BAY OF PLENTY REGIONAL COUNCIL
TOI MOANA

Taking account of iwi planning documents

Guideline notes

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Introduction

Iwi/hapū planning documents[1] are key instruments Council staff should refer to when preparing or changing a plan, developing policy or considering a resource consent application. Iwi/hapū planning documents are a portal into the aspirations of the iwi/hapū.

Some of the new generation iwi/hapū plans specifically identify areas or sites of cultural significance, and present resource management objectives, policies and methods for the preservation and restoration of land and waterways. The core legislative requirement "take into account" is derived from the Resource Management Act 1991 (RMA) however as iwi/hapū values and their associations with the environment are generally presented in these documents they can be a useful resource for other areas of Council business and relationships. They will help staff with their considerations of RMA Part 2 matters relating to Māori including RMA s.6(e), s.7(a) and s.8, and will contribute to a broader understanding of concepts and wording.

In understanding how an iwi/hapū planning document should be taken into account, direction on who has authority to recognise and prepare one, and where that authority comes from is essential to dealing confidently with Māori interests. In this regard, these guidelines cover how to recognise an iwi/hapū authority, what to consider when giving weight to one iwi/hapū planning document, who holds mana whenua, and what to consider when there are overlapping interests.

What does take into account mean?

The requirement to "take into account" is a deliberate legislative contrast with the language "recognise and provide for" which is used in section 6 of the RMA. "Recognise and provide for" means that actual provision must be made for the listed matters. In contrast, the obligation to "take into account" requires the decision-maker to consider that matter, to weigh it up with other relevant factors and to *give it the weight that is appropriate in the circumstances.*[2] This is the requirement that must be met by staff.

In legal terms "must take into account" means there is a mandatory obligation to genuinely consider material which is relevant to the issue or decision.

There are requirements within the RMA to record how iwi/hapū planning document information has been used (such as a summary under s.32(4A) or s.42A) but it is best practice to specifically record how the information has been used to inform the relevant decision and in cases it may be useful to enter this into the public record.

What is an iwi/hapū planning document?

Under the RMA Council must take into account "any relevant planning document recognised by an iwi authority" – s.66(2A).

[1] Defined as "any relevant planning document recognised by an iwi authority" – s.66(2A) RMA.
[2] Generally no weight can be given to matters outside of Council's control.

An iwi/ hapū planning document is developed and owned by the hapū or iwi. There is no set format or content. Iwi/hapū planning documents held by Council currently take a number of forms. Staff need to be aware of the range of documents held by Council. Iwi/hapū planning documents include:

- Iwi management plans.
- Hapū management plans.
- Cultural values frameworks.
- Statements of cultural values or interest (for example, Mātaatua Declaration; Wai Māori Statement).

For Council to be able to take an iwi/hapū planning document into account it must be "recognised by an iwi authority" and "lodged with Council, in the manner specified" – s.61(2A).

When an iwi/hapū planning document is lodged it must be received by Council. Council cannot reject, review or amend such plans and is obligated to maintain an up to date record of them. Receipt of an iwi/hapū planning document is not formal approval or endorsement of such document by Council. The lodging process for any iwi/hapū planning document will document the recognition that is being provided by the iwi authority.

For Council, Komiti Māori has delegation to formally receive iwi/hapū management plans. Many plans are lodged through Komiti Māori but this process is not mandatory. As long as iwi/hapū have made a reasonable attempt to bring their planning document to Council's attention then it must be appropriately acknowledged (can be via email, post or over the counter).

Staff must ensure they have access to all iwi/hapū planning documents that have relevance to the matter being addressed.[3] There may be occasions where staff may need to check they are working with the correct version of an iwi/hapū planning document as revisions over time may not have been lodged with Council.

What constitutes an iwi authority?

Receiving, using or acknowledging an iwi/hapū planning document requires verification that the organisation sponsoring an iwi planning document is authorised to do so. An iwi authority as defined under the RMA is the "authority which represents an iwi and which is recognised by that iwi as having authority to do so".

"Iwi authorities" may be identified through:

- Legal or statutory instruments. This includes the iwi register established under the Māori Fisheries Act 2004.
- Te Puni Kokiri updates the register of iwi authorities on a regular basis via the Te Kahui Mangai website.
- Post Settlement Governance Entities (PSGE) under Treaty Settlements.
- Te Arawhiti (the new Crown/Māori Relations entity) may also provide information on hapū and iwi organisations through Treaty settlement processes.

[3] On occasion an iwi/hapū planning document may be received during the latter stages of a planning process. There is no specific time limitation on receiving documents and therefore a "late" assessment should be undertaken.

- The Māori Land Court provides information via the Māori Landonline website particularly in regard to Māori Land Trusts and Incorporations.
- The BOPRC IMP funding process that requires approval to draft an iwi planning document from the relevant iwi authority.
- Settlement Group Register – particularly useful for identifying post settlement entities that have authority to undertake commercial, economic or social enterprises.

What is mana whenua?

Iwi/hapū planning documents may contest the status of mana whenua and therefore how weighting should be applied.

The RMA defines Mana Whenua as "customary authority exercised by an iwi or hapū in an identified area". The Environment Court has consistently stated that it is the Māori Land Court that is the appropriate forum to make such determinations. The Environment Court is clear that it can only make decisions with respect to resource management issues.[4]

There is sufficient common law and recommendations from the Waitangi Tribunal now that can be used to guide Council in how it deals with mana whenua matters:

- Certain tribal groups are the primary kaitiaki for an area.[5]
- While a collective authority may represent the interests of a group this does not assert that the authority alone holds mana whenua (hapū and whānau may also hold it).[6,7]
- Anyone who exercises kaitiakitanga also exercises customary jurisdiction.[8]

Guidance on determining who holds mana whenua may be clearly demonstrable through historical occupation, the ongoing exercise of kaitiakitanga, the ongoing practice of tikanga, historical accounts (written and oral), and the presence and use of marae, urupa and waahi tapu.

In this regard there is some expectation on Council to determine who has mana whenua with respect to the management of natural resources and therefore which iwi/hapū planning document should apply to an area. It is not Council's role however to decree which iwi/hapū are or are not mana whenua or to determine this to the exclusion of other iwi/hapu.

Overlapping interests

The application of iwi/hapū planning documents may overlap for an area or issue.

Where there are overlapping interests that have been verified through Treaty settlement legislation, survey data, judicial decisions, or any other legal or statutory instrument, Council has an obligation to recognise those interests. In some cases the overlapping interests may extend to or include waahi tapu, marae, legally defined land blocks or sites of

[4] *Beadle v Minister of Corrections* A74/02 [EC].
[5] *Friends and Community of Ngawha Inc. v Minister of Corrections* [2003] NZRMA 272.
[6] *Ngā Uri o Wiremu Moromona Raua ko Whakarongohau Pita Inc. v Far North District Council* A14/08 [EC].
[7] *Waitangi Tribunal (1999) Whanagnui River Report,* at paragraph 2.5.1.
[8] The exercise of Kaitiakitanga requires: ongoing involvement, to take responsibility and care for something of great value to the survival of the iwi or hapū; and tangata whenua are afforded the opportunity to exercise guardianship of natural resources in accordance with tikanga Māori.

significance. This does not exclude hapū or iwi who have a "cultural interest" identified in their iwi/hapū planning document from participating in the decision-making processes of Council.

Where a proposed activity has the potential to directly effect areas that are associated with a particular iwi or hapū (like marae or wāhi tapu) then weight is given to the relevant iwi/hapū planning document.

How do I take into account?

1 All matters within an iwi/hapū planning document for Council that are relevant to the issue or decision under consideration must be taken into account. "Relevant" also means that it must be a matter than can be addressed by Council – for example under s.30 of the RMA "Functions of Regional Councils".

2 Matters that cannot be taken into account are addressed in the section below.

3 Take into account means:

(a) Assessing the iwi/hapū planning document to develop an understanding of the context and historical relationships.

(b) Identifying those matters within an iwi/hapū planning document that are relevant to the issue before Council. This may be alongside any assessment of environmental and cultural effects in relation to a resource consent application or plan/policy development process.

(c) Building a layered view if multiple iwi/hapū planning documents apply to an issue/area and identifying any different viewpoints. Reviewing the relevant iwi/hapū planning documents together may or may not provide a perspective on weighting between documents.

(d) Developing a view of appropriate weighting in decision-making particularly where:

(i) There will be significant disassociation of the land, water and/or other taonga Māori have a relationship with.

(ii) An activity is likely to have an adverse effect on cultural or spiritual values.

(iii) Consultation/engagement has been undertaken and further information has been gathered.

(iv) There is a specificity of material to the relevant issue and a depth of reason/information.

(e) Considering how the iwi/hapū planning documents inform an understanding of RMA Part 2 matters relating to Māori including s.6 (e), s.7 (a) and s.8. For example, "Does the iwi/hapū planning document inform me about the role of kaitiakitanga under section 7(a) or where the principles of the Treaty of Waitangi under section 8 are relevant to the issue?"

(f) Considering whether matters in an iwi/hapū planning document have wider benefits to the community and the economy.

(g) Considering if any preservation or conservation matters raised in an iwi/hapū planning document enhance Council environmental objectives or projects.

(h) Identifying how the matters in an iwi/hapū planning document that are relevant to the issues should be considered in any Council decision-making process.

There may be a need to seek further clarity from the iwi/hapū on the intent or interpretation of relevant aspects of their planning document. Where an iwi/hapū planning document is unclear, incomplete or is not specifically directed at the matter you are seeking to take into account, there may be benefit in exploring a more complete picture with the authors/owners of the iwi/hapū planning document.

What Council cannot take account of in?

Matters within an iwi/hapū planning document for Council to consider must be relevant to the resource management issues of the region. This may require an assessment of whether the document or parts of it can be addressed by Council. Section 30 of the RMA sets out the functions of a Regional Council. Any matter that falls outside of these functions generally cannot be addressed by Council.[9] For example matters pertaining to defining and confirming mana whenua should be considered by the Māori Land Court[10].

There are other matters which are *ultra vires* or outside of Council's authority which cannot be taken into account:

- Excluding other iwi at the request of iwi claiming mana whenua status, unless iwi are in agreement.
- Rights and ownership matters with respect to the natural environment – for example fresh water: this is for the Crown and the Courts to decide.

As an example, Council can only consider those matters in the *Mātaatua Declaration on Freshwater (2012)* and the *Wai Māori Statement* 2018 that fall within its areas of responsibility and function.

Statutory and policy matters

Taking into account iwi/hapū planning documents occurs within the context of a range of other statutory and policy matters. The matters in the iwi/hapū planning document may provide useful assistance to understanding and interpreting this wider context in relation to the resource management issues in the region. The following are the key RMA provisions planners should take note of:

Section 6(e) – Council is required ***to recognise and provide for*** (Matters of national importance) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. This is the default position to take when considering or taking account of an iwi/hapū planning document. Part 2 of the RMA provides the hierarchy or the weight given to matters relating to Māori and the Treaty of Waitangi. In the case of resource consents this is particularly so where an assessment of effects is undertaken.

Section 7(a) – Council is required to ***have particular regard to*** (Other matters) kaitiakitanga.

[9] Case law supports a limited scope for councils to consider matters beyond these functions in certain limited circumstances.
[10] In *Te Pairi v Gisborne District Council W093/04* the Environment Court emphasised that the Māori Land Court, not the Environment Court, is the appropriate forum to resolve issues of mandate, and issues of mandate should not be disguised as resource management issues.

Section 8 – Council shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Part 5, Subpart 2 Mana Whakahono a Rohe – the contents of a mana whakahono a rohe may include any iwi/hapū planning document. Obligations on Council also extend to:

Schedule 1 (1A(1)) – a proposed policy statement or plan must be prepared in accordance with any applicable mana whakahono a rohe.

Schedule 1 (26A) – in exercising or performing any powers, functions or duties …a Council must comply with any mana whakahono a rohe that specifically provides a role for iwi authorities.

Schedule 1 (76) – where a local authority has requested to use a streamlined planning process the responsible Minister must have regard to clause 76(2)(c) any relevant obligations set out in any iwi participation legislation or mana whakahono a rohe.

Section 66(2A)(a) – when preparing or changing a regional plan a council *must take into account* any relevant planning document recognised by an iwi authority.

Schedule 1, (4A(1)(b)) – Prior to notification of a plan Council must provide a draft copy to iwi authorities and allow them reasonable time to review it. Council must also demonstrate that it has had particular regard to the advice iwi authorities have provided. Advice received may include any iwi/hapū planning document.

Schedule 4 (7) – Matters that must be addressed by applicants in assessments of environmental effects [for resource consent applications]. Of note clauses 7(1)(a) and (d) refer to cultural effects and spiritual or cultural values.

The Bay of Plenty Regional Policy Statement (RPS) includes a number of provisions specifically relevant to iwi/hapū management plans including Policies IW 2B, IW 4B and IW 8D and Methods 12 and 66. **RPS Policy IW 2B** – requires that proposals which may affect the relationship of Māori and their culture and traditions must recognise and provide for …. *(iv) Sites of cultural significance identified in iwi and hapū resource management plans.'*

Policy IW 4B 'Taking into account iwi and hapū resource management plans' seeks to *'Ensure iwi and hapū resource management plans are taken into account in resource management decision making processes.'*

Method 12 – requires Council that 'when assessing environmental effects of activities *take into account* potential effects on cultural values and relationships identified in any relevant planning document recognised by an iwi authority who may be affected.

Other Case law

G & S Hoete v Minister of Local Government [NZENVC] Dec 2012

The Court took the view that the cultural issues are so inextricably intertwined with resource management planning on [Mōtiti] Island that a Hapu planning document must be of importance and relevance.

Maketū v Bay of Plenty Regional Council [NZENVC] May 2016

The Court referred to the RPS in particular those policies relating Māori and the importance of iwi planning documents.

Envirofume Ltd v Bay of Plenty Regional Council [2017] NZRMA 419

The Court noted that "there is also a need to reference the Tauranga Moana Iwi Management Plan 2016 (registered August 2016), given the provisions of the Policy Statement and Plans", emphasising the importance of considering iwi planning documents.

See also the following cases regarding the meaning of "take into account":

Bleakley v ERMA [2001] 3 NZLR 213 and;

Haddon v Auckland Regional Council [1994] NZRMA59

Assistance for Staff

If any staff require assistance in understanding how to take into account the content of hapū/iwi planning documents, there are a number of avenues for support via:

- Māori Policy Team.
- In-house Legal Counsel Team.
- Senior Planning and Policy staff.

Access to copies of documents

Copies of documents lodged with Council can be accessed:

- Through the Objective Electronic Filing system (Māori Policy can assist with the file path for navigation).
- On Council's website kaupapa Māori page (note that some earlier plans are not held on the website).
- In the reference section of Council's library in Whakatāne (hard copies).
- In the reference section of the Māori Policy Team (hard copies).