

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2023] NZEnvC 043

IN THE MATTER OF appeals under Clause 14 of Schedule 1 of
the Resource Management Act 1991

BETWEEN MINISTER OF CONSERVATION

(ENV-2019-AKL-000122)

PUBLIC POPULATION HEALTH
UNIT, NORTHLAND DISTRICT
HEALTH BOARD

(ENV-2019-AKL-000126)

Appellants

AND NORTHLAND REGIONAL
COUNCIL

Respondent

Court: Environment Judge J A Smith sitting alone pursuant to s 279 of the
Act

Date of Order: 13 March 2023

Date of Issue: 13 March 2023

CONSENT DETERMINATION

A: Under section 279(1)(b) of the Resource Management Act 1991, the
Environment Court, by consent, orders that:

pNRP – Topic 6: Damming and diversion of water



- (1) the appeal is allowed in accordance with Annexure A to this Order; and
- (2) the order resolves the provisions set out in the determination. No appeal points remain outstanding in Topic 6 – Damming and diversion of water.

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

REASONS

Introduction

[1] This determination relates to appeals against Northland Regional Council's decision on the Proposed Regional Plan for Northland, in respect of appeals by the Minister of Conservation and Public and Population Health Unit, Northland District Health Board (**Northland DHB**) against provisions relating to Topic 6 – Damming and diversion of water.

[2] The appeals relate to:

- (a) Rule C.4.1.1 Land drainage – permitted activity; and
- (b) Rule C.4.1.9 Land drainage and flood control general conditions.

[3] The following persons have given notice of their intention to become parties to one or more the appeals under s 274 of the Act and have signed the memorandum of the parties dated 28 February 2023:

- (a) Horticulture New Zealand;
- (b) Federated Farmers of New Zealand; and
- (c) Royal Forest and Bird Protection Society of New Zealand Incorporated.

Agreement reached

[4] The parties participated in Court-assisted mediation in September 2019 as well as subsequent informal discussions. The parties have now reached agreement on the provisions under appeal.

[5] The Court has now read and considered the consent memorandum of the parties dated 28 February 2023.

[6] A summary of the proposed changes is set out below.

Rule C.4.1.1 Land drainage – permitted activity

[7] Rule C.4.1.1 provides that the damming, diversion and discharge of water associated with land drainage are permitted activities, subject to conditions.

[8] Rule C.4.1.1 was appealed by the Minister of Conservation who sought that a new condition be inserted requiring that the activity does not have adverse effects on areas of significant indigenous vegetation and significant habitats of indigenous fauna in terrestrial, freshwater and marine environments.

[9] The rationale for the Minister of Conservation’s appeal is that Rule C.4.1.1 does not adequately protect areas of significant flora and fauna, which is contrary to section 6(c) of the RMA.

[10] Following mediation, the Minister of Conservation proposed that the following two conditions be included in the rule as consequential relief to her appeal:

5) the discharge is not within the catchment of an outstanding water body, and

6) the discharge is not directly to or within 500 metres upstream of a natural wetland.

[11] Following subsequent discussions, the parties agreed to insert the following new condition:

4) the discharge is not within the catchment of an outstanding lake or a dune lake with outstanding or high ecological value, and

[12] The parties consider that the inclusion of the condition is appropriate as it ensures that outstanding lakes and dune lakes with outstanding or high ecological value are protected from land drainage activities. This approach is consistent with other rules in the Proposed Regional Plan for Northland (**Proposed Plan**), such as Rule C.8.2.1 Land preparation – permitted activity.

Rule C.4.1.9 Land drainage and flood control general conditions

[13] Rule C.4.1.9 sets out the general conditions that apply to activities referred to in the rules of Section C.4.1 of the Proposed Plan.

[14] Rule C.4.1.9 was appealed by Northland DHB and the Minister of Conservation.

[15] Northland DHB sought that Rule C.4.1.9 be amended to include a new condition requiring that any discharge does not contain concentrations of contaminants which are likely to have any more than minor adverse effect on source water for human consumption, as per the Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007 (**NES-DW**).

[16] The rationale for Northland DHB's appeal is that the decisions version of Rule C.4.1.9 would allow activities that could have negative impacts on the sources of human drinking water across Northland.

[17] The Minister of Conservation sought:

- (a) to amend clause (10) of the rule so that it applies to a discharge entering a water body or the coastal marine area beyond the zone of reasonable mixing, instead of an “outstanding water body” or “coastal water”;
- (b) reinstatement of the clause in the notified version of the Proposed Plan which required that any discharge of drainage water does not contain concentrations of contaminants which have or are likely to have significant adverse effects on aquatic life; and
- (c) that the following new conditions are inserted in the rule:
 - x) The activity shall not take place during August to December inclusive (to avoid inward migration of indigenous freshwater fish).
 - x) Bank disturbance is limited to one side of the waterway.

x) Excavation does not widen or deepen the original grade or cross section of the channel (unless for constructing a sediment retention trap).

x) When clearing aquatic vegetation, a weed bucket shall be used with a curved flat base and a slatted back.

x) Work shall be undertaken from upstream to downstream.

x) Woody debris are not removed unless it is causing, or has the potential to cause, a flood or erosion risk or threat to infrastructure.

x) The activity does not take place in an identified īnanga spawning area or threatened species habitat.

x) Where a discharge from land drainage enters an outstanding freshwater body beyond the zone of reasonable mixing, the discharge does not cause the natural temperature of the receiving water body to be changed by more than one degree Celsius.

[18] The rationale for the Minister of Conservation's appeal is that Rule C.4.1.9 as it currently stands fails to meet section 70(1)(g) of the RMA, which requires the Council to be satisfied that any significant adverse effects on aquatic life are not likely to arise in receiving waters (after reasonable mixing) as a result of the discharge of a contaminant that is permitted by a rule in the Proposed Plan.

[19] Following mediation and subsequent discussions, the parties agreed to:

- (a) Insert new condition (10) which provides that any discharge of drainage water does not contain concentrations of contaminants likely to have significant adverse effects on aquatic life in any river, wetland, or the coastal marine area. The parties consider that this is appropriate as it ensures that contaminants from a discharge of drainage water will not have significant adverse effects on those waterbodies.

- (b) Make the following amendments to condition (11):

~~11) Where a discharge from land drainage enters an outstanding freshwater body or coastal water beyond the zone of reasonable mixing,~~
 †The discharge to the water body or coastal marine area does not,
beyond the zone of reasonable mixing:

...

e) cause the natural temperature of the receiving water body to be changed by more than three degrees Celsius, except in an outstanding freshwater body where it must not be changed by more than one degree Celsius, and

f) cause contamination which may render freshwater taken from a mapped priority drinking water abstraction point (refer | Maps | Ngā mahere matawhenua) unsuitable for human consumption after existing treatment.

The parties consider that the changes to the chapeau of condition (11) are appropriate as they improve its clarity and readability. In terms of condition (11)(e), the parties consider the amendment is appropriate in light of the Court's decision on Topic 5 – Water quality, which introduced a limit in 'Policy H.3.2 – Water quality standards for lakes' for temperature change in outstanding water bodies of no more than one degree Celsius. Further, the parties consider that the insertion of condition (11)(f) is appropriate as it will ensure priority drinking water abstraction points (which have been mapped in the Proposed Plan) will be protected.

- (c) Insert new condition (13)(a) requiring a visual inspection of the works area to be undertaken where in-river works involving bed disturbance from mechanical vegetation clearance or sediment removal is undertaken between 1 August and 31 December. If a shoal of whitebait is present, no in-river works can be undertaken until the shoal passes. The parties also agreed to insert new condition (13)(b) which prohibits in-river works from being undertaken more than once in any area

between 1 August and 31 December of any year. The parties consider that these amendments are appropriate as they enable in-river works to occur at appropriate times whilst also ensuring the impact of in-river works on indigenous freshwater fish migration is managed.

- (d) Insert new condition (14) which requires that river bank disturbance is limited to one side of the waterway, at any one time. The parties consider that this is appropriate as it ensures that disturbance to river banks is appropriately managed.
- (e) Insert new condition (15) which requires a weed bucket with a curved flat base and a slatted back to be used when mechanically clearing aquatic vegetation. The parties consider that this is appropriate as it clarifies how mechanical aquatic vegetation clearance should be carried out.
- (f) Insert new condition (16) which prohibits the activity from taking place in an īnanga spawning site between 1 March and 30 September. Additional information regarding īnanga spawning timing has recently become available following a 25-year study in Northland. The information indicates that the key īnanga spawning times in Northland are between April – September. The period of 1 March – 30 September is premised on enabling vegetation growth prior to spawning activity in April. Federated Farmers does not oppose the inclusion of condition (16). The other parties agree that including a restriction in īnanga spawning sites during the peak īnanga spawning period (1 March to 30 September) is appropriate to address the adverse effects that land drainage can have on those habitats.

Consideration

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

- (a) all parties to the proceedings have executed the memorandum requesting this order;
- (b) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

Assessment

[21] In terms of an assessment under section 32AA of the Act, the parties advised that the proposed changes were discussed at length between the parties through an iterative process following mediation. The Appellants and Respondent consider that the proposed changes are the most appropriate way to achieve the objectives of the Proposed Plan as well as give effect to the relevant higher-order documents, including the New Zealand Coastal Policy Statement 2010 and the NES-DW. No party opposes this.

[22] This Determination does not represent the outcome of a full hearing by the Court, but rather an agreement reached between parties represented by experienced counsel after lengthy discussions.

[23] I am satisfied that the changes to Rule C.4.1.1 appropriately provide for protection of features from land drainage activities and provide for consistency with other rules in the plan.

[24] I consider the changes mean Rule C.4.1.9 is more in keeping with s 70(1)(g) RMA. The changes to condition (11) are properly consistent with the decision on Topic 5 – water quality. The prioritisation of drinking water abstraction points is significant.

[25] I also conclude that new condition (13)(a) achieves a balance of in-river works and protection of indigenous freshwater species. The changes have ensured clarity and consistency, for example new condition (15) specifies how mechanical aquatic

vegetation clearance should be carried out. It is also fitting that new condition (16) incorporates learnings from a 25-year long study in Northland.

[26] Overall, I am satisfied that the agreement reached is one that balances the various interests of the parties. I conclude the parties have taken a considered approach, and the agreed amendments are the most appropriate way to achieve the purpose of the Act and the objectives in the Plan. Overall, I consider the sustainable management purpose and the other relevant requirements of the Act are broadly met.

Order

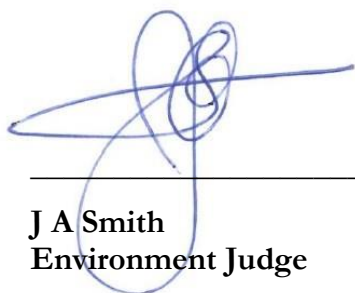
[27] Therefore, the Court orders, by consent that the Proposed Regional Plan for Northland be amended as set out in **Annexure A** to this Determination.

[28] The Determination resolves the following provisions:

- (a) Rule C.4.1.1 Land drainage – permitted activity; and
- (b) Rule C.4.1.9 Land drainage and flood control general conditions.

[29] No appeal points remain outstanding in relation to Topic 6 – Damming and diversion of water.

[30] There is no order as to costs.



J A Smith
Environment Judge



ANNEXURE A: AMENDMENTS TO THE PROPOSED PLAN

C.4.1.1 Land drainage – permitted activity

The damming, diversion and discharge of water associated with land drainage are permitted activities, provided:

- 1) the activity complies with all relevant conditions of Rule C.4.1.9 Land drainage and flood control general conditions, and
- 2) any resulting land subsidence or slumping does not cause adverse effects on structures or infrastructure on other property, and
- 3) the discharge is in or from the same catchment in which the water would naturally flow, and

4) the discharge is not within the catchment of an outstanding lake or a dune lake with outstanding or high ecological value, and

4) 5) a new drain is not constructed within 15 metres of an existing wastewater disposal area.

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

- Drainage of land (s9(2)).
- Disturbance of the bed of a lake or river or deposition of a substance in, on, or under the bed of a lake or river incidental to the connection of a drain to a lake or river (s13(1)).
- Damming and diversion of water (s14(2)).
- Discharge of drainage water and the incidental discharge of sediment entrained in drainage water to water (s15(1)).

C.4.1.9 Land drainage and flood control general conditions

General conditions apply to activities when referred to in the rules of Section C.4.1.

Note:

Work affecting archaeological sites is subject to an authority process under the Heritage New Zealand Pouhere Taonga Act 2014. If any activity associated with a project could modify, damage or destroy any archaeological site(s), an authority (consent) from Heritage New Zealand must be obtained for the work to proceed lawfully.

- 1) There is no adverse flooding, erosion or over-drainage effects on other property.
- 2) The activity does not alter the course of a lake or continually or intermittently flowing river.
- 3) New land drainage does not occur within 50 metres of any natural wetland.

- 4) Drainage does not cause any change to the seasonal or annual range in water level of a natural wetland to an extent that may adversely affect the wetland's natural ecosystem.
- 5) No vegetation, soil or other debris generated from the activity is placed in a position where it may be carried into a river or natural wetland, lake or the coastal marine area.
- 6) There is no damage to a flood defence or any other authorised structure.
- 7) Fish passage is maintained, unless an existing authorisation provides otherwise, or temporary works to enable repair and replacement works are being carried out.
- 8) Eels, fish (other than pest fish), kōura (freshwater crayfish) and kākahi (freshwater mussels) unintentionally removed during mechanical clearing of drainage channels are returned to the drainage channel as soon as practicable, but no later than one hour after their removal.
- 9) Refuelling of machinery does not take place in the bed of a river or lake.

10) Any discharge of drainage water does not contain concentrations of contaminants which have or are likely to have significant adverse effects on aquatic life in any river, wetland, or the coastal marine area.

10) 11) Where a discharge from land drainage enters an outstanding freshwater body or coastal water beyond the zone of reasonable mixing, the discharge to the water body or coastal marine area does not, beyond the zone of reasonable mixing:

- a) result in any conspicuous oil or grease films, scums or foams, or floatable or suspended material except where caused by natural events in the receiving water, and
- b) cause the pH of the receiving water to fall outside the range of 6.5 to 9.0 (except where caused by natural events, or when natural background levels fall outside that range), and
- c) cause any emission of objectionable odour in the receiving water, and
- d) cause any conspicuous change in colour or visual clarity of the receiving water, and
- e) cause the natural temperature of the receiving water body to be changed by more than three degrees Celsius, except in an outstanding freshwater body where it must not be changed by more than one degree Celsius, and
- f) cause contamination which may render freshwater taken from a mapped priority drinking water abstraction point (refer | Maps | Ngā mahere matawhenua) unsuitable for human consumption after existing treatment.

11) 12) Any discharge of sediment associated with repair and maintenance activities does not occur for more than five consecutive days and must not occur for more than 12 hours on any one day.

13) Where in-river works involve bed disturbance from mechanical vegetation clearance or sediment removal:

- a) if undertaken between 1 August and 31 December, a visual inspection of the works area must be undertaken, immediately prior to in-river work starting.

If a shoal of whitebait is present, no in-river works shall be undertaken until the shoal passes; and

b) the works shall not occur more than once in any area between 1 August and 31 December of any year.

14) River bank disturbance is limited to one side of the waterway, at any one time.

15) When mechanically clearing aquatic vegetation, a weed bucket shall be used with a curved flat base and a slatted back.

16) The activity does not take place in an īnanga spawning site between 1 March and 30 September.