BEFORE THE ENVIRONMENT COURT

Decision [2015] NZEnvC 50
ENV-2013-WLG-000050

IN THE MATTER	of an appeal under cl 14 of Schedule 1 to the Resource Management Act 1991
BETWEEN	NGATI KAHUNGUNU IWI INC Appellant
AND	THE HAWKES BAY REGIONAL COUNCIL Respondent

Court: Environment Judge C J Thompson
Environment Commissioner A C E Leijnen
Environment Commissioner K Prime
Hearing: at Hastings 3 and 4 December 2014
Counsel and Representatives:
N J R Tiuka for Ngati Kahungunu Iwi Inc
N F Jones for Hawkes Bay District Health Board – s274 party
L J Blomfield for the Hawkes Bay Regional Council

DECISION ON APPEAL

Decision issued: 27 MAR 2015

The appeal is allowed: - see paras [107] and [108]

Costs are reserved

Introduction

[1] Proposed Change 5 (Change 5) to the Hawke's Bay Regional Resource Management Plan – Land Use and Freshwater Management (RRMP), notified on 2 October 2012, is, in part, a step towards the Hawkes Bay Regional Council implementing the National Policy Statement for Freshwater Management. The RRMP is a combined regional policy statement and regional plan. Sections 1-4 of the document are intended to meet the requirements of s62 of the RMA in relation to the contents of a Regional Policy Statement (RPS) and sections 5-8 the requirements of s67 relating to the contents of a Regional Plan (RP).

[2] Change 5 is primarily concerned with the RPS and it introduces a new section to Chapter 3 of the RRMP. The decisions version of Change 5, released on 5 June 2013, would delete Objective 21 from the Groundwater Quality section (3.8) in Chapter 3: Regionally Significant Objectives and Policies, and would also amend Objective 22. It would also consequentially amend and delete duplicate Objectives 42 and 43 respectively from section 5.6 of Chapter 5: Regional Plan Objectives and Policies. This is (somewhat obscurely) located under a section in Change 5 entitled *Insertions to other chapters in the Part 3 (RPS) of HB Regional Resource Management Plan.*

[3] Objective 21 presently reads:

> No degradation of existing groundwater quality in the Heretaunga Plains and Ruataniwha Plains aquifer systems.

And Objective 22, again without the Change 5 amendment, reads:

> The maintenance or enhancement of groundwater quality in unconfined or semi-confined productive aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[4] The decisions version of Change 5 would, as noted, delete Objective 21 and amend Objective 22 to read:

The groundwater quality in the Heretaunga Plains and Ruataniwha Plains aquifer systems and in unconfined or semi-confined productive aquifers is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[5] The significant difference between the notified and decisions versions of Objective 22 is the opening reference to Objective LW1 (OBJ LW1) in the notified version. That objective is part of the new section inserted as Chapter 3.1A (ie of the RPS) and sets the scene, as it were, for the changes proposed for Chapter 3.8. We are informed that, with one exception (see footnote), OBJ LW 1 has now been settled (through other concluded appeals) and is beyond challenge. It now reads:

OBJ LW1 Integrated management of fresh water and land use and development

Fresh water and the effects of land use and development are managed in an integrated and sustainable manner which includes:

1. protecting the quality of outstanding freshwater bodies in Hawke's Bay;

1A. protecting the significant values of wetlands[1];

2. the maintenance of the overall quality of freshwater within the Hawke's Bay region and the improvement of water quality in water bodies that have been degraded to the point that they are over-allocated;

2B. establishing where over-allocation exists, avoiding any further over-allocation of freshwater and phasing out existing over-allocation;

3. recognising that land uses, freshwater quality and surface water flows can impact on aquifer recharge and the coastal environment;

4. safeguarding the life-supporting capacity and ecosystem processes of fresh water, including indigenous species and their associated fresh water ecosystems;

5. recognising the regional value of fresh water for human and animal drinking purposes, and for municipal water supply;

6. recognising the significant regional and national value of fresh water use for production and processing of beverages, food and fibre;

7. recognising the potential national, regional and local benefits arising from the use of water for renewable electricity generation;

[1] This part of the Objective is still subject to an appeal but does not affect the present discussion

8. recognising the benefits of industry good practice to land and water management, including audited self-management programmes;
8A. recognising the role of afforestation in sustainable land use and improving water quality;
9. ensuring efficient allocation and use of water;
...
12. recognising and providing for river management and flood protection activities;
13. recognising and providing for the recreational and conservation values of fresh water bodies; and
14. promoting the preservation of the natural character of the coastal environment, and rivers, lakes and wetlands, and their protection from inappropriate subdivision, use and development.

We pause here to note the use of the term *overall quality* in paragraph 2. This leads to the issue of considering an *overs and unders* approach to region-wide water quality which we anticipate is founded on Objective A2 of the National Policy Statement for Freshwater Management (NPSFM) and which we will come to later.

[6] POL LW1 is entitled *Problem solving approach – Catchment-based integrated management*. Here it is stated that the Council will ... *adopt an integrated management approach to fresh water and the effects of land use and development within each catchment area*, that amongst other things:

b) provides for *matāuranga a hapū* [ie the collective knowledge of a hapu] and local tikanga values and uses of the catchment;
c) provides for the inter-connected nature of natural resources within the catchment area, including the coastal environment;
cA) recognises and provides for the need to protect the integrity of aquifer recharge systems;
d) gives effect to provisions relating to outstanding freshwater bodies arising from the implementation of Policy LW1A;
dA) maintains, and where necessary enhances, the water quality of those outstanding freshwater bodies identified in the catchment, and where appropriate, protects the water quantity of those outstanding freshwater bodies;
e) promotes collaboration and information sharing between relevant management agencies, iwi, landowners and other stakeholders.
f) takes a strategic long term planning outlook of at least 50 years to consider the future state, values and uses of water resources for future generations;

g) aims to meet the differing demand and pressures on, and values and uses of, freshwater resources to the extent possible;

gA) .....

h) ensures the timely use and adaptation of statutory and non-statutory measures to respond to any significant changes in resource use activities or the state of the environment;

iC) .....;

iD) .....

iE) recognises and provides for existing use and investment;

j) ensures efficient allocation and use of fresh water within limits to achieve freshwater objectives; and

k) .....[2]

[7] Part 2 of POL LW1 describes the process for preparation of regional plans, including the identification of the spatial extent of each catchment, the scope of values which must be attributed, and those values that are optional to a water body, and focuses on provisions for outstanding freshwater bodies. Sub clause (e) requires regional plans to:

> ... set out how the groundwater and surface water quality and quantity limits and targets will be implemented through regulatory or non-regulatory methods including specifying timeframes for meeting water quality and allocation targets.

[8] When the Council sets objectives in its Regional Plan aligned to POL LW1.2, Policy POL LW1.3 requires it to ensure:

a) the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water are safeguarded; and

b) adverse effects on water quantity and water quality that diminish mauri are avoided, remedied or mitigated; and

c) the microbiological water quality in rivers and streams is safe for contact recreation where that has been identified as a value under Policy LW1.2 or Policy LW2 Table 1.

[2] Note: the numbering of the subparagraphs of this policy does not strictly follow in sequence the policy needs to be referred to as following consent order settlement.

[9] When prioritising water values, the *problem solving* approach requires that subject to POL LW1.3, (relevant to this appeal) the Council:

1. Give priority to maintaining, or enhancing where appropriate, the primary values and uses of freshwater bodies shown in Table 1 for the following catchment areas in accordance with Policy LW2.3: (emphasis added)
   a) Greater Heretaunga/Ahuriri Catchment Area;
   b) Mohaka Catchment Area; and
   c) Tukituki Catchment Area.

These provisions also apply both to the preparation of regional plans, and where no catchment-based plan has yet been prepared for the relevant catchment. The default position then, one could say, is POL LW1.3. We set out Table 1 as it relates to the Greater Heretaunga/Ahuriri Catchment area:

Catchment Area	Primary Value(s) and Uses – in no priority order	Secondary Value(s) and Uses – in no priority order
Greater Heretaunga / Ahuriri Catchment Area	• any regionally significant native water bird populations and their habitats • Cultural values and uses for: o mahinga kai o nohoanga o taonga raranga o taonga rongoa • Fish passage • Individual domestic needs and stock drinking needs • Industrial & commercial water supply • Native fish habitat in the Ngarururo River and Tutaekuri River catchments • Recreational trout angling and trout habitat in: o the Mangaone River o the Mangatutu Stream o the Ngarururo River and tributaries upstream of Whanawhana cableway o the Ngarururo River mainstem between the Whanawhana cableway and confluence with the Maraekakaho River o the Tutaekuri River mainstem above the Mangaone River confluence • The high natural character values of the Ngarururo River and its margins upstream of Whanawhana cableway, including Taruarau River • The high natural character values of the Tutaekuri River and its margins above	• Aggregate supply and extraction in Ngarururo River downstream of the confluence with the Mangatahi Stream • Amenity for contact recreation (including swimming) in lower Ngarururo River, Tutaekuri River and Ahuriri Estuary • any locally significant native water bird populations and their habitats • Native fish habitat, notwithstanding native fish habitat as a primary value and use in the Tutaekuri River and Ngarururo River catchments • Recreational trout angling, where not identified as a primary value and use • Trout habitat, where not identified as a primary value and use

	the confluence of, and including, the Mangatutu Stream • Trout spawning habitat • Urban water supply for cities, townships and settlements and water supply for key social infrastructure facilities • Freshwater use for beverages, food and fibre production and processing and other land-based primary production	

[10] In the absence of a numerical standard compliance relies, in the interim, on an interpretation of the objectives and policies. The setting of a numerical standard (to follow in regional plans) relies on an interpretation of the amended objectives and policies, which as Ngati Kahungunu (whose position we will set out shortly) asserts, sets a bottom line of a quality of water (through the application of OBJ 22 as proposed by the Council), that is *suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of natural water quality.*

[11] To give more context, we should mention now two further objectives which have been settled. These are:

OBJ LW2 Integrated management of freshwater and land use development

The management of land use and freshwater use that recognises and balances the multiple and competing values and uses of those resources within catchments. Where significant conflict between competing values or uses exists or is foreseeable, the regional policy statement and regional plans provide clear priorities for the protection and use of those freshwater resources.

OBJ LW3 Tangata whenua values in management of land use and development and freshwater

Tangata whenua values are integrated into the management of freshwater and land use and development including:

a) recognising the mana of hapu, whanau and iwi when establishing freshwater values; and

b) recognising the cumulative effects of land use on the coastal environment as recognised through the Ki uta ki Tai (*mountains to the sea*) philosophy; and

c) recognising and providing for wairuatanga and the mauri of fresh water bodies in accordance with the values and principles expressed in Chapter 1.6, Schedule 1 and the objectives and policies in Chapter 3.14 of this Plan; and

d) recognising in particular the significance of indigenous aquatic flora and fauna to tangata whenua.

[12] We record, and shall return to the point later, that Objectives 42 and 43 in the regional plan portion of the RRMP, without the amendments of Change 5, read:

> OBJ 42 No degradation of existing groundwater quality in aquifers and Ruataniwha Plains aquifer systems.
>
> OBJ 43 The maintenance or enhancement of groundwater quality in unconfined or semi-confined productive aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[13] The Council, quite understandably, was at pains to point out that the amendments proposed through Change 5 were designed to affect the RPS and that the RP changes were still to come. After the Change 5 amendments to the RPS set in place *higher order* objectives and policies, a process would then be followed by the Council to amend its regional plan as it considers each catchment. However, as already noted, Change 5 purports to consequently change Objectives 42 and 43 of the Regional Plan.

[14] While s67(3) RMA requires a regional plan to *give effect* to the RPS, this does not require that the plan simply mimics the RPS. In this case Change 5 clearly sets out that *the* RP is earmarked for future changes. However, by making a change to a fundamental objective of the RP as a *consequential* change, the objective is unable to be considered in the context of the whole of the plan to which it relates. A

consequential change to the RP could change the meaning of that plan in a broader context. We were not provided with any evidence on the significance of that change to the overall drafting/meaning of the RP such as a s32 analysis would deliver.

[15] In the meantime, the *Board of Inquiry into the Tukituki Catchment Proposal* has given a decision on Plan Change 6 (which is specific to the Tukituki catchment) - so that process has, in some respects, *leap-frogged* Change 5. Clearly, some caution is needed in considering the Board decision's relevance to the present issues because it dealt with a regional plan change, rather than being directed at the higher level document (regional policy statement) we have before us. The Board has indicated that the provisions of Chapter 5.6 of the Regional Plan do not apply within the Tukituki River catchment, of which the Ruataniwha Plains aquifer system forms part. It has made an amendment to Objective 42 by removing from it the words ... *and Ruataniwha Plains [aquifer system].* On that basis, Objective 42 is now to read:

> No degradation of existing groundwater quality in aquifers in the Heretaunga Plains. [3]

In addition, the Board's decision on PC 6 appears to seek to impose better management practices to reduce contaminant loading. This is the sort of amendment one might expect once the Council takes to implementing the review of its Regional Plan to align with the NPSFM. Again we note that Change 5 relates to Chapter 3 of the combined Plan, which is the Regional Policy Statement, not the Regional Plan.

The hierarchy of planning instruments

[16] Since the Supreme Court judgment in *EDS v NZ King Salmon Co Ltd* [2014] NZRMA 195 there has been an increased awareness of the need to consider the hierarchy of planning documents, and the degree of control those documents have over the required or permissible contents of the documents ranking below them. Plainly, the senior document is the RMA, and immediately below that are the National Policy Statements (NPS). In this case, this is the NPSFM which came into force on 1 August 2014 and, with some transitional provisions, revoked the 2011

[3] see p62, Appendix 5 to the Board's Report

version from that date. In its own terms the NPSFM speaks of being applicable to Regional Plans, and makes no mention of Regional Policy Statements. Why that is so, we do not know, because s62(3) RMA makes it perfectly clear that a Regional Policy Statement must give effect to an NPS.

[17] Also, going up the chain rather than down, a Regional Plan must give effect to both an NPS and to a Regional Policy Statement, so it would make no sense to have a Regional Policy Statement that did not give effect to an NPS.

Ngati Kahungunu Iwi Inc's position

[18] In respect of Objective 21, Ngati Kahungunu Iwi Inc (Ngati Kahungunu) wishes to see the *as notified* version of Change 5 remain as part of the RRMP, and in an approach slightly revised from the relief sought in the original appeal, seeks that Objective 22 should read:

> The maintenance or enhancement of groundwater quality in other aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

We note Ngati Kahungunu's point about the term *productive aquifers*. These are defined in the RRMP as:

> i. Has quantity and flow of water such that it can be used for water supply purposes, and
> ii. Where the benefits of utilisation outweigh the costs (especially where the aquifer has existing contamination).

The NPSFM does not differentiate between *productive* and *non-productive* aquifer systems and Ngati Kahungunu is concerned that, first, the proposed wording would allow for the degradation of non-productive aquifers; and secondly, that classification as *non-productive* or *productive* is a function of use for the time being, rather than of inherent quality or quantity. This position did not appear to be challenged during the hearing although Ms Blomfield, in her reply, thought it unnecessary.

[19] In his opening submissions for Ngati Kahungunu (para 64), Mr Tiuka emphasised the point that:

> The operative RPS Objectives 21 and 22 are reinforced by Policy 17 which directs decision makers to manage effects of activities on groundwater quality so that the environmental guidelines in the RRMP, Policies 75 and 76, are complied with. The guidelines in Policies 75 and 76 reinforce the direction set in the operative Objective 21 and 22, that water quality in the Ruataniwha and Heretaunga should not be degraded, and that elsewhere it should meet human drinking water and irrigation quality standards.

Mr Tiuka went on to emphasise that the operative provisions give clear direction that the existing quality in those aquifers is to be maintained, and that elsewhere it is to be maintained or improved. Further, he noted Policy 17, which reads:

POL 17 Decision-Making Criteria – Activities affecting Groundwater Quality

3.8.15 To manage the effects of activities that may affect the quality of groundwater in accordance with the following approach:

(a) To ensure that all activities, particularly discharges of contaminants onto or into land, comply with the environmental guidelines for groundwater quality, and the associated implementation approach, set out in Policies 75 and 76.

(b) To encourage discharges of contaminants onto or into land where these are likely to have less adverse effect than discharges into water.

(c) To consider the effects of the taking of groundwater on the quality of groundwater, including the potential for salt water intrusion.

(d) To prevent or minimise spills or other breaches of resource consent conditions causing contamination of groundwater, particularly in those areas of high contamination vulnerability for the Heretaunga Plains aquifer system as shown in the DRASTIC map in Schedule V, by requiring the preparation and implementation of site management plans and spill contingency measures for relevant activities.

(e) To disallow any discharge activity which presents a significant risk of groundwater contamination in those areas of high contamination

> vulnerability for the Heretaunga Plains aquifer system as shown in the DRASTIC map in Schedule V.

is not changed by Change 5, so there would be an internal inconsistency between the operative RPS policy and the provisions to be amended by Change 5 – as he puts it … *The objective allows for degradation and the policy requires maintenance.*

[20] Mr Tomoana, who is the Chair of Ngati Kahungunu and who provided cultural evidence for the Iwi, provided some examples of better practice in response to questions from Ms Blomfield. We are also aware that there exists a Settlement Act relating to Tainui and the Waikato River which relies on the potential for maintenance and enhancement of the water of that river and its related waterways. That must have some basis of practicality as it has the effect of a National Policy Statement under the RMA, although in terms of direction-setting, it may do no more than does the direction in s30(1)(c)(ii).

[21] We shall return to Ngati Kahungunu's position in discussing s6 issues.

The District Health Board's position

[22] Dr Jones indicated that the Board was pleased that the Regional Council was setting an objective to protect the safety of water for drinking. Unsurprisingly, the Board's concern was how that might be implemented; its effectiveness, and the issues of possible changes of levels of contamination over time.

[23] He also pointed out that what is regarded as *safe* – for instance in terms of nitrate levels in the water – might change over time. While that change might possibly go either way, the Board's view was that a precautionary approach, keeping acceptable levels noted as low, would provide a buffer and reassurance against problems in the future. Dr Jones also reminded us that in the Tukituki Board's decision on Plan Change 6, the groundwater nitrate-nitrogen (NO_3-N) limit has been set at 10-11.3 mg/L[4] - but that that could be revisited in any subsequent plan change.

[4] See paras [48] –[49] for explanation of this numeric

The Council's position on what it is able to do about water quality in aquifers – and why it has made the disputed changes in Change 5

[24] The reasons the Council advances for deleting Objective 21 are, first, that its wording is absolute – it states that there is to be no degradation of the quality of groundwater, and it believes that to be impossible to achieve. Secondly, there is a time lag between cause and effect upon water in aquifers – ie a contaminant may be released into groundwater at entry point A and then, depending upon the permeability of the land through which it passes, it may not show up as a contaminating effect at measuring point B until years, or decades, later. Even then, it will probably not be possible to connect a particular effect to a particular cause. That means that there will be, because of what may have been introduced to groundwater in the past, an effect or set of effects of groundwater degradation that are unpredictable in kind and/or degree, and impossible to relate to any one cause or event. This is referred to by the Council as *the load to come*. In her closing submissions, Ms Blomfield puts the point this way:

> 42. For the future, implementing the 'no degradation' objective would require regional plans to limit or prevent any activity which might result in contaminants entering groundwater. That would mean a prohibition on all farms, all horticulture, and taken to an extreme level, even native bush because it too leaches nitrogen into the soil and that nitrogen inevitably reaches groundwater. An absolute and blanket requirement for 'no degradation' of groundwater across the whole region is clearly an unworkable proposition.
>
> 43. As noted previously, instead what is required is the setting of appropriate limits on the allowable extent of degradation, such that use and development can occur without compromising life-supporting capacity and the health and well-being of people and communities (amongst other things). Clearly such limits may be tougher in some areas and laxer in others. That is why Appendix 2 to the NPSFM sets a range of numerical attributes for communities to select from.

[25] The Council points out that Objectives 21 and 22 are in the present RRMP, notified in 2000 and effective from 2006, but there has been, over the last 14 years of monitoring, increases of nitrate-nitrogen at 18% of the monitoring sites. Most of

these sites are in the Heretaunga Plains and Ruataniwha gravel aquifers. As Ms Blomfield put it in her opening submissions:

> Even if further land use change is curtailed, it is likely that over time existing groundwater quality will degrade to some extent.

And she then went on to say:

> What is proposed instead is an objective requiring the groundwater quality in the Heretaunga Plains aquifer and the Ruataniwha aquifer systems and confined aquifers or semi-confined productive aquifers to be suitable for human consumption and irrigation without treatment (unless treatment is necessary because of the natural water quality).

[26] The Council also points out that the changes to Objectives 21 and 22 of the RPS are but part of a package; and a high-level part at that. It says, correctly, that when it comes to catchment-specific issues, Regional Plan provisions can be put in place, tailored to the circumstances of those catchments.

[27] We shall return to these themes later in the decision.

A regional council's functions

[28] The functions required of a regional council – and indeed its *raison d'etre* – are those of relatively high-level control of resources having regional, as opposed to immediately local, significance. Section 30 is key to considering what a regional council may do and, more importantly in this context, what it must do. The relevant portions of the section provide:

> 30 Functions of regional councils under this Act
>
> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> (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: (emphasis added)

(iii) The maintenance of the quantity of water in water bodies and coastal water: …

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

We interpolate that *water body* is defined in s2 RMA as:

> … fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area (emphasis added).

[29] So, in summary, it is a function of every regional council to control the use of land to maintain and enhance the quality of water in water bodies – ie including water in aquifers, and to control the discharges of contaminants into *water* (again, including water in aquifers). This function is not optional – it is something a regional council is required to do, whether it be difficult or easy.

[30] A regional council must have a regional policy statement (RPS) in place, prepared in accordance with Schedule 1 to the Act: - see s60(1) - and we turn to consider what such a document must contain.

The requirements of a regional policy statement

[31] An RPS must comply with the provisions of s61 (in this case, the version of that section operative between 1 April 2011 and 27 June 2013) – of which the first requirement (just to emphasise the point) is that it be prepared in accordance with the functions of a regional council under s30. Also, and unsurprisingly, accordance with Part 2 of the Act is required, as it is with duties under s32 and any regulations.

[32] The contents of an RPS must also comply with s62(3):

> A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement or New Zealand coastal policy statement.

[33] In the relevant parts of Hawkes Bay, there is no water conservation order in place. Obviously the relevant national policy statement to be given effect is the NPSFM, and, to the extent it may be relevant, the New Zealand Coastal Policy Statement.

Section 32 report

[34] It is common ground that the version of s32 to be considered in this appeal, because of the date of notification of the Plan Change (2 October 2012), is that in force at that time. It provides:

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
>
> (a) the Minister, for a national environmental standard or a national policy statement; or
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
>
> (ba) the Minister of Aquaculture, for regulations made under section 360A; or
>
> (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) … of Schedule 1); or
>
> (d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) … of the Schedule 1.
>
> (2) A further evaluation must also be made by—
>
> (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
>
> (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.
>
> (3) An evaluation must examine—

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

Our overall view of the inadequacies of Change 5 is summarised later and it follows that the s32 evaluation did not succeed in identifying those inadequacies. Given that overall view, we need not take up space in going through the s32 requirements in detail.

The relevant part of the NPSFM

[35] In passing, we note that Objective D1 and Policy D1 are identical in both the 2011 and 2014 versions of the NPSFM:

D. Tāngata whenua roles and interests

Objective D1

To provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.

Policy D1

Local authorities shall take reasonable steps to:

a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region

b) work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region and

c) reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.

Also, both the 2011 and 2014 versions of the NPSFM contain this paragraph in the Preamble:

> Setting enforceable quality and quantity limits is a key purpose of this national policy statement. This is a fundamental step to achieving environmental outcomes and creating the necessary incentives to using fresh water efficiently, while providing certainty for investment. Water quality and quantity limits must reflect local and national values. The process for setting limits should be informed by the best available information and scientific and socio-economic knowledge.

What is meant by "no degradation of existing groundwater"?

[36] Mr Gavin Ide, the Council's Manager Strategy and Policy, expressed the view that the unconditional statement in Objective 21 that there is to be ... *no degradation of existing groundwater quality* ... while aspirational, is unrealistic and ambiguous. He said that the amended OBJ 22 provides a clearer description of the intended environmental outcome for management of not only the Heretaunga and Ruataniwha aquifer systems, but also the region's other unconfined and semi-confined productive aquifers.[5] His evidence led us to consider two questions in relation to his criticism of the wording of OBJ 21:

a) Are the words *no degradation* too absolute?

b) Is the reference to *existing ground water* ambiguous?

[37] There are two bases for the criticism that *no degradation* is too absolute:

a) The first is premised on the *load to come* phenomenon.

[5] Ide EIC Para [2.3-2.4]

b) The second, on the perceived potential constraint that *no degradation* will have on the drafting of regional plans which, as Ms Blomfield put it in her closing submission, … *would limit or prevent any activity which might result in contaminants entering the groundwater.* As noted at para [24], the result of that, Ms Blomfield submitted, would mean … *a prohibition on all farms, all horticulture, and taken to an extreme level, even native bush because it too leaches nitrogen into the soil and that nitrogen inevitably reaches groundwater.*

We think that this submission, while certainly reflecting the evidence called by the Council, somewhat overstates both the issue and the possible consequences of adopting Ngati Kahungunu's position.

[38] In explaining the concept of *the load to come* Mr Ide referred to contaminants from land uses such as grazing cows, dairy effluent, and septic tank discharges, that can *leak* through the soils and into groundwater. In some aquifers, the presence of contaminants *leaked* by human activities in the past may not be observed until many years later. This *lag legacy* effect or *load to come* can mean that even if, from today, there was no further land use change in the catchment and no additional contaminants *leaked* through soils into groundwater, there would still be unavoidable degradation of groundwater quality observed in the future.

[39] Dr Stephen Swabey, the Council's Science manager, provided a more detailed explanation of this phenomenon in his evidence in chief at paras 3.23 to 3.32. It essentially means that changes in contaminant levels at observation bores may potentially reflect contamination from land use activities, or other sources, that occurred years, decades, or longer, before the observations are made. Therefore, Dr Swabey says, the Council is essentially setting what is sees as a pragmatic and practical objective based on a water quality thought to be achievable.

[40] We understand the point that this *load to come* cannot be practicably quantified, but several things come to mind in considering the Council's proposed course:

a) We don't know what the *load to come* will present as, so how do we know the objective is unrealistic?

b) There can be no doubt that better land use practice can result in a reduction in the release of contaminants to land and to groundwater. This can address both existing and future uses.

c) We were told that ground water does have the ability to attenuate the contaminants that enter it, and that groundwater is generally purer than surface water, but that near-surface ground water may be closer to the quality of the surface water it enters/mixes with. Mr Swabey told us that:

> High levels of nitrate in groundwater can lead to nutrient enrichment of surface water where groundwater contributes to the baseflow of rivers, or discharges to wetlands, estuaries or lakes. High levels of nitrate in surface water can be toxic to aquatic life[6]

d) When we look at the NPSFM later we note the surface water value for nitrate-nitrogen sits at 11.3mg/L. If ground water were to have the same standard applied, would this have a potential adverse impact on the maintenance of the surface water standard?

[41] The use of the term *existing* is not unusual in RMA practice. It denotes the point in time when a decision is to be made. In terms of OBJ 21, the terminology *existing ground water quality* must incorporate *the load to come*. There is no ambiguity in that, other than the difficulty in measuring its duration or quantum. However, the adoption of a water quality standard that is essentially just suitable for human consumption, as an objective, carries with it a risk that there is acceptance of a general degradation of the water quality potentially below what *the load to come* might bring.

[42] This brings in to play the role of an *objective* in RMA terms. We are not aware of any decision of this Court in which the term is defined – probably because the meaning is so apparent that judicial pronouncement has been thought unnecessary. The Concise Oxford is simple and direct: – an *objective* is … *a goal or aim*. That

[6] EIC S E J Swabey Para [6.11]

simplicity sits perfectly well here – an *objective* in a planning document sets out an end state of affairs to which the drafters of the document aspire, and is the overarching purpose that the policies and rules of the document ought to serve. In this planning document, the objective must be governed by the function imposed on a regional council by s30(1)(ii):

> The maintenance and enhancement of the quality of water in water bodies and coastal water

and that, we think must be plain, was the intention behind Objective 21 as drafted and notified.

Suitable for human consumption?

[43] We were told by the Council that the words *suitable for human consumption* did not relate to any numerical standard, and that a numerical standard would be set when catchment specific regional plans are prepared in accordance with the policy. However, we note that the AER sets out a Table of what can be indicators of achievement of that standard as:

- Nitrate-nitrogen levels
- Organic and inorganic determinands of significance in NZ Drinking Water Standards
- E.coli levels
- Pesticides and herbicides

[44] Dr Swabey told us that, in general, groundwater in the Heretaunga Plains meets the NZ Drinking Water Standard (NZDWS) values for parameters measured.[7] Dr Swabey has a strong background in hydrology and hydrogeology and has assisted ecologists in their studies of stygofauna and troglofauna, but he did not claim expertise in ecological matters.

[45] It is accepted that the NZDWS is referenced as an indicator in terms of organic and inorganic determinants in the AER table, but it is also noted that a key water quality parameter used to indicate the *State of the Environment* for groundwater

[7] EIC S E J Swabey Para [7.2]

quality is nitrate-nitrogen.[8] Dr Swabey explained that nitrate is a naturally occurring nutrient for plant growth. However, at higher concentrations, nitrate in groundwater can be detrimental to human health and to aquatic ecosystems. High levels of nitrate in groundwater can lead to nutrient enrichment of surface water where groundwater contributes to the base flow of rivers, or discharges to wetlands, estuaries or lakes. High levels of nitrate in surface water can be toxic to aquatic fauna.[9]

[46] The Ministry of Health (MoH) has set a limit of 11.3 mg/L nitrate-nitrogen (NO_3-N) as the maximum acceptable level in drinking water.[10] In the absence of anything else then, this must be a determinant bottom line. What was termed the *trigger value* for NZDWS is 5.65 mg/L[11] (i.e. half the MoH acceptable level drinking water limit) although the evidence is not clear about the significance to be attributed to this value.

[47] While there is an exception in one site in the western part of the Heretaunga aquifer where the trigger point has been observed, the water in the Heretaunga aquifer is of a much higher quality than required by the NZDWS. Dr Swabey said there was no trend from most sites (2009-2013) but concentrations increased during this period at two sites. We note from the exhibits provided by Dr Swabey that most sampling sites (14 of 17) in the Heretaunga aquifer tested indicate levels less than 1.00mg/L NO_3-N. A couple of sites measured in what he described as the *moderate* range (1.0 to 5.65mg/L) and there was one site above this - but no site recorded an exceedance of the NZDWS.

[48] Dr Swabey also described the groundwater quality of the Ruataniwha plains. The sampling period is reliable from 1999 onwards. Again, this aquifer seems to measure up relatively well and Dr Swabey found concentrations of parameters measured generally compliant with, or in most cases well above, the NZDWS.

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[8] EIC S E J Swabey Para [6.9]
[9] EIC S E J Swabey Para [6.9 to 6.11]
[10] EIC S E J Swabey Para [6.10]
[11] EIC S E J Swabey Para [7.3]

[49] Dr Swabey set out in detail the nature of an aquifer (both confined and unconfined) and aquifer processes. He noted:

> In most locations in the Hawkes Bay, local surface water is of a lower quality than local groundwater (particularly the groundwater located deeper than 10m below the ground), so in most cases the addition of deeper groundwater to surface water is most likely to improve surface water quality.[12]

He also explained that:

> The physical links between rivers and ground water occur where rivers recharge aquifers and where aquifers discharge to rivers as springs. The two classes of freshwater body should not be considered as a continuum from the point of view of physical processes. There is adequate rationale to manage surface water and ground water separately in policy, while considering the impact of each upon the other.[13]
>
> (Emphasis added)

[50] Dr Swabey partly relied on evidence from Dr Christopher Hickey, a Principal Scientist with NIWA, presented to the Plan Change 6 Board of Inquiry. Dr Hickey examined the susceptibility of groundwater invertebrates to nitrate. Apparently Dr Hickey employed mayfly and water fleas as surrogates to establish guideline concentrations for protecting groundwater invertebrates. His evidence was that compliance with the NZDWS (11.3mg/L NO_3-N) will mean protection of stygofauna because the chronic guideline for the surrogates based on his research was 17mg/L NO_3-N.

[51] In the hearing before this Court, that evidence could not be tested. Neither Dr Swabey nor Mr Black (for Ngati Kahungunu – and who we shall introduce shortly) claimed expertise in this area. The conclusion Dr Swabey drew was that adopting the NZDWS at 11.3mg/L is more conservative than Dr Hickey's findings, and will protect the animal life in groundwater. On this basis the Council was comfortable that the life-supporting capacity, ecosystem processes and indigenous species - including their associated ecosystems of fresh water - would be safeguarded. This would be consistent with OBJ LW1.4 of Change 5.

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[12] EIC S E J Swabey Para [9.6]
[13] EIC S E J Swabey Para [9.28]

[52] Ngati Kahungunu essentially see that this objective would result in the quality of the groundwater (compared to its measured quality today) being permitted to deteriorate to the cusp of chronic decline.

[53] Dr Swabey referenced PC 6 in terms of Dr Hickey's evidence and the standard which has been set at 11.3mg/L, but we were not provided with any analysis of the decision-making which has resulted in the adopted plan change. PC 6 of course affects the Regional Plan, rather than a Policy Statement, and relates to the Tukituki Catchment.

[54] Mr Ide explained that water is allocated in terms of the quantity that may be taken from the water source and also in terms of the measureable quality of the water based on the permissive quality standard after assimilation. Thus, based on Change 5, the reference to *suitable for human consumption* in the disputed OBJ 22 provides the measure for quality allocation purposes. It could be described as representing the cusp of over-allocation.

Conclusion – what does "suitable for human consumption mean?

[55] Reading Change 5 as a whole, the AER indicates that the NZDWS defines the term *suitable for human consumption* and that this defines the (current) acceptable limit of NO_3-N at 11.3mg/L. This measure was clearly relied upon in the Council's evidence. If this level of degradation were to occur it would be well below the current environmental level, and at the cusp of being detrimental to, and therefore unable to sustain, the life supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water.

The term "overall quality" and the concept of "overs and unders"

[56] A significant matter in Change 5 is that it requires maintenance of the *overall quality* of freshwater within the whole of the Hawkes Bay region – cf Objective A2 of the NPSFM. This is said by the Council to allow for (indeed to mandate) an *unders and overs* approach. Questions of Mr Ide confirmed that an *unders and overs* approach was the intent of the new objective and that it means that deterioration of

the quality of water in one area or waterbody could be tolerated, so long as there is a matching (at least) improvement in quality somewhere else. We have difficulty in seeing how such an approach can be consistent with the unqualified function imposed on regional councils by s30(1)(c)(ii) of ... *the maintenance and enhancement of the quality of water in water bodies* ... .

[57] Nor do we see it as compatible with the requirements of s69, which provides:

> Rules relating to water quality
>
> (1) Where a regional council—
>
> > (a) Provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and
> >
> > (b) Includes rules in the plan about the quality of water in those waters,—
> >
> > the rules shall require the observance of the standards specified in that Schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.
>
> (2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.
>
> (3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so. (emphasis added)

[58] There could also be issues with s107, the relevant parts of which provide:

> Restriction on grant of certain discharge permits
>
> (1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit ... allowing—
>
> > (a) The discharge of a contaminant or water into water; or

> (b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; …
> if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:
> (c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
> (d) Any conspicuous change in the colour or visual clarity:
> (e) Any emission of objectionable odour:
> (f) The rendering of fresh water unsuitable for consumption by farm animals:
> (g) Any significant adverse effects on aquatic life.

[59] Moving down the chain of planning documents, Objective A1 of the NPSFM is unequivocal. It reads:

> To safeguard:
>
> a) The life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water; and
> b) The health of people and communities, at least as affected by secondary contact with fresh water …

Objective A2 then somewhat clouds the issue by requiring that:

> The overall quality of fresh water within a region is maintained or improved while …

without defining what *overall* should be taken to mean.

[60] It might, perhaps, be appropriate for a Council to regard *overall quality* as permitting some increase in a type of contaminant (nitrate-nitrogen, for instance) in a particular water body, so long as that was matched or exceeded in its adverse effects by, say, a reduction in some other contaminant, so that the … *quality of the water* … taken overall, was at least no worse.

[61] But as a matter of practical implementation, and for monitoring and enforcement, tangled issues can readily be imagined if the Council's view of the term *overall quality* is adopted. Insofar as aquifer water is concerned, the practical issues could be acute. If it is impossible to know and anticipate the location, extent, or exact cause, of water quality decline over time through *the load to come*, how could anyone possibly plan for, or put into effect, compensatory improvements in other water bodies in other parts of the region?

[62] Further, who would set the average (or perhaps, it would better be called a median) and what kinds of contaminant in one water body could be offset against others, in a different water body – ie what sort of beneficial effect would counterbalance an adverse effect when those effects are in different water bodies perhaps scores of kilometres apart?

[63] We recognise what we say elsewhere about the absence of legal consequences in failing to achieve an objective, but that is not the same thing as having an objective interpreted in such a way that it would be impossible to know whether it had been achieved at all.

[64] In saying all of that, we recognise that we are dealing with an Objective rather than a Rule, so direct enforceability might not be such an acute issue. However, an Objective is a goal which rules (to follow in the planning document) will be focused towards achieving. We conclude that this approach to the interpretation of *overall quality* is fundamentally flawed, and that drafting and/or interpreting the Change 5 objectives in that way could result in a more degraded and unacceptable water outcome.

[65] The distinction the Heretaunga aquifer holds in the operative RP recognises the very high quality of groundwater in this aquifer.[14] We share the concerns held by

[14] PC6 Tukituki Catchment Proposed Board of Enquiry Plan Change – Determined by the Board of Inquiry June 2014 – amended 29 August 2014, page 54 POL 75 Table 10 and Explanation and reasons 5.6.2.

Ngati Kahungunu that the overall thesis of Change 5 is the acceptance of a lower water quality than that which can be measured today. It is working *down* rather than *up*.

Summary of responses to the Council's position

Response 1 – "overall quality and "no degradation"

[66] The core of the Council's argument is that because many factors or agents which may affect groundwater quality are already existent within the system(s), and are beyond the control of the current generation, it is futile to have objectives which seek the maintenance of, let alone the enhancement of, the quality of that groundwater.

[67] That is because, they say, the results of what was done on the land or in the water 10 years, or decades ago, for instance by way of the introduction of nitrates or other pollutants, may still be working its way through the systems, and there is nothing to be done to prevent their eventual emergence. So, they say, the quality of the groundwater is pre-ordained, for better or for worse, and the success or failure of any Objective seeking to maintain or enhance it cannot be measured.

[68] What happened in 1965, or in 1915 for that matter, in upstream catchments by way of the application of fertilizers, or by way of extreme weather events causing sediment and nutrient loading of water may, we accept, be having effects now, and into the future, on water in aquifers. Whether that is so, or not, and the degree of any effect, is unknown and, on the present state of science, probably unknowable. However that situation is known to exist and must therefore form part of the existing environment, and is therefore to be addressed in Plan objectives and other provisions.

[69] This lack of precise knowledge is not a reason to refrain from taking any step to try to maintain, and indeed improve, the quality of the water in any aquifer. We can start with the definition of *existing water quality* in the NPSFM – the quality of the fresh water at the time the regional council commences the process of setting or reviewing freshwater objectives and limits in accordance with Policy A1, Policy B1,

and Policies CA1 – CA4. The Objective therefore should be to, at the least, maintain that level of quality. While maintaining water quality may be something of a moving target, the requirement is to strive for management practices that will prevent degradation, and to strive to ensure that quality is, at a minimum, maintained. That is the plain requirement of s30: - see particularly s30(1)(c)(ii) and s30(1)(f):

> (c) The control of the use of land for the purpose of: - …
>
> (ii) the maintenance and enhancement of the quality of water in waterbodies and coastal water …
>
> (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water … (emphasis added).

[70] If historical causes of water quality lead to decline later, and are causes which cannot be foreseen or controlled, then that will have to be dealt with at the time the quality decline is identified and its extent becomes known. To say *we can do nothing* because there may be a *load to come* is as illogical as saying … *we can do nothing because next week there might be another Cyclone Bola which may cause massive sediment and nutrient runoff into the region's waterbodies.*

[71] The frequent use in the hierarchy of planning documents of terms such as *enhancement* – see eg s7 RMA, or *improve* – see eg Objective A2 of the NPSFM, inherently recognise that there will be situations where, from whatever cause, water or other aspects of the environment (eg, air, or land) may be degraded to some degree from their pristine states.

[72] It is self-evident that we can only plan for what is reasonably predictable, and if we cannot predict the effect, if any, of whatever might or might not have happened decades ago, we cannot plan for it. But that is not, we repeat, a logical basis for saying that we should not plan for what we can predict. If it was, the same would hold good for every aquifer system in the country. As to that, we need to point out that, so far as we can establish, none of the other 10 Regional Councils (and 6 Unitary Councils) in the country have adopted the view espoused here – that aquifers are *too hard* and that there is no point in making them the subject of positive

objectives and policies in regional planning documents so a default minimum standard should be adopted.

[73] What we can predict, and can, and should, be planning for, by way of objectives and policies, is the effects of current anthropogenic activities affecting waterbodies.

[74] If the *load to come* argument has any superficial appeal, it cannot succeed against the truth that we know what makes the quality of groundwater worse – ie putting pollutants into it. So, if we appropriately manage potential pollutants entering it now, its quality at least will not get worse (ie it will be *maintained*) and, as the inherited pollutants slowly work their way out of it, it will get better (ie it will be *improved*). Having a sub-optimal present is not an excuse for failing to strive for an optimal (or, at least, closer to optimal) future.

[75] There may have been increases of nitrate-nitrogen at 18% of groundwater monitoring sites. While undoubtedly that is an issue, the fact that at 82% of the monitoring sites nitrate-nitrogen has either remained stable, or decreased, over those 14 years is evidence that for the great majority of sites, whatever controls and practices relating to groundwater contamination have been in place for at least the last 14 years have worked well, and it makes no sense to abandon the policies that govern those controls and practices now.

[76] Further, we must be able to know, within broad bounds at least, what activities have been undertaken on the headwaters land of these catchments over the last c120 years, and to derive from that knowledge at least a broad expectation, by way of known properties of other aquifers in the country, of likely effects upon the water to be found in the aquifers, now and into the future.

[77] Even putting that possibility aside, not being able to remedy the poor practices of the past (assuming, which is certainly not proven, that remedy is actually required) is not a good reason to allow the same errors to be made in the future. We must be

able to say that, even if what has been done in the past is irreversible, it would be irresponsible to use that as an excuse not try to apply better standards from this point on. In saying that, we have in mind the analogy of air discharges. Policy Statement and Plan objectives over years have encouraged improvement, and this has led to best-practice improvements as knowledge has increased and technology has improved. The objectives for clean air assist in driving technology development, and this becomes very important when we are intensifying activity which is associated with farming in the region, or more urban based activities such as sewage treatment and disposal. Whatever intensification leads to higher potential pollutants, technology and best practice needs to be developed to maintain and, where degraded, enhance the environment to ensure that the sustainability principles of RMA are fulfilled.

Response 2 – what are the consequences of having an RPS Objective that is not achieved?

[78] Next, we have to ask what the legal or other consequences would be if, in a particular aquifer or part of one, an objective aspiring to maintenance or enhancement of water quality was not met? The answer seems clearly to be - *None.* If, in support of such an objective, the Plan's Rules are written to govern inputs – the sort of LUC and nutrient budget rules to be found in the Manawatu-Wanganui Regional Council's One Plan for example – then the expected outcome would be known, within broad limits at least. If the actual outcome shows higher rates of nutrient pollution than predicted, that may be at least a lead to identifying what the *load to come* actually might be. If the objective is that the quality of all water is to be maintained, and in one part of a catchment it actually deteriorates, then the *load to come* might well be the culprit. Again, the possibility of an objective of maintenance or enhancement being partly unfulfilled is not an excuse for not trying at all. The objective, even if unachieved because of *the load to come*, will still have value as a demonstration that the aspiration, from now on, is to at least maintain quality and that, from now on, the planning documents will be designed to give effect to that aspiration.

[79] Insofar as catchment-specific Plan provisions are concerned, it is quite correct to say that they can be tailored to match what is required or desired in a catchment. But what also needs to be present is consistency down through the hierarchy of planning documents – so the Plan provisions will need to *give effect to* the RPS provisions, which in turn give effect to the NPSFM. If the contents of the RPS are inadequate, there could be no confidence that the Plan provisions will not suffer from the same deficiencies.

Part 2 RMA – s6

[80] For completeness we will set out the whole of s6 – the matters declared to be of national significance and which all decision- makers under the Act are required to recognise and provide for. Of particular relevance here is s6(e):

> 6 Matters of national importance
>
> In achieving the purpose of this 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 the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.
>
> (g) the protection of protected customary rights.

[81] The evidence principally relevant to s6(e) came, unsurprisingly, from the witnesses called for Ngati Kahungunu.

[82] Mr Marei Boston Apatu is of Ngati Hori, Ngati Hawea, Ngati Hinemanu, Ngati Marau and Ngai Te Upokoiri hapu, which are of Ngati Kahungunu. Through these hapu he has ancestral connections to the Heretaunga Aquifer, the Ngaruroro River, the Rua Taniwha aquifer system and the Tukituki River.

[83] In this *pepeha* Mr Apatu summarises the cultural connections of Ngati Kahungunu and their hapu to their *maunga* (mountains), *awa* (rivers), *whenua* (lands) and, in particular, the Ngaruroro River:

> Ko Ruahine, Owhaoko, Puketapu nga maunga
> Ko Ngaruroro, Taruarau, Ikawatea nga awa
> Ko Kuripapango nga korero nehera
> Ko Owhaoko, Timahanga, Omahaki, Kohurau, Otamauri, Matapiro, Maraekakaho, Ohiti-waitio, Ngatarawa, Heretaunga nga whenua
> Ko Ngati Hinemanu, Ngai Te Upokoiri nga hapu
> Ko Heretaunga Haukunui, Ararau, Haro Te Kaahu, Takotonoa, Ringahora
> Ko Ngati Kahungunu te iwi

[84] His description of the Maori perception of the environment is succinct:

> … the physical embodiment of *atua* (celestial beings) and the topography of the whenua often being explained as the result of actions of our ancestors. The physical and metaphorical aspects making p the environment are inseparable and give rise to their status as *taonga*.
>
> i. This understanding, or world view, gave rise to *protocols* governing how Maori treat the land, water, and other natural resources;
> ii. The protocols were relayed from birth through through teaching tools, such as parables, storytelling, whakatauki, wananga and allegorical or symbolic names and descriptions expressing personification to demonstrate applied practices for kaitiaki;
> iii. The kaitiakitanga guidelines were for everyone. For example, to guard against abuse of the environment, Maori Rangatira applied non-

negotiable restrictions such as Tapu, Rahui (ban, restriction)to protect people and environmental resources from natural mishap, human misuse and sometimes potential to abuse; and,

iv. There is a rich inheritance and whakapapa connecting Maori to their own matauranga and the source of this cultural knowledge.

[85] He continued to describe in detail many of the cultural, spiritual and historic connections of Ngati Kahungunu to their environment. Of significance were the exploits of their eponymous explorer ancestor Tamatea Pokaiwhenua, Kahungunu's father in the 15th century. (para 17. ii.) Te Awa a Tamateanui and Tuna a Tamatea are two of the many examples of the historic culture of their Ngati Kahungunu ancestor's name being embedded into the landscape (para 17. v.)

[86] Mr Apatu described the past abundance of good quality water, eels, kakahi, pukeko, and weka prior to the swamps being drained; adding that titi (mutton birds) were plentiful on the ranges of the Timahanga district. Fibres like flax and raupo for clothing, roofing and binding grew abundantly around the wetlands as did plants used for medicinal purposes. Another interesting cultural aspect mentioned by Mr Apatu was how the Ngaruroro River was named by an ancestor Mahu Tapoanui, who witnessed schools of Upokororo (grayling) creating a wave-like action on the water (*Ngaru* - wave, *roro* - an abbreviated form of *Upokororo*, which were abundant at that time).

[87] Mr Apatu also gave his connections through other maunga, awa, taniwha, the Karamu lands and the links of other hapu, namely Ngati Hori, Ngati Hawea and Ngati Ngarara to Kahungunu. This further illustrates the diversity of whakapapa connections individual iwi may have to a number of different land blocks within Ngati Kahungunu.

[88] In his upbringing by his kuia and koroua he was very much influenced by their teachings of the cultural knowledge and practices of their hapu. He mentioned being taught of springs that had ... *spiritual and healing powers* ... and many other springs

that had some cultural significance to their hapu. He particularly mentioned that as children he and his siblings were always taught by their mother, a rongoa Maori practitioner, to *...respect water as precious...* and *...never to waste water...* .

[89] In his view there is now a *wider understanding* and *partial alignment* between western science and cultural imperatives where there is cooperation. He summarised this portion of his evidence by stating:

> Ngati Hori ki Hawea is not averse to any action it deems necessary to protect our taonga, our whenua and our wai, and it is our duty as Maori and kaitiaki to do whatever it takes to hold true to our values, beliefs and rituals in order that we pass these taonga on in good condition for the next generation to come.

[90] Later in his evidence in chief Mr Apatu recited further connections through maunga (mountains), tupuna (ancestors), hapu and iwi to their awa tupuna (ancestral river) the Tukituki river. This river was traditionally the *highway* that connected whanau to other whanau, to their gardens, to trade links, to their pa sites, to their waahi tapu and waahi tupuna.

[91] Mr Apatu closed his evidence by giving detail of the collective Treaty of Waitangi claim WAI 595 on behalf of Ngati Kahungunu, which highlights their concerns for the Heretaunga aquifers and freshwater management as far back as 1995, when the claim was lodged. In his view the changes to the Objectives will have effects on the cultural relationships of tangata whenua to these aquifers.

[92] Mr Morris Wayne Black is a self employed resource management consultant and researcher. He is of Ngati Hawea, Ngati Kahungungu, Nga Rauru, and Ngati Porou, and he gave planning evidence on behalf of Ngati Kahungungu Iwi Incorporated. While Mr Black did comment on some iwi issues, he defers to Mr Apatu and Mr Tomoana for more detailed explanation on cultural matters.

[93] In his view the connectivity between aquifer systems and surface water will cause adverse affects on the relationships that Maori have with the rivers and the streams connected to these systems if water quality is not maintained. He considers that the respondent Council has a duty to maintain or enhance groundwater quality within the region's two main aquifer systems.

[94] He sees the Tukituki and Ngaruroro rivers as *iconic* to tangata whenua as kaitiaki, whose duty involves protecting and upholding the mauri within the river systems, including their associated ground water sources. Like Mr Tomoana, he sees rivers, including their water, their beds, their banks, tributaries, springs and ground water systems, as taonga in the Maori world view and points out that matauranga Maori and whakapapa are founded in wairuatanga (Maori spirituality) which links Maori to both the spiritual and physical. Maori knowledge systems, he says, recognise the nurturing nature of Papatuanuku and the benefits derived from the waters she produces, that originate from Ranginui as the water passes through the natural cycle of evaporation, precipitation over Papatuanuku to replenish mauri released via the springs. He states that ... *any decline in water quality that adversely affects mauri is seen by tangata whenua is an adverse affect on their health and wellbeing* ...

He concludes with the statement that:

> ... groundwater quality in the Heretaunga Plains and Ruataniwha Plains should be maintained or enhanced and Objective 21 retained with consequential amendments to Objectives 22, 42 and 43 ...

[95] Mr Ngahiwi Tomoana is the current chair of Ngati Kahungunu Incorporated. He has been involved in hapu and iwi development issues for most of his life. He currently holds many governance roles in local, regional and national organisations.

[96] In his evidence in chief he briefly summarised the Maori cosmology from Ranginui (Sky father) and Papatuanuku (Earth mother) through to their 70 children, naming some of those better known. He drew comparisons between the whenua (placenta) of a pregnant woman that nurtures an unborn child and the whenua (land)

which nurtures mankind; this whenua (placenta) being buried at a significant site to the child recognising another aspect of the connection of birth to the earth inherent in whakapapa.

[97] He explains the significance of the inter-connectedness of the values of *mauri* and *wairuatanga* to Ngati Kahungunu in relation to *kaitiakitanga* and that responsibility to safeguard our natural resources, concluding with the comment that it is their cultural duty as kaitiaki to protect *nga taonga tuku iho* (the treasures handed down).

[98] In a power point presentation to the Court Mr Tomoana described the Ngati Kahungunu connectedness to the universe and the environment through genealogy. The continuity of that connectedness is demonstrated in the proverb:

> ...*hinga atu he tetekura ara mai na he tetekura* (...when one fern frond dies another one takes its place...)

He continued, likening the reproductive capacity of the womb to the reproductive capacity of Papatuanuku, stating that the aquifer is the womb of Papatuanuku - our Earth Mother, and drew similarities between the Maori view of a baby in the womb and mankind in our physical environment. In doing so, he likened degradation of our waters to polluting the waters in which an embryo develops into a baby in a mother's womb:

> ...if we allow the waters of our aquifers to be degraded ... we let the waters of our womb be degraded.

[99] The cultural obligation of offering the best hospitality possible to visitors is paramount to any iwi. In cross-examination from Ms Blomfield, he gave an example of Ngati Kahungunu's reputation being sullied by feeding guests polluted mussels:

> ... They all got sick and we were the laughing stock of the country because we'd sent visitors home with the runs. If the water or any food is degraded, we see that as a slight on our ability to give due respect to any visitors that come here deserving the best hospitality and we, we're fearful that any

> degradation of the aquifer is going to have a, an [inimical] effect on our ability to host visitors in the proper manner ... .

[100] In describing the Heretaunga Muriwaihou (Heretaunga aquifer system) Mr Tomoana quoted from the evidence of Te Hira Huata at the Waitangi Tribunal hearing of WAI 2358:

> The extraordinary clean water from the springs, and from the streams that flowed from them, was the exilir of life for the hapu, feeding and cleansing body, soul and mind, and as important for ritual as it is for bodily needs.

[101] Of great cultural relevance is how Heretaunga Muriwaihou is embedded in their whakatauki (proverb):

> Heretaunga Hauukunui – Heretaunga of the life giving dews or waters
> Heretaunga Ararau – Heretaunga of Arcadian pathways
> Heretaunga Haro Te Kahu – Heretaunga the beauty of which only can be appreciated by the eyes of a hawk in full flight
> Heretaunga Takoto Noa – Heretaunga from whence the Chiefs have departed and only the servants remain

Mr Tomoana says that while Ngati Kahungunu is supportive of economic development in their region they do not want development at the cost of detriment to the natural resources, and closed his evidence with a plea to retain objectives 21 and 22.

Conclusions on s6(e)

[102] When it comes to considering the implications of s6(e):

> The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga ...

the unchallenged evidence of those three witnesses is directly relevant, and very powerful. The evidence makes it plain that *culture and traditions* are to the fore, and the relationship of that culture and those traditions with water is clear. That the quality of the water in the whenua should be, at the very least, not further degraded by anthropogenic activities in the future is fundamental. That controlling authorities should at least aspire to the improvement of that quality over time is no less so. We

have the clear view that nothing less than those two objectives – of protection from further degradation, and improvement over time – will suffice to *recognise and provide for* this issue of *national importance*.

[103] As the Court noted (although in the context primarily of land, rather than water) in its decision in *Outstanding Landscape Protection Soc v Hastings DC* [2008] NZRMA 8 what has been described to us in this evidence seems to be just the kind of relationship *...of Maori, their culture and traditions with their ancestral ... water*... that the drafters of the section must have had in mind.

[104] Against that background, it is our view that compliance with the requirement, as a matter of *national importance*, to recognise and provide for the matters in s6(e) cannot possibly be achieved in failing to even aspire to maintain, let alone improve, the quality of the water in these aquifers. For the same reasons it does not meet Objective D1 and Policy D1 of the National Policy Statement for Freshwater Management. – Change 5 and the assessment that supports it must therefore be flawed.

The most appropriate outcome to meet the purpose and principles of the Act

[105] For the reasons we have attempted to set out, we have a very clear view that the deletion and amendment of Objectives 21 and 22 which the Council seeks to effect through Change 5 cannot be supported. The existing provisions, with the amendment sought by NKII, (see para [18]) would be a much better means of attempting to achieve the purpose of the Act – the sustainable management of natural and physical resources – while attempting to achieve the goals set out in s5(2) and of recognising and providing for the issues of s6(e). To not aspire and attempt to at least maintain the quality of water abdicates the functions of a regional council under s30 (see para [29]) and the requirements of a regional policy statement under s62(3) (see paras [32] and [33]) and fails to implement the role of such a document in the hierarchy of planning instruments.

Section 290A – the first-instance decision.

[106] Section 290A requires the Court to ... *have regard to* ... the decision that is the subject of the appeal. Section 290A does not mean that the first-instance decision is presumed to be correct and that an appellant has the onus of demonstrating that it is incorrect. But it does require the Court to give the decision genuine and open-minded consideration in coming to its decision. In this instance we have done that, but have been driven to the conclusion, on the evidence and material we heard, that the operative versions of Objectives 21 and 22 (including the Ngati Kahungunu amendment) are those that best accomplish the purpose and principles of the Act.

Result

[107] For the reasons we have outlined, our decision is that, insofar as relevant to this appeal, the Decisions Version of Change 5 should be set aside, and Objectives 21 and 22 should be reinstated with the amendments sought to Objective 22 in these terms:

> Objective 21:
>
> No degradation of existing groundwater quality in the Heretaunga Plains and Ruataniwha Plains[15] aquifer systems.
>
> And Objective 22:
>
> The maintenance or enhancement of groundwater quality in aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[108] Further, the consequential changes set out in Change 5 to Part 5 of the RRMP which relate to the regional plan (OBJ 42 and OBJ 43) should be deleted and the regional plan (Chapter 5.6) be left intact until the Council comes to specifically address these provisions in the context of freshwater management in accordance with its obligations under the NPSFM (notably Policy A2 and Policy CA2).

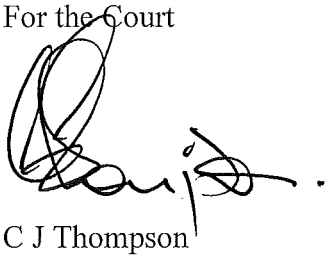
[15] Subject to the Ruataniwha Plains aquifer being removed by Plan Change 6

Costs

[109] It is the usual practice of the Court to not award costs on a plan appeal, and we do not encourage any application in this instance. But as a matter of formality, costs are reserved and any application should be made within 15 working days of the issuing of a final decision, and any response should be lodged within a further 10 working days.

Dated at Wellington this 27th day of March 2015

For the Court



C J Thompson
Environment Judge