

IN THE ENVIRONMENT COURT  
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA  
KI TĀMAKI MAKĀURAU

Decision [2021] NZEnvC 033

IN THE MATTER OF

appeals under clause 14 of the First  
Schedule to the Resource Management  
Act 1991 (**the Act**) and of Water Use,  
Allocation and Quantity Topics 3 and 4 of  
the proposed Northland Regional Plan

BETWEEN

MINISTER OF CONSERVATION

(ENV-2019-AKL-122)

NORTHPOWER LIMITED

(ENV-2019-AKL-123)

NORTHLAND DISTRICT  
HEALTH BOARD

(ENV-2019-AKL-126)

ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF  
NEW ZEALAND  
INCORPORATED

(ENV-2019-AKL-120)<sup>1</sup>

(ENV-2019-AKL-127)

Appellants

AND

NORTHLAND REGIONAL  
COUNCIL

Respondent

Court: Environment Judge J A Smith  
Environment Commissioner K S Prime  
Environment Commissioner I M Buchanan

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<sup>1</sup> Royal Forest and Bird Protection Society Incorporated substituted the Northland Fish and Game Council as the appellant on this appeal on 7 October 2020.



Hearing: 27-20 October 2020 (inclusive)  
Last case event: Joint memorandum of the parties dated 5 March 2021

Date of Decision: **16 MAR 2021**

Date of Issue: **16 MAR 2021**

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## DETERMINATION OF THE ENVIRONMENT COURT

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A: The final agreed provisions are attached to this determination as **Appendix 1**.

- (a) The amendments shaded in grey were agreed between the parties and recorded in the memoranda filed by the parties dated 28 October 2020 and 25 November 2020.
- (b) The amendments that are shaded yellow are in response to the findings in the Court's decision.
- (c) The amendments shaded green are minor amendments proposed by the parties for clarification or correction.

B: Any application for costs is not encouraged, but if one is to be made it is to be filed within 20 working days with a reply within 10 working days and a final reply (if any) 5 days thereafter.

## REASONS

### Introduction

[1] These appeals are against the Northland Regional Council's decision on the proposed Regional Plan for Northland. This determination relates to Topic 3, Allocation and use of water and Topic 4, Water quantity.

[2] Joint memoranda were filed by the parties dated 28 October 2020 and 25 November 2020.

- [3] The changes agreed in the 28 October 2020 memorandum resolved:
- (a) All the parties' appeal points on Rule C5.1.1.
  - (b) Northpower's appeal points on Rules C.5.1.14 and C.5.1.14.
- [4] The 25 November 2020 memorandum addressed the rootstock survival provision.
- [5] At that point remaining and unresolved matters were identified as follows:<sup>2</sup>

*Activity Status*

For applications for takes below minimal flows or beyond allocation limits, is the most appropriate activity status non-complying or prohibited (Rules C.5.1.13 and C.5.1.14).

*Supplementary takes*

What regime should be adopted for takes above median flow (Rule C.5.1.10). Issues arise as to:

the Policy backing for this Rule, with Fish & Game Appeal;

Whether the rule should be deleted (in which case the activity would become full discretionary);

If it is not deleted, what criteria should apply;

Whether Forest & Bird could seek an alternative specified link in Policy H.4.3 or the Rule given the scope of appeals (in particular, the Fish & Game Appeal).

*Alternative minimum flows*

This relates to the issue of rootstock survival but also impacts upon how other takes including those for public water supply, stock, individual needs and existing consents affect the minimum flow rate calculations. (Policy D.4.12(2))

*Dune Lake Levels*

What is the appropriate minimum level for dune lakes? (Policy H.4.2).

- [6] These were heard before the Court at Whangarei on 27-29 October 2020. A decision was issued on 25 January 2021.<sup>3</sup>

<sup>2</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1 at [15].

<sup>3</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1.

[7] In that decision the Court came to the following conclusions:

[140] We conclude that the parties have given detailed consideration to these provisions and we have adopted provisions suggested by one or more parties in resolving these appeals. The final wording of this should be a matter of quick resolution given the courts conclusion on the various provisions before the Court.

[141] In summary, we approve the agreement between the Minister of Conservation and Horticulture NZ as to the wording in respect of rootstock survival water. We would modify the other provisions to exclude that and make provision instead for exceptional water takes for town water supply existing as at the relevant date individual and stock water where it does not create an adverse effect and non-consumptive takes.

[142] Furthermore, allocation outside the allocation block provided should be prohibited as suggested by the Minister, with the exceptions noted in the decision. So far as the issue of water harvesting is concerned, we conclude that a restricted discretionary activity for half flow above median flow is appropriate on a water-sharing basis and this will encourage high volume water harvesting of at most half of the flow in the river over median.

[143] In respect of lakes, we conclude that water abstraction should be a non-complying activity in all Dune Lakes.

[144] The provisions we have now identified are the most appropriate and meet the test under s 32, 32AA and Part 2 of the Act. Accordingly, we direct the Council to incorporate these into a single document and circulate to the other parties for approval and file with the Court by the end of February 2021.

[8] A joint memorandum was subsequently filed by the parties on 5 March 2021. The memorandum set out the final agreed provisions to resolve Topic 3 and 4. In support of the amendments made the parties provided the Court with the following summary of the issues and how they have now been addressed:<sup>4</sup>

Rule C.5.1.13 Water take below a minimum flow or water level and Rule C.5.1.14 Water take that will exceed an allocation limit have been amended to provide that such takes a prohibited activities.<sup>5</sup> New rules C.5.1.13A and C.5.13B provide an exception for takes for “registered drinking water supply” below a minimum flow or level or in excess of an allocation limit as non-complying activities.<sup>6</sup>

Rule C.5.1.10 High flow allocation has been amended to require that 50% of the flow above median flow remains in the river and that the timing, rate and volume of takes to maintain the function of flushing flows is added as a matter

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<sup>4</sup> Memorandum of counsel providing agreed final provisions Topic 3 allocation and uses of water and Topic 4 Water Quantity, dated 5 March 2021 at [4]-[5].

<sup>5</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [142].

<sup>6</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [107] and [142].

of discretion.<sup>7</sup>

Policy D.4.12 Minimum flows and levels has been amended to provide for existing permits as “interim minimum flows”<sup>8</sup> and for takes for registered drinking water supply, reasonable domestic needs or animal drinking water and non-consumptive takes as “alternative minimum flows”.<sup>9</sup> The proposed additional wording to require that the best information available is used in calculating allocation limits and minimum flows and levels has been included at the start of H.4 Environmental flows and levels, rather than in Policy D.4.12.<sup>10</sup> Relocating the additional wording is necessary to ensure that it applies to allocation limits and minimum flows and levels, as Policy D.4.12 applies only to minimum flows and levels.

Policy H.4.2 Minimum levels for lakes and natural wetlands has been amended to provide that there can be no change to the levels of any dune lake.<sup>11</sup> A note has been provided in Policy H.4.2 to identify that there can be natural variation in dune lake levels and clarify how a plan user would determine if a proposal would change the level of a dune lake. New Rule C.5.1.13C provides that an application to take water that would result in a change in dune lake levels is a non-complying activity.<sup>12</sup>

[9] The parties also made the following minor changes for clarification or correction:

Clarification in Rule C.5.1.10 High flow allocation that the 50% of flow remaining in the river is to be determined at the time and location of the take. This avoids the potential for alternative interpretations.

Correction in the note to Rule C.5.1.13 Water take below a minimum flow or water level to remove a reference to aquifers. Aquifers do not have minimum flows or water levels, but are instead managed through allocation limits.

Grammatical corrections in Policies H.4.1 and H.4.3 to include a missing word as follows:

The [minimum flow / allocation limit] will be applied at a gauging station(s) that is representative of the hydrological conditions of the proposed site of the point of take...

## Outcome

[10] Having considered the amendments proposed by the parties, I agree that they

<sup>7</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [117] and [142].

<sup>8</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [86].

<sup>9</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [141].

<sup>10</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [104].

<sup>11</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [134] and [143].

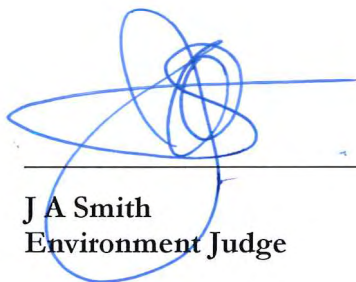
<sup>12</sup> *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [143].

reflect the Court's earlier decision and are appropriate. For this reason, the final agreed provisions are approved and are attached to this determination as **Appendix 1**.

- (a) The amendments shaded in grey were agreed between the parties and recorded in the memoranda filed by the parties dated 28 October 2020 and 25 November 2020.
- (b) The amendments that are shaded yellow are in response to the findings in the Court's decision.
- (c) The amendments shaded green are minor amendments proposed by the parties for clarification or correction.

[11] Any application for costs is not encouraged, but if one is to be made it is to be filed within 20 working days with a reply within 10 working days and a final reply (if any) 5 days thereafter.

For the Court:



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**J A Smith**  
**Environment Judge**



## APPENDIX 1: FINAL AGREED PROVISIONS

Amendments are shown in underline and strikethrough as follows:

- Amendments shaded in grey were agreed between the parties and recorded in joint memoranda dated 28 October 2020 and 25 November 2020;
- Amendments shaded in yellow are proposed in response to the findings in the Court's decision dated 25 January 2021; and
- Amendments shaded in green are minor amendments proposed by the parties for clarification or correction.

### C.5.1.1 Minor takes – permitted activity

The taking and use of water, and in the case of geothermal water any associated heat and energy, from a river, lake or aquifer is a permitted activity, provided:

- 1) the take is not from a coastal aquifer or outstanding freshwater body unless the take and use was authorised at 1 September 2017, and
- 2) the total daily take per property from all sources does not exceed:
  - a. 10 cubic metres, or
  - b. 30 cubic metres for the purposes of dairy shed wash down and milk cooling water existing at 1 September 2017, or
- 2A) if two or more properties are amalgamated after 1 September 2017, total daily takes authorised by conditions 2(a) and (b) that existed prior to the amalgamation do not need to be reduced, and
- 3) The rate of take from a river does not exceed ~~30~~10 percent of the instantaneous flow at the point and time of the take, and
- 4) the maximum rate of geothermal heat take (without taking water) does not exceed 7500 megajoules per day, and
- 5) the take does not cause any change to the seasonal or annual level of any natural wetland, and
- 6) the take does not adversely affect the reliability of any existing authorised take, and
- 7) for a surface water take, the water intake structure is designed, constructed, operated and maintained so that:
  - c. the maximum water velocity into the entry point of the intake structure is not greater than 0.12 metres per second, and
  - d. if the take is from a coastal river, outstanding river or lake, the intake structure has a fish screen with the intake screen mesh spacing not greater than 1.5 millimetres, or
  - e. if the take is from a small river or large river, the intake structure has a fish screen with mesh spacing not greater than three millimetres, and
- 8) any reticulation system and its components are maintained to minimise leakage and wastage, and
- 9) at the written request of the Regional Council, the water user provides the Regional Council with the following information:

- f. the location of the water take, and
  - g. the daily volume of the water taken and the maximum daily rate of take, and
  - h. the purpose for which the water is used or is proposed to be used, and
- 10) at the written request of the Regional Council, a water meter(s) is installed at the location(s) specified in the request and water use records are provided to the Regional Council in a format and at the frequency specified in the request.

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

- Taking and use of water from a river, lake or aquifer, and any associated heat or energy from geothermal water (s14(2)).

### Rule C.5.1.10 High flow allocation – restricted discretionary activity

The taking and use of water from a river when the flow in the river is above **median flow** that is not a permitted or controlled activity under C.5.1 of this Plan is a restricted discretionary activity, **provided 50% of the river flow above the median flow remains in the river at the point and time of take.**

**Matters of discretion:**

- 1) The timing, rate and volume of the take to avoid or mitigate effects on existing **authorised** takes and aquatic ecosystem health.
- 2) Measures to ensure the reasonable and efficient use of water.
- 3) The positive effects of the activity.
- 4) **The timing, rate and volume of high flow takes to maintain the function of flushing flows to support aquatic ecosystem health.**

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

- Taking and use of water from a river (s14(2)).

### **C.5.1.13A Water take for registered drinking water supply below a minimum flow or water level – non-complying activity**

**The taking and use of fresh water from a river, lake or natural wetland for registered drinking water supply when the flow in the river or water level in the natural wetland or lake is below a minimum flow or minimum level set in H.4 Environmental flows and levels, and that is not permitted by a rule in this Plan, is a non-complying activity.**

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

- **Taking and use of fresh water from a river, lake or natural wetland (s14(2)).**



### C.5.1.13B Water take for registered drinking water supply that will exceed an allocation limit – non-complying activity

The taking and use of fresh water for registered drinking water supply that would cause an allocation limit set in H.4 Environmental flows and levels for a river or aquifer to be exceeded, and that is not permitted by a rule in this Plan, is a non-complying activity.

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

- Taking and use of fresh water from a river or aquifer (s14(2)).

### C.5.1.13C Water take affecting a dune lake - non-complying activity

The taking and use of fresh water that would change the level of a dune lake as referred to in Policy H.4.2 Minimum levels for lakes and natural wetlands, and that is not permitted by a rule in this Plan, is a non-complying activity.

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

- Taking and use of fresh water from a river, lake, natural wetland or aquifer (s14(2)).

### C.5.1.13 Water take below a minimum flow or water level – non-complying prohibited activity

The taking of fresh water from a river, lake or natural wetland when the flow in the river or water level in the natural wetland or lake is below a minimum flow or minimum level set in H.4 Environmental flows and levels, and that is not permitted by a rule in this Plan or a non-complying activity under rule C.5.1.13A or rule C.5.1.13C, is a non-complying prohibited activity.

*For the avoidance of doubt, this rule does not apply to non-consumptive takes.*

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

- Taking and use of water from a river, lake or natural wetland or aquifer (s14(2)).

### C.5.1.14 Water take that will exceed an allocation limit – non-complying prohibited activity

The taking and use of fresh water that would cause an allocation limit set in H.4 Environmental flows and levels for a river or aquifer to be exceeded, and that is not permitted by a rule in this Plan or a non-complying activity under rule C.5.1.13B, is a non-complying prohibited activity.

*For the avoidance of doubt, this rule does not apply to non-consumptive takes or, for aquifers, those matters specified in H.4.4(3).*

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

- Taking and use of water from a river or aquifer (s14(2)).

## Policy D.4.12 Minimum flows and levels

- 1) For the purpose of assisting with the achievement of Objective F.1.1 of this Plan, ensure that the minimum flows and levels in H.4 Environmental flows and levels apply to activities that require water permits pursuant to rules in this Plan, and
- 2) Notwithstanding Policy D.4.12(1), water permits granted prior to 4 May 2019 that set different minimum flows or levels to a minimum flow or level in Policy H.4.1 or Policy H.4.2 of this plan are recognised as interim environmental flows and levels.
- 23) Notwithstanding this general requirement, for rivers a An alternative **minimum flow** (comprising the minimum flow set in H.4 Environmental flows and levels less a specified rate of flow particular to an activity) may be applied where the water is to be taken, dammed or diverted for:
  - a) the health of people as part of a **registered drinking water supply**, or
  - ~~b) **root stock survival water**, or~~
  - ~~eb)~~ an individual's reasonable domestic needs or the reasonable domestic needs of a person's animals for drinking water that is, or is likely to be, having an adverse effect on the environment and is not permitted by a rule in this Plan, or
  - ~~ec)~~ a **non-consumptive take**.

## H.4 Environmental flows and levels

In calculating the allocation limits, minimum flows and levels in accordance with H.4 Environmental flows and levels, Council will use the best information available at the time, which may include information that is provided by an applicant and will apply the methodologies set out in Policies H.4.1 – H.4.3.

### Policy H.4.1 Minimum flows for rivers

The **minimum flows** in Table 24: Primary ~~M~~minimum flows for rivers and Table 24A Secondary minimum flows for rootstock survival purposes apply to all consumptive takes from Northland's rivers (excluding **ephemeral rivers or streams**) unless a lower **minimum flow** is provided for under Policy D.4.12 Minimum flows and levels.

**Table 24: Primary ~~M~~minimum flows for rivers**

River water quantity management unit	Minimum flow (l/s)
Outstanding rivers	100 percent of the <b>seven-day mean annual low flow</b>

Coastal rivers	90 percent of the <a href="#">seven-day mean annual low flow</a>
Small rivers	80 percent of the <a href="#">seven-day mean annual low flow</a>
Large rivers	80 percent of the <a href="#">seven-day mean annual low flow</a>

**Table 24A: Secondary minimum flows for rootstock survival purposes**

River water quantity management unit	Minimum flow (l/s)
<a href="#">Coastal rivers</a>	85 percent of the <a href="#">seven-day mean annual low flow</a>
<a href="#">Small rivers</a>	75 percent of the <a href="#">seven-day mean annual low flow</a>
<a href="#">Large rivers</a>	75 percent of the <a href="#">seven-day mean annual low flow</a>

**Table 24A is subject to the following**

a. Root stock survival water may only be taken after four consecutive days below the primary minimum flow

b. Water for root stock survival water must not be taken once the secondary minimum flow for root stock survival water purposes in Table 24A is reached

c. Root stock survival water in Table 24A is only available if there is no other practicable alternative source of water available.

**Notes:**

- 1) The [minimum flow](#) will be applied at a [gauging station\(s\)](#) that is representative of the hydrological conditions of the proposed site [of](#) the point of take and any downstream flow recorder sites, as determined by the regional council.
- 2) The [seven-day mean annual low flow \(MALF\)](#) at flow recorder ~~gauging~~ [site\(s\)](#) will be determined using the lowest average river flow for any consecutive seven-day period for each year of record based on a minimum of ten years of measured and/or simulated flow.
- 3) If there is no minimum flow information available numerical modelling will be undertaken to determine long term trends for river levels from which MALF could be calculated. The MALF for other sites, for which no measured flow data exists,

*will be determined through gauging of river flows correlated with water level monitoring sites or flow recorded sites. The Regional Council will have discretion over the location and method for the gauging.*

## Policy H.4.2 Minimum levels for lakes and natural wetlands

The **minimum levels** in *Table 25: Minimum levels for lakes and natural wetlands* apply to Northland's lakes (excluding artificially constructed water storage reservoirs) and **natural wetlands** unless a lower level is provided for under Policy D.4.12 Minimum flows and levels.

**Table 25: Minimum levels for lakes and natural wetlands**

Management unit	Minimum level
Deep lakes (>10 metres in depth)	Median lake levels are not changed by more than 0.5 metres, and there is less than a 10 percent change in mean annual lake level fluctuation and patterns of lake level seasonality (relative summer versus winter levels) remain unchanged from the natural state.
Shallow lakes (<10 metres in depth)	Median lake levels are not changed by more than 10 percent, and there is less than a 10 percent change in mean annual lake level fluctuation and patterns of lake level seasonality (relative summer versus winter) remain unchanged from the natural state.
<b>Dune lakes</b>	<b>There is no change in lake levels.</b>
<b>Natural wetlands</b>	There is no change in their seasonal or annual range in water levels.

**Note:**

- 1) **Dune lakes are subject to natural variation in lake levels. "No change" means that as a result of the abstraction of water median water levels, mean annual water level fluctuations, and patterns of water level seasonality (relative summer versus winter) remain unchanged.**

## Policy H.4.3 Allocation limits for rivers

- 1) The quantity of fresh water that can be taken from a river at flows below the **median flow** must not exceed whichever is the greater of the following limits:
  - a) the relevant limit in Table 26: Allocation limits for rivers ~~or~~ **and Table 26A: Root stock survival water allocation block, or**

- b) the quantity authorised to be taken by:
- i. resource consents existing at the date of public notification of this Plan less, with the exception of water permits for takes from rivers in the Mangere Catchment, any resource consents subsequently surrendered, lapsed, cancelled or not replaced, and
  - ii. takes that existed at the notification date of this Plan that are subsequently authorised by resource consents under: Rule C.5.1.8 Replacement water permits for registered drinking water supplies – controlled activity, Rule C.5.1.9 Takes existing at the notification date of the plan – controlled activity and Rule C.5.1.11 Takes existing at the notification date of this Plan – discretionary activity.
- 2) The allocation limits specified in Clause 1) include volumes allowed to be taken under section 14(3)(b) of the RMA and permitted to be taken by rules in this Plan, and the estimated or measured volumes associated with such takes should be considered when making decisions on applications water permits.
  - 3) The allocation limits specified in Clause 1) apply to applications for water permits for the taking and use of fresh water from rivers, but do not apply to non-consumptive components of takes.

**Table 26: Allocation limits for rivers**

River water quantity management unit	Allocation limit (m <sup>3</sup> /day)
Outstanding rivers	10 percent of the <b>seven-day mean annual low flow</b>
Coastal rivers	30 percent of the <b>seven-day mean annual low flow</b>
Small rivers	40 percent of the <b>seven-day mean annual low flow</b>
Large rivers	50 percent of the <b>seven-day mean annual low flow</b>

**Table 26A: Root stock survival water allocation blocks**

River water quantity management unit	Allocation limit (m <sup>3</sup> /day)	Condition of take (in addition to other consent conditions)
Coastal rivers	4 percent of the <b>seven-day mean annual low flow</b>	The amount of water for each individual consent should be limited to the water demand requirements to maintain root stock in drought conditions.
Small rivers	5 percent of the <b>seven-day mean annual low flow</b>	

Large rivers	6 percent of the <u>seven-day mean annual low flow</u>	not exceeding 25% of the <u>irrigation demand</u>
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**Notes:**

- 1) *The allocation limit will be applied at a gauging station(s) that is representative of the hydrological conditions of the proposed site of the point of take and any downstream flow recorder sites, as determined by the regional council.*
- 2) *The seven-day mean annual low flow (MALF) at flow recorder gauging site(s) will be determined using the lowest average river flow for any consecutive seven-day period for each year of record based on a minimum of ten years of measured and/or simulated flow.*
- 3) *If there is no minimum flow information available numerical modelling will be undertaken to determine long term trends for river levels from which MALF could be calculated. The MALF for other sites, for which no measured flow data exists, will be determined through gauging of river flows correlated with water level monitoring sites or flow recorded sites. The Regional Council will have discretion over the location and method for the gauging.*