

BEFORE THE HEARING COMMISSIONERS

IN THE MATTER OF the Resource Management Act 1991

AND

IN THAT MATTER OF The Proposed Natural Resources Plan
for the Wellington Region

BETWEEN Greater Wellington Regional Council

AND Minister of Conservation (Submitter)

Hearing 3:

Natural Form and Function

Water Allocation

Legal submissions on behalf of the Minister of Conservation (submitter no 75)

Dated: 13 September 2017

Solicitor acting: Katherine Anton
Department of Conservation
Conservation House
18 – 32 Manners Street
Te Aro, Wellington 6011

May it please the panel

INTRODUCTION

1. These legal submissions will traverse aspects of the Natural Form and Function and Water Allocation topics on which the Minister of Conservation (“the Minister”) submitted.
2. The section 42A reports recommend accepting many of the Minister’s submission points. The degree of alignment can be seen in:
 - (a) appendix 1 to these legal submissions for Water Allocation; and
 - (b) appendix 1 to the evidence of Christopher Staite and for Natural Form and Function
3. Today I will focus on areas where the Minister’s submission and s 42A report recommendations are not aligned.

PART 1: NATURAL FORM AND FUNCTION

4. As set out in Mr Staite’s evidence, the Minister is comfortable with the large majority of recommendations in Ms Legarth’s s 42A report on provisions which the Minister has submitted on.
5. Mr Staite has identified two provisions for which he has further comment.

Objective 19 – natural processes

Mr Staite recommends wording that will allow the provision to give effect to the NZCPS, while recognising that some uses and developments may be appropriate in some places as follows:¹

Natural processes, including natural elements, patterns and ecological processes, continue to occur, and the integrity and functioning of natural processes and forms are retained not adversely affected by inappropriate use and development. (track change from the s 42A recommended provision²)

¹ Chris Staite, Evidence, Hearing 3, paragraph 20 and 21.

² S 42 A report, Yvonne Legarth, para 303.

M24 – identifying certain natural features and landscape

Mr Staite has recommended a realistic timeframe be included for the identification of these features. I support his assessment that s 55 of the RMA requires local authorities to make amendments as soon as practicable, and acknowledge that the regional council is co-ordinating this process with relevant district council timeframes.

O17 – natural character of CMA, rivers, lakes and their margins and natural wetlands

6. The Minister of Conservation supported this objective as notified, but sought a minor amendment to ensure that the margins of natural wetlands were also caught by the provision. Ms Legarth agrees.³

PART 2: WATER ALLOCATION

7. Mr Percy's joint hearing evidence⁴ addresses the Minister's submissions on water allocation. I now address some themes that can be drawn from the Minister's submissions and Mr Percy's evidence.

A range of uses is currently enabled below minimum flows

8. The combined effect of Policies 111 and 115 as notified is to enable this range of water uses below minimum flows:
 - (a) the 'statutory takes' in s 14(3)(b);
 - (b) takes permitted by rules in the plan;
 - (c) takes authorised by resource consents for drinking water supply, horticultural or viticultural root crops and groundwater.
9. Relevant submission points from the Minister are that s 14(3)(b) takes should be accounted for in minimum flows, and that rootstock protection should not be part of policy 115.
10. Allowing these takes below a minimum flow which has been identified in order to safeguard the life supporting capacity of ecosystems could have unacceptable adverse effects, including cumulative adverse effects. In addition, the current plan structure would enable these takes even after more detailed consideration of minimum flow levels

³ S 42 A report, Yvonne Legarth, para 131.

⁴ Also on behalf of Rangitāne and Fish and Game.

has occurred in the whitua processes. The whitua processes in my submission present an opportunity to examine the extent of these takes and provide for them in a flow regime. This would enable a clear identification of the critical levels at which these sorts of takes have adverse effects.

S 14(3)(b) takes can and should be accounted for in minimum flows

11. S 14(3)(b) is a statutory right to take, but it is not unqualified. The taking and use of water for reasonable domestic needs and drinking water for animals is enabled where “the taking or use does not, or is not likely to, have an adverse effect on the environment”.
12. The Resource Legislation Amendment Act 2017 replaced the word “individual” with “person” so it refers to the reasonable needs of a *person’s* animals for drinking water. The effect of this is that the statutory exemption from the prohibition applies to a legal person, including a company, whose stock requires drinking water. As such, this statutory right to take can now be of a more of significant scale.
13. It is permissible for regional plans to define the point at which a take has, or is likely to have, an adverse effect on the environment and is therefore not authorised by s 14(3)(b) (*Carter Holt Harvey Ltd v Waikato RC* [2011] NZEnvC 380). To that end, s 14(3)(b) takes can and should be managed within a plan in order to effectively manage allocable flows and define a point at which adverse effects may begin to occur.

Freshwater Accounting

14. The NPS-FM, through Policy CC1(b), expects that accounting happens “at levels of detail that are commensurate with the significance of the freshwater quality and freshwater quantity issues, respectively, in each freshwater management unit”.
15. Guidance from the Ministry for the Environment says the NPS-FM requires accounting for all water takes, including:
 - consented (including both consumptive and non-consumptive)
 - permitted
 - unauthorised takes. (MfE guide to freshwater accounting – s 5.5)
16. The guidance acknowledges that measuring permitted takes frequently does not occur and that modelling be a more commensurate way to measure such takes.

17. Whether measured or modelled, all takes need to be accounted for in order to underpin a reliable allocation framework, to avoid further over allocation and to phase out over allocation.

The Wellington Regional Policy Statement requires allocation limits for “the total amount of water” that can be taken

18. Policy 13: Allocating water – regional plans says:

Regional plans shall include policies and/or rules that:

(a) establish allocation limits for the total amount of water that can be taken from rivers and lakes, taking into account aquatic ecosystem health; and

(b) establish allocation limits for the total amount of water that can be taken from groundwater, taking into account the aquatic ecosystem health of rivers, lakes and wetlands, and preventing saltwater intrusion.

19. Policy 13 in the RPS, which must be given effect to, refers to limits for the total amount of water that can be taken. This supports Mr Percy’s evidence that all takes should be accounted for in a minimum flow regime.

NPS-FM requires further over allocation to be avoided

20. Objective B2 of the NPS-FM requires further over-allocation of fresh water to be avoided. Policy B5 of the NPS-FM requires regional councils to ensure that no *decision will likely* result in future over-allocation. Such “decisions” include:

(a) making permitted activity rules,

(b) to not account for s 14(3)(b) takes in flow allocations,

(c) the policy environment for granting resource consents below minimum flows.

21. In heavily allocated catchments, in my submission, the plan provisions that enable a range of permitted activity and statutory takes, as well as consented takes below minimum flows, could, in combination, amount to further over allocation contrary to the NPS FM requirements. In addition, it is unclear on the policies of the plan whether such further over allocation will be accounted for.

22. Other regional councils are beginning to accept that a combination of permitted activity takes and s 14(3)(b) takes can fall foul of the requirements to not have adverse effects, and to avoid any further overallocation. For example, plan change 9 to the Bay of Plenty

Regional Plan introduces a permitted activity rule for the take and use of surface water (with similar rules applying to groundwater) that:

- (a) Clarifies the take is in addition to a s 14(3)(b) take;
- (b) Requires the take to be registered with certain information, including whether the take also provides for stock or domestic drinking requirements;
- (c) Requires metering and record reporting if the combination of the take and a s 14(3)(b) take exceeds 15m³/day per property;
- (d) Prevents new permitted takes from a fully allocated water resource.⁵

23. Mr Percy's recommendations would account for these permitted, statutory and restricted discretionary takes in a two tiered allocation regime which recognises some takes are justified at lower flows than others.⁶

RMA does not afford specific statutory protection for rootstock

24. There is a theme in the Minister's submission around how the plan provisions deal with rootstock protection. The submission queried this in relation to:

- (a) Policy 112 which preserves the ability to take water below minimum flows or water levels for firefighting, human health, animal drinking water and rootstock protection;
- (b) Policy 115 which would enable resource consent to be granted below minimum flows or water levels for group or community drinking water supply and the survival of permanent horticultural or viticultural root crops.

25. The issue in relation to Policy 112 is that rootstock protection is afforded a similar level of protection to uses which have a statutory recognition in s 14(3) (ie firefighting, human health and animal drinking water). The Minister's preference is that the issue should be addressed by incorporating rootstock protection into the setting of minimum flows or water levels.

⁵ See appendix 2 for the provision.

⁶ Joint hearing Evidence of Phil Percy for Hearing 3 – suggesting two tiered allocation regime with Class B takes (for firefighting, domestic needs, animal drinking water, group or community drinking water supply and water races) being able to continue below the Class A minimum flow, but not below the Class B minimum flow or water level.

26. It is acknowledged that rootstock protection for the purpose of avoiding death at times of low water levels is an important sustainable management consideration. However, the statutory and national policy framework does not explicitly provide for this type of take in the same way it does for firefighting, domestic needs and animal drinking water.
27. Ms Hammond, in her s 42A report agrees that rootstock protection is not appropriate in Policy 112, but considers that it is appropriate in Policy 115.⁷ She has recommended it be removed from Policy 112⁸ – which the Minister supports.
28. In relation to Policy 115 she notes that there are only eight consented takes for rootstock across the Wellington region. She recommends that rootstock protection under Policy 115 should only apply to replacing existing consents, as such, ensuring the amount of water available to be used for five days below minimum flow does not increase in the future.⁹ Mr Percy has adopted Ms Hammond's recommendations in limiting this policy to replacing existing resource consents and has carried that through to his revised Policy 111 – water takes below minimum flows and water levels.¹⁰ In Mr Percy's recommended provisions, provision for permanent horticultural or viticultural root crops is made in P 111 which gives a framework for taking water below Class A minimum flows under a restricted discretionary resource consent, but any such take is not possible below Class B minimum flows or water levels.¹¹ The Minister supports Mr Percy's recommendation as a preferred approach and considers it gives the best answer to her submission that rootstock be provided for in minimum flows and water levels.
29. As an alternative fallback position, the Minister would accept Ms Hammond's amended P115 provided the provision for enabling takes for rootstock protection only endures until the Waitua processes establish minimum flows which factor in allocation for rootstock protection.
30. This could be done with the following amendment (using recommended amendments from Ms Hammond's s 42A report):

The take and use of water may be authorised below **minimum flows** or lake **water levels** established in **waitua** chapters of the Plan (chapters 7-11) for:

...

(d) permanent horticultural or viticultural rootcrops (excluding pasture species, animal fodder crops and maize), where an application is for the replacement of an **existing resource consent** and is lodged prior to the relevant

⁷ Ms Hammond, s 42A report, paragraph 497

⁸ Ms Hammond, s 42A report, paragraph 522

⁹ Ms Hammond, s 42A report, paragraph 507

¹⁰ Evidence of Phil Percy, amended P111 v (page 12 of 51 of appendix B to his evidence).

¹¹ Evidence of Phil Percy, amended P111 v (page 12 of 51 of appendix B to his evidence).

Whaitua provisions relating to minimum flows being notified, for the sole purpose of avoiding their death provided:

- (i) the water shall only be available five days (120 hours) after **minimum flow or water level** cessation take restrictions are imposed and where no practical alternative sources of water are available or accessible, and
- (ii) the amount of water needed shall be determined following consideration of the extent and type of crop(s) and the risk of crop death in drought situations, and...

Water shortage directions are not intended to be used as an allocation tool

31. At any time there is a serious temporary shortage of water, section 329 of the RMA empowers regional councils to issue a direction requiring that the taking or use etc of water be apportioned, restricted, or suspended in any part of their region. A water shortage direction may not last for more than 14 days unless renewed by a subsequent direction.
32. The words in s 329 are virtually identical to those of the predecessor provision in s 24E Water and Soil Conservation Act 1967. In *Jordan v Marlborough RWB* (1982) 9 NZTPA 129 (PT), the Planning Tribunal held that that section only applied to unforeseen water shortages. The Tribunal indicated that rights to take water should not have been granted in circumstances where the board was unsure whether or not there was a sufficient supply. These comments are likely to apply equally to s 329. In other words, regional councils should not over-allocate water resource consents on the assumption that they will later be able to impose restrictions pursuant to s 329 if water shortages subsequently arise.
33. Mr Percy's recommended allocation regime would instead transparently allocate for uses at two tiers of minimum flows. This approach is consistent with the case mentioned above and the requirements of the NPS-FM.

Supplementary allocation amounts above median flows should have a percentage limit – Policy 117

34. Policy 117 is to provide for supplementary allocation amounts at flows above the median flow provided that flushing flows and a portion of flow above the median flow remains in the river to meet Objective 25.
35. The Minister's submission sought a percentage limit on supplementary allocation. Ms Hammond (adopting the evidence of Mr Thompson) has recommended a percentage

limit for both small and larger rivers.¹² Mr Percy's evidence agrees with the percentage limits recommended by Ms Hammond, and adds parameters designed to mitigate against alterations to the natural flow regime.¹³ It is submitted that the percentage limits address the relief sought by the Minister.

Flow variability and flushing flows should be provided for when considering damming and diverting water

36. Policy 129 prevents damming or diversion of water from reducing flows or water levels below minimum flows or water levels identified in the whitua chapters of the Plan. The Minister's submission is that P 129 needs to include reference to flow variability and flushing flows to achieve Objective 25 as the damming and diverting of water can affect the natural flow variability in water bodies. This submission is rejected in Ms Hammond's report for two reasons. Firstly, other relevant policies also apply; and secondly the issue will be discussed further in the topic "Beds of lakes and rivers".
37. Mr Percy disagrees that the issue will be discussed further in the topic "Beds of lakes and rivers" because this provision is not scheduled to be addressed as part of that hearing. He recommends amending Policy 129 as follows (which the Minister supports):

The take, use, damming or diversion of water from a surface water body shall not reduce natural flow variability, the frequency of natural flushing flows, reduce the magnitude of the median flows or reduce water levels below minimum flows or water levels identified in the whitua chapters of the Plan (chapters 7-11).

Fish screen requirements on smaller scale intakes

38. The Minister of Conservation requested more specific conditions relating to fish being prevented from entering intakes or becoming trapped against them in Rules 136, 137 (permitted activities) and 141 (controlled activity), namely:
- (a) A minimum screen mesh size of 3mm;
 - (b) A maximum approach velocity (the speed at which water is drawn into the intake) of 0.1m/s.

¹² Ms Hammond's s 42A report, amended text page 269.

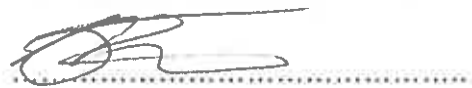
¹³ Mr Percy's evidence, appendix B: amended P 117 at page 15 of 51.

39. The Minister's representatives later agreed at a pre-hearing meeting that a maximum approach velocity of 0.3m/s would be acceptable as that is what equivalent provisions in Auckland, Northland, BOP and Horizons have .

40. Ms Hammond recommends accepting the screen mesh size minimum of 3mm, but rejecting any requirement for a maximum approach velocity. The reason for rejecting the latter is a view that such a permitted activity condition may be overly complex for a take of water that cannot exceed a rate of take of 2.5L/s.

41. With respect, this does not address the potential for cumulative effects if a number of permitted takes were all taking water over the velocity limit from a small but ecologically valuable stream, thereby entrapping native freshwater fish. Further, the imposition of this condition has not been seen as overly complex in Auckland, Northland, Bay of Plenty and Manawatu-Whanganui.¹⁴ Each of these plans has a 0.3m/s approach velocity limit for fish screens on permitted activity takes.

DATED this 13th day of September 2017



Katherine Anton

Counsel for the Minister of Conservation

¹⁴ Relevant provisions are reproduced in appendix 3.

Appendix 1 – Minister of Conservation’s submission points on water allocation

Proposed plan provision	Minister of Conservation Submission or Further Submission	Recommendation in 42A report
P 107 – framework for taking and using water	FS 61/036 on s 352/177 – Federated Farmers – Oppose in part~FF submission that limits in existing plan should be referenced	Disallow in part
P 111 – water takes at minimum flows and water levels	FS 61/037 on s 308/73 support in part – Fish & Game seeking takes below minimum flows be consistent with s 14(3)(b)	Allow
P 112 – priorities in drought and serious water shortage	Submission opposing inclusion of rootstock protection	Allow – recommended referenced to rootstock protection be deleted
P 113 – core allocation for rivers	Submission in support	Accept
P 115 – authorising takes below minimum flows and lake levels	Amend to give effect to NPS-FM Objective B1 - remove reference to rootstock protection	Reject
P 117 – supplementary allocation amounts at flows above the median flow	Amend to include percentage limit on supplementary flow	Accept in part
P 120 – taking water for storage	Support	Accept
P 122 – flow variability	Support	Accept
P 129 – minimum flows and water levels	Include reference to flow variability and flushing flows	Reject
Rule R136: Take and use of water - permitted activity	Amend (c) fish are prevented from entering the water intake or becoming trapped against it, by meeting the following standards: (i) The maximum approach velocity (the speed at which water is drawn into the intake) shall be 0.1m/s, and (ii) the screen mesh size shall be a maximum of 3mm, and	Accept in part – approach velocity not accepted
Rule R137: Farm dairy washdown and milk-cooling water - permitted activity	As for R 136	As for R 136
Rule R141: Take and use of water not permitted - controlled activity	As for R 136	As for R 136
Whaitua chapter policies and rules	Support	Accept

Appendix 2 – example plan provision that accounts for permitted takes and s 14(3)(b) takes

Bay of Plenty Plan Change 9

WQ R3

In addition to any take under section 14(3)(b) of the Act, the take and use of water from any surface water body where the water has a temperature of less than 30° Celsius, and the quantity taken does not exceed 15 cubic metres per day per property is a Permitted Activity subject to the following conditions:

(a) The take and use is registered with the Bay of Plenty Regional Council within one year of this regional plan becoming operative, or for new takes, prior to their commencement and the following information is provided to Council:

- (i) Location of take;
- (ii) General purpose for which water is being used;
- (iii) Confirmation that requirements (b) to (g) can be met;
- (iv) Whether the take also provides for stock or domestic drinking requirements; and
- (v) Name, address and contact details of person responsible for the take and use.

(b) Where the quantity of water taken under this rule, in combination with stock drinking water taken under section 14(3)(b) of the Act exceeds 15 cubic metres per day per property, water meters must be installed to separately record stock drinking water and all other water taken. Records are to be provided to Bay of Plenty Regional Council in an electronic format on a monthly basis within 28 days following the end of each month.

(c) The rate of take does not exceed 2.5 litres per second.

(d) No additional water is taken under WQ R1 or WQ R2.

(e) The take is not from a water resource that is fully allocated at the time the take is established, unless the take was established prior to 18 October 2016.

(f) The take is not from a wetland or waters draining into a wetland.

(g) The intake velocity through the screen shall not exceed 0.3 meters per second.

(h) Where the take is from a river or stream, the total abstraction (all users) of surface water takes shall not exceed the interim instream flow at any point.

Appendix 3

Provisions from other regional plans on maximum flow approach velocities (in highlight)

Horizons One Plan – Part 2: Regional Plan – 16.3 – Rules

16-1 Minor The take or use **Permitted**

takes and of surface

uses of water[^]

surface pursuant to

water[^] s14(2) and

s14(3)(b) RMA.

- a. The rate of take must not exceed:
 - i. 400 l/ha per day for animal farming up to a maximum of 30 m³/day per **property***
 - ii. 15 m³/day per **property***, where the water is for any other use. The rates of take allowed under (i) and (ii) cannot be added: the maximum allowable rate of take under this rule is 30 m³/day per **property***.
- b. The rate of take must not exceed 2.0 l/s.
- c. An intake screen with a mesh aperture size not exceeding 3 mm in diameter must be used and the intake velocity must not exceed 0.3 m/s.
- d. The take must not be from a **rare habitat***, **threatened habitat*** or **at-risk habitat***
- e. The water[^] must be used on the **property***.
- f. The Regional Council must be notified in writing of the location of the take, the maximum instantaneous rate of take and the intended use of water[^].

Draft Northland Regional Plan (28 July 2016):

Rule C.5.1.11

General permitted activity conditions for taking and using freshwater

- 1) a screen covers the intake structure of surface water takes and has a minimum aperture (mesh size) of 5mm to protect native fish species, and the velocity across the screen must not exceed 0.3m/s, and*
- 2) the take does not adversely affect the reliability of water supply for a lawfully established water take, and*
- 3) the take does not lower the water level in a natural wetland, and*

4) *the reticulation system is constructed and maintained to minimise leaks, and*

5) *the water user provides the regional council with:*

a) their name, address, and phone number, and

b) the location of the water take, and

c) the nature of the water use.

Waikato Regional Plan - 3.2.4.2 Waikato Region Surface Water Class Standards – Standards

- c. All water intake structures shall be screened with a mesh aperture size not exceeding three millimetres in diameter at locations less than 100 metres above mean sea level, or five millimetres in diameter at locations greater than 100 metres above mean sea level.*
- d. The maximum intake velocity for any water intake structures shall not exceed 0.3 metres per second.*

BOPRC Water and Land Plan, Rule 41 - Permitted – Take and Use of Surface Water

(e) The intake structure shall be screened with a mesh aperture size:

(i) Not exceeding three (3) millimetres by 30 millimetres in the tidal areas of rivers and streams.

(ii) Not exceeding five (5) millimetres by 30 millimetres or five (5) mm diameter holes in any other area that is not in the tidal area of a river or stream.

(f) The intake velocity through the screen shall not exceed 0.3 metres per second.