

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC 380

IN THE MATTER of appeals under Clause 14(1) of Schedule One
of the Resource Management Act 1991 (the
Act)

BETWEEN CARTER HOLT HARVEY LIMITED
(ENV-2009-AKL-000132)

WAIHOU IRRIGATORS INCORPORATED &
UPPER WAIKATO IRRIGATORS SOCIETY
INCORPORATED
(ENV-2009-AKL-000133)

HAMILTON CITY COUNCIL
(ENV-2009-AKL-000134)

WAIPA DISTRICT COUNCIL
(ENV-2009-AKL-000136)

WAIKATO DISTRICT COUNCIL
(ENV-2009-AKL-000137)

WATERCARE SERVICES LIMITED
(ENV-2009-AKL-000138)

HORTICULTURE NEW ZEALAND
(ENV-2009-AKL-000139)

RAUKAWA CHARITABLE TRUST
(ENV-2009-AKL-000149)

TE RUNANGA O NGATI TAHU (NGATI
WHAOA)
(ENV-2009-AKL-000150)

WAIKATO-TAINUI TE KAUHANGANUI
INCORPORATED
(Successor to Waikato Raupatu Trustees
Company Limited)



(ENV-2009-AKL-000151)

TUWHARETOA MAORI TRUST BOARD

(ENV-2009-AKL-000153)

DEPARTMENT OF CORRECTIONS

(ENV-2009-AKL-000055)

NEWMONT WAIHI GOLD LIMITED

(ENV-2009-AKL-000092)

MIGHTY RIVER POWER LIMITED

(ENV-2009-AKL-000107)

(ENV-2009-AKL-000108)

(ENV-2009-AKL-000109)

(ENV-2009-AKL-000110)

(ENV-2009-AKL-000111)

(ENV-2009-AKL-000112)

(ENV-2009-AKL-000113)

(ENV-2009-AKL-000114)

(ENV-2009-AKL-000115)

(ENV-2009-AKL-000116)

(ENV-2009-AKL-000117)

(ENV-2009-AKL-000118)

SOLID ENERGY NEW ZEALAND LIMITED

(ENV-2009-AKL-000119)

HAURAKI DISTRICT COUNCIL

(ENV-2009-AKL-000120)

WAIRAKEI PASTORAL LIMITED

(ENV-2009-AKL-000123)

WAIRARAPA MOANA INCORPORATION –

WAIRARAPA MOANA FARMS

(ENV-2009-AKL-000124)

TRUSTPOWER LIMITED

(ENV-2009-AKL-000125)

GENESIS ENERGY LIMITED

(ENV-2009-AKL-000126)



CONTACT ENERGY LIMITED
(ENV-2009-AKL-000127)

FONTERRA CO-OPERATIVE GROUP
LIMITED
(ENV-2009-AKL-000128)

FEDERATED FARMERS
(ENV-2009-AKL-000129)

MERIDIAN ENERGY LIMITED
(ENV-2009-AKL-000130)

KING COUNTRY ENERGY LIMITED
(ENV-2009-AKL-000131)

Appellants

AND

WAIKATO REGIONAL COUNCIL

Respondent

Topic: Variation No. 6 to the Proposed Waikato Regional Plan

Date of

Decision: 30 November 2011

Hearing:

In Hamilton, 28 February – 4 March; 8 – 11 March; 21 – 25 March; 28 March – 1 April; 18 – 22 April; 1 – 6 May; 9 – 13 May; 16 – 20 May; 25 – 29 July; and 1 – 4 August 2011.

Court:

Environment Judge R G Whiting
Environment Commissioner K Prime
Environment Commissioner M Oliver
Deputy Environment Commissioner O Borlase

Appearances:

Mr J Milne and Ms N Rye for Waikato Regional Council
Mr T Robinson and Ms R Dixon for Contact Energy Limited (**Contact Energy**)



Ms J Appleyard and Mr B Williams for Meridian Energy Limited
(Meridian Energy)

Mr P Green and Mr A Vane for Department of Corrections

Ms K Bellingham and Ms S Bradley for Director General of
Conservation

Mr S Berry and Ms J Vella for Waikato Region Municipal Users Group
*(Hamilton City Council, Waipa District Council, Waikato District
Council, Watercare Services Limited, Taupo District Council)*
(Municipal Users Group)

Mr P Lang for Matamata-Piako District Council

Mr A Green for Hauraki District Council, and Solid Energy NZ Limited

Ms H Andrews for Waikato-Tainui Te Kauhanganui Incorporated

Ms J Forret and Ms A Twaddle for Raukawa Charitable Trust, and
Ngati Tahu Ngai Whaoa Rununga Trust

Ms L Burkardt for TrustPower Limited **(TrustPower)**

Mr I Cowper and Ms J Munro for Mighty River Power Limited
(Mighty River Power)

Mr P Majurey and Mr T Hovell for Genesis Energy Limited **(Genesis)**

Ms A Maddox and Ms C Faesenkloet for Newmont Waihi Gold
Limited

Ms G Chappell for Carter Holt Harvey Limited **(Carter Holt Harvey)**

Mr A Hazelton for Horticulture New Zealand **(Horticulture NZ)**

Mr A Braggins for Wairarapa Moana Incorporation **(Wairarapa
Moana)**

Mr J Hassan and Ms G Hamilton for the Agricultural Working Group
*(Fonterra Co-Operative Group Limited, Federated Farmers Limited,
Waihou Irrigators Incorporated, Upper Waikato Irrigators Society
Incorporated)* **(Agricultural Working Group)**

Mr T Daya-Winterbottom for Wairakei Pastoral Limited **(Wairakei
Pastoral)**



DECISION OF THE ENVIRONMENT COURT

The decision of the Waikato Regional Council is amended by substituting the Decision version of Variation 6 with the 8 August 2011 Version as set out in Appendix 2 save for the following:

- A. The primary allocable flow at Karapiro Dam is to be set at 5% of the Q₅ flow;
- B. Policy 8(c) is to be amended by adding the following words "*that exceed the primary allocation in Table 3-5 and*" after the opening words "*Restricting takes*" and before the words "*which reduce*" so that it shall now read:
- c) Restricting takes that exceed the primary allocation in Table 3-5 and which reduce the amount of water that would otherwise be available for renewable electricity generation or be used for cooling of the Huntly Power Station, including in particular any takes from the Waikato River catchment upstream of the HPS mixing zone that when assessed in combination with all other authorised water takes would exceed 100% of the primary allocable flows in Table 3-5.
- C. Rule 3.3.4.14 is to be amended by deleting the word "Existing" in the title to the rule and replacing it with "Replacing Authorised" so that it shall now read:
- Replacing Authorised Existing Taking of Surface Water for Domestic or Municipal Water Supply.
- D. The Regional Council is to make any consequential amendments arising out of A, B or C within two calendar months from the date of issue of this decision. If there are any difficulties in implementing this direction, leave is granted to the Regional Council to apply to the Court for directions.



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1 INTRODUCTION

[1] Variation 6 of the Proposed Waikato Regional Plan was promulgated by the Regional Council to address the adverse effects of the taking and use of freshwater, other than geothermal water, from ground and/or surface water resources within the Waikato region.

[2] Water is an essential resource. The life-supporting capacity of water is expressly recognised in Section 5(2)(b) of the Act which requires it to be safe-guarded. Water is essential for the welfare of people. Water is of particular cultural significance to Maori. Water is essential for plants, livestock and farming activities. Water is essential for industry. Water is essential for the generation of hydro-electric power and is also necessary for geothermal and other thermal power generation.

[3] Because of the demand for water for different uses within many parts of the Waikato region, the point has been reached where demand for water has the potential to exceed the sustainable supply. In some catchments the consents to take water already exceed the allocation limits. This has given rise to growing competition amongst present and prospective users of the region's freshwater resources. Variation 6 is the Council's attempt to meet this worsening situation.

[4] The Variation was publicly notified on 20 October 2006. An experienced hearing committee heard submissions over 21 hearing days and after deliberation produced a detailed decision in four volumes. The committee's recommendations were adopted unchanged by the full Council on the 30 October 2008.

[5] A total of 37 appeals were filed by 26 parties. At least 470 Section 274 notices were lodged. According to Mr Speirs, a Council officer, the appeals covered every aspect of Variation 6. The Council and the parties have undergone extensive negotiations in an endeavour to reach agreement or narrow the issues.

[6] When this hearing commenced, some 19 parties had issues that were still extant.

[7] The hearing of the appeals took place in Hamilton over 49 sitting days (including reading of evidence). After hearing opening submissions by Mr Milne for the Council



and opening statements from other parties, we retired to read the evidence. We then resumed the hearing for cross-examination and full opening submissions from other parties. Because of the length and complexity of the hearing, we allowed all parties to make closing submissions.

[8] We heard and read the evidence from a total of 68 witnesses, many of whom were cross-examined. The list of witnesses and their area of expertise is attached as Appendix 1. Because of the number of witnesses, it is just not possible to refer to all that was said by them. Similarly, it is not possible to refer to all that was said by counsel in their submissions. We have taken all of the evidence and submissions into account in coming to our decision.

Variation 6

[9] The purpose of Variation 6 is to set out how the Regional Council will manage water allocation within the Waikato region. It is in response to increasing pressure on the resource and the demand for water for different and sometimes competing uses.

[10] Prior to, and following notification, there has been extensive consultation and discussions with interested parties, culminating in the Hearing before the Council's Hearing Committee. Since the adoption by Council of the Hearing Committee's recommendations, there have been further discussions. Thus the document has been through many iterative changes.

[11] At the commencement of the hearing, the proposal being advanced by the Council was contained in a version dated 14 February 2011. That version was changed quite considerably from the decisions version. These changes came about as a consequence of the meetings and discussions between the parties, including their experts. Since the hearing started, that document has been through at least 12 iterative changes in response to matters raised during the hearing; further discussions between the parties and their experts; and the promulgation of the National Policy Statements on Renewable Electricity¹ and Freshwater.² The latest version advanced by the Council was lodged

¹ *The National Policy Statement for Renewable Electricity Generation 2011* – issued by Notice in Gazette on 4 April 2011



with the Court following the completion of the Hearing. That version is dated 8 August 2011. It is that version that we will refer to in this decision. It is attached as Appendix 2.

[12] At first sight, the Variation appears to be a complex document, but overall, its intent and structure is relatively straightforward. Its complexity arises because water is essential to so many vested interest groups and agencies as evidenced by the 19 parties who appeared at the hearing. It is the interconnections across those interest groups that creates the complexity. To assist in its understanding, Mr Spiers prepared and produced³ line-wiring diagrams. An updated version of the line-wiring diagrams which reflect the latest proposed Variation advanced by the Council is attached as Appendix 3.

[13] As Variation 6 is a variation of the Proposed Waikato Regional Plan, it needs to be read and considered within the context of that document. It introduces two new chapters. *Chapter 3.3* which deals with water takes and manages the allocation regime, and *Chapter 3.4* which deals with the efficient use of water.

Chapter 3.3 Water Takes

[14] *Chapter 3.3* has a basic format. It contains an Issue, 1 Objective, 21 Policies, 10 Non-Regulatory Methods, 19 Rules, and 1 Standard.

[15] *Issue 3.3.1* addresses matters of relevance to water allocation and use. It addresses the potential adverse effects of the allocation and taking of water including in relation to:

- [a] The ability of rivers and streams to assimilate contaminants;
- [b] The restoration and protection of the health and well-being of the Waikato River which is required by the Vision and Strategy for the Waikato River;
- [c] The inefficient allocation and use of water;

² *The National Policy Statement for Freshwater Management* – issued by Notice in Gazette on 12 May 2011

³ Spiers, Rebuttal at [21] – [23]



- [d] The social and economic effects on electricity generation by the allocation of water to other uses;
- [e] The need to avoid compromising existing and future domestic and municipal supply takes;
- [f] Recognising that existing water takes contribute to social and economic well-being and support significant investment;
- [g] The need for water to be available to provide for the social and economic needs of people including rural-based activities;
- [h] The consequence of water shortages if not properly managed;
- [i] The need to phase out over time allocation in excess of the combined primary and secondary flows;
- [j] The unmanaged transfer of permits; and
- [k] The accumulative effects of taking water.

[16] *Chapter 3.3 contains Objective 3.3.2 which states:*

3.3.2 Objective

In addition to Objective 3.1.2, the management of water allocation and use in a way which ensures:

- aa) Giving effect to the overarching purpose of the Vision and Strategy to restore and protect the health and well-being of the Waikato River for present and future generations.
- a) The availability of water to meet the existing and the reasonably justified and foreseeable future domestic or municipal water supply requirements of individuals and communities and the reasonable needs for an individual's animal drinking water requirements.
- ab) The recognition of the significant community benefits that derive from domestic or municipal supply takes
- ac) The efficient allocation and the efficient use of water
- b) No further allocation of water that exceeds the primary allocation in Table 3-5 that reduces the generation of electricity from renewable energy sources.



- ba) The recognition that existing water takes contribute to social and economic wellbeing and in some cases significant investment relies on the continuation of those takes, including rural-based activities such as agriculture, perishable food processing and industry.
- ca) The continued availability of water for cooling of the Huntly Power Station.
- c) Sufficient water is retained instream to safeguard the life supporting capacity of freshwater, including its ecosystem processes and indigenous species and their associated ecosystems.
- d) That decisions regarding the allocation and use of water take account of the need to avoid the further degradation of water quality, having regard to the contaminant assimilative capacity of water bodies.
- e) Subject to Objectives aa) to c) above, the availability of water to meet other future social, economic and cultural needs of individuals and communities (including rural-based activities such as agriculture, perishable food processing and industry).

[17] In order to achieve the Objective, there is a comprehensive policy framework which can be summarised as:

- [a] A process for establishing and determining the level of minimum, primary, secondary and water harvesting allocable flows and determining the combined level of surface water allocation within a catchment – *Policies 1, 1A and 1B*;
- [b] A process for establishing and determining the sustainable yields from groundwater – *Policies 2 & 2A*;
- [c] The relationship between exceedance of the allocable flows and the definition of “*over-allocation*” in the National Policy Statement on Fresh Water Management – *Policy 2AB*;
- [d] Classification for the activity status for consents based on the allocation level within a catchment or aquifer – *Policies 3, 4 & 16* for surface water, and *Policy 5* for groundwater;



- [e] Assessment criteria for the taking of surface water and groundwater respectively – *Policies 8, 9A & 9B* for surface water and *Policy 9* for groundwater;
- [f] Conditions for consent;
- consent duration for the taking of water – *Policy 11*;
 - water take recording and reporting – *Policy 12*;
 - water shortage condition restrictions – *Policy 13*;
 - levels of priority to apply during water shortages – *Policy 14*;
 - promoting shared use and management of water – *Policy 17*;
- [g] Methods to reduce over-allocation – *Policy 15*.

[18] In order to assist with the implementation of the policies, the Variation proposes a number of non-regulatory methods including education, the providing of information, working with other agencies, and guidance on achieving policies – *Methods 3.3.4.1 – 3.3.4.8A*.

[19] The policies are further implemented by a number of rules which reflect the policies' hierarchy of water-take categories of permitted activities, controlled activities, restricted discretionary activities, discretionary activities, and non-complying activities. As a general proposition:

- [a] The taking of surface water, when assessed in combination with all other authorised takes, up to 70% of the allocable flows is a controlled activity – *Rule 3.3.4.13*;
- [b] The taking of surface water between 70% and 100% of the primary allocable flow is a restricted discretionary activity – *Rule 3.3.4.15*;



[c] The taking of surface water (excluding priority takes), when assessed in combination with all other authorised water takes (all calculated on a net take basis) exceeds the primary allocable flow but is less than the combined primary and secondary allocable flows in Table 3-5, is a discretionary activity – *Rule 3.3.4.16*; and

[d] The taking of surface water when assessed in combination with all other authorised water takes, exceeds the primary and secondary allocable flows in Table 3-5, is a non-complying activity – *Rule 3.3.4.20*.

[20] The key component for any water allocation regime is the minimum flow which is designed to protect certain physical, economic, social and environmental values.⁴ A minimum flow is defined in terms of a hydrological statistic. Regional councils in New Zealand employ a variety, including, for example, the mean annual 7-day low flow (MALF), the 1 in 5 year 7 day low flow (Q_5), some fraction of MALF or Q_5 , the instantaneous mean annual low-flow or the exceedance flow.

[21] Variation 6 uses the Q_5 . The minimum flow is expressed as a percentage of the Q_5 . According to *Policy 1A*, the minimum flow is to be determined having particular regard to *Policy 1* following detailed habitat and river studies. Where such studies have not been undertaken, the minimum flow shall be set at 90% of the Q_5 for streams with a mean flow greater than $5\text{m}^3/\text{s}$ and 95% of the Q_5 for streams with a mean flow less than $5\text{m}^3/\text{s}$.

[22] In general, the primary allocable flow is to be set as the difference between the minimum flow and the Q_5 . If the minimum flow is 90% of the Q_5 , the primary allocable flow will be 10% of the Q_5 . If the minimum flow is greater than the Q_5 , then the allocable flow is zero. With the exception of the Waikato River between the Taupo outlet and Karapiro Dam, the secondary allocable flow is deemed to be the portion of the flow between the primary allocable flow and 30% of Q_5 , except as otherwise specified in Table 3-5 of the Variation, which sets the allocable flows.

⁴ See McKerchar, EIC at [6] and following



[23] Of importance to this hearing, Table 3-5 sets the minimum flow for that section of the Waikato River upstream of the Karapiro Dam at 96.4% of Q_5 . Thus, the primary allocable flow is set at 3.6% of Q_5 . This figure is derived from an assessment of all existing takes of water, together with a small quantity to provide for presently planned dairy expansion, from the river upstream of the Karapiro Dam. There is no secondary allocable flow. The limit set combined with strong policy direction, ensures that all existing takes are within the allocable flow, but that no further grants of consent can reduce the amount of flow in the river above 3.6% of the Q_5 . Thus the full flow of the river, less the allocable flow (i.e. up to 3.6% of the Q_5) is assured as being available for the Waikato Hydro Electricity Scheme. This protection granted to hydro-electricity generation was the source of considerable contention between the hydro-electrical generating company (Mighty River Power) and those seeking more water for consumptive uses such as irrigation.

[24] Priority to identified users, or groups of users, is managed by the activity status of the take and the levels of priority to apply during water shortages. For example, municipal supply authorities are afforded priority, by assigning to them more benign consent activity classifications for applications for the replacement of existing consents and applications for new takes,⁵ and being afforded a more favourable level of priority during water shortages.⁶

[25] Priority is also afforded other takers of water including:

- [a] The Huntly Power Station for the taking of cooling water – *Policy 3(c)(ia) and Rule 3.3.4.13A*;
- [b] The taking of water for existing milk cooling and dairy shed washdown – *Policy 2B, Policy 3 and Rules 3.3.4.14A & B; and Policy 5(ab)*;
- [c] The taking of water for existing industrial purposes, such as the Kinleith Pulp and Paper Mill – *Policy 1(ia), Policy 2B(e) and Rule 3.3.4.16(4)*.

⁵ See *Objective 3.3.2(a), Policy 4; Policy 1(i), Policy 2B(g) and Rule 3.3.4.14 and 3.3.4.16(b)*

⁶ See *Standard 3.3.4.21*



[26] The issue of priority was also a matter that gave rise to differences of opinion during the course of the hearing.

Chapter 3.4 Efficient use of water

[27] *Chapter 3.4* addresses the efficient use of water. There is no separate objective for *Chapter 3.4*. The objective statement refers back to *Objective 3.1.2* of the Waikato Regional Plan and *Objective 3.3.2* of the Variation. Of particular relevance is the following from *Objective 3.1.2* of the Regional Plan:

3.1.2 Objective

The management of water bodies in a way which ensures:

- a) that people are able to take and use water for their social, economic and cultural wellbeing
- ...
- g) inefficient use of the available ground surface water resources is minimised
- ...
- o) concentrations of contaminants leaching from land use activities and non-point source discharges to shallow ground water and surface waters do not reach levels that present significant risks to human health or aquatic ecosystems
- p) that the positive effects of water resource use activities and associated existing lawfully established infrastructure are recognised, whilst avoiding, remedying or mitigating adverse effects on the environment.

[28] Policy 1 is intended to provide for the management of potential adverse effects arising from the use of water and any associated discharges to land. The “use” of water has been separated from the “take” of water to facilitate the transfer of water permits for different purposes.

[29] Policy 2 promotes a number of measures to achieve the efficient use of water, including facilitating the transfer of water permits. Policy 3 provides for the permanent, or temporary transfer of water permits, as long as the transfers do not result in adverse effects. Transfers are to be implemented by the use of environmental education (Method 3.4.4.1) and by providing for a permitted activity rule for the transfer of surface water permits (Method 3.4.4.2). Waikato Tainui and the River Iwi Trusts opposed the transfer of permits.



[30] Non-regulatory methods and rules address the efficient use of water. None of these are in contention.

2 THE COUNCIL DECISION

[31] Section 290A of the Act states that in determining an appeal, *the Environment Court must have regard to the decision that is the subject of the appeal*. The Waikato Regional Council Hearings Committee comprised a panel of five commissioners. The committee's decision is in four volumes:

- [a] Volume 1 deals with process issues in Part A, and Part B is the committee's substantive decision on the principal issues;
- [b] Volume 2 contains Part C of the committee's recommendations on submissions covering all the matters of detail;
- [c] Volume 3 is Part D comprising the Catchment Consumptive Takes Table, a strike-through version showing the committee's amendments to the publicly notified version, a *clean print* version of the amended Variation and the maps; and
- [d] Volume 4 contains the Section 32 evaluation to support the amended document.

[32] The committee heard submissions over 21 hearing days and deliberated at length before producing its detailed decision. The committee's recommendations were adopted unchanged by the full Council.

[33] Since the Council's decision, the Variation has, as we have said, been through at least 12 iterative changes. This has resulted in some major amendments to the objectives, policies and rules. The Variation 6 that the Council now proposes is quite a different document to the decision version. There have been a number of major policy shifts, the most significant of which has been the deletion of the procedural priority provisions.

[34] The key provisions deleted were Policies 6 & 11 of the decisions version, which provided for a procedural priority to take effect on a common expiry date. All consents



in a defined catchment, except municipal supply consents, were to expire at the same time. At that time, applications to take water would be processed according to an established order of priority which would displace the *first-in first-served* principle which would otherwise apply.

[35] Policy 6 and that part of Policy 11 which fixed a common expiry date have now been abandoned by the Council in the face of jurisdictional opposition by a number of parties - a position that is now accepted by all parties. Priority is now accorded by way of favourable activity status to certain types of uses.

[36] Importantly, the Council has agreed to afford priority to a greater number of existing users such as:

- [i] The taking of water for existing milk cooling and dairy shed washdown;
and
- [ii] The taking of water for existing industrial purposes, such as the Kinleith Pulp and Paper Mill.

[37] Notwithstanding the many changes, there are a number of issues still extant. Where any of those issues were argued before the Council's Hearing Committee, Section 290A of the Act is pertinent. We will discuss parts of the Council's decision as they apply to any outstanding issue at the time we address the particular issue.

3 STATUTORY BASIS FOR DECISION

[38] Variation 6 was publicly notified on 20 October 2006. All parties agreed that on matters of process the variation must be determined as if the amendments made by the 2009 Amendment Act had not been made. Thus on matters of process, the version of the Act that applies is as amended by the 2005 Amendment Act.

[39] Counsel in their submissions referred to a variety of decisions of this Court and quoted passages which are effectively checklists reflecting the relevant statutory directions. The most comprehensive checklist is contained in the well-known passage



from *Long Bay*⁷, acknowledging that *Long Bay* relates to a District Plan. Apart from *Long Bay*, many of the passages quoted tended to emphasise those statutory directions which were relevant to the particular case before the Court.

[40] Section 63(1) of the Act provides that the purpose of the preparation, implementation and administration of Regional Plans is to carry out any of the Regional Council's functions in order to achieve the purpose of the Act. A Regional Council's functions are set out in Section 30 of the Act. It relevantly says:

30 Functions of regional councils under this Act

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
- (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
 - ...
 - (e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including –
 - (i) The setting of any maximum or minimum levels or flows of water:
 - (ii) The control of the range, or rate of change, of levels or flows of water:
 - (iii) The control of the taking or use of geothermal energy;
 - ...
 - (fa) If appropriate, the establishment of rules in a regional plan to allocate any of the following:
 - (i) the taking or use of water (other than open coastal water);
 - ...
- (4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:
- (a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and
 - (b) nothing in paragraph (a) affects section 68(7); and
 - (c) the rule may allocate the resource in anticipation of the expiry of existing consents; and

⁷ *Long Bay – Okura Great Parks Society Inc v North Shore City Council*, [2010] NZEnvC265 at [18]



- (d) in allocating the resource in anticipation of the expiry of existing consents, the rule may –
 - (i) allocate all of the resource used for an activity to the same type of activity; or
 - (ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and
- (e) the rule may allocate the resource among competing types of activities; and
- (f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

[41] Section 65(3) of the Act contemplates a broad range of circumstances in which a Regional Council should consider preparing a Regional Plan, including:

- (a) Any significant conflict between the use, development, or protection of natural and physical resources or the avoidance or mitigation of such conflict;
- (b) Any significant need or demand for the protection of natural and physical resources or of any site, feature, place, or area of regional significance;
- ...
- (d) Any foreseeable demand for or on natural and physical resources;
- (e) Any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources;
- (f) The restoration or enhancement of any natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration;
- ...
- (i) Any other significant issue relating to any function of the regional council under this Act.

[42] The Variation must also meet the following relevant statutory requirements:

- [a] Section 66(2) – to have regard to any proposed Regional Policy Statement – in this case the Proposed Waikato Regional Policy Statement (November 2010);
- [b] Section 66(2) – to have regard to any management plans and strategies prepared under other Acts – in this case the Waikato-Tainui Raupatu



claims (Waikato River (Settlement Act) 2010), and in particular, Schedule 2 which is the Vision and Strategy for the Waikato River,⁸

[c] Section 67(3) of the Act – requires that the variation must give effect to:

- Any national policy statement – in this case there are three relevant national policy statements that have been issued under Section 52 of the Act. These are:
 - The New Zealand Coastal Policy Statement 2010;
 - The National Policy Statement for Renewable Electricity Generation; and
 - The National Policy Statement for Freshwater Management
- Any Regional Policy Statement – in this case, the Waikato Regional Policy Statement.

[43] Section 68 of the Act refers specifically to rules. Of particular relevance is Section 68(3) which provides that in making rules, the Regional Council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect.

[44] Section 68(5) of the Act provides that:

A rule may –

- (a) Apply throughout the region or part of the region.
- (b) Make different provision for –
 - (i) Different parts of the region; or
 - (ii) Different classes of effects arising from an activity
- (c) Apply all the time or for stated periods or seasons:
- (d) Be specific or general in its application:
- (e) Require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.

⁸ Also the Ngati Tuwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010



[45] Overarching all of the statutory directions is Part 2 of the Act. The purpose of the Act as set out in Section 5 is to be achieved⁹ and any Regional Plan is to be in accordance with Part 2 of the Act. The specific provisions of Part 2 that are particularly relevant are:

- [i] To recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga – (Section 6(e));
- [ii] To have particular regard to:
 - Kaitiakitanga and the ethic of stewardship – Section 7(a) and (aa);
 - The efficient use and development of natural and physical resources – Section 7(b);
 - The intrinsic value of ecosystems – Section 7(d);
 - Any finite characteristics of natural and physical resources – Section 7(g);
 - The effects of climate change – Section 7(i); and
 - The benefits to be derived from the use and development of renewable energy – Section 7(j).
- [iii] To take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) – Section 8;

[46] The Variation process is also subject to the constraints imposed by Section 32 of the Act which require an evaluation that must examine:

- [a] The extent to which each objective is the most appropriate way to achieve the purpose of the Act (Section 32(3)(a));

⁹ Section 63(1) of the Act



[b] Whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives – Section 32(3)(b).

[47] Such an evaluation must take into account:

[a] The benefits and costs of policies, rules, or other methods – Section 32(4)(a).

[48] Variations and plan changes are promulgated in accordance with the First Schedule procedures. This entails public notification, the lodging of submissions and further submissions by interested parties. This process gives all parties interested an opportunity to participate in and influence the development of the proposed objectives, policies and rules. It is clear from the evidence that the parties have been actively involved in the process over many months. To this extent, the process has given integrity to those matters that have been agreed on. We thus do not address them. The contested issues that remain have been synthesised from the extensive negotiations.

[49] We propose to discuss, where necessary, the relevant statutory provisions and the relevant statutory instruments as they apply to the contested issues.

4 THE RELEVANT STATUTORY PLANNING INSTRUMENTS

The New Zealand Coastal Policy Statement and relevant national policy statements

[50] Sections 67(3)(a) & (b) of the Act require that Variation 6 must give effect to any national policy statement and any New Zealand Coastal Policy Statement.

[51] We agree with the submission of Mr Milne that only national policy statements that have been approved and issued under Section 52 of the Act are relevant considerations. Proposed national policy statements should not be afforded any weight.

[52] There are three operative national policy statements that are now relevant, these being:

[a] The New Zealand Coastal Policy Statement 2010;



[b] The National Policy Statement for Renewable Electricity Generation 2011; and

[c] The National Policy Statement for Freshwater Management 2011.

The New Zealand Coastal Policy Statement 2010 (NZCPS)

[53] It was the respondent's position that the NZCPS 2010 has little relevance to the current proceedings. We agree. No other party submitted otherwise.

[54] While it is acknowledged that the lower portion of all rivers within the region will fall within the coastal environment, the NZCPS provides little, if any, guidance on water allocation issues. In so far as the statement seeks to preserve the natural character of the coastal environment, then the setting of minimum and allocable flows will undoubtedly assist with achieving that outcome.

The National Policy Statement for Renewable Electricity Generation 2011

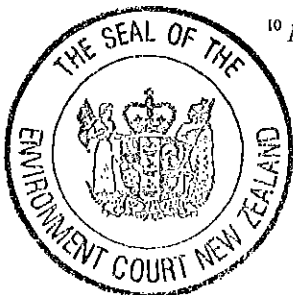
[55] The National Policy Statement for Renewable Electricity Generation came into force on 12 May 2011. This policy statement ensures a consistent approach to planning for renewable electricity generation in New Zealand by giving clear directions on the benefits of renewable electricity generation and requiring all councils to make provision for it in their plans.

[56] The statement emphasises as matters of national significance:

- a) the need to develop, operate, maintain and upgrade renewable electricity generation activities throughout New Zealand; and
- b) the benefits of renewable electricity generation.¹⁰

[57] The preamble to the Statement contains the following:

¹⁰ National Policy Statement for Renewable Electricity Generation 2011 at page 4



Preamble

...

This national policy statement does not apply to the allocation and prioritisation of freshwater as these are matters for regional councils to address in a catchment or regional context and may be subject to the development of national guidance in the future.¹¹

[58] It was submitted by some parties that the inclusion of this statement in the preamble precludes us from having regard to it when considering any of the contested issues to which it is relevant. However, we agree with Mr Cowper that the location of the above statement in the Preamble illustrates that it is not intended to act as a guide to decision-makers in respect to any freshwater allocation decisions they are making. Rather, the statement says that (amongst other things) the National Policy Statement should not be used to justify always giving hydro-electricity generation activities priority when making freshwater allocation decisions. It envisages that there may be circumstances when this will not be appropriate and should not occur.

[59] However, the statement in the Preamble should not be read as excluding the ability of regional councils to make freshwater allocation decisions which reflect the importance of renewable energy activities. Even if we are wrong in this regard, we consider it necessary, as a cautionary approach, to consider the policy statement's provisions which reflect and give strong guidance to the relevant statutory provisions contained in Part 2 of the Act.

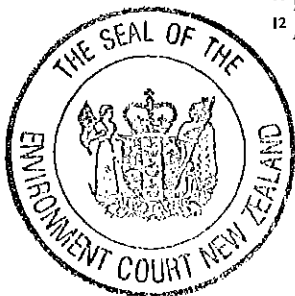
[60] The objective for the National Policy Statement for Renewable Electricity Generation is:

To recognise the national significance of renewable electricity generation activities by providing for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities, such that the proportion of New Zealand's electricity generated from renewable energy sources increases to a level that meets or exceeds the New Zealand Government's national target for renewable electricity generation.¹²

[61] The policies of the National Policy Statement for Renewable Electricity Generation recognise that:

¹¹ Ibid, page 3

¹² At [4]



- [a] Renewable electricity generation activities, and the benefits that are derived from them, are matters of national significance to be recognised and provided for;¹³
- [b] The protection of the assets, operational capacity and continued availability of the existing renewable energy resource is required as well as acknowledgment of the fact that *“even minor reductions in the generation of existing renewable electricity generation output activities can cumulatively have significant adverse effects on national, regional and local renewable electricity generation output”*;¹⁴
- [c] There is a *“need to locate the renewable electricity generation activity where the renewable energy resource is available”* and where it can be connected to the national grid;¹⁵ and
- [d] That there needs to be the incorporation of provisions for renewable electricity generation activities into regional policy statements, regional plans and district plans to include objectives, policies and methods to provide for new and existing hydro, wind and geothermal generation to the extent applicable to the region or district as well as for small and community-scale distributed renewable electricity generation activities.¹⁶

[62] The provisions in the National Policy Statement for Renewable Electricity Generation provide a clear indication that the government sees renewable electricity generation as an essential need for the nation and which should be treated as of national significance.

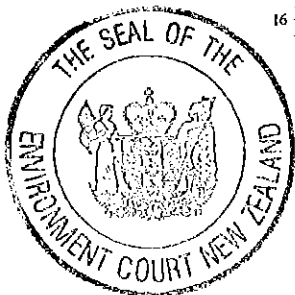
[63] The provisions in the Policy Statement are particularly relevant to the main issue between the electricity generators and those parties seeking water for agricultural purposes. We will be conscious of the relevant provisions when we address that issue.

¹³ At [5]

¹⁴ Policy B(a) & (b) at [5]

¹⁵ Policy C(1), clauses (a) & (c) at [5]

¹⁶ Policies E - F at [6] – [7]



National Policy Statement on Freshwater Management 2011 (NPS FM)

[64] The National Policy Statement on Freshwater Management was issued by notice in the Gazette on 12 May 2011 and took effect on 1 July 2011. It sets out objectives and policies that direct local government to manage water in an integrated and sustainable way, while providing for economic growth within set water quantity and quality limits. Such limits are to reflect local and national values underlain by the best available scientific and socioeconomic knowledge to ensure adequate environmental flows.

[65] Once limits are set water needs to be allocated to users, and if allocation exceeds the point where national and local values are not met, then such allocation is to be reduced over time.

[66] In its decision on Variation 6, the Waikato Regional Council set the environmental flows throughout the region with regard to the instream ecological requirements. It then increased the minimum flows to allow for tangata whenua uses and values, existing uses, and municipal supply needs, among others.

[67] The Council has identified appropriate minimum flows which protect the environment, defined in a wider sense by the Act. It was agreed that those minimum flows fit appropriately into the Policy framework set by Variation 6.

[68] At the time of issue of the National Policy Statement, Variation 6 was almost at the end of its participatory process. Many months of participation by many parties had been completed. By Minute dated 13 May the Court directed all parties to consider the implications of the Policy Statement and for their planning witnesses to attend a conference facilitated by Commissioner Oliver. A statement of outcome of the facilitated conference was issued on 15 July 2011. Paragraph [6] of the 15 July 2011 statement says:

- 6. Recognising the context of Variation 6**
- 6.1 There was agreement that:
 - a) V6 is a part of the Regional Council's management of freshwater and it is neither appropriate nor necessary that V6 address all aspects of the NPS.



- b) V6 is primarily about water takes and use and about water quantity. There is limited content relating to freshwater quality relative to other parts of the Regional Plan which are beyond the scope of V6. Therefore V6 cannot be used to address wider freshwater management issues beyond the scope of V6.
- c) Opportunities to give effect to all aspects of the NPS will occur in the context of the current review of the Proposed Regional Policy Statement ("PRPS") followed by the programmed review of the Regional Plan (presumably including V6).
- d) The structure and scope of V6 is a valid way to give effect to the relevant parts of the NPS within this appeal process. While there are some changes needed there is no requirement for a complete re-write.

[69] It was agreed that the Policy Statement focussed on ecological limits, and to this extent was more narrowly focussed than the matters set out in the Objective of Variation 6. Paragraph [10.2] of the Joint Statement says:

10.2 There was agreement that:

- The concept and function of an allocation limit in the NPS appears to be different to the use of allocable flow limits in V6. The concept of allocable flow in V6 allows a broader consideration of what over allocation is. This recognises spatial differences and that one size doesn't fit all. The approach in WRC's 17 June Version Discussion Document, which assumed any exceedance of Table 3-5 limits had to be avoided in an absolute manner, is not the only way to deal with the issue of giving effect to Objective B2.
- The Table 3-5 'allocable flows' could be exceeded in some specified situations if that was appropriate to achieve some of the components of Objective 3.3.2 and hence not be "over allocation" in terms of the NPS.
- The issue of what constitutes over allocation could be re-visited over time in light of various matters including the values or freshwater objectives that prevail and state of knowledge.
- Any over allocation that occurs on the basis of the flows set out in Table 3-5 is proposed to be phased out by 2030 or, in the case of a new municipal take that caused over allocation, sooner than that. "Phasing out" could include a revision of the Table 3-5 flows.

[70] It was generally considered that with a number of suggested amendments the Variation would generally give effect to the Policy Statement. All these amendments have been accepted by the parties with the exception of two – Horticulture New Zealand and the Director-General of Conservation.



[71] Of particular concern to these two parties were the following proposed amendments (now adopted by the Council):

[a] The following amendment to the Explanation to the Issues:¹⁷

The NPS on Freshwater Management requires allocation limits to be set and defines 'over-allocation.' Chapters 3.3 and 3.4 were developed prior to the release of the Operative NPS and it was not intended that an exceedance of an allocable flow as set out in Table 3-5 would be considered to be 'over-allocation' as defined in the NPS. The flows in Table 3-5 have been set to achieve Objective 3.3.2 and they also determine the activity status of water take consent applications. The activities identified in Policy 2AB are enabled to achieve aspects of Objective 3.3.2

[b] A new Policy 2AB:

Policy 2AB: Certain Exceedances of Table 3-5 Allocable Flows not to Represent Over-allocation for the Purposes of the Freshwater NPS (Implements Objective 3.1.2 and 3.3.2)

Takes that may exceed the combined primary and secondary allocable flows in Table 3-5 in order to achieve one or more limbs of Objective 3.3.2 for the following types of activities do not represent "over-allocation" as defined in the Interpretation section of the National Policy Statement for Freshwater Management 2011:

- a) In recognition of Objective 3.3.2(a) and 3.3.2(ab) and the statutory requirement to provide potable water for people and communities, takes to meet the existing and reasonably justified and foreseeable domestic or municipal supply requirements of individuals and communities where a water management plan which meets the requirements of Method 8.1.2.2 has been provided.
- b) In recognition of Objection 3.3.2(ba), takes to meet existing and reasonably justified needs for milk cooling or dairy shed wash down where applicants for those takes are lodged prior to January 2015.
- c) In recognition of Objection 3.3.2(a) and 3.3.2(ba), takes relying on section 14(3)(b) of the Resource Management Act that were occurring prior to 15 October 2008.

[72] It was contended that these amendments are contrary to the intent of the Policy Statement and accordingly do not give effect to it as required by section 67(3)(1) of the

¹⁷ Page 11



Act. Further, Ms Bellingham, on behalf of the Director-General of Conservation, submitted that such provisions would amount to a dangerous precedent as it would signal that councils could evade the prescriptions of the Policy Statement by invoking similar provisions.

[73] We do not agree with either of these contentions. First, a reading of the objective in Variation 6 reveals that the matters contained in it are broader than the focus of the Policy Statement. Such matters as: the community need to meet the existing and future needs of domestic and municipal supply; the recognition of the contribution to social and economic wellbeing of existing takes; and the need to protect electricity generation are all matters outside the ambit of the Policy Statement, which focuses on allocation in the context of protecting water quality. The matters outside the focus of the Policy Statement are also relevant resource matters which need to be considered when determining the sustainable use of the resource. The proposed Policy 2AB is a practical way of recognising that the objectives and policies of the Variation extend beyond the scope of the National Policy Statement.

[74] Further, balance is achieved with respect to any current over-allocation, as it is proposed to be phased out by 2030. Further opportunities to give effect to all aspects of the Policy Statement will occur in the context of the current review of the Regional Policy Statement, which is to be followed by a programmed review of the Regional Plan.

[75] We accept, that with the suggested amendments, and recognising that the objectives and policies extend beyond the scope of the National Policy Statement, the Variation will generally give effect to it.

Waikato Regional Planning Instruments

Waikato Regional Policy Statement

[76] The Waikato Regional Policy Statement is the Regional Council's primary planning instrument and contains issues, objectives, policies and methods relating to flow regimes, the modification of flow regimes and the efficient use of water. It was the Council's case that Variation 6 complies with the provisions of the Regional Policy Statement that are relevant. No other party contested otherwise. We therefore do not propose to discuss this document further.

The Proposed Waikato Regional Policy Statement

[77] The Proposed Waikato Regional Policy Statement was publicly notified on 3 November 2010. The Proposed Policy Statement is set out in three substantive parts. This structure addresses requirements for integrated management. Part A contains six significant resource management issues, the Vision and Strategy for the Waikato River, and 26 objectives which address the issues. Under each objective, a table is included which lists the policies to achieve each objective.

[78] Part B contains the policies and methods which achieve the objectives in Part A. Part C identifies the procedures to be used for monitoring the effectiveness of the Proposed Policy Statement in achieving the stated objectives.

[79] The relevant objectives and policies are set out in full in the evidence of Mr Spiers. Again, it was the Council's position, that Variation 6 as now proposed, appropriately gives effect to the relevant provisions of the Proposed Regional Policy Statement. No party, other than the River Iwi Trusts contested otherwise. It was the Trusts' contention that the provisions of the Variation do not give effect to the Vision and Strategy as contained in the Proposed Regional Policy Statement. That Vision and Strategy being the same as the Vision and Strategy promulgated by the Settlement Act. We discuss this in more detail later in the decision.

The Waikato Regional Plan

[80] As we have said, Variation 6 needs to be considered within the context of the relevant issues, objectives and policies of the Operative Regional Plan. Chapters 3.1 and 3.2 are relevant.

[81] Chapter 3.1 of the Operative Regional Plan contains an exhaustive list of issues which underlie the need to manage flow regimes and the taking and using of water. These include:

- [a] The adverse effects, including cumulative effects, of non-point discharges on the water quality of the region's water bodies;



- [b] Recognition that the ability of people and communities to provide for their needs may be limited by inefficient use of finite water resources;
- [c] Recognition that modification of flow regimes through water takes, damming and diversion, can adversely affect water bodies;
- [d] The need to protect the spiritual and physical attributes of water quality and the mauri of water;
- [e] The need to provide for the sustainable yield of deep groundwater resources; and
- [f] The recognition that not enabling the use and development of water resources in the region may compromise the ability of people and communities to provide for their social, cultural and economic well-being, and for their health and safety.

[82] Part 3.1 of the Plan then contains objectives and policies which are designed to address these issues and the management of water bodies. It was the Council's position that the provisions of the Regional Plan have been appropriately considered and taken into account, and are reflected in the provisions of Variation 6. Again, no party contested the Council's position.

The Waikato Regional Energy Strategy

[83] The Waikato Regional Energy Strategy is a non-statutory document. It has been developed to facilitate agreement within the regional community on how to achieve continued access to reliable energy supplies at affordable prices, and to help inform decision-makers at the regional and district level in the development of policy and planning documents.

[84] The overall purpose of the Regional Energy Strategy is to:¹⁸

¹⁸ *Waikato Regional Energy Strategy*, page 1



- [a] Encourage and enable energy conservation and efficiency;
- [b] Promote the Waikato region's role in maintaining security of energy supply;
- [c] Facilitate the development and use of renewable energy sources and innovative energy technologies; and
- [d] Acknowledge and promote the crucial role of energy in the regional and national economy.

[85] The Energy Strategy contains 27 recommendations for action. Of particular relevance to the debate about the measures of protection afforded to electricity generators is Recommendation 4 which states:¹⁹

Recommendation 4: The Regional Energy Strategy recognises the importance and value of existing and potential hydro generation infrastructure, within the Waikato region and its essential contribution to regional and national energy needs and security of supply.

The Regional Energy Strategy advocates for policies and actions that promote maintenance and appropriate development and use of this valuable natural resource.

When new proposals for water allocation are being considered in the consenting process, the Regional Energy Strategy recommends that hydro generation should be considered a desirable renewable low emission source of electricity essential to regional and national energy needs and for security of supply.

5 THE VISION AND STRATEGY FOR THE WAIKATO RIVER

[86] It is accepted that as at 1840 Waikato-Tainui possessed the Waikato River and their lands in accordance with their tikanga, along with other Waikato River iwi. However, from the time of the Raupatu in 1863, the Crown has assumed control of, and exercised jurisdiction over, the Waikato River.

[87] Following development along its length after the Raupatu, the river has been used for a significant range of activities. These include farming, coal mining, power

¹⁹ Ibid, page 80



generation schemes, the discharge of waste, and domestic and industrial abstraction. This list largely encapsulates the uses of the main parties involved in this hearing. While all of these uses have contributed to New Zealand's economic growth, and continue to do so, they have also caused the pollution and deterioration of the health of the Waikato River, to the extent it is currently acknowledged as being significantly degraded.

[88] Over the same period it is common ground that Waikato-Tainui had been excluded from decision-making. They have not been adequately consulted regarding their understanding of the river and its ecosystems. Their rights and interests in the river, and the authority and control they exercised to protect and ensure the well-being of the river and its resources, have been denied.

[89] Waikato-Tainui believe that their ability to meet their obligations to the Waikato River, as their tupuna awa, has been severely compromised. This sense of injustice is long-standing and continues today.

[90] Consequently, Waikato-Tainui initiated claims before the Waitangi Tribunal. Negotiations with the Crown regarding the river claim were commenced in 1999. These negotiations culminated in the signing of an agreement in principle for settlement in December 2007. This agreement provided for the formation of a Guardians Establishment Committee consisting of Crown and Waikato River iwi representatives. The committee's main function was to develop a "*vision and strategy for the Waikato River*".²⁰

[91] Following the agreement in principle, the Crown and Waikato-Tainui signed a Deed of Settlement in relation to the Waikato River on 22 August 2008. Importantly, this Deed of Settlement included as Clause 2.1:

OVERARCHING PURPOSE

- 2.1 The overarching purpose of the settlement is to restore and protect the health and wellbeing of the Waikato River for future generations.

[92] The 2008 Deed also incorporated, as Part 1 of the Schedule to that Deed, the Vision and Strategy developed by the Guardians Establishment Committee, and

²⁰ Clause 51



subsequently approved by both the Crown and Waikato-Tainui. In 2009, aspects of the 2008 Deed and the co-management arrangements for the Waikato River were reviewed resulting in agreement and the signing of a 2009 Deed. Like the 2008 Deed, it's successor incorporated the same overarching purpose in Clause 3.1, and the Vision and Strategy developed by the Guardians Establishment Committee as Part 1 of the Schedule to that Deed.

[93] The 2009 Deed was implemented through the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, which received royal assent on 7 May 2010 and came fully into force as at 25 November 2010. Consistent with the 2009 Deed, the Settlement Act records (inter alia):

- [i] The various Crown acknowledgments made with respect to the Raupatu, and the impact of this on Waikato-Tainui's special relationship with the Waikato River, by denying their ability to protect the importance of Te Mana o te Awa and exercise mana whakahaere over the river;²¹
- [ii] The overarching purpose of this settlement has been to restore and protect the health and well-being of the Waikato River for future generations;²² and
- [iii] The Vision and Strategy, which is attached as Schedule 2 of the Settlement Act 2010, is Te Ture Whaimana o Te Awa o Waikato, and intended by Parliament to be the primary direction setting document for the Waikato River and activities within its catchment affecting the Waikato River.

[94] The Settlement Act inserted the Vision and Strategy for the Waikato River into the Operative Regional Policy Statement by operation of law and without the use of the Schedule 1 process.²³ Section 5 of the Settlement Act records that the Vision and Strategy is intended by Parliament to be the primary direction setting document for the Waikato River and activities within its catchment affecting the Waikato River. Clearly

²¹ Preamble

²² Section 3

²³ Section 11(1)



therefore the Vision and Strategy must be accorded importance in the current process. Under Section 67(3) of the Act:

- (3) A regional plan must give effect to—
...
(c) any regional policy statement.

[95] Variation 6 must therefore give effect to the Vision and Strategy. There was no argument in that regard.

[96] The Settlement Act requires that the Waikato Regional Policy Statement and the Waikato Regional Plan be reviewed in the very near future to ensure that those documents are consistent with, and give effect to, the Vision and Strategy respectively. The Settlement Act further makes it clear that Waikato-Tainui (through the Waikato Raupatu River Trust) is to be involved in all stages of that review.

[97] The Vision and Strategy lists the following 13 objectives for the Waikato River:

- A. The restoration and protection of the health and well-being of the Waikato River.
- B. The restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural and spiritual relationships.
- C. The restoration and protection of the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural and spiritual relationships.
- D. The restoration and protection of the relationships of the Waikato Region's communities with the Waikato River, including their economic, social, cultural and spiritual relationships.
- E. The integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River.
- F. The adoption of a precautionary approach towards decisions that may result in significant adverse effects on the Waikato River, and, in particular, those effects that threaten serious or irreversible damage to the Waikato River.

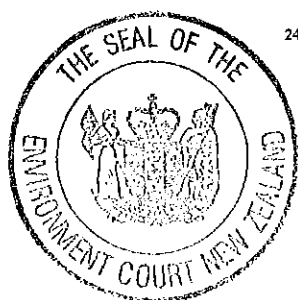


- G. The recognition and avoidance of adverse cumulative effects, and potential cumulative effects, of activities undertaken both on the Waikato River and within the catchment on the health and well-being of the Waikato River.
- H. The recognition that the Waikato River is degraded and should not be required to absorb further degradation as a result of human activities.
- I. The protection and enhancement of significant sites, fisheries, flora, and fauna.
- J. The recognition that the strategic importance of the Waikato River to New Zealand's social, cultural, environmental, and economic well-being requires the restoration and protection of the health and well-being of the Waikato River.
- K. The restoration of water quality within the Waikato River so that it is safe for people to swim in and take food from over its entire length.
- L. The promotion of improved access to the Waikato River to better enable sporting, recreational, and cultural opportunities.
- M. The application to the above of both maatauranga Maaori and the latest available scientific methods.

[98] The Waikato River runs through the rohe of Tuwharetoa, Te Arawa, Raukawa and Waikato-Tainui.²⁴ The Settlement Act is a settlement of Waikato-Tainui's Treaty Claim in respect of the river. It has formed a model for the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010. The latter Act does not settle the Treaty Claim of these three iwi in respect of the river, but it implements the identical co-management framework for the river as in the Settlement Act.

[99] The weight and importance accorded to the Vision and Strategy is considerable. In terms of Section 12(1) of the Settlement Act it prevails over any inconsistent provisions in any National Policy Statement or New Zealand Coastal Policy Statement. The Waikato Regional Council is precluded from reviewing or amending the Vision and Strategy under Section 79 of the Resource Management Act. A review can be undertaken only by the Waikato River Authority pursuant to Sections 18 - 20 of the Settlement Act

²⁴ Milne, opening submissions at [58]



and amended by the Governor-General by Order in Council only on the advice of the Minister under Section 21(3).

[100] The co-management regime established by the Settlement Act and the River Iwi Act is radically different to what hitherto existed under the Resource Management Act and what currently exists elsewhere in New Zealand. Parliament has accorded great weight and importance to the Vision and Strategy as the primary direction-setting document for the Waikato River catchment.

6 ISSUES

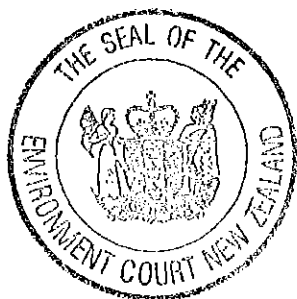
[101] It is in the context of the above background and relevant statutory provisions that we consider the contested issues. The contested issues changed in an iterative way during the course of the hearing as the Council made numerous amendments to the Variation in an endeavour to meet many of the valid concerns of the appellants. Mr Milne, in his closing submissions, comprehensively addressed what he considered to be the remaining contested issues. At the end of the hearing the Court issued a direction that any party who considered that the issues as identified by Mr Milne were either not accurate or incomplete, was to notify the Court. Several memoranda were received.

[102] The following contested issues were identified as a consequence of that process:

- [a] Issue 1 Can Section 14(3)(b) takes be constrained?

- [b] Issue 2 Protection of water for electricity generation and allocation preference
 - *Issue 2(i)* The degree of protection to be afforded electricity generation
 - *Issue 2(ii)* Genesis – increased priority for the Huntly Power Station

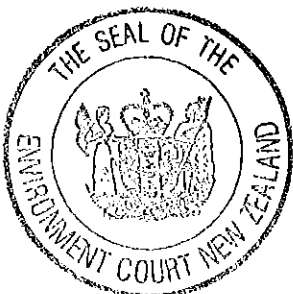
- [c] Issue 3 Policies
 - *Issue 3(i)* Adverse effects vs significant adverse effects – Policy 1(d)



- *Issue 3(ii)* Should the provisions relating to protection of electricity be more generic? – Policy 1A(e) and consequential provisions
- *Issue 3(iii)* Should there be a new standalone policy espousing the importance of renewable energy generation? – Proposed Policy 3A
- *Issue 3(iv)* Municipal supply takes – agricultural and industrial takes over 15m³/d – Policy 4
- *Issue 3(v)* Volumetric caps for agricultural and industrial municipal takes – Policy 4 and Rule 3.3.4.20
- *Issue 3(vi)* Secondary allocable flow and Waikato River tributaries above Karapiro – Table 3-5 and Policy 4
- *Issue 3(vii)* Priority for drought intolerant crops in time of shortage – Policy 14 and Standard 3.3.4.21
- *Issue 3(viii)* Consent Application Assessment Criteria – Surface Water & Groundwater - Policies 8 and 9
- *Issue 3(ix)* Restricting takes otherwise available to electricity generation - Policies 8(c) and 9(s)
- *Issue 3(x)* Management of Groundwater – Policy 9(sa)
- *Issue 3(xi)* Should there be policies directing decision-makers to generally not grant non-complying activity consents for the taking of surface water unless certain circumstances apply? Policies 9A and 9B
- *Issue 3(xii)* Should dairy farms be exempt from general rules that water take consents be for 15 years - Policy 11(a)(v)

[d] Issue 4 Rules and Standards

- *Issue 4(i)* Wairakei Pastoral – specific allocation rules
- *Issue 4(ii)* Winter takes above Karapiro – Restricted Discretionary Rule 3.3.4.15A
- *Issue 4(iii)* Should water transfers be made less restrictive? – Rule 3.4.4.3(i)



- *Issue 4(iv)* Nutrient Management Plans - Rule 3.4.5.6 and Rule 3.4.5.7
- *Issue 4(v)* Should flows be naturalised in the Waikato River below Lake Taupo? – Standard 3.3.4.21 and Method 3.3.4.6C
- *Issue 4(vi)* Should Table 3-5 have a cross-reference to Standard 3.3.4.21(f)?
- *Issue 4(vii)* Should water shortage restrictions apply to Genesis? Standard 3.3.4.21
- *Issue 4(viii)* Threshold Date – numerous policies and rules
- *Issue 4(ix)* Definitions
- *Issue 4(x)* Mighty River Power – addendum to closing submissions

[e] Issue 5 Iwi Issues

- Does Variation 6 give effect to the Vision and Strategy?
- Should there be preferential access to water for “iwi development”?
- Should rules providing for the transfer of water permits be included in Variation 6?

[103] We now propose to consider each of the above issues in the order set out. We do not address the non-contested aspects of the 8 August 2011 version of Variation 6. They are the result of an intensive and rigorous participatory process involving the parties and their experts. We are satisfied as to the integrity of that process which is reflected in the non-contested provisions of the Variation - provisions which exhibit a balancing of the statutory directions.



6.1 ISSUE 1 Can Section 14(3)(b) Takes Be Constrained?

[104] Section 14(3)(b) of the Act relevantly states:²⁵

14 Restrictions relating to water

...

- (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
- (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
 - (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
 - (i) an individual's reasonable domestic needs; or
 - (ii) the reasonable needs of an individual's animals for drinking water,—and the taking or use does not, or is not likely to, have an adverse effect on the environment;

[105] Section 14(3)(b) of the Act provides a statutory authorisation for the specified taking and using of water. The right to take is not absolute. The take or use must be *required*; the needs must be *reasonable*; and the taking or use does not, or is not likely to *have an adverse effect on the environment*.

[106] Under Variation 6, Section 14(3)(b) takes of surface water would be constrained by Policy 3(b) and Rule 3.3.4.16. Policy 3(b) states:

Except as provided for in Policy 4, the Waikato Regional Council will manage the allocation of surface water in catchments that do not exceed the combined primary and secondary allocable flows in Table 3-5 on a net take basis by:

...

- b) Classifying as a non-qualifying s14(3)(b) take and a discretionary activity any take which was not existing prior to 15 October 2008 and would otherwise be allowed by s14(3)(b) of the RMA, except that when assessed in combination with all other existing authorised water takes

²⁵ We quote the current wording from the 2009 Amendment, as it was not contested that the transitional section (s161) did not apply to non-process matters



within the same catchment, is for a rate greater than 100 percent of the primary allocable flow in Table 3-5.

[107] Rule 3.3.4.16 relevantly states:

3.3.4.16 Discretionary Activity Rule – Surface Water Takes

The taking of surface water that:

1. Is a non-qualifying s14(3)(b) take described in Policy 3(b);

...

is a discretionary activity (requiring resource consent) subject to the following standards and terms:

...

[108] The combined effect of Policy 3(b) and Rule 3.3.4.16 would be to constrain the statutory right to take without the need for a resource consent for all takes which, when assessed in combination with all other authorised takes within the same catchment, exceed 100% of the primary allocable flow in Table 3-5.

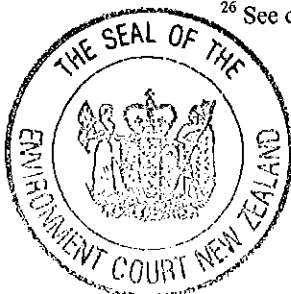
[109] Policy 5(a)(i) and (b), and Rule 3.3.4.18(1A) have a similar combined effect with respect to groundwater. Section 14(3)(b) takes from groundwater, when assessed in combination with all the other authorised takes within the same aquifer, which exceed the sustainable yield of that aquifer require a resource consent as a discretionary activity.

[110] For Wairakei Pastoral, Mr Daya-Winterbottom submitted that the constraint imposed on Section 14(3)(b) takes is ultra vires. He submitted that the power to include rules in the Regional Plan in relation to the taking of freshwater is subject to the matters governed by Section 14(3)(b) of the Act. This interpretation, he said, is underpinned by Section 30(4)(f) of the Act which provides, in relation to the regional council's ability to establish rules to allocate water that:

- (4) ...
- (f) the rule may allocate water ... as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e)

*[emphasis Mr Daya-Winterbottom]*²⁶

²⁶ See closing submissions [6] & [7]



[111] We reject that submission. We accept the submission of counsel for the respondent, Mr Milne, that the provisions are not ultra vires. The authorisation to take pursuant to Section 14(3)(b) is not unlimited. The taking or use must not have, or be likely to have, an adverse effect on the environment. There is no qualifier to “adverse effect” so, on the face of it, any effect which is greater than de minimis would be sufficient to terminate the statutory authorisation. The constraining provisions proposed in Variation 6 do not “*affect the activities authorised by s14(3)(b)*”. Rather, what they seek to do is define the point at which a take, that would otherwise be authorised under Section 14(3)(b), has, or is likely to have, an adverse effect, and hence fails to gain the statutory authorisation.

[112] Such an interpretation underlays good commonsense policy reasons. Those who would likely be affected by the rule would be people undertaking new dairy conversions since 15 October 2008, or increasing their stock numbers in catchments at or above full allocation. The position of all existing Section 14(3)(b) takes as at 15 October 2008 is protected. Converting a forestry or dry-stock property to a dairy farm is a capital intensive exercise. It is preferable for would be converters to have a clear statement in the Plan of the respondent’s position on when Section 14(3)(b) takes have, or will likely have, an adverse effect and hence lose their statutory authorisation, rather than leaving that to the vagaries of possible enforcement action.

[113] Counsel for Wairakei Pastoral also referred to the position at common law and to the right to take and use water for animal needs being preserved by Section 21 of the former Water and Soil Conservation Act 1967. Be that as it may, the common law has been overridden by the provisions of the RMA which have replaced the 1967 Act with the more restrictive Section 14(3)(b).

[114] Mr Hassan, counsel for the Agricultural Working Group, in his closing submissions, advised that the residual issue for his client is what triggers stock drinking water takes to become discretionary activities in terms of Policy 3 and Rule 3.3.4.16. As we have said, the combined effect of Policy 3 and Rule 3.3.4.16 is that such takes would be caught by the rule if they, in combination with all other existing authorised takes in the same catchment, exceed the primary allocable flow in Table 3-5.

[115] Mr Willis, who gave planning evidence for the Agricultural Working Group, proposed that such accounting should be done only by reference to the combined effect of



new and existing Section 14(3)(b) takes. In our view that would not be appropriate. Such an approach would extend the threshold considerably and we received no hydrological evidence that such a proposal would provide any realistic limit at all.²⁷ In any event, it would exclude from consideration the cumulative effect of Section 14(3)(b) takes with other existing authorised takes in the same catchment.

[116] We thus reject Mr Willis' proposal.

6.2 ISSUE 2 Protection of water for electricity generation and allocation preference

Introduction

[117] Variation 6 contains a number of provisions that give protection to existing electricity generation. Mighty River Power operates the control gates on Lake Taupo and a chain of eight hydro dams and nine power stations on the Waikato River down to Karapiro. Between the control gates and the first of these dams, Contact Energy discharges approximately 1.1m³/s from Wairakei Power Station, which will reduce to 0.5m³/s by 2017. Downstream from Karapiro, Genesis operates the Huntly Power Station which relies on cooling water from the river.

[118] Because of the contribution which these power stations make to New Zealand's energy supply, as detailed in the evidence of Might River Power and Genesis, the Council has accorded protection to them. The degree of protection afforded in the Variation has been disputed by the agricultural users as it effectively limits any future additional abstraction for agricultural uses.

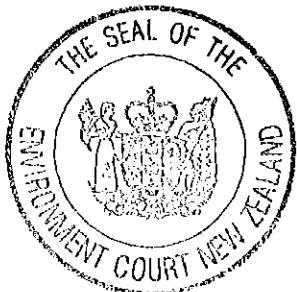
Issue 2(i) The Degree of Protection to be afforded Electricity Generation

[119] Variation 6 affords priority to electricity generation by:

- [a] Fixing the primary allocable flow at Karapiro at 3.6% of Q₅.²⁸ This figure is derived from an assessment of all takes of water from the Waikato River

²⁷ Milne, closing submissions [54] & [55]

²⁸ Policy 1A(e)



above Karapiro, together with a small future allocation for the conversion of land to dairying;

- [b] Having no secondary allocable flow above Karapiro;²⁹
- [c] Strong policy direction that generally non-complying activity applications for takes shall not be granted unless the take achieves a higher level of electricity generation than would otherwise be achieved were the consent declined.³⁰

In reality, the Waikato Hydro Power Scheme uses all the water remaining in the river, that is after any water that is authorised to be taken from within the primary allocable flow has been abstracted – a primary allocable flow that is on the cusp of full allocation.

Appellants' Relief

[120] Wairakei Pastoral seeks that the proposed allocable flow above Karapiro should be increased from 3.6% of Q_5 to 4.5% of Q_5 to provide for pasture irrigation, either by amending the primary allocable flow or by providing for a secondary flow.

[121] Wairakei Pastoral also seeks that the proposed allocable flow above Karapiro should be increased by 0.08% of Q_5 to provide animal usage water for 25,000 ha of forest to dairy conversion.

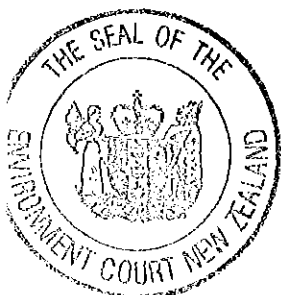
[122] Wairakei Pastoral thus seeks a total increase of the allocable flow to 4.58% of Q_5 .

[123] The Agricultural Working Group seeks to increase the primary allocable flow by 0.4% (i.e. from 3.6% to 4% of Q_5). This is to enable new dairy investment above Karapiro through non-irrigated conversions.

[124] A second adjustment is sought to provide for a secondary allocable flow of 3% of Q_5 . This secondary allocable flow would provide opportunity for other consumptive uses

²⁹ Table 3-5

³⁰ Polices 9A & 9B



to be considered on their merits by reference to Objective 3.3.2 and relevant policies, in accordance with the Variation rules.

[125] Wairarapa Moana also seek an increase in allocable flows to 7% of Q_5 at Karapiro.

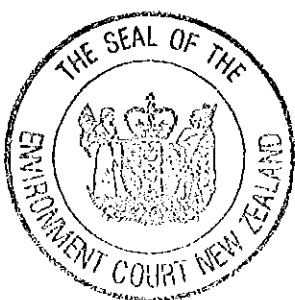
[126] The total increase of allocable flows sought is to 7% of Q_5 at Karapiro. This figure is the hydrological limit available. This is so because any increase of the Q_5 at Karapiro beyond 7% could not be utilised, as to do so would result in a breach of the cumulative primary allocation at the river mouth of the Waikato River, which is set at 10% of Q_5 .

[127] The increase in allocable flows above Karapiro were sought, but not limited, to provide for potential consumptive takes for increased dairy production. Underlying the relief sought was the accepted premise of the importance of the dairy industry to the economic and social welfare of the region and New Zealand.

[128] We thus heard a substantial quantity of evidence on the benefits of dairying on the one hand, and electricity generation on the other. There was much argument and counter-argument as to their respective importance and significance, both nationally and regionally.

[129] We propose to discuss this evidence in the following sections of this decision. The evidence highlighted to us that competing users of the resource can each have significant national and regional contributions that give rise to tensions as between many of the Part 2 matters.

[130] While the debate focussed on dairy vs electricity, we consider this to be too narrow. The real issue is whether the water in the Waikato River above Karapiro should be more liberally freed up to enable uses other than for electricity generation – rather than effectively locking up all of the available water above 3.6% of Q_5 exclusively for electricity generation.



The Problem – Lost Generation

[131] The debate arises because every litre of water taken above Lake Karapiro for a consumptive use is not available for electricity generation. This is the central core of the concern of Might River Power.

[132] A number of the hydrological expert witnesses carried out various modelling scenarios to assess the generation loss of takes above 3.6% of Q_5 above Karapiro. These modelling scenarios were carried out by Mr Williamson (called by Wairakei Pastoral), Mr Woods (called by the Council), Mr Henderson (called by Mighty River Power), and Mr Cussins (called by Agricultural Working Group). Their estimates of foregone generation arising from their modelling results varied. Following a caucus meeting of all of the hydrologists, a joint statement was signed and issued dated 24 January 2010. Paragraphs [11.2] - [11.4] of that statement are relevant. We set them out in full:

11.2 Modelling results

Williamson, Para 17.1-17.45 EIC, 4.14-4.26 & 4.68-4.84 Rebuttal

Woods, Para 52 EIC, 4-7 & 16-23 Rebuttal

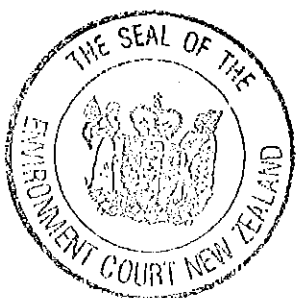
Henderson, Para 4.1-4.24 EIC, 8.1-8.4 Rebuttal

Cussins, Para 47-52 Rebuttal

Different modelling approaches have resulted in broadly similar estimates of foregone generation where the base assumptions are similar (fraction of Q_5 to be allocated, area to be irrigated, locations of irrigated land, values of other water use allocations). Appendix 4, Figure 4 Henderson EIC (Excluding the "simple" Henderson scenario), Henderson rebuttal Para 8.1 and Williamson Table 3 (rebuttal page 29).

Disagreement remains about the precise magnitude of the foregone generation across all the scenarios. However, the witnesses agree that the upper bound of foregone generation for various allocation scenarios, assuming all abstraction occurs upstream of all power stations on the Waikato Hydropower System, and is all year around, is as follows:

Table: Upper bounds of foregone flow and generation for the Waikato River above Karapiro Dam.



% of Q ₅ allocated	Upper bound of % reduction in mean annual flow (245.3 m ³ /s) at Karapiro	Upper bound of % reduction in mean annual generation for MRP	Consequential conversion to GWh/y
3.6	0	0	
5.0	0.8	1	40 GWh/y
7.5	2.3	2.9	116 GWh/y
10	3.8	4.7	188 GWh/y
15	6.8	8.4	336 GWh/y

Note: The reason the percentage reduction in generation forgone is greater than the percentage reduction in flow is because the flow reduction is calculated on the mean annual flow at Karapiro, while the generation has been calculated from the mean flow at each station. Thus the reduction in flow is a bigger fraction of the mean flow at the dams further up the river, than if calculated at Karapiro.

[conversion column has been added]

11.3 Effects on minimum flow at Karapiro Dam.

Woods, Para 16-23 Rebuttal

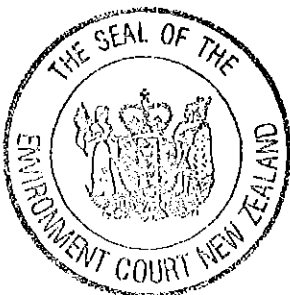
Brown, Para 95, 97 EIC, 68 Rebuttal

Henderson, Para 5.1 & Table 2, 7.2, 7.5 EIC

Williamson, Para 4.20 & 4.81-4.131 Rebuttal

Witnesses agree increased abstraction would result in more occasions when Karapiro flows are at minimum. Flows below minimum at Karapiro will occur during prolonged dry conditions when Taupo is also below minimum level (355.85 masl) and the sum of catchment inflows (including Lake Taupo and inflows to all hydro reservoirs) are below 140 m³/s – refer to condition 4.6 of MRP consent (105227) for full details. This is a very rare event (see Figure 7 of Hunter's EIC, which shows no occurrences of Lake Taupo receding below minimum control level since it was instituted in 1941 with the construction of the outlet Control Gates. MRP manages Lake Taupo to avoid the extremes of the range (Hunter EIC Paragraph 7.15).

There was disagreement about the frequency or likelihood of flows receding below minimum (140 m³/s) at Karapiro under the various allocation scenarios considered in evidence (i.e. up to 15% Q₅).



11.4 From a water balance perspective, what degree of ability do MRP have to move water from one season to another?

Woods, Para 22, 67 EIC, 8-9 Rebuttal

Williamson, Para 10.3, Figure 3 EIC (page 19), 4.132-4.133 Rebuttal

The context of Woods Para 67 (EIC) is the inability of the generator to move a significant proportion of its generation from one season to another. This does not relate to the technical feasibility of MRP to augment summer outflows to meet summer consumptive uses. Both witnesses agree with this.

[133] It was confirmed through cross-examination that the “upper bounds” are in respect of a “worst case” scenario, because it is unlikely that all abstractions would access upstream of all the power stations or all year round.³¹

[134] We do not propose to discuss the sometimes conflicting evidence relating to the different modelling approaches used by the expert witnesses. They are underlain by multiple uncertainties that cannot easily be distilled. Therefore, we propose to use the upper bounds as set out in the table in the caucusing statement. We bear in mind that they are upper bounds, and in reality the loss of electricity generation is likely to be significantly less. For example, Mr Henderson, a witness for Mighty River Power, gave evidence of the results of his modelling the effects of potential water abstraction on the consequent potential annual loss of electricity generation from the Waikato Hydro System. His model used actual daily mean flows at each dam and the daily mean generation values over the period 1 July 1992 – 30 June 2008. Under his SW-EQ³² scenario at 5% of Q₅ the long term average MW loss of the Waikato River Hydro Scheme, with variable monthly take for irrigation on irrigable areas, would be 1.584 MW or 14GWh/yr.

[135] We acknowledge that the “*upper bound*” figures for the Waikato Hydro Scheme need to be considered together with paragraph [11.3] of the caucusing statement. Flows below the minimum set at Karapiro will occur more often during prolonged dry

³¹ Woods, Cross-examination transcript at [26], lines 8 – 13; Collins, Cross-examination transcript at [1068], lines 39 - 45

³² Henderson, EIC, Appendix 4, Scenario SW-EQ (water is extracted preferentially from surface water and irrigation is equally shared between catchment by flow) also Energy Caucusing Statement at [12]



conditions. This will have a constraining effect on the operations of both the Waikato Hydro Scheme and the Huntly Power Station.

[136] As for the Waikato Hydro Scheme, Dr Brown gave examples of when demand is not easily met in Figure 18 of his evidence-in-chief and Figure 2 of his additional rebuttal.

[137] Dr Keller modelled the generation loss at Huntly that could have occurred each year from 2000 – 2010, as a result of further allocation above the Karapiro Dam.³³ This evidence was not contested. We discuss in some detail the effects of reduced flow on the Huntly Power Station later in the decision.³⁴ We put this in the mix of evidence to be weighted and balanced on this important issue.

Replacement of Lost Electricity Generation

[138] Any electricity generation that is lost will have to be replaced. There was a suggestion by Mr Daya-Winterbottom that any lost generation could be sourced from spare capacity in various co-generation plants, particularly Southdown. This was put to Mr Torrens of the Energy Efficiency and Conservation Authority and he responded:³⁵

... In the short term, if they do have spare capacity they may be able to replace lost generation. I would – so in the case of Southdown there obviously is spare capacity there because they do fluctuate up and down to meet dry years. I'm not quite sure if that would be the case for other co-generation plants because there is not enough of those particular plants.

[139] And in response to a question from the Court regarding the long-term situation, Mr Torrens replied:³⁶

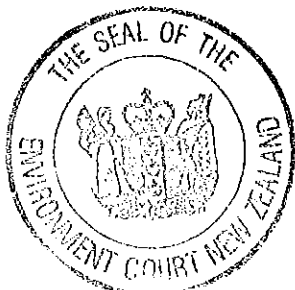
... In the long term – so I guess what I am saying there that if you wanted to retain your security of supply margins to deal with adverse events impacting the electricity supply market, you are eventually going to have to replace any generation that is lost or any demand that is – any new demand that is brought onto the system. So in the long term you would have to replace – you would have to put on new generation. Yes, I guess that's what I mean.

³³ Keller, EIC at [3.3] – [3.12]

³⁴ In the section headed “Issue 2(ii) Genesis – Increased priority for the Huntly Power Station”

³⁵ Transcript at 193 - 194

³⁶ Transcript at 194



[140] In his rebuttal evidence, Mr Torrens concluded that lost generation from the Waikato Hydro System would only be partially able to be replaced by geothermal or wind generation, neither of which offers the same flexibility to respond to rapid changes in electricity demand.³⁷ Furthermore, new generation is likely to cost more than the lost generation.³⁸

[141] We therefore conclude, that in the long-term at least, any lost generation will have to be made up with new generation, part of which is likely to be thermal generation.

The Importance of Electricity

[142] Electricity is an essential non-substitutional commodity. New Zealand's economic and social well-being are inextricably dependent on a secure and cost-effective electricity supply system.

[143] Most of the electricity generation that occurs in the Waikato region is centred around the Waikato River catchment. The Waikato River's headwaters drain the central volcanic plateau. The river starts as small streams on the east side of Mt Ruapehu. These streams join the Tongariro River which is the largest tributary of Lake Taupo.

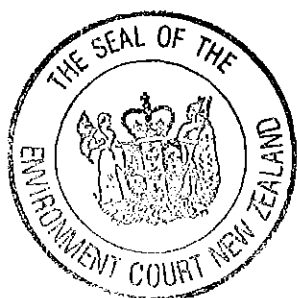
[144] The Waikato River flows out of Lake Taupo, is joined by the Waipa River at Ngaruawahia, and discharges into the Tasman Sea at Port Waikato. It drains a natural catchment of approximately 14,443 km². The catchment also includes the diversion associated with the Tongariro Power Scheme, which adds another 654 km² to the overall catchment, increasing the Waikato River flow by approximately 19% at the Taupo control gates.³⁹

[145] The water is utilized in-stream for hydro-electric power and out of stream for geothermal and thermal power. By far the largest utilisation of in-stream use is for the Waikato Hydro Scheme operated by Mighty River Power. The scheme consists of eight dams and nine power stations operated in a closely integrated manner to maximise the

³⁷ At [9]

³⁸ At [7]

³⁹ See Woods, EIC at [10] and following



value, in terms of electricity generation, to be gained from the available fall between the Taupo control gates and Lake Karapiro.

[146] The nine power stations together produced an average output for the financial years 2000 – 2007 of 40,000 GWh.⁴⁰

[147] Mighty River Power also operates a number of geothermal power stations which are owned and/or operated in conjunction with Maori land trusts, including Rotokawa, Nga Awa Purua, Mokai and Kawerau. It also operates a gas powered fire station at Southdown, Auckland.

[148] Within the Waikato region, Genesis generates electricity at the Huntly Power Station and key elements of the station comprise:

- [a] Four (nominal) 250 MW coal or gas units (Units 1 – 4);
- [b] One (nominal) 400 MW combined cycle gas unit (Unit 5); and
- [c] One (nominal) 48 MW open cycle gas unit (Unit 6).

[149] In their evidence, Messrs Weir and Truesdale (both called by Genesis) explained the significant role of the Huntly Power Station as a demand load operator producing approximately 15.5% of New Zealand's installed generation capacity.⁴¹ The station has a strategic location and plays a significant role in the electricity system by providing a firm and controllable generating capacity, making important contributions to peak and general energy supply requirements.⁴² It plays a valuable role in managing New Zealand's vulnerability to dry weather.

[150] Trustpower owns and operates a small scheme on the Hinemaia River, a tributary of Lake Taupo. The output of approximately 29.3 KW/h is for local supply.

⁴⁰ See Hunter, EIC at [6.9] and Table 1

⁴¹ Weir, EIC at [6.2]

⁴² Weir, EIC at [6.8] – [6.28] and Truesdale, EIC at [71] – [74]



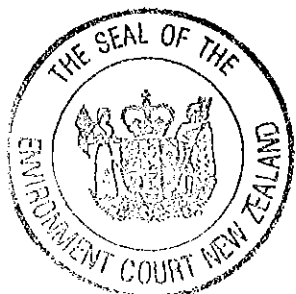
[151] Within the Waikato region, Contact Energy operates a number of power stations. It's facilities are principally geothermally-based. It operates the Wairakei Power Station, the Wairakei Binary Plant, the Poihipi Power Station, and the Te Huka Power Station on the Wairakei/Tauhara geothermal system near Taupo. The plants have a continuous output of approximately 230 MW. Contact also operates the Ohaaki Power Station on the Ohaaki geothermal field. It has a continuous output of approximately 43 MW. It owns and operates the Te Rapa Co-Generation Plant in association with Fonterra at the Te Rapa dairy factory. That plant generates around 41 MW of electricity. Collectively, Contact's geothermal power stations produce around 2,250 MW/year. Contact also holds resource consents to construct geothermal power stations at Te Mihi and Tauhara.

[152] Contact holds resource consents to take volumes of water for cooling and other plant purposes, and to discharge geothermal condensate back into the Waikato River. Overall, Contact is a net contributor of water volume to the Waikato River catchment, although the extent to which this is the case will reduce over time.

[153] The above synopsis clearly shows the importance of electricity generation to the region. As we have said, electricity is a vital resource to New Zealand. That this is so, is recognised by the strong directions in the Act relating to electricity generation, and in particular, renewable energy. These strong directions are complemented by equally strong directions in the relevant regional statutory instruments and particularly in the recent National Policy Statement for Renewable Energy.

[154] Variation 6, as first promulgated, contained provisions which recognised the importance of the Waikato River and the Waikato Hydro and Huntly Power Stations. The Council in its decision on Variation 6 also recognised the importance and national significance of both. It is in recognition of the importance of electricity generation that Variation 6 as proposed has settled the allocation of water above Karapiro at 3.6% of Q₅.

[155] The strong policies proposed to support the electricity protection regime would effectively mean that no more water could be drawn for consumptive use above Karapiro, and if Genesis succeeds with their relief, above Huntly including within the Waipa catchment.



Mighty River Power's Resource Consents

[156] The current resource consents to enable Mighty River Power to operate the Waikato Hydro Scheme were granted in 2006 and came into force on 12 April 2006. The consents expire 35 years from their commencement. The central consent for the hydro operation is Consent 105227, which authorises the company:

To dam the Waikato River and divert and take water (including any energy or material included therein), from the Waikato River, for water level control, generation of hydro-electricity, and operation of the Waikato hydro system.

[157] The purpose of the consents is expressed in the following terms:

- 1.1 These consents authorise damming, diversion and discharge of the full available flow of the Waikato River.

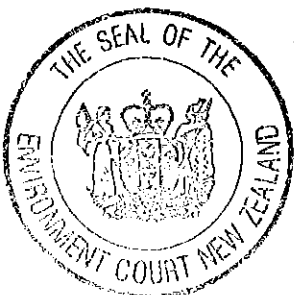
[158] In his opening submissions, Mr Cowper, relying on *Aoraki*⁴³ had this to say:

It is respectfully submitted:

- a) that the Waikato Hydro Scheme is an existing consented operation, to which regard must be had in the setting of the objectives, policies and rules in this Plan;
- b) that the consents granted to the Waikato Hydro Scheme reflect the national importance of the river system for the generation of electricity from a renewable resource;
- c) that it is not appropriate to derogate from the resource consents that are already granted to Mighty River Power for the Waikato Hydro Scheme;
- d) that it is important to maximise the achievable benefits of the existing infrastructure that is located within the river.

[159] We disagree with those aspects of the above quote that refer to the derogation from the resource consent that would occur if the relief sought by Wairakei Pastoral and the Agricultural Working Group were granted in whole or in part. We agree with Mr Milne and Mr Hassan, that *Aoraki* is distinguishable in that Mighty River Power's consent does not allocate a specific amount of water, as was the case in *Aoraki*.

⁴³ *Aoraki Water Trust v Meridian Energy*, [2005] NZRMA 251



[160] We also agree with Mr Milne that the words “*the full available flow of*” means something less than “*the full flow of*”. The word “*available*” adds the qualification to the word “*full*”. Such an interpretation is clearly consistent with the plain ordinary meaning of the words.

[161] Water is a public resource which the Act applies clear allocation restrictions and principles to. We are of the view that any exclusive take and use right should be clearly conferred by a consent in clear and unambiguous language within the parameters of an application.

[162] We accordingly find, that Mighty River Power’s consents do not confer a right to a physical allocation of water in the sense of granting rights to defined maximum rates and quantities of water. Hence, increasing the allocable flow is not precluded by non-derogation principles, nor by Section 34 of the Act.

The Importance of Agriculture

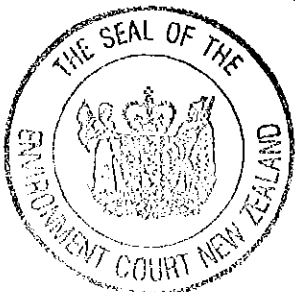
[163] Just as the importance of electricity to New Zealand was accepted by the parties, so the importance of agriculture, and in particular dairying, to the New Zealand economy at a local, regional, and national level, was accepted. We heard undisputed evidence to this effect. Mr Newland told us that currently dairying accounts for approximately 25% of New Zealand’s total export earnings.⁴⁴ The Waikato contains approximately 34.6% (3,653) of Fonterra supply farms⁴⁵ and 29% (1.2m) of the total number of cows. In addition, a number of farms supply Tatua Dairy and Open Country Dairy, two independent processing companies in the Waikato.

[164] The Waikato suppliers to Fonterra produced 373 million kgs of milk solids in the drought affected 2009/2010, or 29% of total domestic production. At the payout level announced by Fonterra on 23 September 2010⁴⁶ this would introduce to the Waikato regional economy a farm-gate value of \$2.47 billion.

⁴⁴ Newland (employed by Fonterra and called by the Agricultural Working Group), EIC at [13] and following

⁴⁵ Based on Fonterra’s supply figures which accounts for 91% of New Zealand’s dairy production

⁴⁶ NZ \$6.70/kg milk solids



[165] Using similar figures and other statistical data, Dr Layton expanded on the economic implications for the national, regional, and local economies.⁴⁷ This evidence was uncontested and underlays the importance of agriculture in general, and particularly dairying in the Waikato, to New Zealand's economic performance. Dr Layton, and indeed other witnesses, emphasised the flow-on effects of agriculture. This includes the economic activity involved in processing the raw material produced on farms, not to mention the other support industries involved in supplying transportation, financing, marketing, wholesaling and retailing.

[166] Dr Layton said, that the importance of water for agricultural products and processing is obvious:⁴⁸

- [i] It is needed for grass and crops to grow;
- [ii] It is essential for drinking water;
- [iii] It is needed for washing down milking sheds, milking equipment, and dairy cows;
- [iv] It is important for cooling milk; and
- [v] It is essential for maintaining food hygiene.

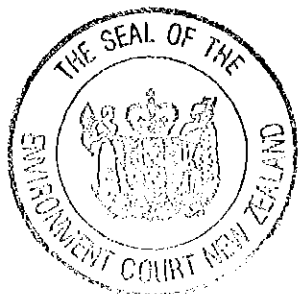
[167] Mr Newland, Mr Bennett and Mr Houghton in their evidence, confirmed that water is critical to agriculture, and more specifically dairy production. It is necessary for stock to drink and for the hygienic collection and primary processing of milk and dairy products.⁴⁹ It is also required for the growth of the feed that dairy cows consume.⁵⁰

⁴⁷ Layton, (called by the Agricultural Working Group), EIC at [31] – [50]

⁴⁸ Layton, EIC at [51]

⁴⁹ Newland, EIC at [40]

⁵⁰ Newland, EIC at [41]



Irrigation

[168] That water for irrigation can also produce a very significant increase in the output and returns from agricultural production was not contested. This was clearly illustrated in the evidence of Dr Rout, called by the Regional Council. Dr Rout told us, that based on a 2003 study of irrigation systems in the Reporoa area and taking into consideration changes in the payout and inflation in the intervening years, the marginal benefit of irrigation for dairying in the upper Waikato is typically of the order of \$470 - \$600 per hectare, depending on the type of irrigation system. For other irrigated crops, such as market gardening and with the use of spray-gun irrigators, generally the returns per unit area for vegetable crops are 2 – 3 times higher per unit area than for dairying.⁵¹

[169] Mr Newland, called by the Agricultural Working Group, told us that if dairy production is to be maintained at current levels within the Waikato region, some potential for growth in dairying land area would be required.⁵² He told us that growth in agricultural production in the Waikato catchment would occur where the land was most suitable for it to occur, either due to physical or economic characteristics. He expected that most of the irrigation growth in the Waikato catchment is likely to occur in the area above the Karapiro Dam because of the significant irrigation responses obtained on the volcanic soils with low levels of readily available moisture.⁵³

[170] He contrasted this with the Waikato catchment below Karapiro, which is mature dairying country and unlikely to respond to irrigation to the same extent as the volcanic land in the upper Waikato.

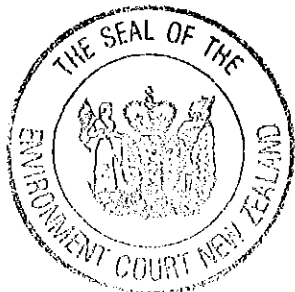
[171] In terms of the land above Karapiro, Mr Newland explained that there is 120,000 ha of suitable land where dairying could occur without irrigation in the Waikato River catchment between the Taupo control gates and Lake Karapiro. He explained that of this, some 9,000 ha would benefit from irrigation.⁵⁴ In his Appendix 4 to his evidence-in-chief, Mr Newland provided a breakdown of what is sought by the Agricultural Working Group by way of an increase in allocable flow above Karapiro.

⁵¹ Rout, EIC at [10] and [12]

⁵² Newland, EIC at [26]

⁵³ Rebuttal at [26] and [54]

⁵⁴ Rebuttal at [27] and [158]



[172] Mr Newland opined that when comparing the increase in value between potential water use below and above Karapiro, it is not simply a question of comparing irrigated dairying below and above Karapiro Dam. Consideration of the ability to provide for new dairying to occur is also relevant.⁵⁵ The economic returns that will result from the conversion of existing forestry and dry-stock land above Karapiro to dairy production would be significantly greater than those associated with the irrigation of existing dairy farms below Karapiro, if there was such a demand. The opportunity for such conversions to occur below Karapiro simply does not exist in any significant way, as there are no large areas of suitable forestry (or other) land for conversions.⁵⁶

[173] In essence therefore, keeping allocable flow above Karapiro at 3.6% of Q_5 would in effect deny investment opportunity for the dairy sector in the upper Waikato catchment.

[174] Mr Cowper and Mr Milne both emphasised that water is needed below Karapiro for horticulture. They said that taking water above Karapiro will reduce the amount of water available for a potential increase in downstream abstraction for horticulture.

[175] We received no direct expert evidence as to the potential extent or likely location of any use of water for horticulture below Karapiro. Mr Balle confirmed in cross-examination by Mr Cowper that the requirement for water in the stretch between Karapiro and the mouth of the river for the irrigation of land and crops by horticultural growers exists now and will be more so in the future.⁵⁷ That evidence was not challenged. However, there was no evidence before us as to the potential extent or likely location of any such future use for horticulture below Karapiro, or whether such need could be, or is, best met by surface or ground water.

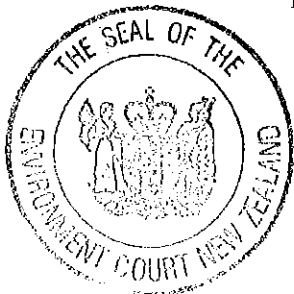
The Economic Evidence

[176] It was in the context of the above background that we heard a considerable amount of expert economic evidence from six economists. Five prepared written evidence-in-chief and also lodged rebuttal evidence. One, Professor Sharp, called by the

⁵⁵ Supplementary evidence at [13]

⁵⁶ Supplementary evidence at [14] & [15]

⁵⁷ Balle (called by Horticulture NZ), transcript at 1207, line 44 – 1208, line 29



Council, filed rebuttal evidence only, which consisted of comments on the evidence of the other five economic witnesses. All were cross-examined.

[177] There has been considerable debate about the extent of the relevance of economic evidence under the Act. Economic evidence can cover a wide spectrum. It can address macro and micro economic considerations. It can address international, national, regional and local economic considerations. It can provide an in-depth cost/benefit analysis as to the use of alternative sites or methods, or as to doing or not doing something. These examples are by no means exhaustive.

[178] Clearly, the Act is concerned with economic effects. The term “*environment*” is defined in Section 2 of the Act as including:

environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, *economic*, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters

[highlighting in italics added]

[179] It follows from this definition that the social, economic, aesthetic, and cultural conditions which affect people and communities are relevant for the purposes of Section 5(2)(c) and Section 104(1)(a) of the Act. In addition, Section 5(2) of the Act refers to the management of:

- (2) ... resources in a way ... which enables people and communities to provide for their social, *economic*, and cultural well-being and for their health and safety ...

while meeting the three constraints set out in (a), (b) and (c).⁵⁸

⁵⁸ See *Environmental and Resource Management Law*, 3rd edition, Derek Nolan, at [3.29]



[180] Economic considerations are also relevant to some of the statutory directions set out in the Act and, with respect to policy statements and plans, in the First Schedule. For example, the efficient use of natural and physical resources has an economic component. Economic efficiency may in appropriate cases be a factor in Sections 29, 32, and 108 of the Act.

[181] Thus, there can be no doubt that the Act includes economic considerations. But the manner in which such considerations are to be taken into account is sometimes complex and depends on the nature of each individual case. Economics is just one of the various threads discernable in the Act which contributes to the attainment of sustainable management.

[182] In the present case, we were confronted with a large amount of economic evidence. Its complexity was compounded by the fact that different methodologies were employed and there was no consensus as to the appropriate base data. While the witnesses caucused as directed, the caucus statement identified relatively few points on which the witnesses agreed, nor did it set out succinctly the areas of disagreement and the reasons why.

[183] A further problem was that the economic expert witnesses addressed their respective client's briefs. The briefs were not the same. For example, Dr Layton's instructions were:⁵⁹

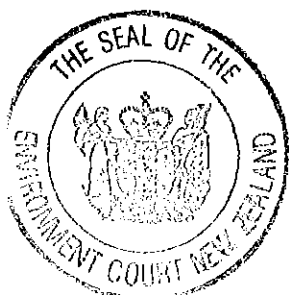
... to provide evidence on the role of agriculture in the Waikato economy and its contribution to the wider New Zealand economy and the importance of water to agriculture. I have also been asked to provide evidence on whether elements of the Waikato Regional Council's (the Regional Council's) decision on Variation 6 to the proposed Waikato Regional Plan (Variation 6), which relates to water allocation, will promote economic inefficiency.

[184] By contrast, Mr Murray's instructions included:⁶⁰

1.14 In Section Four of my evidence I assess the effects of an alternative allocation objective relative to the Regional Council's allocation objective using the criteria established by Part 2 of the RMA. I provide quantitative estimates and/or qualitative descriptions of these relative effects.

⁵⁹ Layton, EIC at [5]

⁶⁰ Murray (called by Mighty River Power), EIC at [1.14]



[185] If economic evidence is to assist the Court, the issues to be addressed have to be clearly identified, either by agreement between the parties or the economic experts. The economists should then meet to endeavour to determine the appropriate economic methods or approaches which should be applied when addressing the identified issues. This reflects the Code of Practice.⁶¹

[186] As the key issue of contention addressed in the evidence is the use of available water for agricultural production as opposed to existing electricity generation, the economic experts tended to address one or both of these and the end uses. Both of these end uses have significant economic value.

[187] Dr Layton⁶², called by the Agricultural Working Group, provided estimates that agriculture contributes approximately 17% to New Zealand's GDP. As a percentage of merchandisable exports, agriculture is shown to account for approximately 50%; the contribution of dairy products is in the order of 14% - 21%. The Waikato region is the most significant region for agriculture in New Zealand with nearly 32% of New Zealand's dairy output coming from the Waikato region. Dr Layton concluded that the high value of water and agricultural uses should be recognised and, accordingly, amendments should be made to the Policy Statement and Rules in Variation 6 to reflect this.

[188] Dr Wheeler⁶³, called by the Municipal Users Group, highlighted the significance of water allocation in respect of electricity generation, noting that Mighty River Power's facilities generate 22% of New Zealand's peak electricity demand. He also opined that the social and economic structure in the Waikato region is dominated by the presence and growth rates of the primary sector and urban population. The result of this is that it is important that the Variation sets ground rules which facilitate efficient use for a wide variety of heterogeneous and rapidly changing uses of water.⁶⁴

⁶¹ Code of Practice 5.6.2 which requires expert witnesses during caucusing to identify the issues that are agreed between them and to identify the issues upon which they cannot agree and the reasons for their disagreement.

⁶² Layton, EIC at [35]

⁶³ Wheeler, EIC at [3.18]

⁶⁴ Wheeler, EIC at [2.13]



[189] He noted that the growth and performance of the primary sector is inextricably linked to urban and rural population clusters and their sound social and economic development, given that they are suppliers of labour and numerous intermediate inputs to primary sector economic activity. Thus, the obligations of municipal authorities to provide services, including supply of water, are in this sense an obligation generated by the primary sector.⁶⁵

[190] The key conclusion to be drawn from Dr Wheeler's analysis is that the GDP contribution of urban areas in the region is large (at 41%) and well ahead of agriculture (13%) and energy (12%). Thus, at the very least, rural and urban economies are co-mingled and interdependent, and comparisons of the economic value of units of water for rural and urban uses must take these factors into account.

[191] Both Mr Murray, called by Mighty River Power, and Professor Evans, called by Wairakei Pastoral, undertook a more narrow economic approach. They undertook a cost/benefit analysis of allocating some of the water in the Waikato River above Karapiro to hydro-electricity generation compared with allocating it to irrigation for dairying. Mr Murray in his evidence-in-chief estimated that the annual quantifiable cost in a *mean* year of taking up to 10% of Q₅ during the irrigation season, to provide for a potential increase in irrigation in the Waikato catchment above Karapiro, is \$900,000.⁶⁶

[192] Professor Evans in his evidence-in-chief estimated that after taking into account the effects of environmental externalities, the net present benefit to New Zealand as a whole of applying one additional cumec of water from the upper Waikato River to irrigated dairying instead of electricity generation, is \$44.5m.⁶⁷

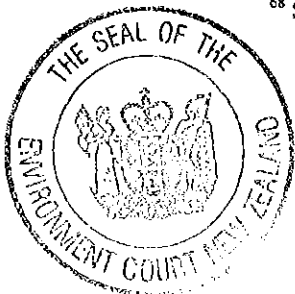
[193] According to Dr Sharp, the analysis presented by Mr Murray, and which is based on 10% of Q₅ being taken for consumptive use above Karapiro, will be sufficient to irrigate 45,900 ha, provided water is taken just for the irrigation season.⁶⁸ Dr Sharp scaled up Professor Evans' scenario (1m³/s irrigating an additional 4,320 ha) to 10% of Q₅ and concluded that this would be sufficient to irrigate an additional 40,920 ha of land.

⁶⁵ Wheeler, EIC at [2.17]

⁶⁶ Murray, EIC at [4.84]

⁶⁷ Evans, EIC, at [5.16]

⁶⁸ Sharp, EIC, at [35]



Thus, for comparison purposes, the land/water relationship in Professor Evan's scenario is within approximately 10% of that assessed in Mr Murray's analysis. Notwithstanding, the conclusions of Mr Murray and Professor Evans are in considerable conflict with one another.

[194] Dr Sharp analysed in some detail and produced a table⁶⁹ comparing the two cost/benefit analyses. We reproduce that table here:

Table 2: Comparison of Cost Benefit Analyses

	Dr Evans	Mr Murray
Increase in stocking rate	0.36 cows/ha	0.40 cows/ha
Milk price \$5.58/kgMS	\$5.58/kgMS	\$6.10/kgMS
Production displaced below Karapiro	Not included	\$14m/year
Carbon price	NZ\$25	NZ\$19.46
Change in GHG emissions	Included	Included
External costs of dairy	\$35/ha	Discussed
Electricity lost (per m^3/s) ²⁵	6.95GWh	3.58GWh
Annual cost of replacing electricity lost (per m^3/s) ²⁶	\$0.55m/year	\$0.36m/year
Present value of net benefits	\$44.5m	
Present value of net benefits/hectare	\$10,292	
Present value of net benefits/ m^3	\$2.86	

[195] This table highlights the similarities and differences between their economic assessments. The most striking difference is the inclusion of the value of production displaced below Karapiro and the calculated economic benefits that attach to this displaced production. The production displaced, valued at \$14m arises as a result of a presumed lost opportunity to use the water downstream of Karapiro for irrigation for

⁶⁹ Table 2 at 14



horticulture which Mr Murray, on the evidence of Dr Rout, attaches a weight of 7% over dairying.

[196] Mr Murray, relying on the evidence of Mr Male, maintained that demand for irrigation downstream is likely to arise in the future.⁷⁰ We have already commented on the lack of direct evidence in this regard. The timing of any such demand, if any, is hypothetical. Whether there is in fact a future demand for downstream irrigation for horticulture is dependent on a number of variables, including the potential irrigation area and the relative prices and costs associated with the irrigation area. If in fact there is a demand for consumptive use upstream earlier in time than there is demand for water downstream, there would be no opportunity cost in allocating that water for upstream consumptive use until water became scarce downstream. This was not factored by Mr Murray into his calculations.⁷¹

[197] Mr Murray attempted to draw many of the matters contained in Part 2 of the Act into his cost/benefit analysis – matters that could not be quantified and require a qualitative judgment. Such an approach tends to simplify these matters. Matters on which we had extensive evidence and cross-examination.

Evaluation of Cost/Benefit Analysis

[198] The extensive evidence that addressed this issue contained much criticism and counter-criticism regarding the inclusion or failure to include various matters. We heard a lot of evidence and counter-evidence on the numerical estimates that each witness applied to derive their various costs and benefits. We also heard extensive evidence on the correct methodology that should be applied, such as whether figures should be fixed as *end point* values or discounted.

[199] It is just not possible for us to determine with any certainty that one cost/benefit analysis should be preferred over another. The assessment of such modelling includes a number of factors that need to be evaluated including:

⁷⁰ Murray, EIC, at [4.70] – [4.76]

⁷¹ Evans, rebuttal at [3.70]



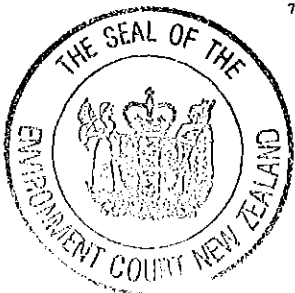
- [a] The context and framing – this includes the methodologies applied and the range of factors to incorporate into the analysis, and specific prediction choices;
- [b] The uncertainties - there are always uncertainties about inputs that drive a cost/benefit assessment. This includes uncertainties about such factors as the amount, if any, of downstream irrigation displaced by consumptive takes upstream at Karapiro;
- [c] The structure – the model structure needs to reflect reality and where different structures or methodologies are used, this increases uncertainty.

[200] Because there are so many variables that underlay the economic analysis, there can be no absolute answer. To this extent the economic evidence has its limitations. To enwrap issues, that rely to a large extent on human rationality, within fixed mathematic formulae, is confounded by the many variables that human rationality gives rise to. Further, a slight change to any one of the variables could give rise to dramatically different results.

[201] The cost/benefit analysis gives us an insight into the potential economic effects of displacing hydro generation with water for dairy irrigation above Karapiro. At the very worst, the net annual cost arrived at by Mr Murray is, in our view, not significant and it would take only a modest increase in the price of dairy products to turn the cost into a net annual benefit.⁷²

[202] More importantly, the cost/benefit analysis was too narrowly construed. The analysis addresses the taking of water for irrigation for dairying as against the use of that water for hydro-electricity generation. Whereas, the real issue is whether all of the water above 3.6% of Q₅ above Karapiro should be effectively locked up for use in electricity generation, thus not allowing parties proposing alternative uses to be considered. The question is whether this is consistent with promoting the management of natural and physical resources in a way that enables economic well-being in accordance with the single purpose of the Act – sustainable management. Economics is just one of the

⁷² See Layton, rebuttal at [29]



threads discernable in the Act which contribute to the attainment of sustainable management.

[203] Further, the cost/benefit analysis did not take account of the contribution that agriculture, and in particular, dairying, makes to the regional economy – a matter we have already addressed. The economists accepted that any increase or decrease of dairy production would have flow-on social and economic effects. These have not been quantified in any cost/benefit analysis.

Evaluation of Issue 2(i) – Allocable Flow above Karapiro

[204] The part of the relief sought to provide for a secondary allocable flow above Karapiro is effectively a challenge to the objective from which the policies and rules which give statutory protection to electricity generation cascade. This is Objective 3.3.2(b) which states:

3.3.2 Objective

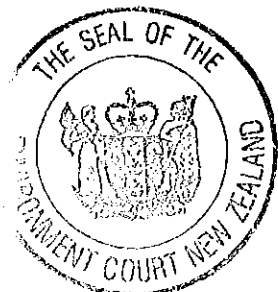
...

- (b) No further allocation of water that exceeds the primary allocation in Table 3-5 that reduces the generation of electricity from renewable energy sources

[205] This strong objective is carried on in the policies under Section 3.3.3 Policy 1(i) which provides that the benefits derived from the use of water for, or directly associated with, the generation of electricity from renewable energy sources, are one matter that is to be given particular regard to in establishing and reviewing allocable and minimum flows. The primary allocable flow has been set at 3.6% of Q₅ to protect the level of hydro-electricity generation presently occurring.

[206] Policies 8(c) and 9(s) provide specific guidance to decision-makers on the potential adverse effects of takes on renewable energy generation.

[207] The only relief sought to the strong policy direction was a suggested change to Objective (b) - by adding the words “*and secondary*” after the words “*primary*” and the deletion of the following sentence from Policy 1A(e):



In reality, the Waikato Hydro Scheme uses all water remaining in the river (i.e. after any water that is authorised to be taken from within the primary allocable flow has been abstracted) to generate electricity in a renewable manner.

[208] Apart from a reference by Mr Willis in his supplementary evidence⁷³ to the effect that the above sentence, being descriptive, was far removed from policy; we heard no evidence why we should make such a dramatic change to the strong policy provisions. Nor did we hear submissions directly on point.

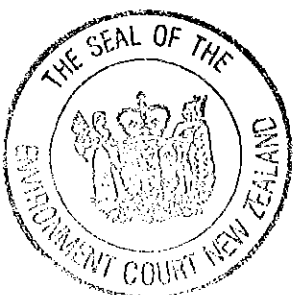
[209] Section 32 of the Act requires that the objective be the most appropriate way to achieve the purposes of the Act and that the policies are the most appropriate way to achieve the objectives. The Council underpinned its strong protectionism policy on the strong statutory directions relating to climate change and renewable energy.

[210] No substantial reason was advanced why we should weaken the strength of the objective. Subject to one caveat, we endorse the Council's position. The caveat relates to the quantum of the primary allocation above Karapiro.

[211] The fundamental question for us is where within the range of 3.6% and 7% the most appropriate balance lies. The issue was put in Mr Milne's opening as "*electricity vs dairying*". This was because the proponents arguing this contentious matter were the electricity generators on the one hand, and those with interests in dairy production on the other.

[212] As a consequence, the focus was where the most appropriate balance lies between the competing Section 5 values pertaining to the socio-economic well-being of the regional and national communities, with respect to the relative value of water used for electricity and dairying. The evidence and submissions tended to focus on where the intersection points are between these competing Section 5 values, and this assumed that the outcome must be a choice of *winner or loser*. Such an approach eschews the well established approach we should adopt when applying Section 5 and the guiding matters of the remaining sections in Part 2. This involves an overall broad judgment of what would best promote the sustainable management of natural and physical resources. This

⁷³ Willis, supplementary evidence at [48]



allows for the balancing of competing considerations in terms of their relative significance.⁷⁴

[213] Section 5 of the Act requires natural and physical resources to be managed “*in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being*”. In so doing, we must be guided by a number of relevant matters set out in Section 7 of the Act which require us to have particular regard to:

7 Other matters

...

(b) the efficient use and development of natural and physical resources:

(c) the maintenance and enhancement of amenity values:

...

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

...

(i) the effects of climate change:

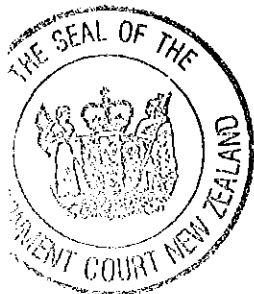
(j) the benefits to be derived from the use and development of renewable energy.

[214] In this case there are some inherent tensions as between these factors. Each of these factors need to be assessed in the context of Section 5 of the Act – managing the resource to enable communities to provide for their social and economic well-being. This underpins Proposed Objective (ac) of Variation 6 which ensures the efficient allocation and the efficient use of water. “*Efficient allocation*” is defined in the Variation as:

Efficient allocation ... includes economic, technical and dynamic efficiency.

[215] We acknowledge the importance of electricity to New Zealand. We acknowledge the strong statutory directions that emphasise the importance of renewable energy and effects of climate change. We also acknowledge the strong directions contained in the relevant statutory instruments, particularly the National Policy Statement on Renewable Energy. However, to effectively lockup the entire variable flow above 3.6% of Q₅ in the

⁷⁴ *Trio Holdings v Marlborough District Council*, W103A/96 (PT)



Waikato River between the Taupo control gates and Lake Karapiro for electricity generation, would not give effect to Section 5 of the Act. The 3.6% is close to being fully allocated. Once it is allocated, no water would be effectively available for any consumptive use. We are satisfied, after a careful consideration of the evidence, and a balancing of the relevant statutory directions, that this would not be an efficient use of the resource.

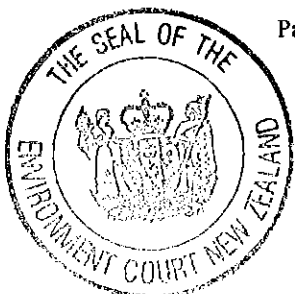
[216] Agriculture, particularly dairying, is an important industry and providing for its future growth can only be of benefit to the social and economic well-being of the region and to New Zealand. This is clear from the evidence to which we have already averred – and which is uncontested. There are some undesirable consequential effects of agriculture, particularly dairying, such as nutrient run-off to our waterways. We received little, if any, direct evidence on this. This is a matter which needs to be addressed by the industry itself, and in other parts of the Plan – perhaps with more enthusiasm. Nevertheless, it is a matter we put into the mix for our consideration.

[217] We note that the growth and performance of the primary sector is inextricably linked to rural and population clusters and their sound social and economic development. It is important that the Variation sets ground rules which facilitate efficient use for a wide variety of heterogeneous and changing users of water.

[218] We are of the view that more water should be made available for future consumptive uses that could be of benefit to the social and economic wellbeing of the community. Such uses should not have to go through a contested non-complying activity process that would have to overcome a high bar created by the protectionist policies designed to protect electricity generation.

[219] Overall, on balance, we find that some more water should be made available for consumptive use in the upper Waikato catchment. We are conscious that this is contrary to the Council's decision. In the Council decision report⁷⁵ the Hearings Committee concluded that:

⁷⁵ Proposed Waikato Regional Plan, Variation 6 – Water Allocation Hearings Committee Report Volume 1, Part B Substantive Decision on Principle Issues, Section 11.10



- (k) As important as the primary sector is to the New Zealand economy, taking RMA Part 2 considerations into account, the existing electricity generators on the Waikato River (both the hydro system and HPS) should retain the priority accorded to them in the Variation.

[220] After careful consideration of that decision, we feel compelled, by weighing the evidence we have heard and balancing the relevant statutory directions to come to a different conclusion. We now consider the appropriate extent of the increase.

Fixing the Allocable Flow above Karapiro

[221] Wairakei Pastoral seeks:

- [a] An increased allocable flow from 3.6% of Q_5 to 4.5% of Q_5 to provide for pasture irrigation; and
- [b] A further 0.08% of Q_5 (i.e. 4.58% of Q_5) to provide for animal water usage.

[222] The Agricultural Working Group seeks:

- [a] An increase in the primary allocable flow to 4% of Q_5 to enable room for new dairy investment through non-irrigated conversion; and
- [b] An adjustment to provide a secondary allocable flow of 3% of Q_5 for other consumptive uses.

[223] We consider that fixing a secondary allocable flow would not be appropriate for achieving the objective – a matter we have earlier averred to. We consider that setting a primary allocable flow at 7% of Q_5 would be going too far. According to the “*upper bound*” figure, agreed to in the hydrologists’ caucusing statement, this would result in approximately 2.7% of lost production in mean annual generation from the Waikato Hydro Scheme, or a loss of approximately 108 GWh/year.

[224] We consider an appropriate balance would be met by increasing the primary allocable flow to 5% of Q_5 . This would enable a quantity of water for a variety of other uses, including dairy investment for non-irrigation, together with some for irrigation.



Setting the allocable flow at 5% of Q_5 would result, according to the “upper bound”, in a 1% loss of generation of 40 GWh/year from the Waikato Hydro Scheme. Overall this provides for a more efficient use of this important resource. It still provides strong protection to the electricity industry for all the available water above the 5% of Q_5 . However, it also provides a quantity of water for other users and it does not completely lock-up the resource.

[225] The Maori appellants all supported the 3.6% of Q_5 at Karapiro, as increasing the limit would do nothing to realise and protect the relationship of iwi with the river in accordance with Objectives (b) and (c) of the Vision and Strategy. Setting the primary allocable flow at 5% of Q_5 will not impact on the Vision and Strategy. Such a figure would leave more than an adequate volume of water in the river to ensure that the objectives of the Vision and Strategy are not compromised.

Issue 2(ii) Genesis – Increased priority for the Huntly Power Station

[226] Genesis sought a suite of amendments to ensure that no more water was allocated from the Waikato River downstream of Karapiro Dam to the Huntly Power Station mixing zone. These amendments were designed to avoid further constraints on the operations of the Power Station and effectively give it greater recognition, or priority, under the Variation.

Allocable Flow from Karapiro to Huntly Power Station

[227] Genesis sought that the allocable flows between Karapiro and the Huntly Power Station be set to a percentage of Q_5 at Huntly that equates to the current level of authorisation. Mr Majurey submitted that this was necessary to protect the long standing nationally important resource and to properly implement the National Policy Statement on Freshwater Management.

[228] This relief was modified to recognise the future water takes sought by the municipal authorities. Genesis and the Municipal Users Group had agreed, in a Joint Memorandum, to an allocation regime with defined parameters for demonstrated future urban growth, but involving specified volumetric caps for “industrial-type” takes.



[229] Under Variation 6 the primary allocable flow between Karapiro and Huntly is set at 10% of Q_5 or $17.68\text{m}^3/\text{s}$. The current level of allocation at this point is $9.515\text{m}^3/\text{s}$. This leaves a remainder of $8.175\text{m}^3/\text{s}$ before the primary allocation is fully utilised.⁷⁶ At Karapiro, if the primary allocable flow is set at 5% of Q_5 or $7.400\text{m}^3/\text{s}$ and the combined consumptive allocation at this point is $5.293\text{m}^3/\text{s}$, this would leave $2.107\text{m}^3/\text{s}$ to be allocated above Karapiro. However, when this $2.107\text{m}^3/\text{s}$ is fully allocated above Karapiro it will reduce the current availability of $8.175\text{m}^3/\text{s}$ at Huntly to $6.068\text{m}^3/\text{s}$.⁷⁷

[230] In response to questions from the Court, Dr Brown advised that if allocation is restricted to current levels of allocation as proposed in the Joint Memorandum of Counsel for Genesis and the Municipal Users Group dated 6 May 2011, this would have the effect of reducing the allocable flow from 10% of Q_5 or $17.69\text{m}^3/\text{s}$ to current levels of allocation i.e. 5.38% of Q_5 or $9.515\text{m}^3/\text{s}$ in this reach of river.⁷⁸ Furthermore, in addition to limiting allocation from the Waikato River, it would mean that up to $3.343\text{m}^3/\text{s}$ would no longer be potentially available for allocation from the Waipa River, based on current allocation data as at 3 May 2011. In effect, this would mean that there could not be any further allocation from the Waipa River.⁷⁹

[231] Mr Newland, expert witness for the Agricultural Working Group, considered there was very little demand for irrigation for dairying in this part of the Waikato catchment. He said current forecasts for dairying showed limited or nil growth with increasing land use change from dairying to lifestyle blocks and horticultural activities. Mr Newland also advised that none of the three Fonterra processing plants in this part of the Waikato catchment is forecast to require more water than is currently provided by their consents.

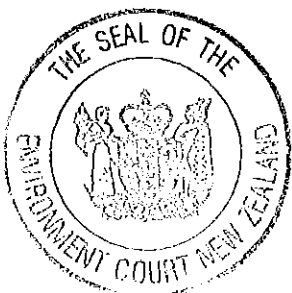
[232] Despite this lack of demand from the dairying sector, Counsel for the Agricultural Working Group confirmed that they opposed Genesis' relief. This was on the basis that it was not necessary to protect the rights conferred on the Huntly Power Station through its existing consents; nor was it desirable to promote sustainable management; and it will prevent any further allocation from within the Waipa catchment.

⁷⁶ Brown, Supplementary Evidence, 20 May 2011, at [6] and Table 1

⁷⁷ The Q_5 flows in this paragraph have not been naturalised.

⁷⁸ Brown, Supplementary Evidence, 20 May 2011, at [11] and Figure 4

⁷⁹ Brown, Supplementary Evidence, 20 May 2011, at [11] – [12]



[233] Horticulture NZ's witnesses confirmed that there already exists a requirement below Karapiro for water for crop irrigation and that this will increase in the future. However the evidence did not specify whether this requirement was likely to be from above the Huntly Power Station.

[234] Mr Berry submitted for Municipal Users Group, that while the Joint Memorandum agreement between the Users Group and Genesis retained a restricted discretionary activity status for new municipal takes on the Waikato River, it had subsequently become clear that reducing the primary allocable flow as sought by Genesis would mean that any new municipal takes from the Waipa River would become discretionary activities immediately. Mr Berry confirmed that in light of the agreement reached, the Users Group did not support, but no longer opposed the Genesis relief. The reason the Users Group did not support the Genesis approach was because it was concerned that there would be "*knock on*" effects for other potential users in that part of the catchment.

[235] The Regional Council opposed the reduction in the primary allocable flow sought by Genesis and maintained the position expressed by the Hearings Committee. In summary, the decision stated that the Huntly Power Station was not afforded the same recognition under the Act as renewable energy generation (c.f. Section 7(j)), and that the Station has options available to mitigate against the adverse effects of reduced cooling capacity from future allocation, if that were to occur. The Hearing Committee further noted that the Station operators could submit on resource consent applications for future takes as an affected party. Mr Milne, for the Council, submitted that the Variation 6 provisions are an appropriate means of recognising the important role played by the Huntly Power Station.

[236] As we have said, the Huntly Power Station is situated on the left (western) bank of the Waikato River, near the town of Huntly. It comprises four (nominal) 250MW coal-or-gas units (Units 1 – 4), one (nominal) 400MW gas fired combined cycle gas turbine (Unit 5) and a (nominal) 48 MW open cycle gas unit (Unit 6). The Power Station represents approximately 15.5% of New Zealand's installed generation capacity.

[237] The Station utilises water from the Waikato River for condenser cooling. A more recently constructed cooling tower allows for 150MW of generation without the use of river water. This is used in periods of low river flows or high ambient temperatures when



generation would otherwise be restricted under consent conditions. Units 5 and 6 have minor requirements for water from the Waikato River for cooling purposes. Units 1 – 4 are the most important in respect of Variation 6. These four units, if they are in service, have good short term flexibility and they also provide frequency keeping, voltage support and instantaneous reserve services.

[238] Since 2005 Units 1 - 4 have provided on average 10.9% of New Zealand's total electricity generation, and since being commissioned in 2007, Unit 5 has provided 6.5% of the total generation on average. Annual output from the Station is variable. The total generation in 2008 and 2009 was approximately 7,400GWh and 6,000GWh, respectively. Units 1 – 4 generated 4,375GWh in 2008 (a dry year), and 3,055 GWh in 2009 (a wet year).⁸⁰ The generation from Units 1 – 4 has reduced since the commissioning of Unit 5.

[239] The Station draws up to 40m³/s of cooling water from the river when generating at full capacity and the majority (98%) of that water is discharged back to the river at an elevated temperature, typically 8.6°C above ambient river temperature. This warmer water forms a thermal plume downstream. The discharge of the cooling water is regulated by a number of resource consent conditions, the most important being that the maximum temperature against the left bank 1 km downstream of the outfall structure must not exceed 25°C.⁸¹

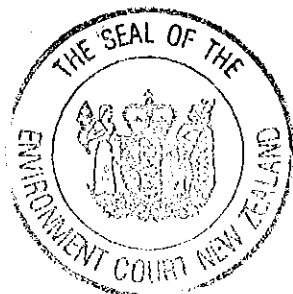
[240] Generation is essentially unconstrained by flow or temperature between May and November. In general, further abstractions from the river during these months would not impact on the Station's operations. During the December to April period generation is constrained as the river warms and cools during the day and this varies from year to year in response to both flow and temperature. The evidence of Dr Keller, for Genesis, was that during periods of constrained generation due to river temperature, even small changes in flow can have a significant impact on generation.⁸²

[241] Dr Keller modelled the effect of upstream abstractions of water on the Station's generation capacity. His analysis was based on actual real-time river flow and temperature data and generation data at 10 minute intervals for each of eleven summers

⁸⁰ Weir, EIC, at [6.4] – [6.6] and Figure 3

⁸¹ Environment Waikato Consents 9308830 (take) and 930881 (discharge)

⁸² Keller EIC, at [2.13] - [2.14]



from 1999-2000 to 2009-2010. He presented results showing the loss of total generation capacity with and without the cooling tower for upstream abstractions of 1, 5 and 8m³/s. The analysis showed that the computed lost generation varies significantly from year to year in direct response to the ability of the river to assimilate heat from the cooling water discharge.

[242] For an assumed abstraction of 8m³/s, the predicted generation losses without the cooling tower averaged 74.387GWh over the eleven year period. Losses ranged from 23.195GWh in the summer of 2003-2004 to 221.128GWh in the summer of 2007-2008. Using less conservative parameters in the analysis, the annual generation loss could be as high as 308.931GWh.⁸³

[243] Comparative generation losses with the cooling tower operating continuously at optimal performance averaged 27.217GWh over the eleven year period. Losses ranged from 7.268GWh in the summer of 2000-2001 to 99.177GWh in the summer of 2007-2008. Using less conservative parameters in the analysis, the annual generation loss could be as high as 149.360GWh.⁸⁴

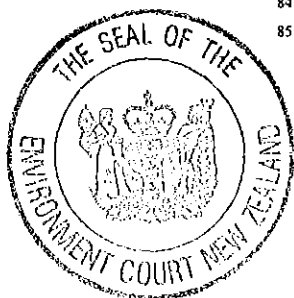
[244] According to Dr Keller, significant losses can also occur on a day to day basis, especially when generation is constrained by high river temperatures and/or low river flows. For an upstream abstraction of 8m³/s, 0.641GWh would have been lost over a 24hr period on 9 February 2005 and 2.745GWh on 4 February 2008, regardless of whether or not the cooling tower was operating on those days. On both of these days generation was constrained to less than 0.750GWh throughout the day. Dr Keller said it is for this reason that the operation of the cooling tower does not influence the effect of an upstream abstraction of 8m³/s on generation loss.⁸⁵

[245] According to Mr Truesdale, for Genesis, from an electricity supply perspective the important issue is that further restrictions on Huntly generation will need to be replaced with alternative generation that would otherwise not be required. He emphasised

⁸³ Keller, EIC, at [5.2]. Dr Keller expressed his results in MWh, for consistency when comparing losses we have converted MWh to GWh by dividing by 1,000

⁸⁴ Keller, EIC, at [5.3]

⁸⁵ Keller, EIC, at [5.5]



the significance of the Huntly Station's contribution of flexible and controllable generation.

[246] Mr Weir advised that Genesis had altered its earlier plans to 'retire' two of Units 1 to 4, and instead providing the option to temporarily 'store' units and return them to the market as and when the need arises.

[247] Mr Cox, for the Agricultural Working Group, considered that allocating a further small proportion of water to agricultural use would result in a minor amount of lost generation that could be readily and economically replaced with alternative forms of renewable energy. Commenting on Mr Weir's evidence of the annual generation from the Station from 1991 to 2009, Mr Cox noted a sharp decline in the use of Units 1 to 4 from 2006 when the new, and more efficient, Units 5 and 6 came into service.

[248] The output of Units 1 to 4 declined from just under 6000GWh in 2005 and 2006, to just over 4000GWh in 2007 and 2008, and declined further to 3000GWh in 2009. Mr Cox considered that Units 1 to 4 had reached their design life and by current standards are very inefficient, expensive to operate and high producers of CO₂ emissions. He considered it reasonable to expect that Units 5 and 6 would provide the majority of generation from the Station in future. He considered that the generation figure assumed by Dr Keller in his modelling did not accord with the future operational scenario for Units 1 to 4 outlined by Mr Weir, or with the generation trends since 2006 when Units 5 and 6 were commissioned.

[249] Mr Cox accepted that Units 5 and 6 play a significant role in supplying electricity, but as these Units are not affected by the Waikato River flows, levels and temperature, he did not understand how these Units would be constrained by increased abstraction. Mr Cox was of the view that the increased abstraction proposed by the Agricultural Working Group would have little or no impact on the Huntly Power Station's future role in the national electricity system.

[250] Variation 6 recognises the need for cooling water to be available to the Huntly Power Station through a suite of provisions, including Objective 3.3.2(ca):

The continued availability of water for cooling of the Huntly Power Station



The explanation to the objective states that:

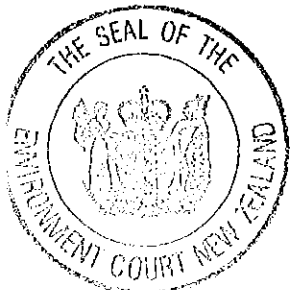
Part (ca) acknowledges the importance of the Huntly Power Station to the national electricity supply system, and foreshadows making the renewal of the existing cooling water take a controlled activity.

Policy 3(c)(ia) and Rule 3.3.4.13A then provide for taking up to 0.7m³/s for cooling water for the Station as a controlled activity.

[251] Genesis' request to limit the allocable flow to the current allocation level is aimed at ensuring that the Station's operations are not restricted to any extent beyond that currently occurring. However, it would mean that no more water could be allocated from that stretch of the Waikato River, except for the specific recognition for municipal supplies, and also no further allocation for any uses from the Waipa River.

[252] As with the evaluation of the disputed allocable flow regime above Karapiro, the Genesis request brings into focus the objectives of the Variation and the extent to which they are the most appropriate way to achieve the purpose of the Act. To give effect to Genesis' relief would require Objective 3.3.2 to be amended to give greater priority to the operations of the Huntly Power Station (Part (ca)) and to "trump" or further reduce the weight to be given to future uses to meet other social, economic and cultural needs (Part (e)).

[253] We find that such an amendment would not be appropriate. We have found that the allocable flow above Karapiro should be increased in order to provide some water for future uses other than electricity from renewable energy sources. For the same reasons, we find that all remaining available water in the Waikato and Waipa catchments should not be locked up – thus disabling any future consumptive uses. We find that the Council's version of the objectives is the most appropriate to achieve the purpose of the Act and that the policies and rules which set the allocable flow between Karapiro and the Huntly Power Station at 10% of Q₅ are the most appropriate for achieving those objectives.



6.3 ISSUE 3 Policies

Issue 3(i) Adverse Effects vs Significant Adverse Effects – Policy 1(d)

[254] Policy 1 sets out matters that particular regard must be had to for establishing and reviewing allocable and minimum flows for surface water bodies. The decisions version of the Variation included the following wording for Policy 1(d):

- (d) In-stream ecological values and biodiversity are not adversely affected

[255] Addressing the wording of Policy 1(d) Mr van Voorthuysen in his evidence-in-chief stated:⁸⁶

141. With regard to Trust Power and King Country Energy, I agree that Policy 1(d) is worded in rather absolute terms. It would prevent any adverse effects on in-stream ecological values and bio-diversity, which in my opinion is unworkable from a practical perspective. In my opinion it would be preferable to require adverse effects to be avoided where reasonably practicable, and otherwise remedied or mitigated.

[256] Mr van Voorthuysen recommended the Council amend Policy 1(d), which the Council has agreed to as follows:

- (d) The avoidance of significant adverse effects on in-stream ecological values and bio-diversity and the remediation or mitigation of adverse effects otherwise.

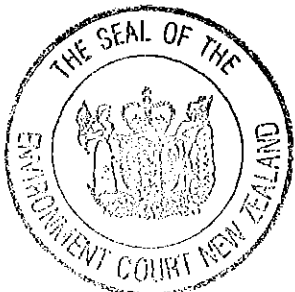
[257] The Director-General of Conservation seeks to retain the wording from the decisions version.

[258] Under cross-examination by counsel for the Director-General, Mr van Voorthuysen stated:⁸⁷

... if the wording of the policy is such that any effects are to be avoided, in my view that precludes the decision-maker from considering the application on its merits. All effects must be avoided. There is no discussion of minor effects or significant effects or remediation, mitigation, simply the avoidance of those effects. That precludes the decision-maker exercising their discretion in my view.

⁸⁶ Voorthuysen, EIC, at [141]

⁸⁷ Voorthuysen, Transcript, 29 March 2011, page 540



[259] We agree with Mr van Voorthuysen's view. To adopt the wording sought by the Director-General's representatives would be impracticable. It would preclude the exercise of the decision-maker's discretion. We note that the wording now proposed reflects the wording of policy 11(b) of the New Zealand Coastal Policy Statement dealing with indigenous biodiversity generally, which states:

- (b) Avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

Issue 3(ii) Should the provisions relating to protection of electricity be more generic? Policy 1A(e) and consequential provisions

[260] Wairarapa Moana seeks that Policy 1A(e) - which fixes the primary allocable flow at Karapiro for the protection of electricity – be amended to refer to protecting electricity generation from the Waikato River, rather than referring to the Waikato Hydro Scheme or the Huntly Power Station, and that this alteration should be made throughout the Variation.⁸⁸ No reasons were given for this request. Importantly, no planning evidence was called to support such a change.

[261] The Council was opposed to this request. As Mr Milne pointed out, the primary allocable flow at Karapiro was set specifically to protect the existing electricity generation from the Waikato Hydro Scheme and the Huntly Power Station.

[262] We can see no reason for changing the provisions, and the relief is denied.

Issue 3(iii) Should there be a new standalone policy espousing the importance of renewable energy generation? Proposed Policy 3A

[263] Mighty River Power seeks the insertion of a new Policy 3A titled "The Importance of Renewable Energy Generation." The proposed wording is set out in the evidence-in-chief of Mr Collins.⁸⁹

Policy 3A – the importance of renewable energy generation

⁸⁸ Wairarapa Moana, closing submissions, at [3]

⁸⁹ Collins, EIC, at [134]



To restrict takes from the Waikato River catchment (beyond specified allocable flows) which limit the amount of water that would otherwise be available for electricity generation from renewable energy, except to the extent necessary to provide for reasonable domestic and municipal needs.

[264] The rationale for the wording is concisely set out in paragraphs [6.1] to [6.9] of Mr Cowper's submissions on behalf of Mighty River Power. Mr Cowper submitted rightly, that it is a foundation of best planning practice to ensure that provisions in a planning document "cascade" from issues to objectives then to policies, and lastly, rules. It was his submission that, while the importance of electricity is referenced in the issue,⁹⁰ and the objective⁹¹ and in policy 8 which sets out assessment criteria,⁹² there is no specific policy which implements the objective. Policy 8, which sets out the assessment criteria, does not provide sufficient guidance for decision-makers when assessing discretionary or non-complying activities.

[265] The respondent opposes the insertion of Policy 3A. We agree for the following reasons:

[a] In the overall context of the 8 August 2011 version, the protection of the existing generation capacity of the Waikato Hydro-Scheme is adequately provided for by:

- First, the setting of the primary allocable flow above Karapiro as a percentage of Q_5 in Table 3-5 and Policy 9A, which states:

Policy 9A: Non-complying activities within the Waikato River Catchment above Huntly and Karapiro (Implements Objectives 3.1.2 and 3.3.2(b) and (ca))

Generally, non-complying activity applications for surface water takes within the Waikato River catchment upstream of the HPS mixing zone shall not be granted unless the take:

- (a) Is a zero net take; or
- (ab) Replaces a consented take for an activity listed in Policy 11(a)(v); or

⁹⁰ 3.3.1(ba)

⁹¹ 3.3.2(b)

⁹² Policy 8(c)



- (b) Achieves a higher level of renewable electricity generation within the Waikato River catchment than would otherwise be achieved were the consent declined; or
- (c) Is located between the Karapiro Dam and the HPS mixing zone but would not adversely affect electricity generation from the Huntly Power Station.

Our earlier determination to increase the allocable flow above Karapiro to enable further water for other users does not affect the strong policy protection for electricity generation as Policy 9A and the supporting policies will still apply to all the water above 5% of Q₅.

- The suggested Policy 3A is unnecessary and its inclusion is contrary to the overall scheme of the variation. Other users of water given favourable consideration in Objective 3.3.2 (such as domestic or municipal supply takes, or the Huntly Power Station cooling water take) do not have stand-alone Policies that support their case as would Policy 3A for the Waikato Hydro-Scheme. If proposed Policy 3A was inserted into the variation, then it would be arguably necessary to insert similar policies for domestic or municipal supply takes, the Huntly Power Station cooling water take, existing dairy shed takes, existing s14(3)(b) takes and existing takes for industry or agriculture.

Issue 3(iv) Municipal Supply Takes - Agricultural and Industrial Takes over 15m³/d – Policy 4

[266] Because of the unique nature and importance of territorial local authorities with respect to the provision of community water supply services, Variation 6 has afforded priority to them. This is recognised in Objective 3.3.2(ab):

The recognition of the significant community benefits that derive from domestic or municipal supply takes

[267] Providing priority to domestic or municipal supply was supported in principle by all parties. However, some parties challenged the scope of the take that should enjoy such a priority. Concern was raised by a number of appellants about the *industrial* or



agricultural component in excess of 15m³/d. Including such takes as part of the municipal take, would, they say, result in them being treated differently to similar activities outside of a municipal supply system.

[268] This concern was based on the different activity status that would apply to such takes. The preferential status for new *agricultural* and *industrial* takes within a municipal supply arrangement means that such takes would be assessed as a discretionary activity. A stand-alone *industrial* and *agricultural* take would be assessed as a non-complying activity. This, it was said, would be inequitable.

[269] Mighty River Power suggested adding to the current *Policy 4 – How Surface Water Takes Will be Classified – Takes for Domestic and Municipal Supply*, the following:

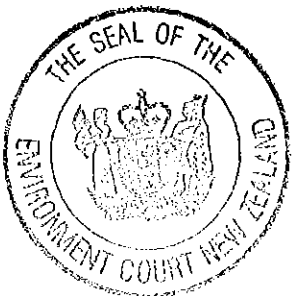
Classifying as a non-complying activity any new component of a surface water take for domestic or municipal supply, that is for the purposes of industry or agriculture and is in excess of 15m³ per single industrial user or agricultural property per day and when assessed in combination with all other authorised water takes exceeds the combined primary and secondary allocable flow in Table 3-5.

They sought a consequential amendment to Standard 3.3.4.21(a).

[270] Mr Berry, for the Municipal Users Group, emphasised the management difficulties and costs associated with such an approach as set out in the rebuttal evidence for the Group. He pointed out that to address the equity concern, Policy 4 of the Variation now requires all applications for a municipal supply take to be accompanied with a Water Management Plan, otherwise it is to be classified as a non-complying activity.

[271] We are satisfied that the concerns of Mighty River Power are adequately addressed for the following reasons:

- [i] The Water Management Plan provisions require municipal supply authorities to identify and justify each component of a municipal take,



including agricultural and industrial needs.⁹³ The Management Plan also requires specific identification of industrial and agricultural users which use over 15m³/d.⁹⁴ Thus, any large users which a municipal supply authority seeks to supply, will be clearly identifiable and the justification for that component of the take will be the subject of particular focus, both by the regional council and competing users;

- [ii] Any application by a municipal supply authority to supply a 15m³/d plus user in an over-allocated catchment, which forms part of a municipal supply application as a whole, or as an individual application specific to that user, will be a discretionary activity.⁹⁵ Thus, the application could be granted or declined, having regard to its effects and the relevant objectives and policies of the Plan;
- [iii] The objectives and policies of the Plan require consideration of the benefits of municipal supply, but the municipal supply take must be “*reasonably justified*”;⁹⁶
- [iv] The objectives and policies recognise the importance of existing takes⁹⁷ and require consideration of the effects of a new municipal take on existing users.⁹⁸ The objectives and policies of the Plan also recognise the importance of electricity generation, particularly renewable electricity generation.⁹⁹

[272] Also of concern was the different status of 15m³/d plus takes during times of water shortage. We agree with the Municipal Users Group’s submission that appropriate reductions during water shortages can be achieved via the Drought Management Plan which must include:¹⁰⁰

⁹³ Rule 8.1.2.2.2 as proposed to amend Chapter 8.1 of the Plan

⁹⁴ Rule 8.1.2.2.15 as proposed to amend Chapter 8.1 of the Plan

⁹⁵ Rule 3.3.16

⁹⁶ Objective 3.3.2(a) and Policy 8(b)

⁹⁷ Objective 3.3.2(ba)

⁹⁸ Policy 8(cb) and (h)

⁹⁹ Objective 3.3.2(b) and Policy 8(c)

¹⁰⁰ Rule 8.1.2.2.9(a) as proposed to amend Chapter 8.1 of the Plan



Steps to be taken to reduce consumption during water shortage conditions, including those uses that will be restricted at the same time as priority SW-B users (in accordance with Policy 14 and Standard 3.3.4.21) and steps to be taken to implement those restrictions.

And:

Targets for the water savings expected to be achieved via the restriction of activities identified in (a) above, which shall align as closely as possible to the restrictions for SW-B users provided for in Standard 3.3.4.21.¹⁰¹

Issue 3(v) Volumetric Caps for Agricultural and Industrial Municipal Takes - Policy 4 and Rule 3.3.4.20

[273] Genesis and the Municipal Users Group entered into an agreement which inter alia provided for:¹⁰²

- (a) A per application cap of 3,000m³/d (not including "backpack water") for municipal takes for the purposes of industry and agriculture; and
- (b) A cap of 15,000m³/d on municipal takes for the purposes of industry and agriculture which uses more than 15m³/d (not including "backpack water"), over a 10 year period. At the end of 10 years, the "meter" is "re-set" to zero.

[274] It was agreed that those takes would be calculated on a net take basis, excluding from the take the volume of water that is to be:

- [a] Discharged to either a municipal or industrial wastewater system; and
- [b] Returned to either the source water body or an upstream tributary.

[275] The proposed volumetric caps were part of a number of provisions that had been agreed to between Genesis and the Municipal Users Group. The remaining provisions are reflected in the Variation as now proposed, with the exception of the agreed volumetric caps on the water for industrial and agricultural purposes.

¹⁰¹ Rule 8.1.2.2.9(aa)

¹⁰² Joint memorandum of counsel for WRMUG and Genesis Energy, 6 May 2011



[276] Mr van Voorthuysen agreed during the planners' "hot-tub" session that given the agreement between the Municipal Users Group and Genesis, it would be appropriate for the volumetric cap regime to be included in Variation 6. However, Mr Berry, for the Municipal Users Group, also discussed the agreement in his closing submissions. He said that the Municipal Users Group acceptance of the caps was conditional, and it would require the reinstatement of the distinction of the "15m³/d plus" takes in the reach of the lower Waikato River between Karapiro and Huntly.¹⁰³ That would require some complicated redrafting of the policies and rules which had not been undertaken either by the Municipal Users Group or Genesis.

[277] As Mr Milne pointed out, the volumetric caps would apply to domestic or municipal supply takes that exceeded the primary allocable flow (there is no secondary allocable flow in that reach of the river) and those takes are discretionary activities.¹⁰⁴ Such applications would, in any event, be assessed on their individual merits against the provisions of the Variation, including the need to consider potential adverse effects on the Huntly Power Station.¹⁰⁵ Furthermore, reinstating the Karapiro to Huntly caps for domestic and municipal supply takes would create a complicated regime that applied to only a small part of the region. That regime would be one for which there is no readily discernible management need. The only rationale for the reinstatement would be the fact that a side agreement to that effect exists between the Municipal Users Group and Genesis.

[278] We consider that to grant the Genesis relief, would be solely to further protect the generational capacity of the Huntly Power Station. We have discussed what we consider to be the appropriate level of protection elsewhere in this decision. We consider the provisions as they stand do provide adequate protection. While the power companies sought an increase in the level of protection provided for in the provisions of the Variation (and which substantially improves their present position), allowing such an increase would be to the detriment of the enabling provisions of the Act. Increasing protection would further reduce the ability for consumptive uses. As Mr Milne pointed out, applications for consumptive uses would still have to satisfy the current strong provisions that are designed to protect electricity generation.

¹⁰³ Berry, Closing Submissions, at [5.23]

¹⁰⁴ Rule 3.3.4.16(6)

¹⁰⁵ Policy 8(c)



Issue 3(vi) Secondary Allocable Flow and Waikato River tributaries above Karapiro - Table 3-5 and Policy 4

[279] Mighty River Power was concerned that Table 3-5 provides for secondary allocable flows in the tributaries of the Waikato River above Karapiro. Mr Cowper submitted that it is not possible to allocate water from these secondary allocable flows when the availability of water is also constrained by the primary allocable flow at Karapiro Dam. Mighty River Power considered that including secondary allocation on tributaries of the Waikato River above Karapiro Dam would create an unrealistic expectation that there is water physically available if the primary allocable flow is reached. There would be no physical water available to be allocated.

[280] Mr Cowper's concerns may not be quite so pertinent now that we have fixed the primary allocable flow at 5% of Q₅. However, when the primary allocable flow has been fully allocated, Mr Cowper's concerns would possibly be activated.

[281] For the council, Mr Milne told us that the Council does not agree with such a proposal. He pointed out that the proposed inclusion of Policy 1B (determining the combined level of surface water allocation within a catchment) also ensures that any allocation within a tributary cannot occur without also determining the combined allocation at the point of take and at each affected downstream reach. As a result, no allocation can occur on a tributary above Karapiro Dam without also assessing the allocation level at Karapiro Dam.

[282] Mr Milne also pointed out that many existing users extract water from tributaries and the amounts authorised often exceed the primary allocable flow for that particular tributary. Allowing the allocation on these tributaries to include a secondary allocable flow, while remaining collectively within the primary allocable flow at Karapiro, ensures that existing consents are provided for within the Table 3-5 allocation limit. This would not prejudice Mighty River Power.

[283] The consequence of not providing the secondary allocation on the tributaries would be that any new abstractions which exceeded the primary allocable flow on the tributary would then be classified as a non-complying activity and most likely declined based on Policy 9A. This would occur even though their combined abstraction is less than the primary allocable flow at Karapiro Dam.



[284] For the reasons set out by Mr Milne, we endorse the Council's position.

Issue 3(vii) Priority for Drought Intolerant Crops in Time of Shortage - Policy 14 and Standard 3.3.4.21

[285] Horticulture NZ sought to have takes for horticultural crops restricted less often at times of low flows (namely when the Table 3-5 minimum flows are reached) and Policy 14 (levels of priority to apply during water shortages) and Standard 3.3.4.21 (how water shortage restrictions shall apply) apply. It sought to have horticultural crops classified with SW-B restrictions in Policy 14 and Standard 3.3.4.21. In Standard 3.3.4.21, SW-B takes are restricted last after all other authorised consumptive takes and the level of abstraction reduction required is very small, being only 15% of the authorised rate of take rather than 75%.

[286] Horticulture NZ provided a suggested list of crops that would be included in a new definition of "drought intolerant crops" and takes servicing those crops would be classified as SW-B.¹⁰⁶ However, the Council considered the list of crops to be very broad. So broad in fact, that the majority of horticulturalists in the Waikato region grow vegetables on the list. This would mean that the definition of "*drought intolerant crops*" would have widespread application. Under cross-examination Mr Barber agreed that:¹⁰⁷

... the list that you have proposed in paragraph 4 covers the predominant horticultural crops for the Waikato Region.

[287] Mr Milne submitted that the purpose for water take restrictions during droughts is to reduce the taking of water when stream flows reach their Table 3-5 minimum flow. If more abstractors are classified with SW-B priority compared with SW-C or SW-D, then there is less ability to reduce abstractions. This in turn will result in the Table 3-5 minimum flows being reached more often and the streams will sit at those minimum flow levels for longer.

¹⁰⁶ Barber, Supplementary Evidence, 15 April 2011 at [4]

¹⁰⁷ Barber, Transcript, page 1224 lines 1 - 3



[288] Stream flows may also reduce below the minimum levels as flows naturally decrease in the drought, resulting in the more frequent occurrence of extremely low flows that would otherwise only occur rarely.

[289] Mr Barber agreed with questions put to him in cross-examination, that in catchments where horticultural surface water takes account for a large portion of the overall volume of water abstracted, such as occurs at Pukekohe (Whakapipi and Tutaenui Streams), elevating horticultural takes to SW-B priority would effectively result in no low flow restrictions for these streams – as SW-B takes need only reduce abstraction by 15% of the total authorised. This in turn means that the water body would not be protected, circumventing the purpose of setting minimum flows during low flow restrictions.

[290] Mr Barber agreed with the following propositions:¹⁰⁸

Now, if we have the situation where all of the takes in a sub-catchment are for horticulture, and all of the crops grown are within your paragraph 4, then in fact there would be no effective water restriction, would there?

And:¹⁰⁹

And the outcome then would be that the water body would not be protected because it would fall below the minimum flows.

[291] Unfortunately, Horticulture NZ has provided no analysis of the impact the proposal would have on flows in any streams in the region.¹¹⁰

[292] The agricultural expert caucusing statement recorded agreement that horticultural crops are more sensitive to droughts than pasture,¹¹¹ but there was disagreement amongst the experts as to whether or not the horticultural crops needed a special priority during times of low flow.

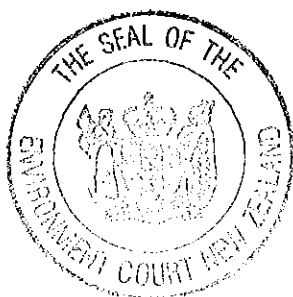
[293] Horticultural takes currently have SW-C priority under Policy 14. That means that abstractions are only partially restricted during low flows and do not have to cease in

¹⁰⁸ Barber, Cross-examination, Transcript at page 1225 lines 16 - 19

¹⁰⁹ Barber, Cross-examination, Transcript at page 1225 lines 23 - 24

¹¹⁰ Barber, Cross-examination, Transcript at page 1224 line 11

¹¹¹ Agricultural Caucusing Statement, page 6 at [11]



their entirety. Under Standard 3.3.4.21, SW-C reduce by 50% ten days after the minimum flow is reached, and by 75% seventeen days after the minimum flow is reached. However, this is not the base assumption behind the Horticulture NZ analysis of Mr Barber. Mr Barber agreed that his Figures 4 & 5¹¹² overstate the effect of the restrictions proposed in Standard 3.3.4.21 for horticultural irrigation consents with SW-C restrictions. Under cross-examination he agreed with the following propositions:¹¹³

In your supplementary evidence dated 21 February 2011, the restriction scenarios in Figures 4 and 5 are not based on the SW-C restrictions as provided for in Variation 6 are they?

And:¹¹⁴

And in terms of the Variation 6 restrictions, for horticultural consents, allocated within the primary allocation, they wouldn't cease as demonstrated in your Figures 4 and 5 would they?

[294] In the agricultural experts' caucusing statement there was general agreement that Variation 6 sets out other methods for achieving increased abstraction reliability for horticultural takes; including trading (relying on the transfer provisions), water user groups, water harvesting and seasonal allocations within the primary and secondary allocations. There was agreement that there is a need for reliability and flexibility of horticultural water takes and of the sensitivity of some crops to water stress. But there was disagreement this warranted a high level of priority during restrictions at times of shortage.¹¹⁵

[295] Mr Keenan, a resource management consultant called by Horticulture NZ, agreed that the use of Policy 17 and Method 3.3.4.3 could provide for horticultural takes during times of low flow restrictions. He stated he could:¹¹⁶

Support the mechanism of horticultural users working together voluntarily to ensure that of the water available to them, water is made available to the highest

¹¹² Supplementary Evidence, 21 February 2011, Figure 4 at page 6 and Figure 5 at page 7

¹¹³ Transcript, page 1227 lines 43 - 45

¹¹⁴ Transcript, page 1228 lines 5 - 7

¹¹⁵ Agricultural Caucusing Statement – Preliminary Statement of Matters in Agreement and Disagreement Regarding Agriculture, at [4], [5], and [12]

¹¹⁶ Keenan, Transcript page 1238 line 40 - 44



value or the most water sensitive crops, as they see fit, without breaching the minimum flows in the water bodies from which water is abstracted.

And:¹¹⁷

Just qualify my answer by cautioning that enough water is available among the users within the group and that the mix of rotational systems is appropriate to enable that to take place.

[296] We acknowledge the difficulty that horticulturalists have with regard to drought intolerant crops. However, to introduce a new definition that would result in horticultural takes being assigned SW-B priority under Policy 14 would fail to address over-allocation. To do so would have the potential to cause adverse stream effects, as streams would be held at or below their Table 3-5 minimum flows more frequently and for longer periods of time.

[297] We agree with the Council, that mechanisms already exist within Variation 6 for horticulturalists to collectively provide for themselves a higher reliable water supply at times of low flow.

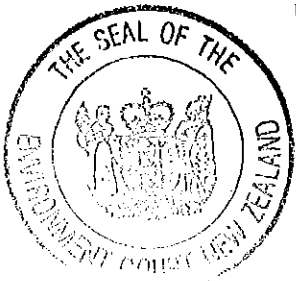
Issue 3(viii) Consent Application Assessment Criteria - Surface Water and Groundwater Policies 8 and 9

[298] Policy 8 contains a list of assessment criteria that decision makers are to have particular regard to when considering resource consent applications. Mr Milne, in closing, submissions, stated that Wairakei Pastoral had consistently sought deletion of some or all Clauses (a) to (t) from Policy 8 and referred to Ms Hardy's evidence-in-chief (dated 15 October 2011) and rebuttal (dated 13 December 2011). The Council strongly opposed deleting the Policy 8 matters.¹¹⁸ However this relief was not included in the 11 May 2011 Statement of Issues, nor in Mr Daya-Winterbottom's closing submissions for Wairakei Pastoral. As a matter of caution we address the issue.

[299] Earlier submissions and evidence for Wairakei Pastoral indicated that they did challenge both Policies 8 and 9 (Consent Application Assessment Criteria – Surface

¹¹⁷ Keenan, Transcript page 1239 lines 1 - 3

¹¹⁸ Milne, Closing Submissions, at [308]



Water and Groundwater, respectively) on jurisdictional grounds and on the basis that they were inappropriately drafted as policies, preferring that the detailed contents be redrafted as rules or other methods. They proposed replacement policies of a general wording.

[300] While we agree that Policies 8 and 9 list assessment criteria more usually found in rules and methods, this matter did not appear to remain alive as a concern at the end of the hearing. The variation document has been developed with numerous cross references to these policies, and all parties appear to have understood and accepted that structure. At this stage of what has been a lengthy process, we are reluctant to restructure the document. To do so would be impractical and would result in numerous consequential amendments. We find that in general terms Policies 8 and 9 should remain, although the content of the sub-clauses may be the subject of separate determinations in this decision.

[301] Generally, the policies as proposed by the Council are the most appropriate for achieving the objective of the Plan.

Issue 3(ix) Restricting takes otherwise available to electricity generation - Policies 8(c) and 9(s)

[302] Policies 8 and 9 contain lists of assessment criteria that decision makers are to have particular regard to when considering resource consent applications to take surface water and groundwater, respectively. Policies 8(c) and 9(s) relate to the effect of proposed takes on renewable electricity generation or the cooling of the Huntly Power Station. Policy 8(c) as proposed by the Council states:

Policy 8: Consent Application Assessment Criteria – Surface Water

...

- (c) Restricting takes which reduce the amount of water that would otherwise be available for renewable electricity generation or be used for cooling of the Huntly Power Station, including in particular any takes from the Waikato River catchment upstream of the HPS mixing zone that when assessed in combination with all other authorised water takes would exceed 100% of the primary allocable flows in Table 3-5



[303] Mr Newfield, called by Carter Holt Harvey, raised a concern about the meaning of Policy 8(c). It could be interpreted to mean that takes within the primary allocable flow would be restricted.¹¹⁹

[304] Genesis also had a concern about the clarity of the wording and as part of their relief seeking to prevent the allocation of any further water sought to amend these policies by adding to Policy 8(c) the words in Clause (ii) to read:¹²⁰

Restricting takes which reduce the amount of water available for renewable electricity generation or be used for cooling of the Huntly Power Station, including in particular any takes from the Waikato River catchment upstream of the HPS mixing zone that when assessed in combination with all other authorised water takes:

- (i) would exceed 100% of the primary allocable flows in Table 3-5;
or
- (ii) in any event, would increase the total allocation of water from the reach of the Waikato River between the HPS mixing zone and Karapiro.

[305] As for the additional words in (ii), consistent with our earlier findings to refuse the request to limit the allocable flow to current levels, we also refuse to grant this aspect of the relief sought by Genesis.

[306] As for the concerns about the clarity of meaning, Mr Milne submitted that the first part of the provision had general application to situations both above and below the allocable flow. He submitted that the latter part, following the word “*including*”, is a single example, albeit an important one in the context of the Variation.

[307] If the intent and purpose of the first part of Policy 8(c) is as Mr Milne suggests then it would be inconsistent with Objective 3.3.2(b) which states:

- (b) No further allocation of water that exceeds the primary allocation in Table 3-5 that reduces the generation of electricity from renewable energy sources.

¹¹⁹ Planners’ Caucusing Statement, May 2011

¹²⁰ Policy 9(s) is similar and relates to groundwater



[308] Our understanding of the Variation, and as stated in the Principle Reasons for Adopting the Objective, is that:

The purpose of Part (b) is to ensure that any reduction in electricity generation from renewable energy sources is confined to that resulting from takes falling within the allocable flow.

[309] To be consistent with the Objective, the beginning of Policy 8(c) should be amended to say:

(c) Restricting takes that exceed the primary allocation in Table 3-5 and which reduce ...

[310] Raukawa and Te Arawa considered that Policies 8(c) and 9(s) be limited to recognising existing renewable energy or Huntly Power Station cooling needs. They were concerned that as written the policies could affect all applications as any takes could adversely affect future energy generation or cooling needs. Although noting that it was not clear what was meant by “*existing*”, the Council did not support narrowing the provisions. Mr Milne submitted that the potential adverse effects of takes on any future renewable electricity generation scheme, that is consented during the life of the Plan, should be evaluated and weighed by decision-makers at the time and that in general any reduction in the renewable energy generation potential of consented schemes should be avoided.

[311] Having noted that any consented schemes would be part of the “*existing environment*” which must be used to evaluate the effects of future take application, Mr Milne did agree, by reference to established case law, that decision-makers should not be asked to speculate on the effects of future takes on as yet unconsented future renewable energy generation schemes. If the Court found it desirable Mr Milne submitted that the Council would support an amendment to read:

Restricting takes which reduce the amount of water that would otherwise be available for consented renewable electricity generation or be used for cooling ...

Mighty River Power opposed this amendment.

[312] We agree with Mr Milne that the provisions should not be limited to recognising effects only on renewable electricity projects that existed at the threshold date of 2008.



To do so would be inconsistent with the recognition given to renewable energy generation under the Act and in the objectives and policies of this Variation (including Objective 3.3.2(b) and Policy 1(i)). Secondly, it is now well settled what amounts to the existing environment and the extent to which the future environment, and hence speculative or unconsented projects, can be taken into account when considering resource consent applications.¹²¹

Issue 3(x) Management of Groundwater – Policy 9(sa)

[313] Policy 9 is headed *Consent Application Assessment Criteria – Groundwater*. Policy 9(sa) provides for the nature of hydraulic connection (if any) between the groundwater resource from which water is proposed to be taken and surface water bodies, to generally be assessed on a case-by-case basis. It then provides for a number of situations where the nature of the hydraulic connection does not need to be assessed. Both Mighty River Power and Wairarapa Moana had issues with Policy 9(sa).

[314] Mighty River Power proposed two amendments, one of which was accepted by the Council. The other amendment was not supported by the Council. This was to add to Clause (iii) the words “*provided that this clause shall not apply in the Waikato catchment upstream of the Karapiro Dam*”.¹²²

[315] Clause (iii) states:

The nature of hydraulic connection does not need to be assessed and the groundwater take need not be assessed against Policy 8 or Policy 9(s) where:

- (iii) The physical separation between the surface water body(s) and the underlying groundwater table is large enough to ensure that if there was a lowering of the groundwater table from pumping this would not impact the surface water body (as calculated for streams using the Advisory Note at the end of this Policy); or ...

...

Except in the circumstances described under (v) to (ix) above, the nature of hydraulic connection shall always be assessed for groundwater takes within the Waikato River catchment upstream of the Karapiro Dam unless a Table 3-6 Sustainable Yield has been set for the groundwater resource from which the groundwater take is to occur.

¹²¹ Milne, Closing Submissions, at [138]

¹²² Mighty River Power, Closing Submissions, at [13.8]



[316] In our view the addition proposed by Mighty River Power is unnecessary because Clause (iii) only applies above Karapiro if a sustainable yield has been set for the groundwater resource from which the groundwater take is to occur. This is because of the wording later in the provision. In this situation the sustainable yield would be set at a level to ensure there is no impact on the surface water body from groundwater takes. When a sustainable yield has been set, there is no need for an applicant to provide their own assessment of the hydraulic connection.

[317] This approach was supported by all the groundwater hydrologists in the caucusing statement where:

All the witnesses agree that where management levels or sustainable yields have been set these should adequately provide the relevant information to enable an assessment of the interception loss. In this situation an applicant would not need to provide their own separate analysis in Policy 5(h).¹²³

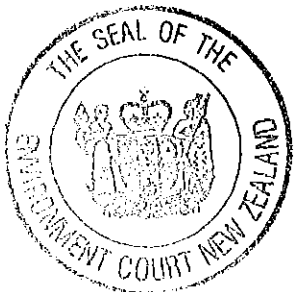
[318] Wairarapa Moana had substantial issues with Policy 9(sa). Counsel submitted that the Variation results in groundwater takes above Karapiro having to “require additional assessment”.

[319] Counsel for Wairarapa Moana asserted that a site-by-site assessment has the following drawbacks:

1. The testing cannot be undertaken until the expense of drilling the well has been incurred;
2. There is uncertainty around as to how extensive and conclusive the evidence needs to be; and
3. If any more than a minor relationship with surface water as identified, then consent is unlikely to be granted.

[320] As for 1 above, Council is seeking to sustainably manage a resource that is concealed beneath the ground. Drilling a hole is the only means by which it can be assessed. The expense of drilling is unavoidable because unless it is undertaken, the

¹²³ Second hydrology Caucusing Statement at [13]



decision-maker is not in a position to conclude that the requested take would not have a significant adverse effect on surface water users.

[321] As for 2 above, the required evidence involves the application of experienced professional judgment by a hydrologist to data obtained from one or more bores. Such is an everyday task for a hydrologist.

[322] As for 3 above, the conclusion that a minor relationship with surface water, if identified, would result in the consent being unlikely to be granted, does not follow. For example, if there is a partial effect only on surface water, then it may be feasible to mitigate that effect. Such an evaluation needs to be made on the facts of a particular case.

[323] Counsel for Wairarapa Moana further submitted that the catchment investigation into sustainable yields, which under Table 3-4A is scheduled for 2017, should be brought forward to 2012. There was no evidence produced, nor was it suggested, that the criteria for reviewing sustainable yields under Method 3.3.4.7 have been triggered, or that there is demonstrated high demand for groundwater in a fully allocated catchment. More importantly, the timing of such an investigation is a financial decision for the respondent alone. That decision has to be taken in accordance with the relevant provisions of the Local Government Act 2002 as it requires an application of public funds.

[324] In support of their concerns about the assessment of groundwater takes above Karapiro, Wairarapa Moana sought a number of detailed wording amendments. Their submissions were not supported by any technical or planning evidence. We briefly discuss the relief sought in their three amendments:

- (1) Amend policy 2(eb) ... to read "*the loss of benefits derived from the generation from electricity that can result from ground water takes above Karapiro if there is a significant linkage between ground water and surface water flows. This assessment shall recognise that ground water takes may be a mechanism to access water in summer as part of the winter surface water allocation and/or may allow more water to be utilised than is lost from the surface water body*".

[325] Policy 2 is designed to guide the setting of sustainable yields from groundwater. It would be inappropriate to qualify Policy 2(eb) by the introduction of a significant threshold when there is no evidential basis for the delineation of such a threshold in the



context of sustainable yields. Further, other clauses of Policy 2 already provide for other factors to be considered when establishing sustainable yields

(2) Amend policy 9(sa) (second paragraph) as follows:

Where a the case by case assessment demonstrates that there is a hydraulic connection and the assessed maximum surfaced water body depletion and interception loss (in cubic metres per day) calculated for the term of the consent exceeds 20% of the groundwater take ~~15 cubic metres per day~~ then the Waikato Regional Council shall will assess the nature and extent of the effect of the groundwater take on surface water bodies having particular regard to the relevant parts of Policy 8. When considering applications in the Waikato Catchment, policies relating to hydro-generation or thermal cooling will be balanced against:

- *The extent to which groundwater that otherwise would not be available will be utilised;*
- *Promoting access to water that does not have a direct effect on summer water low flows,*
- *Mitigating or minimising the extent to which there is an impact on summer water flows.*

[326] This change involving the replacement of “15 cubic metres per day” with a percentage threshold in Policy 9(sa), namely “20% of the groundwater take”, is not supported by the evidence. Dr Brown opposes the use of percentage thresholds, and he stated:¹²⁴

[16] I consider these thresholds are not appropriate as they do not consider the allocation state of the surface water body. This conclusion is also reached by PDP in their report ...

[327] Counsel for Wairarapa Moana did not call on any evidence disputing Dr Brown’s opinion.

[328] The three bullet points as suggested to be added to Policy 9(sa) seek to insert decision-making criteria into what is a technical policy that determines whether or not there is a need to have regard to the criteria in Policy 8 when considering groundwater takes. This is inappropriate. No planning evidence was called supporting such a change and nor was the suggested wording put to any of the other planning witnesses during

¹²⁴ Brown, Supplementary Evidence, 16 May 2011, at [16]



cross-examination. We consider that Policies 8 & 9 already provide sufficient guidance to enable any appropriate balancing to be undertaken.

(3) Delete Policy 9(s)

[329] Again, counsel for Wairarapa Moana provided no evidential rationale for deleting Policy 9(s) which is one of the key provisions required to achieve Objective 3.3.2(b) & (ca). The relief is denied.

Issue 3(xi) Should there be policies directing decision-makers to generally not grant non-complying activity consents for the taking of surface water unless certain circumstances apply? Policies 9A and 9B

[330] Policies 9A and 9B provide strong guidance to decision-makers, directing them to generally not grant non-complying activity resource consent applications for the taking of surface water unless certain circumstances apply. Non-complying activity applications are addressed by Rule 3.3.4.20 of the Variation and generally these are surface water take applications that will breach the primary and secondary allocable flows set in Table 3-5.

[331] The rationale for policies 9A and 9B was set out in the evidence of Mr van Voorthuysen. He stated:¹²⁵

92. New policies 9A and 9B are intended to give effect to the amended objective 3.3.2(b). They are drafted in such a way that, in my opinion, decision-makers are left in no doubt that non-complying activity applications within the Huntly Power Station outfall (which includes, of course, the Waikato River upstream of the Karapiro Dam) are not to be granted unless they achieve the higher level of electricity generation than would otherwise be achieved if the application was declined. This type of approach is based on the non-derogation of existing electricity generation capacity, whilst allowing flexibility for the more efficient or innovative use of water for electricity generation purposes.

[332] It has been argued by some of the parties that Policies 9A and 9B are effectively prohibited activities. For example, Ms Hardy for Wairakei Pastoral stated:¹²⁶

¹²⁵ van Voorthuysen, EIC, at [92]

¹²⁶ Hardy, Rebuttal, at [98]



98. In my view, Policies 9A and 9B effectively make all activities apart from existing and future electricity generation prohibited activities.

[333] Counsel for Wairakei Pastoral, Mr Daya-Winterbottom, submitted that Policies 9A and 9B contain *standards and terms* and the Act does not provide for that to occur for non-complying activities. We can see no justification for such a submission. The word “Policy” is not defined in the Act. The dictionary definition relevantly says:¹²⁷

A course or principle of action adopted or proposed by a government, party, business, or individual etc.

[334] We have not been referred to any provision in the Act which limits the dictionary meaning of the word – a meaning which is not limited in any way in its application.

[335] The Court of Appeal in *Auckland Regional Council v North Shore City Council*¹²⁸ found that a “policy” was “a course of action,” and as such may be either flexible or inflexible, broad or narrow. It rejected the contention that a policy cannot include something highly specific (in that case a direction to territorial authorities).

[336] We find that the wording of Policies 9A and 9B does no more than make a direction to decision-makers, being one of the policies that a decision-maker must have regard to when considering an application for a non complying resource consent.

[337] Mr Daya-Winterbottom also submitted that the policies amounted to fixed rules, thus abdicating the council’s discretionary power. For reasons given by Mr Milne we reject this proposition also. Firstly, both Policies 9A and 9B commence with the word “generally.” “Generally” is relevantly defined in the Concise Oxford Dictionary as:

1. Usually; in most cases
2. In a general sense; without regard to particulars or exceptions... ;
3. For the most part extensively...;
4. In most respects... .

¹²⁷ Concise Oxford Dictionary

¹²⁸ [1995] 3NZLR 18; [1995] NZRMA 424 (CA)



[338] It is commonly understood that the word provides guidance to decision-makers that the policy should not be blindly applied in a blanket fashion to all consent applications. The strength of Policies 9A and 9B is such that the starting presumption is appropriately against the grant of non-complying activities, but each case must be assessed on its individual merits based on the evidence presented to the decision-maker at the time.

[339] Policies 9A and 9B both guide decision-makers considering non-complying consent applications. Under Section 104(1)(b)(vi) of the Act, decision-makers need only “*have regard to*” the provisions contained in regional plans, which include Policies 9A and 9B. They do not have to “*recognise and provide for*,” “*have particular regard to*,” or “*give effect*” to the policy. It is quite open for the decision-maker to afford less weight to some policies than others when evaluating an application.

[340] The strong guidance provided by Policies 9A and 9B creates an appropriate balance in the context of the Variation, having regard to our decision to increase the primary allocable flow above Karapiro.

Issue 3(xii) Should Dairy Farms be Exempt from General Rules that Water Take Consents be for 15 years? Policy 11(a)(v)

[341] Policy 11(a)(v) as presently included in the Variation relevantly reads:

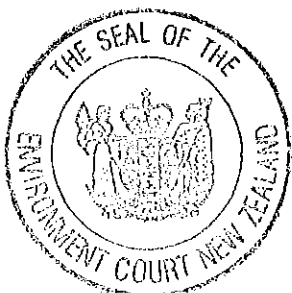
- a) Subject to Policy 15 the Waikato Regional Council will generally ensure that all resource consents for the take of surface and groundwater shall have a term no longer than 15 years except those consents;

...

- v) for large scale, capital intensive industrial facilities such as mines, dairy factories, pulp mills and water harvesting infrastructure.

...

[342] The May 2011 Planners Caucusing Statement records that all parties other than Wairakei Pastoral are in agreement with the present wording. Wairakei Pastoral considers that in relation to Policy 11(a)(v) “*.....further amendments are required to provide for large scale dairying activities.*” Mr Daya-Winterbottom submitted that



amending the Policy in this way would allow resource consents to be granted for dairying for a term exceeding 15 years in appropriate cases.¹²⁹

[343] The Council did not accept that Policy 11(a)(v) should be amended to include "*large scale dairying activities*." Mr Milne submitted that there are significant differences between large scale dairy farms and the sort of large scale industry already referred to in Policy 11(a)(v). Dairy farms each use only a fraction of the water used by large scale industry on a daily basis, but cumulatively they account for a large volume of water within discrete catchments. Often the dairy farm takes occur from small tributaries for which no detailed environmental assessments have been done. This differs from takes for large scale industry where, in almost all cases, detailed investigations of the effects of those individual takes has occurred, thereby justifying longer term consent durations.

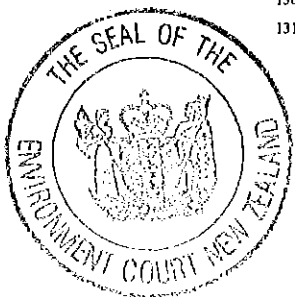
[344] Mr Milne also emphasised that many of the existing dairy shed takes are actually unauthorised (in that they exceed the permitted activity take limits) and many of them occur in currently over-allocated catchments. Council considers that a tight regulatory control is required on dairy shed takes as they are progressively authorised for the first time or as existing consents are renewed. This is particularly so in over-allocated catchments where it is necessary to ensure that appropriate mitigation is imposed to counter the effects of over-allocation (such as riparian retirement and planting), or to ensure that existing over-allocation is phased out by 2030 at the latest, as now required under the Freshwater National Policy Statement. Exempting dairy shed takes from the default consent duration of 15 years would not assist in achieving those outcomes.¹³⁰

[345] Mr Milne further submitted: Firstly, it is noted that Policy 11(a)(v) expressly refers to "*water harvesting infrastructure*". This is precisely the type of "*capture and storage*" option of concern to counsel for Wairakei Pastoral. Council considered that no further amendments are required in that regard. Secondly, while the presumption under Policy 11 is that dairy shed takes will be granted for 15 years, the use of the words "... *will generally ensure that . . .*" in the first line of the Policy means that a term longer than 15 years could still be granted "... *in appropriate cases*" as sought by Wairakei Pastoral.¹³¹

¹²⁹ Daya-Winterbottom, Closing Submissions, at [68]

¹³⁰ Milne, Closing Submissions, at [161] -- [165]

¹³¹ Mr Milne Closing Submissions, paragraphs 167 and 168



[346] We accept that significant investment is made in pastoral conversion to dairying and to investigate and install capture and storage infrastructure for water harvesting. This contributes significantly to the regional economy.¹³² However, we are persuaded by Mr Milne's submissions that relief should not be granted. The policy already allows possible exemption for water harvesting infrastructure. We agree that regulatory control is required to ensure that proper mitigation is imposed, particularly in over-allocated catchments.

6.4 ISSUE 4 Rules and Standards

Issue 4(i) Wairakei Pastoral Limited – Specific Allocation Rules

[347] As part of its relief package, Wairakei Pastoral sought a suite of changes to the rules to:

- [a] Provide for increased water use;
- [b] Make specific reference to dairy farming uses;
- [c] Make specific reference to itself as a named party, or to its land and the conversion project involving 20,000 ha.

[348] The rationale for the various amendments was that the Council's water use calculation model used by Dr Brown, and last run in 2006, contains a specific allocation of water for the Wairakei Pastoral land i.e. the conversion of up to 25,000 ha from forestry to dairying during the Plan period.

[349] Wairakei Pastoral's position was that such a volume of water should be made available or reserved for that specific land area/project and should not be allocated generally for any use to the next applicant in the queue.

[350] The Council's position was that:

¹³² Mr Daya-Winterbottom Closing Submissions, paragraphs 66 to 68 pages 21 and 22.



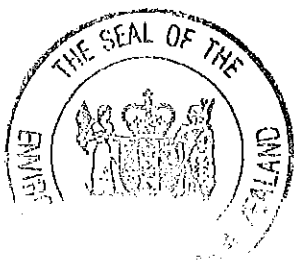
- [a] First, it did not agree with that interpretation of the model. The water calculation model was used to determine the amount of water being extracted from the upper Waikato catchment in 2006 and included a proxy for dairy conversion (up to 25,000 ha) that was not included in the Agribase data at that time; and
- [b] Secondly, such changes to the rules were not necessary.

[351] The Council considered that the existing 10,000 ha of Wairakei Pastoral's converted land had already been catered for in terms of stock water, dairy shed wash down and milk cooling. The stock water needs for the proposed additional 10,000 ha conversion could be met under the Council's proposed allocable flow of 3.6% of Q_5 above Karapiro. Any additional water required for shed wash down, milk cooling or irrigation was available for abstraction now during the winter months (described as "*winter takes*") subject to Wairakei Pastoral, or anyone else, applying and gaining consent to abstract water under Rule 3.3.4.15 (restricted discretionary activity) and then storing the water until it is required.

[352] In relation to the water calculation model, we agree with the Council's position and consider that Wairakei Pastoral is incorrect to attempt to use the model for purposes for which it was not designed or intended.

[353] On the latter point, if that were the situation with the allocable flows set at 3.6% of Q_5 , then our earlier determination to increase the allocable flow above Karapiro means that there is even more water available for a range of new takes. In response to questions from the Court as to whether or not an increase in the allocable flow above Karapiro would address Wairakei Pastoral's concerns, Mr Daya-Winterbottom agreed that that would improve the situation in the short term. But he maintained that in the longer term it was prudent to have a known volume reserved for dairying.

[354] Water is an important resource which is fast approaching the limits of its allocation in parts of the Waikato region. We have already averred to the importance of the Variation setting ground rules which facilitate efficient use for a wide variety of heterogeneous and changing uses of water. Locking quantities of water up for a particular use or user would not provide for the social and economic well-being for the community.



[355] We therefore reject this part of the relief package sought by Wairakei Pastoral.

Issue 4(ii) Winter Takes Above Karapiro – Restricted Discretionary Rule 3.3.4.15A

[356] Mr Braggins, on behalf of Wairarapa Moana, sought that “*winter takes*” be provided for as a restricted discretionary activity in Rule 3.3.4.15A. Winter takes need to be differentiated from “*water harvesting*” which is a specific activity provided for in the Variation. Water harvesting is defined as:

Taking water to be stored for future use in accordance with Policy 16.

[357] Policy 16 is headed *Surface Water Harvesting* and says:

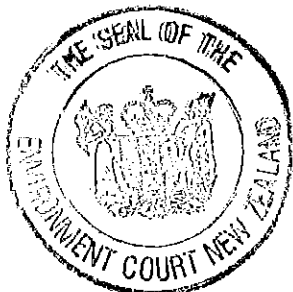
Except as restricted by Policies 9A and 9B, in addition to the primary allocation and secondary allocation set out in Table 3-5, an allocation at higher flows from rivers may be provided as a restricted discretionary activity;

- (a) if the take is not within the Waikato River catchment upstream of the Karapiro Dam; and
- (b) in circumstances where water is only taken when the river flow is greater than the median flow, and the total amount of water taken by way of water harvesting does not exceed 10% of the flow in the river at the time of abstraction.

[358] Winter takes are simply takes, in the context of the catchment above Karapiro, applied for within the primary allocable flow under Rule 3.3.4.15. As Rule 3.3.4.15A relates solely to “*water harvesting*”, it would be confusing and inappropriate to grant the amendment sought by Mr Braggins. There is no need to amend Rule 3.3.4.15 to provide for “*winter takes*” and the new advisory note under Policy 1B clearly identifies such takes as an option.

Issue 4(iii) Should Water Transfers be Made Less Restrictive? – Rule 3.4.4.3(i)

[359] Wairakei Pastoral sought less restrictive transfer provisions, in particular enabling unrestricted upstream transfer. No planning witness or hydrological witness was called to support the proposed amendments. The economist called by Wairakei Pastoral, Dr Evans, was the only witness who gave evidence in this matter.



[360] Dr Evans was cross-examined by counsel for the respondent on this topic.¹³³ He was examined at some length. He conceded a number of matters including:

- [a] The difficulties of assessing the adverse effects of a take if transferred upstream following its grant,¹³⁴ and
- [b] The difficulty of assessing the adverse effects of a take which may be transferred upstream from one hydro reservoir to another and any consequential effect on electricity generation.¹³⁵

[361] We do not propose to discuss the lengthy cross-examination in detail. Suffice it to say we are satisfied that the changes proposed by Wairakei Pastoral would be impractical.

Issue 4(iv) Nutrient Management Plans - Rule 3.4.5.6 and Rule 3.4.5.7

[362] In *Chapter 3.4 Efficient Use of Water*, Rules 3.4.5.6 (permitted activity) and 3.4.5.7 (controlled activity) relate to the use of water for crop and pasture irrigation. The rules contain conditions and/or standards and terms which in previous versions of the Variation had required a nutrient management plan dealing with water irrigation. In response to appeals and the advice of Dr Rout, this was replaced with a requirement for information on seasonal and monthly irrigation water balances.

[363] The Director-General of Conservation was not confident that water irrigation balances were sufficient to protect receiving water bodies against increased nutrient losses which may occur, even when an irrigation water balance is followed. The concerns related particularly to the coincidence of the application of irrigation water, animal effluent and fertiliser, and to the need to ensure integration between the Variation and other sections of the Plan. The relief sought was to add two further clauses to the list of matters to be specified with the irrigation water balances:

The rate, type and location of fertiliser application under Rule 3.9.4.11; and

The rate, type and location of farm animal effluent under Rules 3.5.5.1, 3.5.5.2 and 3.5.5.3

¹³³ Transcript at 1747 - 1758

¹³⁴ Transcript at 1749 - 1751

¹³⁵ Transcript at 1755 - 1756



[364] Mr Milne submitted that the rules in the Variation only related to irrigation for crops and pasture, whereas the other rules listed in the proposed amendments related to other activities such as:

1. Permitted activity rules for fertiliser application;
2. Discharge of farm effluent onto land;
3. Discharge of feed pad and stand-off pad effluent onto land; and
4. A controlled activity rule for the discharge of effluent from existing pig farms onto land.

[365] For the Council, it was submitted that there was no evidential basis for the proposed amendment and nothing to suggest that there was a real problem that required to be addressed. The additional information would be of no practical benefit to the Council.

[366] Wairakei Pastoral also opposed references to nutrient management plans in the rules. Its opposition, in part, was motivated by the need for certainty over the content of such plans. Mr Daya-Winterbottom submitted, that nutrient management plans were complex technical documents and more work needed to be done to identify the content of such documents. Research to date was described as a work in progress. Wairakei Pastoral were satisfied with the Council's final version which allowed for the Regional Policy Statement and the Regional Plan to address nutrient management plans at a future date.

[367] We are not satisfied that the amendments to the rules proposed by the Director-General are appropriate at this time. Clearly the wider topic of nutrient management plans and their role as a regulatory method is complex, technical and evolving. There is insufficient information available to confirm that the additional information sought would be effective and relevant. In these circumstances we agree with Mr Daya-Winterbottom that leaving this matter to be addressed through the Regional Policy Statement review and any subsequent Plan changes would appear to be the pragmatic and practical approach at this time.



***Issue 4(v) Should Flows be Naturalised in the Waikato River below Lake Taupo?
Standard 3.3.4.21 and Method 3.3.4.6C***

[368] The Waikato River catchment includes the diversion associated with the Tongariro Power Scheme. It adds another 654km² to the overall catchment, increasing the Waikato River flow by approximately 19% at the Lake Taupo control gates. Mighty River Power manipulates the flow below the control gates in an integrated manner, by controlling not only the Taupo gates, but also the eight dams between the gates and Karapiro.

[369] The Council proposes to remove the influence of the eight Waikato River hydro generation dams, the Lake Taupo outlet gates and the Tongariro Power Scheme, on the hydrology of that catchment above the Karapiro Dam. This is provided for in Standard 3.3.4.21 which relates to how water shortage restrictions shall apply. Standard 3.3.4.21 relevantly states:

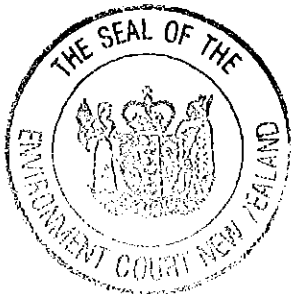
3.3.4.21 Standard – How Water Shortage Restrictions Shall Apply

- a) Restrictions on water takes directly from surface water bodies will occur in the following manner and order, unless existing water take resource consents already contain conditions requiring the restriction or cessation of taking at times of river low flow or in other circumstances in which case the resource consent conditions shall prevail.
- ...
- (f) In the Waikato River catchment upstream of Karapiro Dam, restrictions will be deemed to occur when calculated natural flows (calculated for the relevant natural inflows to Lake Taupo and the Waikato River above Karapiro Dam) fall below the minimum natural flows calculated using the relevant minimum flow percentages in Table 3-5.

Standard 3.3.4.21 is followed by an Advisory Note which states:

Advisory Note

- Standard 3.3.4.21 part f), 'natural flows' are flows where the influence of the eight Waikato River hydro-generation dams, Lake Taupo outlet gates and the Tongariro Power Scheme on the hydrology of the catchment have been removed. These flows will be determined by the model referred to in Method 3.3.4.6C



[370] The Advisory Note refers to the model that is to determine the natural flow as set out in Method 3.3 4.6C which states:

**3.3.4.6C Assessment of hydrological flow statistics for water allocation
(Method to implement Section 3.3.3 Policy 1)**

The Waikato Regional Council will maintain a technical report detailing the calculation of flow statistics used for water allocation at key flow recorder sites in the Region, including methods to remove the influence of existing surface water takes. In the Waikato River catchment upstream of the Karapiro Dam this includes the Council developing a model to remove the influence of the eight Waikato River hydro-generation dams, the Lake Taupo outlet gates and the Tongariro Power Scheme on the hydrology of the catchment for implementing Standard 3.3.4.21(f). The model shall be independently peer reviewed.

The flow statistics in the technical report will typically be reassessed five yearly, unless there are any significant changes to the flow regime in which case the technical report will be reassessed as soon as practical thereafter. The technical report will be published on the Waikato Regional Council website.

Advisory Note:

- The Council will make available to stakeholders a peer review of the model described in this method and the results of periodic reviews of the data used in this model.

[371] There is general agreement with respect to the development of the model and its peer review. However, Wairakei Pastoral opposes naturalising the flows above Karapiro (removing the influence of Mighty River Power storage and Tongariro Power Scheme inflows) when implementing restrictions on consumptive uses.

[372] Mr Daya-Winterbottom contended that removing the influence of the Tongariro Power Scheme on the hydrology of the catchment, would result in less water being notionally available for abstraction, and the likelihood that water shortage restrictions would be applied more frequently. Mr Williamson, a hydrologist called by Wairakei Pastoral, had this to say in his supplementary evidence:¹³⁶

6.2 My view is that naturalised flow above Karapiro should be the sum of flow that arrives at Taupo (including flows resulting from the TPS consents) and flows that arrive in the main stem of the Waikato River downstream

¹³⁶ Williamson, Supplementary evidence at [6.2] – [6.4]



of Taupo. This was discussed in section 8 of the Second Hydrology Caucusing Statement.

- 6.3 The TPS inflows to Taupo are significant with a mean annual value nearing 30 m³/s and a Q₅ flow of 15 m³/s according to Hunter's Exhibit 1 (MRP's AEE for Resource Consent).
- 6.4 Excluding TPS inflows from the naturalised flow calculation would not make sense for a number of reasons:
- (a) whatever flow that arrives at Karapiro (including TPS releases) will be accounted for in the low flow statistic;
 - (b) exclusion of TPS flows would restrict consumptive users earlier than is warranted by the actual water level in the river;

...

[373] The quote from Mr Williamson's evidence reflected the stance he took at the expert caucusing of the hydrologists. Whereas Dr Brown, called by the Council, and Mr Keller, called by Genesis, both considered that naturalising of flows above Karapiro is appropriate when implementing water shortage restrictions, Mr Williamson did not.

[374] Dr Brown in his rebuttal evidence had this to say:¹³⁷

... As discussed by hydrology experts during witness caucusing (including Dr Mitchell) as part of the Wairakei Pastoral Limited consent appeal process the TPS does not augment the Q₅ flows as most of this water is being stored in Lake Taupo rather than directly increasing Waikato River flows below the Taupo gates.

[375] In his evidence-in-chief, Dr Brown made the following recommendation:¹³⁸

93. ... I recommend that the restrictions are based on the 'natural' flows of the catchment as shown in the "track changes" version of Variation 6 attached to the evidence of Mr van Voorthuysen. The natural flows in this context are the flows that would have occurred without the influence of the hydropower generation which involves; the diversion of water into Lake Taupo via the Tongariro Power Scheme, the manipulation of Lake Taupo water levels via the Taupo outlet gates and the manipulation of flows from the eight hydro dams between Karapiro Dam and Lake Taupo.

[376] Dr Brown's recommendation was made for practical hydrological reasons. Dr Brown was concerned with the effect on water take restrictions as a result of the influence

¹³⁷ Brown, Rebuttal evidence at [35]

¹³⁸ Brown, EIC, at [93]



of power generation on natural flows, which involves the active management and manipulation of Lake Taupo water levels and outflows by Mighty River Power. He wanted the Council to be able to assess Waikato River flows without the influence of operational decisions by the hydro-power generators. Otherwise restrictions, when and if they do occur, will be after the time when the takes ought to have been restricted.¹³⁹

[377] Also, as he pointed out, it is important to note that water take restrictions in the Waikato catchment above Karapiro may occur in any tributary and these are not influenced by the Tongariro Power Scheme water. A large majority of the surface water takes in the catchment above Karapiro are on tributaries rather than the main stem, and water take restrictions would be implemented using Standard 3.3.4.21.

[378] Mr Williamson appears to agree with Dr Brown's practical approach. He said:¹⁴¹

13.1 From a hydrology perspective we agree that the water restrictions based on "natural flows" to Lake Taupo are sensible. From a practical implementation perspective, this is reliant on MRP making hydrology data publicly available and the process of calculating the "natural flows" needs to be audited and subject to public scrutiny.

Method 3.3.4.6C will implement such an audit and public review process.

[379] We are satisfied that the review process, put in place in accordance with Method 3.3.4.6C, should allay any reservations that may be held about the effect of a naturalised Q₅ at Karapiro.

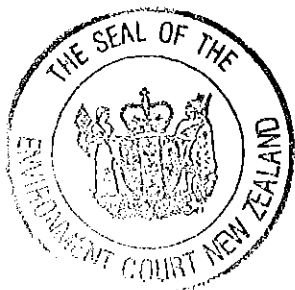
[380] We therefore agree with Dr Brown. We find that restrictions above Karapiro are to be based on the natural flows as is set out in the Council's latest proposed version of the Variation.

[381] Genesis sought to naturalise the flows on the Waikato for water shortage restrictions below Karapiro as far as the Huntly Power Station mixing zone. Dr Mitchell, environment consultant for Genesis, gave as his reason:¹⁴²

¹³⁹ Brown, EIC, at [91] and [92]

¹⁴¹ Williamson, EIC, at [13.1][sic], page 34

¹⁴² Mitchell, EIC, at [2.9] and [92]



2.9 ... This water is diverted into the catchment for the sole purpose of electricity generation, and I consider it inequitable and inefficient to have it potentially allocated to other parties "part way along the pipe".

No hydrological reason was given.

[382] This matter was not discussed at any great length in the hydrological evidence. However, it was discussed during the second caucusing session of the hydrologists. Their second statement had this to say:¹⁴³

Brown considers there is little benefit in naturalising the flows downstream of Karapiro if the purpose is to ensure that consumptive allocation does not consume the water provided by the TPS prior to it flowing past Huntly Power Station. Brown considers that the minimum flows downstream of Karapiro are not significantly influenced by TPS diversions (which are often restricted during summer low flows) and the availability of water is determined by discharges from Karapiro Dam combined with natural flows in the catchment downstream of Karapiro.

Keller does not agree that the flows downstream of Karapiro should not be naturalised. The TPS flow has an annual mean value of nearly 30m³/sec, and has a profound influence on water availability below Karapiro, noting that the future availability for this water cannot be relied upon. As shown in Keller's EIC, small reductions in river flows, even when Karapiro is discharging at significantly higher than the mandated minimum, routinely affect generation capacity at Huntly during the summer. Thus, if consumptive takes are based on the Q₅ that includes the TPS flow, this will allow higher levels of abstraction and consequent reductions in the generation capacity at Huntly at times of high river temperature.

[383] Mr Majurey in his closing submissions for Genesis, referred to the evidence of Mr Weir¹⁴⁴ that the water diverted into the Waikato River from the Tongariro Power Scheme is not guaranteed to be fully available in the future. This, he said, underscores the need to maintain current flows available for the Waikato Hydro Scheme and the Huntly Power Scheme. This reflected the evidence-in-chief of Dr Mitchell.¹⁴⁵

[384] The concern of Mr Majurey and Dr Mitchell was adequately answered by Dr Brown in his statement of rebuttal.¹⁴⁶

¹⁴³ Hydrologists' second caucusing statement, at [8] on page 7

¹⁴⁴ Weir, EIC, at [4.4] – [4.5]

¹⁴⁵ Mitchell, EIC, at [2.9] & [4.57]

¹⁴⁶ Brown, rebuttal evidence, at [13]



13. Dr Mitchell requests the reservation of TPS inflows so they are made available for the Huntly Power station. I disagree with that suggestion as I consider that once the TPS inflows have entered Lake Taupo they simply become part of the upper Waikato River catchment water available for use by MRP in the Waikato Hydro Scheme. Flows below Karapiro are a result of MRP operational decisions and the maintenance of the minimum flow specified in MRP's consent conditions for the Karapiro dam.

[385] We accordingly find the Method and Standard as now proposed by the Council would be the most appropriate way of implementing restrictions on consumptive uses on the main stem of the Waikato River.

Issue 4(vi) Should Table 3-5 have a Cross-Reference to Standard 3.3.4.21(f)?

[386] Mr Cowper submitted on behalf of Mighty River Power that the inclusion of a cross-reference in Table 3-5 to Standard 3.3.4.21(f), which relates to restrictions being calculated with respect to the calculated natural flows below Lake Taupo, should be deleted, and be replaced by an advisory note.

[387] It was Mr Cowper's submission that the inclusion of the cross-reference, in the row dealing with the catchment allocation for the Waikato River, is inconsistent with how the rest of the Table has been formulated. He sought that it be removed from the Table and included as an advisory note at the end of the Table, which is what has been done with other matters associated with information relevant to the contents of the Table. No other allocable flow has reference made to the water restriction provision relating to it.

[388] We agree with Mr Milne that this cross-reference in Table 3-5 does provide clarity to users of the Plan as to how minimum flow restrictions are implemented for the unique situation of the Waikato River above Karapiro Dam. Hence its inclusion in the Table. Deletion of this cross-reference, and then introducing it as an advisory note, would introduce more uncertainty. Users of Table 3-5 would need to read both the relevant rows in the Table and then align this with the relevant advisory note.

[389] We agree that providing clarity within Table 3-5 is particularly important if a user of the Plan is working their way from Standard 3.3.4.21(f) to Table 3-5. Standard 3.3.4.21(f) includes the words on the last line "... *fall below the relevant minimum flow percentages in Table 3-5*". The inclusion of the cross-reference with Table 3-5 to



Standard 3.3.4.21(f) clarifies which flow percentages are the relevant ones in relation to the Standard.

[390] The Council has agreed to include in the 8 August 2011 version of Variation 6 an Advisory Note cross-referencing to the whole of Policy 1A, and this was agreed to by Mr Cowper.

Issue 4(vii) Should Water Shortage Restrictions Apply to Genesis? Standard 3.3.4.21

[391] Policies 13 and 14 and Rule 3.3.4.21 provide a regime of restrictions to be implemented when water shortage conditions arise. Rule 3.3.4.21(a) sets out the manner and order that restrictions on water takes will occur in times of shortage.

[392] Genesis sought to have the Huntly Power Station exempt from the standard (Rule 3.3.4.21(a)), as it is at such times that its generation is most needed.

[393] The Council had amended the standard to ensure that any resource consent conditions imposing low flow restrictions would prevail over the standard, noting that the provision only applies to restrictions in water take consents. In the case of the Huntly Power Station consents, there are no low flow restrictions in the take consent. The associated discharge consents restrict discharge of heated water in certain defined conditions, but do not require cessation.

[394] The Council's position was that it would be more appropriate for Genesis to seek to change its resource consent to take water (under Section 127 of the Act) to include more certain and site specific water restrictions and hence be exempt from the requirements of Standard 3.3.4.21(a), rather than to include provisions in the Variation to deal with a single case.

[395] We agree with the Council's position. The amendment proposed by Dr Mitchell to insert the words "... *except that any take for the Huntly Power Station will not be required to be reduced*" is very general and may not be appropriate in the long term. We consider that it would be more appropriate to provide for the Power Station's unique position to be considered on its merits on a case specific basis, having regard to the suite of consents that must surely apply to such a complex.



Issue 4(viii) Threshold Date

[396] The Variation contains a number of provisions which include a “threshold date” before or after which the provisions apply. Initially in the Decisions version a date of 20 October 2006 (the date on which the variation was notified) was used. Subsequently, in response to appeals, and particularly the evidence of Mr Willis (planning expert for AWG) the date was changed to 15 October 2008 (the date when the Council’s decisions on the variation were released). There was agreement that a consistent date should be used, and all parties except Genesis accepted the 2008 date.

[397] Genesis sought to retain the 2006 date. Mr Majurey, describing the effect of using a later date as “*planning creep*”, submitted that the upshot of using the 2008 date was that unlawful behaviour was effectively rewarded, and that the 2008 date lacked the necessary evidential foundation to displace the presumption that the 2006 notification date should apply. Mr Mitchell, planning expert for Genesis, supported the 2006 date in the context of ensuring that the net amount of water taken did not exceed that occurring prior to 20 October 2006.¹⁴⁷

[398] Mr Milne submitted that the rationale for using the 2008 date was simply that abstractors, in historically over-allocated catchments, were either acting innocently because they were unaware of the limits, or they were granted take consents by the Council. He acknowledged that it meant that historical takes were treated more benignly than increases of take that occur after the 2008 date, particularly when consents come to be renewed.

[399] Mr Willis, planning consultant for the Agricultural Working Group, identified four categories of existing agricultural takes that would benefit from the later date, two of which related to takes that could be described as unlawful. Mr Willis considered that it was reasonable to use the more recent 2008 date given the length of time this variation process had taken and the changes that had been made to it. He was concerned that there were water users, particularly agricultural users, who did not understand or were unaware of the new regime set up by the variation. If such takes were now to be classified as non-complying activities this would impose a cost on those users. In his opinion the more

¹⁴⁷ Mitchell, rebuttal, at [3.16], [4.2] – [4.5]



recent date was an appropriate and pragmatic planning response to an existing, albeit undesirable, situation.

[400] Mr van Voorthuysen agreed with Mr Willis that it was not plausible to suggest that the taking of water for those existing users was an activity generally not to be condoned.

[401] Mr Milne submitted, that from questions of cross-examination posed by Mr Majurey, Genesis' concern was that the removal of water from the Waikato River catchment below Karapiro and above the Huntly Power Station mixing zone, would increase the amount of time that restrictions were placed on the operation of the power station, due to the temperature of the river rising to a level that precludes the discharge of the power station's heated cooling water into the Waikato River. The presumption being that by moving the date back to 2006 then less water would have been removed from the Waikato River above the power station.

[402] Genesis' position can more readily be understood in the context of other relief sought by them: to have the allocable flow above Huntly reduced from 17.6 m³/s (being 10% of Q₅) to some lesser figure of around 8 or 9m³/s (being the level of takes authorised at 20 October 2006).

[403] We have earlier determined that the allocable flow above Huntly should remain at 10% of Q₅. Amending the date from 2008 to 2006 would have no impact on the amount of water taken from above the power station.¹⁴⁸ In those circumstances we find that the 15 October 2008 date should be retained as it appropriately provides for the historical abstractors whilst avoiding adverse effects on in-stream environmental values.

Issue 4(ix) Definitions

"Property" and "Site"

[404] During the hearing the Court raised a question about the term "property" having different meanings in various parts of the Variation which resulted in some uncertainty and was potentially confusing. The matter was discussed in the Planners Conferences in

¹⁴⁸ Brown, Supplementary Evidence, 20 May 2011, Table 1



July and it was suggested that separate definitions be used. A new definition of “*site*”, meaning a Certificate of Title, was proposed being used in the rules. The term “*property*” would continue to mean adjacent land in one ownership but its use would be limited to the provisions relating to riparian management plans.

[405] Mr van Voorthuysen reserved his position on the new definition of “*site*” until he had received advice from Dr Brown regarding any implications the change might have, particularly in relation to the modelling of current water use and the permitted activity rules. Subsequently, Dr Brown advised that the Council’s water allocation calculator model does not rely on the delineation of properties or certificates of title to estimate permitted activity water use. Instead the model estimates stock water, dairy shed wash down and milk cooling water based on the number of cows within a catchment and then increases the estimate by 20% to allow for permitted activity water use.

[406] Based on Dr Brown’s advice, the suggestion from the Planners was accepted by Mr van Voorthuysen and the Council’s position at the end of the hearing was that the terms be defined as:

Property: For the purposes of Chapters 3.3 and 3.4 means one or more allotments contained in a single certificate of title, and also includes all adjacent land that is in the same ownership but contained in separate certificates of title.

Site: One or more allotments contained in a single certificate of title.

[407] In submissions, the Director-General of Conservation sought that the definition of “*site*” be further qualified by limiting it to certificates of title “*that existed on (date of Environment Court decision or 15 October 2008)*”. The concern with the Council’s definition was that subsequent subdivision of large areas of land could produce more certificates of title with consequential permitted activity rights. Of particular concern was the conversion of large areas of forestry blocks into dairy or other farming operations. The concern was that this could increase the number of takes and may have adverse effects on the ecology of small streams. The Director-General’s definition would prevent new titles created after the specified date from enjoying permitted activity status under certain rules in the Variation.

[408] The Court raised the question that denying permitted activity status may cause undue hardship to some people including where there was genuine subdivision for a



proper purpose. District Plans throughout the Region provide for subdivision for a range of purposes and sizes of lots.

[409] Mr Milne advised that the Council did not have any real concern about the potential effects of increases in the number of takes arising out of subdivision of land. While it is potentially possible that someone might subdivide in order to take advantage of the permitted activity volume of water (such as the 15m³ per day), this would involve a cost and such subdivision would not be widespread. There was a greater likelihood that the proposed restriction would unnecessarily restrict genuine subdivision. Counsel for the Council did not consider that a case to restrict the definition had been made out on the merits.

[410] We note that although the new definition of “*site*” changes the wording, the meaning is the same as in earlier versions of the Variation where a rather convoluted piece of drafting in the permitted activity Rules 3.3.4.9 and 3.3.4.10 used rule specific footnotes to explain that “*a single property in one ownership is a property which has a single certificate of title*”. The term “*site*” is simpler and is now to be used in a way commonly found in most regional and district plans, and recognises that permitted activity rights usually attach to a single certificate of title. We find that the definition and use of the term “*site*” is appropriate as it provides certainty and clarity that was lacking in the previous wording, and is consistent with the meaning of earlier versions of the Variation and the commonly understood basis for permitted activity rights.

Issue 4(x) Mighty River Power – Addendum to Closing Submissions

[411] In addition to the matters raised in the main text of his closing submissions, Mr Cowper attached two tables which identified key provisions of the Variation which Mighty River Power considered were critical to retain (Part A) and provisions where amendments to the 25 July version were sought to strengthen the protection of the Waikato Hydro Scheme (Part B). For completeness we refer to the remaining matters in Part B.¹⁴⁹

¹⁴⁹ That is Part B matters which were addressed by Mr Milne in closing submissions and which we have not already determined, and those matters which Counsel for Mighty River Power advised in a post-hearing Memorandum, dated 19 August 2011, were still issues for the Court to consider



Policy 3 Clause (a)(ii) and Rule 3.3.4.10 Permitted Activity Rule – Supplementary Surface Water Takes

[412] This policy and rule relate to permitted activities. Mighty River Power sought to limit these provisions to properties/sites existing as at 15 October 2008. Presumably any sites created after that date would require some form of resource consent to take even small volumes of water. For the same reasons as set out above in the part of this decision relating to the definition of “site” we do not consider it appropriate to remove permitted activity rights from sites created after 15 October 2008.

Rule 3.3.4.14 Controlled Activity Rule – Existing Taking of Surface Water for Domestic or Municipal Supply

[413] Mighty River Power sought to add the word “existing” into the first paragraph of the rule to be consistent with the rule title, such that it would read:

Except as permitted by Rule 3.3.4.10 any taking of surface water for the purposes of existing domestic or municipal supply is a controlled activity (requiring resource consent) subject to the following standards and terms:

- a) The take is described by Policy 4(a)
- b) The applicant shall prepare and provide a water management plan which meets the requirements of Methods 8.1.2.2
- ...
- d) All applications to take water under this rule shall be assessed on a net take basis.
- ...

[414] The Council opposed the amendment on the basis that it was unnecessary as the cross reference to Policy 4(a) detailed the three criteria that needed to be met for an application to be classified as a controlled activity under this rule.

[415] Policy 4(a) relates to *replacing* resource consents for domestic or municipal supply provided that they comply with the three criteria listed, being:

- At the time of application the take was an authorised water take; and
- There is no increase in the nature, rate and volume of the take from that previously authorised; and



- A water management plan which meets the requirements of Method 8.1.2.2 has been provided.

[416] The key to understanding Rule 3.3.4.14 is the cross reference to the contents of Policy 4(a) and that policy relates to *replacing authorised* resource consents to take water. This is different to how the word “existing” is used elsewhere in the Variation. We consider that the title of the rule would be a more accurate and helpful “*label*”, or paraphrasing, if it were amended to read:

Replacing Authorised Existing Taking of Surface Water for Domestic or Municipal Water Supply.

[417] A further amendment to Rule 3.3.4.14 sought by Mighty River Power was the addition of clause (h) of Policy [sic] 3.3.4.14A. We understand this should refer to Rule 3.3.4.14A “*Controlled Activity Rule – Taking of Surface Water for Existing Milk Cooling and Dairy Shed Wash Down*”. Clause (h) is a standard and term:

- h) Any water take under this rule shall be deemed to include (as the first 15 cubic metres per day of such takes) all water that is permitted for the site pursuant to Rules 3.3.4.9 and 3.3.4.10 (so that the total water allocated to the site is accounted for within the consented amount to ensure no double accounting).

[418] We assume the purpose of MRP’s amendment is to ensure that there is an accurate accounting of all water being taken throughout the catchment, and particularly above Karapiro. The intention of the clause being that any consent under the controlled activity rule would be for a volume of water including that provided for as a permitted activity.

[419] We note that Rule 3.3.4.14 relates to “*domestic or municipal supply*”. This is a defined term in the Variation and means “*a reticulated supply publicly or privately owned ...*” The rule is limited to such reticulated supplies. In which case the matters addressed in Clause (h) are not relevant given that generally “*domestic or municipal*” takes will be for large volumes of water compared to that permitted under Rules 3.3.4.9. and 3.3.4.10 and also because Clause (h) refers to water permitted for the “*site*”, a term defined in the Variation to mean a Certificate of Title.

[420] We reject the relief sought as being not necessary.



6.5 ISSUE 5 Iwi Issues

[421] In her closing submissions, Ms Forret for the River Iwi Trusts narrowly defined the outstanding iwi issues as:

- [a] The nature and extent of amendments to Variation 6 required to give effect to the Vision and Strategy;
- [b] Potential access to water for *iwi development*; and
- [c] The transfer provisions in light of the co-management deeds.

We deal with each in turn.

Does Variation 6 give effect to the Vision and Strategy?

[422] The evidence adduced by the Maori appellants sought amendments to Variation 6 to better give effect to the Vision and Strategy.¹⁵⁰ As a consequence the Council adopted Mr van Voorthuysen's recommendation of reference to the Vision and Strategy by way of direct cross-reference in the introductory and key decision-making provisions. Some further amendments were made to the post-caucusing version.

[423] Ms Forret, for the River Iwi Trusts, in her opening statement advised that the Trusts now largely supported the then-current version. She stated that Ms O'Sullivan was preparing supplementary evidence that identified further minor amendments sought.

[424] In his closing submissions, Mr Milne, on behalf of the Council, had this to say:¹⁵¹

68. In their subsequent [opening] legal submissions, counsel for the River Iwi Trusts stated that Ms O'Sullivan's supplementary evidence set out the further changes sought in respect of references to the Vision and Strategy, most of which have been accepted by the Council. The remaining point of dispute appears to be the Trusts' desire to include a new clause (ac) into Policies 8¹⁵² and 9¹⁵³ as follows:

¹⁵⁰ See in particular Manukau, EIC, and den Ouden, EIC

¹⁵¹ At [68]

¹⁵² Consent Application Assessment Criteria – Surface Water



"The need to restore and protect the economic, social, cultural and spiritual relationships of Waikato River Iwi with the Waikato River."

[425] In response to a direction from the Court seeking clarification of the accuracy of the issues identified in Mr Milne's closing submissions, Ms Forret had this to say¹⁵⁴:

4. The changes to include new clause (ac) into Policies 8 and 9 are correctly referenced at paragraph 68 of the respondent's closing submission.

[426] According to Ms Forret, that without recommended clause (ac), there are no assessment criteria for applications concerning either surface water or ground water that require the decision-maker to have particular regard to the economic and social relationship of Waikato River Iwi with the Waikato River. This, she said, is needed to reflect Objective C of the Vision and Strategy which says:

- C. The restoration and protection of the relationship of Waikato River Iwi according to their tikanga and kawa, with the Waikato River, including their economic, social, cultural and spiritual relationships

[427] For the Council, Mr Milne submitted that the proposed new paragraph would duplicate:

- [a] Policy 8, Clause (aa) – repeated in Policy 9 - which states:
 - (aa) Whether the proposed take would adversely affect the restoration and protection of the health and wellbeing of the Waikato River.
- [b] Policy 8, Clause (ab) – repeated in Policy 9 – which states:
 - (ab) The effect of the activity on the relationship of tangata whenua and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga
- [c] Issue 3.3.1(aa) which states:
 - (aa) The allocation and use of water, if not managed appropriately, can adversely affect the restoration and protection of the health

¹⁵³ Consent Application Assessment Criteria – Ground Water

¹⁵⁴ At [4]



and wellbeing of the Waikato River as well as the spiritual, physical and economic wellbeing, identity and cultural practices of those iwi whose mana and mauri the river represents

[d] Objective 3.3.2(aa) which states:

- (aa) Giving effect to the overarching purpose of the Vision and Strategy to restore and protect the health and wellbeing of the Waikato River for present and future generations.

[428] Further, Mr Milne submitted:¹⁵⁵

... If the proposed clause (ac) were to be inserted to give effect to Objective C, then as a matter of logic it would also be necessary to insert an additional clause to give effect to the parallel Objective D which requires the restoration and protection of the relationship of the Waikato Region's communities with the Waikato River including their economic, social, cultural and spiritual relationships. If one then provides for two specific objectives in that way, the question then arises why not also specifically provide for Objectives E to M as well.

[429] We agree with Mr Milne. We are mindful that the Vision and Strategy is already part of the Operative Regional Policy Statement from 25 November 2011 as a matter of law. Repeating large parts of the Vision and Strategy in various parts of Variation 6 is repetitive and unnecessary. Nor is it appropriate to pick out certain parts of the Vision and Strategy and repeat them in particular parts of the Variation. This runs the risk of detracting from the holistic nature of the Vision and Strategy and inappropriately implies that the quoted parts are more important than others.

[430] The extent of the references required to the Vision and Strategy are, as Mr Milne said, a matter of evaluative judgment rather than a matter of law. We find that the Council has struck an appropriate balance between the competing positions. Appropriate acknowledgment is given to the statutory direction that the Vision and Strategy is intended by Parliament to be the primary direction-setting document for the Waikato River.

¹⁵⁵ At [71]



Should there be preferential access to water for “iwi development”?

[431] The River Iwi Trusts propose a new Rule 3.3.4.14AB:

**Rule 3.3.4.14AB Control Activity Rule – Taking of surface water for iwi development
(Implements section 3.3.3 and Policy 3ab¹⁵⁶)**

The taking of surface water by **Waikato River Iwi** for iwi development exceeding 70 percent and up to and including 100 percent of the primary allocable flow of water from catchments as identified in Table 3-5 is a **controlled activity** (requiring resource consent) subject to the following standards and terms:

- a) The net rate of the take assessed in combination with all other authorised water takes (all calculated on a net take basis) shall not exceed 100 percent of the primary allocable flows for catchments specified in Table 3-5;
- b) The water take location shall not be within a water body classified as Natural State Water on the Water Management Class Maps;
- c) All applications to take water under this rule shall be assessed on a net take basis and the assessment of cumulative allocation under this rule shall not exceed 0.6 percent of the portion of the primary allocable flow between 70 percent and 100 percent for the catchment.

[432] “*Iwi development*” is proposed to be defined as:

iwi development: development undertaken by Waikato River Iwi within their rohe in respect of:

- a) Maori land held under Te Ture Whenua Maori Act 1993 and/or
- b) Land owned or leased by an iwi authority representing any of the Waikato River Iwi, and undertaken by the relevant authority for the benefit of its members.

Any application for the purpose of iwi development must be made by an entity entirely controlled by the relevant iwi authority or the Te Ture Whenua Maori Act recognised representative body affiliated to the River Iwi.

¹⁵⁶ Policy 3ab is a cross reference to Ms O’Sullivan’s proposed policy change that has never been incorporated into the Regional Council’s version of Variation 6. The reference is to a new policy which would read: “*Policy 3ab. Within catchments that were not over-allocated prior to 15 October 2008 classifying as a controlled activity any take for iwi development.*”



[433] “*Waikato River Iwi*” is proposed to be defined as:

Waikato River Iwi: refers to Ngati Tuwharetoa, Raukawa, Te Arawa River Iwi, Ngati Maniapoto and Waikato-Tainui.

Would such a rule be ultra vires?

[434] It was the respondent’s position, that the preferential rule would be ultra vires relying in part on the judgment of the High Court in *Hauraki Maori Trust Board v Waikato Regional Council*.¹⁵⁷ Counsel for the River Iwi Trusts endeavoured to distinguish the *Hauraki Maori Trust Board* decision on the basis that Section 30 of the Resource Management Act has since been amended and the Vision and Strategy enacted by the Settlement Act has since come into force.

[435] Randerson J, in *Hauraki Maori Trust Board*, entered into a detailed analysis of the relevant provisions of the Resource Management Act, commencing with section 30, which sets out the Regional Council’s functions and powers. He concluded.¹⁵⁸

[57] ... The Act focuses on the authorisation of activities and may do so by reference to a particular class of activity or by reference to the effects of activities. That is consistent with the statutory purpose as defined in section 5(2). Section 68 does not contemplate the making of rules which would give preference to a particular section or sections of the community in the allocation of space in the coastal and marine area.

[436] Importantly, for present purposes, he identified the Act’s focus on the authorisation of activities by reference to a particular class of activity or by reference to the effects of activities – not giving preference to a particular section of the community.

[437] Randerson, J’s conclusion reflects the clear wording of the Council’s functions and powers which relevantly say (bolded sections are the new provisions enacted by the 2005 Amendment):

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

¹⁵⁷ HC, CIV-2003-485-999, Auckland Registry, Randerson, J

¹⁵⁸ At [57]



- (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
 - (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
 - (c) ...
 - (ca) ...
 - (d) ...
 - (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including –
 - (i) the setting of any maximum or minimum levels or flows of water:
 - (ii) the control of the range, or rate of change, of levels or flows of water:
 - (iii) ...
 - (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:
 - (fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:**
 - (i) the taking or use of water (other than open coastal water):**
 - (ii) the taking or use of heat or energy from water (other than open coastal water):**
 - (iii) ...**
 - (iv) the capacity of air or water to assimilate a discharge of a contaminant:**
 - (fb) ...
 - (g) ...
 - (ga) ...
 - (gb) the strategic integration of infrastructure with land use through objectives, policies, and methods:
 - (h) any other functions specified in this Act.
- (2) ...
- (3) ...



- (4) A rule to allocate a natural resource established by a regional council in a Plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:
- (a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and
 - (b) nothing in paragraph (a) affects section 68(7); and
 - (c) the rule may allocate the resource in anticipation of the expiry of existing consents; and
 - (d) in allocating the resource in anticipation of the expiry of existing consents, the rule may –
 - (i) allocate all of the resource used for an activity to the same type of activity; or
 - (ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and
 - (e) the rule may allocate the resource among competing types of activities; and
 - (f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

[438] We note that Section 1(a) focuses on the integrated management of the resources and Section 1(b) on the potential effects. Again, Sections (e) and (f) focus on the control of the resource. The new Section (fa) focuses on the allocation of the taking or use of the resource. There is no direct reference in Section 30 to any group in the community. The allocation is to be controlled by the status of the activity not the status of the applicant.

[439] The rules in Variation 6 which provide for a more favourable allocation, do so by means of creating a favourable activity status for various activities. The controlled activity rules for dairy-shed wash-down and milk cooling purposes are an example. Shed wash-down and milk cooling are specific existing activities. The favourable status applies to any person who undertakes those activities (whether an individual, a partnership or a limited liability company) and is not in any way based on the ethnicity of that person. There is no other rule in Variation 6 which is based on the status of the applicant. Any person may apply for a consent to undertake any activity.



[440] The Settlement Act and the Vision and Strategy do not extend the functions and powers of the Regional Council under the Resource Management Act. Ms Forret mounted an argument based on the words *restoration and protection* in Objective C in the Vision and Strategy. Objective C does not extend the Council's functions and powers as set out in Section 30 of the Resource Management Act. The Settlement Act legislation would require clear and unambiguous words to override the principal Act which creates the functions and powers of decision-makers.

[441] Even if we are wrong in considering ourselves bound by *Hauraki Maori Trust Board* we consider that such a rule would not be the most appropriate for achieving the objectives and policies of the Variation and the purpose of the Act for a number of reasons, including:

- [a] No evidence has been adduced that suggests Maori are not able to undertake any cultural or traditional practice because of the wording of the Variation;
- [b] During the Schedule 1 process a Maori incorporation, Wairarapa Corporation (which is not part of Waikato River iwi) has obtained the largest and second-largest takes for irrigation in the region;
- [c] When water is available within the allocable flow, then an application by an iwi authority which satisfies the provisions of the plan could be granted regardless of whether it enjoys a favourable allocation status. Where water is not available within the allocable flow, creating a favourable allocation activity status would not assist iwi unless such applications were explicitly enabled to breach the allocable flow. Accordingly, there is no practicable reason for granting the relief sought;
- [d] The definition of the Waikato River iwi limits the rule to the five named iwi. We were not referred to any Policy or other reason why it should be so confined. As a matter of fairness and equity, if such provision were to be introduced, they should apply throughout the region and to all iwi;
- [e] The proposed definition of *iwi development* is wide and includes land owned or leased by an iwi authority and development undertaken by the



authority for the benefits of its members. This would enable non-Maori to utilise a lease to an iwi authority as a means of obtaining preferential treatment.

Should rules providing for the transfer of water permits be included in Variation 6?

[442] Waikato/Tainui and the River Iwi Trusts oppose providing for the transfer of water permits in the Variation. Ms Andrews, counsel for Waikato Tainui, said this is primarily because Waikato-Tainui considers the transfer of water and rights between commercial operations is likely to have detrimental impacts on the Waikato River. Providing for transfers may also encourage some parties to view water as something to be used and maximised purely for economic gain, rather than a resource to be restored and protected as required by the Settlement Act.¹⁵⁹ Mr Manukau expressed a similar concern in his evidence.

[443] Mr Spears, in his rebuttal evidence, stated that in his experience people who had paid for a water right had an even stronger incentive to sustainably manage the resource. He was not cross-examined.

[444] In response to the evidence of Mr Manukau for Waikato-Tainui, Mr van Voorthuysen advised:¹⁶⁰

106. I found Mr Manukau's evidence to be helpful as it clarified in my mind that Waikato-Tainui does not oppose water take transfers on philosophical or cultural grounds. Instead, Waikato-Tainui wishes to see any potential adverse effects on the Waikato River that might result from such transfers being avoided, remedied or mitigated.

Mr van Voorthuysen then examined *Rules 3.4.4.2* and *3.4.4.3* and concluded that: subject to them additionally referring to the Vision and Strategy, their provisions were appropriate to avoid, remedy or mitigate potential adverse effects. That evidence was not challenged.

¹⁵⁹ Opening Submissions at [6.10]

¹⁶⁰ Rebuttal at [106]



[445] Ms Forret, counsel for the River Iwi Trusts, submitted that the transfer provisions are in breach of the Co-Management Deeds between the Crown and Raukawa and Te Arawa River Iwi because they introduced transfer provisions without carrying out the consultation process required under the deeds.¹⁶¹ Those Deeds were entered into on 17 December 2009 and 9 March 2010 respectively. They each have an identical Clause 13.2 as follows:

13.2 Notwithstanding clause 13.1, the Crown will not:

13.2.1 establish a regime of tradable rights or tradable permits in water;

13.2.2 establish or confer management or use rights of a nature and/or duration that in effect create rights of property in the waters of the Waikato River;

13.2.3 develop policy or introduce any legislation which in effect amounts to the privatisation of the waters of the Waikato River,

without first engaging with [Raukawa/Te Arawa River iwi] in good faith and in accordance with the principles of the [Raukawa-Crown/Te Arawa River Iwi-Crown] accord set out in part 8.

[446] Mr Milne pointed out that at the time those deeds were executed the Resource Management Act already contained the following provisions:

[a] Section 122 stating that consents are not real or personal property;

[b] Section 123 authorising a duration not exceeding 35 years from the date of granting; and

[c] Section 136 authorising a holder of a water permit granted other than for damming or diverting water, to transfer the whole or any part of the holder's interest in the permit to any owner or occupier of the site in respect of which the permit is granted; or to another person on another site; or to another site, if both sites are in the same catchment or aquifer; and the transfer is expressly allowed by a regional plan or has been

¹⁶¹ Opening Submissions at [86]



approved by the consent authority that granted the permit on an application under subsection (4).

[447] Mr Milne submitted that the wording of Clause 13.2 of the deeds is in the future tense – “*will not*”. It does not repeal any of the provisions of the Resource Management Act and it does not purport in any way to remove or restrict their application. Nor could it do so. We agree.

[448] Ms O’Sullivan, for the River Iwi Trusts, gave evidence that ownership of water was deliberately left out of the co-management settlement and that Raukawa have never ceded traditional ownership of their waterways under Article 2 of the Treaty of Waitangi.¹⁶² To this end, she said, they continue to assert a right to manage allocation.¹⁶³ The inference from her evidence was that Maori should be consulted regarding the transfer of any water right within the region.

[449] Mr Manukau, for Waikato-Tainui, also gave evidence to the effect that Waikato-Tainui should be consulted regarding the transfer of any water right within the region.

[450] Section 36A of the Act expressly provides that neither the applicant for a resource consent nor the local authority has a duty under the Act to consult any person about an application for a resource consent. The only provision under the Act requiring consultation with Maori is Clause 3 of Schedule 1 of the Act, which does not apply to transfer of water permits. Under the Act permitted activities do not require a resource consent. There is nothing in the Act that requires any form of consultation in respect of undertaking such an activity.

[451] All other parties supported the transfer provisions. The agricultural caucusing experts agreed that there was a need for the transfer of water takes to provide flexibility and efficiency of water use for irrigation.¹⁶⁴ Mr Layton, the economist who gave evidence for the Agricultural Working Group, opined that the ability to transfer water permits would improve economic efficiencies. His view was that it would stimulate innovation and investment to find more efficient ways of using water to allow surplus

¹⁶² O’Sullivan, EIC, at [72]

¹⁶³ O’Sullivan, EIC, at [74]

¹⁶⁴ Preliminary statement of matters in agreement and disagreement regarding agricultural, at [6]



entitlements to be on-sold.¹⁶⁵ He expressed a view that if there were fewer restrictions on trading assets like a water permit, there would be greater potential gains in efficiency.

[452] Section 136(2) of the Act provides that the holder of a water permit granted other than for damming or diverting water, may transfer the whole or any part of the holder's interest in the permit:

- (2) A holder of a water permit granted other than for damming or diverting water may transfer the whole or any part of the holder's interest in the permit—
 - (a) to any owner or occupier of the site in respect of which the permit is granted; or
 - (b) to another person on another site, or to another site, if both sites are in the same catchment (either upstream or downstream), aquifer, or geothermal field, and the transfer—
 - (i) is expressly allowed by a regional plan; or
 - (ii) has been approved by the consent authority that granted the permit on an application under subsection (4).

[453] That provision applies to the transfer of permits to take and/or use water. In terms of Section 136(2A), such a transfer may be for a limited period. An application for approval under ss (2)(b)(i) must be jointly lodged by the holder and the transferee and is to be considered in accordance with specified sections as if it were an application for resource consent, and in addition the consent authority shall have regard to the effects of the proposed transfer.

[454] It is common ground that there were previously no rules in the Regional Plan expressly allowing a transfer. Variation 6 addresses transfers in Chapter 3.4 and introduces a permitted activity Rule 3.4.4.2 subject to a number of conditions. The explanatory text explains that historically water resources in the region have not generally been used efficiently and that the Council considers the promotion of water use efficiency to be an important resource management issue. Dr Sharp, the economist called by the Council, supports the transfer of water rights as leading to efficiency.¹⁶⁶

¹⁶⁵ Layton, EIC, at [112] – [116]

¹⁶⁶ Sharp, rebuttal evidence, at [44] – [46]



[455] Mr van Voorthuysen considers that the conditions in the proposed new permitted transfer rule are appropriate for a permitted activity. He also considered that the matters in the restricted discretionary activity transfer, Rule 3.4.4.3 provides decision-makers with ample scope to ensure that any potential adverse effects on the Waikato River are avoided, remedied or mitigated.

[456] We are satisfied that in the interests of efficiency, it is appropriate to have rules enabling the transfer of water permits. We are also satisfied that the Council has struck an appropriate balance by enabling transfers, either by way of permitted or restricted discretionary activity status, but at the same time ensuring that any potential adverse effects on the Waikato River are avoided, remedied or mitigated.



7 DETERMINATION

[457] In accordance with our findings, and the reasons given in the decision, we make the following determination:

The decision of the Waikato Regional Council is amended by substituting the Decision version of Variation 6 with the 8 August 2011 Version as set out in Appendix 2 save for the following:

- A. The primary allocable flow at Karapiro Dam is to be set at 5% of the Q₅ flow;
- B. Policy 8(c) is to be amended by adding the following words “*that exceed the primary allocation in Table 3-5 and*” after the opening words “*Restricting takes*” and before the words “*which reduce*” so that it shall now read:
 - c) Restricting takes that exceed the primary allocation in Table 3-5 and which reduce the amount of water that would otherwise be available for renewable electricity generation or be used for cooling of the Huntly Power Station, including in particular any takes from the Waikato River catchment upstream of the HPS mixing zone that when assessed in combination with all other authorised water takes would exceed 100% of the primary allocable flows in Table 3-5.
- C. Rule 3.3.4.14 is to be amended by deleting the word “Existing” in the title to the rule and replacing it with “Replacing Authorised” so that it shall now read:

Replacing Authorised Existing Taking of Surface Water for Domestic or Municipal Water Supply.
- D. The Regional Council is to make any consequential amendments arising out of A, B or C within two calendar months from the date of issue of this decision. If there are any difficulties in implementing this direction, leave is granted to the Regional Council to apply to the Court for directions.

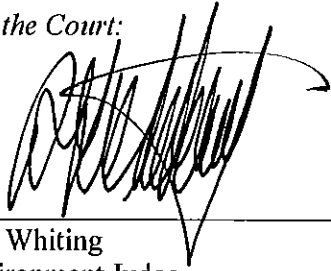


Comment

[458] We have already referred to the intensive and rigorous participatory process of this Variation and the integrity of that process. A process that culminated in the 8 August 2011 version of Variation 6. That version and the few amendments to it as a result of this decision, reflects the quality of the Council's experts and advisors. They exhibited a fair and objective approach to their task. This has been appreciated by the Court. On the other hand, some of the other experts did not display the same objectivity. Their evidence at times appeared to us to be influenced by the objectives of their client rather than their obligations to the Court.

DATED at AUCKLAND this 30th day of November 2011

For the Court:



R G Whiting
Environment Judge

