The plan shall be implemented by the consent holder for the duration of this consent and reviewed every 5 years in consultation with the Royal Forest & Bird Protection Society. Any revisions to the plan shall be submitted for approval to the Team Leader.

Advice note: The above condition has been offered by the applicant on an *Augier* basis.

Schedule 1

Drawing number and revision	Title	Architect / designer / author	Date
Marina Design and Engineering Plans			
31575-F2 (Rev 4)	Drawing List and Location Plan	Tonkin & Taylor	17 Feb 17
31575-F2 (Rev 5)	Proposed Marina Plan	Tonkin & Taylor	17 Feb 17
31575-F3 (Rev 5)	Existing Bathymetry Plan	Tonkin & Taylor	17 Feb 17
31575-F4 (Rev 7)	Marina Layout Plan	Tonkin & Taylor	17 Feb 17
31575-F5 (Rev 6)	Access / Parking Pontoon Layout Plan	Tonkin & Taylor	17 Feb 17
31575-F6 (Rev 6)	Occupation Areas Plan	Tonkin & Taylor	17 Feb 17
31575-F7 (Rev 4)	Aerial Photo	Tonkin & Taylor	17 Feb 17
31575-F9 (Rev 2)	Wharf Structure – Plan and Longsection	Tonkin & Taylor	1 Sept 16
31575-F10 (Rev 2)	Wharf Structure - Sections	Tonkin & Taylor	1 Sept 16
Architectural Design Plans			
Sheet A01.00(C)	Ground Level Floor Plan – Community Building	Young + Richards	14 Sept 16
Sheet A01.02(C)	Roof Level Plan - Community Building	Young + Richards	14 Sept 16
Sheet A11.02	Exterior Elevations – Community Building	Young + Richards	14 Sept 16
Sheet A11.51	Building Sections – Communities Building	Young + Richards	14 Sept 16
Sheet A01.00(O)	Ground Level Floor Plan – Marina Office	Young + Richards	14 Sept 16
Sheet A01.01(O)	First Level Floor Plan – Marina Office	Young + Richards	14 Sept 16
Sheet A01.02(O)	Roof Level Plan – Marina Office	Young + Richards	14 Sept 16
Sheet A11.00	Exterior Elevations – Marina Office (North & East)	Young + Richards	14 Sept 16
Sheet A11.01	Exterior Elevations – Marina Office (South & West)	Young + Richards	14 Sept 16
Sheet A11.50	Building Sections – Marina Office	Young + Richards	14 Sept 16

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Schedule 2

(a) Application Form and Assessment of Environmental Effects (AEE), prepared by Richard Blakey of Blakey Planning Limited, dated 24 February 2017;

(b) Marina Design and Construction Report, prepared by Mair& Associates Limited, dated February 2017;

(c) Marina Services and Operations Report, prepared by Mair& Associates Limited, dated February 2017;

(d) Coastal Engineering Design Report, prepared by Grant Pearce of Tonkin & Taylor Limited, dated February 2017;

(e) Lighting Assessment, prepared by John McKensey of Lighting Design Practice, dated 23 February 2017;

(f) Ecology and Water Quality Assessment, prepared by Pamela Kane and Mark Poynter of 4Sight Consulting Limited, dated February 2017;

(g) Integrated Transportation Assessment, prepared by Traffic Design Group Limited, dated February 2017;

(h) Acoustic Assessment, prepared by Craig Fitzgerald of Marshall Day Acoustics Limited, dated 20 February 2017;

(i) Navigation Safety Assessment and Report, prepared by Nigel Drake, dated 17 February 2017;

(j) Archaeological Survey and Assessment of Effects, prepared by Dr. Hans-Dieter Bader of Archaeology Solutions Limited, dated July 2016 and Section 92 Response, dated 1 November 2016;

(k) Landscape and Visual Assessment, prepared by RA Skidmore Limited, dated September 2016;

(l) Landscape and Visual Effects Assessment, prepared by Rachel de Lambert of BoffaMiskell Limited, dated 23 February 2017 (including visual simulations prepared by Young + Richards Architects, dated February 2017);

(m) Statement of Intent – KPM Maritime Trust, prepared by Kennedy Point Boatharbour Limited, dated September 2016; and

(n) Project Consultation Report, prepared by Kennedy Point Boatharbour Limited, dated September 2016 and Consultation Update Report dated February 2017.

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KENNEDY POINT MARINA

ARCHITECTURAL DESIGN PLANS

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

14 SEP 2016 CONCEPT DESIGN

KENNEDY POINT MARINA

16-YR22-KPBL

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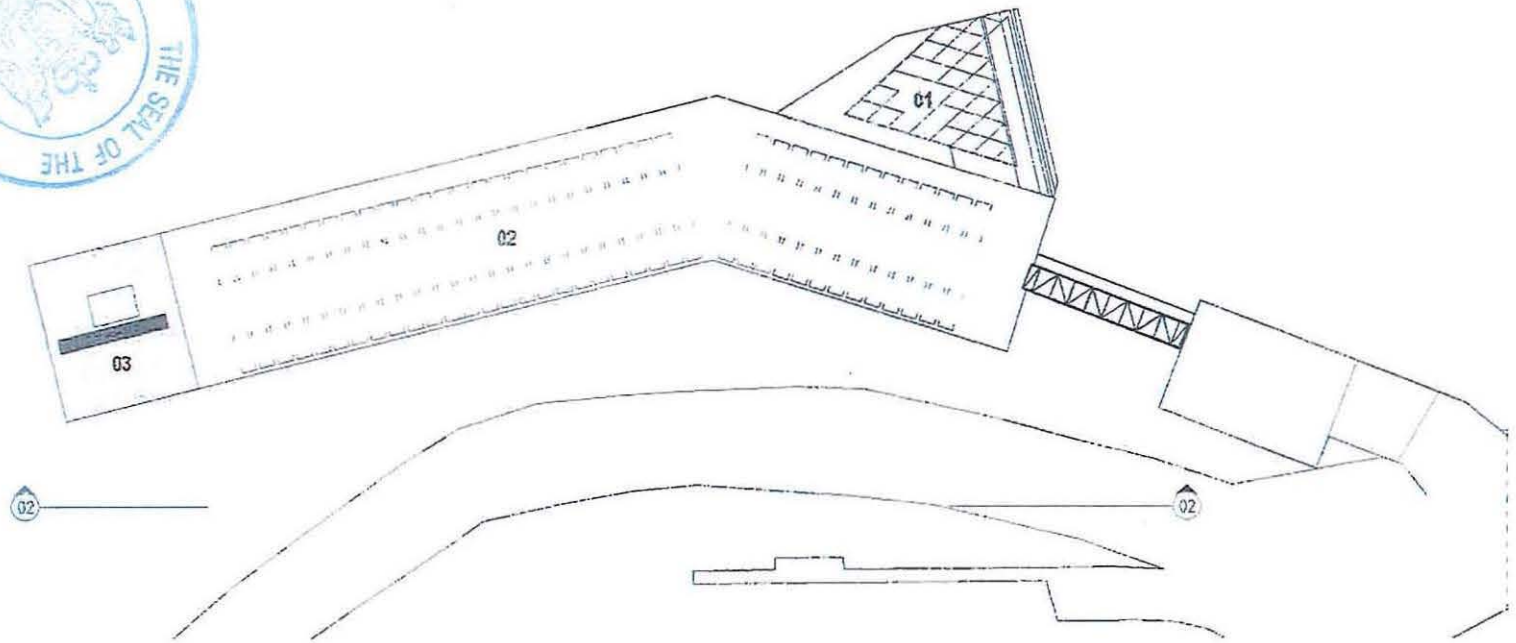
PROPOSED SITE ELEVATION 02



PROPOSED SITE PLAN 01

Key NOTES

01 - COMMUNITY BUILDING

02 - CAR PARK

03 - MARINA OFFICE AND SERVICES BUILDING

SHEET NOTES

LEGEND

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

KENNEDY POINT MARINA

YOUNG + RICHARDS

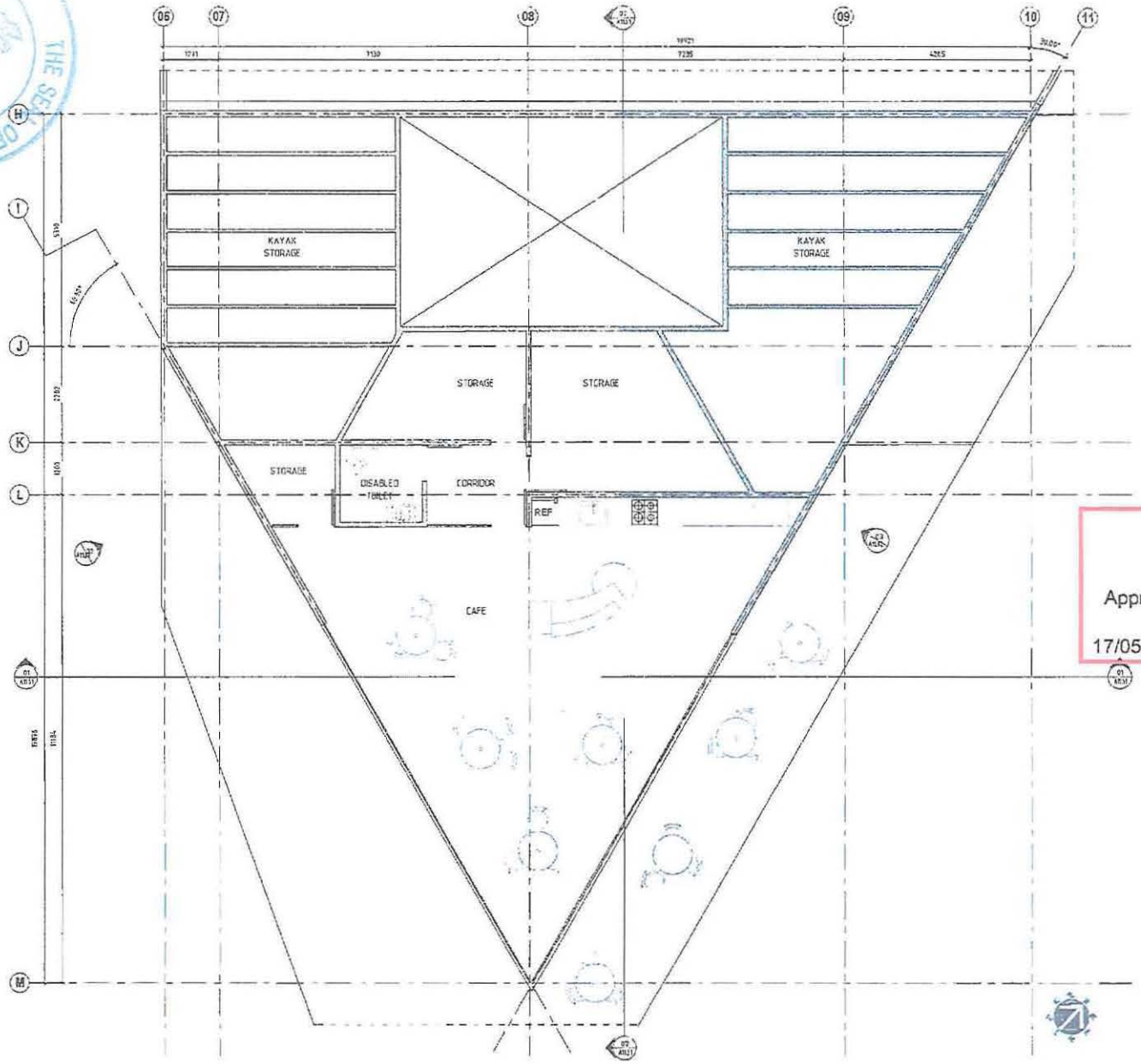
Job Number
16-YR22-KPBL

Job Status
ARCHITECTURAL DESIGN PLANS

Sheet Title
PROPOSED SITE PLAN

Sheet Status
As indicated @ A1

Sheet Number
A00.51



KEY NOTES

GROUND FLOOR AREA = 226.3M²

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

SHEET NOTES

LEGEND

FULL HEIGHT WALL

SCALE 1:50

GROUND LEVEL FLOOR PLAN - COMMUNITY BUILDING 01

KENNEDY POINT MARINA

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46 Edwin Street
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BP21069

Job Number
16-YR20-KPBL

Job Status
ARCHITECTURAL DESIGN
PLANS

Sheet Description
GROUND LEVEL FLOOR PLAN - COMMUNITY BUILDING

Sheet Scale
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Sheet Number
A01.00(C)

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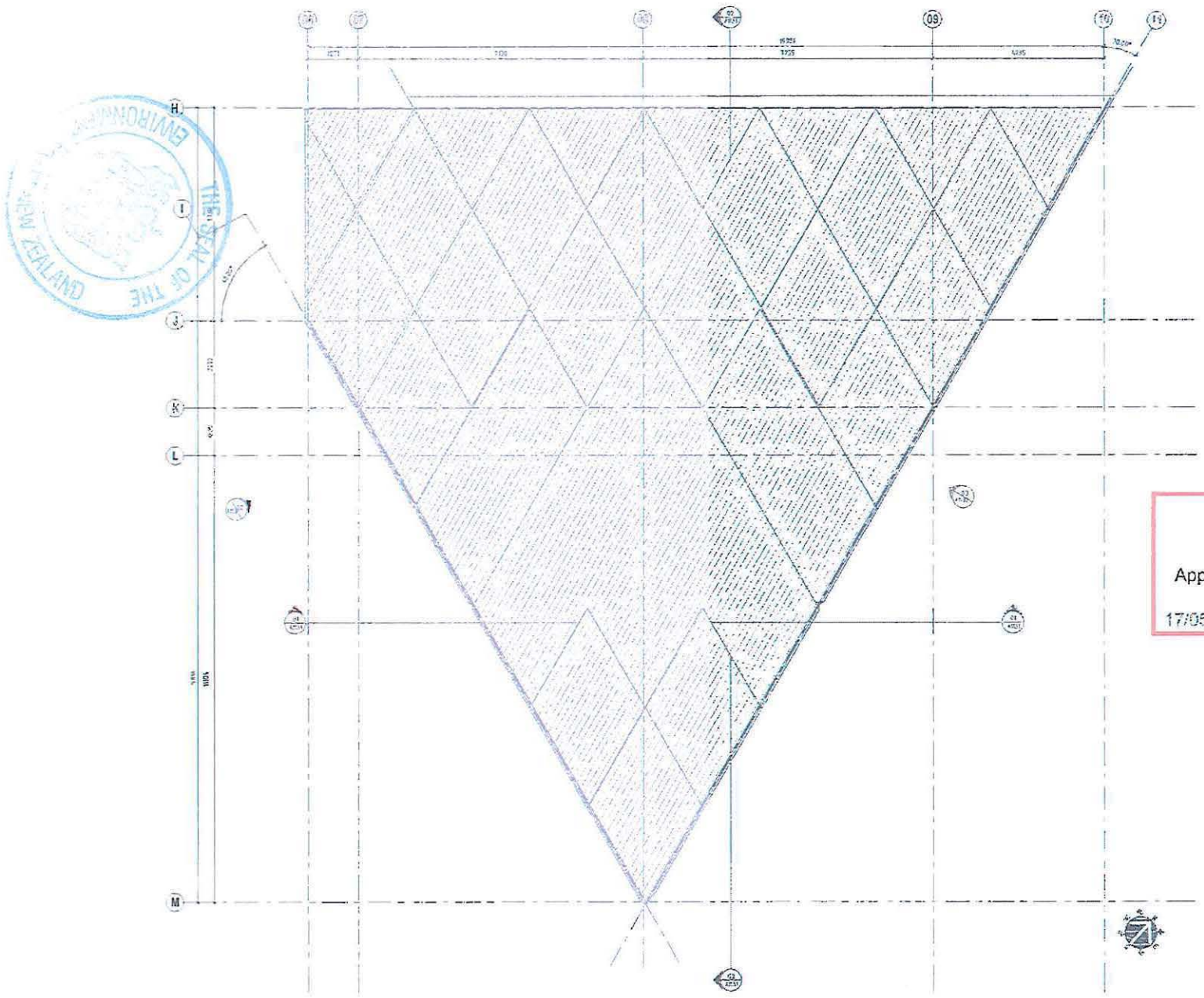

KEY NOTES

ROOF AREA = 228.36SF

SHEET NOTES

LEGEND

R/REG/2016/4270
Approved Resource Consent Plan
17/05/2017

ROOF LEVEL PLAN - COMMUNITY BUILDING 01

KENNEDY POINT MARINA

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Job Number
15-YR22-KPBL

Job Status
ARCHITECTURAL DESIGN
PLANS

Client Reference

Client Name

Drawing Name
ROOF LEVEL PLAN - COMMUNITY BUILDING

Sheet Size
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Sheet Number
A01.02(C)

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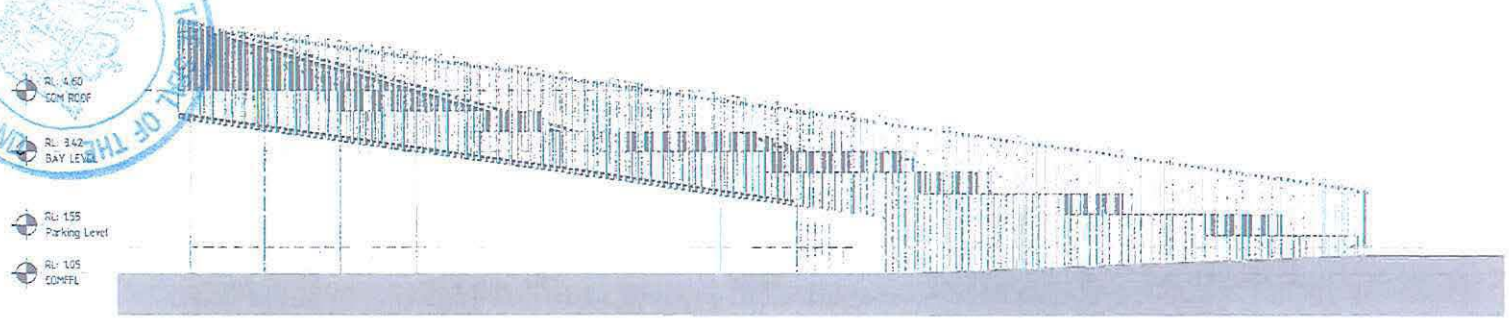
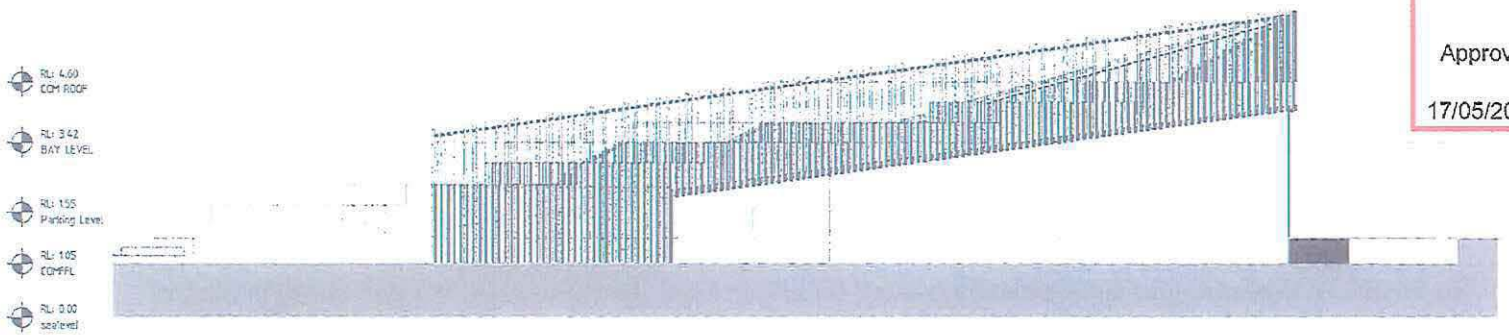
KEY NOTES



SCALE 1:50 EXTERIOR ELEVATION - COMMUNITY BUILDING 03



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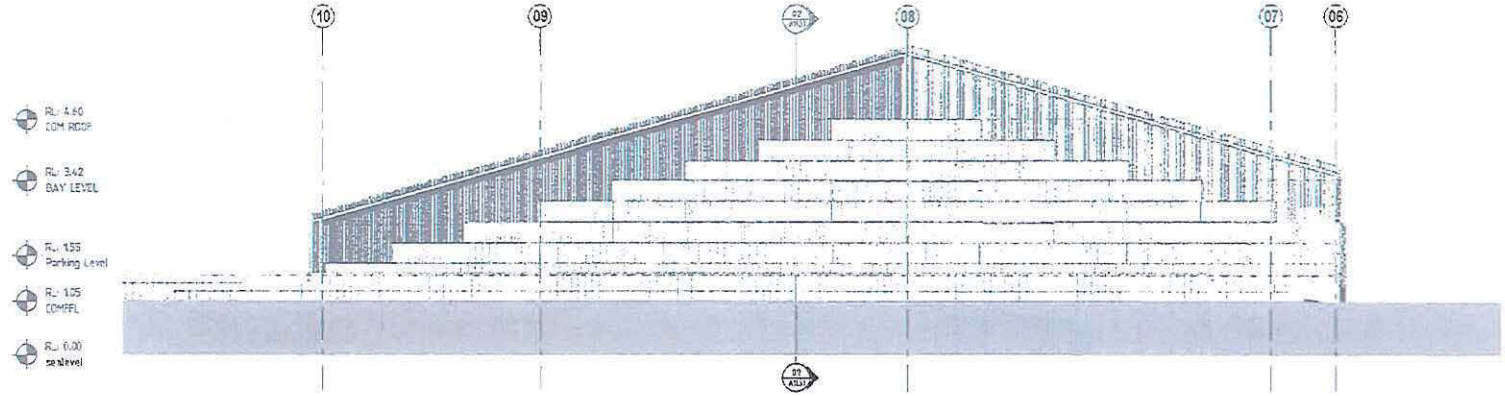

SCALE 1:50 EXTERIOR ELEVATION - COMMUNITY BUILDING 01

SHEET NOTES

LEGEND

SELECTED TIMBER CLADDING

GLAZING

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

KENNEDY POINT MARINA

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LBP BP121039

Mark	Date	Issue Description	By	Check
1	14/04/2016	CONSENT ISSUE	MP	PH

Seal / Signature

Job Number
16-YR22-KPBL

Job Status
ARCHITECTURAL DESIGN PLANS

Progress Print

Sheet No

Sheet Description
EXTERIOR ELEVATIONS - COMMUNITY BUILDING

Sheet Scale
1:50 @ A1

Sheet Number
A11.02

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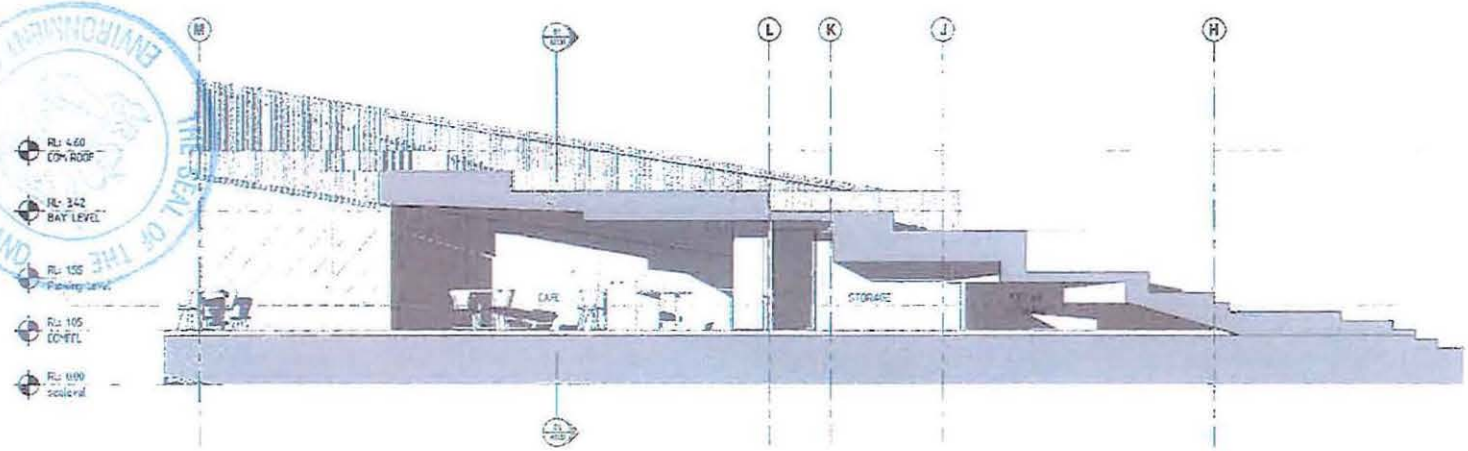
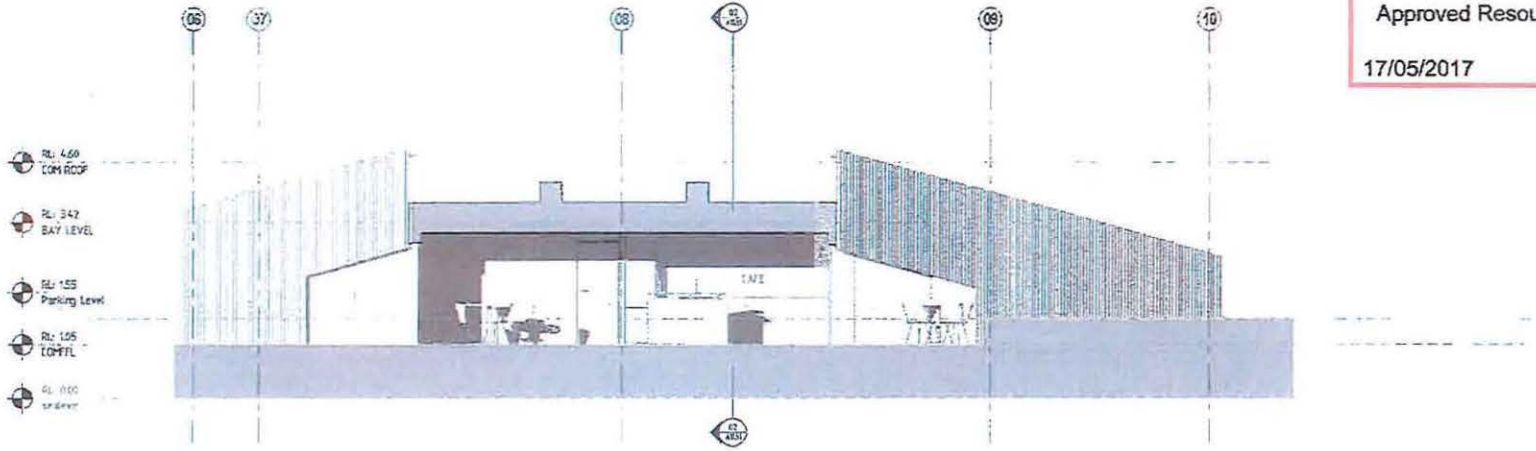
KEY NOTES



BUILDING SECTION- COMMUNITY BUILDING 02



BUILDING SECTION- COMMUNITY BUILDING 01

Auckland Council stamp

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

KENNEDY POINT MARINA

YOUNG + RICHARDS

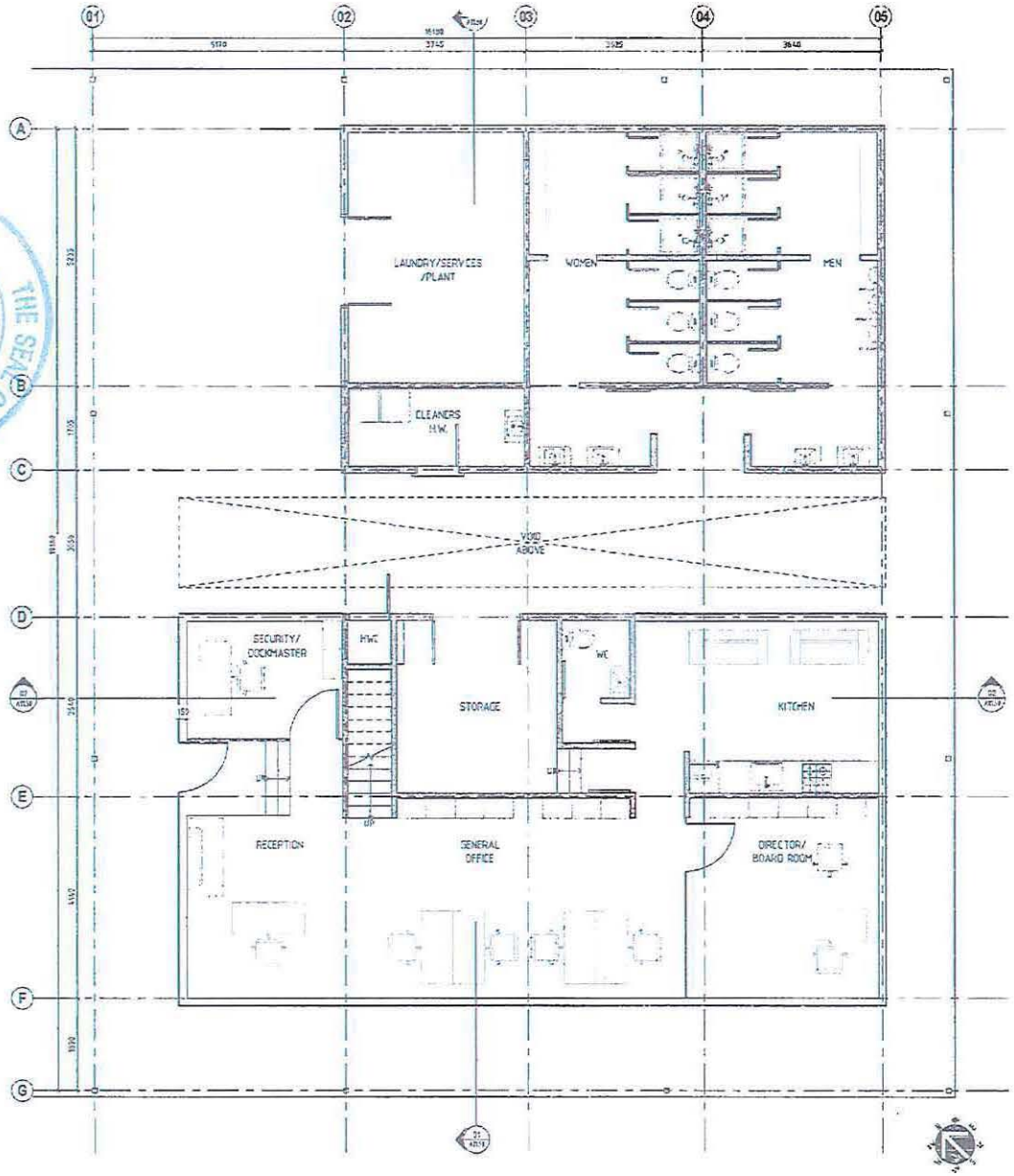
Job Number
15-YR22-KPEL

ARCHITECTURAL DESIGN
PLANS

BUILDING SECTIONS - COMMUNITY BUILDING

1:50 @ A1

A11.51



THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

KEY NOTES

GROUND FLOOR AREA = 195.7M²

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

SHEET NOTES

LEGEND

FULL HEIGHT WALL

KENNEDY POINT MARINA

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GST: 89121080

Issue	Date	Issue Description	By	Check
1	14 SEP 2016	CONSENT SUBMISSION	VR	CY

Job Number: 16-YR23-KPBL

Job Status: ARCHITECTURAL DESIGN PLANS

Sheet Title: GROUND LEVEL FLOOR PLAN - MARINA OFFICE

Sheet Scale: 1:50 @ A1

Sheet Number: A01.00(O)

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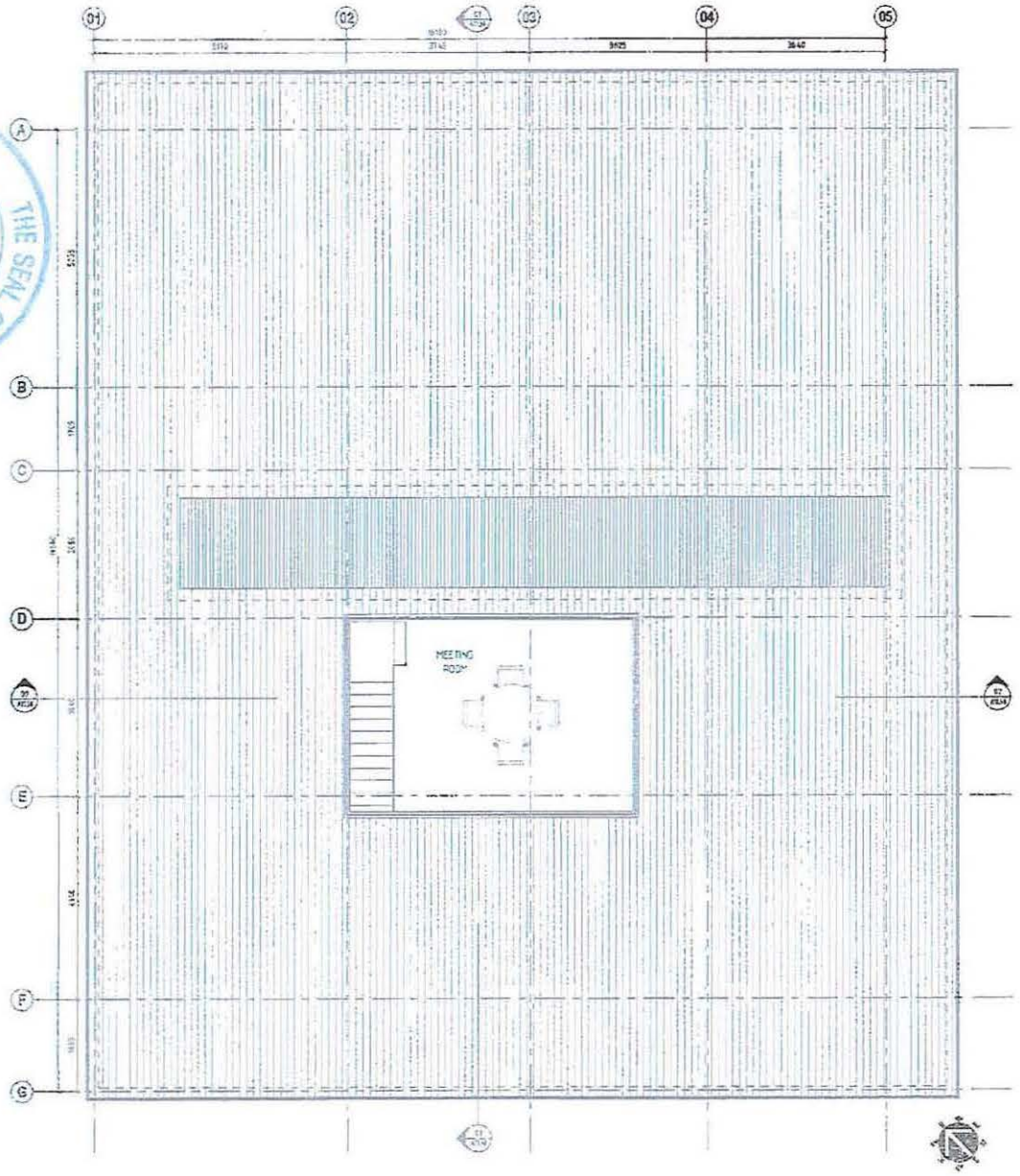
SCALE 1:50

GROUND LEVEL FLOOR PLAN - MARINA OFFICE 01



KEY NOTES

FIRST FLOOR AREA = 15.0M²

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

SHEET NOTES

LEGEND

FULL HEIGHT WALL

KENNEDY POINT MARINA

YOUNG + RICHARDS

42 Britain Street
PO Box 6171
Phone
Fax
Email
Web
LBP

Job Number
10 YR22 KPBL

ARCHITECTURAL DESIGN PLANS

Drawn By

FIRST LEVEL FLOOR PLAN - MARINA OFFICE

Sheet Scale
1:50 @ A1

Sheet Number
A01.01(O)

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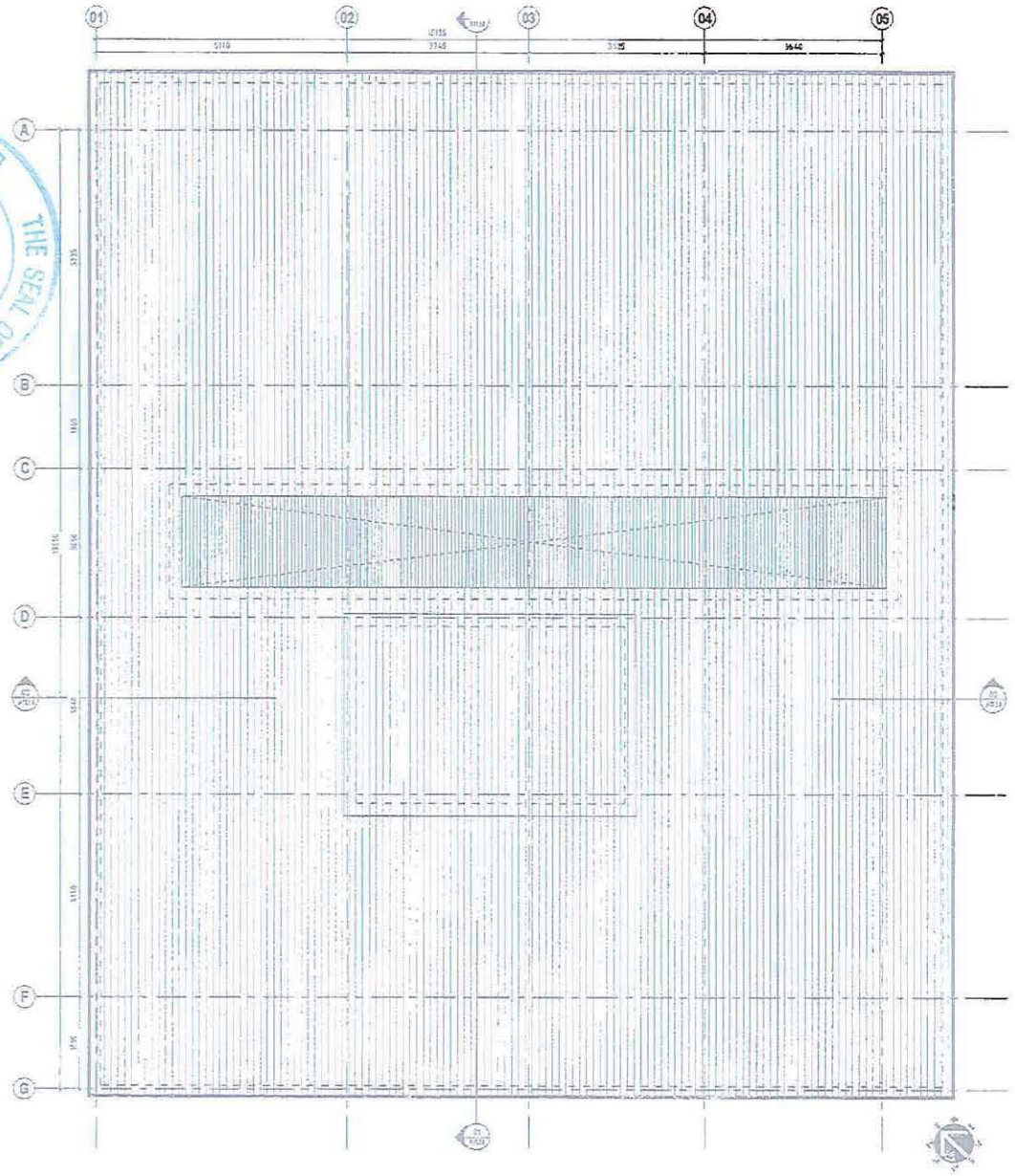
SCALE 1:50

FIRST LEVEL FLOOR PLAN - MARINA OFFICE **01**



KEY NOTES

ROOF AREA = 374.4M²

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

SHEET NOTES

LEGEND

FULL HEIGHT WALL

KENNEDY POINT MARINA

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LBP BP121069

Issue	Date	Issue Description	By	Check
1	24 MAY 2016		VB	EY
		CONSENT SUBMISSION		

Seal / Signature

Job Number
16-YR02-KPBL

Job Status
ARCHITECTURAL DESIGN PLANS

Sheet Title
ROOF LEVEL PLAN - MARINA OFFICE

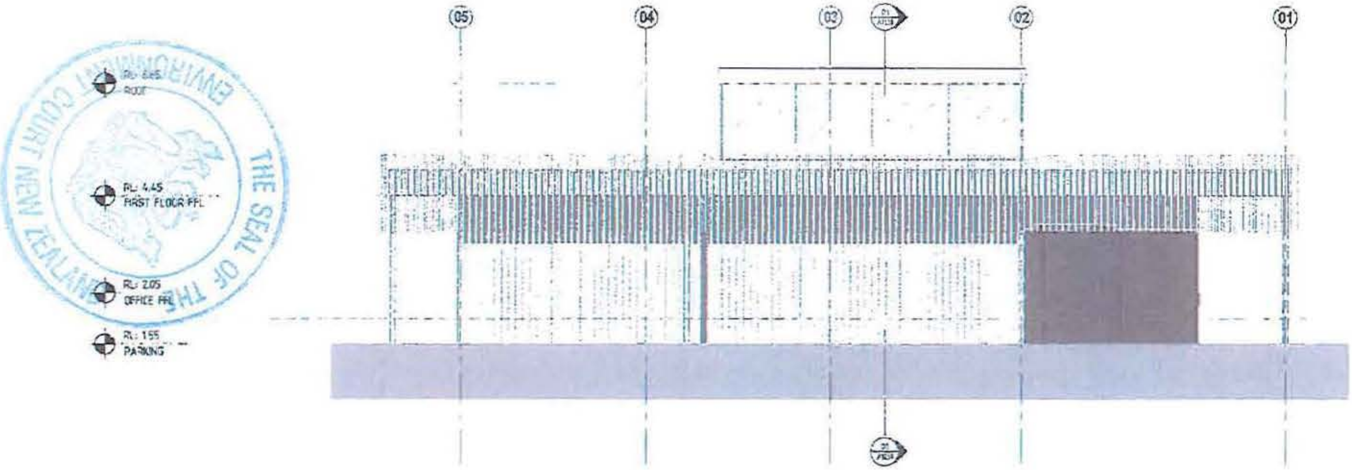
Sheet Scale
1 : 50 @ A1

Sheet Number
A01.02(O)

SCALE 1 : 50

ROOF LEVEL PLAN - MARINA OFFICE 01

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND



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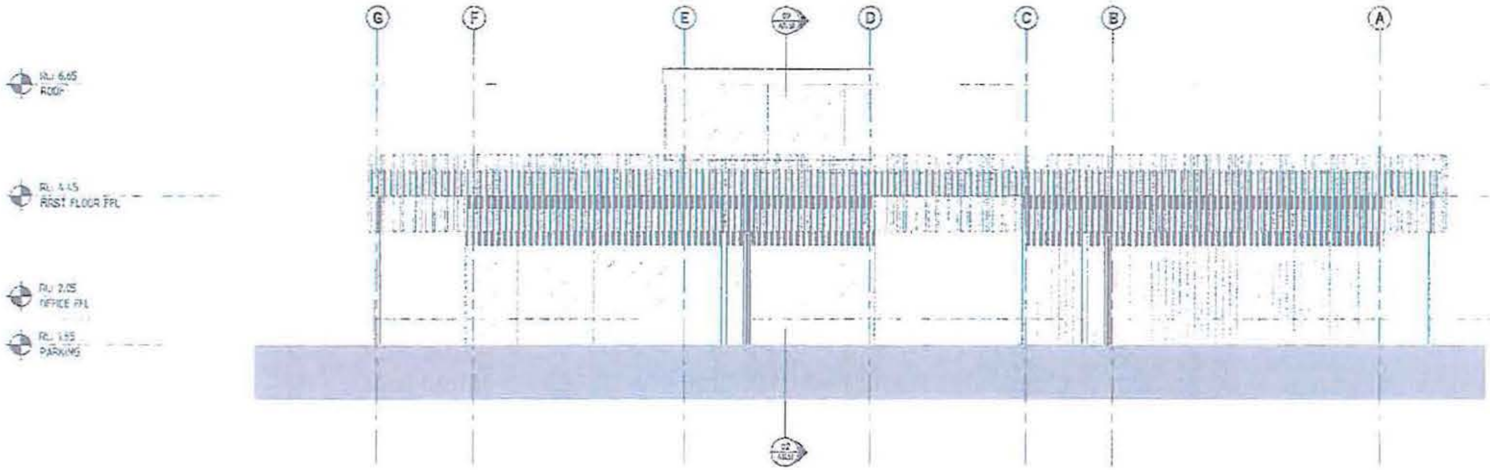
EXTERIOR ELEVATION - MARINA OFFICE 02

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017



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EXTERIOR ELEVATION - MARINA OFFICE 01

KEY NOTES

SHEET NOTES

LEGEND

SELECTED TIMBER CLADDING

GLAZING

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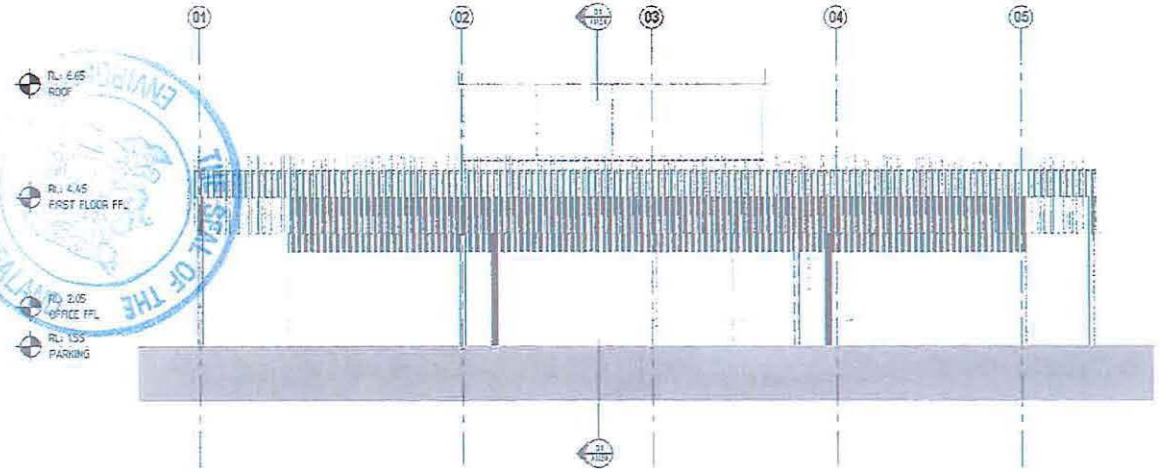
16-YR024KPEL

ARCHITECTURAL DESIGN PLANS

EXTERIOR ELEVATIONS - MARINA OFFICE (NORTH & EAST)

A11.00

KEY NOTES



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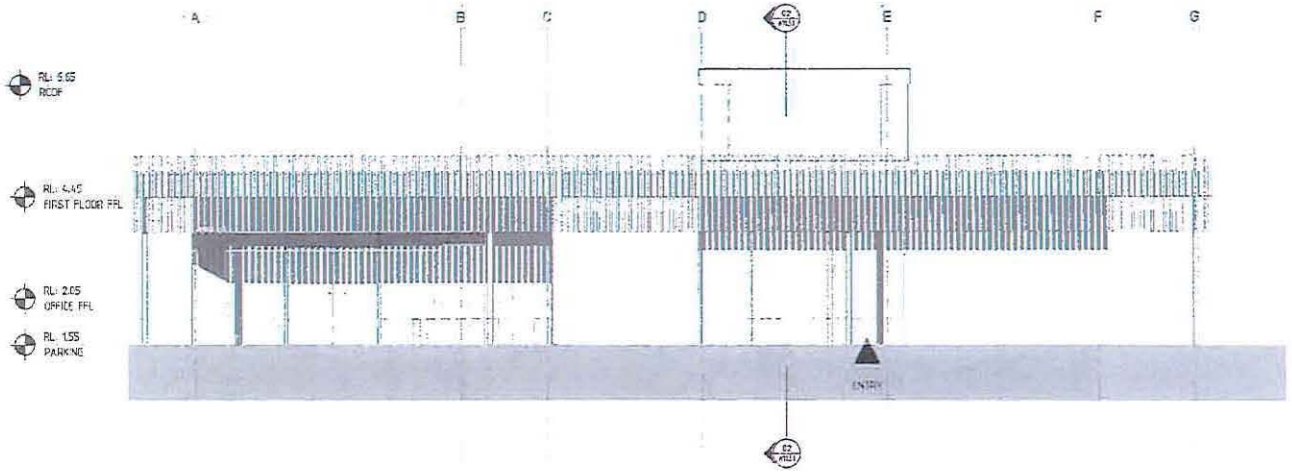
EXTERIOR ELEVATION - MARINA OFFICE WEST 02



SCALE 1:50

EXTERIOR ELEVATION - MARINA OFFICE WEST 01

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

SHEET NOTES

LEGEND

SELECTED TIMBER CLADDING

GLAZING

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Issue	Date	Issue Description	By	Check
1	14 SEP 2016	CONSENT SUBMISSION	MB	EY

Seal / Signature

Job Number
16-YR22-KPBL

Job Status
ARCHITECTURAL DESIGN PLANS

Sheet Description
EXTERIOR ELEVATIONS - MARINA OFFICE (SOUTH & WEST)

Sheet Scale
1:50 @ A1

Sheet Number
A11.01

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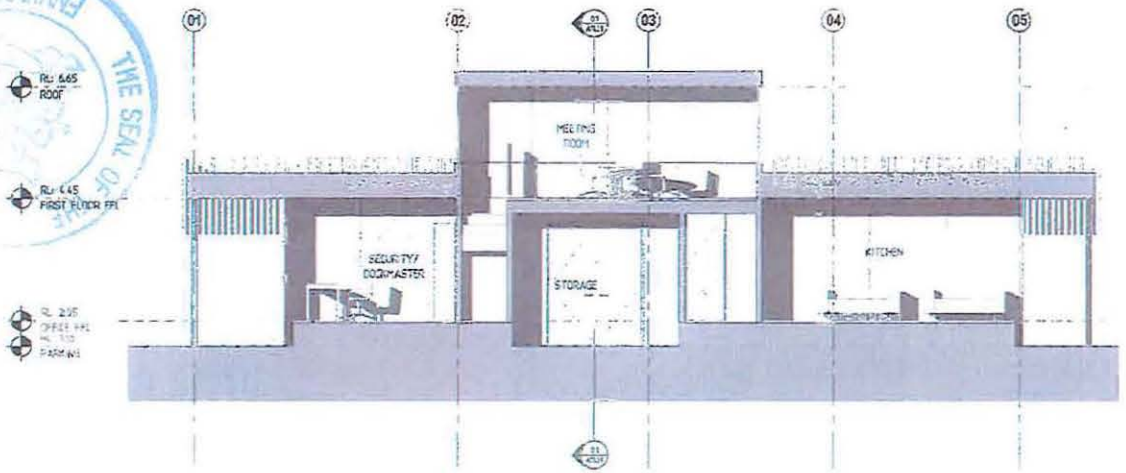
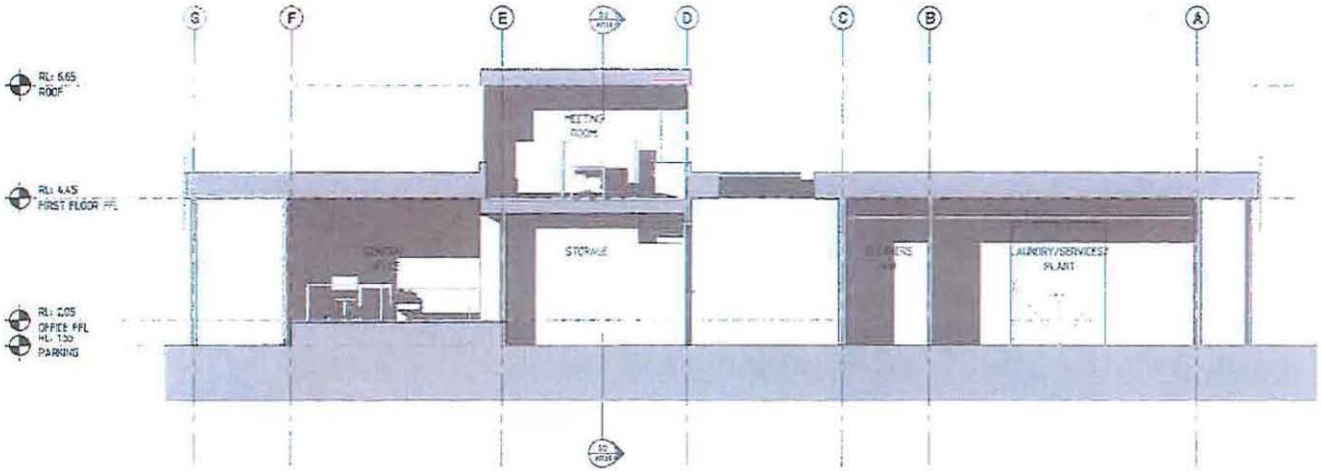


BUILDING SECTION - MARINA OFFICE **02**



BUILDING SECTION - MARINA OFFICE **01**

KEY NOTES

SHEET NOTES

LEGEND

KENNEDY POINT MARINA

YOUNG + RICHARDS

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

ARCHITECTURAL DESIGN PLANS

BUILDING SECTIONS - MARINA OFFICE

1:50 @ A1

A11.50

KENNEDY POINT BOATHARBOUR LTD
Kennedy Point Marina
Consent Issue

DRAWING	Rev	Title
• 31575-F1	4	Drawing List and Location Plan
• 31575-F2	5	Proposed Marina Plan
• 31575-F3	5	Existing Bathymetry Plan
• 31575-F4	7	Marina Layout Plan
• 31575-F5	6	Access / Parking Pontoon Layout Plan
• 31575-F6	6	Occupation Areas Plan
• 31575-F7	4	Aerial Plan
31575-F8	1	Breakwater Sections
31575-F9	2	Wharf Structure - Plan and Longsection
31575-F10	2	Wharf Structure - Sections

LOCATION PLAN
SCALE 1:200,000
A3 SCALE 1:200000
0 2.0 4.0 6.0 8.0 10 (km)

Auckland Council
R/REG/2016/4270
Approved Resource Consent Plan
17/05/2017

• Denotes drawing this issue: 15/02/2017

1. All dimensions are in millimetres unless noted otherwise.
2. Topomap sourced from the LINZ Data Service and licensed by LINZ for re-use under the Creative Commons Attribution 3.0 New Zealand licence.

Tonkin+Taylor	DRAWN: JWP Feb. 17	KENNEDY POINT BOATHARBOUR LTD
105 Carlton Gore Road, Newmarket, Auckland	DRAFTING CHECKED:	KENNEDY POINT MARINA
www.tonkintaylor.co.nz	APPROVED:	WAIHEKE ISLAND
	CAD FILE: \\31575-F01.dwg	Drawing List and Location Plan
	SCALES (A1 A3 SIZE): 1:200,000	
	PROJECT No.: 31575	FIG. No.: Figure 1
		REV.: 4

L:\31575\Working\Plots\CAD\F01\31575-F01.dwg, F01, 15/02/2017 11:16:50 a.m.

Auckland Council

R/REG/2016/4270

Approved Resource Consent Plan

17/05/2017

NOTES:
1. Coordinate Datum: NZ Geodetic 2000 Mt Eden circuit.
2. Level Datum: Chart Datum, Waiheke Island
3. Aerial photo sourced from Auckland Council GIS website.
4. Bathymetry supplied by Discovery Marine Ltd, surveyed 16 March 2016.

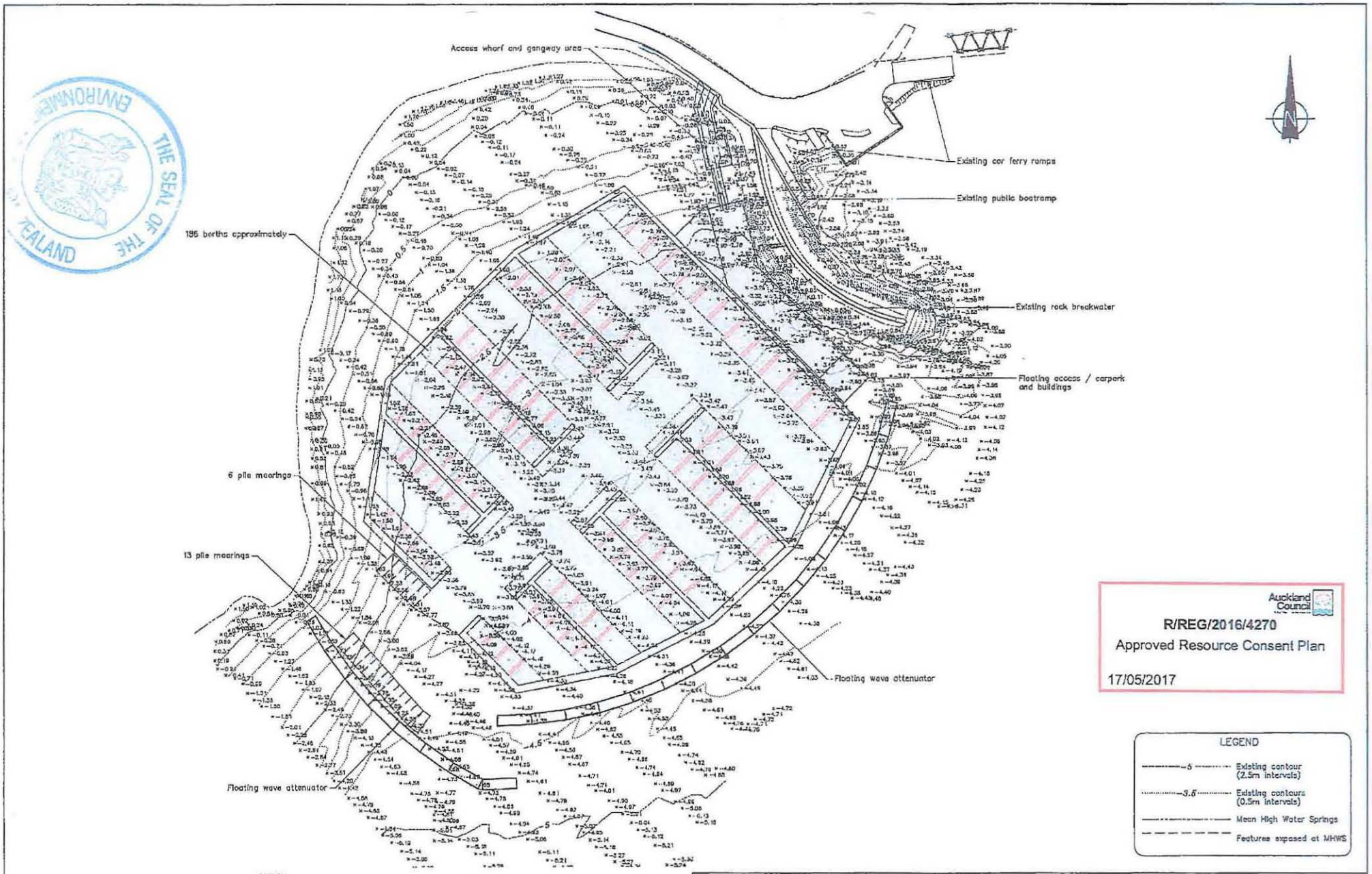
A3 SCALE 1:4000
0 40 80 120 160 200 (m)

Tonkin+Taylor
105 Carlton Gore Road, Newmarket, Auckland
www.tonkintaylor.co.nz

DRAWN	ITH	Feb 17
CHECKED		
APPROVED		
DATE		
SCALE (at A3 size)	1:4000	
JOB No.	1075	

KENNEDY POINT BOATHARBOUR LTD
KENNEDY POINT MARINA
WAIHEKE ISLAND
Proposed Marina

Fig No. Figure 2 REV. 5



NOTES.
1. Coordinate Datum: NZ Geodetic 2000 Mt Eden circuit.
2. Level Datum: Chart Datum, Waiheke Island.
3. Bathymetry supplied by Discovery Marine Ltd, surveyed 16 March 2016.

LEGEND
- 5 — Existing contour (2.5m intervals)
- 3.5 — Existing contours (0.5m intervals)
- Mean High Water Springs
- Features exposed at MHWS

Auckland Council
R/REG/2016/4270
Approved Resource Consent Plan
17/05/2017

A3 SCALE 1:2000
0 20 40 60 80 100 (m)

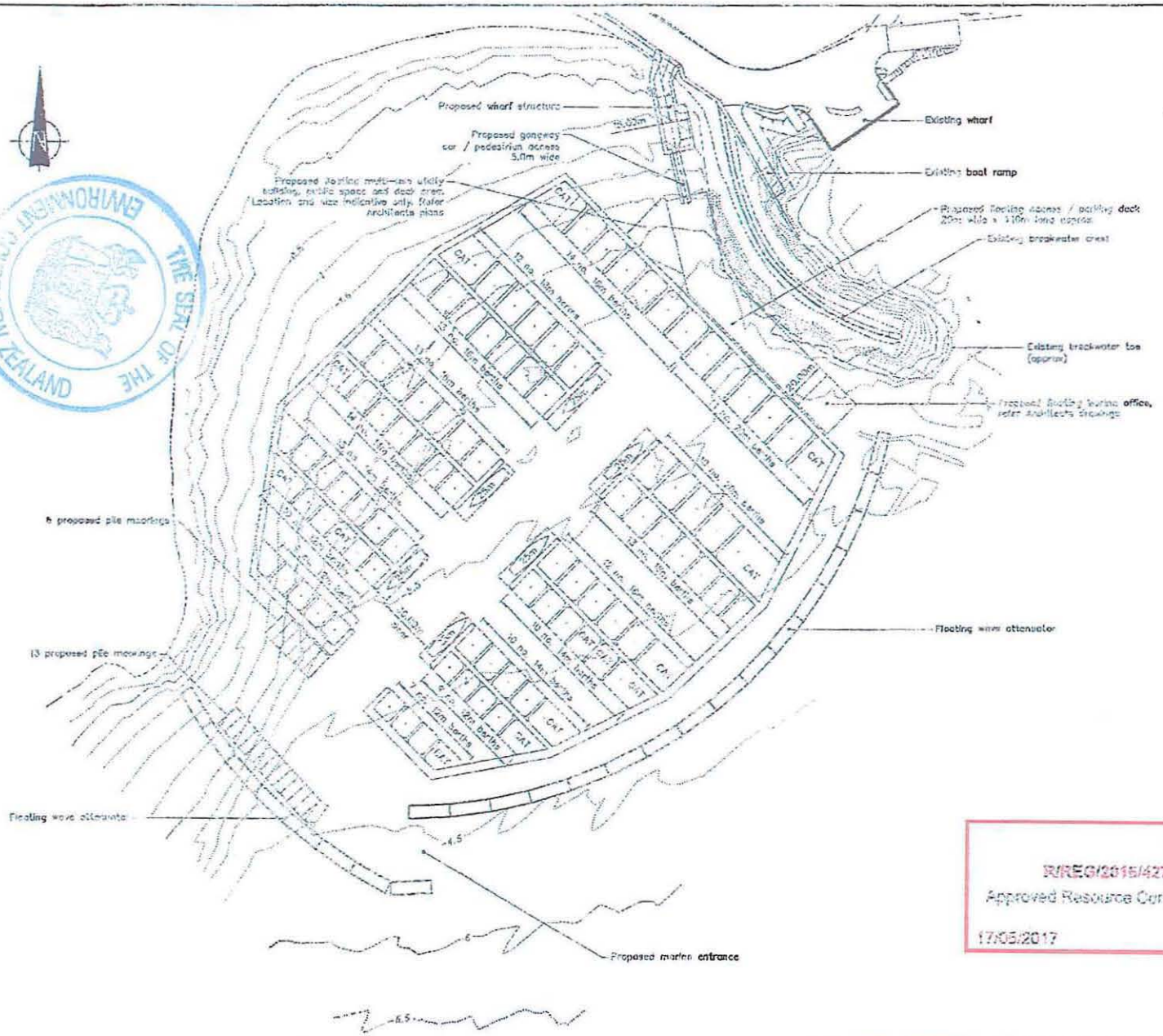
Tonkin+Taylor
105 Carlton Gore Road, Newmarket, Auckland
www.tonkintaylor.co.nz

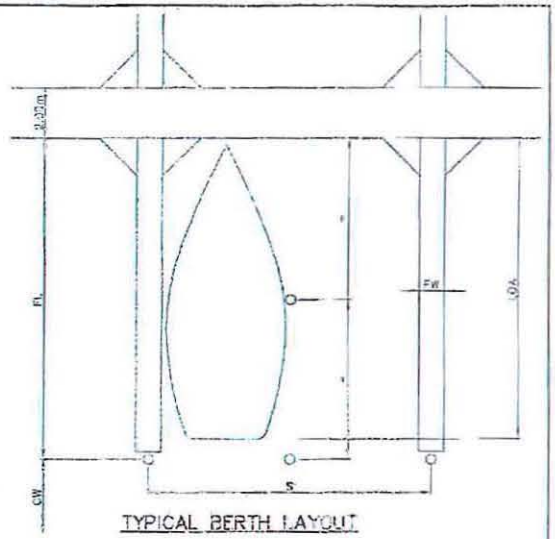
DRAWN	TJ	Feb. 17
DRAWING CHECKED		
APPROVED		
CADFILE: \\3 1575--F03.dwg		
SCALES (AT A3 SIZE) 1:2000		
PROJECT No. 31575		

KENNEDY POINT BOATHARBOUR LTD
KENNEDY POINT MARINA
WAIHEKE ISLAND
Existing Bathymetry Plan

FIG. No. Figure 3 REV. 5

L:\31575\Working\Natcad\CAD\F103\31575-F03.dwg, F02, 15/02/2017 2:09:08 p.m.





TYPICAL BERTH LAYOUT

SCALE 1:200

BERTH DIMENSIONS

Berth length "LOA" (m)	Finger length "FL" (m)	Finger spacing "S" (m)	Finger width "FW" (m)	Channel width "CW" (m)	Berth Nos
26	22.5	16.5	2.5	41.0	8
20	20.5	14.4	1.7	35.0	21
18	18.5	13.5	1.7	31.5	23
16	16.5	13.4	1.5	26.0	51
14	14.5	12.4	1.5	24.5	47
12	12.5	11.4	1.5	21.0	35

Auckland Council

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17/05/2017

LEGEND

- 6 — Existing contour (2.5m intervals)
- 3.5 — Existing contours (0.5m intervals)
- Mean High Water Springs

NOTES:
1. Coordinate Datum: NZ Geodetic 2000 Mt Eden circuit.
2. Level Datum: Chart Datum, Waiheke Island.
3. Bathymetry supplied by Discovery Marine Ltd, surveyed 16 March 2016.

4.5 SCALE 1:2000

0 20 40 60 80 100 (m)

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DRAWN	CJ	Feb 17
DRAFTING CHECKED		
APPROVED	Project	15/5
DRAWING	J31575-F04.dwg	
SCALES (AT A3 SIZE)	1:2000	
JOB No.	31575	

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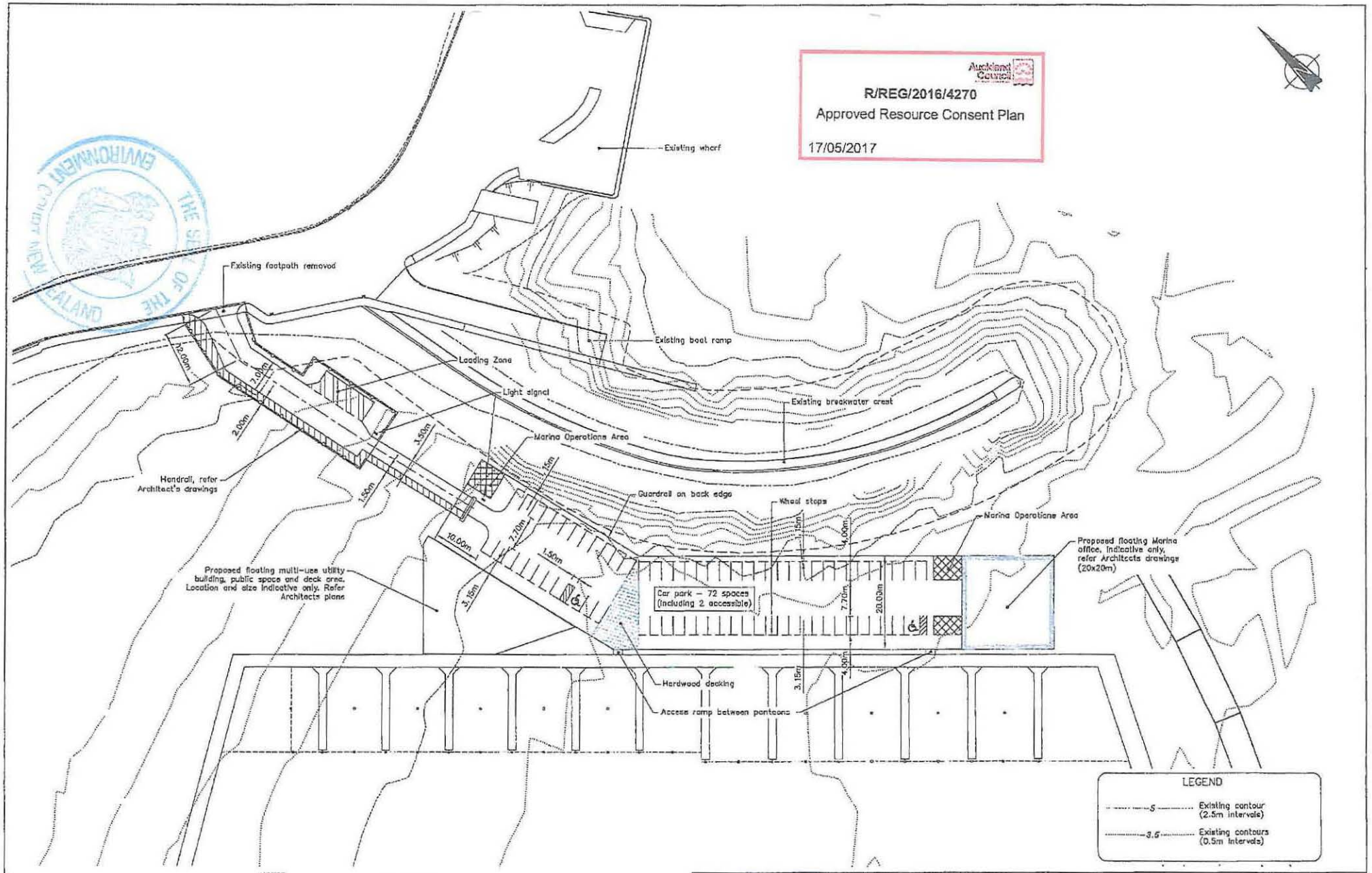
WAIHEKE ISLAND

Marina Layout Plan

FIG. No. Figure 4 REV. 7



NOTES.
1. Coordinate Datum: NZ Geodetic 2000 Mt Eden circuit.
2. Level Datum: Chart Datum, Waiheke Island.
3. Bathymetry supplied by Discovery Marina Ltd, surveyed 16 March 2016.

SCALE 1: 750
0 10 20 30 40 50(m)

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DRAWN	TJ	Feb. 17
DRAFTING CHECKED		
APPROVED		
CADFILE :	\\3 1575–F05.dwg	
SCALES (AT A3 SIZE)	1: 750	
PROJECT No.	31575	

KENNEDY POINT BOATHARBOUR LTD
KENNEDY POINT MARINA
WAIHEKE ISLAND
Access / Parking Pontoon Layout Plan

FIG. No. Figure 5 REV. 6

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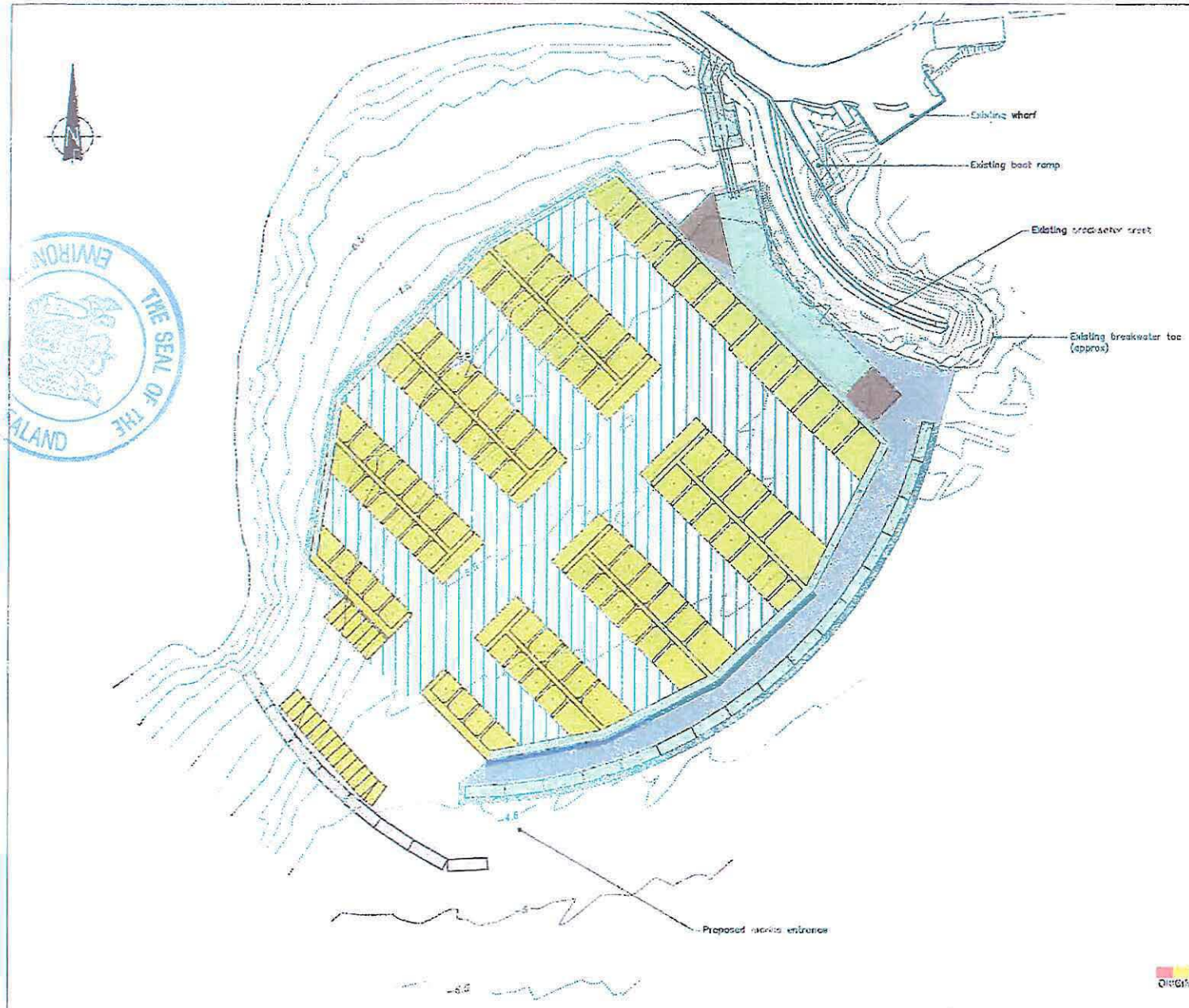

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17/05/2017

OCCUPATION AREA SCHEDULE

ITEM	AREA (m²)
Breakwaters	2,950
Marina and Pile Moorings	27,400
Floating Buildings and Pontoons	5,200
Access chart and gangway	700

LEGEND

- Existing contour (2.0m intervals)
- Existing contours (0.5m intervals)
- Mean High Water Springs
- Proposed breakwater crest
- Proposed MSL RL 1.5m CD
- Proposed breakwater toe
- Proposed occupation Zone 1
- Proposed occupation Zone 2
- Proposed occupation Zone 3
- Proposed occupation Zone 4
- Proposed occupation Zone 5
- Proposed occupation Zone 6
- Proposed occupation Zone 7
- Proposed occupation Zone 8

ORIGINAL IN COLOUR

NOTES.
1. Coordinate Datum: NZ Geodectic 2000 Mt Eden circuit.
2. Level Datum: Chart Datum, Waiheke Island.
3. Bathymetry supplied by Discovery Marine Ltd, surveyed 16 March 2016.

A3 SCALE 1:2000
0 20 40 60 80 100 (m)

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APPROVED		
ORIGINAL SIZE (IF A3 SIZE)	A3	
JOB No.	31575	

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KENNEDY POINT MARINA
WAIHEKE ISLAND
Occupation Areas Plan

FIG No. Figure 6

REV. 8

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NOTES
1. Coordinate Datum: NZ Geodetic 2000 Mt Eden circuit.
2. Level Datum: Chart Datum, Waiheke Island.
3. Aerial photo sourced from Auckland Council GIS website.
4. Bathymetry supplied by Discovery Marine Ltd, surveyed 16 March 2016.

A3 SCALE 1: 10000

0 0.1 0.2 0.3 0.4 0.5 (km)

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SCALES (AT A3 SIZE) 1: 10,000		
PROJECT No. 31575		

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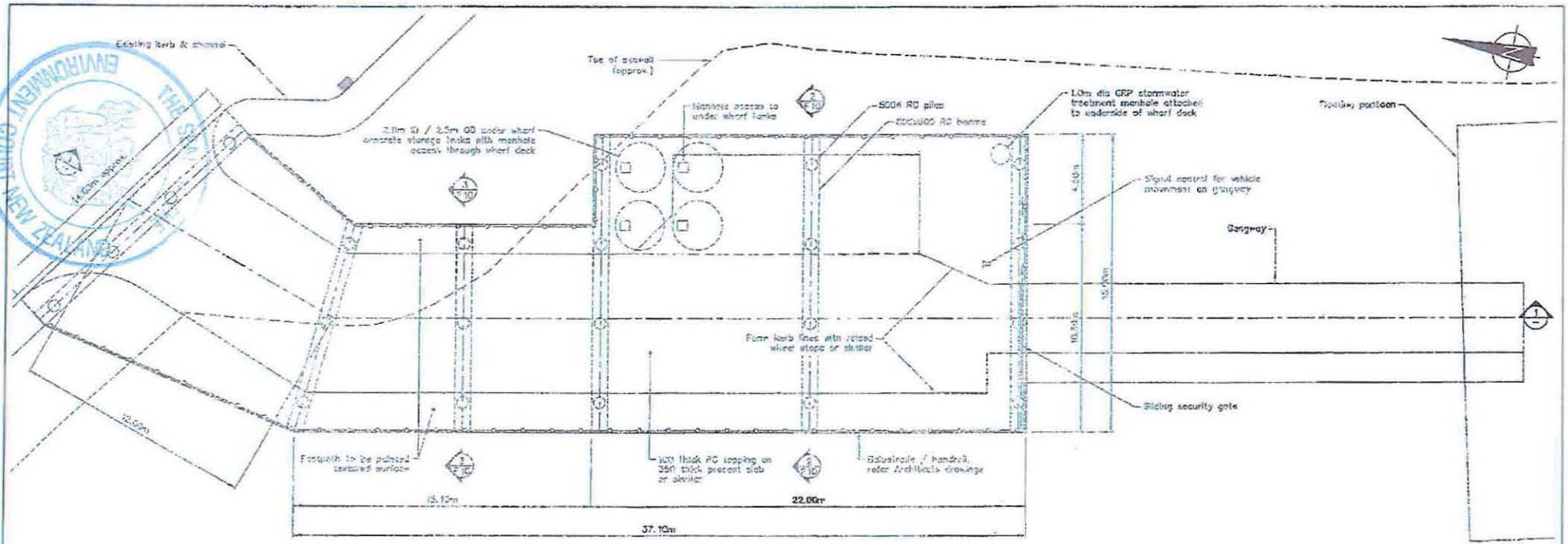
KENNEDY POINT MARINA

WAIHEKE ISLAND

Aerial Photo

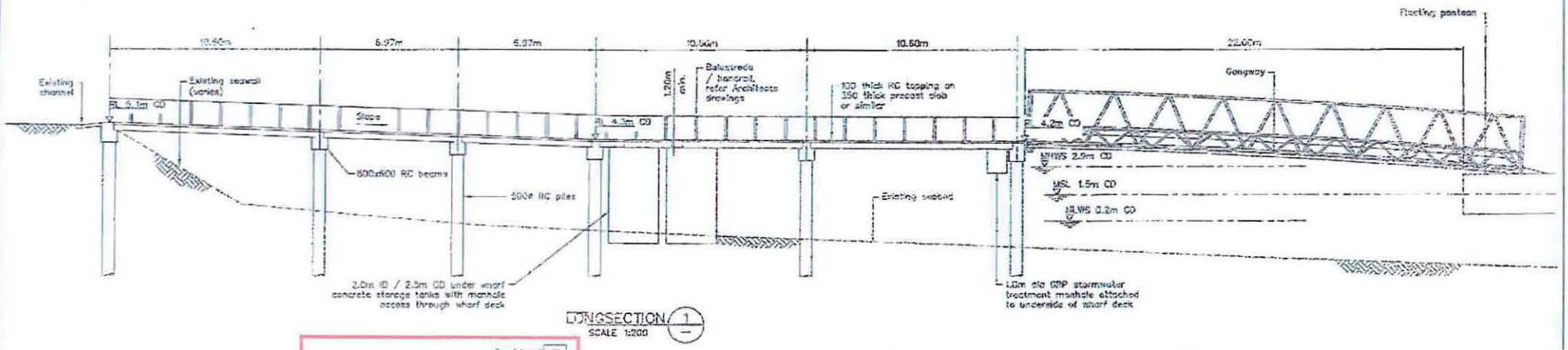
FIG No. Figure 7

REV. 4



WHARF STRUCTURE – PLAN

SCALE 1:200



LONGSECTION 1

SCALE 1:200

NOTES:
1. Level Datum: Chart Datum, Waiheke Island

A3 SCALE 1:200

0 2 4 6 8 10 (m)

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APPROVED		9/12
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SCALES (AT A3 SIZE) 1:200		
PROJECT No. 31575		

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KENNEDY POINT MARINA

WAIHEKE ISLAND

Wharf Structure – Plan & Longsection

FIG. No. Figure 9

REV 2

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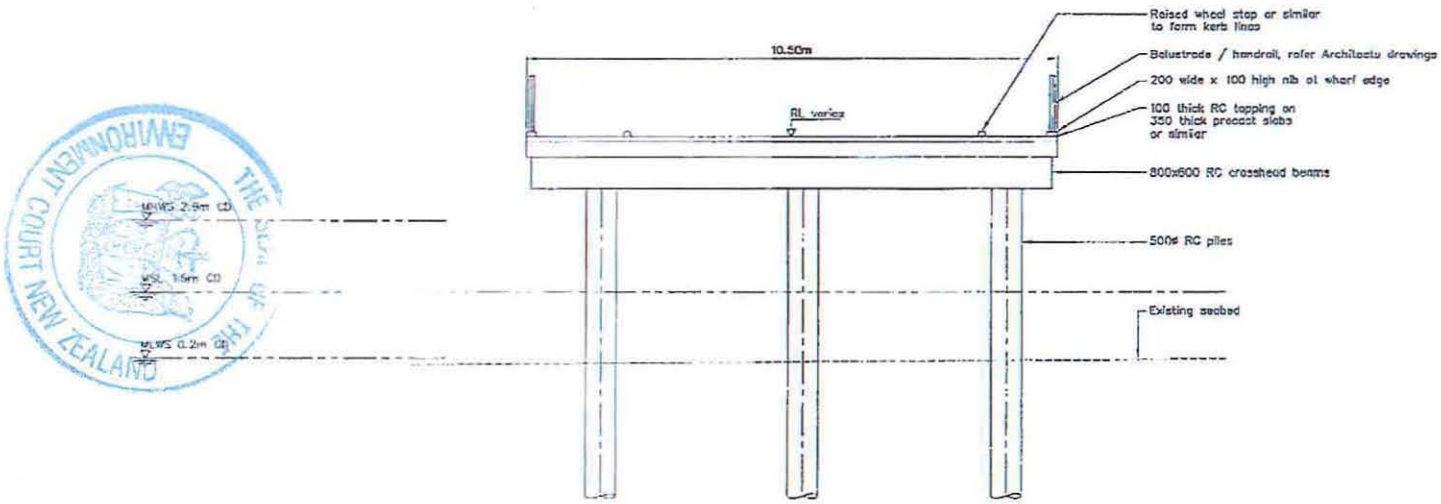
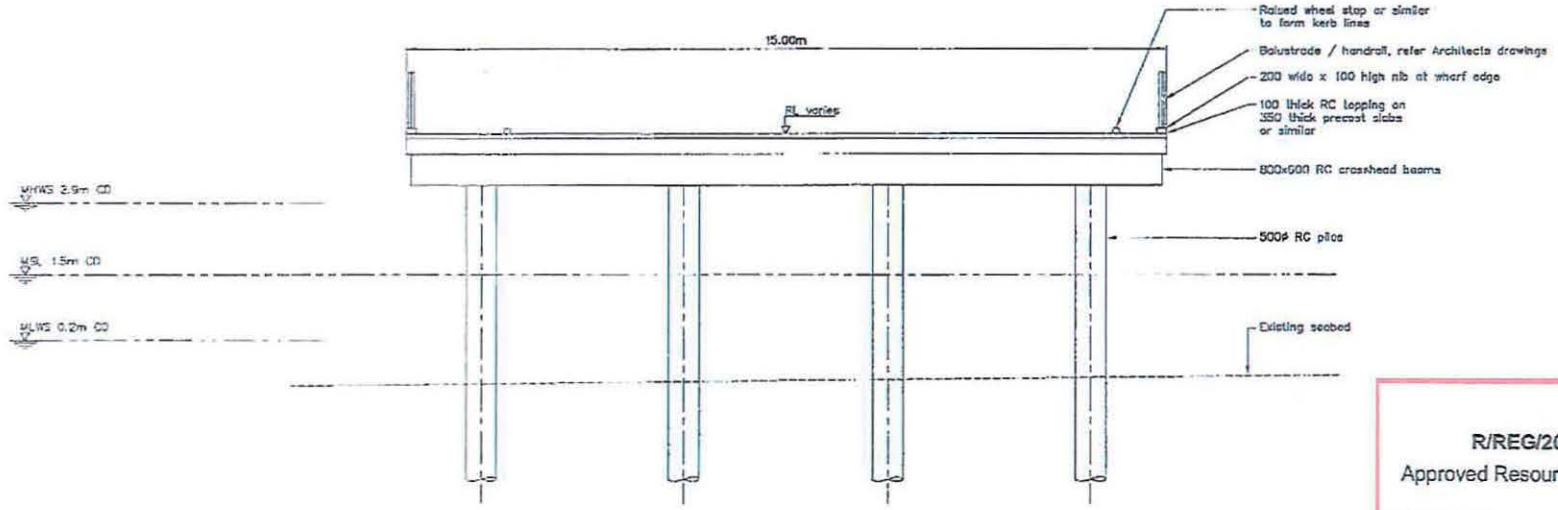


SECTION 3 / F9
SCALE 1:100



SECTION 2 / F9
SCALE 1:100

Auckland Council
R/REG/2016/4270
Approved Resource Consent Plan
17/05/2017

NOTES
1. Level Datum: Chart Datum, Waiheke Island

A3 SCALE 1:100
0 1 2 3 4 5 (m)

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DRAWN	TJ	Sep.16
DRAFTING CHECKED		
APPROVED		
CADFILE: \\3 1575-F 10.dwg		
SCALES (AT A3 SIZE) 1:100		
PROJECT No. 31575		

KENNEDY POINT BOATHARBOUR LTD
KENNEDY POINT MARINA
WAIHEKE ISLAND
Wharf Structure – Sections

FIG. No. Figure 10 REV. 2

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2020-470-31
[2021] NZHC 1201

BETWEEN	TAURANGA ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Appellant
AND	TAURANGA CITY COUNCIL and BAY OF PLENTY REGIONAL COUNCIL Respondents
	TRANSPOWER NEW ZEALAND LIMITED Applicant for consent

Hearing:	3-4 September 2020
Appearances:	J D K Gardner-Hopkins for the appellant and the Maungatapu Marae Trustees as an interested party M H Hill and R M Boyte for the respondents A J L Beatson, J P Mooar and E M Taffs for the applicant for consent Appearance excused for Ngāi Tūkairangi Trust, an interested party
Judgment:	27 May 2021

JUDGMENT OF PALMER J

This judgment was delivered by me on Thursday 27 May 2021 at 2.00 pm.
Pursuant to Rule 11.5 of the High Court Rules.

……
Registrar/Deputy Registrar

Counsel/Solicitors:
J D K Gardner-Hopkins, Barrister, Wellington
Sharp Tudhope Lawyers, Tauranga
Cooney Lees Morgan, Tauranga
Bell Gully, Wellington
Lara Burkhardt, Mt Maunganui

Contents

Summary

[1] Ngati Hē was dispossessed of most of its ancestral lands but retains the Maungatapu Marae and beach at Rangataua Bay, on Te Awanui Tauranga (Tauranga Harbour). Ngāti Hē has a long-standing grievance about the location of electricity transmission lines across the Bay from the Maungatapu Peninsula to the Matapihi Peninsula. Some of the transmission poles will require replacement soon. In 2016, to address Ngāti Hē's grievance, Transpower initiated consultation with iwi about realignment of the transmission lines, including at Rangataua Bay. Ngāti Hē supported removal of the existing lines and initially did not oppose their proposed new location. But when it became clear that a large new pole, Pole 33C, would be constructed right next to the Marae, Ngāti Hē concluded the proposed cure would be worse than the disease and opposed the proposal. Consents were granted for the proposal realignment which the Environment Court upheld.[1] The Tauranga Environmental Protection Society Inc appeals the decision of the Environment Court, supported by the Maungatapu Marae Trustees from Ngati Hē.

[2] I uphold the appeal. I find:

(a) The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law.

(b) Proper application of the law requires a different answer from that reached by the Environment Court. When the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the Outstanding Natural Features and Landscapes (ONFL), it is not open to the Court to decide it would not.

(c) The Court erred in law in applying an "overall judgment" approach to the proposal and in its approach to pt 2 of the Resource Management

---

1 *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2020] NZEnvC 43 [Environment Court] at [218].

Act 1991 (RMA). The Court was required to carefully interpret the meaning of the planning instruments it had identified (the Bay of Plenty Regional Coastal Environment Plan (RCEP) in particular) and apply them to the proposal.

(d) The relevant provisions of the RCEP do not conflict and neither do the provisions of the higher order New Zealand Coastal Policy Statement (NZCPS) and the National Policy Statement on Electricity Transmission (NPSET). There are cultural bottom lines in the RCEP:

(i) Policy IW 2 requires adverse effects on Rangataua Bay, an "area of spiritual, historical or cultural significance" to Ngāti Hē, to be avoided "where practicable".

(ii) Policy NH 4, NH 5(a)(ia) and NH 11(1) require the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 to be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

(e) Determining whether the exceptions to the cultural bottom lines apply requires interpretation and application of the "practicable", "practical" and "possible" thresholds. The Court erred in failing to recognise that this determines whether the proposal could proceed at all. The technical feasibility of alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. On the basis of the Court's existing findings, Policy NH 11(1)(b) is therefore not satisfied and consideration providing for the proposal under Policy NH 5 is not available.

[3] These are material errors. I quash the Environment Court's decision. But I consider it desirable for the Environment Court to further consider the issues of fact relating to the alternatives. With goodwill and reasonable willingness to compromise

on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal. And, if the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. I remit the application to the Environment Court for further consideration consistent with this judgment.

The application for consents in context

Ngāti Hē and te Maungatapu Marae

[4] Ngāti Hē is a hapū of Ngāi Te Rangi. After the battles of Pukehinahina (Gate Pā) and Te Ranga in 1864, much of Ngāi Te Rangi's land was confiscated for settlement under the New Zealand Settlements Act 1863 and Tauranga District Lands Act 1868.[2] The confiscations were then reviewed by Commissioners and land was returned.[3]

[5] The confiscated land included that of Ngāti Hē at Maungatapu, a peninsula in the south of Te Awanui Tauranga (Tauranga Harbour), jutting into Rangataua Bay. In 1884, the Crown "awarded" back to Ngāti Hē two blocks of land on Maungatapu peninsula, some three kilometres east of central Tauranga.[4] Block 2 was part of the tip of the Maungatapu peninsula. Ngāti Hē has since lost part of that land too. Some was taken for the public purposes of putting in a motorway and electricity transmission lines. Some was subject to forced sale, because Ngāti Hē was unable to pay rates, and then sub-divided.[5] As stated in the agreed Historical Account in the Deed of Settlement between Ngāi Te Rangi and the Crown, upon which the Crown's acknowledgement and apology to Ngāi Te Rangi was based:[6]

---

2 *Ngāi Te Rangi and Ngā Pōtiki Deed of Settlement of Historical Claims* (14 December 2013) [Deed of Settlement], cl 2 (CBD 303.0702 and 303.0703). The Deed is conditional upon settlement legislation coming to force, which has not yet occurred.

3 See generally Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at chs 4 and 10.

4 Maungatapu 1 and 2 Blocks. Commissioner Brabant "Land Returned to Ngaiterangi Tribe Under Tauranga District Land Acts" [1886] AJHR G10; Heather Bassett *Aspects of the Urbanisation of Maungatapu and Hairini, Tauranga* (July 1996) at 6 (CBD 301.0024); and Des Heke *Transpower Rangataua Realignment Project: Ngāti Hē Cultural Impact Assessment* (September 2017) at 6 (CBD 304.0966).

5 Deed of Settlement, above n 2, cl 2.71.

6 Clause 2.72.

> The Maungatapu subdivision contributed to the reduction of Ngāti He landholdings on the peninsula to 11 hectares by the end of the twentieth century. Maungatapu was once the centre of a Ngāti He community who used their lands for gardens, but now the hapū only maintains the marae and headland domain, along with a small urupā.

[6] Amongst the Crown's many acknowledgements in the Deed, it acknowledged:

(a) public works, including "the motorway and infrastructure networks on the Maungatapu and Matapihi Peninsulas", have had "enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi";[7]

(b) "the significant contribution that Ngāi Te Rangi . . . [has] made to the wealth and infrastructure of Tauranga on account of the lands taken for public works";[8] and

(c) "the significance of the land, forests, harbours, and waterways of Tauranga Moana to Ngāi Te Rangi . . . as a physical and spiritual resource".[9]

[7] As stated in evidence in this proceeding:[10]

> The result of all these forms of alienation has been that very little land in Maungatapu and Hairini is still owned by Māori. There are a handful of reserve areas, such as marae and urupā, and some families live in the area on their individual sections. The traditional rohe of Ngāti Hē and Ngāi Te Ahi now has the overwhelming characteristics of a well populated residential suburb, in which there is less scope for Māori interests and activities to be promoted than there was in the past.

[8] The Maungatapu Marae (the Marae) of Ngāti Hē , also called Opopoti, is on the northern tip of the Maungatapu peninsula.[11] The wharenui, Wairakewa, and wharekai, Te Ao Takawhaaki, look to the northeast, towards the bridge and Matapihi peninsula. Te Kōhanga Reo o Opopoti is established on the eastern side of the Marae, between the Marae and a health facility next to State Highway 29A. To the west of

---

7 Clauses 3.15 and 3.14.5.
8 Clause 3.16.1.
9 Clause 3.18.1.
10 Bassett, above n 4, at 6 (CBD 301.0024).
11 Environment Court, above n 1, at [10].

the Marae is a large flat area that was Te Pā o Te Ariki and is now Te Ariki Park, home to the rugby field, tennis/netball courts and clubrooms of Rangataua Sports and Cultural Club. The land on which the Club is situated is a Maori reservation managed by Ngāti Hē.[12]

Ngāi Tūkairangi

[9] Ngāi Tūkairangi, another hapū of Ngāi Te Rangi, has a marae and other land on the Matapihi headland.[13] Te Ngāio Pā, near the southern tip of the Matapihi Peninsula, is associated with Ngāi Tūkairangi, Ngāti Hē, Ngāti Tapu, and Waitaha.[14] Approximately 60 hectares in Matapihi is owned by over 1,470 Ngāi Tūkairangi or Ngāti Tapu landowners.[15] The Ngāi Tūkairangi No 2 Orchard Trust has managed orchard land in the area since 1992.[16]

The A-line

[10] In the 1950s, the Maungatapu 2 block was implicated in plans for a motorway and a new electricity transmission line.[17] In 1958, the Maungatapu 2 block, including the beach in front of it, was reserved as a marae and recreation area under s 439 of the Māori Affairs Act 1953.

[11] Also in 1958, the Ministry of Works, a department of the Crown, constructed the "A-line", an electricity transmission line. It is located very near Ngāti Hē's remaining land. It is supported by poles in Rangataua Bay and passes over some 40 private residences and above the playing fields of Te Ariki Park. Ngāti Hē complained but the Ministry took the position that there was no alternative route for the power lines.[18] The Crown Law Office has acknowledged that the electricity department did not properly inform those affected.[19] The Crown acknowledged in the

---

12 Heke, above n 4, at 15 (CBD 304.0975).
13 Environment Court, above n 1, at [28].
14 At [29].
15 Brief of Evidence of Peter Te Ratahi Cross, (25 March 2019) [Cross Brief] at [7] (CBD 202.0388).
16 Environment Court, above n 1, at [188].
17 Bassett, above n 4, at 10 (CBD 301.0030).
18 At 11 (CBD 301.0032).
19 Rachael Willan *From Country to Town: A Study of Public Works and Urban Encroachment in Matapahi, Whareroa and Mount Maunganui* (December 1999) at 85 (CBD 301.0081).

Treaty settlement that it did not send notices to all the owners of land taken, which may have been why Ngāti Hē owners did not apply for compensation within the required timeframe.[20] Ngāti Hē's concerns about the location of the A-Line infrastructure were included in their claim to the Waitangi Tribunal in 2006.[21] The claim referred to the absence of compensation for, or adequate notification of, the construction of the power lines.

[12] The power lines were also placed through the middle of Ngāi Tūkairangi's land, despite the hapū's opposition.[22] The A-Line went directly over Te Ngāio Pā on the southern tip of the Matapihi peninsula. The effect of the A-line on the use and development of horticultural lands at Matapihi was also the subject of Treaty of Waitangi claims to the Waitangi Tribunal by Ngāi Tūkairangi in 1988 and 1997.[23] These claims also concerned the construction of the power lines without compensation nor adequate consultation.[24]

[13] In 1959, a bridge was constructed from the northern end of the Maungatapu peninsula to the southern end of the Matapihi peninsula. This is now State Highway 29A, to Mt Maunganui. Construction substantially altered the site of Te Pā o Te Ariki of Ngāti Hē, disturbing an ancient urupā and exposing bones.[25]

The B-line

[14] Under the State-Owned Enterprises Act 1986, the electricity assets of the Ministry of Works were transferred to the Electricity Corporation of New Zealand. In 1991, the electricity transmission assets were further transferred to Transpower, the SOE which still manages the national grid. In mid-1991, work began on a second transmission line to Mt Maunganui and Papamoa. In 1993, Transpower undertook a feasibility study for erecting a new line along the Maungatapu to Matapihi portion of

---

20 Deed of Settlement, above n 2, cl 2.54.

21 Environment Court, above n 2, at [44]; and Waitangi Tribunal *Tauranga Moana: Report on the Post-Raupatu Claims Volume 1* (Wai 215, 2006).

22 Cross Brief, above n 15, at [10].

23 Environment Court, above n 1, at [44]; and Hikitapua Ngata *Transpower Line Realignment Project: Ngai Tūkairangi Hapu Cultural Impact Assessment* at 10 (CBD 304.1008). Wai 211 was heard as part of the foreshore and seabed inquiry. Wai 688 was heard as part of the Kaipara inquiry.

24 Ngata, above n 23, at 10 (CBD 304.1008).

25 Bassett, above n 4, at 13 (CBD 301.0034); and Deed of Settlement, above n 2, cl 2.56.

the state highway.[26] That would enable the A-line to be removed. The B-line was constructed in 1995. It crosses Rangataua Bay through a duct underneath the Maungatapu-Matapihi bridge and underground on the approaches at each end of the bridge.[27] Ms Raewyn Moss from Transpower confirms the resulting expectation:[28]

> … When the B-line was constructed in 1995, there was an expectation at the time that the A-line would eventually be re-aligned onto the B-line. I understand that Ngāti Hē, Ngāi Tūkairangi, Māori trustee land owners also share this expectation. This has been the subject of discussion between the parties and Transpower over many years.

The realignment proposal

[15] The A-Line has not yet been moved. Now, the condition of Poles 116 and 117, located in Te Ariki Park, is deteriorating and the poles need to be replaced. In particular, Pole 117 is close to the edge of the cliff above the harbour and recently required temporary support to protect it from coastal erosion.[29] Tower 118, situated in Rangataua Bay, is due for major refurbishment in the next 10 years.[30]

[16] Recently, Transpower developed a realignment proposal that would remove Poles 116 and 117 and Tower 118 from Rangataua Bay. Instead, aerial lines would extend between two new steel monopoles, Pole 33C on Maungatapu, at a height of approximately 34.7 metres, and Pole 33D at Matapihi, at a height of approximately 46.8 metres. The lines would no longer pass over Ngāti Hē land or private residences at Maungatapu or over Ngāi Tūkairangi land at Matapihi. This is depicted in the illustration below, with the red lines and poles to be removed, the green lines and poles to be added and the blue lines and poles to be retained.[31]

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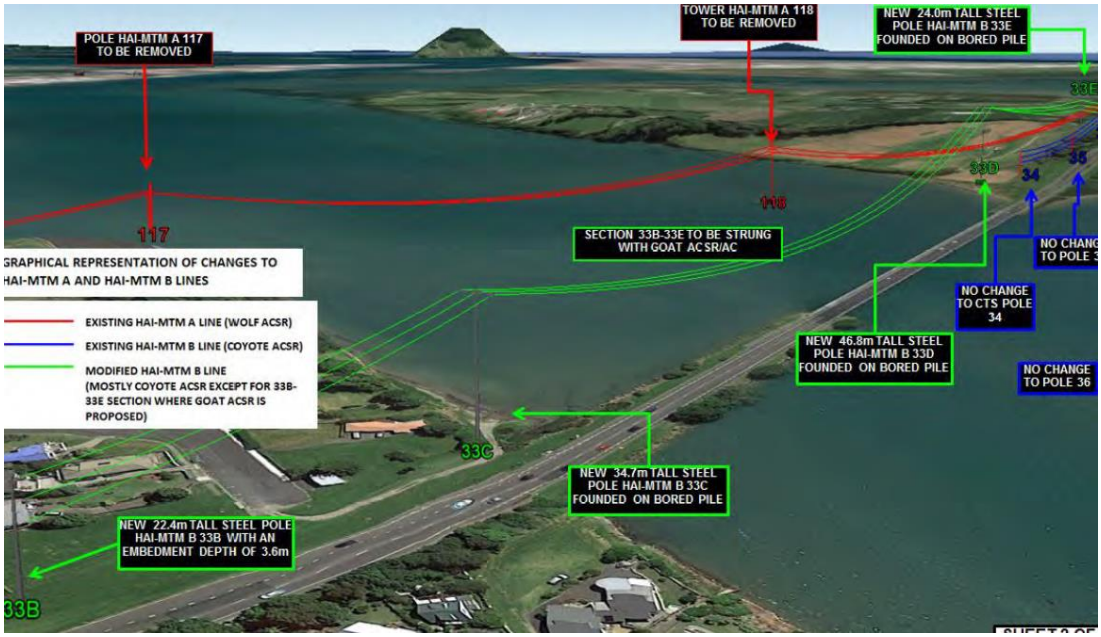
26 Willan, above n 19, at 79 (CBD 301.75).
27 Environment Court, above n 1, at [42].
28 Notes of Evidence of Environment Court [NOE] 15/9–14 (CBD 201.0015).
29 Environment Court, above n 1, at [40].
30 At [42].
31 Transpower *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Tauranga* (July 2017) at Sch A.1 (CBD 304.1103).



[17] Transpower's objectives for this project, set out in its Assessment of Effects on the Environment, are to:[32]

> a) Enable Transpower to provide for the long-term security of electricity supply into Mount Maunganui;
>
> b) Remove an existing constraint from an important cultural and social facility for the Maungatapu community; and from horticultural activities for the Matapihi community; and
>
> c) Honour a longstanding undertaking to iwi and the community to remove Tower 118 from the harbour.

[18] From March 2013, Transpower discussed the project with Ngāti Hē and Ngāi Tūkairangi, among others.[33] The proposal was a "welcome surprise" to Ngāi Tūkairangi, which supports it.[34] Removal of the lines will allow more flexible farming practices, use of shelter planting and reconfiguration of the orchard.[35]

[19] Ngāti Hē and the Marae also initially supported the proposal. But once the applications were notified, and Ngāti Hē and the Marae realised the size, nature and

---

32 Transpower *Assessment of Effects on the Environment: Realignment of the HAI-MTM-A Transmission Line, Maungatapu to Matapihi including Rangataua Bay, Tauranga* (24 October 2017) at 8 (CBD 304.0784).

33 Environment Court, above n 1, at [47].

34 At [12].

35 At [14].

location of the new Pole 33C, directly adjacent to the entrance to the Marae, they opposed it. A mock-up of the view of Pole 33C from the Marae is depicted below.[36]

The application and Council decisions

[20] In 2017, Transpower applied for the required resource consents for the proposal from the Tauranga City Council and the Bay of Plenty Regional Council (the Councils):[37]

(a) From the Tauranga City Council under the National Environmental Standards for Electricity Transmission Activities (NESETA) regulations for relocation of support structures, removal of willow and other vegetation and construction of the additional poles.

(b) From the Bay of Plenty Regional Council for earthworks, disturbance of contaminated land, drilling of foundations below ground water, modification of wetland, disturbance of the seabed and occupation of the coastal marine area airspace.

[21] Section 2 of the RMA defines the "coastal marine area" to mean "the foreshore, seabed, and coastal water, and the air space above the water", up to the line of mean high water springs.

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36 *Transpower Hairini to Mount Maunganui Re-Alignment: Landscape and Visual Graphics, Attachments to the Environment Court Evidence of Brad Coombs* (30 January 2018) at 39 (CBD 202.0514).

37 Environment Court, above n 1, at [50], Table 1.

[22] The Councils each appointed an independent hearing commissioner to consider and decide the consent applications. On 23 August 2018, the commissioners jointly decided to grant land use consents to realign the A-Line, subject to various conditions.

Appeal to the Environment Court

[23] The Tauranga Environmental Protection Society (TEPS) is an association of 14 people whose views of the harbour after realignment would be impacted by the new powerlines or poles and who made submissions opposing the application. TEPS appealed to the Environment Court. The trustees of the Maungatapu Marae, Ngāi Tūkairangi Hapū Trust, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Mr Luke Meys joined the appeal as parties under s 274 of the RMA:

(a) The Marae supported removal of the A-Line, as the subject of their long-held grievance and a danger to users of the Sports Club. But the Marae opposed the new poles and lines. Ngāti Hē would rather wait longer to get the right result.

(b) Similarly, Ngāi Te Rangi supported removal of the A-Line and its relocation. It opposed the method by which the realignment would cross Rangataua Bay.

(c) Ngāi Tūkairangi conditionally opposed the appeal on the basis it would delay the removal of transmission infrastructure on Matapihi land, which would have positive cultural and other effects for them.[38] However, if the appellants' concerns could be met through changes within the scope of the application, Ngāi Tūkairangi would wish to consider that.

(d) Mr Meys, whose property is under the existing A-Line, supported the proposal, with urgency, and opposed the appeal.

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38 At [16]–[17].

The Environment Court decision

[24] The Court refused the appeal and amended the conditions of consent.[39] The structure of its decision was to:

(a) identify the background to, and nature of, the proposal and consent application;

(b) outline the legal framework and the relevant policies and plans;

(c) identify three preliminary consenting issues: bundling; alternatives; and maintenance or upgrade;

(d) consider the cultural effects of the proposal;

(e) consider the effects on the natural and physical environment; and

(f) consider and amend the conditions of the consents.

[25] In its conclusion, the Court observed that neither the Councils nor the Court on appeal "have the power to substantially alter Transpower's proposal or to require any third party, such as the New Zealand Transport Authority, to participate in the proposal".[40] It said "[i]f we consider that the proposal, essentially as applied for, is inappropriate, then we may refuse consent".[41] In summary, the Court in its concluding reasoning:

(a) Found the removal of the A-Line will result in positive effects for all people, land and water and for Ngāti Hē and Ngāi Tūkairangi.[42]

(b) Noted it had found the proposal is a single one and its elements should be considered together.[43]

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39 At [271]–[272].
40 At [260].
41 At [260].
42 At [261].
43 At [262]–[263].

(c) Held that the proposed relocation "does not result in wholly positive effects" and it must have regard to Policy 15 of the NZCPS because the "location is not ideal". In particular, placing the line above the bridge with the associated tall poles "creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A".[44]

(d) Found the alternatives of laying the A-Line on or under the seabed, or in ducts attached to the bridge, "appear from the evidence to be impracticable", though they are technically feasible, because of the cost.[45] The Court does not have the power to require Transpower to amend the proposal.

(e) Found "[t]he character or nature of the effects at the heart of this case are essentially those that relate to restrictions on using land, visual impact and the imposition of the works on sites of significance to Māori."[46] The positive effects of removal of the existing A-Line are "significantly greater than the adverse effects in intensity and scale" in terms of land use, visual impact and effects on sites of significance to Māori, "even while taking account of the impact of the relocated line on views from the marae and proximity to the kōhanga reo".

(f) Considered it "must undertake a fair appraisal of the objectives and policies read as a whole".[47] The Court did not accept Policy 15 of the NZCPS requires consent to be declined or the proposal amended on the basis it has adverse effects on the ONFL. The NZCPS "does not have that kind of regulatory effect" and its terms do not provide that "any use or development in an ONFL would be inappropriate". What is inappropriate "requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the

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44 At [264].
45 At [265].
46 At [266].
47 At [267].

effects of the use or development may be on the things which are to be protected".

(g) Noted it is important that the existing environment of the ONFL includes the existing bridge and national grid infrastructure.[48]

(h) Considered it must also "have regard under s 104(1)(b)" to the relevant objectives and policies of the NPSET, RCEP and District Plan.[49] Those instruments "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved". Policy 6 of the NPSET guides the Court, consistently with the proposal, but "there is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved".

(i) Said finally:

> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

The appeal

[26] Under s 299 of the RMA, a party to a proceeding before the Environment Court "may appeal on a question of law to the High Court" against a decision, report or recommendation of the Environment Court. Under r 20.18 of the High Court Rules 2016, the appeal is "by way of rehearing".

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48 At [268].
49 At [269].

[27] TEPS appeals the Environment Court's decision. The Marae Trustees support the appeal as an interested party. Transpower, as the applicant for consent, supports the Environment Court's analysis. Ngāi Tūkairangi Trust supports the submissions of Transpower and does not make any additional submissions. The Councils, as the consent authorities, separately support the Court's decision.

[28] Counsel argued six or seven grounds of appeal. There was quite a lot of overlap in all parties' submissions from one ground to another. I group the grounds of appeal in terms of five issues and treat them in a different order. I treat submissions made by counsel in relation to the issue to which they are most relevant. The issues are:

(a) Was the Environment Court wrong to "bundle" the effects together?

(b) Was the Court wrong in its findings about adverse effects?

(c) Did the Court err in its approach to pt 2 of the RMA?

(d) Did the Court err in interpreting and applying the planning instruments?

(e) Was the Court wrong in its assessment of alternatives, including the status quo?

Issue 1: Was the Environment Court wrong to bundle the effects together?

The Environment Court's decision

[29] The Environment Court addressed the issue of "bundling" as the first preliminary issue. It stated:

> [96] It is generally accepted that where a proposal requires more than one consent and there is some overlap of the effects of the activity or activities for which consent is required, then the consideration of the consents should be bundled together so that the proposal is assessed in the round rather than split up, possibly artificially, into pieces.[50] Where, however, the effects to be

[50] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580; and *King v Auckland City Council* [2000] NZRMA 145 (HC) at [47]–[50].

> considered in relation to each activity are quite distinct and there is no overlap, then a holistic approach may not be needed.[51]

[30] The Court recorded but rejected the appellant's argument that the proposal was in two parts that should be assessed separately using a structured approach.[52] It considered the term "effect" is defined broadly and inclusively in s 3 of the Resource Management Act 1991 (RMA) and is subject to the requirements of context.[53] The Court considered case law has generally interpreted and applied the statutory definition of "effect" in a realistic and holistic way.[54] It concluded:

> [110] These passages indicate that the correct approach to the assessment of effects involves not merely the consideration of each effect but also the relationships of each effect with the others, whether positive or adverse. This is consistent with the inclusion of cumulative effects in the definition in s 3: while many cases have considered the overall impact of cumulative adverse effects, there is nothing in s 3 which would prevent consideration of the cumulative impact of positive and adverse effects. Where effects are directly related and quantifiable in commensurable ways, then it may even be possible to sum the overall effect, but these passages also indicate that commensurability is not a pre-requisite to such consideration.
>
> [111] We also consider that such an approach is not limited to the level of individual effects but applies similarly to the whole activity. While one may conceive of an activity as separate elements with separate effects, that approach may not properly address the proposal as it is intended to occur or operate. Numerous provisions of the RMA, including the functions of territorial authorities and regional councils, indicate that the statutory purpose is to be pursued or given effect by methods which help to achieve the integrated management of the effects of the use, development or protection of resources. While there may be separate or ancillary activities which require separate consideration, the analysis should not be artificial. This approach is consistent with the identification of activities in terms of planning units which can assist in such integration.
>
> [112] In this case, we are satisfied that the proposal is to be assessed as a single one with its activities bundled together for the purposes of identifying the correct activity classification and considering the effects, positive and adverse, cumulatively. We note that counsel for the Appellant acknowledged that its two parts may only proceed together: without the new line, there would be no removal of the existing one. We agree and see that as determinative of this point.

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51 *Bayley v Manukau City Council,* above n 50, at 580; and *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513; [2000] NZRMA 529 (CA) at [21]–[22].

52 Environment Court, above n 1, at [100].

53 At [104].

54 At [106]–[108], citing *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC); *Marlborough District Council v New Zealand Rail Ltd*]1995] NZRMA 357 (EnvC); and *Auckland City Council v Minister for the Environment* [1999] NZRMA 49 (EnvC).

[31] In its overall conclusion, the Environment Court said that, even though it was "treating the proposal as a single one", the effects of the elements of the proposal "must be identified and analysed separately as they involve different things, but having done that, the judgment of whether the effects are appropriate … must be done in terms of all the effects".[55]

Submissions

[32] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Environment Court erred in rejecting a structured approach. He submits the Court should have considered the two distinct elements of the removal of the A-Line and construction of the new infrastructure separately. He submits doing so is particularly important given the "avoid" policies which require a proposal with adverse effects to be squarely confronted. He submits the Court netted off the adverse effects on the Marae with the benefits of removing Poles 116 and 117. The effect of that approach was to subsume the adverse effects into an overall net-effect analysis. This masked the effects on cultural values and circumvented the requirement to confront the terms of the planning documents.

[33] Mr Beatson, for Transpower, submits the Court properly accepted that relocation of the A-Line depended on consents being granted, which determined whether or not to consider the effects in a holistic way. He submits the Court was correct, given that the removal and placement are integrally related, and was consistent with the assessment of all expert witnesses and the authorities.

[34] Ms Hill, for the Councils, submits there is no material error of law. Separate assessment of each part of the proposal against the avoid policies would not necessarily prohibit a proposal with adverse effects. It would just require the effects to be squarely confronted. The Environment Court was clear that the effects of the separate parts of the proposal must be identified and analysed separately and it squarely confronted the effects of the proposal. The structured approach is not supported by the policy framework. The Court's "realistic and holistic" approach was

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55 Environment Court, above n 1, at [263].

appropriate and consistent with sound resource management practice, whereas the structured approach has no supporting authority.

Did the Court err in applying a bundling approach?

[35] The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law. The two elements of the proposal, removing old infrastructure and constructing new infrastructure, are integrally related. One would not occur independently of the other, as Mr Gardner-Hopkins acknowledged. The effects on cultural values were incorrectly determined, as I discuss in Issue 2. But they were not masked by the Court's approach. The Environment Court was correct to consider the effects of the proposal relating to Rangataua Bay in a realistic and holistic way. The effects on Matapihi and Maungatapu seem more independent of each other. Perhaps they could be separately considered. But that is not the argument advanced here. The problems with the Court's reasoning were not caused by its approach to bundling.

Issue 2: Was the Court wrong in its findings about adverse effects?

[36] The Court was required to consider whether the proposal had certain adverse effects. This issue concerns whether the Court's findings regarding adverse effects constituted an error of law.

Relevant provisions

[37] The Court was required to interpret and apply two policies of the Bay of Plenty Regional Coastal Environment Plan (RCEP).[56]

[38] First, Iwi Management Policy IW 1(d) requires proposals "which may affect the relationship of Māori and their culture, traditions and taonga" to "recognise and provide for" "[a]reas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements,

[56] Relevant extracts from the RCEP and other planning instruments are provided in full in the Annex to this judgment.

iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumātua".

[39] Schedule 6 identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

> Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ng*ā *Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land. Maintenance of kaimoana and coastal water quality is particularly important.
>
> …
>
> Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.
>
> Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

[40] IW 2 of the RCEP applies to "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS [Regional Policy Statement]". Advice Note 2 to the Policy states that "[t]he Areas of Significant Cultural Value identified in Schedule 6 are likely to strongly meet one or more of the criteria listed in Appendix F set 4 to the RPS".

[41] Second, Natural Heritage Policy NH 4 applies to "adverse effects" "on the values and attributes of" "[ONFL] (as identified in Schedule 3)". Te Awanui (Tauranga Harbour) is identified as ONFL 3, including the harbour around Maungatapu and Matapihi. Schedule 3 states "[t]he key attributes which drive the requirement for classification of ONFL, and require protection, relate to the high natural science values associated with the margins and habitats; the high transient

values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns".

[42] Schedule 3 of the RCEP provides assessment criteria for "Māori values" as "Natural features and landscapes that are clearly special or widely known and influenced by their connection to the Māori values inherent in the place". "Māori values" of ONFL 3 are rated as "medium to high" and evaluated as follows:

> Ancient pā, mahinga kai, wāhi tapu, kāinga, taunga ika.
>
> Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.
>
> Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

[43] Policy NH 4A provides:

> When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedule … 3 to this Plan …:
>
> (a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape …
>
> (b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;
>
> (c) Recognise the potential for cumulative effects that are more than minor;
>
> (d) Have regard to any restoration and enhancement of the affected attributes and values, and
>
> (e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

[44] The Tauranga City Plan, which has the legal status of a District Plan, should also be interpreted and applied. It identifies Te Ariki Pā/Maungatapu as a significant Māori area (No M 41) of Ngāti Hē.[57] Its values are recorded as:

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[57] Environment Court, above n 1, at [26].

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu / Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa / Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

[45] The iwi management plans, included in the Annex to this judgment, and invoked in other planning instruments, relevantly provide:

(a) Policy 10 of Te Awanui Tauranga Harbour Iwi Management Plan 2008 specifically records that "[i]wi object to the development of power pylons in Te Awanui".

(b) Policy 15.1 and 15.2 of the Tauranga Moana Iwi Management Plan is to "[o]ppose further placement of power pylons on the bed of Te Awanui" and "[p]ylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge".

(c) The Ngāi Te Rangi Resource Management Plan states:

> Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.
>
> …
>
> Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

[46] Te Tāhuna o Rangataua (Rangataua Bay) is also listed in the New Zealand Heritage List/Rārangi Kōrero as a wāhi tapu historically associated with several iwi and hapū, including Ngāti Hē.[58]

Environment Court's decision on adverse effects

[47] In its lengthy discussion of cultural effects, the Environment Court outlined the consultation process, the iwi management plans, and the cultural impact assessments of the proposal.[59] It summarised the evidence of each witness from the Marae, Ngāi Te Rangi and Ngāi Tūkairangi.[60] In particular:

(a) The late Mr Taikato Taikato, chairperson of the Maungatapu Marae Trust and kaumātua, supported the removal of the A-Line from Te Ariki Park but did not support its replacement as an aerial line. This was because the cable would be directly in front of the marae and would "move the lines from our backs and put them back in front of our faces".[61] He had concerns about the noise from the lines. He believed Ngāti Hē could wait another year or two to get the right result. Mr Taikato agreed that he would want his mokopuna to enjoy the benefits that come with electricity, and that, should consent be refused, negotiations about replacing Poles 116 and 117 would have to start all over again.

(b) Dr Kihi Ngatai focused on the significance of Te Pā o Te Ariki, the pā site of Ngāti Hē. He told the Court his main purpose as a member of the Te Pā o Te Ariki Trust is to get the line shifted away from this significant site because it is wāhi tapu and should be left as it was when it became tapu; without powerlines.

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58 Heritage New Zealand *New Zealand Heritage List/Rārangi Kōrero – Report for a Wāhi Tapu Area: Te Tāhuna o Rangataua* at 5 and 22 (CBD 303.0663 and 303.0680).

59 Environment Court, above n 1, at [153]–[169].

60 At [170]–[193].

61 At [170]; and Statement of Evidence of Taikato Taikato on behalf of the Maungatapu Marae Trust, (25 March 2019) at 3 (CBD 202.0370).

(c) Ms Hinerongo Walker, a kuia and a Trustee of both the Maungatapu Marae and the kōhanga reo, and Ms Parengamihi Gardiner, a kuia who lives in the Kaumātua Flats on Te Ariki, gave evidence together. Ms Walker was concerned about the visual aesthetics and constant humming of the realignment and the impact on the marae and kōhanga reo. Ms Gardiner said they had been trying to have the lines removed, and confirmed she had submitted in favour of the proposal to remove the lines from Te Ariki Park. However, she said she did not want them removed if it meant an impact on the marae, the kōhanga reo or other people. When asked whether they supported the removal of Tower 118 from the middle of Te Awanui, they said that depended "on the removal of lines from here" and they looked it as a whole package.[62]

(d) Ms Matemoana McDonald, of Ngāti Hē and a councillor on the Bay of Plenty Regional Council, gave evidence on the changes to the cultural landscape of Ngāti Hē over her lifetime.[63] She said the Transpower proposal adds insult to injury in terms of what Ngāti Hē have lost in providing for the needs of the city, and said they do not want two new poles in close proximity to their sacred marae. She wanted to see alternative options considered and discussed to find a better solution to the proposal. She accepted that Transpower had put a lot of effort into trying to find a workable solution to the A-Line issue. She questioned why Pole 33C could not go to the other side of SH 29A, because although it could have effects on other parties on that side of the road, those houses would change hands over time, whereas Ngāti Hē would always be present at their marae. She confirmed that "Te Awanui and Te Tahuna has much significance as what the marae does".[64]

(e) Ms Ngawaiti Hera Ririnui, chairperson of Te Kōhanga Reo o Opopoti, said the potential effect of Pole 33C on tamariki that live on the marae

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62 NOE 260/3.
63 Statement of Evidence of Matemoana McDonald (8 April 2019) (CBD 202.0378).
64 NOE 276/6–9.

or attend the kōhanga reo was seen as negative, as there is no research that proves or disproves whether there is an impact on health from such powerlines.[65] She gave evidence of tamariki having full access to the area around the Marae and "tamariki out on the beach at Rangataua being taught by our kaimahi about what it means to be part of our community and be a member of Ngāti Hē".[66] She saw the pole as a "monstrous dark structure that's going to be hanging over our marae on a daily basis, lines that are going to be slung across our marae swinging in the wind for our tamariki to see".[67] She said generations have tried to fight the changes in the surrounding environment, but have never won. She agreed removal of the poles and wires from Te Ariki Park would be a benefit, but not if the poles were relocated to beside the kōhanga reo.

(f) Ms Yvonne Lesley Te Wakata Kingi, secretary of the Maungatapu Marae committee for 25 years, said she felt they were having to continue a battle to maintain the mana on their land. She talked about their use of the beach.[68] She stated they are being treated in the way Māori were when new people first began to settle there. She described wanting the marae to be a happy place, not only for Māori but for the visitors who come there.

(g) Mr Mita Michael Ririnui, a kaumātua, the chair of the Ngāti Hē Hapū Trust, and the Ngāti Hē representative on the Ngāi Te Rangi Settlement Trust and Te Rūnanga O Ngāi Te Rangi Iwi Trust, clarified that Ngāti Hē Hapū Trust supported the removal of the existing line from Te Ariki Park. However, the Trust had not given any support to the proposed structures including Pole 33C. He said the proposed

65 Environment Court, above n 1, at [179].
66 NOE 281/12–25.
67 NOE 281/27–30.
68 NOE 286/4–15.

structures are considered "a blight on the [Ngāti Hē] estate" and marae.[69]

(h) Mr Paul Joseph Stanley, Chief Executive of Te Runanga o Ngāi Te Rangi Iwi Trust, submitted "[i]t will be much better … if those lines were put across with the bridge or underneath the harbour".[70]

[48] In relation to cultural effects, the Court:

(a) said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui";[71]

(b) identified "the key cultural issues" to be "the damage to the mana of Maungatapu Marae and concern about the environment, particularly at the kōhanga reo there";[72]

(c) traversed the process of consultation in preparing the application;[73]

(d) summarised the submissions on the notified consent application, focussing on Ngāti Hē's position, including in this (implicitly critical) paragraph:[74]

> [205] The evidence for Ngāti Hē did not make any mention of the adverse effects on Ngāti Tūkairangi of not allowing the realignment. It did not address in detail the cultural matters affected by the existing line crossing the harbour, or the effects on the harbour and sea bed of the removal of Tower 118. The effects on cultural values relating to the moana generally did not appear to be front of mind. The evidence did not mention any cultural effects of the alternatives that Ngāti Hē preferred in terms of effects on the seabed of, for example, excavations for new piles or a trench to take the line below

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69 NOE 291/5–6.
70 NOE 265/19–20.
71 Environment Court, above n 1, at [194].
72 At [195].
73 At [196]–[197].
74 At [198]–[206].

> the harbour floor. The evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view.

(e) found that Transpower had carried out a full and detailed consultation, and that Ngāti Hē changed its mind, as it was entitled to do;[75]

(f) noted Ngāti Hē's frustration and anger about the original construction of the A-Line and accepted the cultural effects of that had adversely affected them for the last half-century;[76]

(g) found the removal of the A-Line and poles from Ngāti Hē's land at Te Ariki Park and of Tower 118 in Rangataua Bay would have positive effects;[77]

(h) "deeply regretted" the "adverse effects from their point of view" of Pole 33C, but found there was no opportunity to move the pole without adversely affecting other persons not before the Court;[78]

(i) found Ngāti Hē's preferred alternatives of a strengthened or new bridge or under-sea-bed crossing would reduce the effects on the marae and kōhanga reo but "may also, from our understanding of the evidence" have greater effects within the [Coastal Marine Area] and on the ONFL than those that will result from the aerial transmission line";[79]

(j) observed that Ngāi Tūkairangi consider the effects of the proposal on their land would be highly beneficial;[80]

(k) observed there is no certainty that a proposal Ngāti Hē can support will come forward or achieve their desired outcomes;[81]

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75 At [207]–[208].
76 At [209].
77 At [211].
78 At [212].
79 At [213].
80 At [214].
81 At [214]–[215].

(l) suggested changes to activities or to the environment may result in the cumulative effect being less than before and doubted the only proper starting point for assessing cumulative effects was prior to any development;[82]

(m) held that the question was whether Ngāti Hē is better or worse off in terms of the assessment of cumulative effects, deducting the removal of adverse effects from the creation of adverse effects, and noted Ngāti Hē "are clear in their view that they are worse off, not least because they see the proposed change as continuing to subject them to adverse effects";[83]

(n) considered no other group would be worse off by the proposal and some, "particularly Ngāi Tūkairangi and the residents along Maungatapu Road" would be better off and refusing consent would leave them worse off;[84]

(o) noted Transpower has said it will walk away from the realignment project if the appeal is granted and then strengthen or replace its infrastructure on Te Ariki Park, which does not require further consent;[85] and

(p) concluded:[86]

> [220] Ultimately, we have had to assess the realistic alternatives and the likely effects of those through the cultural lens as best we can, taking into consideration the interests of both hapū. **From the above analysis we do not find the proposed realignment to have cumulative adverse cultural effects on Ngāti Hē.** Existing adverse effects at Te Ariki Park will be removed and new adverse effects will occur near the marae and the kōhanga reo. We are conscious that the benefits to Ngāi Tūkairangi will be considerable. We conclude that the benefits of the realignment to Ngāti Hē, coupled with the benefits to Ngāi Tūkairangi, are greater than the adverse

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82 At [216].
83 At [217].
84 At [218].
85 At [219].
86 Emphasis added.

> effects of Pole 33C's placement near the marae and the kōhanga reo. For Ngāti Hē, those benefits will be felt as soon as the structures and line are removed from Te Ariki Park, and there is some urgency to that. Their removal will immediately facilitate change. The opportunity to change the configuration of the A-Line in relation to a bridge or sea-bed location may arise in future but Ngāti Hē cannot rely on that.

[49] In relation to the effects on the ONFL, the Environment Court compared and assessed the evidence of expert witnesses, in particular that of Ms Ryder for the Councils and Mr Brown for TEPS.[87] The Court was "unable to confirm Mr Brown's opinions in relation to what he considered [were] the significant effects on Māori values in ONFL 3 on the basis of the evidence provided by the cultural witnesses".[88]

[50] The Court further concluded:

> [246] We have no doubt about the importance of Rangataua Bay to the marae and to Ngāti Hē hapū. But we must draw the argument back to the assessment of the effects on ONFL 3 and its values, attributes and associations. The activities that will take place there are the removal of Tower 118 and the addition of a powerline above the SH 29A bridge. We heard no evidence about the effect of the removal of Tower 118 on Maori Values in the ONFL 3, except, as Ms Ryder pointed out, that there is a strong preference of iwi for no power pylons to be present in Te Awanui – and we cannot accept that taking this structure out of the centre of Rangataua Bay, where it stands alone, will not have benefits to Te Awanui in this area. Similarly, the removal of the powerlines to the SH 29A corridor consolidates the infrastructure into one place rather than having the line strung across the otherwise open Rangataua Bay, again surely a cultural benefit in relation to its current intrusion into the open airspace above the bay.
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> [247] The cultural witnesses expounded more on the effects on the marae of Pole 33C (and to a lesser extent pole 33D) with concern, as noted above, for the mana of the marae and the health of the tamariki who attend the kōhanga reo directly adjacent to it than they did on the effects of the activities that will take place within ONFL 3, the latter being the subject of this evaluation.
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> [248] During the removal of Tower 118 the works will be visible albeit short-lived and the realignment of the powerline to a new position above and parallel with the bridge will similarly be visible and could be considered by some viewers to be fleetingly adverse. The works may be visible from the marae and vicinity. We consider those effects both short term and long term to be *de minimis*. On the other hand, there will benefits to the ONFL from the removal of Tower 118 and the powerline.

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87 Summarised at [243], Table 3.
88 At [244].

Submissions on adverse effects

[51] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in light of the evidence before it, because the true and only reasonable conclusion is that there would be:

(i) at least some adverse effects in terms of ASCV 4 or otherwise on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment, contrary to Policy IW 2; and/or

(ii) significant, or at least some, adverse effects on Ngāti Hē's association with the cultural values of ONFL 3, contrary to Policy NH 4(b).

(b) It is for Ngāti Hē to identify the cultural impacts on them and they have done so. All the Ngāti Hē witnesses promoted the same overall outcome and gave a consistent message. They did not support the proposal because the benefits of the removal of the A-Line did not outweigh the adverse effects. Not one witness said the proposal should proceed if the cost was the poles being in front of the Marae. The evidence focussed on the visual dominance of the poles but kaumātua and kuia also raised wider issues of the connectedness of the Marae and the reserve with Rangataua Bay. The visual effects can clearly affect the aesthetic and experience of the ONFL. The moderate to high rating of Māori values in ONFL 3 answers the submission that Māori values are not a key component of the ONFL at the Bay.

(c) The Environment Court navigated around all that, finding the effects were de minimis. It was focussed on the effects of aerial lines crossing the harbour on the ONFL, not the effects of the large structures on either side that will impact on Ngāti Hē's cultural association with the harbour. If the Court had applied the right framework and focussed on

the poles as well as the lines, it could not have found the effects to be *de minimis*.

(d) It cannot be right that any adverse effect needs to be assessed against the Tauranga harbour as a whole, because that would require a proposal of a massive scale. In the context of this proposal, the appropriate scale must be Rangataua Bay. If the project proceeds and Poles 33C and 33D are constructed, the effects on Ngāti Hē and the Marae will continue for another two to three generations. They do not want an additional visual intrusion into their connectedness with Rangataua Bay from their marae or beach. If that is not available now, they are prepared to wait.

[52] Mr Beatson, for Transpower, submits:

(a) It could not be further from the truth to suggest the Court found there were no effects on cultural values at all or it imposed its own assessment of the cultural effects. The Court spent some 20 pages summarising the consultation and evidence on cultural effects. It weighed the evidence before concluding there was an overall positive cultural effect. The benefits of the realignment to Ngāti Hē and Ngāi Tūkairangi would be greater than the adverse effects of Pole 33C on the Marae and kōhanga reo. Its approach is consistent with *SKP Incorporated* and *Trans-Tasman Resources*.[89]

(b) The Court focussed its enquiry on the effects of ONFL. It noted the main adverse cultural effects related to visual effects on the Marae and kōhanga reo enjoyment of the ONFL, rather than on the values and attributes of ONFL 3. The description of the values and attributes is a guide to the key focus of the ONFL. Adverse effects on Māori values would not necessarily lead to the conclusion there is an adverse effect on the ONFL as a whole, in terms of the description. The Court found

[89] *SKP Incorporated v Auckland Council* [2018] NZEnvC 81; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

the conclusion that the effects on the Māori values would be significant was not supported by the evidence of the cultural witnesses.[90]

(c) The Environment Court's findings were well supported by the landscape and cultural evidence. As the primary finder of fact it should be given latitude to do so. The appellant has not cleared the high bar of an "only true and reasonable conclusion". An assessment of the effects should take an overall approach, allowing the significant positive effects of the relocation to be taken into account. The relocation is more desirable than retaining the status quo.

[53] Ms Hill, for the Councils, submits:

(a) The weight given to particular considerations by the Environment Court is not able to be revisited as a question of law. It should be given some latitude in reaching findings of fact within its area of expertise, with which the High Court should not readily intervene.

(b) The Environment Court thoroughly set out and carefully evaluated the cultural evidence. It observed the evidence given by the cultural witnesses focussed on the visual effects of the pole in front of their marae rather than the effects on the cultural values of ONFL 3. The values and attributes of the ONFL include the national grid infrastructure so that is why the effect of the proposal is *de minimis*.

(c) Policy IW 2 is not a directive policy. The Court clearly explained its approach to the cumulative effects on Ngāti Hē arising from historical matters. The effects on Ngāti Hē are only part of the wider cultural equation. Cultural values are often intangible and it is difficult to avoid something that cannot be seen.

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90 Environment Court, above n 1, at [228].

Did the Court err in its findings about adverse effects?

[54] It is clear from the evidence before the Court, as summarised above, that Ngāti Hē considers the re-alignment proposal would have an overall adverse effect compared with the status quo. In particular, they are concerned about the implications of the location of Pole 33C on their use and enjoyment of their marae and kōhanga reo, and the effects on the ONFL. The Environment Court summarised the submissions this way:

> [198] Submissions received on the notified consent application in 2018 indicated opposition to the proposal, specifically around Pole 33C, and the effects on the ONFL. Neither had been raised previously. The effects of Pole 33C were expressed in terms of cultural values, effects of noise and electro-magnetic radiation, visual effects of the pole and line, effects on kōhanga reo children, effects on the mana of the marae, ongoing cumulative effects on the Hapū of developments being imposed on their land over the last 50 or so years, which they claimed was illegal (that matter is not being pursued through this hearing), and the need for greater attention to alternatives they preferred which were bridge and sea-bed options, including a new bridge (and cycleway).

[55] That view is understandable given the history and cultural values of Ngāti Hē that are recognised in ASCV 4 and ONFL 3 of the RCEP and substantiated by the evidence of kuia and kaumātua of Ngāti Hē. It is consistent with the identification in the Tauranga City Plan of Te Ariki Pā and Maungatapu as a significant area for Ngāti Hē with special values and significance in terms of mauri, wāhi tapu, korero tuturu and whakaaronui o te Wa. It is consistent with the significance of Tauranga Moana to Ngāi Te Rangi as a physical and spiritual resource, recognised by the Crown in the Deed of Settlement. It is consistent with the objections in the Iwi Management Plans to power pylons and the emphasis of Ngāi Te Rangi's Resource Management Plan on the importance of marae. It is consistent with the Marae Sightlines Report, which was in evidence before the Environment Court and referred to by several witnesses. That report was prepared for SmartGrowth and the Combined Tāngata Whenua Forum in 2003 to review the visual setting, values and landscape context of 36 marae in the Western Bay of Plenty.[91] Its conclusions stated:[92]

> Protecting visual access and linkages to the ancestral landscape is critical to the personal and cultural wellbeing of the tāngata whenua of the rohe.

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91 Kaahuia Policy Resource Planning & Management *Marae Sightlines Report* (December 2003) (CBD 301.0143).

92 At 34–35 (CBD 301.0163–301.0164).

> Discrete taonga identifiable as landscape markers or pou whenua cue the oral traditions, poetry and waiata, traces events leaders and traditions, catalyses and facilitates the education of generation to generation and serves as personal mentor.
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> …
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> The sense of belonging and turangawaewae is dependent on the quality of the visual of the surrounding landscape. The challenge then is to promulgate a landscape management principle dedicated to tāngata whenua interest to protect the mnemonic – iconic values associated with their rohe and turangawaewae. Particular regard for their relationship with the landscape as a component of landscape quality and diversity is required.

[56] In its decision, the Court explicitly noted that Ngāti Hē "were opposed to the aerial transmission line and wanted a bridge or sea bed harbour crossing".[93] It recorded that "[t]hey are clear in their view that they [will be] worse off, not least because they see the proposed change as continuing to subject them to adverse effects".[94] The Court recorded that "the evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view".[95] In its conclusion, the Court said:

> [264] The proposed relocation of the A-Line to an alignment which follows SH 29A and is located above the Maungatapu Bridge does not result in wholly positive effects. While it enables the removal of the existing line and ensures security of electricity supply, its location is not ideal. In particular, placing the line above the Maungatapu Bridge, with associated tall poles, creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A.

[57] The depth of Ngāti Hē's opposition to the proposal is reflected in their preference for the status quo over the proposal. In its Deed of Settlement with Ngāi Te Rangi, the Crown acknowledged the infrastructure networks on the Maungatapu peninsula "have had enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi" while making a "significant contribution . . . to the wealth and infrastructure of Tauranga".[96] The Court said:

> [209] The cultural evidence described the frustration and anger held by the hapū over many years as a result of the original construction of the A-Line across Te Ariki Pā and the earthworks for roading and bridge construction that affected their marae. We acknowledge the information and opinions provided about the history of development activities in the Ngāti Hē rohe and accept

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93 Environment Court, above n 1, at [200].
94 At [217].
95 At [205].
96 Deed of Settlement, above n 2, cls 3.15.5 and 3.16.1.

that these cultural effects have adversely affected the hapū for the last half century.

[58] Yet Ngāti Hē preferred that status quo to the proposal.

[59] The Environment Court's conclusion in relation to the cultural effects of the proposal, relevant to IW 2, or the effects on the values of the ONFL relevant to NH 4, did not reflect the evidence before it:

(a) Having set out in 67 paragraphs the extent and depth of Ngāti Hē's firm opposition to the proposal, in one paragraph the Court effectively found that the adverse cultural effects would be outweighed by the beneficial effects.[97] That involved the Court saying explicitly that it did not find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē,[98] even though it had found Ngāti Hē clearly considers it would.[99]

(b) In relation to the ONFL, the Court said it had no doubt about the importance of Rangataua Bay to the marae and Ngāti Hē.[100] That is clearly demonstrated by the evidence before it. But the Court concluded the long-term visual effects of the works from the marae and vicinity to be "de minimis".[101]

[60] The Supreme Court's judgment in *Bryson v Three Foot Six Ltd* is the most authoritative current exploration of the parameters of questions of law.[102] In summary:

(a) Misinterpretation of a statutory provision obviously constitutes an error of law.[103]

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97 Environment Court, above n 1, at [220].
98 At [220].
99 At [217].
100 At [246].
101 At [248].
102 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 72. Applied in an RMA context in *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].
103 At [24].

(b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. "Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable".[104]

(c) But "[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law, because proper application of the law requires a different answer".[105] The three rare circumstances in which that "very high hurdle"[106] would be cleared are where "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination".[107]

[61] I consider the Court's conclusions about the evidence were insupportable in terms of *Bryson v Three Foot Six Ltd*. The Court accurately summarised Ngāti Hē's clear opposition to the proposal on the basis of its significant adverse effects on an area of cultural significance and on the Māori values on the ONFL. But it refused to find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē and it found that the long-term visual effects from the marae and vicinity would be "de minimis".

[62] The evidence of Ngāti Hē, as summarised above, is contradictory of those findings. The evidence is that, in Ngāti Hē's view, Pole 33C will have a significant and adverse impact on their use and enjoyment of the Marae and on their cultural relationship with Te Awanui, even taking into account the removal of the existing

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104 At [25].

105 At [26]. The sentence quoted in *Bryson* contained a semi-colon rather than the word "because", which was inserted in the application of the principle in the subsequent Supreme Court judgment in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52].

106 *Bryson v Three Foot Six Ltd*, above n 102, at [27].

107 *Edwards v Bairstow* [1956] AC 14 (HL) at 36. These can also be seen as circumstances of unreasonableness: *Hu v Immigration Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28] and footnote 27.

adverse effects. For the purposes of IW 2, this constitutes a significant adverse effect on Rangataua Bay, an "area of spiritual, historical or cultural significance to tāngata whenua" identified in ASCV 4. For the purposes of NH 4, taking into account the considerations in NH 4A, it constitutes a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3. I consider those are the true and only reasonable conclusions. Even though cultural effects may be intangible, they are no less real for those concerned, as the evidence demonstrates.

[63] The Court's approach is not saved by a distinction between the "values and attributes" of the ONFL and the ONFL itself. The Māori values of ONFL 3 are rated as medium to high and clearly encompass connections to ancestral and cultural heritage sites. The evidence is that Pole 33C would interfere with those connections with Rangataua Bay, including on the beach.

[64] As Mr Gardner-Hopkins submits, an effect of a proposal at Rangataua Bay does not have to be assessed for its impact on the whole Tauranga Harbour, just Rangataua Bay. And neither is the Court's approach saved by it being an overall assessment of cultural effects, including the effects on Ngāi Tukairangi. The Court clearly rested its conclusions on its findings that the effects on Ngāti Hē alone would be, on balance, positive for Ngāti Hē. It relied on evidence from an expert landscape architect for the councils, Ms Ryder, to that effect.[108] But that was not Ngāti Hē's view. As the Court recorded Mr Gardner-Hopkins submitted:[109]

> While the evidence for the marae trustees was not articulated in terms of cultural values of the ONFL it provides significant support for the importance of Rangataua Bay to the Marae and Ngāti Hē Hapū (and other mana whenua). It provides real world support for and elaboration on the "cultural values" as expressed in the RCEP for ONFL 3 but with greater specificity as to location and content. The evidence was genuine and heartfelt, and should not need a "cultural expert" to have to put it into "planning speak".

[65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant

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108 Environment Court, above n 1, at [228]–[229].
109 At [245].

and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

[66] Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Incorporated v Auckland Council*, approved by the High Court in 2018 that:[110]

> … persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

[67] Deciding otherwise is also inconsistent with the requirement of Policy IW 5 of the RCEP, and similar statements in Policies IW 2B(b) and IW 3B(e) of the RPS. Contrary to the Court's finding, the RCEP is specific enough about the cultural values and attributes of Rangataua Bay and Te Awanui. Policy IW 5 states:[111]

> Decision makers shall recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

[68] Mr Taikato and Mr Ririnui are kaumātua. Ms Walker and Ms Gardiner are kuia. The evidence of Ngāti Hē is clear.

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110 *SKP Incorporated v Auckland Council*, above n 89, at [157]. On appeal, Gault J considered the general statement of position in support of the proposal by the party taken to represent mana whenua "resolved any cultural effects issue". (He accepted that finer grained evidence would be required in an application for re-hearing where two entities were claiming mana whenua with competing evidence on cultural effects): *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879 at [57].

111 Bay of Plenty Regional Council *Proposed Bay of Plenty Regional Coastal Environment Plan (RCEP)* at 38 (CBD 302.0302).

[69] I do not readily reach a different view of the facts to that of the Environment Court. But I consider proper application of the law requires a different answer from that reached by the Court regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of the ONFL. Accordingly, the Court's findings about those matters constitute an error of law. Whether that matters to the outcome of the appeal depends on how material the error was, which I consider in the context of the remaining issues.

Issue 3: Did the Court err in its approach to pt 2 of the RMA?

[70] This ground of appeal is whether the Court erred in not applying pt 2 of the RMA. It is integrally related to the submissions of counsel about whether the Court should have, and did, apply an "overall judgment" approach.

Part 2 of the RMA and the former overall judgment approach

[71] Part 2 of the RMA provides the overall sustainable management purpose and principles of the Act. Section 5(1) in pt 2 states that the purpose of the Act "is to promote the sustainable management of natural and physical resources". Section 5(2) explains that "sustainable management" means "managing the use, development, and protection of natural and physical resources in a way … which enables people and communities to provide for their "social, economic, and cultural well-being" while:

> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[72] The Act then provides for a cascading hierarchy of legal instruments in "a three-tiered management system" which give effect to pt 2.[112] A document in a tier must give effect to, or not be inconsistent with, those in the tiers above. The highest tier is national policy statements, which set out objectives and identify policies to

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[112] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*EDS v King Salmon*] at [10] and [30].

achieve them. The next tier are regional policy instruments, which identify objectives, policies and methods of achieving them including rules, that are increasingly detailed as to content and location.

[73] The tiers of planning instruments are the legal instruments which "flesh out" how the purpose and principles in pt 2 apply in a particular case in increasing detail and specificity.[113] The Supreme Court explained in *EDS v King Salmon* the importance of attending to the wording of the planning instruments, as with any law:

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, 'avoid' is a stronger direction than 'take account of'. That said however, we accept that there may be instances where particular policies in the NZCPS 'pull in different directions'. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
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> [130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.
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> [131] A danger of the 'overall judgment' approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them…

[74] So, although pt 2 is relevant to decision-making, because it sets out the RMA's overall purpose and principles, the basis for decision-making is the hierarchy of planning documents.[114] The Supreme Court noted in *EDS v King Salmon* that pt 2 of the RMA may be relevant if a planning document, there the NZCPS, does not "cover the field" or to assist in a purposive interpretation if there is uncertainty as to the meaning of particular policies in the NZCPS.[115]

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113 At [151].
114 At [151].
115 At [88].

[75] There has been some debate as to the implications for this approach of following the subsequent Court of Appeal judgment in *RJ Davidson Family Trust v Marlborough District Council*.[116] There, the Court of Appeal accepted that, in considering a resource consent application compared with a plan change proposal, a decision-maker must have regard to the provisions of pt 2 when appropriate.[117] The Court said that applications for resource consent "cannot be assumed" to "reflect the outcomes envisaged by pt 2" and "the planning documents may not furnish a clear answer to whether the consent should be granted or declined".[118] It did not consider that the Supreme Court's rejection of the "overall judgment" approach prohibited consideration of pt 2 in the context of resource consent applications.[119]

[76] There are obiter comments by the Court of Appeal in *RJ Davidson Family Trust* that appear to suggest the Supreme Court's proscription of the "overall judgment" approach in *EDS v King Salmon* might not apply outside a context that engages the NZCPS.[120] However, this case does engage the NZCPS. It is clear that, where the NZCPS is engaged, any consent application will necessarily be assessed applying the provisions of the NZCPS and other relevant plans, and also pt 2 if it is otherwise unclear whether the consent should be granted or not.[121] Part 2 cannot be used "for the purpose of subverting a clearly relevant restriction in the NZCPS".[122] Where there is "doubt" as to the outcome of the consent application on the basis of the NZCPS, recourse to pt 2 is necessary.[123] Recourse to pt 2 may or may not assist, depending on the provisions of the relevant plan.[124]

[77] In any case, I read the Court of Appeal's comments as being focussed on permitting reference to pt 2 of the RMA. I do not read the Court of Appeal to be endorsing the previous approach of courts simply listing relevant considerations, including provisions of planning documents, and stating a conclusion under the rubric

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116 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
117 At [47].
118 At [51].
119 At [66].
120 At [67]–[69] and [71].
121 At [71] and [73].
122 At [71].
123 At [75].
124 At [75].

of an "overall judgment" in relation to consent applications that do not engage the NZCPS. The Supreme Court was clear about the obvious defects of that approach.[125] It is inconsistent with the text and purpose of the RMA, inconsistent with the need to give meaning to the text of the plans as the legal instruments made under the RMA, and inconsistent with the rule of law. The Court of Appeal's statement, that in all cases not involving the NZCPS "the relevant plan provisions should be considered and brought to bear on the application" makes it clear it does not advocate for that.[126] Rather, the Court considered there must be "a fair appraisal of the objectives and policies [of a plan] read as a whole".[127] While the Court of Appeal expanded on the use of pt 2 of the RMA, I do not consider its judgment contradicted the reasoning of the Supreme Court in warning about the defects of the overall judgment approach in relation to particular consent applications.

[78] This was illustrated in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*.[128] That case involved a challenge to the formulation of natural heritage policies for the Regional Coastal Environment Plan (RCEP) on the basis of inconsistency with the NZCPS. Wylie J held:

(a) The Environment Court was not entitled to focus on the unchallenged provisions of the planning document at issue, or the one immediately above it and ignore or gloss over higher order planning documents.[129]

(b) The Court erred in resolving tensions in RCEP policies primarily by reference to the RCEP's objectives, with only limited reference to the RPS and NZCPS.[130] The Court "failed to make 'a thoroughgoing attempt to find a way to reconcile' the provisions it considered to be in tension".[131]

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125 *EDS v King Salmon*, above n 112, at [131]–[140].
126 *RJ Davidson Family Trust v Marlborough District Council,* above n 116, at [73].
127 At [73], citing *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
128 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1.
129 At [84].
130 At [89].
131 At [98], citing *EDS v King Salmon*, above n 112, at [131].

(c) The "proportionate" approach adopted by the Environment Court was an overall judgment approach, "albeit by a different name", of the sort that had been "roundly rejected" by the majority of the Supreme Court in *EDS v King Salmon*.[132] It was not available to the Court to suggest that the benefits and costs of regionally significant infrastructure that could have adverse effects on areas of Indigenous Biological Diversity, which are areas with outstanding natural character in the coastal environment, should be assessed on a case-by-case basis having regard to all relevant factors.[133]

(d) Accordingly, the Environment Court erred in:

(i) approving policies and a rule that did not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a) of the NZCPS;[134]

(ii) by failing to consider the directive nature of Policies CB 2B and CE 6B of the RPS;[135] and

(iii) by failing to recognise that the objectives in the RCEP recognise that "provision needs to be made for regionally significant infrastructure, but not in all locations in the coastal marine area".[136]

[79] The Supreme Court's decision in *EDS v King Salmon*, and the Court of Appeal's decision in *RJ Davidson*, requires decision-makers to focus on the text and purpose of the legal instruments made under the RMA. A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed.[137] As with any legal instrument, the text of the

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132 At [103]
133 At [106].
134 At [123].
135 At [129].
136 At [135].
137 At [128]–[129].

instrument may dictate the result. Where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to pt 2 is required.[138] The same approach, of carefully interpreting the meaning and text of the relevant policies, is required in applying them to consent applications, for the same reasons. That is consistent with the standard purposive interpretation of enactments, as summarised by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*:[139]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The Environment Court's treatment of pt 2

[80] Here, the Environment Court held, with reference to *RJ Davidson*, that it is "necessary to have regard to Part 2, when it is appropriate to do so", but reference to pt 2 is "unlikely to add anything" where it is clear a plan has been competently prepared having regard to pt 2.[140] "[A]bsent such assurance, or if in doubt, it will be appropriate and necessary to do so".[141] The Court considered submissions about whether reference to pt 2 was required here, in particular regarding the relationship between the NPSET and NZCPS, or whether those instruments were clear and had been reconciled in the formulation of the RCEP.[142] The Court considered evidence of expert planning witnesses about whether to refer to pt 2,[143] which is irrelevant and an error given that the necessity or otherwise of reference to pt 2 is an issue of law. The Court said:

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138 At [75].

139 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

140 Environment Court, above n 1, at [59].

141 At [59].

142 At [60]–[67], citing *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 128, and related Environment Court judgments.

143 At [66].

> [68] We agree that the RCEP is comprehensive, has been tested through hearing and appeal processes and provides a clear policy framework and consenting pathway for these applications. Accordingly, our evaluation of the statutory provisions focusses on the relevant policies in the RCEP. We also address the higher order policy documents and the District Plan.

[81] The Court acknowledged the need to give effect to national policy statements according to their particular terms, rather than on the basis of a broad overall judgment.[144]

[82] In the final two paragraphs of its concluding reasoning, after rejecting the argument that the NZCPS required consent to be declined, the Court said:

> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
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> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on pt 2 and the overall judgment approach

[83] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Court erred by failing to assess the proposal against pt 2, including ss 6(3), 7(a) and 8, directly. The nature of the issues, the meaning of the policies and the relationship between the NZCPS and NPSET made it "appropriate and necessary" for it to do so. He submits the Court erred in applying an overall judgment of the proposal against s 5 selectively, without analysis, and without consideration of the balance of pt 2. *RJ Davidson* does

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144 At [92].

not mean that reference to pt 2 only occurs if there is a problem. Rather, pt 2 and superior planning instruments must be taken into account in a difficult case, as it was here. He submits that pt 2 should be used in a purposive interpretation of the terms in the RCEP.

[84] Mr Beatson, for Transpower, submits:

(a) *EDS v King Salmon* rejected the previous "overall broad judgment approach". *RJ Davidson* confirms recourse to pt 2 is only necessary where there is a question as to whether a plan has been competently prepared having regard to pt 2. The Court was correct that it is up to a decision-maker to give competing policies such weight as it thinks necessary in the context.

(b) The Court found there is no need for an overall evaluation under pt 2 at the consenting stage where plans have been prepared having regard to pt 2. Here, the Court found the RCEP is comprehensive and provides a clear policy and consenting pathway for the project, so it focussed on the RCEP policies. The relevance to a proposal of higher order documents, which have been reconciled and prepared in accordance with pt 2, does not justify concluding it is unclear as to whether consent should have been granted. No defect within the RCEP has been identified that makes recourse to pt 2 necessary. The Court's concluding paragraphs were not attempting to undertake a pt 2 analysis.

(c) Regardless of its decision that recourse to pt 2 was not necessary, the Court carefully set out the cultural evidence provided by witnesses, the consultation undertaken by Transpower, the potential cumulative cultural effects and how the cultural effects on both hapū would be impacted by the proposal. That is the same analysis that would be undertaken under ss 6(e), 7(a) and 8. Addressing those sections directly would have added nothing. Sections 7(b), 7(c) and 7(f) of pt 2 of the RMA would also be relevant. The conclusions reached would inevitably have been the same.

[85] Ms Hill, for the Councils, submits the Environment Court exercised a discretionary judgment not to consider the proposal against pt 2.[145] As the Court of Appeal held in *RJ Davidson*, assessment against pt 2 is only necessary where a plan has not been competently prepared in accordance with pt 2. The Court correctly observed that, in applying the policies, no specific outcomes are particularised and no outcome that would wholly avoid adverse effects was possible.[146] Its consideration of s 5 did not purport to be an assessment against pt 2.

Did the Court err in its approach to pt 2?

[86] I outlined above the proper approach to pt 2 of the RMA and the legal defects of the overall judgment approach. Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust,* a Court will refer to pt 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to pt 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions attempt to confine reference to pt 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

[87] Mr Beatson is correct that the Court here considered that the RCEP is comprehensive and provides a clear policy framework and consenting pathway for the proposal.[147] The Court also correctly acknowledged the need to give effect to the National Policy Statement according to their particular terms "rather than on the basis of a broad overall judgment".[148] But the Court did not provide the careful analysis required of how the relevant planning instruments should be interpreted and applied to the proposal. It stated that the planning instruments contain "relevant objectives and policies to which we must have regard".[149] That generic characterisation recalls the overall judgment approach that the Supreme Court ruled out in *EDS v King Salmon*. The planning instruments are more than "relevant" and the Court must do more than "have regard" to them.

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145 Environment Court, above n 1, at [59]–[68].
146 At [269].
147 At [68].
148 At [92].
149 At [269].

[88] In the last two paragraphs of its reasoning, the Court characterised the regional and district plans as generally treating as desirable both the protection of ONFL and provision of network infrastructure. It characterised Policy 6 of the NPSET as guiding it to reduce existing adverse effects of transmission. But the Court said the NPSET and NZCPS do not provide guidance as to how potential conflict between them should be resolved. So it fell back on reaching "a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA".[150] In only two further sentences, the Court made a "judgment" that the proposal was "more appropriate overall" than the status quo.[151] This is effectively, and almost explicitly, the application of an overall judgment approach. As such, it was an error of law.

[89] Instead, what the Court was required to do was to carefully interpret the meaning of the planning instruments it had identified, the RCEP in particular, and apply them to the proposal. If the text of the RCEP was not sufficient to do that, as the Court considered they were not, it was required to have recourse to the higher-level instruments such as the NZCPS and NPSET, and to pt 2 of the Act. The Court did consider the NZCPS and NPSET and found them insufficient. Yet all parties agreed the Court did not have recourse to pt 2.

[90] The Court's approach to pt 2, and its use of an overall judgment approach, was a legal error. Whether that makes sufficient difference to the outcome to sustain the appeal depends on the outcome of that exercise, which I examine next.

Issue 4: Did the Court err in interpreting and applying the planning instruments?

[91] The submissions on this ground of appeal centred on whether one national policy statement, the NZCPS, is inconsistent or takes priority over another, the NPSET. Lying behind that were submissions as to whether the NZCPS or the RCEP contains directive provisions determining the result of the application.

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150 At [270].
151 At [270].

The RMA and bottom lines

[92] The Supreme Court in *EDS v King Salmon* clarified that a policy of preventing adverse effects of development on particular areas is consistent with the sustainable management purpose of the RMA.[152] It held that "avoid", in s 5 and the NZCPS, is a strong word that has its ordinary meaning of "not allowing" or "preventing the occurrence of".[153] The use in s 5 of "remedying and mitigating" indicates that developments with adverse effects could be permitted if they were mitigated or remedied, assuming they were not avoided.[154]

[93] Specific decisions depend on the application of the hierarchy of planning instruments. Accordingly, the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application.[155] This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgment".[156]

[94] The RMA also envisages that there may be cultural bottom lines. As Whata J stated recently in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, "… there is comprehensive provision within the RMA for Māori and iwi interests, both procedurally and substantively".[157] The cascading hierarchy of the RMA, and the legal instruments under it, accord an important place to the cultural values of Māori. That is reflected in pt 2 of the Act:

(a) The core purpose of the Act, stated in s 5, is to promote sustainable management by managing the "use, development and protection of resources in a way which enables people and communities" to provide for their "social, economic, and cultural well-being" at the same time as sustaining the potential of resources to meet the reasonably foreseeable needs of future generations.

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152 *EDS v King Salmon*, above n 112, at [24](d).
153 At [24](b), [96] and [126].
154 At [24](b).
155 At [47].
156 At [39]–[41].
157 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [29].

(b) The requirements on all persons exercising functions and powers under the Act in relation to "managing the use, development, and protection of natural and physical resources":

(i) to "recognise and provide for" "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as one matter of national importance in s 6(e);

(ii) to "have particular regard to" kaitiakitanga in s 7(a); and

(iii) to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)" in s 8.

Māori values in the RMA recognised in case law

[95] The implications of those pt 2 provisions have been recognised in case law. In 2000, in his last sitting in the Judicial Committee of the Privy Council in *McGuire v Hastings District Council*, Lord Cooke described pt 2 of the RMA as "strong directions, to be borne in mind at every stage of the planning process".[158] They mean "that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads".[159] In that case, which involved a challenge to the designation of a road through Māori land, the Privy Council held "if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route".[160] This principle would extend to not constructing the new route at all in that case if "other access was reasonably available".[161] All authorities making decisions are therefore "bound by certain requirements, and these include particular sensitivity to Maori issues".[162] The Judicial Committee was satisfied that Māori land rights are adequately protected by the RMA.[163]

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158 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].
159 At [21].
160 At [21].
161 At [21].
162 At [21].
163 At [29].

[96] Similarly, in 2014 the Supreme Court in *EDS v King Salmon* affirmed that "the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind".[164] In its reasoning rejecting the "overall judgment approach", the Supreme Court held that s 58 of the RMA was inconsistent with the NZCPS being no more than a statement of relevant considerations.[165] Section 58 contemplates the possibility, depending on the meaning of the planning instruments, that there might be absolute protection from the adverse effects of development — a potential environmental bottom line.

[97] The Supreme Court's emphasis on s 58 is also relevant to this case. Section 58(1)(b) empowers a NZCPS to state objectives and policies about "the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga mataitati, and taonga raranga" and, in s 58(1)(gb), "the protection of protected customary rights". This indicates that cultural bottom lines, as well as environmental bottom lines, can be provided for under the NZCPS. Whether there are particular cultural bottom lines depends on the text and interpretation of the relevant planning instruments.

[98] In 2020, the Court of Appeal in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (currently under appeal to the Supreme Court), the Court of Appeal considered an appeal of decisions on consent applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[166] The Court held the decision-maker erred by "failing to give separate and explicit consideration" to environmental bottom lines; failing to address the effects of the proposals on the cultural and spiritual elements of kaitiakitanga; and in failing to identify relevant environmental bottom lines under the NZCPS and consider whether the proposal would be consistent with them.[167]

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164 *EDS v King Salmon*, above n 112, at [88].
165 At [117].
166 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 89.
167 At [12](a), [12](c), and [12](d) and [201].

[99] The Court held the interests of Māori in relation to all taonga, referred to in the Treaty of Waitangi and regulated by tikanga, were included in a statutory requirement to take into account the effects of activities on "existing interests".[168] It held it was necessary for the decision-maker to "squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests".[169] The Court stated:

> [174] In this case, the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right – as ancestors, gods, whānua – that iwi have an obligation to care for and protect.

[100] Also in 2020, in *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd*, after comprehensively traversing the ways in which the RMA recognises Māori cultural values, Whata J observed that:[170]

> [73] … the obligation 'to recognise and provide for' the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. …
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> …
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> [102] … where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e) , 6(g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. …

The NZCPS and NPSET

[101] The NZCPS and NPSET are national policy statements which bear on the interpretation of lower order planning instruments. The NZCPS of 1994 was the first national policy statement formulated. It was substantially revised in 2010, under s 58 of the RMA. Under s 56, the purpose of a NZCPS is "to state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand". Under ss 62(3), 67(3) and 75(3), regional policy statements, regional plans and district plans must "give effect" to the NZCPS. Its 29 policies support seven

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168 At [163] and [177].
169 At [170].
170 *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd,* above n 157.

stated objectives. The relevant Objectives and Policies are set out in the Annex to this judgment. As explored further below they involve three sets of relevant values: protection of natural features and landscape; culture; and social, economic, and cultural values.

[102] Policy 15 of the NZCPS was a particular focus in *EDS v King Salmon* and is in this case too. The Supreme Court held that:

(a) Policy 15 of the NZCPS, in relation to natural features and landscapes, states a policy of directing local authorities to avoid adverse effects of activities on natural character in areas of outstanding natural landscapes in the coastal environment.[171]

(b) The overall purpose of the direction is to "protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development".[172] It provides a graduated scheme of protection that requires avoidance of adverse effects in outstanding areas but allows for avoidance, mitigation or remedying in others.[173]

(c) The broad meaning of "effect" in s 3 must be assessed against the opening words of the policy.[174] Consistent with Objectives 2 and 6, "avoid" in Policy 15 bears its ordinary meaning as stated above.[175] Similarly, "inappropriate" use and development should be assessed against the characteristics of the environment that the Policy seeks to preserve.[176]

(d) Policies 15(a) and 15(b) provide "something in the nature of a bottom line".[177] It considered "there is no justification for reading down or otherwise undermining the clear terms" of the policy.[178]

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171 *EDS v King Salmon*, above n 112, at [58] and [61].
172 At [62].
173 At [90].
174 At [145].
175 At [96].
176 At [100]–[102] and [126].
177 At [132].
178 At [146].

[103] The NPSET was the second national policy statement formulated. Under s 45 of the RMA its purpose is to "state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act". Sections 62(3), 67(3) and 75(3) also require regional policy statements, regional plans and district plans to effect to it. The NPSET sets out the objectives and policies for managing the electricity transmission network under the RMA. The relevant Objectives and Policies are also set out in full in the Annex to this judgment. They set out relevant considerations for, and impose requirements on, decision-makers.

The relationship between the NZCPS and NPSET

[104] In an interim judgment in *Transpower New Zealand Ltd v Auckland Council*, Wylie J considered the respective relationships of the NZCPS and NPSET to the purposes of the RMA.[179] He noted that documents lower in the planning hierarchy are required to give effect to both of them and he considered *EDS v King Salmon*.[180] He noted that a national policy statement "can provide that its policies are simply matters decision-makers must consider in the appropriate context, and give such weight as they consider necessary" and accepted that the NPSET does so provide.[181] Before undertaking a detailed analysis of the text of the NPSET policies, regional policy statement and district plan provisions relevant there, he said:

> [83] I also agree with Ms Caldwell and Mr Allan that the New Zealand Coastal Policy Statement at issue in *King Salmon*, and the NPSET, derive from different sections of the Act, which use different terms. Section 56 makes it clear that the purpose of the New Zealand Coastal Policy Statement is to state policies in order to achieve the purpose of the Act. In contrast, the NPSET was promulgated under s 45(1). Its purpose is to state objectives and policies that are relevant to achieving the purpose of the Act. Section 56 suggests that the New Zealand Coastal Policy Statement is intended to give effect to the Part 2 provisions in relation to the coastal environment. A national policy statement promulgated pursuant to s 45 contains provisions relevant to achieving the Resource Management Act's purpose. The provisions are not an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose. In this regard I note that a number of the policies relied on in this case, including Policy 10, start with the words "(i)n achieving the purpose of the Act".
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> [84] I accept the submission advanced by Ms Caldwell and Mr Allan that the NPSET is not as all embracing of the Resource Management Act's purpose set

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179 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [77]–[84].
180 At [77]–[78].
181 At [82].

> out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary.

Regional and District planning instruments

[105] Regional and District planning instruments sit below the national policy statements but are more detailed in their provisions. The RCEP is required by s 67(3)(b) of the RMA to give effect to the NZCPS and national policy statements including the NPSET. The RCEP sets out issues, objectives and policies in relation to the coastal environment in the Bay of Plenty regarding the same three sets of values as the NZCPS and taking into account the requirements of the NPSET. The relevant provisions of the RCEP involve the same three sets of values involved in the NZCPS noted above.

[106] Consent authorities consider the granting of consents under s 104 of the RMA, which provides that "the consent authority must, subject to Part 2, have regard to: actual and potential effects on the environment of allowing the activity; relevant provisions of planning instruments; and any other matter it considers relevant and necessary". Here, the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009 (NESETA Regulations) specify what activities relating to existing transmission lines are permitted, controlled, restricted discretionary, discretionary, or non-complying. They are national environmental standards made under s 43 of the RMA and take precedence over the District Plan, under s 43B. Transpower's proposal here involved controlled, restricted discretionary or discretionary activities under the NESETA Regulations.[182]

[107] The Tauranga City Plan is a District Plan for the purposes of s 43AA of the RMA. Its purpose is to enable the Council to carry out its functions under the RMA. Relevant provisions are included in the Annex. They involve the same three sets of values involved in the NZCPS and RCEP.

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[182] Environment Court, above n 1, at [55] and Table 1.

The Court's treatment of the planning instruments

[108] The Environment Court agreed that the RCEP is comprehensive, has been tested and "provides a clear policy framework and consenting pathway for these applications."[183] Accordingly, its "evaluation of the statutory provisions focusses on the relevant policies in the RCEP". It also addressed the higher order policy documents and the District Plan.

[109] After outlining the NPSET and the NZCPS in its decision, the Environment Court noted the *Transpower New Zealand Ltd v Auckland Council* decision. Despite its later recourse to an overall judgment approach, the Court said:

> [77] There is no basis on which to prefer or give priority to the provisions of one National Policy Statement over another when having regard to them under s 104(1)(b) RMA, much less to treat one as "trumping" the other. What is required by the Act is to have regard to the relevant provisions of all relevant policy statements. Where those provisions overlap and potentially pull in different directions, then the consent authority or this Court on appeal, must carefully consider the terms of the relevant policies and how they may apply to the relevant environment, the activity and the effects of the activity in the environment.

[110] The Court noted no party had identified any policy in the RPS which set out anything not otherwise found in the other planning instruments. It noted the RCEP gives effect to the RPS through more specific direction, and there was no contest in relation to any of the RPS provisions.[184] Therefore, it did not quote any of the RPS provisions. It set out relevant provisions of the RCEP. It considered it should have regard to the District Plan and iwi management plans and outlined some of their relevant provisions.

[111] The Court addressed the issue of whether the proposal is a maintenance project or an upgrade, and whether it includes new infrastructure, for the purposes of Policies 4 and 6 of the NPSET.[185] It agreed with expert evidence that the proposal is a "substantial" rather than "major" upgrade and that it is not new infrastructure.[186] The

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183 At [68].
184 At [78].
185 From [145].
186 At [150].

Court also said it was guided by Policies 7 and 8 of the NPSET but concluded those policies were not determinative. They are expressed to deal with the planning and development of the transmission system, which "indicates these policies relate to future and new works rather than to upgrades of the existing system".[187]

[112] The Court said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui".[188]

[113] In its concluding reasoning, the Court said:

> [259] … While a range of competing concerns have been raised, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA.
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> …
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> [267] The relevant policy framework applicable to the assessment of these effects of the proposal is extensive, as set out earlier in this decision, and is not limited to Policy 15 of the NZCPS. In having regard to the statutory planning documents under s 104(1)(b) RMA we must undertake a fair appraisal of the objectives and policies read as a whole.[189] We do not accept the argument that Policy 15 would require consent to be declined or the proposal to be amended on the basis that it has adverse effects on the ONFL. As a policy, it does not have that kind of regulatory effect. In its terms, it requires avoidance of adverse effects of activities on the ONFL to protect the natural landscape from inappropriate use and development. The policy does not entail that any use or development in an ONFL would be inappropriate. The identification of what is inappropriate requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the effects of the use or development may be on the things which are to be protected.
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> [268] It is important to note that this is not a proposal to undertake and use a new intensive commercial development in an ONFL. The existing environment of the ONFL includes the existing bridge and national grid infrastructure.
>
> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how

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187 At [152].
188 At [194].
189 *Dye v Auckland Regional Council*, above n 127, at [25]; and *RJ Davidson Family Trust v Marlborough District Council*, above n 116, at [73].

> potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
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> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcomes would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on application of the planning instruments

[114] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in not giving the more directive provisions of the NZCPS priority over the less directive provisions of the NPSET. NZCPS is a mandatory document at the top of the hierarchy of planning instruments with the purpose under s 56 of achieving the purpose of the RMA. It could have, but did not, refer specifically to NPSET. The NPSET states objectives and policies that are only relevant to achieving the purpose of the RMA. The NPSET is not as all-embracing of the RMA's purpose. It was intended to be only a guide for decision-makers — a relevant consideration, subject to pt 2, which is not to prevail over the RMA's purpose. Accordingly, if one national policy statement has to give way to another, the NPSET must give way to the NZCPS, particularly Policy 15.

(b) The Court erred in finding that the proposal constitutes a substantial, rather than a major, upgrade and that it is not new infrastructure. This follows from the extent of works proposed in a different location, amounting to almost 40 new structures and several kilometres of lines, the benefit to mana whenua as promoted by Transpower, and the major nature of some of the new poles such as Poles 33C and 33D.

Accordingly, the Court should have applied Policy 4 of the NPSET, which contains an "avoid" directive, rather than Policy 6.

(c) The Court failed to have regard to Policy IW 2 of the RCEP and its directive to avoid adverse effects on sites of cultural significance or to be sure that it is not possible to avoid them or not practicable to minimise them. It also failed to apply NH 4, which provides that adverse effects on the values and attributes of ONFLs must be avoided. Policy SO 1 confirms the primacy of IW 2 and NH 4.

[115] Mr Beatson, for Transpower, submits:

(a) There is no difference in the status of the NZCPS and the NPSET. When they are both engaged and read together, the specific overrides the general, according to *EDS v King Salmon* and *Transpower New Zealand Ltd v Auckland Council.* Therefore, the "reduce existing adverse effects" language in Policy 6 and "seek to avoid" language of Policy 8 of the NPSET should be preferred over the NZCPS "avoid". Making anything of the silence of NZCPS as to NPSET is a speculative and fruitless exercise.

(b) There is no bottom line, or absolute policy of avoidance of all adverse effects, in Policy 15(a) of the NZCPS. That policy directs that the adverse effects of *inappropriate* development should be avoided, which is context-dependent. The Court assessed the proposal against Policy 15(a) and other instruments. Policy IW 2 of the RCEP does not have direct relevance to this ground of appeal because it does not reference the criteria in set 2 to the RPS. The Court accepted Ms Golsby's expert planning evidence for the Council that Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them.[190]

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[190] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(c) In any case, the RCEP gives effect to both the NZCPS and NPSET, as it is required to do by s 67(3) of the RMA. It reconciles the tensions between them. As the Environment Court held in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*, higher order instruments should be regarded as particularised in the relevant plan unless there is a problem with the plan itself.[191]

(d) The Court presumably did not engage with Policies NH 4, NH 5 and NH 11 on the basis of the evidence that effects on the ONFL were avoided. If NH 4 is triggered, Policies NH 5(a) and NH 11(a) provide an alternative consenting pathway. Transpower adopts the Councils' submissions on that issue. A project should not have to meet two different thresholds within the same policy context. Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them. The Court relied on the evidence of Ms Ryder for the Councils, and concluded the proposal was consistent with NH 4.[192]

(e) Even if there were adverse effects on the Māori values of ONFL 3, they would not have made a difference to the outcome. Māori values are only one part of the values and attributes associated with the ONFL. They would not necessarily lead to the conclusion there was an adverse effect on the ONFL as a whole. ONFL 3 is identified in the RCEP as having existing infrastructure located within it, which must be relevant to assessing the appropriateness of its relocation.

(f) The Court's findings that Policy 6 of NPSET had greater relevance than Policy 4, that the proposal was consistent with it, and that the finding that the proposal is a substantial upgrade, are not susceptible to being overturned on appeal unless it is clear there is no evidence to support the interpretation. This is not the case.

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191 *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35, [2017] NZRMA 479.

192 Environment Court, above n 1, at [228]–[229]. Statement of Evidence of Rebecca Keren Ryder, 11 February 2019 (CBD 202.0517).

[116] Ms Hill, for the Councils, adopts Transpower's submissions. In addition, she submits:

(a) The Environment Court correctly applied *EDS v King Salmon* by directly applying the RCEP without recourse to the NZCPS and NPSET. There is no authority requiring otherwise. The process of reconciling the NZCPS and NPSET has already been undertaken through the recent development of the RCEP. If the Court is required to re-examine whether the NH policies appropriately reconcile relevant national policy statement directions in every subsequent consent application, planning processes could be rendered futile.

(b) The Court was not required to assess the proposal against the detail of each policy such as IW 2, but to undertake a fair appraisal of the objectives and policies read as a whole. The Court did consider the proposal against the intent of IW 2. It carefully evaluated the cultural effects based on the evidence of the tāngata whenua witnesses and Mr Brown and gave considerable attention to cultural mitigation opportunities.[193] It was conscious that the existing environment includes the existing bridge and national grid infrastructure.

(c) The finding of adverse effects was not contrary to Policies IW 2 or NH 4(b) because: those policies require consideration as a whole; avoidance of adverse effects is not required by IW 2; NH 4(b) only requires avoidance of effects on the particular "values and attributes" of ONFL 3; the effect of Poles 33C and 33D does not detract from the identified factors, values, and associations with the ONFL of the whole harbour; the Māori values component of the ONFL is only one of several components; and the Court was unable to confirm there were significant effects on the Māori values of ONFL 3.

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[193] Environment Court, above n 1, at [165], [167], [194]–[220], [232], [233] and [244]–[248].

Did the Court err in applying the planning instruments?

[117] I agree it was reasonable for the Environment Court to focus particularly on the RCEP as providing a clear policy framework and consenting pathway and as giving effect to the RPS through more specific direction.[194] There are provisions of the RPS and Tauranga City Plan that are relevant but they supplement and reinforce the interpretation and application of the RCEP undertaken below. It is arguable that provisions of the Tauranga City Plan further constrain the decision.[195] But this was not the subject of submission, so I do not consider it further.

[118] The more major difficulty with the Court's decision is that, consistent with its overall judgment approach, the Court did not sufficiently analyse or engage with the meaning of the provisions of the RCEP or apply them to the proposal here. The Court rejected the proposition that the NZCPS requires consent to be declined because it does not have that regulatory effect. It suggested the regional and district plans "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable".[196] But it considered they did not "particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved".[197] Then it mentioned Policy 6 of the NPSET and suggested there is no guidance as to how "potential conflict" between the NPSET and NZCPS is to be resolved, and moved to its overall judgment.[198] As I held above, the Court's employment of the overall judgment approach, and failure to analyse the relevant policies carefully, is an error of law.

[119] The starting point is the RCEP. When they are examined carefully, the three sets of values in them can be seen to overlay and intersect with each other without conflicting.

[120] Interpreting and applying the natural heritage provisions of the RCEP:

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194 At [68] and [78].
195 For example, Policy 6A.1.7.1(g).
196 At [269].
197 At [269].
198 At [269].

(a) Issue 7 of the RCEP, which gives a clue to its purpose, is that "Māori cultural values … associated with natural character, natural features and landscapes … are often not adequately recognised or provided for resulting in adverse effects on cultural values". Consistent with Policy 15 of the NZCPS, Objective 2(a) is to protect the attributes and values of ONFL from inappropriate use and development "and restore or rehabilitate the natural character of the coastal environment where appropriate".

(b) Te Awanui is identified in sch 3 of the RCEP as ONFL with medium to high Māori values, "a significant area of traditional history and identity" and as including "many cultural heritage sites", many of which are recorded in iwi management plans and Treaty settlement documents. That is reinforced by the recognition in the Tauranga City Plan of Te Ariki Pā/Maungatapu as a significant area for Ngāti Hē in terms of mauri, wāhi tapu, kōrero tuturu and whakaaronui o te wa. I found in Issue 2 that the proposal would constitute a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3.

(c) The natural heritage policies include a requirement on decision-makers in Policy NH 4 to avoid adverse effects on the values and attributes of the OFNL, in order to achieve Objective 2: protecting the attributes and values of ONFL from inappropriate use and development. This is consistent with and reflected in the Tauranga City Plan, as it must be. As noted in relation to Issue 2, I consider the proposal's adverse effect on Ngāti Hē's values in ONFL 3 would constitute an adverse effect on the ONFL.

(d) Under Policies NH 4A and 9A respectively:

(i) The assessment of adverse effects should: recognise the activities existing at the time the area was assessed as ONFL and have regard to the restoration of the affected attributes and

values and the effects on the cultural and spiritual values of the tāngata whenua.

(ii) Recognise and provide for Māori cultural values, including by "avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape", "assessing whether restoration of cultural landscape features can be enabled", and "applying the relevant iwi resource management policies". Those policies object to power pylons and emphasise that "Marae provide the basis for the cultural richness of Tauranga Moana".[199]

(e) So, if a proposal is found to adversely affect the values and attributes of the ONFL having regard to all those considerations, as I have held this one does, the default decision is that it should be avoided under NH 4.

(f) But, nevertheless, Policy NH 5(a)(ia) requires decision-makers to "consider providing for" proposals that relate to the construction, operation, maintenance, protection or upgrading of national grid, even though will adversely affect those values and attributes. Policy 11(1) in turn sets out the requirements for NH 5(a) to apply, including that:

> (a) There are no practical alternative locations available outside the areas listed in Policy NH 4; and
>
> (b) The avoidance of effects required by Policy NH 4 is not possible; and
>
> …
>
> (d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and
>
> (e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

[199] Ngāi Te Rangi Resource Management Plan. See also Te Awanui Tauranga Harbour Iwi Management Plan 2008 (Objective 1, Policies 1, 2, 10), Tauranga Moana Iwi Management Plan 2016 (Policies 15.1, 15.2, 15.4).

(g) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, if all the circumstances specified in NH 11 apply, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A (including the iwi management plans).

[121] The Iwi Resource Management Policies of the RCEP must also be applied:

(a) Schedule 6 of the RCEP identifies Te Awanui as an ASCV, with reference to iwi management plans and other historical documents and Treaty settlement documents.

(b) Policy IW 1 of the RCEP requires proposals "which may" affect the relationship of Māori and their culture, traditions and taonga, to "recognise and provide" for" areas of significant cultural value identified in sch 6, and other sites of cultural value identified in hapū resource management plans or evidence. Policy IW 5 provides that "only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga".

(c) Similarly, but slightly differently to Policy NH 4, Policy IW 2 requires "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS" to be avoided as a default. As Advice Note 2 states, ASCVs are likely to strongly meet one or more criteria in Appendix F. Unlike the ONFL, the ASCV applies directly to the land on which the Marae is situated. I held in Issue 2 that the proposal constitutes a significant adverse effect on an area of cultural significance to Ngāti Hē.

(d) The qualification in IW 2 is that, where avoidance is "not practicable", the adverse effects must be remedied or mitigated. Where that is not possible either, it may be that offsetting positive effects can be provided. Policy 7C.4.3.1 of the District Plan expands slightly on that.

[122] The issues, objectives and policies related to activities in the coastal marine area must also be interpreted and applied:

(a) Issue 40 recognises that activities in the coastal marine area can promote social, cultural, and economic wellbeing, may need to be located in the coastal marine area in appropriate locations and in appropriate circumstances, but may cause adverse effects.

(b) Policy SO 1 recognises infrastructure is appropriate in the coastal marine area but that is explicitly made subject to the NH and IW policies "and an assessment of adverse effects on the location", which involve the practicability tests as above. That is reinforced by Objective 10A.3.3 and Policies 10A.3.3.2(c) and 10A.3.3.2(d) of the District Plan that minor upgrading of electric lines "avoids or mitigates" and "address[es]", respectively, potential adverse effects. Objective 10B.1.1 and Policy 10B.1.1.1 of the District Plan provides that adverse effects should be "avoided, remedied or mitigated to the extent practicable". Policy 10A.3.3.1 requires network utility infrastructure to be placed underground unless certain conditions apply.

[123] So, read carefully together, the iwi resource management policies are consistent with the natural heritage policies and with the structures and occupation of space (SO) policies:

(a) Policy IW 2 of the RCEP requires that adverse effects on areas of spiritual, historical or cultural significance to tāngata whenua must be avoided "where practicable". The Environment Court erred in failing to interpret and apply Policy IW 2. This is not a matter of evidence, however expert. Expert witnesses cannot and should not give evidence on issues of law, as it appears Ms Golsby was permitted to do.[200] The interpretation and application of the law is a matter for the Court.

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[200] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(b) Similarly, Policies NH 4 and 4A of the RCEP require that "adverse effects must be avoided on the values and attributes of ONFL". However, a decision-maker can still consider providing for a proposal in relation to the national grid if, under NH 5(a)(ia) and NH 11(1), there are "no practical alternative locations available" outside the areas listed in NH 4, the "avoidance of effects" is not possible, and "adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements". The Court did not apply these either.

(c) I do not accept the submission that there cannot be two different thresholds in the IW and NH policies. The thresholds are similar and must each be satisfied for the proposal to proceed.

(d) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, in the circumstances specified in NH 11, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A.

(e) Under Policy SO 1, the analysis of adverse effects overrides the default approach that infrastructure is appropriate in the coastal marine area. Policy SO 2 also invokes the requirements of both the NZCPS and NPSET.

[124] The last point expressly directs reference to the "requirements" of NZCPS and NPSET. Even if it did not, as I held in Issue 3, a Court will refer to pt 2 and higher order planning instruments if careful purposive interpretation and application of the relevant policies requires that. But it is wrong to turn first to the NZCPS and NPSET. Whether consent needs to be declined depends on an application of the RCEP (and District Plan) provisions interpreted in light of the NZCPS and NPSET.

[125] I agree with the Environment Court that the NZCPS itself does not necessarily require consent to be declined.[201] That is clear on the face of the relevant policies and because of the operative role of the RCEP. I also agree with the Court that, in relation

[201] Environment Court, above n 1, at [267].

to the issues at stake here, neither the NZCPS nor the NPSET should necessarily be treated as "trumping" the other and neither should be given priority over or "give way" to the other.[202] As the Supreme Court in *EDS v King Salmon* stated, their terms should be carefully examined and reconciled, if possible, before turning to that question. It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue, as counsel submit. In *Transpower New Zealand Ltd v Auckland Council,* Wylie J characterised the NPSET as providing relevant considerations in general.[203] I agree that a number of the policies do that. And it may be that the NPSET is not as "all embracing" of the RMA's purpose as the NZCPS.[204] But the terms of both national policies inform the interpretation and application of the relevant planning instrument to the specific issue in determining the outcome, as Wylie J demonstrated.[205]

[126] I do not agree with the implication of the Environment Court's reasoning that the NZCPS and NPSET conflict in their application to this proposal.[206] I accept the submissions of Mr Beatson and Ms Hill that, in relation to this issue, the RCEP gives effect to the NZCPS and NPSET and reconciles them. I consider their requirements are consistent with each other as expressed in both the RCEP and District Plan. In more detail:

(a) Objective 2 and Policy 15 of the NZCPS, as interpreted by the Supreme Court in *EDS v King Salmon*, reinforce the nature of the natural heritage policies of the RCEP as bottom lines in requiring adverse effects to be avoided. The circumstances in which use and development are "appropriate" under Policy 15 are set out in the RCEP. Adverse effects should be avoided, but may be considered if no practical alternative locations are available, avoidance of adverse effects is not possible and they are avoided to the extent "practicable".

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202 At [77].
203 *Transpower New Zealand Ltd v Auckland Council,* above n 179, at [82].
204 At [84].
205 At [85]–[104].
206 Environment Court, above n 1, at [269].

(b) Objective 3 and Policy 2 of the NZCPS, as outlined above, reinforce the Iwi Resource Management policies of the RCEP as cultural bottom lines in requiring adverse effects to be avoided unless "not practicable".

(c) Objective 6 and Policy 6 of the NZCPS reinforce the recognition in Issue 40 and Policies SO 1 and SO 2 of the importance to well-being of use and development of electricity transmission in "appropriate places and forms" on the coast or coastal marine area and within "appropriate limits". Policy 6 specifically references the need to make "appropriate" provision for marae and associated developments of tāngata whenua, to "consider how adverse visual impacts of development can be avoided" and "as far practicable and reasonable" apply controls of conditions to avoid those effects. Policy 6 also recognises that activities with a "functional need to be located in the coastal marine area" should be, in "appropriate" places, and those that do not, should not.

(d) The NPSET similarly recognises the national significance of electricity transmission while managing its adverse effects. Policies 2, 5, 6, 7 and 8 put requirements on decision-makers. But Policy 2 is general in requiring that they "recognise and provide for the effective operation" etc of the network. Policy 5 is more specific in requiring decision-makers to "enable the reasonable operational, maintenance and minor upgrade requirements of transmission assets when considering environmental effects. That is consistent with the general requirements of the NZCPS as expressed in the more detailed regime for doing so set out in the RCEP and District Plan. Policy 6 is relative, in requiring decision-makers to "reduce" existing adverse effects where there are "substantial upgrades of transmission infrastructure". And Policies 7 and 8 are consistent with the NZCPS and RCEP in requiring decision-makers to "avoid" or "seek to avoid" certain adverse effects.

[127] I do not consider Mr Gardner-Hopkins' submission that the Court erred in finding the proposal constitutes a "substantial" rather than "major" upgrade makes much difference to the outcome. Policy 4 of the NPSET requires decision-makers to

"have regard" to the extent to which adverse effects of major upgrades have been minimised, which must be relevant anyway, under other provisions. Policy 6 adds an element of proactivity in requiring "substantial upgrades" to be used as an opportunity to "reduce existing adverse effects". Each bears on the outcome of the application, but neither is determinative. If it does matter, I consider it was open to the Court to find the proposal was a "substantial" upgrade on the basis of the evidence before it. I am more dubious about the Court's conclusion that Policies 7 and 8 relate only to future and new works rather than to upgrades of the existing system. I see no reason why upgrades do not involve planning of the transmission system and the purpose of those policies, of avoiding adverse effects, may apply to upgrades.

[128] More generally, to the extent that there is room for differences to be found between the NZCPS and NPSET, both instruments are reconciled and given effect in the RCEP and District Plan. But the Court needed to carefully interpret the RCEP and apply it to the facts here, as outlined above, in light of the higher order instruments. Reference to the general principles in pt 2 of the Act, particularly ss 6(e), 7(a) and 8, simply confirms the analysis undertaken above.

[129] I found in Issue 2 that as a matter of fact and law, the proposal would have a significant adverse effect on an "area of spiritual, historical or cultural significance to tāngata whenua" and a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL. That means the bottom lines in Policies IW 2 and NH 4 of the RCEP respectively may be invoked:

(a) Under IW 2, the adverse effects on Rangataua Bay as an "area of spiritual historical or cultural significance to tāngata whenua" must be avoided "where practicable".

(b) Under NH 4, NH 5(a)(ia) and NH (11), the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 must be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

[130] So, whether the cultural bottom lines in the RCEP are engaged depends on whether the "practicable", "possible" and "practical" thresholds are met. That requires consideration of the alternatives to the proposal, which is the next issue.

Issue 5: Was the Court wrong in its assessment of alternatives?

[131] In this issue I deal with the grounds of appeal regarding whether the Court erred in failing to adequately consider alternatives and whether it erred in law in considering the status quo was the obvious counterfactual. Both of those issues relate to how the Court assessed the alternatives.

Law of alternatives

[132] In *EDS v King Salmon*, the Supreme Court considered whether a decision-maker was required to consider alternatives sites when determining a site-specific plan change that is located in, or fails to avoid, significant adverse effects on an ONFL.[207] It considered previous case law, including the High Court's judgment in *Meridian Energy Ltd v Central Otago District Council*, which rejected the proposition that alternatives must be considered.[208]

[133] The Supreme Court held that consideration of alternatives may be necessary depending on "the nature and circumstances" of the particular application and the justifications advanced in support of it.[209] If an applicant claims that an activity needs to occur in the coastal environment and it would adversely affect the preservation of the natural character, or that a particular site has features that make it especially suitable, the decision-maker ought to test those claims. That will "[a]lmost inevitably" involve consideration of alternative localities.[210] In that case, it considered the obligation to consider alternatives sites arose from the requirements of the NZCPS and sound decision-making, as much as from s 32 of the RMA.[211]

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207 *EDS v King Salmon*, above n 112, at [156].
208 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
209 *EDS v King Salmon*, above n 112, at [170].
210 At [170].
211 At [172].

The Environment Court's treatment of alternatives

[134] In its decision, the Environment Court stated:[212]

> [46] Transpower considered a range of options for taking the transmission line across Rangataua Bay including bridge or sea bed cable options as well as the aerial crossing option. The bridge and sea bed options were rejected for reasons that included costs being between 10 and 20 times more than those of an aerial crossing, programming issues, health and safety effects and access and maintenance considerations.

[135] In its second preliminary issue section, the Court considered whether it was necessary for Transpower to consider alternative methods for realignment of the A-Line and, if so, whether its assessment and evaluation was adequate.[213] In summary, the Court said:

(a) An assessment of alternatives "may be relevant" under s 104(1)(a) of the RMA if the adverse effects are significant or, under the RCEP, if there are adverse effects of an activity on the values and attributes of ONFL 3.[214] The Court referenced Policies NH 4 and NH 5.

(b) It noted that the identification of the attributes of ONFL 3 in sch 3 of the RCEP recognises that the current uses of ONFL 3 includes national grid infrastructure.[215] It considered it may follow, "in the absence of any policy for the removal of such uses", that it "might be considered to be generally appropriate within it on the basis that they do not undermine or threaten the things that are to be protected".[216] This does not take into account IW 2, NH 4, NH 5 and NH 11(1).

(c) The Court considered "an applicant is not required to undertake a full assessment or comparison of alternatives, or clear off all possible alternatives, or demonstrate its proposal is best in net benefit terms"

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212 Environment Court, above n 1, at [46], citing Transpower's Assessment of Effects on the Environment, above n 32.
213 At [113].
214 At [115].
215 At [116].
216 At [116].

and "[a]ll that is required is a description of the alternatives considered and why they are not being pursued".[217]

(d) The Court considered a list of seven options considered by Transpower in Table 2, entitled "Principal options considered by Transpower":

Option	Option Description	Comments
1	Do nothing	Poles A116 and A117 will still require replacement. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
2	Underground cable between Poles A116 and A117 on Ngāti Hē land (sports field)	Would require two new cable termination structures to replace Poles A116 and A117. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
All remaining options below involve relocation of the circuit onto or adjacent to the HAI-MTM-B support poles between poles B28 and B48, and removal of redundant HAI-MTM-A line poles from Te Ariki Park, residential and horticultural land.		
3(a)	Aerial crossing of Rangataua Bay in a single span.	Requires two monopoles of approximately 34.7 m on the Maungatapu side and 46.8 m high on the Matapihi side, and removal of the existing Tower A118 from the CMA.
3(b)	Aerial crossing of Rangataua Bay utilising a strengthened or replacement Tower A118 in the CMA.	Requires one monopole of up to 40 m high on the Maungatapu side of the harbour and a 12m to 17m high concrete pi-pole on the Matapihi side. Existing Tower A118 in the CMA is retained.
4(a)	Integrate a cable into a potential future replacement road bridge.	New cable termination structures required on either side in the order of 15m to 20m high. New bridge would need to be designed to accommodate an additional transmission cable.
4(b)	Cable across estuary on a new stand-alone footbridge or cable bridge	New cable termination structures required on either side in the order of 15m to 20m high. New bridge structure required.
4(c)	Cable across existing bridge - east side	New cable termination structures required on either side in the order of 15m to 20m high. Terminate on

[217] At [117].

		west side adjacent to Marae, but then cross to east side (opposite side to existing cable) as soon as practicable. Thrust bore under road required.

(e) The Court recorded that Transpower rejected option 2 for cultural reasons and lack of wider benefits.[218] Transpower rejected the options attaching a cable to the bridge or beneath the seabed for reasons of operational and security of supply risk, unacceptable costs and the need for substantial termination structures on either side of the waterway. Transpower shortlisted the two aerial crossing options. Its preferred option was the single span, option 3(a).

(f) The Court considered in some detail the potential alternatives of under-seabed and bridge-attachment cables because they were particularly mentioned by TEPS, the Marae and Ngāi Te Rangi.[219] The cost of the bridge-crossing option was estimated by Transpower at more than 10 times that of the aerial crossing.[220] The costs of undergrounding was "at least an order of magnitude more" than an aerial route.[221] On that basis, the Court considered these alternatives were "impracticable".[222]

(g) The Court held that "[a] relocated A-Line crossing of the harbour on a strengthened existing bridge would appear to be technically feasible".[223] But it considered that the cost alone meant Transpower "has a clear reason for discounting a bridge option".[224] It considered imposing a condition requiring that cost "could well be unreasonable" and "would also be likely to go beyond the Court's proper role in adjudicating disputes under the RMA".[225] The Court considered that, if it were to conclude that level of expenditure was necessary to avoid,

218 At [122].
219 At [123] and [124]–[137].
220 At [130].
221 At [136].
222 At [265].
223 At [138].
224 At [139].
225 At [140].

remedy or mitigate the adverse effects "then the more appropriate course could be to refuse consent to the proposal".[226] It accepted Transpower's dismissal of the under-sea options on the same basis.

(h) The Court considered all of the alternatives would place tall structures in the ONFL "whether above or below it or on its margins".[227]

(i) Accordingly, it concluded "the alternatives to have been appropriately assessed and the reasons for the selection of the project on which Transpower wishes to proceed to be sound".[228]

[136] Later, in considering the cultural effects of the proposal, the Court held that the alternatives may have greater effects on the values and attributes of the harbour than the proposal.[229] In acknowledging Ngāti Hē's view that the effects of a new Pole 33C outweigh the benefits of the A-Line removal, the Court said "there is no certainty that a proposal they can support will come forward, and if it does, whether it will achieve the outcomes they desire".[230] It noted evidence, though not from NZTA, that NZTA has no plans to upgrade the bridge to a standard that could support the lines.[231] The Court also said:

> [219] Transpower has in effect said that it will walk away from the realignment project altogether if the appeal is granted. It would then strengthen or replace its infrastructure on Te Ariki Park which is work that does not require any further consent. We have no ability to require that they do otherwise. We do not regard this as any kind of threat or otherwise as an inappropriate position: it simply recognises that if an activity requires resources consent but cannot obtain it, then not undertaking that activity is an obvious option for the unsuccessful applicant.

[137] As noted in relation to Issue 4, in its concluding reasoning, the Court said:

> [265] The alternatives of laying the re-located A-Line on or under the seabed or in ducts attached to the Bridge appear from the evidence to be impracticable. While technically feasible, the uncontroverted evidence is that the works involved would entail costs of an order of magnitude greater than the estimated costs of Transpower's proposal. We have already found that we

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226 At [140].
227 At [143].
228 At [144].
229 At [213].
230 At [214].
231 At [215].

> do not have the power to require Transpower to amend its proposal in a manner that would result in a cost increase of that kind. To do that would go beyond the scope of the power to impose conditions on the proposal as it would effectively result in a new proposal.

[138] And, in the last two sentences of its last paragraph, the Court said:

> [209] … In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on alternatives

[139] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) It is accepted there is a functional need for the lines to cross Rangataua Bay at some location. But Transpower did not try very hard to consider alternatives. It did not commission a detailed investigation as to whether strengthening the bridge would feasibly accommodate the A-Line. Its costs were "back of the envelope" figures provided by email.

(b) The RCEP's requirements that adverse effects be avoided in the IW 2 and NH 11 policies mean the Court must satisfy itself there are not possible alternatives or no practicable alternatives that would avoid the adverse effects. The terms "not practicable" and "not possible" in Policies IW 2 and NH 11 establish a very high threshold. The term "not possible" must impose a higher threshold than "not practicable". The threshold in NH 11(1)(d) is not met because it only requires having regard to technical and operational requirements.

(c) The Environment Court did not engage with what it understood the two terms to mean. It simply listed the relevant policies, applied the *Meridian Energy* test, and made no assessment of the requirements. It dismissed the bridge and under-sea alternatives solely for cost reasons, but cost is not the determining element — its weight depends on the context. The Court made no findings as to whether the bridge and

under-sea alternatives were "possible" or "practicable", or what they mean in the regulatory context here, so it failed to have regard to Policies IW 2 and NH 11.

(d) It would accord with the spirit of pt 2 of the RMA, consistent with *McGuire*, to prefer an alternative. Transpower's 2017 Options Report identifies two alternative ways of achieving the project while avoiding the adverse effects required to be avoided by IW 2. They would involve using a cable across the bridge, with a termination structure of, at most, half the height of the proposed structures, some distance away from the Marae.[232] It was not established that the termination structures of these alternatives, however "Dalek-like" (as apparently discussed at the Environment Court hearing), would need to be placed where Pole 33C is proposed to go or whether they could go in a different location, further away from the Marae.

(e) Posing the status quo as the obvious counterfactual was a mistake, given the evidence. At the least, the Court should have acknowledged that declining consent would not necessarily deprive Ngāti Hē and others of the benefits of the current proposal in removing the A-Line alignment across Rangataua Bay. But it is unlikely the status quo would be maintained, given the evidence that Pole 117, on a cliff face, is subject to erosion and episodic erosion events of three to six metres at a time.

(f) Mr McNeill, Transpower's Investigations Project Manager, agreed that if Transpower had known the proposal did not have Ngāti Hē and Maungatapu Marae support, it would have said "no way" and would "continue to meet and to, yeah, come up with other proposals…".[233] Ms Raewyn Moss, a General Manager at Transpower, gave evidence that Transpower would need to consider whether to proceed with the

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232 Transpower New Zealand Ltd *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Taurauga* (July 2017) at 16–18 (CBD 304.1087–304.1089).

233 NOE 34/19–21.

Matapihi aspect of the proposal if that was the only aspect granted consent.[234] Another Transpower witness confirmed it was possible from an engineering perspective, with modification to how the lines connected.[235]

(g) Transpower has an obligation to address the historical breach of the Treaty of Waitangi, especially given the assurance that the A-Line would be relocated to the new B-Line path when the B-Line was proposed some 25 years ago. Otherwise, the existing bridge and motorway will be a justification for further infrastructure being located alongside them with further negative cumulative effects.

[140] Mr Beatson, for Transpower, submits:

(a) The approach in *Meridian Energy Ltd* is correct. Transpower undertook a comprehensive analysis of all technically viable alternative options. "Practicable" imports feasibility, viability, and cost considerations. In NH 11(1), "practicable" is clearly informed by Transpower's technical and operational requirements.

(b) Transpower satisfied the requirements of NH 5 and NH 11, given avoidance of all effects is not possible and adverse effects are avoided to the extent practicable. Ugly termination structures of 23 metres, characterised as "Daleks" would be required for any alternate option.[236] The alternatives of laying the relocated A-Line on or under the seabed or attached to the bridge were found to be impracticable, not solely for cost reasons. The Court's findings were reasonable and supported by evidence.

(c) The Court was entitled to rely on, and prefer, the evidence of Transpower as to its plans and ability to retain the existing A-Line alignment if consent is declined. Mr McNeill's comments provide no

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234 NOE 27/12–15.
235 NOE 114/10–20.
236 Evidence of Richard Joyce (1 February 2019) (CB 203.623) at [28] and following photograph.

guarantee unspecified alternatives would have been pursued. Ms Moss provided clear statements that Transpower would maintain Poles 116 and 117.[237] It is not clear whether it would be practically possible to split the Matapihi and Maungatapu aspects of the proposal.

(d) Mr Thomson confirmed maintenance of the A-Line is achievable if realignment does not proceed, with Pole 117 being relocated further inland.[238] The Court accepted Transpower could apply for a new consent for the anchor blocks associated with Pole 117 and continue to operate until all appeals were determined. Mr Beatson advises this is what has transpired. The Court also noted other regulatory avenues open to Transpower to secure the failing poles.

(e) What Transpower is trying to do is entirely consistent with *McGuire.* It has worked extremely hard to come up with a solution that it felt struck the right balance between cost and resolving the ongoing source of contention. It put it forward in good faith and got agreement and still considers it is a suitable response. There is no legal obligation on Transpower to move the A-Line under the RMA. Transpower does not have the obligations of the Crown under s 9 of the State-Owned Enterprises Act 1986 and there has been a Treaty settlement with Ngāi Te Rangi. Transpower would not be creating an additional transgression by maintaining the A-Line where it is. But dialogue with Ngāti Hē would continue in any case.

[141] Ms Hill, for the Councils, submits:

(a) *Meridian Energy* does not require all possible alternatives to be evaluated nor proof that the intended proposal is the best of the alternatives. Avoidance of adverse effects to the "extent practicable"

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237 Statement of Evidence of Raewyn Moss, 1 February 2019 at [38] (CBD 203.0612); and NOE 15/18–22.

238 Statement of Evidence of Colin Thomson, 1 February 2019 at [26] (CBD 203.645).

under NH 11(d) and NH 11(e) clearly relates to the particular proposal rather than to alternatives.

(b) The Environment Court did not dismiss particular options but assessed the adequacy of Transpower's consideration of them and whether a clear rationale for discounting an option was provided.[239] It set out detailed reasons why Transpower discounted particular options. It clearly considered whether avoidance of adverse effects was "not possible" having regard to the alternatives.[240] The Court assessed mitigating or offsetting adverse effects and found the alternatives were impracticable. It found the alternatives may affect the values and attributes of the harbour to a greater extent than the aerial line, and avoidance of adverse effects was not possible under any scenario.

(c) The Councils adopt the submissions of Transpower in relation to the status quo issue. In addition, it is difficult to know how such an error, if established, would be material to the outcome. Even if the prospect of the A-Line remaining is less certain than the Court considered it to be, the Court would be unable to establish there is another feasible alternative to the status quo with the requisite certainty or to direct Transpower to implement that.

Did the Court err in its treatment of alternatives?

[142] As determined in Issue 4, both the IW 2 and NH 4 Policies of the RCEP require consideration of whether it is "practicable" and "possible" to avoid adverse effects and whether alternative locations are "practical". If it is practicable to avoid the proposal's adverse effects on the area of spiritual, historical or cultural significance to Ngāti Hē, the proposal must not proceed under Policy IW 2. If there are practical alternative locations of the infrastructure, or it is possible to avoid the proposal's adverse effects on the Māori values of Te Awanui as ONFL 3, then the proposal must not proceed under Policy NH 4, NH 5(a)(ia) and NH 11(1)(a) and (b).

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239 Environment Court, above n 1, at [46] and [144].
240 At [143].

[143] Either way, applying *EDS v King Salmon*, the practicability, practicality, and possibility of alternatives is a material fact which directly affects the available outcome of the application. This is more than something that "may be relevant" as the Court characterised them.[241] *EDS v King Salmon* has overtaken *Meridian Energy* in that regard. In this context, given the nature of the application and the relevant law, the Court was legally required to examine the alternatives in order to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant policies of the RCEP. Furthermore, the Court is required to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal. The Court's findings would determine whether the relevant adverse effects must, as a matter of law, be avoided under Policies IW 2 and NH 4 of the RCEP.

[144] In *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc*, the Supreme Court considered the meaning of "practicable" in the context of the Civil Aviation Act 1990:[242]

> [65] 'Practicable' is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

[145] The Environment Court dealt with practicability rather differently. In its conclusion, the Court considered that the alternatives favoured by Ngāti Hē were technically feasible but would "entail costs of an order of magnitude greater" than the proposal.[243] It therefore concluded, apparently because it did not consider it had the power to require Transpower to amend its proposal, that the alternatives "appear from

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241 At [115].

242 *Wellington International Airport Ltd v New Zealand Air Line Pilots Association Inc Industrial Union of Workers* [2017] NZSC 199, [2018] 1 NZLR 780.

243 Environment Court, above n 1, at [46] and [265].

the evidence to be impracticable".[244] The Court determined that, when faced with a range of competing concerns and no possible outcome would be wholly without adverse effects, it had to decide which outcome better promotes the sustainable management of natural and physical resources as defined in s 5 of the RMA.[245]

[146] The Court misdirected itself in law by not interpreting and analysing the "practicable", "possible" and "practical" in the context of the policies and the proposal. It erred in failing to recognise that the practicability, practicality or possibility of alternatives are directly relevant to whether the proposal could proceed at all.[246]

[147] The "practicability" of avoiding adverse effects in Policy IW 2 relates to cultural values. The emphasis on the Treaty of Waitangi and cultural values, and potential for cultural bottom lines in the RMA and planning instruments suggests that cultural values should not be underestimated. Issue 7 of the RCEP suggests they are "often not adequately recognised or provided for". It is always difficult to put a price on culture, which is what is implied in a finding that the cost of an alternative is "too" high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not of the applicant. But the cost of network infrastructure is eventually felt by all electricity consumers, as well as the Crown. I do not consider, in this context, that cost must be irrelevant to practicability or to practicality.

[148] What cost is "too" high to satisfy an alternative not being "practicable" is a matter of fact and degree to be assessed in the circumstances. I do not rule out the possibility that, if the Court had itself examined robust costings of the alternatives, it may still have concluded the cost to be too high to be "practicable". I do not consider the reference in NH 11(d) to having regard to technical and operational requirements excludes the possibility of having regard to cost implications. A court would have to consider and weigh that. For the same reason, it may reasonable for a court to conclude that no "practical" alternative locations are available. It is hard to draw a meaningful distinction between "practical" and "practicable" in this context.

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244 At [265].
245 At [270].
246 At [265].

[149] But the requirement of Policy NH 11(1)(b), that "the avoidance of effects required by Policy NH 4 is not possible", does not involve an assessment of costs. The plain meaning of "possible" in NH 11(1)(b) suggests that if an alternative is technically feasible it is possible, whatever the cost. That interpretation is reinforced by the use of "practical" in NH 11(1)(a) and "practicable" in NH 11(d). This interpretation is not inconsistent with the wording of NH 11(1)(a) because (a) relates to the practicality of alternative locations while (b) relates to the possibility of avoidance of effects. It is not inconsistent with NH 11(1)(d) and (e) because they relate to the avoidance, remedying or mitigation of all "adverse effects" to the extent practicable, while (b) requires the avoidance of effects required by Policy NH 4 to be possible. Policy NH 4 relates to the values and attributes of ONFL, which are different. It is the values and attributes of the ONFL that are the subject of the cultural bottom line in Policy 15(a) of the NZCPS, supported by pt 2 of the RMA.

[150] So, the technical feasibility of the alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. Policy NH 11(1)(b) is therefore not satisfied and consideration of providing for the proposal under Policy NH 5 is not available.

[151] I also consider the Court's consideration of the alternatives was focussed too widely on the alternatives considered by Transpower. The Court should have focussed on the precise issues that constituted the adverse effects that had to be avoided unless one of the exceptions applied. As I found in Issue 2, those effects centred on the effect of Pole 33C. What were the alternatives to the location, size and impact of that on the area of cultural significance to Ngāti Hē and the Māori values of Te Awanui at ONFL 3? Could Pole 33C be situated in a location that did not have those adverse effects but did not have the cost implications of the alternatives Transpower considered?

[152] The status quo was one of the alternatives that Transpower, and the Court, considered. The Court was obliged to consider Transpower's evidence that it would walk away from the realignment project if the appeal was granted. It was open to the Court to regard that as an obvious option for Transpower. It was not required to give greater weight to Mr McNeill's evidence or even to make a finding either way. Predicting the future of this proposal is inherently speculative. But examination of the

status quo option needed to be included in the analysis of alternatives. It was not a matter of preferring the proposal to the status quo, as the Court said. In law, it was a matter of whether the proposal was lawfully available, given the alternatives.

[153] Finally, Mr Gardner-Hopkins submits Transpower has an obligation to address the location of the transmission lines as an ongoing breach of the Treaty of Waitangi. Mr Beatson submits it does not. This was not fully argued before me and the issue is not part of the appeal, so I do not comment further. Neither do I further consider how it might affect the obligations on the decision-maker in relation to the proposal. But there is no doubt that further discussion between Transpower and Ngāti Hē over these issues would be consistent with the principles of the Treaty of Waitangi, given the unhappy history of the transmission lines at issue.

Relief

Law of relief on RMA appeals

[154] Section 299 of the RMA provides that appeals are made in accordance with the High Court Rules 2016. Rule 20.19 provides:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
>
> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.
>
> …
>
> (3) The court may give the decision-maker any direction it thinks fit relating to—
>
> (a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.

…

(6) The powers given by this rule may be exercised in favour of a respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.

[155] As Dunningham J observed in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*, the "usual course" is to refer the matter back to the Environment Court.[247] But "the High Court has been prepared to substitute its own decision where the outcome is inevitable and there is no need to make further factual determinations in the specialist Court".[248]

[156] In *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau*, Heath J quashed a decision imposing a condition and referred it back to the Environment Court for rehearing, leaving the rest of the decision undisturbed.[249]

[157] In *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, Gault J said: [250]

> [207] As indicated, even if the Court finds an error of law, it must be material to the decision under appeal for relief to be granted. The Court is cautious, however, before accepting that it would be futile to remit on the basis that the outcome would be the same. That is particularly so here given the importance of the relationship of iwi and hapū with water evident in the NPSFM Preamble, and the fact that the Environment Court is the specialist tribunal best placed to assess the effects. Also, effects may be relevant to assessing appropriate conditions, not merely whether consent should be granted or declined.

Submissions on relief

[158] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the errors are material. He submits it cannot be assumed the Environment Court would reach the same decision and the matter should be referred back to it for reconsideration. He also submits that I should refuse the consent if I find the effects of the proposal are adverse

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247 *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [112].
248 At [112].
249 *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 at [69].
250 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, [2020] NZHC 3388.

in terms of Policy 15(a) of the NZCPS and Policies IW 2 and NH 4 of the RCEP and that Transpower has failed to demonstrate it is not practicable or possible to avoid those effects. It would only be if I definitively found that there are practicable alternatives that would avoid the adverse effects, and other errors, that I could quash the consents and not refer the matter back to the Environment Court.

[159] Mr Beatson, for Transpower, submits that the Environment Court has not made an error of law. Thus, the High Court is not able to interfere with a decision made on the merits where there is no error of law.

[160] Ms Hill, for the Councils, submits that it is not the role of the High Court to weigh the evidence or substitute its own assessment of the consistency of the proposal with a plan. If the Court finds the Environment Court erred in its approach to assessing effects, Ms Hill submits the matter should be remitted to the Environment Court to reconsider in light of this Court's directions.

Should the decision be remitted?

[161] In summary, I have concluded the Environment Court made errors of law in:

(a) its findings regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of ONFL 3;

(b) its "overall judgment" approach and treatment of pt 2 of the RMA;

(c) interpreting and applying to the proposal the cultural bottom lines in the planning instruments; and

(d) its treatment of the practicability, or practicality and possibility of avoiding the adverse effects of the proposal.

[162] These are material errors. I have determined the true and only reasonable conclusion about the adverse effects of the proposal. I have indicated the correct approach to interpreting and applying the planning instruments. I have interpreted and

applied the meaning of Policy NH 11(1)(b) in light of the Environment Court's existing findings. But the Court's findings were not premised on the legal need for it to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal.

[163] I consider it is desirable for the Environment Court to further consider the issues of fact relating to whether the alternatives to the proposal are practicable, practical or possible in light of the legal framework and the questions about the alternatives that I have identified. It is likely that further evidence on that will be required from Transpower.

[164] The interpretation of "possible" in Policy NH 11(1)(b) in this judgment suggests that, if the proposal remains as it is and the Environment Court comes to the same conclusion as it did before on the basis of further evidence about alternatives, the proposal will not proceed as it is. But further consideration of alternatives with a narrower focus on the size, nature and location of Pole 33C might lead Transpower to amend its proposal. Evidence of Ngāti Hē's considered views of any such alternatives would be required in order to determine the adverse effects of any such amendments. With goodwill, and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal.

[165] Furthermore, no issue has been taken with the part of the realignment proposal from Matapihi north. There are clear benefits to that part of the proposal, including to Ngāi Tūkairangi. If the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. There is evidence that may be possible, but the implications are not clear to me. I leave that to the Environment Court as well.

Result

[166] I quash the Environment Court's decision and remit the application to it for further consideration, consistent with this judgment.

[167] Costs should be able to be worked out between counsel. If not, I give leave for the appellant to file and serve a memorandum of up to 10 pages on outstanding issues

regarding costs within 10 working days of the judgment and leave for the respondents to file and serve a memorandum of an equivalent length within 10 days of that. If that happens, the appellant then has five days to file and serve a memorandum in reply of up to five pages.

Palmer J

Annex: Relevant planning provisions

New Zealand Coastal Policy Statement 2010

Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
- encouraging restoration of the coastal environment.

Objective 3

To take account of the principles of the Treaty, recognise the role of tāngata whenua as kaitiaki and provide for tāngata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tāngata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tāngata whenua and persons exercising functions and powers under the Act;
- incorporating mātauranga Māori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tāngata whenua.

…

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

Policy 2 The Treaty of Waitangi, tāngata whenua and Māori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) recognise that tāngata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;

…

(c) with the consent of tāngata whenua and as far as practicable in accordance with tikanga Māori, incorporate matauranga Māori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision-making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga, may have knowledge not otherwise available;

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and

(i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; …

(f) provide for opportunities for tāngata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment, through such measures as:

(i) bringing cultural understanding to monitoring of natural resources;

(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tāngata whenua;

(iii) …; and

(g) in consultation and collaboration with tāngata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tāngata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

(i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

(ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori . . .

Policy 6 Activities in the coastal environment

(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, . . . are activities important to the social, economic and cultural well-being of people and communities.

(b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;

…

(d) recognise tāngata whenua needs for papakainga, marae and associated developments and make appropriate provision for them;

…

(h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;

(i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment;

(2) Additionally, in relation to the coastal marine area:

…

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there

Policy 15 Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

National Policy Statement on Electricity Transmission

5. Objective

To recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, while:

• managing the adverse environmental effects of the network; and

• managing the adverse effects of other activities on the network.

7. Managing the environmental effects of transmission

Policy 2

In achieving the purpose of the Act, decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network.

Policy 3

When considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network.

Policy 4

When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.

Policy 5

When considering the environmental effects of transmission activities associated with transmission assets, decision-makers must enable the reasonable operational, maintenance and minor upgrade requirements of established electricity transmission assets.

Policy 6

Substantial upgrades of transmission infrastructure should be used as an opportunity to reduce existing adverse effects of transmission including such effects on sensitive activities where appropriate.

Policy 7

Planning and development of the transmission system should minimise adverse effects on urban amenity and avoid adverse effects on town centres and areas of high recreational value or amenity and existing sensitive activities.

Policy 8

In rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities.

Bay of Plenty Regional Coastal Environment Plan

Issues of the RCEP

1.2 Natural Heritage

Issue 7 Māori cultural values, practices and mātauranga associated with natural character, natural features and landscapes and indigenous biodiversity are often not adequately recognised or provided for resulting in adverse effects on cultural values.

1.4 Iwi Resource Management

Issue 17 Ko te moana ko au, ko au ko te moana (I am the sea – the sea is me). Tangata whenua, as indigenous peoples, have rights protected by the Te Tiriti o Waitangi (the Treaty of Waitangi) and that consequently the RMA accords tangata whenua a status distinct from that of interest groups and members of the public.

Issue 19 Wāhi tapu and other sites of significance to tāngata whenua can be adversely affected by human activities and coastal erosion. Degradation of coastal resources and the lack of recognition of the role of tāngata whenua as kaitiaki of this resource can adversely affect the relationship of Māori and their ancestral lands, waters, sites, wāhi tapu and other taonga.

Issue 20 Māori have a world-view that is unique and that can be misunderstood, unrecognised and insufficiently provided for in the statutory decision-making process.

Issue 26 Policy 6 of the NZCPS recognises tangata whenua needs for papakainga, marae and associated developments in the coastal environment; but tangata whenua aspirations in relation to use, values

and development are not well understood, particularly in the coastal marine area.

1.8 Activities in the coastal marine area

Issue 40 The use and development of resources in the coastal marine area can promote social, cultural and economic wellbeing and provide significant social, cultural and economic benefits but may also cause adverse effects on the coastal environment.

Objectives of the RCEP

2.2 Natural Heritage

Objective 2 Protect the attributes and values of:

(a) Outstanding natural features and landscapes of the coastal environment; and

(b) Areas of high, very high and outstanding natural character in the coastal environment;

from inappropriate subdivision, use, and development, and restore or rehabilitate the natural character of the coastal environment where appropriate.

2.4 Iwi Resource Management

Objective 13 Take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of Tāngata whenua in management of the coastal environment when activities may affect their taonga, interests and values.

Objective 15 The recognition and protection of those taonga, sites, areas, features, resources, attributes or values of the coastal environment (including the Coastal Marine Area) which are either of significance or special value to tāngata whenua (where these are known).

Objective 16 The restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.

Objective 18 Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tāngata whenua or the relationship of tāngata whenua and their customs and traditions with the coastal environment.

2.8 Activities in the Coastal Marine Area

Objective 27 Activities and structures that depend upon the use of natural and physical resources in the coastal marine area, or have a functional need to be located in the coastal marine area are recognised and

provided for in appropriate locations, recognising the positional requirements of some activities.

Objective 28 The operation, maintenance and upgrade of existing regionally significant infrastructure, and transportation infrastructure that provides access to and from islands, is recognised and enabled in appropriate circumstances to meet the needs of future and present generations.

Policies of the RCEP

Natural Heritage (NH) Policies

Policy NH 4 Adverse effects must be avoided on the values and attributes of the following areas:

…

(b) Outstanding Natural Features and Landscapes (as identified in Schedule 3).

…

Policy NH 4A When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules . . . 3 to this Plan . . :

(a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape . . .

(b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;

(c) Recognise the potential for cumulative effects that are more than minor;

(d) Have regard to any restoration and enhancement of the affected attributes and values, and

(e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

Policy NH 5 Consider providing for … use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where:

…

(a) The proposal:

(ia) Relates to the construction, operation, maintenance, protection or upgrading of the National Grid;

Policy NH 9A Recognise and provide for Māori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:

(a) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;

(b) Assessing whether restoration of cultural landscape features can be enabled; and

(c) Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

Policy NH 11

(1) An application for a proposal listed in Policy NH 5(a) must demonstrate that:

(b) There are no practical alternative locations available outside the areas listed in Policy NH 4; and

(b) The avoidance of effects required by Policy NH 4 is not possible; and

…

(d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and

(e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

Iwi Resource Management (IW) Policies

Policy IW 1 Proposals which may affect the relationship of Māori and their culture, traditions and taonga must recognise and provide for:

(a) Traditional Māori uses, practices and customary activities relating to natural and physical resources of the coastal environment such as mahinga kai, mahinga mātaitai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori;

(b) The role and mana of tāngata whenua as kaitiaki of the region's coastal environment and the practical demonstration and exercise of kaitiakitanga;

(c) The right of tāngata whenua to express their own preferences and exhibit mātauranga Māori in coastal management within their tribal boundaries and coastal waters; and

(d) Areas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumatua; and.

(e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments.

Policy IW 2 Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.

Policy IW 5 Decision makers shall recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

Policy IW 8 Tāngata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value (identified in accordance with Policy IW 1(d)).

Structures and Occupation of Space (SO) Policies

Policy SO 1 Recognise that the following structures are appropriate in the coastal marine area, subject to the Natural Heritage (NH) Policies, Iwi Resource Management Policy IW 2 and an assessment of adverse effects on the location:

…

(c) Structures associated with new and existing regionally significant infrastructure…

Policy SO 2 Structures in the coastal marine area shall:

(a) Be consistent with the requirements of the NZCPS, in particular Policies 6(1)(a) and 6(2);

(b) Where relevant, be consistent with the National Policy Statement on Electricity Transmission;

Schedule 3 of the RCEP identifies areas of Outstanding Natural Features and Landscapes (ONFL) using the criteria of Policy 15(c) of the NZCPS and Appendix F, set 2 to the RPS.

Te Awanui Harbour, Waimapu Estuary & Welcome Bay – ONFL 3

Description:

Tauranga Harbour is a shallow tidal estuary of 224 km². At low tide, 93% of the seabed is exposed. The harbour and its estuarine margins comprise numerous bays,
estuaries, wetland and saltmarsh. The key attributes which drive the requirement for classification as ONFL, and require protection, relate to the high natural science
values associated with the margins and habitats; the high transient values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns.

Current uses:

Bridges, national grid infrastructure, wharves, moorings, residential development, boardwalks, stormwater and sewer infrastructure, boat ramps, reclamations,
recreational activities such as water skiing, fishing, boating, channel markers, navigational signs.

Evaluation of Māori values: Medium to High

Ancient pa, mahinga kai, wāhi tapu, kāinga, taunga ika.

Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.

Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

Schedule 6 of the RCEP identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ngā Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land.

Maintenance of kaimoana and coastal water quality is particularly important.

…

Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.

Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

Bay of Plenty Regional Policy Statement (RPS)

Policy IW 2B: Recognising matters of significance to Māori

Proposals which may affect the relationship of Māori and their culture and traditions must:

(a) Recognise and provide for:

(i) Traditional Māori uses and practices relating to natural and physical resources such as mahinga mātaitai, waahi tapu, papakāinga and taonga raranga;

(ii) The role of tangata whenua as kaitiaki of the mauri of their resources;

(iii) The mana whenua relationship of tangata whenua with, and their role as kaitiaki of, the mauri of natural resources;

(iv) Sites of cultural significance identified in iwi and hapū resource management plans; and

(b) Recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act

Exercise the functions and powers of local authorities in a manner that:

(a) Takes into account the principles of the Treaty of Waitangi;

(b) Recognises that the principles of the Treaty will continue to evolve and be defined;

(c) Promotes awareness and understanding of councils' obligations under the Act regarding the principles of the Treaty, tikanga Māori and

kaupapa Māori, among council decision makers, staff and the community;

(d) Recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public; and

(e) Recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the Act.

Policy IW 4B: Taking into account iwi and hapū resource management plans

Ensure iwi and hapū resource management plans are taken into account in resource management decision making processes.

Policy IW 5B: Adverse effects on matters of significance to Māori

When considering proposals that may adversely affect any matter of significance to Māori recognise and provide for avoiding, remedying or mitigating adverse effects on:

(a) The exercise of kaitiakitanga;

(b) Mauri, particularly in relation to fresh, geothermal and coastal waters, land and air;

(c) Mahinga kai and areas of natural resources used for customary purposes;

(d) Places sites and areas with significant spiritual or cultural historic heritage value to tangata whenua; and

(e) Existing and zoned marae or papakāinga land.

Policy IW 6B: Encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects

Encourage tangata whenua to recommend appropriate measures to avoid, remedy or mitigate adverse environmental effects on cultural values, resources or sites, from the use and development activities as part of consultation for resource consent applications and in their own resource management plans.

Tauranga City Plan (the District Plan)

Objectives

Objective 6A.1.3 The natural character of the City's coastal environment, wetlands, rivers and streams is preserved and protected from inappropriate subdivision, use and development.

Objective 6A.1.7 The landscape character values of the City's harbour environment is maintained and enhanced.

Objective 6A.1.8 The open space character of the coastal marine area and the factors, values and associations of outstanding natural features and landscapes and important amenity landscapes and their margins is maintained and enhanced.

Objective 10A.3.3 Construction, Operation and Maintenance of Network Utilities

a) The construction (and minor upgrading in relation to electric lines) of network utilities avoids or mitigates any potential adverse effects on amenity, landscape character, streetscape and heritage values;

b) The operation (and minor upgrading in relation to electric lines) and maintenance of network utilities mitigates any adverse effects on amenity, landscape character, streetscape and heritage values.

Policies

Policy 6A.1.7.1 By ensuring that subdivision, use and development along the margins of Tauranga Harbour does not adversely affect the landscape character values of that environment by:

…

g) Protecting areas of cultural value;

h) Avoiding built form of a scale that dominates the harbour's landscape character;

i) Siting buildings, structures, infrastructure and services to avoid or minimise visual impacts on the harbour margins environment;

…

m) Ensuring activities maintain and enhance the factors, values and associations of outstanding natural features and landscapes and/or important amenity landscapes.

Policy 6A.1.8.1 By ensuring that buildings, structures and activities along the margins of the coastal marine area, outstanding natural features and landscapes and important amenity landscapes do not compromise the natural character, factors, values and associations of those areas, through:

a) The impact of the bulk and scale of buildings, structures and activities on the amenity of the environment;

…

d) Buildings, structures and activities detracting from the existing open space character and the factors, values and associations of outstanding natural features and

landscapes and important amenity landscapes and their margins;

Policy 7C.4.3.1 By ensuring that subdivision, use and development maintains and enhances the remaining values and associations of Group 2 Significant Maori Areas by having regard to the following criteria:

a) The extent to which the degree of destruction, damage, loss or modification associated with the activity detracts from the recognised values and associations and the irreversibility of these effects;

b) The magnitude, scale and nature of effects in relation to the values and associations of the area;

c) The opportunities for remediation, mitigation or enhancement;

d) Where the avoidance of any adverse effects is not practicable, the opportunity to use alternative methods or designs that lessen any adverse effects on the area, including but not limited to the consideration of the costs and technical feasibility of these.

Policy 10A.3.3.1 Undergrounding of Infrastructure Associated with Network Utilities

By ensuring infrastructure associated with network utilities (including, but not limited to pipes, lines and cables) shall be placed underground, unless:

a) Alternative placement will reduce adverse effects on the amenity, landscape character, streetscape or heritage values of the surrounding area;

b) The existence of a natural or physical feature or structure makes underground placement impractical; c) The operational, technical requirements or cost of the network utility infrastructure dictate that it must be placed above ground;

d) It is existing infrastructure.

Policy 10A.3.3.2 Effects on the Environment

By ensuring that network utilities are designed, sited, operated and maintained to address the potential adverse effects:

a) On other network utilities;

b) Of emissions of noise, light or hazardous substances;

c) On the amenity of the surrounding environment, its landscape character and streetscape qualities;

d) On the amenity values of sites, buildings, places or areas of heritage, cultural and archaeological value.

Objective 10B.1.1 Electricity Transmission Network

The importance of the high-voltage transmission network to the City's, regions and nation's social and economic wellbeing is recognised and provided for.

Policy 10B.1.1.1 Electricity Transmission Network

By providing for the sustainable, secure and efficient use and development of the high-voltage transmission network within the City, while seeking that adverse effects on the environment are avoided, remedied or mitigated to the extent practicable, recognising the technical and operational requirements and constraints of the network.

The Tauranga City Plan identifies Te Ariki Pā/Maungatapu as a significant Māori area of Ngāti Hē (Area No M41). Its values are recorded as:

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu/Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa/ Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

Iwi Management Plans

The Te Awanui Tauranga Harbour Iwi Management Plan 2008

> OBJECTIVE
>
> 1. To reduce the impacts on cultural values resulting from infrastructural development in, on or near Te Awanui.
>
> POLICIES
>
> 1. To restrict the placement of structures in, on or near Te Awanui, and to promote the efficient use of existing structures around Te Awanui.
>
> …
>
> 8. To avoid adverse effects on culturally important areas, including waterways and cultural important landscape features as a result of works, including the storage and or disposal of spoil as a product of works.

…

10.Iwi object to the development of power pylons in Te Awanui, appropriate alternative routes need to be investigated in conjunction with tāngata whenua.

The Tauranga Moana Iwi Management Plan 2016-2026

15.1 Oppose further placement of power pylons on the bed of Te Awanui (Tauranga Harbour).

15.2 Pylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge.

…

15.4 In relation to the placement, alteration or extension of structures, within Tauranga Moana:

(a) Ensure that:

(i) tāngata whenua values are recognised and provided for.

…

(b) Avoid adverse effects on sites and areas of cultural significance, wetlands or mahinga kai areas.

Ngāi Te Rangi Resource Management Plan

All environmental activities that take place within the rohe of Ngaiterangi must take into account the impact on the cultural, social, and economic survival of the Ngaiterangi hapu.

…

The cultural significance of Ngaiterangi's links to their lands and the values they hold in respect of land, whether still in customary title or not, should be acknowledged and respected in all resource management activities.

…

Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.

…

Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 277

IN THE MATTER	of appeals under sections 120 and 121 of the Resource Management Act 1991 (**RMA/the Act**)
AND	
IN THE MATTER	of an application by Waste Management NZ Ltd for resource consents to construct and operate a new landfill at 1232 State Highway 1, Wayby Valley, Wellsford
BETWEEN	TE RŪNANGA O NGĀTI WHĀTUA (ENV-2021-AKL-076)
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED (ENV-2021-AKL-078)
	DIRECTOR-GENERAL OF CONSERVATION (ENV-2021-AKL-079)
	FIGHT THE TIP: TIAKI TE WHENUA INCORPORATED (ENV-2021-AKL-082)
	NGĀTI WHĀTUA ŌRĀKEI & ENVIRONS HOLDINGS LIMITED (ENV-2021-AKL-085)

CHANNEL INFRASTRUCTURE NZ LIMITED (as to protection of gas pipeline only)
(ENV-2021-AKL-084)

Appellants

MANUHIRI KAITIAKI CHARITABLE TRUST
(withdrew as Appellant January 2023)

(ENV-2020-AKL-080)

AND

AUCKLAND COUNCIL

Respondent

Court:	Judge J A Smith Judge M J Dickey Commissioner R Bartlett Commissioner G Paine Commissioner K Prime
Hearing:	20-23 June 2022, 25-28 July 2022, 1-11 August 2022, 25-31 October 2022, 1-4 November 2022, 21-25 November 2022, 1-2 February 2023, 20-24 March 2023, 29-31 March 2023, 3-6 April 2023, 13-14 April 2023, 19 April 2023, 24 April 2023 and 27-28 April 2023
Appearances:	B Matheson, S Pilkinton and M Mitchell for Waste Management NZ Ltd (**The Applicant/Waste Management**) D Hartley and A Buchanan for Auckland **Council** J Pou and T Urlich for Manuhiri Kaitiaki Charitable Trust (**MKCT**) s 274 party with Appeal withdrawn January 2023. R Enright for **Te Rūnanga o Ngāti Whātua** and Trustees of Ngā Maunga Whakahii o Kaipara Development Trust R Haazen for **Ngāti Whātua Ōrākei** and Environs Holdings Ltd and **Te Uri o Hau** S Ongley and M Hooper for the Director-General of Conservation (**Director-General**) P Anderson and M Downing for Royal **Forest and Bird** Protection Society of New Zealand A Braggins for **Fight the Tip** Tiaki Te Whenua Inc W Foster appearing for himself Channel Infrastructure NZ Ltd no appearance– abide decision on the basis of agreed condition related to fuel pipeline
Date of Decision:	21 December 2023
Date of Issue:	21 December 2023

INTERIM DECISION OF THE ENVIRONMENT COURT

This Court concludes:

A: A modified Application, conditions and Management Plans could meet the purpose of the Act, and the provisions of the AUP.

B: Further work is required to identify:

(a) whether the Northern Valley can be retained (unlogged) for 7-10 years while the frog population improves;

(b) whether the downstream area of landfill and the separation of waters can be improved to deal with:

(i) high rainfall;

(ii) landslip or failure of the landfill;

(c) the arrangement with tangata whenua (including MKCT) can be resolved as conditions of consent or other agreements.

C: Waste Management is to file and serve a memorandum with its response and timeline to issues raised in B. This memo is to be filed by 31 January 2024.

D: Auckland Council and MKCT are to file any additional memoranda by 9 February 2024.

E: Appellants and s 274 parties are to file any memoranda in response by 1 March 2024.

F: The Court will convene a judicial conference or make further directions as necessary.

G: Costs issues (if any) will be subject to directions after any final decision.

REASONS

A. Background – the proposed landfill

Proposed landfill

[1] These appeals relate to an Auckland Council decision to grant resource consents to Waste Management New Zealand Ltd to establish and operate a new class 1 landfill at 1232 State Highway 1 (**SH1**), Wayby Valley near Wellsford.

[2] The application was highly contentious, and the decision of the Council-appointed Commissioners was divided. Those who have filed appeals support the minority decision of Commissioner Tepania; while Waste Management and Auckland Council support the decision of the majority.

[3] There was a contemporaneous application for a plan change to establish a regional landfill in this area which was refused by the same Commissioners. The decision on that application for plan change has not been appealed.

[4] The position of the Council, and now Manuhiri Kaitiaki Charitable Trust (**MKCT**), is to support the majority decision of the Council subject to extensive changes to the conditions of consent. The latest version of conditions was produced in closing on 28 April 2023. The conditions are numerous and rely in part on draft management plans that have yet to be finalised. The final management plans are critical to a full understanding of the activity and the conditions.

The site

[5] **The Site** covers parts of two significant properties, known as Springhill Farm and [the part of] Rayonier Matariki Forests (**Matariki Forests**) between Wilson Road and Springhill, comprising around 1,070 ha.

[6] The **Landfill Footprint** itself is in the order of 80 ha and has a preliminary design showing around 30 million cubic metres of landfill space available. It fills what we will refer to as the **Landfill Valley** on the Matariki Forests land. Associated with this are other development areas, including those for spoil stockpiles, gas recovery and leachate treatment, site offices, settlement ponds and other water management features, along with roading. Beyond the immediate Landfill Footprint a large area for predator-proof fencing covering several large wetlands is proposed, and additional borrow areas in addition to the large spoil stockpile. This is largely on Springhill land.

[7] The Landfill Footprint will be seated within the valley floor of the Landfill Valley (map attached as **Annexure A – Fig.2** from Mr John Goodwin's evidence). It will be built in stages from the base towards the top of the valley. The anticipated fill life for the landfill is around 30 years depending on waste volumes received, followed by disestablishment and remediation. **Annexure B – Fig. 8**, from the same evidence, shows the layout of the landfill's physical components.

Range of waste

[8] Waste Management intends the landfill to be operational on completion of the filling of the Redvale Landfill anticipated to occur by 2028. Redvale Landfill currently receives some of Auckland Council's waste, particularly from the central and northern parts of the Auckland region. However, evidence was clear that much of Redvale Landfill is utilised for commercial and demolition waste, as this new landfill would be.

[9] The Auckland Waste Assessment 2017 recorded that 15% of waste is from household kerbside sources and 85% from commercial sources. The most readily available composition data is from 2016,[1] as follows:

	Percent	Estimated Tonnes
Paper	8%	144,000
Plastics	12%	216,000
Organics	19%	342,000
Ferrous	2%	36,000
Non-ferrous	1%	18,000
Glass	1%	18,000
Textiles	4%	72,000
Nappies & Sanitary	2%	36,000
Rubble	21%	378,000
Timber	10%	180,000
Rubber	2%	36,000
Potentially hazardous	17%	306,000
TOTAL	**100%**	**1,800,000**

[10] Although Waste Management seeks no particular constraints on the sources of waste, it is clear that the primary intention will be to serve the northern part of the Auckland Region, including Warkworth, with the potential to also supply services to points further north such as Wellsford and the Kaipara District.

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[1] Table 8: Auckland Residual Waste Composition; EIC, Mr Duncan Wilson, dated 26 April 2022, at [11.5].

Outline of intended operation

[11] Waste Management intends that transportation of waste will occur via current SH1. In the event that a new state highway is constructed between Warkworth and Wellsford during the life of the landfill, then a connection point would be constructed to Wayby Valley Road and thus to the existing SH1. A new roundabout will be constructed on SH1 to allow all traffic to enter the site. Incoming waste-filled trucks will access a 24-hour bin exchange area where the incoming bins will be exchanged for empty bins and these trucks will then depart the site.

[12] The Site's main access road will be constructed from the bin exchange area up to the landfill site and will act as an internal trucking route for specialised trucks, operated by Waste Management staff. These trucks will transport the bins to the deposit areas within the landfill in accordance with a written programme for the placement of waste (an operation management plan). That route also provides access to all other site facilities.

[13] The bin exchange area is very close to Sunnybrook Scenic Reserve and situated on the Waitaraire Stream, a tributary to the Hōteo River, in which aquatic and benthic values have been identified.

[14] During the construction period when the Site is being prepared, access will be obtained via a private road known as Wilson Road, which is accessed off SH1 some kilometres further to the south in Dome Valley. This access point is close to several properties, some residential, one of which is immediately adjacent to the entry point. Vehicles will need to traverse relatively steep terrain to access the balance of the Site for construction purposes.

[15] It appears inevitable that some of the construction vehicles will also need to enter through the Springhill Farm access, given the relatively easier terrain and readier proximity to certain areas such as the base of the landfill, the stream areas and the stockpile areas.

[16] Construction at the Site will take approximately five years, making a total period of at least 35 years with the landfill operation. The landfill itself will be constructed in stages, including the removal of existing plantation pine forest, excavation to form the landfill shell and construction of water management facilities both within the landfill itself and downstream, as treatment ponds. A liner system will be required to contain the waste and this will be constructed in stages once the site is operational, as the landfill develops. The development will include both leachate collection and containment infrastructure and stormwater management infrastructure.

Hearing

[17] This hearing commenced in June 2022.

[18] As the hearing progressed, it became clear that there were aspects of the application that Waste Management had not fully explored with the other parties. The hearing was suspended for several months while the parties held further discussions. By agreement, they returned to the Court and asked to continue with the hearing.

[19] In January 2023 we were advised that Waste Management had reached an agreement with MKCT such that it now supported the application. Waste Management made a number of significant concessions in terms of the conditions of consent and entered into a side agreement to provide land for housing, funding and to transfer the entire block to MKCT on completion of the landfill activity.

[20] That raised questions as to the status of MKCT's appeal, and the evidence already filed and cross examination conducted.

[21] Eventually its appeal was withdrawn, but MKCT continued as a s 274 party. The evidence that had already been filed on the matter, particularly from Mr Mook Hohneck, was still supported. Mr Greg Carlyon, a planning witness originally called by both MKCT and Te Rūnanga o Ngāti Whātua, was now called only by Te Rūnanga o Ngāti Whātua and he remained as a witness for them, although subject to cross-examination by Mr Pou for MKCT.

[22] In later discussions it transpired that the earlier adjournment for discussions to occur between the parties was more narrowly focussed than had been indicated to the Court. The discussion was, we understand, primarily with Ngāti Whātua about an alternative site, and MKCT was involved in the discussions only at the preliminary stage.

[23] The change of position has meant that much of the evidence given at the earlier stages of the hearing, some subject to vigorous cross-examination by Mr Pou, needs to be re-examined in the context of the agreement reached.

The appeals

[24] The wide range of issues raised by the appellants relate to:

(a) the use of landfill as opposed to other waste minimisation techniques and residential interests;[2]

---

[2] Particularly Fight the Tip, individual local resident submitters, Mr Foster, Kaipara District Council, Ngāti Whātua Ōrākei and Te Uri o Hau, MKCT.

(b) operational and development concerns;

(c) relationship of Māori with the values of the area;[3]

(d) ecological concerns.[4]

[25] When MKCT changed its position to support the proposal it did not change its evidence on its cultural concerns. Mr Hohneck made it clear that without the amended conditions now proposed by Waste Management and MKCT and the further agreement that was reached, MKCT would still oppose the application.

[26] The position for Te Rūnanga o Ngāti Whātua and Ngā Maunga Whakahii o Kaipara (we refer to them both as **Ngāti Whātua**),[5] Ngāti Whātua Ōrākei and Te Uri o Hau[6][7] (when we refer to Te Uri o Hau we are also referring to Environs Holdings Ltd) is that their concerns remain and that these should lead to the decline of the application.

[27] There are a number of other issues arising in this case beyond the above key issues relating to local amenity (noise, effects on residents of the construction road, odour), and the need for this particular site or a new landfill at all.

Further refinement of proposal and concessions

[28] In his thorough and thoughtful final submissions, Mr Matheson, for Waste Management, indicated that there had been further development of the conditions of consent and indicated several significant changes.

[29] The major one of these is a proposal that the **Northern Valley**, the valley immediately north of the Landfill Valley, would now be subject to a significant change in ecological approach so that the riparian margins of the main stem of the stream at the base of the valley are preserved in the long term as habitat for native species, including pepeketua | Hochstetter's frog, pekapeka-tou-roa | long-tailed bat, mokomoko | lizards and other important native species.

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3 Te Rūnanga o Ngāti Whātua (and Ngā Maunga Whakahii o Kaipara), Ngāti Whātua Ōrākei, Te Uri o Hau, Environs Holdings Ltd (a company operating under a wider remit for Te Uri o Hau) and MKCT.

4 Particularly Royal Forest and Bird Protection Society of New Zealand Incorporated (**Royal Forest and Bird**), Director-General of Conservation (**Director-General**) and all other appellants in support of them.

5 Te Rūnanga o Ngāti Whātua and Ngā Maunga Whakahii o Kaipara are Post Settlement Governance Entities. The latter manages Te Rūnanga's settlement assets.

6 Both are hapū of Ngāti Whātua a iwi. Environs Holdings Ltd is the environmental management arm for Te Uri o Hau.

7 We include Environs Holdings Ltd when we refer to Te Uri o Hau.

[30] These changes were not ones that we were able to discuss with any of the other parties. We address them later in the decision.

The necessary consents

[31] The Site is in the Rural-Rural Production Zone. There is common ground that the application for this landfill consent is overall a non-complying activity. It requires numerous consents, including for land use as a non-complying activity, discharges to land, air and water and for reclamation.

[32] Waste Management conceded that the application for consent does not pass the first limb of the threshold test under s 104D(1)(a), which requires that the proposal's effects be minor. In fact, in several respects there was evidence that without offset or compensation (countervailing benefits under s 104(1)(ab)), the impacts of the activity would be significant. These are particularly in the following areas:

(a) the loss of stream length and function (12.2 km of permanent and intermittent streams);

(b) impact upon Hochstetter's frogs (the potential loss of between 500 and 2,000 animals);

(c) impact on lizards and bats;

(d) effects on amenity;

(e) effects on the relationships of iwi and hapū with the values of the area.

[33] In relation to the second limb of the threshold test under s 104D(1)(b), which requires that the proposal not be contrary to objectives and policies of the Auckland Unitary Plan Operative in Part (**AUP**), Waste Management and the Council conceded that the application does not meet some policies. However, their view is that giving appropriate weight to the wording and context of each of the provisions, and the changes to conditions and further proposals, the application does pass the s 104D threshold when viewed against the objectives and policies of the AUP as a whole.

[34] Waste Management says that, taking into account the offset and compensation benefits (particularly those relating to approximately 50 km of riparian enhancement), the predator-proof fenced area around the Springhill Farm wetlands and surrounds, and the other significant mitigatory offset and compensation steps proposed, the application should be granted consent on the merits under s 104(1).

Section 290A – Decision of the first instance

[35] Section 290A of the RMA states the Court must have regard to the decision appealed. We conclude we must have genuine regard to that decision and have reasons for departing from it. Where the proposal becomes more refined or new cases or new evidence becomes available, these may be reasons for a change in outcome.

[36] The Commissioners agreed that the application did not pass the effects threshold under s 104D(1)(a). They accepted that their consideration of the adverse effects under this section must not include offset or compensation.

[37] The majority determined that the application is contrary to some objectives and/or policies. At paragraph [670] they speak of a broad overall judgement being appropriate. They recognised that the proposal was contrary to some policies, but stated that these were not so central as to sway the decision. Unfortunately, the majority did not identify which provisions they considered were not central. They also said that measured weight should be given to the avoid policy.

[38] Overall, we conclude that this is an unsatisfactory approach to the analysis in respect of s 104D given the specific wording of the decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (***King Salmon***).[8] The Supreme Court noted the need to pay particular attention to the different wording and context of provisions in a [Regional] Plan and that some words are to be given their particular meaning and 'avoid' may mean 'not allow'. The meaning is dependent on the wording and context.

[39] The tension which has continued to be addressed is what is to be avoided? Ephemeral (or minimal) and temporary effects are a matter of fact for the Court and have not been particularly troublesome in identification. On the other hand, what is an *ephemeral* or *minimal* effect has caused ongoing issues for experts.

[40] In the recent ***Port Otago***[9] case the Supreme Court imported the term *material harm* from the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 to assist with evaluating this term. For practical purposes in this case neither *avoid adverse effects* nor *avoid material harm* fully captures the issue as to whether the death of a substantial number of threatened animals can be justified by medium term gains for the species. However, with these definitions the issue of scale remains as does the time to achievement and the certainty of the outcome.

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8 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (***King Salmon***) [2014] NZSC 38; [2014] 1 NZLR 593.

9 *Port Otago Ltd v Environmental Defence Society Inc* (***Port Otago***), [2022] NZSC 112.

[41] What level of loss, in the short to mid-term, is acceptable; and how certain do the long term gains need to be to satisfy us that a consent may be granted? We conclude that detailed analysis is required, together with high levels of precaution as to outcomes to avoid material harm or adverse effect.

[42] With regard to the overall merit and our broad discretion under s 104(1), the majority acknowledged that the adverse effects are more than minor, but overall considered that they are avoided, remedied or acceptably mitigated, offset or compensated. Again, given the lack of any further analysis it is difficult to understand the basis on which this finding was made.

[43] The dissenting minority position was set out particularly at paragraphs [166] – avoid means avoid, and [171] – that the cultural values, cultural landscapes, ecology effects are such that the proposal did not merit consent under s 104(1). As we will discuss in due course, the movement in the test to avoid material harm does not resolve the key concerns in this case, although it does frame them.

[44] However, the change in position of MKCT at this hearing is relevant, and influences the assessment of cultural values, cultural landscapes and even ecological effects given kaitiaki involvement in restoration works.

[45] We take into account that the first instance decision was relatively nuanced; and the Commissioners recognised the proposal is finely balanced. Accordingly, the changes that have been made to the proposal since that time are such that we cannot presume that the approach of the Commissioners is necessarily still applicable, particularly with the amended conditions and the change by MKCT to support the consent.

B. Overview of issues and our findings

[46] The issues for the proposed landfill distill to the following:

- Breach of tikanga – no consultation before site was chosen.
- Mauri, mātauranga and taonga values adversely affected.
- Contaminants from construction and operation reaching the Hōteo River and Kaipara Harbour.
- Loss of river and wetland extent.

- Loss of habitat and species.
- Inadequacy of effects management.
- Inadequacy of conditions and management plans, in particular the need for trigger levels for contingency actions. There is also a need for contingency actions for low probability but high impact events.

[47] We have concluded, on all of the evidence, that there is no direct provision in the AUP for a landfill in the Auckland Region. Its status is explicitly non-complying in the Rural Production Zone.

[48] Even with the maximum levels of avoidance, remediation and mitigation proposed there are adverse effects which are more than minor. Whether these can be satisfactorily offset or compensated lies at the heart of this case.

[49] Waste Management and the Council do not accept that the proposal is contrary to the objectives and policies of the AUP as a whole. The appellants say there are at least some objectives and policies to which the application is contrary, and viewed in the round the application is contrary to the regional and district objectives and policies. Whether the application can meet either threshold under s 104D of the Act is another issue central to this case. It is conceded that the effects are more than minor.

[50] We should note that the Court has concerns as to how this Site, in particular, was chosen for the works, and whether the Site is appropriate. This, of course, feeds into the question of avoidance of adverse effects, which we will discuss later, given the clear and recognised adverse effects on threatened species and habitats. However, as Mr Matheson submitted and we accept, the appropriateness of the site is not determinative of the consent outcome.

Overview of Court conclusions

[51] The tensions raised in this case are not new. They lie at the heart of the Act's purpose in seeking to enable use of natural and physical resources while avoiding, remedying or mitigating adverse effects. This has often been typified as a bottom line approach, however consideration in this and many other cases leads us to suggest that a more proportionate response is anticipated in terms of the Act, in that the use of the word while envisages that use and development may not necessarily be anathema to the other values protected and supported under the Act.

[52] The way in which that proportionate view is expressed is both in the wording of the various statutory and other provisions that might apply in a particular case, but also

in the ways in which overall benefits might be realised.

[53] This Court has previously criticised bottom line approaches to the wording in s 5. That cannot be the intent of the Act. We do not understand any Court to have upheld that position. The Act requires particular regard both to the ways in which the values are expressed and in designing outcomes. We reiterate this given the importance of the question of tikanga as law and the views of tangata whenua expressed very clearly in this hearing.

[54] In relation to the concept of mana whenua, this is agreed to be a relatively new concept – it may even be described as a legal construct. It is clear that the overlaying of various forms of authority, tapu, kawa and tikanga lie at the heart of the concepts of mauri and mana.

[55] As the parties were quick to tell us in this case, questions of whanaungatanga become important and bear upon how these relationships are expressed. The Hōteo River is a prime example, with all parties expressing their particular connections to it and the other parties to this hearing in relation to it and the wider area.

[56] Nevertheless, there appears to have been a common understanding of which areas were Ngāti Manuhiri, Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau. These included the area of the landfill site itself and the area to the east of it. The landfill site appears to have been recognised as being within the Ngāti Manuhiri rohe. Ngāti Whātua have clearly been established around portions of the Kaipara and for some distance up the various tributaries, including the Hōteo River.

[57] Nevertheless, the Hōteo River seems to demonstrate areas of overlapping interest both for the harvesting potential of the river itself and for the karaka trees that grew along its margins. The extent of this is in dispute and is the subject of an application to the Māori Land Court. However, Ngāti Whātua Ōrākei and Te Uri o Hau are established more broadly around the Hōteo and on the Kaipara Harbour.

[58] We do not intend to comment upon who may have exclusive authority in respect of any part of the Hōteo. What we can say is that the evidence was clear before us that, at least up to the Wayby Valley area, there was common usage by a number of parties that may have been based upon whanaungatanga and other informal – or formal – understandings between the various hapū and iwi.

[59] These relationships are also reflected in the Act in the provisions of ss 6, 7 and, of course, in s 8, and the provisions of the Treaty of Waitangi|te Tiriti o Waitangi.

[60] Accordingly, the Deeds of Settlement for the Treaty Claims are also of relevance. However, as the parties explained, although the settlements can be indicative of mana whenua, they do not in themselves establish mana whenua (i.e., they suggest but do not determine mana whenua).

[61] As the legal system struggles with these issues they are very much at the forefront of many of the RMA matters the Court has considered recently and is likely to consider within the next few years.

Summary conclusions

[62] Overall, the Court needs to consider the ways in which the various effects are experienced in planning terms and in real terms, both in scientific evidence and in mātauranga Māori. We also need to consider the effects including those on Māori relationships and their values. We must view those through the lens of the public documents – statutory, regulatory and planning – and seek to respond on a proportionate basis.

[63] In this case it is unfortunate that Waste Management did not engage with tangata whenua prior to making an application to the Overseas Investment Office (**OIO**) to purchase the Site, which application signalled the company's intention for the Site as a landfill. We see no basis for Waste Management's assertion that there were confidentiality issues or relationship issues that would have prevented such an approach. In fact, the witnesses for Waste Management for the most part conceded that, in retrospect, they should have engaged in such a way.

[64] Overall, we have found that there are clear adverse effects both on the ecology of the area in relation to Hochstetter's frogs, native bats and aquatic biota, and their habitat from the loss of stream length and to other native species (for example, lizards and invertebrates) from habitat loss.

[65] We have also found that there is a clear potential impact of sediment, leachate and other contaminants on the mauri of both the wider landfill area as a whole and in particular on the Hōteo River. We acknowledge that mauri is already depleted in this area, but Ngāti Whātua in particular are concerned that the effect on mauri might be overwhelming on the wider Kaipara catchment if there were to be a failure of the landfill engineering.

[66] We also recognise the lack of consultation and involvement with iwi and hapū that had occurred prior to this hearing commencing.

[67] Mr Matheson made a proposal in closing in relation to additional riparian enhancement and predator control in the next valley to the Landfill Valley, which we have called the Northern Valley. This proposal has resonated with the Court, and suggests an additional way to rebuild partnership relationships and whanaungatanga and increase the mauri of the land and streams in the vicinity of the landfill generally, their ecological function and the ecological function and mauri of the Hōteo River.

[68] We conclude the Effects Management Package proposed by Waste Management is generally appropriate subject to a number of changes that need to be made. Also, much of its implementation and acceptability to address issues depends on conditions that we would need to finally determine.

Conditions

[69] There was a great deal of evidence given about conditions of consent. It became very clear to the Court at an early stage that the conditions would require revisions if consent was to be granted. Lack of clarity, certainty and enforceability was a major concern to this Court, and many conditions were simply expressed in terms of leaving the details for parameters to management plans to be produced at a later time.

[70] That being the case, we are not able to finally judge whether the effects are acceptable or can be adequately addressed by management plans until at least the parameters for the conditions can be finalised. It also became clear that the wording of many conditions was a work in progress, and changes have been made throughout the hearing by various witnesses.

C. The Identification and Assessment of Potential Landfill Sites and Assessment of Alternative Methods of Waste Disposal

[71] The site selection process and the adequacy of the assessment of alternative sites was a significant issue for the appellants. The availability of alternative methods for waste disposal, to avoid having to develop a new landfill, was also an issue and we address it in our discussion of landfill capacity in Auckland (Section I).

The parties' arguments

[72] Waste Management argues that, for consent applications, the procedural requirements for alternatives are precise and only require a description of possible

alternatives, relying on *Meridian Energy Ltd v Central Otago District Council*.[10] It notes that the assessment does not have to capture every alternative, and it is not necessary to put forward the best alternative.[11] It argued that there is no jurisdiction to reconsider the alternatives assessment in the Assessment of Environmental Effects document, as the obligation is to provide a description of alternatives and that was done.

[73] In terms of the substantive assessment, Waste Management accepted that alternatives may be relevant under s 104(1)(c). It acknowledged that the assessment may be triggered where it is directed by the planning framework or where, as here, the application may have significant adverse effects.[12] Again, it said it does not have to demonstrate that the proposed landfill is the best alternative;[13] nor does every possible alternative for the landfill need to be assessed.[14]

[74] Ngāti Whātua referred us to the High Court's findings in *Tauranga Environmental Protection Society Inc v Tauranga City Council (**Tauranga Environmental Protection Society**)*[15] which applied the *King Salmon* approach to alternatives to the resource consent applications before it. The High Court stated:[16]

> The Supreme Court held that consideration of alternatives may be necessary, depending on "the nature and circumstances" of a particular application and the justifications advanced in support of it. If an applicant claims that an activity needs to occur in the coastal environment and it would adversely affect preservation of the natural character, or that a particular site has features that are especially suitable, the decision-maker ought to test those claims. That will "[a]lmost inevitably" involve consideration of alternative localities. In that case, it considered the application to consider alternative sites arose from the requirements of the NZCPS and sound decision-making, as much as from s 32 of the RMA.

[75] Ngāti Whātua[17] argued that *Meridian* has been overtaken by *King Salmon* as applied in the above case. It argued that it was both mandatory and appropriate to consider alternative sites in this case, given the planning framework, Ngāti Whātua tikanga and the factual context. We were referred to relevant provisions from the National Policy Statement for Freshwater Management 2020 (**NPS-FM 2020**) and Chapter E3 and

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[10] RMA, Schedule 4, clause 6(1)(a) and clause 6(1)(d)(ii) and s 105 in respect of discharges; *Meridian Energy Ltd v Central Otago District Council* (***Meridian***) [2011] 1 NZLR 482, at [78] (HC).

[11] *Meridian* at [148](e).

[12] *Waimea Plains Landscape and Preservation Society Inc v Gore District Council* (***Waimea***) [2022] NZEnvC 29 at [136]; and Meridian, at [65].

[13] *Meridian* at [148](e).

[14] *Transpower NZ Ltd v Rodney District Council*, A056/94, 8 July 1994, at p3.

[15] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882, at [133] (***Tauranga Environmental Protection Society***).

[16] *Tauranga Environmental Protection Society*, at [133].

[17] And Te Uri o Hau and Ngāti Whātua o Ōrākei.

Chapter B6 provisions from the AUP.[18]

[76] Ngāti Whātua and others took issue with Waste Management's assessment that the proposed Site is the …*best available landfill site north of Auckland*.[19]

[77] Ngāti Whātua and others' view is that there are fundamental problems with the approach taken to site selection, in particular the absence of consideration of cultural values and effects that could only be obtained from consulting the relevant tangata whenua parties and with the absence of detailed consideration of biodiversity effects (as argued by the Director-General).

[78] Ngāti Whātua argued that the significant cultural effects and the associated breach of Ngāti Whātua tikanga was entirely predictable. Waste Management bought the Site before engagement with Ngāti Whātua. Ngāti Whātua submitted that the paper trail, including extensive Tonkin + Taylor reports and the 2016 Waste Management Board reports demonstrates this was a deliberate strategy. It referred to the Board report of June 2016, which stated:[20]

> … although closer to Auckland, there were perceived difficulties in dealing with iwi as landowners (potential risks of extended negotiations on timeline) and a wider public recreational stakeholder interest in the area.

[79] Ngāti Whātua argued that Waste Management did not follow the advice given by Tonkin + Taylor in the consultation strategy, including the extensive briefing given to Waste Management relating to the Treaty settlement framework and iwi authorities. It submitted that it was telling that most or all of the independent experts called for Waste Management agreed that this failed best practice, including Ms Juliane Chetham and Mr James Whetu who agreed that this was not how they would approach engagement with tangata whenua for an infrastructure project of this scale.[21]

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[18] Policy 7 of the NPS-FM: *The loss of river extent and values is avoided to the extent practicable*; Objective E3.2(6) of the AUP, which requires reclamation and drainage of streams and wetlands to be avoided, *unless there is no practicable alternative*; Policy E3.3(2) of the AUP which requires *avoiding where practicable… any adverse effects on lakes, rivers, streams or wetlands*; Policy E3.3(13), which directs the avoidance of the reclamation of streams and wetlands unless there is *no practicable alternative method for undertaking the activity outside… the stream or wetland*; Policy E3.3(17) and (18) of the AUP, which require loss of *natural inland wetlands* and of *river extent* to be avoided, unless, among other things, there is a *functional need for the activity in that location*.

[19] EIC, Mr Ian Kennedy, dated 11 February 2021, at [6.42], where he stated: I am pleased to say that all further investigations on the site have confirmed that the incredibly thorough site selection process that dates back to 2007 has resulted in what I am convinced from the technical perspective, is the best available landfill site north of Auckland, which can be developed and operated with minimum effect on the environment…

[20] Board Paper: Project and Update, Polaris, 21 June 2016; Appendix A Supplementary Evidence of Mr Ian Kennedy, 14 February 2023.

[21] NOE, 6-28 April 2023 at p228-229 (Ms Chetham) and p258-259 (Mr Whetu).

[80] Royal Forest and Bird submits that the Court cannot have confidence alternatives have been considered to the extent that the Court in the *Tauranga Environmental Protection Society* case stated is necessary. It submits that the High Court in *TV3 Network Services Ltd v Waikato District Council*[22] found that where matters of national importance under s 6 are engaged, an assessment of alternative locations is required. It submits that given the proposal raises s 6 issues (effects on wetland and stream habitat) alternative locations are to be considered.

[81] The Director-General asserts that Waste Management's site selection was informed only by desktop analyses of ecological matters, and having regard to the Court's decision in *Waimea,*[23] that is not enough.

[82] Waste Management accepts that it did not follow its consultants' advice for consultation. It regrets it did not consult earlier and observes that is an approach it would not repeat. It does not accept, however, that its failure to consult earlier amounts to unlawfulness or a failure to meet the standards required of an application for resource consent. It does not necessarily accept that its 'alternatives assessment' was flawed. Mr Matheson says that if the Court has concerns around the site selection process, those concerns cannot weigh against the grant of consent – given the planning framework operative at the relevant time. It says that were that so, it would be without precedent in the context of a resource consent application.

[83] Finally on this point, Mr Matheson submitted that while tikanga is accepted as a source of law in New Zealand, it cannot supplant direct and clear statutory wording. Mr Matheson notes that while not consulting mana whenua prior to site selection might not have been tikanga, s 36A of the RMA states that an applicant is not required to consult with any party including mana whenua.

[84] In assessing what was done, we summarise first the criteria Waste Management used to select a site, and then look to the process of selection.

Site selection criteria

[85] We received evidence from Ms Simonne Eldridge that the Technical Guidelines for Disposal to Land[24] are the recognised guidance document for landfills (**WasteMINZ Guidelines/Guidelines**) such as that proposed. These were first published in 2016 and were updated in 2018.

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22 *TV3 Network Services Ltd v Waikato District Council* HC Hamilton AP55/97, 12 September 1997, at p25.

23 *Waimea,* at [139].

24 Prepared by Waste Management Institute New Zealand (**WasteMINZ**).

[86] The purpose of the WasteMINZ Guidelines is to provide technical guidance relating to the siting, design, operation and monitoring of landfills in New Zealand, based on local and international experience. The Guidelines call for a balanced approach where factors are assessed against each other, and mitigation is put in place to get the best outcome.

[87] Ms Eldridge described site selection as a complex, multi-criterion and time-consuming process. It involves consideration of multiple factors such as technical, environmental, geological-hydrogeological, operational, economic, cultural, social and political. Specific weighting for the assessment criteria is not provided by the Guidelines. Ms Eldridge said that weightings are developed on a case-by-case basis with reference to the specific planning context.

[88] For class 1 landfills, the Guidelines recommend the use of a robust selection process and siting criteria to select the most appropriate landfill site to help with avoiding or reducing potential environmental and social impacts of a landfill. It specifically recommends an assessment around the following technical constraints:

(a) site stability – geothermal areas, karst areas, active faults;

(b) hydrogeology – drinking water aquifers;

(c) surface hydrology – flood plains, water supply catchments, estuaries, marshes and wetlands;

(d) environmentally sensitive areas – significant wetlands, intertidal areas, significant areas of native bush, recognised wildlife habitats, areas of sensitive fish/wildlife/aquatic resources.

[89] The Guidelines specify the identification of a number of possible localities or sites, considering geology, hydrogeology, surface hydrology, stability, topography, meteorology, location (logistics of waste transport), potential pathways for the release of contaminants and compatibility with surrounding land uses.

[90] Ms Eldridge deposed that in general terms, the approach recommended in the Centre for Advanced Engineering Guidelines and the WasteMINZ Guidelines is the approach adopted for selection of a suitable location for the landfill.

[91] Ms Eldridge said that consistent with the WasteMINZ Guidelines, the key drivers for a site to be selected as suitable for a regional landfill are a site:

(a) large enough to provide a regional facility and enable security of operation for the landfill into the future;

(b) with adequate buffer distances to neighbouring properties;

(c) that is readily accessible from the state highway network to enable safe and efficient access;

(d) which has underlying geology that is workable, stable and does not present any fatal flaws;

(e) which has terrain and topography that is not too steep, and which has adequate flat areas for ancillary facilities;

(f) which avoids known sites of significance to iwi;

(g) which has planning overlays and zones that do not show areas of archaeological or ecological significance or other significant features; and

(h) which has relatively few landowners and titling encumbrances.

[92] Ms Eldridge said that when taking these key drivers into account, quarries and valley systems are typically preferred for engineered landfills over plains, as they enable the waste volume to be maximised while minimising the Landfill Footprint and height above the surrounding area. This results in reduced excavation, improved stability and improved efficiency of containment thereby significantly reducing environmental and visual effects when compared to a landfill developed on a plain.

[93] No evidence was produced to suggest that a valley was a necessity, however that was clearly a preference for Waste Management. We were told it assists in groundwater management and minimises the potential for a leachate head to develop across the landfill, thus minimising the potential for leachate seepage. Ms Eldridge considered that good management systems would be needed, but a valley was still preferable. She acknowledged a quarry site could be used. Mr Anthony Bryce (a landfill design expert called by Waste Management), however, considered that old quarry sites present significant challenges, and in reference to Whitford landfill moving into the adjacent quarry, said *it is quite an engineering exercise*.[25] He said given a choice between a quarry and the type of site Waste Management has here, he would choose this type of landfill *every day … because it's so much more workable, so much less risky … so much easier to provide the protection you need*.[26]

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[25] NOE, 1 August 2022 at p81, lines 19-24.
[26] NOE, 1 August 2022 at p81, line 26 through to line 4 on p82.

[94] For completeness, we note that some suggested that potential effects from climate change meant that a precautionary approach would site a landfill away from hills, or in a quarry.

Site selection criteria actually used

[95] Mr Ian Kennedy set out Waste Management's preferred criteria for the landfill. The primary criterion was that it should be accessible within a corridor (ideally 2 km, and at maximum 5 km) either side of a state highway to the north or north-west of the Auckland CBD. It was recognised that the new landfill is a replacement for Redvale, and that to efficiently serve the same catchment it needed to be to the north or north-west of the CBD. This would ensure that traffic impacts associated with the new landfill remain close to existing established transport corridors and would not disturb local communities along otherwise-quiet country roads.

[96] An initial cut-off distance of 60 km from the Auckland CBD was applied, but this was later relaxed when there was further confirmation from the NZ Transport Agency/Waka Kotahi (**Waka Kotahi**) of its motorway projects from Puhoi to Warkworth, which should significantly reduce travel times north on SH1. The Wayby Valley site is approximately 70 km from Auckland CBD.

[97] Secondary constraints/criteria were then applied to the areas of potential suitable land within the 2-5 km wide corridor adjacent to the state highway. A site-ranking matrix was developed based on secondary and tertiary siting criteria to generate scores for each site. The weighting of the constraints was largely dependent on whether constraints could or could not be overcome or mitigated by obvious engineering solutions. An example was in respect of buffer availability to sensitive receivers.

[98] In addition, areas where the geology was known to have a high permeability and any sites with known active seismic faults were avoided, as both these factors were deemed to be 'fatal flaws'. Mr Kennedy spoke of learnings from Redvale and the crucial importance of a large buffer to insulate the landfill from its surrounding environment and enable it to properly manage effects.

[99] After a review of its potential sites in 2009, and commensurate with the 1 km buffer rule in the proposed Auckland Air, Land and Water Plan, a 1 km buffer to protect neighbouring properties was added to the criteria.

[100] Waste Management said that it had undertaken exhaustive examination of alternative sites since 2007. Tonkin + Taylor had been retained for this purpose at various times over these years, and the criteria for the selection of a site appears to have been set

in part by Tonkin + Taylor and in part by Waste Management.

[101] The WasteMINZ Guidelines are informative in this context as they recommend assessment around a number of key technical constraints and set out the stages of site selection and key parameters to consider.

[102] However, the criteria set out by Mr Kennedy omitted several critical criteria; including sites of significance to iwi and ecological significant areas which are very relevant to the site eventually chosen.

The site selection process and timeline

2007 - 2009

[103] The initial evaluation in 2007 produced well over 60 potential sites. In both 2007 and 2009 sites around Wayby Valley were selected, among many others to the south of SH1 and elsewhere in the area. Concerns were expressed in those reports about the use of this area given they were too far from Auckland and affected by Rodney District Council overlays that seemed to extend towards Wayby Valley and the Matariki Forests area. The Wayby Valley area was not taken forward as a result of those reports and was essentially left, like most of the other sites, unexplored.

2014-2015

[104] In 2014-2015, after a flyover, Waste Management added back into the assessment areas close to and including part of the Wayby site. For current purposes this could be regarded as including the landfill area. At that stage Tonkin + Taylor did a more formal appraisal of the area, among many others, and the Wayby area was ranked fourth (at 55%) out of eight sites.

[105] There was no recommendation to proceed further with the site. It was outside the distance from SH1 preferred by Waste Management, and there were geological and ecological constraints on the site. These were not separately evaluated. Nevertheless, the scoring system included a weighting for certain items. Cultural concerns were given no extra weighting and therefore did not influence that score. At this stage, sites considered in the Woodhill area scored considerably higher than the Wayby Valley area.

2016

[106] In early 2016 it was agreed that Tonkin + Taylor would prepare a consultation report for Waste Management. Various reports were completed by Chapman Tripp between 2014 and 2015. They set out the property issues for various preferred sites,

referencing tangata whenua interests and relevant Deeds of Settlement. Therefore, it should have been very clear to Waste Management from early 2016 that early consultation in respect of any prospective sites should be undertaken, including with tangata whenua. This Tonkin + Taylor report provided information about Deeds of Settlement involving tangata whenua in North Auckland. The report contained a programme for consultation in 2016. This included consultation with both Ngāti Manuhiri and Ngāti Whātua. At that time the preferred area remained as Woodhill, and it appeared to be anticipated that such consultation would be undertaken within the next few months.

[107] Shortly after that, a Waste Management Board report shows that there was a management preference to move to the northern sites. These are sites owned by Matariki Forests off Wayby Station Road, south of SH1 behind hills that were then in pine coverage. The reasons for that decision are opaque.

[108] Waste Management then had discussions with Waka Kotahi about its intentions for the construction of a new SH1 in this area, and it became clear that decisions as to the final alignment had not been made.

[109] Around this time (June 2016), Ngāti Whātua representative Mr Glenn Wilcox approached Waste Management and suggested discussions in relation to the Woodhill site (W5) in 2016. In August/October 2016 Tonkin + Taylor assessed the Woodhill site (W5) proposed by Mr Wilcox. It scored relatively highly, as compared with other sites, but constraints were noted including proximity to Outstanding Natural Landscape and High Natural Character overlays, Significant Ecological Areas, and hydrological/ geological suitability.

[110] In September 2016 a decision was made not to proceed with Woodhill. In explanation of this Mr Kennedy suggested that further investigation showed the site's existing and other planned uses were incompatible with the landfill. We found that explanation less than convincing, given the decision was already made to look at the northern sites.

2017

[111] Waste Management Board reports indicate that in March 2017 the Board authorised Waste Management to enter into a contract to purchase land south of SH1 from Matariki Forests. The hope was that this would lead to some action by Waka Kotahi in finalising its alignment. A little over a month later management came back to the Board to indicate that the Springhill property had come on the market and they now wished to look at purchasing that.

[112] Curiously enough, the 2014 Tonkin + Taylor report had indicated a number of potential issues with the Site, including its geology. A note on the file dated 16 March 2017 indicates that somebody had reviewed the earlier geology assessment and now considered it to be appropriate, with engineering redesign. That note is not on a Tonkin + Taylor form and its authorship is unclear. While dated 16 March 2017, it does not appear to have formed part of the Board report. Certainly, there is no evidence that Waste Management or Tonkin + Taylor gave further consideration to the earlier advice from Chapman Tripp, or its own consultation advice in relation to the selection of this site, given the known cultural values identified in earlier evaluations, and ecological issues relating to it.

[113] However, in April 2017 Tonkin + Taylor provided a report addressing the Awatere and Wayby sites. It concluded Wayby was slightly more favourable from a geotechnical perspective. Further, a report prepared by Tonkin + Taylor in May 2017 discussed various consenting requirements for access. Various Plan provisions applying to the site were recorded.

Application for Overseas Investment Office approval

[114] No further investigation of ecological matters was undertaken, and the Matariki Forests and Springhill Farm purchases were authorised and agreements signed in September 2017 (Springhill) and March 2018 (Matariki) and then referred to the OIO but with no information being supplied or sought from tangata whenua.

[115] The OIO issued a conditional approval that required consultation with tangata whenua as part of the process for the resource consent application. It appears that Waste Management then initiated contact with tangata whenua, and undertook onsite assessments of potential habitats and ecological values.

[116] We conclude it is no surprise that, when contacted and after learning of OIO approval, the reaction of Ngāti Whātua, Ngāti Manuhiri and the other hapū and iwi, including Te Uri o Hau, was negative. It does not appear that Waste Management was at any time prepared to discuss alternative sites but rather the terms and conditions under which consent might be granted.

[117] Nevertheless, all tangata whenua groups accept that after August 2018 consultation was undertaken appropriately. Although there were high levels of mistrust, it is clear that Ngāti Manuhiri have been able to build that trust through the hearing process and now take a different view of the application than they did initially. We record that not all of Ngāti Manuhiri support the proposal. We address that later.

[118] In August 2018, after the OIO conditional approval, Tonkin + Taylor completed a Preliminary Ecological Opportunities and Constraints Report. Its purpose was to report on the initial site walkover, identify high level ecological risks, opportunities and constraints to inform the design of the landfill and associated activities.

[119] Finally we record that, after decisions were made to negotiate the purchase of Springhill Farm and the Matariki Forests Land, Waste Management obtained a report from Tonkin + Taylor assessing the viability of developing a landfill in the Kings Quarry at Pebble Brook Road. The assessment identified a number of challenges with the site, and it was considered to be more complex than the other sites, in part due to concerns about residents on the access road and nearby.

Issues with alternative assessment

[120] We accept that, in the usual course of an application for consent for a proposal that is likely to have significant adverse effects, a description of possible alternative locations or methods for undertaking the activity is required to be provided in the assessment of environmental effects. Usually the decision-maker will not look 'behind' that description and will only focus on whether the process was adequate.

[121] When, however, the objectives and policies of a plan require that there be no practicable alternative method or location for undertaking the activity, and/or s 6 of the Act is engaged, the question is how far we must go in assessing those matters.

[122] In *King Salmon* the Supreme Court held that consideration of alternatives may be necessary depending on the *nature and circumstances* of the application and the justifications advanced in support of it.[27] While that was in the context of a plan change, the High Court in *Tauranga Environmental Protection Society*[28] applied this approach to a notice of requirement for infrastructure. Applying to the facts of that case, it found that the:[29]

> …practicability, practicality and possibility of alternatives is a material fact which directly affects the available outcome of the application. This is more than something that "may be relevant"…

[123] The High Court said that *Meridian* had been overtaken in that regard. It found that the Court is legally required to examine the alternatives to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant policies of a plan. It also found that the Court must satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider

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[27] *King Salmon* at [170].
[28] *Tauranga Environmental Protection Society*.
[29] *Tauranga Environmental Protection Society,* at [143].

agreeing to the proposal.

[124] We record that 'practicable' is a word: [30]

> that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account

[125] It is on that basis, therefore, that we assess the analysis of alternatives, when we come to make our overall assessment of the proposal and whether it achieves the objectives and policies of the AUP. As preliminary points, we observe:

- Consultation with tangata whenua would have better informed the alternatives assessment. Although Waste Management had information from various reports obtained relevant to the area of its values to tangata whenua, there is no evidence that this or the importance of the Hōteo River and Kaipara Harbour were recognised.

- While there are various documents that could assist with information, for example Treaty claims and settlements and planning documents, it is difficult to dismiss the value of consultation.

- Although s 36A does not require consultation, it must be read in the context of Part 2 of the Act and particularly s 6(e) and s 8. If the only way to adequately address the cultural effects of a proposal is to talk to those who are affected, it is not enough to stand behind s 36A.

- We had no evidence as to other alternative sites from the appellants, but note there was no obligation on them to identify an alternative.

- There were a number of assessments of alternative sites over a decade, but changes in criteria (for example, extension of the distance from central Auckland) or reasons for adding or deleting areas are not documented. Similarly, the abandonment of the Woodhill Area and W5 for the northern sites was not documented or explained adequately.

- Final decisions on site selection appeared to have been made relatively quickly, and included a site that, while previously assessed, had not scored highly compared with others.

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[30] *Tauranga Environmental Protection Society*, at [144] referring to *Wellington International Airport Ltd v New Zealand Airline Pilots' Association Industrial Union of Works Inc* [2017] NZSC 199 at [65].

- The final assessment supporting the final decision was sparse, but Waste Management did have the benefit of earlier assessments which included that general land area. The updated geological comment is not dated or on letterhead, and we do not know if it was contemporaneous.

- The ecological analyses were done on a desk-top basis, with site walkovers and further investigation only occurring after decisions were made to purchase the sites. There was recognition of some ecological issues, but the catchment issues for the Hōteo River and Kaipara Harbour and their ecological issues were not addressed.

- Certain objectives and policies in the AUP, which require there be an analysis of alternatives for some activities, did not exist at the time the company was assessing site options for its next landfill.

[126] Overall, we conclude that there was a lack of proper analysis of this Site given its late reintroduction to the selection process. There was a failure to consider the relevant portions of the Chapman Tripp reports and attached documents, including the Ngāti Manuhiri Deed of Settlement. We also conclude that the earlier issues relating to ecological and geological concerns were not clearly addressed.

[127] Although we accept these issues were not determinative of selection, they do not satisfy us that the Wayby site's ranking had changed as it still had potential constraints identified in earlier reports and reflected in its lower ranking. There is no evidence that this was the best site available.

[128] Rather, we are satisfied that this site was chosen because it became available within the general area of preference of the Waste Management Board. Why the Board preferred this area remains a matter of speculation.

D. Assessment Framework

[129] Sections 104 and 104D of the RMA contain the fundamental criteria to which we should have regard in assessing this proposal.

Section 104

[130] When considering an application, we must, subject to Part 2 of the Act, have regard to a number of matters. They are:

(a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of a national environmental standard, regulations, a national policy statement, a New Zealand coastal policy statement, a regional or proposed regional policy statement, a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Section 104D

[131] Section 104D is often described as containing the threshold tests for non-complying activities. In other words it contains two tests, one of which must be satisfied before consent can be given to a non-complying activity.

[132] In summary, s 104D(1) states that a resource consent can be granted for a non-complying activity only if the consent authority is satisfied that either;

(a) the adverse effects of the activity on the environment will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of a relevant plan in respect of the activity.

[133] Section 104D(1)(b) relates to regional and district plans. Plan has the meaning given in s 43AA, being a regional plan or a district plan.

[134] The initial issue arises as to whether this includes the regional provisions which are included within the AUP. The AUP contains regional policy statement provisions, regional plan provisions and district plan provisions. What is agreed by all parties is that the s 104D(1)(b) assessment cannot include regional policy statements or other documents such as national policy statements.

[135] For reasons which follow we will address first the relevant s 104 matters, and having assessed the evidence on those matters then consider if either of the tests in s 104D is passed.

[136] Most planners have dealt with this as an entry test. Dr Philip Mitchell, called for Waste Management, in particular criticised Ms Burnette O'Connor, the planner called for Fight the Tip, for approaching it as an exit threshold. There is a strong line of authority

that s 104D can either be an entry or an exit threshold.[31]

[137] The issue that arises is whether we need to undertake the threshold assessment prior to undertaking the substantive merits assessment under s 104. There appeared to be agreement at the conclusion of the case that although both requirements need to be considered there was no particular order required in terms of the statute.

Section 104B

[138] Under this section, after considering an application for a non-complying activity, consent may be granted or refused and conditions imposed under s 108. The Court has a very broad discretion based on s 104 and Part 2 of the Act.

Sections 105 and 107

[139] These sections apply to applications for discharge permits, and contain various matters to which we must have regard or about which we must be satisfied. They include the nature of the discharge and possible alternative methods of discharge (s 105(1). Section 107 imposes restrictions on the grant of certain discharge permits.

The Court's approach to analysis

[140] Because of the significant crossover between effects and the various policies and objectives of the AUP, it is not possible to assess whether an activity is contrary to an objective or policy without considering the question of effects, and the potential for avoidance, remedy, mitigation and also offset and compensation in some cases. This makes the approach to assessment particularly difficult, and we have concluded that the following approach should be adopted:

(a) firstly, we examine the various documents listed in s 104(1)(b), including any other documents that might be relevant (this meets part of s 104(1)(c)). From this we intend to generate findings that we consider to be key points which need to be addressed when considering the application in due course. These also feed into the question of effects;

(b) we then analyse the various effects in this matter under s 104(1)(a). This may also include documents that we consider relevant under s 104(1)(c), if any. Given the significant amount of evidence, and the huge number of accompanying documents it is not possible to go through each effect and the proposals for their reduction. We have focussed on those areas where there remain effects, and the

[31] See for example *Foster v Rodney District Council* [2010] NZRMA 159 at [14] (EnvC).

steps and the adequacy of those steps to address the concerns. The effects include positive effects to offset or compensate for adverse effects under s 104(1)(ab);

(c) having then identified the key effects, without addressing s 104(1)(ab) we then move to consider the threshold test under s 104D. This will use the findings in relation to the provisions and those in relation to the effects under s 104(1)(a) to address the question of whether the application is contrary to the objectives and policies. We note that, in doing so, these are flavoured by the reference on many occasions to avoidance, remedying or mitigating;

(d) if the application passes either of the threshold tests under s 104D we must reach a conclusion under s 104(1). Full assessment is required against all of the matters in s 104, including documents not directly relevant to s 104D, such as regional and national policy statements, all AUP provisions, other Acts and other matters such as offset and compensation under s 104(1)(ab);

(e) by its nature, the decision must be interim given the complexity of this matter. It is clear that significant changes need to be made to the conditions, management plans, and even to the proposal if the application is to receive consent. We have a discretion to determine if a consent could be granted if the concerns outlined in this interim decision are met. The intention is to clarify if that is possible, and if so how.

E. Approach to relevant documents

[141] A significant number of both statutory and non-statutory documents bear upon consideration of the proposal. Some are directly relevant under s 104(1), such as national policy statements, regional policy statements or the provisions of the regional and district plans. Because of the issues that arise under s 104D of the Act relating to the objectives and policies of the AUP, we have concluded that we should deal first with the issues under the policy statements, then under the AUP. We deal with the matters in the following order:

- National policy statements;
- National environmental standards;
- Regional policy statement (**RPS**)- AUP; and

- AUP regional and district plans.

[142] A significant number of further documents and legislation are relevant under s 104(1)(c) (other matters), and these include the Wildlife Act 1953, the Waste Minimisation Act 2008 (**WMA 2008**), Waste Minimisation Plans prepared under that Act by the Auckland Council, and WasteMINZ Guidelines and the Kaipara Moana Remediation project **(KMR).**

[143] It was largely agreed that the following planning documents are relevant to our consideration of this matter:

(a) National Policy Statement for Freshwater Management 2020 (**NPS-FM 2020**) and the National Policy Statement for Freshwater Management 2020 (February 2023 version) (**NPS-FM 2023**);

(b) National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB 2023**);

(c) National Policy Statement for Renewable Electricity Generation 2011 (**NPS-Renewable Electricity**);

(d) New Zealand Coastal Policy Statement 2010 (**NZCPS**);

(e) National Environment Standards for Air Quality (**NES-Air Quality**);

(f) National Environmental Standards for Plantation Forestry (**NES-Plantation Forestry**) now amended by National Environmental Standards for Commercial Forestry which took effect on 3 November 2023;

(g) the AUP comprising the RPS, Regional Plan and District Plan.

[144] In this regard we note that the regional plan and district plan objectives and policies are relevant to the threshold test under s 104D, but all provisions are relevant to an assessment under s 104(1).

[145] The planners agreed that the rules set out under the National Environmental Standards for Freshwater do not apply to the proposal given that the Standards post-date notification of the application. Waste Management submitted that the NES remains a relevant matter to which regard must be had under s 104(1)(b) because it contains the standards that Matariki Forests will have to follow when felling the pines on the Waste Management landholdings.

F. Planning documents

NPS-FM 2014, NPS-FM 2020 and NPS-FM 2023

[146] A National Policy Statement for Freshwater Management was first introduced in 2011. It has since been amended four times: in 2014, 2017, 2020 and in February 2023.

[147] The NPS-FM 2020 came into effect on 3 September 2020, after the consent application and plan change were notified.

Fundamental concept – Te Mana o te Wai

[148] Te Mana o te Wai was first introduced as a concept in 2014. In 2017, an objective and policy requiring that it be considered and recognised in the management of freshwater was added (the policy was directed at regional council policy and plan making).[32] The fundamental concept of Te Mana o te Wai in the NPS-FM 2020 is as follows:[33]

> Concept
>
> (1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.
>
> (2) Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.

[149] The concept is supported by six principles.[34]

[150] The single Objective of the NPS-FM 2020[35] is:

> … to ensure that natural and physical resources are managed in a way that prioritises:
>
> (a) first, the health and well-being of water bodies and freshwater ecosystems
>
> (b) second, the health needs of people (such as drinking water)
>
> (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[151] A suite of policies follow the Objective. We received submissions about Policy (2) (tangata whenua involvement in freshwater management and decision-making) and the proposal's consistency with Te Mana o te Wai and its core principles, Policy (1), Policy (6) (no further loss of extent of natural inland wetlands), Policy (7) (loss of river extent is

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32 NPS-FM 2014 (updated August 2017), Objective AA1 and Policy AA1.
33 NPS-FM 2020, clause 1.3.
34 Clause 1.3(4).
35 Clause 2.1.

avoided to the extent practicable) and Policy (9) (habitats of freshwater species are protected).

Finding A

[152] The NPS-FM 2020 and as amended in 2023 seek to restore and preserve the balance between the water, the wider environment and the community. Te Mana o te Wai is all about restoring and preserving that balance. It seeks first to protect and then to restore the mauri of waters.

[153] The NPS-FM 2020 required that specific policies be included in regional plans:

- 3.22(i) – extent of natural inland wetlands;
- 3.24 – extent of rivers; and
- 3.26 –fish passage.[36]

[154] These specific policies are then deemed to become policies within the AUP as part of the Regional Plan. They are therefore policies to which we will need to refer in due course under s 104D. They are therefore relevant to both our s 104 and s 104D assessments.

Finding B

[155] The weight to be attached to the above provisions as included in the AUP – extent of inland wetlands, extent of rivers and fish passage, is in dispute and needs to be resolved.

Analysis of NPS-FM 2020

[156] The two NPS-FM 2020 inland wetland and river policies referred to above were directly imported into the AUP in December 2020 and after the Council hearing on Waste Management's applications. Policy (17) is directed at avoiding the loss of extent of natural inland wetlands, protecting their values and promoting their restoration subject to certain exceptions, which include that there be a functional need for the activity. Policy (18) – rivers, states that the loss of river extent and values is to be avoided unless there is a functional need for the activity in that location, among others.

[157] Waste Management submitted it responded meaningfully to substantive changes in the regulatory environment by way of design refinements as they have occurred, a fact acknowledged by Mr Carlyon[37] in questioning. The Court notes Waste Management's

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[36] Included in AUP as Policies E3.3(17), (18) and Objective E3.2(7).
[37] Planning witness for Te Rūnanga o Ngāti Whātua.

actions from 2020 – including redesign undertaken to avoid freshwater habitats, renewed efforts for engagement and partnership with tangata whenua and other considerations of cultural values. We accept these actions must be read within the context of an already lodged application, and any directive policies of the NPS-FM should be appropriately weighted within that context.

[158] Waste Management argued that questions in cross-examination have suggested there is nothing new in the most recent iteration of the NPS-FM and the key concepts have been known about for a long time and should not come as a surprise. The Director-General and others submit that the policies and previous iterations demonstrate that submission is incorrect. Waste Management says that there was no policy direction in the 2014 or 2017 versions of the NPS-FM directing wholesale avoidance of wetlands and rivers, and no policy direction of any kind on reclamation. It submitted that Objective (A2) from NPS-FM 2014 was focussed on outstanding water bodies and significant values of wetlands.

[159] Mr Matheson further argued that:

(a) Policy A4, the only policy in respect of consenting of discharges which addressed water quality, did not utilise a functional or even operational needs assessment but referred to *the extent to which it is feasible and dependable that any more than minor adverse effects [on health or freshwater ecosystems] would be avoided.*

(b) the AUP policies in place from November 2016[38] relied on similarly lower bars compared to functional need, referring to functional and operational need or adverse effects avoided as far as practicable within overlay areas.[39]

(c) the Infrastructure chapter contained similar provisions for overlay areas. The project has been designed to avoid all effects on those scheduled areas.

[160] We accept that the NPS-FM 2014 and NPS-FM 2017 did not direct the wholesale avoidance of wetlands and rivers or address reclamation. We also accept that Te Mana o Te Wai was not as prominent in previous versions of the NPS-FM as it is now.

[161] We accept that the AUP, from 2016, excepted infrastructure having a functional or operational need to be in a certain location, from certain of its requirements. It did, however, contain provisions directed at structures, depositions and reclamation of

[38] Operative in Part, 15 November 2016.
[39] He referred to 'sensitive areas', but we were unable to locate a reference for this.

water bodies.[40]

[162] There is a long-standing authority, *Ireland v Auckland City Council*,[41] which states that there is a general duty to determine an appeal in the light of the circumstances prevailing at the date an appeal is heard. The High Court found that if taking into account a change in the law or circumstances since the date of the decision appealed against would prejudice existing rights of a party, the Court could be justified in departing from the general rule. It ruled that in that case the appellant had obtained only contingent rights when the original Council approval was given because that decision was always subject to a right of appeal, which was exercised.

[163] This is not a case where the NPS-FM 2020 or the RMA provide transitional savings for applications in train.

[164] We are sympathetic to the position of Waste Management, which finds itself buffeted by the winds of legislative change, but find that the new policies must be considered along with all the other objectives and policies that apply to this proposal. Having said that, the new policies came into effect just before the Council's hearing commenced.

[165] We conclude that some pragmatism and proportionality need to be applied to such changes of circumstances. Changes to legislation, and as a result policy frameworks, are occurring with some frequency. It is indeed unfair and unrealistic to determine a proposal solely against policies that did not exist when the proposal was first notified. We accept that Waste Management has endeavoured to respond to that changed framework with various design changes to its proposal.

Finding C

[166] The changed legislative environment is part of the context in which we must assess the AUP's objectives and policies. However, it informs rather than dictates the outcome of the assessment under s104D(1)(b) looking at objectives and policies of the AUP. These changes are also relevant to any substantive assessment under s 104(1)(b)(iii).

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[40] Our global term for lakes, rivers, streams and wetlands referred to in the various objectives and policies.

[41] *Ireland v Auckland City Council* (1981) 8 NZTPA 96 (HC).

NPS-Indigenous Biodiversity 2023

[167] The NPS-IB 2023 came into force on 4 August 2023, several months after the end of the appeal hearing. It contains, for indigenous biodiversity, precepts similar to those in the NPS-FM 2023 which applies to aquatic biodiversity. It requires that there be maintenance and at least no overall reduction in the size of populations of indigenous species, their occupancy across their natural range, the functions, properties and full range and extent of ecosystems and habitats they use or occupy, connectivity and buffering around such ecosystems, and their resilience and adaptability. In achieving this through the kaitiakitanga of tangata whenua and the stewardship of people and communities it also provides for the social, economic and cultural wellbeing of people and communities.

[168] It treats the management of Significant Natural Areas identified by territorial authorities differently from land that has not been formally identified in a plan (though it may have significant biodiversity values). Certain adverse effects must be *avoided* in an Significant Natural Area, with exceptions made for new development where it is specified infrastructure that provides significant national or regional benefit, or where there is a functional or operational need for a development to be in a particular location and there are no practicable alternative locations for it. In that case, the construction or upgrade must be managed by applying the effects management hierarchy. Areas of significant biodiversity value that are not identified as such in a plan must also be managed by applying the effects management hierarchy.

[169] In relation to ecological assessment and the effects hierarchy, appendices to the NPS-IB 2023 set out, separately, the principles for biodiversity offsets and for biodiversity compensation that can be applied to projects where the steps to avoid, remedy or minimise adverse effects have been sequentially exhausted. These appear to be similar to those promulgated in the NPS-FM 2023 and also in an appendix to the AUP. They appear to have been applied in a general sense in ecological assessment in recent years and the earlier guidelines have been referenced in the ecological assessments made for the project.

NPS-Renewable Electricity

[170] This is relevant to the proposed use of landfill gas for energy. It was not an issue.

New Zealand Coastal Policy Statement (NZCPS)

[171] There was a dispute between the planners as to whether we need to consider the provisions of the NZCPS. Those who argue that we do not say that it has been given effect to by the AUP, and the proposal is not in the coastal environment. Others

considered that, although the proposal is not located in the coastal environment, there are downstream effects on that environment.

[172] We received evidence on potential effects of the landfill on the coastal environment and agree with Dr Mitchell that those effects are addressed through the relevant objectives and policies in the AUP, for example those contained in Chapters E1 and E11.

Finding D

[173] The various issues raised in the NZCPS are subsumed within the AUP.

National Environmental Standards

NES-Air Quality

[174] These standards control discharges of a number of combustion-derived contaminants as well as discharges to air from landfills having a capacity of >1 million tonnes, as the proposed facility does.

[175] Landfills with more than 200,000 tonnes of waste and a design capacity of >1 million tonnes are to collect landfill gas and either flare it or use it as a fuel to produce energy. The project includes the collection of landfill gas and its conversion to energy supplied to the national grid. We accept the evidence of Ms Jenny Simpson for Waste Management that the facility will meet the requirements of these standards.

NES-Plantation Forestry

[176] The purpose of these standards is to maintain or improve the environmental outcomes associated with plantation forestry activities. They apply to any forestry of at least 1 ha that has been planted for commercial harvesting.

[177] We were advised that the harvesting of forestry on the site would be undertaken separately by the forestry operators – Matariki Forests – and does not form part of the Application.

[178] We were advised that the National Environmental Standards for Freshwater are expressly subject to these standards, meaning that any forestry harvesting operation that may affect streams can continue to occur provided that it complies with the NES-Plantation Forestry. During deliberation of this decision another NES for forestry became operative, the NES for Commercial Forestry.

[179] Given that it was Waste Management's case that Matariki Forests, not it, would fell the pine trees on its landholdings, we were not assisted further with regard to either standard.

[180] It would be fair to say this position was contested by some appellants. Given the waterways and the presence of threatened species, the permitted standards and/or the Wildlife Act may be an issue for forestry clearance. However, we had no evidence on the issues and it is not part of the Application.

Auckland Unitary Plan Operative in Part

Definitions

[181] We summarise relevant definitions for terms used in the AUP, which includes the RPS and the Regional and District Plan.

[182] Landfill is defined as *a facility where household, commercial, municipal, industrial and hazardous, or industrial waste is accepted for disposal.*

[183] Infrastructure is defined with reference to the definition in s 2 of the Act but adds *municipal landfills*. Municipal landfills are not defined in the AUP.[42]

[184] Waste Management described its proposed facility as the Auckland Regional Landfill. We address that description later in this decision.

[185] The terms *functional need* and *operational need* are referred to in various AUP provisions. Functional need is defined as *the need for a proposal or activity to traverse, locate or operate in a particular environment because it can only occur in that environment*. Operational need is similarly defined except the basis for need is described as *because of technical or operational characteristics*.

[186] We accept that the proposed landfill falls within the definition of landfill and infrastructure in the AUP. A question arises as to the applicability of Chapter E26 – Infrastructure to the proposal, and we address that later in this section.

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[42] The RMA defines industrial or trade premises as: (b) any premises used for the storage, transfer, treatment, or disposal of waste materials or for other waste-management purposes, or used for composting organic materials…

Regional Policy Statement

[187] The RPS is part of the AUP and was promulgated contemporaneously. It is demarcated in the AUP largely by separate chapters starting with **B.** As we noted earlier, the policy provisions inform the exercise of our discretion under s 104(1) but are not relevant to the threshold test under s 104D(1)(b).

[188] Our attention was drawn to RPS Chapters:

- B2 Tāhuhu whakaruruhau ā teone – Urban growth and form;
- B3 Ngā pūnaha hanganga, kawekawe me ngā pūngao – Infrastructure, Transport and Energy;
- B4 Te tiaki taonga tuku iho – Natural heritage;
- B6 Mana whenua;
- B7 Toitū te whenua, toitū te taiao – Natural resources;
- B9 Toitū te tuawhenua – Rural environment; and
- B10 Ngā tūpono ki te taiao – Environmental risk.

Chapters B2 Tāhuhu whakaruruhau ā teone – Urban growth and form and B3 Ngā pūnaha hanganga, kawekawe me ngā pūngao – Infrastructure, Transport and Energy

[189] Chapters B2 and B3 emphasise better use of existing infrastructure and efficient provision of new infrastructure.[43] Infrastructure shall be resilient, efficient and effective. The benefits of infrastructure are recognised through, among others, providing essential services for the functioning of communities and providing for public health, safety and wellbeing.[44] The development and operation of infrastructure is enabled while managing adverse effects.[45]

[190] The RPS also requires that the functional and operational needs of infrastructure are recognised, and that the adverse effects of that infrastructure are avoided, remedied or mitigated.[46]

[191] The policies accompanying the objectives for Chapter B3 – Infrastructure are focussed on enablement and providing for the locational requirements of infrastructure

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[43] B2.2. Tāhuhu whakaruruhau ā teone – Urban growth and form.
[44] B3.2.1 Objectives (1), (2)(a) and (d).
[45] B3.2.1 Objectives (3).
[46] B3.2.1 Objectives (4) and (8).

to recognise that it can have *a functional or operational need to be located in areas with natural and physical resources that have been scheduled … in relation to natural heritage, mana whenua, natural resources, coastal environment … and special character.*[47]

Finding E

[192] The need for new infrastructure is recognised in the AUP where:

(a) there is a functional and operational need for it to be located in particular areas with natural and physical resources that have been identified in the AUP that otherwise preclude development; and

(b) its operation should be enabled while managing adverse effects.

Chapter B4 Te tiaki taonga tuku iho

[193] Chapter B4 relates in part to outstanding natural features and landscapes, and has as an objective the protection of those areas from inappropriate subdivision, use and development. It also requires that the ancestral relationships of mana whenua and their culture and traditions with the landscapes and natural features of Auckland are recognised and provided for.[48]

Chapter B6 – Mana whenua

[194] Chapter B6 was the subject of much discussion in the hearing. Part of the Issues Statement encapsulates the reasons for the provisions which follow in the chapter:[49]

> Development and expansion of Auckland has negatively affected Mana Whenua taonga and the customary rights and practices of mana whenua within their ancestral rohe. Mana Whenua participation in resource management decision-making and the integration of mātauranga māori and tikanga into resource management are of **paramount importance** to ensure a sustainable future for mana whenua and for Auckland as a whole.
>
> [emphasis added]

[195] The words *paramount importance* are an indication of centrality to the provisions. Unfortunately, this wording is not repeated in the objectives and policies that follow however it does give a flavour to those provisions.

[196] Objective B6.2 provides for recognition of Treaty of Waitangi | te Tiriti o Waitangi partnerships and participation and the objectives and policies are in part directed at providing opportunities for mana whenua to actively participate in sustainable

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47 B3.2.2 Policy (3).
48 B4.2.1 Objectives (1) and (2).
49 B6.1. Issues.

management of natural and physical resources. Certain policies call for *timely, effective and meaningful engagement with mana whenua at appropriate stages in the resource management process…*[50]

[197] The RPS also recognises mana whenua as specialists in the tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, wāhi tapu and other taonga.[51] The policies directed at providing opportunities for mana whenua also require that participation is such that it recognises and provides for mātauranga and tikanga.[52]

[198] The RPS calls for mana whenua values, mātauranga and tikanga to be properly reflected and accorded sufficient weight in resource management decision-making.[53] The objectives require that the mauri of, and relationship of mana whenua with, natural and physical resources are enhanced overall.[54]

[199] The RPS seeks integration of mana whenua values, mātauranga and tikanga and the management of natural and physical resources within the ancestral rohe of mana whenua and in the development of innovative solutions to remedy the long-term adverse effects on historical, cultural and spiritual values from discharges to freshwater and coastal water, and in resource management processes and decisions relating to freshwater.[55] Policies also look to provide opportunities for mana whenua to be involved in the integrated management of resources so as to recognise the holistic nature of the mana whenua worldview, among others.[56]

[200] Of particular relevance Policy B.6.3.2(6) states:

> (6) Require resource management decisions to have particular regard to potential impacts on all of the following:
>
> (a) the holistic nature of the mana whenua world view;
>
> (b) the exercise of kaitiakitanga;
>
> (c) mauri, particularly in relation to freshwater and coastal resources;
>
> (d) customary activities, including mahinga kai;
>
> (e) sites and areas with significant spiritual or cultural heritage values to mana whenua; and
>
> (f) any protected customary right in accordance with the marine and coastal area (Takutai Moana Act 2011).

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50 B6.2.2(1)(c).
51 B6.2.2(1)(e).
52 B6.2.2(1)(g).
53 B6.3.1 Objectives (1).
54 B6.3.1 Objectives (2).
55 B6.3.2 Policies (2)(a), (c) and (d).
56 B6.3.2 Policies (4).

[201] The chapter contains further references to supporting Māori economic, social and cultural development (Policy B6.4) and the protection of mana whenua cultural heritage (Policy B6.5).

Chapter B7 Toitū te whenua, toitū te taiao – Natural resources

[202] This chapter seeks to protect areas of identified significant indigenous biodiversity value from the adverse effects of development.[57] A further objective is to maintain indigenous biodiversity through its protection, restoration and enhancement in areas where ecological values are degraded.[58] Degraded freshwater systems are to be enhanced, and the loss of freshwater systems minimised.

[203] There is a focus on avoiding, remedying or mitigating the adverse effects of changes in land use on freshwater.[59] Policies aim to control the use of land and discharges to minimise adverse effects of runoff and to avoid development where it will significantly increase adverse effects on freshwater systems, unless those effects can be adequately mitigated.[60]

[204] There is a detailed policy at B7.3.2(4) directed at avoiding the permanent loss and significant modification or diversion of rivers and streams (excluding ephemeral streams), and wetlands and their margins, unless: it is necessary to provide for infrastructure (among others), no practicable alternative exists, mitigation measures are implemented to address the adverse effects, where adverse effects cannot be adequately mitigated, environmental benefits including onsite or offsite works are provided.[61]

[205] Development is to be managed (which includes discharges and activities in the beds of rivers and streams and wetlands) to protect identified Management Areas; minimise erosion and modification; limit the establishment of structures within the beds of the waterways to those that have a functional need or operational requirement to be located there, and maintain or where appropriate enhance: freshwater systems not protected as Management Areas, navigation along rivers and public access, existing riparian vegetation located on the margins of rivers, streams and wetlands, and areas of significant indigenous biodiversity.[62]

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57 B7.2.1 Objectives (1).
58 B7.2.1 Objectives (2).
59 B7.3.1 Objectives (1)-(3).
60 B7.3.2 Policies (1)(c)-(d).
61 B7.3.2 Policies (4).
62 B7.3.2 Policies (5).

[206] There are further policies regarding the use and allocation of freshwater among others, and managing effects of discharges, including sediment runoff and stormwater management. Finally, there is a policy to restore and enhance freshwater systems where practicable when development occurs.[63]

Finding F

[207] There is a centrality of Māori worldview contained within the RPS. This seeks to maintain, and where appropriate enhance, freshwater systems, mauri of areas and the relationship of tangata whenua with important features. It does not preclude development but anticipates that adverse effects will be addressed and freshwater systems are restored and enhanced where that is possible.

Other RPS Chapters

[208] There are other RPS provisions relating to air, the rural environment and environmental risk. We have considered those provisions but do not summarise them.

Regional And District Plan provisions

[209] The Regional and District Plan provisions are contained in the same document as the RPS. Almost all of these provisions are inter-related to some degree beyond those marked RPS only. The regional and district provisions are normally identified by a delineation in brackets in relation to the provisions, RP (for regional plan) or DP (for district plan) or RPS (for regional policy statements). The distinction between whether a particular objective, policy or other provision is a regional or district one relies on this indication.

[210] As is clear when we move through the various chapters, water quality, lakes, rivers, streams and wetlands, land disturbance, vegetation management, biodiversity, engage both regional and district issues and there is clear ground for overlap between the two. This is highlighted when we come to discuss the provisions of E13.

[211] The proposal needs numerous resource consents as it engages many aspects addressed by the planning framework. Of particular relevance to the proposal are Chapters E1 – Water quality and integrated management, E3 – Lakes, rivers, streams and wetlands, E11 – Land disturbance – regional, E12 – Land disturbance – district, E13 – Cleanfills, managed fills and landfills, E15 – Vegetation management and biodiversity, E26 – Infrastructure, E14 – Air quality and H19 – Rural zones. There are other chapters

[63] B7.3.2 Policies (6).

to which we have had regard but for present purposes we see no need to summarise those provisions.[64]

[212] While there are numerous objectives and policies that apply to this proposal, our primary focus was on those that addressed effects on rivers, streams and wetlands and ecological values relating to native flora and fauna, and Māori relationship values which embrace all those elements. These objectives and policies are not only relevant to the exercise of our discretion under s 104(1) and Part 2, but also to the threshold test under s 104D(1)(b).

Chapter E1 – Water quality and integrated management

[213] The introduction to this chapter refers to the objective of the AUP and national policy statements being to improve the integrated management of freshwater and the use and development of land. The focus of the provisions is on avoiding adverse effects as far as practicable and otherwise minimising them. It records a key concern of mana whenua is effects on the mauri of water caused by pollution of streams, rivers, catchments or harbours.

Objectives and policies

[214] The objectives require that freshwater and sediment quality is maintained where it is excellent or good and progressively improved over time in degraded areas.[65] Further, the mauri of freshwater is maintained or progressively improved over time, to enable traditional and cultural use of this resource by mana whenua.[66] There are policies directed at freshwater quality and ecosystem health interim guidelines[67] and a particular directive policy that requires freshwater systems to be enhanced unless existing intensive land use and development has irreversibly modified them such that it practicably precludes enhancement.[68]

[215] The NPS-FM 2014 required that Policies E1.3(4) to (7) be included in the AUP. Those policies contain, at (4) and (5) matters to be considered on an application for discharge, with Policy (6) making it clear that the previous policies apply to new discharges or a change or increase of any discharge of a contaminant into freshwater or onto or into land in circumstances which may result in that contaminant entering freshwater.

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[64] Chapter D4 – Natural stream management area overlay, D8 – Wetland management areas overlay, D9 – Significant ecological areas overlay, E31 – Hazardous substances, E33 – industrial and trade activities, E36 – natural hazards and flooding.

[65] E1.2 Objective (1).

[66] E1.2 Objective (2).

[67] E1.3 Policies (1) – (2)

[68] E1.3 Policy (3).

[216] There are detailed policies[69] regarding stormwater and others directed at wastewater and other discharges.

Finding G

[217] The objectives and policies reinforce the importance of freshwater and sediment quality being either maintained at an excellent level or improved over time. The AUP also identifies issues from the RPS relating to the mauri of freshwater being maintained or progressively improved over time. This is reinforced by the NPS-FM 2023.

Chapter E3 – Lakes, rivers, streams and wetlands

[218] Chapter E3 – Objectives and Policies are identified as regional plan provisions. The objectives firstly identify protection from degradation (3.2(1)) and restore, maintain or enhance (3.2(2)). An objective then identifies that significant residual adverse effects on lakes, rivers, streams or wetlands that cannot be avoided, remedied or mitigated are offset where this will promote the purpose of the RMA. The appellants identified that this is a positive requirement, intended (one assumes) to achieve above objectives 1 and 2. The introduction to this chapter speaks first of the importance of management of water bodies to protect natural and ecological and biodiversity values, among others. It also states:

> There is a balance to be struck between the need to provide for the ongoing growth of urban Auckland, including the requirements of infrastructure, and the protection, maintenance and enhancement of lakes, rivers, streams and wetlands. It is important that development occurs in a sustainable manner which should involve, where practicable, the retention and enhancement of lakes, rivers, streams and wetlands.
>
> The Plan identifies a number of areas where the natural values of lakes, rivers, streams and wetlands are higher than elsewhere. These areas are especially vulnerable to the adverse effects of inappropriate subdivision, use and development and require a greater level of protection. These areas are identified in the following overlays:
>
> - D4 Natural Stream Management Areas Overlay;
>
> …
>
> - D8 Wetland Management Areas Overlay; and
> - D9 Significant Ecological Areas Overlay
>
> This Plan requires that permanent loss is minimised and significant modification or diversion of lakes, rivers, streams and wetlands are avoided. Where adverse effects cannot be avoided, remedied or mitigated, it may be appropriate that the residual adverse effects be offset by providing environmental benefits either onsite or offsite. In some circumstances the existing natural values of a lake, river, stream or wetland are so high that offsetting will be inappropriate…

[69] E3.2 Policies (8) – (16).

Objectives

[219] As might be expected, Chapter E3 places value on those lakes, rivers, streams or wetlands (water bodies) containing high natural values, and aims to protect them from degradation and permanent loss. There is also an emphasis on restoration, maintenance and enhancement. Significant residual adverse effects that cannot be avoided, remedied or mitigated are to be offset.[70]

[220] Structures are permitted where there are functional or operational needs for them. Activities are managed to minimise adverse effects. Reclamation and drainage is avoided, unless there is no practicable alternative.[71] The NPS-FM 2020 added an objective for fish passage, requiring that the passage of fish is maintained or is improved.[72]

[221] Parties brought particular attention to 3.2(6) which states reclamation and drainage of any lake river or stream/wetland is avoided unless there is no practicable alternative. Clearly, they identified this as applying to the Landfill Footprint area, which reclaims a significant length of stream as defined in the AUP. Although there is clear reference back to the need to maintain stream and wetland areas, there is also recognition of the potential for restoration and enhancement.

[222] Reference on several occasions was made to the effects management hierarchy, including compensation or offset, which indicates that alternative methods to achieving the above results may be considered in terms of the policies in general terms. The issue is then whether the qualifications, in this case, otherwise negate the avoidance provisions.

Policies

[223] There is a general policy directed at avoiding significant effects on various overlay Management Areas, which does not apply to this proposal.[73] For the area outside the overlays, the policy is to avoid where practicable or otherwise remedy or mitigate any adverse effects on water bodies, and where appropriate restore and enhance the water body.[74]

[224] Policy 3.3(3) seeks to enable the enhancement, maintenance and restoration of water bodies. Policy 3.3(4) seeks that *restoration and enhancement actions, which may form part of an offsetting proposal should…*:[75]

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70 E3.2 Objectives (1), (2) and (3).
71 E3.2 Objectives (4), (5) and (6).
72 E3.2 Objectives (7). NPS-FM 2020, clause 3.26(i).
73 E3.3 Policies (1).
74 E3.3 Policies (2)(a).
75 E3.3 Policies (4).

(a) be located as close as possible to the subject site;

(b) be 'like-for-like' in terms of the type of freshwater system affected;

(c) preferably achieve no net loss or a net gain in the natural values including ecological function of lakes, rivers, streams or wetlands; and

(d) consider the use of biodiversity offsetting…[76]

[225] Policy 3.3(5) requires:

> Avoid significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities in, on, under or over the beds of lakes, rivers, streams or wetlands on:
>
> (a) the mauri of the freshwater environment; and
>
> (b) mana whenua values in relation to the freshwater environment.

[226] Royal Forest and Bird submits that Policy (5) is specific and directive. It submits that the absolute loss of stream habitat and freshwater species that do not survive salvage efforts (including mahinga kai species) contravene this policy. It notes that the policy does not extend to offsetting and compensating the loss of mauri or mana whenua values.

[227] Royal Forest and Bird submits that the proposed stream reclamation will result in direct loss of inanga, smelt, other whitebait species such as banded kōkopu, long and shortfinned tuna (eels), kōura and kākahi. It submits that the loss of macroinvertebrates resulting from stream reclamation is a residual adverse effect left unaddressed by Waste Management.

[228] Waste Management submitted that MKCT have confirmed this policy is achieved in terms of any onsite effects, and from their perspective the Hōteo awa, whereas in respect of the Hōteo awa the Ngāti Whātua parties and Te Uri o Hau say it is not.

[229] We conclude that the project may not be fully consistent with this policy, but mauri could be enhanced if the overall outcomes in relation to the freshwater resources of significance are beneficial.

[230] Given that the effects of the proposal as a whole are said by tangata whenua to impact the mauri of the environment, we return to this policy later. The effect on mauri and consistency with the policy turns on our conclusions as to the outcome of the grant of consent (excluding offset or compensation).

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[76] Note 1 attaching to this Policy requires that two documents should be referred to: *Auckland Council Technical Report 2011/009: Stream Ecological Values (SEV)*…; and *Guidance on Good Practice Biodiversity Offsetting in New Zealand … 2014* …

[231] Policy 3.3(6) relates to the management of adverse effects on mana whenua cultural heritage that is identified during development. Policy 3.3(7) provides for structures in, on, under or over any water body and the associated diversion of surface water, provided it complies with certain criteria – including that there is no practicable alternative method or location for undertaking the activity inside the bed of the water body.[77]

[232] Policy 3.3(9) provides for the disturbance and depositing of any substance, among others, in, on or under the bed of a water body, but requires that there is no practicable alternative method or location for undertaking the activity outside the water body and that, among other purposes, it is for the operation, use, maintenance, repair, development or upgrade of infrastructure. Any disturbance is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects on mana whenua values associated with freshwater resources, including wāhi tapu, wāhi taonga and mahinga kai.[78]

[233] Policies 3.3(10) – (12) contain general encouragement to provide plants that are native to the area, and encourage the incorporation of mana whenua mātauranga, values and tikanga in any planting in, on or under the bed of a lake, river, stream or wetland.[79]

[234] There is a directive policy, 3.3(13) relating to reclamation and drainage that requires:

> (13) Avoid the reclamation and drainage of the bed of lakes, rivers, streams and wetlands, … unless all of the following apply:
>
> (a) there is no practicable alternative method for undertaking the activity outside the lake, river, stream or wetland;
>
> (b) for lakes, permanent rivers and streams, and wetlands, the activity is required for any of the following:
>
> (i) as part of an activity designed to restore or enhance…
>
> (ii) for the operation, use, maintenance, repair, development or upgrade of infrastructure; or
>
> … and
>
> (c) the activity avoids significant adverse effects and avoids, remedies or mitigates other adverse effects on mana whenua values associated with freshwater resources, including wāhi tapu, wāhi taonga and mahinga kai.

[235] Two policies, 3.3(15) and (16), direct the protection of the riparian margins so as to safeguard habitats, aesthetic landscape and natural character values, contribution to

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[77] Chapter E3.3 Policies (6)-(8),
[78] Chapter E3.3 Policies (9)(a), (b)(ii) and (c).
[79] Chapter E3.3 Policies (10)-(12).

biodiversity, avoid or mitigate the effects of flooding, among others.[80]

[236] The NPS-FM 2020 required that two new policies (3.3(17) and (18)) relating to natural inland wetlands and rivers be added to the AUP.[81] The first policy focusses on the avoidance of the loss of extent of natural inland wetlands, the protection of their values, and the promotion of their restoration.[82] Some exceptions are provided for. The second relates to avoiding the loss of river extent and values and is also subject to exceptions.[83]

[237] Prior to the NPS-FM 2023, one of the exceptions to the loss of wetlands or river extent related to specified infrastructure. The regional council had to be satisfied that the loss of wetlands or river extent is necessary for the construction of the specified infrastructure; it will provide significant natural or regional benefits; there is a functional need for it in that location; and its effects are managed through applying the effects management hierarchy. Specified infrastructure is defined to include *(b) regionally significant infrastructure identified as such in a regional policy statement or plan*.

[238] The NPS-FM 2023 now provides for landfills in its list of exceptions to loss of wetlands. The relevant provision states:[84]

> The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:
>
> …
>
> (f) the Regional Council is satisfied that:
>
> (i) the activity is necessary for the purpose of constructing and operating a new or existing landfill or cleanfill area; and
>
> (ii) the landfill or cleanfill area:
>
> - will provide significant national or regional benefits; or
> - is required to support urban development as referred to in paragraph (c); or
> - is required to support the extraction of aggregates as referred to in paragraph (d); or
> - is required to support the extraction of minerals as referred to in paragraph (e); and
>
> (iii) there is either no practicable alternative location in the region, or every other practicable alternative location in the region would have equal or greater adverse effects on a natural inland wetland; and

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80 Chapter E3.3 Policies (15)-(16).
81 NPS-FM 2020 3.22(1) and 3.24(1).
82 Chapter E3.3 Policy (17).
83 Chapter E3.3 Policy (18).
84 Chapter E3.3 Policy (17)

(iv) the effects of the activity will be managed through applying the effects management hierarchy.

[239] It was generally agreed among the parties that, in light of that amendment, there is no need to consider whether the proposal constitutes specified infrastructure as defined in the NPS-FM 2020. Leaving that agreement to one side, we note some difficulties with the amendment insofar as its requirement for alternatives to be satisfied is so expansive as to be impossible to meet (f)(iii). We note the Director-General's concession on this point, noting that as there are no fundamental matters of disagreement between experts, it will not argue that there are any issues on this point. Therefore, while there is a clear exception for landfills in this amendment, we will not consider whether the proposal is specified infrastructure under the NPS-FM 2020.

[240] Finally, in this Chapter Policy 3.3(18) requires:[85]

> The loss of river extent and values is avoided, unless the Council is satisfied:
>
> (a) that there is a functional need for the activity in that location; and
>
> (b) the effects of the activity are managed by applying the effects management hierarchy.

[241] The term effects management hierarchy is defined in the NPS-FM 2020 in relation to natural inland wetlands and rivers to mean *an approach to managing the adverse effects of an activity on the extent or values of the wetland or river (including cumulative adverse effects and loss of potential value)*. It sets out a cascade of management tools that must be applied, starting with the requirement that adverse effects are avoided where practicable, through to minimisation, remedying, aquatic offsetting, and finally determining that if aquatic compensation is not appropriate, the activity itself is avoided. The terms aquatic compensation and aquatic offset are defined and we address those matters when we come to our assessment of the ecological effects of the proposal.

Evaluation of E3

[242] A key issue in relation to Chapter E3 related to whether or not bottom lines are required in 3.2 Objectives, and in particular in 3.2(3) and 3.2(6). While the language of control differs, and while enabling certain activities, there is a focus on avoiding significant adverse effects on the mauri of, and mana whenua values in relation to, the freshwater environment.

[243] While the appellants argued that certain provisions set clear environmental bottom

[85] NPS-FM 2020 February 2023 made minor amendments to Policy (18) that are of no moment for the purposes of this decision. The NPS-FM 2020 defines *functional need* in the same way as the AUP.

lines, they accepted that some were qualified by listed exceptions. Save for the policy addressing mauri, we conclude these provisions do not set environmental bottom lines precisely because they are qualified, and seek to enable activities while controlling effects.

[244] However, the objectives and policies in Chapter E3 are prescriptive, and set out in some detail the ambit of exceptions to their requirements or conditions applying to authorised activities.

[245] The objectives focus on protection of high natural value water bodies; restoration, maintenance or enhancement of all water bodies; management of significant residual adverse effects; provide for structures when there are operational or functional needs; activities are managed to minimise adverse effects; reclamation is avoided unless there is no practicable alternative; and fish passage is maintained.

[246] General policies speak of managing effects by *avoiding where practicable or otherwise remedying or mitigating adverse effects*; and enabling enhancement and restoration, among others.

[247] Specific policies provide for most activities subject to compliance with listed matters, which include:

- no practicable alternative method or location for undertaking the activity outside the water body;
- it is for infrastructure; and
- it avoids significant adverse effects on mana whenua values associated with fresh water.

[248] Reclamation and drainage is to be avoided unless certain exceptions apply, including that:

- There is no practicable alternative method, and
- It is for infrastructure.

[249] The objective which speaks of *operational or functional need* for structures is not carried through to the relevant policy, which makes no mention of either. It is possible, we think, to read *no practicable or alternative method or location* alongside those qualifiers.

[250] Significant adverse effects on the mauri of the freshwater environment and mana whenua values are to be avoided.

Objective (7) – fish passage

[251] Royal Forest and Bird noted that Objective 7 is directive and only allows fish passage to be obstructed where desired fish species are to be protected from some fish species, for example pest species. It noted that two stream channels to be altered by construction of the landfill access road may be too steep to re-establish effective fish passage through the culverts. It says the Court cannot be satisfied Objective 7 has been met.

[252] We acknowledge that there are two instances where fish passage may be restricted, but accept Ms Justine Quinn's evidence (freshwater ecology) for Waste Management that the limited amount and quality of upstream habitat is such that there will be a minimal impact. We conclude that, because a number of existing barriers will be removed, overall there will be an improvement of fish passage access to the wider Western Block (at least 10 km) and Waitaraire Stream (20 km) catchments and therefore benefits to native freshwater fauna.

Policy E3.3(13) – reclamation and drainage

[253] Policy E3.3(13) requires that the reclamation of streams be avoided unless, among others, there is *no practicable alternative method* and the activity avoids significant adverse effects (and avoids, remedies or mitigates others) on mana whenua values associated with the freshwater resources.

[254] Royal Forest and Bird submits that alternative methods includes alternative technologies and alternative landfill scales. It points to Waste Management's acknowledgement that there can be smaller facilities, for example Puke Coal, which was consented for an 8 million m^3 facility.

[255] For mana whenua values, Royal Forest and Bird notes the policy does not extend to offsets or compensation for the loss of these values. In any event, it notes that the losses of stream habitat and mahinga kai are not adequately avoided, remedied or mitigated.

Policy E3.3(17) – loss of inland wetlands

[256] Policy (17) – added by NPS-FM 2020 – requires that loss of wetlands is avoided. One exception related to specified infrastructure. The exceptions were amended by the NPS-FM 2023, which now includes a consenting pathway for new landfills in natural inland wetlands provided that the consenting authority is satisfied of certain matters; that there is either no practicable alternative location in the region, or every other practical

alternative location would have equal or greater effects on a wetland; and the effects of the activity will be managed through applying the effects management hierarchy.

[257] Royal Forest and Bird submits the proposal is contrary to various policies. It adopts the Director-General's closing on alternatives and site selection, highlighting that there is no updated weighting matrix assessing ecological values of alternative sites after the Springhill site was purchased, and that the evidence illustrates an approach whereby ecological issues would be *engineered* away. It submitted that Dr Matthew Baber (terrestrial and wetland ecological matters expert for Waste Management) was only instructed to look at constraints within the proposed site.

[258] Royal Forest and Bird submits the Court cannot have confidence that alternatives have been considered to the extent that the Court in *Tauranga Environmental Protection Society* stated is necessary. It also submits that where matters of national importance under s 6 are engaged, an assessment of alternative locations is required. It submits that given the proposal raises s 6 issues (effects on wetland and stream habitat) alternative locations are to be considered.

[259] While the application might not advance particular policies, it is difficult to draw the conclusion that it is contrary to the objectives and policies of the AUP as a whole. If adverse effects from the discharges were not avoided, or we were not satisfied that there would be a net gain to biodiversity on the site in relation to rivers and wetlands, then it appears to us that the policies and objectives and other provisions guide us to a refusal of consent. The matter is finely balanced.

[260] We accept the application does not meet or advance this policy. The Policy seeks to avoid the loss of natural wetland. Here the loss is addressed, in part, by the improvement of other wetlands of significant value. We must view these outcomes holistically.

Policy E3.3(18) – rivers

[261] Policy (18) directs that loss of river extent and values is avoided unless there is a functional need for the activity and the effects are managed by applying the effects management hierarchy. Royal Forest and Bird contends that the proposal does not fall within either exception. We have already described the weight we should attach to these policies, given the timing of the addition of Policy (18).

[262] We conclude that Policies (13) and (18) canvass the same issue. They are not entirely consistent, given that Policy (13) excepts infrastructure if there is no practicable alternative method while Policy (18) requires there be a functional need for the activity in that location and that effects are managed by applying the effects management hierarchy (of the NPS-FM).

[263] When considering s 104D this is one policy among others. The assessment cannot require the application to meet every policy. In most cases a non-complying activity is likely to offend one or more objectives and policies in the AUP. It may be directly contrary to some. It may also meet others or achieve them in full.

[264] However, it is not individual policies or objectives against which the application and its effects are judged, but the AUP as a whole. That is, has this application *set its face* against the thrust of a Plan, including core values?

Finding H

[265] Chapter E3 recognises the tension between development and the objectives to preserve quality environments and improve those that are degraded. There is still an emphasis on avoidance, remediation or mitigation, although the NPS-FM 2020 (see Policies (17) and (18)) recognises the application of an effects management hierarchy.

[266] We conclude that the introduction of Policies 3.3(17) and 3.3(18) introduce avoidance in the context of the other provisions. The overall effects under s 104D and s 104 are matters we will discuss in due course.

Chapters E11 (Land Disturbance – Regional) and E12 (Land Disturbance – District)

[267] The backgrounds to these chapters recognise that land disturbance is an essential prerequisite for development and use of land. They seek to manage adverse effects through best practice land management techniques while recognising that it is not possible to prevent all sediment entering water bodies.

[268] The provisions relating to land disturbance require that it be managed to, among other things, maintain the cultural and spiritual values of mana whenua in terms of land and water quality, preservation of wāhi tapu and kaimoana gathering.[86] Policies are also directed at enabling land disturbance necessary for a range of activities undertaken to provide for people and communities.[87]

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[86] Chapter E11.3 Policy (2)(d).
[87] Chapter E11.3 Policy (4).

[269] Sediment discharges are to be minimised to the extent practicable having regard to the quality of the environment, with any significant adverse effects to be avoided, [other] adverse effects to be avoided as far as practicable, and the receiving environment's ability to assimilate the discharged sediment to be taken into account.[88]

[270] Chapter E12 objectives and policies are similar to those for the regional plan land disturbance provisions.

Chapter E13 – Cleanfills, managed fills and landfills

[271] The background to the chapter notes that filling activities support the use of land and the disposal of fill and waste generated by residential, commercial, industrial and rural activities in Auckland.

[272] There was a dispute as to the extent to which the objectives and policies referred to landfills generally or only to the discharges from them. The argument advanced by the appellants in particular is that they consider that E13 applies to avoiding all adverse effects from new landfills based upon policy E13.3(4).

[273] While the objectives and policies do not refer to discharges, discharges are the sole focus of the Activity Table. The policies at Chapter E13.3 read as follows:

> (1) Avoid significant adverse effects and remedy or mitigate other adverse effects of … landfills on lakes, rivers, streams, wetlands, groundwater and the coastal marine area.
>
> (2) … land instability.
>
> (3) … relevant industry best practice
>
> (4) Avoid adverse effects from new landfills.
>
> (5) Manage … landfills (including the closure of) to:
>
> (a) Protect the integrity of the site including the containment of contaminants; and
>
> (b) Require aftercare that is appropriate to the nature and requirements of the site, including the type of material that was deposited during its operative period.

Scope of provision

[274] There is nothing in the background to the chapter at E13.1 that limits the way in which the objectives and policies are to be read.

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[88] Chapter E11.3 Policies (7)(a)-(c).

[275] E13.4 Activity Table states that the Activity Table specifies the activity status of discharges from cleanfills, managed fills and landfills pursuant to s 15 of the Act. It is clear that the Activity Table deals with discharges. This demonstrates, in our view, quite clearly that the Activity Table does not cover the full extent of matters addressed within the objectives and policies. We conclude there is nothing exceptional about this.

[276] Waste Management says that E13 is directed at managing the discharges of contaminants to land in circumstances where they might enter water (s 15(1)(b) RMA) in the context of three specific activities: cleanfills; managed fills; and landfills. It notes that other rules in the Auckland-wide section of the AUP address the effects of other discharges in s 15, including discharges of water to water (stormwater) (s 15(1)(a) RMA and AUP E8), discharges from an industrial or trade activity or process to air (s 15(1)(c) RMA and AUP E14) and discharges from an industrial or trade activity or process to land (AUP E33 and s 15(1)(d) of the RMA).

[277] The Council argued in closing submissions that Chapter A of the AUP is relevant to the interpretation of Chapter E13. Part A1.3 relates to the structure of the AUP. It explains that each chapter generally provides the objectives and policies, and in the case of regional and district plans, the rules for a particular resource management matter. Counsel argued that, taking Chapter A into account, the policies need to be read in the context of the chapter within which they sit.

[278] That is consistent with case law – while it is appropriate to seek the plain meaning from a provision, it is not appropriate to undertake that exercise in a vacuum.[89] Regard must be had to the immediate context, and where any obscurity or ambiguity arises it may be necessary to refer to the other sections of the AUP.

[279] E13 is in the Natural Resources section of the Auckland-wide chapter of the AUP. It sits among provisions that control all manner of effects on natural resources. We conclude it is not appropriate to treat it as an island in a sea of other controls. It is not self-contained, and does not control all effects generated by cleanfills, managed fills and landfills. Other sections in Chapter E and elsewhere also must be taken into account and they need to be read as a whole.

[280] The policy provisions need to be read in the context of the chapter within which they are contained. Objective E13.2(1) refers to cleanfills, managed fills and landfills, ensuring that they are sited, designed and operated so that adverse effects on the environment are avoided, remedied or mitigated. The objective for landfills is given effect

[89] *Powell v Dunedin City Council* [2004] 3 NZLR 721, at [35] (CA).

to by two policies – policy (1) and policy (4) which are set out above.

[281] It is of note that the AUP also controls, in other sections, effects from activities more generally. The reference to land stability (in Policy 2) to us addresses discharges, and if seen in that way is consistent with discharges of contaminants.

[282] Having regard to that context we conclude that Policies (1) and (4) are limited in their application to activities which discharge contaminants, that is to be read to include land stability and soil slips, etc. This might include contaminants generally as there is no clear limitation. So, while it includes leachates and other emerging contaminants, it cannot go as far as all effects, for example noise and ecological effects. Again, a pragmatic and proportionate interpretation is required.

[283] In this regard we take the meaning of avoid, with reference to *Port Otago*, to mean avoid material harm. In interpreting these words in a practical sense for this Site, we see the objectives and policies requiring that no more than acceptable levels of contaminants become water-borne beyond the Landfill Footprint and the treatment systems, and do not reach the boundary of the property or the Hōteo rIVER.

[284] From this we conclude that in relation to external effects, namely from discharges that can occur from construction, stormwater, sediment and other contaminants, the avoidance of discharges cannot mean there is no sediment at all in water. As discussed earlier, E11 contemplates some level of discharge but in the parlance of *Port Otago, material harm* must be avoided.

[285] E13 is focussed on discharges from the activity on the land. It is therefore not focussed on the Landfill Footprint itself, except to the extent that that could lead to discharges beyond the footprint. In other words it is concerned with all forms of physical contaminant that could reach land and in particular water. To that extent, roads and their potential to generate sediment or contaminants to nearby streams and land not part of the property, and leachate to contaminate ground and surface water, are clearly in the frame.

Finding I

[286] E13 is directed to avoiding contaminants from the landfill activity reaching land or water, including groundwater, beyond the Site. This includes those which can either be borne in water, that is, leachates, sediments, etc, or are caused by the activities themselves which then leads to the discharge, such as the construction of roads or dams. The requirement to avoid adverse effects in itself identifies that this is not a prohibition against new landfills, but a requirement as to the internalisation of adverse effects. This

is not a total prohibition of any adverse effects but those that create material harm. Again, this calls for pragmatic proportionate interpretation.

Chapter E15 – Vegetation management and biodiversity

[287] The background to this chapter states that the objectives and policies apply to the management of terrestrial and coastal vegetation and biodiversity values outside of scheduled Significant Ecological Areas.

Objectives

[288] Given the impact of the proposal on rivers and streams (by their removal) and indigenous biodiversity values, Chapter E15 is also relevant. The objectives are directed at ensuring that ecosystem services and indigenous biological diversity values, particularly in sensitive environments, are maintained and enhanced while providing for appropriate subdivision, use and development. Where ecological values are degraded, or where development is occurring, indigenous biodiversity is restored and enhanced.

Policies

[289] Policy (1) requires the protection of areas of contiguous indigenous vegetation cover and vegetation in sensitive environments, including the coastal environment, riparian margins, wetlands and environments prone to natural hazards.

[290] Policy (2) requires that the effects of activities are to be managed to avoid significant adverse effects on biodiversity values as far as practicable, minimise significant adverse effects where avoidance is not practicable, and avoid, remedy or mitigate any other adverse effects on indigenous biodiversity and ecosystem services.

[291] Policy (3) encourages the offsetting of any significant residual adverse effects on indigenous vegetation and biodiversity values that cannot be avoided, remedied or mitigated through protection, restoration and enhancement measures – having regard to matters in Policy (4) and Appendix 8 Biodiversity offsetting.

[292] Policy (5) enables activities that enhance the ecological integrity and functioning of areas of vegetation, including for biosecurity, safety and pest management. Vegetation management is enabled to provide for the operation and routine maintenance needs of activities (Policy (6)).

Finding J

[293] The policies require protection of indigenous vegetation in sensitive environments and the management of activities to avoid significant adverse effects on biodiversity where practicable. There is a clear directive to the use of the effects management hierarchy to manage effects that cannot be avoided, remedied or mitigated, including encouragement of the use of offsetting.

Chapter E26 – Infrastructure

[294] E26 clearly relates to infrastructure and there is no dispute between the parties that this activity constitutes infrastructure. The question is whether municipal landfills are included in E26, or if it is more constrained to what might be called network utilities defined in the AUP.

[295] Given the AUP's inclusion of *municipal landfills* in its definition of infrastructure, Waste Management argued that Chapter E26 applies to the proposal. Certain parties argued against its relevance, maintaining that as the heading preceding the objectives and policies and the Activity Table itself do not contain any reference to municipal landfills, it is logical that the objectives and policies that precede the Activity Table also do not relate to them.

[296] The Commissioners at first instance were unanimous that E26 does not apply.[90]

[297] We are guided by a plain and ordinary meaning of the words, and note that the objectives and policies are not limited to the activities listed in the Activity Table. Adopting the same contextual approach we adopted for the objectives and policies in Chapter E13, we consider how the AUP and Chapter E26 provides for infrastructure.

[298] The introduction to the chapter notes that infrastructure is critical to the social, economic and cultural wellbeing of people and communities and the quality of the environment. It states that the chapter provides a framework for development, operation, use, maintenance, repair, upgrading and removal of infrastructure. It notes that infrastructure is provided for on the basis of Auckland-wide provisions, but that additional infrastructure provisions in, for example, zones, are also provided throughout the AUP and should be referred to. A table sets out the overlay and Auckland-wide provisions that are included in the chapter. It does not include landfills.

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[90] This finding was not subject to any appeal. At best, it is part of the General Appeals seeking refusal of consent.

Objectives

[299] The objectives and policies of the chapter are set out under the heading 'Network Utilities and Electricity Generation – All Zones and Roads'. On the face of it, the provisions which follow may be limited by reference to the words in the heading. However, save for some specific sub-headings, many of the objectives and policies refer in general terms to infrastructure – without qualification.

[300] The objectives recognise the benefits and value of investment in infrastructure.[91] They enable the development of infrastructure and safe, efficient and secure infrastructure.[92] Objectives require that the adverse effects of infrastructure are avoided, remedied or mitigated.[93]

Policies

[301] Policy (1) recognises the social, economic, cultural and environmental benefits that infrastructure provides.[94] Policy (2) further provides for the development of infrastructure by recognising functional and operational needs, location, route and design needs and constraints, the benefits of infrastructure to communities within Auckland and beyond.[95]

[302] We accept that Waste Management is not a network utility operator. Eligible infrastructure seems to rely on s 8 of the Infrastructure Funding and Financing Act 2020. Given that this is not regionally significant infrastructure, nor is that term defined in the AUP, it is difficult to find support for a view that E26 was intended to cover landfills as well as network utilities. We are reluctant to substitute our determination for that of the Commissioners. It is clear from the appeals filed that this aspect of the decision was supported by the appellants, and they also supported the minority decision.

[303] Our view is that landfills are likely to be covered by E26, however we are reluctant to rely strongly on this provision, given the Commissioners' decision and the lack of a direct appeal point on it. Even if it was taken into account fully, it is clearly subject to the general requirement that infrastructure must avoid, remedy or mitigate its effects.

[304] The submission that there was not scope for us to revisit that decision is at least arguable. We do not consider the finding on this point critical to a determination of this

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91 E26.2.1 Objectives (1) and (2).
92 E26.2.1 Objectives (3) and (4).
93 E26.2.1 Objective (9).
94 E26.2.2 Policy (1)
95 E26.2.2 Policy (2).

case.

Chapter E33 – Industrial and trade activity

[305] The Background to this chapter addresses the need to appropriately manage industrial and trade activities including managing environmentally hazardous substances.

[306] It was accepted that the proposed landfill falls within the definition of industrial and trade activities involving the use, handling and storage of environmentally hazardous substances as part of its production and operation. The objectives and policies are directed at managing the activities to avoid adverse effects on land and water from environmentally hazardous substances and the discharge of contaminants, or to minimise adverse effects where it is not reasonably practicable to avoid them.[96]

Chapter H19 – Rural zones

[307] The site is located in the Rural-Rural Production Zone. The relevant Activity Table provides that landfills are a non-complying activity in all the Rural Zones.

[308] The Zone Description states that the purpose is to provide for the use and development of the land for rural production and rural industries and services while maintaining rural character and amenity values.

[309] The general Rural objectives and policies are focussed on the land resource and rural production activities. A range of rural production activities is enabled, together with a limited range of other activities in the rural areas including the development of infrastructure. Objectives and policies focussed on rural character, amenity and biodiversity values aim to maintain or enhance those values. The effects of rural activities are to be managed to achieve the character, scale, intensity and location that is in keeping with rural character, amenity and biodiversity values including by recognising certain characteristics, including *(c) a general absence of infrastructure which is of an urban type and scale*.[97]

[310] Opportunities are enabled to protect existing Significant Ecological Areas or provide opportunities to enhance or restore areas to meet criteria for Significant Ecological Areas.[98] Objectives addressing, among others, non-residential activities, require that industries, services and non-residential activities of an urban type and scale unrelated to rural production activities are not located in Rural zones.[99] Non-residential

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[96] E33.2 Objective (1) and Policies that follow.
[97] H19.2.4 Policies (1)(c).
[98] H19.2.4 Policies (3).
[99] H19.2.5 Objectives (4).

activities are to be managed to contain and manage adverse effects on site, and avoid, remedy or mitigate adverse effects on traffic movement and the road network.[100]

[311] There is a reference to cleanfills and managed fills where they can assist the rehabilitation of quarries. The objectives and policies relating to the Rural Production zone include providing for forestry activities, including the planting and management of new and existing forests, and planting of indigenous species and amenity exotic species for long-term production purposes and the eventual harvesting of these species.[101]

Chapter E14 – Air quality

[312] The Description for this chapter states that the provisions relate to the management of air quality and the separation of incompatible land uses.

Objectives

[313] The objectives include protecting human health and the environment from significant adverse effects from the discharge of contaminants to air, ensuring that incompatible use and development are separated. However the operational requirements of industry and infrastructure, for example, are recognised and provided for.[102]

Policies

[314] There is a specific suite of policies relating to management of discharges, including in certain rural zones. Among others, there is a requirement for adequate separation between use and development that discharges dust and odour and activities that are sensitive to those adverse effects.[103]

[315] There is a general policy that requires that the discharge of contaminants to air from industrial activities in Rural Zones be avoided, except where the activity is location-specific for infrastructure requiring large separation distances that cannot be provided for within the urban area.[104] There are other requirements to adopt the best practicable option for emission control, effects of air quality beyond the boundary of premises where the discharge is occurring, among others.[105]

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[100] H19.2.6 Policies (2)(b) and (c).
[101] H19.3.3 Policies (2)(a) and (c).
[102] E14.2 Objectives (2), (3) and (4).
[103] E14.3 Policies (3).
[104] E14.3 Policies (6)(a) and (c).
[105] E14.3 Policies (8) and (9).

Activity status of air discharges

[316] Discharge to air from landfills is a discretionary activity.[106] One of the requirements is that the landfill operation must be able to maintain a minimum separation distance of 1 km between the Landfill Footprint and the nearest dwelling located in the urban area and zoned for residential activities.[107] We note that the proposal does not comply with the other standards, which are time-specific as to the disposal of waste and relate back to 2010. Waste Management has proposed a separation distance of 1 km between its Landfill Footprint and surrounding residences that accords with the requirement.

Commentary on AUP Objectives and Policies

[317] In relation to those that relate to biodiversity, the AUP provides a range of alternatives. The question for the Court is whether we can see anything in this wording that seeks to derogate from the requirements of s 6 in general, and in particular the requirement under s 6(c) – the protection of areas of significant vegetation and significant habitats of indigenous fauna and 6(e) – the relationship of Māori and their cultural and traditions with ancestral lands, water, sites, wāhi tapu and other taonga.

[318] While the AUP indicates that there may be alternative methods to achieve those outcomes, we understand that for the objectives to be met, the activities must avoid adverse effects beyond the site in relation to contaminants and discharges, including from construction or operation, those being discharges to land or to water.

[319] In relation to the streams, rivers, wetlands, they should be protected as well as the habitats of indigenous species.

[320] Protection has a broader application within the AUP, but the intent is to achieve at least maintenance and preferably enhancement. We will describe this later in the decision as the 'net gain' objective in relation to biodiversity and two issues arise in respect of that. The first issue is as to how outcomes are measured, and the second is the length of time to achieve the outcome and the certainty that it will be achieved either during or by the end of the term of consent.

[321] As we will discuss in due course, these are not simple issues in the context of this case, involving as it does a significant impact on threatened species, and very low

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[106] See Table E14.4.1, Activity Table.

[107] See Activity Table (A159) and (A160) – note that landfills that do not comply with restricted discretionary activity standards are non-complying. The activity that requires minimum separation distance is located at E14.6.4.1, however the proposed landfill does not comply with the requirements of this rule and therefore must be considered as non-complying.

probability risks of discharge but nevertheless extremely high consequences if this occurs.

[322] It is also to be noted that as the hearing progressed, the experts' areas of disagreement narrowed. There were significant improvements in the proposals put to the Court and the recognition by experts that further work will need to be done if consent is otherwise appropriate. We also mention that the design at this stage is a concept design only for the landfill, and significantly greater certainty would be needed in respect of design outcomes if we were to be satisfied that the landfill could minimise discharges of all forms of contaminant to land or water beyond the site to the extent it has described.

G. Other relevant legislation

Statutory framework for managing waste

National and Auckland waste policy direction

[323] During the hearing issues arose in relation to the provisions of the Auckland Waste Management and Minimisation Plan 2018 (**Waste Minimisation Plan**), prepared under the WMA 2008 and the Low Carbon Auckland Action Plan 2014 (**Low Carbon Plan**). On various aspects of these issues Waste Management, Auckland Council, Ngāti Whātua Ōrākei and Fight the Tip called evidence.

Framework prior to the Waste Minimisation Act 2008

[324] Under the Local Government Act 1974 (**LGA 1974**) territorial authorities were allowed to either collect and dispose of waste or contract for those services.[108] The Local Government Act 2002 (**LGA 2002**) included a specific requirement for territorial authorities to assess *sanitary services* within their districts.[109] Sanitary services were defined by reference to the definition of *sanitary works* in the Health Act 1956. That definition referred to *works for collection and disposal of refuse, night soil, and other offensive matter.*[110]

[325] The LGA 1974 required that every territorial authority adopt a waste management plan, which was required to make provision for the collection and reduction, reuse, recycling, recovery, treatment, or disposal of waste in the district. It also had to provide for its effective and efficient implementation, among other matters.[111] Further, every

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[108] Part 31 Waste management, ss 540, 541 and others.

[109] Part 7, subpart 1 LGA 2002.

[110] Section 25(1)(c) Health Act 1956.

[111] Section 539(1) and (2) of the LGA 1974. The definition of *waste management plan* was … *plan developed … in the following order of priority, of the following methods (which methods are listed in order of their importance): (a) reduction; (b) reuse; (c) recycling; (d) recovery; (e) treatment; (f) disposal.* (s 537 LGA 1974).

territorial authority was required to promote effective and efficient waste management within its district, having regard to the environmental and economic costs and benefits for the district; and ensuring that the management of waste does not cause a nuisance or become injurious to health.[112]

[326] Again, under LGA 1974 a territorial authority could undertake or contract for the efficient and effective management of waste, including the provision of waste disposal facilities within or beyond the district.[113] Where a waste management plan was in force, the territorial authority had to exercise its powers relating to waste management in accordance with the AUP.[114]

[327] As at 2008, therefore, the responsibility for assessing and providing waste collection and disposal services was provided for through a combination of provisions in the LGA 1974 and LGA 2002.

Framework after 2008

[328] The advent of the WMA 2008 removed waste collection and disposal from both Local Government Acts by deleting the reference to waste disposal and the definition of *sanitary services* in the LGA 2002, deleting s 128 of the LGA 2002 (which was the process for making an assessment of water and sanitary services), and repealing Part 31 (waste management) of the LGA 1974.

[329] The purpose of the WMA 2008 is to encourage waste minimisation and a decrease in waste disposal in order to protect the environment from harm and provide environmental, social, economic and cultural benefits.[115]

[330] A territorial authority is required to promote effective and efficient waste management and minimisation within its district.[116] Waste management and minimisation is defined to mean *waste minimisation and treatment and disposal of waste*. For those purposes, a territorial authority must adopt a waste management and minimisation plan. That plan must provide for objectives and policies for achieving effective and efficient waste management and minimisation within the district, including:[117]

> (i) collection, recovery, recycling, treatment, and disposal services for the district to meet its current and future waste management and minimisation needs (whether provided by the territorial authority or otherwise); and

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[112] Section 538 LGA 1974.
[113] Section 540(1)(d) LGA 1974.
[114] Sections 540(2) and 541(3) LGA 1974.
[115] Section 3 WMA 2008.
[116] Section 42 WMA 2008.
[117] Section 43(2)(b) WMA 2008.

(ii) any waste management and minimisation facilities provided, or to be provided, by the territorial authority; and

(iii) any waste management and minimisation activities, including any educational or public awareness activities, provided, or to be provided, by the territorial authority.

[331] In preparing a plan, a territorial authority must:[118]

(a) consider the following methods of waste management and minimisation (which are listed in descending order of importance):

(i) reduction;

(ii) reuse;

(iii) recycling;

(iv) recovery;

(v) treatment;

(vi) disposal; and

(b) ensure that the collection, transport and disposal of waste does not, or is not likely to, cause a nuisance; and

(c) have regard to the New Zealand Waste Strategy, or any government policy on waste management and minimisation that replaces the strategy; and

(d) have regard to the most recent assessment undertaken by the territorial authority under s 51; and

(e) use the special consultative procedure …

[332] The waste assessment to which a Council must have regard must contain a number of elements. They are: description of the collection, recycling, recovery, treatment and disposal services provided within the territorial authority's district; a forecast of future demand for those services within the district; a statement of options available to meet the forecast demands; the authority's intended role in meeting the demands; proposals for meeting, including proposals for new or replacement infrastructure; a statement about the extent to which the proposals will ensure the protection of public health and promote effective and efficient waste management and minimisation.

[333] We were advised that the Waste Minimisation Plan was prepared pursuant to the special consultative procedure under the LGA 2002. In evidence and submissions there was much criticism of the Council and whether its consent to the proposal and defence of its decision in these appeals meant that it was complying with the Waste Minimisation Plan. Ngāti Whātua Ōrākei and Te Uri o Hau[119] said that they see the Council as *missing*

[118] Section 44 WMA 2008.

[119] Te Uri o Hau and Ngāti Whātua Ōrākei, closing submissions, dated 19 March 2023 at [2].

in action and its decision to support the proposal is contrary to the policies and targets of the Waste Plan. Mr Foster, in his closing submissions, suggested that the Council's support for the proposal is a misuse of the consent process, and suggested that the Council could even have used the AUP policies and Waste Minimisation Plan as a basis for opposing the proposal from the outset.

[334] In response, the Council noted that landfills are not prohibited in the AUP, and that caution should be exercised in elevating the role of the Waste Minimisation Plan and Low Carbon Plan in the resource consenting process under s 104(1) of the RMA. It submitted that neither document is an aid to the interpretation of the relevant AUP provisions, especially given the Waste Minimisation Plan was prepared after the AUP was made partially operative in November 2016.

[335] It noted the role of the Waste Minimisation Plan and Low Carbon Plan in the statutory criteria under s 104(1)(c) as potentially being *any other matters* the Court may consider relevant and reasonably necessary to determine the application. The Council does not accept that its support for the proposal is contrary to the Waste Minimisation Plan. While that plan includes the aspirational goal of zero waste by 2040, it recognises that landfills will still be needed, at least in the short to medium terms. Whether the proposal will be commercially viable, it said, is a matter for Waste Management.

[336] Waste Management submitted that the suggestion of *no new landfills* as Council's policy is contrary to other express statements of the Waste Minimisation Plan to the effect that there remains a need for landfills.[120] The Waste Minimisation Plan expressly recognises that landfills continue to be required:[121]

> It is not yet technically or economically feasible to divert all materials from landfill. There is no viable method for re-using or recycling many of the products in use today, and the products that will replace them haven't yet been invented.

[337] We were pointed to the statement that there would be *no new landfills* in clause 5.2 Māori priorities of the Waste Minimisation Plan. The priorities outlined in that section are noted as being *identified as priority actions by mana whenua and mataawaka through engagement on this plan or drawn from iwi management plans*.

[338] We were advised that the Council's most recent waste assessment is made at clause 6.2 of the Waste Minimisation Plan and in the Appendix. At clause 7.2 it recognises the transport inefficiencies of moving waste out of the region. It records that around 40% of waste to landfill is currently trucked out of the region (a round trip of 140-300 km).

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[120] Waste Minimisation Plan at clause 3.2, p18; 8.2.3 at p53.
[121] Waste Minimisation Plan at clause 3.2, at p18.

[339] The future projections of waste are addressed at clause 7.3 of the Waste Minimisation Plan, which records the current heavy reliance on *out of region* disposal:

> Currently, around 40 per cent of our refuse is trucked out of Auckland … While there is adequate landfill disposal capacity for the near-medium-term, relying on this capacity doesn't meet our mandate to promote waste minimisation. It also ignores the other cost of waste, including transport costs.

[340] The 2017 Waste Assessment noted that as at that time, the combined capacity of the landfills servicing Auckland would be enough to service Auckland's waste disposal needs for the next decade (that is until 2027). It also noted transportation issues associated with transfer of waste across the region.[122]

[341] The Waste Minimisation Plan noted the importance of building resilience into the waste management systems, including to cater for future natural disasters.[123]

[342] Finally, the Waste Minimisation Plan expressly acknowledges that Auckland needs to retain a safe residual waste disposal option. It says:[124]

> Landfill disposal is regarded as a poor waste management option, particularly in the context of managing organic wastes which decompose over time and release methane. Litter and illegal dumping have both environmental and social effects, damaging the natural environment and harming communities' sense of pride in place.
>
> These objectives are concentrated at the least preferred end of the waste hierarchy – treat and dispose. While they are the least preferred methods, it is important we continue to manage residual waste effectively for public and environmental health and safety reasons.

Evaluation of Waste Minimisation Plan

[343] While we accept that the Plan is the sum of its parts, and there is only one reference to *no new landfills*, we observe that it is unhelpful to have such references in the Plan without making clear the place of that statement in the objectives, policies and methods for waste management and minimisation in Auckland.

[344] We accept the statements made about landfill being at the lowest end of the hierarchy of waste management, and note the comments about landfilling capacity in the region. However, it is not helpful to state the aspirations of tangata whenua in such a document in a vacuum, and without reference back to those aspirations when formulating methods for waste management and minimisation.

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[122] Auckland's Waste Assessment 2017, at p86 and p 85.
[123] Waste Minimisation Plan at clause 7.3, at p49.
[124] Waste Minimisation Plan at clause 8.2.3, at p53.

[345] We can only say that the case put by Waste Management assuming that waste would continue at least at the current levels if not increase over future years, appears to defy the purpose of the WMA 2008 and the objectives of the Waste Minimisation Plan. This may require further government intervention, but at this stage we do not accept that we should uncritically assume that a landfill with volumes at the same levels currently received at Redvale will continue into the future.

[346] It is clearly the intention of the Waste Minimisation Plan that there be significant reductions both by 2030 and by 2040, and we anticipate government intervention if these objectives are not being pursued. Having said that, we acknowledge that there is nothing within any of the documents that requires, or even aspirationally states, that there will be no need for any solid waste disposal to landfill in the near to medium future.

[347] The issue then turned on the volumes that may be required in the future, and whether Redvale or Whitford, or other existing landfills, may be able to take any smaller quantity of residual waste. In our view that is speculative at this stage, but goes to the question as to whether there is a clear necessity for a landfill of this size.

[348] As we discuss later, that addresses the rate of utilisation of landfill *airspace*, or the life of a landfill, rather than the construction of a new landfill. This does not present an insurmountable hurdle to Waste Management. While indicating general intentions to reduce waste and use of landfills this does not bear upon the merits of an application. The inverse is also correct that arguments as to national, regional or local **necessity** for landfills do not fit with relevant legislation and plans.

The Wildlife Act 1953

[349] Issues as to the relevance of this Act arose during the course of the hearing and we sought and received submissions from the parties. Helpfully, an agreed position was reached between counsel for the various parties as to the interface between the RMA and the Wildlife Act.

[350] The construction of the landfill will result in habitat loss and/or direct harm to wildlife, including Hochstetter's frog and long tailed bats. The experts agree that *the general project effects include frog mortality, permanent habitat loss, degradation and fragmentation through vegetation clearance, earthworks activities and potential sedimentation.*[125]

[351] The Wildlife Act predates the RMA and has been in force since 1953. It forms part of the legislative landscape. The Director-General has power to authorise the

[125] JWS, Lizards, frogs and invertebrates, dated 23 May 2023, at [1.1](i).

catching alive or killing of wildlife.[126]

[352] The Director-General pointed out that the purposes of the RMA and the Wildlife Act differ. The RMA is focussed on sustainable management whereas parts of the Wildlife Act that are relevant to the proposed landfill focus on wildlife protection. Under the RMA, adverse effects associated with habitat loss and harm to threatened species can be addressed by either refusing resource consent or imposing conditions that address habitat loss and harm.[127]

[353] At that high level the parties were agreed. The RMA and the Wildlife Act involve separate processes. Any resource consents obtained under the RMA do not relieve an applicant of the need to address any issues that may arise under the Wildlife Act.

[354] Waste Management specifically acknowledged in its closing that it will apply for (and only be able to proceed if granted) any further approvals for its ongoing monitoring, salvage and relocation activities of wildlife if consent is granted. It submits this approach is typical of activities requiring such approvals, given the particular activity may be ultimately adjusted by the resource consents granted and require Wildlife Act approvals that reflect this.

[355] We agree that we do not have jurisdiction under the Wildlife Act 1953. It is sufficient to note that if consent is granted, a separate consenting process may be employed under that Act.

H. Would the landfill be a regional facility?

[356] Waste Management described its proposed facility as the Auckland Regional Landfill, but this appears to have its genesis in an application for a plan change that accompanied the original application. With respect, we can find no support for such an identification in any form of governmental or Auckland Council document. Waste Management is one of several private operators who operate landfills in and around Auckland for profit, Redvale being the most prominent.

[357] Although landfills are identified in the AUP as infrastructure, it does not identify them as regionally significant infrastructure. Dr Mitchell, the planner for Waste Management, opines that 'infrastructure' should be read as regionally significant. We do

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[126] Section 53, Wildlife Act 1953.
[127] *Solid Energy NZ Ltd v Minister of Energy* [2009] NZRMA 145, at [112] (HC).

not agree.

[358] It is not for us to interpolate into documents and/or reinterpret the AUP when its intention is clear. Such interpolation might be possible where there is doubt, but in this case landfills were never identified as regionally significant infrastructure. We do note, however, that the AUP does not identify *any* infrastructure as 'regionally significant'.

[359] As we understand the evidence, there is no guarantee that household waste would necessarily be disposed of to the proposed landfill. As well as from Auckland, we assume that Waste Management hopes to attract waste from Northland. Nevertheless, there is no indication that this is a regional facility as defined within the AUP, any national document or otherwise.

[360] As we have discussed, Chapter E26 on its ordinary interpretation could apply to all infrastructure – not just network utilities. That being the case, the provision for landfills only in certain areas as a non-complying activity might be argued as contrary to the enabling provisions in E26.

[361] However, that conclusion would require decisions as to whether there had been a failure by Council to properly provide for such infrastructure. Rather, the proper interpretation when looking at E26 and E13 is that the non-complying status requires a close examination to ensure that it is acceptable not only in terms of the AUP provisions as a whole, but in terms of its effects.

[362] We conclude that that is a logical consequence of the application of the provisions in the AUP, where so many of the relevant objectives and policies refer to avoiding, remedying or mitigating effects, and appropriateness generally. Reliance on other provisions such as essential services is not helpful in the context of the RMA. This Court is, of course, a creature of that Act and must apply the terms of the Act and the relevant plans.

[363] We note that originally an application was made for a plan change which was refused at first instance. Waste Management did not file an appeal in respect of that decision. Accordingly, we have no discretion to consider whether or not a plan change should be made to provide for a landfill at the Site.

Future need for landfill

[364] We received evidence on the capacity of existing Auckland landfills. If filling were to occur at the same volumes and frequency as it has to date, those landfills will reach capacity within the next 5-10 years. That raises a question as to what thought has been

given to the future requirements for landfills by Auckland Council.

[365] If the Council had intended that landfills be provided for in the Auckland region, then we would have anticipated that they would have been included within the AUP. Although this Court was not involved in the consideration of the AUP provisions, we can infer that the Council deliberately decided not to make direct provision for landfills within the AUP.

[366] However, its status as a non-complying activity does contemplate that there may be circumstances (which might be described as unusual or exceptional) that may justify a grant of consent. We agree that the AUP does not provide that any application for a landfill needs be considered as a plan change, and it therefore seems that there is the option of seeking a plan change or a non-complying consent.

[367] Overall, we consider that the criteria brought to bear would be nearly identical. The AUP contemplates plan changes for certain future urban development. It may be (although not explicit within the AUP) that the Council considered that a landfill was best addressed on the same basis.

[368] Finally, we acknowledge that appropriate waste disposal is a fundamental requirement of all communities. The legislative changes that have removed the requirements on Councils to assess and provide waste collection and disposal services mean that no statutory body has responsibility any more for providing those services, except perhaps tangentially with regard to their Health Act 1956 obligations.

[369] The legislative focus since 2008 is on waste minimisation and a decrease in waste disposal. A Waste Minimisation Plan must be prepared, but we were not advised how it would be implemented. What that means for Auckland's waste minimisation and disposal is unclear.

[370] If, for example, waste minimisation initiatives are not so successful as to remove the need for landfills before landfill capacity runs out, the City will be left with a problem. While that is not a problem for this Court to remedy, we find that it is appropriate to broadly recognise that, until there are other viable options for waste disposal, landfills are still going to be used in Auckland. That is not to say that this proposal gains an advantage because of that finding – it is merely to observe that it is infrastructure that would perform a public service.

[371] We observe that increases in waste levies may change behaviour, but that has not occurred yet. If there were to be more recycling of construction/demolition waste, that would certainly reduce the amount of waste going to landfill – but again – at this time

present initiatives can only achieve so much. At the moment there is still a need for landfilling in Auckland. In order to drive further waste minimisation efforts, it might be appropriate to place annual limits on the amount of waste to be disposed of to the proposed landfill. This was not raised in the hearing and thus we do not consider it further.

I. Landfill capacity in Auckland

[372] Landfill capacity was a matter of concern and debate among parties to the proceeding, particularly Fight the Tip and Te Uri o Hau. The proposed landfill would be a class 1 landfill. There are five classes of landfill in New Zealand, which can be colloquially described as follows:[128]

- Municipal disposal facility: class 1 – in effect, accepts all waste including household waste, commercial or industrial waste and green waste among others;
- Construction and demolition fill disposal facility: class 2 – it accepts waste from construction and demolition activity but does not accept household waste or waste from commercial or industrial sources among others;
- Managed or controlled fill disposal facility: classes 3 and 4 – in effect, accepts inert waste material from construction, demolition and earthworks and does not accept household or commercial waste or waste material from construction and demolition activity (except for inert waste material);
- Cleanfill facility: class 5 – accepts only virgin excavated natural material (such as clay, soil, or rock) for disposal.

[373] Waste Management provided the Court with detail of the current class 1-4 landfills located within and servicing the Auckland region. Apart from Claris on Great Barrier Island (which is about to close) there are two class 1 landfills within Auckland's boundary, being Redvale and Whitford. However, approximately 80% of Auckland's waste is accepted by two class 1 municipal landfills at Hampton Downs in the Waikato and Redvale. Whitford has limits on the rate of waste acceptance and receives approximately 15-20% of Auckland's waste. Whitford had original available air space of 12 million m^3, but less than 6.8 million m^3 is now remaining.

[128] Waste Minimisation (Calculation and Payment of Waste Disposal Levy) Regulations 2009 at s 3B.

[374] Also, Puwera landfill in Northland currently accepts very small volumes of Auckland's waste collected from Northland Waste transfer stations. It accepts all of Northland's waste and has an air space of 4 million tonnes. If it accepted all of Redvale's annual waste, it would be full in 3-5 years.

[375] There are two class 2 landfills at Puketutu and New Zealand Steel, which serve Watercare and New Zealand Steel respectively. There are 11 class 3-4 landfills which represent a combination of private and open facilities. They can only accept inert materials. Auckland's Waste Assessment indicates there are likely to be over 100 class 5 landfills (cleanfills) in Auckland, although the exact number is unclear.[129]

[376] Fight the Tip argued that as the household component of Auckland's waste accounts for 20% of the waste stream, the other 80% is construction and demolition waste which is non-putrescible. However Waste Management pointed out, and we agree, that landfill gas is generated by the breakdown of all organic matter, including that which does not come from households. Many commercial sources include putrescible waste (cafes, restaurants, etc). Even construction and demolition waste can include organic components which break down.

[377] The Waste Assessment notes that the other 80% of Auckland's waste stream is from commercial sources and is in effect all waste other than kerbside waste.[130] This is different from construction and demolition waste, which only forms one part of commercial waste. Commercial sources include the residual waste generated by businesses, hospitals, schools etc. Unlike construction and demolition waste, which can go to a class 2 landfill, all of the other general waste streams must go to a class 1 landfill in terms of the WasteMINZ Guidelines.[131] It seems about 20% of the waste stream is rubble. (We assume this is concrete, rocks and similar.)

[378] The organic component of the Auckland waste stream was a matter of dispute. Surprisingly, there is no clear assessment of the actual component that must go to a class 1 landfill. From the evidence of various witnesses, we conclude it is between 35 and 50%, but will vary depending on natural events (i.e. floods), the rebuilding cycle and major infrastructural construction. We conclude that the submission by Fight the Tip that class 2 and below can provide capacity for 80% of the waste stream is not entirely correct. Notwithstanding that, there is clear ability for some of Auckland's current waste stream to be diverted or reused (for example timber and concrete recycling).

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[129] Auckland Waste Assessment 2017 at clause 5.5.5.
[130] Auckland Waste Assessment 2017, Table 7, at p50.
[131] Technical Guidelines for the Disposal to Land (WasteMINZ, August 2018).

[379] Aucklanders produce approximately 1.6 million tonnes of waste per annum that requires landfilling. A large portion of this waste is expected to be generated in north and north-west Auckland. This evidence was undisputed by all of the corporate and technical waste sector experts who presented evidence. Even with some reuse and diversion to other landfill classes, and even with reducing volumes of waste, there is going to be a continuing demand for class 1 landfill disposal into the future.

[380] As to remaining capacity, Waste Management argued that if Puwera accepted the equivalent of what Redvale currently accepts per annum it would be full in 3-5 years. Also, the Redvale consent will expire by around 2028. Waste Management argued that while Hampton Downs has greater capacity, it currently takes 35-45% of Auckland's residual waste and would fill more quickly if that percentage increased. It is consented to 2030, and while it may be able to renew its consents that is not a foregone conclusion.

[381] Whitford cannot accept a greater proportion of Auckland's waste than it currently does, and both it and Hampton Downs would likely be full by 2035-2037 if they had to accept all of Auckland's waste. However, even if those restrictions were relaxed, Whitford has limited remaining capacity of 6.8 million m^3.

[382] Waste Management observed that, while Hampton Downs has a larger capacity, its closure during the week subsequent to the Auckland flooding and Cyclone Gabriel events, and consequent requirement for Redvale to accept the majority of Auckland's waste in the interim, is evidence enough of the risk Auckland would be taking if it limited landfill infrastructure. In terms of other landfill types that may be able to accept some of the expected waste, there are no class 2 landfills in Auckland ready to take all types of construction and demolition waste. Class 3-5 landfills are significantly restricted in the kinds of waste they can accept, as all waste must be inert.

Alternative methods for waste disposal

[383] On alternative methods for waste disposal, some of Fight the Tip's members and witnesses consider that development of a waste to energy plant is a relevant alternative. However, the organisation's primary position is that:

(a) there is no immediate need for the proposed landfill as Auckland presently has sufficient landfill capacity and there is no evidence of significant adverse effects arising if this consent is not granted;

(b) at some point in the future some additional landfill capacity may be needed, but not at the scale proposed, not in the proposed location and ideally as a last resort after best-practice waste reduction, renewal and recycling has taken place.

[384] For completeness we address the assertion that waste minimisation or the use of other technologies may reduce the demand for a landfill.

Waste minimisation

[385] Waste Management called evidence from Mr Chris Purchas, a person with considerable experience in waste policy and regulation, including waste minimisation in New Zealand. Fight the Tip called Mr Holger Zipfel, an engineer with particular experience in energy from waste projects. Ngāti Whātua Ōrākei called Mr Duncan Wilson, who has experience in the waste and resource recovery sector. All participated in conferencing and produced a JWS dated 13 May 2022.

[386] They agreed:

(a) that current policy settings focus on reducing waste generation and enabling more recycling and recovery activities;

(b) that these settings are intended to bring about a move to a low waste economy through the adaption of a circular economy, which means designing out waste and keeping resources in use for as long as possible;

(c) that the government has acknowledged in policy proposals that establishing a circular economy in New Zealand involved a transition over a period to 2050;

(d) there is an ongoing need for residual waste disposal capacity in the Auckland region;

(e) that landfill capacity is still going to be an ongoing requirement; and

(f) the scale of landfilling activity is one of a number of factors that influence the cost and therefore incentives for landfilling versus resource recovery.

[387] In his evidence, Mr Purchas considered there remains a need for substantial residual waste disposal capacity, in Auckland and in New Zealand, for the foreseeable future. Further, that landfills are best placed to fulfil that role over other technologies raised throughout the consenting process, including waste to energy incineration technologies, because:

- All those other options result in waste by-products that require final residual disposal options.
- None of the national and local waste policy frameworks show any specific intention to utilise regulatory levers like the waste disposal levy to significantly

subsidise or otherwise encourage other technologies. The disposal levy is not applicable to incineration at this time. Landfills, therefore, remain the most commercially viable residual waste option in New Zealand.

- There remains an immediate and ongoing need to safely manage residual waste.
- Landfills are a flexible waste disposal system and can accommodate fluctuating waste capacities and volumes.
- Large-scale landfills are better able to accept decreasing waste volumes while running effective gas capture systems, and spread the capital costs of establishment, compared to several small-scale landfills.

[388] Concerns from some that ongoing landfill capacity will encourage producers to send waste to landfill that could otherwise be recovered do not align with national and local policy frameworks, according to Mr Purchas. Not having an ownership interest in a disposal facility incentivises a generator of waste to reduce their costs by reducing the amount of material requiring disposal.

[389] There was also evidence that addressed in detail allegations that Waste Management's commercial incentive is to maximise its return by filling the landfill as quickly as possible – conflicting with local and national policy to reduce waste to landfill. Further, there was evidence about the influence of waste levies on the nature of materials disposed of to landfills. We do not propose to address these matters as we have found that there is a need for landfill capacity in Auckland. The rate at which a landfill is filled or the way in which levies are made and imposed are not matters relevant to this proposal.

[390] If the current waste to class 1 was half the current waste stream (excluding recyclables and construction) that would still produce around 800,000 m^3 per annum. If half of that volume went to a northern landfill, that would be around 400,000–500,000 m^3. Assuming extremely good separation and lower population growth, 500,000 m^3 of waste to a northern landfill represents around 50-60 years' capacity to fill up to 30 million m^3 of air space. This compares to around 30 years receiving Redvale's current volumes. In short, a landfill between 10 million m^3 and 30 million m^3 seems realistic for known and potential waste generation in Auckland.

Finding K

[391] There is going to be a continuing demand for a class 1 landfill in Auckland even if waste reduction strategies lead to less residual waste. We are less convinced as to the volume required to be placed in such a class 1 landfill.

J. Effects

[392] In this section it is axiomatic to our consideration that it is conceded by the relevant experts, and parties, that there are significant adverse effects after avoidance, remediation and mitigation. Waste Management relies on offset and compensation to bridge the gap and satisfy us that:

(a) the discharges from the Site can be avoided to a significant level of certainty. We regard the risks as minimal.

(b) in relation to the loss of stream length, habitat and species that within a reasonable period of time (but not immediately) the avoidance, remediation or mitigation offset and compensatory work will render a better environmental outcome not only on the Site but in the wider area.

[393] We acknowledge that Waste Management, having chosen the Site, has then undertaken significant works to seek to minimise impacts, including recent changes to reduce areas of loss and increase areas of gain, in particular predator-proof fencing, predator control generally and a significant increase in the amount of offsite riparian works on the Hōteo River.

[394] As previously discussed, in final submissions Mr Matheson proposed the Northern Valley, which has a similar size and dimension to the Landfill Valley, would be given additional protection for the stream and riparian margins. We discuss this in due course because this does appear to introduce the potential to avoid the effects of short-term loss of species if the area is deforested.

Relationship of Māori with the values of the area

[395] It is clear that the concerns of tangata whenua relate not only to the potential for discharges from the site, but also to the potential loss of taonga species and the mauri of the site as a whole and of the Hōteo River. In order to appreciate the relationship concerns of Māori arising from this proposal, it is necessary to understand the cultural landscape of the site and the surrounding area within both an historical and contemporary context.

[396] We conclude on all the evidence that this location holds immense cultural, historical, and environmental significance for the iwi and hapū participating in this process. We received much evidence on these issues, and we are grateful to all who made an effort to prepare statements and came forward to speak to them. We have also

considered the Cultural Values Assessments that were prepared.[132] We were not made aware of any Mana Whakahono a Rohe: Iwi participation arrangements or relevant planning documents recognised by iwi.

[397] We acknowledge that the proposed landfill has raised many issues for iwi and hapū – relating not only to the effects it might have but bringing back into focus concerns about past actions of the Crown and the impacts they have had on the Hōteo and Kaipara moana.

[398] We have referred by name in our decision to some witnesses from whom we heard. The fact that we have not specifically referred to others by name is no reflection on them. All the evidence we read and heard has informed our decision-making.

Te Rūnanga o Ngāti Whātua

[399] Ngāti Whātua is a confederation of three main tribes occupying the lands between the Hokianga Harbour and Tāmaki Makaurau, these are Te Roroa, Te Uri o Hau and Te Taou. Each of these tribes is affiliated to the Mahuhu-ki-te-rangi waka. The Rūnanga Board of Trustees comprises hapū representatives from five takiwa - Ōrākei, South Kaipara, Whāngarei, Northern Wairoa and Otamatea. The Board represents approximately 12,000 registered Ngāti Whātua.

[400] The confederated hapū and tribes are listed in the 2008 Deed of Mandate. They include: Ngā Oho, Ngāi Tāhuhu, Ngāti Hinga, Ngāti Mauku, Ngāti Rango (sometimes referred to as Ngāti Rongo), Ngāti Ruinga, Ngāti Torehina, Ngāti Weka, Ngāti Whiti, Patuharakeke, Te Parawhau, Te Popoto, Te Roroa, Te Urioroi, Te Taou, Te Uri Ngutu, Te Kuihi and Te Uri o Hau. We acknowledge that Te Rūnanga has authority to speak on issues of rangatiratanga, kaitiakitanga, tikanga and kawa for Ngāti Whātua.

Marae

[401] Te Rūnanga o Ngāti Whātua are also affiliated with 35 marae of the Kaipara: namely Haranui; Kāpehu; Ahikiwi; Naumai; Ngā Tai Whakarongorua; Ōmaha; Ōrākei; Ōtamatea; Korokota; Ōtuhianga; Ōturei; Pahinui; Parirau; Pōuto; Puatahi; Rewiti; Ōruāwharo; Te Kia Ora; Rīpia; Taita; Takahiwai; Tama Te Uaua; Te Aroha Pā; Te Kōwhai; Rawhitiroa; Toetoe; Te Pounga; Te Whētu Mārama; Tirarau; Waihaua; Waikarā; Waikaraka; Waiohau; Waiotea.

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[132] On behalf of: Te Rūnanga o Ngāti Whātua, dated 21 October 2020; MKCT, dated February 2019; Ngāti Rongo, dated February 2020.

[402] Ngāti Whātua is the primary iwi occupying the area north of the Tāmaki River. Their northern boundary is shown on a map of the Ngāti Whātua rohe. Evidence was also presented for Ngāti Whātua saying the site lies within the wider traditional rohe of Ngāti Whātua.

Ngā Maunga Whakahii o Kaipara Development Trust

[403] Ngā Maunga Whakahii O Kaipara Development Trust (**Ngā Maunga Whakahii**) is the Post Settlement Governance Entity (**PSGE**) of Ngāti Whātua o Kaipara.[133] It is a s 274 party to Te Rūnanga's appeal. Ngā Maunga Whakahii holds, among other things, the commercial assets returned to it under the settlement.

[404] The term Ngāti Whātua o Kaipara is not traditional and was adopted during the claim period to avoid confusion between Ngāti Whātua in Ōrākei, Ngāti Whātua from Te Uri o Hau and Ngāti Whātua in south Kaipara. Ngāti Whātua o Kaipara is the name that was agreed upon by the majority of hapū and whanau of the five marae of south Kaipara (Reweti, Haranui, Kakanui, Araparera and Puatahi) during the claim and settlement process. This is the primary area of interest that Ngā Maunga Whakahii works within. Witnesses called for Ngā Maunga Whakahii held local affiliations and gave a local perspective on issues and values in this area.

Ngāti Manuhiri

[405] Ngāti Manuhiri are the descendants of the eponymous ancestor Manuhiri, the eldest son of the Rangātira and warrior chieftain Maki, himself a descendant from the Tainui waka. From this whakapapa Ngāti Manuhiri, in their own right through Maki and his sons, have unbroken ties to their ancestral rohe. Maki, Manuhiri and their people, over time, settled in the southern Kaipara, Waitākere, Whenua roa ō Kahu (North Shore), Albany up to Mahurangi districts including Pakiri, Matakana, Puhinui (Warkworth), and finally the eastern offshore islands such as Hauturu ō Toi/Little Barrier and Āotea/Great Barrier.

[406] Ngāti Manuhiri made strategic marriages with other tribal groupings such as Ngāi Tāhuhu and Ngāti Wai among others, who occupied the eastern coastline and many of the offshore islands. Through these marriages Ngāti Manuhiri strengthened their links with the land, sea, and islands on the eastern coastline from Paepae ō Tū (Bream Tail) to Te Raki Paewhenua (Takapuna area) and inland Kaipara areas.[134]

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[133] Section 11, Ngāti Whātua o Kaipara Claims Settlement Act 2013.
[134] Cultural Values Assessment, Ms Fiona McKenzie (MKCT), at section 1.1.

[407] Ngāti Manuhiri maintain an unbroken connection with their rohe exercising their mana through manuhiritanga in the form of tribal traditions, songs, place names, tupuna (ancestral rights), urupā (burial grounds) and kaitiakitanga.[135]

[408] Omaha Marae is the only Ngāti Manuhiri marae within their rohe. The Ngāti Manuhiri rohe, or area of interest, has been formally recognised in the Ngāti Manuhiri Deed of Settlement.[136] The Ngāti Manuhiri Claims Settlement Act 2012 among other things, highlighted the iwi designated area for Right of First Refusal which includes land around Tohitohi o Reipae and the headwaters of the Hōteo.[137] This area includes the Site of this application, but the site is privately owned. Therefore, the Right of Frist Refusal does not apply.

[409] A statutory acknowledgement in favour of Ngāti Manuhiri sits over this region, including the landfill site. The statement of association that supports the acknowledgement sets out that:[138]

> **Tohitohi o Reipae**
>
> Tohitohi o Reipae is a prominent landmark lying to the north west of Puhinui (Warkworth). This mountain was an important traditional boundary marker and is a significant historical reminder of the early ancestral origins of Ngāti Manuhiri. The mountain takes its name from the ancient and famous Tainui ancestress Reipae, who is said to have travelled north from the Waikato in the company of her sister, Reitu, who was seeking the hand of a leading northern chief Ueoneone. Unusually Reipae and Reitu travelled on the back of a large pouakai or eagle. On their journey they alighted at Taurere o Reipae at Pakiri and then at Tohitohi o Reipae, before finally arriving at Whanga a Reipae (Whangarei). Here Reipae married the leading Ngai Tahuhu rangātira Tahuhupotiki. Ngāti Manuhiri are descendants of this union. The mountain continues to be a significant landmark to Ngāti Manuhiri and is valued for its ecology including the Waiwhiu kauri grove.
>
> **Te Awa Hōteo**
>
> Te Awa Hōteo (the Hōteo River) was an important traditional resource of Ngāti Manuhiri, and it remains a water body of major cultural, spiritual and historic significance to the iwi. The river has particular importance as the home of the eponymous ancestor Manuhiri who occupied pā at Tūtā, Umukuri and Mangatū where he lived until his death. The lower reaches of the river were also an important boundary marker between Ngāti Manuhiri and other groups. Until the late 1860s the lower river was the focal point of settlement for Uri ō Katea, a hapū of Ngāti Manuhiri who descended from Tūwhakaeketia, the second son of Manuhiri. Of special importance are Taihāmau and Iriwata, the sons of Tūwhakaeketia, who stand as stones in the river. They are located just above the Tarakihi rapids which marked the navigable upper reaches of the river.

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135 Cultural Values Assessment, Ms Fiona McKenzie (MKCT), at section 1.1.

136 Exhibit 45, Ngāti Manuhiri and Crown Deed of Settlement; Exhibit 53, Ngāti Manuhiri and Crown Deed Settlement, Attachment 1.

137 Cultural Values Assessment, Ms Fiona McKenzie (MKCT), Figure 5 – Map depicting MKCT Right of First Refusal area; Exhibit 53, Ngāti Manuhiri and Crown Deed of Settlement: Attachment 2.

138 EIC, Mr Terence (Mook) Hohneck, dated 29 April 2022, at [14] and [16].

> From the time Ngāti Manuhiri settled the area in the late seventeenth century, kāinga and cultivations were maintained beside many parts of the river including at Hōteo, Te Awapū, Mangakura, Mangatū, Awa Matangao and Kawakawa. The Hōteo River provided a wide range of fish, eels, kākahi and water fowl. Kāinga on the lower part of the river were renowned for their karaka groves from which ripe kernels were harvested in autumn. As the river extended many kilometres inland to Tomarata and Whāngaripo it provided a traditionally important east-west transport route.

[410] We received evidence from the chairperson of Omaha Marae, Ms Annie Moana Baines, and from Mr Mikaera Miru, and then from Mr Hohneck for MKCT. Mr Miru said that the Ngāti Manuhiri whanau of Omaha Marae are the mana whenua who keep the fires of the tupuna burning on the whenua. He said that MKCT are fully aware of the links between the Omaha Marae whanau and the site of the proposal, and needed to have regard to them as mana whenua and engage with them under tikanga. He said they (at the marae) were unaware of decisions being made by MKCT. He set out a process he said the MKCT should have followed to ensure decisions are tika. Ms Baines reiterated the Marae's position and spoke of MKCT's obligations to the Marae.

[411] We note a clear tension between the Omaha Marae Board and MKCT, especially after MKCT reached agreement with Waste Management. The Marae is the only marae of Ngāti Manuhiri, the beneficiaries are clearly Ngāti Manuhiri, but it has no mandated authority to speak for Ngāti Manuhiri as a whole on resource management issues. Nevertheless, we recognise that the Marae represents the whanau who ahi kā to the area and live in the vicinity of the Marae. We acknowledge and take into account their views.

[412] Mr Hohneck spoke of the mandate of the MKCT particularly in relation to resource management issues. The mandate is confirmed every five years *in an open and transparent vote. It is open to challenge, and it is challenged.*[139] All legitimate members can stand to be trustees of the MKCT at these elections. He said:[140]

> All of the trustees on our trust are kaumatua in our right…

[413] Mr Hohneck asserted that those who gave evidence on behalf of Omaha Marae should listen to those who *our people support to speak for them*.[141] Mr Hohneck said:[142]

> While the Ngāti Whātua Runanga represent Ngāti Whātua, it is the Ngāti Manuhiri Settlement Trust that is mandated by statute and by our people. In 2011, 99.44% of our people voted in support of the settlement negotiated by myself and the late Laly Haddon, and 97.44% voted in favour of the Ngāti Manuhiri Settlement Trust receiving the redress and taking on the role it now does (reference the Deed of Settlement).

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[139] NOE, 6-28 April 2023, p159 at lines 29-31.
[140] Mr Mook Hohneck, speaking notes dated 12 April 2023, at [7].
[141] NOE, 6-28 April 2023, p160 at lines 15-17.
[142] Mr Mook Hohneck, speaking notes, dated 12 April 2023, at [4].

[414] We note that the Ngāti Manuhiri Settlement Trust established the MKCT, which holds the mandate on environmental matters and has representative status to make resource management decisions for Ngāti Manuhiri in its rohe. It now supports the landfill. We also recognise that Omaha Marae opposes the landfill.

[415] Accordingly we acknowledge the clear role of the MKCT to speak for Ngāti Manuhiri on resource consent matters. The Trust now supports the proposal. Its reasoning is based on significant benefit to Ngāti Manuhiri, including acquisition of the land, papakainga on the site and direct involvement in the maintenance of ecological and cultural values on the site. Members of the local Omaha Marae strongly oppose the application. We acknowledge their right to do so.

Ngāti Whātua Ōrākei and Te Uri o Hau

[416] We heard evidence regarding the whakapapa of Ngāti Whātua Ōrākei and Te Uri o Hau and their close association with Ngāti Whātua. Mr Joe Pihema tells us that the broader tribal area for the hapū; Ngaoho, Te Taou, Ngāti Whātua Tūturu and Te Uri o Hau stretches along the west coast from the Manukau Harbour to Maunganui Bluff just north of Dargaville. On the east coast their border stretches from Mangawhai in the north to Tāmaki and moves inland at various places.

[417] The tribal name Ngāti Whātua is derived from the subtribe hapū Ngāti Whātua Tūturu who are based on the south Kaipara head at Haranui Marae. Ngāti Whātua Tūturu and neighbouring hapū Te Mangamata lands occupy the peninsula opposite the mouth of the Hōteo.

[418] Mr Pihema described that at the heart of this region is the Kaipara Harbour, a vast expanse of water with numerous rivers and creeks reaching out to a myriad of Ngāti Whātua villages and kāinga. He said:[143]

> The Kaipara Harbour and Wairoa River have supported over 14 generations of my people and helped create and shape the identity of the modern day Ngāti Whātua tribe. The waters of the Kaipara Harbour (which includes the Wairoa River) continue to influence and shape our lives and will do so for many generations to come.

[419] Ngāti Whātua described areas of significance in their Cultural Values Assessment as:[144]

> All of the hills and ridges in the catchment were named, as were all of the waterways, including even the smallest tributaries. The high points that encircle the Hōteo catchment provided reference points for the local iwi and were important boundary

[143] EIC, Mr Joe Pihema, dated 1 May 2022, at [3].

[144] Cultural Values Assessment, Mr Mikaera Miru (Te Rūnanga o Ngāti Whātua), dated 21 October 2020, at p11 and 12.

> markers. Forming the western edge of the catchment between Te Arai and Wellsford are the high points traditionally known as Pukemiro, Pukenui, Pukemata, Ngāmotu and Hauhanganui. To the west of Wayby are Kikitangeo and Te Mauku Ridge, which extends south to Mt Harriot. Further south overlooking the mouth of the Hōteo River, the catchment is enclosed by fortified hills known as Pukekohuhu and Rangi te pū. Standing in the northeast at the head of the Whangaripo sub catchment are the hills known as Haukāwa and Tamahunga. At the head of the Waiwhiu sub catchment is Tohitohi ō Reipae, which is a landmark of importance in the traditions of Te Tai Tokerau (Northland). The catchment to the south are the high points known traditionally as Koihamo (Salt Hill), Paekauri and Te Kohanga. Overlooking the southern side of the Hōteo River mouth is Atuanui, a landmark of central importance to the identity of Ngāti Rongo, hapū of Ngāti Whātua.
>
> The catchment takes its name Hōteo, or the calabash, from a specific locality situated beside the Hōteo River just upstream of the junction with the Kaitoto stream. In a traditional sense, this name applied only to the lower section of the river between the confluence of the Waiteitei, Waitapu, Whangaripo and Waiwhiu streams and the river mouth at Puatahi.
>
> Each tributary in the Hōteo catchment had its own name which gave it a unique identity, a mauri or spiritual essence, which is still seen by tangata whenua as being of fundamental importance in their management of resources and ancestral connections. Some of the traditional names of these waterways, for example, Waiteitei, Whangaripo, Waiwhiu, Awarere, Anganga Pakaru, Waitoto and Ngārarapapa were named because of their historical and spiritual associations. Other like Waikōwhara, Pīkoko and Te Kapu were named because of the resources found within them or their catchment areas. This intricate pattern of place-names indicates that the tangata whenua of the area have associations with the waterways of the entire catchment.
>
> All of the sub tribal groups of the district had ancestral associations with various parts of the block, and for this reason title was awarded to Te Uri o Hau, Te Mangamata, Ngāti Whātua Tūturu and Ngāti Rongo hapū of Ngāti Whātua as well as to Te Uri o Katea and Ngāti Manuhiri. Four reserves were, however, retained in Māori ownership: Puatahi on the southern side of the Hōteo River mouth, Maungakura on the lower Hōteo River, Mataia at Glorit and Piritaha near Tauhoa. By the mid-1880s the only landholdings within the Hōteo River catchment that remained in Māori ownership were Puatahi and Maungakura blocks, located near the river mouth.

[420] The Assessment described the way that referring to the names of the rivers, the maunga and the resources provides links to spiritual associations with the Hōteo. It cites Mr Richard Nahi's description of this:[145]

> The spiritual significance and meaning around these names give substance to the tribe. So we are talking about several hapū tribes that lived between the Hōteo mouth right up to the end of the Hōteo River then streaming out over to the Ngāti Manuhiri, Ngāti Wai side in terms of their association and how they used these particular resources. These names plus all the other names that we have, where the Dome and where this dump is going to be, this landfill, if they [WMNZ] knew anything about the meaning of these particular names there is a significant reason why it [the landfill] shouldn't go there… We are just talking about names, we're not talking about significant pā sites or arakai or where these particular areas were but using the Hōteo River as a means to plant their food, to water their plants etc… Murdoch managed actually track and find these particular places to be able to name them. And when we aligned them we found that all of the places that we know aligned with what he had. So the integrity of his

[145] Cultural Values Assessment, Mr Mikaera Miru (Te Rūnanga o Ngāti Whātua), dated 21 October 2020, at p13.

mapping and what we knew aligned.

Te Uri o Hau

[421] Te Uri o Hau was formally acknowledged by the Crown in 2000, in recognition of the alienation of Te Uri o Hau from their native ancestral lands and loss of their natural resources dating back to 1845. In 2002, the Crown accepted Te Uri o Hau grievances through the ratification of the Te Uri o Hau Claims Settlement Act 2002, legally formalising Te Uri o Hau Settlement Trust.

[422] The Te Uri o Hau statutory area embraces areas northeast of Wellsford, east to Te Ārai Point taking in the Mangawhai Heads to Bream Tail, then north west to Pikawahine (south of Whāngarei), across to Mahuta Gap on the West Coast, south to Poutō and across the Kaipara Harbour entrance south to Ōkahukura and Taporapora. Te Uri o Hau rohe includes the Mangawhai and Kaipara Harbours and the marine and coastal areas extending to the outer limits of the Exclusive Economic Zone (as defined in the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977).

[423] It includes upper reaches of the banks of the Hōteo. They also used and traversed the Hōteo past the Site to reach the Kaipara.

Areas of interest

[424] At the commencement of the hearing, all iwi interests were aligned and the parties were united in their opposition to the landfill. As described, that changed part way through the hearing, when MKCT reached agreement with Waste Management and withdrew its opposition. Until then, the definition of the rohe of each group was not an issue. Their respective rohe did come into focus following the MKCT agreement, and we heard evidence on that.

[425] As previously described:

(a) Ngāti Whātua is the primary iwi occupying the area north of the Tāmaki River. Ngāti Whātua also say that the landfill lies within the traditional rohe of Ngāti Whātua;

(b) MKCT drew our attention to:

(i) the Ngāti Manuhiri Deed of Settlement Schedule: Documents (**Documents Schedule**), which set out Ngāti Manuhiri's area of interest, areas over which cultural vesting and other redress (including statutory acknowledgements)

were obtained, and an area over which Ngāti Manuhiri has exclusive rights of first refusal over all Crown land;

(ii) the Ngāti Manuhiri Deed of Settlement formally recognised its rohe or area of interest. It has Right of First Refusal over land around Tohitohi o Reipae and the headwaters of the Hōteo. Ngāti Manuhiri's rohe is non-exclusive, and overlaps with those of its neighbours;

(iii) statutory acknowledgements, whether they are coastal or relate to areas set out in the Deed of Settlement: Attachments (**Attachments Schedule**), are wider than the river and relate to the statutory area in which the river exists. To the extent that they relate to the river, they include the bed and the waterway. That does not, however, limit the statutory acknowledgement to be confined between the banks of the river;

(iv) the Documents Schedule also provides clarity that the acknowledgement applies to the area set out in the Attachments Schedule. So while the connection to the area might be highlighted by the river, the statutory acknowledgement in itself applies to the area;

(v) the Attachments Schedule also sets out an exclusive Right of First Refusal area. Within this area all lands currently held in fee simple or vested in the Crown, including all conservation lands and reserves, are subject to a statutory encumbrance in favour of Ngāti Manuhiri, which provides some restrictions on disposal;[146]

(vi) their boundary is the Tarakihi rapids, set by their tupuna Te Kiri. Whether a traditional and contemporary boundary between Ngāti Whātua and Ngāti Manuhiri lies in the Hōteo at the Tarakihi rapids, Wharepu, or another location should be determined by the extant Māori Land Court proceedings;

(c) Ngāti Whātua Ōrākei and Te Uri o Hau say:

(i) The Ngāti Whātua Ōrākei Deed of Settlement settles the historical claims of Ngāti Whātua Ōrākei. It sets out the areas of interest, specifies the cultural redress, and the financial and commercial redress, to be provided in settlement to the governance entity that has been approved by Ngāti Whātua Ōrākei to receive the redress.

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[146] Ngāti Manuhiri Claims Settlement Act 2012, s 112 and s 111.

(ii) Part 1 of the general matters schedule provides for other action in relation to the settlement with provision for further redress to be provided through the Tāmaki Makaurau Collective Deed.

(iii) The Deed, among other things, acknowledges that a Right of First Refusal over land in Tāmaki Makaurau will be provided in the Tāmaki Makaurau collective deed.

(iv) Te Uri o Hau Deed of Settlement formally recognises its area of interest and provides an apology, financial, commercial and cultural redress specified in Sections 6, 7 and 4 and 5, respectively.

(v) Section 8 of the Deed grants Right of First Refusal property rights in the Right of First Refusal area, but this does not include the Site as it is privately owned.

(vi) Statutory acknowledgement of Te Uri o Hau's special association with the statutory areas being Pouto Stewardship Area, Oruawharo River Stewardship Area, Mangawhai Marginal Strip and that part of Pukekaroro Scenic Reserve not vested in Te Uri o Hau.

(vii) Acknowledgement of special association with the coastal areas being the Kaipara Harbour and its tributaries and the Mangawhai Harbour. This would include the Hōteo River.

(viii) The provision for Protocols with various Ministries and the appointment of Te Uri o Hau governance entity as an advisory committee to provide advice to the Minister of Fisheries on all matters concerning the utilisation, while ensuring sustainability of fish, aquatic life and seaweed within Te Uri o Hau Fisheries Advisory Area.

[426] Mr Enright submitted that, in terms of s 6(e) Mr Nahi's evidence identifies sites of significance that demonstrate the whakapapa of Ngāti Whātua to the receiving environment affected by the landfill, and that must be recognised and provided for.

[427] In reference to the landfill area, Mr Hohneck for Ngāti Manuhiri said:[147]

> That there are no – I mean a failure to engage is not a fatal flaw in itself as those guidelines for the ecology sort of make out. But the failure to engage could mean that

[147] NOE, 6- 28 April 2023, p545, lines 9 - 14.

> a fatal flaw is not revealed in terms of specific wāhi tapu or urupā or those sorts of things. There are no urupā, there are no such things on the site.

[428] The Treaty settlement framework is non-determinative of mana whenua status or rohe boundaries. The Crown agrees that it does not establish mana whenua status through legislation. Ms Margaret Kawharu (Ngāti Whātua) accepted the heartland approach to ahi kā, where a rohe is exclusive, but also identified the relevance of all the land areas (where occupation was unlikely) and that the question of shared interests may arise. Mr Wilcox provided Ngāti Whātua tikanga on the whakapapa/creation belief for the Hōteo catchment, directly adjacent to the landfill site.

[429] Mr Enright submitted that there is some question as to the weight that may be placed on the area of exclusive Right of First Refusal identified in settlement legislation for those hapū that have settled with the Crown. Such rights only relate to Crown land, not privately owned land, so cannot establish a rohe (let alone an exclusive rohe) over the subject site. Other indicia (such as whakapapa, marae, urupā, conquest, ahi kā, karakia, whakatauki and waiata) are plainly relevant. To the extent that witnesses referred to reciprocal duties under whanaungatanga (such as Mr Wilcox in relation to Tohitohi o Reipae), Ngāti Whātua reserved the ability to act to protect their taonga.

[430] Kahurangi Dame Naida Glavish refers to this protection in her evidence for Ngāti Whātua saying granting the application would have a significant impact on cultural values and the physical and practical expressions of them as part of their Ngāti Whātua tikanga and kaitiakitanga.[148]

> A Landfill in this location breaches tikanga, given the vulnerability of Papatūānuku and the waters that flow through her…

and[149]

> … so any mishap in the river will eventually make its way down to the harbour. Not only are we protectors of the river, we are protectors of the harbour that that river runs into. And we are duty-bound, it's not that we want an argument with anybody. We are duty-bound. I am duty-bound to do it for my mokopuna and the unborn Ngāti Whātua child.

[431] The Crown (which entered an appearance at an interlocutory stage on only this issue) agrees that mana whenua status is not created through legislation. Mr Alan Riwaka confirmed in evidence that Te Rūnanga has not to date settled their claim in relation to the Mahurangi Block and produced the Claims Map. It is clear in the Settlement Deed and other documents before us that a central grievance in this area was the way in which the Mahurangi Block was acquired and distributed. This block includes the site.

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[148] Will say SoE Kahurangi Dame Naida Glavish, dated 6 May 2022, at [32].
[149] NOE, 3 April 2023, p22, lines 26-31.

Mr Enright submitted that it is not obvious that any discussion or agreement on exclusive Right of First Refusal areas for the purposes of Crown landholdings applies more widely.

[432] In summary, Mr Enright submitted that there is an obvious difference of view as to where the line is drawn for the rohe between Ngāti Whātua (as a collective iwi perspective) and Ngāti Manuhiri. He submitted the Court may not need to make a factual finding on this issue because the downstream effects of the landfill on Ngāti Whātua relationships, beliefs and values are uncontested, as is the significance of these values. Alternatively, Te Rūnanga and Ngā Maunga Whakahii maintained their assertion on the issues of rohe and mana whenua, and relied on the evidence of Kahurangi Dame Naida Glavish that the collective Ngāti Whātua rohe includes the landfill site. He submitted that a substantial body of evidence supported this position.

[433] The nature of the Right of First Refusal area referred to is one of exclusivity in favour of Ngāti Manuhiri and is identified in the Claims Map.[150] As discussed above, that area is an agreement between the Crown and Ngāti Manuhiri and is for Right of First Refusal purposes. We do not understand such areas to apply more widely than the area that is reflected in the Ngāti Manuhiri Deed of Settlement. It does not include the Site. Given the Right does not apply to the Site, we conclude it is not necessary to resolve conflicting claims.

[434] As discussed earlier in this decision, tangata whenua parties were clear in their position that it is not the Crown or this Court that determines mana whenua status. Although Treaty settlements can be indicative of mana whenua, they do not in themselves establish mana whenua. Mr Pou in closing submits that as iwi achieve settlements these are not the source of mana whenua. As Mr Hohneck notes, this Court process is not the source of mana whenua. The resource consent is not a source of mana whenua.[151] We accept these submissions.

[435] Having said that, and as discussed earlier, we also understand that no tangata whenua party disputes that Ngāti Whātua has the right to act to protect their taonga. Ngāti Manuhiri assert that the Site is within their rohe. We acknowledge the difference of view as to where the line is drawn for the rohe of Ngāti Whātua (from a collective iwi perspective) and Ngāti Manuhiri. We do not need to make a factual finding on this issue because, as Mr Enright submitted, the downstream effects of the landfill on Ngāti Whātua relationships, beliefs and values are uncontested, as is the significance of these values.

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[150] Exhibit 45, Map SO 442891, p3.
[151] NOE, 27 April 2023, p546, lines 25 - 31.

Tangata whenua issues

[436] A central cultural concern raised by all mandated tangata whenua groups is their concern about breaches of tikanga by Waste Management. They raised the lack of engagement and consultation with them prior to the site being selected as a fundamental flaw of the process. Tangata whenua were aligned in their concerns about the potential adverse effects of the landfill on the mauri of Papatūānuku, the awa and the moana, natural ecosystems and the flora and fauna, including taonga species such as the mokomoko|lizards, skinks, pekapeka|New Zealand long-tailed bat and pepeketua|Hochstetter's frog.

[437] While MKCT subsequently supported the proposal, they maintained their original evidence relating to the breach of tikanga. Their position was that the breach has now been addressed to their satisfaction, not that it did not occur.

[438] Tangata whenua also identified that the construction and operation of the landfill has the potential to adversely impact on the mana of tangata whenua as their ability to exercise kaitiakitanga would be compromised, as would their relationship with their ancestral lands, water and other taonga. In part, the MKCT position changed because of agreement to involve Ngāti Manuhiri more directly in the kaitiakitanga relationship with the Site.

[439] This was reinforced in Ngāti Whātua's opening submissions; granting approval will not protect Ngāti Whātua's relationship with their ancestral lands, waters and Kaipara moana. Ngāti Whātua submit it will be a failure of their reciprocal duty of care, arising from whakapapa and kaitiakitanga, to Hōteo and Kaipara moana, which have taonga status as living beings, as well as taonga status as habitat for indigenous flora and fauna. They said the proposal is inconsistent with the health and wellbeing of freshwater, Te Mana o te Wai.

[440] Tikanga was described as being at the heart of assessing the proposal. In tikanga, context is everything. Kahurangi Dame Naida Glavish confirmed that *culture and reo is evolutionary. Tikanga is infinite.*[152] In the following parts of the decision we address various tangata whenua concerns. While they have been separated for the purpose of our decision, we accept that they are inextricably linked to one another.

[152] NOE, 3-5 April 2023, at p21, lines 13-14.

Failure to engage

[441] Ngāti Whātua argue that the failure by Waste Management to engage with Ngāti Whātua iwi and hapū likely to be affected by the proposed landfill before purchasing the landfill site was a breach of tikanga. They submitted that was a deliberate strategy. The requirement for consultation became a condition subsequent (not precedent) of OIO approval to be assessed through the resource management process.

[442] Mr Enright tells us that tikanga is contextual and may be iwi and hapū-specific. The lack of engagement shows Ngāti Whātua has not been acknowledged in the proper context within their rohe, with 35 marae and 19 hapū from coast to coast. This lack of acknowledgement is deeply offensive to the iwi and hapū and negatively impacts on their relational values and kaitiaki responsibilities with their ancestral tribal lands, waters, wāhi tapu and taonga.

[443] Ngāti Whātua Ōrākei and Te Uri o Hau also cited a breach of tikanga around the lack of engagement by Waste Management. Ms Haazen told us that:[153]

> Tikanga is incorporated by reference as well as now being a body of law unto itself which runs in parallel to the RMA. In this case the breaches of tikanga are not inconsistent with other failings such as the failure to consult and the consequences of that decision being the wrong site, site selection being fatally flawed …

[444] Despite MKCT's settlement with Waste Management, it is clear that they do not assert that there was never any breach of tikanga. As set out in the following paragraphs, they consider the breach has been addressed to their satisfaction. Whereas Ngāti Whātua and the other appellants are still saying there was a breach of tikanga that, from their perspective, has never been repaired.[154]

[445] Mr Hohneck explained in his second brief of evidence that, initially when MKCT concerns were raised with Waste Management, they did not feel they had been properly engaged with and they felt the engagement had been shepherded – especially given that it occurred after the site had been selected and OIO approval obtained. In short, MKCT felt that it was a box to be ticked. However, once the hearing commenced MKCT felt the engagement changed and that the questions it was asking were, for once, being responded to. We also heard MKCT made the decision to engage proactively with the new leadership of Waste Management.

[446] We reiterate that this hearing was delayed so tangata whenua parties could engage with Waste Management. Extensions were sought, including from MKCT, Ngāti

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[153] Ngāti Whātua Ōrākei and Te Uri o Hau, closing submissions, dated 19 March 2023, at [47].
[154] NOE, 3 – 5 April 2023, p15, lines 25 – 34.

Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau to allow continuing discussions.

[447] Ngāti Whātua and Ngā Maunga Whakahii's closing submissions reiterated the breach of tikanga in Waste Management's failure to engage prior to the purchase of the site. They believe this breach of tikanga was compounded by Waste Management's selection of the wrong site. They reinforced that the proposal (if approved) would result in significant adverse effects to Ngāti Whātua relational and other values with their ancestral lands, waters, wāhi tapu and taonga. We note that Mr Wilcox, for Ngāti Whātua, was engaging with Waste Management in 2016, suggesting a possible site (W5 - Woodhill).

[448] Mr Pou submits that in terms of the MKCT approach to the breach of tikanga and the boundaries of shared interest areas, Ngāti Manuhiri have read the *Ngāti Whātua Ōrākei* High Court decision[155] where Mr Pou suggests the decision says: *It's up to Ngāti Whātua o Ōrākei to assert their tikanga and say what those things are*.[156] Mr Pou said that MKCT agrees with that declaration, so to the extent that the evidence as it currently sits does that this Court has that in front of it. Mr Pou said:[157]

> In terms of the tikanga that we said, yes there were infringements on the tikanga because of the absence of engagement at the start, as you are correct, their [has] been some forgiveness and, you know, tikanga is breached, not necessarily all the time, but just because tikanga has been breached in the past doesn't mean that it can't be fixed up.

[449] Mr Pou submitted that it is important to ensure that tikanga is not constructed and applied in a way that allows for an arbitrary creation of a veto. He noted that while it is accepted that it is for tangata whenua to describe effects on them and how those effects ought to be appropriately addressed, care must be taken to ensure that there is a connection between what is being described and the actual effect. He said that a response to an application cannot just be that *it is impacting on my wairua* and therefore it has to be declined.[158] He took care to acknowledge Ngāti Whātua's concerns, however.

[450] Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau, throughout the Hearing, have been clear that the lack of engagement by Waste Management has been a breach of their tikanga, and the collective Ngāti Whātua parties' evidence presented at Te Hana o Te Ao Marama confirmed that they thought the wrong site had been chosen, through the wrong process. Having heard the evidence, we consider that, for Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau, the breach of tikanga in terms of lack of engagement still remains. We accept that for MKCT this breach of tikanga has been repaired.

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155 *Ngāti Whātua Ōrākei Trust v Attorney General* [2022] NZHC 843 (HC).
156 NOE, 3 – 5 April 2023, p16, lines 10 – 15.
157 NOE, 3 – 5 April 2023, at p16, lines 13 – 20.
158 NOE, 27 April 2023, at p551, lines 30-35 and p552, lines 1-5.

Movement of paru/waste

[451] A common theme regarding adverse cultural effects was the opposition to the movement of paru|waste from one rohe to another. Waste is to be moved from Auckland to the landfill Site, and according to tangata whenua it is offensive to move waste from rohe to rohe without the consent of the receiving iwi or hapū.

[452] Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau have marae and urupā downstream of the Hōteo, and notwithstanding any boundary issues the iwi and hapū find it offensive to have a landfill upstream of their significant wāhi tapu and marae.

[453] Mr Pihema for Te Uri o Hau reinforced that this is an offence, giving evidence that the concept of a *mega-dump* is offensive to most humans but strikes at the heart of their relationship with Papatūānuku. Mr Pihema advised us it is takahi (abhorrent) to his mana and the mana of the taiao. Even if the tip were to register a minimal or no amount of seepage, the fact remains that it is an unwelcome addition and will always pose a risk to the health and wellbeing of their waterways, taiao and people.[159]

[454] Kahurangi Dame Naida Glavish gave evidence that Ngāti Whātua tikanga is to avoid mixing what is sacred with what is profane:[160]

> In gathering our kai, we do not want to be connected with Auckland's landfill, whether physically, or spiritually. Our whakapapa connects us to the Hōteo and Kaipara. These are living beings to which we are connected. Any harm, or indignity, to our ancestral water bodies harms us equally.

[455] When asked about potential adverse impacts of the landfill on the Hōteo, Kahurangi Dame Naida Glavish confirmed that:[161]

> in my respectful opinion, yes there will be. There will be. And that adverse [impact] has already shown today what that would be (that is, the mauri of the trees around it and the loss of the birds). The mauri of the manawa in the Hōteo River at the moment it's already got an adverse effect in it. And I know it's not entirely from Waste Management…

[456] It was evident to us that whether there was any actual or real impact on the Hōteo or the Kaipara, a landfill upstream of iwi and hapū taonga is culturally offensive.

[457] Although MKCT no longer oppose the landfill, Mr Hohneck did not resile from his evidence on their cultural concerns. He says that these concerns have been addressed following the agreement between MKCT and Waste Management. In response to questions, Mr Hohneck made it very clear that everyone's wish was that the landfill could

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[159] EIC, Mr Joe Pihema, dated 1 May 2022, at [24]-[25].
[160] Will say SoE, Kahurangi Dame Naida Glavish, dated 6 May 2022, at [30].
[161] NOE, 3 – 5 April 2023, p36, lines 28 - 32

possibly be in a better location and that location was searched for during the hearing adjournment but wasn't found. Consequently, the landfill location ended up being back in the rohe of Ngāti Manuhiri. As a result of not finding an alternative site, Ngāti Manuhiri then put pressure on Waste Management in and around the conditions and the mitigation.[162]

[458] Mr Hohneck continued, saying Ngāti Manuhiri had to deal with the rubbish and the waste coming out of Auckland:[163]

> … so the price that you pay is that you have to actually get together with the right strategic relationships and people and deal with it and try and mitigate it and be resolute in that.

[459] Responding to questions from Mr Enright, Mr Hohneck added that MKCT were still concerned about the total area and the landfill itself, adding:[164]

> … if Māori manage it, well then we can manage it possibly in a Māori way. Who best to identify what we have to do than Māori ourselves? Or do we sit back and leave it for – just moan about it, do nothing, don't be pragmatic, the landfill, the rubbish has to go somewhere, the landfill has to go somewhere. So, like all Māori and all rohe right across the motu that have landfills, we have to actually work the best we can to actually uphold the best outcomes. That's my view.

[460] In mid-January 2023, MKCT advised the Court and the other parties that it supported the grant of consent, and that it considers that the cultural effects of the proposal of concern to it (including the movement of paru|waste) can be addressed through the agreed measures, subject to some further minor refinement of the consent conditions and review of the draft management plans, which MKCT will immediately engage with Waste Management about. From MKCT's perspective, the cultural concerns of Ngāti Manuhiri can be addressed in this way.

[461] MKCT's Heads of Agreement with Waste Management notwithstanding, from the evidence presented to the Court it was clear that the movement of paru|waste from one rohe to another was of concern for all tangata whenua. However, adding to that concern was that the paru|waste was going to the proposed landfill. For tangata whenua these two issues appear to be inter-linked in that, in considering one cultural effect (the movement of paru|waste) you must also consider the other cultural effect (the breach of tikanga in relation to site selection).

[462] In closing submissions, Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau confirmed that, their view was still that having identified that the site of the proposed

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[162] NOE, 6 – 28 April 2023, p553 lines 22 – 27.
[163] NOE, 6-28 April 2023, p190, lines 7 – 13.
[164] NOE, 6- 28 April 2023, p187, lines 15 – 23.

landfill was the wrong site the effects cannot be addressed retrospectively.

[463] In closing, Ms Haazen says that addressing one Māori group's interests cannot be said to address another's concerns. We accept that proposition. Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau have been consistent throughout the hearing in their opposition to the movement of paru|waste and the proposed siting of the landfill, and as such, we find that for these parties the breaches of tikanga remain.

Mauri

[464] One of the primary concerns of tangata whenua was the potential adverse effects of the landfill on the mauri of Papatūānuku. As we understand the evidence, all things living, spiritual and inanimate have a mauri or life force, and mauri is not just physical but spiritual. Many elements of the landfill contribute to adverse effects on the mauri of the area, i.e. the movement and placement of paru|waste. There are also effects resulting from construction of the landfill – in sediment; reclaiming streams impacting native species and risks – particularly from leachate escape. We deal with those other matters later in this section.

[465] Mr Miru, in Ngāti Whātua's Cultural Values Assessment, says of mauri:[165]

> …when you go to a special area you can feel the mauri of that area, its life force, like waves upon the sand. Mauri therefore, as with all our cultural values, is of great significance to Ngāti Whātua.

[466] As discussed in other parts of this decision, it was acknowledged that the mauri of the Hōteo and the Kaipara is already degraded, and that any additional pressure on these taonga would have significant adverse effects on ecological and cultural values. These additional pressures and potential effects are identified in the Cultural Values Assessment: [166]

> The mauri of our earthmother Papatuanuku will be violated by the placement of millions of tonnes of paru into her body. The mauri of the native forest and all the native species therein will be obliterated by the removal of the forest and relevant waterways. The mauri of the wetlands, waterways and all of Tangaroa's children that dwell within the landfill area will be decimated by the complete reconstruction of the environment, which includes the destruction of 14 kilometres of waterways. The mauri of several species in the area, such as Hochstetter's frogs and longfin eel, border on the verge of extinction. The mauri of the sea grass forest at the mouth of the Hōteo, which is already seriously depleted, will be decimated by leachate. The mauri of the children of Tangaroa within the Kaipara moana - kanae (mullet), kahawai, pioke (dogfish), araara (trevally), patiki (flounder), tamure (snapper), mango (shark), kutai (mussels), tio (oysters), tipa (scallops), karahu (mudsnails), toheroa, tuatua, pipi, tuangi (cockles), pupu, and papaka (crabs) - which is already seriously diminished, will be

[165] Cultural Values Assessment, Mr Mikaera Miru (Te Rūnanga o Ngāti Whātua), p17
[166] Cultural Values Assessment, Mr Mikaera Miru (Te Rūnanga o Ngāti Whātua), p22.

> decimated by leachate. Through current land management practices over 700,000 tonnes of silt currently flow into the Kaipara every year. The applicant has given no guarantee that the landfill liner will not breach there is not guarantee that siltation will not find its way down the Hōteo and into the Kaipara. The setting down of the rāhui is to protect the mauri of Papatuanuku, Ranginui, Hōteo awa, Kaipara moana and all the children of Tane, Haumia-tiketike, Rongo-ma-Tane and Tangaroa that live within this environment.

[467] Mr Nahi, for Ngāti Whātua, described the spiritual dimension behind Ngāti Whātua opposition to the landfill: [167]

> For me, it is explained already in our whakapapa. But in simple terms, we revere our Mother Earth, including all her waterways. The Hōteo and Kaipara are living beings, in the same way that we are living beings, with mauri or life-force. They can be healthy, or unwell. The signs are both obvious and hidden. When we cannot gather kai, drink from our awa, bathe in our streams, these are all obvious signs of unwellness.
>
> We do not separate the physical and the spiritual because these are inter-related. We know from our tikanga that mistreatment of the Hōteo and Kaipara affects us in turn, both physically and spiritually. We are downstream of Auckland's paru, from the rohe of many hapū in the wider Tāmaki Makaurau.

[468] Mr Edward Ashby's evidence outlined the acknowledgement by the Crown of the kaitiaki role of Te Uri o Hau , in The Te Uri o Hau Claims Settlement Act: [168]

> The whaikorero (oral history) of our tupuna from of old and now honoured by each generation thereafter places the utmost importance on the role of Te Uri o Hau as kaitiakitanga (guardians) for all the life forms of the environment. Te Uri o Hau have always believed that the environment, including all indigenous species of fish, flora, and fauna alive, is inter-related through whakapapa and all is precious to Te Uri o Hau. All species are important and all play their particular role within the environment.
>
> The integration of all species in the environment is woven within the holistic pattern of life itself. Te Uri o Hau as a people are part and parcel of the environment itself.
>
> Te Uri o Hau recognise that any negative effects on one species may cause ill effects for other species. Te Uri o Hau continue to maintain a kaitiaki (guardian) role to look after all species within our environment. The mauri (life force) of all species is important to Te Uri o Hau, the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All species of the natural environment possess a life force and all forms of life are related.

[469] The concerns over the adverse effect on the mauri of Ngāti Manuhiri taonga and taiao, and the Hōteo River and the Kaipara Harbour were also expressed by Ngāti Manuhiri. We heard evidence from Mr Hohneck that, as a result of the Heads of Agreement with Waste Management,[169] MKCT is now supporting the proposal. The commitments that allow for Ngāti Manuhiri to care for the whenua into the long term

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[167] Will say SoE, Mr Richard Nahi, dated 5 May 2022, at [11] and [12].
[168] EIC, Mr Edward Ashby, dated 29 April 2022, at [22].
[169] Exhibit 52, Heads of Agreement – Auckland Regional Landfill, 22 December 2022.

were initially described as:[170]

> (a) development of cultural indicators for the Digital Dashboard for the whenua and awa within Ngāti Manuhiri's rohe.
>
> (b) more generally, input into the finalisation of the consent conditions and management plans by Ngāti Manuhiri, including in particular where these relate to the Ngāti Manuhiri's taonga species and cultural values on the site and surrounding environment.
>
> (c) partner with Waste Management for the relocation of taonga species into the predator-fenced sanctuary at the Wayby Valley site, or elsewhere should that be an option agreed by Ngāti Manuhiri.
>
> (d) work with Waste Management on the monitoring on site on an ongoing basis, including ecological, sediment, stormwater and water quality monitoring. This will include the involvement of kaitiaki from Ngāti Manuhiri to feed into this monitoring framework, including in respect of their mātauranga Māori and cultural indicators.
>
> (e) input into the identification of sites for, and working with Waste Management on the undertaking of, the offsite riparian vegetation planting throughout the Hōteo catchment.
>
> (f) onsite cultural input in the lead up — and throughout — the construction and works period, including the cultural induction and training of the workforce working on the site, and the kaitiaki monitoring and opportunities for involvement of members of Ngāti Manuhiri in the workforce on site.
>
> (g) development of measures to reflect and restore the mana of Ngāti Manuhiri in the wider landscape, including the restoration of native flora and fauna, joint opportunities to progress future waste minimisation and circular economy ventures.

[470] In a further statement, Mr Hohneck elaborated on the nature of the agreement with Waste Management:

> (a) a $10 million mechanism [bond] was agreed to be called on if the river was ever exposed to risk;
>
> (b) ultimately, Ngāti Manuhiri will receive the entire 1060 ha of Waste Management's land holdings – once each part of the site is no longer required for landfill or Waste Management's aftercare responsibilities are fulfilled and once all of the Matariki forestry rights expire. Further a final date has been agreed whereby no further applications for consent will be made without Ngāti Manuhiri consent;
>
> (c) the existing houses at Springhill and Izard Price Properties will be made available to Ngāti Manuhiri whanau to live in at $1 per year until they transfer;

[170] Memorandum of Counsel updating the Court and the Parties about the position of MKCT, dated 16 January 2023, at [4].

(d) Waste Management will make a $2 million payment to Ngāti Manuhiri to construct up to six homes on Springhill for Ngāti Manuhiri whanau to live in and rent for $1 per year until the Springhill property transfers;

(e) ensure Ngāti Manuhiri will be closely involved in the development, construction, maintenance and running of the ecological and landfilling activities on site, including the predator-fenced sanctuary;

(f) Waste Management have agreed to prioritise Ngāti Manuhiri people for employment;

(g) there will be further work with Waste Management on conditions and outcomes – including the Digital Dashboard.

[471] While some of these agreements would sit outside any consenting process, it is appropriate to record them in this decision as they comprise the reasons for MKCT's change in position. Although the above commitments are Ngāti Manuhiri-specific, Mr Hohneck's evidence was clear in that should this proposal be granted, they would look forward to working with Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau on any committee.

[472] MKCT's settlement can be seen as a way of facilitating Ngāti Manuhiri in the exercise of their kaitiakitanga in a way that has been denied them for over 150 years. Mr Hohneck notes that by being able to move into the landfill area Ngāti Manuhiri will be the first to know if anything goes wrong. It will be their people that signal concern, not to the Council but directly to Waste Management. Mr Hohneck described the effect of this is that they can have their own people living in their tribal lands exercising mana motuhake in a meaningful way as their tupuna Te Kiri always wanted.

[473] They see the agreement as a way in which MKCT can facilitate the increase in the integrity of the Hōteo so that it can once again become swimmable; by working with Waste Management they can enhance their s 6(e) connections with their taonga a Hōteo. To work with Waste Management in the development of a predator fence and pest control are ways in which they can intensify and enhance their relationships with the pepeketua, the mokomoko and the pekapeka.

[474] As to the return of land from Waste Management, Mr Hohneck observed there is nothing tangata whenua seek more than getting their land back and the ability to once again exercise rangatiratanga. That desire is increased when that land was wrongfully taken from the tribe.

[475] He also notes that they can get rid of the forests and replant the area in natives – another opportunity to get back onto their lands and restore their taiao. He records that these lands *were the very lands of Manuhiri that were sold by others*.[171]

[476] He referred to the recent storms (early in 2023) – he thinks that exploitation of the environment has decreased its resilience and ability to deal with the shock of such events. He believes that through the agreement, *we can build on and enhance the resilience of the system as a whole thereby increasing its resilience and its ability to cope into the future*.[172]

[477] They see that no opportunity like that has arrived, nor do they see another opportunity on the horizon, by which they can enhance s 6(e) connections and 7(a) responsibilities. In the absence of the ability to exercise kaitiakitanga over the last 100 years they have been deficient in exercising their obligations to those species which are named as taonga in their Deed of Settlement.

[478] Other Ngāti Manuhiri witnesses, including those for Omaha Marae, strongly opposed the grant of consent. They adopted a position nearly identical to that for Te Uri o Hau and Ngāti Whātua. They essentially agreed with Mr Hohneck's first brief of evidence but did not accept that the breach of tikanga was resolved, or that the new conditions and arrangements overcame their concerns about paru|waste on the site.

Relationships with ancestral lands and sites, the Hōteo and Kaipara moana

[479] Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau, and those Ngāti Manuhiri who gave evidence for themselves or for Omaha Marae say that granting approval:

(a) will not protect their relationships with their ancestral lands, waters and Kaipara moana;

(b) will be a failure of their reciprocal duty of care, arising from whakapapa and kaitiakitanga, to Hōteo and Kaipara moana, which have taonga status as living beings, as well as taonga status as habitat for indigenous flora and fauna;

(c) is inconsistent with the health and wellbeing of freshwater, te Mana o te Wai;

(d) breaches Treaty principles relevant to the resource consent decision-making process, in particular, the active duty to protect the exercise of rangatiratanga and vulnerable taonga; and

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[171] Mr Mook Hohneck speaking notes, dated 12 April 2023, at [42].
[172] Mr Mook Hohneck speaking notes, dated 12 April 2023, at [44] and [45].

(e) these Treaty principles, and the tikanga identified by Kahurangi Dame Naida Glavish and other mandated kaumatua and kuia, are in the nature of bottom lines to protect sacred values and relationships.

[480] For MKCT, the fundamental issue brought to light in this proceeding relates to the dispossession of their lands. The lands that the proposal sits upon were sold to the Crown by a neighbouring Hauraki iwi. The land that Ngāti Manuhiri has been able to hold onto has been through lawful protest and civil disobedience, for which they were punished.[173] But for those injustices and breaches of the Treaty, those lands could still be theirs. The Crown acknowledged in the Settlement Act:[174]

> By around 1900 Ngāti Manuhiri were left virtually landless and that the Crown's failure to ensure that Ngāti Manuhiri retained sufficient land for their present and future needs was a breach of the Treaty of Waitangi and its principles. This hindered the social, economic, and cultural development of Ngāti Manuhiri as a tribe, undermined the ability of Ngāti Manuhiri to protect and manage their taonga, including te reo māori, and their waahi tapu, and to maintain spiritual connections to their ancestral lands. The Crown further acknowledges that this has severely impacted on the wellbeing of Ngāti Manuhiri today.

[481] MKCT said that the burden of infrastructure has historically been imposed on mana whenua and tangata whenua. They claimed that that is happening again, and that repetition of abuse is corrosive to the fabric of Ngāti Manuhiri wellbeing. Mr Pou spoke of Crown regulation of the timber trade in the Mahurangi district, which saw it stripped of the sparse stands of kauri to feed the colony and construct what was then its new capital. He submitted that the evidence of Ngāti Manuhiri speaks to the significant adverse cultural effects to their tikanga, beliefs and relationships between their ancestral coastal waters, lands and taonga. These effects include biodiversity and ecological impacts to taonga, habitats and species.

[482] We were asked to view this exploitation in the context of the apology made by the Crown to Ngāti Manuhiri 10 years ago.[175] In that apology the Crown said:

> …
> (2) … profoundly regrets its breaches of the Treaty of Waitangi and its principles which left Ngāti Manuhiri with few landholdings by 1865. The Crown is deeply sorry for its failure to protect the remaining lands of Ngāti Manuhiri, the loss of which have devastating consequences for the cultural, spiritual, economic and physical wellbeing of Ngāti Manuhiri that continue to be felt today.
>
> (3) The Crown unreservedly apologises for not having honoured its obligations to Ngāti Manuhiri under the Treaty of Waitangi. …

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[173] Ngāti Manuhiri Claims Settlement Act 2012, at s 8(5).
[174] Ngāti Manuhiri Claims Settlement Act 2012, at s 8(13).
[175] Ngāti Manuhiri Claims Settlement Act 2012, at s 9(2) and s 9(3).

[483] We were urged to be mindful of the way in which the land titles within which the proposed landfill is sited were taken from Ngāti Manuhiri, and the treatment that has been inflicted on them in the past in the name of regional development. Treaty settlement policy dictates that only Crown land is available for settlement. Where it has passed out of the Crown's hands, the titles obtained by third parties cannot be displaced and it is therefore unavailable for return to tangata whenua.

[484] Again, Ngāti Manuhiri outside MKCT agree with the historical narration but not the settlement agreed to by MKCT.

Adverse effects on taonga species, Hōteo and the Kaipara harbour

[485] It was common ground that granting consent results in significant adverse effects to Ngāti Whātua o Kaipara, their hapū and marae, and to Ngāti Whātua Ōrākei and Te Uri o Hau. A similar scale of impact was acknowledged for Ngāti Manuhiri.

[486] We acknowledge that the impact of the proposal on these values is not just a physical impact – the impacts include the way in which iwi relate to them, including the exercise of kaitiakitanga and whanaungatanga discussed earlier.

[487] We address the effects of the landfill proposal on the relationship values of habitats, taonga species, the Hōteo and the Kaipara in our section on ecology. The key additional point is that these values represent relationships with key elements of the local environment and their close interconnectedness with the human realm.

Iwi/Hapū Relationships

[488] The change of position of MKCT, from opposition to support, raised concerns during the hearing about how these differing views or positions of iwi and hapū could damage inter-iwi relationships. This includes those witnesses who have ahi kā for Ngāti Manuhiri and Omaha Marae whanau and do not agree with the position of MKCT.

[489] Mr Hohneck was clear in that, while Ngāti Manuhiri interests in the proposal have been settled, MKCT cannot talk for interests or effects on their whanaunga Ngāti Whātua or Te Uri o Hau. They are for them to discuss. He continued, saying that:[176]

> Notwithstanding our current disagreements, our relationship with our whanaunga, I feel is generally sound. Those who would assert that this proposal would ruin this relationship beyond repair have obviously not worked within iwi politics. …

[176] Mr Mook Hohneck, speaking notes, 12 April 2023, at [49] and [50].

[490] During cross-examination, Kahurangi Dame Naida Glavish was asked by Mr Pou if she saw:[177]

> Ngāti Manuhiri as owning the land as being something worse than, for instance, the current Pākehā owning the land?

Her response was: [178]

> Definitely not. Because, and one of the reasons is because we can sit down with Manuhiri at the table, and we can have a good conversation. We can agree to disagree. And often have, but the relationship is still strong.

[491] In his evidence of 19 March 2023, Mr Hohneck refers to Te Uri o Hau: *I acknowledge Te Uri o Hau. They are our relations and our neighbours…we do not always agree on matters, but we work things out and we do so respectfully*.

[492] We heard Mr Hohneck agree with Mr Pihema's evidence in its entirety, informing the Court that *it is up to Ngāti Manuhiri to identify what is tika within our rohe, but we are not the only tangata whenua impacted and it is not only our rohe which is impacted*.

[493] Mr Hohneck signalled that MKCT would be greatly interested in meeting with the rest of the mana whenua of the Tāmaki region to engage with how to best progress Waste Management's agreement to commit to waste minimisation within the region.

[494] Mr Hohneck was clear about what he thought about iwi/hapū relationships saying we know who our whanaunga are and we respect them.[179]

> Notwithstanding our current disagreements, our relationship with our whanaunga that I feel is generally sound, will go on and on and on within the future generations as long as we put down the kōrero right and we teach our future generations on actually who they are.

[495] Considering the evidence and submissions we heard, it was clear the relationships between the tangata whenua are based on shared whakapapa and a common commitment to provide for ecological and cultural values as they related to, among other things, taonga, awa, moana and te taiao. The current work to restore the Kaipara (including the Hōteo), including through the KMR, is a clear example.

[496] What is more complex here is the breakdown between MKCT and the local Manuhiri hapū who maintain ahi kā, and the Omaha Marae. We accept the mandated role of MKCT in resource management matters but this is clearly not supported by the Marae, or witnesses who spoke to us. This breakdown is more problematic for the Court,

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[177] NOE, 3 – 5 April, p32, lines 8-10.
[178] NOE, 3 – 5 April, p32, lines 11 – 16.
[179] NOE, 6 – 28 April 2023, p163 lines 33- 34 and p164 lines 1-3.

and we acknowledge that local Ngāti Manuhiri hapū do not agree with the agreement reached. We can take into account these views, but cannot displace the role of MKCT as mandated authority for RMA matters.

Findings on issues that remain

[497] In assessing the cultural values and the effects on those values we have had regard to Commissioner Tepania's decision. We agree with her analysis of the approach we must take to the evidence on cultural values and effects – that we *must be able to identify, involve and provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori*.[180]

[498] Referring to the outcomes sought by iwi in order to meet those directives, we must meaningfully respond to the claim that the duty must apply to the tikanga-based claims made by iwi as to what is required to meet those objectives.[181]

[499] Further, we agree that:[182]

> … that duty also requires us to engage meaningfully with the impact of the application on the whanaungatanga and kaitiakitanga relationship between iwi and the natural environment, with their lands, waters, taonga and other significant features of the environment such as Te Awa Hōteo and Kaipara moana: seen not just as physical resources but as entities in their own right – as ancestors, gods, whānau – that iwi have an obligation to care for and protect.

[500] But for the change of position by MKCT and the further proposed conditions, we would have endorsed Commissioner Tepania's decision (and conclusion).

[501] We accept that the area generally is within the rohe of Ngāti Whātua. We also accept that the general landfill Site is within Ngāti Manuhiri rohe – that they maintain an unbroken connection with their rohe exercising their mana through manuhiritanga. While the rohe of Ngāti Whātua and Ngāti Manuhiri overlap to an extent, we find that Ngāti Manuhiri has a more intimate relationship with the landfill Site than does Ngāti Whātua.

[502] This conclusion does not relate to the Hōteo River itself. In that regard, there is clear evidence of overlapping interest, usage and occupation of the river and its margins. We accept that the Hōteo is within the rohe of Ngāti Whātua and Ngāti Manuhiri and Te Uri o Hau – where on the river the exact boundary is between iwi is not agreed.

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[180] Decision of Commissioner Tepania, section 23.4, at [5].
[181] Decision of Commissioner Tepania, section 23.5, at [5].
[182] Decision of Commissioner Tepania, section 23.5, at [5].

[503] We also accept that the Kaipara Harbour generally is within the rohe of Ngāti Whātua Ōrākei, Te Uri o Hau and Ngāti Whātua o Kaipara.

[504] We accept the strength of the relationship that all iwi have with the Hōteo and the Kaipara Harbour – those relationships are both physical and spiritual. They need to be safeguarded.

[505] We accept that iwi have traditionally used the Hōteo for food gathering, but that they recognise that it is now degraded and that those fish that once may have been sourced from the area are no longer there. All recognise the present vulnerability of the Hōteo.

[506] We accept that all iwi find the movement of paru|waste from one rohe and into another offensive and that it impacts their relationship with Papatūānuku; that it is a breach of tikanga.

[507] We acknowledge that all iwi are also concerned that the location of the landfill in the headwaters of the Hōteo River creates an unacceptable risk to the Hōteo River and the Kaipara Harbour - in terms of potential contamination from leachate and contamination from sediment. That risk negatively impacts their relationship with those waters and is a spiritual effect on them.

[508] There are concerns about the effects of the proposal on the mauri of the environment. The evidence was that the mauri is the life force – it is both physical and the spiritual. Iwi believe that a landfill in this area will diminish the mauri of Papatūānuku and all those who rely on her health and well-being. As mentioned, however, all acknowledge the vulnerable and degraded state of the Hōteo River. We acknowledge the specific concerns about the effects of the landfill on taonga species and their habitats.

[509] Finally, we acknowledge the overarching concerns that the landfill's presence may diminish iwi's relationship with their lands, water, sites, wāhi tapu and other taonga and limit their ability to exercise kaitiakitanga and manaakitanga. Together, when expressed by all iwi and hapū in the region, the effects on their relationships are significant.

[510] However, not all iwi and hapū now consider the effects on their relationships will be significant with appropriate conditions and modifications to the proposal.

[511] MKCT[183] (and Omaha Marae) say that there will be adverse effects arising from the landfill, but MKCT is now prepared to accept those adverse effects in light of the

[183] MKCT Settlement Trust is a Post Settlement Governance Entity (PSGE). It has 97.44% support from voters.

benefits it and the wider environment will receive from the agreement with Waste Management. It is also prepared to accept the offence to tikanga that the landfill causes in this location. The agreement will enable it to exercise kaitiakitanga at the landfill, but it sees wider benefits for the integrity and mauri of the Hōteo River.

[512] The question for us, then, is whether MKCT's agreement to the proposal, the benefits it sees to Ngāti Manuhiri and the Hōteo River, are such that the cultural effects of the proposal are less significant than when all iwi and hapū joined as one to oppose the landfill.

[513] That agreement does not diminish the concerns of the remaining iwi – MKCT expressly accepts that. Does it, however, reduce their significance for the landfill Site in terms of the effects that will occur there given Ngāti Manuhiri's greater intimacy with that area? Also, what influence does continuing opposition of local Ngāti Manuhiri and the Omaha Marae have on the MKCT agreement?

[514] We place some weight on MKCT's changed position. The benefits it sees are not insignificant. We also conclude that MKCT's position is based on its conclusion that with proper conditions and direct oversight it can ensure there is no material harm to the Hōteo or the Kaipara.

[515] What we must now do is extend this discussion to consider the effects of the landfill proposal in a physical sense but also measured against the particular cultural values we outlined above. We must also consider whether or not the benefits that Ngāti Manuhiri see for the environment are likely to ensue.

[516] Finally, we need to consider the risks that Ngāti Whātua, Ngāti Whātua Ōrākei, Te Uri o Hau, the Omaha Marae and nearby residents see for the landfill and whether they can be addressed by this proposal.

Landscape and visual

[517] We received evidence from two landscape architects, Mr John Goodwin for Waste Management and Mr Peter Kensington for Auckland Council. We also received evidence from witnesses called by Ngāti Manuhiri, Ngāti Whātua and Ngāti Whātua Ōrākei on their understanding of the landscape. We were also assisted by two cultural values assessments prepared on behalf of Ngāti Manuhiri and Ngāti Whātua. We record that Mr Kensington's evidence largely agreed with Mr Goodwin's evidence addressing the level of natural character, landscape and visual effects.

[518] There are three physical catchments within the Waste Management landholdings that will be affected by the project, being the Eastern Block (site of the landfill), the Western Block (site of the clay borrow pit, main stockpile and topsoil stockpile 1) and the Southern Block (the site of the bin exchange area, landfill access road and topsoil stockpile 2). Within the Eastern and Southern Block streams have very high ecological values and in the Western Block there are high ecological values in the vegetated areas and lower values in the pastoral areas. Within production forestry the abiotic attributes of stream margins are generally modified by previous harvesting, and these areas in the wider landscape context reduce the overall natural character values of these watercourses.

[519] Visual effects of the proposal were assessed, but as this was not a focus of contention we do no more than note that there will be effects, but that they will be seen in the context of ongoing forestry and farming and will be seen together with the proposed revegetation measures.

[520] We recognise that the Hōteo catchment has been modified through a range of activities that resulted in extensive land clearance and drainage for pastoral farming, and more recently, plantation forestry.

[521] Both Mr Goodwin and Mr Kensington accepted that mana whenua hold strong associative values with the land within the Hōteo catchment.

[522] There was little attempt to fuse the assessment of landscape and visual effects with that of iwi's view of the land, water and their values. Having said that, Mr Goodwin provides a helpful overview of the physical and perceptual effects on the landscape of the proposal from his perspective.

[523] The proposed landscape and ecological mitigation measures include:

(a) re-routing the landfill access road to avoid native vegetation clearance within Significant Ecological Areas and Natural Stream Management Areas;

(b) avoidance of effects on identified Outstanding Natural Landscapes (and associated Significant Ecological Areas) by locating the landfill and other activities over 500 m away within a separate catchment;

(c) siting stockpiles and the bin exchange area away from stream margins and areas of indigenous vegetation;

(d) the use of bridges (as opposed to culverts) to reduce impacts on the natural character of watercourses and their margins;

(e) planting native revegetation species (approximately 42 ha) along the cut and fill slopes around the bin exchange area, the main access road, and west of the landfill (around the site roads, buildings, stormwater ponds, wetlands and renewable energy centre) to the Dividing Ridge (which is on the western side of Landfill Valley and broadly separates the forestry from the pastoral activities);

(f) planting adjacent to the roundabout and SH1 to re-establish roadside character and provide screening of the project activities and enhance the existing Significant Ecological Area/native vegetation along the Waitaraire Stream;

(g) planting on the eastern side slopes and along the southern and western ridge tops around the perimeter of the Landfill Valley with quick-growing exotic species to assist in screening and integrating the project works;

(h) the creation of a 126 ha pest free sanctuary;

(i) riparian planting along 8 km of stream margins (49.09 ha) and 5.13 ha of wetland vegetation and enrichment planting.

[524] Other operational measures will be implemented through other conditions of consent and through the Landfill Management Plan to manage offsite landscape and visual effects. They include conditions to avoid light spill and establishment of a series of walking tracks, among others.

[525] The effects of the proposal on natural character were an issue, and Mr Goodwin summarised the existing natural character relying on the ecological assessments that had been made. They provide a helpful physical baseline against which changes can be considered. He recorded that the Waste Management team had divided the landscape into five geographic areas based primarily on a combination of landform, land cover and land use attributes and the activities proposed by Waste Management. Mr Goodwin outlined the present landscape features and natural values of each.

(a) Waiwhiu Block – east of Wilson Road ridge to the Waiwhiu Stream and boundary of the Waste Management landholding. This block does not contain any landfill activities and is to remain as production forestry. Mr Goodwin concluded that as for the Eastern Block and other similar steep gully systems in production pine, the level of natural character of the watercourses is assessed as being low-moderate.

(b) Eastern Block – contains two main north/south oriented ridge and valley systems. These extend from the Dividing Ridge in the west across a valley (where the landfill is proposed) up to the more elevated Wilson Road ridge. Within this

block there are a series of secondary ridges, valleys and small gullies on either side of the main ridges which are currently in plantation pine forest.

The streams within the Eastern Block (during the periods when the forestry land use provides riparian shading) have a high ecological function with limited channel modification and a high in-stream habitat. During forestry harvest activity and in the years following, these ecological values would decrease until the stream systems recover. In terms of experiential attributes, the elements, patterns and processes are quite modified due to production forestry land use and the level of perceived natural character is overall low. Mr Goodwin assessed the overall level of natural character of the water bodies to be low-moderate.

(c) Western Block – extends from the margins of Te Awa o Hōteo across river flats before rising more steeply in elevation on the pasture covered hills to the east to the Dividing Ridge. It contains a number of streams, watercourses and wetlands, some of which have been modified by farming activities while others are fringed by pockets of native and exotic vegetation. Two of the wetlands are identified in the AUP as a Natural Stream Management Area, and are identified as a Significant Ecological Area. This block is to contain the main stockpile, a clay borrow area and topsoil stockpile 1.

It has been modified and is subject to degradation through agricultural land use, but the biodiversity values within the streams are still moderate and the headwaters, in particular, have a high potential for enhancement. The upper part of the southern sub catchment was identified as having very high value and the upper north sub catchment has relatively intact stream systems with an absence of riparian margins contributing to a slightly lower value. In terms of experiential attributes, the streams are within a working pastoral farm with modified biotic elements and degraded stream system patterns. The large southern wetland is of a scale that exhibits a high level of natural character through its observable process and pattern. Mr Goodwin considers the overall natural character values of water bodies to be low due to the dominant farming practices.

(d) Southern Block – a westerly oriented valley (which emanates from the Waitaraire Stream adjacent to SH1) with gullies extending to catchment ridge boundaries to the north (Middle Ridge) and south to Sunnybrook Ridge trees.

Stream characteristics are similar to those in the Landfill Valley, with cascades and waterfalls a feature through the gully. A wetland is present in the lower reaches prior to the confluence with the Waitaraire Stream. Streams within the Southern Block have very high ecological values as they are either within the

Natural Stream Management Area or are connected to it and have high or significant ecological value scores and biotic indices. The streams have good water quality and are largely set within an indigenous vegetative riparian margin and wider landscape context. Mr Goodwin considers the level of natural character of the watercourses to be high.

(e) Waitaraire Tributary Block – comprises the head of a southwest oriented valley emanating from the Wilson Road ridge and is predominantly plantation pine forest. No landfill activities are proposed in this area which is largely covered in plantation forestry.

[526] The catchment for Te Awa o Hōteo comprises 405 km^2, with the predominant land uses comprising pastoral land and exotic plantation forestry. The catchment has been highly modified as forests have been cleared and wetlands drained. The tributary that contains the project footprint is approximately midway down the Hōteo. The ecological values of the Hōteo at the Waste Management boundary are considered to be high. This is based on the presence of the Natural Stream Management Area and Significant Ecological Area overlays, and the presence of at-risk fish species (while recognising the water quality effects from surrounding land uses). The positive experiential attributes of the river margins are evident from adjacent and surrounding roads. Mr Goodwin considers the Hōteo has a moderate level of natural character.

Assessment of changes

[527] Mr Goodwin concluded:[184]

> 8.64 The loss of 14km of stream habitat, within the Eastern, Western and Southern Blocks of the Waste Management property will adversely affect the existing biophysical and experiential attributes of these elements and their patterns and processes and reduce the level of natural character within and in the immediate context of these water bodies.
>
> 8.65 An Effects Management Package has been developed to address the effects on these and other attributes and values within the landholding. This will include 5.31ha of wetland planting, and 45.09ha of stream margin riparian planting along 17km of stream length. These elements are to be fenced from stock and protected in perpetuity, along with the establishment of a pest exclusion fenced area to be protected as a habitat sanctuary for stream, wetland and terrestrial species. Furthermore, additional stream and riparian protection and enhancement outside the landholding but within the Hōteo catchment is proposed which is likely to amount to as much as 57km of stream length.
>
> 8.66 When the impacts on the elements, patterns and processes are considered in relation to the attributes of the streams and wetlands, and the land use and landscape character of the wider landholding, along with the proposed mitigation and enhancement measures, in my opinion the existing level of

[184] EIC, Mr John Goodwin (Landscape and Visual), dated 11 February 2022, at [8.64]-[8.66].

> natural character will be retained and over time potentially noticeably improved.
> Footnote excluded

[528] What is noticeable is that this analysis does not touch upon the Cultural Landscape of this area or the landfill Site, notwithstanding that the Landscape Assessment Guidelines (Te Tangi a te Manu) require that it do so.

[529] Again, this confirms our view that in terms of the objectives and policies the landscape evidence assumes there is no adverse effect from contaminants reaching the Hōteo or other streams. Moreover, in respect of the biophysical effects of the activity those are clearly identified in this evidence together with others. There are a number of steps being taken, which we have identified. The adequacy of those is a matter of judgement. Again, we must be satisfied that these would adequately avoid, remedy or mitigate the activity or alternatively, depending on the issue yet to be addressed, offset or compensated.

Air quality

[530] The emission of odour from the proposed landfill was of particular concern to Fight the Tip. A number of residents living close to the proposed facility expressed concerns in relation to odour effects, including those identified as sensitive receptors in the evidence provided by Ms Simpson for Waste Management (air quality).

[531] The residents' concerns relate to the amenity of their properties. Some are retired and spend much of their days at home. They were concerned that the outdoor activities they presently enjoy, such as gardening, walking, hosting weddings, eating outside, entertaining, camping, hunting, bike riding, horse riding, kayaking, archery and swimming would also be potentially impacted by odour discharge from the proposed landfill.

[532] Many commented that they sleep with their windows open and/or have their windows open during the day in the summer and warmer months – some through winter as well. Residents commented that they do not currently experience any unpleasant odours and enjoy the smell of their freshly cut lawns/hay, trees and flowers as well as the fresh air.

[533] Other concerns included effects on tank water and contaminants in the air.

[534] Fight the Tip summarised its concerns as:

(a) the effects of odour on surrounding residents;

(b) Waste Management's compliance history in relation to the operation of landfills and management of their effects and whether various assumptions expressed by Ms Simpson (air quality expert for Waste Management) will be achieved; and

(c) the Council's ability to effectively monitor and enforce compliance.

[535] Two air quality experts were called and provided evidence, Mr Paul Crimmins for Auckland Council and Ms Simpson for Waste Management. They conferred and provided a joint witness statement. The joint witness statement recorded that the experts were generally in agreement and the outstanding issues related to the wording of specific conditions.

[536] The witnesses acknowledged that while there may be detectable odours from time to time beyond the site boundary, there is a very low risk these events would be offensive or objectionable. Waste Management argued that these effects are largely avoided by large buffer distances between the Landfill Footprint and neighbours and are further mitigated by management procedures like provision of a cover over the entire working face at the end of each day and that a working surface of the daily waste will be kept within stated size limits to minimise the area of exposed waste. The witnesses also agreed that concentrations of airborne contaminants from dust and landfill gas generation combustion will be well within ambient air quality standards and guidelines at residential dwellings, and will not cause exceedances of any NES-Air Quality values beyond the site boundary.

[537] We note that Waste Management provides a buffer of greater than 1 km from the nearest receiver, which is recorded in the proposed conditions. While the conditions require that there be no odour of a noxious, dangerous, offensive or objectionable effect beyond the boundary of the Site, Fight the Tip had serious reservations about effective monitoring of odour coming from the landfill, especially given the experience of certain residents who lived in the vicinity of the Redvale landfill.

[538] Waste Management proposed an extensive suite of air quality monitoring conditions but Fight the Tip noted that there is no technical method to actively monitor odour, and there are no independent FIDOL (Frequency, Intensity, Duration, Offensiveness and Location) people available to respond to complaints. A key concern of locals is the lack of Council response when odour concerns arise, with reference to experiences at Redvale. They noted that Ms Simpson confirmed that in the Redvale example Council officers did not attend a majority of the odour complaints, and by the time they finally arrived, the odour had either weakened or disappeared. Fight the Tip submissions concluded that if the Court was minded to grant consent, further work would

be required to ensure robust monitoring and enforcement.

[539] Subject to imposing appropriate conditions (as well as reviewing the Management Plan), we are satisfied that any adverse effects of odour can be appropriately addressed.

Noise and vibration

[540] We received expert evidence on noise and vibration from Mr Stephen Peakall for Waste Management and Mr Jon Styles for Auckland Council.

[541] Mr Peakall and Mr Styles conferenced and produced a joint witness statement.[185]

Noise limits

[542] Fight the Tip maintained that the proposed conditions to address noise effects are inappropriate, as they only require compliance with the AUP's noise standards.

[543] It claimed that Waste Management does not need to emit noise to the maximum permitted volume up to the notional boundary of existing houses in order to operate the proposed landfill. It noted that Mr Peakall has estimated operational noise will be far less than that. It said that the noise conditions should be reduced to reflect predicted noise.

[544] As the application is for a non-complying activity there is no particular reason for the Court to adopt the general noise standard, which is to acknowledge that there are general rural activities, this being a Rural Production zone, that would have impacts on the neighbouring properties.

[545] We can see no reason in principle why the noise impacts for the activity should not be internalised. To that end, we consider that the appropriate amenity in the neighbouring properties can be reached if the AUP noise standard is adopted at the boundaries of the 1,070 ha project site. If construction is required near the boundaries, then this would rely on the construction noise level being met at the boundary.

[546] In our view this would address the concerns about an ongoing impact on the use of neighbouring properties by virtue of a 24-hour/day operation on an industrial scale. The same would apply to night-time noise at the boundary.

[547] Given the change to amenity that the proposed landfill will cause in the valley, we consider that condition 228 in its application of stricter night-time noise limits is appropriate.

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[185] Dated 18 May 2022.

Truck access to Wilson Road during construction

[548] The other significant concern that we heard from the parties in relation to amenity was the impact on several residents living on SH1 near the construction road entrance (Wilson Road). One particular home is situated directly on the boundary of the entrance to the private road, and having inspected the site we are satisfied that there would be a significant impact on the amenity of that property.

[549] This would arise from trucks climbing the incline to the ridge immediately next to and behind the house, the potential for vehicles to queue during the construction period awaiting the opening of the gates or if the gates are left unlocked, and the use of the road outside normal operating hours of 8.00 am to 6.00 pm. We acknowledge that a visual screen would not reduce the noise, and constructing a high-enough sound wall would, in our view, be visually intrusive and add to the amenity impact on the neighbours.

[550] The draft Construction Transport Plan sets out the upgrading of the construction road and estimated traffic numbers over the ensuing construction period. In year 1 of construction there will be 76 vehicles per day, and this will reduce as construction progresses to 52 vehicles per day in year 2, 32 vehicles per day in year 3 and 12 vehicles per day over the ensuing three years, by which time the access road and roundabout are expected to be complete.

[551] Once the primary landfill access road and roundabout connection with SH1 are completed our understanding is that the private road will no longer be used. Several other properties on SH1 also indicated their concerns about traffic to and from the site, particularly during the construction period. Dome Valley has been subject to extensive renovation recently but has closed on several occasions due to slips and road collapse.

[552] In questioning from the Court Ms Leane Barry, who lives in the property next to the construction road entrance, confirmed there is plantation forestry on the hills behind her property. It is likely to be accessed via the same side road during harvesting. Such operations may last for several years.

[553] The use of SH1 is to be expected given its status as highway. The issues, as we see them, relate to the use of the side road and potential for vehicles to queue along SH1 if there is a delay on entry, or otherwise create amenity impacts while vehicles are using the access road.

[554] We do not consider that Waste Management has given any real thought at this point as to how it might improve the amenity of the properties on SH1 in the vicinity of the landfill construction access points, or otherwise provide for the clear impact on

amenity over the next 5-7 years as the construction is completed. We acknowledge that once construction is completed this entry will be closed, and that the new bin exchange area to the north will not have the same amenity impacts. We understand that there has been some thought as to traffic management at the side road, and expect to see that in the conditions.

[555] We conclude that appropriate conditions would be needed to resolve this issue, or suitable arrangements made with the resident at this junction.

Traffic and transportation effects

[556] The Warkworth-Wellsford section of the state highway is now consented and our understanding is that most landfill traffic will approach the Site from the north, where an off-ramp is to be situated. Already-high traffic levels through Dome Valley (some 12,000 vpd two-way traffic) are likely to increase as further development takes place to the north of Auckland, but once the new section of the highway is complete our understanding is that vehicle numbers on the Dome Valley Road will decrease considerably.

[557] Two experts provided evidence on transportation effects, Mr Don McKenzie, on behalf of Waste Management and Mr Ian Clark on behalf of Auckland Council. Those experts conferred and produced a joint witness statement.

[558] The main transport issues raised by Mr Clark relate to potential traffic effects associated with trucks arriving at the proposed landfill during peak periods when there is heavy northbound traffic on SH1 through the Dome Valley at times (Friday afternoons being a good example). The concerns relate to both the construction and operational phases. While the effects during the construction phase will be mitigated to some extent by the proposed conditions, there were no conditions that cover traffic issues during the operational phase.

[559] It was therefore agreed that for the operational phase of the proposed landfill new wording should be added to a condition requiring the minimisation of the number of trucks approaching the site from the south on Friday afternoons, until the state highway from Warkworth to Wellsford project becomes operational. Mr Clark also sought that a maximum number of inbound trucks be specified to reduce any ambiguity in the agreed clause. He proposed that typical Friday afternoon truck arrivals should be no more than three per half hour period from 2.00 pm to 7.00 pm on those days. Mr McKenzie opposed the inclusion of that condition, considering that the first amendment will be sufficient to manage the intensity of traffic generation.

[560] We agree with Mr McKenzie but conclude there needs to be some focussed attention on traffic management. This would require that Waste Management monitor traffic as operations continue and, if necessary, decrease movements at busy times.

[561] The witnesses did agree on how to address specific construction-related Friday afternoon traffic issues. Conditions could be drafted that require the operator to minimise the total number of truck movements from construction activities between 2.00 pm and 7.00 pm during Friday afternoons between October and April and any other Friday afternoons immediately prior to any public holiday weekend. Similar consideration should be given to the movement of large machinery items during those periods.

[562] Again, we conclude that further thought needs to be given to operational conditions. One might be that the Landfill cannot commence until the new deviation (Warkworth to Wellsford) is completed. That may be unrealistic given it depends on Government funding. The alternative may be to have more restrictive conditions until the new deviation is completed. This will require further consideration and drafting. Nevertheless, we conclude that with appropriate conditions (and a Management Plan) this issue could be addressed.

Lighting

[563] We understand the extensive lighting proposals of Waste Management. The experts agreed on modified conditions for night operation which Mr Kennedy did not accept.

[564] We conclude that any consent should require lighting at minimal levels and especially to avoid attraction of bats or pests. This would need to be addressed if consent is otherwise appropriate.

Economics

[565] Waste Management called Mr Michael Copeland to give evidence on the potential economic impacts of the proposed landfill. The basic thesis underpinning his effects assessment is that landfills are, and for the foreseeable future will remain, essential infrastructure for the Auckland region, with municipal landfills identified in the AUP as being part of the region's infrastructure.

[566] For that view Mr Copeland relied on the evidence of Mr Kennedy, Mr David Howie (corporate – waste policy) and Mr Purchas (waste regulatory framework), all of whom were called by Waste Management. He relied on their conclusions that, while waste minimisation efforts may become more effective at reducing residual waste,

alternatives to landfilling (for example, waste to energy incineration plants) are not a feasible option for Auckland at this time.

[567] Mr Copeland considers the position that no new landfill capacity will be required for Auckland within the next 30-50 years is unrealistic, noting Statistics New Zealand data implies a 1.1% average annual increase in Auckland Region's population to 2048. The Rodney area of northern Auckland has an implied growth rate of 2.1%.

[568] In forming his view on economic costs and benefits, Mr Copeland analysed the comparative additional economic costs of alternative landfill proposals to the proposed landfill.

[569] We have some difficulty with the table on which Mr Copeland relied, and his conclusions. His analysis did not take into account Waste Management's site selection process, nor have any regard to sites identified by Waste Management that scored higher than did the proposed landfill site. On that basis, we find the assessment of economic benefits based on a comparison of other potential sites to be of limited assistance.

[570] We concluded earlier that demand for landfills will continue in Auckland – even when regard is had to the requirements of the Waste Minimisation Act and the Waste Minimisation Plan. The volumes disposed of each year affect the life of the landfill rather than the ultimate volume it is designed for.

Landfill Bond

[571] Waste Management called evidence from Mr Anthony Kortegast on the purpose of financial bonds. He stated that the underlying intent of a bond is to ensure that sufficient funds are available to deal with acute risks, as well as the costs associated with early closure and post closure costs, and to ensure that funds are secure and available when required.

[572] If the proposal is consented this is a matter we would need to consider further. We note that during the hearing amendments were made to the proposed conditions governing the bond in favour of MKCT and Ngāti Whātua. It would enable them to draw on the bond in certain circumstances. A bond was also offered to secure offsite stream planting. These conditions may require some refinement.

[573] Overall, we consider that a narrow range of risks is being considered with the figures derived, with an estimate of some $11 million at peak – well short of the type of costs we would expect from a landfill being abandoned. However, until the design and conditions are advanced, a figure representing the cost to the Government or ratepayer

of remedial action cannot be finalised.

Geotechnical

[574] Two experts were called addressing geotechnical issues, Mr Tim Coote for Waste Management and Mr Ross Roberts for Auckland Council. Those witnesses conferred and reached agreement on all matters. They produced a joint witness statement. It was agreed that an appropriate level of geotechnical investigation has been undertaken to assess the suitability of the site for the concept design.

[575] Additional geotechnical investigation, ground modelling and design work input will be required to support detailed design. Additional investigation will be needed to confirm volumes of material available onsite for use in the construction of the landfill liner subgrade and cap.

[576] These experts agreed that the site has relatively simple underlying geology and low seismic risk. We have reservations demonstrated by the recent repeated failures on SH1 in the Dome Valley area immediately after considerable upgrade work. Local residents also repeated concerns, pointing to slanting rock formations and springs well up the valley ridges. They suggest the name Springhill where the landfill is proposed to be placed demonstrates local knowledge.

[577] However, Messrs Coote and Roberts are confident that the hazards can be managed. Certain geotechnical hazards and constraints were discussed by the expert witnesses under headings of slope stability, tunnel gullies/tomos, groundwater and seismicity.

Slope instability

[578] Slope instability was identified as the main geotechnical hazard, particularly during landfill construction where landslides could damage the landfill excavation and disrupt the liner and/or drainage system. Historic landslides of varying magnitude have been identified onsite from site investigations and terrain analyses, however none would preclude the site as being suitable for a landfill.

[579] The experts agree that as the landfill is progressively filled, the additional mass at the toe of the slopes will, over time, increase the stability of the slopes so that they are more stable than they are in their natural state. They concur that the risks are able to be mitigated through the implementation of an appropriate level of geotechnical investigation, groundworks design and construction monitoring, to ensure the stable design and construction of the proposed landfill base-grade slopes.

[580] Slope design optimisation and ground strengthening and improvement works will be required in specific areas. The experts agreed that the measures required to manage the risks posed by potentially unstable slopes during construction are within the bounds of normal engineering practice in New Zealand.

[581] During our site visit and overflight of the site, we observed numerous landslides in the Dome Valley area and surrounds, highlighting for us the importance of appropriate additional geotechnical investigation and design work. We conclude that with adequate final design and a high level of re-designing or design safety the site should be adequate. One issue will be the Factor of Safety of the design and any failure pathways.

Tunnel gullies/tomos

[582] Cavities or tunnel gullies, also called tomos or sinkholes were identified in areas adjoining and within the Landfill Valley. Mr Matthew Lomas, a local landowner, provided us with detailed evidence and photographs of tunnel gullies on his property and outlined the effects of them.

[583] Tunnel gullies are erosion features created by the removal of subsurface soil by water. At the Site, these features appear to be the result of relatively shallow tunnel gulley erosion processes in the surficial (< 3 m depth) soil profile. Experts consider that cavities formed by the collapse of tunnel gullies are unlikely to develop between the constructed (fully lined and sealed) landfill shell structure because surface water infiltration will be limited by the presence of the landfill, and groundwater flow will be controlled by engineered drainage systems.

[584] We conclude the risk of such features developing during construction can be appropriately managed and mitigated through the future phases of detailed investigation, design and construction. The experts consider the potential risk can be appropriately addressed by the conditions. Again, a suitably conservative design would avoid this risk.

Groundwater

[585] Groundwater seepage and hydrostatic forces pose a risk to both slope stability and the engineered landfill lining system. The experts conclude that these risks can be mitigated by the installation of a subsoil drain network system incorporating a central drain and additional drains that target specific seeps and springs as they are encountered within the footprint of the landfill.

[586] We remain concerned as to how surface water above and around the Landfill Footprint will be controlled and dealt with. Given the underfloor drains to the landfill,

and the piping of water above the intermediate stages of the landfill, there remains potential for contamination. Water from the landfill cap captured by peripheral drains and water piped under the Landfill Footprint is, we understand, directed to the stormwater system that is physically separate from the leachate collection system and landfill contents. We are uncertain as to the confidence we can have in the complete separation of these flows, and we suggest a downstream failsafe to ensure floodwaters can be impounded or directed to treatment.

Seismic hazards

[587] The experts agreed that the site has a low seismic hazard risk, as documented in a probabilistic seismic hazard assessment undertaken specifically for the Site. We accept that evidence, but a failsafe in the design could accommodate a moderate quake if it were to occur.

Conclusion on technical matters

[588] We cautiously accept the expert advice on geotechnical matters but would need to have the opportunity to consider proposed conditions before being satisfied that the effects can be adequately addressed. In part these risks might be addressed by containment design downstream in case the landfill or its toe fail. Water contamination issues might arise if liner failure were to affect subsurface drains or water from the landfill upper surfaces reached peripheral drains.

[589] We conclude that there is low probability of a landfill failure due to geotechnical considerations, but if there were a failure it could have an impact on the downstream catchment, the magnitude of which would depend on the circumstances.

[590] The potential for water contamination is recognised, but the use of water quality measurement does not give a complete answer. In the event of instrument failure or flood events contamination may reach the Hōteo. While as a percentage of flood volume contaminant concentrations may be low, the absolute quantity of contaminant may be unacceptable (for example, if mercury were to reach the Kaipara catchment). Again, this would need to be directly addressed in conditions supported by management plans.

[591] In the event of instrument failure such that contaminant concentrations cannot be measured, that would need to be addressed by, for example, containment of all waters or cessation of all filling.

Discharges and potential discharges and proposed controls

Erosion and sediment control and stormwater management

[592] During construction, sediment entrained in stormwater at the site will be discharged via its tributaries to the Hōteo River which flows approximately 35 km to the Kaipara Harbour through a mix of farmland, plantation forest and stands of native forest and scrub.

[593] The catchment of the Hōteo River covers 405 km^2 and it is one of several contributing to the Kaipara Harbour, which has a catchment of approximately 6,000 km^2. The Hōteo catchment currently contributes approximately 4% of the sediment discharged to the Kaipara Harbour, or approximately 25,600 tonnes per annum. The Landfill Footprint covers some 60 ha, which is 0.15% of the Hōteo catchment and 0.17% of the Kaipara catchment.

[594] We received evidence on sediment control from Mr Robert Van de Munckhof, who was called by Waste Management. His evidence addressed the following areas:

(a) discharges associated with stormwater, use of land and contaminants from an industrial or trade activity (the landfill); and

(b) discharges of sediment from earthworks during the site establishment works and operational landfill including the stockpiles and clay borrow area.

[595] Waste Management also called evidence from Ms Quinn and Mr Marcus Cameron (marine ecology). The Council called Mr Alan Pattle (landfill engineering, stormwater and industrial trade practices), Mr Mark Lowe (freshwater ecology) and Ms Fiona Harte (earthworks – sediment effects). Ngāti Whātua called Ms Kathryn McArthur (freshwater ecology and water quality) (also appearing for Royal Forest and Bird). The Director-General called Dr Susie Clearwater, (freshwater) and Mr Clinton Duffy (coastal) and Fight the Tip called Dr Leane Makey (marine ecology). All those experts participated in conferencing and produced a joint witness statement.[186]

[596] The context in which the discussions occurred is important, as the experts agreed on the values of the receiving environment. While accepting that the focus of the conferencing was on ecological and water quality values associated with sediment, they acknowledged there are other values, including social and cultural values, of the catchment. They agreed that they would consider the receiving environment as comprising three key scales of assessment:

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[186] 9 May 2022. The Court records that Mr Clinton Duffy was absent from the conferencing.

(a) the immediate freshwater receiving environment (within the Waste Management landholdings);

(b) te Awa o Hōteo; and

(c) the Kaipara moana.

[597] They acknowledged the interconnected nature of the water bodies and land (ki uta ki tai), and noted that the three scales of assessment are artificial in ecological and cultural terms but useful in the context of assessing the effects of sediment.

[598] They agreed that ecological values of the immediate freshwater receiving environment within the Waste Management landholdings range from high to very high. Ms Quinn noted an exception to that – some highly modified stream reaches in the lower-lying Western Block that she considers have a moderate current ecological value with potential for enhancement.

[599] All experts agreed that the Hōteo awa is impacted by sediment. Long term monitoring data is limited to one state-of-the-environment site approximately 13 km downstream of the Waste Management land. They agree that measures to maintain and improve the Hōteo should consider the current state, long term trends and monitoring and/or modelling data for the catchment.

[600] Ms McArthur noted that long-term (1989-2021) trends in water clarity have shown improvement. Finally, they agreed that the ecological values of the marine receiving environment at the Hōteo River confluence with Kaipara moana (the zone of influence) are generally moderate to very high.

[601] The experts agreed that the Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland Region (**GD05**) is current best practice for erosion and sediment control but acknowledged that not all sediment will be captured by GD05 devices. GD05 is proposed to be the minimum standard implemented on the Site. They agreed that there may be residual adverse effects following the implementation of GD05 controls. There was a range of opinion on the level of residual sediment and associated effects, but that was not explored at the conference.

[602] With the exception of Ms McArthur and Dr Clearwater, the witnesses agreed that an adaptive management approach can be appropriate, following best efforts of erosion and sediment controls and with triggers and standards that are developed in the context of the receiving environment. Ms McArthur and Dr Clearwater required more detail to have greater confidence in assessing the effects, and would like the erosion and sediment

control plans and adaptive management plans to be laid out in full and be site specific.

[603] Additional monitoring of the Waitaraire Stream was proposed. On that latter point we note there has been some agreement around additional monitoring on that stream, and we see that as a matter for conditions.

[604] Ms McArthur and Dr Clearwater consider there is too much reliance on adaptive management, and the effects should be managed and secured in conditions of consent to improve confidence in assessing effects. For some very high value sites it is appropriate to put all best methods in place rather than rely on adaptive management. Finally, they consider the Waitaraire Stream confluence is a significant area of ecological concern and would like more certainty around controls. Dr Makey would like to understand the cumulative effects, and how they would be managed with the proposed sediment and erosion controls. This is discussed further in the Ecology section.

[605] We accept that potential sediment effects relate to both short-term effects from the initial site establishment phase, and long-term effects associated with the operation of the landfill and associated infrastructure. We reach the same conclusions as discussed for water contamination generally. The critical issue is to address high flood or failure scenarios and then provide monitoring in general operation. Again, trigger values are important as well as consequences for exceeding or information not being available in real time.

[606] We find that the predicted residual sediment discharges will increase the sediment loads on the immediate receiving environment by <1% during the initial site establishment, and that in the context of sediment in the Hōteo and Kaipara moana that is an acceptable effect for a period of 5-7 years. However, we conclude this would be unacceptable as a long term effect.

[607] We accept that there are likely to be reductions in sediment discharge from the site during the ongoing operation, associated with the stream planting and revegetation proposed as part of the ecological offsetting. Mr Van de Munckhof considers there will be net positive effects on sediment inputs over the landfill's life (with higher sediment inputs than baseline during site establishment but lower sediment inputs once the landfill is operational).

[608] However, to address parties' concerns as to the certainty of this outcome, additional measures are proposed to mitigate residual effects, as well as sediment load balance conditions requiring an additional offset should the anticipated net positive outcome not be achieved within ten years of landfill operations. We agree with that

approach.

[609] All of the experts (save for Dr Makey) agreed that the sediment load balance approach, which seeks to achieve a net zero discharge, has merit. Dr Makey disagrees because of the inability to address cultural, social or ecological effects. We have already outlined that Ms McArthur and Dr Clearwater consider there is too much reliance on adaptive management, and that effects should be managed and secured in conditions of consent. We agree with this view. Dr Makey also considered that cultural and social values should be considered in the development of the sediment balance approach, and Ms McArthur considered that any restoration efforts should be complementary to the wider Kaipara moana remediation. They noted they had not received any opinion from mana whenua with regards to the acceptability of a sediment balance approach. We agree mana whenua should be involved in setting and checking trigger levels for discharges, and that these should be complementary to the Kaipara Moana Restoration Programme.

[610] Given that the sediment balance approach is only to be applied in the event that the erosion and sediment controls are insufficient, we consider that amendments to the proposal, design and conditions might be developed to make these effects minimal and avoid material harm. We conclude that the conditions must set trigger limits for investigation, immediate abatement and cessation or emergency contingency (that is, landfill failure).

Leachate

[611] There is no proposal to discharge leachate to the environment from the proposed landfill. However, landfills such as the one proposed do create leachate, and it needs to be collected and disposed of. Exceedance trigger levels for investigation, abatement and emergency contingency will need to be set. Again, reliance on operational management plans, although necessary, may not resolve concerns about any discharges that do occur.

[612] Waste Management proposes a lining system, the design of which is said to be appropriate and best practice for the containment of leachate generated by the landfill. Those opposing the landfill were concerned about the risk of leachate escaping from the landfill and into groundwater and the Hōteo. They were all concerned for the health and wellbeing of water.

[613] Ms Eldridge gave evidence on the proposed landfill's lining system for Waste Management. She provided a useful summary of the function of landfill liners. She indicated that liners provide the primary element for environmental containment, separating the external natural environment from the solid waste within.

[614] Landfill liners require careful consideration in conjunction with other elements of development, including leachate and landfill gas collection systems, surface water control, and the design of the founding layer geometry. The lining system's performance is enhanced by the installation of the final capping system, which reduces surface water contamination (where surface water is fully isolated from the waste), surface water infiltration (and therefore the generation of leachate) and restricts landfill gas emissions.

[615] Waste Management proposes a composite lining system of two liner layers (high density polyethylene and mineral soil/geosynthetic clay liner placed against each other). Evidence for Waste Management concludes that provided the lining system is designed and installed in line with best practice requirements, it will provide a high level of engineering containment for the several hundred years that are required for the organic components of the waste to break down. This view was challenged by many appellant witnesses on the basis:

(a) the landfill liner may deteriorate over time and be more susceptible to damage or puncture;

(b) site operations may puncture or damage the liner, and this may not be visible;

(c) micro-plastics may escape to runoff or through leachate escaping the landfill;

(d) as the landfill ceases to be maintained (100+ years) contaminants, including micro-plastics, drugs, hormones and other dangerous contaminants may enter the Kaipara catchment.

Liner design

[616] Mr Van de Munckhof in his rebuttal provided a useful summary of the approach to leachate management. He notes that the overall approach has been based on avoiding the discharge of leachate to surface water in place of managing or minimising the discharge. It is reflected in the following key aspects designed to avoid the discharge to te Awa o Hōteo:

(a) the overall approach to leachate based on treating all surface water that may come into contact with waste to be treated as leachate;

(b) providing secondary containment of any leachate storage at the site to avoid a discharge in the event of a spill or leak (including in the transfer of leachate from the tanks to tankers for offsite disposal);

(c) comprehensive monitoring for the presence of leachate to enable appropriate responses, including monitoring the inlet to the treatment system and outlet of the wetland;

(d) procedures and system to monitor and identify and remediate potential leachate breakouts;

(e) ensuring the amount of leachate within the landfill is minimised (which helps to avoid leachate breakouts);

(f) provision to cease discharge from the outlet of the wetland in the event that leachate contamination has occurred;

(g) the inclusion of monitoring within the perimeter drains to identify leachate prior to it entering the pond system.

[617] Microplastics and other contaminants from landfill waste such as hormones and drugs (described as emerging contaminants) are intended to be addressed by the leachate principles of the design. This is both in:

(a) design and interception of leachate escaping the liner; and

(b) dealing with water falling on or coming from the landfill top surface.

[618] This raises issues as to how these contaminants are identified and controlled in surface water and subsurface drains. From the evidence, the subsurface drains and peripheral drains around the landfill go to a downstream pond with the outflow being monitored. We are less clear about whether such monitoring for clarity, electro-conductivity and certain other parameters would capture the full range of contaminants that may be of interest. While we suspect electro-conductivity would pick up a range of contaminants in leachate, we suspect hormones and microplastics may not feature. The tests for these contaminants and others may be more specific due to the recent appearance of these as a concern.

[619] We record that other experts called by Waste Management and Auckland Council agreed with Ms Eldridge that the design of the lining system is appropriate and best practice. Further, experts agreed that the subsoil drainage and groundwater collection system is appropriately designed to avoid damage to the lining system from groundwater pressure and to capture and provide early warning of any leachate escape through the lining system, enabling contingency steps to be taken in the unlikely event this occurs. The experts further agreed that the quantities of groundwater diverted will be small, with effects on the underlying groundwater system less than minor.

[620] It is clear that tangata whenua, including Ngāti Manuhiri, retain concerns about the potential for contaminants to leave the site and reach the Hōteo, either by intermediary streams or directly. Ngāti Manuhiri has clearly reached the view that its involvement in the project more directly may better ensure that this does not occur. We agree that that does represent a benefit, particularly if mauri and mātauranga principles are taken into account. To other tangata whenua, we acknowledge their concern that this activity will always constitute a risk no matter how low. The RMA is not a no risk statute, but it clearly recognises that the greater the potential effect the more stringent the

assessment of risk will be. This is one of those cases. We conclude that more needs to be done to satisfy tangata whenua that there is no prospect of an adverse effect reaching the offsite streams or Hōteo River.

[621] So far as the taonga species and concerns about loss of stream length, these again relate in part to mātauranga Māori and mauri itself. The involvement of MKCT (and potentially other parties) might achieve a positive outcome if they have a substantial role in operating the Site and the opportunity to introduce some of the mātauranga principles in the operation of the areas surrounding the landfill itself. Nevertheless, again, the question is the adequacy of the steps taken and whether these meet the provisions of the AUP and otherwise satisfy us that consent can safely be granted.

[622] Waste Management submitted that a liner is designed not to leak. However, based on international best practice, some leakage is assumed and the effects of that are assessed. It was further agreed between experts that the site's geology is suitable for leachate containment, being low permeability Pakiri formation bedrock and residual soils. Finally, it was agreed that even in a worst-case scenario, groundwater contaminant concentrations are far below guideline values at all potential exposure points.

[623] We are concerned to ensure there is no potential for leachate contamination. We note that, while a failure in the liner is a remote possibility, it can and does happen. To that extent leachate could escape into the sub-drains or peripheral drains, or into the toe of the landfill. The Court is also aware of the potential for peripheral leakage from the landfill cap occurring as a result of management failures, and is concerned to ensure that the proposed detection systems will detect any leakage and capture the leachate.

[624] To that end, we conclude that the conditions proposed to address such matters must be robust. In the unfortunate event of any discharge, this must be detected and acted upon before it can reach groundwater or the Hōteo. There must be no prospect of any leachate reaching either. This requires a very robust design, redundancy and contingency planning.

[625] Again, conditions and trigger levels will need to be reconsidered, backed by contingencies for failure and strong management plans. Again, this encourages the Court towards considering installing further retention and detection processes below the ponds to avoid contamination of groundwater or the Hōteo.

Stormwater

[626] Experts called on behalf of Waste Management, the Director-General, Auckland Council, Ngāti Whātua and Royal Forest and Bird conferenced on matters relating to

operational stormwater and contaminants. Beyond the concern about leachate contamination the main concern was the potential for erosion and sedimentation of the downstream catchment.

[627] While those opposing the proposal had concerns about the appropriate management of stormwater, we record that the experts agreed on a number of matters.

Stormwater ponds and treatment wetland

[628] The experts agreed that the proposed stormwater ponds and treatment wetland exceed the requirements of the Erosion and Sediment Control Guide for land-disturbing activities in the Auckland Region. They agreed that stormwater ponds and treatment wetlands are appropriate methods for treating stormwater runoff and discharge to the receiving environment from the landfill, although potential effects of elevated water temperature in the receiving waters remained at issue.

[629] Dr Clearwater had additional concerns about impacts on 'environmental flows' being discharged from the wetland and stormwater ponds into the Eastern stream, with potential increases in the in-stream water temperature. The experts agreed that monitoring at the discharge points from the wetland, downstream and upstream, and in North Valley, is appropriate as a minimum in terms of effects of the discharge on the receiving environment. This would be carried out for the operational life of the landfill (and construction phase).

[630] There was some discussion and agreement regarding data collected and the suite of parameters identified in proposed condition 375. Some amendments to proposed condition 375 were agreed, and these would be a matter for further consideration at the time of any finalisation of conditions.

[631] All except Dr Clearwater agreed that during periods of forestry harvest in sub-catchments up-stream of the monitoring sites more reliance on the wetland discharge data will be required to determine and manage potential effects on the receiving environment. Dr Clearwater considered that a comprehensive understanding of pre-harvest conditions needs to be incorporated into the monitoring regime (including trigger levels) to enable effective management (particularly for sediment). She proposed a means by which this could be accomplished, with which we agree, and that is set out in the joint witness statement.

[632] There was some disagreement regarding the baseline data to be used to develop trigger levels for the discharge, parameters in condition 375, trigger levels for management, among others. Again, we see these as a matter for finalising as part of any

conditions.

[633] The monitoring parameters need further consideration. We also conclude that an alternative failure/flood path and additional retention down the Eastern Stream may add another layer of protection in avoiding contamination of the Hōteo River. The issue of forest harvesting causing sediment pulses might be addressed by delaying or limiting harvesting near the Landfill Footprint. Such a flow/detention system may also provide a contingency pathway for any form of contamination by temporary detention and settlement/treatment/removal.

Ponds and treatment

[634] Ms McArthur raised a number of concerns about the adequacy of the proposed erosion and sediment control and stormwater treatment, and whether the capacity of the operational stormwater ponds is adequate. Ms McArthur considers that should consent be granted any proposal should require best practice of the highest standard given the sensitivity of the receiving environment. She also claims that the erosion and sediment controls proposed are unproven as appropriate protection for very high ecological value, and monitoring is inadequate.

[635] Mr Van de Munckhof responds that the erosion and sediment controls proposed for the project have been implemented throughout the Auckland Region and New Zealand as a whole in a wide range of settings. He notes that the experts, save for Ms McArthur, agreed in the joint witness statement that GD05 is current best practice for erosion and sediment control.

[636] Ms McArthur acknowledges it is not always possible to achieve a 95% sediment removal efficiency, and that this is an area of uncertainty. Mr Van de Munckhof accepts that, but notes that the removal efficiencies for the project have been considered over the proposed works areas and the duration of works (being the earthworks season), rather than being a value applied to all rain events and discharges.

[637] Overall, we conclude that the level of effects can be controlled by conditions for the overall discharge of sediment from the project. As previously discussed, this may be elevated above current sediment concentrations during construction, but during operation of the landfill sediment control will be highly effective, to the extent that we can call it a net zero discharge. While uncertainty does exist, as there are factors within the project's control (such as implementation of erosion and sediment control) and factors outside the project's control (such as weather variability and rainfall) we conclude that clear conditions requiring implementation of erosion and sediment control to achieve

net zero discharge and rapid response to outside events appropriately address this issue. To remove doubt and dispute, we conclude that the discharge baseline should exclude forestry harvesting periods but cover removal operations since acquisition.

Flooding and pond capacity

[638] A number of residents made reference to the high rainfall in the local area, which makes the site – they say – prone to flooding. Mr Van de Munckhof for Waste Management accepts that the site does have higher rainfall than experienced in other areas of Auckland, but says this has been appropriately considered during the assessment and design of the surface water systems.

[639] He provided a helpful summary of Mr John Rix's review of rainfall rates and existing flood issues within the Wayby Valley. He agrees with Mr Rix that:[187]

> (a) the stormwater ponds will not alter the frequency, flood extents, flood depths or flood duration within te awa o Hōteo;
>
> (b) the flood levels used to inform the design of the site entrance, bridge access and bin exchange area have been undertaken based on a cautious upper estimate of flood levels; and
>
> (c) the impact of flooding within the flood plain of the Waitaraire Stream are slight, with the largest increase (of up to 140mm) occurring at the bin exchange area and that water levels return to pre-development levels within 150m of the proposed bridge and access from SH1.

[640] The maximum capacity of the proposed stormwater ponds in light of the rainfall in the locality was raised. Pond capacities are far in excess of the current guidance in GD01 and GD05, but as Mr Pattle said in his evidence that is no substitute for a higher level of focus at source. We agree with Mr Pattle, and consider the proposed landfill's management plans, including the Industrial Trade Activity and Environmental Monitoring Plan are key to minimising the potential effects associated with the activities. We also conclude pond sizing should be based on increasing flood frequency and rainfall, and we emphasise our desire for high levels of control, greater than GD05 as Mr Pattle has described.

[641] Mr Van de Munckhof provides a useful summary of the purpose of stormwater ponds when addressing a concern raised by residents as to whether a three-day period of heavy rainfall could produce more potentially-contaminated runoff than could be stored in the stormwater ponds. He notes that the purpose of the ponds is to remove sediment from site runoff, saying there is no intent to store all rainfall runoff from the site in these ponds such that it does not enter the downstream receiving environment following

[187] Rebuttal, Mr Robert Van de Munckhof, dated 3 June 2022, at [9.6].

sediment treatment. Water flows through the ponds, with some storage up to the maximum water level, and sediment settles along the length of the pond before the water is then discharged. Given that, he says there is no need for the ponds to have storage capacity for three days.

[642] We agree, provided ponds give sufficient settlement time to remove sediment to better than minimum standards. The sizing of the pond depends on the maximum rainfall captured and the time required for sediment to settle. We suspect that rainfall is increasing for major events, and this dictates pond sizing for a large event, for example, 200, not 100 years.

[643] It is also important to remember that the landfill must be operated to ensure that there is clear separation between stormwater and waste or leachate. Any rainfall that comes into contact with waste within the Landfill Footprint should be treated as leachate. The rainwater treated as leachate is only a small proportion of rainfall, and should be managed in a separate system from the stormwater. How the separate ponding for landfill cap peripheral drains is provided is less than clear to us currently.

Potential for landfill failure

[644] In relation to the preceding sections on sediment control, leachate management and stormwater management we are aware of appellant concerns about the potential for very large-scale rainfall events or other natural events to cause what has been termed 'catastrophic failure' of the landfill. This has been expressed in various ways, but it comes down to whether there is potential for an event to mobilise the landfill contents, causing them to become unstable, move or at worst case flow from the Landfill Valley, overwhelm the settlement ponds and wetland and release leachate and landfill waste into the Hōteo River and thence into the Kaipara Harbour.

[645] The landfill is to be built in a valley with a very small catchment that is approximately demarcated by the road around the top of the valley. The water management system is designed to capture stormwater that falls within the valley to prevent it flowing onto the working area of the landfill and drain it away to the settlement ponds. The only water able to enter the landfill via that small working area (approximately 80 m by 80 m) will be the water that falls on its surface directly as rain. As the landfill is constructed, the material within it is to be compacted and capped with clay cover materials in stages, so that water will be less able to percolate into the waste heap and accumulate there. The construction method is designed to keep the inside of the landfill as dry as possible.

[646] The walls of the valley are to be excavated to a depth of around 2 m in any areas where there are unstable surfaces, to minimise the potential for any slippage underneath the landfill once it has been constructed. We are told the weight of the landfill material will further assist in maintaining the stability of the walls, minimising any potential for instability of the landfill waste or the liner beneath it that captures the leachate.

[647] At Phases 1-3, as the operations begin, there will be a pond above the landfill (Pond 4) to capture stormwater from the slopes above and direct it to the settlement ponds via a pipe. It will be constructed such that it will overflow to the stormwater perimeter drains in the event of a storm that is greater than 99% of those that occur annually at this location (the 1% AEP/annual exceedance probability). Pond 4 will be disestablished after the first 5-6 years of operation and no other ponds will be constructed above the landfill.

[648] While the stormwater system has been designed to contain unexpectedly heavy rainfalls, in a very large storm there is potential for more sediment to flow to the Hōteo and out to the Kaipara, but we conclude the amount likely to come from the site is a very small proportion of what would flow from the rest of the Hōteo catchment after a rainfall event that size.

[649] We have listened to and taken account of the concerns expressed about risks to the Hōteo and Kaipara ecosystems. The location of the landfill and the degree of concern expressed by the appellant parties is such that despite the layers of stormwater and sediment control already described by Waste Management we propose a further step. We understand the low risk, but very high impact, of a failure of the landfill or stormwater/leachate system.

[650] We ask whether there is potential to design an additional bunded wetland series below Pond 1. We would envisage it to be an extension of the design to provide an additional layer of security in the event of a significant weather or seismic event. The concept would involve a preference flow for a peak pulse to be diverted parallel to the stream through a series of ponds and stop banks to reduce the rate of flow and allow contaminants to settle. Although not raised by the parties, the concept has been utilised at Matata and elsewhere. Combined with improved regular flow monitoring, this would give more confidence that the Hōteo or Kaipara is unlikely to be adversely affected in all reasonable circumstances. The parties need to consider the practicality of such an approach or another alternative if developed.

[651] Overall, we conclude that this is one of the key issues for this application. We must be satisfied that the application can avoid adverse effects reaching land or water

beyond the Site. The particular focus is on leachate and other contaminants and sediments. At this stage we are concerned that there is not sufficient redundancy in the system to satisfy us that the potential for adverse effects from an escape of leachate or contaminants has been properly designed out. In part this is due to the fact that this is a concept design rather than a final design; and in part due to focus on the liner system and detection systems rather than providing multiple levels of redundancy. This is a case that justifies multiple levels of redundancy and we have suggested a method by which this might be achieved.

Ecological effects

Evidence presented

[652] The ecology witnesses generally approached their subjects from a western scientific and technical perspective and it is from that perspective that this section on ecology is written. The very limited perspective or acknowledgement of cultural values and mātauranga Māori science in the ecological evidence was the subject of considerable cross-examination during the hearing.

[653] We conclude there are critical issues involving the mauri and wairua of the water bodies, the presence of taonga species, including Hochstetter's frog, lizards and bats, and the overarching effect of the proposal on Papatūānuku. We have set those matters out in the preceding section and draw together those effects with matters ecological at the end of this section, recognising that it is impossible to separate out the different effects as they all contribute to the mauri of the freshwater environment.

[654] In relation to the ability of the ecology witnesses to incorporate a cultural perspective in their evidence we note Commissioner Tepania's comment in her decision, that *while cultural aspects of the environment include both physical and spiritual dimensions, the effects on cultural values, whether they be physical or spiritual aspects must be assessed within a cultural framework and by those with the requisite knowledge to undertake that assessment*. Accordingly, we see the evidence presented in this section as a contribution to our holistic assessment that must include that cultural evidence. In other words, the scientific and technical ecological evidence is important, but the mātauranga and cultural evidence on ecological values and mauri is also important. Together, they provide a much better understanding of the ecological impacts and effects on mauri relevant in this case.

[655] We heard evidence on the ecology of the site and surrounds including the values of the existing vegetation, habitats, fauna, and freshwater values, as well as marine values in the Kaipara Harbour and Hōteo River estuary. The effects of the proposal on each

attribute were exhaustively explored.

[656] This included, in many cases, comment on the mitigation proposed for construction and operation of the landfill, and on the offsetting and compensation proposed for what all ecological witnesses considered to be significant residual adverse effects of the project on biodiversity.

[657] The degree to which Waste Management's proposal for ecological management can be demonstrated to prevent a net loss of biodiversity (and preferably provide a net gain) was a subject of contention. Suffice it to say that the Court received a comprehensive range of opinions on the ecological issues from the witnesses who covered a range of often-intersecting specialist topics.[188]

[658] All parties agreed that while some mitigation of effects can be achieved onsite, the residual adverse effects would need to be offset or compensated for offsite. In short, there will be loss of various threatened flora and fauna, particularly within the Landfill Footprint.

[659] Expert conferencing commenced in May 2022 and continued into November 2022. The conferences narrowed the issues considerably and agreements or concessions were reached on a range of matters.

[660] Key ecological issues remaining relate to:

- Whether the loss of 12.2 km of high-value intermittent and permanent streams can be mitigated, offset or compensated for.
- Whether the loss of habitat and of threatened native plant and fauna species can be mitigated, offset or compensated for, such that there is no decrease in biodiversity values as a result of the proposed development.

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[188] **Waste Management**: Dr Matthew Baber – Terrestrial and wetland ecological; Mr Roger MacGibbon – Terrestrial ecological values; Mr Dylan Van Winkel – Effects on herpetofauna; Ms Hannah Mueller – Bat ecology; Dr Helen Blackie – Pest management; Ms Justine Quinn – Freshwater ecological values; Dr Marcus Cameron – Marine ecology values.
Auckland Council: Mr Simon Chapman – Terrestrial ecological values; Mr Mark Lowe – Freshwater ecology.
Director-General: Dr Susie Clearwater – Freshwater; Ms Melanie Dixon – Wetland ecological values; Ms Tertia Thurley – Bat ecology; Dr Jennifer Germano –Values and effects on Hochstetter's frogs and lizards; Mr Rhys Burns – Effects on avifauna; Mr Thomas Emmitt – Pest management suitability; Dr Laurence Barea – Biodiversity offsetting and compensation; Mr Clinton Duffy – Coastal and estuarine ecology.
Royal Forest and Bird: Ms Fiona Wilcox - Terrestrial and wetland ecology values. **Ngāti Whātua:** Dr Fleur Maseyk - Terrestrial and wetland ecology; Ms Kathryn McArthur – Freshwater ecology and water quality.
Fight the Tip: Dr Leanne Makey – Marine ecology.

- Whether there will be adverse effects of sediment discharges on the Hōteo River, its tributaries and Kaipara Harbour.
- Tangata whenua relationship values with freshwater and other taonga.

[661] These issues each contain a bevy of sub-issues which we will explore later. First, for context, we provide descriptions of the ecological setting of the proposed landfill, and we summarise the existing freshwater, wetland and terrestrial values of the site and those of the Hōteo River and Kaipara Harbour.

Ecological setting

[662] The principal features of the Site are summarised as follows:

(a) the 1,070 ha Waste Management landholdings comprises a mixture of terrain and land uses, including pastoral farmland (approximately 188.35 ha), plantation forestry (approximately 713.89 ha of pine and wattle), 114.59 ha of indigenous forest (forest and regenerating scrub), 15.66 ha of indigenous wetlands and 14.45 ha of exotic wetlands.

(b) the land rises from the Hōteo awa and the farmland in the west to steep hills covered with plantation forestry in the east.

(c) the Waste Management landholdings are zoned Rural Production zone in the AUP.

(d) the landfill will be located within the Landfill Valley in the Eastern Block, an area that currently has a cover of near-harvestable pine plantation.

(e) the land to the northeast, east and south of Landfill Valley is owned by Waste Management and is covered mainly in plantation forest, managed by Matariki Forests.

(f) the land is undulating, with numerous steep ridges and valleys.

(g) to the west and north-west of the project area the topography flattens out, with rolling hills that are mostly operated as dairy, beef and sheep farms, with some lifestyle blocks.

(h) there are large tracts of high quality native forest within the wider area, including the Sunnybrook Scenic Reserve (154.5 ha) and the Dome Forest Stewardship Area (401 ha).

(i) Te Awa o Hōteo, which is recognised as a Natural Stream Management Area and Outstanding Natural Feature, is on the boundary of the Waste Management landholdings.

[663] The broader context of the site is shown in **Annexure A**,[189] which shows the location of features of the Site within the Dome Valley.

Ecological values

Freshwater ecosystem values

[664] Some 12.2 km of permanent and intermittent streams that flow through the Landfill Footprint and other parts of the site will be lost due to the project, mostly by excavation of the Landfill Footprint. These contain a range of freshwater species and provide ecological services. Ms Quinn, who carried out a range of freshwater surveys for Waste Management, said the survey effort was *extensive, includes a range of techniques and is sufficient to understand fish and large invertebrate populations and habitat values for the purpose of the Project*.

[665] The fish surveys recorded nine species of native freshwater fish, three of which are *At Risk–Declining* (under the New Zealand Threat Classification System managed by the Department of Conservation) being longfin eel (*Anguilla dieffenbachii*), inanga (*Galaxias maculatus*) and torrent fish (*Cheimarrichthys fosteri*). Kōura (*Paranephrops planifrons*) were present at four of the seven sites. Two species of kākahi (*Echridella species*), also *At Risk* were found in the 2021 surveys of lower Waitaraire Stream (both upstream and downstream of the junction between the proposed project access road and SH1).

[666] An additional species, lamprey (*Geotria australis – Threatened–Nationally Vulnerable*) was found at a site in Sunnybrook Scenic Reserve and within forestry on Waste Management land in the Waiwhiu catchment, that is, not within the project area itself. The species was not found in the project area or elsewhere during previous project surveys, but its presence is noted.

[667] Dr Clearwater added further information about the Department of Conservation's rankings of streams on and adjacent to the landfill site that are not formally protected. She noted that 45% of the Waste Management land in the Western and Southern Blocks is in the highest two (of ten) rankings of unprotected freshwater habitat in New Zealand. We note that the streams and wetlands (other than those directly affected by the construction activities) are to be protected under the proposed Ecological Management

[189] Refer paragraph [7] of this Decision.

Plan (including the Northern Valley, added on the last day of the hearing).

[668] The freshwater ecological values and the effects of the project were assessed by Ms Quinn using the New Zealand Ecological Impact Assessment Guidelines (**EcIAG**) which she said were developed to *provide a nationally consistent direction to be adopted when assessing ecological impacts*. She acknowledged the reference to cultural context and values in those Guidelines but did not address them.

[669] There remained some differences of opinion as to the magnitude of effects captured by the guideline framework, however the experts agreed that the values of the freshwater receiving environment on the Waste Management property were high or very high. The exceptions noted were some highly modified stream reaches in the Western Block. These were considered to have a moderate ecological value currently but with potential for enhancement.

[670] Ms Quinn used the Stream Ecological Valuation (**SEV**) method to assess the values of the stream at 20 sites across the Waste Management property including Landfill Valley (7 Sites), Southern Block (6 sites), Western Block (6 sites) and Waitaraire Tributary Block (1 site). Sites were selected as impacted sites or potential mitigation or offset sites. She then used the Ecological Compensation Ratio (**ECR**) to quantify the amount of stream bed needing to be restored to address residual adverse effects. Original calculations showed around 30 km was necessary. By the time of this appeal hearing Waste Management was proposing some 50-60 km of stream be restored or rehabilitated via riparian planting and other works.

[671] The freshwater ecologists agreed that the SEV is an appropriate tool to assess the value of the ecological functions of the streams on the Site. Ms McArthur and Dr Clearwater noted that the ECR method does not account for all ecological values such as structure, extent, biodiversity, and conservation status. In addition, water quality monitoring was carried out in the surrounding catchments against which to consider the biological values.

Terrestrial vegetation and habitat values

[672] The site has been in farming or forestry since the 1960s or earlier. At that time little riparian vegetation existed along the streams and a large proportion of the Site was farmland. Pine and wattle forests were likely planted between 2001 and 2004 and there has been some native forest regeneration, resulting in the vegetation cover seen today.

[673] Surveys and evaluation of the terrestrial vegetation and habitats were carried out by Dr Baber (called by Waste Management), who assessed the values and effects following

the EcIAG methodology to determine the relative values of components of the ecosystem on a qualitative scale. The surveys were carried out in preparation for the Council hearings held in November 2020 and again in preparation for this hearing.

[674] Dr Baber identified ten indigenous habitat types at the Site, including five mature indigenous forest types, two regenerating forest types, and three indigenous wetland types. They include (with their threat classifications):

- 55.97 ha of mature native forest of five ecosystem types. Kauri, podocarp, broadleaved, beech forest is considered *Threatened-Critically Endangered*; while kahikatea-pukatea forest, taraire, tawa podocarp forest and kauri, podocarp broadleaved forest are considered *Threatened–Endangered*. Anthropogenic totara forest is not threat-ranked.
- 50.36 ha of two regenerating forest ecosystem types: kanuka scrub/forest and broadleaved scrub, both classified *Least Concern*.
- 15.66 ha of native wetlands in three ecosystem types: manuka tanglefern scrub; flaxland; and raupō reedland, all classified *Threatened–Critically Endangered*:
- Natural wetland in wet pasture (14.45 ha) and areas of pine and wattle are present, neither of which is afforded a threat classification because they are dominated by exotic species.

[675] Of the significant ecological areas identified in the AUP, no Significant Ecological Areas, Natural Stream Management Areas or Wetland Management Areas are within the Landfill Footprint.

[676] Eight plant species identified on site are listed as *Nationally Threatened* or *At Risk* by the New Zealand Threat Classification System, all of which have that status as a precautionary measure due to the risk of myrtle rust. These are four *Metrosideros* (pohutukawa and rata) species, swamp maire, manuka and kanuka. Two other species, kawaka and kaikomako, are identified as being significant because they are threatened in the Auckland Region.

Terrestrial and wetland fauna values

[677] Many of the indigenous fauna species recorded at the Site are classified as *Threatened* or *At Risk*. All are protected under the Wildlife Act 1953.

[678] **Long-tailed bats** (*Threatened–Nationally Critical*) are known to use the exotic and native vegetation on the Waste Management landholdings for foraging, based on surveys

undertaken on three occasions over the period 2018-2022. The highest level of activity was recorded near the bin exchange area, in (exotic-dominated) wattle forest. There are no identified roost trees for bats within the project footprint, but the experts agree that they could be present.

[679] Twenty-one **native bird species** and five introduced species were recorded during surveys of the site. Most are relatively common in agricultural and pine-forest landscapes. Species recorded at the site that are considered *Threatened* or *At Risk* under the Threat Classification System included black shag, long-tailed cuckoo, New Zealand pipit, whitehead, North Island fernbird and spotless crake. The wetland and forest habitat of fernbird and spotless crake within the Waste Management landholdings is almost all outside the project footprint.

[680] A single Australasian bittern (*Threatened–Nationally Critical*) was observed during a monitoring survey of the Wayby South Wetland after the hearing ended, the species not having been confirmed at the site previously. Other *At Risk* bird species not recorded at the site but that bird experts considered may be present were kākā, kākāriki and pied stilt.

[681] Of the **lizards,** the native copper skink (*At Risk*) and introduced rainbow skink (exotic) were recorded during site surveys and a single native gecko was found in a more recent monitoring survey. The lizard experts agreed that four other lizard species, three of which are *At Risk* may be present on the wider Waste Management property but most of the habitat within which they could be expected to occur is outside the project footprint.

[682] The endemic **Hochstetter's frog** (*Leiopelma hochstetteri*) (*At Risk–Declining*) has been recorded within the project area, in the Landfill Valley itself but also in other areas on the wider site and adjacent areas outside. Some 20% of the 9.5 km of permanent and intermittent streams in the Landfill Valley provide suitable habitat for the frogs, particularly in hard-bottomed stream cascade complexes. Their presence in that valley indicates their ability to maintain a population despite exotic plantation forestry operations there.

[683] Current protections of those habitats include the NES-Plantation Forestry (now the NES-Commercial Forestry) and the certifications held by Matariki Forests under the Forest Stewardship Council and the Program for the Endorsement of Forest Certification Standards. These, and the Wildlife Act 1953, under which authority is required for disturbance of protected native species, may mean that disturbance to the habitat and the animals will be limited in nature during future forestry operations.

[684] Searches of other streams in 2022 found that the frogs are present in other native, pine and wattle forest areas in the broader Waste Management property, as reported in the attachments to Dr Baber's rebuttal evidence. They are also known to be present in an area proposed for predator exclusion on the Waste Management property as part of the Ecological Management Package we will describe later.

[685] There was considerable emphasis on the outcome for frogs at the hearing and agreement as to their management had not been reached by the end of the hearing. The frogs are within what is known as the Southern Clade (group) of Hochstetter's frog in the Northland Evolutionarily Significant Unit of this species, the Northern Clade being in the Brynderwyn Range. The Landfill Footprint population forms a small part of the Southern Clade. However, population numbers are extremely difficult to estimate, given the secretive nature of the frog and its high rate of decline. Their vulnerability to predators indicates that the frog population in the Southern Clade will continue to decrease in the absence of predator Control. Dr Clearwater noted that the predicted rate of decline of frogs in the Northland Evolutionarily Significant Unit is 10-30%. Lizards, large invertebrates and forest birds are similarly vulnerable to predators though we were provided with no estimate of their likely percentage decline over time.

[686] Searches for **terrestrial invertebrates** found the native rhytid snail (*At Risk*) and a velvet worm *Peripatus* (variable threat classification depending on species) during searches of suitable habitat within and around the project footprint, and the experts agreed they are likely to be commonly present. No kauri snails (*At Risk*) were found during surveys but the experts considered they may be present.

[687] The **mammalian pest/predator species** commonly found in lowland habitats are agreed by the ecologists as likely to be present in moderate to high numbers, particularly in wetland and native forest areas, including feral cats, ship rat and Norway rats, the mustelids ferret, stoat and weasel, hedgehogs, hares and rabbits. Sign of other mammalian pest species possum, pig, goat and deer was observed by experts across the Waste Management property. These pests are well known to predate or otherwise disturb many native species and their habitat.

Marine ecology values

[688] Marine ecological values were of considerable importance at the hearing as described in the previous section on cultural values and relationships. The Hōteo River and Kaipara Harbour are highly valued.

[689] Mr Cameron described a 'zone of influence' around the mouth of the Hōteo River at the Kaipara Harbour as the area thought to be the predominant sink for sediment discharged from the Hōteo River. The zone of influence supports a large area of saltmarsh and mangrove forest vegetation on shallow subtidal and intertidal sand and mudflats. Several Significant Ecological Areas are present within this area, including Tauhoa Scientific Reserve, one of two significant mangrove reserves in New Zealand. These support rich intertidal flora and fauna, including seagrass beds and habitats identified as nursery areas for fish. Mr Cameron listed a range of shellfish species and birds that occupy the area and noted the presence of dolphins at times.

[690] The biodiversity values of the Kaipara Harbour were agreed by all experts to be moderate to very high. Dr Makey added a social-environmental geographic perspective, that the ecosystems were considered *kin, a family member, actor and agent with inter-dependence and its own entity,* which she said *gives effect to an ethical understanding of values*.

[691] All agreed that the Kaipara *has a significant role in the wider west coast ecosystem for a variety of species and that the diversity of benthic invertebrate populations in the vicinity of the Hōteo mouth are very important feeding areas for wading birds in the south and central Kaipara*.

[692] The area in the vicinity of the Hōteo River mouth was agreed to be somewhat degraded, and the experts considered that turbidity and sedimentation contributed the most to that, and that nutrients made a lesser contribution.

[693] During construction, sediment entrained in stormwater at the site will be discharged via its tributaries to the Hōteo River which flows approximately 35 km to the Kaipara Harbour through a mix of farmland, plantation forest and stands of native forest and scrub.

[694] The catchment of the Hōteo River covers 405 km^2 and it is one of several contributing to the Kaipara Harbour, which has a catchment of approximately 6,000 km^2. Mr Cameron's evidence is that the Landfill Footprint covers some 1039 ha, which is 0.15% of the Hōteo catchment and 0.01% of the Kaipara catchment. From Mr Van de Munckhof we heard that the Hōteo catchment currently contributes approximately 25,600 tonnes of sediment per annum (4% of the total discharge) to the Kaipara Harbour.

Effects on freshwater values

[695] The effects of the project on freshwater values include loss of streams at the landfill site, potential sedimentation of downstream waterways and the potential for discharges from the settlement ponds to increase water temperatures directly downstream.

[696] Loss of the streams will remove all in-stream biota, including fish, invertebrates and amphibians (including Hochstetter's frog). This is a permanent loss.

[697] By far the greatest concern of tangata whenua witnesses was the unintended discharge of sediment or leachate to the Hōteo River and thus to the Kaipara.

Effects on terrestrial values

[698] The creation of the Landfill Footprint and other works will remove indigenous forest and wetland vegetation, exotic-dominated wetland, exotic pine forest, exotic pasture and exotic-dominated wattle forest – all of which provide habitat for fauna as described above.

[699] That is expected to lead to the mortality of an unknown proportion of the flora and fauna present, the degree of loss being dependent on the vegetation type, the mobility of the fauna and other factors. It includes the permanent loss of the stream and terrestrial habitat occupied by Hochstetter's frog in the Landfill Valley, degradation and fragmentation of habitat through vegetation clearance and earthworks activities, and potential sedimentation effects on riparian and stream habitat in other parts of the site.

[700] Other effects include a reduction in the feeding habitat and potentially the roost sites of long-tailed bat, reduction of habitat for threatened wetland bird species including fernbird, spotless crake and bittern, and diminution of the habitat of threatened forest bird species and lizard species, along with the habitat of numerous other species.

[701] Despite the highly modified nature of the habitats involved, the presence of a large number of species and habitats considered *Threatened* or *At Risk* means the successful management of effects to improve biodiversity is of high importance.

Effects on the marine environment

[702] Waste Management accepts there will be sediment discharges from the Landfill Footprint, with initial increases in sediment during construction followed by decreases once all sediment ponds and the management regime are in place.

[703] Dr Makey was of the view that the proposed controls would not be sufficient to protect the longer term and intergenerational values or mitigate the long-term effects of sediment pollution on the Kaipara Harbour.[190]

[190] JWS Marine Ecology, 22 July 2022.

[704] Although unable to give technical comment on the modelling presented by Waste Management in relation to sediment management, Mr Duffy considered that if it is correct, the effect of the project on the zone of influence is likely to be minor. However, he opined that if there was a more-than-minor failure of the landfill's sediment control measures or if the landfill itself failed, the effect on the marine environment could be significant. He also wanted to see more information about the possible sediment reduction measures that would be employed if the sediment balance is not achieved.

Effects management – avoidance, remediation and mitigation

[705] The availability and extent of avoidance, remediation and mitigation was in significant dispute between the experts. Given that all experts acknowledged there remained more than minor effects after all these steps we do not intend to dwell on these differences. Waste Management gave evidence about the steps it had taken to avoid, remedy, mitigate and offset various effects of the activity. Many of those steps were not in dispute.

[706] The focus in this case was how to address the loss of stream length within the Landfill Footprint and the species associated with it. Arguments then fell as to whether some of the remediation and mitigation methods adopted by Waste Management were appropriate or not.

[707] The core position for all of the appellants was that the adverse effects on threatened species had to be avoided. They argued it was not appropriate to use a lower-level method of effects management.

[708] The approach of Waste Management to select this site in the absence of any detailed ecological investigation set the parameters within which the ecology experts could assess the proposal. In addition, they did not assess the cumulative effects of forest clearance on the site as that was being dealt with by Matariki Forests. As a result, there has had to be a strong focus on offset compensation.

[709] In designing the site layout, the Waste Management experts sought to avoid Significant Ecological Areas, Natural Stream Management Areas and Wetland Management Areas. Further, in relation to adverse effects Waste Management responded to concerns raised in the previous hearing and to ecological advice in relation to:

(a) avoiding particular habitats or hotspots of important species;

(b) reducing effects on streams and avoiding clearance of two small wetlands;

(c) minimising the risk of landfill instability by modifying the initial reliance on a temporary pond 4 and toebund in favour of a permanent toebund;

(d) moving the toebund up the valley thereby reducing the footprint of the landfill and the area of vegetation and habitat to be cleared;

(e) moving the main stockpile to avoid high-value kahikatea and pukatea forest;

(f) avoiding sediment runoff to the Northern Valley by re-configuring a ridge-line stockpile and associated drainage system;

(g) moving ancillary infrastructure to avoid higher-value ecological areas and enable the construction of a predator-proof fence;

(h) connecting two parts of the proposed predator-proof fence with a bridge rather than culverts to minimise effects on the stream;

(i) designing improvements to the wetland adjacent to the kahikatea and pukatea forest near the stockpile area by hydrological modification (as necessary) and revegetation;

(j) proposing vegetation clearance management with input from onsite ecologists to minimise damage to adjacent high-value vegetation;

(k) constraining works and vegetation clearance in bird habitat during breeding season in native forest and wetlands, including a 30 m buffer around wetlands.

[710] Restoration works are proposed in the immediate surrounds of the landfill and ancillary structures where screen plantings of native vegetation will be carried out, and bare ground around the landfill will be stabilised with grasses and short-stature native planting.

[711] There are a number of mitigation proposals onsite for the project effects. These include:

- Translocation of fauna and flora. This will include the capture and translocation of Hochstetter's frogs, fish, kākahi and kōura from the Landfill Valley and other streams that will be permanently lost. The destination of the salvaged frogs remained at issue until the end of the hearing when it was confirmed by Waste Management to be the predator-fenced area, to be created as we will describe later, which already contains frogs.
- Replacement planting of wetland vegetation that is not within a Significant Ecological Area to address the loss of wetland extent where there has been partial

removal.

- Provision of artificial roosts or roosting cavities for long-tailed bats as roost trees may be removed from the project area (though none have been identified).
- Planting of 42 ha of native forest around the access road and bin area, along with the entire area around the south-western edge of the landfill and its adjacent onsite roading and pond area.
- Mitigation for the some of the loss of streambed area to address both the quantum of stream habitat and its biota that will be destroyed, including fish, kākahi and kōura. This will see 8 km of permanent and intermittent stream bed improved by planting with riparian vegetation and protected. This addresses 19% of the stream length affected by the project, with the remainder to be offset offsite.

[712] Waste Management's experts concluded that most of the remaining effects could not be avoided, remedied or mitigated on site, due to:

- The desire to minimise the area of earthworks needed to establish the landfill and ancillary facilities;
- The almost complete removal of the vegetation from the Landfill Footprint; and
- The limited area left that could be used for stream and terrestrial mitigation.

[713] We conclude there would be significant residual adverse effects that could not be avoided, remedied or mitigated on the Site, particularly in the Landfill Footprint. We describe these residual effects below and then set out the Effects Management Package that Waste Management proposed to address them and the arguments as to the methodology proposed.

After mitigation, what are the residual adverse effects?

[714] In relation to terrestrial residual effects the following were described by Dr Baber:[191]

- High level of residual effects via vegetation loss: kanuka scrub / forest (5.77 ha), manuka and tanglefern scrub (0.4 ha), raupō reedland (0.06 ha), exotic dominated wetland (1.02 ha), anthropogenic tōtara forest (0.64 ha).

[191] We have corrected these figures to account for additional avoidance measures already described earlier, i.e., we removed the kahikatea swamp forest and reduced the quantum of effect on the exotic wetland.

- High level of residual effects via habitat loss or direct harm: Hochstetter's frog, long-tailed bat, spotless crake, North Island fernbird and copper skink.
- Moderate level of residual effects via vegetation loss: broadleaved scrub/forest (0.04 ha), exotic pine forest floor habitat (114.71 ha).
- Moderate level of residual effects via habitat loss on: Australasian bittern, long-tailed cuckoo, swamp maire, four lizard species and invertebrate species Rhytid snail and potentially kauri snail.
- Low level of effects on forest and wetland birds.
- Low or very low level of effects on a range of other biodiversity values and that appears to include exotic dominated vegetation (1.02 ha of wetland and 114 ha of pine forest).

[715] In relation to freshwater, mitigation will address 19% of the loss of stream length. Loss of the remaining 81% of the stream length is a significant residual effect and has implications for associated freshwater plants and animals, including the water-obligate Hochstetter's frog.

Residual effects management s 104(1)(ba) – offset or compensation?

[716] There was a common view by all parties, and it was not argued before this Court, that there were significant residual effects. The question as to whether the effects should be avoided was at the forefront of the argument by the parties before this Court. The view of the Director-General, supported by Royal Forest and Bird, was that in respect of the Hochstetter's frogs, at least, the effects could not be avoided and it is not possible to then remedy, mitigate, offset or compensate for these.

[717] A number of experts appeared to consider that effects which cannot be avoided, remedied or mitigated on the landfill Site could be addressed by offset or compensation, presumably on the assumption that remedying or mitigation, then offset, then compensation substitute for avoidance. In this case, the avoidance suggested by the appellants was that the site not be used.

[718] For **offsetting**, the principles are set out in the AUP's Appendix 8 Biodiversity Offsetting, in NPS-FM 2020 for aquatic effects (version February 2023), and most recently in the NPS-IB 2023. They require (among other things) that an offset be measurable or quantifiable in advance such that the degree to which it will achieve its purpose can be known. Its purpose is to achieve at least no net loss of biodiversity and preferably a net gain.

[719] Situations arise in which the outcome of an offset activity cannot be quantified, such as when fauna species are difficult to survey and enumerate in advance of the effect occurring or to monitor after an offset activity has been applied, or if their response to a certain habitat cannot be predicted. Cryptic and/or very mobile species, such as the frogs, lizards, bats and invertebrates that are found on the Waste Management site, are typical of such situations. In those circumstances **compensation** may be available.

[720] We note that these provisions are not mandatory in application but are to be had regard to under s 104(1)(ba). Whether this Court is likely to consider such approaches will turn on a number of factors but must be guided by the objectives and policies we have discussed. In relation to the effects on site (as opposed to discharges), the objective must be to maintain or enhance biodiversity and mauri of the area. In that regard we would see the relationship of tangata whenua with the Site and the species as being a matter of importance also.

[721] We were presented with models to calculate offsets and compensation, develop an effects management package and estimate likely outcomes. It was fundamental to a number of appellants' positions that they did not see this as appropriate, because they were not satisfied that the calculations were reliable and would result in a positive outcome for the species under consideration. They submitted consent should be refused because of adverse effects on significant species and the loss of some 12 km of streams. They relied on the *avoid* policies (AUP E3.3 (17) and (18)).

[722] To address residual effects on native forest loss a biodiversity offset accounting model was used by Dr Baber to show that the planting of native trees to offset the loss of those greater than 15 cm in diameter would result in a net gain for all species, using the known basal area loss and calculated basal areas over 15 or 20 years based on known growth rates for each species. This model could not be used for many of the fauna species of interest as the offset method relies on quantitative data (such as population data from both before and after the offset activity) that the experts agreed would be very difficult or impossible to obtain.

[723] Dr Baber used a biodiversity compensation model (**BCM**) to calculate compensation for the loss of terrestrial habitat; wetland biodiversity in relation to the loss of wetland habitat on species of conservation interest including spotless crake, fernbird and Australasian bittern; Hochstetter's frog in relation to the loss of pine-forest stream habitat; and long-tailed bat and copper skink in relation to the loss of pasture and exotic and native vegetation. The BCM takes a qualitative approach.

[724] The BCM model was used to estimate the area that would be needed to enable the existing populations in a proposed compensation area to expand to make up for the losses suffered at the Site.

[725] The compensation modelling predicted there would likely be no net loss of ecological value but likely a net gain in all the species and communities Dr Baber examined, as a result of the Effects Management Package he and other ecologists for Waste Management designed. That includes predator-proof fencing, pest control, and other activities.

[726] The use of the compensation modelling method was criticised by other ecologists but the outcome of his calculations assisted Waste Management in confirming the design of the Effects Management Package.

[727] Based on the likely positive effects shown by his modelling Dr Baber was confident in the outcome of the Effects Management Package, saying *as far as I am aware and relative to the level of effects on wetland and terrestrial ecology values, this is the most comprehensive residual effects management package proposed for any RMA consent application*.[192]

[728] His confidence was not shared by other expert witnesses, and the Director-General did not accept that the compensation model was acceptable as there was no way to determine quantitatively that its outcome would be as predicted and this posed too high a risk to the species of interest.

[729] The majority decision of the Council found that Dr Baber had demonstrated there would likely be benefits arising from the Effects Management Package, with some provisos regarding wetland management. The minority judgement was not satisfied that such an outcome could be achieved. In both judgements the level of certainty and the period for achievement are unclear. Furthermore, there was no discussion of cumulative effects of harvesting on the Site or effects of climate change.

Problems with offsets and compensation

[730] As we have already identified, the core issue is whether we are satisfied that the objectives and policies of the AUP and superior documents are going to be achieved by the proposals before the Court.

[731] Clearly, avoidance is the most certain outcome and from there on there are decreasing levels of certainty about the outcomes. Dr Baber referred to likely a net gain

192 Dr Baber, Rebuttal, EVD 2554.

from the compensation proposed, which indicates to us that it is more probable than not that there will be an improvement in 10 years' time. This is to be compared with the immediate loss of an estimated 1000 frogs plus other stream habitat and other biodiversity including bat, lizards, fish, etc. The Court must be satisfied that a net gain outcome will be achieved and is measurable over a reasonable timeframe. This inevitably requires that risks as to the outcome are addressed by contingency planning to assure the outcome.

[732] We understand that any mitigation project, including riparian or terrestrial planting, fauna translocation and habitat restoration, will take time for the benefits to be realised and that is taken into account in the modelling. We also understand that the modelling itself is used to estimate the time that will be needed for a positive outcome to be observed. Where there are doubts they must be addressed by providing alternative methods to assure the outcome.

[733] We are aware that a population increase may be very difficult to demonstrate, the issue being the cryptic nature of the frogs and the inability to reliably find them in repeated monitoring rounds.

[734] We conclude that the differences between the experts as to the value of the model predictions hinge on their views of the reliability of the outcomes for the stream loss (being offset) and for the various other species and habitats. Certain losses will occur from this project. We conclude that the proposal needs to satisfy us that the frog population in the predator-controlled area is maintained in the short term, 3-5 years and improved in the medium to long term, say 6-8 years. To rely on offset or compensation we need to be satisfied that avoidance, remediation or mitigation have been carried out to the greatest degree possible. In evaluating the lower order outcomes (especially for threatened species) the Court will be looking for the best possible certainty of outcome over the shortest possible period. Again, this is a matter for pragmatism and proportionality.

The Effects Management Package

Freshwater streams and biota

[735] Waste Management proposes that the residual effects relating to stream loss be offset by the protection and riparian planting of streams elsewhere in the Hōteo catchment (or the Kaipara catchment if sufficient sites in the Hōteo catchment cannot be found). As described earlier, the quantum of riverbed that would protected by fencing and riparian planting determined by the SEV and ECR method was approximately 50-60 km of stream length.

[736] Approximately 8 km of riparian planting will be undertaken as mitigation on the Waste Management property, along with 11 km of stream compensation (protection in perpetuity) on site. In addition, the riparian protection and planting of the Northern Valley stream was proposed during Waste Management's closing submissions (although the details of this were not yet clear). We think this would be considered compensation, unless it is offered as an offset with the necessary pre- and post-management detailed measurement, and we have no detail as to that.

[737] The locations for the offset stream enhancement and protection work in the Hōteo catchment have yet to be agreed, and we understand that landowners are reluctant to make agreements in advance of the project's resource consents being granted.

[738] While the methods are broadly understood to include a stock-fenced, covenanted 20 m riparian zone along both sides of the streams, the details as to the inclusion, treatment and management of headwater streams and of flood-prone areas such as Wayby Valley have yet to be determined. As is recognised by all parties, stock-fencing is required by statute and this does not form part of the offset. However, we acknowledge that a funding source will make the fencing more likely in the short to medium term.

[739] We also note that the KMR project is providing funding for similar works throughout the Kaipara Catchment including the Hōteo. It provides a 50% subsidy for similar works to that proposed. Given the thousands of kilometres of waterways in the catchment we see the projects as complementary, with the Waste Management proposal focused only on the Hōteo.

Terrestrial and wetland ecosystems and their fauna

[740] The Effects Management Package comprises pest and predator management on the Waste Management site to protect the remaining indigenous vegetation and natural streams within it as well as revegetation of farmland and the protection and enhancement of wetlands. The package has several components:

(a) A 126 ha **Wayby Valley Sanctuary** (provisionally named) near the western edge of Waste Management's land, and close to the northern boundary of Sunnybrook Scenic Reserve. The sanctuary is to be surrounded by a 7.6 km predator exclusion fence like those built and operated elsewhere in New Zealand. A long-term eradication programme within the sanctuary will target all mammalian pests (cats, rodents including mice, mustelids and possums and other known pests).

The sanctuary would encompass 41.9 ha of existing indigenous forest, 14.72 ha of wetland habitat, 26.01 ha of pine and wattle (exotic-dominated) forest, and

38.86 ha of pasture that will be revegetated with forest, wetland and riparian species selected to suit terrain and hydrology. At the point where the access road to Landfill Valley would cross a tributary of Waitaraire Steam, the sanctuary would be divided to allow for bridge and road construction and operation, whilst preserving the predator-proof nature of the fences.

(b) **Native vegetation** would be planted over 88.76 ha of Waste Management land to the north of the Wayby Valley Sanctuary. This would include 38.36 ha of terrestrial restoration (native trees and shrubs), 5.31 ha of wetland revegetation and enrichment planting, and 45.09 ha of riparian planting along existing watercourses.

It is not clear to us what the final vegetation cover for the main soil stockpile, the topsoil stockpiles or the clay borrow and stockpile area will be. The clearance of those areas may also be mitigated by replanting with natives at closure of the site but we do not have that detail.

(c) **Mammalian pest control** over the remaining wetlands, indigenous forest and revegetated areas described in (b) above, along with the adjacent pine forest (103 ha) and native forest (17.82 ha), to achieve stated pest densities for each vegetation type /area. We note that *Figure 14 Forest and Wetland Compensation Package* shows the pine forest areas surrounding the landfill and ponds and extending down the left bank of the *discharge tributary* to be subject to mammalian pest control (with no target density). It is unclear whether this vegetation is to be pine or native vegetation, as it is native vegetation that is shown on *Figure 8 Site-wide Ecological and Landscape Plan (Graphic Supplement).* If this is native regeneration it is unclear why it is not subject to predator control with target densities. This requires clarification.

(d) The area to the north of the Wayby Valley Sanctuary to be planted in pine forest is shown on *Figure 8*. We understand this pine forest is part of an agreement with the forestry operator in part mitigation for the loss of some parts of the plantation. We presume that this will also be subject to the same mammalian pest control to complete the coverage of the area surrounding the wetlands, but it does not appear to be shown as such on *Figure 14*.

In closing, Mr Matheson proposed the Northern Valley would be subject to additional protections. We understood the whole of the Waste Management landholding was to have mammalian predator control.

(e) **Mammalian pest control** over Sunnybrook Scenic Reserve to stated densities, (subject to the Director-General's approval). This would create a continuous pest-control coverage from the reserve through to the exclusion-fenced area, also to the adjacent Waitaraire Tributary Block which is on Waste Management property, and right across the western portion of the site, essentially wrapping around the Wayby Valley Sanctuary.

[741] The evidence provides information on the specialised environmental management to be applied to streams to encourage the development of frog habitat, including the creation of small rocky waterfalls, log refugia and the like.

Remaining issues

[742] The issues in relation to the Effects Management Package remaining at the end of the hearing can be summarised as follows.

(a) **Freshwater:** Does the Effects Management Package adequately address the significant adverse effects of removing 12.2 km of intermittent and permanent streams from the site?

(b) **Terrestrial:** Does the Effects Management Package proposed for terrestrial and wetland habitat and species ensure that biodiversity values are maintained or improved?

(c) **Hōteo River and Kaipara Harbour:** Is there potential for adverse ecological effects on the Hōteo River and Kaipara Harbour as a result of sediment, leachate or other discharges and is the risk of such acceptable?

(d) **Tangata whenua relationship values with freshwater and other taonga**.

Freshwater

[743] The Director-General's overall submission was that consent for the proposal should be declined because, among other reasons, the outcome of the offset for stream loss is uncertain. Counsel submitted that the SEV and ECR methods do not account for all ecological values including extent, structure, biodiversity and conservation status. Dr Clearwater and Ms McArthur expounded on the matter. Ms Quinn for Waste Management addressed these concerns in considerable detail.

[744] We note that the SEV method and ECR methods have been in use since circa 2006. The Auckland Council's Technical Report 2001/009 (reprinted 2015) provides the methods used for assessing the ecological functions of Auckland streams. It has been

used frequently in New Zealand, including before this Court, and the method has been published internationally. No other method of assessment has been suggested by the appellants' experts.

[745] The freshwater experts agree the EcIAG provide a framework for assessing the level of effect of an activity both before and after the management of effects (under the effects management hierarchy), and that the Guidelines consider both ecological values and the magnitude of effects.

[746] There are limitations to the EcIAG where large and complex projects are being considered; and expert judgement is required. Dr Clearwater considered there were additional limitations to those discussed and there remained disagreement on the magnitude of effects Ms Quinn had described.

[747] We conclude that that the SEV and ECR parameters and modelling achieve a reasonable determination of stream length/area to offset the loss of the streams from the Landfill Valley. We acknowledge the limitations of using any model, and these need to be viewed in a pragmatic and proportionate way. We find the arguments over the modelling to be unnecessarily technical. The factors in the model appear sensible, the outcomes reasonable, and they help to formulate a response. Here, the response is to improve over four times the length of stream lost.

[748] Ms Quinn included only the permanent and intermittent streams in her calculations of stream length and stream-bed area. The methods used to classify the streams and the length of streams affected were agreed by the experts in conferencing.[193]

[749] Ms Quinn did not include ephemeral streams, saying (and illustrating with photographs) that they provide an overland flow path for only a short period after rainfall rather than providing ongoing freshwater habitat. Two of the appellants' witnesses disagreed, considering that such areas do provide freshwater habitat of value, particularly in the ephemeral upper headwaters (which if added would increase by around 3 km the total stream length to be offset). The two witnesses conceded that they were not aware of any offset or compensation projects that included ephemeral streams.

[750] We conclude that any streams included in the offsite (or onsite) offsets will also be subtended naturally by ephemeral flow paths within the 20 m of riparian vegetation that is planted around the streams. Where the headwater reaches of streams are included in the offset, the ephemeral upstream reach would at least partly be protected within the fenced area. Such ephemeral flow paths will, if the mitigation and compensation works

193 Freshwater ecology and offsetting Joint Witness Statement, 5 May 2022.

are successful, have their values enhanced and protected. In that sense, protection of ephemeral reaches of streams in the offset would provide considerable similar habitat. We conclude the use of permanent and intermittent streams is appropriate at least in this setting.

[751] The experts agreed on several matters regarding salvage and relocation of freshwater fauna – in short:

- They agreed freshwater fauna salvage should be carried out.
- There are few data available on the success or failure of such salvage for mitigation relocation.
- Monitoring such success / failure is challenging.
- Improving access to the streams where salvage will occur will improve success.
- Fish should be prevented by instream barriers from making their way back upstream once removed.
- Observing fauna behaviour during and after salvage and translocation may provide useful information and potentially improve outcomes.
- Changes to the draft Native Freshwater Fish and Fauna Management Plan could be made to improve confidence in the methods and outcomes.
- Macroinvertebrate injury and mortality are not accounted for in the assessment of residual adverse effects and remain unaddressed.

[752] There were differences in opinion as to the degree of injury and mortality of fauna during salvage and translocation, and the likely success of translocation was also at issue. Ms McArthur and Dr Clearwater were of the view that effects on macroinvertebrates have not been accounted for.

[753] Our understanding is that none of the witnesses is proposing the salvage and translocation of macroinvertebrates that must inevitably be lost when streams are reclaimed. We conclude that the proposed stream protection and riparian planting will establish new habitat for macroinvertebrates, fish and other fauna as a component of the offset for the acknowledged loss.

[754] It cannot be known whether the same complement of species will colonise the protected reaches. The intended improvement of water quality in the stream reaches to be rehabilitated and enhanced can be expected to encourage recolonisation by a variety of macroinvertebrate species and fish that favour that improved stream water quality.

[755] The selection of offset stream reaches will be crucial to providing habitat of the necessary value. We presume that headwater and tributary streams will be among those selected and will look for this in conditions if consent is pursued.

[756] Most of the stream protection and enhancement required will be off site, with the final area of stream bed to be determined once the stream locations for the offset and their values have been determined.

[757] Waste Management has not secured landowner agreements for the stream reaches it has identified but indicated it has developed relationships with some landowners and its expectation was that agreements would be finalised if resource consents were to be granted. Waste Management submitted that there is no requirement for such agreements to be in place prior to the granting of consent.

[758] The Director-General's experts strongly contested that without definite locations for stream offsetting in the surrounding catchment there was insufficient certainty as to its outcome.

[759] During the hearing[194] Waste Management strengthened the conditions such that it must be able to demonstrate that there is land available for the offset (via contracts or third-party agreements) prior to initial works being started (i.e., before a sod is turned), thus overcoming the lack of certainty as to the provision of the offset and its location, length and values. This was supported by Ms McArthur subject to the final wording. However, in closing submissions the Director-General was still unconvinced as to whether the wording (and the offset) was secure.

[760] We conclude that if consent is otherwise appropriate, the revised condition should require contracts to be in place.

Interface with KMR project

[761] Kaipara Moana Remediation came into being in July 2021 and is a collaboration of landowners, industries, mana whenua, land-care groups, conservation boards, schools and Crown entities including the Department of Conservation, Ministry for Primary Industries and Ministry for the Environment. We understand that $300 million has been made available to restore and revegetate streams to minimise sediment generation, for remediation of the Kaipara catchment over a ten-year period.

[194] Following a proposed change to condition 123 proffered by Mr Lowe.

[762] At Te Hana Marae we heard from Mr William Wright (Ngāti Whātua) that the fund is intended to provide half of the costs for remediation on a property, with landowners contributing the other half. Mr Wright remarked on the difficulty of finding landowners prepared to fund, for example, fencing of the wetlands or waterways due to the considerable financial cost involved.

[763] The offset for Waste Management's stream loss requires some 50-60 km of stream length, intended to provide a like-for-like offset to the streams destroyed.

[764] Ms Quinn was confident that 50-60 km of stream reaches with the necessary characteristics would be available to Waste Management on the Hōteo without interfering with KMR's initiatives. Unlike the KMR sites, however, Waste Management's landowners will benefit from the 100% funding it proposes.

[765] Waste Management's offset project and the KMR project face similar issues, particularly in relation to finding sites which will not be continually affected by flooding and the destruction of fences and the riparian plantings themselves as has occurred in the past.

[766] Rather than see stream enhancement and protection in the Hōteo catchment carried out by two parties (KMR and Waste Management), the Court's clear preference is for Waste Management to contribute to the KMR effort by providing the other half of the funding required for the KMR-funded stream enhancements, up to the value of the costs Waste Management would encounter if it carried out the revegetation works separately on its own offset streams. With 20 m of riparian planting on either side of 50 km of stream for the offset programme (or more if the length is 60 km) this gives 200 ha to be planted by Waste Management. At an estimated cost of $50,000 per ha for the planting that amounts to $10 million that could be contributed to the KMR programme. This would be subject to a satisfactory agreement being reached by the two parties.

[767] Waste Management's contribution would benefit KMR by encouraging landowners to come on board its scheme without being faced with a significant cost outlay; in addition, the knowledge and expertise of both parties would contribute to betterment of the project overall.

[768] We envisage KMR would be the lead in the project and as a result, that there would continue to be significant input from the Kaipara Uri (Te Uri o Hau, Ngā Maunga Whakahii and Te Iwi o Ngāti Whātua) who are lynchpins in the KMR project, as well as from Ngāti Manuhiri through its future involvement in the Waste Management offset and compensation projects, as appears to be envisaged. This will need to be costed further if

consent is granted.

Stream temperature

[769] Dr Clearwater was concerned that following a period of hot weather, when water in the settlement ponds and wetland would have heated up, a sudden large rainfall event could cause warm water to be discharged to Eastern Stream at first flush with the potential to adversely affect stream biota. Mr Van de Munckhof opined there will be an 80% vegetation cover within the wetland (Pond 1), and although he did not model water temperature specifically for Pond 1 he said he had reviewed the GD05 methods to mitigate water temperature and confirmed that the methods proposed were consistent with them. Monitoring upstream and downstream of the discharge to Eastern Stream is now proposed and should enable temperatures to be checked.

[770] Ms McArthur confirmed that the monitoring of water temperature proposed upstream and downstream of the discharge location would be helpful in showing a temperature rise if it did occur. She acknowledged that in a 95th percentile storm a lot of water would be flowing through the catchment and that would likely mitigate any temperature effects.

[771] In relation to Waitaraire Stream, concerns were expressed by the same witnesses that warm water running off the Access Road and bin exchange area would jeopardise critically endangered species immediately downstream. Monitoring upstream and downstream of the Access Road and bin exchange area is now proposed. Both Dr Clearwater and Ms McArthur had agreed that would be a useful addition to the monitoring programme. If adverse effects on water temperature are noted, this could be addressed either by amendments to management plans or review of the consent.

Terrestrial

[772] Matters on which a level of agreement was reached between the experts include the residual effects on native forest and wetland vegetation, wetland and forest birds, long-tailed bats, lizards and pine forest habitat, as described briefly below. The issue as to the use of the compensation model was never resolved.

Native forest and wetland vegetation

[773] The residual effects of the loss of native forest vegetation will be offset, primarily adjacent to wetlands or streams within the Wayby Valley Sanctuary and in two areas of the Western Block. The loss will be up to 1,240 trees, and the offset will see 79.34 ha of terrestrial vegetation planted, many times the area lost. In the ecologists' caucusing of

11 August 2022 there was no disagreement about either the wetland or terrestrial revegetation proposed. All agreed on methods and principles to achieve appropriate biodiversity outcomes for both, along with the need for robust monitoring and the methods to be used.

Wetland and forest birds

[774] It seems to be agreed by experts that the level of residual effects on wetland and forest birds will be low. Most of the native forest birds were considered common, while the nationally *At Risk* species kākā and kākāriki are likely to be only occasionally present. To minimise effects on forest and wetland birds Waste Management proposed a range of constraints (as conditions) that include avoidance of habitat clearance during the bird breeding season, an earthworks buffer along the wetland edge during breeding season and restriction of operating hours for construction during the breeding season of particular species. It was agreed that the residual effects package would be adequate for managing the effects on them.

[775] There was general agreement among the relevant ecologists that there were well-tested methods for monitoring wetland and forest bird populations and they agreed on details of the monitoring required, however noting that the advice of a biostatistician would be sought on some matters.

Long-tailed bats

[776] In caucusing the four experts on long-tailed bat agreed that because of the highly mobile nature of the animals and their natural variability in activity levels, acoustic monitoring is not likely to assist in determining any effects of the project but could be used to monitor changes in spatial distribution and habitat use. They agreed that a biostatistician would need to be involved if it was intended to monitor such changes. There was no discussion about the proposed conditions that relate to bat monitoring, and we presume the experts are satisfied with them.

[777] Two of the experts considered the money to be set aside for bat monitoring could be better used for bat conservation or research. We note there is no requirement for Waste Management to allocate funds for monitoring or research for its own sake, and careful consideration should be given to the need to monitor in every case (particularly when the value of the outcome is uncertain) given the expense involved. We suggest further thought be given to this proposition if consent is otherwise appropriate.

Lizards (geckos and skinks)

[778] The four lizard experts agreed that the salvage and relocation of lizards and their use of refuges should be monitored along with the outcome of the mammalian pest eradication and control.

[779] They agreed it may be difficult to interpret the outcomes of monitoring given the biology, cryptic behaviour and low density of the lizards, except copper skink, but that monitoring may provide useful information and should be carried out. We note further consideration could be given to the need for monitoring species other than copper skink unless there is a reasonable likelihood of obtaining useful information.

Terrestrial invertebrates

[780] During caucusing two ecologists agreed that rhytid snails, kauri snails and velvet worm should be salvaged and translocated from the Landfill Valley.[195] They said:

> We agree that a comprehensive salvage and relocation program is warranted. We agree that it is unlikely to reduce the overall level of effect since not all terrestrial invertebrates will be captured and there is uncertainty around the degree of survival.
>
> We note that the likelihood of success associated with invertebrate relocations is largely unknown. However, we note that the proposed approach to terrestrial invertebrate salvaging and relocation may generate a higher likelihood of success compared to most mitigation relocations.

[781] It is not clear whether a concerted effort is intended to be made to search for these invertebrates or if salvage and translocation would apply to those found incidentally during the searches for frogs and lizards. The latter seems appropriate to us given it is unlikely that the level of effect on them would be reduced. Kauri snails have been mentioned as having a possible presence, though none were seen during the snail surveys as we understand it. If consent is otherwise appropriate, further consideration should be given to the search effort proposed.

Pine forest habitat

[782] Clearance of the pine forest will be carried out ahead of the normal forestry cycle and its effects are not included in the assessment of effects carried out by Waste Management, however Dr Baber included in his assessment the loss of habitat of creatures that inhabit the floor of the pine forest, including skinks, Hochstetter's frog and invertebrates. The pine trees will be mainly replaced through replanting of pines on the Springhill site near the Wayby South Wetland, the protection of which is part of the Effects Management Package. As above we presume this area will be subject to pest

[195] JWS Lizards, Frogs and Invertebrates 13 May 2022.

management similar to that in the surrounding area outside the predator fence.

[783] We note that any harvesting of the exotic forestry beyond the Landfill Footprint will also have an adverse effect on the same species. Whether this requires a Wildlife Act permit or resource consent was unresolved during the hearing.

[784] The witnesses have discussed the above matters and we conclude that further careful consideration of the need to monitor cryptic fauna will be required if consent is otherwise appropriate. We presume that further conditions would cover the matters agreed (subject to further review).

[785] Matters that remained in dispute were, to a large degree, about Hochstetter's frogs.

Hochstetter's frogs

[786] By the end of the hearing, despite continued misgivings about the use of the biodiversity compensation model to predict the outcome of predator control in the Wayby Valley Sanctuary as described in the previous section, and the difficulties in monitoring the outcome for some species (frogs, bats and lizards in particular), there was a level of agreement between the experts that the effects management proposed could be effective for bats, lizards, birds and wetland vegetation, subject to the details of the mitigation and appropriate monitoring thereafter, and to the conditions proposed.

[787] The Director-General's closing submissions (supported by Royal Forest and Bird) continued to oppose the project because there is a high level of uncertainty as to whether the proposed offsets and compensation will effectively address biodiversity losses. The uncertainties expressed are almost all about Hochstetter's frog.

[788] The appellants' submissions raised the following matters:

- The efficacy of the proposed mammalian pest control to generate sufficient biodiversity gains over the predator-fenced area within which the pests are intended to be eliminated.
- Whether mice can be controlled to a low enough level in the predator-fenced area to render their potential effects on Hochstetter's frog nil or negligible.
- The use of untested methods of habitat creation (such as the use of rocks to create new stream-edge rocky cascade habitat and other manipulations).
- The unknown carrying capacity of frogs in the predator-fenced and Sunnybrook Scenic Reserve areas and whether the addition of frogs salvaged from Landfill

Valley will risk the mortality of the existing frogs in either area by exceeding the habitat's carrying capacity.

- The paucity of demonstrated benefits of predator control for frogs from previous research.
- The degree of ongoing management and oversight by regulatory authorities required where offsetting and compensation are used (with a preference for avoidance at the site selection stage).
- The inability to demonstrate statistically an increase in the frog population if frogs are translocated to those areas where frogs are already present; and the need for a trigger to initiate adaptive management if a population increase is not being demonstrated.

[789] Waste Management's closing submissions responded as follows:

- There is a very limited number of rocky cascades in Landfill Valley [i.e., there is a limited amount of 'ideal' habitat for frogs there].
- The proposed predator-fenced area and Sunnybrook Scenic Reserve contain habitat and rocky cascades of significant value to frogs, plus new rocky cascades will be created.
- The predator-fenced area will have the proposed high level of protection (amounting to elimination) in perpetuity or until it can be shown that a 40 km pest-free buffer exists around it (on the premise that other large-area or national pest control initiatives may be implemented successfully in the longer term).
- The predator and pest control methods are proven – for both predator elimination in the fenced area and for intensive pest control in the unfenced Sunnybrook Scenic Reserve area.
- Mouse control is proposed and the predator management plan, which includes mice, is comprehensive and detailed.
- If 500-2000 frogs are present within the approximately 1.9 km length of stream estimated to support them, at a landscape scale that is 0.8% of the habitat of the Southern Clade of Northland Evolutionarily Significant Unit of Hochstetter's frog and is mostly in pine forest, which is less suitable habitat for the frog due to periodic forest harvesting and disturbance of the frog's riparian and aquatic habitat.

[790] Considerable evidence was presented in relation to the above matters and we discuss it below under a series of questions as to the frogs' distribution, abundance, habitat, behaviour, protection and monitoring.

[791] Three surveys completed since 2019, most recently in 2022, show that Hochstetter's frog is widely but sparsely and patchily distributed across the Waste Management land holdings in pine forest including in Landfill Valley. Previous surveys by the Department of Conservation demonstrate they are found scattered through the Dome Forest in both native forest and pine forest.

[792] Dr Baber's Hochstetter's frog survey report (2022) says that 1,950 m of stream reach in the Landfill Valley was searched with over half the frogs (56.7%) found under vegetation with fewer (23.6%) under rocks or woody debris and the least in crevices. Four times as many frogs were found in wattle and native forest than in pine forest. The total number of frogs recorded over three surveys in all surveyed locations was approximately 173, on our count.

- In the Landfill Valley pine forest 15 frogs were found over three surveys; in the pine forestry blocks 17 were found over two surveys;

- In native forest on the margins of the pine forestry blocks 25 were found in one survey. In the proposed predator-fence area 55 frogs were found over three surveys, mostly at the eastern end and some in small eastern tributaries of the Wayby South wetland and in wattle forest as well as regenerating native forest.

- In the north-western native forest within the Waste Management site 19 frogs were found (16 in 2022, three in the two other surveys). In Sunnybrook Scenic Reserve 42 frogs were found in 2022.

[793] Given the scale of surveys and the cryptic nature of the species, estimates of frog numbers in the Landfill Valley must be broad. We conclude that a loss of around 1,000 Hochstetter's frogs is a reasonable estimate.

[794] The Director-General's experts considered there is uncertainty about the recovery of frogs in the Wayby Valley Sanctuary and the other predator controlled areas, raising concerns about:

(a) the effectiveness of predator control;

(b) the availability of sufficient habitat for a population increase; and

(c) the degree to which the frogs will use restored and revegetated stream habitat.

[795] We were told that a study regarding Hochstetter's frog in a predator-fenced area at Maungatautari Mountain found, over a three-year period following pest eradication, a four-fold increase in both the number of frogs and their spatial extent. Further, pest control at Maungatautari did not include the House Mouse which was present in low numbers. The study also remarked that the stream-side habitat Hochstetter's frog prefers was *extremely dynamic* with the *thorough reworking of streamside litter and rocks by flood events*. The authors cited a previous paper that indicated the frogs move away from streams during floods and can disperse long distances away from waterways.[196]

[796] The lowland streams in pasture that are to be revegetated within the Wayby Valley Sanctuary may take some years to [or may never] develop the type of hard-bottomed habitat that the frogs are said to prefer. However, Mr Dylan van Winkel has observed that Hochstetter's frogs are not limited to shaded bedrock streams, are tolerant of lower value habitat, and can disperse through unshaded pasture streams and where dense grass cover shades the stream channel. He cited other studies that have suggested frogs can move widely within and between streams and through marginal terrestrial habitats. It is clear, however, that frogs must at times be close to streams/ water as their life cycle depends on that.

[797] The above goes to our understanding of the potential for frogs to move around, and potentially to establish and multiply if translocated into areas of suitable habitat where recent surveys found few frogs. In the Maungatautari case the absence of frogs in the first survey from habitat that they occupied in the second survey suggests that the reason for their absence was not lack of suitable habitat but their vulnerability to predators.

[798] In the Wayby Valley Sanctuary case we must ask whether it is safe to assume that frogs translocated into appropriate habitat in that area will not adversely affect an established population if present.

[799] In relation to the potential number of frogs that may be salvaged and translocated, Mr van Winkel noted that Dr Baber's high residual effect for frog demise is based on the conservative assumption used in the compensation modelling that there will be limited (or zero) success of translocation. Dr Baber noted that mitigation-driven herpetofauna translocation is generally considered to have around 15% chance of success, citing Dr Jennifer Germano's evidence from the Council hearing evidence in that regard.

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[196] Longson, C. G., Brejaart, R., Baber, M.J., Babbitt, K. J. *'Rapid recovery of a population of cryptic and evolutionarily distinct Hochstetter's frog, Leiopelma hochstetteri, in a pest-free environment'* (2017) 18(1) Ecological Management and Restoration 26-31.

[800] Wayby Valley Sanctuary is unlikely to be at carrying capacity for Hochstetter's frog because the area has had no predator control, such that translocated frogs may be supported there. The ecologists agreed that the proposed predator-fenced area currently supports the full range of mammalian predators that are present in the Auckland region, that they are likely influencing the population of frogs at the site, and that, at a high level, revegetation and pest management are beneficial to Hochstetter's frog.

[801] The existing frog population is expected to increase following pest control as has occurred at Maungatautari. We conclude it likely that the revegetated tributaries and slopes above the wetland area within the fence will also, in time, afford further habitat for frogs. In the longer term, the provision of new habitat to the south of the Wayby South Wetland may be expected to provide habitat for frogs.

[802] We conclude that the rate of population increase in any of the areas subject to the pest control programme is unknowable. Predator control and habitat creation are both well-used weapons in the arsenal available for species protection and recovery. However, in our view frog population recovery from the landfill losses needs to be progressing in the short term with demonstrable population increases in the medium term (which we suggest appears to be 6-8 years).

[803] Waste Management's management plan provides several levels of defence against predation both within and outside the property, as described by Dr Helen Blackie and Mr Roger MacGibbon (both called by Waste Management). These include:

- The fence itself, 7.6 km in length, designed to recognised standards proven successful in NZ (including at Karori Wildlife Sanctuary, Mt Bruce Wildlife Centre, Cape Kidnappers Sanctuary and Maungatautari Sanctuary) by an experienced practitioner. It is divided into two cells to allow the construction of a bridge on the Access Road to the landfill.

- Predator control within the fence to a high level to eradicate pests at the outset, including mice, with ongoing controls and monitoring to prevent incursion, and to identify and eliminate intruders should they penetrate the fence.

- A detailed pest monitoring programme to ensure pests do not re-invade and to respond to any incursions.

- Additional predator control to achieve the predator density reduction targets set for Sunnybrook Scenic Reserve, Waitaraire Tributary Block and along the western edge of the predator fence, which effectively encircle the fenced area to minimise the potential for reinvasion.

- The pest management programme is to run for the life of the landfill and in perpetuity or to a time when national or regional predator control programmes have been developed to the extent that a 40 km predator-free buffer around the pest management area can be demonstrated. We heard evidence from Dr Blackie as to the progress being made in developing such large-scale predator control, but be that as it may, the in-perpetuity control is proposed to be enshrined by conditions of consent. We note the intended involvement of Ngāti Manuhiri in the ongoing work.

[804] The pest control experts agreed that *the animal pest control proposed for this project is at a high standard and of high intensity*.[197] The ability of the predator fence to exclude mice was raised as an issue, although Dr Germano said that some recent research may indicate a more promising outcome than she had previously entertained. Mr MacGibbon's evidence is that mice will be excluded through the use of appropriate fence materials, and Dr Blackie has specified pest protection to eliminate mice and monitor for them.

[805] We conclude that frog populations in the predator-fenced area and in the Sunnybrook Scenic Reserve, both to be subject to increased predator control, will improve. The issue is over what period a net gain will be achieved over the loss from the landfill area.

How will Waste Management demonstrate an increase in frog numbers or trigger contingency steps?

[806] The population of existing frogs in the predator-fenced area is expected to increase, and monitoring is to be carried out there to assess the outcome of predator control. The translocation of additional frogs to that area from the Landfill Valley poses some issues for the success of monitoring the existing population and also for the translocated population (of whatever size that may turn out to be).

[807] After receiving advice from an independent statistician, the ecologists confirmed[198] that it would be possible to design a monitoring programme to allow statistical analysis of frog numbers in the predator-fenced pest eradication area and the pest control sites (Sunnybrook Scenic Reserve and on Waste Management property) – but only if frogs were **not** translocated from the Landfill Valley to those areas. They agreed that it would be preferable to translocate the frogs elsewhere, to enable the statistical method to be adopted. Hauturu|Little Barrier Island was posited as a release site.

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[197] JWS Pest Control, 18 August 2022.
[198] JWS Ecologists, 10 November 2023, at 1.1.

[808] Ngāti Manuhiri did not support the translocation of frogs to Hauturu or out of their rohe and the Director-General respects that position. Ngāti Manuhiri stated in their closing submissions that, according to their tikanga, the predator-fenced area is an appropriate site for release of taonga species. In Waste Management's closing submission Mr Matheson said the company has decided to release frogs into the predator-fenced sanctuary (despite the confounding effect that will have on the statistical analysis of its monitoring results).

[809] Ngāti Manuhiri's response is an important consideration, in part because of the previously limited to no input Ngāti Manuhiri and other iwi have been able to have as to the discussion of ecological values and management in their rohe. Also, Dr Laurence Barea (called by the Director-General) and Dr Fleur Maseyk (called by Ngāti Whātua) considered stake-holder involvement in decision-making to be a preferred means of determining appropriate management when a quantifiable offset cannot be calculated.

[810] In this instance, despite the confounding effect translocation of frogs will have on the statistical design proposed for monitoring, engagement with Ngāti Manuhiri during the hearing has led to a decision with which they are satisfied, and that the Director-General appears to have accepted (if that is what respect means in this context). A practicable means by which to monitor the frog population and interpret the result is now needed.

[811] A monitoring programme is provided in proposed condition 119. The monitoring proposed would quantify the relative abundance of frogs found within 96 stream reaches in sites including Landfill Valley, the predator fenced area, the other predator-controlled sites on Waste Management land, the Sunnybrook Scenic Reserve, the Dome Forest and in pasture streams.

[812] The search effort during these surveys must of necessity be carefully undertaken to avoid damaging either the frogs or their habitat. Mr van Winkel estimated 500-2000 frogs may be currently present in the Landfill Valley. The number found during searches to be carried out in advance of logging and pre-construction, in comparison with the numbers previously observed during the purposely light-handed surveys carried out in the past when habitat destruction was minimised to the greatest extent practicable, may shed new light on the apparently large divide between frog numbers observed during surveys and those actually present.

[813] The surveys would use standard single-transect monitoring techniques used in previous frog surveys described by Dr Baber, with visual estimation within 50 m stream reaches. Monitoring will be carried out in three-yearly cycles, with one third of sites

surveyed every year so that each monitoring site is surveyed at three-year intervals.

[814] Our understanding is that it will not be possible to separately identify the existing frogs and progeny and the translocated frogs and progeny to assess the success or otherwise of translocation statistically, from the monitoring results. The results of monitoring will, however, provide population increase data based on total numbers of frogs found. It is not clear to us whether some means may be found by which monitoring results may be attributed to different areas within the ecological management area (fenced, unfenced, currently native forest, currently pasture, under regeneration, frogs already present/not present, etc.).

[815] At worst it seems the combined number of frogs in the monitoring areas at the commencement of the project once translocation is complete could be considered as a single founder population, with monitoring outcomes recorded against the original populations in various of the predator controlled areas.

[816] The Director-General's closing submissions note:[199]

> …although there is expected benefit to Hochstetter's frogs through the revegetation and predator control, the extent of the benefit is unknown and will depend on the success of the efforts. The proposal shifts the risk of management failure out to 25 to 30 years" and that "given existing pressure on this species, including from climate change, it will be more difficult to redress the losses in this future time period.

[817] We agree that there are uncertainties around the management of frogs and the degree to which the predicted frog population increases will occur. We conclude it is likely that predator control will lead to an increase in frog numbers in the predator-fenced area as well as in Sunnybrook Scenic Reserve and other similar areas of existing frog habitat subject to predator control.

[818] We cannot be fully satisfied that this will occur. Monitoring will be necessary to ensure that numbers (in absolute terms) are at or above the pre-development levels within a reasonable timeframe.

[819] This requires monitoring and levels of redundancy. Without further provision for, protection of, and increases in another population the Court would not approve the application. In short, the mauri of this area depends in part on the replacement and improvement of habitat and population of Hochstetter's frogs.

[820] We now return to the proposal made by Waste Management in closing submissions to revegetate the riparian margins of streams in the Northern Valley with

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199 Director-General's closing submissions, dated 14 April 2023, at [79].

native species and to protect the area. We understand frogs are present in or adjacent to those streams. This work could provide the assurance this Court requires that mauri and the Hochstetter's frog population as taonga could be maintained or improved.

[821] It amounts to front-loading a contingency action that might have been offered in future if frog population increases in the enhancement and protection areas to the east do not reach the numbers estimated or required.

[822] We conclude that protection of the exotic forest area in the Northern Valley in the medium term (for, say, 7-10 years) with predator control and exclusion fencing for deer, pigs and the like, would give us confidence that the protection of Hochstetter's frogs and improvement to their population will occur in their natural environment.

[823] The potential for further cessation of forestry in the Northern Valley would be dependent on future decisions (and on monitoring showing an improved population of Hochstetter's frogs and habitat within the valley and on the site as a whole).

Required outcomes – terrestrial and freshwater ecology

[824] We conclude that the outcome to be achieved must be a net population increase. This requires some means to demonstrate on a pragmatic and proportionate basis that the taonga species are demonstrably in a better situation after the works than before. Clearly, a model can do no more than estimate an outcome. The compensation model was an appropriate method in the current circumstances. However, there must be high confidence in a robust outcome within the short to medium term. The Effects Management Package with the monitoring summarised above (or improved on further consideration by the experts) coupled with additional protection of frogs and frog habitat in the Northern Valley approaches that level of confidence. We have yet to be satisfied that the conditions apply the proposals that Waste Management relies upon.

Marine ecology - sediment discharges and effects

[825] The Director-General's closing submissions indicated that Mr Duffy had reached a level of agreement with Mr Cameron as to the potential effects of sediment in the Kaipara moana. Mr Cameron had said there would be a negligible effect on the zone of influence in the Hōteo mouth during the construction and operational phase or there could be an improvement in sediment concentrations during the operational phase compared to the current levels. But Mr Duffy indicated there could be a significant effect on the zone of influence if there was more than a minor failure of the sediment controls. Questions arose in the cross-examination of Mr Duffy as to whether Mr Cameron had made his assessment based on a 95% efficiency of removing total suspended solids, to

which Mr Duffy responded that that was potentially a best-case scenario.

[826] In further cross examination by Mr Matheson, Mr Duffy was taken through a report by Mr Van de Munckhof that provided for comparison sediment load volumes based on 75% efficiency (Revised Sediment Calculations). That report provided, for year 1, that 563.5 tonnes of sediment will be discharged to the Hōteo River. Compared to the average total sediment load currently from the Hōteo River to the Kaipara Harbour of between 33,000 tonnes and 73,467 tonnes per year (based on modelling and actual monitoring records) Mr Duffy agreed that even if all of the sediment being discharged from the site reached the Kaipara Harbour, the 563 tonnes of sediment was a small proportion of the current loads and would be very difficult to detect. In terms of whether any sediment load more than minor would have a significant effect on the Kaipara Harbour he agreed that quite a catastrophic event would be needed, and he accepted that was unlikely given the information on the design of the landfill.

[827] For the Court, the issue is certainty, and the avoidance of risk of sediment (or leachate) reaching the Hōteo and or the Kaipara. It is in part for this reason we consider further fail-safes along the existing stream from the landfill need to be provided.

[828] While dealing with extreme events or risks, the assurance required addresses both the mauri of this area and the potential effect on tangata whenua values downstream in the Hōteo and Kaipara.

[829] The marine ecologists in caucusing also touched on the issue of whether the pine forest harvesting to take place just before and during the commencement of construction would cause cumulative effects.

[830] Again, a proactive approach to sediment control will limit any effect on mauri of the site or river. If a diversion system below the settlement ponds was adopted, as suggested, this might even be utilised during forestry clearance. Furthermore, the retention of trees in the Northern Valley for 7-10 years would mean the sediment discharge would go through the settlement system and reduce overall discharge from the site.

[831] As set out under our finding on sediment management, we conclude that a comprehensive management and monitoring regime, along with the condition requiring a positive balance of sediment discharge, satisfies us that the effects of sediment discharges on the Hōteo River and Kaipara Harbour would not adversely affect the river or the harbour's ecology to more than a negligible degree.

Risk and tangata whenua values

[832] It was common ground that granting consent results in significant adverse effects to Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei and Te Uri o Hau. A similar scale of impact was acknowledged for Ngāti Manuhiri.

[833] At the commencement of the hearing the biodiversity experts agreed that there will be significant effects on freshwater ecology (stream reclamation and wetlands) and terrestrial ecology (including taonga species such as pepeketua|Hochstetter's frog and pekapeka|long tailed bat). Broad agreement was also reached in respect of the freshwater receiving environment values, generally considered (depending on location) to be high or very high.

[834] Residual biodiversity effects following implementation of the offset/ compensation package were not agreed, including a range of uncertainties as to the adequacy of controls to address freshwater ecology effects and the magnitude of those effects. Experts were not agreed as to whether Waste Management could deliver a net gain for biodiversity, habitat and sediment effects on Hōteo and Kaipara moana.

[835] We have now assessed the effects of the proposal on freshwater ecology and terrestrial ecology. The direct physical effects are clear. Intangible effects have been described to us by the cultural witnesses as set out earlier in this decision. Risks of particular concern have been identified – especially leachate escape during the life of the landfill and following its closure, and sediment discharge.

[836] We have addressed the risk of leachate escape and determined that it is a low risk. Even in heavy rainfall the proposed stormwater system is such that an escape of leachate is also low risk. However, it was clear that from iwi's perspective the risk of leachate escape has significant consequences for their cultural values. In other words those events, although low probability, would have significant impact if they occur. For tangata whenua the risk remains as an impediment to their relationship with the values of the site.

[837] We have addressed the effects of the proposed sediment discharges into the Hōteo and the Kaipara. We have determined that the likelihood of a greater sediment discharge in the event of storm or other events is small. There are layers of defence that will guard against that. However, a major failure remains a possibility and we were given no evidence as to the Factor of Safety or engineering redundancy built into the design. Again, however, from residents and iwi's perspective any effects of sediment discharges are unacceptable.

[838] MKCT consider their involvement will help ensure proper design and operation to avoid risk. Other tangata whenua say that awareness of risk can adversely impact cultural belief systems, reasonably held, and relationships between parties. It was pointed out by Mr Pihema that no-one knows for certain that the proposed site will not cause or create any issues for the environment and in the Kaipara, but Ngāti Whātua is concerned the landfill is sitting above Ngāti Whātua, and that impacts on whanaungatanga between Ngāti Manuhiri and Ngāti Whātua may occur and they will have to live with the consequences.

[839] Mr Riwaka said that the risks and impacts associated with establishing the landfill are just too great when you consider how important the Kaipara moana is to their people.

[840] The question for us is whether the particular risk can be reduced further or otherwise is acceptable through conditions or management plans. We acknowledge that the spectre of a leachate escape looms large for iwi, and that the risks weigh heavily on them. We have described earlier that the likelihood of such a failure is low, and that the circumstances that could drive such a failure have been considered. Ngāti Manuhiri has determined that the risk is acceptable to them. The other iwi groups who sit 'downstream' of the landfill have not.

[841] We cannot discount the effects on Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau who remain concerned about the proposal, however MKCT agreement for the works to take place in their rohe signifies that they see benefits for both the environment and themselves.

[842] Everyone accepts that the current status of the Hōteo and its mouth on the Kaipara Harbour is degraded, as is the landfill site, and that the latter is by no means a high quality environment for native terrestrial and freshwater fauna, even though populations have managed to persist over forestry cycles.

[843] The question remains as to the effects on the mauri of freshwater, and tangata whenua's relationship with that and other taonga. We will return to that when we come to our overall assessment.

K. Statutory assessment – s 104

Effects (s 104(1)(a) and (ab))

[844] We have assessed the effects of the proposed landfill in section J. We have found that there are potential significant adverse effects but also positive effects including potential net gains for biodiversity.

Other relevant matters (s 104(1)(c))

[845] We have outlined other legislation that impacts the proposal. We observe:

- the Waste Minimisation legislation does not make any statutory body responsible for waste disposal – while a Waste Minimisation Plan must be prepared, there is no obligation to implement it;
- the Wildlife Act is engaged if any of the fauna to which it applies are endangered;
- Forestry harvesting may occur if the operator complies with the NES-Commercial Forestry. We do not know if the application of those standards would ensure the protection of the endangered species located in the Landfill Valley during harvesting. Evidence was that they would not, although the Wildlife Act is partially engaged.

Plan Provisions in Relation to s 104(1) and s 104D

Is the application contrary to the objectives and policies under s 104D(1)(b)?

[846] The term contrary to is a high bar, defined as something that is opposed in nature, different or opposite, repugnant to or antagonistic.[200]

[847] Waste Management argued that the correct approach to s 104D(1)(b) is to assess the objectives and policies as a whole rather than compare them to the activity on an individual basis.[201] For an activity (identified holistically) to be contrary to the objectives and policies, there needs to be more than non-compliance with a single provision,[202] and the assessment must be made, not in isolation but in the context of the AUP as a whole. Mr Matheson submitted that this is particularly so where, for large infrastructure like the proposed landfill, it is inevitable that an activity is contrary to some objectives and policies.

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[200] *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70, at p11 and Waste Management, opening submissions, dated 13 June 2022, at [5.9].
[201] *Akaroa Civic Trust v Christchurch City Council* (***Akaroa***) [2010] NZEnvC 110 at [74].
[202] *Akaroa* at [74].

[848] Waste Management submitted that the approach to be taken in considering applications for resource consent is outlined by the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*[203] which stated:

> [73] We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans. In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole.
>
> Footnote excluded

[849] Waste Management submitted that in any assessment of contrariness the Court should place the landfill's effects in their proper context, both in terms of the nature of the affected resource and the nature of the proposed activity giving rise to those effects. It said, as many people have commented: *In law, context is everything.*[204]

[850] Royal Forest and Bird, supported by the other appellants, argues that breach of a significant directive policy means the activity is contrary to the objectives and policies as a whole, and also submits that it is not one directive policy that is breached here – there are a number of directive policies that are breached. The issue then is which (if any) of these directive policies are key or significant in terms of the whole Plan.

[851] Royal Forest and Bird agrees that relevant objectives and policies should be identified and assessed. It notes that is entirely consistent with the approach set out in *King Salmon*, so long as that fair appraisal is reached based on the words of the policy instrument (as occurred in *Dye*)[205] and not on an overall judgement approach that is not anchored to the language of the policies.[206] It referred to the High Court's decision in *Tauranga Environmental Protection Society* which, it says, affirmed that the focus should be on the text as opposed to an overall judgement:[207]

> …the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application. This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them in reaching some "overall judgement".

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[203] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].
[204] Waste Management, opening submissions, dated 13 June 2022, at [5.5]-[5.14].
[205] *Dye v Auckland Regional Council* [2002] NZLR 337 (CA).
[206] *Tauranga Environmental Protection Society*, at [77].
[207] *Tauranga Environmental Protection Society*, at [93].

[852] Waste Management acknowledges that the Court needs to pay close attention to the wording of specific objectives and policies, particularly where they are directive, and reconcile those against others in the AUP where there may be conflict. It observes, however, that the Court must still make its s 104D assessment of the AUP as a whole and as a fair and full appraisal.

[853] Royal Forest and Bird submitted that the Supreme Court's findings in *King Salmon* should be applied when interpreting objectives and policies:[208]

(a) the language of directive policies is determinative. Various policies are not inevitably in conflict or pulling in different directions. Avoid is a strong word, meaning not allow or prevent the occurrence of. What is inappropriate is to be assessed against the characteristics of the environment that the policies seek to preserve;

(b) terms that have more flexibility in how they are implemented and are less prescriptive include: take account of, take into account, have (particular) regard to, consider, recognise, promote, encourage, as far as practicable, where practicable (noting that there are strict parameters around practicable), where practicable and reasonable, taking all practicable steps, no practicable alternative methods;

(c) in contrast, terms that are specific, directive, and unqualified, and leave little or no flexibility in how they are implemented include avoid, protect, do not allow, directed to;

(d) policies expressed in more directive terms will carry greater weight than those expressed in less directive terms. The policy may be stated in such directive terms that the decision-maker has no option but to implement it;

(e) there may be instances where policies pull in different directions. This is likely to occur infrequently, and it may be that an apparent conflict between policies will dissolve if close attention is paid to their expression);

(f) only if conflict remains after the analysis is undertaken is there justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible;

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[208] *King Salmon* at [126], [127], [129] and [130].

(g) enabling provisions that provide scope for choices as to how and where the proposal occurs do not prevail over directive policies that require avoidance of adverse effects.[209]

[854] Royal Forest and Bird submits that, unlike s 104(1), which involves consideration of wider planning instruments, the considerations in s 104D(1)(b) are circumscribed to the objectives and policies of the relevant Plan. Despite this, clause 1.3(2) of the NPS-FM 2020 states that Te Mana o te Wai is relevant to all freshwater management and not just specific aspects of freshwater management referred to in the NPS-FM. Royal Forest and Bird submits that while the proposal is not to be directly assessed against Te Mana o te Wai under s 104D(1)(b), it may assist in construing the objectives and policies of the AUP.

[855] The parties drew our attention to a recent decision (currently under appeal) of the High Court in *Royal Forest and Bird Protection Society of NZ Inc v New Zealand Transport Agency*.[210] That was an appeal on questions of law arising from the decision of a Board of Inquiry in relation to the East-West Link project. It involved approximately 18.3 ha of reclamation of the Māngere Inlet, including areas within the AUP's Significant Ecological Area overlay.

[856] Royal Forest and Bird submitted that, in that case, the Board of Inquiry had no jurisdiction to consider the merits of the proposed East-West Link. That was because when the provisions of the AUP were properly reconciled, in the manner required by the Supreme Court's decision in *King Salmon*, the particular policies with which the East-West Link would not comply imposed mandatory bottom lines and 'trumped' all other objectives and policies. Royal Forest and Bird argued that this meant that East-West Link was contrary to the objectives and policies of the AUP and did not meet the gateway test in s 104D(1)(b) of the RMA.

[857] We record that the High Court accepted that, in effect, there was no substantive difference in approach required to a plan's objectives and policies as a result of the decision in *King Salmon*.[211] Simply because the East-West Link was inconsistent with discrete parts of the AUP did not necessarily mean that the proposal was contrary to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA. Rather, the High Court found that all of the objectives and policies had to be considered comprehensively and, where possible, appropriately reconciled.[212]

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[209] *King Salmon* at [126] – [131].
[210] *Royal Forest and Bird Protection Society of NZ Inc v New Zealand Transport Agency* [2021] NZHC 390.
[211] *Royal Forest and Bird*, at [39].
[212] *Royal Forest and Bird* at [29]-[30] and [43].

[858] We determine that the correct approach is that it is appropriate for all objectives and policies to be considered comprehensively and reconciled if possible where the provisions pull in different directions.

[859] We see this approach as requiring the Court to give attention to the structure and wording of the objectives and policies as a whole to identify those objectives and policies that are central, key or significant to an understanding of those provisions. We conclude this interpretation is consistent with both the *King Salmon* and *Port Otago* Supreme Court decisions.

[860] We later discuss the concept of avoid material harm used in *Port Otago*. For current purposes, we note the Supreme Court considered that a detailed analysis was required to address this issue at a Plan level.

[861] We do not understand the *Port Otago* case to derogate from the approach to the assessment of objectives and policies described above. Having looked at all parties' submissions, we cannot discern a substantive difference to the approach outlined above.

[862] We conclude that the purpose of s 104D(1)(b) is not to conduct a tick-box exercise against each policy and objective. There needs to be a focussed attention on the key objectives and policies of the AUP. We find that the elements on which Waste Management relies are more in the nature of operational needs or preferences than functional needs, as those terms are defined in the AUP.

[863] We list our findings generally from earlier in the decision on objectives and policies:

A. The NPS-FM 2020 and as amended in 2023 seeks to restore and preserve the balance between the water, the wider environment and the community. Te Mana o te Wai is all about restoring and preserving that balance. It seeks first to protect and then restore the mauri of the waters.

B. The weight to be attached to Policy 3.22(i) – extent of inland wetlands, 3.24 – extent of rivers and 3.26 – fish passage, is in dispute and needs to be resolved.

C. The changed legislative environment is part of the context in which we must assess the AUP's objectives and policies. However, it informs rather than dictates the outcome of the assessment under s 104D(1)(b) looking at objectives and policies of the AUP. These changes are also relevant to any substantive assessment.

D. The various issues raised in the NZCPS are subsumed within the AUP.

E. The need for new infrastructure is recognised where:

(i) there is a functional and operational need for it to be located in areas with particular natural and physical resources which have been identified in the AUP that otherwise preclude development;

(ii) its operation should be enabled while managing adverse effects.

F. There is a centrality of Māori worldview contained within the RPS. This seeks to maintain, and where appropriate enhance, freshwater systems, mauri of areas and the relationship of tangata whenua with important features. It does not preclude development but anticipates that adverse effects will be addressed and freshwater systems restored and enhanced where that is possible.

G. The objectives and policies reinforce the importance of freshwater and sediment quality being either maintained at an excellent level or improved over time. The AUP also identifies issues from the RPS relating to the mauri of freshwater being maintained or progressively improved over time. This is further reinforced by the NPS-FM 2020 and NPS-FM 2023.

H. E3 recognises the tension between development and the objectives to preserve quality environments and improve those that are degraded. There is still an emphasis on avoidance, remediation or mitigation, although the NPS-FM 2020 (see Policies (17) and (18)) recognises the application of an effects management hierarchy.

I. E13 is directed to avoiding contaminants from the landfill activity reaching land or water, including groundwater, beyond the Site. This includes those which can either be borne in water, leachates, sediments etc, or are caused by the activities themselves which then leads to the discharge such as the construction of roads or dams. The requirement to avoid adverse effects in itself identifies that this is not a prohibition against new landfills, but a requirement as to the total internalisation of adverse effects.

J. The policies require protection of indigenous vegetation in sensitive environments and the management of activities to avoid significant adverse effects on biodiversity where practicable. There is clear encouragement to use the effects management hierarchy to manage effects that cannot be avoided, remedied or

mitigated, including encouragement of the use of offsetting.

[864] The findings on the RPS are not the focus of the s 104D evaluation. However we found RPS policy B7.3.2(4) helpful in giving a succinct statement of the approach relevant to a case such as this. Overall we conclude that the other relevant regional and district objectives and policies fit into this framework as they relate to water and even biodiversity generally.

[865] Policy B7.3.2(4) states:

> Avoid the permanent loss and significant modification or diversion of lakes, rivers, streams (excluding ephemeral streams), and wetlands and their margins unless all of the following apply:
>
> (a) It is necessary to provide for:
>
> (i) the health and safety of communities; or
>
> (ii) the enhancement and restoration of freshwater systems and values; or
>
> (iii) the sustainable use of land and resources to provide for growth and development; or
>
> (iv) infrastructure;
>
> (b) no practicable alternatives exist;
>
> (c) mitigation measures are implemented to address the adverse effects arising from the loss in freshwater system functions and values; and
>
> (d) where adverse effects cannot be adequately mitigated, environmental benefits including on or off-site works are provided.

[866] We have already made our findings in respect of the objectives and policies and have also reached conclusions in respect of a whole range of effects, many of which are not directly necessary in considering s 104D(1)(b). The short point that we have already identified is that we must be satisfied that the application avoids material harm from the adverse effects of discharges to water or land from the Site and the removal/reclamation of a stream or streams.

[867] The level of certainty in that regard must be high given the clear significant adverse consequences. In short, if we conclude substantively that *material harm* is avoided, then the application will not be contrary to that key policy thrust. Because of the relationship between effects and the policy provisions, it is not fair to say simply by applying the objectives and policies that an application is contrary to them. This requires a nuanced evaluation of both the objectives and policies and the effects.

[868] The other major policy thrust relates to the maintenance and net gain/restoration of the mauri and the biodiversity on this Site. We must be satisfied that the evidence, including the offset and compensation evidence, will lead to those outcomes.

[869] Again, this is difficult to evaluate in an objectives and policies sense given that the objectives and policies themselves indicate the availability of various alternative methods of achieving avoidance of material harm, including restoration or improvement. This is largely due to the way in which the AUP is drafted.

[870] There is agreement that all of the provisions need to be looked at holistically. Words need to be given their full and proper meaning but in the context of a complex, multifaceted AUP. There was extensive evidence and argument on these matters. Given their importance to the arguments made by the parties we have addressed key provisions separately. We note, however, that they do not stand apart from the rest of the AUP and other objectives and policies – they were simply the focus of the appellants' opposition to the proposal.

[871] Viewed through the lens of the Supreme Court decision in *Port Otago*, the first question for us is can this activity and application avoid material harm from discharges of contaminants, sediment and soils? That requires us to be satisfied that there can be such outcomes, which then turns on the issue of merit rather than to the question of whether the application is contrary to the objectives and policies. While the appellants argued that E13 is not limited to discharges, we have found that clearly, it is.

[872] We have found that many provisions in the AUP are engaged by this proposal. We have considered all provisions and identified those we consider to be core to our assessment. No priority is given to one provision over another, though the language of certain provisions is more directive than it is for others.

[873] There is a tension in the AUP between infrastructure and provisions directed at protecting the environment – in its broadest sense. We have found that the AUP enables infrastructure because of its importance to communities, with certain qualifying matters to be addressed in assessing effects as we have already described. Other chapters directed at protecting water bodies from degradation or loss, and maintaining or enhancing indigenous biodiversity values, permit certain activities and limit others. There are qualified exceptions for infrastructure predicated on various matters being satisfied.

[874] Waste Management addresses these issues by a combination of avoidance of some key areas, a significant improvement of the degradation on the Springhill site in relation to the wetlands, improvement in the Hōteo River by funding riparian planting of approximately 50 km of waterway and taking steps to either avoid species loss or mitigate that loss on the site. It provides the large Wayby Valley Sanctuary as compensation for the effects on a range of habitats and fauna, along with the planting of areas of native forest and vegetation.

[875] We also note the strong direction of objectives and policies towards the mauri of the freshwater environment, tangata whenua values and other relationships with taonga. Nevertheless these should not preclude tangata whenua from achieving broader objectives in appropriate circumstances.

[876] The provisions upon which focus has been placed – addressing effects on the mauri of freshwater, river loss, loss of inland wetlands and impact on indigenous biodiversity, are clearly relevant to the tone of the AUP in this case.

[877] However, we do not ignore those provisions that encourage restoration and enhancement of the mauri of freshwater and native planting, among others, for they are forward looking and recognise that some water environments such as the Hōteo and Kaipara are not healthy and need improvement.

[878] We conclude that the objectives and policies are not in conflict. They enable certain types of use and development where certain environmental outcomes can be achieved. This follows from the concept of sustainable management in Part 2 and the AUP. Put bluntly the AUP sees infrastructure such as landfills justifiable where they can avoid adverse effects (material harm). Whether this proposal can do that is not an issue under s 104D(1)(b) but rather requiring careful evaluation under s 104(1).

[879] Accordingly, we conclude that the proposed landfill is not contrary to the objectives and policies of the AUP under s 104D(1)(b). As it must only pass one threshold we now move to a substantive evaluation under s 104 of the Act.

Substantive evaluation

[880] This enables the Court to consider the application in the exercise of its discretion, taking into account the matters in s 104 of the Act, particularly ss 104(1), 105, 107 and Part 2.

[881] The broad discretion involves all the matters discussed, and includes any other matters the Court considers relevant and reasonably necessary to determine the application. We can also consider at this stage positive effects and offset and compensation.

[882] We have already made findings in respect of the objectives and policies and reached conclusions in respect of a whole range of effects. The short point we have already identified is that we must be satisfied that the application avoids material adverse effects from discharges to water or land from the Site. The level of certainty in that regard must be high given the potentially significant adverse consequences.

[883] Given the complexity of this application, we have taken into account all the evidence before us in exercising our discretion. We conclude that, with changes to the proposal to meet the outlined concerns and improvement of the conditions and management plans, we could be satisfied in granting consent on the basis of net biodiversity gains and protection of threatened species on the Site.

[884] The substitution of the term material harm from the *Port Otago* decision does not fundamentally change the focus. We are dealing with levels of risk as well as a dispute as to the extent of harm for the issues identified. Questions of avoidance and material harm (or material adverse effects) become an issue as does the scale at which we are examining the adverse effects and benefits.

[885] The Supreme Court in *King Salmon* does not suggest such an absolute position when dealing with transitional or ephemeral effects. Neither Supreme Court formulation fully addresses the issues in this case that deal with the question of risk, and the question of how material harm or avoidance is to be measured. Is every single member of that species to be considered, and if not what group of that species and what level of impact constitutes not avoiding or no material harm?

[886] We have already noted that we do not consider that such an evaluation will always be on an entire-species basis, nor even necessarily on a local or regional basis. In some circumstances the death of an individual may amount to material harm.

[887] The circumstances of the case and a pragmatic and proportional response are required. In this case, we conclude that the whole of the Waste Management holding in Springhill Farm and Matariki Forests is the correct scale to consider better outcomes in the short, medium and long term. This includes the waterways and all of the identified threatened species we have discussed. It can also include improvements to the Hōteo River.

[888] We do not accept that the phrase *avoid adverse effect* on particular species means avoid every effect on every member of that species. Such a position would mean there would be no further developments in New Zealand. But nor can it mean every development can provide offset/compensation even for threatened species. Outcomes must be fact dependent.

[889] In the *Port Otago* case, the Supreme Court gave some guidance as to how the question of material harm might be addressed in deciding plan provisions. It is clearly an evaluative process depending on evidence and an appropriate response in the circumstances.

[890] The concept of proportionate response has been utilised in common law in England and also at various times referred to in New Zealand. Decisions upheld in superior courts indicate that there will be circumstances where there may be local losses of individuals, species or even of broader environments but where other steps may be taken that in the longer term would leave the species in a better state than it was prior.

[891] As was clear in this case, the success of a predator-proof area or other mitigation or offsets can never be calculated with mathematical precision. By the same token, the re-creation of a similar ecotone does not guarantee that it would provide as effective a habitat for a species as the habitat lost.

[892] We have concluded that when examining questions of compensation and offset, we are looking for an outcome that can be described ecologically as better than that which existed before, and accept that determining whether that outcome has been reached and to what degree, particularly for Hochstetter's frog, may take some years.

[893] With significant amendments to the proposal relating to how landfill leachate, stormwater, sediment and other contaminants are dealt with, we consider the effects can be internalised to such a degree that we are satisfied that the consent could be granted without a significant adverse effect on the Hōteo River and Kaipara Harbour.

[894] To that degree, a better outcome for discharges from the landfill site should be expected than those from existing farming and forestry activities where significant sediment pulses are released at times, and in the case of forestry take place over several rotations, repetitively.

[895] Nowhere is this issue better highlighted than in relation to potential failure or leaching of contents of the landfill into the Hōteo River and Kaipara Harbour. Although no final design for the landfill has yet been completed, the experts for Waste Management are confident that they will avoid such events. That level of confidence is often reflected in the factor of safety in the design. Notwithstanding questions from the Court on this issue, we do not understand that to have been settled at this stage and it is difficult for the Court to determine whether the risk has been fully addressed.

[896] An approach adopted in other cases is to allow that even in the event of a major catastrophic event there are in-built design features which compensate for such an event. In this case, an additional overflow pond system could be developed down the true left side of the valley below Pond 1 adjacent to and above Eastern Stream. This would have the purpose of minimising the effect of a major failure of the landfill whereby a significant rainfall event could overflow Pond 1 and flow consecutively through bunded ponds

below that would then capture and slow the flow.

[897] Similarly, with a leachate failure the liquid could be diverted to a holding pond until it could be either extracted by a truck or otherwise treated. These steps could essentially move the design closer to a failsafe level. Even if the structure proves to be redundant that level of extra security would not be wasted.

[898] The Court is not satisfied that the current design would avoid contaminant discharge to the Eastern Stream and beyond in the event of an unforeseen exceptional event at the landfill. We need to be satisfied that even in the event of failure, the risk has been considered and a method is available to avoid adverse effects and enable recovery and repair of the landfill. The evidence in this case indicated that the project is at a preliminary design stage, such that additional thought could be given to the factor of safety and to additional mitigation within the Eastern Stream valley below Pond 1.

[899] We return to the subject of the loss of values from within the Landfill Valley described earlier which includes the stream and riparian habitats, Hochstetter's frogs, lizards, bats and native fish. There is an acknowledged effect on the mauri of the Landfill Valley Site and the area as a whole as a result of the project.

[900] The difficulty for the Court is that it is faced with an actual or potential loss of the habitat and of many individuals of several species, some of which are protected under the Wildlife Act. This is to be offset with an anticipated improvement to those species' populations through predator control and the 126 ha Wayby Valley Sanctuary but without a guaranteed outcome.

[901] The proposed conditions currently state that if the increased population is not achieved within 10 years, it will then be achieved within 20 years. If not achieved within 20 years, it will be achieved within 30 years. The question is what if it is not achieved at all ?

[902] The effect would be the loss of the area of habitat and numbers of individuals in several species previously described. The Hochstetter's frog becomes a proxy for effects and benefits. We understand that the frog population to be removed or lost from the Landfill Valley is an important, though small (0.8%), proportion of the Southern Clade of the species in this area.

[903] Dr Baber's predictions for a likely increase in frog numbers in the Wayby Valley Sanctuary, the Sunnybrook Scenic Reserve and other predator-controlled areas presume successful breeding within the existing population of frogs in the habitat they currently occupy outside the Landfill Footprint, along with expansion of their range into new areas

of appropriate habitat as that develops in the coming decades.

[904] We found it unlikely there would not be an increase in frog numbers as a result of the proposed predator control. The uncertainty lies in the breeding potential of the species locally, the availability of future suitable habitat for expansion and the willingness/ability of the species to migrate into new territory as new habitat develops.

[905] Can we be satisfied that there is sufficient certainty of outcome that we can decide there will be no material harm to the species? We have concluded that whether we are dealing with the term *avoid adverse effects* or *avoid material harm* the issue is whether that species would be in a better position within a reasonable timeframe as a result of the development.

[906] It is also important to address the matter at an appropriate scale. In this case, our view is that the appropriate scale is the whole of the application site which Waste Management and MKCT (and hopefully other tangata whenua) can control directly. It is the scale on which there needs to be a better outcome ecologically.

[907] We wish to be very clear that we do not understand the Supreme Court or decisions of this Court to suggest that the necessary examination of the effect on a species or population must be made at a national or even regional level.

[908] Contextually though, nationally, the risk to the species as a whole is high – it is classified as *At Risk–Declining* and is threatened chiefly by predation and development within its habitat. At the local scale within the application site, we heard that without predator control numbers are likely to continue to diminish, and we are aware that in the Dome Valley area there is little or no predator control. Here we are dealing with a small population of frogs in the Landfill Valley surrounded by an active forestry operation that may be affecting similar small populations in other local valleys. Each time a population of frogs is lost the potential for interaction between populations is threatened or removed, and we understand there are consequences for species viability where populations are disconnected.

[909] While it is likely there will be an increase in the frog population due to the predator control proposed by Waste Management, we consider that the loss of a frog population in the Landfill Valley is insufficiently compensated by the potential for improvement in another population in the Wayby Valley Sanctuary/Sunnybrook Scenic Reserve area.

[910] The presence of frog habitat in other valleys within the forest area provides an opportunity to secure that habitat such that another population of frogs can be supported, as has been proposed for the Northern Valley.

[911] MKCT now supports the proposal. Ngāti Manuhiri represented by the Omaha Marae and certain other individuals, Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei and Te Uri o Hau remain opposed to the application.

[912] Mr Hohneck for MKCT was careful to say that he did not resile from his initial evidence which was opposed to the proposal. In doing so, he acknowledged the proposition put to the Court in Ngāti Manuhiri's opening submissions, similarly in opposition to the proposal. As we understood his evidence, the reason for the change of position was that Waste Management had moved to involve MKCT in managing and advising at the Site, and that Ngāti Manuhiri's acquisition of the Site in the long term meant that they now considered they were in a position to ensure appropriate outcomes on the Site. We accept that the benefits for MKCT could be significant. How this will be achieved needs to be set out in documentation in due course.

[913] We do not understand that MKCT has yet entered into final arrangements with Waste Management.

[914] It was clear from Mr Hohneck's comments that he acknowledged that Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau would have concerns about impacts upon the Hōteo River, the Kaipara Harbour and upon the mauri on the wider area through the loss of the species and benthic areas and streams on the Site.

[915] Relating to the Hōteo River itself, it is fair to say that all of the tangata whenua parties, including Ngāti Manuhiri, have an interest in that river and there are issues between them as to who might hold mana whenua. Clearly, we need only conclude that the parties have overlapping interests in the river, that Te Uri o Hau have interests particularly in the upper reaches and Ngāti Whātua Ōrākei in the lower regions, with Ngāti Manuhiri having an interest in areas overlapping Te Uri o Hau and Ngāti Whātua o Kaipara but not co-extensive.

[916] In considering the mauri of the freshwater and mana whenua values in relation to the environment, we acknowledge the degraded state of the Hōteo River and Kaipara Harbour and the efforts already being taken to improve the environmental status and mauri of these water bodies. Similarly, within the Site, forestry and farming use have depleted the mauri of the area.

[917] As we have described above, Waste Management has sought to address these by a combination of avoidance of some key areas, a significant improvement of the degraded Springhill Farm in relation to the wetlands, and improvement in the Hōteo River through riparian enhancement.

[918] Overall, the AUP is less focussed than many other plans on a common vision for the District/Region. The AUP allows a range of activities, and uses a non-complying status for certain proposals, which makes it difficult to conclude that many proposals are repugnant to the objectives and policies. Further, the clear linkage of objectives' and policies' outcomes with mitigation and even offset and compensation qualify the 'avoid' objectives and policies of the AUP. Finally, the introduction of new policies through National Policy Statements and National Environmental Standards creates a certain disconnection with the AUP's objectives and policies.

[919] We have concluded that the AUP is written in such a way that it anticipates that there will be circumstances where activities can avoid adverse effects while achieving the enabling provisions of the Act. The AUP does not set itself against infrastructure generally, or landfills in particular. Provisions such as E13.3(4) envisage a high standard of assurance, or satisfaction by the consenting authority that there will be no material adverse effects from discharges. Similarly, Chapters E3 and E15, for example, require that there needs to be a high level of satisfaction that any remedial, mitigatory, offset or compensation works achieve, maintain or improve the biodiversity or ecological function of the area.

[920] These are matters of degree. We consider that overall we must be satisfied that the application will avoid material adverse effects.

Conclusion

[921] Although these are matters of degree, it means that we need to pay particular attention to avoiding adverse effects:

(a) on Hochstetter's frog,

(b) from the loss of stream length (12.2 km),

(c) on significant lizards and bat habitat,

(d) from other benthic effects on the waterways; and

(e) on the mauri of both the landfill site as a whole (1,070 ha) and also on the mauri of the Hōteo River and the Kaipara.

[922] The evaluation that is required is an overall evaluation under s 104. If the application does not avoid adverse effects from discharges to the satisfaction of the Court, or we are not satisfied that there would be a maintenance and restoration on the Site and in the area in respect of biodiversity and wetlands, then we would conclude that

the application should not be granted consent, and would then also be contrary to the AUP.

[923] The interconnection between the two elements – effects under s 104 and the objectives and policies in the AUP – has created enormous difficulty and confusion for the parties. The Act did not anticipate the co-mingling of objectives and policies with effects. Where they intermingle, such as here, the two evaluations become merged. That is the reason we have dealt with the process under a s 104(1) evaluation.

[924] Elements of the proposal seek to achieve the AUP's objectives and policies to maintain or enhance water bodies and indigenous biodiversity. We refer in particular to the pest control, predator-fenced area, riparian planting and fencing, protecting the Northern Valley and sediment reduction once forestry is complete. Waste Management says that Ngāti Manuhiri's agreement means that, at least in respect of the landfill site, Ngāti Manuhiri is satisfied that any significant adverse effects are avoided.

[925] In considering the mauri of the freshwater and mana whenua values in relation to the environment, we acknowledge that the Hōteo is already significantly degraded and is already the subject of a remediation plan as part of the KMR project. In our view, this means it is particularly sensitive to any further material adverse effects on it, and brings into play objectives and policies of the AUP relating to the improvement of the quality of the waterway, and on the mauri of that water where it is already depleted or degraded.

[926] We have concluded that the effects in several categories are significant without further amendment to the proposal and conditions. We are assuming these changes are possible, as the matter is finely balanced. We acknowledge the AUP connection between objectives and policies and effects. Accordingly, whether the application is contrary to the AUP depends on whether particular effects can be satisfactorily addressed.

[927] The Court has a general discretion that it must be satisfied that a consent should be granted having regard to the principles of the Act under Part 2. The Court may take into consideration matters it considers relevant and reasonably necessary to determine the application, and we can consider at this stage positive effects and offset compensation.

[928] It is clear that the Court's proposed overall outcome has been critical to our reaching a conclusion that a consent might be granted with the significant changes that we have outlined.

[929] The hurdle is not an easy one and requires us to be satisfied that the sustainable management purpose of the Act will be achieved. Given the range of effects on mauri, tangata whenua, taonga and significant flora and fauna, and the loss of streams, there are

considerable impediments to the grant of consent. Generally, where individual objectives and policies are not met, or there are significant effects, there must be some unusual (even exceptional) aspects of the application that justify granting it.

[930] We conclude that the status of the activity as non-complying provides that a consent might be granted if it achieves the key purposes of the AUP and the Act. It is for this reason that we conclude further steps are required:

(a) To reduce any possibility of major adverse effects on the Hōteo River and the Kaipara Harbour by additional design solutions in Eastern Valley below Pond 1 to provide further storage in case of unforeseen events.

(b) Significantly increasing the redundancy in respect of the potential for discharge of leachate and sediment. Redundancy systems should be installed prior to the commencement of the construction. We are generally satisfied with the liner design, subject to being assured that any leachate that escapes the liner will be picked up downstream either by ground monitoring or water monitoring.

(c) Provision for high water flows and diversion where required (that is, if any leachate or high sediment concentrations or other contaminant is detected). Potential to use a settling system alongside the stream that higher flows may be diverted to. Using a system of weirs enables this to be automatic rather than requiring intervention.

(d) Final design of the Landfill Footprint, ponds and stormwater to achieve sediment control to as high quality as practicable, that is to say GD05 or better.

(e) Trigger levels to be set for normal conditions, concern conditions and contingency requirements as conditions of consent.

(f) To provide protection for the Hochstetter's frog population in the Northern Valley from forestry activities in the medium term (say 7-10 years). This would include:

    (i) when and how pine harvesting is to occur;

    (ii) a perimeter fence (limited to stock fencing i.e., for pigs and deer);

    (iii) riparian planting along the valley floor to provide a 20 m buffer on both sides; and

    (iv) predator control (bait station, traps, aerial (predator fencing not required).

(g) To investigate whether the riparian planting programme can be partnered with the KMR programme to achieve rapid gains in the Hōteo.

(h) Other provisions provided including the potential for tangata whenua to join the committee with MKCT to discuss further improvements to the system during its operation.

(i) In relation to biodiversity, with the frog as a proxy, the general plan already envisaged, with the Northern Valley included. We envisage the Northern Valley would be operated in accordance with mātauranga principles, funded by Waste Management and managed in conjunction with them.

(j) Agreed systems as to how a net gain in the frog population in the predator controlled areas will be measured with a goal of achieving improvement in the population within 6-8 years, with ongoing monitoring during the life of the landfill to ensure these gains continue.

Part 2

[931] In considering this matter broadly within Part 2 we are satisfied that an amended application and amended conditions in the broad terms we have described could meet the purpose of the Act and satisfy us that there would be no adverse discharge effects from the landfill and that it would otherwise achieve a net biodiversity gain on the Site. To be satisfied of this we would need to see the improved design and also more certain conditions and management plans.

Outcome

[932] **The Court concludes that a modified application, conditions and Management Plans could meet the purpose of the Act, and the relevant matters under s 104. We would need to see amendments to the proposal, conditions and management plans sufficient to satisfy us that the consent can be granted.**

[933] **Further work is required to identify:**

(a) whether the Northern Valley can be retained (unlogged) for 7-10 years while the frog population improves;

(b) whether the downstream area of landfill and the separation of waters can be improved to deal with:

(i) high rainfall;

(ii) landslip or failure of the landfill;

(c) the arrangement with tangata whenua (including MKCT) can be resolved as conditions of consent or other agreements.

[934] **Waste Management is to file and serve a memorandum with its response and timeline to issues raised in B. This memo is to be filed by 31 January 2024.**

[935] **Auckland Council and MKCT are to file any additional memoranda by 9 February 2024.**

[936] **Appellants and s 274 parties are to file any memoranda in response by 1 March 2024.**

[937] **The Court will convene a judicial conference or make further directions as necessary.**

[938] **Costs issues (if any) will be subject to directions after any final decision.**

For the Court:

JA Smith
Environment Judge

MJL Dickey
Environment Judge

DOUBLE SIDED

Decision No. W024/2002

IN THE MATTER of the Resource Management Act I991

AND

IN THE MATTER of four appeals under section 325 of the Act

BETWEEN **TWISTED WORLD LIMITED**

(RMA026/02, RMA139/02, RMA156/02 and RMA258/02)

C S GRIFFITHS and another

(RMA1 87/02)

ZADAMIS PROPERTIES LIMITED

(RMA188/02)

BONIUM HOLDINGS LIMITED

(RMA189/02)

Appellants

AND **THE WELLINGTON CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge Sheppard (presiding)
Environment Commissioner W R Howie

HEARING at Wellington on 21, 22 and 23 May 2002

(Final submissions in writing 28 May 2002)

Counsel

P Steven for the appellants

P J Milne and T McNeil1 for the respondent

DECISION

Introduction

[1] Twisted World Limited (trading as Roadside Attractions) erected signs and billboards on properties in the central business district of Wellington. The Wellington City Council maintained that resource consents were needed for the signs and billboards, but Twisted World did not apply for resource consents for them. When Council enforcement officers issued abatement notices requiring removal of the signs and billboards, Twisted World and owners of buildings affected appealed to the Environment Court, claiming that resource consent was not needed.

[2] The difference in meaning between signs and billboards is not material in this case. In this decision we refer to all the signs and billboards in question as signs, although at least some of them may be billboards.

[3] The main issue between the parties was the true construction of a district rule and its application to the signs in question. The Council maintained that the signs do not comply with the conditions in the rule for permitted activities, and the appellants maintained that they do. The appellants also maintained that Council employees had previously applied an interpretation of the rule by which the signs in question would comply with the rule, and that was rejected by the Council.

[4] The appellants applied for orders staying the abatement notices pending the Court's decision on the appeals. The Council did not oppose the application in respect of two of the signs. By decision given on 26 April 2002' Judge Sheppard stayed the abatement notices in respect of those signs.

[5] The Council opposed the application in respect of the other signs. By decision given on 26 April 2002,[2] Judge Sheppard stayed the abatement notices in respect of those signs on certain conditions pending the decision on the appeals.

[6] There are four main issues to be considered in deciding the appeals:

[1] Decision A89/2002.
[2] Decision A87/2002.

(a) What is the true interpretation of Rule 13.1.1.8. 1? (That also calls for consideration of a claim that part of the rule is invalid, and if so, whether that part can be severed.)

(b) Applying the rule to the signs, do any of them require resource consent?

(c) Should the Court refrain from confirming the abatement notice in respect of any of the signs? (That calls for consideration of whether the Court has a discretion to exercise in that respect, and if so, whether that discretion should be exercised.)

(d) If any of the abatement notices is upheld, should the Court continue the stay of it pending obtaining resource consent?

[7] We consider those issues in that order.

What is the true interpretation of Rule 13.1.1.8.1?

[8] We start our consideration of the true interpretation of the rule in question by setting out its text in the district plan.

The text of Rule 13.1.1.8.1

[9] All the abatement notices rely on Rule 13.1.1.8.1. That rule is in Section 13 of the district plan, which is headed "Central Area Rules". In that section of the plan, subsection 13.1 prescribes permitted activities. Rule 13.1 .1 provides–

> Any activity, except for:
> - those specified as Controlled Activities, Discretionary Activities (Restricted) or Discretionary Activities (Unrestricted)
> - those activities listed in the Third Schedule to the Health Act 1956
> - helicopter landing areas
>
> is a permitted activity provided that it complies with the following conditions.

[10] There follow a number of subsections of the plan containing rules prescribing the conditions on which various activities are classified as permitted activities.

[11] Subsection 13.1.1.8 of the district plan applies to signs in the Wellington central area. It contains three rules: one about signs on buildings on or below the fourth storey (Rule 13.1.1.8.1), one about signs on buildings above the fourth storey (Rule 13.1.1.8.2), and the third about free-standing signs not attached to any building (Rule 13.1.1.8.3). Three paragraphs of explanatory material follow the texts of the three rules.

[12] The signs the subject of these appeals are attached to buildings on or below the fourth storey, so Rule 13.1.1X.1 is the applicable rule. We quote the rule–

> For signs on buildings on or below the fourth storey:
> - The maximum area of any one sign is $20m^2$
> - Signs must be displayed only on plain wall surfaces where they do not obscure windows or architectural features
> - No sign shall project above the parapet level or the highest part of the building to which it is attached
> - Any illuminated sign (excluding signs below verandah level) within 50 metres and visible from a Residential area must not flash
> - Any sign attached to a verandah must be at least 2.4 metres above the footpath
> - Signs on buildings above verandah height shall not project from the face of the building by more than 1.5 metres.

[13] We also quote from the explanatory material that follows the three rules in section 13.1.1.8. The second sentence of the first paragraph of that material is about freestanding signs, which are the subject of Rule 13.1.1.8.3. The third paragraph of the explanatory material relates only to signs above the fourth storey level, which are the subject of Rule 13.1 .1 .8.2. Those parts of the explanatory material do not help in understanding Rule 13.1.1.8.1 about signs on or below the fourth storey, so we omit them from the quotation.

> Council believes that in cities, residential owners or occupiers cannot expect the complete exclusion of signs from view and that a balance must exist between providing reasonable protection from annoying signs and encouraging signs as a desirable townscape element.. .
> The area below the fourth storey of buildings is very visible to people at street level, Within this area, signs are generally permitted although these rules ensure that they are appropriately situated and, if illuminated, will not annoy residents in nearby Residential Areas.

[14] If a sign does not comply with any of the conditions in Rule 13.1.1.8.1 so as to qualify as a permitted activity, Rule 13.3.1 of the district plan would apply-

> 13.3.1 Activities that do not comply with one or more of the following conditions for permitted activities in rule 13.1.1:
>
> 13.3.1.6 signs

are Discretionary Activities (Restricted) in respect of the condition(s) not being met.

[15] There was no contest between the parties on that. The effect of that rule is that if any of the signs in question does not comply with any of the conditions of eligibility as a permitted activity in Rule 13.1.1.8.1, then the sign is classified as a restricted discretionary activity, and resource consent is needed.

[16] The issues between the parties relate to the interpretation of the second condition, the interpretation of the third condition, and whether the rule is invalid for uncertainty. We address these issues in turn.

The interpretation of the second condition

[17] The difference between the parties about the second condition is whether the requirement that signs are to be displayed on a plain wall surface is independent of the requirement that signs do not obscure an architectural feature or window.

[18] The appellants maintained that the true interpretation of the condition is that where signs are displayed on a plain wall surface, they must be displayed so as not to obscure an architectural feature or wall. They contended that the condition does not mean that signs must only be displayed on plain wall surfaces.

[19] The Council maintained that the true interpretation is that (except where attached to a verandah) signs may only be displayed on a plain wall surface, and must not obscure either windows or architectural features.

<u>The appellants' case</u>

[20] The appellants contended that the meaning advanced by the Council (that signs may only be displayed on plain walls) does violence to the rest of the condition in that. If they may only be displayed on plain wall surfaces, there would be no need for the rule to refer to the sign not obscuring windows or architectural features (as a plain wall surface will not include a window or architectural features). They also argued that the rule does not restrict signs to those displayed on plain wall surfaces because it allows signs displayed in two other ways. The fifth condition allows signs attached to a verandah (if at least 2.4 metres above the footpath); and the sixth

condition contemplates that signs may project from the face of the building by up to 1.5 metres.

The Council's case

[21] The Council contended that the conditions are to be read conjunctively where they are applicable. It referred to another rule in section 13 which, it submitted, has to be interpreted in that way. The Council accepted that the rule allows for signs to be attached to verandahs. It argued that if the meaning advocated by the appellants had been intended, the condition would have started with words like "Where signs are on walls.. ."

[22] The Council submitted that the appellants' interpretation required that the word "either" be implied before the words "be displayed" in the second condition, and the word "or" instead of "where they". It contended that its interpretation of the second condition strains the wording less than the appellants' interpretation does. It argued that it would make no sense not to restrict signs that obscure windows or architectural features only where they are on plain wall surfaces. The reason was that, although signs on a plain wall surface could obscure windows or architectural features, a plain wall surface will not have such features,

The Court's interpretation

[23] Like many contents of district plans, Rule 13.1.1.8.1 is clearly not a polished piece of drafting. Therefore it is inappropriate to seek indications about the intended meaning from applying presumptions used in interpreting polished drafting. For example, we do not accept that a particular intention can be inferred from finding that certain words are repetitive. So we do not accept the appellants' criticism that if signs may only be displayed on plain wall surfaces, there would be no need for the rule to refer to the sign not obscuring windows or architectural features (as a plain wall surface will not include a window or architectural features). We do not accept either, that the presumption that a drafter has used words consistently throughout the instrument would be a reliable guide in interpreting this plan.

[24] Both parties accepted that the interpretation should be guided by the purpose of the district plan, as indicated by relevant objectives and policies. We agree. However, although our attention was called to the relevant objectives and policies, they are stated in such broad generalities that they give little guidance for resolving

the difference between the parties over the intention of tbe second condition. An example is Policy 12.2.2.8, the material part of which is to "manage the maximum size and placement of signs on buildings".

[25] The only indication elsewhere in the plan that might be usefui is the Design Guide for the Central Area, which contains material about the external appearance of buildings.

[26] The analysis in section 3.0 identifies values such as legibility, and design coherence. Item G1 directs that buildings should communicate with their surrounding public environment, and that opporttmity is to be taken to provide an external expression of spaces and activities within a building. Section 4.0 identifies values of a building's external design as well as the desirability of a building displaying a clear and complete architectural concept. For the street concept, the guidelines value window openings as particularly useful indicators of scale (item G6). They value contrast by layering of architectural elements, use of contrasting surface finishes, colours or patterns, or emphasising part of the overall composition (item G7). The Guidelines for building bulk also identify articulation of a building's surface treatment as an area of concern. Again they value use of contrasting surface finishes, colours or patterns, inclusion of discrete architectural elements, and emphasis of part of the overall composition of a building's form or surfaces (item G1). They also place value on vertical and horizontal patterns on building frontages (item G2).

[27] We can get help in finding the intention of the rule from expecting consistency with the Design Guide. As the rule is not polished drafting, that consistency will be more reliable than making presumptions from the wording of the rule itself.

[28] To be consistent with the Design Guide, it is to be expected that the conditions about the placement of signs as permitted activities would preclude placing them where they would inhibit legibility and coherence of the building's design. Of course the conditions might be expected to ensure that signs do not obscure window openings or articulation of surface treatment such as contrasting finishes, colours or patterns, and discrete architectural elements. But the values identified in the Design Guide go further than that. They extend to the display of a clear and complete architectural concept.

[29] The explanatory material following Rule 13.1 .1.8.3 (already quoted) refers to a balance between protection from annoying signs; and signs as a desirable townscape element.

[30] The appellants' interpretation of the second condition would preclude signs as of right that obscure windows or architectural features. But it would allow signs placed so that, although they do not obscure windows or architectural features, they inhibit legibility and coherence of the building's design.

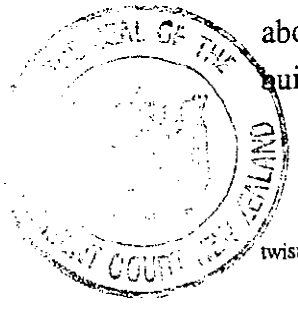
[31] Even plain wall surfaces can be a deliberate part of the designed external appearance of a building. The finishes and colours of plain surfaces have their part in expressing the complete architectural concept. In seeking a balance with recognising signs as a desirable townscape element, the Council has been willing to sacrifice the value of plain wall surfaces.

[32] The Council's interpretation, like the appellants', precludes signs that obscure windows or architectural features. By only allowing signs that are displayed on plain wall surfaces, the Council's interpretation also limits the extent to which the placing of signs inhibits legibility and coherence of the building's design concept in other ways. It limits the sacrifice for signs to those on plain wall surfaces (and those on verandahs).

[33] The Council's interpretation is more faithfully consistent with the Design Guide than the appellants' interpretation. We hold that the Council's interpretation represents the intention conveyed by the words of the second condition, and is the true interpretation to be applied. The outcome is that (except when attached to a verandah in accordance with the fifth condition), signs on buildings on or below the fourth storey only qualify as permitted activities if they are displayed on plain wall surfaces, and if they do not obscure windows or architectural features.

The interpretation of the third condition

[34] There are two differences about the third condition. One is whether the prohibition of a sign projecting above the parapet level only to applies to signs attached to the parapet. The other is whether the prohibition of signs projecting above the highest part of a building refers to the highest part of the part of the building to which the sign is attached, or to the highest part of the building.



[35] The appeliants maintained that the parapet level only applies to signs attached to the parapet, and that where a sign is not attached to a parapet, it is not to project above the highest part of the building.

[36] The Council maintained that where a building has a parapet, a sign is not to project above the level of the parapet, whether or not the sign is attached to the parapet. It also maintained that the condition means that a sign is not to project above the highest part of the part of the building to which the sign is attached, not the highest part of the overall building to which the sign is attached.

The appellants case

[37] Counsel for the appellants submitted that in this rule, the parapet level refers to the level of a parapet at the top of a building not, for instance, to a parapet wall around the edge of a balcony.

[38] It was the appellants' case that the condition about the parapet level only applies where the sign is attached to the parapet, not where there is no parapet on the part of the building where the sign is attached.

[39] On the other point, it was the appellants' case that the Council's interpretation requires reading the condition as if it said –

. the highest part of *that part of* the building to which it is attached.

[40] Ms Steven observed that the additional words "that part of" are not in the condition; and submitted that words that are not there, and which change the meaning, should not be read into the rule.[3]

[41] The appellants also urged that the Council's interpretations on the two points are contradictory, in applying to the parapet level the level of any parapet on the building (even if unrelated to the placing of the sign), but not doing the same in respect of the highest part of the building. They urged that the Council's interpretation would give rise to difficulties in the administration of the plan,[4] and that a liberal interpretation should be preferred to an unnecessarily sophisticated or overly literal one.

3 iting Burrows *Statute Law in New Zealand,* (Second edition) 196.
4 Citing *Nanden v Wellington City Council* [2000] NZRMA *562* (HC).

The Council's case

[42] The Council maintained that it is sensible to interpret the condition so as to refer to the highest part of the building to which the sign is attached, regardless of the fact that there may be a higher part of the building elsewhere. The reason was that this is consistent with the purpose of respecting the architectural design of buildings. Mr Milne urged that it would make no sense to refer to other parts of a building that may be higher (as in a podium and tower building, or a main building and penthouse).

[43] Of the appellants' interpretation, the Council argued that it would make no sense to reference the control to part of the building which the sign is not on. That the effect of the size limit is that there would be no control over placement of signs on the rooftops of the lower parts of split-level buildings, contrary to the purpose of the rule.

[44] The Council contended that the word 'or' in the condition means that a sign must not be higher than either of the levels.'

The Court's interpretation

[45] The Council did not contest the appellants' interpretation that in the context the word 'parapet' refers to the level of a parapet at the top of a building, not to a parapet wall around the edge of a balcony. In the context, we agree.

[46] We find no basis in the text or the context for restricting the application of the parapet level control to signs that are attached to the parapet. The final words of the condition "to which it is attached" refer to the words "the building", not to the words "parapet level".

[47] We simply do not accept that the text supports the appellants' interpretation in that respect. The point is to control the height of signs. Attachment to the parapet or not is beside the point. To qualify as a permitted activity, a sign is not to project above the parapet level, even if the sign is not close to the parapet.

Citing *Logan v Auckland City Council* (CA243/99).

[48] Grammatically, the second part of the condition may be open to two meanings. However the purpose is me appearance of buildings from street level so that their architectural concept is displayed. A sign placed so that it projects above the highest part of the part of the building to which it is attached would inhibit the display of the architectural concept. A sign that projects above the highest part of some other part of the building, to which it is not attached, would not.

[49] We have considered the appellants' claim that the Council's interpretations on the two points are contradictory. From their point of view it may appear that way. However when the purpose approach to interpreting the condition is followed, there is no inconsistency between them. We accept that inserting the words "the part of in the second part of the condition would have made the meaning clearer. The whole rule would benefit from professional editing. But any difficulties in administration of the plan arise from poor drafting, not from giving the condition its correct meaning.

[50] So although the condition is not well expressed, we hold that the Council's interpretation is the correct one, and we do not accept that it has the meanings claimed by the appellants.

[51] We hold that the correct interpretation of the third condition is that to qualify as a permitted activity a sign is not to project above the level of the parapet at the top of the building (if there is one), nor is it to project above the highest part of the part of the building to which it is attached.

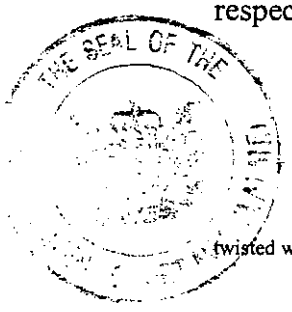
Is part of the rule invalidfor uncertainty?

[52] Next we tum to the appellants' claim that part of the rule is invalid for uncertainty. The part in question is the second threshold in the second condition-

> .where they do not obscure windows or architectural features.

<u>The appellants' case</u>

[53] It was the appellants' case that these words are uncertain in the following respects:



(a) It is uncertain whether 'obscure' means totally obscure, or extends to partially obscure.

(b) It is uncertain what is meant by 'architectural features'

[54] On the first, Ms Steven submitted that it is unclear whether the condition proscribes placing a sign against the backdrop of a wall so that it obscures a window from some views, though not all.

[55] On the second, Ms Steven submitted that what amounts to an architectural feature is fraught with subjectivity, and is not capable of objective ascertainment. Counsel quoted dictionary meanings of the word 'feature'. She submitted that a Council may not reserve by subjective formulation the decision whether an activity is a permitted activity, and that permitted activities fall for objective ascertainment.

[56] Ms Steven continued by contending that permitted activities may not be defined, even in objective fashion, in terms so nebulous that a reader is unable to determine whether a use may or may not be carried on in the zone. That need not involve any express subjective formula, but simply inherent vagueness. Counsel accepted that the question is one of degree: Is the description of a permitted activity too wide, or too vague, to have "some measure of certainty"?

[57] Counsel acknowledged that concepts of subjective formulation and vagueness have to be distinguished, and that an expression need not be invalid because it is general. She submitted that the question must be whether it is sufficiently certain to be understandable and functional.[6]

The Council's case

[58] The Council rejected the claim that the condition is uncertain, and asserted that it is capable of a sensible and logical meaning.

[59] It accepted that a rule may not reserve a discretion to decide what is a permitted activity, but contended that the condition does not reserve a discretion.

[6] Citing *McLeod v Countdown Properties* **(1990) 14 NZTPA 362 (HC)**

[60] Mr Mile submitted that there is no basis for confining the meaning of 'obscure' to totally obscure or cover, as that would mean that a sign which covered 90% of a window or architectural feature would compiy with the condition.

[61] Counsel also rejected the appellants' submission that judgement of what is an architectural feature is fraught with subjectivity. He submitted that this is a matter on which a court can come to an objective view, based on technical and common meanings.

The Court's decision

[62] We accept that concepts of subjective formulation and vagueness should be distinguished.

[63] On the first, we accept the submissions of both parties that a district plan may not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity.' Permitted activities fall for objective ascertainment.[8] On the second, we also accept that if a rule defining a class of activity incorporates an element that is so uncertain that the definition is not functional, the rule might be invalid for inherent vagueness.'

[64] It is in the nature and purpose of district plans that some classifications and rules cannot be expressed in measurable units, such as of height or area. Objectively phrased conditions of permitted activities are not necessarily ruled out merely because they require an exercise of judgement. But they are to be assessed for validity on their own degree of certainty or lack of it.[10] So we accept the submissions of counsel for the appellants that we have to consider whether the condition in question is too wide or too vague to have that element of certainty by which a decision-making body could reach a conclusion after hearing evidence and weighing competing factors."

[7] *Ruddlesdon v Kapiti Borough* (1986) 11 NZTF'A 301 (HC); *Fairmont Holdings cChristchurch City Council* (1989) 13 NZTF'A 461(HC); *McLeod v Countdown Properties*,, supra.
[8] *McLeod* pages 372, 373.
[9] Ibid, page 373.
[10] Idem.
[11] Ibid, page 37

[65] Returning to the condition in question, we have no difficulty with the use of the word 'obscure'. By specifying that signs are to be placed where they do not obscure windows or architectural features, we have no doubt that the intention was that signs are not to obscure (hide, cover) a window or an architectural feature whoily or in part, and from whatever viewpoint. There is no room for holding that the condition is invalid for uncertainty in this respect.

[66] There was a difference between expert witnesses on whether a particular face of a building contained an architectural feature, or whether it was an architectural element. This difference was relied on by the appellants as indicating that the condition is too vague.

[67] We do not accept that it is. In resource management matters, differences of opinions between expert witnesses are common, and where they arise, functionaries have to hear the conflicting opinions, evaluate them by reference to the purpose of the Act and of instruments under it, and the ordinary meaning of non-technical terms, and come to reasonable decisions. It is not always easy, and reasonable people may differ over decisions made. But the use of words and phrases like 'architectural features' is understandable and functional, and in our judgement (unlike the phrase 'nearly all'[12]) is not too wide or too vague to have some element of certainty.

[68] The outcome is that we do not accept the appellants' submissions that the phrase in question is invalid for uncertainty. Therefore the question whether the part questioned can be severed from the rest of the rule does not arise.

Do any of the signs require resource consent?

[69] Now we have to consider each of the signs the subject of the abatement notices and decide whether, on the correct interpretation of Rule 13.1.1.8.1, it qualifies as a permitted activity in the respect questioned in the relative notice, or requires resource consent.

[12] Ibid, 377, 378.

71-81 Cuba Street (RMA26/02 and RMA188/02)

[70] The abatement notice dated 13 December 2001 (which is the subject of Appeals RMA26/02 by Twisted World Limited and RMA188/02 by Zadamis Properties Limited) relates to seven billboard signs erected on the roof of The Oaks complex at 71-81 Cuba Street and facing Manners Street, Dixon Street, Cuba Mall and Te Aro Park. The notice alleges that the signs-

> .project above the parapet level of the building, project above the highest part of the building to which they are attached and are not attached to a plain wall surface.

[71] The appeals allege that properly construed as a whole, reading each component cumulatively, the signs comply with the rule.

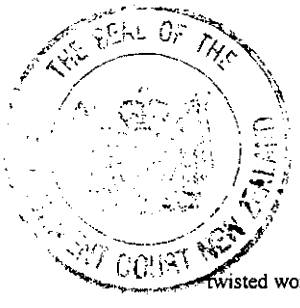
[72] The evidence of Ms YB Weeber, an urban designer employed by the Council, stated--

> 28. The Oaks had been designed as a stand-alone building with a ground floor level, verandah and a first-floor level. The first floor level has an angled roof form which terminates the building around the street edge. In the centre of the building is a higher atrium roofline, which runs in an east west direction. The higher atrium roof while forming the spine of the building is only partially visible from the majority of street vantage points.
> 29. The signs project above the angled roofline of the building. The higher central atrium portion of the building can only be seen behind the signs when they are viewed from a distance. When this is viewed from the street, the signs obscure the architectural features and windows of the higher central atrium portion of the building.
> 30. The structural supports and signs are attached to the angled roofline of The Oaks. The placement of signs on this angled roofline makes the signs visually intrusive as the flat vertical sign is placed on top of an angled roofline. The overall design composition of the building is compromised due to the inappropriate placement of all these signs.

[73] In cross-examination Ms Weeber accepted that obscuring an architectural feature is not one of the allegations of non-compliance in the abatement notice.

[74] The evidence of Mr S J Barry, Governing Director of Twisted World, in respect of these signs was-

> 5. This building is a two storied shopping mall complex. It has a large steel, glass and concrete spine that runs the length of the roof. The signs are attached to the roof and extend upwards from the outside verandah awning level around the outside edge of the building. However they do not project above the highest point of the central spine construction. From my perusal of the plans for this building I calculate the height of the highest part of the building to be 12 metres above ground level .



[75] In cross-examination Mr Barry accepted that one of the signs on this building, having an area of 36 square metres, requires consent.

[76] The affidavit of a planning consultant, Mr C 3 Erskine, sworn on 22 February 2002, contained the following evidence about these signs–

> 4. The building to which all signs are attached has a central spine running the full length, in an east west direction, and extending approximately four metres higher than the roof for the remainder of the building. All seven signs are attached to the main roof, extending three metres vertically from the point to which they are attached. Three signs are attached to the western side of the building, two on the eastern side, and one on the southern and northern sides
> 5. All signs are used for the purpose of advertising off site activities. Typically the advertising is in conjunction with a marketing campaign run concurrently in other forms of media .

[77] We refer to the allegations about the signs in the abatement notice. We find that on their true interpretation, the signs on this building do not meet the second condition of Rule 13.1.1.8.1 in that they are not displayed on plain wall surfaces.

[78] Considering the third condition, the level of the top of the angled roof of the first floor of the building is the parapet level. As the signs are not attached to the central atrium roof, but to the angled roof of the first floor, the top of that angled roof is also the highest part of the building to which the signs are attached.

[79] We find that the signs project above the parapet level of the building, and that they project above the highest part of the part of the building to which they are attached. So we hold that the signs do not meet the third condition of the rule.

[80] In short we find that the seven billboard signs erected on the roof of The Oaks complex at 71-81 Cuba Street and facing Manners Street, Dixon Street, Cuba Mall and Te Aro Park do not qualify as permitted activities under Rule 13.1.1.8.1 in the respects alleged in the abatement notice. In those respects the signs require resource consent as restricted discretionary activities,

[81] Although not the subject of the allegations in the notice, it is apparent that those signs do not qualify either in respect of obscuring the architectural feature of the central atrium roof. In addition, one of the signs does not qualify as a permitted activity because its size is 36 square metres, which exceeds the maximum area of 20 square metres stipulated in the first condition of the rule.

[82] As those matters were not the subject of the abatement notice against which the appeals have been brought, we make no finding in those respects.

32-34 ***Kent Terrace*** ***(RMA139/02 and RMA187/02)***

[83] The abatement notice dated 18 December 2002 (which is the subject of Appeals RMA139/02 by Twisted World Limited and RMA187/02 by C S and P A Griffiths) relates to a sign (3 metres by 12 metres) at 32-34 Kent Terrace. The notice alleges that–

> The sign protrudes above the parapet level of the building and also projects above the highest part of the building to which they are attached, being the northern façade of the podium. The sign is not displayed on a plain wall surface and obscures windows.

[84] The appeals allege that properly construed as a whole, reading each component cumulatively, the signs comply with the rule.

[85] Ms Weeber gave evidence that the sign is made up of two flat surfaces that can be used for a single elongated advertisement or for two advertisements. The witness stated that the sign is attached to a wall that is part of the podium of a taller building, and that the sign projects above the podium wall and obscures the windows and architectural features of the main building behind it. She agreed in cross-examination that obscuring architectural features was not one of the allegations in the abatement notice.

[86] In his evidence, Mr Barry explained that the building is nine storeys high, that the bottom two storeys cover a larger ground area, creating a platform on which the other seven storeys stand. He stated that the signs are attached to the parapet wall running around the outside edge of the two-storey lower portion of the building.

[87] In his affidavit Mr Erskine stated that the signs are attached to the northern side of the building at the highest point of the second floor, extending three metres vertically from this point. He explained that this effectively means that there is a gap between the signs and the third floor of the building.

[88] The top edge of the podium is the parapet level. It is also the highest part of the part of the building to which it is attached.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[89] We find that the sign does not meet the second condition of the rule in that it is not displayed on a plain wall surface, and in that it obscures windows on the tower block. We also fmd that the sign does not meet the third condition of the rule in tbat it projects above the parapet level; and in that it projects above the highest part of the part of the building to which it is attached.

[90] The result is that the sign erected on the building at 32-34 Kent Terrace does not qualify as a permitted activity in the respects alieged in the abatement notice, and requires consent as a restricted discretionary activity.

[91] We make no finding in respect of aspects that were not alleged in the abatement notice. The evidence suggests that, used as a single sign, it also exceeds the maximum area of 20 square metres, and that it obscures architectural features of the tower building behind the podium on which it stands.

68- 74 Willis Street (RMAI 56/02 and RMA189/02)

[92] Appeals RMA156/02 and RMA189/02 challenge an abatement notice dated 22 February 2002 in respect of two billboards on a car-parking building at 68-74 Willis Street. The notice claims that –

> Two billboards have been erected on site that obscure an architectural feature (aluminium slat).

[93] The appeals disputed that the signs are obstructing an architectural feature.

[94] A Council compliance monitoring officer, Ms H E Binmore, gave evidence that she had issued the abatement notice because the signs obscure the louvres which are the most prominent architectural feature of the building. Asked in cross-examination on what basis she made that assessment, the witness replied that she had assessed the overall design of the building, considered the elements repeated, and the features that were there to make a statement in the design of the building. She had considered the prominence of the aluminium slats, and how they had been described in the resource consent for altering the façade above the verandah. Ms Binmore reported that the resource consent application had described the louvres as horizontal, so that they would tie in with horizontal bands on balconies of an adjoining apartment building.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[95] Ms Weeber stated that the two signs and associated lighting project out over the louvres, and that the signs obscure the louvres. She referred to her own assessment of tbe application for alterations to the building in which she had reported–

> The existing buiiding [is] in a sense a blank wall with a series of louvres on the wall to add architectural features and a visual pattern and relief to the building. The bland wall is painted a recessive black colour allowing the louvres and surrounding buildings to dominate. The parapet top edge is visible and not hidden by the overall louvre design.

[96] Ms Weeber gave the opinion that as well as screening, the combination of the louvres in a repetitive design sequence on the building facade create an architectural feature of the building. This witness stated that the signs break the design pattern of the louvres, and obscure the most prominent architectural feature of the building.

[97] In cross-examination Ms Weeber stated that she did not agree with the opinion of the architect Mr I C Athfield that the louvres are not an architectural feature. She stated that the louvres had been placed on the building to reduce visibility of cars in the parking building behind, and to give vertical emphasis. She considered that they are not just an infill panel, but an architectural feature of the building.

[98] It was Mr Barry's evidence that the signs are erected on slat screens placed over parts of the frontage of the building to obscure the gaps between the floor plates of the car-parking floors. He did not agree that the signs were obscuring an architectural feature; and he did not consider that the screens have any particular merit aesthetically. In cross-examination he stated that at the time the signs were erected, he had not taken advice on whether or not the louvres were architectural features.

[99] In his evidence Mr Athfield gave the opinion that the slat screens do not constitute an architectural feature of the building, but are an element of the building facade. He stated that an architectural feature articulates the architectural character of the building in a manner which adds to the quality of that building; that its purpose is to enhance a building. He considered that the primary reason for this element is screening, and stated that they modulate the wall in the manner that a window does.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[100] In cross-examination Mr Athfield stated that the slatted panels to which the signs are attached are a component of the facade of the building and part of the facade composition. Asked if he regarded those components as being a design feature of that facade, the witness replied that a design feature could be any architectural element, whether background or an architectural feature.

[101] The Wellington district plan is not a technical instrument for the architectural profession. It is a public document for use by the public generally. Therefore, in the absence of provision giving a particular meaning to words used in the plan, they have to be *given* their ordinary meaning. That extends to the words "architectural features" in the second condition of Rule 13.1.1.8.1.

[102] Material dictionary meanings of 'feature' are–

> 1 A distinctive or characteristic part of a thing. 2 (usu in pl) a distinctive part of a face, esp. with regard to shape and visual effect [13]
>
> 1. any one of the parts of a face, such as the nose, chin or mouth. *2* a prominent or distinctive part, as of a landscape, book etc.[14]
>
> 1 any of the parts of the face, eg eyes, nose, mouth etc . . . 2 a noticeable part or quality of something.[15]
>
> 1. *a* distinguishing aspect or part.[16]

[103] Qualified by the word 'architectural' (referring to the design and construction of buildings) the sense of the words 'architectural features' is parts of a building facade that are distinctive or give it character or make it noticeable.

[104] To give the words "architectural features" that meaning in the context of the Rule 13.1.1.8.1 is consistent with the value that the Design Guide places on contrasting finishes, colours and patterns.

[105] We do not find support for making, in ordinary use, the distinction between feature and element made by Mr Athfield.

[106] From the evidence about the facade of the building at 68-74 Willis Street (assisted by photographs of it produced by Mr Barry and Ms Binmore) we fmd that the slatted panels on the Willis Street facade of the building are parts of the facade

[13] *The Concise Oxford Dictionary.*
[14] *The New Collins Concise English Dictionary, New Zealand Edition.*
[15] *Chambers Combined Dictionary Thesaurus.*
[16] *Heinemann's New Zealand Dictionary.*

that are distinctive, that give it character and make it noticeable. They are obscured by the two signs.

[107] For those reasons we hold that the two signs do not meet the second condition of the rule in the respect alleged in the abatement notice, in that they obscure architectural features. So the signs are not permitted activities, and need resource consent.

54 Jervois Quay (RMA258/02)

[108] Appeal RMA258/02 by Twisted World challenges an abatement notice about two signs on a building at 54 Jervois Quay. The notice claims that–

> The signs protrude above the parapet level of the building and also project above the highest part of the building to which the sign is attached. The signs are also not attached to a plain wall surface.

[109] The appeal was based on the appellant's assertion that the signs comply with Rule 13.1.1.8.1, and are a permitted activity.

[110] A Council compliance monitoring officer, Ms R N Murphy, gave evidence that the signs are two 3 x 6 metre billboards erected at right angles to each other on a corner of the roof of a car-parking building fronting Jervois Quay and Willeston Street. She added that the signs obscure horizontal openings in the parking building.

[111] It was Ms Weeber's evidence that the signs are attached to the lower section of the building, where there *is* significant distance between it and the main higher block of the car-parking building. The signs are attached to the wail at the Jervois Quay and Willeston Street comer, and project well above the highest part of that part of the building.

[112] Ms Weeber gave the opinion that the signs obscure a pattern of openings in the wall which could be considered an architectural feature.

[113] Mr Barry explained in his evidence that this part of the building is stepped out from the rest, forming a carpark platform at this lower level, with the rest of the building rising up behind it. He stated that the signs are attached to the parapet wall on the comer outside edge of the lower portion of the building.

[114] Mr Erskine also described the placement of the signs in his affidavit–

> The third storey of the building extends to the perimeter of the site while the remaining four storeys are stepped in approximately 30 metres from the eastern boundary. This effectively creates an outdoor parking area on the third storey of the building. The signs are attached to the south-east corner of the building, extending three metres vertically from the point to which they are attached.

[115] Assisted by photographs of the signs produced by Mr Barry and Ms Murphy, on the evidence we find that the upper edge of the third storey of the building is a parapet, and that both signs stand on top of that parapet and project above the parapet level. We also find that the highest part of the part of the building to which the signs are attached is the edge of the third storey of the building, and that the signs are placed on that part of the building and so they project above it. As the signs stand free on top of the parapet, we find that neither of them is displayed on a plain wall surface.

[116] Therefore we hold that neither sign complies with the second or third condition for being a permitted activity in the respects alleged in the abatement notice. Both signs require resource consent.

Should the Court refrain from confirming any of the abatement notices?

[117] The appellants submitted that in the light of the conflicting readings of the rule, the Council officers did not have reasonable grounds to consider that the signs breached the rule, as there is no evidence that they had legal advice, and there was no agreed consistent approach to the administration of the rule. They submitted that it would have been more appropriate for the Council to apply for a declaration to clarify the meaning of the rule instead of issuing abatement notices.

[118] The appellants contended that a discretion should be exercised by cancelling the abatement notices in the circumstances, particularly –

(a) On the interpretation of the rule previously adopted by the Council the signs would have been treated as permitted.

(b) Resource consent has not been required for signs similarly placed elsewhere in the central area

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

(c) Some Council staff considered the subject signs were permitted activities

(d) A warning that the Jervois Quay signs required resource consent had been cancelled in writing

(e) Commitments had been made before firm notice was given that the Council would require resource consent for the signs in question

(f) The appellants had professional advice supporting their position.

(g) The signs do not have an adverse effect on the environment.

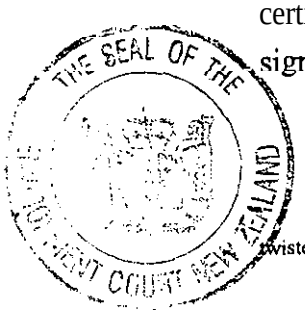
[119] The Council submitted that if the grounds have been made out, the Court does not have a discretion to cancel the abatement notices, but must confirm them. It acknowledged that the Court can amend the terms of the notice to the extent sought by the appeal or so that it achieves its purpose.

[120] The Council submitted that by section 84 it has a duty to observe and enforce the observance of the district plan, in spite of any purported waiver or departure from it; and that even if the Court has a discretion to cancel the notices, the circumstances of the case do not support it doing so.

[121] In respect of the Jervois Quay signs, the Council initially claimed that the signs had been erected early in July 2001, prior to withdrawal of the notice on 20 August 2001. However it was later established that they were erected between 31 July and 19 August.

[122] The Council accepted that cancellation of the warning that resource consent was required for those signs might be relevant to civil or offence proceedings, but submitted that it is not relevant to these appeals as the enforcement officer had to make her own independent decision about issuing an abatement notice.

[123] The Council did not accept that the fact that the appellants took professional advice was relevant. It observed that they were aware of the different interpretations of the rule, and that it would have been prudent for them to have applied for a certificate of compliance or a declaration. They chose not to do so, and erected the signs at their own risk.



[124] On the appellants' suggestion that the Council could have sought a declaration, the Council responded that it has a discretion as to how it takes enforcement action, and contended that abatement notices were appropriate where the Council was sure the signs did not comply, and it is the appellants who take issue with that.

[125] The Council also contended that appellants had the benefit of revenue from the signs for some months, having erected them in the knowledge that the Council considered they were not permitted activities, and having chosen to proceed and take a risk that the Court would uphold its interpretation.

[126] We have held that none of the signs is a permitted activity. There is no question but that none of them has been authorised by a grant of resource consent. The Council officers did have reasonable grounds to issue the abatement notices. If the Court has a discretion to cancel the notices in such circumstances, we consider that it would not be appropriate to do so in these cases.

[127] We are not persuaded that, on the interpretation of the rule previously adopted by the Council, the signs would have been permitted. But even if they would have been, that interpretation is not correct. On the correct interpretation, the signs are not authorised. To cancel the notice would condone continuation of unauthorised signs, and would undermine performance by the Council of its duty to enforce observance of its plan.

[128] It is understandable that the appellants point to other signs in the central area which they consider indicate that they have been unfairly selected for enforcement action when others have not. Poor drafting of the rule, and uncertainty among Council staff about its interpretation, can lead to uneven compliance and feelings of unfairness. Even so, the solution is education of enforcement officials, and active compliance monitoring, not acquiescing in continuation of unauthorised signs.

[129] We accept that there was some regrettable vacillation about the Jervois Quay signs. This can be taken into account in deciding the terms of compliance, without undermining the plan, or the urban design values that it is designed to achieve.

[130] We also accept that some commitments may have been made before firm notice was given that the Council required resource consent for the signs, and that the appellants had professional advice. These matters may help explain why the

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

signs were erected at a time when me appellants knew that the Council required resource consent, and show that erecting them was not a simple act of defiance. They may assist in deciding the terms of compliance, but they are not reasons for cancelling the notices.

[131] We do not accept the appellants' claim that the signs do not have adverse effects on the environment. The basis for the conditions in the rule can be understood from the Design Guide for the central area. The signs in question inhibit the display of the external design of the buildings.

[132] For those reasons we judge that the abatement notices should be confirmed, but we need to review the terms of compliance.

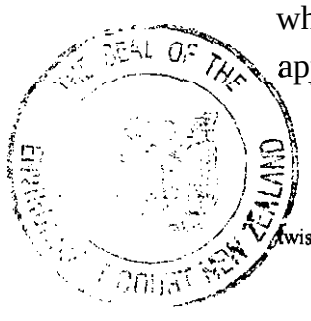
Should the Court continue the stay pending consent?

[133] The appellants maintained that if the notices are to be confirmed, the time for compliance should be postponed to allow resource consent applications to be made to authorise the signs.

[134] Mr Milne submitted that strictly the Court does not have power to continue the stay of me abatement notices. But the Council accepted that the Court should review the terms of compliance and amend them.

[135] We accept that. In our judgement, the time for removing the signs should be set so as to allow a resource consent application to be made; and if one is made, a further period for removal should be allowed so the application can be decided. But both times should be set so that, to get the advantage of them, the appellants would have to prepare and pursue the resource consent application with expedition. In addition, it would be inappropriate for the appellants to continue to gain revenue from the signs in the meantime. (Mr Barry explained that the advertising contracts were conditional on the outcome of these appeals, so that should not cause undue prejudice to the appellants, or to the advertisers.)

[136] In our judgement, the time by which any advertising content of the signs is to be removed should be 10 working days after the giving of this decision. The date by which the structures are to be removed if a fully-complying resource consent application for the sign has not been made should be 20 working days after the



giving of this decision. The date by which the structures are to be removed if application is made should be three months after the giving of this decision.

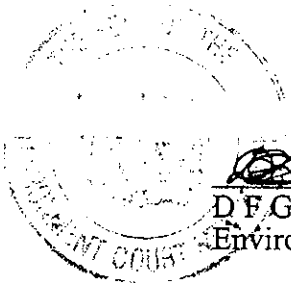
Determinations

[137] For the reasons given, the Court amends each of the abatement notices the subject of these proceedings by deleting the content of paragraph 5 in each case, and by substituting the tunes for compliance stated in the preceding paragraph of this decision. Save to that extent, each of these appeals is disallowed.

[138] The appeals have failed, but the dispute arose because the rule was not drafted and edited to the professional standard appropriate, and the dispute was aggravated by lack of unanimity among the Council staff about its interpretation, and by insufficiently active compliance monitoring. Our tentative view is that the costs of the parties should lie where they have fallen. However, as the parties have not made submissions on costs, we reserve the question in case they wish to do so.

DATED at Wellington this 8th day of July 2002.

For the Court:



D F G Sheppard
Environment Judge