

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 100

IN THE MATTER of appeals pursuant to Clause 14 of
First Schedule of the Resource
Management Act 1991 (**the Act**)

BETWEEN NGĀTI MĀKINO HERITAGE TRUST
(ENV-2012-AKL-000170)

Appellant

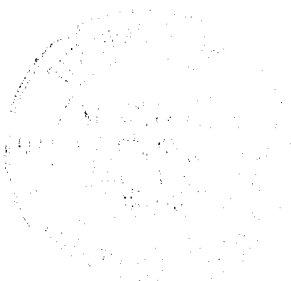
AND BAY OF PLENTY REGIONAL
COUNCIL

Respondent

\Court: In chambers at Auckland, Environment Judge J A Smith, sitting
alone in pursuant to Section 279 of the Act

Participants: Mr J M Pou for Ngāti Mākino Heritage Trust (**Ngāti Mākino**)
Mr P H Cooney and R M Boyle for the Bay of Plenty Regional
Council (**the Regional Council**)
Ms L C R Burkhardt and T R M Williams for TrustPower
Limited – Section 274 party (**TrustPower**)
Ms B S Carruthers for Fonterra Cooperative Group Limited –
Section 274 party (**Fonterra**)
Mr P R Gardner for Federated Farmers of New Zealand
Incorporated – Section 274 party (**Federated Farmers**)
Mr M Tapsell for Waitaha Iwi Resource Management Unit –
Section 274 party

DECISION OF THE ENVIRONMENT COURT



A. The Court confirms the following wording for Method 39D:

Method 39D: Involve iwi and hapu in the development of regional plans

Involve iwi and hapu in the development of Regional Plans to achieve this Policy Statement, and in particular:

- (a) ensure that tangata whenua values and interests are reflected, and the objectives of the National Policy Statement on Freshwater Management are given effect to;
- (b) involve iwi and hapu and take into account iwi and hapu resource management plans in decision-making relating to the setting of instream flows and the setting of allocation limits;
- (c) develop or adapt appropriate methodologies to identify and provide for Maori cultural values, including, where appropriate, specific cultural uses, in determining instream flows and the setting of allocation limits; and
- (d) work with tangata whenua to identify cultural priorities for investigation in management of culturally significant water bodies.

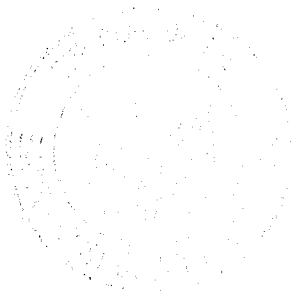
Implementation responsibility: Regional Council

B. There is no order for costs.

REASONS FOR DECISION

Introduction

[1] By substantive Decision No. [2014] NZEnvC25 this Court concluded that there could properly be some amendment to wording and made directions for changes to the Plan. This left only the question of the finalisation of the wording for Method 39D and Method 39E. The Court suggested a replacement text for both of those, with a new Method 39D at [36] which read:



Method 39D:

The Regional Council shall provide for the involvement of iwi and hapu in the development of Regional Plans to achieve this Policy Statement, and in particular:

- (a) to ensure that tangata whenua values and interests are reflected, including the objectives of the National Freshwater Policy Statement,
- (b) to involve iwi and hapu and to incorporate iwi and hapu management plans in decision making relating to the setting of in-stream flows and the allocation of water,
- (c) to develop a methodology to identify and provide for Māori cultural values in determining in-stream flows and allocating water, and
- (d) to work with tangata whenua to identify cultural priorities for investigation in management of culturally significant waterbodies.

Later progress

[2] Subsequent to that the parties considered the Court wording and filed with the Council and the Court their views on the appropriate wording of Method 39D. The Council considered those responses from Ngāti Mākino, TrustPower, Fonterra, Federated Farmers and Ngāti Ranginui. It would be fair to say that Ngāti Mākino and Ngāti Ranginui generally preferred the Court's proposed wording, while others felt that this went too far and suggested changes.

[3] The Council considered all of these submissions and reached a conclusion as to wording for Method 39D, essentially adopting the approach of the Court but changing some of the wordings. In an excellent and detailed memorandum Mr Cooney goes through the various changes made, the parties' position and the Council's reasons for preferring the alternative proposed. I can do little more than attach this as it sets out in detail the reasoning behind the final wording. That memorandum is annexed hereto as **A**.

[4] Overall, there have been several changes to make the Method more direct, moving from passive to more active tenses, which makes the Method shorter and plainer as to its meaning. Thus, *the Regional Council shall provide for the*

involvement of becomes *shall involve*. Accordingly, I agree with the changes made to the heading and introductory passage and do not consider that it has resulted in any change of meaning or purpose.

Method 39D(a)

[5] Essentially, the words used in sub-paragraph (a) mean that tangata whenua values or interests are reflected, while the National Policy Statement must be given effect to.

[6] I agree that this clearly identifies the various roles, and I note that this is incorporated through several of the other paragraphs. Words like *reflected*, *take into account*, and the like, could be criticised as being capable of non-compliance. My view is that it is clear, in the *McGuire*¹ sense, that the provisions of the Treaty of Waitangi, and those provisions relating to tangata whenua values inculcate, and are inchoate in, all the concepts of the RMA, including the Regional Plan.

[7] Although Ngāti Mākino is concerned that in the past such wording has led to an overlooking of these important values, I do not think that the Regional Council either intends, or can expect, that situation to continue into the future. As is clear from the primary decision, these issues will become very much the focus of future documents under the Regional Plan, and the Council has indicated that they are committed to that process.

[8] Nevertheless I recognise the difference between the need to give effect to a National Policy Statement and the way in which tangata whenua values and interests permeate the fabric of plans and their preparation. Accordingly, we agree with the re-wording of Method 39D(a).

¹ *Hastings City Council v McGuire*, [2002] NZLR 57

Method 39D(b)

[9] In respect of (b) a similar argument takes place as to whether or not the phrase *to incorporate* should be used rather than *take into account*. Again I acknowledge that the phrase *to incorporate* is unclear as to its meaning, whereas the obligation to *take into account* is now settled law.

[10] The second issue is that the Council has moved from *the allocation of water to the setting of allocation limits*. I agree that, in the circumstances of this Regional Policy Statement, it would be inappropriate to begin to reach conclusions as to how allocation decisions should be made in respect of water, as that is a matter for the particular water plans.

[11] Nevertheless, for the reasons the Court set out in some detail in the decision, I suspect that the question of iwi and hapu involvement in the allocation of water will become an issue at the time those plans are to be considered.

[12] Although I agree, somewhat reluctantly, with the wording proposed by the Regional Council, I do not consider that this wording in any way limits the level of involvement of iwi and hapu at the allocation stage when appropriate plans are being prepared.

[13] In other words, I signal that iwi and hapu involvement in allocation is an argument for another day. The Regional Council and all of the key parties here will be aware that such issues remain at the forefront of iwi and hapu thinking, particularly in relation to Crown settlements. Thus, by agreeing with the Regional Council's approach I do not in any way derogate from the argument in relation to iwi and hapu involvement in actual allocation of water under appropriate plans.

Method 39D(c)

[14] In respect of (c), beyond the question of allocation limits versus allocation of water, the wording has striven to provide sufficient flexibility for situations where

different methodologies may be appropriate in different geological areas. This subparagraph notes that it intends that these statements should be qualified so that some level of specificity or definition is intended to be developed for cultural use at the regional plan level.

[15] There should also be some discretion or flexibility in the approach at regional plan level to account for different scenarios applying to different water bodies throughout the region. The Court accepts that proposition entirely.

[16] This region contains areas of deep aquifers, shallow aquifers, geothermal aquifers through many different geological situations. To suggest there is a one-size-fits-all for the region would not only be essentially impossible of definition, but would not allow for the variety of cultural and other uses that may occur in different areas. An example would be the use of geothermal water for cooking and bathing, or the variety of fish and plant life that may occur in different streams or rivers in the region.

Method 39D(d)

[17] There does not appear to be any particular comment in respect of Method 39D(d).

Final concluding comments

[18] Although the Court has adopted the wording proposed by the Regional Council for the reasons set out by Mr Cooney, I wish to note that the policy change here does reflect something of a sea change in the approach of the Regional Council to cultural matters and iwi and hapu. The Court concluded clearly in its decision that it saw the issues of partnership arising from the Treaty of Waitangi and the various Crown settlements in the Bay of Plenty as having a particular meaning and focus in the context of water, which is a taonga of all iwi and hapu.

[19] I recognise that the Regional Council is attempting to approach this matter in a genuine but measured way, and that to some extent it is looking to resource the issues arising from this through the various Crown settlements which are occurring, given the absence of funding for these iwi and hapu groups to undertake the work required in this area.

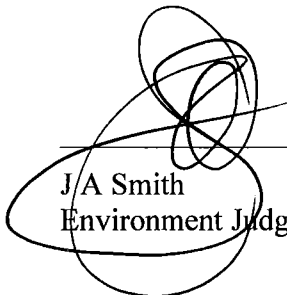
[20] Nevertheless, I see the emphasis of *McGuire* permeating future decisions of the Council in respect of the various regional plans and their application in due course. This agreement with the Council wording is not intended in any way to be a derogation of the primary decision of the Court in this matter. I consider that the wording proposed by the Council achieves the purpose of the Act and the Plan in terms of our primary decision.

[21] I therefore confirm the wording as proposed by the Regional Council set out at [9] of their memorandum **A**.

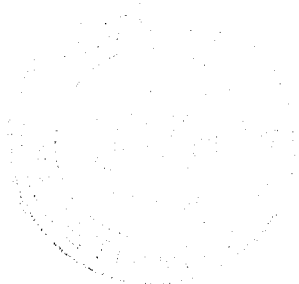
Costs

[22] There is no issue to costs and no order for costs is made.

DATED at AUCKLAND this 1st day of May 2014



J/A Smith
Environment Judge



Annexure A

BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY

TOPIC ENV-2013-348-000006 "Water Quantity Methods"

ENV-2012-AKL-000170

IN THE MATTER: of the Resource Management Act 1991

A N D

IN THE MATTER: of appeals pursuant to clause 14 of the
First Schedule to the Act in relation to
the Proposed Bay of Plenty Regional
Policy Statement

BETWEEN: NGATI MAKINO HERITAGE TRUST

Appellant

AND: BAY OF PLENTY REGIONAL
COUNCIL

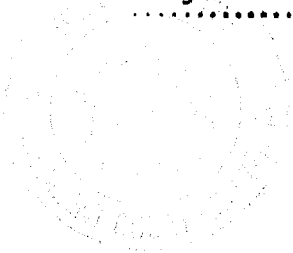
Respondent

A N D: VARIOUS S274 PARTIES

MEMORANDUM OF COUNSEL ON BEHALF OF
BAY OF PLENTY REGIONAL COUNCIL

17 APRIL 2014

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MAY IT PLEASE THE COURT:

1. Counsel refers to the Environment Court decision in relation to these proceedings dated 13 February 2014, where the Court proposed alternative wording for Method 39D for the parties' comment ("Decision").
2. The Court directed all parties other than the Regional Council to file and serve their submissions on the Court's proposed wording of Method 39D (which is intended to replace the proposed wording of Methods 39D and 39E as had been agreed between the parties) 15 days after the date of the Decision, with the Council's response to follow another 15 days later.
3. Council had the opportunity to consider responses from the Ngati Makino Heritage Trust ("Ngati Makino"), and several s.274 parties, namely TrustPower Limited ("TrustPower"), Fonterra Cooperative Limited ("Fonterra"), Federated Farmers, and Ngati Ranginui.
4. By way of general comments, Ngati Makino and Ngati Ranginui preferred the Court's proposed wording (with Ngati Makino suggesting further changes), while the remaining section 274 parties were of the view that the proposed wording goes somewhat further than they would prefer, and suggested some more substantive changes.
5. Council considered all of those responses and then responded to the parties with its suggested wording and reasons via email on 26 March 2014. This incorporated elements of all parties' suggested wording. Regional Council invited further comment on its wording.
6. Fonterra, TrustPower, and Federated Farmers supported Council's proposed wording. Ngati Makino and Ngati Ranginui accepted a number of the proposed changes, but disagreed with some.
7. This memorandum sets out the Council's final proposed wording, first clean and then with each subparagraph in underline and ~~strikethrough~~ with reasons. This includes an explanation of, and response to, the concerns raised by the other parties.
8. For convenience, the Court's proposed Method 39D reads:

Method 39D:

The Regional Council shall provide for the involvement of iwi and hapu in the development of Regional Plans to achieve this Policy Statement, and in particular:

- (a) to ensure that tangata whenua values and interests are reflected, including the objectives of the National Freshwater Policy Statement;
- (b) to involve iwi and hapu and to incorporate iwi and hapu resource management plans in decision making relating to the setting of in-stream flows and the allocation of water;
- (c) to develop a methodology to identify and provide for Maori cultural values in determining in-stream flows and allocating water; and
- (d) to work with tangata whenua to identify cultural priorities for investigation in management of culturally significant waterbodies.

Regional Council's proposed wording

9. The proposed wording of Method 39D has been considered and agreed by the Regional Council RPS Appeals Subcommittee and reads:

Method 39D: Involve iwi and hapu in the development of Regional Plans

Involve iwi and hapu in the development of Regional Plans to achieve this Policy Statement, and in particular:

- (a) ensure that tangata whenua values and interests are reflected, and the objectives of the National Policy Statement on Freshwater Management are given effect to; ✓
- (b) involve iwi and hapu and take into account iwi and hapu resource management plans in decision making relating to the setting of in-stream flows and the setting of allocation limits; ✓
- (c) develop or adapt appropriate methodologies to identify and provide for Maori cultural values including, where appropriate, specific cultural uses, in determining in-stream flows and the setting of allocation limits; and ✓

- (d) work with tangata whenua to identify cultural priorities for investigation in management of culturally significant waterbodies.

Implementation responsibility: Regional Council

Title / Introduction

10. Council proposes the following amendments:

Method 39D: Involve iwi and hapu in the development of Regional Plans

~~The Regional Council shall provide for the involvement of~~ **Involve iwi and hapu in the development of Regional Plans to achieve this Policy Statement, and in particular:**

11. Council prefers that the methods have a title to highlight what they are intended to achieve, and has proposed that Method 39D be entitled "Involve iwi and hapu in the development of Regional Plans". Council also proposes a change to the structure of the explanatory text. It has simply replaced "The Regional Council shall provide for the involvement of" with an imperative - "Involve". This suggested change is to make the Method consistent with the structure of the methods in the remainder of the proposed Regional Policy Statement ("proposed RPS"). This was also suggested by Fonterra and Federated Farmers.
12. Ngati Makino would prefer the title be "Provide for the involvement of iwi and hapu in the development of regional plans" and that the explanatory text proposed by the Court be retained. Ngati Makino considers that this wording is more consistent with the National Policy Statement for Freshwater Management ("NPS Freshwater"), provides more clarity around the responsibilities involved and certainty in the processes forward. Council does not think its proposed wording changes the substance of the Method in any way, and would prefer that it is consistent with the structure and wording of the remaining methods.
13. Lastly, Council raised concerns that the fulfilment of the Method would be quite difficult in practice if it extended to formal involvement of all iwi and all hapu in the region and suggested that perhaps it should apply to iwi only. This is because there are hundreds of hapu, often with conflicting views. As a result of objections from Ngati Makino and Ngati Ranginui to the narrowing of the Method, Council no longer seeks this change.

Method 39D(a)

14. Council proposes the following amendments:

~~to ensure that tangata whenua values and interests are reflected, including and the objectives of the National Freshwater Policy Statement for Freshwater Management are given effect to.~~

15. Council sees a potential conflation of the "values and interests" of tangata whenua and the objectives of the NPS Freshwater, which are clearly intended to be much broader, in the Court's proposed version of Method 39D. This was also a concern raised by Fonterra in respect of the first subparagraph of proposed Method 39D. Council agrees with Fonterra that amendment is necessary to ensure that the objectives are given effect to, as opposed to "reflected". This is consistent with the Act.

Method 39D(b)

16. Council proposes the following amendments:

~~to involve iwi and hapu and to incorporate take into account iwi and hapu resource management plans in decision making relating to the setting of in-stream flows and the setting of allocation limits allocation of water,~~

17. There is no explanation in the Decision for the extension of the Method to cover iwi and hapu management plans, which were not at issue at the hearing. However, Council recognises the importance of these plans and sees benefit in these being referenced specifically in relation to decision-making around water quantity. The proposed RPS already contains similar provisions, for example Policy IW 4B is to take into account iwi and hapu resource management plans, and Method 10 requires these to be taken into account in assessments of environmental effects.
18. That being said, Council has several concerns with the proposed wording:

"Incorporate"

19. A requirement for management plans to be "incorporated" into decision making is not overly clear, and appears to go much further than the Act or the NPS Freshwater. The Act requires a regional council to "take into account any relevant planning document recognised by an iwi authority"¹ when preparing or changing a regional policy statement or plan, which has been reflected in the other Regional Policy Statement provisions. As

¹ Under sections 61(2A)(a) and 66(2A)(a).

noted above, the proposed RPS provisions have remained consistent with this. Council seeks that "incorporate" be amended to "take into account". This concern was also raised by Fonterra, TrustPower, and Federated Farmers.

20. Ngati Makino does not agree and says that "taking into account" has meant "ignore" in their experience. Ngati Makino suggests that "incorporate" is more consistent with the NPS Freshwater and that Council's change moves away from the direction set at the national policy level. Ngati Makino explains that the NPS Freshwater requires a reflection of iwi views, values and interests and that it is difficult to see how this can be achieved without some level of incorporation. Ngati Makino considers that merely taking a matter into account does not ensure that this reflection of views will be provided for.
21. Council maintains that a requirement to "incorporate" a matter in decision-making is unclear. The NPS Freshwater does not require that iwi and hapu resource management plans be incorporated in decision-making. In Council's view, "take into account" is intended to be a strong direction – one which the Act reserves for documents prepared by iwi and for the principles of the Treaty of Waitangi. It does not consider that there is a need to depart from the language and requirements of the Act, especially where there is no clear understanding as to what incorporating would entail in this context.
22. Lastly, the proposed RPS contains a definition of "iwi and hapu resource management plans", which are to be recognised by the relevant iwi authority and lodged with the regional, city, or district council. The Method should be amended to use the defined term.

"Allocation of water"

23. Method 39D applies when developing or amending planning documents, rather than considering consent applications. However, Council shares the concern raised by TrustPower that the choice of wording – "allocation of water" – could be interpreted as relating to resource consent decisions and the allocation of water within allocation limits. To ensure consistency with the theme of setting limits (both in-stream and allocative) and the wider context of the Method as applying to Regional Plan development, Council considers this should be amended as proposed above (ie to refer to the setting of allocation limits).
24. Ngati Makino has objected to this change on the basis that they have been clear that they see their involvement in decision-making as being an ongoing one, not one limited to the setting of limits.

25. Council considers this goes well beyond what was accepted at the hearing. It made clear that it intended cultural values and uses would be reflected in the setting of instream and allocable *limits* in Policy WQ 2A, and that the availability of water for cultural uses should be had regard to when allocating and re-allocating water in Policy WQ 3B. It agreed to make those intentions more explicit, and its wording has been accepted by the Court in its decision. This was also accepted by Ngati Makino at the hearing.
26. Council explained in its closing submissions² that it does not consider it appropriate that a *carte blanche* direction to involve tangata whenua in decision-making should be included in the policy on allocating and re-allocating water. Council maintains that this is not directed by the NPS Freshwater. The need for flexibility is also acknowledged by the Court in the decision, where it says that an approach that may be appropriate for the Waitahanui River may not be appropriate in respect of other watercourses.³
27. The Method was not intended to apply to or provide for an "ongoing" role for iwi in decision-making in respect of the allocation of water within allocation limits as suggested by Ngati Makino. This implies that the Method was intended to have some application to resource consent decisions, which it does not. Council considers the statements made in the decision relating to allocation need to be read in this light and that the Method should be worded as it has proposed.

Method 39D(c)

28. Council proposes the following amendments:

to develop or adapt a appropriate methodologies to identify and provide for Maori cultural values including, where appropriate, cultural uses, in determining in-stream flows and setting of allocation limits allocating water, and

29. Although not identified in underline in the Memorandum of Counsel on behalf of Ngati Makino, they sought additional amendments to (c) which would give Council, iwi, and hapu the option of either developing or adapting appropriate methodologies to identify and provide for Maori cultural values (and uses, which we will come to shortly). Council supports the proposed amendments, as they provide flexibility for situations where different methodologies may be applicable in different geological areas, and allow for adaption of methodologies where these have already been developed and could be adjusted for use in this context.

² At paragraph 30.

³ At paragraph 47.

30. Council accepts that methodologies should be developed or adapted to allow for cultural uses to be identified and provided for, where appropriate. It remains concerned about the scope of potential uses that this could encompass and considers that it should be qualified so as to:
- (a) signal that some level of specificity or definition is intended to be developed for "cultural uses" at the Regional Plan level; and
 - (b) to allow for some discretion or flexibility in the approach at the Regional Plan level to account for the different scenarios applying to the different waterbodies throughout the region.
31. In its most recent response to Council, Ngati Makino has only opposed the proposed replacement of *allocating* water with reference to the *setting of allocation limits*, and refers to the Court's comments at [33] and [35] of the Decision.
32. Council is concerned that a direction to develop methodologies to identify and provide for cultural values and uses in the allocation of water goes beyond what is intended by Policy WQ 3B. That policy requires Council to have regard to the availability of water for other uses, including cultural uses, and to the benefits of maintaining minimum flows to protect and enhance cultural values of a waterbody, when allocating freshwater. This is in addition to a range of other important factors to be considered in respect of those allocation decisions. This wording has been accepted. The Method should not go further than what the Policy requires.
33. Cultural uses could be considered as a component of cultural values that should be provided for when setting allocation limits, and so the Method should reflect this rather than extending the intended application of the policy framework in the way suggested.

Further minor amendments

34. Council also suggests that "to" at the commencement of each subparagraph be deleted for grammatical tidiness and that the words "Implementation Responsibility: Regional Council" be inserted at the end of the Method for consistency with other methods in the proposed RPS.

Conclusion

35. The Court's proposed Method is generally accepted by Council, subject to the amendments outlined above. Council considers its proposed wording best gives effect to the Water Quantity objectives and policies in the proposed RPS as well as the NPS

Freshwater, while providing the appropriate level of flexibility for a Regional Policy Statement.

DATED 17 April 2014


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P H Corney
Counsel for Bay of Plenty Regional Council

