IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-000271
CIV-2024-404-000367
[2024] NZHC 3794

IN THE MATTER OF	an Appeal under Section 299 of the Resource Management Act 1991
BETWEEN	TE RŪNANGA O NGĀTI WHĀTUA First Appellant
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND SOCIETY OF NEW ZEALAND INCORPORATED Second Appellant
AND	AUCKLAND COUNCIL First Respondent
	WASTE MANAGEMENT NZ LTD Second Respondent
	Continued...

Hearing: 29 July to 2 August 2024

Appearances: R B Enright, I Paniora, M R Enright for First Appellant
P D Anderson, M Downing for Second Appellant
A F Buchanan, W M C Randall for First Respondent
B J Matheson, W M Irving, S H Pilkington, A E Gilbert for Second Respondent
R H Haazen for Ngāti Whātua Orākei Whai Maia Ltd
A W Braggins, A Parkinson for Fight the Tip Inc
J M Pou, T M Urlich for Ngāti Manuhiri Kaitiaki Charitable Trust

Judgment: 19 December 2024

JUDGMENT OF WHATA J

This judgment was delivered by me on 19 December,
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar Date: ……..

Continued...

NGĀTI MANUHIRI KAITIAKI CHARITABLE TRUST
First Interested Party

FIGHT THE TIP INCORPORATED
Second Interested Party

AUCKLAND COUNCIL
First Respondent

NGĀTI WHĀTUA ŌRĀKEI WHAI MAIA LIMITED and ENVIRON HOLDINGS LIMITED
Third Interested Party

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INTRODUCTION

[1] Waste Management NZ Limited (WM) has applied for resource consents to construct and operate a new exceptionally large regional landfill at Wayby Valley, Wellsford (the Landfill). Consents were granted by Auckland Council. Several parties appealed this grant to the Environment Court. That Court has released an interim decision indicating that it is minded to grant consent, subject to resolution of specific issues.[1]

[2] Two appeals have been filed on the Environment Court's interim decision by Te Rūnanga o Ngāti Whātua (Te Rūnanga) and by Royal Forest and Bird Protection Society of New Zealand (Forest and Bird). Manuhiri Kaitiaki Charitable Trust (Ngāti Manuhiri) also filed an application seeking a strike out of the appeals. For efficiency reasons, both the strike out application and substantive appeals were heard together.

[3] Five key areas of the Environment Court decision are under challenge:

(a) mana whenua status and cultural effects (1st to 3rd errors of law of the Te Rūnanga appeal);

(b) site selection (4th error of law of the Te Rūnanga appeal);

(c) freshwater matters and the National Policy Statement for Freshwater Management 2020 (NPS-FM) (5th error of law of the Te Rūnanga appeal and 2nd, 4th, 5th and 6th error of law of the Forest and Bird appeal);

(d) the Auckland Unitary Plan (AUP) and Chapter E13 of the AUP (3rd error of law of the Forest and Bird appeal); and

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1 *Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277 [Environment Court interim decision]. (Judge J A Smith, Judge M J Dickey, Commissioner R Bartlett, Commissioner G Paine and Commissioner K Prime.)

(e) the waste minimisation framework (6th error of law of the Te Rūnanga appeal).

[4] As the substantive matters were fully argued, this judgment addresses the major issues before turning to consider whether the appeals should have been struck out.

Appeal threshold

[5] Appeals from the Environment Court are limited to questions of law only.[2] This Court will only interfere with decisions of the Environment Court on the basis of an error of law, irrelevant considerations or a failure to have regard to relevant considerations, procedural impropriety, and/or unreasonableness, which includes a conclusion without evidence or one that cannot have been reasonably reached on the evidence.[3] The error must also materially affect the result.[4]

Overview

[6] A summary of the outcomes on each of the grounds of appeal is noted at [322]. This overview addresses the key issues, namely:

(a) Did the Court correctly address competing mana whenua positions?

(b) Did the Court correctly apply the "avoid" policies of the NPS-FM and the AUP?

(c) Is "no material harm" a proper measure of "avoid"?

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2 Resource Management Act 1991, s 299.

3 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34], citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).

4 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 2, at 153; *Stark v Auckland RC* [1994] 3 NZLR 614 at 616; and *Art Deco Society (Auckland) Inc v Auckland City Council* [2006] RMA 49 at [13].

Mana whenua

[7] Ngāti Whātua, Te Uri o Hau and Ngāti Whātua Ōrākei say the landfill will significantly adversely affect the mauri of Papatūānuku, the Hōteo Awa and the Kaipara Moana in breach of their tikanga. On their account this should be enough to warrant decline, having regard to AUP policies that require that significant adverse effects on mauri and mana whenua values must be avoided. In addition they say the Court was required but failed to apply the guidance afforded by *Ngāti Maru*,[5] when assessing the strength of their relationship to the affected rohe. They also say that their tikanga should have been treated as cultural bottom lines, not to be breached. The Court did not do this.

[8] Ngāti Manuhiri agree that there has been a breach of tikanga, but say that the proposed landfill will provide a much needed opportunity to restore and enhance the presently degraded freshwater environment in their rohe. Ultimately this will help restore and enhance the mana and the mauri of the Hōteo Awa and the Kaipara Moana as a whole. The project will also provide them with the opportunity to reconnect directly with their whenua, with the return of more than one thousand hectares of land to them on the closure of the landfill. For them, the proposal is therefore tika.

[9] I find that the key factual findings of the Court about mana whenua were available to the Environment Court, including that Ngāti Manuhiri have a more intimate relationship with the site of the Landfill. It would have been better for the Court to overtly apply the *Ngāti Maru* three pronged approach to strength of relationship issues for transparency and cogency reasons. Nevertheless I am satisfied the Environment Court adequately addressed the relevant matters. Importantly the Court gave close attention to the mana whenua values of Ngāti Whātua, Te Uri o Hau and Ngāti Whātua Ōrākei.

[10] I find that there may be cases where tikanga may operate as a cultural "bottom line". But caution is needed. It is not the role of the Environment Court to declare and affirm tikanga as law. Rather, unless there is a clear statutory or policy directive

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5 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352.

otherwise, the Environment Court is tasked with balancing competing values. In the present case there is also a major obstacle to finding that the tikanga of a particular iwi is a cultural bottom line because, among other things, all affected iwi and hapū might legitimately claim that their tikanga position is a bottom line. What was required was a process of reconciliation and balancing, having regard to several factors including the strength of relationship while also recognising, as far as possible, the relational interests and responsibilities of all mana whenua. A process, borrowing from the *Port Otago* structured balancing approach,[6] is suggested below from [212].

Avoid policies

[11] A key feature of both the Te Rūnanga and Forest and Bird cases is that the Court failed to apply the directive NPS-FM "avoid" policies as bottom lines by adopting a "pragmatic and proportional", as well as a "holistic" approach to the assessment of effects and the interpretation of the "avoid" policies.

[12] I find that the "pragmatic and proportional" approach was not an "overall judgment" or "blender" approach. Rather the Court appears to be using these ideas to ensure fairness and appropriate balance having regard to the policy matrix as a whole, and that applicable policies are given practical effect in a way that is commensurate with their underlying purpose. However, I find that the Court was wrong to find that only the policies relating to mauri were bottom lines. An exceptions pathway experience (as per *East West Link*)[7] was appropriate in respect of the NPS-FM policies. In identifying the criteria for the exceptions pathway, a structured balancing approach was mandated, making it necessary to take into account the policies of the AUP that recognise infrastructure and mana whenua values.[8]

[13] I find no error in the "holistic" approach both to the avoid policies and to the assessment of effects. A whole of AUP approach to interpretation of policies including "avoid" policies was endorsed by the Supreme Court in *East West Link*. There is also

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6 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205.

7 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 241 [*East West Link*].

8 By analogy to *Port Otago*, above n 6, at [78]-[79].

nothing wrong with a holistic approach to the effects assessment, provided there is some nexus between any remediation or offset and the adverse effect.

[14] Moreover, I find that because the Court effectively identified the key NPS-FM "avoid" policies as directive and adopted a "no material harm" approach to key adverse effects, the bottom line error was not material to the outcome. I also find that it was premature to make findings about this until the Court had completed its analysis of the scale of the effects.

Material harm

[15] Forest and Bird rally against the Court's "no material harm" approach to the "avoid" requirement, especially as it relates to policies that require that loss of the extent of river must be avoided. I reject this claim. The Supreme Court in *Trans-Tasman* and *Port Otago* endorsed no material harm as a valid measure of "avoid".[9] Whether no material harm arises, including by reason of offset, is a matter for the Court as the expert trier of fact. Whether they are right or wrong about that cannot sensibly be assessed in this Court (if at all) until the final findings are made about the scale of such effects.

Another issue of interest

[16] One further finding of some general interest is that the principle against retrospective effect does not apply to the NPS-FM policies introduced after the application commenced because, in short, WM has no existing rights or interests affected by the new NPS-FM policies.

PART A - BACKGROUND

[17] The parties helpfully provided a detailed summary of agreed facts setting out the background to these appeals. For the most part, I repeat it here. The summary of the sections dealing with tangata whenua is borrowed from the Environment Court interim decision.

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9 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

Description of the Landfill

[18] The Landfill is intended to provide 23.4 Mm^3 of landfill capacity. The Landfill is expected to be capable of accepting approximately 50 per cent of Auckland's annual residual waste, which could be up to 800,000 tonnes of waste per year. Residual waste is the waste that is not recycled or reused and so must be safely disposed of.

Context

[19] The Landfill site in the Wayby Valley is located between Warkworth and Wellsford. It is approximately 4 km southeast of Wellsford. Wayby Valley is within the catchment of the Hōteo Awa. There are 4,100 km of permanent and intermittent streams within the Hōteo Catchment. The Hōteo is one of several catchments contributing to the Kaipara Moana, which itself has a catchment of approximately 600,000 ha. See Map A attached as Appendix One for an overview of the Hōteo Catchment. The Hōteo Awa drains nearly 8 per cent of Auckland's total land area. At its confluence with the Kaipara Moana, the Hōteo has a catchment area of 405 km^2.

Description of the site

Landfill site characteristics

[20] The Landfill site is approximately 1,001 ha. It comprises 344.5 ha of land that was known as Springhill Farm, and 656.9 ha of adjacent land owned by Matariki Forests and which is currently in commercial pine forests.

[21] The proposed landfill is within a valley (approximately 100 ha) in the centre of the site and will occupy approximately 54 ha of an existing pine forest (the Landfill Footprint). The topography of the landholdings is a mix of predominantly pastoral farmland and plantation forestry.

[22] WM owns the Springhill Farmland and has an agreement to purchase the Matariki Forests land conditional upon the successful granting of all necessary resource consents to the satisfaction of WM.

[23] The Landfill site is comprised of four key areas as shown in Map B attached as Appendix Two**:**

(a) Western Block: the western part of the landholdings including Springhill Farm and the Hōteo Awa is located along a portion of its western boundary.

(b) Eastern Block: an area of approximately 350 ha of plantation pine forestry (which also includes the Waiwhiu Tributary Block). This area is predominantly steep ridges and valleys and includes the proposed landfill valley (the Landfill Valley). The adjacent valley, to the north of Landfill Valley, is another valley r(the Northern Valley). No landfilling is proposed in the Northern Valley, with the stream in the base of that valley to be planted and protected and pest control designed to reduce predators of pepeketua (also known as Hochstetter's Frog).

(c) Southern Block: a strip of land between Springhill Farm to the north and the Sunnybrook Reserve, owned by the Crown and managed by the Department of Conservation (DoC), to the southeast.

(d) Waiteraire Tributary Block: an area of plantation forestry and native vegetation at the southeastern extent of the site.

[24] There are several dwellings on rural properties located around the site. The size of WM's landholdings provides a 1 km buffer between the Landfill Footprint to the nearest dwelling as shown in Map C attached as Appendix Three**.**

Water catchments

[25] The site is in the mid-to-upper Hōteo Catchment, approximately 35 km as the stream flows from the Kaipara Moana. Te Awa o Hōteo, the Waiteraire Stream and the Waiwhiu Stream, run around the edges of the site.

[26] There is around 134 km of permanent, intermittent and ephemeral stream within the site. This comprises about 40 km of permanent and 24 km of intermittent stream length, of which 12.2 km of permanent and intermittent stream is within the Landfill Footprint. The remaining 70 km is expected to be primarily ephemeral or otherwise intermittent stream. See Map A and Map D attached as Appendix Four.

Planning maps

[27] The site is zoned Rural Production under the AUP. Overlays under the AUP are summarised below and shown on Map B:

(a) There are several Significant Ecological Area (SEA) overlays on the wider site. No project works are proposed within these overlays.

(b) There is a Natural Stream Management Area (NSMA) overlay within the Southern Block and another along the Hōteo Awa channel. No project works are proposed within the Hōteo Awa channel.

(c) There is an Outstanding Natural Landscapes overlay to the south of the Landfill Footprint. No project works will occur in this overlay.

Ecological values

[28] There is approximately 1,020 ha of habitat on the site (comprising the 1,001 ha site plus 19 ha of paper roads). This is made up of approximately 664 ha of exotic pine forest, 188 ha of pasture, 106 ha of native forest, 50 ha of exotic wattle forest, 16 ha of native wetlands and 14 ha of exotic wetlands. See Map E attached as Appendix Five. These areas provide habitat for native fauna, including bats (pekapeka), birds, lizards, frogs (pepeketua) and invertebrates.

Proposed works

Site layout

[29] The general site layout is shown in Map F attached as Appendix Six. The Landfill includes infrastructure that supports landfilling activities including:

(a) a new intersection at the existing State Highway 1 (agreed with New Zealand Transport Agency Waka Kotahi) and a new access road going directly to the main site from the State Highway 1 (see Map G attached as Appendix Seven);

(b) a bin exchange area near the entrance where truck and trailer vehicles will be able to deposit enclosed bins for site vehicles to transport them to the landfill tipping face (there is no public access to either the bin exchange area or landfill tipping face) (See Map G);

(c) operational infrastructure such as a weighbridge located on the access road near the entrance to the Landfill Valley to weigh incoming and outgoing vehicles and a wheel wash facility for cleaning the wheels of all vehicles leaving the site, which have access to unpaved areas;

(d) various ancillary buildings and services such as a site office for staff operating the landfill and a workshop for plant and general maintenance;

(e) during and post-construction, stormwater ponds that cascade down will capture and treat (for sediment purposes) stormwater within Landfill Valley catchment and downstream of other works areas (stockpile, top soil and clay borrow area);

(f) stockpile areas including topsoil and clay borrow pit which will be used to construct the landfill and/or store material excavated during works; and

(g) a renewable energy facility which will collect landfill gas (LFG), including methane, from the landfill and be used to generate electricity for export into the grid.

[30] The construction of the Landfill will take place over approximately five years.

Potential adverse effects and proposed response

[31] Where effects in this section refer to proposed consent conditions, these are not all agreed to by all of the parties and have not been confirmed by the Environment Court.

Reclamation effects

[32] The project works for the Landfill will result in the permanent and irreversible loss of 12.2 km of permanent and intermittent stream habitat (approximately 5.1 km and 7.1 km respectively). Should this project proceed, this effect cannot be mitigated. The vast majority of this stream loss will be within the Landfill Valley, which is inevitable beneath the Landfill. This loss represents approximately nine per cent of the permanent and intermittent streams on the site and 100 per cent of the permanent and intermittent streams within the Landfill Footprint.

[33] Loss of approximately 5.5 km of ephemeral streams are not accounted for. It is noted that the AUP does not require resource consent for works within ephemeral streams, and the objectives and policies do not refer to ephemeral streams. A plan change to give effect to the NPS-FM has not yet been promulgated.

Effects on wetlands

[34] The site includes 16 ha of native wetlands and 14 ha of exotic wetlands. The Landfill will result in the loss of approximately 0.4 ha of native wetlands and 1.35 ha of exotic wetlands (approximately six per cent of wetlands on the site).

[35] Residual effects on wetlands are addressed through the effects management package for the Landfill which seeks to achieve no net loss.

Effects on freshwater fauna

[36] Native freshwater fauna are present across the Landfill Footprint and include:

(a) "At Risk Declining" species such as longfin eels, torrentfish, and kākahi (*E. menziesii*);

(b) “At Risk Naturally Uncommon” species such as freshwater crab; and

(c) possibly "Threatened Nationally Vulnerable" species such as kākahi (*E. aucklandica*).

[37] The Environment Court found that the loss of the streams beneath the Landfill Footprint will remove all in-stream biota, including fish, invertebrates and amphibians, including pepeketua. Salvage efforts will be made to recover in-stream biota. The Court concluded that this would be a permanent loss.

[38] To respond to the effects on aquatic ecology, mitigation is proposed including fish salvage and relocation in summer months when intermittent streams have dried, and fish have moved downstream into areas of more permanent habitat. No specific aquatic fauna relocation sites were identified to the Environment Court and parties during the hearing. Once salvaged, freshwater fauna will be relocated. These measures and others will be implemented through a Native Freshwater Fish and Fauna Management Plan. There are unaddressed residual adverse effects from the injury and mortality of macroinvertebrates. The application of the Stream Ecological Value (SEV) through the Ecological Compensation Ratio (ECR) equation does not explicitly account for macroinvertebrate mortality. Publicly available monitoring data for the success or failure of freshwater fauna salvage for mitigation relocation is sparse.

Sediment Effects

[39] There are both short-term and long-term sediment effects. Short-term effects are associated with the potential discharge of sediment during earthworks. Long-term effects include the ongoing discharges from the stormwater treatment devices including sediment-laden water and stormwater.

[40] Controls are proposed to address sediment effects including proposed erosion and sediment control measures to ensure the discharge of sediment is minimised as far as is practicable. Mitigation measures including stream planting and revegetation will reduce overall sediment loads during operation of the Landfill but given uncertainty from some experts during the consenting process an overall "sediment balance"

approach has been proposed. This will require WM to ensure the overall sediment loads from the Landfill are either nil, or less than the current baseline sediment loads.

Leachate and groundwater effects

[41] The Landfill lining system is designed with a series of barrier layers to prevent leachate entering groundwater. The lining system is designed not to leak; however it is best practice to assume some leakage to assess potential effects. In this leakage assessment the contaminant concentrations are estimated to be below adopted acceptance criteria at potential exposure points.

[42] A subsoil drainage and groundwater collection system has been designed to avoid damage to the lining system from groundwater pressure underneath the liner, and to capture and provide early warning of any unintended leachate escape through the lining system, enabling contingency steps to be taken. Conditions relating to groundwater flow and monitoring and contingency are aligned with industry best practice.

Effects on vegetation

[43] All areas identified by the AUP as being within overlays (i.e. the SEA or NSMA overlays) have been avoided, either through site selection or through further detailed design and optioneering within the site.

[44] The Project is expected to result in the permanent loss of approximately 15 per cent of terrestrial habitat on the site, including the loss of approximately 115 ha of pine forest, 22 ha of pasture, 13 ha of wattle forest, and 6.5 ha of non-SEA native forest.

Effects on pepeketua

[45] Pepeketua have been identified within the Landfill Valley, the wider site, Sunnybrook Reserve and the wider landscape (including within the area for the new State Highway under Designation 6779). Experts have agreed they are "at risk" and in a state of decline both nationally and regionally.

[46] The amount of habitat occupied by pepeketua that will be permanently lost is estimated to be 20 per cent of the 9.5 km of pine forest stream in the Landfill Footprint. Ecological assessments undertaken for the Landfill estimate that 500 to 2,000 pepeketua could be within that area. The Environment Court estimated that 1,000 frogs would be lost.

[47] Not every stream within the impact and compensation sites has been searched. Hotspots are likely to have been missed in these locations. The effects assessment for pepeketua assumed that all frogs will perish and the effects assessment has also assumed that salvage and relocation will not reduce the level of effects on frogs.

[48] Mitigation has been proposed to address effects on pepeketua, including the creation of a pest-free sanctuary, salvage, and relocation of frogs to suitable habitat prior to each section of vegetation clearance (including 100 person-hours of salvaging for every 1 km of suitable stream habitat). These will be managed through a Hochstetter's Frog Management Plan. Experts agreed at a high level that indigenous revegetation and pest animal control are beneficial to pepeketua (and no pest control currently occurs on the site or neighbouring DoC land). The expert for DoC noted some of these benefits may take decades.

Effects on pekapeka (long-tailed bats)

[49] Habitat for pekapeka exists on the site. Foraging habitat appears to be most important within the pine forest plantation, regenerating indigenous forest and wattle forest areas. Roosting is most likely within the indigenous forest remnants, as well as the wattle forest and the indigenous regenerating forest areas, and less likely in planation forestry.

[50] The Landfill has potential adverse effects on bats including direct mortality or injury, habitat loss, habitat fragmentation and degradation, and disturbance effects of noise, lighting and vibration. Direct and residual mitigation measures are proposed to address these effects and to provide an overall net gain in the improvement of bat habitat over time, compared to its currently modified state. These will be managed through a Bat Management Plan including assessment of potential roost trees before any vegetation removal.

Mitigation, offset and compensation proposal

[51] A mitigation, offset and compensation package is proposed. The final package is subject to confirmation in the Environment Court process. This includes planting up to 60 km of streams offsite (or payment of $10 million to the Kaipara Moana Remediation Programme), planting most streams onsite, a pest management programme for the site, including the adjacent Sunnybrook Reserve.

[52] This package includes a pest fence around one of Auckland's largest remaining natural wetlands, and the creation of a 126 ha pest-free sanctuary that will be replanted and kept pest free into the future. Mammalian predators and habitat destruction and degradation are the major drivers for population decline of pepeketua, lizards, wetland birds, and forest birds. Mammalian browsers and predators are a key driver of indigenous wetland and forest vegetation decline. Experts agreed that construction of a pest fence is the most efficacious method for managing pests to zero density (see Map D and Map H attached as Appendix Eight).

Council hearing

[53] The resource consent application for the Landfill was lodged in May 2019. There are no Landfill Special Purpose zones in the AUP. "Municipal Landfills" fall within the definition of Infrastructure. Landfills are listed as a non-complying activity in all rural zones and discharges from new landfills are also a non-complying activity in the AUP.

[54] The Council-level hearing for the Landfill was held over 20 days between November 2020 and January 2021.

[55] A decision dated 11 June 2021 (served on 14 June 2021) granted consent for the Landfill by majority of four to one (the Council Decision). The dissenting decision was issued by Commissioner Tepania (now an Environment Court judge).

[56] A private plan change (lodged in July 2019) was also sought at the site and heard at the same time as the resource consent application. This private plan change was seeking to put in place a new precinct within the AUP to provide for the Landfill.

This was declined in a decision dated 10 September 2021. WM did not appeal this decision.

Environment Court

[57] Eight appeals were lodged with the Environment Court against the Council Decision by:

(a) the Director-General of Conservation;

(b) Fight the Tip: Tiaki Te Whenua Inc (Fight the Tip);

(c) Ngāti Manuhiri (this appeal has since been resolved);

(d) New Zealand Refining Company Ltd, now Channel Infrastructure NZ Ltd (this appeal has since been resolved, with consent documents lying in Court pending the outcome of the substantive appeals);

(e) Ngā Maunga Whakahii o Kaipara Development Trust;

(f) Ngāti Whātua Ōrākei and Environs Holding Ltd (Te Uri o Hau);

(g) Forest and Bird;

(h) Te Rūnanga; and

(i) William and Te Arahi Kapea (this appeal has been withdrawn).

[58] Those appeals were heard over 13 weeks. Over 160 briefs of evidence were filed. The hearing was adjourned twice, in August 2022 and in September 2022. These adjournments were to allow for hui and discussion between WM and tangata whenua.

[59] Following these discussions, WM entered into an agreement with Ngāti Manuhiri, allowing Ngāti Manuhiri to support the grant of consent for the Landfill. Among other things, this agreement will see over 1,000 ha of land transferred

to Ngāti Manuhiri at the completion of the landfilling and aftercare period and expiry of the forestry rights (which Matariki Forests would retain on transfer of the land to WM).

[60] The Environment Court issued its interim decision on the Landfill on 21 December 2023. This did not grant consent for the Landfill but rather concluded that a modified application, conditions and management plans could meet the purposes of the Resource Management Act 1991 (RMA) and in particular the relevant matters under s 104. I return to provide a more detailed overview of this decision below.

Site selection

[61] The site selection process began in August 2007. Various reports were produced from then, including in 2009, 2014, 2015, 2016, 2017 and 2018. The site was first mentioned in the 2007 report. It was part of further investigations in reports dated 2009, 2014 and 2017 (amongst other options). WM obtained Overseas Investment Office approval to purchase the site in September 2018.

Policy Framework

[62] It is customary to provide a review of the applicable objectives and policies in a judgment like this, but the list is so long that an acontextual discussion of them would add more to length than to comprehension. Instead the policies are addressed first in detail in the context of the summary of the interim decision, and then where relevant issue by issue. The following is simply an introduction to some key elements.

NPS-FM

[63] There have been various changes to NPS-FM over the last decade, with a first iteration in 2011, a second in 2014 (with amendments in 2017) and a third in 2020 (with amendments in 2023).

[64] Clause 2.1 sets out the objective of the NPS-FM 2020:

> (1) The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

(a) first, the health and well-being of water bodies and freshwater ecosystems

(b) second, the health needs of people (such as drinking water)

(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[65] Auckland Council has included Policies 3.22 and 3.24 from the NPS-FM in the AUP without using process set out under sch 1 of the RMA as required by s 55(2A) of the RMA. These are known as AUP Policies E3.3.(17) and E3.3.(18) respectively. They seek to avoid the loss of extent of wetland and the loss of river extent and values except in specified circumstances.

AUP

[66] The AUP combines the regional policy statement, regional coastal plan, regional plan and district plan for the Auckland region into one combined plan, with the exception of the Auckland Council District Plan – Hauraki Gulf Islands Section. The AUP has a hierarchical policy framework with the regional policy statement at the top, then with regional and district plan provisions giving effect to the regional policy statement. The proposed AUP was notified on 30 September 2013 and became operative in part on 15 November 2016.

[67] Chapters of the AUP include Chapter B6 Mana Whenua, B7 Toitū te whenua, Toitū te taiao – Natural resources and Chapter E3 Lakes, rivers, streams and wetlands. As noted above, Chapter E3 has Policies E3.3.(17) and E3.3.(18) as inserted into the AUP from the NPS-FM.

[68] As noted, I return to the key applicable provisions below when summarising the Environment Court's interim decision.

Section 104D(1)(b) of the RMA

[69] The proposed activity is a non-complying activity overall, for which a resource consent may only be granted in limited circumstances. Most relevantly, s 104D(1)(b) provides that in such cases, a resource consent may be granted if the consenting

authority is satisfied that the application is for an activity that will not be contrary to the objectives and policies of a relevant plan or a district plan.

The Waste Minimisation Act 2008

[70] The purpose of the Waste Minimisation Act 2008 (WMA) is outlined in s 3:

> **3 Purpose of this Act**
>
> (1) The purpose of this Act is to encourage waste minimisation and a decrease in waste disposal in order to—
>
> (a) protect the environment from harm; and
>
> (b) provide environmental, social, economic, and cultural benefits.

[71] Part 4 of the WMA imposes specific responsibilities on territorial authorities for waste collection and disposal.

[72] Section 42 of the WMA provides that a territorial authority must promote effective and efficient waste management and minimisation within its district.

[73] Section 43(1) of the WMA provides that for the purposes of s 42, a territorial authority must adopt a waste management and minimisation plan.

[74] Section 52(1) of the WMA provides:

> (1) A territorial authority may undertake, or contract for, any waste management and minimisation service, facility, or activity (whether the service, facility, or activity is undertaken in its own district or otherwise).

[75] The WMA enables a levy to be imposed on waste disposal. A levy is currently imposed on waste disposed of at a disposal facility. The levy must be paid to the levy collector in accordance with requirements under the Waste Minimisation (Calculation and Payment of Waste Disposal Levy) Regulations 2009.

[76] Auckland Council published a Waste Management and Minimisation Plan in 2018. It records inter alia that:

(a) Auckland aspires to be zero-waste by 2040;

(b) in 2016, more than 1.6 million tonnes of waste was sent to landfill in Auckland;

(c) it is not yet technically or economically feasible to divert all materials from landfill; and

(d) the mana whenua priorities include no new landfills.

[77] There are three goals and nine objectives in this Plan. The overarching goals are to minimise waste generation, maximise opportunities for resource recovery and reduce harm from residual waste.

Tangata whenua

[78] An area not addressed in the parties' agreed statement of facts is a description of the tangata whenua engaged in these appeals. As mentioned above, I adopt the description of those tangata whenua parties provided by the Environment Court:[10]

> ***Te Rūnanga o Ngāti Whātua***
>
> [399] Ngāti Whātua is a confederation of three main tribes occupying the lands between the Hokianga Harbour and Tāmaki Makaurau, these are Te Roroa, Te Uri o Hau and Te Taou. Each of these tribes is affiliated to the Mahuhu-ki-te-rangi waka. The Rūnanga Board of Trustees comprises hapū representatives from five takiwa - Ōrākei, South Kaipara, Whāngarei, Northern Wairoa and Otamatea. The Board represents approximately 12,000 registered Ngāti Whātua.
>
> [400] The confederated hapū and tribes are listed in the 2008 Deed of Mandate. They include: Ngā Oho, Ngāi Tāhuhu, Ngāti Hinga, Ngāti Mauku, Ngāti Rango (sometimes referred to as Ngāti Rongo), Ngāti Ruinga, Ngāti Torehina, Ngāti Weka, Ngāti Whiti, Patuharakeke, Te Parawhau, Te Popoto, Te Roroa, Te Urioroi, Te Taou, Te Uri Ngutu, Te Kuihi and Te Uri o Hau. We acknowledge that Te Rūnanga has authority to speak on issues of rangatiratanga, kaitiakitanga, tikanga and kawa for Ngāti Whātua.
>
> <u>*Marae*</u>
>
> Te Rūnanga o Ngāti Whātua are also affiliated with 35 marae of the Kaipara: namely Haranui; Kāpehu; Ahikiwi; Naumai; Ngā Tai Whakarongorua; Ōmaha; Ōrākei; Ōtamatea; Korokota; Ōtuhianga; Ōturei; Pahinui; Parirau; Pōuto; Puatahi; Rewiti; Ōruāwharo; Te Kia Ora; Rīpia; Taita; Takahiwai; Tama Te Uaua; Te Aroha Pā; Te Kōwhai; Rawhitiroa; Toetoe; Te Pounga;

[10] Environment Court interim decision, above n 1.

Te Whētu Mārama; Tirarau; Waihaua; Waikarā; Waikaraka; Waiohau; Waiotea.

[402] Ngāti Whātua is the primary iwi occupying the area north of the Tāmaki River. Their northern boundary is shown on a map of the Ngāti Whātua rohe. Evidence was also presented for Ngāti Whātua saying the site lies within the wider traditional rohe of Ngāti Whātua.

…

Ngāti Manuhiri

[405] Ngāti Manuhiri are the descendants of the eponymous ancestor Manuhiri, the eldest son of the Rangātira and warrior chieftain Maki, himself a descendant from the Tainui waka. From this whakapapa Ngāti Manuhiri, in their own right through Maki and his sons, have unbroken ties to their ancestral rohe. Maki, Manuhiri and their people, over time, settled in the southern Kaipara, Waitākere, Whenua roa ō Kahu (North Shore), Albany up to Mahurangi districts including Pakiri, Matakana, Puhinui (Warkworth), and finally the eastern offshore islands such as Hauturu ō Toi/Little Barrier and Āotea/Great Barrier.

[406] Ngāti Manuhiri made strategic marriages with other tribal groupings such as Ngāi Tāhuhu and Ngāti Wai among others, who occupied the eastern coastline and many of the offshore islands. Through these marriages Ngāti Manuhiri strengthened their links with the land, sea, and islands on the eastern coastline from Paepae ō Tū (Bream Tail) to Te Raki Paewhenua (Takapuna area) and inland Kaipara areas.

[407] Ngāti Manuhiri maintain an unbroken connection with their rohe exercising their mana through manuhiritanga in the form of tribal traditions, songs, place names, tupuna (ancestral rights), urupā (burial grounds) and kaitiakitanga.

[408] Omaha Marae is the only Ngāti Manuhiri marae within their rohe. The Ngāti Manuhiri rohe, or area of interest, has been formally recognised in the Ngāti Manuhiri Deed of Settlement. The Ngāti Manuhiri Claims Settlement Act 2012 among other things, highlighted the iwi designated area for Right of First Refusal which includes land around Tohitohi o Reipae and the headwaters of the Hōteo. This area includes the Site of this application, but the site is privately owned. Therefore, the Right of First Refusal does not apply.

…

Ngāti Whātua Ōrākei and Te Uri o Hau

[416] We heard evidence regarding the whakapapa of Ngāti Whātua Ōrākei and Te Uri o Hau and their close association with Ngāti Whātua. Mr Joe Pihema tells us that the broader tribal area for the hapū; Ngaoho, Te Taou, Ngāti Whātua Tūturu and Te Uri o Hau stretches along the west coast from the Manukau Harbour to Maunganui Bluff just north of Dargaville. On the east coast their border stretches from Mangawhai in the north to Tāmaki and moves inland at various places.

> [417] The tribal name Ngāti Whātua is derived from the subtribe hapū Ngāti Whātua Tūturu who are based on the south Kaipara head at Haranui Marae. Ngāti Whātua Tūturu and neighbouring hapū Te Mangamata lands occupy the peninsula opposite the mouth of the Hōteo.
>
> [418] Mr Pihema described that at the heart of this region is the Kaipara Harbour, a vast expanse of water with numerous rivers and creeks reaching out to a myriad of Ngāti Whātua villages and kāinga. He said:
>
> > The Kaipara Harbour and Wairoa River have supported over 14 generations of my people and helped create and shape the identity of the modern day Ngāti Whātua tribe. The waters of the Kaipara Harbour (which includes the Wairoa River) continue to influence and shape our lives and will do so for many generations to come.
>
> (footnotes omitted)

PART B – THE INTERIM DECISION

[79] The Environment Court's interim decision spans more than 900 paragraphs. Many key findings are interspersed through the decision. In order to assist with comprehension, this part of the judgment serves as an overview of those key findings assembled by reference to the key themes of the appeals: tangata whenua, other environmental impacts, objectives and policies, effects management and waste minimisation.

Tangata whenua issues

[80] The Court found that:[11]

> [54] In relation to the concept of mana whenua, this is agreed to be a relatively new concept – it may even be described as a legal construct. It is clear that the overlaying of various forms of authority, tapu, kawa and tikanga lie at the heart of the concepts of mauri and mana.
>
> [55] As the parties were quick to tell us in this case, questions of whanaungatanga become important and bear upon how these relationships are expressed. The Hōteo River is a prime example, with all parties expressing their particular connections to it and the other parties to this hearing in relation to it and the wider area.
>
> [56] Nevertheless, there appears to have been a common understanding of which areas were Ngāti Manuhiri, Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau. These included the area of the landfill site itself and the area to the east of it. The landfill site appears to have been recognised as being within the Ngāti Manuhiri rohe. Ngāti Whātua have clearly been established around

[11] Environment Court interim decision, above n 1.

> portions of the Kaipara and for some distance up the various tributaries, including the Hōteo River.
>
> [57] Nevertheless, the Hōteo River seems to demonstrate areas of overlapping interest both for the harvesting potential of the river itself and for the karaka trees that grew along its margins. The extent of this is in dispute and is the subject of an application to the Māori Land Court. However, Ngāti Whātua Ōrākei and Te Uri o Hau are established more broadly around the Hōteo and on the Kaipara Harbour.
>
> [58] We do not intend to comment upon who may have exclusive authority in respect of any part of the Hōteo. What we can say is that the evidence was clear before us that, at least up to the Wayby Valley area, there was common usage by a number of parties that may have been based upon whanaungatanga and other informal – or formal – understandings between the various hapū and iwi.

[81] The Court records that all tangata whenua groups were concerned about breach of tikanga by WM, lack of consultation, potential effects on mauri of Papatūānuku, the awa and the moana, natural ecosystem, and flora and fauna, including taonga species.[12] While Ngāti Manuhiri subsequently supported the proposal, they maintained their original evidence relating to breach of tikanga, but that this breach has been addressed to their satisfaction.[13]

[82] On the issue of pre-application consultation, the Court found that WM did not appropriately engage with tangata whenua as part of its process of identification of sites but after August 2018 consultation was undertaken appropriately.[14] The failure to properly engage was nevertheless a breach of tikanga that has been repaired for Ngāti Manuhiri, but not so for Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau.[15]

[83] The Court found the location of the proposed landfill holds immense cultural, historical, and environmental significance for the iwi and hapū participating in this process.[16] The Court acknowledged the difference of view as to where the line is drawn for the rohe of Ngāti Whātua and Ngāti Manuhiri.[17] No finding is made on this

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12 At [436].
13 At [437].
14 At [116]–[117].
15 At [450].
16 At [396].
17 At [435].

issue because the downstream effects of the landfill on Ngāti Whātua relationships, beliefs and values are uncontested, as is the significance of these values.[18]

[84] The movement of paru or waste from one rohe to another was identified by the Court as a common theme regarding adverse cultural effects.[19] The Court observed that a landfill upstream of iwi and hapū taonga is culturally offensive,[20] and this issue is interlinked with the breach of tikanga in terms of site selection.[21]

[85] The potential effects of the Landfill on the mauri of Papatūānuku, the Hōteo River and the Kaipara Harbour and the relationship of the tangata whenua with them were also identified as an effects of primary concern.[22] However as a result of the heads of agreement reached with Ngāti Manuhiri, the Court recorded that they now support the proposal.[23] The agreement is recorded as including:

> [470] In a further statement, Mr Hohneck elaborated on the nature of the agreement with Waste Management:
>
> (a) a $10 million mechanism [bond] was agreed to be called on if the river was ever exposed to risk;
>
> (b) ultimately, Ngāti Manuhiri will receive the entire 1060 ha of Waste Management's land holdings – once each part of the site is no longer required for landfill or Waste Management's aftercare responsibilities are fulfilled and once all of the Matariki forestry rights expire. Further a final date has been agreed whereby no further applications for consent will be made without Ngāti Manuhiri consent;
>
> (c) the existing houses at Springhill and Izard Price Properties will be made available to Ngāti Manuhiri whanau to live in at $1 per year until they transfer;
>
> (d) Waste Management will make a $2 million payment to Ngāti Manuhiri to construct up to six homes on Springhill for Ngāti Manuhiri whanau to live in and rent for $1 per year until the Springhill property transfers;
>
> (e) ensure Ngāti Manuhiri will be closely involved in the development, construction, maintenance and running of the ecological and landfilling activities on site, including the predator-fenced sanctuary;

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18 At [435].
19 At [451].
20 At [456].
21 At [461].
22 At [464], [469], and [479]–[484].
23 At [469].

(f) Waste Management have agreed to prioritise Ngāti Manuhiri people for employment;

(g) there will be further work with Waste Management on conditions and outcomes – including the Digital Dashboard.

[86] The Court acknowledged the potential impact of the proposal on taonga species, the Hōteo and the Kaipara harbour, including both physical impacts and impacts on the exercise of kaitiakitanga and whanaungatanga.[24] The Court also found that the relationships between the tangata whenua are based on shared whakapapa and a common commitment to provide ecological and cultural values as they related to taonga, awa, moana and te taiao.[25]

[87] In assessing the cultural values and effects the Court observed that, "we must be able to identify, involve and provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori."[26]

[88] And:

> [499] Further, we agree that:
>
> > … that duty also requires us to engage meaningfully with the impact of the application on the whanaungatanga and kaitiakitanga relationship between iwi and the natural environment, with their lands, waters, taonga and other significant features of the environment such as Te Awa Hōteo and Kaipara moana: seen not just as physical resources but as entities in their own right – as ancestors, gods, whānau – that iwi have an obligation to care for and protect.
>
> (footnote omitted)

[89] The Court observed:

> [500] But for the change of position by MKCT [Ngāti Manuhiri] and the further proposed conditions, we would have endorsed Commissioner Tepania's decision (and conclusion).
>
> [501] We accept that the area generally is within the rohe of Ngāti Whātua. We also accept that the general landfill Site is within Ngāti Manuhiri rohe – that they maintain an unbroken connection with their rohe exercising their mana through manuhiritanga. While the rohe of Ngāti Whātua and Ngāti

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24 At [485]–[487].
25 At [495].
26 At [497].

> Manuhiri overlap to an extent, we find that Ngāti Manuhiri has a more intimate relationship with the landfill Site than does Ngāti Whātua.
>
> [502] This conclusion does not relate to the Hōteo River itself. In that regard, there is clear evidence of overlapping interest, usage and occupation of the river and its margins. We accept that the Hōteo is within the rohe of Ngāti Whātua and Ngāti Manuhiri and Te Uri o Hau – where on the river the exact boundary is between iwi is not agreed.

[90] The Court then made the following findings:

(a) The Kaipara Harbour generally is within the rohe of Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei and Te Uri o Hau.[27]

(b) They accept the strength of relationship that all iwi have with the Hōteo and Kaipara Harbour and that they have to be safeguarded.[28]

(c) The movement of paru is offensive, impacts the relationship of the tangata whenua with Papatūānuku and is a breach of tikanga.[29]

(d) The location of the Landfill creates an unacceptable a risk to the Hōteo and the Kaipara Harbour in terms of potential contamination and this risk negatively impacts on the relationship of tangata whenua to those waters and is a spiritual effect on them.[30]

(e) Iwi believe that a landfill in the area will diminish the mauri (life force) of Papatūānuku and all those whose rely on her health and wellbeing,[31] and the already vulnerable and degraded state of the Hōteo is acknowledged.[32]

(f) There are overarching concerns that the Landfill's presence may significantly diminish iwi relationships with their taonga.[33]

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27 At [503].
28 At [504].
29 At [506].
30 At [507].
31 At [508].
32 At [508].
33 At [509].

(g) Not all iwi and hapū now consider the effects on their relationship will be significant with appropriate conditions and modifications to the proposal.[34]

(h) Ngāti Manuhiri say there will be adverse effects arising from the Landfill, but now are prepared to accept those adverse effects and offence to tikanga the Landfill causes, in light of the benefits it and the wider environment will receive from their agreement with WM.[35]

[91] The Court then queries whether the agreement reached reduces the significance of the effects for the site in terms of the effects that will occur given Ngāti Manuhiri's greater intimacy with that area.[36] The Court responds:[37]

> [514] We place some weight on MKCT's [Ngāti Manuhiri's] changed position. The benefits it sees are not insignificant. We also conclude that MKCT [Ngāti Manuhiri's] position is based on its conclusion that with proper conditions and direct oversight it can ensure there is no material harm to the Hōteo or the Kaipara.

[92] From this position the Court examines the effects on mana whenua values of the proposed Landfill and the likelihood of the benefits Ngāti Manuhiri foresee. Key findings are:

(a) Ngāti Manuhiri's ongoing involvement in the project will be a benefit in terms of managing potential contaminants, particularly if mauri and mātauranga principles are taken into account.[38] But other tangata whenua consider there will always be risk, and that more needs to be done to satisfy tangata whenua that there is no prospect of an adverse effect reaching the offsite streams or Hōteo.[39]

(b) Ngāti Manuhiri's involvement might see a positive outcome in terms of taonga species and loss of stream length and future management of the

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34 At [510].
35 At [511].
36 At [513].
37 See also at [44].
38 At [620].
39 At [620].

proposal if they have a substantial role, but the question is the adequacy of the steps taken and whether these meet the provisions of the AUP and otherwise satisfy the Court that the consent can safely be granted.[40] This encourages the Court towards considering installing further retention and detection processes below the ponds to avoid contamination.[41]

(c) In terms of risks to the Hōteo and Kaipara of landfill failure, a key issue for mana whenua, multiple levels of redundancy are justified.[42]

(d) In terms of risk of effects in terms of tangata whenua relationship values with freshwater and other taonga:

(i) It is common ground that granting consents results in significant adverse effects to Ngāti Whātua o Kaipara, Ngāti Whātua Ōrā kei and Te Uri o Hau.[43]

(ii) The risk of leachate escape while assessed as low probability, if it occurs the impact will be high on tangata whenua.[44]

(iii) From an iwi perspective any effects of sediments are unacceptable.[45]

(iv) The presence of the Landfill sitting above Ngāti Whātua impacts on whanaungatanga between Ngāti Manuhiri and Ngāti Whātua.[46]

(v) A key question is whether a particular risk can be reduced further or is otherwise acceptable through conditions and management plans. Ngāti Manuhiri has determined that the risk

40 At [621].
41 At [625].
42 At [651].
43 At [485] and [832].
44 At [836].
45 At [837].
46 At [838].

is now acceptable to them; while other iwi groups who sit "downstream" of the landfill have not.[47]

[93] The Court then observes:

> [841] We cannot discount the effects on Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau who remain concerned about the proposal, however MKCT [Ngāti Manuhiri's] agreement for the works to take place in their rohe signifies that they see benefits for both the environment and themselves.
>
> [842] Everyone accepts that the current status of the Hōteo and its mouth on the Kaipara Harbour is degraded, as is the landfill site, and that the latter is by no means a high quality environment for native terrestrial and freshwater fauna, even though populations have managed to persist over forestry cycles.
>
> [843] The question remains as to the effects on the mauri of freshwater, and tangata whenua's relationship with that and other taonga. We will return to that when we come to our overall assessment.

[94] I summarise this overall assessment below at [117]-[119].

Other Environmental impacts

[95] Turning to environmental impacts (other than effects on mana whenua values), the Court found that there would be clear adverse effects on both the ecology of the area in relation to the Hochstetter's frogs, native bats and aquatic biota, and their habitat from the loss of stream length and to other native species (for example lizards and invertebrates) from habitat loss.[48] The Court also found that there is a clear potential impact of sediment as well as leachate and other contaminants on mauri of both the wider landfill area as a whole and in particular the Hōteo River.[49]

[96] Specific observations included:

(a) Adverse effects on stream temperature could be addressed either by amendment to management plans or review of the consent.[50]

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47 At [840].
48 At [64].
49 At [65].
50 At [771].

(b) Residual effects on the loss of native forest vegetation will be offset primarily adjacent to wetlands or streams within the Wayby Valley Sanctuary.[51]

(c) The residual effects on wetland and forest birds will be low with the residual effects package.[52]

(d) Further consideration should be given to conditions or research relating to long tailed bats, lizards, terrestrial invertebrates, and pine forest removal.[53]

(e) Given the scale of surveys and cryptic nature of species, estimates in the Landfill Valley must be broad,[54] with an estimated loss of about 1000 Hochstetter's frogs. Proposed revegetation may be expected to provide habitat for frogs and while the long term benefits of predator control are unknowable, frog population within predator proof fenced areas or subject to predator control, will improve.[55]

(f) The outcome to be achieved must be a net population increase of frogs and other taonga species. The Effects Management Package "approached that level of confidence",[56] but the Court was yet to be satisfied that the conditions apply the proposals that WM relies upon.[57]

(g) A comprehensive management and monitoring regime, along with conditions requiring a positive balance of sediment discharge, satisfied the Court that the effects of sediment on the Hōteo and Kaipara Harbour would not adversely affect the river or harbour ecology.[58]

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51 At [772].
52 At [774].
53 At [776], [779], [781], and [782].
54 At [793].
55 At [802], [805], and [817].
56 At [824].
57 At [824].
58 At [830].

Objectives and Policies

[97] The Court was required to review and assess the proposal against the applicable planning instruments, namely national policy statements, national environmental standard, the regional policy statement (RPS – AUP) and the AUP regional and district plans.[59] I will focus here on the Court's treatment of these documents most relevant to the appeals.

[98] The Court rejected the overall broad judgment taken by the majority of the Commissions at first instance, noting the observations of the Supreme Court in *King Salmon*,[60] that particular attention to the different wording and context of provisions in a plan and that some words are to be given their particular meaning and "avoid' may mean "not allow", and that this meaning is dependent on the wording and context.

[99] The Court identified as relevant to its determination national policy statements, national environmental standards, regional policy statement (RPS-AUP) and AUP regional and district plans. The Court records the agreement of the planners that the rules of the National Environment Standards for Freshwater do not apply given the Standards post-date the notification of the application.[61]

[100] The Court then made a series of observations in relation to each of the key planning instruments. The key overarching conclusions are noted below. Important observations and findings relevant to the appeals are canvased here.

Inland wetlands, rivers and freshwater

[101] NPS-FM 2020 imported two inland wetland and river policies (E3.3(17) and E3.3(18)). Policy (17) wetlands - is directed to avoiding the loss of extent of natural inland wetlands, protecting their values and promoting their restoration subject to certain exceptions, which include that there are no practicable alternative sites for the

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59 At [141].
60 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
61 At [145].

activity. Policy (18) – rivers, states that loss of river extent and values is to be avoided unless there is a functional need for the activity in the location.[62]

[102] Prior to the NPS-FM 2020, previous iterations of these policies did not direct wholesale avoidance of wetlands and rivers or address reclamation and that Te Mana o Te Wai was not as prominent in previous versions of the NPS-FM. The AUP excepted functional or "operational" need to be in a certain locations, from certain of its requirements.[63] There is also no provision for transitional savings for applications in train. The Court expressed sympathy for WM in terms of the change to the policies after its application was made, but concluded it must still consider those policies. It also said:

> [165] We conclude some pragmatism and proportionality need to be applied to such changes in circumstances. Changes to legislation, and as a result policy frameworks, are occurring with some frequency. It is indeed unfair and unrealistic to determine a proposal solely against policies that did not exist when the proposal was first notified. We accept that Waste Management has endeavoured to respond to that changed framework with various design changes to its proposal.

[103] In another part of the decision the Court notes that one of the exceptions to the operation of policies 3.3(17) incorporated by NPS-FM 2023 are specified infrastructure and new landfills. The criteria for such exceptions include national benefit or regional benefit and there is either no practical alternative location in the region or every other alternative would have equal or greater adverse effects.[64] It then records:

> [239] It was generally agreed among the parties that, in light of that amendment, there is no need to consider whether the proposal constitutes specified infrastructure as defined in the NPS-FM 2020. Leaving that agreement to one side, we note some difficulties with the amendment insofar as its requirement for alternatives to be satisfied is so expansive as to be impossible to meet (f)(iii). We note the Director-General's concession on this point, noting that as there are no fundamental matters of disagreement between experts, it will not argue that there are any issues on this point. Therefore, while there is a clear exception for landfills in this amendment, we will not consider whether the proposal is specified infrastructure under the NPS-FM 2020.

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62 At [156].
63 At [161].
64 At [238] and [256].

[104] And further:

> [241] The term effects management hierarchy is defined in the NPS-FM 2020 in relation to natural inland wetlands and rivers to mean *an approach to managing the adverse effects of an activity on the extent or values of the wetland or river (including cumulative adverse effects and loss of potential value)*. It sets out a cascade of management tools that must be applied, starting with the requirement that adverse effects are avoided where practicable, through to minimisation, remedying, aquatic offsetting, and finally determining that if aquatic compensation is not appropriate, the activity itself is avoided. The terms aquatic compensation and aquatic offset are defined and we address those matters when we come to our assessment of the ecological effects of the proposal.

[105] Then, when addressing submissions by Forest and Bird that alternatives for the purpose of 3.3(17) have not been properly considered, the Court concludes:

> [259] While the application might not advance particular policies, it is difficult to draw the conclusion that it is contrary to the objectives and policies of the AUP as a whole. If adverse effects from the discharges were not avoided, or we were not satisfied that there would be a net gain to biodiversity on the site in relation to rivers and wetlands, then it appears to us that the policies and objectives and other provisions guide us to a refusal of consent. The matter is finely balanced.
>
> [260] We accept the application does not meet or advance this policy. The Policy seeks to avoid the loss of natural wetland. Here the loss is addressed, in part, by the improvement of other wetlands of significant value. We must view these outcomes holistically.

[106] It also says in relation to a similar submission that the landfill does not fall within any of the exceptions specified at policy E3.3(18), that the assessment cannot require the application to meet every policy, and "it is not the individual policies or objectives against which the application and its effects are judged, but the AUP as whole."[65]

[107] The Court also observes:

> [265] Chapter E3 recognises the tension between development and the objectives to preserve quality environments and improve those that are degraded. There is still an emphasis on avoidance, remediation or mitigation, although the NPS-FM 2020 (see Policies (17) and (18)) recognises the application of an effects management hierarchy.

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65 At [264].

> [266] We conclude that the introduction of Policies 3.3(17) and 3.3(18) introduce avoidance in the context of the other provisions. The overall effects under s 104D and s 104 are matters we will discuss in due course.

[108] In terms of freshwater issues more generally, the Court identifies that the proposal engages numerous Regional and District Plan provisions relating to freshwater, with a focus on avoiding adverse effects as far as practicable and otherwise minimising them.[66] Key provisions relevant to these appeals include:

(a) Maintain and improve over time mauri of freshwater.[67]

(b) NPS-FM 2014 incorporated various policies into the AUP, including Policy E13(6) making it clear that previous policies apply to new discharges or a change or an increase of any discharge of contaminant.[68]

(c) Chapter E3 (Lakes, rivers, streams and wetlands) – the objectives identify protection from degradation (3.2(1)) and from permanent loss and to restore, maintain or enhance (3.2(2)). Specific reference is made to Policy E3.3(5), which requires:

> (5) Avoid significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities in, on, under or over the beds of lakes, rivers, streams or wetlands on:
>
> (a) the mauri of the freshwater environment; and
>
> (b) mana whenua values in relation to the freshwater environment.

Significantly, the Court concludes on this policy:

> [229] … the project may not be fully consistent with this policy, but mauri could be enhanced if the overall outcomes in relation to the freshwater resources of significance are beneficial.
>
> [230] Given that the effects of the proposal as a whole are said by tangata whenua to impact the mauri of the environment we return to this policy later. The effect on mauri

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66 At [212].
67 Auckland Unitary Plan Chapter E1.2 Objective (2).
68 At [215].

> and consistency with the policy turns on our conclusions as to the outcome of the grant of consent (excluding offset or compensation).

(d) A raft of polices addressed to management of effects on mana whenua cultural heritage (Policy E3.3.(7)), disturbance and depositing of any substance in, on or under a bed of water (Policy E3.3(9)) (including the requirement to avoid any significant adverse effect on mana whenua values associated with freshwater resources) and policies E3.3(10)–(12) relating to the encouragement of native plants and the incorporation of mana whenua mātauranga, values and tikanga in any planting within a waterway.[69]

(e) Policy E3.3(13):

> [234] There is a directive policy, 3.3(13) relating to reclamation and drainage that requires:
>
> > (13) Avoid the reclamation and drainage of the bed of lakes, rivers, streams and wetlands, … unless all of the following apply:
> >
> > (a) there is no practicable alternative method for undertaking the activity outside the lake, river, stream or wetland;
> >
> > (b) for lakes, permanent rivers and streams, and wetlands, the activity is required for any of the following:
> >
> > (i) as part of an activity designed to restore or enhance…
> >
> > (ii) for the operation, use, maintenance, repair, development or upgrade of infrastructure; or
> >
> > … and
> >
> > (c) the activity avoids significant adverse effects and avoids, remedies or mitigates other adverse effects on Mana Whenua values associated with freshwater resources, including wāhi tapu, wāhi taonga and mahinga kai.

[69] At [231]–[233].

(f) Policies E3.3(15) and (16) relating to the protection of riparian margins.[70]

[109] The Court identifies as a key issue whether or not bottom lines are required in E3.2 Objectives. The Court finds:

> [243] While the appellants argued that certain provisions set clear environmental bottom lines, they accepted that some were qualified by listed exceptions. Save for the policy addressing mauri, we conclude these provisions do not set environmental bottom lines precisely because they are qualified, and seek to enable activities while controlling effects.
>
> [244] However, the objectives and policies of Chapter E3 are prescriptive and set out in some detail the ambit of exceptions to their requirements or conditions applying to authorised activities.

[110] The Court specifically acknowledges that, "Significant adverse effects on the mauri of the freshwater environment and mana whenua values are to be avoided."[71]

[111] The Court's overall conclusion in relation to Chapter E3 is noted below at [117].

Landfills

[112] The Court addresses Chapter E13 relating to landfills. Most relevantly E13.3 states:

> (1) Avoid significant adverse effects and remedy or mitigate other adverse effects of cleanfills, managed fills and landfills on lakes, rivers, streams, wetlands, groundwater and the coastal marine area.
>
> (2) Require cleanfills, managed fills and landfills to be sited, and where appropriate, designed and constructed, to avoid the risk of land instability.
>
> (3) Require cleanfills, managed fills and landfills to be designed and operated in accordance with relevant industry best practice.
>
> (4) Avoid adverse effects from new landfills.
>
> (5) Manage closed managed fills and landfills (including the closure of) to:

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70 At [235].
71 At [250].

(a) protect the integrity of the site including the containment of contaminants; and

(b) require aftercare that is appropriate to the nature and requirements of the site including the type of material that was deposited during its operative period.

[113] At issue is whether this policy addresses all landfill activities or only discharges from landfills. In resolving this issue the Court observed that while it is appropriate to seek the plain meaning from a provision, it is not appropriate to undertake that exercise in a vacuum. Regard must be had to the immediate context, and where any obscurity or ambiguity arises it may be necessary to refer to other sections of the AUP.[72] The Court then finds:

> [279] E13 is in the Natural Resources section of the Auckland-wide chapter of the AUP. It sits among provisions that control all manner of effects on natural resources. We conclude it is not appropriate to treat it as an island in a sea of other controls. It is not self-contained, and does not control all effects generated by cleanfills, managed fills and landfills. Other sections in Chapter E and elsewhere also must be taken into account and they need to be read as a whole.

[114] When viewed in this wider context, and with specific reference to other policies that control offsite effects of landfills, the E13.3 policies do not extend to effects such as noise and ecological effects.[73] Rather it is focused on discharges from the activity of the landfill.[74] In addition the Court applying the approach taken in *Port Otago*, interprets the word "avoid" to mean avoid material harm.[75]

Infrastructure

[115] Chapters B2 and B3 of the Regional Policy Statement (RPS) emphasise the better use of existing infrastructure and efficient provision of new infrastructure. The RPS requires that the benefits, functional and operational needs of infrastructure are to be recognised and that the adverse effects of that infrastructure are avoided, remedied or mitigated.[76]

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72 At [278].
73 At [282].
74 At [285].
75 At [283]–[284].
76 At [190].

Mana whenua, Toitū te whenua, Toitū te taiao

[116] The Court reviews in some detail the objectives and policies most relevant to mana whenua and to the Māori world view. Key observations include:

(a) Chapter B4 requires that the ancestral relationships of mana whenua and their culture and traditions with the landscapes and natural features of Auckland are recognised and provided for.

(b) The reference in Chapter B6 to the paramount importance of recognition mana whenua participation in resource decision making and the integration of mātauranga and tikanga into resource management is noted, as is the fact that the RPS recognises mana whenua as specialists in tikanga of their hapū and iwi as being best to convey their relationship with their ancestral lands and other taonga; and that mana whenua values, mātauranga and tikanga is to be properly reflected and accorded sufficient weight in resource management decision making.[77]

(c) Policy B.6.3.2(6) is identified as having particular relevance as decision makers are required to have particular regard to among other things the exercise of kaitiakitanga and mauri, particularly in relation to freshwater and coastal resources.[78]

(d) Policy B7.3.2.(4) is directed to avoiding the permanent loss and significant modification or diversion of rivers and streams and wetlands at their margins: unless it is necessary to provide for infrastructure, no practical alternative exists, mitigation measures are implemented to address the adverse effects and where adverse effects cannot be adequately mitigated, environmental benefits including offsite and onsite are provided.[79] Development within waterbeds is to be limited to structures that have a functional or operational need to locate there

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77 At [195]–[198].
78 At [200].
79 At [204].

and maintain and or where appropriate enhance: freshwater systems not protected as Management Areas, navigation, existing riparian vegetation along margins and areas of significant indigenous biodiversity.[80] There are also policies managing discharges, and a policy to enhance freshwater systems where practicable.[81]

Overall

[117] The Court then identified and assessed the environmental impacts, including on tangata whenua, in light of applicable planning instruments. There are issues as to whether the Court applied the correct approach to this exercise to which I return below. The key outputs of that exercise are recorded at [863] of the judgment. I cannot improve on that summary so I repeat it here:

> [863] We list our findings generally from earlier in the decision on objectives and policies:
>
> **A**. The NPS-FM 2020 and as amended in 2023 seeks to restore and preserve the balance between the water, the wider environment and the community. Te Mana o te Wai is all about restoring and preserving that balance. It seeks first to protect and then restore the mauri of the waters.
>
> **B**. The weight to be attached to Policy 3.22(i) – extent of inland wetlands, 3.24 – extent of rivers and 3.26 – fish passage, is in dispute and needs to be resolved.
>
> **C**. The changed legislative environment is part of the context in which we must assess the AUP's objectives and policies. However, it informs rather than dictates the outcome of the assessment under s 104D(1)(b) looking at objectives and policies of the AUP. These changes are also relevant to any substantive assessment.
>
> **D**. The various issues raised in the NZCPS are subsumed within the AUP.
>
> **E**. The need for new infrastructure is recognised where:
>
> (i) there is a functional and operational need for it to be located in areas with particular natural and physical resources which have been identified in the AUP that otherwise preclude development;

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80 At [205].
81 At [206].

(ii) its operation should be enabled while managing adverse effects.

F. There is a centrality of Māori worldview contained within the RPS. This seeks to maintain, and where appropriate enhance, freshwater systems, mauri of areas and the relationship of tangata whenua with important features. It does not preclude development but anticipates that adverse effects will be addressed and freshwater systems restored and enhanced where that is possible.

G. The objectives and policies reinforce the importance of freshwater and sediment quality being either maintained at an excellent level or improved over time. The AUP also identifies issues from the RPS relating to the mauri of freshwater being maintained or progressively improved over time. This is further reinforced by the NPS-FM 2020 and NPS-FM 2023.

H. E3 recognises the tension between development and the objectives to preserve quality environments and improve those that are degraded. There is still an emphasis on avoidance, remediation or mitigation, although the NPS-FM 2020 (see Policies (17) and (18)) recognises the application of an effects management hierarchy.

I. E13 is directed to avoiding contaminants from the landfill activity reaching land or water, including groundwater, beyond the Site. This includes those which can either be borne in water, leachates, sediments etc, or are caused by the activities themselves which then leads to the discharge such as the construction of roads or dams. The requirement to avoid adverse effects in itself identifies that this is not a prohibition against new landfills, but a requirement as to the total internalisation of adverse effects.

J. The policies require protection of indigenous vegetation in sensitive environments and the management of activities to avoid significant adverse effects on biodiversity where practicable. There is clear encouragement to use the effects management hierarchy to manage effects that cannot be avoided, remedied or mitigated, including encouragement of the use of offsetting.

[118] The Court concludes that if material harm is avoided,[82] then the application will not be contrary to the policy framework captured by RPS policy B7.3.2(4), which states:

> [865] Policy B7.3.2(4) states:

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82 At [866]–[867].

(4) Avoid the permanent loss and significant modification or diversion of lakes, rivers, streams (excluding ephemeral streams), and wetlands and their margins unless all of the following apply:

(a) it is necessary to provide for:

(i) the health and safety of communities; or

(ii) the enhancement and restoration of freshwater systems and values; or

(iii) the sustainable use of land and resources to provide for growth and development; or

(iv) infrastructure;

(b) no practicable alternatives exist;

(c) mitigation measures are implemented to address the adverse effects arising from the loss in freshwater system functions and values; and

(d) where adverse effects cannot be adequately mitigated, environmental benefits including on or off-site works are provided.

[119] The following passages exemplify the Court's approach overall:

> [866] We have already made our findings in respect of the objectives and policies and have also reached conclusions in respect of a whole range of effects, many of which are not directly necessary in considering s 104D(1)(b). The short point that we have already identified is that we must be satisfied that the application avoids material harm from the adverse effects of discharges to water or land from the Site and the removal/reclamation of a stream or streams.
>
> [867] The level of certainty in that regard must be high given the clear significant adverse consequences. In short, if we conclude substantively that material harm is avoided, then the application will not be contrary to that key policy thrust. Because of the relationship between effects and the policy provisions, it is not fair to say simply by applying the objectives and policies that an application is contrary to them. This requires a nuanced evaluation of both the objectives and policies and the effects.
>
> [868] The other major policy thrust relates to the maintenance and net gain/restoration of the mauri and the biodiversity on this Site. We must be satisfied that the evidence, including the offset and compensation evidence, will lead to those outcomes.

Effects management

[120] Critical to this conclusion is the Court's assessment of the effectiveness of proposed effects management. The Court refers to mitigation proposals including:

> [711] There are a number of mitigation proposals onsite for the project effects. These include:
>
> - Translocation of fauna and flora. This will include the capture and translocation of Hochstetter's frogs, fish, kākahi and kōura from the Landfill Valley and other streams that will be permanently lost. The destination of the salvaged frogs remained at issue until the end of the hearing when it was confirmed by Waste Management to be the predator-fenced area, to be created as we will describe later, which already contains frogs.
>
> - Replacement planting of wetland vegetation that is not within a Significant Ecological Area to address the loss of wetland extent where there has been partial removal.
>
> - Provision of artificial roosts or roosting cavities for long-tailed bats as roost trees may be removed from the project area (though none have been identified).
>
> - Planting of 42 ha of native forest around the access road and bin area, along with the entire area around the south-western edge of the landfill and its adjacent onsite roading and pond area.
>
> - Mitigation for the some of the loss of streambed area to address both the quantum of stream habitat and its biota that will be destroyed, including fish, kākahi and kōura. This will see 8 km of permanent and intermittent stream bed improved by planting with riparian vegetation and protected. This addresses 19% of the stream length affected by the project, with the remainder to be offset offsite.

[121] Residual adverse effects are mitigation are described as follows:

> [714] In relation to terrestrial residual effects the following were described by Dr Baber:
>
> - High level of residual effects via vegetation loss: kanuka scrub / forest (5.77 ha), manuka and tanglefern scrub (0.4 ha), raupō reedland (0.06 ha), exotic dominated wetland (1.02 ha), anthropogenic tōtara forest (0.64 ha).
>
> - High level of residual effects via habitat loss or direct harm: Hochstetter's frog, long-tailed bat, spotless crake, North Island fernbird and copper skink.

- Moderate level of residual effects via vegetation loss: broadleaved scrub/forest (0.04 ha), exotic pine forest floor habitat (114.71 ha).

- Moderate level of residual effects via habitat loss on: Australasian bittern, longtailed cuckoo, swamp maire, four lizard species and invertebrate species Rhytid snail and potentially kauri snail.

- Low level of effects on forest and wetland birds.

- Low or very low level of effects on a range of other biodiversity values and that appears to include exotic dominated vegetation (1.02 ha of wetland and 114 ha of pine forest).

(footnote omitted)

[122] The Court then addresses the potential to offset or compensate for these residual effects and refers to a proposed "Effects Management Package".[83] This package includes:

(a) Protected fencing and riparian planting of 50-60 km of stream length, 8 km of riparian planting on WM's property, along with 11 km of stream compensation (protection in perpetuity) on site as well as planting of the Northern Valley Stream.[84]

(b) Pest and predator management and revegetation (including a 126 ha Wayby Valley sanctuary), native vegetation planting over 88.76 ha,

(c) Mammalian pest control in those areas as well in the adjacent pine forest (103 ha) and native forest (17.82 ha).

(d) Mammalian pest control over Sunnybrook Scenic Reserve.

[123] The Court also addresses the effectiveness of the Effects Management Package in relation to freshwater and terrestrial habitats, and in relation to the Hōteo River, the

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83 At [726].
84 At [736].

Kaipara Harbour and in terms of tangata whenua relationship with taonga.[85] Key conclusions are noted above.

Waste minimisation

[124] The issue of waste minimisation is addressed at length. The statutory framework is summarised above at [70]. The Court refers to the purpose of the WMA 2008, namely, to encourage waste minimisation and a decrease in waste disposal in order to protect the environment from harm and provide environmental, social and cultural benefits. A territorial authority is required to adopt a waste minimisation plan, and this must provide for objectives and policies for achieving effective and efficient waste management. The Council's waste minimisation plan notes that 40 per cent of waste is trucked out of Auckland and this reliance does not meet its mandate to promote waste minimisation;[86] the combined capacity of the current landfills would be enough to service Auckland's needs for the next decade (until 2027); the importance of building resilience into the waste management system, and acknowledges Auckland's needs to retain a safe residual waste disposal option. There is also a reference to no new landfills and that landfills are at the lowest end of the hierarchy of waste management.

[125] The Court observes that WM's assumption that the waste would continue at least at current levels, appears to "defy the purpose of the WMA 2008" and it did not accept that a landfill with the same levels received at Redvale would continue into the future. Having said that the Court noted there is nothing in the Waste Minimisation Plan (WMP) that requires there will be no need for any solid waste disposal to a landfill in the medium future.[87] There remains an issue as to whether there is any clear necessity for a landfill of this size as benchmarked against the rates of utilisation of land fill airspace or the life of a landfill. But this does not present an insurmountable hurdle to the proposed landfill.[88]

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85 At [742].
86 At [338]–[339].
87 At [346].
88 At [344]–[348].

[126] The Court made related findings that the AUP does not appear to anticipate landfills and deliberately decided not to provide for them, but also that waste disposal is a fundamental requirement of all communities,[89] and that until there are viable other alternatives for waste disposal, landfills are still going to be used in Auckland.[90] It did not accept the submission by Fight the Tip that class 2 and below landfills can accommodate 80 per cent of the waste stream but also found that there is a clear ability for some of Auckland's current waste stream to be diverted or reused.[91] It also found that Auckland produces approximately 1.6 million tonnes of waste per annum requiring landfills, and even with some reuse, there is going to be a continuing demand for class 1 landfill disposal into the future.[92] Having reviewed the evidence the Court finds that a landfill between 10 million cubic metres and 30 million cubic metres seems realistic for known and potential waste generation in Auckland.[93]

Conclusion

[127] The Environment Court concluded at [930] of the interim decision that the status of the activity as non-complying provides that a consent might be granted if it achieves the key purposes of the AUP and the Act. It is for this reason that it considered further steps are still required. Those steps are listed. The Court then states:

> **Part 2**
>
> [931] In considering this matter broadly within Part 2 we are satisfied that an amended application and amended conditions in the broad terms we have described could meet the purpose of the Act and satisfy us that there would be no adverse discharge effects from the landfill and that it would otherwise achieve a net biodiversity gain on the Site. To be satisfied of this we would need to see the improved design and also more certain conditions and management plans.

[128] In the result the Environment Court concludes that a modified application, conditions and Management Plans could meet the purpose of the Act, and relevant matters under s 104.

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89 At [365]–[367].
90 At [370].
91 At [378].
92 At [379].
93 At [391].

PART C – MANA WHENUA

"Common understanding"

[129] Mr Enright for Te Rūnanga contends that the Court erred in finding that there was a "common understanding" between the parties that the landfill site was solely or exclusively within the rohe of Ngāti Manuhiri. He refers to evidence from various deponents that affirm Ngāti Whātua's relationship to the site, including the following:

> The wider Ngāti Whātua rohe, is, however, much larger. We consider that the landfill lies within this wider traditional rohe of Ngāti Whātua… The treatment of Ngāti Whātua, as secondary in this application to me is an affront that highlights a lack of understanding of our tikanga.
>
> Ngāti Whātua was the dominant tribe throughout the Hōteo, as demonstrated by our sites. This includes the landfill site. Ngāti Whātua controlled this entire area and provided a general permission for Ngāti Manuhiri to use the Hōteo. The gifting of whenua to Manuhiri was by the tikanga of tukuwhenua. Gifted land involves reciprocal duties. Tukuwhenua continues to apply. It has never been withdrawn. It acknowledges the mana of Ngāti Whātua, and the purpose for which it was given.
>
> In this circumstance, Ngāti Whātua maintains the beforementioned rohe interests. It does not alter the fact that the proposed Waiwhiu Wayby landfill site, in its entirety, is located within the overall Ngāti Whātua tribal rohe as shown in various tribal and Crown maps.

[130] This "common understanding" error is said to be a material error per *Bryson*,[94] emphasising that its significance is amplified by the subsequent finding that Ngāti Manuhiri has the "more intimate relationship" and that their change of position influenced the Environment Court's view as to the proper outcome.

[131] Mr Pou for Ngāti Manuhiri responds that the evidence shows there was a common understanding that the site was within in the rohe of Ngāti Manuhiri. He refers to evidence submitted by Te Rūnanga acknowledging that "Ngāti Manuhiri is the hapū on the side of the Waste Management landfill." This evidence was said to be important because it was filed on behalf of the particular Te Rūnanga hapū that held interests proximate to the site and was signed by various representatives including their marae trustees. One of their deponents also identified that their interests are on "the Kaipara side" and another confirmed under cross examination that

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[94] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

Ngāti Manuhiri looked after their interests at the site. A deponent of Ngāti Whātua Ōrākei also gave evidence that Ngāti Manuhiri are "the tangata whenua" and the joint planning expert for Te Rūnanga and Ngāti Manuhiri identified Ngāti Manuhiri as holding the mana over the area in which the application is proposed to be located.

[132] Mr Pou acknowledged that Te Rūnanga filed supplementary evidence claiming that the landfill site was within the rohe of Ngāti Whātua, but he says there was clearly ample evidence before the Court upon which a finding could be made that there was a common understanding that the site was within the rohe of Ngāti Manuhiri and that it had the more intimate relationship. Mr Pou submits there was therefore no error of material fact or law.

Assessment

[133] It is important first to specifically identify what the Environment Court in fact said:

> [56] Nevertheless, there appears to have been a common understanding of which areas were Ngāti Manuhiri, Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau. These included the area of the landfill site itself and the area to the east of it. The landfill site appears to have been recognised as being within the Ngāti Manuhiri rohe. Ngāti Whātua have clearly been established around portions of the Kaipara and for some distance up the various tributaries, including the Hōteo River.

[134] And further:

> [501] We accept that the area generally is within the rohe of Ngāti Whātua. We also accept that the general landfill Site is within Ngāti Manuhiri rohe – that they maintain an unbroken connection with their rohe exercising their mana through manuhiritanga. While the rohe of Ngāti Whātua and Ngāti Manuhiri overlap to an extent, we find that Ngāti Manuhiri has a more intimate relationship with the landfill Site than does Ngāti Whātua.

[135] It was plainly open on the evidence before the Court to find that the landfill site "appears to have been recognised" as being within the rohe of Ngāti Manuhiri.[95] As one Ngāti Whātua Ōrākei pūkenga put it in his Statement of Evidence:

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[95] See for example the Supplementary Evidence of Glenn Wilcox dated 13 March 2023 at 5–6.

> …Ngāti Whātua o Ōrākei is compelled through our whanaungatanga and kaitiakitanga responsibilities to oppose the moving of paruparu waste from within the rohe of Ngāti Whātua o Ōrākei *into the rohe of Ngāti Manuhiri without their consent.*
>
> (emphasis added)

[136] Moreover, the Court's finding is not a statement of exclusion of other iwi or hapū. That is evident from the statement at [501] that the rohe of Ngāti Whātua and Ngāti Manuhiri "overlap" and that Ngāti Manuhiri had "a *more* intimate relationship." Nothing in this language suggests that the Court considered that Ngāti Manuhiri held exclusive mana in relation to the site.

[137] Importantly, the Court did not treat the intimacy finding as meaning the tikanga of Ngāti Manuhiri was necessarily determinative of the outcome overall. This is reflected in the statements immediately following the intimacy finding including the observations that: this finding did not apply to the Hōteo river itself; the Kaipara is within the rohe of Ngāti Whātua Ōrākei, Te Uri o Hau and Ngāti Whātua o Kaipara; the strength of the physical and spiritual relationships of all iwi with the Hōteo and Kaipara Harbour must be safeguarded; all iwi find the movement of paru offensive and that it impacts their relationship with Papatūānuku; it is a breach of tikanga; and the risk of adverse effects on the awa negatively impacts all their relationships with it.[96]

[138] The significance of the intimacy finding must also be understood in the context of the judgment as a whole which plainly recognises the mana of Ngāti Whātua hapū and iwi as kaitiaki of the region including of the Hōteo and the Kaipara Harbour, and the significant effects of the proposal on them.[97] There are also findings that speak of the shared mana or responsibilities of the tangata whenua to the whenua, awa and moana, including Ngāti Whātua and Te Uri o Hau. Illustrative of this, in the section dealing with iwi/hapū relationships, the Court referred to evidence on behalf of Ngāti Manuhiri confirming that "it is up to Ngāti Manuhiri to identify what is tika within our rohe, but we are not the only tangata whenua impacted and it is not only our rohe which is impacted."[98] The Court also referred to the "shared whakapapa and

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96 Environment Court interim decision, above n 1, at [503]–[507].
97 At [464], [469], [479]–[484].
98 At [492].

a common commitment to provide for the ecological and cultural values as they related to, among other things, taonga, awa, moana and te taiao."[99] And, perhaps most importantly, the Court identified the effects on the mauri of Papatūānuku, the Hōteo and the Kaipara.[100] Those effects clearly weighed (and must continue to weigh) heavily in the evaluation.

[139] I acknowledge that the Court goes on to "place some weight" on Ngāti Manuhiri's changed position, and that they now believe that can ensure there is no material harm to the Hōteo or the Kaipara.[101] But the Court also states that "we need to consider "the risks that Ngāti Whātua, Ngāti Whātua Ōrākei, Te Uri o Hau, the Omaha Marae and nearby residents see for the landfill and whether they can be addressed by this proposal."[102]

[140] I am therefore satisfied that the Environment Court did not err in fact or law when referring to the relationship of Ngāti Manuhiri to the site as more intimate. While it is clear that the Court considered that this factor was relevant when assessing onsite effects, it was not a recognition of the primacy of Ngāti Manuhiri's mana to the exclusion of other iwi and hapū.

"Strength of relationship"

[141] A second related issue raised by Te Rūnanga is whether the Environment Court failed to consider relevant matters, had regard to irrelevant matters and/or applied the wrong legal test when assessing divergent tikanga based claims and the relative "strength of relationship" held by competing tribal interests of Ngāti Whātua and Ngāti Manuhiri towards natural and physical resources affected by the proposal, including the Landfill site.

[142] On this, Mr Enright submits that the Court did not apply the framework laid out in *Ngāti Maru* for the purpose of assessing strength of relationship, that is involving three considerations:[103]

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99 At [495].
100 At [507]–[508].
101 At [514].
102 At [516].
103 *Ngāti Maru,* above n 5, at [115].

(a) the relative strength claim must be clearly defined according to tikanga Māori and mātauranga Māori;

(b) clearly directed to the discharge of an obligation to Māori under the RMA; and

(c) precisely linked to a specific resource management outcome.

[143] Dealing with the first consideration, Mr Enright contends that the Court did not specifically address the evidence of strength of relationship in its reasons, particularly as it relates to the Landfill site, the Hōteo and its environs. In so doing it failed to determine whether Ngāti Manuhiri had a stronger relationship with the site than Ngāti Whātua, and whether Ngāti Whātua had a stronger relationship to the Hōteo and Kaipara Moana. Instead the Court used a standard not found in the case law for identifying who has the mana whenua by using the term "intimate" without explaining the meaning or significance of this finding. The effect of this he submits is that the Court never resolved a key question for the purpose of determining the correct tikanga for the evaluation. This error is said to be amplified by the fact that six questions were identified for consideration in a pre-hearing minute of the Court on this issue and the parties' evidence specifically addressed these questions.[104]

[144] The Court is also said to have failed to squarely address the second and third considerations by not linking the findings of relative strength to specific RMA obligations or to a specific resource management outcome. There was therefore no way of knowing whether the correct legal test for assessment of relative strength was applied.

[145] Mr Pou responds that the Environment Court did exactly what it was asked to do by finding that Ngāti Manuhiri had the more intimate relationship to the site. He also challenges the claim that the Court did not properly address the strength of relationship. Mr Matheson for WM submits that no question of law is raised at all, that findings as to intimacy were simply findings of fact in accordance with the

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[104] *Te Rūnanga o Ngāti Whātua v Auckland Council* NZEnvC Auckland ENV-2021-AKL-085, 3 February 2023 (Minute of the Environment Court).

directive in *Ngāti Maru* to define relationships in accordance with tikanga. He also says that no party challenged the strength of Ngāti Whātua's relationship to the Hōteo and Kaipara.

Assessment

[146] First a word about *Ngāti Maru*. That case concerned a claim to "primary mana whenua" status. The Court was required to identify the jurisdictional basis for making determinations about tikanga based claims like this. It explained:[105]

> …when exercising functions under the RMA, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori in order to discharge express statutory duties to Māori. Thus, where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), (g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond still applies when different iwi make divergent claims as to what is required to meet those obligations, and this may mean a choice has to be made as to which of those courses of action best discharges the statutory duties under the RMA.

[147] The Court also recognised the inherent complexity and sensitivity required when making determinations about mana and more broadly about relative strength of relationship. The following passages are illustrative:[106]

> [108] The problem of cross-cultural definition is referred to in Mr Quinn's submissions as an added reason to exclude jurisdiction. But that would rarely, if ever, be a reason to exclude jurisdiction while at the same time purporting to discharge the RMA's express obligations to, among other things, recognise and provide for the relationship of Māori and their culture and traditions with their taonga. However, I think it is a reason to require clarity as to the meaning of the tikanga concept in issue before resolving the issue of jurisdiction. Furthermore, as the Environment Court suggested, resolution of issues of the present kind will normally require evidence, for example, about mana whenua rights and interests according to tikanga Māori.
>
> [109] It appears that the parties proceeded before the Environment Court on the basis that "primary mana whenua" means "pre-eminence or dominance". But what that means in a resource management context is also ambiguous. Does it mean Ngāti Whātua Ōrākei has a power of veto in terms of recognition of other iwi interests in resource management matters? Does it mean that Ngāti Whātua Ōrākei is to be regarded as authoritative in terms of effects on iwi and Māori, including the appellants? Or does it mean, as it did in Te Ngai Hapu, that Ngāti Whātua Ōrākei tikanga applies in relation to the affected area? It may even be a combination of all of these interpretations, or none of them at

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105 Above n 5, at [102].
106 Above n 5.

> all. The answer to the jurisdictional question is likely to be different depending on which of these (or other innumerable possible) outcomes is envisaged. It could not extend to a right of veto given the longstanding principle that pt 2 does not confer a right of veto. It might, on the facts of a particular case, mean that the views of iwi could be authoritative in terms of adverse cultural effects, or that the tikanga of that iwi ought to be applied.
>
> [110] All of this serves to emphasise that when iwi make mana whenua-based claims, those claims must be clearly defined according to tikanga Māori, directed to the discharge of the RMA's obligations to Māori and to a precisely articulated resource management outcome. In this regard, I apprehend that the largely unqualified claim to pre-eminent mana whenua status per se by Ngāti Whātua Ōrākei diverted the decision-makers from their primary task of ascertainment of the applicable tikanga Māori for the purpose of discharging the RMA's duties to Māori…

[148] The Court also said:[107]

> [122] Similarly, when the Court evaluates the relative strength of relationships it is not determining what is tikanga Māori. The Court is simply stating that, at a particular time, on the available evidence, it is more likely than not that the relationship of an iwi is stronger than another iwi in relation to a particular area. It is important to add that what this means, in any individual case, still needs to be worked out, having regard to the views of all affected iwi…

[149] In response to the proposition that local authorities can recognise and provide for iwi relationships with their taonga without assessing the relative strengths of that relationship, the Court agreed but also noted:[108]

> …that does not preclude local authorities or the Court from assessing relative strength where that claim is properly grounded in tikanga Māori, is directed to the discharge the RMA's duties to Māori and is precisely linked to a particular resource management outcome. To hold otherwise is to fetter the capacity of iwi to inform decision-makers of what they consider to be important to them and what they consider is tika.

[150] Finally the Court concluded that:[109]

> [133] Overall therefore, in regards to the third issue, I am satisfied that when addressing the s 6(e) RMA requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga, a consent authority, including the Environment Court, does have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions. But any assessment of this kind will be predicated on the asserted relationship being clearly grounded in and defined in accordance with

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107 Above n 5.
108 Above n 5, at [128].
109 Above n 5.

> tikanga Māori and mātauranga Māori and that any claim based on it is equally clearly directed to the discharge of the statutory obligations to Māori and to a precise resource management outcome.

[151] In summary, the Court confirmed the power of the Environment Court to make findings as to the relative strength of the relationship of an iwi or hapū to an affected area, subject to the three pronged approach noted above. In this way *Ngāti Maru* provides a useful guide for assessment of relative strength of relationship and other tikanga based claims. It helps to ensure that on an issue as significant as this, tikanga provides the analytical framework, the evaluative task is only undertaken where it is necessary to discharge a relevant resource management obligation and then only for the purpose of achieving a specific resource management outcome. This in turn serves two key imperatives: the Environment Court's evaluation of relative strength of relationship accords, as far as is possible, with tikanga, and the evaluation is clearly mandated by the RMA.

[152] Returning to the present case, in a minute of 3 February 2023, the Court approved further cultural evidence to be adduced to address matters arising from the settlement between WM and Ngāti Manuhiri and its subsequent support of the consents. The parties agreed that the evidence should be confined to the following specific questions and issues:

> Draft statement of issues in relation to s 6(e) RMA "strength of relationship" in relation to the Ngāti Whātua parties:
>
> Q1 Of the parties before the Court, who currently has the strongest s 6(e) RMA relationship with the landfill site?
>
> Q2 How do the different s 6(e) relationships identified in Q1 interrelate?
>
> Q3 How does the answer to Q1 and Q2 affect the Environment Court's assessment of cultural effects, including the relevant planning instruments; and proposed consent conditions for the proposal (if consent is granted).
>
> Q4 Of the parties before the Court, who currently has the strongest s 6(e) RMA relationship with the Hōteo and/or Kaipara Moana, or (alternatively) parts of it, in terms of the downstream receiving environment to the landfill ?
>
> Q5 How do the different s 6(e) relationships identified in Q4 Interrelate?
>
> Q6 How does the answer to Q4 and Q5 affect the Environment Court's assessment of cultural effects, including the relevant planning instruments; and proposed consent conditions for the proposal (if consent is granted).

[153] It is evident that the parties had in mind the guidance afforded by *Ngāti Maru* when settling on these questions and issues. But the Court specifically stated in the same minute that the questions/issues agreed between the parties are for the purposes of further evidence and are not to be taken as limiting the Court on how it will approach the exercise of its discretion on those matters. The complaint now is that the Court should have answered these questions before making any definitive findings as to the overall merits of the landfill in terms of cultural issues and effects.

[154] I have come to the view that given the way the parties approached the issue, it would have been preferable for the Court to more directly answer the questions and issues posed for both transparency and cogency reasons. Nevertheless, I am satisfied that the Environment Court adequately addressed those matters in the judgment to the extent it was necessary to do so, in relation to the mana whenua issue.

[155] First, it is appropriate to recall it is not the function of this Court on an appeal on point of law to test the factual findings of the Environment Court as to strength of relationship their being some evidence to support the factual findings in dispute. My focus is to assess whether the Court applied the correct legal framework for assessment.

[156] Second, in terms of the first *Ngāti Maru* consideration, the Environment Court identified the nature and strength of the relationship of each group to the affected rohe by reference to tikanga Māori and mātauranga Māori. The Court referred to the whakapapa based connections of the iwi and hapū to the site, the Hōteo and the Kaipara Harbour. The decision is also replete with consideration of tikanga concepts such as whanaungatanga, kaitiakitanga and mauri which all speak to relationships in tikanga terms.

[157] Third, the Court recognised the mana of the Ngāti Whātua hapū and iwi in the region as a whole, but in particular with respect to the Hōteo and the Kaipara Harbour. While the Court does not identify their relationship as stronger than Ngāti Manuhiri in respect of these places, that has not affected the Court's assessment of the significance of their relationship or of the scale of the effects of the proposed Landfill

on them.[110] Put another way, irrespective of the "relative" strength of relationship, the mana and concerns of the Ngāti Whātua iwi and hapū have been carefully weighed by the Court. The following passage of the judgment is illustrative:

> ***Adverse effects on taonga species, Hōteo and the Kaipara harbour***
>
> [485] It was common ground that granting consent results in significant adverse effects to Ngāti Whātua o Kaipara, their hapū and marae, and to Ngāti Whātua Ōrākei and Te Uri o Hau. A similar scale of impact was acknowledged for Ngāti Manuhiri.
>
> [486] We acknowledge that the impact of the proposal on these values is not just a physical impact – the impacts include the way in which iwi relate to them, including the exercise of kaitiakitanga and whanaungatanga discussed earlier.
>
> [487] We address the effects of the landfill proposal on the relationship values of habitats, taonga species, the Hōteo and the Kaipara in our section on ecology. The key additional point is that these values represent relationships with key elements of the local environment and their close interconnectedness with the human realm.

[158] Fourth, it was available to the Court to complete its evaluation without making a specific finding as to who held the primary mana in relation the Hōteo and Kaipara Harbour (though as I explain below, it may be a relevant factor when resolving competing tikanga claims).[111] This is because, as I have said, the mana of the Ngāti Whātua iwi and hapū in respect of those areas was not disputed, and their corresponding tikanga were weighed in the assessment. As the Court explained:

> [435] Having said that, and as discussed earlier, we also understand that no tangata whenua party disputes that Ngāti Whātua has the right to act to protect their taonga. Ngāti Manuhiri assert that the Site is within their rohe. We acknowledge the difference of view as to where the line is drawn for the rohe of Ngāti Whātua (from a collective iwi perspective) and Ngāti Manuhiri. We do not need to make a factual finding on this issue because, as Mr Enright submitted, the downstream effects of the landfill on Ngāti Whātua relationships, beliefs and values are uncontested, as is the significance of these values.

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110 I also note that the overlapping nature of the relationship to the Hōteo was acknowledged by a Ngāti Whātua tikanga expert, together with the observation that Ngāti Whātua controlled and gave consent to other tribes to use the Hōteo. There is also evidence referring to the shared mana in relation to the Landfill site while Ngāti Whātua had the stronger relationship to the Hōteo.

111 I note this approach is consistent with the evidence of Professor Margaret Kawharu who states that identifying boundaries to effectively determine a western concept of ownership does not reflect the interrelationship between Ngāti Manuhiri and Ngāti Whātua.

[159] Whether Ngāti Whātua tikanga should have been determinative engages a different issue, canvassed next in relation to cultural bottom lines. But for the purpose of the first *Ngāti Maru* consideration, I see no error in the way the Court approached consideration of relative strength.

[160] Fifth, in terms of the second and third *Ngāti Maru* considerations, I am satisfied that the Court examined the issue of strength of relationship as part of its evaluation mandated by ss 6(e), 7 and 8, and specifically directed it to resolving key resource management issues in this case, including in particular the assessment of the nature and scale of the environmental impacts of the Landfill on Māori interests, having regard to the overarching planning instruments — see my summary of the judgement at [92] above. All of this was linked to the specific resource management outcome, namely whether the proposal could pass through the various gateway tests.

[161] Finally, while characterisation of the relationship of Ngāti Manuhiri as "more intimate" is open to interpretation, in my view the Court considered that Ngāti Manuhiri was more closely connected, in tikanga terms, to the Landfill site. This is exemplified by the passages immediately preceding the intimacy finding:

> [497] In assessing the cultural values and the effects on those values we have had regard to Commissioner Tepania's decision. We agree with her analysis of the approach we must take to the evidence on cultural values and effects – that we must be able to identify, involve and provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori.
>
> [498] Referring to the outcomes sought by iwi in order to meet those directives, we must meaningfully respond to the claim that the duty must apply to the tikanga-based claims made by iwi as to what is required to meet those objectives.
>
> [499] Further, we agree that:
>
> > … that duty also requires us to engage meaningfully with the impact of the application on the whanaungatanga and kaitiakitanga relationship between iwi and the natural environment, with their lands, waters, taonga and other significant features of the environment such as Te Awa Hōteo and Kaipara moana: seen not just as physical resources but as entities in their own right – as ancestors, gods, whānau – that iwi have an obligation to care for and protect.
>
> (footnotes omitted)

[162] Again, the intimacy finding is a finding of fact beyond the ordinary reach of this Court. But, in any event, for reasons already explained, this finding in respect of the Landfill site while influential (as it should be) in relation to the assessment of the effects on the site itself, was not automatically determinative overall of the position presently reached by the Environment Court in its interim decision.

[163] For these reasons, I find there was no error of law in the approach taken by the Court in its assessment of relative strength. It may be helpful however in terms of any final judgment, that the questions posed by the parties for resolution of this issue are more directly addressed.

"Cultural bottom lines"

[164] Mr Enright contends that the Environment Court failed to correctly respond, in light of governing planning instruments, to its finding that there will be significant adverse effects on Ngāti Whātua values, including freshwater and heritage values. He says that the AUP effectively imposes cultural bottom lines insofar as it requires significant adverse effects on mana whenua values to be avoided and the approach taken by this Court in *Tauranga Environmental* should be followed.[112]

[165] The following provisions are highlighted:

(a) Chapter E3 Lakes, rivers, streams and wetlands (Freshwater):

(i) E3.3(5) — "Avoid significant adverse effects … of activities … on the mauri of the freshwater environment; and mana whenua values in relation to the freshwater environment."

(ii) E 3.3(13) — "Avoid the reclamation and drainage of the beds of lakes, rivers, streams and wetlands … unless … the activity avoids significant adverse effects … on Mana Whenua values associated with freshwater resources, including wāhi tapu, wāhi taonga and mahinga kai."

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[112] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882.

(iii) E3.3(7) and (9) include the same avoidance requirement for structures and excavation in lakes, rivers, streams and wetlands.

(b) Chapter B6 Mana Whenua (RPS):

(i) B6.1 Issues — mana whenua participation in decision making and the integration of mātauranga Māori and tikanga into resource management is of "paramount importance".

(ii) B6.2.1 Objectives — treaty principles are recognised and provided for.

(iii) B6.2.2.(1) Polices — provides for timely, effective, meaningful engagement. This section also recognises and provides for mātauranga and tikanga, and recognises mana whenua as specialists in the tikanga of their hapū and iwi.

(iv) B6.3.1 Objectives — mana whenua values, mātauranga and tikanga are properly reflected and accorded sufficient weight, the mauri of and the relationship of mana whenua with natural resources is enhanced overall.

(v) B6.3.2 Policies — integrate mana whenua values, mātauranga and tikanga; recognise the holistic nature of the mana whenua world view; restore or enhance mauri; have particular regard to the holistic world view, kaitiakitanga and mauri.

(vi) B6.5.2 Policies — protect mana whenua cultural and historic heritage sites and areas of significance.

[166] He further submits that tikanga values may also independently operate as cultural bottom lines that should not be compromised given its status as forming part of the common law where relevant and its recognition by the RMA. Having found

breaches of Ngāti Whātua tikanga,[113] the Court failed to assess whether this merited decline in light of the Part 2 directives, but instead applied a proportionate approach.

[167] The Court's findings at [207] and [213] are identified as examples of this type of error. For ease of reference, the Court said:

> ***Finding F***
>
> [207] There is a centrality of Māori worldview contained within the RPS. This seeks to maintain, and *where appropriate* enhance, freshwater systems, mauri of areas and the relationship of tangata whenua with important features. It does not preclude development but anticipates that adverse effects will be addressed and freshwater systems are restored and enhanced where that is possible.
>
> …
>
> ***Chapter E1 – Water quality and integrated management***
>
> [213] The introduction to this chapter refers to the objective of the AUP and national policy statements being to improve the integrated management of freshwater and the use and development of land. The focus of the provisions is on avoiding adverse effects *as far as practicable* and otherwise minimising them. It records a key concern of mana whenua is effects on the mauri of water caused by pollution of streams, rivers, catchments or harbours.
>
> (emphasis added)

[168] Mr Enright submits that Finding F is simplistic and does not correspond with the identified cultural bottom lines and directive language used in Chapter B6. The statement that B6 "does not preclude development" is wrong because it will depend on context – avoidance may be required, and the requirement to restore or enhance freshwater systems and mauri is not qualified in the manner expressed. Similarly, the reference in [213] misinterprets the effect of the E3 provisions. In the absence of a *Ngāti Maru* finding as to primary mana whenua, the Court was obliged to consider whether the consent should be declined given the significant adverse

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[113] Including: cultural offence caused by locating a landfill upstream of their taonga; mixing sacred with the profane by placing a landfill upstream of their taonga; failure in a reciprocal duty of care to Hōtea and Kaipara Moana as taonga; mistreatment of Hōtea and Kaipara affects Ngāti Whātua physically and spiritually; failure to engage with affected tangata whenua; shifting paru from one rohe to another; allowing adverse effects on mauri and wairua of the water bodies and taonga species; addressing the interests of Ngāti Manuhiri without sperate consideration of Ngāti Whātua's tikanga in breach of whanaungatanga; and failure to consider the environment holistically.

effects on Ngāti Whātua values and breaches of their tikanga. It never turned its mind to this important evaluation.

[169] When pressed about whether he was effectively advocating for a tikanga based veto, he said that this was not the case, emphasising that the cultural bottom line in this context was the result of the finding of significant adverse effects on the mana and the mauri of te taiao and tangata whenua and the plan's demand that such effects must be avoided.

[170] Ms Haazen for Te Uri o Hau and Ngāti Whātua Ōrākei joins with Mr Enright on this issue, referring especially to the evidence that there could be significant intergenerational adverse impacts on the mauri of the Kaipara and Hōteo. She also submits that the Court failed to properly engage with this evidence, noting that there were two distinct tikanga breaches — first through lack of consultation and so disenabling Te Uri o Hau and Ngāti Whātua Ōrākei from discharging their kaitiaki responsibilities and second by not recognising their mana. She also clarified that the bottom lines are the protection of the mauri and mana of the Kaipara and Hōteo. Given this clear common ground between Ngāti Whātua, Ngāti Whātua Ōrākei and Te Uri o Hau for ease of reference, I will simply refer to them as the Ngāti Whātua Collective.

[171] Mr Pou submits that the Ngāti Whātua Collective's expression of tikanga recognition is oppressive to those that might disagree and contrary to the statement in *Pouākani*, that in tikanga, as in law, context is everything and that it is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context.[114] He stated that whether any particular tikanga has the force of law is a matter of fact to be determined, not a matter of bare assertion. Moreover, the authorities do not support an inherent tikanga bottom line approach. Rather, whether there is a "bottom line" will depend on the planning instruments, which do not provide for such bottom lines. Mr Pou accepts that there may be cases where tikanga bottom lines are engaged, for example in relation to urupā or tapu sites. But he says there is nothing in this case that identifies a breach of such a bottom line.

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[114] *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [74].

[172] Mr Matheson submits that absent clear policy directive, there can be no "bottom line" and there is no such overarching policy directive in the AUP, and nor is there any adverse effect that by itself breaches tikanga. He refers to the language of the provisions of B6, noting that they do not purport to mandate bottom lines rather they generally promote recognition and enabling of mana whenua. He says the Environment Court was clearly aware of this as they applied these provisions and that the conditions of consent will secure these outcomes.

[173] In terms of the E3 policies, Mr Matheson notes the Court identified that policy E3.3.(5) set an environmental bottom line in terms of the need to avoid significant adverse effects on mana whenua values, but submitted that they are forward looking and that the existing environment was degraded. There was therefore no error in the Court's approach, especially given that: the gateway tests set out at ss 104 and 104D(1)(b) require a fair appraisal of the objectives and policies as a whole and consideration of enabling objectives and policies; there is no mana whenua veto; the effects need to be assessed at an appropriate scale (spatially and through time) with due regard to the full suite of restorative measures and the mana enhancing benefits for Ngāti Manuhiri. He also submits this case is distinguishable from *Tauranga Environmental* because in that case the provisions were far more directive.

Some definition

[174] Before turning to my assessment, it is necessary to provide some clarity on the use of the concept tikanga in this part of the judgment. As Tā Taihakurei Durie said:[115]

> [Tikanga] is the set of values, principles, understandings, practices, norms and mechanisms from which a person or community can determine the correct action in te ao Māori.

[175] In this case tikanga appears to be used in all these senses. To assist with comprehension I will refer to:

(a) Tikanga: being the general definition as used by Tā Taihakurei Durie.

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[115] See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).at [1.5].

(b) Tikanga Māori: being the core tikanga values commonly recognised and shared among iwi and hapū.

(c) Tikanga ā-iwi: being the tikanga of a particular iwi.

Assessment

[176] Mr Enright identifies nine findings in the Environment Court decision of breaches of Ngāti Whātua tikanga ā-iwi.[116] This, he says, should have triggered an assessment of whether these breaches warranted declining grant of the consent. Conversely, Ngāti Manuhiri are claiming that the effects of the Landfill can be effectively managed, given especially the effect management package now on offer and therefore should be granted consent. The Environment Court was, and this Court is now invited to, choose between their respective positions and in the case of the Ngāti Whātua Collective, to decide the matter in accordance with their tikanga ā-iwi as a "bottom line". I am assuming for this purpose that "bottom line" refers to something that is inviolable and a standard that must not be breached. I will use the language of tikanga standard to describe the type or class of tikanga engaged when speaking of "bottom lines".

[177] This all triggers complex jurisdictional issues in relation to an already complex substantive evaluation. It raises questions about the jurisdiction of the Environment Court and other decision makers under the RMA to make findings about tikanga and then as to whether and if so when tikanga may operate as binding rule, determinative of a resource management outcome. As I have noted, similar jurisdictional questions were raised in *Ngāti Maru*, albeit focused on the concept of mana whenua. It is helpful then to revisit again the approach taken by the High Court to these jurisdictional matters. As explained in *Ngāti Maru*:[117]

> [66] The RMA also anticipates that iwi will be involved in policy and plan promulgation and may have delegated to them decision-making functions; that there will be cases where different iwi or hapū may have overlapping areas of interest; and that iwi and hapū with defined customary rights will be specifically provided for where relevant. The Mana Whakahono a Rohe

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116 Ms Haazen for Te Uri o Hau and Ngāti Whātua Ōrākei states that they share the relevant tikanga, but also notes that it is not an exhaustive list.

117 Above n 5.

process also enables agreement to be reached about competing iwi claims in respect of overlapping areas of interest. The AUP also recognises the existence of multiple iwi and iwi authorities in Auckland and their respective planning documents. All of this necessarily demands that resource management decision-makers are able to identify, involve and provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori.

[67] However, when making resource management decisions, local authorities and the Environment Court are not engaged at pt 2 of the RMA in a process of conferring, declaring or affirming tikanga-based rights, powers or authority per se whether in State law or tikanga Māori. Similarly, pt 2 does not expressly or by necessary implication empower resource management decision-makers to confer, declare or affirm the jural status of iwi (relative or otherwise) and there is nothing in the RMA's purpose or scheme which suggests that resource management decision-makers are to be engaged in such decision-making. The jurisdiction to declare and affirm tikanga based rights in State law rests with the High Court and/or the Māori Land Court.

[68] Nevertheless, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties. To elaborate, as the Privy Council asseverated in McGuire, ss 6(e), 7(a) and 8 contain strong directions that must be observed at every stage of the planning process. Where iwi claim that a particular outcome is required to meet those directions in accordance with tikanga Māori, resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond must apply when different iwi make divergent tikanga-based claims as to what is required to meet those obligations. This may involve evidential findings in respect of the applicable tikanga and a choice as to which course of action best discharges the decision-makers statutory duties. To hold otherwise would be to emasculate those directions of their literal and normative potency insofar as concerns iwi.

[69] It is not possible to be definitive about the scope of the jurisdiction to respond to iwi tikanga-based claims, including claims based on asserted mana whenua, in the abstract. But the operation of s 7(a) dealing with kaitiakitanga is illustrative. Kaitiakitanga is exercised by the hapū or iwi that holds mana whenua over a particular area. As the RMA anticipates, and as this case exemplifies, there will be occasions when there are overlapping iwi interests in the same whenua. Nevertheless, s 7(a) directs that regard must be had to their respective kaitiakitanga. Where the views of those iwi diverge as to the responsibilities of kaitiaki, a decision may need to be made as to which of those views is to apply in the context of that particular application and that may involve evidential findings as to what the iwi consider is required in tikanga Māori.

(footnotes omitted)

[178] The qualified nature of the mandate to adjudicate on conflicting tikanga ā-iwi claims is important to maintain the integrity of both the law and tikanga, including tikanga Māori. The jurisdiction of the Environment Court (and resource management

decision makers generally) cannot be extended beyond that limited statutory mandate. And, just as importantly:[118]

> …the courts must not exceed their function when engaging with tikanga. Care must be taken not to impair the operation of tikanga as a system of law and custom in its own right.

[179] For these same reasons, any invitation to effectively enforce tikanga ā-iwi as if it is a "bottom line" inviolable standard with binding effect, for the purpose of exercising functions under the RMA must be approached with caution. That does not mean that tikanga ā-iwi cannot be a decisive factor in a particular case. As the Court said in *Ngāti Maru*, the directions at ss 6, 7 and 8 may, for example, promote a tikanga consistent outcome. In cases where there is no dispute as to who holds mana whenua, the applicable tikanga ā-iwi and corresponding cultural impact, their position may be adopted and applied.[119] But as this case illustrates, where multiple divergent tikanga ā-iwi positions are intersecting, applying one tikanga ā-iwi position as if it is above all other tikanga positions involves an arrogation of mana that must be very clearly justified.

[180] There is a further point, amplified by Williams J in *Pouākani*, that it may be dangerous to apply tikanga as if they were rules devoid of context. The pūkenga, Reverend Māori Marsden, described tikanga principles based reasoning in this way:[120]

> Kaupapa and Tikanga are juxtaposed and interconnected in Māori thinking. When contemplating some important project, action or situation that needs to be addressed and resolved, the tribe in council would debate the kaupapa or rules and principles by which they should be guided. There is an appeal to first principles in cases of doubt and those principles are drawn from the creation stories of Tua-uri, the acts of gods in the period of transition following the separation of Rangi and Papa, or the acts of the myth heroes such as Māui and Tawhakai and numerous others. The methods and plans they used in a similar situation are recounted and recommended. Alternative options are also examined and a course of action (tikanga) is adopted.

[181] As that passage shows, ascertaining the correct course of action depends upon the "project, action or situation that needs to be addressed". In cases of doubt, first principles are identified and methods and plans used in "similar situations" are

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118 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22].

119 See for example *Tauranga Environmental,* above n 112.

120 Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 66.

recounted and recommended. Alternative options are considered and a decision made. All of this will be strikingly familiar to the common law lawyer.

[182] What then is the proper approach? First there must be a proper jurisdictional and factual basis for the tikanga ā-iwi bottom line claim. Second, where tikanga ā-iwi are in conflict, then as far as is possible, those positions need to be reconciled (discussed further below at [212]). The guidance afforded in *Ngāti Maru* also has useful application in relation to the first step. That is, when assessing a tikanga ā-iwi bottom line standard claim:

(a) any alleged tikanga ā-iwi standard must be clearly defined according to tikanga Māori and mātauranga Māori;

(b) the assessment must be clearly directed to the discharge of an obligation to Māori under the RMA; and

(c) precisely linked to a specific resource management outcome.

[183] Dealing with the first consideration, it is essential that the claimed tikanga ā-iwi standard is defined with precision so that the decision maker can evaluate whether and how that standard is engaged or breached by the proposed activity on the proven facts. Identifying the tikanga ā-iwi standard is a matter for the affected iwi or hapū. Provided there is a credible and reliable basis for the standard, it is not for the Environment Court to form a view as to its reasonableness.[121] Conversely, if the claim is not credible or reliable, then the resource management decision maker must reject it.[122] But, a generalised claim by an iwi that a place is a taonga will be adversely affected by a proposal and therefore violates their tikanga, will rarely be sufficient. As with all claims that bear on the rights and interests of others, they must be clearly proven. The decision maker needs to know what the specific tikanga ā-iwi standard is, its significance (e.g. as a bottom line) and precisely how the proposal is breaching that standard. This will require careful explanation of the tikanga ā-iwi by a suitably

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121 *Tauranga Environmental,* above n 112, at [65]. See also *Ellis* above n 118; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

122 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* [2002] NZEnvC 421, (2002) 9 ELRNZ 111.

qualified expert as to why the tikanga standard represents a bottom line, including the source or whakapapa of this particular standard and any supporting narratives (such as pūrākau) relied upon for establishing this standard. The pūkenga must then clearly explain how that tikanga is breached by the proposed activity. The pūkenga should also clearly state the assumptions upon which their opinion is given, including any assumption about the likelihood of the effect occurring and the basis for that assumption. Furthermore, in an environmental law context, there should be evidence about how the effects of the breach of the tikanga ā-iwi standard might be avoided, mitigated or remedied.

[184] There will also need to be evidence supporting a finding of likely breach, for example that the proposal is likely to affect a taonga in a particular material way. This may require separate expert or fact evidence as to alleged adverse effect. To the extent that this evidence involves prediction of future events, the pūkenga must be careful not to trespass into other areas of expertise or speculation. All of this is important, because a decision maker under the RMA has the independent responsibility of assessing whether the proposed activity will likely breach the claimed tikanga ā-iwi standard — for example whether the alleged adverse effect is likely to occur at a scale that violates the tikanga bottom line (if one exists). Sometimes the decision maker should defer to the claimant about both these matters, for example where the tikanga standard is not disputed and when the claimant is best qualified to speak to the corresponding adverse effect arising from breach, as happened in *Tauranga Environmental*. But each case must be assessed on its own merits. For example, cases where the breach is based on an assessment of future risk may be a matter of evaluation beyond the expertise of the pūkenga and in this respect that expert will need to be careful not to purport to give evidence on such matters unless clearly qualified to do so.

[185] From my review of the evidence for Ngāti Whātua hapū and iwi, their whakapapa to the Kaipara dates back to the arrival of the waka Māhuhu-ki-te-rangi in 1250 AD. Their mana and kaitiaki responsibilities to Papatūānuku, Te Hōteo (and its tributaries), Pokopoko te taniwha and to the Kaipara are infinite, and because of this they are obliged to protect, maintain and enhance the mauri and mana of those taonga. They speak of pūrākau and tohu that identify the rohe of the landfill as important to

them, including the pūrākau of Reitu and Reipae and landmarks such as Waiwhiu, Waiteitei, Whangaripo, Te Tohe a Reipae, Onerahi and Hōteo. Emphasising the significance of the proposal to them, Ngāti Whātua issued a rāhui over the proposed site, one pūkenga saying that the rāhui was imposed because the Hōteo catchment is a precious source of water. Furthermore, the moana has a mauri and they are a part of it as reflected in the whakataukī mentioned by the trustees from marae within the hapū of Ngāti Rongo "Ko au te awa, ko te awa ko au". They also consider that the proposed Landfill will remove historical and spiritual connections to them and replace those connections with "a bladder filled with paru", and that this would be a cause of shame if they permitted this to occur. At the heart of their opposition to the dump is the concern that the Landfill will disrupt and degrade their whakapapa relationship and their mauri linkage to their taonga.

[186] Various effects of the proposed activity are identified as affecting (among other things) their rangatiratanga and kaitiakitanga, the hau, the wai and the whenua. WM is said to have trampled on the mana of Ngāti Whātua by failing to engage with them and by ignoring their rāhui. The proposal will trample on the tapu and on the mauri of Papatūānuku and the wairua of the forests, wetlands and flora and fauna. The placing of the paru in the whenua inherently affects the mauri of Papatūānuku that cannot be mitigated by conditions. There is also the risk of leachate — "a patu over our heads". They say the proposal will further diminish the ability of Ngāti Whātua to manaaki visitors and that the wellbeing of the Kaipara Moana and acknowledging the importance of the role played by it as a food source is an integral part of their tikanga. The degradation of their taonga has already compromised their ability to practice manaakitanga that was the foundation of their whanaungatanga with other iwi. Any risk to one part of the catchment is to be treated as a risk to the Kaipara Moana and all other parts it is connected to.

[187] The agreement reached between WM and Ngāti Manuhiri is also identified as violating tikanga Māori of whanaungatanga, with Ngāti Whātua having to "suffer the indignity of a "hole in its rohe" and "even a new boundary that is forced on it." Where Ngāti Whātua tikanga recognises their interests and Ngāti Manuhiri's interests are shared interests. To place a Landfill on the site even where there is only the slightest risk of poison to the Hōteo and Kaipara is an insult to Ngāti Whātua cultural

traditions and tikanga Māori that are shared with Ngāti Manuhiri. Even if the Landfill does not spill, the location of the Landfill lessens the mauri and the mana of the Hōteo and the Kaipara. Mitigation must be absolute and guaranteed.

[188] Given this evidence (and the evidence of the other iwi and hapū) the tikanga Māori values and principles of mauri, mana, tapu, kaitiakitanga, whakapapa, whanaungatanga and manaakitanga are all clearly engaged. What is less clear however, is which of these tikanga Māori values when applied to the present facts generate truly inviolable tikanga ā-iwi standards, breach of which is unavoidable or incapable of adequate mitigation or remedy. Some matters are obvious — an even minor discharge of leachate to the Hōteo would likely violate the mana and mauri of the awa. This must be avoided. Other effects, however, for example the failure to consult, loss of some habitat (capable of remediation or offset) and the mere presence of the Landfill, while clearly important considerations, are less obviously *unmitigable or irremediable* breaches of tikanga standards.

[189] What is also not clear is the extent to which the pūkenga have assumed the risk of an adverse effect when identifying breach of a tikanga ā-iwi standard. Predictions of future behaviour for example in response to the mere presence of the Landfill are susceptible to challenge as speculative. Without this type of clarity, it is difficult for any decision maker, let alone this Court on appeal on points of law, to make any meaningful conclusion about the claimed breach of tikanga bottom lines.

[190] In any event, I am satisfied the Environment Court considered and weighed the impacts of the proposed Landfill in terms of tikanga values as applied by Ngāti Whātua and identified that in the absence of further mitigation and enhancement, granting consents results in significant adverse effects to Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei and Te Uri o Hau.[123] They also acknowledged that the risk of leachate escape while assessed as low probability, if it occurs the impact will be high on them.[124] The Court also identified the impacts of the Landfill on the relationship of Ngāti Whātua with their taonga, as well as the effect of the proposal on the Hōteo,

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123 Environment Court interim decision, above n 1, at [485] and [832].
124 At [836]

Kaipara and Papatūānuku as entities in their own right.[125] This part of the evaluation, as far as the Court was reasonably able to do, largely conforms to step one of *Ngāti Maru* in terms of identifying the tikanga engaged by the proposed activity.[126] However, in signalling its tentative approval for the proposal, it is evident that the Court was satisfied that its obligations to Ngāti Whātua under the RMA, as informed by the relevant statutory instruments could still be discharged by the grant of consent, though on a tentative basis pending the finalisation of effects management measures. The Court's commitment to a standard of no material harm to the NPS-FM protected inland wetlands and rivers, is plainly key to that assessment. Significantly in this respect the Court held that the mauri of freshwater may be enhanced. In so doing the Court appears to have undertaken the last two *Ngāti Maru* steps, though obviously contrary to the outcome sought by Ngāti Whātua.

[191] The central remaining issue then is whether the Environment Court was correct to reach this conclusion while at the same time finding that Ngāti Whātua's tikanga ā-iwi had been breached. This brings into focus the directions in Part 2 and the corresponding provisions of applicable planning instruments. In this regard, I accept that it is intuitively difficult to reconcile the clear findings of tikanga breach (involving among other things derogation of Ngāti Whātua mana, kaitiakitanga and the actual and potentially irremediable violation of mana, mauri and tapu of Papatūānuku, the Hōteo and the Kaipara Harbour) with the:

(a) obligation to, among other things, recognise and provide for their relationship with their taonga — especially the Hōteo and the Kaipara Harbour.

(b) regional policies at B6 and E3 of the AUP that require recognition of mana whenua tikanga and avoidance of significant adverse effects on mauri and mana whenua values.

[192] However, these are complex polycentric evaluative matters, requiring careful review of divergent tikanga ā-iwi and the full spectrum of evidence of environmental

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125 See my summary above at [88].
126 I deal with the mana whenua aspect above at [146]–[163].

effects, in light of the full suite of relevant objectives and policies. The evaluation is especially complex given that proof of tikanga breach and corresponding effects on Ngāti Whātua will in many instances be dependent on non-tikanga based findings about those effects. Similarly, findings of relative strength of relationship, including the intimacy finding, are evaluative matters for the Court, as is their assessment of the significance of Ngāti Manuhiri's change of position in terms of their assessment of the gravity of the effects of the Landfill on the site. Ordinarily those complex evaluations are not amenable to challenge on appeal to this Court on a point of law. In this regard this case is not like *Tauranga Environmental* where the there was no dispute as to the applicable tikanga Māori or tikanga ā-iwi or the type, nature and scale of the effects on the affected iwi and hapū.

[193] Furthermore, and significantly, the Environment Court has not yet decided to grant the consent. Most relevantly, it is not yet satisfied that the relevant effects and risk of effects on the environment will be adequately mitigated by the proposed environmental management package.[127] To that extent any consideration of a claimed breach of a tikanga bottom line is premature. I repeat here the most salient conclusions reached by the Court:

> [926] We have concluded that the effects in several categories are significant without further amendment to the proposal and conditions. We are assuming these changes are possible, as the matter is finely balanced. We acknowledge the AUP connection between objectives and policies, and the effects. Accordingly, whether the application is contrary to the AUP depends on whether particular effects can be satisfactorily addressed.
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> …
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> [928] It is clear that the Court's proposed overall outcome has been critical to our reaching a conclusion that a consent might be granted with the significant changes that we have outlined.
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> …
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> [931] In considering this matter broadly within Part 2 we are satisfied that an amended application and amended conditions in the broad terms we have described could meet the purpose of the Act and satisfy us that there would be no adverse discharge effects from the landfill and that it would otherwise achieve a net biodiversity gain on the Site. To be satisfied of this we would need to see the improved design and also more certain conditions and management plans.

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[127] See discussion above at [127].

[194] Given these clearly qualified and incomplete findings made by the Court, I am simply not in a position to find a material error of law.

[195] However, to assist the parties I make the following comments. There is credible evidence that the Landfill will violate Ngāti Whātua tikanga in such a way that they consider is incapable of mitigation or remedy. That evidence refers, in essence, to the derogation of the mauri of Papatūānuku by the introduction of a bladder of paru, and of the Hōteo and the Kaipara caused by the presence of such large scale paru upstream of those taonga. This derogation will be manifest and exacerbated by the potential loss of connection by the mana whenua to the Hōteo and Kaipara including as a source of kai. The inherent risks of failure and discharge are also unacceptable. On its face, this triggers corresponding AUP standards requiring recognition of mana and avoidance of significant adverse effects on mauri and mana whenua values relating to freshwater resources.

[196] Balanced against this is equally credible evidence that with the implementation of the environmental management package, the biophysical state of the environs, the Hōteo and Kaipara Harbour will be enhanced over time, with corresponding enhancement of the mana and mauri of freshwater, including as a source of kai. There is then the opportunity to restore the relationship of Ngāti Manuhiri with their whenua via the transfer of the site lands to them, and by enhancing their ability to discharge their kaitiaki responsibilities. Declining consent would therefore also perpetuate an ongoing hara or wrongdoing in terms of the: ongoing degradation of the Hōteo and Kaipara; ongoing derogation from their mana and mauri; and ongoing loss of whenua connection by Ngāti Manuhiri to the site and land around it. This triggers the corresponding AUP policies especially in terms of recognition of their mana and their mana whenua values, including obligations of kaitiakitanga and whanaungatanga. Both positions therefore might be described as identifying engagement with important tikanga Māori, tikanga ā-iwi and mana whenua values or standards as well as corresponding AUP policies.

[197] The Environment Court has the difficult task of reconciling these positions with its statutory obligations at ss 6(e), 7 and 8 when it comes to make its final decision. I am not prepared to offer a view as to where the end point should be. But it

is important to remember that these provisions cannot operate as an automatic veto — either in favour of or against the grant of the consent.[128] This is because unless applicable statutory provisions and policies very clearly direct otherwise,[129] the statutory scheme as a whole envisages a balancing of important (often conflicting) values.[130] Importantly, this approach is consistent with the operation of tikanga Māori principles of mauri, utu and ea, and what the Law Commission described as the prescriptive demand to seek a state of balance in all things.[131] And in my tentative view the Court does not have the luxury of simply picking a clear winner in this case based on an alleged bottom line. The strong directions at ss 6(e), 7(a) and 8 do not permit this when there are genuine and credible competing claims for recognition and the potential for significant adverse effects on mauri and mana whenua values whatever the outcome. On the contrary, the Court must do the best it can to recognise and provide for all legitimate mana whenua interests in accordance with tikanga Māori.

[198] Turning then to the contention that the B6 and E3 objectives and policies lay down cultural bottom lines such that because significant adverse effects on Ngāti Whātua mana whenua values must be avoided, the consent must be declined. The key "avoid" policy is E3.3.(5) which I repeat here for ease of reference:

> (5) Avoid significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities in, on, under or over the beds of lakes, rivers, streams or wetlands on:
>
> (a) the mauri of the freshwater environment; and
>
> (b) Mana Whenua values in relation to the freshwater environment.

[199] This policy (and other similar policies) sit alongside B6 objectives and policies that seek to "recognise" mana whenua, "enhance" mana whenua relationships and "protect" mana whenua heritage. Including:

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128 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 at 307. Mr Enright expressly eschewed the opportunity to argue that this is not good law, noting its binding effect on this Court.

129 As per *King Salmon,* above n 60.

130 *Watercare,* above n 128. See also by way of example discussion in *Port of Otago,* above n 6, when dealing with conflicting policies at [78]-[79]. This is not an overall judgment approach as per [81].

131 *He Poutama,* above n 115, at 62–71.

B6.2. Recognition of Treaty of Waitangi/Te Tiriti o Waitangi partnerships and participation

B6.2.1. Objectives

(1) The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are recognised and provided for in the sustainable management of natural and physical resources including ancestral lands, water, air, coastal sites, wāhi tapu and other taonga.

(2) The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are recognised through Mana Whenua participation in resource management processes.

(3) The relationship of Mana Whenua with Treaty Settlement Land is provided for, recognising all of the following:

(a) Treaty settlements provide redress for the grievances arising from the breaches of the principles of Te Tiriti o Waitangi by the Crown;

(b) the historical circumstances associated with the loss of land by Mana Whenua and resulting inability to provide for Mana Whenua well-being;

(c) the importance of cultural redress lands and interests to Mana Whenua identity, integrity, and rangatiratanga; and

(d) the limited extent of commercial redress land available to provide for the economic well-being of Mana Whenua.

(4) The development and use of Treaty Settlement Land is enabled in ways that give effect to the outcomes of Treaty settlements recognising that:

(a) cultural redress is intended to meet the cultural interests of Mana Whenua; and

(b) commercial redress is intended to contribute to the social and economic development of Mana Whenua

B6.2.2. Policies

(1) Provide opportunities for Mana Whenua to actively participate in the sustainable management of natural and physical resources including ancestral lands, water, sites, wāhi tapu and other taonga in a way that does all of the following:

(a) recognises the role of Mana Whenua as kaitiaki and provides for the practical expression of kaitiakitanga;

…

(e) recognises Mana Whenua as specialists in the tikanga of their hapū or

…

(g) recognises and provides for mātauranga and tikanga; and…

B6.3 Recognising Mana Whenua values

B6.3.1. Objectives

(1) Mana Whenua values, mātauranga and tikanga are properly reflected and accorded sufficient weight in resource management decision-making.

(2) The mauri of, and the relationship of Mana Whenua with, natural and physical resources including freshwater, geothermal resources, land, air and coastal resources are enhanced overall.

(3) The relationship of Mana Whenua and their customs and traditions with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, natural resources or historic heritage values is recognised and provided for.

…

B6.5. Protection of Mana Whenua cultural heritage

B6.5.1. Objectives

(1) The tangible and intangible values of Mana Whenua cultural heritage are identified, protected and enhanced.

(2) The relationship of Mana Whenua with their cultural heritage is provided for.

(3) The association of Mana Whenua cultural, spiritual and historical values with local history and whakapapa is recognised, protected and enhanced.

(4) The knowledge base of Mana Whenua cultural heritage in Auckland continues to be developed, primarily through partnerships between Mana Whenua and the Auckland Council, giving priority to areas where there is a higher level of threat to the loss or degradation of Mana Whenua cultural heritage.

(5) Mana Whenua cultural heritage and related sensitive information and resource management approaches are recognised and provided for in resource management processes.

[200] The meaning of these objectives and policies is to be ascertained from the text and in light of its purpose and context. As the Supreme Court said in *Port Otago*:[132]

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[132] Above n 6, at [60].

> This means that close attention to the context within which the policies operate, or are intended to operate and their purpose will be important in interpreting the policies, This includes the context of the instrument as a whole, including the objectives … but also the wider context whereby the policies are considered against the background of the relevant circumstances in which they are intended to operate.

[201] The Supreme Court also explained that a policy may be expressed in such a way that a decision maker has no option but to follow it. The Court explained in the context of the NZCPS, "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of", meaning that it provided "something in the nature of the bottom line".[133] In addition, the Court said in respect of the avoidance policies in the NZCPS, they must be interpreted in light of what is sought to be protected, including relevant values and areas, and when considering any development, whether measures can be put in place to avoid material harm to those values and areas.

[202] The Supreme Court also examined whether policies "recognising" a value was directive. In that case the juxtaposition of the word "requires" with "recognise" meant that the decision maker was directed to recognise, in that case the port network. There is no similar juxtaposition of the words "required" with "recognise" in this case, but the B6 objectives and policies are prefaced with the following observation:

> Development and Expansion of Auckland has negatively affected Mana Whenua taonga and the customary rights and practices of Mana Whenua within their ancestral rohe. Mana whenua participation in resource management decision making and the integration of mātauranga Māori and tikanga into resource management are of **paramount importance** to ensure a sustainable future for Mana Whenua and for Auckland as a whole.

[203] Given this, while not directive in an inviolable sense, it seems highly likely that the drafters envisaged that the "recognition" policies were strong directions to be followed. Furthermore, treating them in this way accords with the Council's Part 2 ss 6(e), 7 and 8 obligations. That does not mean recognition must occur in a particular form or way, and it should be noted that the recognition is addressed to specific listed matters. But, nevertheless, recognition must at least be concordant with the paramount importance of the integration of mātauranga Māori and tikanga into decision making.

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133 Above n 6, at [64].

[204] The Supreme Court in the *East West Link* case, dealing with infrastructure in sensitive coastal environments, also had the opportunity to examine some of the "avoid" policies of the AUP.[134] I return to examine the significance of this decision below when dealing with Forest and Bird's challenge to the Environment Court's approach to "avoid". For present purposes the following propositions may be gleaned from the judgment of the majority in that case and though dealing with a set of different policies resonate in this specific context:

(a) Generally directive policies, such as policies requiring particular environmental impacts to be avoided, have greater potency than other non or less directive policies.[135]

(b) But the AUP is a complex planning instrument that envisages provision for public infrastructure as a public good and moderates the strict application of the directive policies through the identification of specified exceptions for such infrastructure where for example there is no other practicable alternative.[136]

(c) There must be close scrutiny of any proposal that contravenes the avoid policy, it must be necessary rather than desirable, the effects to be avoided must be mitigated to a standard that corresponds to the significance of the environment and the benefits of the solution must plainly justify the environmental cost of granting consent.[137]

[205] Also relevantly, the majority affirmed the approach taken in *RJ Davidson Family Trust*, to the effect that the subordination of s 104 to Part 2 could not be invoked for the purpose of subverting a clearly relevant policy restriction.[138] The rationale for this is that the policies (including policies allowing exceptions) themselves are the embodiment of the Part 2 requirements.[139]

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134 Above n 7.
135 Above n 7, at [72].
136 Above n 7, at [79]–[89].
137 Above n 7, at [91].
138 Above n 7, at [106]–[108]; citing *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316; [2018] 3 NZLR 283 at [71].
139 Above n 7, at [106].

[206] Finally in terms of their survey of Supreme Court considerations of "avoid" policies, both the majority and Glazebrook J acknowledged the possibility that a conflict with an avoid policy could arise on the facts, such that a structural balancing analysis would need to apply to the resolution of the conflict.[140]

[207] Returning to policy E3.3(5), on a plain reading this is a directive policy, the object of which is to not allow significant adverse effects on the listed matters. The Environment Court identified this policy as a bottom line policy and observed that significant adverse effects on the mauri of the freshwater environment and mana whenua values are to be avoided.[141] The Court also found that with appropriate effects management conditions, the mauri of the fresh water environment may be improved.[142] While not entirely clear, it appears the Court has also reached the view that with appropriate mitigation and remediation, the effects on Ngāti Whātua's mana whenua values can be adequately mitigated through its no material harm approach to key environmental effects.

[208] However, the Court found that there has been and may be ongoing breach of the tikanga ā-iwi of Ngāti Whātua o Kaipara, their hapū and marae and of Ngāti Whātua Ōrākei and Te Uri O Hau.[143] As I have said intuitively, this finding is difficult to reconcile with Policy E3.3(5) as well as the Part 2 directions just mentioned. Even without Policy E3.3(5), a finding of breach of the tikanga ā-iwi and corresponding significant adverse impact on the mana whenua values of the Ngāti Whātua Collective is a strong reason favouring decline. But, where there are clearly conflicting mana whenua values in play, I am not persuaded Policy E3.3(5) is a "cultural bottom line" policy in the sense used in the trilogy of "bottom line" cases: *King Salmon*, *Port Otago* and *East West Link.*

[209] First, as I explain above at [146] any decision made must be reconciled with the strong statutory directions in Part 2 that demand recognition for *all* mana whenua values including those of Ngāti Manuhiri. It could not have been intended by the

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140 Above n 7, at [249] per Glazebrook J, at [125] per Winkelmann CJ, William Young, Ellen France and Williams JJ.
141 Environment Court interim decision, above n 1, at [242]–[243].
142 At [229]
143 At [485]

drafters of E3.3(5) to disenable altogether the ability of decision makers to recognise and provide for Ngāti Manuhiri's mana whenua values on a finding of breach of Ngāti Whātua tikanga ā-iwi. This is amplified by the fact that the "do nothing" option perpetuates a violation of Ngāti Manuhiri tikanga ā-iwi, namely the ongoing degradation of the Hōteo and the ongoing alienation of Ngāti Manuhiri from their whenua. Any genuine recognition of Māori relationships to their taonga does not permit total disregard for any iwi or hapū that has established mana whenua.

[210] Second, any decision made must also be reconciled with the objectives and policies at B6 that (for example) demand recognition of kaitiakitanga, tikanga and mātauranga of mana whenua.[144] If the finding that any tikanga breach must be avoided is treated as a cultural bottom line, Ngāti Manuhiri's kaitiakitanga, tikanga and mātauranga must effectively be disregarded. The problem equally applies in reverse to the extent that recognition of Ngāti Manuhiri's mana whenua values are treated as a "cultural bottom line" as Ngāti Whātua's mana whenua values would thereby be sidelined.

[211] Third, the "bottom line" cases all involve a largely binary choice between policies seeking to "avoid" specified effects and enabling policies. This case is nothing like that insofar as concerns tikanga and mana whenua issues. The assessment is inherently polycentric, involving multiple intersecting values and standards, including tikanga ā-iwi values and standards, the resolution of which could result in significant consequences for the affected iwi and hapū. In this context, the notion of a tikanga or cultural "bottom line" is misconceived.

[212] I am therefore not persuaded that the E3.3(5) "avoid" policy should be construed as institutionalising within the RMA framework inviolable "cultural bottom lines" where the effect is to emasculate the mana of any iwi or hapū. This is not about Part 2 matters subverting policy. It is about ensuring an interpretation that does not do violence to the tikanga Māori or tikanga ā-iwi principles and mana whenua values that the AUP policies and Part 2 are aimed at protecting. Rather, the decision maker must endeavour to reconcile their conflicting positions as best as they are able. In this

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144 Including B6.3.2(6) that "require(s)" resource management decisions to "have particular regard" to potential impacts on, among other things the exercise of "kaitiakitanga" and "mauri".

regard, the structured analysis described in the *Port Otago* case may be of assistance albeit within a tikanga analytical framework.[145] In the present context where there are genuine conflicting tikanga ā-iwi positions, with corresponding significant impacts on the affected iwi in the event of breach, this involves the following:

(a) The appropriate balance must depend on the circumstances, considered against the values inherent in the tikanga ā-iwi of the affected mana whenua.

(b) All relevant factors must be considered in the particular factual circumstances, including assessing whose tikanga ā-iwi should prevail, or the extent they should prevail in the particular circumstances of the case.

(c) The decision makers will consider the importance, in tikanga ā-iwi terms, of allowing the proposed activity, including the mana and mauri enhancing elements of the proposal, and conversely the importance and the intrinsic worth of the adversely affected mana whenua values.

[213] This links to the emphasis placed by the parties on strength of relationship, and as set out in *Ngāti Maru*, that may well be a determinative factor in accordance with tikanga Māori. But I emphasise again, that where other iwi and hapū can credibly and reliably show that a decision will (for example) seriously derogate from their whakapapa and whanaungatanga based connection to place, and thus mauri, those are still important matters that must be weighed. As I have said above, in my view the Environment Court has tried to do this by striving to mitigate the effects on Ngāti Whātua's mana whenua values by taking a no material harm approach to all off site discharges and reclamation effects and by reserving its position on a range of matters designed to enhance the ecology, mana and mauri of the environment. Ultimately, the outcome must avoid a significant adverse effect on mana whenua values in accordance with E3.3(5), or if that cannot be achieved, must be clearly justified by reference to underlying tikanga.

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145 Above n 6.

[214] All of this brings us back to the central importance of the cogency of the pūkenga evidence. The pūkenga must clearly specify the tikanga ā-iwi standard, its whakapapa (provenance or source) with supporting pūrākau, its significance, why and how it will be breached, the assumptions upon which that opinion is given, and opportunities, if any, for avoidance, mitigation or remediation. It is then the task of the Environment Court to evaluate whether, in light of that evidence, there will be an unavoidable or irremediable breach of tikanga Māori or tikanga ā-iwi standards with any corresponding adverse effects. If so, these must be strong factors to be weighed in determining whether consent can or should be granted, but always having regard also to the tikanga values and standards of other affected iwi and hapū, as well as the environmental benefits, in tikanga terms, of the proposed activity.

[215] In the result, for the foregoing reasons, I also dismiss this ground of appeal. Having said that, the Court will need to clearly articulate in its final decision how cl E3.3(5) has been satisfied and the respective tikanga ā-iwi positions have been reconciled.

PART D – SITE SELECTION

[216] The fourth issue concerns whether the Environment Court erred as to the relevance of site selection by WM. The relevant passage of the judgement is:[146]

> [50] We should note that the Court has concerns as to how this Site, in particular, was chosen for the works, and whether the Site is appropriate. This, of course, feeds into the question of avoidance of adverse effects, which will discuss later, given the clear and recognised adverse effects on threatened species and habitats. However, as Mr Matheson submitted and we accept, the appropriateness of the site is not determinative of the consent outcome.

[217] Mr Enright submits (in short) that this finding is flawed insofar as the Court found that appropriateness of the site is not determinative of the consent outcome even though there was breach of Ngāti Whātua's tikanga during the site selection process and the policies of the AUP direct that adverse effects from new landfills must be avoided unless there is no practical alternative location or functional need for it.

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146 Environment Court interim decision, above n 1.

[218] He is supported in this submission by Mr Anderson who highlights the observations in *King Salmon* which, in short, emphasise that when dealing with sensitive sites almost inevitably consideration of alternative localities may be necessary.[147] He refers also to *Tauranga Environmental* for the proposition that if the assessment of alternatives is not adequate the application must be declined.[148] Mr Anderson highlights that the Court not only criticised the approach to alternatives undertaken by WM, but did not make any clear findings about alternatives, even though they are one of the factors identified in the Wetland E3 policy for consideration.

Assessment

[219] I am able to deal with this briefly. In agreement with Mr Matheson's submissions, a *process* failure per se to consider alternatives will not ordinarily provide a basis for decline. There is nothing in the gateway provisions of the RMA that provide for decline on that specific basis, and I was not taken to any provisions of the planning instruments that might justify such an approach.

[220] In terms of substantive failure to provide a robust assessment of alternatives to satisfy any applicable policy requirements, this may present a problem for an applicant where the proposed activity will have significant adverse effects by virtue of its location or method. There are numerous authorities for this basic proposition.[149] But in this case, the issue is somewhat moot given the approach ultimately taken by the Court, namely, to avoid material harm in respect of those policies where alternatives are required and to also require enhancement of mauri of freshwater. That on the face of the decision as presently framed may be difficult to maintain unless the significant adverse effects on Ngāti Whātua, Te Uri o Hau, and Ngāti Whātua Ōrākei can be adequately mitigated. And, as I elaborate below, if the Court is ultimately unable to find that the proposal will avoid material harm and enhance mauri then the Court will need to show how the proposal can satisfy the requirements of the exceptions pathway (see [270]–[288]) and as part of that address the alternative sites

147 Above n 60, at [170].
148 Above n 112, at [143].
149 An early well known example is *Te Rūnanga o Taumarere v Northland Regional Council* [1996] NZRMA 77.

issue. But for present purposes I am not satisfied the Court has erred in its approach to alternatives.

PART E — FRESHWATER

[221] Both Te Rūnanga and Forest and Bird alleged fundamental errors relating to the Court's treatment of freshwater objectives and policies. Te Rūnanga claims that the Environment Court failed to correctly apply the single objective of NPS-FM 2020.

[222] Mr Anderson and Ms Downing for Forest and Bird further submit that the Environment Court fundamentally erred in the way it approached the interpretation of the key planning instruments by:

(a) Adopting a "pragmatic and proportionate" approach to the interpretation and application of key "avoid" policies (Error one).

(b) Failing to apply the NPSFM and policies a E3.3(17) (Rivers policy) and E3.3(18) (Wetlands policy) as directive and merely treating them as one policy among others and judged against the AUP as a whole (Error two).[150]

(c) Failing to apply the proper interpretation of the objectives and policies of Chapter 13 AUP by limiting their application to discharge of contaminants and not for example noise and ecological effects (Error three).[151]

(d) Requiring "material harm" from adverse effects of discharges when the E3 policies simply speak of avoiding adverse effects (Error four).

(e) Removing consideration of Policies E13.3(1) and E13.3(4) and the River policy from a s 104D(1)(b) assessment to a s 104 assessment (Error five).

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150 Environment Court interim decision, above n 1, at [263]-[264].
151 Environment Court interim decision, above n 1, at [282].

(f) Not undertaking a careful evaluation of the River Policy when it said such an evaluation was necessary under s 104(1) (Error 6).

The Objective error

[223] Mr Enright submits that while the Court refers to the NPS-FM 2020 Objective, no substantive consideration was given to its application to the proposed Landfill. Section 104 of the RMA was amended on 25 October 2024 to the effect that a "consent authority must not have regard to cls 1.3(5) or 2.1 of the NPS-FM 2020 (which relates to the hierarchy of obligations in the NPS-FM 202). I raised this amendment with the parties. All agreed it did not apply to the present appeal. I proceed on that basis but this judgment should not be treated as determinative of whether this amendment applies to existing proceedings.

[224] To assist I repeat the Objective here for ease of reference:

> **2.1 Objective**
>
> (1) The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:
>
> (a) first, the health and well-being of water bodies and freshwater ecosystems
>
> (b) second, the health needs of people (such as drinking water)
>
> (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[225] Mr Enright submits that the Objective clearly requires prioritisation first for the "health and wellbeing of water bodies and freshwater ecosystems", yet nowhere in the judgment is this referred to. This is another issue considered in considerable depth when dealing with the claims by Forest and Bird in respect of the Court's alleged failure to properly apply the freshwater objectives and policies of NPS-FM 2020 and the AUP to the assessment. I will address the substance of Te Rūnanga's complaint there. But by way of preliminary observation, I do not consider that Mr Enright has accurately characterised the judgment. The Environment Court interim decision expends considerable energy devoted to assessing the health of the freshwater systems,

exemplified by the repeated attention to the mauri of freshwater. In this way the Environment Court has given vent to the concept of Te Mana o te Wai which is defined by the NPS-FM 2020 as follows:

> **1.3 Fundamental concept – Te Mana o te Wai**
>
> *Concept*
>
> (1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.
>
> (2) Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.

[226] Relevantly the Court correctly observes:[152]

> [152] The NPS-FM 2020 and as amended in 2023 seek to restore and preserve the balance between the water, the wider environment and the community. Te Mana o te Wai is all about restoring and preserving that balance. It seeks first to protect and then restore the mauri of waters.

[227] I therefore see no obvious error of the kind claimed by Te Rūnanga in relation to the Courts application of the NPS-FM Objective on the face of the judgment. I would also add, as Ms Urlich submitted for Ngāti Manuhiri, there is no final decision as to the effects of the proposal on freshwater health and wellbeing. This claimed error is therefore premature.

Error one — pragmatic and proportionate

[228] Dealing first with the "pragmatic and proportionate" approach, the Court said:

> [51] The tensions raised in this case are not new. They lie at the heart of the Act's purpose in seeking to enable use of natural and physical resources while avoiding, remedying or mitigating adverse effects. This has often typified as a bottom line approach, however consideration in this and many other cases leads us to suggest that a more proportionate response is anticipated in terms of the Act, in that the use of the word while envisages that use and development may not necessarily be anathema to the other values protect and supported under the Act.

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[152] This finding is repeated in the Environment Court interim decision, above n 1, at [863].

> [52] The way in which that proportionate view is expressed is both in the wording of the various statutory and other provisions that might apply in a particular case, but in the way the overall benefits might be realised.

[229] This approach is said to cut across the principles laid down in *King Salmon*, *Port Otago*, and *East West Link* insofar as it dilutes the normative force of various directive policies or otherwise fails to correctly interpret and apply the policy framework as it applies to the freshwater environment. Furthermore, Mr Anderson submits that this Court in the 2017 *Bay of Plenty Regional Council* decision expressly deprecated a "proportionate" approach to avoid policies,[153] and further that the Environment Court in adopting that approach in this case thereby failed to carry out a properly disciplined approach to the interpretation and application of "avoid" policies as required by *East West Link*.

[230] The following examples are highlighted:

(a) The Court said "pragmatism and proportionality" needed to be applied to the mid-process change in legislation and associated policy framework, so that directive policies introduced after the application process had commenced were merely relevant factors rather than binding considerations.[154]

(b) The Court said a "pragmatic and proportionate" interpretation is to be applied to Policies E13.3(1) and (4) that seek respectively to "avoid" significant adverse effects and remedy and mitigate other adverse effects of landfills on lakes, rivers, streams, wetlands, groundwater and other coastal marine area; and to "avoid adverse effects from new landfills".[155]

(c) The Court said the application does not advance policy E3.3(17) that directs that loss of wetlands is "avoided", instead viewing the loss and improvement of other wetlands "holistically."[156]

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153 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 at [106].
154 Environment Court interim decision, above n 1, at [165].
155 Environment Court interim decision, above n 1, at [282].
156 Environment Court interim decision, above n 1, at [260].

(d) The Court adopted a net frog population increase approach, and that this requires some means to demonstrate on a "pragmatic and proportionate" basis that the taonga species are demonstrably in a better situation after the works than before.[157]

[231] Mr Matheson submits that the Court when using the phrase "pragmatic and proportionate" did not reflect any inappropriate overall judgment or blender approach to the application of objectives and policies. Rather, the Court used its expertise and contextual factors to assess whether as a matter of fact, and with regard to specific categories of effects, there was an adverse effect that triggered the relevant policies and adopted a proportionate approach rather than an absolutist approach to that assessment.

Assessment

[232] To begin, the Environment Court expressly rejected the "broad overall judgment" approach at the outset of its interim decision and I have no reason to think that it inadvertently engaged in that or a similar "blender" approach in the balance of its decision. In this regard it is too easy to highlight a handful of paragraphs in a judgment of more than 900 to cast it in a particular negative light. The above lengthy summary of the decision should give a sense of the depth, the analysis and the care taken. It thus mischaracterises the interim decision to suggest that the Court has simply applied a broadbrush blender approach when it is clear that the Court was careful to analyse the meaning and effect of individual policies having regard to the words used in their context (refer to the summary above at [97]-[110]). Rather, overall the Court appears to be using these ideas to ensure fairness and appropriate balance having regard to the policy matrix as a whole, and so that applicable policies are given practical effect and in a way that is commensurate with their underlying purpose.

[233] As I have explained above, in *Port of Otago* there is recognition that it may be necessary to find a structured balance between competing "directive" policies. The structured balancing in that case directly engaged notions of pragmatism and proportionality in the sense that the policies must be considered as a whole, be given

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157 Environment Court interim decision, above n 1, at [824].

practical effect and applied in a way that is proportionate to (in the sense of commensurate with) their objectives. So in reconciling the directive avoid and directive enabling policies the Court said:[158]

(a) The work was required (not merely desirable) for the safe and efficient operation of the ports;

(b) If required, all options for dealing with safety needed to be evaluated, and *where possible* the option that did not breach the avoidance policy will be chosen; and

(c) Where a breach of an avoidance policy was unable to be averted, any breach was *only to the extent necessary required* to provide for the safe and efficient operation of the ports.

[234] Similarly, in *East West Link*, the majority effectively deployed a pragmatic and proportionate approach to reconciliation of important conflicting values, noting that the AUP policy matrix must be considered as a whole, there must be close scrutiny of any proposal that contravenes the avoid policy, it must be necessary rather than desirable, the effects to be avoided must be mitigated to a standard that corresponds to the significance of the environment and the benefits of the solution plainly justify the environmental cost of granting consent.[159]

[235] Furthermore, this case is not like the *Bay of Plenty* case. In that case the High Court is critical of the fact that the Environment Court did not, among other things, canvas the relevant objectives and policies in any depth. That cannot be said here. This Court plainly grappled with the "tension between development and the objectives to preserve a quality environment".[160] It resolved that tension fully cognisant of the "avoid" character of the Chapter E policies.

[236] So the problem is not so much with ideas of "pragmatism and proportionality" per se, but with their application in the individual case. I turn then to examine the areas of concern specifically identified by Forest and Bird.

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158 Above n 6, at [76], [82] and [83].
159 Above n 7, at [91].
160 Environment Court interim decision, above n 1, at [863] H.

NPS-FM 2020 policies

[237] Dealing first with the Court's "pragmatic and proportionate" approach to the change in the E3 policies mid-application via the NPS-FM. For ease of reference, the key impugned passage is:

> [165] We conclude some pragmaticism and proportionality need to be applied to such a change in circumstances. Changes to legislation, and as a result policy frameworks, are occurring with some frequency. It is indeed unfair and unrealistic to determine a proposal solely against policies that did not exist at when the proposal was first notified. We accept that Waste Management has endeavoured to respond to that changed framework with various design changes to its proposal.

[238] It can be seen the concepts of pragmatism and proportionality are used here in reference to the inherent unfairness to WM of the evaluative criteria changing and that it is necessary to assess the significance of those policies alongside existing polices. For this reason it appears the Court identified "operational" need as a relevant consideration when assessing whether the proposed landfill was contrary to the objectives and policies of the AUP. But this is not an illustration of the Court taking a blender or otherwise inappropriate approach. In this regard, the word "solely" is important. The Court was clearly concerned to ensure that these policies were considered alongside the full library of relevant objectives and policies. I see nothing wrong with this approach, especially as it is also clear that the Court nevertheless recognised that the NPS-FM policies had to be applied. In this regard the immediately preceding paragraph is important:

> [164] We are sympathetic to the position of Waste Management, which finds itself buffeted by the winds of legislative change, but find that new policies must be considered alongside all other objectives and policies that apply to this proposal….

[239] Moreover, all of this aligns with the balancing methodology described in *Port Otago* and further developed in *East West Link*. I explain my reasoning on this below. I simply observe here that when construing the policies the overall context, including the balance of the plan, was important.

Policies E13 (1) and (4)

[240] This issue also raised as a separate point of appeal, Error three. I address it below at [302]–[308].

Policy E3.3(17), "holistically"

[241] The Court's treatment of this policy and its sister policy E3.3(18) is addressed below at [271]–[288]. The alleged failure to take a scrupulous approach is addressed in that context.

Frogs

[242] Mr Anderson submits that when considering how the pepeketua or Hochstetter's frogs (at risk declining) are affected by the project, the outcome to be achieved "must be a net population increase", albeit "this requires some means to demonstrate on a pragmatic and proportionate basis that the taonga species are demonstrably in a better situation after the works than before." I understand the complaint to be that the reference to pragmatic and proportionate potentially dilutes the requirement to "avoid" or otherwise properly mitigate or remediate the effects on pepeketua. But I do not read this passage in that way. To my mind, the Court, comprised of experts in the assessment of effects, is simply undertaking its task in a way that is realistic and corresponds to the goal to be achieved, namely a net gain in terms of the population of frogs. There is no evident dilution of the normative heft of the relevant protective policies.

Error two – failure to apply directive policies E3.3(17), E3.3(18) and E3.3(13)

[243] These three policies require avoidance of loss of extent of river and wetland and avoidance of reclamation unless specified circumstances apply. Mr Anderson and Ms Downing contend that the Court erred in three key ways when engaging with these policies:

(a) The Court wrongly gave the NPS-FM policies (E.3.3(17) and (18) less weight because they had been included after the application process had commenced.

(b) The Court adopted a "holistic" approach instead of the scrupulous approach demanded by *East West Link.*

(c) The Court misapplied the *Port of Otago* material harm approach to evaluate the significance of the "loss of extent" of river. (I address this aspect separately at Error four).

Lack of recognition of E3.3(17) and E3.3(18)

[244] As to the first issue, Mr Anderson for Forest and Bird and Mr Braggins for Fight the Tip submit that these policies should have been applied on their terms having been fully incorporated to the AUP in 2020. They emphasise:

(a) A regional plan must give effect to a national policy statement.[161]

(b) The policies were expressly mandated by the NPS-FM 2020 and incorporated pursuant to s 55(2) of the RMA.

(c) The RMA contains no transitional provisions preserving the criteria for assessment of applications for consent as at the date of the application.

(d) The principle against retrospectivity is not engaged because WM has no crystallised rights affected by the new policies..

(e) If it was intended that the policies did not apply to existing applications for consent, then transitional would have been expected.

(f) Leading authority affirms that the principle against retrospectivity does not logically apply in a resource management context, citing *Ireland* and *Art Deco*.[162]

[245] Mr Matheson rallies against this approach. He submits that applications are made on the basis of operative and proposed plans in existence as at the time of the

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161 Resource Management Act 1991, s 67(3)(a).
162 Referring to *Ireland v Auckland City Council* (1981) 8 NZTPA 96 (HC); and *Art Deco,* above n 4.

application, submissions are made on those applications and any decision is made on the application and having regard the principle against retrospectivity entrenched s 12 of the Legislation Act 2019 which states "Legislation does not have retrospective effect."

[246] He says this reflects the longstanding position of the common law, as expressed by the Court in *Phillips v Eyre*:[163]

> [retrospective legislation] is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, deal with future acts, and ought not to change the character of transactions carried on upon the faith of the then existing law.

[247] He also submits that the present case is not like *Ireland* or *Art Deco* as in both of those cases there could be no expectation of an outcome based on pre-existing law whereas by contrast here, WM had been involved in a pre-application and application process spanning 13 years by the time the policies were introduced. Significantly, if those policies are construed as Forest and Bird demands, WM cannot satisfy the criteria because the application was not made by reference to the exceptions pathway as now required by those policies. More specifically, WM cannot realistically satisfy the requirement to show there are no alternative locations and the Court has found that there is no functional need to locate in the Valley, while accepting there was a operational need to do so.[164] The effect of this would be to render nugatory more than 13 years of engagement in the RMA process.

Assessment

[248] I propose to address the issue of retrospectivity in some length given the attention given to it by counsel. But to my mind this is an issue without a cause. On my reading of the Environment Court interim decision, the Court had regard to these policies as if they were fully incorporated. As already noted above the Court expressly proceeded on the basis that the new policies must be considered alongside the other relevant objectives and policies.[165] The Court also said "[t]he changed

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163 *Phillips v Eyre* (1870) LR 6 QB 1 at 23.
164 Environment Court interim decision, above n 1, at [862].
165 At [165].

legislative environment is part of the context in which we must assess the AUP's objectives and policies."[166]

[249] It goes onto say that "it informs rather than dictates the outcome of the assessment under s 104D(1)(b) looking at objectives and policies of the AUP." But that is no more than saying the new provisions are relevant considerations and not determinative per se. This is an unremarkable proposition for the purpose of the s 104D(1)(b) evaluation, namely whether "the application is for an activity that will not be contrary to the objectives and policies of a relevant plan". This basic point was made by Williams J, speaking for the majority in *East West Link*:[167]

> …the relevant policies must be read "as a whole" in order to get the true intent of the drafter. This means that internal relationships between the policies D9.3 [significant indigenous biodiversity] and their connection, in turn, with related policies such as F2 [coastal reclamation] and E26 [Infrastructure] must be understood.

[250] As Williams J also says:

> [80] That does not mean all objectives can simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened. Rather, attention must be paid to relevant objectives and policies both on their own terms and as they relate to one another in the overall policy statement or plan.

[251] On my reading of the judgment, that is what the Environment Court has done.

[252] Turning to the issue of retrospectivity, it is helpful to first set out the legislative framework as it relates to incorporation of the policies as required by a National Policy Statement (NPS) as well as the key provisions of NPS-FM 2020 and the corresponding AUP policies.

[253] Section 45(1) of the RMA states the purpose of national policy statements as follows:

> (1) The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.

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166 At [166].
167 Above n 7, at [63].

[254] Section 55 then provides that a local authority "must" amend its planning instruments to include specific objective and policies of the NPS, as occurred in this case.

[255] NPS-FM 2020 provides:

(a) A fundamental concept – Te Mana o te Wai – noted above at [225]

(b) A framework of principles relating to the roles of tangata whenua, including mana whakahaere, kaitiakitanga, manaakitanga, governance, stewardship and care and respect.[168]

(c) A hierarchy of obligations that prioritises:

(i) First, the health and wellbeing of water bodies and freshwater systems.

(ii) Second, the health needs of people (such as drinking water).

(iii) Third, the ability of people and communities to provide for their social, economic and cultural wellbeing, now and into the future.

(d) The Objective: see [224] above.

(e) The following policies:

2.2 Policies

Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.

Policy 2: Tangata whenua are actively involved in freshwater management (including decision making processes), and Māori freshwater values are identified and provided for.

[168] Clauses 1.3(3) and (4).

Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.

Policy 4: Freshwater is managed as part of New Zealand's integrated response to climate change.

Policy 5: Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.

Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

Policy 7: The loss of river extent and values is avoided to the extent practicable.

Policy 8: The significant values of outstanding water bodies are protected.

Policy 9: The habitats of indigenous freshwater species are protected.

Policy 10: The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9.

Policy 11: Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.

Policy 12: The national target (as set out in Appendix 3) for water quality improvement is achieved.

Policy 13: The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.

Policy 14: Information (including monitoring data) about the state of water bodies and freshwater ecosystems, and the challenges to their health and well-being, is regularly reported on and published.

Policy 15: Communities are enabled to provide for their social, economic, and cultural wellbeing in a way that is consistent with this National Policy Statement.

(f) Incorporation of (most relevantly to this case) of policies relating to wetlands and rivers into the AUP, namely policies E3.3(17) and (18).

[256] Those policies (relevantly) state:

E3.3(17)

Natural inland wetlands

The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted except were:

…

(f) the regional council is satisfied that:

(i) the activity is necessary for the purposes of constructing or operating a new or existing landfill or cleanfill area; and

(ii) the landfill and clean fill area:

- will provide significant national or regional benefits; or
- is required to support urban development as referred to in paragraph (c); or
- is required to support the extraction of aggregates as referred to in paragraph (d); or
- is required to support the extraction of minerals as referred to in paragraph (e); and

(iii) there is no practical alternative location in the region, or every other practical alternative location in the region would have equal or greater adverse effects on a natural inland wetland; and

(iv) the effects of the activity will be managed through applying the effects management hierarchy.

E3.3(18)

Rivers

The loss of river extent and values is avoided, unless the council is satisfied that:

(a) that there is a functional need for the activity in that location; and

(b) The effects of the activity are managed by applying the effects management hierarchy.

[257] In addition, clauses 3.22(3) and (4) of the NPS-FM states that a regional council "must make or change its regional plan to ensure that an application" for consent "is not granted unless" among other things "the applicant has demonstrated how each step of the effects management hierarchy will be applied to any loss of extent or values of the wetland" and "any grant of consent is subject to … conditions that apply the effects management hierarchy". Under cl 4.1 a local authority is also obliged to give effect to the NPS as soon as reasonably practicable.

[258] NPS-FM defines:

> **effects management hierarchy**, in relation to natural inland wetlands and rivers, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) that requires that:
>
> (a) adverse effects are avoided where practicable; then
>
> (b) where adverse effects cannot be avoided, they are minimised where practicable; then
>
> (c) where adverse effects cannot be minimised, they are remedied where practicable; then
>
> (d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; then
>
> (e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; then
>
> (f) if aquatic compensation is not appropriate, the activity itself is avoided
>
> **functional need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment
>
> **loss of value**, in relation to a natural inland wetland or river, means the wetland or river is less
>
> (a) any value identified for it under the NOF process
>
> (b) any of the following values, whether or not they are identified under the NOF process:
>
> (i) ecosystem health
>
> (ii) indigenous biodiversity
>
> (iii) hydrological functioning
>
> (iv) Māori freshwater values
>
> (v) amenity values
>
> **restoration,** in relation to a natural inland wetland, means active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its ecosystem health, indigenous biodiversity, or hydrological functioning
>
> For the purpose of the definition of **effects management hierarchy**:

> **aquatic compensation** means a conservation outcome resulting from actions that are intended to compensate for any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, remediation, and aquatic offset measures have been sequentially applied
>
> **aquatic offset** means a measurable conservation outcome resulting from actions that are intended to:
>
> (a) redress any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, and remediation, measures have been sequentially applied; and
>
> (b) achieve no net loss, and preferably a net gain, in the extent and values of the wetland or river, where:
>
> (i) **no net loss** means that the measurable positive effects of actions match any loss of extent or values over space and time, taking into account the type and location of the wetland or river; and
>
> (ii) **net gain** means that the measurable positive effects of actions exceed the point of no net loss.

[259] With this context in mind, I turn to evaluate whether policies E3.3(17) and (18) were incorporated with full effect from 3 September 2020, being the commencement date on which NPS-FM 2020 came into force. For the reasons that now follow, and not without some considerable disquiet, I have come to the conclusion that it must.

[260] As the Court of Appeal stated in *Foodstuffs Auckland Limited v Commerce Commission*:[169]

> [20] We turn now to the wider context and to principle. As in this case, counsel and the courts will resort to those matters and relevant authority when faced with difficulties in applying interpretation legislation. The common law concerning non retrospectivity and related interpretation legislation have both long recognised the need to strike a balance between giving effect to Parliament's will, aimed at changing the law and introducing new policies, on the one hand, and, on the other, to protect, for reasons of justice and fairness, positions already established under the old law. In terms of the second matter,

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169 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA). The decision of the Court was overturned on appeal, but not on this point — *Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd* [2002] UKPC 25, [2004] 1 NZLR 145. That decision is instructive also in that the Privy Council found that an express saving in respect of "any proceeding commenced before the commencement of this Act" meant that the applicable new law did not apply to the application already made by *Progressive Enterprises* at [13],[25],[35] and [37]. There is no provision of this kind in this case.

> courts and legislatures alike have stated the principle of non-retrospectivity and have protected legally recognised interests – such as rights, titles, immunities, duties, liabilities – which "exist" or have "vested" or "accrued". If the general law lacks means or procedures to recognise, enforce or sanction those legally recognised interests, courts and especially legislatures may also recognise and save the continued effect of the procedures that supported those interests (eg ss 20(e)(iii) (second part), (e) (final part), (h) (second part) and 22 of the 1924 Act; s 38(2)(e) of the Interpretation Act 1889 (UK); and s16(1)(e) of the Interpretation Act 1978 (UK)). But if, broadly speaking, no existing, vested or accrued legal interests are put in jeopardy the new manifestation of Parliament's will is to be given full effect.

[261] In that case, the question was whether the pre-amendment or post amendment test for dominant position in a market should apply to an application made before the amendment. The Court concluded:

> [42] We accept that arbitrary consequences may appear to occur when new law is brought in with instantaneous effect (for instance in respect of those applicants who agreed in the present context to have their applications considered in extended periods after 26 May on the basis, stated by the Commission, that it would apply the old law). But changes in law may and do advantage some and disadvantage others depending on matters of timing. In this case, while expectations based on administrative understandings may have been dashed, no existing right or interest based on the old test was, we consider, denied. Further, administrative convenience cannot be preferred to the proper legal interpretation. Progressive's right to have its application determined remained unaffected, but the determination was to be in accordance with the law in force at the time of the determination and by reference to the facts at that time. As at 26 May 2001, when the new test replaced the old, it had no existing right or interest founded on, or stated in, the old provision.

[262] In the present case, it cannot be said that any existing, vested or accrued legal interests are put in jeopardy by the NPS-FM 2020. Rather, the policies only affect the eligibility criteria for the resource consents sought by WM — the granting of which was never assured. Furthermore, and importantly:

(a) The NPS scheme has been in existence with similar effect since the inception of the RMA.

(b) An NPS, as its title suggests, relate to matters of national significance, and an interpretation consistent with the recognition of this basic fact is to be preferred.

(c) There is nothing in the RMA to suggest that NPS policies will not apply to existing applications.

(d) Clause 3.22 is a very strong pointer that the NPS-FM would apply with immediate effect – as noted above, it stipulates, in short, that the Auckland Council "must not" grant consent for a landfill (among other activities) unless the application of the effect management hierarchy is shown.

(e) The scale of the present proposal, and the potential extent of the wetland and river losses, is plainly the type of activity for which NPS- FM is most concerned to regulate.

[263] Taken together, these factors strongly favour an interpretation of the RMA and NPS-FM 2020 that meant that the policies applied to all applications for resource consent, including applications that had commenced prior to the commencement date of NPS-FM. I have therefore come to the conclusion that had the Court read down the effect of the NPS-FM policies because of their late incorporation it would have erred. But for reasons I have already given, I do not consider the Court did this.

[264] For completeness, given WM's involvement in the application process spanned more than 13 years by the time NPS-FM 2020 commenced, it would be procedurally and substantively unfair to WM if the NPS-FM policies operated like an automatic veto and effectively prohibited landfills of the type proposed. Such an outcome would undermine the integrity of the application process and the planning instruments upon which applications are based. As the former Chief Justice Dame Sian Elias observed, "People and communities can order their lives under it [the district plan] with some assurance."[170] The same observation logically applies to regional plans. They define the status of a proposed activity and identify the considerations that must be assessed as part of the application process. This Court should be slow to impute into a NPS an outcome that fundamentally undermines the ordinary operation of the application

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[170] *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] NZRMA 337 at [10]. I refer also to the observations of the Privy Council in *Progressive Enterprises Ltd* above n 169 at [37] and the caution expressed there, against an interpretation that is "apt to produce … a disorderly, illogical and unfair transition".

process. However, I do not interpret the NPS-FM policies as having a prohibitive veto like effect. I will shortly explain why.

A holistic approach

[265] Turning to the claim that the Court wrongly applied a holistic approach, instead of the *East West Link* scrupulously disciplined methodology. The key passages of the Environment Court interim decision in focus here are:

> [259] While the application might not advance particular policies, it is difficult to draw the conclusion that it is contrary to the objectives and policies of the AUP as a whole. If adverse effects from the discharges were not avoided, or we were not satisfied that there would be a net gain to biodiversity on the site in relation to rivers and wetlands, then it appears to us that the policies and objectives and other provisions guide us to a refusal of consent. The matter is finely balanced.
>
> [260] We accept the application does not meet or advance this policy (E.3.(17)). The Policy seeks to avoid the loss of natural wetland. Here the loss is addressed, in part, by the improvement of other wetlands of significant value. We must view these outcomes holistically.
>
> …
>
> [263] When considering s 104D this is one policy among others. The assessment cannot require the application to meet every policy. In most cases a non-complying activity is likely to offend one or more objectives and policies in the AUP. It may be directly contrary to some. It may also meet others or achieve them in full.
>
> [264] However, it is not individual policies or objectives against which the application and its effects are judged, but the AUP as a whole. That is, has this application set its face against the thrust of a Plan, including core values?
>
> [265] Chapter E3 recognises the tension between development and the objectives to preserve quality environments and improve those that are degraded. There is still an emphasis on avoidance, remediation or mitigation, although the NPS-FM 2020 (see Policies (17) and (18)) recognises the application of an effects management hierarchy.
>
> [266] We conclude that the introduction of Policies 3.3(17) and 3.3(18) introduce avoidance in the context of the other provisions. The overall effects under s 104D and s 104 are matters we will discuss in due course.

[266] Mr Anderson submits that this "holistic" approach is fundamentally wrong in two respects – first in assessing the effects holistically, and second by blending all policies and thereby devaluing the NPS-FM policies. Referring to *East West Link*,

Mr Anderson submitted that the Court had to instead carry out, and did not, a "scrupulously disciplined approach to determining whether it is appropriate to make an exception." Where the "starting point must be that the answer is no."[171] Had this been done properly the Court would have carefully stepped through each of the criteria for exceptions to the requirement to avoid the extent of wetland and river losses. It did not do this. He also submits that unlike *Port Otago,* there are no countervailing policies that might justify a structured balancing of competing policies.

[267] Amplifying the substantive nature of the error, Mr Anderson highlighted that the Court found no breach of wetland and river policies even though it found:

(a) Alternative site selection was inadequate.

(b) There was no evidence this was the best site available.

(c) 12.2 km of permanent and intermittent streams that flow through the Landfill Footprint and other parts of the site will be lost because of the project.

(d) The loss of streams will remove all instream biota, including fish, invertebrates and amphibians (including Hochstetter's frog) constituting a permanent loss.

(e) The elements on which WM relies are more in the nature of operational needs or preferences than functional needs.

(f) The Landfill is not "infrastructure" for the purpose of Chapter E26 which directs recognition of "the social, economic, cultural, and environmental benefits that infrastructure provides".

[268] Mr Matheson submits that in the context of the proposal, it was appropriate for the Environment Court to assess the effects on the wetlands "holistically". While avoiding effects on natural inland wetlands is one component, other

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[171] *East West Link*, above n 7, at [153].

components include the protection of values and promotion of their restoration. The proposal responds to these requirements on a holistic basis, by applying an effects management package. That achieves no net loss.

[269] Mr Matheson further submits that:

(a) WM cannot be criticised for not undertaking an alternative sites assessment in accordance with a policy that did not exist when it undertook those assessments.

(b) The Court did not make a finding that E26 did not apply – rather it said it was likely that it did apply – and on a plain reading "infrastructure" must apply to municipal landfills.

(c) "Avoid" does not "exclude a margin for necessary exceptions where in the factual context, relevant policies are not subverted and sustainable management clearly demands it."

(d) This Landfill clearly does not subvert policies that anticipate much needed infrastructure in a location that may be otherwise used for purposes that can have an ongoing and significant adverse effects on the values the polices are directed to protect.

Assessment

[270] I address the issue of holistic assessment of effects when dealing with Error four below at [289].

[271] I accept the Court approached the evaluation on the basis that (save in respect of effects on mauri) non-compliance with the policies E3.3(17) and (18) is not determinative of whether the gateway test at s 104D is satisfied. Rather, the test applied by the Court was whether the proposal is contrary to the objectives and policies as a whole. For reasons already expressed, it was appropriate to examine the meaning

and effect of policies by reference to the AUP as a whole. I would add at this juncture the following further important comments by Williams J in *East West Link*:[172]

> Section 104D(1) asks whether the proposal is contrary to the "objectives and policies of the relevant plan. In considering the correct approach to s104D, the Court of Appeal in *Dye v Auckland Regional Council* explained that "a fair appraisal of the objectives and policies read as whole" is required. In other words, isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the drafters must be avoided. The approach will be the same under ss 104 and 171.

[272] And further, after deprecating the blender approach, Williams J added:[173]

> As *King Salmon* held, the mere presence of tension does not open up an unfettered discretion to choose between unequal policies. On the other hand, the presence of tension between stronger and weaker policies will not always be resolved in favour of the stronger. Ecosystems are complex and dynamic, as is the impact of human communities located within them. Fact and context will be important in determining how tensions between policies will be resolved.

[273] That case involved the intersection between (among other policies):

(a) directive policies (D.9.3) that require (among other things) avoiding structures in Significant Ecological Areas – Marine 1 (SEA-M1) except in specified circumstances (for example significant structures where there is no reasonable or practicable alternative location on land);

(b) recognition policies (E26.2.1) that require that the benefits of infrastructure be recognised; and

(c) directive/enabling policies (F2.19.1) that require avoiding reclamation and drainage in the coastal marine area except in specified circumstances (for example where there are no practical alternative ways of providing for the activity).

[274] As the majority in the Supreme Court stated in relation to this combination of policies:

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172 Above n 7, at [79].
173 Above n 7, at [80].

> [71] In other words, and this is crucial to the structure of the regime overall, infrastructural reclamation is contemplated as an exception to the firm requirement to avoid adverse impacts in the SEA-M1 overlays, even where it is more than minor in scale…

[275] In resolving the tensions in that case between the directive avoid policies and the recognise and provide policies, the Court considered the direct application of *King Salmon* to be too rigid.[174] The Court emphasised that in the AUP context infrastructure is a public good, the AUP policies highlight infrastructures importance, and there is recognition of infrastructure policies in the avoid policies.[175] In addition, the point is made that the AUP does not just thumb its nose at the avoid policies — the circumstances in which an exception might be made are carefully circumscribed and narrow, referring for example to the "no other practicable alternative" requirement.[176] Underlying drivers in Auckland are also identified as important, and these provide very good reason to interpret the AUP in a manner that contemplates some narrow exceptions to "avoid".[177]

[276] Mindful of *King Salmon*, the majority found that the AUP threaded the needle between two extremes of banning all development in SEAs and permitting it as a fully discretionary activity by combination of non-complying activity status,[178] and an exceptions pathway approach involving the exception standards noted above.[179]

[277] Returning then to the Environment Court's approach; overall the Court carefully interpreted and applied the NPS-FM policies in light of other policies before reaching a conclusion that the proposal was not (likely to be) contrary to the objectives and policies of the AUP. The Court found that save in relation to policies addressing mauri, the Court did not consider that they represented "bottom lines precisely because they are qualified and seek to enable activities while controlling effects."[180] The Court was nevertheless very clearly alive to the "avoidance" character of Chapter E policies, including E3.3(17), E3.3(18) and E13. It describes them as "prescriptive" and "directive" and specifically links the NPS-FM policies to the effects management

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174 Above n 7, at [84].
175 Above n 7, at [84].
176 Above n 7, at [86].
177 Above n 7, at [87].
178 Above n 7, at [89].
179 Above n 7, at [91].
180 Environment Court interim decision, above n 1, at [243].

hierarchy. The Court refers to the "tension between development and objectives to preserve quality environments".[181] The effects of the proposal on the freshwater environment are closely scrutinised in terms of the effects on freshwater against these policies. While the Court did not find that the proposal complied with the exceptions listed in either the river or wetlands policies, the Court reasoned that if material harm could be avoided, then the proposal would not be contrary to the policy framework.[182] Significantly the Court also found that mauri could be enhanced overall.[183]

[278] The references here to no material harm and enhancement are important because the Court was clearly concerned to ensure that whatever the need or justification for the Landfill proposal, it must not result in material harm to the freshwater environment or mauri arising from either discharges or reclamation. This gives proper vent to the "avoid" policies. The following passages of the Environment Court interim decision provide the key insight into the approach taken:

> [866] We have already made our findings in respect of the objectives and policies and have also reached conclusions in respect of a whole range of effects, many of which are not directly necessary in considering s 104D(1)(b). The short point that we have already identified is that we must be satisfied that the application avoids material harm from the adverse effects of discharges to water or land from the Site and the removal/reclamation of a stream or streams.
>
> [867] The level of certainty in that regard must be high given the clear significant adverse consequences. In short, if we conclude substantively that material harm is avoided, then the application will not be contrary to that key policy thrust. Because of the relationship between effects and the policy provisions, it is not fair to say simply by applying the objectives and policies that an application is contrary to them. This requires a nuanced evaluation of both the objectives and policies and the effects.
>
> [868] The other major policy thrust relates to the maintenance and net gain/restoration of the mauri and the biodiversity on this Site. We must be satisfied that the evidence, including the offset and compensation evidence, will lead to those outcomes.

[279] The care in the assessment is then illustrated by the following conclusion reached by the Court:

> [905] Can we be satisfied that there is sufficient certainty of outcome that we can decide there will be no material harm to the species? We have

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181 At [863] H.
182 At [867].
183 At [229] and [868].

> concluded that whether we are dealing with the term avoid adverse effects or avoid material harm the issue is whether that species would be in a better position within a reasonable timeframe as a result of the development.
>
> …
>
> [920] These are matters of degree. We consider that overall we must be satisfied that the application will avoid material adverse effects.
>
> …
>
> [926] We have concluded that the effects in several categories are significant without further amendment to the proposal and conditions. We are assuming these changes are possible, as the matter is finely balanced. We acknowledge the AUP connection between objectives and policies and effects. Accordingly, whether the application is contrary to the AUP depends on whether particular effects can be satisfactorily addressed.

[280] Thus, if avoiding material harm is the proper threshold requirement for avoid, the conclusion reached by the Court that the proposal is not contrary to the objectives and policies was available to it.

[281] For reasons I will give below at [292]–[301], I reject the objection to the "material harm" approach. I am nevertheless concerned about the finding that other than the policies relating to mauri, the NPS-FM avoid policies are not "bottom line" policies. That is on its face an impermissible gloss on the character of the avoid policies. But for the fact that the Court has in any event adopted a no material harm approach, I would have found this to be a reviewable error of law.

[282] Furthermore, given the reasoning in *East West Link*, a *demonstrably* scrupulous approach is necessary in order to be satisfied that the Landfill is not contrary to the objectives and policies of the AUP and in particular does not breach the E3 directive policies. Forest and Bird were correct to raise this issue given its wider implications for the application of the three E3 avoid policies in focus. I acknowledge that the Supreme Court was dealing with works in a SEA and associated directive policies. Here we are dealing with policies that apply to all freshwater systems whatever their present ecological value. Nevertheless, the policy matrix here is sufficiently similar to mandate an exception pathways based approach in relation to the NPS-FM policies if the relevant adverse effects cannot be avoided.

[283] So, what does that all mean in the present context? In cases where adverse effects cannot be avoided, the type of analysis envisaged in *East West Link* is required. That does not mean that the exceptions standards in the E3 avoid policies must be applied in a theoretically absolute way. That would not reflect the structured balancing required to give effect to the policies of the AUP as a whole. Rather, I consider the slightly more nuanced position is mandated to:

(a) Recognise the infrastructure policies (e.g., E26.1) – as stated in *East West Link*, these policies recognise the public good associated with infrastructure and therefore any exceptions pathway criteria cannot be so strict as to automatically preclude provision of such infrastructure;

(b) The evident purpose of the river and wetland policies exemplified by Te Mana o te Wai and Objective 2.1 and Policies 2.2 – the health and wellbeing of freshwater ecosystems are to be prioritised and this involves a range on environmental responses as set out in the effects management hierarchy;

(c) Express recognition of landfills by the NPS-FM – the landfills are provided for alongside specified infrastructure, urban development and quarrying activities and therefore they are not presumptively contrary to the objective and policies of the NPS-FM; and

(d) The mātauranga and mana whenua values recognition policies included within the NPS-FM, and B6 of the AUP — given the prominence afforded to mātauranga and mana whenua values at both the national and regional level, these policies must inform the evaluation. (Refer to the suggested approach to tikanga reconciliation above at [212]).

[284] Accordingly, by analogy to the scrupulous approach taken by the majority in *East West Link,* the decision maker must, if effects cannot be avoided, be satisfied that:

(a) The Landfill is necessary, not just desirable by reference to the exceptions standards set out in E3 ‘avoid’ polices.

(b) The adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the affected wetland and rivers that ought to have been protected to an avoid standard, including by reference to the effects management hierarchy in relation to wetlands and rivers, mātauranga and mana whenua values.

(c) The benefits of the solution plainly justify the environmental cost of granting consent, including recognition of mana whenua issues.

[285] Before moving to the issue of material harm, it is necessary to observe that as with the avoid policies themselves, any express exceptional pathway standards must be read in light of their purpose and context. They cannot be so rigid as to make the exception standard impossible to satisfy, but they must be sufficiently robust to achieve the purpose of those standards, that is to only allow activity that is demonstrably needed, minimises the scale of adverse effects as far as is practicable and is justified. This approach accords with the fact that they must be reconciled with objectives and policies that expressly provide for infrastructure, including for example landfills.[184]

[286] Furthermore, and linking back to the concern expressed by Mr Matheson that the effect of the NPS-FM policies and exceptions standards are prohibitive insofar as it requires an assessment of functional need and alternative sites and methods, these requirements must be applied in a common sense way. That requires a realistic appraisal of need and the available alternatives having regard to in this case the proposed scale of the activity and the corresponding function performed by it. Plainly scale is relevant to the assessment of whether the activity is contrary to the NPS-FM "avoid" policies, and the scale of its effects may mean it is unable to satisfy

[184] As noted, the NPS-FM expressly acknowledges the landfills alongside other types of infrastructure. See also E26.2.1. The Environment Court considered that landfills are likely covered by E26, but were reluctant to rely strongly on this provision, given the Commissioner's decision and lack of a direct appeal point on it at [303]. It does however find that the landfill is infrastructure at [186]. In this regard, insofar as the parties rely on the policies to set the frame for evaluation (as plainly occurred here), they cannot pick and choose between them. If they are relevant to that evaluation, they must be applied as a matter of law. Failure to do so would ordinarily amount to a material error of law. However, I make no final observations about this as the matter was not argued before me.

the second step in the exceptions pathway. But need and availability of alternative sites must be assessed in terms of the proposed activity, not based on theoretical need and availability of site for that type of activity generally. A landfill provides a useful illustration. Given that even a small landfill will in most if not all cases need to be located in an environment where the presence of small streams are highly likely, it would accord with common sense to construe 'functional' need in a way that would accord with this reality. To hold otherwise and effectively prohibit all but the smallest of landfills, would be an altogether perverse outcome having regard to the fact the NPS-FM envisages landfills in wetlands (many wetlands either contain, are fed by, or are almost wholly composed of areas of moving water i.e. streams) without the requirement to show 'functional' need.

[287] Overall, therefore, while there are several indicators in the judgment that the Court in fact adopted a sufficiently robust layered approach mindful that allowing the Landfill must be exceptional, had the Court not adopted a no material harm threshold in respect of key NPS-FM proscribed effects, or otherwise found the proposal could not meet that threshold, I would have required the Court to reconsider its decision in light of my observations above.

[288] In any event, for the reasons I have given and will give, I do not consider that the Environment Court materially erred in its approach to the s 104D(1)(b) threshold assessment. This ground of appeal is dismissed.

Error four - Material harm

[289] For the astute reader of this lengthy judgment, it will be seen that I have considered this error out of order. But it makes sense to address this issue following my findings on the Environment Court's approach to its evaluative exercise.

[290] Ms Downing submits that the Court's conclusion that it had to be satisfied that the application "avoids material harm from the adverse effects of discharges to water or land from the Site, and the removal or reclamation of a stream or streams" misinterpreted and misapplied the reasoning in *Port Otago*. She submits there is no basis for importing the requirement to show material harm when considering loss of river extent. More specifically, the NPS-FM wetland and river policies are more

specific in terms of requiring avoidance of the "extent" of loss. It was not sufficient then to simply assess whether the ecological values of the wetlands or river were materially harmed. Loss of the "extent" of the river must be avoided. By contrast the NZCPS policies in play in the *Port Otago* case more easily accommodated the material harm assessment.

[291] Mr Matheson submits that any assessment of the loss of river extent and values must be undertaken within a factual context, which involves considering the stream lengths on the WM landholdings, within the Hōteo catchment, and the additional habitat to be created by the circa 50-60 km of riparian stream edge planting proposed. The Court correctly took this into account when it applied the *Port Otago* material harm test.

Assessment

[292] The impugned part of the decision is paragraph [866] noted above at [119]. The concept of material harm is also mentioned in the following terms:[185]

> [878] We conclude that the objectives and policies are not in conflict. They enable certain types of use and development where certain environmental outcomes can be achieved. This follows from the concept of sustainable management in Part 2 and the AUP. Put bluntly the AUP sees infrastructure such as landfills justifiable where they can avoid adverse effects (material harm). Whether this proposal can do that is not an issue under s 104D(1)(b) but rather requiring careful evaluation under s 104(1).

[293] So, the Court said that it must be satisfied that the application avoids material harm from the adverse effects of discharges and the removal/reclamation of a stream or streams. It also observed that if it can conclude substantively that material harm is avoided, then the application will not be contrary to the AUP.

[294] It is curious that such a high threshold for management of adverse effects is criticised. The Supreme Court in *Trans-Tasman* and in *Port Otago* adopted the threshold of no material harm to meet the avoid standard. As Glazebrook J summarised in *Port Otago*:[186]

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185 Environment Court interim decision, above n 1.
186 Above n 6.

> [65] This Court in *Trans-Tasman* said the standard was protection from material harm, albeit recognising that temporary harm can be material. Although in a different context, the comments were nonetheless applicable to the NZCPS. It is clear from *Trans-Tasman* that the concepts of mitigation and remedy may serve to meet the "avoid" standard by bringing the level of harm down so material harm is avoided."
>
> (footnotes omitted)

[295] The Court also emphasised that:[187]

> …the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected, including the relevant values and areas and when considering any development, whether measures can be put in place to avoid material harm to those values and areas.

[296] In *Trans-Tasman* Glazebrook J (speaking for the effective majority on this point) also said this:[188]

> The meaning of the term "avoid" is obvious (avoid material harm). The bottom line in s 10(1)(b) (protection from material harm) determines what is an acceptable extent of mitigation: mitigation must bring any harm below the threshold of material harm. As to the term remedy, this must mean that it may be permissible for discharges to cause harm, so long as the decision maker is satisfied any effects can be remedied and so rendered immaterial.
>
> (footnotes omitted)

[297] In the same case the majority identified a three step process for evaluation, namely:[189]

> (a) Is the decision maker satisfied that there will be no material harm caused by the discharge or dumping? If yes, then step (c) must be undertaken. If not step (b) must be undertaken.
>
> (b) Is the decision-maker satisfied that conditions can be imposed that mean:
>
> (i) material harm will be avoided; or
>
> (ii) any harm will be mitigated so that the harm is no longer material; or
>
> (iii) any harm will be remedied within reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?

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187 Above n 6, at [68].
188 Above n 9, at [256].
189 Above n 9, at [261].

> If not, the consent must be declined. If yes, then step (c) must be undertaken.
>
> (c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a) to determine whether the consent should be granted.
>
> (footnote omitted)

[298] Returning to the present case, the avoidance policies of the NPS-FM must be interpreted in light of what is sought to be protected, including relevant values and areas and what can be put in place to avoid material harm to those areas. It is correct that the rivers policy directs that the extent of the loss of the river and values be avoided. So a loss of river extent is a harm. But the NPS-FM expressly contemplates that loss of river extent and values is to be avoided "where practicable" — refer Policy 7 above at [255](e). E3.3(17) also refers to management of effects by applying an "effects management hierarchy." As noted above, this hierarchy lays out as the Court aptly put it a cascade of mechanisms for addressing those effects, including avoiding, minimising, remedying, offsetting, and compensating "where practicable". This cascade of options is consistent with an approach based on avoidance of material harm as conceived in *Trans-Tasman* and *Port Otago*.

[299] Moreover, as the majority in *East West Link* stated, whether the threshold for avoiding adverse effects is met is a question of fact and degree measured against the terms of the relevant avoid policy.[190] This may include offsets in net terms.[191] This directly addresses the criticism of the holistic approach insofar as the Court when using that term was speaking of improvement to wetlands. These are matters of expert evidence, to be carefully assessed by the fact finder:[192]

> The relevant question is not how to define an offset or what kind of offsets can satisfy the avoid policies; it is whether the relevant adverse effect can be avoided in fact. If the contention in the evidence is that the adverse effects at a level identified in the relevant policy (locality, population, ecosystem and so forth) can be avoided through offsets applied elsewhere, that will be a matter to be assessed by the fact finder.

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190 Above n 7, at [176].
191 Above n 7, at [176] and [180](c).
192 Above n 7, at [176].

[300] Having said that, this is not to endorse a bucket approach involving a netting off by unrelated environmental compensation. Here the offset must relate to the adverse effect to be avoided. This may be the area of greatest contention — is there a demonstrable connection between the loss of wetland or river extent and values and any offset or other remediation? Relevant to that assessment will be the definition provided in the NPS-FM as to "no net loss". I am not in a position to test that in any meaningful sense on this appeal of the Environment Court interim decision. It is certainly not for this Court on an appeal on a point of law to presuppose that the no material harm standard cannot be met in this case. I simply observe in this regard that, intuitively, it is the function served by river extent that must surely be the focus of the inquiry. An extensive network of open pipes and culverts might replace the extent of river loss but could be worthless ecologically or significantly worse for the environment than an extensive programme of river and stream enhancement. In any event, it is a matter for the Environment Court, as an expert tribunal of fact, to identify and explain in its reasons as to what is properly needed to "offset" the loss of river extent. If in the end it reaches a no net loss view, this Court will then be in a proper position to assess whether that finding was available to it as a matter of law.

[301] Accordingly, I see no error on account of the Court adopting a no material harm threshold of effects. This point of appeal is also dismissed.

Error three – scope of E13.3

[302] Mr Anderson contends that the Court was wrong to treat E13.3 as relating to discharges only. Clauses (1) and (4) are said to apply to all effects. They state:

> **E13.3. Policies [rp]**
>
> (1) Avoid significant adverse effects and remedy or mitigate other adverse effects of cleanfills, managed fills and landfills on lakes, rivers, streams, wetlands, groundwater and the coastal marine area
>
> …
>
> (4) Avoid adverse effects from new landfills.

[303] The specific impugned finding is:[193]

> [282] Having regard to that context we conclude that Policies (1) and (4) are limited in their application to activities which discharge contaminants, that is to be read to include land stability and soil slips, etc. This might include contaminants generally as there is no clear limitation. So, while it includes leachates and other emerging contaminants, it cannot go as far as all effects, for example noise and ecological effects. Again, a pragmatic and proportionate interpretation is required.

[304] Mr Anderson says there is nothing in the scheme of the E13 policies that expressly or by necessary implication limits its scope to discharges only. On that basis the Court plainly erred by limiting the regulatory effect of the E13.3(1) and (4) in this way.

Assessment

[305] I see no error in the Court's reasoning as it relates to the establishment of new landfills. The "non-discharge" effects associated with the establishment of landfills are subject to purpose built policies that would be largely rendered redundant if all effects of new landfills had to be avoided as required by subclause (4). Most notably, the exceptions pathways throughout Chapter E3 would have no real function, including those set out in E3.3(17) and (18). Moreover, if all adverse effects of new landfills (including the construction and establishment effects) must be avoided without exception, it is difficult to envisage even a moderately sized new landfill obtaining consent given the almost inevitable requirement for new landfills to modify small streams. True, if the landfill can show no material harm, they could then qualify, but the normative basis for such a high threshold for all new landfills has no obvious basis in the plan and is contrary to the parts of the plan that recognise the public good associated with infrastructure. Conversely applying the E13 policies in a unqualified way is an utterly disproportionate response to the corresponding objective E13.2 which states:

> **E13.2. Objectives [rp]**
>
> (1) Cleanfills, managed fills and landfills are sited, designed and operated so that adverse effects on the environment, are avoided, remedied or mitigated.

---

[193] Environment Court interim decision, above n 1.

(2) Human health is protected from the adverse effects of operational or closed cleanfills, managed fills and landfills

[306] There is no mention of the "establishment" or "construction" of new landfills, or the extensive works preliminary to the operation of a landfill for example reclamation of wetlands or rivers or emplacement of structures in waterways in either of these provisions. The reference to "sited" cannot sensibly be expanded to include these works. The reference at (2) is clearly directed at operational effects or closure – all of which occur after any reclamation or diversion or other establishment effects have occurred. The Court was therefore plainly correct to view these policies in this wider context. I also note the submission of the Auckland Council that it promoted these policies at the PAUP hearings stage on the specific basis that they related only to discharges. That is a further reason for rejecting the literal interpretation sought by Forest and Bird.

[307] It may be that "noise" effects arising from the operation might be caught by cls (1) and (4). I do not wish to provide any comment on this as I have not heard argument specifically directed to this type of effect (though ordinarily such effects are dealt with at the District Plan level).

[308] But, in any event, dealing with the effects most in issue in this appeal, I see no error in the Court's approach. Furthermore, even if I am wrong about this, the Court has adopted an avoid material harm approach to key effects. This clearly gives vent to the evident purpose of Objective E13.2 and policy E13.3. This ground of appeal is therefore dismissed.

Errors five and six – flawed s 104D evaluation and evident logical fallacy

[309] I have already addressed the proper approach to s 104D(1)(b) in depth so I can deal with the fifth and sixth errors together and briefly. In essence Ms Downing submits that the Court wrongly failed to specifically address whether the proposal complied with avoid policies E13.3(1) and (4) and the river policy when addressing the gateway threshold at s 104D(1)(b). The following passage is illustrative of this error:

> [878] We conclude that the objectives and policies are not in conflict. They enable certain types of use and development where certain environmental outcomes can be achieved. This follows from the concept of sustainable management in Part 2 and the AUP. Put bluntly the AUP sees infrastructure such as landfills justifiable where they can avoid adverse effects (material harm). Whether this proposal can do that is not an issue under s 104D(1)(b) but rather requiring careful evaluation under s 104(1).

[310] I reject these claims. The Court proceeded on the basis that the key NPS-FM avoid policies demand a no material harm approach and if that can be shown through the substantive s 104 evaluation, then the s 104D threshold will be satisfied. The Court then finds that matter is finely balanced and calls for further conditions to secure this outcome.[194]

[311] There is nothing illogical about this. On the contrary the Court has clearly paid heed to the directive avoid policies. These grounds of appeal are therefore dismissed.

PART F - WASTE MINIMISATION

[312] Issue six of the Te Rūnanga appeal concerns whether the Court failed to correctly apply the waste minimisation legislative and policy framework and annual limits on waste disposal. The following findings are in focus:

> [343] While we accept that the Plan is the sum of its parts, and there is only one reference to no new landfills, we observe that it is unhelpful to have such references in the Plan without making clear the place of that statement in the objectives, policies and methods for waste management and minimisation in Auckland.
>
> …
>
> [346] It is clearly the intention of the Waste Minimisation Plan that there be significant reductions both by 2030 and by 2040, and we anticipate government intervention if these objectives are not being pursued. Having said that, we acknowledge that there is nothing within any of the documents that requires, or even aspirationally states, that there will be no need for any solid waste disposal to landfill in the near to medium future.
>
> …
>
> [348] As we discuss later, that addresses the rate of utilisation of landfill airspace, or the life of a landfill, rather than the construction of a new landfill. This does not present an insurmountable hurdle to Waste Management. While indicating general intentions to reduce waste and use of landfills this does not bear upon the merits of an application. The inverse is also correct that

[194] Above n 1, at [926]-[930].

> arguments as to national, regional or local necessity for landfills do not fit with relevant legislation and plan.
>
> …
>
> [371] We observe that increases in waste levies may change behaviour, but that has not occurred yet. If there were to be more recycling of construction/demolition waste, that would certainly reduce the amount of waste going to landfill – but again – at this time present initiatives can only achieve so much. At the moment there is still a need for landfilling in Auckland. In order to drive further waste minimisation efforts, it might be appropriate to place annual limits on the amount of waste to be disposed of to the proposed landfill. This was not raised in the hearing and thus we do not consider it further.
>
> …
>
> [389] There was also evidence that addressed in detail allegations that Waste Management's commercial incentive is to maximise its return by filling the landfill as quickly as possible – conflicting with local and national policy to reduce waste to landfill. Further, there was evidence about the influence of waste levies on the nature of materials disposed of to landfills. We do not propose to address these matters as we have found that there is a need for landfill capacity in Auckland. The rate at which a landfill is filled or the way in which levies are made and imposed are not matters relevant to this proposal.

[313] Mr Enright submits that the Environment Court, in effect, treated the WMP as having symbolic significance only and need not be enforced by the Council. He says there was clear evidence of limits on amount of waste matter needed, and the Court was wrong to interpret the WMP as "not" saying there was no need for solid waste disposal to landfill in the medium future. He is also critical of the Court's finding that the rate at which the landfill is filled did not bear on the merits. It plainly did, including in respect of traffic, odour, litter, noise, dust, vibration, and light effects and that rate of filling is relevant to these issues.

[314] He also contends that the Court was wrong to hold that there is nothing within any of the documents that requires, or even aspirationally states that there will be no need for any solid waste disposal to the landfill in the near to medium future. The entire point of the WMP is that there will be no need for any solid waste to landfill within the medium 16 year future. Connected to this goal is a guiding principle "Protection of Papatūānuku; no new landfills…".

[315] Finally, he submits that the Court's statement that the WMA does not make anyone responsible for waste disposal is wrong. Section 42 puts a statutory obligation

on the Auckland Council to "promote effective and efficient waste management and minimisation", including waste disposal. Section 43 states that a plan must provide for matters listed in ss 42 and 44 sets out the things the Council must do when preparing, amending or revoking a WMP. There are also provisions dealing with charge fees, making grants, making bylaws, and ministerial performance standards.

[316] Mr Braggins for Fight the Tip supports the position adopted by Te Rūnanga. He adds that all planners agreed that the WMA, WM regulations, the New Zealand Waste Strategy 2010, the Auckland Waste Management and Minimisation Plan as well as climate change legislation and associated schemes were relevant to the s 104 assessment. He also says there was a wide array of evidence seeking to constrain waste going to landfill, to reduce reliance on landfills and that waste can be recycled or repurposed so that it does not enter the landfill. He joins with Mr Enright in submitting that there were multiple references in the evidence to placing limits on the amount of waste disposed to the landfill. All of this should have been weighed in the evaluation as to the alleged benefits of the proposed landfill.

Assessment

[317] Of the issues raised by the appellants, this issue was the least appropriate for consideration by way of appeal on an interim decision where the Environment Court has not yet made any final findings as to the suitability of the proposal in terms of the gateway thresholds, particularly in terms of s 104D(1)(b). The operation of the WMA is a secondary consideration against the first order issues the Environment Court must resolve, including most importantly the need to avoid material harm in order to satisfy the key E3.3 avoid policies. Given time pressures on judicial resource and the needs of other litigants, exploration of a secondary issue of this kind by way of interim appeal was not justified, when an appeal against the final decision, if consent is granted, will be open to the appellants.

[318] In any event, I consider the issues raised to have limited purchase. The Court plainly has regard to the WMA and the WMP and acknowledges the goals of both, namely waste minimisation. It then makes a combination of factual and evaluative findings, including those made at [343], [346], and [348], that appear available to it as

a very experienced expert body comprising two Judges and three Commissioners. They might be wrong, but this Court on an appeal of law is hardly better placed to second guess their evaluation.

[319] The observations at [371] are also factual evaluations beyond the ordinary reach of this Court. The comment that the issue of annual limits was not raised appears to have been available to it. Nothing presented to me in written submissions suggested otherwise. Reliance by counsel on the "entirety of cross examination" while producing a handful of "extracts" is not a strong way to advance a claim challenging a finding of the Court. I will simply assume that the extracts provided are the best evidence to be found on this point. The word "annual limits" is not mentioned.

[320] The strongest point made relates to the comment at [389] that the "rate at which a landfill is filled or the way in which levies are made and imposed are not matters relevant to this proposal." Rate of use and development of a resource is plainly a relevant consideration alongside the effect of such use per s 5 of the RMA. But I agree with Mr Randal for the Council, this comment was specifically related to the operation of the WMA and WMP rather than a general statement about the relevance of rate of use or development. And as I have said, I am satisfied the Court had proper regard to the WMA and WMP, and that its findings about them were matters of expert evaluation beyond the reach of this Court on an appeal of law.

[321] Accordingly this ground of appeal is dismissed.

Outcome

[322] I find:

Common Understanding – was the Court wrong to find that there was a common understanding about where mana whenua interests were held?

(a) The Environment Court's finding that the Landfill site "appears to have been recognised" as within the Ngāti Manuhiri rohe was available to it on the evidence.

(b) The finding that Ngāti Manuhiri had the "more intimate" relationship to the site was also available to the Court on the evidence and more importantly, this finding was not a recognition of Ngāti Manuhiri mana to the exclusion of all other iwi and hapū. It did not distract the Court from its task of assessing the effects of the proposed activity on Ngāti Whātua and the affected hapū, including Ngāti Whātua Ōrākei and Te Uri o Hau.

Strength of relationship – did the Court adopt the correct approach for assessing strength of relationship?

(c) While the Court did not literally apply the *Ngāti Maru* three pronged evaluation in terms of assessing relative strength of relationship, it did so in substance. The Court closely examined the pūkenga evidence of the relationship of the affected hapū and iwi to the site and the wider region. Its analysis was also anchored by Part 2 considerations (including the policy framework) and directed to resolving key issues, including for example the likely effects on mana whenua values. This satisfied the last two steps of the *Ngāti Maru* guidance.

(d) A finding of strength of relationship in respect of the Kaipara Harbour and the Hōteo was not necessarily required given that the Court clearly placed significant weight on the effects of the proposed activity on Ngāti Whātua, though for reasons set out in the discussion dealing with cultural bottom lines, findings of relative strength may assist in determining which of the tikanga ā-iwi positions should prevail in the final analysis.

(e) It would have been preferable that the Court expressly applied the *Ngāti Maru* three pronged evaluation of strength of relationship as the parties tailored their evidence to that evaluation. This would have assisted with the transparency and cogency of the Environment Court interim decision.

Cultural bottom lines – are there inviolable tikanga bottom lines that must not be crossed?

(f) While this Court does not exclude the possibility of "cultural" or tikanga bottom lines, considerable caution is needed before making such a finding in order to maintain both the integrity of the law and tikanga. Consent decision makers must always operate within their legislative mandate. They are not engaged via the RMA in a process of declaring or affirming tikanga as binding law. Just as importantly, consent decision makers must not overstep into the tikanga domain.

(g) In any event, in the present case the proposition that this matter can be resolved by way of tikanga bottom line — that is an inviolable tikanga standard — is misconceived because both Ngāti Manuhiri and Ngāti Whātua might legitimately claim that their respective tikanga ā- iwi positions is a "bottom line". In any event, the task of the decision maker is to recognise and provide for all mana whenua values and this requires a process of reconciliation and balancing. Relative strength of relationship may be a relevant factor, but there must still be some recognition, as far as is possible, of other mana whenua interests. A suggested process, borrowing from the *Port Otago* structured balancing approach is set out at [212].

(h) Given also that the Court has not made any final findings as to whether the effects on Ngāti Whātua could be adequately mitigated, and if so the reasons for that finding, this appeal ground was premature.

Site selection – should consent have been declined because of flawed site selection?

(i) The inadequacies of WM's site assessment is not by itself a reason to decline consent. Rather the key issue is whether policy requirements in terms of alternative sites (or absence thereof) have been satisfied. In this case that issue is presently moot because the Court has effectively adopted a no material harm approach to assessment of relevant key effects. If in the event the Court cannot be satisfied that

this demanding threshold is met, it will then need to address the policy requirements in terms of alternative sites (and methods).

NPS-FM Objective 2.1 – did the Court fail to correctly apply this objective in light of Te Mana o te Wai?

(j) No. Recognition by the Court of this objective, having regard to the concept of Te Mana o te Wai is evident from the face of the record. In addition, any finding of material breach on this issue would be premature in advance of the final findings as to the effects of the proposed activity on freshwater.

Pragmatic and proportionate – did the Court wrongly apply a proportionate approach (aka a broad overall judgment / broadbrush blender approach)?

(k) No. The Court expressly rejected the broad overall judgment approach and moreover, adopts a fine grained assessment by reference to the policy framework. References to pragmatic and proportionate appear in different parts of the judgment but overall, the Court appears to be using these ideas to ensure fairness and appropriate balance having regard to the policy matrix as a whole, and that applicable policies are given practical effect in a way that is commensurate with their underlying purpose.

Failure to apply directive "avoid" river, wetland and landfill policies

(l) The Court correctly treated the NPS-FM 2020 river and wetland policies as if they were fully incorporated into the AUP.

(m) The principle that legislation will not operate retrospectively did not apply in this case as WM had no existing rights or interests against which that principle might logically engage.

(n) The Court erred insofar as it found that only the avoid policies relating to mauri were truly "bottom line" policies. But this did not have a material impact on the decision because the Court still treated the

relevant NPS-FM avoid policies as "prescriptive" and " directive" and ultimately adopted a no material harm approach to the threshold gateway criteria at s 104D(1)(b) for grant of consent. This satisfied the basic requirement of the rivers and wetland policies insofar as they required avoidance of effects.

(o) Following the guidance laid down in *Port Otago* and *East West Link* a structured balancing approach is mandated in terms of defining an exceptions pathway for the NPS-FM avoid policies. Having regard to a range of other policies, including policies that recognise infrastructure as a public good and mana whenua values, the exceptions pathway must have some common sense flexibility to be able to accommodate infrastructure projects such as landfills that are already anticipated by the NPS-FM avoid policies. Assessment of need and alternative sites must be approached realistically.

Material harm – is "material harm" the correct threshold for the "avoid" extent of river loss policies?

(p) A no "material harm" approach is sufficient to satisfy the avoid policies of the AUP. This may include a net offsets approach, provided those offsets respond to the loss of extent of river. Whether that requires replacement with new, or replacement of river extent is a matter for the Environment Court to assess. It is premature, in the absence of final findings for this Court to undertake a meaningful assessment of whether the Court approached its task incorrectly as a matter of law.

E13.3 – landfill policy – do the landfill specific avoid policies relate only to discharges?

(q) There is nothing in the context of E13.3 to support an inference that this landfill policy related to all effects of new landfills. On the contrary the wider objective and policy matrix, including policies relating to the provision of infrastructure and the NPS-FM policies, would be rendered largely nugatory if E13.3 was interpreted with this effect, given that E13.3 requires all effects of new landfills must be avoided.

Waste minimisation – did the Court fail to have proper regard to the objectives of the Waste Minimisation Act (WMA) and the Waste Minimisation Plan (WMP)?

(r) The Court gave careful consideration to the goals of WMA and WMP. It was also available to the Court to find that rates of fill were not raised in the evidence.

[323] Given the foregoing, the appeals against the interim decision are dismissed. The final judgment will nevertheless need to more clearly address how the competing tikanga ā-iwi positions are resolved and the basis upon which a no material harm result is achieved, especially in relation to extent of river loss.

Strike out

[324] As it is now somewhat redundant to address the strike out application, I propose to address it only briefly. Ngāti Manuhiri sought orders striking out the Te Rūnanga appeals on the following grounds (in summary):

(a) The common misunderstanding alleged error relates to commentary in the "overview of issues and findings" and the *misunderstanding* is not contained in the express finding portions. Moreover, the Court did not find that the landfill was "solely" within Ngāti Manuhiri rohe. The appeal therefore had no proper basis.

(b) The strength of relationship alleged error turns on evidence, raises no issue of law, misrepresents the interim decision and selectively distils portions of it.

(c) The claim that tikanga is law and cultural bottom line itself is misconceived — tikanga is a question of fact in the Environment Court jurisdiction.

(d) The site selection alleged error raises issues of fact not law.

(e) The NPS-FM objective error is unwinnable on its face — the allegedly impugned passage is in fact a cut and paste of the relevant key passage in the NPS-FM and in any event freshwater issues are undecided.

(f) The waste minimisation claims had no foundation and misrepresented the decision.

[325] The threshold for strike out is a high one — the Court must be certain the appeal grounds will not succeed. While in the result I have dismissed the appeals, I do not consider that they were so lacking in merit as to warrant strike out. One factor however, affecting nearly all appeal grounds, is that the Environment Court has not yet made final findings as to whether the key NPS-FM prescribed effects in issue can be avoided to a no material harm standard and whether mauri and ecological values might be enhanced. Claims therefore about errors relating to effects on mana whenua values or freshwater are premature because in the end any claimed error may have theoretical interest only. Illustrative of this, the claimed errors relating to mana whenua values and to compliance with freshwater policies may not be material at all to the result if the Court is not satisfied ultimately that the no material harm threshold can be met. In addition, if the Court does reach that conclusion, then this Court on appeal will have the benefit of the final findings on these matters when considering the alleged errors of law. At present this Court is effectively invited to make findings of error of law against a hypothetical scenario.

[326] In reality however, it is only with the benefit of the deep interrogation of the decision, evidence and law, have I been able to reach that conclusion that each of the appeal grounds should be dismissed. On that basis, and by a slim margin, had it been necessary to resolve the strike out application, I would have dismissed it.

Costs

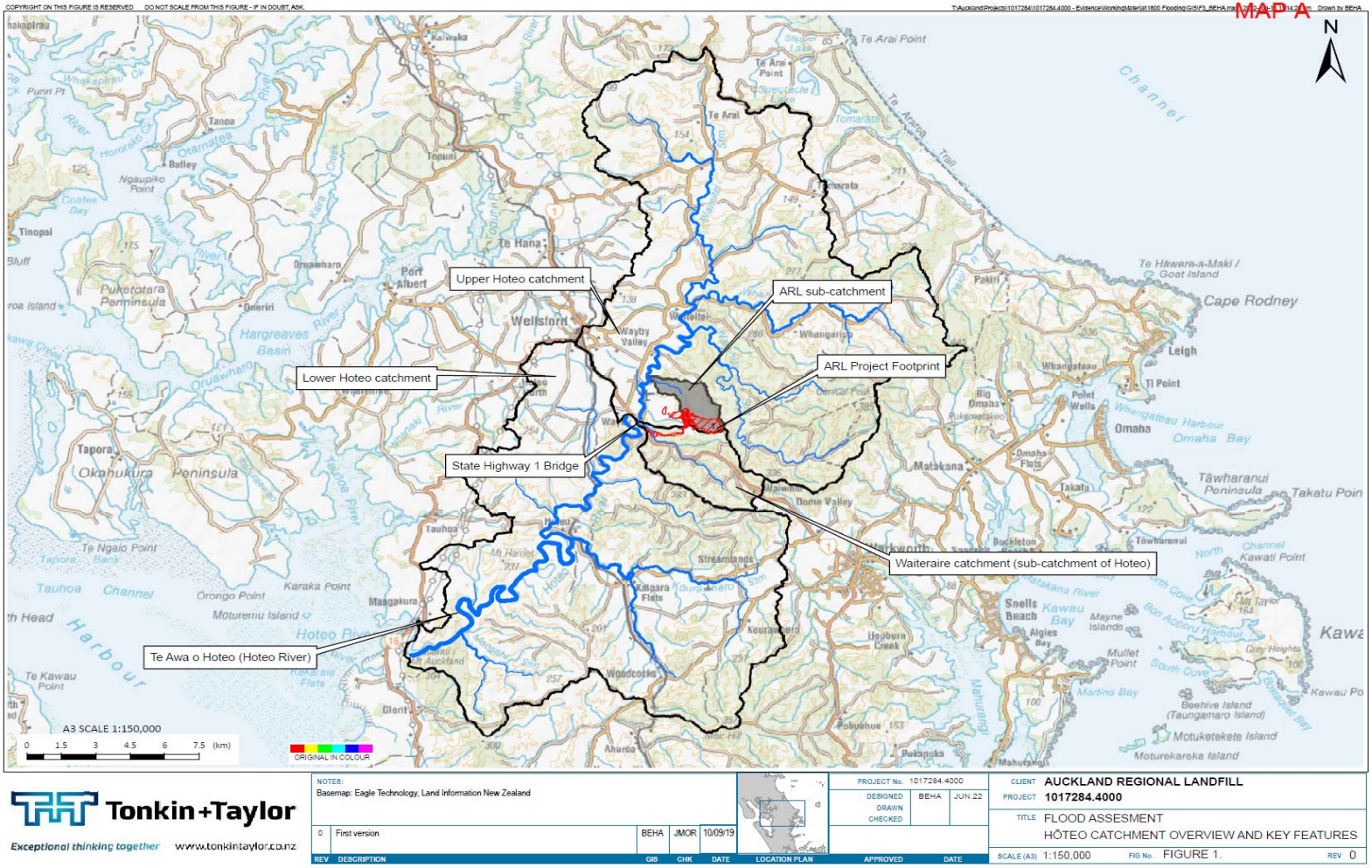
[327] This has been a complex and difficult appeal. While the appeal grounds have been dismissed, and in some key respects the appeals were premature, there were also public interest aspects to these appeals, with several important areas engaged that bear on the operation of the AUP and the RMA. In addition the appellants were successful in terms of the strike out application.

[328] With that background in mind, if costs cannot be agreed, I invite submissions no more than five pages in length.

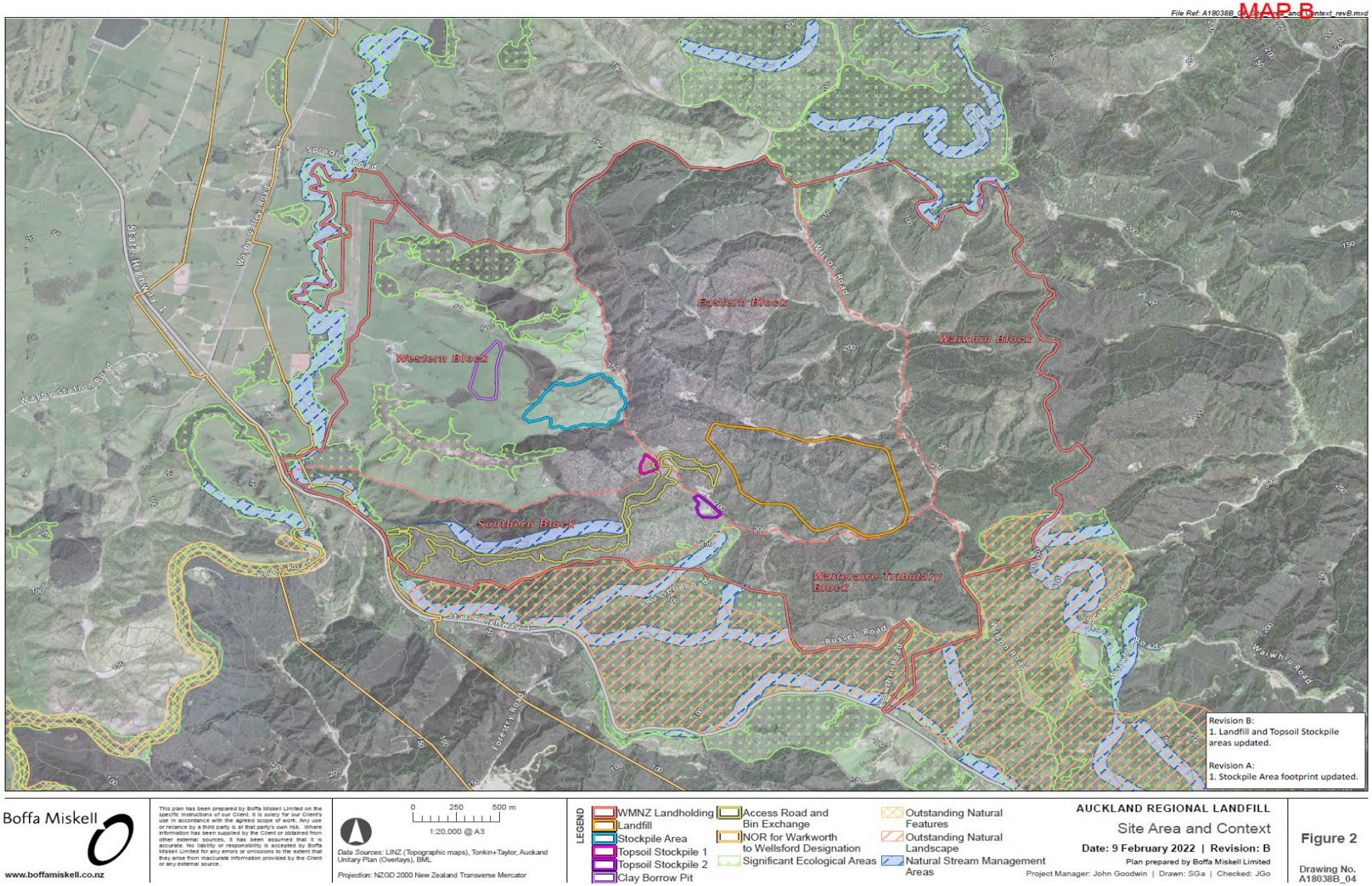
Whata J

R B Enright, M R Enright, Auckland
Royal Forest and Bird Protection Society of New Zealand – Christchurch
DLA Piper, Auckland
Richmond Chambers, Auckland
Thomson Wilson, Auckland
Russell McVeagh, Auckland
Tu Pono Legal, Rotorua
T M Urlich, Hamilton
Ngāti Whātua Orakei Trust, Auckland
R G Haazen, Auckland

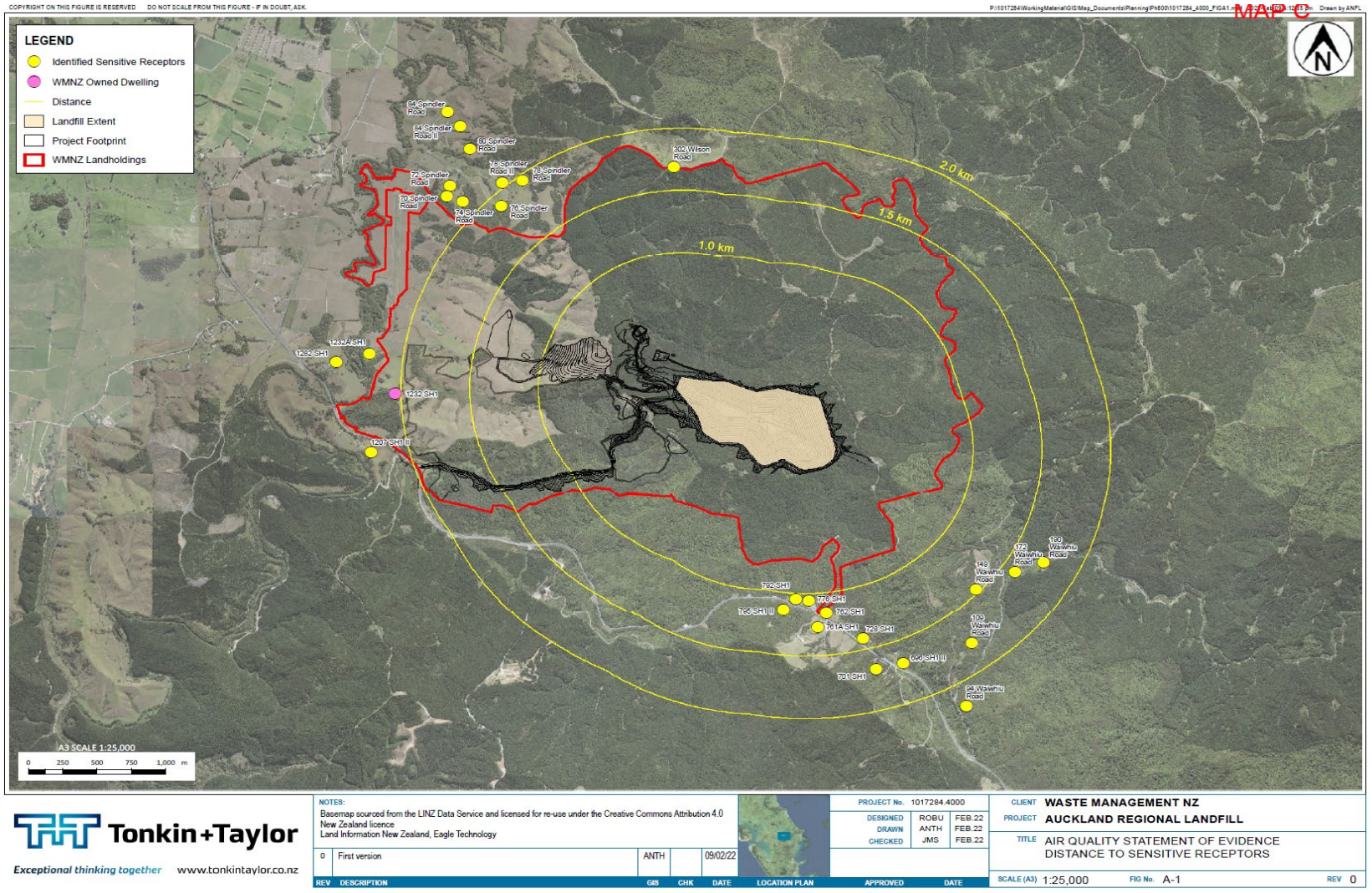
Appendix One: Map A



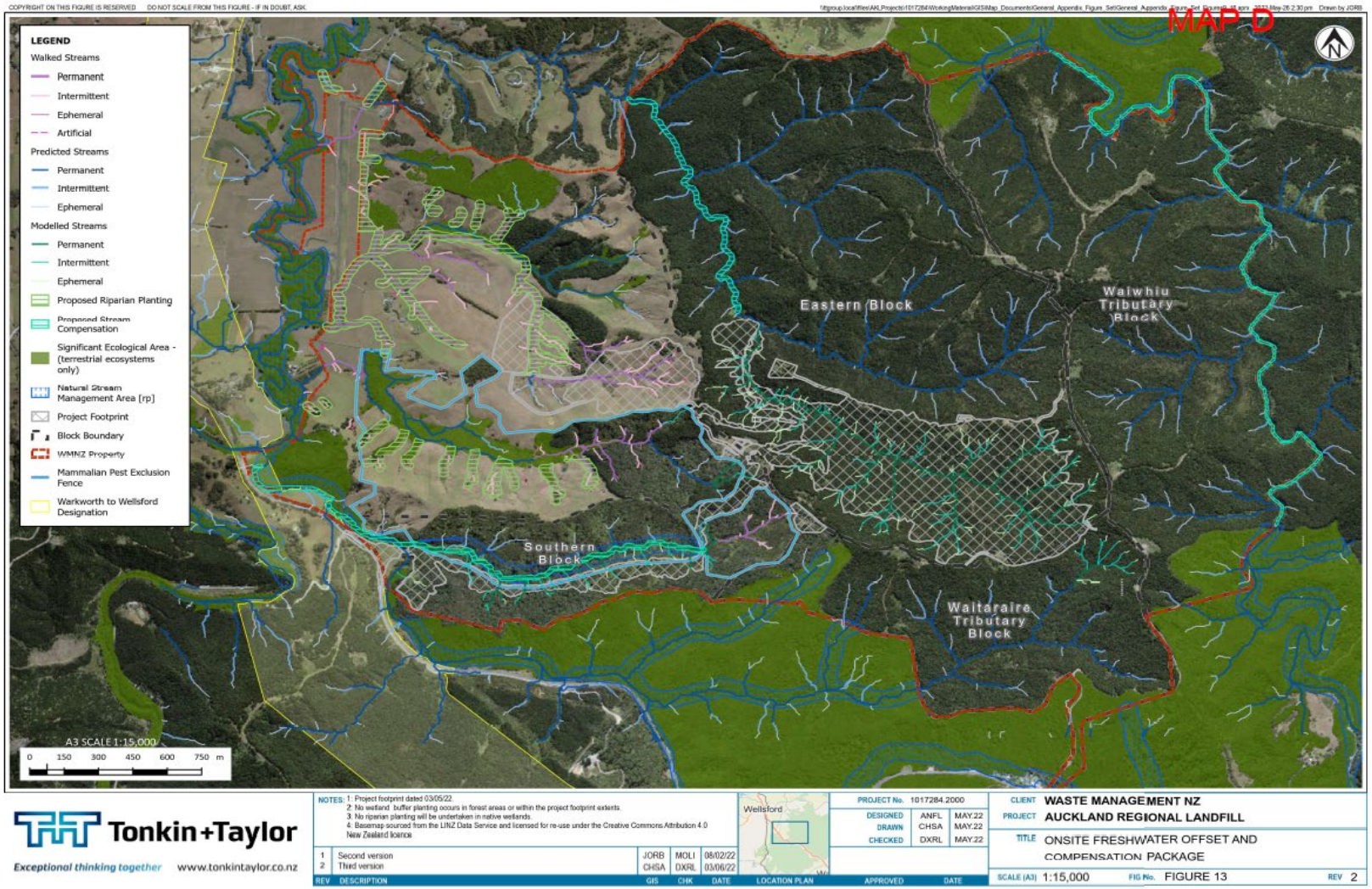
Appendix Two: Map B



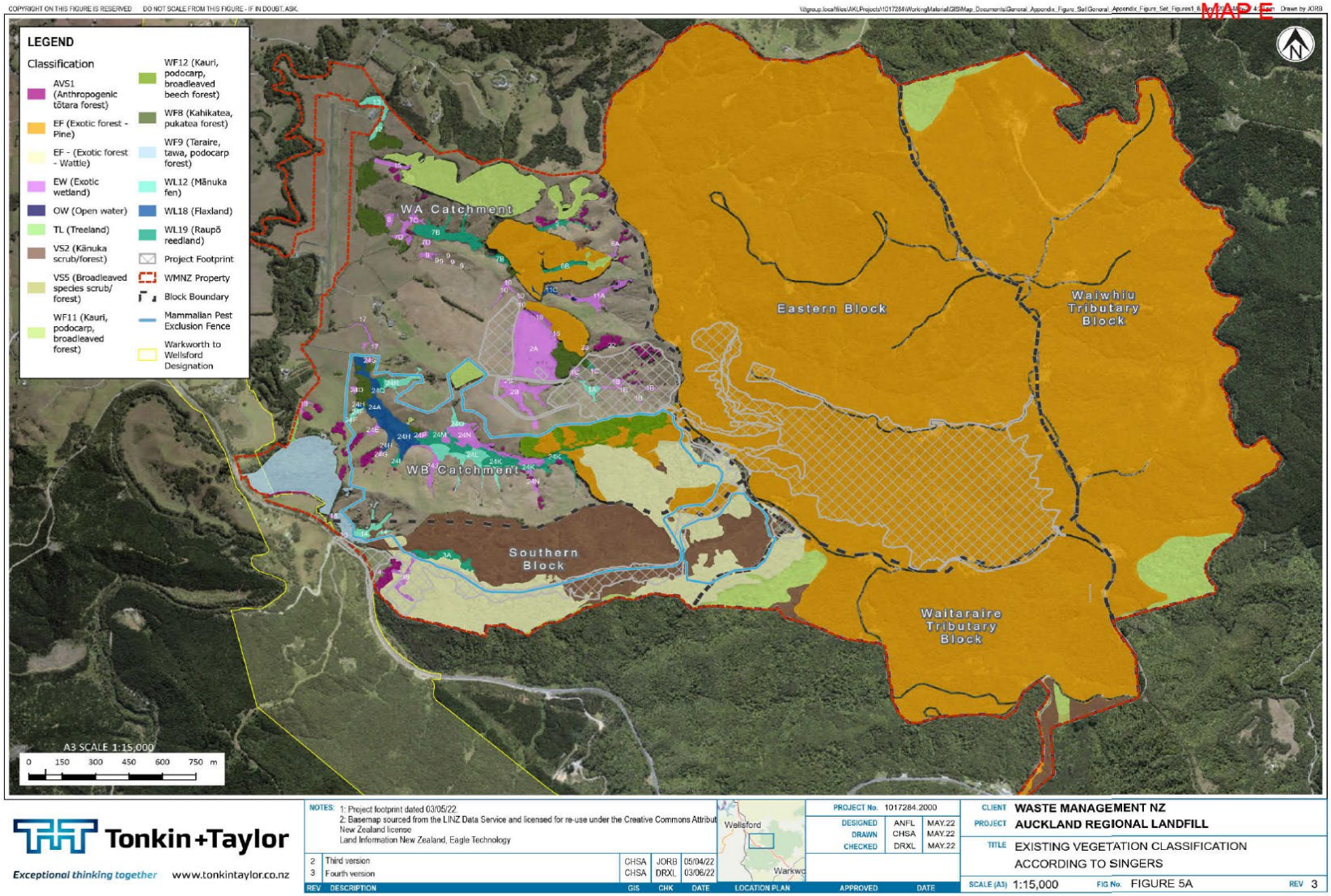
Appendix Three: Map C



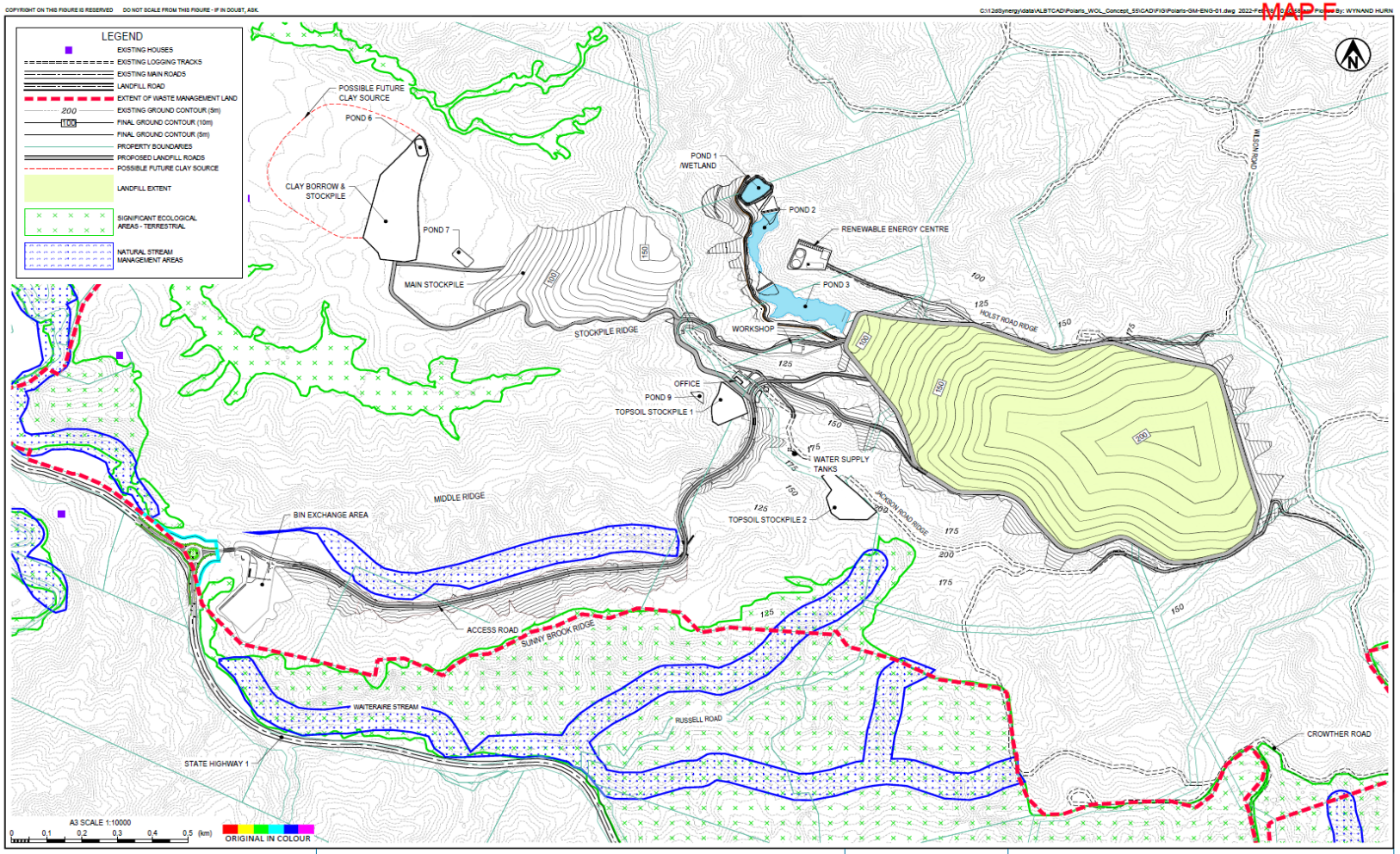
Appendix Four: Map D



Appendix Five: Map E



Appendix Six: Map F



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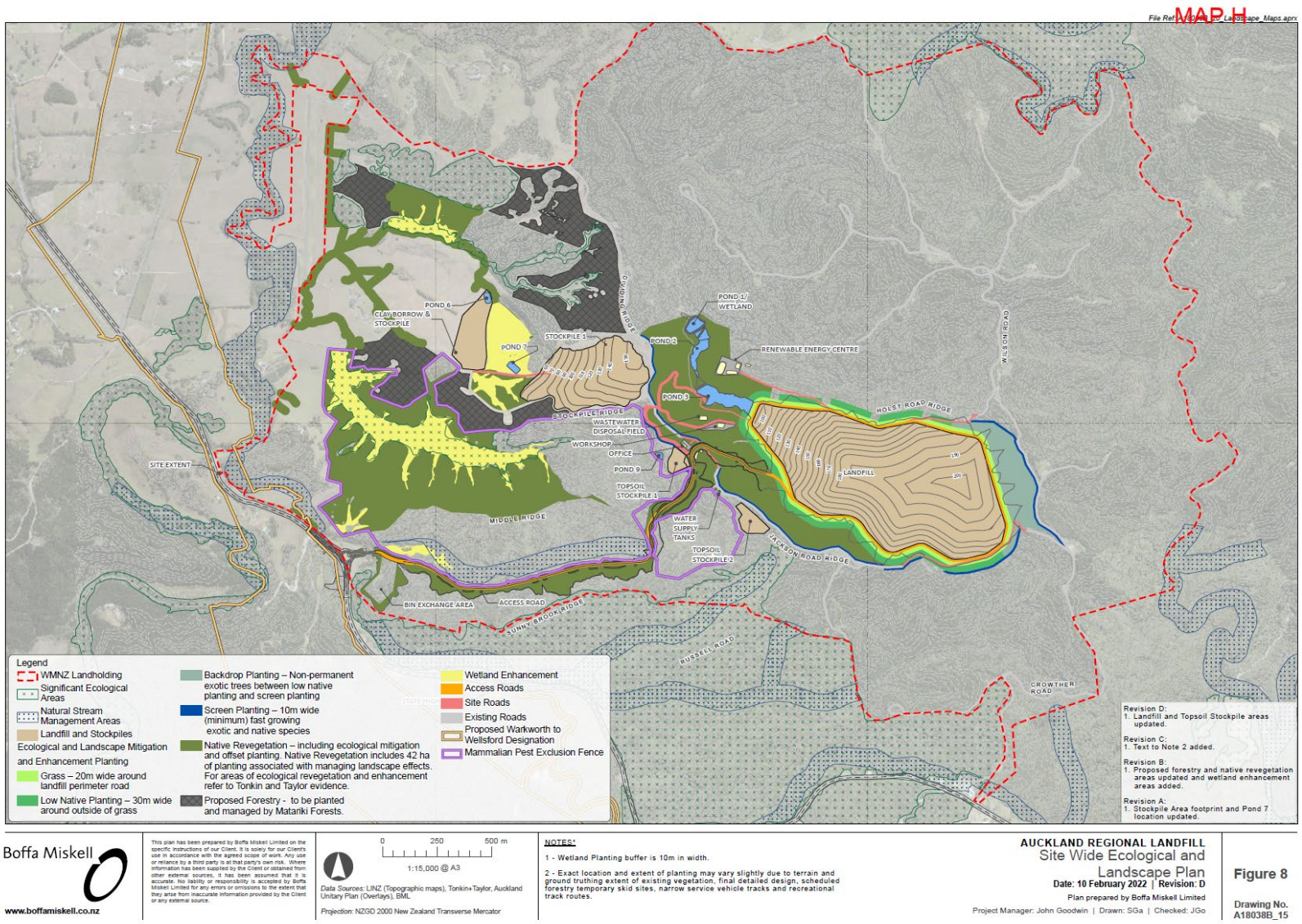
NOTE
1. EXISTING GROUND CONTOURS BASED ON AUCKLAND COUNCIL LIDAR (2013)
2. PROPERTY BOUNDARIES SOURCED FROM LINZ DATA SERVICE
3. OVERLAND FLOWPATHS SOURCED FROM AUCKLAND COUNCIL GEOMAPS

PROJECT No.	1005069	
DESIGNED	AGBB	Jun.18
DRAWN	TORY	Aug.18
CHECKED		
SIMONNE F ELDRIDGE	FEB. 2022	
APPROVED	DATE	

CLIENT **WASTE MANAGEMENT NZ LTD**
PROJECT **AUCKLAND REGIONAL LANDFILL**
TITLE SITE
SITE PLAN
SCALE (A3) 1:10000 FIG No. ENG-01 REV 3

Appendix Seven: Map G

Appendix Eight: Map H



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Data Sources: LINZ (Topographic maps), Tonkin+Taylor, Auckland Unitary Plan (Overlays), BML

Projection: NZGD 2000 New Zealand Transverse Mercator

NOTES*

1 - Wetland Planting buffer is 10m in width.

2 - Exact location and extent of planting may vary slightly due to terrain and ground truthing extent of existing vegetation, final detailed design, scheduled forestry temporary skid sites, narrow service vehicle tracks and recreational track routes.

AUCKLAND REGIONAL LANDFILL

Site Wide Ecological and Landscape Plan

Date: 10 February 2022 | Revision: D

Plan prepared by Boffa Miskell Limited

Project Manager: John Goodwin | Drawn: SGa | Checked: JGo

Figure 8

Drawing No. A18038B_15