

4.2. Giving effect to the NPSFM

- [182] By its submission on Variation 2, Fish and Game claimed that the variation does not adequately give effect to the NPSFM;⁶⁷ and does not give effect to the NPSFM objectives in five classes of particulars.⁶⁸
- [183] In presenting legal submissions for Fish and Game, counsel accepted that the Council is not required to give effect in the variation to the policies of the NPSFM, as their implementation has been deferred under Policy E1 of that statement. Ms St John submitted that the objectives are still relevant, and under section 67(3) should be given effect.⁶⁹
- [184] In the section 42A report, its authors referred to section 55(2D) of the Act, and advised that Policy E1 only applies to implementation of *policies* of the NPSFM, and not to *objectives*. They referred to relevant objectives of the NPSFM⁷⁰ and referred to policies for regional councils making or changing regional plans for achieving the objectives.⁷¹
- [185] A regional plan has to give effect to any national policy statement and any regional policy statement;⁷² and in a regional plan, policies are intended for achieving objectives for the region.⁷³
- [186] The LWRP contains the relevant objectives for the Canterbury region; and also states policies and makes rules of general application in the region. Variation 2 would not add to or amend the objectives; but for the Hinds Plains/Hekeao area, it would state policies for achieving them, and rules for implementing the policies.
- [187] As explained in Chapter 3.10 of this report, the Plan and Variation 2 to it do not give effect to all the directions of the NPSFM, because some of them were added after the Plan and variation were prepared. So, in accordance with Policy E1 of the NPSFM, the Council has adopted a staged implementation programme for implementing the new additions to it. That is why Variation 2 would not give complete effect to the NPSFM.
- [188] Therefore, although Forest and Bird is correct in claiming that the variation does not give effect to certain objectives of the NPSFM, we do not consider that this submission on the variation calls for substantive consideration by the Council. Simply, the variation does not give complete effect to the NPSFM because, in accordance with Policy E1, implementation of parts of it has been postponed.

4.3. Consistency with NPSFM of allowing increases of nitrate-nitrogen losses

The variation proposal

- [189] The Ashburton Zone Committee's ZIP Addendum (to which we referred in Chapter 3.10), noted that land-use consents for up to 30,000 hectares of new irrigation had been granted, but only the Barrhill Chertsey Irrigation Scheme had an associated nutrient discharge consent.⁷⁴ In listing the outcomes to be achieved from the solutions package, it identified "Irrigated area increased by up to 30,000 ha from current irrigated land."⁷⁵ The document contained estimates that "... 30,000 ha of new intensive,

⁶⁷ Fish and Game primary submission, para 27(h).

⁶⁸ Fish and Game primary submission, para 29.

⁶⁹ Legal submissions for Fish and Game, para 29b.

⁷⁰ Section 42A report, paras 5.76f; and 5.81.

⁷¹ Section 42A report, para 5.87.

⁷² RMA, s 67(3).

⁷³ RMA, s 67(1)(b).

⁷⁴ Ashburton ZIP Addendum Hinds Plains. Environment Canterbury. March 2014, pg 5.

⁷⁵ ZIP Addendum cited above, pg 6.

irrigated land use could contribute an additional \$104 million GDP and 232 new jobs per year to the regional economy”.⁷⁶ The ZIP Addendum also contained this statement:⁷⁷

“The nitrate concentrations in groundwater are likely to increase even further than this if 30,000 hectares of new irrigated land are developed and no action is taken.”

[190] As explained in Chapter 3.10 of this report, Variation 2 was based on the ZIP Addendum. The introduction to the variation contains this:⁷⁸

Changes in land use or land use intensification is provided for on a maximum of 30,000 ha provided the nitrogen loss is no more than 27 kg of nitrogen per ha per annum.

[191] That would be provided for by Policy 13.4.13(c):

...
(c) enabling, by way of resource consent process, land use intensification or changes in land use on a maximum of 30,000 hectares of land, provided the nitrogen loss concentration is limited to no more than 27 kg per hectare per year.

[192] That policy would be implemented by condition 2 of Rule 13.5.14:

2. The total area of land subject to any resource consent granted under this Rule and any area of land subject to Row B of Table 13(i) does not exceed 30,000 hectares ...

[193] We asked the authors of the section 42A report whether those provisions indicate that an additional 30,000 hectares of new irrigation would give effect to Objective A2 and Policies A1 and A2 of the NPSFM to set freshwater quality limits to safeguard values, and to implement methods to assist improvement of water quality. The authors replied:

Viewed in isolation, it is possible that a policy allowing increases in nitrogen losses for the baseline land use in the Hinds/Hekeao Plains Area could be interpreted as being contrary to Objective A2(c) ...

However Policy 13.4.13(c) must be viewed within the whole context of the Variation 2 provisions which do provide for and require improvements in the quality of freshwater in water bodies across the Hinds/Hekeao Plains Area.

Overall Variation 2 will result in a reduced nitrogen load of 3,400 tonnes per annum in the Lower Hinds/Hekeao Plains Area from the projected load of 5,600 tonnes per annum. Policy 13.4.13(c) and associated provisions provide for some farmers to increase nitrogen losses at an individual property level. However, this is not at the expense of overall nitrogen losses across the catchment.

While *King Salmon* provides clear authority that directive policies need to be given effect to, it is submitted that each individual provision in a plan or plan change does not need to give effect to the direction. Rather, overall, the proposal (ie Variation 2) must give effect to the specific and directive provisions within the NPSFM.

[194] After citing *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council*,⁷⁹ (which we refer to as *Tukituki*) the authors continued:

⁷⁶ ZIP Addendum cited above, pg 8.

⁷⁷ ZIP Addendum cited above, pg 32.

⁷⁸ Proposed Variation 2, pg 2.

⁷⁹ [2014] NZHC 3191.

Further it is submitted that Policy 13.4.13(c) is different to the 'unders and overs' approach criticised in *Ngāti Kahungunu Iwi Inc v Hawkes Bay Regional Council* ... This is because Policy 13.4.13(c) is not enabling further degradation of water bodies to be offset by improvements in other water bodies elsewhere in the region. Instead, it is controlling land use, by allowing increases in nitrogen loss from a land use (but within a limit of 27 kg/ha/year), whilst requiring significant reductions on other properties. Together these land use controls are predicted to improve water quality within the Lower Hinds /Hekeao Plains Area.

Further, Policy 13.4.13(c) of Variation 2 as proposed by the Council addresses some of the inequities associated with grandfathering nitrogen losses to those existing at the time Variation 2 (and the pLWRP) was notified. The Policy enables a farmer who has not previously intensified his land use to do so, but within an overall policy and rule framework which requires improvements in water quality across the catchment.

The submitters' cases

- [195] By its primary submission, Fish and Game asked that Policy 13.4.13(c) be deleted and replaced with a new policy that in addition would provide that the reduction of total load by 45% per year by 2030 is still achieved. Fish and Game also asked that Rule 13.5.14 be amended so there is certainty the increased area that may be irrigated does not frustrate achievement of the target reduction in load, and instream concentrations.
- [196] Counsel for Dairy NZ and Fonterra made legal submissions about the relation of the judgment in *Tukituki* and the decision in *Ngāti Kahungunu Iwi v Hawkes Bay Regional Council (Kahungunu)*. Mr Matheson sought to distinguish between those cases; submitted that they do not conflict; and that it would not be appropriate to read *Kahungunu* to preclude rules allowing the discharge of contaminants to land or into water.⁸⁰
- [197] Counsel for Horticulture NZ warned us against treating *Kahungunu* as the final word, because each case has to be decided on the facts and legislative context applicable at the time; and that in *Puke Coal v Waikato Regional Council*⁸¹ the Environment Court held that total avoidance of degradation was not required, but that each application had to have real benefit to the river in proportion to the impact. So Ms Atkins submitted that an 'unders and overs' approach remains available, its appropriateness being assessed in the context of each case. Counsel also agreed that Variation 2 is designed to partly give effect to the NPSFM.⁸²
- [198] For Rangitata Diversion Race Management Limited (RDRML), counsel submitted that particularly as the water quality is degraded, Variation 2 should at least maintain, and preferably enhance or improve, water quality. Ms Hamm maintained that this would be consistent with para [74] of *Kahungunu*; and that, although enhancement or improvement should take place within a specified time, set in accordance with Policy 7.3.6 of the CRPS, there is no prescribed requirement for settling on an appropriate timeframe. Counsel also remarked that when considering renewal of existing resource consents, the policies of seeking reductions in nitrogen loss would be relevant.⁸³ Ms Hamm concluded that considering those matters, further intensification anticipated by Variation 2 is appropriate because:

- i. At least a good proportion of it is already lawfully occurring, or authorised and likely to be implemented;
- ii. Variation 2 requires dairy and dairy support activities make reductions in nitrogen losses;

⁸⁰ Legal submissions for Dairy NZ and Fonterra, paras 2,9f.

⁸¹ [2014] NZEnvC 223.

⁸² Legal submissions for Horticulture, paras 14-16.

⁸³ Legal submissions for RDRML, paras 59-61.

- iii. Further intensification would take place in a catchment for which there is an integrated solution to water management (as called for in Policies 7.3.6 and 7.3.9 of the CRPS); and
- iv. There is a timeframe identified in Variation 2 within which improvement of water quality is sought.⁸⁴

Our consideration of the issue

[199] In *Puke Coal v Waikato Regional Council*⁸⁵ the Environment Court quoted a passage from the majority judgment in *King Salmon*⁸⁶ to the effect that a planning instrument may give primacy to preservation or protection in particular circumstances, and inferred that instruments may give primacy to some aspects of the matters in Part 2. The Environment Court stated:

[92] Implicit in the Supreme Court decision was the matter of workable practicality thus any protection or restoration must be proportionate to the impact of the application on the catchment. However, it is clear that it intends to go further than avoiding effect. We have concluded protection and restoration includes preservation from future and restoration from past damage. Restoration can only involve recreation of a past state. Thus, some element of betterment is intended.

[200] In *Tukituki*,⁸⁷ the High Court considered whether as a question of law, a proposed regional plan objective would be inconsistent with Objective A1 of the Freshwater Policy Statement 2011. The relevant objective was:

To sustainably manage the use and development of land, the discharge of contaminants including nutrients and the taking, using, damming, or diverting of fresh water ...so that:

- ...
- (f) The taking and use of water for primary production and the processing of beverages, food and fibre is provided for.

[201] The essence of the challenge to the objective was that it would undermine the primacy that would otherwise be given to protecting the environment. In his judgment, Justice Collins found that there had been a conscious decision not to make the objective “subservient to the environmental objectives”.⁸⁸ He noted that the objective would provide for nothing more than the taking and using of water for primary production, and the processing of beverage, food and fibre in a context that addresses sustainable land use, management of contaminants, and taking of water.⁸⁹ The learned Judge concluded that while the NPSFM places considerable emphasis on measures to protect the environment, it does so in the context of allowing the sustainable use of water for primary production and processing.⁹⁰

[202] In paragraphs [60] to [64] of *Kabungunu*, the Environment Court described deficiencies it saw of applying the ‘overall quality’ term in Objective A2 of the NPSFM in the way the Council submitted. It found that it was “fundamentally flawed”. However the Court did not propose an alternative interpretation of Objective A2 giving a different meaning to the ‘overall quality’ phrase.

[203] At least some of those deficiencies had also been seen by the board of inquiry into the proposed NPSFM. However on consideration of all the submissions and evidence presented to it, that board of inquiry included the ‘overall quality’ term in its recommended NPS. It is to be supposed that the then

⁸⁴ Legal submissions for RDRML, para 63.

⁸⁵ [2014] NZEnvC 223.

⁸⁶ *Environment Defence Society v NZ King Salmon* [2014] NZSC 38 at [149].

⁸⁷ *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191.

⁸⁸ Judgment of Collins J at [201].

⁸⁹ Judgment of Collins J at [204].

⁹⁰ Judgment of Collins J at [205]. Although the NPSFM 2011 applied in that case, the content relevant to that part of the Judgment is repeated in the NPSFM 2014.

Minister for the Environment⁹¹ was aware of those deficiencies when he made amendments to the recommended NPSFM but retained the ‘overall quality’ phrase. His successor as Minister ⁹² would also have been aware of those deficiencies when she recommended for approval the amended NPSFM 2014 which still retained the ‘overall quality’ phrase.

- [204] We have summarised the response by the authors of the section 42A report on the distinction between Policy 13.4.13(c) proposed by Variation 2, and the provisions of the proposed Hawkes Bay regional plan the subject of *Kabungunu*. We accept that this response identifies valid points of distinction between them.
- [205] The Environment Court’s findings in *Kabungunu* about the flawed nature of the ‘unders and overs’ concept related to the proposed instrument that the Court had to consider in that case. With respect, even though that proposed plan and the LWRP have similar (though not identical) objectives for giving effect to the NPSFM, and despite the lucidity of the Court’s reasoning for its findings, those findings did not amount to a declaration of the law of general application, nor do they have the nature of a legal precedent, that would oblige the CRC to apply them to its LWRP.
- [206] The CRC’s function is to make and amend its LWRP in a way that gives effect to the NPSFM, and the CRPS, among other instruments. Both Objective A2 of the NPSFM, and Objective 7.2.3 of the CRPS, use the phrase “the overall quality of fresh water within/in the region”. It is our understanding of the Council’s function that in making and amending its LWRP, the Council has no function of treating those instruments as if they did not refer to the ‘overall quality’ of fresh water, or that they should not have referred to it. Whatever their perceived deficiencies, the Council’s duty is to make and amend its plan to give effect to them by reference to the texts of the instruments as they are, not as some may wish they had been.
- [207] To conclude, following the approach of the Environment Court in *Puke Coal*, we find that the provisions of Variation 2 for further intensification, in the context of the LWRP and the rest of the variation, would not necessarily, as a matter of law, preclude the giving effect to Objective A2 and Policies A1 and A2 of the NPSFM and Policy 7.3.6 of the CRPS.

4.4. Effect of unexercised consents on the existing environment

Cases for submitters

- [208] In support of its submission, Barrhill Chertsey Irrigation (BCI) presented evidence by a hydrogeologist, Mr N Thomas, of the relevant resource consents held by BCI.
- [209] Accepting his evidence, we find that BCI holds a current consent⁹³ to take up to 17 cumecs of water from the Rakaia River, and has an agreement to take up to 10 cumecs from the RDR. The consent authorises the water taken to be used in certain areas identified as Areas 1 to 8, which together extend over much of the lower Hinds Plains between the Rangitata River and the Rakaia River. They are not confined to the Hinds Plains/Hekeao area to which Plan Change 2 would apply.
- [210] The BCI consent does not restrict the amount, or the place where, the water may be used within Areas 1 to 8. The consent also authorises use of water taken on any land between those rivers that may be

⁹¹ At the time the Minister for the Environment was the Hon Dr Nick Smith.

⁹² At the time the Minister for the Environment was the Hon Amy Adams.

⁹³ Consent CRC 143165.