IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-441-000073
[2014] NZHC 3191

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal from a decision of the Board of Inquiry on the Tukituki Catchment Proposal
BETWEEN	HAWKE'S BAY and EASTERN FISH AND GAME COUNCILS
	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellants
AND	HAWKE'S BAY REGIONAL COUNCIL First Respondent
	HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED Second Respondent

CIV-2014-485-009279

IN THE MATTER	of an appeal under section 299 and clause 14, First Schedule of the Resource Management Act 1991
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	HAWKE'S BAY REGIONAL COUNCIL First Respondent
	HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED Second Respondent
	DAIRYNZ LIMITED FEDERATED FARMERS OF NEW ZEALAND INCORPORATED FONTERRA CO-OPERATIVE GROUP

LIMITED
HORTICULTURE NEW ZEALAND INCORPORATED
IRRIGATION NEW ZEALAND INCORPORATED
(Primary Production Interest Group)

HASTINGS DISTRICT COUNCIL
Section 301 Parties

Hearing: 10-12 November 2014

Counsel: R J Somerville QC and C D H Malone for Hawke's Bay and Eastern Fish and Game Councils
S Gepp and P D Anderson for Royal Forest and Bird Protection Society of New Zealand
R B Enright and N M de Wit for Environmental Defence Society Incorporated
T P Robinson and M J E Williams for Hawke's Bay Regional Council and Hawke's Bay Regional Investment Company Limited
B J Matheson and D J Minhinnick for DairyNZ Ltd, Federated Farmers of New Zealand Incorporated, Fonterra Co-operative Group Ltd, Horticulture New Zealand Incorporated and Irrigation New Zealand Incorporated
M E Casey QC for Hastings District Council

Judgment: 12 December 2014

JUDGMENT OF COLLINS J

Introduction

[1] This judgment answers appeals on questions of law brought by Hawke's Bay and Eastern Fish and Game Councils (Fish and Game), Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) and cross-appeals by Environmental Defence Society Incorporated (Environmental Defence). These organisations have challenged an important aspect of a decision of a Board of Inquiry (the Board) established by the Minister for the Environment and the Minister for Conservation pursuant to s 147 of the Resource Management Act 1991 (RMA).

[2] The Board was established to consider and determine proposed changes to the Hawke's Bay Regional Management Plan – Tukituki Catchment (the Regional Plan) and consent applications for a large dam and water storage project called the Ruataniwha Water Storage Scheme. The proposed changes to the Regional Plan were promoted by the Hawke's Bay Regional Council (Regional Council). The consent applications were sought by the Hawke's Bay Regional Investment Company Ltd (Investment Company) a wholly-owned subsidiary of the Regional Council.

[3] Twelve questions of law have been advanced by Fish and Game, Forest and Bird and Environmental Defence. Their appeals and cross-appeals have been opposed by the Regional Council, the Investment Company, the Primary Production Interest Group[1] and the Hastings District Council.

[4] The common theme to all questions of law is the Board's approach to managing nitrogen levels in the Tukituki Catchment Area (Catchment Area). I have concluded the Board did make errors of law when it constructed a factual deeming provision in a rule in the Regional Plan. The rule in question is Rule TT1(j) which applies to farms larger than four hectares.

[5] In the Board's draft report, farms covered by Rule TT1(j) would require resource consents if they caused or contributed to excesses of specified levels of dissolved inorganic nitrogen (DIN)[2] entering the Catchment Area. The Board received submissions from the parties on its draft report.

[6] In the Board's final report, Rule TT1(j) was changed so that farms covered by the rule are deemed not to be contributing to the specified levels of DIN entering the Catchment Area if the farm complies with nitrogen leaching rates specified in a different rule.

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1 DairyNZ Limited, Federated Farmers of New Zealand Incorporated, Fonterra Co-operative Group Limited, Horticulture New Zealand Incorporated and Irrigation New Zealand Incorporated.

2 See [27] of this judgment.

[7] This change produced two overarching errors of law. First, the factual deeming provision was not suggested by any party and was devised by the Board without consultation in circumstances in which the Board had a duty to re-consult the parties about the contents of Rule TT1(j).

[8] Second, an effect of the Board's factual deeming provision in Rule TT1(j) is that the Regional Council will lose an important tool in its management of the amount of DIN that enters significant portions of the Catchment Area. I have concluded the factual deeming provision in Rule TT1(j) does not avoid, remedy or mitigate the adverse effects of activities on the environment[3] or give effect to the National Freshwater Policy Statement 2011.[4]

[9] The effect of my judgment is that the Board will need to reconsider Rule TT1(j) and devise an appropriate mechanism for monitoring the amount of DIN that enters the Catchment Area. The Board will also have to reconsider its terms of consent for the Ruataniwha Water Storage Scheme.

[10] In concluding that the Board made errors of law in relation to Rule TT1(j) I am mindful the Board was working under extreme pressures.[5] Requiring the Board to reconsider Rule TT1(j) will not necessarily cause significant delays to the Ruataniwha Water Storage Scheme.

[11] To help understand my reasons I have divided this judgment into the following parts:

PART I

BACKGROUND

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3 Resource Management Act 1991, s 5(2)(c).

4 Section 67(3)(a).

5 Section 149R(2) of the Resource Management Act 1991 imposes a nine months' time limit on Boards established under Part 6AA of the Resource Management Act 1991. In this case the Minister granted two one-month extensions. The Board received over 28,000 pages of submissions, evidence and reports and delivered a final report totalling 371 pages exclusive of schedules.

PART II

JURISDICTION AND PROCEDURE

PART III

RULE TT1(j)

PART IV

OBJECTIVE TT1(f)

PART V

RUATANIWHA WATER STORAGE SCHEME

PART VI

CONCLUSIONS

[12] The reference in Part IV to Objective TT1(f) is to an objective contained in the Regional Plan that was the subject of a cross-appeal advanced by Environmental Defence.

PART 1

BACKGROUND

The Catchment Area

[13] The headwaters of the Tukituki, Waipawa and Makaroro Rivers are on the eastern flanks of the Ruahine Ranges. These rivers, and other smaller rivers and streams cross the Ruataniwha Plains to the west of Waipukurau and merge into the Tukituki River at a point approximately eight kilometres east of Waipukurau. From there the Tukituki River continues its journey and enters the Pacific Ocean east of Hastings.

[14] There are three distinct zones within the Catchment Area:

(1) The area from the headwaters to the Ruataniwha Plains is used for pastoral farming and forestry.

(2) The Ruataniwha Plains and areas further down the Catchment Area are used for more intensive farming, including some dairy farming, orcharding and horticulture enterprises.

(3) The third zone comprises part of the Heretaunga Plains, which are located along the final 25 kilometres of the Tukituki River. This area is used for horticulture and viticulture.

[15] Of the Catchment Area that is currently used for farming and forestry purposes approximately 74 per cent is used for sheep and dairy farms, 18 per cent for forestry, five per cent for arable farming and less than one per cent for orchards and viticulture.

[16] Beneath the Ruataniwha Plains lies an aquifer which is a multi-layered system covering approximately 800 square kilometres. It is estimated that this aquifer system contains about eight billion cubic metres of water.

[17] Most of the water in the Ruataniwha basin aquifer leaves the basin through the rivers and streams on the basin's eastern boundary.

Irrigation

[18] In 1990 approximately three million cubic metres of water was extracted from the Ruataniwha aquifer system. Today approximately 25 million cubic metres is extracted each year from that aquifer system and is used to irrigate approximately 7,000 hectares.

[19] There are 272 consents authorising the extraction of water in the Catchment Area. Of these, 174 authorised the extraction of ground water. The other 98 consents authorised the extraction of surface water.

Resource concerns

[20] By 2008 the Regional Council had become concerned about a number of issues relating to water allocation, water quality and the management of water resources within the Catchment Area. Specifically, the Regional Council was concerned about:

(1) over-allocation of surface water within the Catchment Area;

(2) a lack of information about ground and surface water connections;

(3) the impacts of drought on irrigation schemes; and

(4) the excessive growth of algae and slime in the middle and lower reaches of the Tukituki River which was impacting on fish and recreational uses of the Tukituki River.

Water quality

[21] The appeal before me focused on the steps taken by the Board to address the quality of water in the Catchment Area.

[22] A feature of parts of the Catchment Area has been an increase of periphyton which is "a complex mixture of algae and slimes that attach to submerged surfaces in rivers".[6] Periphyton occurs naturally in rivers and is an integral part of a healthy river ecosystem. Excessive quantities of periphyton alter the delicate balance of the ecosystems of rivers and streams, thereby causing significant damage to those waterways.

[23] A factor that contributes to excessive growth of periphyton is an increase of nutrients that enter waterways from farms. Phosphorous and nitrogen are two nutrients that can influence the quantity of periphyton in a river.

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6 Hawke's Bay Regional Resource Management Plan, Plan 6 at 36.

[24] Phosphorous enters waterways from a variety of sources which include phosphorous fertilisers, manure and dairy shed effluent. Phosphorous tends to attach to water particles on the surface of the land and enter waterways from water that runs over the surface of land. Dissolved phosphorous (inorganic or dissolved reactive phosphorous) is readily absorbed by periphyton.

[25] The Board's decision relating to the management of phosphorous within the Catchment Area has not been challenged in this appeal. Instead, this appeal questions the Board's approach to the management of nitrogen in the Catchment Area. The following matters relevant to the management of nitrogen require further explanation:

(1) Nitrate-nitrogen;

(2) DIN (Dissolved Inorganic Nitrogen);

(3) LUC (Land Use Capability) systems; and

(4) Farm Environment Management Plans.

Nitrate-nitrogen

[26] Nitrate-nitrogen is a highly soluble compound made up of nitrogen and oxygen. It is an important plant fertiliser which leaches through soils very easily. It is one of the most common contaminants in waterways because it is highly soluble in water.

Dissolved Inorganic Nitrogen (DIN)

[27] DIN is the sum of nitrate in its various forms, and ammonia. In this proceeding DIN refers to the level of nitrogen in a freshwater catchment. Animal urine is a significant source of DIN. When DIN enters waterways it can contribute significantly to the growth of periphyton.[7]

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[7] In setting DIN levels the Board applied a Macroinvertebrate Community Index recommended by some experts as an indicator of the ecological health of waterways.

Land Use Capability System

[28] The LUC system has been used in New Zealand to help achieve sustainable land development and management since 1952. The LUC system takes into account soil type, geology, slope and vegetation cover and can be used as a tool to control the amount of nitrogen on land.[8]

Farm Environmental Management Plans

[29] A farm environmental management plan sets out the management practices used to actively manage environmental issues on a farm where the focus is on managing water quality and quantity issues. A farm environmental management plan is audited regularly by independent assessors in accordance with required audit, compliance and enforcement procedures. A farm environmental management plan can also be used to control the amount of nitrogen on a farm.

[30] In summary, the LUC system and farm environmental management plans focus upon land use as a means of controlling nitrate-nitrogen. The DIN limits focus upon the levels of nitrogen in its various states in waterways. The DIN limits are concerned with the overall ecological health of waterways.

[31] The waters in the middle and lower reaches of the Catchment Area are currently in a degraded state. Excessive quantities of periphyton in these parts of the Catchment Area have contributed to the poor health of the Catchment Area's ecosystem.

[32] The Regional Council's concerns about both the quality and quantity of water in the Catchment Area led it to develop a water management strategy. This strategy

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[8] Land Use Capability class is defined in the Hawke's Bay Regional Resource Management Plan, Plan Change 6 at 35 as meaning "a classification of areas of land within a farm property or farming enterprise in terms of its physical characteristics or attributes (e.g. rock, soil, slope, erosion, vegetation). The land use capability classes can be derived either from the New Zealand Land Resource Inventory or a suitably qualified person specifically assessing and mapping the land use capability classes of land within a farm property or farming enterprise. Where the LUC is assessed by a suitably qualified person that person shall use the land use capacity survey handbook – a New Zealand handbook for the classification of land. (3rd edition, Hamilton., Ag. Research, Lincoln, Landcare Research; Lower Hutt, GNS Science)".

was the genesis of Changes 5 and 6 to the Regional Plan.[9] I will return to the Regional Council's approach to managing periphyton in the Catchment Area when discussing Proposed Plan 6 to the Regional Plan. Before doing so I shall explain the Freshwater Policy Statement 2011.

Freshwater Policy Statement 2011

[33] I will analyse the meaning of the relevant clauses of the National Policy Statement Freshwater Management 2011 (Freshwater Policy Statement 2011) in paragraphs [154] to [177] of this judgment. The following explanation of the Freshwater Policy Statement 2011 is sufficient for the purposes of setting the background to the grounds of appeal and cross-appeal.

[34] Section 46 of the RMA authorises the Minister for the Environment to issue a national policy statement "if the Minister considers it desirable". The purpose of a national policy statement is:[10]

> to state objectives and policies for matters of national significance that are relevant to achieving the purpose of [the RMA].

[35] Section 67(3)(a) of the RMA provides that a regional plan "must give effect" to any national policy statement. Sections 104(1)(b)(iii) and 171(1)(a)(i) of the RMA require consent authorities to "have regard to" a national policy statement when considering consent applications.

[36] The Freshwater Policy Statement 2011 took effect on 1 July 2011. It has since been replaced by the National Policy Statement for Freshwater Management 2014 (Freshwater Policy Statement 2014) which came into effect on 1 August 2014.

[37] The preamble to the Freshwater Policy Statement 2011 explains that the policy:[11]

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9 Change 5 adds objectives and policies into the Regional Policy Statement which forms part of the Regional Plan. Change 5 generated appeals to the Environment Court, most of which were resolved by consent on 26 September 2014.

10 Resource Management Act 1991, s 45(1).

11 National Policy Statement Freshwater Management 2011, Preamble at 3.

> … 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 qualities and quantity limits. The national policy statement is a first step to improve freshwater management at a national level.

[38] The preamble to the Freshwater Policy Statement 2011 identifies 11 uses for which water is valued. These uses include:

(1) domestic drinking and washing water;

(2) animal drinking water;

(3) community water supplies;

(4) irrigation;

(5) recreational activities; and

(6) food production and harvesting.

[39] The Freshwater Policy Statement 2011 also recognises freshwater's intrinsic values for "safeguarding the life-supporting capacity of water and associated ecosystems".[12]

[40] To promote the national values recognised in the Freshwater Policy Statement 2011, the policy sets out eight objectives and 14 policies and directs local governments to manage water in an integrated and sustainable way while providing for economic growth within water quantity and quality limits.

[41] The Freshwater Policy Statement 2011 sets out two objectives (Objectives A1 and A2), followed by four policies (Policies A1 to A4) relating to water quality. Policy A1 of the Freshwater Policy Statement 2011 requires Regional Councils to establish freshwater objectives and to set freshwater limits for all water bodies.

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[12] National Policy Statement Freshwater Management 2011, Preamble at 4.

[42] Objective A1 of the Freshwater Policy Statement 2011 explains that an objective of the policy is "to safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the use and development of land, and of[13] discharges of contaminants".[14]

[43] The objectives of the Freshwater Policy Statement 2011 recorded in Objective A2 include maintaining or improving the overall quality of freshwater while:[15]

> (a) protecting the quality of outstanding freshwater bodies…
>
> …
>
> (c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.[16]

[44] Policy A1 refers to:[17]

> … every regional council making or changing regional plans to the extent needed to ensure the [Regional Council's] plans:
>
> (a) establish freshwater objectives and set freshwater quality limits for all bodies of fresh water in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:
>
> …
>
> (ii) the connection between water bodies
>
> (b) establish methods (including rules) to avoid over-allocation.

[45] Policy A2 states that:[18]

> Where water bodies do not meet the freshwater objectives made pursuant to Policy A1, every regional council is to specify targets[19] and implement

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13 The inclusion of the word "of" appears to be a drafting error.

14 National Policy Statement Freshwater Management 2011, Objective A1 at 6.

15 National Policy Statement Freshwater Management 2011, Objective A2 at 6.

16 Over-allocation is defined in the Freshwater Policy Statement 2011 to mean "where the resource:
(a) has been allocated to uses beyond a limit or
(b) is being used to a point where a freshwater objective is no longer being met".

17 National Policy Statement Freshwater Management 2011, Policy A1 at 6.

18 National Policy Statement Freshwater Management 2011, Policy A2 at 6.

19 "Target" is defined in the Freshwater Policy Statement 2011 to mean "a limit which must be met at a defined time in the future. This meaning only applies in the context of over-allocation".

methods (either or both regulatory and non-regulatory) to assist the improvement of water quality in the water bodies, to meet those targets, and within a defined timeframe.

[46] Policy A3 refers to regional councils:[20]

> (a) imposing conditions on discharge permits to ensure the limits and targets specified pursuant to Policy A1 and Policy A2 can be met and
>
> (b) where permissible, making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.

[47] Policy C1 refers to regional councils:[21]

> … managing freshwater and land use and development in catchments in an integrated and sustainable way, so as to avoid, remedy or mitigate adverse effects, including cumulative effects.

[48] Many of the objectives and policies in the Freshwater Policy Statement 2011 are replicated in the policies and objectives set out in the Freshwater Policy Statement 2014. However, Mr Robinson, senior counsel for the Regional Council and Investment Company submitted that there are important changes to the preamble of the Freshwater Policy Statement 2014 and in Policies CA1 to CA4 in the Freshwater Policy Statement 2014.

[49] It is accepted by the parties that there could be no appeal founded on the Freshwater Policy Statement 2014. More challenging is the question of whether or not the Board should, when reconsidering Rule TT1(j), give effect to the Freshwater Policy Statement 2014 as opposed to the Freshwater Policy Statement 2011. I consider this issue in paragraphs [178] to [184].

Proposed Plan 6

[50] The Regional Council's approach to controlling periphyton in the lower middle reaches of the Catchment Area involved controls on the amount of

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[20] National Policy Statement Freshwater Management 2011, Policy A3 at 6.
[21] National Policy Statement Freshwater Management 2011, Policy C1 at 10.

phosphorous that could be discharged into waterways and limits on nitrate-nitrogen levels. These were to be achieved through Proposed Plan 6 to the Regional Plan.[22]

[51] Proposed Plan 6 aimed to:

(1) give effect to the Freshwater Policy Statement 2011;

(2) address water allocation and quality issues in the Catchment Area;

(3) set water quality limits and targets for freshwater in the Catchment Area;

(4) set new water allocation limits in the Catchment Area;

(5) increase minimum water flows in the Catchment Area; and

(6) provide for future community irrigation schemes.

[52] These objectives are reflected in proposed new chapter 5.9 to the Regional Plan which sets out the objectives, water quality policies and water quantity policies for the Catchment Area. These objectives are also contained in proposed new chapter 6.9 to the Regional Plan which sets out the Catchment Area rules relating to land use, water quality and extraction of water.

[53] The Regional Council's approach to Proposed Plan 6 focused upon nitrate-nitrogen toxicity limits and include requirements that:

(1) Farms over four hectares keep records so that nitrogen budgets could be prepared every three years from 2008.

(2) Industry best practice nitrogen leaching rates be included in the Regional Plan by 2018.

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[22] The Regional Plan came into force in 2006.

(3) Leaching rates be complied with by 2020. Where those limits were exceeded, resource consent would be required as would a farm environment management plan that would take into account all sources of nutrients for the farm activity and identify all relevant nutrient management practices and mitigation measures.

(4) Set a "maximum allowable zone load" for nitrogen in five water management zones.

[54] The Regional Council's approach to the management of nitrate-nitrogen was described by the Board as "hands off" and involved a "single nutrient management approach", namely, the management of phosphorous only.

[55] Proposed Plan 6, as notified by the Regional Council had a number of "conditions" in relation to nitrogen discharge.

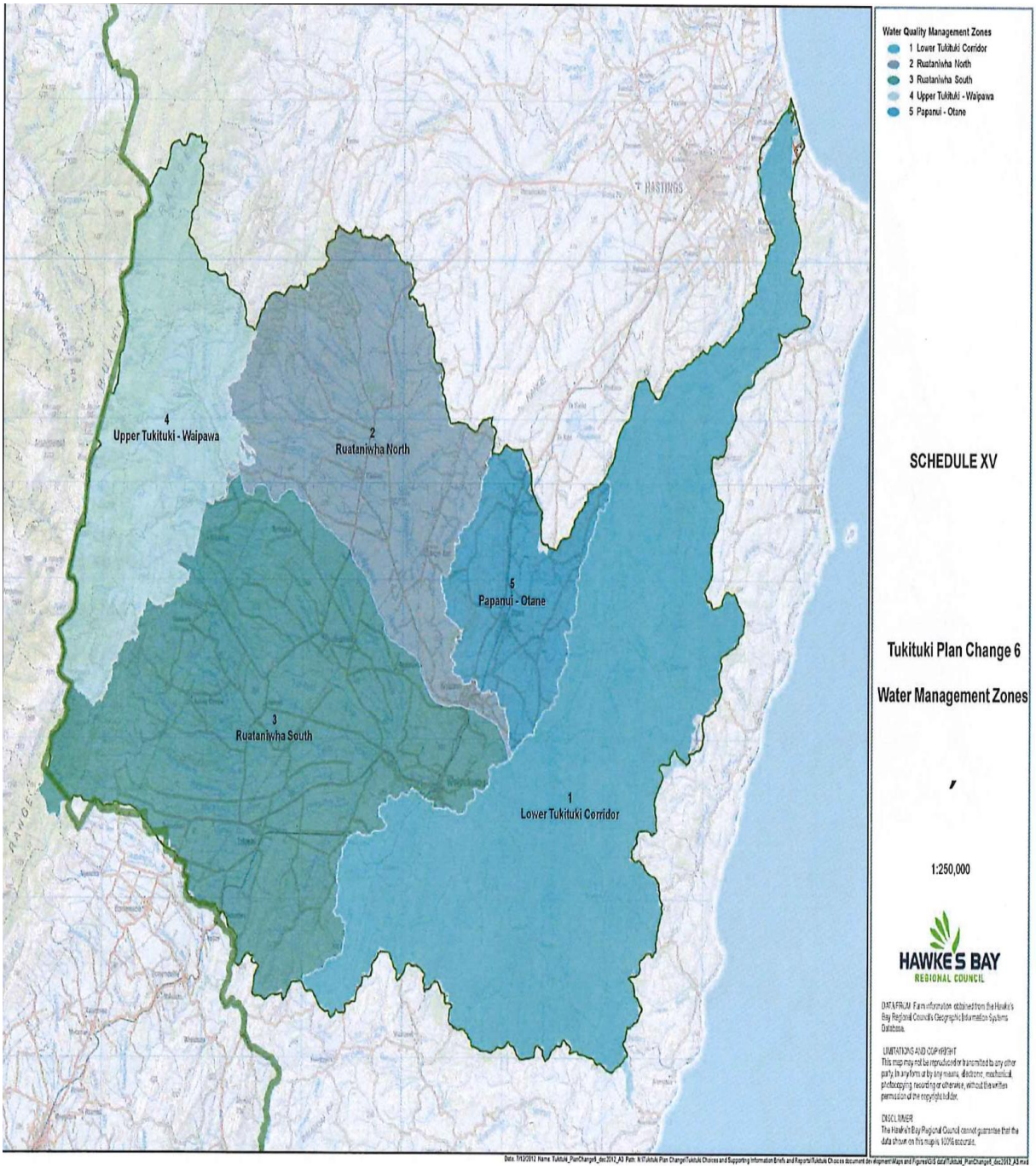
[56] One condition allowed increases in nitrogen leaching in the following ways:

(1) An increase in nitrogen leaching to 15 kg/N/ha/year for the 750 to 850 properties currently leaching less than that amount;

(2) A 10 per cent increase in nitrogen leaching for dairy farms and commercial vegetable cropping operations; and

(3) A 30 per cent increase in nitrogen leaching for sheep and beef farms, arable farms and cropping, mixed arable/livestock farms, permanent horticulture crops, or forestry.

[57] The second condition required farm owners to demonstrate after 1 July 2018 that nitrogen leached from land was not causing or contributing to any measured increase of leaching of nitrate-nitrogen into a waterway above limits specified for the five water management zones depicted in the following map:



Ruataniwha Water Storage Scheme

[58] At the same time the Regional Council was developing the strategy that resulted in Proposed Plan 6. It also investigated ways of improving the quantity of water available in the Catchment Area. These investigations identified 18 potential dam sites and ultimately led to a proposal to produce a reliable supply of irrigation water for approximately 25,000 hectares, mainly on the Ruataniwha Plains.

[59] The proposal which ultimately appealed to the Regional Council involves the construction of a very large dam across the upper reaches of the Makaroro River. This dam would be 83 metres high (at its deepest point), with a 505 metre wide crest behind which 90 million cubic metres of water would be stored. The proposed dam would use 37,500 cubic metres of concrete for the dam surface and foundations and 2.5 million cubic metres of rock and alluvial material for construction.

[60] The irrigation network would involve 36 kilometres of headrace canal and primary pipeline and 121 kilometres of secondary distribution pipeline. Very substantial earthworks would be needed to construct the headrace canal and pipeline network.

[61] The Ruataniwha Water Storage Scheme would be constructed by the Investment Company.

[62] The proposed dam would be the largest dam to be constructed under the RMA and the largest one constructed in New Zealand for irrigation purposes.

[63] The Ruataniwha Water Storage Scheme would affect not only the Regional Council, but also the Central Hawke's Bay Council and the Hastings District Council.

[64] In addition to providing irrigation directly to 25,000 hectares, further farmland would be indirectly influenced so that the land use of the Catchment Area would alter significantly. According to one economic assessment, of the land that would be affected, 37 per cent would be able to be used for dairy farming, 32 per cent for mixed and intensive arable farming, and the remaining 31 per cent would be able to be used for mixed finishing farms, dairy support, orchards and vineyards.

[65] It is estimated that the dam and distribution network would cost approximately $265 million. When on-farm costs are taken into account the total cost of the entire project is likely to be in the vicinity of $650 million.

Board of Inquiry

[66] On 6 May 2014 the Regional Council lodged with the Environmental Protection Authority (the EPA) its Proposed Plan 6 and a notice of request to alter a designation in relation to the Ruataniwha Water Storage Scheme. At the same time the Investment Company lodged with the EPA its 17 applications for resource consent in relation to the Ruataniwha Water Storage Scheme. It was anticipated that the Minister for the Environment would treat the Regional Council's proposals and the Ruataniwha Water Storage Scheme as matters of national significance under s 142 of the RMA and put in place the truncated process for determining the applications set out in Part 6AA of the RMA.

[67] On 5 June 2013 the Ministers for the Environment and Conservation concluded the Regional Council's proposals and the applications relating to the Ruataniwha Water Storage Scheme were matters of national significance and referred them to the Board to determine. This was done pursuant to ss 142 and 147 of the RMA.

[68] The Board was established on 5 June and conducted its hearings between 18 November 2013 and 21 January 2014.

Draft report

[69] The Board released its draft report to the parties on 15 April 2014. In its draft report the Board questioned the Regional Council's approach to the management of nitrate-nitrogen based on toxicity and suggested that an approach based on the "ecological health" of the Catchment Area was more likely to give effect to the Freshwater Policy Statement 2011.

[70] The Board recorded in its draft report that "all the expert witnesses seem to be in agreement that a single nutrient approach [was] fraught with risk".[23] The Board said that a "single nutrient" management approach "would be unsustainable"

[23] Draft Report and Decision of Board of Inquiry, 10 April 2014 at [345].

and that a "dual nutrient" management approach addressing both phosphorous and nitrogen management would be required.[24]

[71] The Board decided to set the following DIN limits in the five water management zones depicted on the map following paragraph [57] of this judgment:

(1) 0.8 mg/l in relation to Zones 1, 2, 3 and 5.

(2) 0.50 mg/l in relation to Zone 4.

[72] These DIN limits were set out in Table 5.9.1B of Proposed Plan 6 as amended by the Board in its draft report and contained limits that were significantly lower than the nitrate-nitrogen targets proposed by the Regional Council in its notified plan. This change was significant because the evidence before the Board suggested that many farms in the Catchment Area were exceeding the DIN limits set by the Board in its draft report and reflected the Board's view that significant changes needed to be made to the management of nitrogen in the Catchment Area.

[73] The Board also decided that compliance with nitrogen limits should be permitted activities. The Board redrafted Rule TT1(j) of Proposed Plan 6 in the following way:

> j. For farm properties or farming enterprises exceeding 4 hectares in area, after 1 June 2018, nitrogen leached from the land shall not be demonstrated [Footnote] to be causing or contributing to any measured exceedence of the Table 5.9.1B limits for the 95th percentile concentration of nitrate-nitrogen or the limit for dissolved inorganic nitrogen in any mainstem (sic) or tributary of a river or to any measured exceedence of the Table 5.9.2 groundwater quality limits for nitrate-nitrogen [Footnote].
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> Footnote: "Demonstrated" means as a result of monitoring and/or modelling undertaken by the Hawke's Bay Regional Council. Individual land owners seeking Certificates of Compliance under Rule TT1 will not be required to undertake any modelling or water quality monitoring themselves.
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> Footnote: By 30 June 2018 [the Regional Council] will develop a Procedural Guideline in collaboration with primary sector representatives setting out how POL TT4(1)(d) and conditions (k) and (l) of Rule TT1 will be implemented. The Guideline will

[24] Draft Report and Decision of Board of Inquiry, 10 April 2014 at [346].

> include, but not be limited to: the process for monitoring water quality trends and alerting affected farming properties if water quality limits are being approached; delineation of the captured zone for the relevant water body (the area of groundwater or surface water contributing to the particular part of the water body in question); and, where Rule TT2 is triggered, an adaptive management process for reducing nitrogen leaching from affected farming properties based on the implementation of progressively more stringent on-farm management practices.

[74] The Board also decided that the provisions of Rule TT1 of Proposed Plan 6 as notified by the Regional Council were not appropriate because they set a catchment-wide leaching rate which would benefit farmers whose properties had existing high levels of nitrogen leaching. Instead, in its draft report, the Board adopted a management system for leaching rates for nitrogen based upon the LUC.

[75] The land use leaching rates adopted by the Board in its draft report referred to eight classes of land use in the LUC system. The rates adopted by the Board in relation to each land use class were:

LUC Class	I	II	III	IV	V	VI	VII	VIII
Rate (kg/ha/year)	30.1	27.1	24.8	20.7	20	17	11.6	3

[76] These limits were incorporated by the Board in its draft report into:

(1) Table 5.1.D of Proposed Plan 6; and

(2) Condition 4A of the Ruataniwha Water Storage Scheme, Schedule Three.

Further submissions

[77] When releasing the draft report the EPA was required to:[25]

> invite the persons to whom it sends the draft report to send any comments on minor or technical aspects of the report to the EPA no later than 20 working days after the date of the invitation.

[25] Resource Management Act 1991, s 149Q(4).

[78] The Board received further submissions from 28 parties, including the Regional Council and the Investment Company.

[79] In its submissions the Regional Council "explained that there was an unintended consequence" of Rule TT1(j) as drafted by the Board. The Regional Council explained that an effect of the alterations to Proposed Plan 6 made by the Board in its draft report would mean farming properties over four hectares that were causing or contributing to an excess of the specified DIN levels would become either discretionary activities or non-complying activities. The Regional Council explained that this was likely to require approximately 615 farms to need resource consent from the Regional Council.

[80] The Regional Council suggested that the Board's draft TT1(j) appeared to be inconsistent with the Board's desire to set a "pragmatic" DIN limit and balance the ecological health of the Catchment Area with more intensive land use.[26]

[81] The Regional Council suggested two remedies to the perceived problem. Those two remedies were:

(1) that the Board direct the Regional Council to fix an in-stream DIN limit that more closely reflected existing water quality and provided for reasonable land use intensification to occur; or

(2) approach the 0.8 mg/l DIN "limit" as an "indicator" rather than as a strictly regulated limit.

The Regional Council preferred the second of these two options.

Final report

[82] On 18 June 2014 the Board delivered its final report.

[83] The Board acknowledged in its report that one of the most contentious features of Proposed Plan 6 was the Regional Council's intended approach to

[26] Draft Report and Decision of the Board of Inquiry, 10 April 2014 at [330].

managing phosphorous and nitrogen. The Board reiterated its comments in its draft report that the Regional Council's proposed plan adopted a "single nutrient" approach focusing on the management of phosphorous and that the Regional Council's proposal involved nitrogen controls being employed to avoid the toxicity effects of nitrogen on aquatic ecology.

[84] The Board maintained is rejection of this approach in favour of what it described as a "dual nutrient" control which involved the management of both phosphorous and nitrogen. Rather than basing nitrogen limits on toxicity, the Board took what it described as "in-stream ecological health" as the basis for the levels of nitrogen. With the exception of one zone, DIN levels were set at 0.8 mg/l.

[85] The exception was the zone in the headwaters of the Catchment Area where the limit was set at 0.50 mg/l. On the basis of comments it received in relation to its draft report the Board decided not to continue with its initial proposal which would have required individual farmers in four catchment areas to meet the 0.8 mg/l DIN limits. Instead, leaching rates for nitrogen based on the LUC classification system were adopted and incorporated by the Board into Proposed Plan 6. Further, the Board included a requirement for all farms within the Catchment Area that exceeded four hectares to prepare a farm environment management plan.

[86] The Board explained it would achieve its objectives by introducing a factual deeming qualification to Rule TT1(j). The Board:[27]

> decided to add a proviso to Rule TT1(j) to the effect that a farm property or farming enterprise shall be deemed to be not contributing to an exceedence of the DIN limit in Table 5.9.1B if it complies with the LUC leaching rates in Rule TT1(d).

[87] The Board summarised its new position in the following way:[28]

> … [A] farm property or farming enterprise which does not exceed the LUC leaching rates in Table 5.9.1D will not require a resource consent by virtue of Rule TT1(j). Conversely, if a resource consent is required the fact that the farm is upstream of a nitrogen "hotspot" can be taken into account when the resource consent application is considered.

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27 Final Report and Decisions of the Board of Inquiry, 18 June 2014 at [449].
28 At [450].

[88] Rule TT1(j) as it emerged from the Board's final report reads:

> j. For farm properties or farming enterprises exceeding 4 hectares in area, after 31 May 2020, nitrogen leached from the land shall be demonstrated [Footnote 1] to be not causing or contributing to any measured exceedence of the Table 5.9.1B limits for the 95th percentile concentration of nitrate-nitrogen or the limit for [DIN] in any mainstream or tributary of a river or to any measured exceedence of the Table 5.9.2 groundwater quality limits for nitrate-nitrogen provided that a farm property or farming enterprise shall be deemed to be not contribution to an exceedence of the DIN limit in Table 5.9.1B if it complies with Rule TT1(d).[Footnote 2]
>
> Footnote 1: "Demonstrated" means as a result of monitoring and/or modelling undertaken by the Hawke's Bay Regional Council. Individual land owners seeking Certificates of Compliance under Rule TT1 will not be required to undertake any modelling or water quality monitoring themselves.
>
> Footnote 2: By May 2018 HBRC will develop a Procedural Guideline in collaboration with primary sector representatives setting out how POL TT4(1)(h) and conditions (j) and (k) of Rule TT1 will be implemented. The Guideline will include, but not be limited to the process for monitoring water quality trends and alerting affected farming properties if water quality limits are being approached; delineation of the capture zone for the relevant water body (the area of groundwater or surface water contributing to the particular part of the water body in question); and, where Rule TT2 is triggered, an adaptive management process for reducing nitrogen leaching from affected farming properties based on the implementation of progressively more stringent on-farm management practices.

[89] Table 5.9.1B sets out the LUC rates which I have explained in paragraph [75] of this judgment.

[90] The key effect of the changes made by the Board to Rule TT1(j) was that farms over four hectares no longer have to comply with the DIN limits provided they comply with the LUC leaching rates.

[91] The Board increased the volume of ground water from the Ruataniwha aquifer that might be consented to for irrigation purposes from a proposed 28.5 million cubic metres per year to 43.5 million cubic metres per year provided that any reduction in surface water flows was compensated from deep ground water or storage.

[92] When issuing the consents for the Ruataniwha Water Storage Scheme the Board synchronised the terms of consent with Rule TT1(j). The Board said that in light of its approach to Rule TT1(j) in the Regional Plan "the same philosophy should apply to farms within the [Ruataniwha Water Storage Scheme]".[29] The Board therefore deleted the references to DIN limits for farms within the Ruataniwha Water Storage Scheme which had formed part of the terms of consent in the Board's draft report.

Appeals

Criteria

[93] Sections 149V and 299 of the RMA permits appeals from the Board's decision to the High Court "on a question of law".[30]

[94] An appeal on a question of law may arise where the Board has:

(1) misinterpreted the law;[31] or

(2) incorrectly applied the law;[32] or

(3) taken into account matters which it should not have taken into account;[33] or

(4) failed to take into account matters which it should have taken into account;[34] or

(5) reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error of law".[35]

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29 Final Report and Decisions of the Board of Inquiry, 18 June 2014 at [1253].
30 Resource Management Act 1991, s 299(1).
31 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
32 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
33 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 32.
34 *Bryson v Three Foot Six Ltd*, above n 31 and *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2014] NZHC 878, [2014] NZRMA 257.
35 *Bryson v Three Foot Six Ltd*, above n 31, at [26] and *Lambton Quay Properties Nominee Ltd v Wellington City Council*, above n 34.

[95] The Supreme Court has made it clear:[36]

> An appeal cannot however be said to be on a question of law where the factfinding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

Grounds of appeal

[96] Fish and Game has argued the Board made six errors of law, which it has posed as questions.

[97] The six questions asked by Fish and Game are:

(1) Did the submissions of the Regional Council on the Board's draft report go beyond the scope of lawful comments pursuant to s 149Q(4) and (5) of the RMA and as a result, did the Board exceed its jurisdiction?

(2) Was the Board's decision to consider the comments of the Regional Council and act on them in the way that it did procedurally unfair?

(3) Is the factual deeming provision of Rule TT1(j) consistent with the requirement in s 5(2)(c) of the RMA to avoid remedy or mitigate adverse effects?

(4) Does the amendment to Rule TT1(j) meet the provisions of s 66(1) of the RMA?

(5) Given the amendment to Rule TT1(j) do the provisions of Proposed Plan 6 give effect to Policy A2 of the Freshwater Policy Statement 2011?

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[36] *Bryson v Three Foot Six Ltd*, above n 31, at [25].

(6) In relation to deletion of the DIN limit from condition 5 of the Ruataniwha Water Storage Scheme consent conditions did the Board fail to have regard to Objectives A1, A2(c) and Policy C1 of the Freshwater Policy Statement 2011 and Objective TT1(a), Objective TT2 and Policies TT1(1)(a) and TT6 of Proposed Plan 6?

[98] Forest and Bird has pursued four grounds of appeal, which it has also framed as questions.

[99] The four questions asked by Forest and Bird are:

(1) Did the Board err by not satisfying itself that the methods that it approved in Proposed Plan 6 give effect to the Freshwater Policy Statement 2011 requirements to avoid allocation beyond the DIN limit, and to achieve the DIN limit target (where water is already over-allocated) within the defined timeframe?

(2) Did the Board err in granting consent to the Ruataniwha Water Storage Scheme, and in the conditions imposed by having regard to the provisions of Proposed Plan 6?

(3) Could the Board have logically found that the Ruataniwha Water Storage Scheme was "entirely consistent" with the outcome sought to be achieved by the Freshwater Policy Statement 2011 given its finding that an in-stream DIN limit and target of 0.8 mg/l was required to give effect to the Freshwater Policy Statement 2011?

(4) Did the Board err when it failed to have regard to a consent decision-making criteria relating to compliance with the DIN limit – which it had approved as part of Proposed Plan 6 – when it decided to grant consent to the Ruataniwha Water Storage Scheme?

[100] Environmental Defence has filed a cross-appeal under s 305 of the RMA. Environmental Defence's grounds of cross-appeal are contained in the following two questions:

(1) Did the Board err when it introduced a factual deeming provision for Rule TT1(j) in its final decision?

(2) Did the Board err when, in issuing Objective TT1(f) of Proposed Plan 6 by failing to give effect to the directive language and priorities in Objectives A1 and A2 of the Freshwater Policy Statement 2011?

[101] Fish and Game, Forest and Bird and Environmental Defence endorse each other's appeals and cross-appeals.

PART II

JURISDICTION AND PROCEDURE

First and second grounds of appeal – Fish and Game

[102] The essence of the first ground of appeal advanced by Fish and Game is that the submissions made by the Regional Council in relation to the Board's draft report relating to Rule TT1(j) exceeded the scope of s 149Q of the RMA. Fish and Game's case is that the Regional Council's submissions on the draft report were more than comments on "minor or technical aspects of the [draft] report" and that by considering and adopting the Regional Council's submissions the Board exceeded its statutory jurisdiction.

[103] The second ground of appeal evolved during the course of the hearing into a submission that in adopting the factual deeming provision to Rule TT1(j) of Proposed Plan 6 the Board departed so significantly from its draft report that the Board had a duty to consult with the parties before making its amendments. Fish and Game says that the Board's failure to re-consult with the parties about the terms of Rule TT1(j) breached a basic principle of natural justice.

[104] These two grounds of appeal challenge the processes followed by the Board when devising the final version of Rule TT1(j).

[105] In examining these grounds of appeal I shall first consider the scope of the consultation provisions in s 149Q of the RMA and then consider the Board's duty to re-consult.

Draft report procedure in the RMA

[106] In 2009 a Technical Advisory Group reported to the Minister for the Environment and recommended changes to a number of aspects of the RMA. One recommendation was that the RMA be amended so that the opportunity to comment on draft reports prepared by Boards of Inquiry would not be treated as an opportunity "to try and challenge the Board's decision as to whether or not the application should be granted, and is confined to comments merely on the proposed conditions".[37] This recommendation reflected the view that planning and consent issues associated with projects of national significance should be determined expeditiously.

[107] The Resource Management (Simplification and Streamlining) Amendment Act 2009 adopted some of the recommendations contained in the Technical Advisory Group's report. As a result of that legislation s 149Q(4) of the RMA confines comments on a Board of Inquiry's draft report to "minor or technical aspects of the [draft] report". Section 149Q(5) of the RMA explains that:

> Comments on minor or technical aspects of the report—
>
> (a) include comments on minor errors in the report, on the wording of conditions specified in the report, or that there are omissions in the report (for example, the report does not address a certain issue); but
>
> (b) do not include comments on the board's decision or its reasons for the decision.

[108] Parliament's intention when passing the Resource Management (Simplification and Streamlining) Bill can be gleaned from the comments made by

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[37] Report of the Minister for the Environment's Technical Advisory Group, February 2009 at 37.

the Hon Dr N Smith, the responsible Minister. During the Second Reading of the Bill Dr Smith said the focus of the Bill was:[38]

> … on reducing the costs, reducing the delays, and reducing the uncertainties of the Act without compromising its underlying environmental integrity. [The] bill is about addressing the vexatious, frivolous, and anti-competitive objections that can add tens of thousands of dollars to the costs of ratepayers and consent applicants. [The] bill is about getting a single-step process in place to enable major infrastructure projects to get consent in a more timely way. We want to consign to history the notion that it takes longer to get a resource consent for a piece of infrastructure than it takes to actually build it.

Analysis

[109] The Board was alert to the limits of any submissions in relation to its draft report. In its final report the Board recorded that it had not considered a number of submissions that failed to comply with s 149Q(4) and (5) of the RMA but that it had considered all the comments that were within the scope of the statutory limits contained in s 149Q(4) and (5).[39]

[110] In its draft report the Board clearly accepted the submissions from Fish and Game that nitrogen in the Catchment Area needed to be carefully controlled and that the Proposed Plan 6 notified by the Regional Council was inadequate.

[111] It became apparent to the Board when considering submissions on its draft changes to Rule TT1(j) of Proposed Plan 6 that the way its findings were to be implemented needed to be re-examined. However, it is clear the Board did not resile from its fundamental finding that nitrogen levels in the Catchment Area required far more careful management than had been envisaged in the Proposed Plan 6 notified by the Regional Council.

[112] The Regional Council's submissions on the Board's draft report pointed out that the Board's proposed change to Rule TT1(j) in Proposed Plan 6 would have had the unforeseen consequence of requiring 615 farms to obtain resource consent from 1 June 2018.

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38 (9 September 2009) 657 NZPD 6133.

39 Final Report and Decisions of the Board of Inquiry, 18 June 2014 at [135] and [137].

[113] In its final report the Board acknowledged that the Regional Council had identified an "unintended consequence" that "needed to be corrected".[40]

[114] I am satisfied the Regional Council drew the Board's attention to a consequence of the draft report that the Board had not appreciated and which was not consistent with the Board's reasons for its proposed changes to Rule TT1(j).

[115] In this respect the Regional Council's submissions were in the form of a legal interpretation of the consequences which would follow from the Board's re-drafting of Rule TT1(j). A legal interpretation can be fairly categorised as a "technical" submission.[41]

[116] I therefore conclude that the submissions made by the Regional Council in relation to the Board's draft report relating to Rule TT1(j) were within the scope permitted by s 149Q(4) and (5) of the RMA and that the Board made no error of law by receiving and considering the Regional Council's submissions in relation to Rule TT1(j).

Duty to re-consult

[117] Although s 149Q of the RMA envisages limited opportunity to comment on a Board's draft report, s 149Q does not purport to override a Board's duty to adhere to the principles of natural justice.

[118] Fairness is at the heart of the issue.[42] Those who have a right to be consulted must be given an adequate opportunity to express their views and to influence the decision-maker.[43] An assessment of whether or not a decision-maker has acted fairly is a quintessential judicial task that is highly influenced by context.[44]

[119] There have been various formulations of the duty to re-consult when circumstances have changed between the initial consultation and the basis upon

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40 Final Report and Decisions of the Board of Inquiry, 18 June 2014 at [448].

41 See definition of "technical" "The Concise Oxford Dictionary" (Ninth ed, Clarendon Press, Oxford, 1995).

42 *R v Monopoly's Commission ex parte Elders* [1986] QBD 451 at 461.

43 *R v London Borough of Islington ex parte East* [1996] ELR 74 (QBD) at 88D.

44 *R v Secretary of State ex p Islam* [1994] ELR 111 (QBD) at 118.

which a decision is based. In *Smith, R (on the application of) v East Kent Hospital NHS Trust* the Court suggested that the need for re-consultation occurred "if there was a fundamental difference" between a proposal consulted upon and the basis upon which the decision-maker made his or her decision.[45]

[120] In some New Zealand decisions the scope of a decision-maker's duty to re-consult echoes the United Kingdom position to some extent.[46] There can be no doubt a decision-maker must re-consult if the final decision differs in a fundamental way from the decision which was indicated at the time of consultation. However some New Zealand decisions suggest the duty is engaged at a lower threshold. For example, in *Air New Zealand Ltd v Nelson Airport Ltd* Miller J found that further consultation might have been required if advice contained in a report already in the decision-maker's possession differed in a "material[ly] adverse way".[47]

[121] I have previously concluded that the approach taken by Miller J best addresses the need to ensure fairness to those who are consulted and affected by an administrative decision.[48] The RMA acknowledges that during the decision-making process, entities such as the Board must act fairly.[49] Section 149Q is not isolated from the principles of natural justice.[50] The principles of natural justice required the Board to provide the affected parties with an opportunity to comment on material changes to the Board's decision.[51]

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45 *Smith, R (on the application of) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) (QBD) at [45].

46 See for example *McInnes v Minister of Transport* [2001] 3 NZLR 11 (CA) at [16] and *Contact Energy Ltd v Electricity Commission* HC Wellington CIV-2005-485-624, 29 August 2005 at [30]-[36].

47 *Air New Zealand Ltd v Nelson Airport Ltd* HC Nelson CIV-2007-442-584, 27 November 2008 at [50]. See also *Leigh Fishermen's Association Inc v Minister of Fisheries* HC Wellington CP266/95, 11 June 1997 at 29 in which McGechan J considered further consultation was required for "a new matter, and not one on which the Minister safely could assume the Leigh fishermen would be unconcerned".

48 *Accountants First Ltd v Commissioner of Inland Revenue* [2014] NZHC 2446.

49 Resource Management Act 1991, s 39(1)(e); *Denton v Auckland City* [1969] NZLR 256 (SC).

50 See *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1993] UKHL 12, [1994] 2 AC 264.

51 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC).

Analysis

[122] There are two reasons why I have concluded the Board breached its duty to re-consult when it re-constructed Rule TT1(j) in its final report:

(1) First, the final version of Rule TT1(j) devised by the Board was materially different from the draft Rule TT1(j) issued by the Board. I will deal with this point under the heading of "materiality".

(2) No party had submitted that the Board should re-draft Rule TT1(j) in the way it emerged in the Board's final report and no party had an opportunity to make submissions on the new version of Rule TT1(j). I will deal with this point under the heading of "fairness" which, as I have said in paragraph [118] underpins a decision-maker's duty to re-consult.

Materiality

[123] Mr Robinson emphasised that the Board's approach in its final report to the management of DIN must be viewed in context.

[124] It was submitted on behalf of the Regional Council and the Investment Company that Rule TT1(j) is part of an integrated approach adopted by the Board to the management of nitrogen in the Catchment Area. The Board itself explained that it was introducing:[52]

> … [A]n integrated regime involving [farm environment management plans], LUC based nitrogen leaching rates, phosphorous management, and nutrient budgeting involving both nitrogen and phosphorous.

[125] The Board explained that Rule TT1(j) was devised after it had "evaluated a number of options ranging from a more regulated land use regime to a less regulated regime.[53]

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52 Final Report and Decisions of the Board of Inquiry, 18 June 2014 at [747].
53 At [747].

[126] The Board also explained that when viewed in an overall and integrated manner:[54]

> … [T]he provisions of [Proposed Change 6] will allow for more intensive use and development while giving effect to the [Freshwater Policy Statement 2011] by safeguarding the environment.

[127] Mr Robinson submitted that the appellants' attack on the way Rule TT1(j) is worded in the Board's final report fails to recognise that Rule TT1(j) is just one part of an integrated response to the problems of water quality in the Catchment Area.

[128] Mr Robinson also pointed out that:

(1) no party had sought that Rule TT1(j) should require farms greater than four hectares that contributed in excess of the specified DIN limits should be required to obtain a resource consent; and

(2) Fish and Game's own expert witness supported the use of LUC leaching rates to control nitrogen in the Catchment Area.

[129] All respondents submitted that when Rule TT1(j) is viewed in context it becomes apparent that any errors in that rule are insignificant and do not need to be revisited.

[130] In my assessment, when the Board inserted the factual deeming provision into Rule TT1(j) it made a significant change from its draft decision. The principal consequence of the Board's final version of Rule TT1(j) is that farms over four hectares which comply with the LUC leaching rates are deemed to comply with the in-stream DIN limits even though those farms are in fact *not* complying with the DIN limits. The principles of natural justice required the Board to provide the affected parties with an opportunity to comment on this material change to Rule TT1(j) that has the impact of altering in a significant way the Regional Council's ability to control nitrogen in waterways in the Catchment Area.

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[54] Final Report and Decisions of the Board of Inquiry, 18 June 2014 at [751].

Fairness

[131] No party argued for or anticipated the changes which the Board made to Rule TT1(j) in its final report. No party therefore had the opportunity to comment on and influence the Board's thinking on the contents of the final version of Rule TT1(j).

[132] I appreciate the Board was required to deliver its report in accordance with strict time limits. However, it is significant that two days after the Board released its draft report the Supreme Court delivered its decision in *Environmental Society Inc v New Zealand King Salmon Co Ltd (King Salmon)*.[55] The Board appreciated that the Supreme Court's judgment in *King Salmon* could have significant implications for its final report. Accordingly, on 7 May 2014 the Board issued a minute in which it invited comments from the parties on how the Supreme Court's judgment should be interpreted and how it affected the Board's draft decision. The parties availed themselves of this opportunity and filed submissions relating to the *King Salmon* decision by 16 May 2014. This approach by the Board demonstrates its appreciation that it could require submissions from all parties when considering significant matters that had not been before the parties previously. In addition, the consultation which required the parties to make submissions to the Board on an important matter was able to occur within a short timeframe. A similar opportunity should have been afforded to the parties in relation to the Board's changes to Rule TT1(j).

[133] I therefore conclude that the Board erred in law when it incorporated the factual deeming provision into Rule TT1(j) without consulting with the parties. As a consequence the Board will need to reconsider Rule TT1(j) and devise an appropriate method for managing DIN levels in the Catchment Area. This will need to be achieved after providing the parties with an opportunity to make submissions on the future content and scope of Rule TT1(j).

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[55] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd (King Salmon)* [2014] NZSC 38, [2014] 1 NZLR 593.

PART III

RULE TT1(j)

Third ground of appeal – Fish and Game
Fourth ground of appeal – Fish and Game
Fifth ground of appeal – Fish and Game
First ground of appeal –Forest and Bird
First ground of cross-appeal – Environmental Defence

[134] In Part II of this judgment I determined the Board must reconsider Rule TT1(j). In view of that decision, I will address the remaining grounds of appeal in a way that is designed to assist the Board in its deliberations.

[135] The third ground of appeal advanced by Fish and Game asks if the factual deeming provision of Rule TT1(j) in the Board's final report complies with s 5(2)(c) of the RMA. That section requires those who apply the RMA to avoid, remedy or mitigate any adverse effects of activities on the environment.

[136] The fourth ground of appeal from Fish and Game asks if the factual deeming provision of Rule TT1(j) in the Board's final report complies with s 66(1) of the RMA. That section provides that any changes to a regional plan have to comply with a number of provisions in the RMA, including the provisions of Part II of that Act and the contents of any evaluation report prepared in accordance with s 32 of the RMA.[56]

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[56] **32 Requirements for preparing and publishing evaluation reports**
(1) An evaluation report required under this Act must–
(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by–
(i) identifying other reasonably practicable options for achieving the objectives; and
(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
(iii) summarising the reasons for deciding on the provisions; and
(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
(2) An assessment under subsection (1)(b)(ii) must–
(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for–
(i) economic growth that are anticipated to be provided or reduced; and

[137] The fifth question of law posed by Fish and Game asks if the factual deeming provision of Rule TT1(j) contained in the Board's final report gives effect to Policy A2 of the Freshwater Policy Statement 2011. This ground of appeal relies on s 66(3)(a) of the RMA which requires regional plans to give effect to any national policy statement.

[138] The first question of law advanced by Forest and Bird asks if the factual deeming provision of Rule TT1(j) contained in the Board's final report gives effect to Objectives A1 and A2(c) and Policies A1(b) and A2 of the Freshwater Policy Statement 2011.

[139] The first ground of cross-appeal advanced by Environmental Defence asks if the Board erred in law when it incorporated the factual deeming provision into Rule TT1(j) in its final report.

[140] There are three themes to the grounds of appeal and cross-appeal in Part III of this judgment. Those themes all relate to the factual deeming provision of Rule TT1(j) in the Board's final report. The three themes can be conveniently considered by answering the following questions:

(1) Did the Board properly apply Part 2 of the RMA?

(2) Did the Board properly apply the Freshwater Policy Statement 2011?

(ii) employment that are anticipated to be provided or reduced; and
(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and
(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

(3) If the proposal (an amending proposal) will amend a standard, statement, regulation, plan, or change that is already proposed or that already exists (an existing proposal), the examination under subsection (1)(b) must relate to–
(a) the provisions and objectives of the amending proposal; and
(b) the objectives of the existing proposal to the extent that those objectives–
(i) are relevant to the objectives of the amending proposal; and
(ii) would remain if the amending proposal were to take effect.

(4) If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

…

(3) Did the Board make any other legal error when it inserted the factual deeming provision into Rule TT1(j)?

Did the Board properly apply Part 2 of the RMA?

[141] The essence of the third question of law advanced by Fish and Game is that the factual deeming provision of Rule TT1(j) in the Board's final report does not comply with s 5(2)(c) of the RMA, the contents of which I explain in paragraph [144].

[142] Fish and Game submit that the effect of the factual deeming provision in Rule TT1(j) is that a significant number of farm properties within the Catchment Area will be deemed to comply with the DIN discharge limit when in fact they are not doing so. From this position Fish and Game submit that the factual deeming provision does not comply with the purposes set out in s 5(2)(c) of the RMA.

[143] Section 5(2)(c) of the RMA must be read in context. Section 5(1) explains that the RMA's purpose is to promote sustainable management of natural and physical resources.

[144] "Sustainable management" is defined in s 5(2) of the RMA as:

> ... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[145] In *King Salmon* the Supreme Court explained that s 5 of the RMA is a carefully formulated statement of principle that:

(1) is intended to guide those who make decisions under the RMA rather than act as an aid to interpretation;[57]

(2) the word "while" in the definition of "sustainable management" means "at the same time as";[58]

(3) the word "avoiding" in "avoiding, remedying, or mitigating" in s 5(2)(c) means "not allowing" or "preventing the outcome of";[59]

(4) the words "remedying" and "mitigating" in s 5(2)(c) indicate that development and uses of natural and physical resources which might have adverse effects if they are not avoided, could be permitted if they are mitigated and/or remedied;[60] and

(5) the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in s 5(2)(c) of the RMA indicate particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management. The Supreme Court explained "the definition [of sustainable management] indicates that environment protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management".[61]

[146] Sections 6, 7 and 8 supplement s 5 of the RMA by expanding on the obligations of those who administer the RMA.

[147] Section 6 of the RMA directs decision-makers to "recognise and provide for" certain matters of national importance including:

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57 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd (King Salmon)*, above n 55, at [24](a).
58 At [24](c).
59 At [24](b) and [92]-[97].
60 At [24](b).
61 At [24](d) and [148].

(a) The preservation of the natural character of … rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

…

(c) The protection of areas of … significant habitats of indigenous fauna:

(d) The maintenance and enhancement of public access to and along … rivers:

…

[148] Section 7 of the RMA requires decision-makers to "have particular regard to" 11 specified matters including:

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

…

(d) Intrinsic values of ecosystems:

…

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

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

(h) The protection of the habitat of trout and salmon:

(i) The effects of climate change:

…

[149] Section 8 of the RMA requires those exercising functions and powers under the Act "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".

[150] In summary, s 5(2) of the RMA "contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b)",[62] which, although not giving "primacy to preservation or protection [means] that provision must be made for preservation and protection as part of the concept of sustainable management".[63]

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62 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd (King Salmon)*, above n 55, at [146].

63 At [149].

[151] It is against this statutory background that I turn to consider whether the factual deeming provision in Rule TT1(j) complies with s 5(2)(c) of the RMA.

[152] I agree with Fish and Game that the factual deeming provision in Rule TT1(j) undermines the Regional Council's ability to effectively monitor water quality in the Catchment Area. In particular, a consequence of the way Rule TT1(j) is framed is that if a farm owner causes or contributes to the specified DIN limits being exceeded but nevertheless complies with the leaching limit set in Table 5.9.1D of the Regional Plan then the Regional Council will be unable to require farm owners to avoid, remedy or mitigate their contribution to DIN entering waterways in the Catchment Area.

[153] This consequence is not consistent with the Regional Council's obligation under s 5(2)(c) of the RMA.

Did the Board properly apply the Freshwater Policy Statement 2011?

[154] Section 67(3)(a) of the RMA requires a regional plan to give effect to any national policy statements.

[155] The fifth question of law advanced by Fish and Game, the first question of law advanced by Forest and Bird and the first cross-appeal from Environmental Defence are all presented on the basis that the factual deeming provision in Rule TT1(j) fails to comply with s 67(3)(a) of the RMA because it does not "give effect" to specific provisions of the Freshwater Policy Statement 2011.

[156] In *King Salmon* the Supreme Court explained that on its face "give effect to" in s 67(3)(a) of the RMA "… is a strong directive, creating a firm obligation on the part of those subject to it".[64] However, the Supreme Court also cautioned that the implementation of a national policy will be affected by the contents of the policy. Thus:[65]

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64 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd (King Salmon)*, above n 55, at [77].

65 At [80].

> A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[157] It is thus necessary to examine the terms of the relevant provisions of the Freshwater Policy Statement 2011.

[158] In undertaking this exercise the parties which supported the appeals and cross-appeal sought to rely on the approach taken by the Supreme Court in *King Salmon* when it interpreted and gave effect to the New Zealand Coastal Policy Statement. The Supreme Court concluded that the New Zealand Coastal Policy Statement contained objectives and policies which, while generally worded, were intended to give substance to the principles of Part 2 of the RMA. In that case the Supreme Court concluded that the failure by the Board and the High Court to give effect to directives and policies in two provisions of the New Zealand Coastal Policy Statement meant the Board and High Court had failed to give effect to that policy and therefore did not comply with s 67(3)(a) of the RMA. Mr Matheson, senior counsel for the Primary Production Interest Group shouldered many of the arguments in support of the respondents' position that the approach taken by the Supreme Court in *King Salmon* could not be transposed upon the case before me.

[159] The arguments advanced on behalf of the Primary Production Interest Group and other respondents can be distilled to nine key points.

[160] First, it was submitted Proposed Plan 6 needs to be read as a whole and effect must be given to all relevant provisions of the Freshwater Policy Statement 2011. It was stressed that it would be a mistake to focus only on the DIN limits in Proposed Plan 6 when determining if Proposed Plan 6 complies with the Freshwater Policy Statement 2011.

[161] Second, the Freshwater Policy Statement 2011 needs to be read as a whole with particular care given to the language used in the relevant provisions in the policy. It was stressed that the development of the Freshwater Policy Statement 2011 led to modification of the language which the Minister approved so that the

final version of the Freshwater Policy Statement 2011 recognises the importance of sustainable management of natural resources.

[162] Third, the language of the Freshwater Policy Statement 2011 requires that it be read in conjunction with Part 2 of the RMA.

[163] Fourth, even if the Freshwater Policy Statement 2011 is equated with the New Zealand Coastal Policy Statement, it still needs to be read in conjunction with Part 2 of the RMA because:

(1) the Freshwater Policy Statement 2011 is not complete; and/or because

(2) reference needs to be made to Part 2 of the RMA to address uncertainties about the meaning of provisions in the Freshwater Policy Statement 2011.

[164] Fifth, in any event, while Part 2 of the RMA was a material part of the Board's decision, it was not used to override any part of the Freshwater Policy Statement 2011 and therefore the Board's approach was entirely consistent with that of the Supreme Court in *King Salmon*.

[165] Sixth, Part 2 of the RMA allowed the Board to:

(1) set water quality limits, objectives, policies and rules in the Regional Plan which reflected sustainable management just not aquatic ecology;

(2) consider social and economic costs in setting the timeframes for water quality limits to be met; and

(3) develop a pragmatic approach that avoided unnecessary costs to primary producers.

[166] Seventh, the factual deeming provision in Rule TT1(j) was an elegant response to a problem which the Board had not foreseen. It was submitted the Board correctly concluded:

(1) The only way to control in-stream nitrogen was through land-based controls (LUC and farm environmental management plans).

(2) Requiring resource consent because an in-stream limit was breached would not ensure a reduction in nitrogen leaching.

(3) While resource consent would require farmers who exceeded DIN limits to take additional steps it would not be possible for the Regional Council to set controls on the land use activities that would result in in-stream DIN limits being met.

[167] Eighth, the Board's overall approach gave effect to the Freshwater Policy Statement 2011 because the Board's suite of controls will safeguard the ecology of the Catchment Area.

[168] Ninth, how the Freshwater Policy Statement 2011 is applied is a matter of "evaluative judgement" which the Board was best placed to make.

Analysis

[169] The Board recognised that it needed to give effect to the Freshwater Policy Statement 2011 and expressly recorded that it believed its report did give effect to that policy. Thus, for example, at paragraph [151] of its report the Board recorded that when considering Proposed Plan 6 it placed the Freshwater Policy Statement 2011 "… at the forefront of its analysis of water quality, water quantity, integrated management …". The Board said that by undertaking that analysis it was satisfied that Proposed Plan 6, "as modified by the Board, gives effect to the [Freshwater Policy Statement 2011] as required by s 67(3)(a) of the RMA".

[170] In my assessment, the Board correctly recognised the need to give effect to the Freshwater Policy Statement 2011. That is the plain meaning of s 67(3)(a) of the

RMA. It also reflects the detailed and considered process the Freshwater Policy Statement 2011 underwent before the Minister approved the final version of that policy. Those processes included an evaluation under s 32 of the RMA and detailed deliberations by the Board and further reflection and consideration by the Minister for the Environment before issuing the Freshwater Policy Statement 2011. The approach taken by the Board was also consistent with the Supreme Court's view that it is necessary to give effect to a national policy statement without necessarily giving primacy to Part 2 of the RMA.

[171] The Board knew the Freshwater Policy Statement 2011 aimed to give substance to Part 2 of the RMA by stating objectives and policies which apply those principles to the freshwater environment.

[172] However, while the Board accurately stated the key principles contained in *King Salmon*, a careful analysis of the Board's reasoning leaves doubt whether or not the factual deeming provision in Rule TT1(j) gave effect to the Freshwater Policy Statement 2011.

[173] The key freshwater quality controls developed by the Board included the DIN limits set by the Board in both its draft and final reports. Those limits gave effect to Objectives A1 and A2 of the Freshwater Policy Statement 2011 which relate to:

(1) safeguarding the ecosystem processes and freshwater ecosystems in sustainably managing the use of land and discharge of contaminants;[66] and

(2) maintaining the overall quality of freshwater within a region and improving the quality of fresh water in water bodies that have been degraded to the point of being over-allocated.[67]

[174] The DIN limits set by the Board in its draft report also gave effect to Policies A1 and A2 of the Freshwater Policy Statement 2011 relating to:

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66 National Policy Statement Freshwater Management 2011, Objective A1.
67 National Policy Statement Freshwater Management 2011, Objective A2(c).

(1) the need for the Regional Council to establish methods to avoid over-allocation;[68] and

(2) the duty placed on the Regional Council to implement methods to assist the improvement of water quality by meeting specified targets within a defined timeframe.[69]

[175] The DIN limits set by the Board in its draft report would also have given effect to Policy C1 of the Freshwater Policy Statement 2011 which requires the Regional Council to manage freshwater and land use and developments in catchments in an integrated and sustainable way, so as to avoid, remedy or mitigate adverse effects, including cumulative effects.

[176] The Board clearly appreciated how the DIN limits it was setting for freshwater would ensure the Regional Plan complied with the relevant objectives and policies in the Freshwater Policy Statement 2011. However, when the Board introduced the factual deeming provision into Rule TT1(j) it substantially dismantled the effectiveness of the DIN limits as a means of giving effect to the relevant provisions of the Freshwater Policy Statement 2011.

[177] In my view, none of the arguments advanced by the respondents displaces my fundamental concern that the factual deeming provision in Rule TT1(j) is difficult to reconcile with the objectives and policies of the Freshwater Policy Statement 2011 upon which I have focused.

Freshwater Policy Statement 2014

[178] The Freshwater Policy Statement 2011 has now been replaced with the Freshwater Policy Statement 2014. Obviously the Board could not be said to have made an error of law by not giving effect to the Freshwater Policy Statement 2014. However, as there is now a new Freshwater Policy Statement the question which must be answered is whether the Board should, when reconsidering Rule TT1(j),

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68 National Policy Statement Freshwater Management 2011, Policy A1(b).
69 National Policy Statement Freshwater Management 2011, Policy A2.

give effect to the Freshwater Policy Statement 2014 or to the Freshwater Policy Statement 2011 that was in effect at the time the Board made its decision?

[179] In *Man O' War Station Ltd v Auckland Council*[70] the Environment Court examined the limited jurisprudence related to this question. The Environment Court concluded that where an appellate Court orders a full rehearing of a case, the planning instruments in force at the time of the rehearing must be considered. The implication appears to be that where an appellate Court orders a partial rehearing it is the planning instruments in force at the time of the original hearing that should be reconsidered. The Environment Court suggested support for this approach could be found in *Auckland Regional Council v Roman Catholic Diocese of Auckland*.[71]

[180] However, in that case, Andrews J found she did not have to answer the question that is before me.

[181] In *Horticulture New Zealand v Manawatu-Wanganui Regional Council*,[72] Kós J held that the Environment Court did not have to give effect to the Freshwater Policy Statement 2011 which had only come into force after appeals had been filed in the Environment Court. Kós J held the regional council in that case, and on appeal the Environment Court, was not obliged to give effect to the Freshwater Policy Statement 2011.

[182] The Freshwater Policy Statement 2014 came into force on 1 August 2014. The implementation provisions of that policy explain that it "is to be implemented as promptly as possible". Default provisions in the policy provide that it is to be fully in effect by 31 December 2025 or by 31 December 2030 if the Regional Council considers that meeting the 31 December 2025 deadline would result in "lower quality planning" or if it would be impracticable to complete implementation by 31 December 2030.[73] The process for the Regional Council to implement any national policy is prescribed in Schedule 1 to the RMA.

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70 *Man O' War Station Ltd v Auckland Council* [2013] NZEnvC 233.
71 *Auckland Regional Council v Roman Catholic Diocese of Auckland* (2008) 14 ELRNZ 16 (HC).
72 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.
73 National Policy Statement for Freshwater Management 2014 at 19.

[183] As the Freshwater Policy Statement 2014 will be the operative Freshwater Policy Statement when the Board reconsiders Rule TT1(j), the Board should give effect to that policy. This approach:

(1) recognises that the Executive wants the Freshwater Policy Statement 2014 to be implemented as promptly as possible; and

(2) best reflects the requirements of s 67(3)(a) of the RMA which requires the Board to give effect to any national policy statement.

[184] Accordingly, the Board should, as part of its reconsideration of Rule TT1(j) invite the parties to make submissions on the meaning and effect of the Freshwater Policy Statement 2014. I appreciate that this direction will mean the Board will have given effect to the Freshwater Policy Statement 2011 in relation to those parts of its report that have not been challenged and give effect to Freshwater Policy Statement 2014 when re-writing Rule TT1(j). This unfortunate but unavoidable consequence arises from the fact the appeal I have had to consider focuses primarily on Rule TT1(j).

Did the Board make any other legal error when it inserted the factual deeming provision into Rule TT1(j)?

[185] The third and fourth questions of law posed by Fish and Game and the first cross-appeal posed by Environmental Defence raise other challenges to the factual deeming provision in Rule TT1(j). Those challenges can be addressed under two headings:

(1) non-compliance with s 66(1) of the RMA; and

(2) the lawfulness of the factual deeming provision.

Non-compliance with s 66(1) of the RMA

[186] The fourth question of law advanced by Fish and Game includes a concern that when the Board re-drafted Rule TT1(j) it failed to comply with s 66(1) of the

RMA. That section required the Board to have regard to an evaluation report prepared under s 32 of the RMA.

[187] Paragraphs [735] to [753] of the Board's final report clearly record that the Board carried out an evaluation pursuant to s 32 of the RMA.

[188] In my assessment, Fish and Game's criticism of the Board's final report is more of a challenge to the reasonableness of the Board's decision and the way it discharged its responsibilities under s 32 of the RMA rather than a claim that the Board failed to discharge its duty under s 32 of the RMA. In this respect, Fish and Game's submission challenges the evaluative judgement made by the Board. This element of Fish and Game's case is not a genuine question of law and accordingly cannot be upheld.

The lawfulness of the factual deeming provision

[189] The factual deeming provision in Rule TT1(j) creates a factual fiction. A result of that factual fiction is that approximately 615 farms are deemed by Rule TT1(j) not to be contributing to excessive quantities of DIN entering waterways in the Catchment Area when in fact they are likely to be doing so.

[190] Deeming provisions are sometimes used as a drafting tool to create legal fictions.[74] For example, legislative transition provisions will often deem legal compliance when in fact there is no compliance.

[191] The Parliamentary Counsel's Office cautions against the use of deeming provisions. In its Principles of Clear Drafting the Parliamentary Counsel's Office says "deeming" has 'traditionally been used when something is to be what it is not, or something will not be what it is".[75] The authors of that document say the term "deeming" "should only be used to create a legal fiction, and even then it should be avoided if there is a sensible alternative way to achieving the same result".

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74 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 430-432.

75 Parliamentary Counsel Office "Principles of Clear Drafting" (2014) Parliamentary Counsel Office <http://www.pco.parliament.govt.nz/clear-drafting/>.

[192] Deeming provisions have been used in the RMA where consents were in place before the RMA was enacted. These consents are deemed to have legal effect following the passing of the RMA.[76] There are other examples of deeming provisions in the RMA.[77]

[193] I accept that in some contexts a legal fiction through a deeming provision may be the only way to give effect to a policy. However, in the present context, the Board has used a deeming provision to create a factual fiction. This is problematic in the context of the RMA and related instruments in which there is a clear emphasis on factual reality. Thus, the definition of "environment"[78] means the actual state of the current environment and the future state of the environment as it evolves and changes.[79]

[194] Similarly, the definition of "effect"[80] in s 3 of the RMA leaves no room for constructing a factual fiction because that term focuses upon "any actual and potential effects on the environment".[81]

[195] While constructing a factual fiction may not in itself amount to an error of law, when the effects of that factual fiction are taken into account in the context of this case it becomes apparent that an unsatisfactory state of affairs is created. The approach taken by the Board has involved the creation of a factual fiction which has

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[76] *Pelorus Wildlife Sanctuaries Ltd v New Zealand King Salmon Co Ltd* [2012] NZHC 995, [2012] NZRMA 321.

[77] See Resource Management Act 1991, ss 10B(2), 80(a), 81(1), 83, 85, 107F(2), 360(1)(ha) and 373.

[78] **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.

[79] *Far North District Council v Te Rūnanga-Ā-Iwi O Ngāti Kahu* [2013] NZCA 221 at [80] and *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [84].

[80] **3 Meaning of "effect"**
In this Act, unless the context otherwise requires, the term **effect** includes–
(a) Any positive or adverse effect; and
(b) Any temporary or permanent effect; and
(c) Any past, present, or future effect; and
(d) Any cumulative effect which arises over time or in combination with other effects–
regardless of the scale, intensity, duration, or frequency of the effect, and also includes–
(e) Any potential effect of high probability; and
(f) Any potential effect of low probability which has a high potential impact.

[81] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [37]-[39].

the practical effect of the Regional Council losing an important tool to control further degradation of a significant portion of the Catchment Area. The factual deeming provision in Rule TT1(j) is difficult to reconcile with the Board's desire to impose controls over the discharge of nitrogen in order to manage the "ecological health" of the Catchment Area.

[196] Thus, when the Board reconsiders Rule TT1(j) it should strive to ensure that it does not create any factual fictions when framing the terms of that rule. Farmers who contribute to excessive quantities of DIN entering waterways should not be deemed to be not contributing excessive quantities of DIN into waterways in the Catchment Area.

PART IV

OBJECTIVE TT1(f)

Second ground of cross-appeal – Environmental Defence

[197] The second ground of cross-appeal by Environmental Defence concerns a discrete question about Objective TT1(f) which was incorporated into Proposed Plan 6 by the Board.

[198] Objectives TT1, TT2 and TT4 in Proposed Plan 6 provide:

> OBJ TT1 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 in the Tukituki River catchment so that:
>
> (a) Groundwater levels, river flows, lake and wetland levels and water quality maintain or enhance the habitat and health of aquatic ecosystems, macroinvertebrates, native fish and trout;
>
> (b) Water quality enables safe contact recreation and food gathering;
>
> (ba) Water quality and quantity enables safe and reliable human drinking water supplies;
>
> (c) The frequency and duration of excessive periphtyon growths [Footnote] that adversely affect recreational and cultural uses and amenity are reduced;

(d) The significant values of wetlands are protected;

(e) The mauri of surface water bodies and groundwater is recognised and adverse effects on aspects of water quality and quantity that contribute to healthy mauri are avoided, remedied or mitigated; and

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

OBJ TT2 Where the quality of fresh water has been degraded by human activities to such an extent that Objective TT1 is not being achieved, water quality shall not be allowed to degrade further and it shall be improved progressively over time so that OBJ TT1 is achieved by 2030.

…

OBJ TT4 To manage the abstraction of surface water and groundwater within a minimum flow regime and allocation limits that achieve OBJ TT1 while recognising that existing takes support significant investment.

Footnote: growths that exceed the periphyton limits and targets set in Table 5.9.1B.

[199] The essence of the argument advanced by Environmental Defence is that Objective TT1(f) does not safeguard ecological values, is inconsistent with Objective A1 of the Freshwater Policy Statement 2011 and is inconsistent with Objectives TT2 and TT4 of Proposed Plan 6.

[200] Environmental Defence's concern is that Objective TT1(f) and Proposed Plan 6 encourage the balancing of protection considerations with use considerations and that Objective TT1(f) as currently drafted undermines the primacy that Objective TT1(f) otherwise gives to protecting the environment.

[201] Paragraphs [296] to [306] of its report demonstrate that the Board gave careful consideration before incorporating Objective TT1(f) into Proposed Plan 6 and that it made a conscious decision not to make Objective TT1(f) "subservient to the environmental objectives".

[202] I am satisfied that Objective TT1(f) is consistent with s 5(2)(c) of the RMA and the Freshwater Policy Statement 2011.

[203] Objective TT1(f) focuses on the sustainable use and development of land, the discharge of contaminants (including nutrients) and the "taking, using, damming or the diverting of freshwater in the Tukituki Catchment".

[204] Objective TT1(f) provides for nothing more than the taking and using of water for primary production and the processing of beverage, food and fibre in the context of a policy that addresses sustainable land use, the management and contaminants and the taking of water from the Catchment Area.

[205] The inclusion of Objective TT1(f) is not inconsistent with s 5(2)(c) of the RMA or the provisions of the Freshwater Policy Statement 2011. While s 5(2)(c) and the Freshwater Policy Statement 2011 place considerable emphasis on measures to protect the environment, they do so in the context of allowing the sustainable use of water for primary production and processing. The Board therefore did not err in law when it included Objective TT1(f) in Proposed Plan 6.

PART V

RUATANIWHA WATER STORAGE SCHEME

Sixth ground of appeal – Fish and Game
Second ground of appeal – Forest and Bird
Third ground of appeal – Forest and Bird
Fourth ground of appeal – Forest and Bird

[206] The sixth ground of appeal advanced by Fish and Game asks if the Board erred in law when it deleted DIN limit from condition (5) of the Ruataniwha Water Storage Scheme (Schedule 3 – General Consent). In particular, Fish and Game submits that when deleting the DIN limit to the conditions for the Ruataniwha Water Storage Scheme the Board failed to have regard to Objectives A1, A2(c) and Policy C1 of the Freshwater Policy Statement 2011 and Objectives TT1(a), TT2 and Policy TT1(1)(a) and TT6 of Proposed Plan 6.

[207] The second ground of appeal advanced by Forest and Bird is that the Board erred in law by failing to have regard to Proposed Plan 6 and unlawfully failed to

give effect to the Freshwater Policy Statement 2011 when granting the applications for consent for the Ruataniwha Water Storage Scheme.

[208] The third ground of appeal advanced by Forest and Bird is that the Board erred in law when it concluded that the Ruataniwha Water Storage Scheme was entirely consistent with the Freshwater Policy Statement 2011.

[209] The fourth ground of appeal advanced by Forest and Bird is that the Board failed to have regard to Policy TT6(2) of Proposed Plan 6 by permitting the dissolved inorganic nitrogen limit in Table 5.9.1B to be exceeded.

[210] The Board considered the Ruataniwha Water Storage Scheme consent applications under s 104 of the RMA. The relevant parts of s 104 of the RMA provide:

> (1) When considering an application for a resource consent ... the consent authority must, subject to Part 2, have regard to—
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> ...
>
> (iii) a national policy statement:
>
> ...
>
> (vi) a plan or proposed plan…
>
> ...
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a ... plan permits an activity with that effect.

[211] The obligation of a decision-maker under s 104 of the RMA to have regard to a national policy is less prescriptive than the duty created by s 67(3)(a) which requires those preparing a regional plan to "give effect" to a national policy statement.

[212] When the Board considered the Ruataniwha Water Storage Scheme consent applications it needed only to have regard to the Freshwater Policy Statement 2011 and the Regional Plan. However, it is clear that the Board wanted to ensure that the terms of consent for the Ruataniwha Water Storage Scheme mirrored the terms of Proposed Plan 6 prepared by the Board.

[213] The Board explained its reasoning in the following way:[82]

> Comments received in relation to the draft report have prompted the Board to make several amendments to the conditions. Two of those amendments should be mentioned.
>
> The first concerns condition (5) in Schedule 3 (general conditions – use of water for production land use), which states that the activities authorised by the use component of resource consents … shall be undertaken so as to ensure that those activities do not cause the concentration limits defined in Table 5 to be exceeded or further exceeded. Table 5 included the in stream DIN limit of 0.8mg/l in the receiving water.
>
> We have already accepted in relation to [Plan Change] 6 that it is not appropriate for farm properties or farming enterprises to be made responsible for achieving DIN limits in the receiving water which may be the result of other activities. Given that the same philosophy should apply to farms within the [Ruataniwha Water Storage Scheme], we have deleted reference to the 0.8 mg/l DIN limit in Table 5.

[214] The comments of the Board in paragraphs [1251] to [1253] of its final report demonstrate the Board's view that farming properties and farming enterprises should not be responsible for achieving DIN limits in waterways.

[215] Because the Board believed that the terms of consent for the Ruataniwha Water Storage Scheme were inextricably linked with the terms of Proposed Plan 6, any changes which the Board makes to Rule TT1(j) will of necessity require the Board to reconsider the terms of consent for the Ruataniwha Water Storage Scheme.

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[82] Final Report and Decisions of the Board of Inquiry, 18 June 2014 at [1251]-[1253].

PART VI

CONCLUSIONS, RELIEF AND COSTS

[216] The Board made a material error of law when it inserted the factual deeming provision into Rule TT1(j) without providing the parties with an opportunity to comment on that significant change to the way Rule TT1(j) had been drafted in the Board's interim report.

[217] A consequence of the factual deeming provision that the Board inserted into Rule TT1(j) is the Board failed to give proper effect to ss 5(2)(c) and 67(3)(a) of the RMA.

[218] The parties have all said that if I find the Board made a material error of law I should direct the Board to reconsider the relevant portion of its report in light of my findings. I agree that is the appropriate course to follow. The Board is seized of significant quantities of evidence and information that could not be properly conveyed to me when dealing with appeals based only on questions of law. I therefore direct the Board to reconsider and change Rule TT1(j). When the Board changes Rule TT1(j) it will also need to amend the conditions of consent to the Ruataniwha Water Storage Scheme project. In making this direction I am not suggesting the Board should necessarily revert to its draft Rule TT1(j). The Board will need to consider a range of possibilities and ensure the parties have had a fair opportunity to comment on the final version of Rule TT1(j).

[219] I make these directions pursuant to ss 149V(3)(c) and 299(2) of the RMA and r 20.19(1)(b)(ii) of the High Court Rules.

[220] When the Board reconsiders and changes Rule TT1(j) it should avoid creating a factual fiction and ensure Rule TT1(j) gives effect to all relevant provisions of the Freshwater Policy Statement 2014.

[221] Fish and Game and Forest and Bird have substantially succeeded in their appeals and are entitled to costs on a scale 2B basis. Environmental Defence has

succeeded with half of its cross-appeal but failed in the other half. Environmental Defence should not be awarded costs or have to pay costs.

[222] My provisional view is that the costs payable to Fish and Game and Forest and Bird should be paid by all three respondents on an equal basis. However, I will grant the parties leave to file memoranda if they do not agree with my proposed approach to the apportionment of costs.

D B Collins J

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