BEFORE THE NORTHLAND REGIONAL COUNCIL

under:	the Resource Management Act 1991
in the matter of:	Resource consent applications by the Te Aupōuri Commercial Development Ltd, Far North Avocados Ltd, P McLaughlin, NE Evans Trust & WJ Evans & J Evans, P & G. Enterprises (PJ & GW Marchant), MP Doody & DM Wedding, A Matthews, SE & LA Blucher, NA Bryan Estate, SG Bryan, CL Bryan, KY Bryan Valadares & D Bryan (Property No 1), MV Evans (Property No 2), MV Evans (Property No 1), Tuscany Valley Avocados Ltd (M Bellette), NA Bryan Estate, SG Bryan, CL Bryan, KY Bryan Valadares & D Bryan (Property No 2), Tiri Avocados Ltd, Valic NZ Ltd, Wataview Orchards (Green Charteris Family Trust), Mate Yelavich & Co Ltd, Robert Paul Campbell Trust, Elbury Holdings Ltd (C/-K J & F G King) for new groundwater takes from the Aupōuri aquifer subzones: Houhora, Motutangi and Waiharara and applications by Waikopu Avocados Ltd, Henderson Bay Avocados Ltd, Avokaha Ltd (c/- K Paterson & A Nicholson), KSL Ltd (c/- S Shine), Te Rarawa Farming Ltd and Te Make Farms Ltd for increased existing consented takes from the Aupōuri aquifer subzones: Houhora, Motutangi, Sweetwater and Ahipara.

Memorandum on behalf of Director-General of Conservation

15 March 2021

For the Director-General of Conservation:

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Background

1. This Memorandum responds to Memoranda filed on behalf of the Applicants dated 2 and 11 March 2021.

2. The Applicants have requested facilitated conferencing and that:

> *"The position for the Applicants is that there is a sound basis of technical evidence for the parties' planners to conference to determine whether, in their opinion, the GMCP is sufficient for the purpose outlined in Paragraph 4 of Direction #3, or could be, with further indicated refinement, after which they are to advise the Panel accordingly. A key expectation in moving into conferencing on the consent conditions with the Department and the Council is that the Environment Court Practice Note 2014 should guide these interactions."*

3. The position for the Director-General (DOC) was outlined to the Applicants in a letter dated 5 March 2021 (attached to this Memorandum with some redactions due to confidentiality). As outlined in this letter:

   a. DOC provided a list of additional tasks it sought to be completed, dated 16 October 2020 (Attachment 2 to this Memorandum).

   b. The Panel's directions did not require facilitated expert conferencing on these additional tasks.[1]

   c. In any event, DOC entered into extensive technical expert conferencing meetings. Four Joint Witness

[1] Minute #3 directed that hydrogeologists for the Applicant, NRC and DOC (together with DOC's ecologists and as necessary the Applicant's and NRC's ecologist) to *"confer"* with the intention of developing an agreed plan to address the wetland issue. When sufficiently developed, planners for the parties were to *"confer"* to determine whether the plan was sufficient for the purposes that are [whether that plan is sufficient in itself for incorporation as an adaptive management condition (if granted) or, alternatively, could be implemented and completed within a reasonable time period and the results confirmed before final decisions are made on the applications].

Statements were signed.[2] (It is correct that DOC sought these meetings be facilitated to overcome issues of process.)

d. The parties technical experts did not reach agreement on the additional tasks that need to be carried out, although they did agree wetland Areas of Interest (AOI).

e. The Applicants do not have expert ecologist(s) involved in conferencing (except in relation to the documented work undertaken by Wildlands for the purpose of the existing MWWUG consents, on the Kaimaumau-Motutangi wetland).[3] The Applicants have not advised how long ground-truthing of other wetlands would take, should it be required *before* consents are granted.

f. There are also significant issues around other surface water bodies that have not been adequately addressed.[4]

g. DOC does not consider formal planning conferencing on the GMCP would be useful at this point, primarily due to the large level of disagreement on tasks that need to be carried out and the lack of information on timeframes for tasks.

h. Mr Christie of DOC together with another of DOC's internal planners, Mr H Familton, are available to have informal discussions with NRC and the Applicants' planners at any time.

i. As a *submitter*, DOC has committed significant resources to this process. DOC does not have unlimited resources to assist the Applicants with back-filling an

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[2] Technical expert conferencing has focussed on the following tasks listed in Attachment to JWS 27 November 2020 (noting that there are 'subtasks' under each heading):

- Task 1 – "Surface Water MALF effects";
- Task 6 – "Potential Wetlands Risk Analysis"; and
- Task 9 – headed "Consent conditions and GMCPs" however included broader matters (subtask includes "What does the Applicant propose regarding threatened species assessment given NZCPS Policy 11 /NPSFM 2020?").

[3] Refer footnote 14 in the attached letter of 5 March 2021.

[4] In Minute #4 it was clarified that the consultation required on the 'wider task list' was not limited to wetland issues alone.

adaptive management regime in the way that the Applicants seem to seek.[5]

j. Unfacilitated planning discussions would not incur any additional cost to the Applicants.

4. However, if the Commissioners do consider that facilitated planning conferencing is required, DOC requests that:

a. Planning conferencing address the preliminary question (under *Sustain Our Sounds*) whether adaptive management is appropriate in the circumstances. This is the question that DOC understood the Commissioners' current Directions had been directed toward.

b. A proposed agenda for planning conferencing be agreed between Counsel (and NRC's planner in the absence of a legal representative) and approved by the Commissioners.

Further updates

5. It is understood that all parties now agree that actual and potential effects associated with depletion of surface water bodies (including streams) need to be assessed under s104 of the Act, even if calculated to be in the 'Other' category in Policy H.5.[6]

6. Further, the Environment Court has released its Decision on water quantity aspects of the Northland Regional Plan. Agreed plan provisions that would reflect the Court's decision have been lodged with the Court (by the parties involved in those plan appeals). Copies of the Court's decision and provisions are filed with this Memorandum.

7. Paragraphs [119] – [134] of the Environment Court's Decision contain discussion on the importance of

[5] In this respect, the understanding in the Applicant's Memorandum dated 2 March (paragraph 4) that "the Department currently wishes to move to consult on the conditions of consent and the formulation of an adaptive management regime" is incorrect.

[6] Email of Stephanie Kane to S Ongley 2 February 2021; email of R Ashton to S Ongley 19 February 2021.

Northland's dune lakes. DOC considers this reinforces its position. Counsel is able to make further submissions on the implications of this Decision at the appropriate time.

Summary

8. The Applicants' 'plan' for addressing the wetland issue, as stated by its technical expert in conferencing, is that ground-truthing/ecological survey of wetland AOI's would occur following the granting of consents. DOC does not agree. The Applicants have not advised the approximate timeframe whereby this work could be carried out should it be required prior to consents being granted.

9. Due to the limited agreement upon 'tasks', DOC's position is that the applications are not at the stage where an adaptive management set of conditions can be considered. Given this, DOC questions what formal planning conferencing will achieve.

10. There is still insufficient information on the potential cumulative adverse effects on sensitive waterbodies and threatened species from the proposed takes, to enable 'adaptive management' to be considered.

Dated this 15 March 2021

S Ongley/L Sutherland
Counsel/Legal advisor
for the Director-General of Conservation

ATTACHMENT 1

S J ONGLEY LLB (HONS)
BARRISTER: ENVIRONMENTAL LAW

5 March 2021

Brookfields
Level 9, Tower One
205 Queen Street
Auckland
Attn: Andrew Green and Rowan Ashton

By email: ashton@brookfields.co.nz; green@brookfields.co.nz

Dear Andrew and Rowan

Consent applications to take water from the Aupouri Aquifer (AAWUG applications)
Your ref: 703563

1. This letter is on behalf of myself and Lisa Sutherland of DOC.

2. We refer to:
   a. Your email of 22 February clarifying the tasks that the Applicants agree to undertake following the Hearing Commissioners' Directions as to what was to occur in the adjournment.
   b. Memorandum of Counsel filed by you on behalf of the Applicants dated 2 March 2021.

3. In relation to your Memorandum, it is not correct to say that DOC's hydrogeologist Tim Baker did not attend conferencing. He attended the first video conferencing session on 22 September 2020. We requested that these meetings be facilitated due to communications issues between the experts during early discussions. The conferencing was then facilitated by Ms Oliver. Three of DOC's other experts attended those facilitated conferencing meetings (D West, T Drinan and J Blyth).

4. DOC did not forward its 'task list' until October 2020, partly because there was an extensive period of time when the Applicants' representative misunderstood the meaning of the Directions. Ultimately, the Commissioners were required clarify that the consultation required on the 'wider task list' was *not* limited to wetland issues alone, and "*… the applicant, NRC and DOC were to review and consider the responses to that list and prepare a jointly agreed schedule of tasks and a timeline – noting that work should be identified that could or might be completed subsequently as part of an adaptive management condition.*"[1] Expert conferencing was not technically required by the Commissioners.[2]

5. The focus on wetlands to the exclusion of other waterbodies has, unfortunately, continued. On the positive side, conferencing has enabled the experts to agree on wetland Areas of Interest (AOI) that would be subject to further analysis.

6. We understand the Applicant's position is that ground-truthing/ecological survey of wetland AOI's would only occur following the granting of consents - under a Groundwater Monitoring Contingency Plan (GMCP). DOC's expert Dr West has not agreed to that.[3]

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[1] Minute #4 dated 9 November 2021.
[2] Minute #3 responded to Mr Williamson's request for direction for hydrogeological conferencing, stating that that was not the 'end point' required.
[3] As stated in the relevant JWS, Dr West defers to the planners on that matter - referred to as 'Step B' in JWS (relating to hydrogeology, freshwater & ecology) held on 27 November 2020, dated 14 December 2020.

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7. You have stated the Applicants' position, that many of the additional tasks identified by DOC are not required. This appears to be primarily based on hydrogeological grounds. As we outline in this letter, without a further and more substantial proposal from the Applicant, further hydrogeological conferencing alone will not enable DOC to alter its position from that stated at the hearing last year.

8. Below we comment on matters that the Applicants have *not* agreed to undertake, however first we would like to outline the legal/planning framework from DOC's perspective.

Legal/planning framework

9. As you know, the decision on the Motutangi-Waiharara Water Users Group (MWWUG) consent applications focused on potential adverse effects on the Kaimaumau-Motutangi wetland. Reasons the Commissioners at Council-level granted the consents, included that the conditions would "*avoid, remedy or mitigate*" the adverse effects:[4]

10. It is now clear that "*avoid, remedy or mitigate*" is not the correct test. The Environment Court found that:
    a. The Kaimaumau-Motutangi Wetland is part of the coastal environment. The extent of the coastal environment is not only that delineated by the Northland RCPS.
    b. NZCPS Policy 11(a)(i) – (vi) and 11(b) were (and are now) engaged.
    c. There was no certain scientific information that could satisfy the decision-maker that there would be no adverse effects on the NZCPS Policy 11(a) values from the abstractions.[5]
    d. The starting point for adaptive management must be the decision of the Supreme Court in *Sustain Our Sounds et al v Marlborough DC* [2014] NZSC 40.

11. In the Environment Court, the then 17 Applicants acknowledged that the consent conditions were to ensure the regime *avoids* adverse effects on the coastal environment, including the Kaimaumau-Motutangi Wetland, and *avoids* significant adverse effects on values and attributes of areas outside the coastal environment but within the drawdown area.[6]

12. In setting an interim water level, the Environment Court found:[7]

> *"We conclude that the standing waters of the Reserve Area have critical values and attributes, meeting all of the criteria of 11(a) of the NZCPS. As such, any change to that water level which is not a natural variation would be of concern."* (Emphasis)

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[4] [103] of that Decision. The Commissioner's posed the following question but did not expressly answer it: *"If Part 2 of the RMA and the NZCPS are in play, then we would need to make a finding on the issue of 'avoidance' of adverse effects, rather than the lesser NPS threshold regarding minor adverse effects."* (Emphasis)

[5] At [26].

[6] At [37].

[7] At [44]. And at [47] "*Any drop of more than 25mm [in one month] below the levels at that time [of installing measurement equipment by agreement] is to represent a trigger for further investigations as to the cause involving both wetland ecologists and hydrologists.*" And at [57]:

> *"The reason we have reached these figures is that it is clear from the evidence of DoC that a drop of 100mm would be of concern. Given that we do not, at this stage, understand the natural fluctuation levels, or the effect of the existing draws, we consider that a suitably conservative number would be to look at any change of more than half of that figure, ie 50mm in any yearly period on a rolling basis. On the other hand, any rapid drawdown, of even 25mm, may indicate an ongoing tendency towards exceedence within a very short period of time."*

13. Accordingly, 'Trigger 1' is a catalyst for investigation by wetland ecologists and hydrologists. A decline in water levels within a wetland can have an ecological impact if the magnitude of decline exceeds the tolerance of the flora and fauna adapted to living in the wetland habitat.[8] The further investigation is intended to ascertain whether change in levels is a natural fluctuation or related to abstraction. This regime was formulated to directly respond to the mandate to "*avoid*" adverse effects on the relevant values.

Further developments since the Court's decision in *Burgoyne*

14. Since the *Burgoyne* decision, the Court of Appeal has delivered its decision in *Trans Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86. Although that decision is under different legislation, preventing an adaptive management regime as defined in that legislation, the Court of Appeal's decision is relevant in that it identified a more *"fundamental"* error in the granting of permits. The more fundamental error involved:

    a. The high level of uncertainty of the information on marine mammals and seabirds (distribution/abundance/habitat) - such that it was difficult to confidently assess the risks or effects at scale.

    b. Allowing Trans Tasman Resources to gather baseline information about the receiving environment during the 2 years *after* the grant of the consents – including in order to establish natural background levels.

    c. The reliance on very general conditions about avoiding adverse effects on fauna - leaving specific controls required to avoid those effects to management plans.

15. The Supreme Court's decision in this case is likely to be released shortly. In the meantime, the Court of Appeal relevantly said:[9]

    "*Key decisions, and the gathering of information on which those decisions are based, are impermissibly left for another day and another decision-maker. The EPA was obliged to make these decisions at the time of consent, and to ensure it had adequate information to do so. If it did not have adequate information to make those decisions, the consent should have been declined.*"

16. The Court of Appeal's reasoning refers to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 as having a "bottom line".[10] Obviously, there are parallels with the Resource Management Act 1991.

17. As well as clarity around the application of the NZCPS (above), the NPSFM 2020 now provides additional policy direction. The NPSFM 2020 is more specific in relation to the protection of wetlands (Policy 6) and the habitats of indigenous species (Policy 9). It includes policies [3.22] for Natural Inland Wetlands and [3.24] for Rivers that must be inserted into regional plans directly. These are 'avoid' policies. The definition of "*Natural Inland Wetland*" includes many shallow lakes.[11]

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[8] Agreed Statement of Facts (ASF) agreed to by NRC, MWWUG and DOC at [23].
[9] At [255].
[10] In section 10(1)(b) EEZ Act: "*to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.*"
[11] RMA definition of Wetland "*includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.*" In the NPSFM 2020 "*Natural wetland means a wetland (as defined in the Act) that is not:*
(a) a wetland constructed by artificial means (unless it was constructed to offset impacts on or restore an existing or former natural wetland); or
(b) a geothermal wetland; or
(c) any area of improved pasture that at the commencement date is dominated by (that is more than 50% of) exotic pasture specifies and is subject to temporary rain-derived water pooling.

18. Finally, Policy D.2.4 of the Proposed Regional Plan for Northland subparagraph (a), refers to the need for adequate "*baseline of information on the receiving environment*" as a pre-requisite for adaptive management. We understand this Policy is not under appeal.[12]

DOC-requested 'tasks'

19. You have advised the Applicants do not agree to undertake the following tasks:
    a. Stream depletion effects/Lakes – site specific investigations on potential stream flow depletion/lake water level for high risk areas (item 1(d)).[13]
    b. Identify example springs in discussion with iwi/NRC/DOC for which baseline data occurs prior to any abstraction (item 1(e)).
    c. Model sensitivity presented for parameters and model calibration within a smaller catchment area with inclusion of groundwater inputs to evaluate if calibration is still possible with some groundwater contributions. The large standing water body east of loggers KM3 and KM4 should be the focus of this evaluation (item 9(c)).
    d. Further radon sampling in Kaimaumau Wetland (item 9(d)).
    e. Threatened species investigations (item 9(f)).[14]

20. In your email of 19 February you advise that the Applicant does not consider that Policy H.5 of the Proposed Northland Regional Plan creates a 'permitted baseline'. However, your expert considers that adequate monitoring in the applications and GMCP would "*safeguard against surface water depletion effects*". In your more recent email of 22 February you say, in relation to threatened species investigations:

> *"Ultimately comes back to adequacy of monitoring."*

Response

21. The tasks that DOC request be undertaken include further information about the receiving environment, and potential effects on the receiving environment. DOC considers that the level of risk must be understood before adaptive management can be considered. For the "Northern" and "Southern" groups, there are surface water bodies over the Aupouri aquifer which are not managed by the Department, but which contain significant indigenous biodiversity and natural character values. The potential adverse effects, cumulative or otherwise on these areas, have not been adequately assessed. There is no assessment of NZCPS Policies 11 or 13 values including threatened species. Without this, DOC believes the consent authority has inadequate information to determine the applications.[15]

22. The Applicant's proposed monitoring regime would only appear to address item d. in the Supreme Court's *Sustain Our Sounds* list: [16]
    a. the extent of the environmental risk (including the gravity of the consequences if the risk is realised);

The application of these definitions was considered in *BOIMP Ltd v Northland Regional Council* [2021] NZEnvC 006 (under appeal as to application of NES in the CMA).

[12] The appeal of Forest & Bird relates to the definition of "adaptive management" in the Proposed Plan.

[13] DOC cannot find any analysis of potential cumulative adverse effects on streams, lakes, wetlands generally, or springs - many of the potentially affected waterbodies remain to be identified.

[14] DOC's ecologist assisted with a preliminary analysis of threated species records along with Katrina Hansen, NRC, in the context of Conferencing and they produced a draft document. The Applicants have not inputted an ecologist to that work.

[15] Section 104(6) RMA.

[16] *Sustain our Sounds v New Zealand King Salmon Co Ltd* at [129] – being the combination of factors when considering whether the precautionary approach requires the activity to be prohibited until further information is available, rather than an adaptive management or other approach.

b. the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
c. the degree of uncertainty; and
d. the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.[17]

23. The monitoring regime proposed by the Applicant in itself places a degree of high reliance on the validity of the model.[18]

24. Sole reliance on monitoring and trigger levels to address the risk/uncertainty without further analysis of potential ecological (cumulative) effects on surface features, is contrary to recent caselaw.

25. As explained below, DOC also has a concern that the 'high trust' model developed for the MWWUG users is not proving to be precautionary. The way the MWWUG conditions are being implemented raises significant doubt around whether the conditions are effective at managing effects as originally intended ie:

> "*The abstractions must, individually and cumulatively, avoid:*
> ...
> *(b) adverse effects on the hydrological functioning of the Kaimaumau-Motutangi wetland;*
> *(c) adverse effects on the significant indigenous vegetation and significant habitats of indigenous fauna in terrestrial or freshwater environments of the Kaimaumau-Motutangi wetland;*
> ...."

MWWUG Consents

26. DOC's willingness to accept an adaptive management regime for the MWWUG consents proceeded under the following circumstances:
    a. 12 months of data collection was considered sufficient to set trigger levels due to the ability to utilise synthesized data. Normally a longer record would be required to understand natural fluctuations and isolate for unusual climatic events/seasonal variations. It seems that, although it was the premise for DOC accepting 12 months data collection the long-term synthesized record was not applied.[19]
    b. A 'rate of change' that included:
        i. A 9 year staged programme for long-term assessment of effects on the Kaimaumau-Motutangi Wetland, allowing seasonal variations to be factored-in (in each period of 3 years).
        ii. Consent holders only proceeding to 'Stage 2' following a full irrigation season.
    c. An adaptive management regime that was precautionary in that it required an initial trigger level (Trigger 1) for further investigation by wetland ecologists and hydrologists, to ascertain whether change in levels was a natural fluctuation or related to abstraction (as discussed above).

27. DOC has experienced the following issues with this regime, including what it considers to be a shift away from a precautionary approach:
    a. Continued failure to include the Wetland North monitoring site;

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[17] We provided this framework to Ms Oliver to help guide the outputs of expert conferencing – this framework was confirmed as appropriate by NRC's planning expert, but it was not explicitly addressed by the experts in conferencing. [Email Sarah Ongley to Marline Oliver 18 Nov 2020].
[18] I refer here to the Environment Court's comment in *Burgoyne* at [29] questioning Mr Williamson's opinion that potential effects at certain boundary locations should not be monitored. Mr Williamson appears to take a similar general approach to monitoring locations, in relation to the current applications.
[19] Report of LWP (Brydon Hughes) 30 October 2020.

b. Lack of telemetering to enable adverse effects to be identified quickly;
c. Hydrological analysis proceeding on the basis that trigger levels should be set *"[t]o avoid trigger level exceedance as a result of natural seasonal variation during future 'dry' summers."* (Emphasis).[20] This followed the drought period in the 2019-2020 summer. It was never the intent for trigger levels to be based upon extreme hydrological events. This essentially allows pumping to mimic those extreme weather events with potential adverse effects on the wetland.
d. Some users moving from Stage 2 before a full irrigation season meaning effects of in pumping in those locations are not able to be properly assessed (a 3 month period, as suggested in draft GMCP documents for the AAWUG applications, is insufficient).

28. In this context, it has become clear to DOC that the objectives contained in consent conditions lack sufficient rigour on their own to guide decision-making under a management plan.[21] The way they have been applied is reminiscent of the issues discussed by the Court of Appeal in relation to 'avoiding adverse effects on seabirds and marine mammals at a population level'.

29. For future consents, DOC would require more specific outcomes to be contained in the consent conditions themselves. Unfortunately, the baseline information on the receiving environment for the Northern and Southern Groups, is not at the stage where that can occur.

Where to from here

30. The further hydrogeological conferencing suggestion in your email correspondence would further address the adequacy of factor d. in the Supreme Court's listed in *Sustain Our Sounds* (listed at paragraph 22 above). DOC has a more fundamental concern regarding factors a. and c. DOC's requested tasks were suggested to address these factors. The Applicants have not agreed to undertake those tasks.

31. Unless your clients can put forward another proposal that addresses DOC's comments, we suggest that your client request that the hearing be reconvened.

32. In relation to your suggestion to have planning conferencing:

a. DOC's planners Mr Christie and Mr Familton are available to have a discussion with your planner and NRC's planner. We do not consider *formal* conferencing between planners is required (it was not directed). There will be no additional costs to your clients from *informal* planning discussions.

b. This letter is intended to assist with the legal framework that will need to be considered by the planners. Your email of 22 February indicated planning conferencing would address the question of whether adaptive management is appropriate *"in the context of consideration of the proposed adaptive management regime"*. DOC does not agree with that proposal. Under *Sustain Our Sounds* there is a preliminary issue as to whether adaptive management is appropriate. Only after considering that issue, can the appropriate regime for achieving

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[20] LWP Letter 30 October 2020 to Northland Regional Council "*Revised Trigger Levels for MWWUG Consents*".

[21] Those objectives being: "*The abstractions must, individually and cumulatively, avoid:*
(a) saltwater intrusion into the Aupouri aquifer;
(b) adverse effects on the hydrological functioning of the Kaimaumau-Motutangi wetland;
(c) adverse effects on the significant indigenous vegetation and significant habitats of indigenous fauna in terrestrial or freshwater environments of the Kaimaumau-Motutangi wetland;
(d) lowering of the groundwater levels of the Aupouri aquifer such that existing efficient bore takes cannot access groundwater from these sub-aquifers."

adaptive management be considered. The planners will need to work through the factors in *Sustain Our Sounds*.

[redacted]

d. Your clients have not lost their investment in Ms Oliver's facilitation – that facilitation has produced 4 Joint Witness Statements.

e. We question what will realistically be achieved by any formal planning conferencing given that your clients have not agreed to many of the tasks sought by DOC.

33. Finally, your understanding that the Memo of D West/T Drinan/J Blyth of 17 December 2020 forms part of the jointly agreed of tasks is incorrect.[22] The Memo was not retrospectively labelled by DOC as 'without prejudice'. It has always been subject to prejudice because it was produced in the context of conferencing and no final resolution occurred on it. As noted above, the reason DOC requested that expert meetings be facilitated was to ensure that procedural elements were being complied with. All the experts signed up to the procedure in the Environment Court Practice Note. As you stated in your Memorandum of Counsel, that expert conferencing proceeded in 'good faith' (it was not directed). DOC would consider it a severe breach of good faith should the Memo of 17 December 2020 be released.

34. We would be happy to discuss the above.

Yours faithfully

SARAH ONGLEY
email: sarah@ongley.co.nz

[22] Memorandum of Counsel filed on behalf of the Applicants 2 March 2021.

ATTACHMENT 2 TO MEMORANDUM OF COUNSEL DATED 15 March 2021

Additional tasks sought by DOC to be added to 'Task List'

Wetland identification/risk analysis	First pass method in GIS (using closed depression analysis) used to identify potential wetlands, however some wetlands may be an 'open environment', i.e. connected to a surface water course or at the headwaters of a gully/spring for example. The current approach may have missed these. Recommend ground truthing be undertaken on high risk wetlands identified from the analysis. This could be undertaken from the short listed at risk sites, with preference given to the *unmapped* wetlands (not in FENZ etc). This should occur before groundwater monitoring bores are established. Ground truthing should also evaluate why some wetland sites classified as high risk did not pick up nearby connected wetlands, which presumably could be due to discrepancies in the GIS based approach (and groundwater modelling outputs). An example of this is in the document 'WWLA_memo_depression_assessment_29092020'.pdf, Area of interest F (page 7) and K (page 14). This may highlight that there are unmapped wetlands of high risk which haven't been captured.
Wetland Baseline Monitoring	An ecological assessment should be conducted on the selected high risk wetlands for monitoring of groundwater. This should include establishment of permanent vegetation plots, invertebrate, fish and bird surveys. This information should be re-assessed on 3-5 year intervals in conjunction with reviews of water level monitoring data. Selection of the groundwater monitoring sites in the selected wetlands should be in conjunction with an NRC or DOC wetland specialist.
Water Balance Modelling - Kaimaumau	Model sensitivity should be presented for other parameters, such as (but not limited to) the 1.4 m level assigned to open water evaporation. Model should be re-calibrated with a smaller catchment area and inclusion of groundwater (GW) inputs to evaluate if a calibration/validation is still possible with some groundwater contributions. GW contribution is not likely to be occurring at all wetland areas (given the mosaic across the wetland and some perched rainfall fed systems), however a sub-model should be trialed to represent a smaller catchment contributing to the large standing water body east of loggers KM3 and KM4, which should be the focus of the GW evaluation.
Radon sampling	Further radon sampling in Kaimaumau Wetland over the peak of summer throughout the standing water body to the East of monitoring sites KM3 and KM4 (multiple samples across a grid area to capture a range of results, given if springs are present they may be localised). This may require helicopter or boat access (i.e. hovercraft).

Springs	Identify example spring(s) (in discussion with iwi/NRC/DOC) for which baseline data (water level monitoring) occurs prior to any abstraction. Further survey/monitoring required should consents be granted.
Threatened species	*What does the Applicant propose regarding threatened species assessment given NZCPS Policy 11 /NPSFM 2020?*
Stream depletion effects **Lakes**	Many of the potentially affected streams are small, with estimated MALFs of <10 L/s. Previous studies have shown smaller systems such as these to be most at risk from hydrological alteration (in terms of ecological protection of instream values). Notwithstanding the overall average/median modelled stream depletions, localised effects could be much higher. Takes may lead to flow reductions below the minimum flow for streams in the hydraulically connected area.[1] Require site-specific investigations on potential stream flow depletion/lake water level for high risk areas (with highest known ecological values + hydraulic connection). Concurrent flow gaugings (streams)/lake water level loggers in conjunction with pump tests. Note that there are a number of pre-existing GW takes in some areas that could be used to run these investigations before any well is dug. Assessing those AEEs that for these pre-existing GW takes would be useful to see what assessments were done.

16.10.20

[1] DOC does not agree with J Williamson Supplementary evidence 28.09.20 which appears to assert that H.5 Table 28 provides some form of 'permitted baseline'. These effects still need to be considered under RMA s104)

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU ROHE

UNDER	the Resource Management Act 1991
IN THE MATTER	of appeals under Clause 14 of Schedule 1 of the Act
BETWEEN	**MINISTER OF CONSERVATION** (ENV-2019-AKL-000122)
	NORTHLAND FISH AND GAME COUNCIL (ENV-2019-AKL-000120)
	NORTHPOWER LIMITED (ENV-2019-AKL-000123)
	PUBLIC AND POPULATION HEALTH UNIT OF THE

(Continued next page)

MEMORANDUM OF COUNSEL PROVIDING AGREED FINAL PROVISIONS TOPIC 3 ALLOCATION AND USE OF WATER AND TOPIC 4 WATER QUANTITY
5 March 2021

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Solicitor: M J Doesburg

WYNNWILLIAMS

NORTHLAND DISTRICT HEALTH BOARD
(ENV-2019-AKL-000126)

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
(ENV-2019-AKL-000127)

Appellants

AND **NORTHLAND REGIONAL COUNCIL**

Respondent

MAY IT PLEASE THE COURT:

1. In its decision on Topics 3 and 4 dated 22 January 2021 (**Decision**) the Environment Court directed the Council to prepare final provisions, consult with the parties and file the provisions by the end of February 2021. The provisions were not fully resolved at the end of February 2021, so a one week extension was sought and granted.

2. The parties are pleased to report that final provisions have been agreed as recorded in **Appendix 1** to this memorandum.

3. Amendments have been made consistent with the joint memoranda filed with the Court dated 28 October 2020 and 25 November 2020, as referred to with approval in the Decision. These amendments are shaded in grey in Appendix 1.[1]

4. In terms of the contentious issues determined by the Decision, in order of the issues at paragraph 15 of the Decision:

    a. 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.[2] 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.[3]

    b. 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 of discretion.[4]

    c. Policy D.4.12 *Minimum flows and levels* has been amended to provide for existing permits as "interim minimum flows"[5] and for takes for registered drinking water supply, reasonable domestic needs or animal drinking water and non-consumptive takes as

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1 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [5]-[14].

2 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [142].

3 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [107] and [142].

4 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [117] and [142].

5 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [86].

"alternative minimum flows".[6] 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.[7] 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.

d. 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.[8] 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.[9]

5. Three other minor changes are proposed for clarification or correction:

a. 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.

b. 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.

c. 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 **<u>of</u>** the point of take…

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6 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [141].

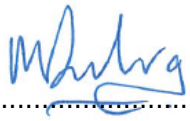
7 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [104].

8 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [134] and [143].

9 *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [143].

6. The revised provisions have been circulated to all parties to Topics 3 and 4 and this memorandum has been signed by all parties that attended the hearing.

DATED this 5th day of March 2021



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Counsel for Northland Regional Council

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S J Ongley / M Downing
Counsel for the Minister of Conservation

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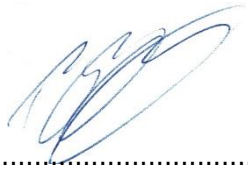
P D Anderson
Counsel for Royal Forest and Bird Protection Society of New Zealand Incorporated



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P R Gardner
Counsel for Federated Farmers of New Zealand

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H A Atkins / N S C Buxeda
Counsel for Horticulture New Zealand

.....

J S Baguley
Counsel for Far North District Council and Whangarei District Council

6. The revised provisions have been circulated to all parties to Topics 3 and 4 and this memorandum has been signed by all parties that attended the hearing.

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Counsel for Horticulture New Zealand

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J S Baguley
Counsel for Far North District Council and Whangarei District Council

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.

~~2~~3) ~~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~~

~~c~~b) 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

~~d~~c) 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 seven-day mean annual low flow

Coastal rivers	90 percent of the seven-day mean annual low flow
Small rivers	80 percent of the seven-day mean annual low flow
Large rivers	80 percent of the seven-day mean annual low flow

Table 24A: Secondary minimum flows for rootstock survival purposes

River water quantity management unit	Minimum flow (l/s)
Coastal rivers	85 percent of the seven-day mean annual low flow
Small rivers	75 percent of the seven-day mean annual low flow
Large rivers	75 percent of the seven-day mean annual low flow

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.
Dune lakes	There is no change in lake levels.
Natural wetlands	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 (m3/day)
Outstanding rivers	10 percent of the seven-day mean annual low flow
Coastal rivers	30 percent of the seven-day mean annual low flow
Small rivers	40 percent of the seven-day mean annual low flow
Large rivers	50 percent of the seven-day mean annual low flow

Table 26A: Root stock survival water allocation blocks

River water quantity management unit	Allocation limit (m3/day)	Condition of take (in addition to other consent conditions)
Coastal rivers	4 percent of the seven-day mean annual low flow	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 seven-day mean annual low flow	

Large rivers	6 percent of the seven-day mean annual low flow	not exceeding 25% of the irrigation demand

~~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.~~*

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2021] NZEnvC 001

IN THE MATTER OF	appeals under clause 14 of Schedule 1 of the Resource Management Act 1991 (**RMA**) 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)
	FEDERATED FARMERS OF NEW ZEALAND LIMITED (INCORPORATED)
	(ENV-2019-AKL-114)
	NORTHPOWER LIMITED
	(ENV-2019-AKL-123)
	PUBLIC AND POPULATION HEALTH UNIT OF THE NORTHLAND DISTRICT HEALTH BOARD
	(ENV-2019-AKL-126)
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND
	(ENV-2019-AKL-127 & ENV-2019-AKL-120)
	HORTICULTURE NEW ZEALAND LIMITED
	(ENV-2019-AKL-116)
	NORTHLAND FISH AND GAME COUNCIL
	(ENV-2019-AKL-349-120)

Appellants

AND NORTHLAND REGIONAL COUNCIL

Respondent

Court:	Judge J A Smith
Members:	Commissioner K S Prime Commissioner I M Buchanan
Hearing: Last case event:	at Whangarei on 27-29 October 2020 (inclusive)
Appearances:	M J Doesburg and E S Lake for Northland Regional Council (**the Council**) S J Ongley and M Downing for Minister of Conservation (**MoC**) P D Anderson for Royal Forest & Bird Society Incorporate of New Zealand and substituted appellant for Fish & Game New Zealand (**Forest & Bird**) N Buxeda and L C Ford for Horticulture NZ (**Horticulture NZ**) P R Gardner for Federated Farmers of NZ Incorporated (**Federated Farmers**) J S Bagley for Whangarei District Council and Far North District Council (**the TLS**)
Date of Decision:	22 January 2021
Date of Issue:	25 January 2021

DECISION OF THE ENVIRONMENT COURT OF JUDGE J A SMITH

Introduction

[1] This appeal is from the proposed Regional Plan for Northland Decision's Version July 2019 (**Proposed Regional Plan**). The Plan deals with a wide range of matters and those the subject of the current appeals relate to aspects of the proposed Plan dealing with the allocation and use of water, and water quantity.

[2] Many issues raised by these appeals have subsequently been abandoned, refined and/or agreed between the parties. Of those remaining, some were the subject of a consent memorandum produced to the Court on the final day of hearing. That Memorandum is attached hereto and marked **A**. This agreement related to issues of Northland Fish and Game Council, Northpower Limited and Northland District Health Board. It also settled some issues of the Minister of Conservation and Royal Forest & Bird Protection Society Incorporated.

[3] All parties before the Court supported the consent Memorandum. Furthermore, the Court was advised and noted that all parties have prepared their evidence based on these issues being resolved. Several parties to the Memorandum did not appear before the Court directly given that they had already agreed to and, in many cases, signed the relevant memorandum.

[4] The remaining issues revolved around four significant matters which we will note shortly.

Issues resolved

[5] There was a mediation on Topics 3 and 4 commencing in November 2019 as well as subsequent discussions. The parties participated and signed a settlement agreement. A Draft Order prepared by the parties to give effect to the agreement was filed with the Court as appendix 2 to their memorandum od 28 October 2020. These changes are attached as Attachment **A** to this decision.

[6] In short, the changes agreed between the parties resolves the appeals of all parties in relation to Rule C.5.1.1. It also resolves Northpower's appeal points relating to non-consumptive takes under Rules C.5.1.13 and C.5.1.14. We agree to these changes and do not understand the impact on the issues remaining before the Court.

[7] There remain for hearing by the Court other appeals in relation to Rules C.5.1.13 and C.5.1.14. Given that the other parties that were parties to this memorandum did not appear at the hearing on those remaining issues, namely Northland Fish and Game

Council and Northland District Health Board, we can only assume that they have no evidence to advance on those matters.

[8] We take it that the parties may still have remaining issues for determination under other Topics but Appendix 1 and this hearing will resolve all these parties' issues in relation to the matters under these Topics, namely Allocation of Use of Water (Topic 3) and Water Quantity (Topic 4).

Settlement between Horticulture NZ and Minister of Conservation and Others

[9] One issue which was the subject of general agreement between the parties but was not the subject of a settlement included in the memorandum of 28 October 2020 and annexure **A** was on the face of it somewhat more complex. Subsequent to the hearing the parties have filed a consent memorandum and seek consent orders. We attach the Memorandum with the proposed orders as Attachment **B.**

[10] Horticulture NZ sought protection for rootstock survival in low flow conditions. The Minister (and other parties) were prepared to agree to this course but within defined limits. During negotiations the parties had developed a relatively nuanced set of provisions which moved away from the original Policy the subject of the appeal, namely Policy D.4.12 (Minimum Flows and Levels) to make provision for rootstock survival through alternative provisions in Policy H.4.1.

[11] Attachment **B** and the amendments proposed attached demonstrates both the reasoning and the outcome sought by consent.

[12] The Decision's Version of the Plan included at Policy D.4.12, without limitation, an exception to minimum flow for rootstock survival water. That was not acceptable to the Minister of Conservation who appealed that provision. In the circumstances of this case and given the subtleties of the changes and their inter-relationship with other provisions, this issue would be complex to resolve at hearing.

[13] To understand the context of the changes sought it is necessary to discuss not only the original provisions and the appeals but also the impact of various documents, most particularly the NPS-FM 2020.

[14] Nevertheless, we have identified that all parties are agreed on the outcomes sought in Attachment **B**. At issue is the mechanism of how this should be achieved through the Plan provisions. We will discuss this later in the Decision after establishing background to the issues.

Remaining issues in dispute

[15] Beyond the question of how the rootstock survival provision is expressed in the Plan there are 4 other issues for this Court to determine in this hearing:

(1) *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).

(2) *Supplementary takes*

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

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

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

(c) If it is not deleted, what criteria should apply;

(d) 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).

(3) *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))

(4) *Dune Lake Levels*

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

Statutory Framework

The New Zealand Coastal Policy Statement (NZCPS)

[16] Many of the water ways in Northland are within the coastal environment, given the Region's extended coastline and narrow landform in many places. Rivers are mostly short-run, with a few exceptions. In accordance with NZCPS Policy 1(2)(c) there are many "areas where coastal processes, influences or qualities are significant and include coastal lakes, lagoons, tidal estuaries, salt marshes, coastal wetlands and the margins of these". Looking at the Objectives and Policies of the NZCPS as a whole it can be seen that most are engaged to a greater or lesser extent depending on the precise place that is being addressed.

[17] Many coastal areas contain threatened or at risk ingenious taxa under Policy 11(a):

> (i) Indigenous ecosystems and vegetation types threatened in the coastal environment; and
>
> (ii) habitats of indigenous species and in certain places threatened or at risk taxa.

[18] There did not appear to be any argument that NZCPS Policies 11, 13 and 15 applied. Where those do not apply further inland outside the coastal area the provisions of s 6(c) RMA identify similar concerns.

The NPS-FM 2014

[19] The National Policy Statement (Freshwater 2014) (**NPS-FM 2014**) was the document applying at the time the Council promulgated its regional plan. It too reinforces the provisions of both the NZCPS and Part 2 to the extent each are relevant in different areas. It also emphasises the concept of Te Mana O Te Wai.

[20] The parties suggested to us that the water quantity objectives in Chapter B of the NPS-FM 2014 were intended to be achieved both in the Regional Policy Statement and in this plan. For example:

> Objective B1:
>
> > Safeguards life supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, and sustainably managing the taking, using, damming or diverting of fresh water.
>
> Objective B2:
>
> > To avoid any further over allocation of water and phase out existing over allocation.
>
> Objective B4:
>
> > To protect significant values of wetlands and of outstanding freshwater bodies.

[21] These and the other Objectives and Policies identified in the NPS-FM 2014 are clearly directly relevant to the matters before this Court. These are encapsulated in the recognition at the Commencement of the NPS-FM 2014 relating to:

> Management of freshwater through a framework that considers and recognises Te Mana O Te Wai as an integral part of Freshwater Management …
>
> (i) Te Mana O Te Wai is the integrated and holistic wellbeing of a Freshwater Body.
>
> (ii) Upholding Te Mana O Te Wai protects the mauri of the water. This requires that in using water you must provide for Te Hauora O Te Taiao, health of the environment, Te Hauora O Te Wai, the health of the water body and Te Hauora O Te Tangata, the health of the people.

[22] All witnesses before us acknowledge that the purpose of both the Regional Policy Statement and the Plan before us was to achieve this integrated approach.

The NPS-FM 2020

[23] After the promulgation and decisions on this Regional Plan and just prior to the hearing of these appeals, the Government published its National Policy Statement for Freshwater Management 2020 which took effect on 7 September 2017. The NPS-FM 2020 is a substantial document of some 70 pages and witnesses had limited opportunity to consider its impact. All parties agreed that it continues the general direction of the NPS 2014 and refers to the fundamental concept of Te Mana O Te Wai.

[24] Importantly clause 1.3(4) of the NPS-FM 2020 has expanded the principles to a framework of 6 principles, being:

> (i) Mana Whakahaere relating to the power, authority and obligations of Tangata Whenua to make decisions that maintain, protect and sustain the health and wellbeing and their relationship with fresh water.
>
> (ii) Kaitiakitanga: the obligation of Tangata Whenua to preserve, restore, enhance and sustainably use fresh water for the benefit of present and future generations;
>
> (iii) Manakitanga: the process by which Tangata Whenua show respect, generosity and care for freshwater and for others.
>
> (iv) Governance: the responsibility of those with authority for making decisions to design a way that prioritises the health and wellbeing of fresh water.
>
> (v) Stewardship: the obligation of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations; and
>
> (vi) Care and Respect: the responsibility of all New Zealanders to care for freshwater in providing for the health of the nation.

[25] Clause 1.3(5) of the NPS-FM 2020 establishes a hierarchy of obligations:

> There is a hierarchy of obligations in Te Mana O Te Wai that prioritises:
>
> (a) First, the health and wellbeing of water bodies and freshwater ecosystems;
>
> (b) Second, the health needs of people (such as drinking water);

> (c) Third, the ability of people in communities to provide for their social, economic and cultural wellbeing now and in the future.

This is picked up as Objective 2.1 of the NPS-FM 2020.

[26] Clause 2.2 Policy 1 picks up the concept of Te Mana O Te Wai from the NPS 2014.

[27] Some other policies seem to be more extensive than previously stated in the NPS-FM 2014, although these may just give greater clarity:

(i) In Policy 6 for example, there is to be "no further loss of extent of natural wetlands". Their values are protected, and their restoration promoted.

(ii) Policy 7, the loss of river extent and values is avoided to the extent practicable.

(iii) Policy 8, the significant values of outstanding water bodies are protected.

(iv) Policy 9, the habitat of indigenous freshwater species is protected.

Other Policies may, to a greater or lesser extent be engaged depending on the circumstances.

[28] There are specific requirements in terms of this NPS-FM 2020. An example is Clause 3.2(1):

> Every Regional Council must engage with communities and Tangata Whenua to determine how Te Mana O Te Wai applies to water bodies and freshwater ecosystems in the Region.

[29] Other provisions such as 3.2(2) identify:

> ...long term visions must be achieved for objectives, policies, methods and criteria for natural inland wetlands, rivers, fixed passages and primary contact sites and water allocation.

[30] Section 3.3 deals with long term visions for freshwater; 3.4 relates to Tangata Whenua engagement and 3.5 relates to Integrated Management.

[31] What is clear to the Court in considering all of these is that the obligation is imposed upon the Regional Council and must accordingly be a future obligation rather than a current obligation. In fact, if there was any doubt about this the various action plans required (Clause 3.15), Identifying take Limits (Clause 3.17) and Monitoring (Clause 3.18) are clearly worded to indicate a future obligation. Timing and transitional matters are raised at Clause 4.1(1) and require:

> (1) Every local authority must give effect to this National Policy Statement as soon as reasonably practicable;
>
> (2) Every local authority must publicly notify any changes to the Regional Policy Statements, Regional Plans and District Plans that are necessary to give effect to this National Policy Statement as required under the Act.

[32] The effect on existing Policy Statements and Plans are covered in Clause 4.3(1):

> (1) to the extent that Regional Policy Statements and Regional District Plans already (at the commencement date) give effect to this National Policy Statement, local authorities are not obliged to make changes to wording or terminology merely for consistency with it.
>
> (2) ...
>
> (3) ... if a local authority chooses to amend an Operative Policy Statement ... the amendment is to be treated as a correction of a minor error.

Impact of NPS-FM 2020

[33] We conclude from this that the NPS-FM 2020 is a matter to which we should have regard and if there is a difference in outcome from the application of the NPS-FM 2020 rather than the NPS 2014, we need to consider whether it is more appropriate to achieve that outcome than that under the NPS-FM 2014. In practical terms however, the overall

effect of the NPS 2020 and that of the NPS-FM 2014 and the context of the provisions we are currently analysing does not indicate any change in focus or desired outcomes.

[34] Accordingly, it appears to us that for the main part the issues of Te Mana O Te Wai and the health of the environment, the health of the waterbody and the health of the people are still acknowledged within the terms of the NPS-FM 2020 albeit in a slightly different form. No witness suggested to us that there was any difference of substance. However, it would be fair to say that the NPS-FM 2020 has not been the subject of extensive evidence or decisions to date.

[35] The primacy given to the health and wellbeing of waterbodies and freshwater ecosystems in NPS-FM 2020, Objective 2.1(1)(a) is consistent with the decisions of the superior Courts including in *Environmental Defence Society v New Zealand King Salmon Company Limited*[1] relating to the NZCPS, Policy 11(a), 13 and 15. We consider that the Regional Plan cannot derogate from the mandatory requirements of the superior documents and the primacy of the health and wellbeing of waterbodies and freshwater ecosystems.

[36] It is for this reason that we conclude both the NPS 2014 and NPS-FM 2020 give primacy to ecological values. While we accept that this is explicit in Objective 2.1 of the NPS-FM 2020, it is nevertheless, in our view, still sufficiently clear from the terms of the NPS 2014.

[37] In considering which are the most appropriate provisions to be inserted within the Plan, all parties acknowledge that the NPS-FM 2020 is a matter we can have regard to. It therefore infers the assessment as to the most appropriate provisions to be inserted.

Regional Policy Statement

[38] The Regional Policy Statement was promulgated under the NPS-FM 2014 and appears to have been fully adopted by Council Resolution made in 2018. The Regional Policy Statement deals with Indigenous Ecosystems and Biodiversity at Objective 3.4 which seeks the safeguarding of Northland Ecological integrity by:

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[1] [2014] NZSC 38.

(a) Protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(b) Maintaining the extent and diversity of indigenous ecosystems and habitats in the region; and

(c) Where practical, enhancing of indigenous ecosystems and habitats particularly where it contributes to the reduction and the overall threat and status of regionally and nationally threatened species.

[39] This Provision is to apply to both land and water under the Regional Policy Statement and is to be read in conjunction with Objective 3.3 which provides for ecological flows and water levels. This seeks to "maintain flows, flow variability and water levels necessary to safeguard the life supporting capacity, ecosystem processes, indigenous species and the associated ecosystems of fresh water."

[40] There are also provisions relating to enabling economic wellbeing such as Objective 3.15. "Northland's natural and physical resources are to be sustainably managed in a way that is attractive for business and investment and that will improve the economic wellbeing of Northland and its community."

[41] Objective 3.7 Regionally significant infrastructure seeks "to recognise and promote the benefits of regionally significant infrastructure (a physical resource), which through its use of natural and physical resources can significantly enhance northlands economic, cultural, environmental and social wellbeing."

[42] We cannot see that any of these provisions, including Objective 3.8 Efficient and Effective Infrastructure, Objective 3.9 Energy Supply and Objective 3.10 Use and Allocation of Resources, are intended to detract from the primacy of the Provisions of Objectives 3.3, 3.4 or contained with the NPS 2014 or the NZCPS.

[43] For clarity, we conclude that the primacy of the health and wellbeing of waterbodies and freshwater ecosystems is clear from the RMA, NZCPS, NPS-FM 2014, NPS-FM 2020 and the RPS. We did not understand any party to derogate from that proposition.

Although the documents give priority to these issues the difficulty is that some of the provisions may in fact derogate from these values. One area is when the health needs of people such as drinking water are seen as a ground for derogating from minimum flows in waterways established to maintain the health and wellbeing of those waterbodies.

[44] This leads us to matters such as s 14(3)(b) of the RMA which provides that taking of water for:

> (i) An individual's reasonable domestic needs; or
>
> (ii) The reasonable needs of (a person) animals for drinking water [is not prohibited] if the taking or use does not, or is not likely to, have an adverse effect on the environment.

The National Environmental Standards for Freshwater (NES-FW 2020)

[45] The NES-FW 2020 was gazetted on the 5 August 2020, taking effect on 3 September 2020. The NES-FW provides, under Regulation 6, that Plan Rules (and proposed as well) may be more stringent than the regulations and can only be more lenient in very specific circumstances.

[46] Given that many of the waters and lakes are the subject of disputed controls we should address the connection to this appeal. Lakes, rivers, streams and waterways which may include (or even comprise) wetlands. Many of the Dune Lakes were described as shallow and photographs show benthic and reed material. Even in rivers and streams there are often areas which are not part of the active bed.

[47] Under NES-FW 2020 Regulation 6 the Regional Council has an obligation to remove any duplication or conflict between the proposed plan and the NES without using the Schedule 1 process. Thus, the lowering of water levels below those naturally occurring may offend against Regulations 53 or 54 of the NES-FW.

[48] Arguably the obligations under the NES-FW 2020 are ones imposed upon the Council rather than on the Court. However, in establishing which are the better

provisions, it would be unrealistic of this Court to include Plan provisions which would immediately need to be changed by the Council without using the Schedule 1 process.

[49] Effectively, the Plan provisions therefore can be stricter than those in the NES-FW but cannot be more lenient. In relation to natural wetlands the NES provides:

(a) It is prohibited to take water from within that wetland if it will result in complete or partial drainage is non-complying to take it from outside but within 100 metres of that natural wetland if will result in complete or partial drainage.

(b) Any other take or use of water from within wetlands or within 100 metres of it is a non-complying activity.

[50] We must immediately point out that this is subject to a number of qualifications some of which may negate the effect of the provision. The one that has been the subject of particular consideration to date in the case of COVID-19 Panel, consideration for Matawaii is that it is for specified infrastructure. Regulation 45(4) which provides:

> the taking for use, damming, diversion or discharge of water or within 100 metres set back from a natural wetland is a discretionary activity if it is for the purpose of constructing specified infrastructure.

[51] The meaning of the various "Regionally Significant Infrastructure", "Significant Infrastructure" and now "specified infrastructure" are not genuine to our immediate enquiry. However, it is clear that water abstraction may lower levels in lakes and rivers. These may constitute takes within 100m of the lakes and rivers and thus be prohibited unless an exception applies such as constantly specified infrastructure.

[52] Witnesses had difficulty in commenting in a meaningful way on the application of the NES-FW 2020 provision and we ourselves are somewhat confused as to their overall meaning in the context of the NPS-FM. We note that there are a series of further provisions that create full or partial exceptions to controls in some circumstances.

[53] Also, issues arose which have been dealt with under other headings of this Plan Review in relation to the extent of wetlands and whether this includes saltwater and brackish water and wetlands including mangroves, salt marsh, rushes etc. Conclusions on those issues are not necessary for the purposes of this particular appeal, but we note that the impact of the NES is unclear, although its affect appears to be absolute, ie., that Plan provisions cannot be more lenient. It is clear however that provisions in the plan can be more restrictive than those in the NES where these are most appropriate.

Matawaii Storage

[54] It also transpired that during the week of hearing a panel decision under the Covid-19 Recovery (Fast Track Consenting Act 2020) in relation to the Matawaii Water Storage at Kaikohe was issued. The Matawaii Water Storage Reservoir is a project listed in Schedule 2 of the Covid-19 Act but involved, among other things, issues relating to Land Disturbance in proximity to waterways. Of particular moment for the purpose of this case were applications for takes above median flow for the purpose of charging the Reservoir the subject of the application.

[55] Unknown to other members of the Court, Commissioner Prime was also a member of that Panel. This was disclosed to the Court on the final day of hearing. The Court immediately notified the parties who indicated initially that they had no concerns with the Commissioner continuing to consider this matter. The Court reserved leave for them to do so before the Court issued its Decision. No such concern has been raised with the Court.

[56] We conclude the Fast Track decision does not bear directly on the Plan issues before us. We note that this Appeal relates to the terms of the Regional Plan rather than the grant of a particular consent.

The Regional Plan

[57] Without the complications of the effect of the NES, the Regional Plan follows fairly closely on the theme set by the Act, the NZCPS, the NZPS-FM 2014, the RPS and to the extent relevant in this case, NPS-FM 2020.

The Northland context

[58] The existing statutory provisions set their face firmly toward the preservation of the natural aquatic environment by maintaining adequate water flow for flora and fauna in streams and rivers.

[59] The high variability in flow in Northland rivers and very low flows at certain periods indicate a need for care in dealing with minimum flows. On the other hand, the catchments are clearly "peaky" and involve periods when extremely high flows can be experienced. While there is an issue in maintaining flow variability there are going to be upper and lower flows at which flora and fauna are likely to suffer, either from lack of enough water to maintain aquatic habitats or too much water damaging these habitats.

[60] The Regional Plan seeks to achieve flow related outcomes by specifying a minimum flow and allowing allocation of water as a percentage of the mean annual low flow (**MALF**) when flows are below the measured or calculated median flow. Depending on the size and importance of the waterway, the flow retained within the river system is higher for some river types than others.

[61] For minimum flows Table 24 sets a primary minimum flow for freshwater management units as follows:

- Outstanding rivers 100% of the 7-day MALF
- Coastal Rivers 90% of 7-day MALF
- Small Rivers 80% of 7-day MALF
- Large Rivers 80% of 7-day MALF

[62] The allocation limit for rivers is based upon a percentage of the 7- day MALF:

- 10% for outstanding rivers
- 30% for coastal rivers
- 40% for small rivers

- 50% for large rivers

[63] There was no disagreement in principle that the 7-day MALF should be the mechanism by which minimum flows would be judged. The adoption of a percentage of this figure, depending on the Freshwater Management Unit (**FMU**), was again not the subject of any significant dispute. It follows closely upon the approach adopted in other Plans and is for the most part in accordance with the NPS-FM 2020.

[64] We should note that one of the other provisions that we will discuss in due course relates to water harvesting. Horticulture New Zealand made the point that they consider the future water use for Northland relates to the water harvesting regime, considering the extended low flow periods in Northland.

[65] Overall, we conclude that the most significant risk to aquatic flora and fauna is low flow periods, particularly during the drought periods experienced on a relatively frequent basis. This is also the time of peak demand for human use of water including for household, stock and rootstock.

[66] In relation to Water Harvesting the high variability in flow gives more confidence that, provided appropriate flow variability is maintained, the other objectives of the Plans and documents including the RPS can be maintained.

The MALF Regime

[67] Given that there are more than 27,000 reaches of rivers and streams in Northland and more than 1,700 waterways the task of physically measuring each waterway would be overwhelming.

[68] The calculations for median flow and MALF depend on figures yet to be ascribed to most of the river catchments. They have been calculated for some waterways at certain points. Attached as **C** is council information on flow for some key sites in Northland. However, the vast majority of waterways have no gauging or other means of independently establishing either the median flow or the MALF.

[69] For this reason, minimum flows and allocation limits in the Plan are expressed as a proportion of MALF rather than as absolute units of flow. Minimum flow and allocation limit setting procedures are codified in the proposed revision of Policies H.4.1 and H.4.3. This involves incorporating the Notes from the Decisions version of these policies into the body of the Policy itself in accordance with appeal relief sort by Horticulture NZ. This proposed change is supported by the parties to this appeal.

[70] The Council has adopted a method generally accepted by all parties of modelling from "like" catchments and this modelling has been developed to take into account the exigencies of the Northland Region

[71] The Regional Council has adopted 4 main FMU; outstanding, coastal, large and small rivers. We were told that around 95% of the "river" reaches involved less than 15 litres per second of flow at MALF. Of the actual rivers the number of reaches with enough volume to allow for substantive extraction are limited, particularly at 7- day MALF levels.

[72] As the flow drops from the median towards the MALF the taking of water before hitting the minimum flow becomes particularly limited. The block of water available for extraction when flows are at or below median is fixed between 10% and 50 per cent of MALF. While this may be meaningful in respect of some of the larger rivers, for the most part it gives a relatively minimal quantity of water available from many of the rivers in Northland. To that extent, the Council advised through the evidence of Dr Thomas Drinan that 2% of river reaches in Northland are potentially fully allocated.

The Court's approach to the issues

[73] We see a clear inter-connection between the issue of "alternative minimum flow" in Policy D.4.12 and the alternative wording for Policy H.4.1 relating to rootstock survival now discussed and agreed between Horticulture NZ and the Minister. We have concluded we should deal with this issue first because it helps set the context for the consideration of out of limit takes. We will then deal with the issue of Out of Limit Takes followed by Supplementary Takes and then the Dune Lake Levels.

Protected Takes

Domestic

[74] Section 14(3)(b) RMA provides that water can be taken for an individual's reasonable domestic needs or for a person's animals for drinking water provided that the taking is not likely to have an adverse effect on the environment. Whether s 14(3)(b) of the Act allows takes below the minimum flow specified in the Plan, is a moot point. We see the minimum flow as the flow below which there is likely to be an adverse effect on the environment. However, we are not required to determine this issue in this decision.

Town water supplies and the like

[75] In addition to the personal and stock provisions under 14(3)(b) RMA there are a number of existing consents which appear to be protected against minimum flow constraints and these include a number of municipal water takes. There also appear to be other consents for horticultural and other use which have no minimum flow conditions imposed upon them. Accordingly, such conditions would either need to be imposed as part of a review after the Plan becomes operative or alternatively on renewal of the consent.

[76] To provide for existing consents, in particular those for registered drinking water supply, the Council has proposed a revised approach to alternative minimum flows, set out in Policy D.4.12 replacement clause (2) which reads:

> (2) Notwithstanding clause 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.

[77] The intent of the amendment is to provide an interim framework recognising existing resource consents with minimum flows below the Proposed Plan limits, rather than enabling additional minimum flows to be set for certain activities on a case-by-case basis.

Rootstock

[78] Horticulture NZ and the Ministry have agreed, with Council support, that there should be a protected take for rootstock survival which adds another class of allocation which may potentially pull flows below the minimum permitted by the calculation from MALF. This is set out in attached **C** including the proposed new wording. We agree with the Minister of Conservation and Horticulture NZ that this should be done as an additional allocation block rather than as an exception to the general rule.

[79] This protection is proposed to be given effect in the Plan by the addition of provisions for a secondary minimum flow for rootstock survival and for rootstock survival allocation block in Policies H.4.1 and H.4.3 respectively. This would replace the provision for rootstock survival water in the decisions version of Policy D.4.12(2)(b).

[80] The allocation block and secondary minimum flows for rootstock allow some extra water to be taken below MALF. In short, minimum flows for coastal rivers are reduced from 90% to 85% of MALF and for small and large rivers to 75% MALF. The allocation block is set out at Table 26A ranging from 4% of MALF for coastal rivers, 5% for small rivers and 6% for large rivers. It also includes a limit on amounts of 25% of irrigation demand.

Analysis and determination

[81] We acknowledge, on the evidence given to us, that there are times when some waterways will be subject to extraction which takes them below the minimum flow because of these protected items.

[82] We realise that there are constraints in providing for water for rootstock survival, stock water, individual household needs of water as well as existing consents. This makes it clear that the provisions of this Plan are transitional with a longer-term goal of moving towards maintaining minimum flows based upon a percentage of MALF.

[83] The Minister took a pragmatic view on essential abstraction and has agreed with Horticulture NZ on rootstock survival water. There also seems to be an agreement generally as to the extraction for town water supplies.

[84] Overall, we acknowledge that there is a need for a pragmatic approach. Our concern remains around the compromises that are made in times of extremity. As pressure builds in Northland for water requirements, it is inevitable that we will see more of these demands for compromises around water use.

[85] We agree with Horticulture NZ that the emphasis within the Plan should be to encourage water harvesting rather than the allocation of water below median flows. To the extent that parties have already agreed on provisions that allow for a rootstock survival allocation, we acknowledge this is a pragmatic and responsible approach by Council to the realities. Nevertheless, continued further allowances of this sort are likely to lead in the long term to the degradation and eventual collapse of some of these waterways which are already under significant stress in drought periods.

[86] We conclude the Council's proposed amendment to Policy D.4.12(2) and the proposed provisions for rootstock survival water in Policy H.4.1 and Policy H.4.3, together with the provisions of s14(3)(b) RMA, is the most appropriate in assisting to achieve Objective F.1.1 of the Plan.

[87] In the short-term however there are going to be some rivers where existing extraction and use are going to result in flows below the relevant percentage of the 7- day MALF for that FMU. Overall, we have concluded this means that the Council must be cautious in allowing further takes where waterways are subject to flows lower than the minimum flow calculated on the percentage of 7- day MALF.

Activity status for takes outside Allocation Limits and below minimum flows

[88] Where an application is outside the parameters of the allocation block and/or minimum flow the Issue between the parties is between non-complying activity status and prohibited status. The Council says that it has not considered the question of prohibited status and there is no policy or other setting which might support such an approach.

[89] On the other hand, the other parties say there is a clear policy background both through the Regional Policy Statement and through the Plan itself which make it clear that the preservation of habitat and minimum water flow is essential.

[90] Those parties turn to examples under s 6(c) of the Act and in coastal areas to Policy 11(a) NZCPS. They point to various taxa particularly bird and fish life which are nationally critical or threatened as justifying the avoid principles of the Act. Furthermore, they reinforce this by reference to NPS 2014 (and NPS-FM 2020) Policy which requires the protection of such indigenous biodiversity.

[91] For our part, we are satisfied that even without reliance on the NPS-FM 2020 the various Plans and other statutory documents are clear in the requirement to avoid adverse effects. We accept that adverse effects occur below the minimum flow. While we acknowledge the transitional nature of this plan, there is clear risk that any additional takes to those provided for in the Plan, when these takes are outside the allocation block and flows are below median, will have an unacceptable adverse effect on the environment.

[92] The MoC and Forest & Bird were faced with arguments that the non-complying status and the proper application of the policies would lead to the declining of such an application. We agree that any proper application of the criteria should lead to such a refusal of consent.

[93] The concern for the MoC and Forest & Bird however was that the many examples, some of which are referred to by the Court in the *Cabra* Decision[2], where cumulative effects are not properly taken into account as part of the assessment by the Council Officers or by Commissioners at first instance. There is also a tendency that if an application passes a Gateway test under s 104 (D) then a consent is granted subject to conditions.

[94] It must follow from the foregoing that we see the purposes of the various documents, including the Regional Plan itself, as militating strongly against further

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[2] *Cabra Rural Developments Limited v Auckland Council* [2020] NZEnvC 153.

abstraction outside of the allocation blocks when flows are below median. We are concerned that the use of non-complying activity status can and has led in the past to the grant of consents without full consideration of implications, particularly around cumulative effects

[95] Forest & Bird and the MoC suggested that in the circumstances of this case a strong bottom line needs to be drawn to discourage this as a simple or low-cost path to water abstraction. We conclude that non-complying status is not appropriate given the nature and extent of the effects that can result.

[96] Mr Doesburg for the Council argued strongly that prohibited status was not justified in these circumstances as it was not the only option available. We acknowledge the argument that we are dealing with extreme situations where personal use of water becomes vital. To that extent, the pressure to grant consent in circumstances where it will have an adverse effect on the waterways will be extreme.

[97] We cannot see how the purposes of the Act will be fulfilled by allocations beyond the Plan limits. It appears to us that the appropriate method is to encourage people to apply for water harvesting consents where they can utilise flow that does not impact on the 7- day MALF.

[98] Mr Doesburg referred to the *Coromandel Watchdog of Hauraki Incorporated v Chief Executive of the Ministry of Economic Development*[3] at paragraph 34 where the Court gave examples of situations where prohibited status might apply:

(a) Where the Council takes a precautionary approach;

(b) Where the Council takes a purposively staged approach;

(c) Where the Council is ensuring comprehensive development;

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[3] *Coromandel Watchdog of Hauraki Incorporated v Chief Executive of the Ministry of Economic Development* 2007 NZCA 473, at [34].

(d) Where it is necessary to allow an expression of social or cultural outcomes or expectations;

(e) Where it is intended to restrict the allocation of resources, for example where a Council wishes to restrict aquaculture to a designated area; and

(f) Where the Council wishes to establish priorities otherwise on a "first in first served" basis, which is the basis on which consent applications are considered.

[99] Overall, we consider the proposed prohibited status would respond to all these factors, in particular restricting resource allocation and prioritising certain needs.

[100] As to whether this is a planned and progressive imposition, we conclude the provisions are nuanced. We have approved amendments to Policies D.4.12, H.4.1 and H.4.3 regarding minimum flows and allocation limits, including provisions for rootstock survival water, existing drinking water supplies and domestic needs that have the potential to affect minimum flows in particular.

[101] We agree that provision needs to be made for new registered drinking water supply applications that are outside these limits and we consider that these would be appropriate as non-complying activities. Replacement consents for existing supplies is provided for as a controlled activity under Rule C.5.1.8. In respect of an individual's reasonable needs, those are covered under s 14(3)3(b) RMA.

[102] The second major concern raised in respect of the utilisation of prohibited activity status was that MALF was modelled rather than measured for most river reaches in Northland, given the complexity of the 1700 waterways in question. However, Horticulture NZ accepted that most river reaches, probably around 90%, would not be suitable for water abstraction below median flows given the extremely low flows of the many waterways.

[103] We acknowledge that further information as to MALF may provide some scope for either reducing or increasing the allocation limit. To this end, we would have thought the

simpler solution than providing a non-complying status for those circumstances was to allow for a revised minimum flow calculation and an amended allocation limit within which the application would fall. A provision in the Plan to this effect has been suggested to the Court by the Minister and Forest and Bird in Exhibit B. This reads in part:

> 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 Policy H.4.

[104] A clause worded along these lines could replace the Council proposed wording for Policy D.4.12(3) in Attachment **C**. This would allow an applicant to establish that the 7-day MALF is factually higher than was originally estimated thereby changing the allocation limits.

Conclusion on activity status

[105] We can see little justification for providing for the taking of water below minimum flows or exceeding allocation blocks as non-complying activities, other than for applications for new public drinking water supplies. Looking at the various criteria suggested by the Court of Appeal, we conclude that a precautionary approach is appropriate given:

(a) The importance of matters under s 6 of the Act, the NZCPS Policies 11, 13 and 15, the Provisions of the NPS-FM 2014, 2020 and the RPS.

(b) We see this Plan as a staged approach allowing an allocation limit with further limit for extreme situations.

(c) We accept the important cultural connection between maintaining minimum flows within rivers and Te Mana O Te Wai, an issue emphasised both in the NPS 2014 and NPS-FM 2020.

(d) We also consider that prohibited status meets the general intent of achieving the purpose of encouraging parties to move towards water harvesting rather than stressing the aquatic environment during periods of low flow.

[106] Overall, we conclude that for takes below minimum flows or exceeding allocation limits **prohibited activity status** most appropriately meets the purpose of the Act and the various Plans and the test provided for by the Court of Appeal in the *Hauraki Watchdog* case.

[107] Rules C.5.1.13 and C.5.1.14 are to be amended as proposed by the Minister of Conservation and Forest and Bird as shown in Attachment C, including provision for new public water supply applications exceeding the limits as non-complying activities. Replacement wording in Policy D.4.12(3) (Council proposed, Attachment C) is also required to allow for new information to inform the calculation of MALF, leading to revised limits on a case-by-case basis.

Allocation of water at high flows

[108] Rule C.5.1.10 enables resource consent applications to be made to take water above median flow as a restricted discretionary activity.

[109] There appears to be a strong basis for considering water harvesting in Northland, Given the relatively low flow of the majority of Northland's rivers there is limited availability of water within the proposed primary allocation limits to contribute at crucial times and to achieve the district's potential for horticulture production. The ability to take water at higher flows for storage and use is promoted by Horticulture NZ and supported by the Council.

[110] Restricted discretionary activity status provides planning encouragement for this activity. We note that any application that does not meet the restricted discretionary criteria would default to discretionary. That status is not under appeal.

[111] Forest and Bird and Fish and Game sought deletion of this Rule, bringing Rule C.5.1.11 into play (discretionary activity) for all takes above median flow. In the

alternative, Fish and game sought standards for these takes as set in the notified version of the Plan, and the more restricted activity status of full discretionary. This would allow for a supplementary allocation limit that results in at least 50% of the flow above median remaining in the river.

[112] Dr Drinan for the Minister and Dr Franklin for the Council agreed in advising that in allocating supplementary takes it was important to manage ecological effects by retaining flow variability and flushing flows. An allocation limit was also important for the management of cumulative effects.

[113] To this effect Dr Drinan, with support from Dr Franklin, proposed an interim supplementary limit restricting takes above median flow to 10% of instantaneous flow. Ms Marr, in planning evidence for the Minister, proposed that this standard be included in Policy H.4.3. This approach was opposed by Counsel for the Council and Horticulture NZ in submissions, citing jurisdictional issues.

[114] We accept the evidence of Dr Drinan and Dr Franklin that a supplementary allocation limit is appropriate. The two approaches in play for this hearing are that provided in the notified version (50% of flow above median) or that promoted by Dr Drinan and supported by the Minister and Forest and Bird (10% of instantaneous flow). Both are flow sharing arrangements that have inherent difficulties in practical applicability. The alternative suggested by Dr Franklin of a simple bulk allocation of flow above median flows as providing greater certainty was not pursued by any party.

[115] The science around the relationship between water abstraction rates and ecological effects at higher river flows is not well established. The flow sharing options advanced are not well understood in this regard, but it seems clear that the 10% option is the more restrictive and is based on a protective approach derived from the international literature on this subject. The 50% option is more conservative around median flows but provides for increased volumes at higher flows when takes for water storage purposes are likely to occur.

[116] Consistent with our acceptance of the Horticulture NZ position that water harvesting be encouraged over potentially more damaging interference with the natural

low flow regime in Northland rivers, we consider the 50% flow sharing option to be the most appropriate, given that the technical evidence does not provide a compelling case between the two options. The alternative relief sought by the Fish and Game appeal of no more than 50% of flows above median flow provides jurisdiction for this standard to be included.

[117] To that end, we agree with Horticulture NZ that this standard of 50% of the river flow above the median flow remaining in the river should be included in Rule C.5.1.10. We also consider that there should be a variation to C.5.1.10 to include the timing, rate and volume, as suggested by Horticulture NZ. Accordingly, we would adopt Rule C.5.1.10 high flow allocation as a restricted discretionary activity in line with the alternative proposed by Horticulture NZ as follows:

> Adding "provided 50% of the river flow above the median flow remains in the river." To Rule C.5.1.10 and;
>
> Adding "4) The timing, rate and volume of high flow takes to maintain the function of flushing flows to support aquatic ecosystem health."

[118] We consider there is a jurisdictional issue with the inclusion of a standard in Policy H.4.3. advanced by the Minister and Forest and Bird but we do not want to rule on the matter given our conclusion on the merits. This Forest & Bird proposal has the added complication of making applications for supplementary takes outside of the standard prohibited under our ruling on Rule C.5.1.13. This is not a position we wish to promote.

The Dune Lakes

[119] The Minister's appeal seeks stricter minimum levels for Dune Lakes by providing specific policy in Policy H.4.2. for Dunes Lakes to have no change to seasonal or annual water level range. A take that resulted in any change to these levels would become prohibited under the Minister's proposed Rule C.5.1.13.

[120] The Council has responded by proposing an amendment to Policy H.4.2 which provides greater protection for Dune Lakes with outstanding or high ecological values.

All other dune lakes would have a lesser standard apply, including all those not yet assessed.

[121] The Minister continues to pursue a higher level of protection for all dune lakes. Of primary concern here is the significant number of lakes in Northland and the fact that not all these lakes, particularly dune lakes, have been assessed.

[122] The Council submits that the minimum levels for deep and shallow lakes are appropriate for dune lakes that have not been assessed or identified as having outstanding or high ecological value. The Council position is the minimum levels are conservative and based on a low risk option identified in the Draft Guidelines for the Selection of Methods to Determine Ecological Flows and Water Levels developed for MfE in 2008.

[123] We note the earlier discussion on wetlands and waterways in regard to the NES-FW. Dune lakes are likely to have wetlands around the shallow margins. Some lakes are small or shallow enough to arguably constitute natural wetlands.

[124] The Council considered that a person proposing to take water from a dune lake within those minimum levels would in most cases need to apply for resource consent as a discretionary activity based upon Rule C.5.1.11 unless it complies with all the standards in C.5.1.1. For the 23 identified dune lakes in the coastal environment the NZCPS would be a mandatory relevant consideration including Policy 11(a).

[125] Dr Drinan gave evidence for the Minister in relation to Dune Lakes. His evidence contends:

(a) Dune Lakes are more sensitive to Hydrological alteration;

(b) Dune Lakes are known to contain diverse and often distinctive biological communities including a range of threatened and at risk aquatic species. He identifies several including Dune Lakes galaxias, kakahi/freshwater mussel, Australian bittern and the Bladderwort;

(c) Dune Lakes are internationally rare;

(d) Only 69 out of the possible 367 dune lakes have been ranked and these unassessed dune lakes are likely to contain significant ecological values, either hydrological alteration of dune lakes can adversely affect the ecological health and biodiversity values.

Dr Drinan says that most coastal dune lakes are within the coastal boundary so the NZCPS must be considered.

[126] The issues in this case turn upon whether nearly 300 dune lakes that have not been ranked contain significant ecological values. Only around one third of dune lakes assessed to date have been identified as having outstanding values. If that ratio applies for the remaining lakes, there is probably another 100 lakes out of 300 that may contain significant flora or fauna or be significant for other reasons.

[127] We note also that many of these shallow lakes will contain wetland areas around their margins which are protected by the NES-FW. The extent of this is unclear until mapping is concluded.

[128] We are faced with a distinction between a discretionary activity where matters relating to the objectives and policies of the various plans and the Act need to be taken into the account and a non-complying status for which the threshold is that the effects are not more than minor. The Minister and Forest and Bird support prohibited status as noted above.

[129] This Court has previously said in a number of cases[4] that a resource consent application status of discretionary activity can achieve the same outcomes as with non-complying status. On several occasions the Court has been over-ruled on this issue on appeal. It appears that the real concern of the Minister and supported by Forest & Bird is that there may be a failure to consider the very relevant provisions of the NZCPS, RPS,

[4] *Cabra Rural Developments Limited v Auckland Council* [2020] NZEnvC 153 and *Royal Forest & Bird Protection Society of New Zealand v Bay of Plenty Regional Council* [2017] NZEnvC 45, [2017] NZHC 3080, (2017) 20 ELRNZ 564.

NPS-FM 2014, NPS-FM 2020, the NES and the Plan itself in considering an application for consent.

[130] In this case, we consider that there is a more compelling reason to adopt non-compliance status. Where the extraction of water might have a significant impact on the aquatic flora or fauna or on the lake geology itself any application should be treated with extreme caution given the protective policies of the Act, Policy Statements and Plan and arguable the NES.

[131] Some of the lakes already assessed have displayed values which are highly unusual and scientifically significant. We have concluded in the circumstances of this case that a cautious approach would be to maintain a non-complying status for all applications that would alter lake levels and require any person seeking to extract water from a lake to demonstrate by analysis of the flora and fauna of that lake, that it does not have any significant or outstanding values.

[132] We would have been more minded to consider this matter as a discretionary activity if there were clearer understanding as to the values that might be expressed in these Dune Lakes and methodologies by which these could be addressed. Given that there may be rare or unique species involved and there may be water conditions well beyond those as expected, we consider that a cautious approach is appropriate in this case.

[133] To that end, we see that the default position could be that consent is not granted unless a study has been undertaken of the lake and it is considered to have low values. We would have been minded addressing the matter in this way if there had been scope within the appeals, however for current purposes we consider that the default status of non-complying until the values and attributes of the lake are identified as the most appropriate response.

[134] The outcome is that the minimum levels for dune lakes is as proposed by the Minister for Policy H.4.2 set out in Attachment C. Rule C.5.1.13 is to be amended to provide for applications for water takes that affect dune lake levels to be non-complying activities.

Analysis under s 32 and s 32AA

[135] As we have considered the provisions in dispute, we have kept in mind the implications of s 32 and 32AA as it relates to identifying the most appropriate provisions for the Plan. We acknowledge that there is a balance to be struck between the natural values and the human values of these areas.

[136] The NPS-FM 2014 emphasises natural values and this is made explicit in the 2020 NPS-FM in terms of its hierarchy. Nevertheless, we consider that all Objectives of the proposed Plan can be achieved by encouraging water harvesting over low flow water takes and providing for exceptional takes for those purposes identified and agreed between the parties being individual and stock take, town water supply, non-consumptive takes and rootstock.

[137] In our view the costs and benefits of this are balanced out in the provisions. We recognise the priority for in-stream values at low flows while accepting the extractive values for higher flows. At the same time, we accept that there are takes which will be essential for the survival of horticultural activity, stock and individuals as well as existing Council supplies. For the future, we consider that water harvesting should be significantly encouraged while extraction below median flow is discouraged given the minimal allocation block. In this way the natural and human values can be maximised. However, the Natural Environment has a clear priority in extremes.

[138] Finally, we conclude that the cost of constraining abstraction from the Dune Lakes is unclear given there appears to be little or no extractive use at the current time. The benefits of important flora and fauna could be significant depending on the values and attributes which are eventually identified.

[139] For water abstraction activity circumstances could be addressed in a particular case by examining the actual MALF figures for a river and/or the actual values of the lake if a consent is be sought. In this way, the information base of Council can be gradually improved as necessary, while at the same time provide for the protection of the values identified in the various Plans and parts of s 6 of the Act.

Outcome

[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.

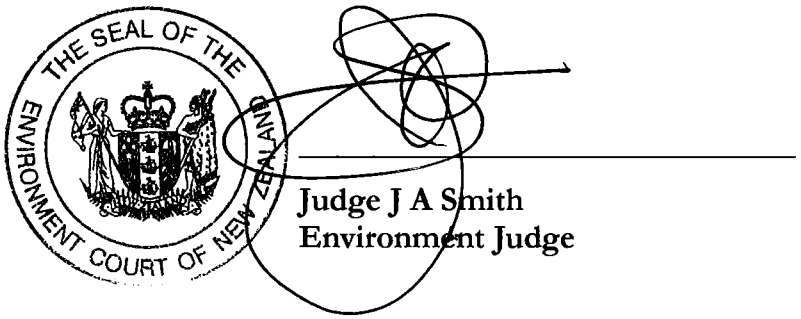
[142] Furthermore, allocation outside the allocation block provided should be prohibited as suggested by the Minister, with the exceptions noted in the decision. So far as the issue of water harvesting is concerned, we conclude that a restricted discretionary activity for half flow above median flow 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] Overall, we consider that 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**.

[145] 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:



Judge J A Smith
Environment Judge

A

29 October 2020

Presented by Minister of Conservation and Royal Forest and Bird Protection Society Inc

C.5.1.12 Other water takes – discretionary activity

The taking and use of water, or the taking and use of heat or energy from water or heat or energy from the material surrounding geothermal water, that is not the subject of any other rule in this Plan is a discretionary activity.

A resource consent for an activity under this Rule must not be granted if it is found that the activity would:

- occur 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**; or
- would cause an allocation limit set in **H.4 Environmental flows and levels** for a river or aquifer to be exceeded.

For the avoidance of doubt this rule covers the following RMA activities:
• Taking and use of water from a river, lake or aquifer, and taking heat or energy from geothermal water or material surrounding geothermal water (s14(2))

D.4.12A Assessing Minimum 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 Policy H.4.

The Regional Council's determination on the calculation of minimum flows and levels and/or the allocation status of a particular waterbody will be made without unreasonable delay.

B

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KOOTI TAIAO
I TĀMAKI MAKAURAU ROHE

IN THE MATTER	of the Resource Management Act 1991 (the Act)
AND	
IN THE MATTER	of appeals under clause 14 of Schedule 1 of the Act
BETWEEN	**NORTHLAND FISH AND GAME COUNCIL**
	MINISTER OF CONSERVATION
	NORTHPOWER LIMITED
	PUBLIC AND POPULATION HEALTH UNIT OF THE NORTHLAND DISTRICT HEALTH BOARD
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
	Appellants
AND	**NORTHLAND REGIONAL COUNCIL**
	Respondent

JOINT MEMORANDUM CONFIRMING AGREEMENT ON ROOTSTOCK SURVIVAL PROVISIONS

TOPIC 3 ALLOCATION AND USE OF WATER; TOPIC 4 WATER QUANTITY

25 NOVEMBER 2020

[redacted] ATKINS | HOLM | MAJUREY

Nicole Buxeda/Louise Ford
PO Box 1585
Shortland Street
AUCKLAND 1140

Solicitor on the record	Nicole Buxeda	Nicole.Buxeda@ahmlaw.nz	(09) 304 0424
Contact solicitor	Louise Ford	Louise.Ford@ahmlaw.nz	(09) 304 0429

MAY IT PLEASE THE COURT:

1. This memorandum is filed jointly between the parties to:

   (a) record the agreement that was reached regarding rootstock survival water provisions in the proposed Northland Regional Plan (**Plan**);

   (b) include a brief summary of the background and content of the agreed provisions; and

   (c) seek orders from the Court.

Agreement

2. Following the exchange of evidence in this matter the parties reached agreement on the provision of a minimum flow regime and allocation block for the take and use of water for rootstock survival purposes (**rootstock regime**).

3. Due to some minor outstanding wording changes a formal agreement was not finalised prior to the hearing. As the substance of the rootstock regime was agreed to in principle the rootstock regime was not considered a 'live issue' and accordingly parties did not prepare expert evidence or arguments for the hearing.

4. The agreed provisions are attached in **Appendix A**. The agreed provisions are shown as amendments in underline/strikethrough and shaded grey. Other aspects of Policy D.4.12(2) are unresolved and the unresolved provisions are highlighted yellow.

Context of agreement

5. Provision for rootstock survival water was included in the Report and Recommendations of the Hearing Panel.

6. Parts of the Plan pertaining to rootstock survival water were appealed by Northland Fish and Game Council, Royal Forest and Bird Protection Society of New Zealand Incorporated,

and the Minister of Conservation (**MOC**). **MOC** sought that allocation for rootstock survival water be accounted for within specific limits, and reasons included *"to encourage rationing and storage before minimum flow levels are reached"*.

7. Horticulture New Zealand (**HortNZ**), MOC, and the Northland Regional Council (**Council**) all contributed significant time, technical expertise, and effort in order to reach agreement on the rootstock regime to be included in the Plan.

Details of agreement

8. Providing for rootstock survival water through an alternative minimum flow regime within strict bounds is considered by all parties to be the most expeditious and certain way to provide for a rootstock regime.

9. The rootstock regime is not considered to be unduly confusing for users or readers of the plan, as the regime will only be used in limited situations by specialist and knowledgeable growers who have industry support and requisite knowledge.

10. The rootstock regime contains clear limits and conditions of use which must be satisfied before water in Table 24A for rootstock survival can be taken. The parties are satisfied the regime contains appropriate safeguards and requirements.

ORDER SOUGHT FROM THE COURT

11. All parties are satisfied that the agreed provisions are within the scope of submissions and appeals, fall within the Court's jurisdiction and conform to the relevant requirements and objectives of the Resource Management Act 1991 including, in particular, Part 2.

12. For the avoidance of doubt, the parties are satisfied that the amendments are consistent with the National Policy Statement for Freshwater Management 2020.

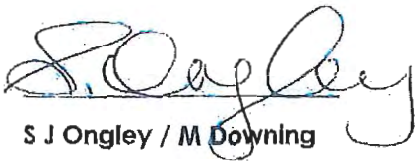
13. The parties therefore respectfully request that the Court approve the agreed provisions in **Appendix A** by consent.

14. No party has any issue as to costs.

DATE: 25 November 2020

M J Doesburg

Counsel for Northland Regional Council

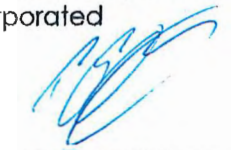


S J Ongley / M Downing

Counsel for the Minister of Conservation

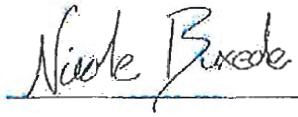
P D Anderson

Counsel for Royal Forest and Bird Protection Society of New Zealand Incorporated



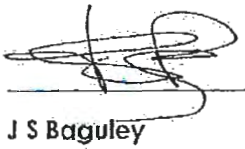
P R Gardner

Counsel for Federated Farmers of New Zealand



N Buxeda / L Ford

Counsel for Horticulture New Zealand



J S Baguley

Counsel for Far North District Council and Whangarei District Council

APPENDIX A: AMENDMENTS TO THE PROPOSED PLAN

The agreed provisions are shown as amendments in underline/strikethrough and shaded grey.
NOTE: Other aspects of Policy D.4.12(2) are unresolved. The unresolved provisions are highlighted yellow.

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 this general requirement, for rivers 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~~

   c) 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

   d) a non-consumptive take.

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 Mminimum flows for rivers

River water quantity management unit	Earthworks thresholds
Outstanding rivers	100 percent of the seven-day mean annual low flow
Coastal rivers	90 percent of the seven-day mean annual low flow
Small rivers	80 percent of the seven-day mean annual low flow
Large rivers	80 percent of the seven-day mean annual low flow

Table 24A: Secondary minimum flows for rootstock survival purposes

River water quantity management unit	Minimum flow (l/s)
Coastal rivers	85 percent of the seven-day mean annual low flow
Small rivers	75 percent of the seven-day mean annual low flow
Large rivers	75 percent of the seven-day mean annual low flow

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.

...

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 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 (m3/day)
Outstanding rivers	10 percent of the seven-day mean annual low flow
Coastal rivers	30 percent of the seven-day mean annual low flow
Small rivers	40 percent of the seven-day mean annual low flow
Large rivers	50 percent of the seven-day mean annual low flow

Table 26A: Root stock survival water allocation blocks

River water quantity management unit	Allocation limit (m3/day)	Condition of tale (in addition to other consent conditions)
Coastal rivers	4 percent of the seven-day mean annual low flow	The amount of water for each individual consent should be limited to the water demand requirements to maintain root stock in drought conditions, not exceeding 25% of the irrigation demand
Small rivers	5 percent of the seven-day mean annual low flow	
Large rivers	6 percent of the seven-day mean annual low flow	

...

C

Table 17 Estimated design drought flows, mean annual low flows, mean flows and median flows in various Northland rivers.

Site	River	Area (km^2)	1 in 5-year design drought flows (7-day min flow L/sec)	7 day mean annual low flows L/sec	Mean flow	Median flow
6018	Ahuroa (Braigh)	57	94	147	1240	550
6014	Ahuroa (Durham Rd)				598	298
1316	Awanui (Kaitāia)	222	460	614		
5538	Hātea at Whareora Rd	38.5		122	1094	539
46625	Hikurangi	189	261	412	5062	1727
46611	Kaihū (Gorge)	116	609	737	3985	2389
*46674 (WCR)	Mangahahuru	20.5	78	118*	594	324
46626	Mangakāhia (Titoki)	798	2455	3143	25,619	12,662
	Makarau at Coles			77		
46618	Mangakāhia (Twin Bridges)	246	1171	1503		
46651	Manganui	411	154	303	8211	2613
*46646 (WCR)	Mangere (Knight Road)	79	102	119*	1610	606
3506	Maungaparerua	11.1	23	37		
4901	Ngunguru	12.5	61	82	412	213
6015	North	38.4	70	109	689	382
1046651	Opouteke	105	484	627	3909	2044
1903	Oruru	79	434	499	2462	1334
47595	Punakitere (Taheke)	284.4	526	747	6848	3202
3432	Rangitane	21.4	49	109	689	382
5528	Raumanga	16.3	64	88	355	196
802	Selwyn Swamp	1.74	2.2	4	35	20.9
5527	Waiarohia	18.6	38	64	362	150
6016	Waihiohoi	25.1	57	95	536	275
6007	Waionehu	24.5	13	31	460	164
*46627 (WCR)	Waiotu (SH1)	125	197	354*	4332	1554
*46641 (WCR)	Waipao	36.7	208	263*	683	487
47804	Waipapa (Puketi Forest)	122	559	765		
*46644 (WCR)	Wairua (Purua)	544	1450	2025*	18,500	7808
*46647 (WCR)	Wairua (Wairua Bridge)	707	1780		20,793	
3722	Waitangi	302	552	1019		
*46632 (WCR)	Whakapara (Cableway)	162	653		6170	2439

Note: * indicates flows that have been naturalised for the Wairua Catchment Report (NIWA: 2000), that is, water abstraction added to recorded flow values. All other values are not naturalised and are the best estimates provided by the flow information.

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

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)[1]
	(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

[1] 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

DETERMINATION OF THE ENVIRONMENT COURT

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:[2]

> *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.[3]

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[2] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1 at [15].
[3] *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:[4]

> 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.[5] 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.[6]
>
> 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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[4] 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].
[5] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [142].
[6] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [107] and [142].

of discretion.[7]

Policy D.4.12 Minimum flows and levels has been amended to provide for existing permits as "interim minimum flows"[8] and for takes for registered drinking water supply, reasonable domestic needs or animal drinking water and non-consumptive takes as "alternative minimum flows".[9] 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.[10] 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.[11] 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.[12]

[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

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[7] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [117] and [142].
[8] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [86].
[9] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [141].
[10] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [104].
[11] *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 1, at [134] and [143].
[12] *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:

J A Smith
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

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.

~~2~~3) ~~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~~

~~c~~b) 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

~~d~~c) 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 seven-day mean annual low flow

Coastal rivers	90 percent of the seven-day mean annual low flow
Small rivers	80 percent of the seven-day mean annual low flow
Large rivers	80 percent of the seven-day mean annual low flow

Table 24A: Secondary minimum flows for rootstock survival purposes

River water quantity management unit	Minimum flow (l/s)
Coastal rivers	85 percent of the seven-day mean annual low flow
Small rivers	75 percent of the seven-day mean annual low flow
Large rivers	75 percent of the seven-day mean annual low flow

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.
Dune lakes	There is no change in lake levels.
Natural wetlands	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 (m3/day)
Outstanding rivers	10 percent of the seven-day mean annual low flow
Coastal rivers	30 percent of the seven-day mean annual low flow
Small rivers	40 percent of the seven-day mean annual low flow
Large rivers	50 percent of the seven-day mean annual low flow

Table 26A: Root stock survival water allocation blocks

River water quantity management unit	Allocation limit (m3/day)	Condition of take (in addition to other consent conditions)
Coastal rivers	4 percent of the seven-day mean annual low flow	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 seven-day mean annual low flow	

Large rivers	6 percent of the seven-day mean annual low flow	not exceeding 25% of the irrigation demand

~~**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.~~*