

MEMO

To: Independent Hearings Panel for Proposed Plan Change 9

From: Ellen Robotham, Policy Planner, HBRC

Date: 4 August 2021

Subject: **NON-COMPLYING PATHWAY FOR GROUNDWATER TAKES IN THE HERETAUNGA PLAINS**

1. Dr Cowie asked the Reporting Team to consider what a non-complying pathway for new groundwater allocations from the Heretaunga Plains water quantity area might look like, as a comparison to the currently proposed Rule TANK 12 prohibited activity status. Dr Cowie referred to the *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*¹(**Coromandel Watchdog**) decision that concerned the circumstances when a local authority might classify an activity as “prohibited” in a plan.
2. The Court of Appeal in that case found that section 77B defines prohibited activity in terms which need no elaboration; it simply means an activity for which a resource consent is not available. The Court of Appeal held that the Environment Court and High Court were wrong to find that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration. To the contrary, the Court of Appeal held that there is no authority for placing an overlay on the statutory language; the definition adopted by the lower Courts had the potential to limit unduly the circumstances in which the prohibited activity status might be the most appropriate of the options under section 77B(7).
3. Possible drafting for a non-complying activity rule is set out in Appendix 2 of this memo for the Panel’s consideration, along with amendments that I consider would be needed to the relevant objectives and policies if this approach was to be taken. For the avoidance of doubt, my recommendation remains that prohibited activity status (and the objectives and policies without the amendments shown in Appendix 2) is the most appropriate approach. Below I have explained my reasons for this view and also my reasons why amendments to the objectives and policies would be needed if the Panel was to prefer non-complying activity status for the provision of additional groundwater takes and uses as a non-complying activity status.

Prohibited Activity status

4. I consider the matter before the panel differs from *Coromandel WatchDog* and its predecessor cases. In the interim decision for *New Zealand Mineral Industry Association v Thames-Coromandel District Council*², mining was proposed to be

¹ *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473.

² *New Zealand Mineral Industry Association v Thames-Coromandel District Council* (2005) 11 ELRNZ

prohibited in large tracks of the Peninsula in a manner which was considered inconsistent with the attitude taken towards other activities, which, depending on their nature and scale, had the potential to produce equally adverse effects.

5. PPC9 does not propose a blanket ban on the taking and use of groundwater in the Heretaunga Plains. The taking and using of groundwater already occurs across the Heretaunga Plains. PPC9 sets an allocation limit above which additional takes and uses of water are considered to have, or be likely to have, adverse environmental effects.
 6. PPC9 is not unique in prescribing takes and uses from ground and surface waters above specified allocation limits a Prohibited activity status.³ It is also not unique in setting a narrative allocation limit (i.e. Existing Use Only), rather than a numerical limit.
 7. Recently in *Minister of Conservation v Northland Regional Council*, the Environment Court considered whether applications outside the parameters of allocations and/or minimum flows should be non-complying activity status or prohibited status.⁴ The Court noted a concern that the use of non-complying activity status can and has led in the past to the grant of consents without full consideration of implications, particularly around cumulative effects.⁵ The Court held that “*We cannot see how the purpose of the Act will be fulfilled by allocations beyond the Plan limits*”.⁶ The Court concluded that for takes below minimum flows or exceeding allocation limits, prohibited activity status most appropriately met the purpose of the RMA and plans prepared under the RMA and the test provided for by the Court of Appeal in *Coromandel Watchdog*.⁷
 8. The test provided by *Coromandel Watchdog* gives examples of situations where prohibited status might apply.⁸ These examples are listed below with an analysis relevant to PPC9.
 - (a) *Where the Council takes a precautionary approach;*
9. In the case of groundwater abstraction in the Heretaunga Plains where an interim total allocation limit is proposed, it is appropriate for the Council to take a cautious approach to re-allocation until such time more is known about the extent of the groundwater resource and the success of mitigation measures. Enabling further allocations could exacerbate over-allocation and stream depletion effects, delaying and increasing the cost of implementing Policy 11 of the NPSFM2020 and RPS LW1 2B. I consider it more efficient to maintain existing allocations and avoid a situation

¹⁰⁵ at [21].

³ Examples included in Appendix 1.

⁴ *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 001. See discussion from [88] regarding Activity status for takes outside Allocation Limits and below minimum flows.

⁵ Ibid, at [94].

⁶ Ibid, at [97].

⁷ Ibid, at [106].

⁸ *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473 at [34] and [36].

where applicants are allocated water and make investments according to that allocation which may be clawed back at a later date.

- (b) *Where the Council takes a purposively staged approach;*
10. It is appropriate to take a purposively staged approach until more is known about the extent of existing groundwater allocations. Under POL TANK 42, a review of TANK provisions could result in a different allocation limit being set which may enable new allocations or may require clawbacks. Taking a staged approach would enable Council to maintain water quantity and avoid the potential cost of claw backs, as is consistent with the precautionary approach described above.
- (c) *Where it is intended to restrict the allocation of resources, for example where a Council wishes to restrict aquaculture to a designated area;*
11. The intention of Rule 12 is to restrict the take and use of groundwater to a specified volume allocation, in this case, to Actual and Reasonable use.
12. Another consideration of the Environment Court in *Minister of Conservation v Northland Regional Council* was in relation to the provision of water for section 14(3) needs and rootstock survival. I consider that section 14(3) uses are already provided for by Rule TANK 8 and POL TANK 51. Rootstock survival is not a relevant consideration for groundwater takes in the Heretaunga Plains because they are not subject to minimum flow cease take requirements (notwithstanding the requirements of POL TANK 39 which may apply requirements to cease takes at minimum flows at a later date subject to participation in a stream flow maintenance and habitat enhancement scheme, and with the exception of Zone 1 takes).
13. The only exception the Court in *Minister of Conservation v Northland Regional Council* made was for the provision of new public water supply applications exceeding the limits as non-complying activities.⁹ I do not consider the same exception is appropriate in the context of PPC9 because POL TANK 52 already provides a more lenient approach to water allocation for domestic and municipal supplies, and PPC9 also provides for alternatives to be investigated and implemented. I consider that these options should be fully investigated and further abstraction from groundwater should be discouraged as a comparably simple or low-cost path.

A Non-Complying pathway

14. Should the panel hold a differing opinion on the above matters, I suggest amendments that would need to be made to relevant PPC9 objectives, policies and rules which would enable new groundwater allocations above allocation limits. These are shown as **bold purple text** with a purple bar in the margin and attached as Appendix 2.
15. Dr Cowie asked specifically about additional groundwater allocations from the Heretaunga Plains Aquifer, however, I do not consider there are obvious reasons

⁹ *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 001 at [105].

why groundwater and surface water should be treated differently. The changes I have recommended relate to groundwater generically, as other groundwater zones are also effectively over-allocated in the proposed PPC9 framework.

16. The level of knowledge about the Heretaunga Plains aquifer is arguably more detailed than surface water. While there are allocation limits for most Water Quantity Areas, some have ‘existing use only’ limits because we don’t have the detail or information necessary to provide numeric limits. It is also possible that providing a non-complying pathway for groundwater only could open the plan up to appeal due to the inconsistent approach applied.
17. The rationale for the recommended groundwater allocation changes are set out in the table below. Additional changes that would be required to incorporate surface water takes into the non-complying pathway are italicised.

Provision	Rationale
OBJ TANK 18	For a non-complying activity to have any prospect of success, it must not be contrary to the objectives and policies of a relevant plan. It is inconsistent to require the avoidance of over-allocation while providing a pathway around an allocation limit. I note that this change to OBJ TANK 18 does not align with the NPSFM2020 Policy 11 or RPS OBJ LW1 2B.
POL TANK 36(l), POL TANK 37(c), POL TANK 43	Exceptions are inserted in reference to new POL TANK 50A. These exceptions ensure that a stringent test remains for any activities which do not meet the description in POL TANK 50A.
POL TANK 52(a)	POL TANK 52(a) should also be amended to provide an exception for surface water activities.
POL TANK 50A	<p>The suggested policy restricts the consideration of applications to groundwater and by its effects to limit the impact of additional cumulative effects on stream depletion.</p> <p>The only uses to be considered under the new policy are for essential human health needs and unforeseen non-commercial uses. Essential human health needs is defined in the PPC9 glossary. Unforeseen non-commercial uses is included to enable scope for uses that have not been considered before and that have environmental or human benefits. This prioritisation reflects OBJ TANK 16 and the NPSFM2020 hierarchy of obligations.</p> <p>The matters to be considered ensure alignment with objectives and other policies. They require applicants to demonstrate that the volume applied for is appropriate for the proposed use, whether the demand could be met by alternatives such as through efficiency, storage or augmentation.</p>

	<p>The policy should not be limited to groundwater if surface water is to be included in the non-complying pathway. Some of the other matters for consideration may need to be broadened to be appropriate for both groundwater and surface water contexts.</p>
Rule TANK 11a and 12	<p>A new rule, Rule TANK 11a, is created to ensure the scope of the non-complying activity status remains confined to groundwater so that surface water allocation limits are not compromised.</p> <p>A new rule would not be required as Rule TANK 12 incorporates both surface and groundwater. Rule TANK 12 could be amended to a non-complying activity and conditions amended to align with POL TANK 50A.</p>

APPENDIX 1 – EXAMPLES OF PROHIBITED ACTIVITIES

Plan	Excerpt of Rules
Canterbury Land and Water Regional Plan	<p>5.128 The taking and use of groundwater is a restricted discretionary activity, provided the following conditions are met:</p> <p>... 2. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, for stream depleting groundwater takes, the take, in addition to all existing consented surface water takes, does not result in any exceedance of any environmental flow and allocation limits set in Sections 6 to 15 for that surface waterbody in accordance with Schedule 9; and 3. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, the seasonal or annual volume of the groundwater take, in addition to all existing consented takes, as determined by the method in Schedule 13 does not exceed the groundwater allocation limits for the relevant Groundwater Allocation Zone in Sections 6 to 15; and ...</p> <p>5.130 The taking and use of groundwater that does not meet one or more of conditions 2 or 3 in Rule 5.128 is a prohibited activity.</p> <p>11.5.33 The taking and using of surface water from a river, lake or wetland or groundwater within the Selwyn Te Waihora sub-region and including all areas within the Little Rakaia Combined Surface and Groundwater Allocation Zone is a restricted discretionary activity, provided the following conditions are met:</p> <p>1. The proposed take in combination with all existing resource consented takes, does not result in any exceedance of any of the allocation limits in Table 11(e), 11(f) and 11(g); or 2. The proposed take is the replacement of a lawfully established surface water or groundwater take for which an application to continue the activity has been made under s124 of the RMA and there is no increase in the proposed rate of take or annual volume; and 3. A surface water take or a groundwater take with a direct or high degree of stream depletion effect greater than 5 L/s determined in accordance with Schedule 9, complies with the minimum flow and restriction regime in Tables 11(c) and 11(d); and</p>

	<p>...</p> <p>11.5.37 The taking and use of surface water from a river, lake or wetland or groundwater within the Selwyn Te Waihora sub-region and including all areas within the Little Rakaia Combined Surface and Groundwater Allocation Zone that does not meet Conditions 1, 2, 3, or 5 of Rule 11.5.33 is a prohibited activity.</p>
Proposed Regional Plan for Northland (Appeals Version – May 2021)	<p>C.5.1.14 Water take for registered drinking water supply that will exceed an allocation limit – non-complying activity The taking and use of fresh water for registered drinking water supply that would cause an allocation limit set in H.4 Environmental flows and levels for a river or aquifer to be exceeded, and that is not permitted by a rule in this plan, is a non-complying activity. For the avoidance of doubt this rule covers the following RMA activities:</p> <ul style="list-style-type: none"> • Taking and use of fresh water from a river, or aquifer (s14(2)) <p>C.5.1.15 Water take affecting a dune lake – non-complying activity The taking and use of fresh water that would change the level of a dune lake as referred to in Policy H.4.2 Minimum levels for lakes and natural wetlands, and that is not permitted by a rule in this plan, is a non-complying activity. For the avoidance of doubt this rule covers the following RMA activities:</p> <ul style="list-style-type: none"> • Taking and use of fresh water from a river, lake, natural wetland or aquifer (s14(2)). <p>C.5.1.17 Water take that will exceed an allocation limit – prohibited activity The taking and use of fresh water that would cause an allocation limit set in H.4 Environmental flows and levels for a river or aquifer to be exceeded, and that is not permitted by a rule in this Plan or a non-complying activity under rule C.5.1.15 [and C.5.1.14]¹⁰, is a prohibited activity. For the avoidance of doubt this rule covers the following RMA activities:</p> <ul style="list-style-type: none"> • Taking and use of fresh water from a river or aquifer (s14(2)).

¹⁰ I believe there is a drafting error in the Appeals version and that rule C.5.1.17 should refer to C.5.1.14 given the title of rule C.5.1.14 and the case law discussed earlier in this memo.

APPENDIX 2 – SUGGESTED AMENDMENTS TO PROPOSED PLAN CHANGE 9

- OBJ TANK 18** The current and foreseeable water needs for mauri and ecosystem health and of future generations ~~and for mauri and ecosystem health~~^{58.12} are secured through;
- a) avoiding future over-allocation and phasing out existing over-allocation^{123.39, 233.9}
 - b) ~~a)water conservation, water use efficiency, and innovations in technology and management;~~
 - c) ~~b)flexible water allocation and management regimes;~~
 - d) ~~c)water reticulation;~~
 - e) ~~d)aquifer recharge and flow enhancement;~~
 - f) ~~e)water harvesting and storage.~~
- POL TANK 36** The Council recognises the actual and potential adverse effects of groundwater abstraction in the Heretaunga Plains Groundwater Quantity Area Water Management Unit on:
- a) groundwater levels ~~and aquifer depletion~~^{123.72};
 - b) flows in connected surface waterbodies;
 - c) flows of the Ngaruroro River;
 - d) groundwater quality through risks of sea water intrusion ~~and water abstraction~~^{123.72};
 - e) tikanga and mātauranga Māori;
- and will adopt a staged approach to groundwater management that includes;
- f) avoiding further adverse effects by not allowing granting new consents to take and use groundwater new water use^{63.4, 99.12} except as provided for by POL TANK 50A;
 - g) reducing existing levels of water use;
 - h) mitigating the adverse effects of groundwater abstraction on flows in connected water bodies;
 - i) gathering information about actual water use and its effects on stream depletion;
 - j) monitoring the effectiveness of stream flow maintenance and habitat enhancement schemes;
 - k) including plan review directions to assess effectiveness of these measures.
- POL TANK 37** In managing the allocation and use of groundwater in the Heretaunga Plains Groundwater Quantity Area Water Management Unit, the Council will;
- a) adopt an interim allocation limit 90 million cubic meters per year based on ~~the A~~actual and ~~R~~easonable water use ~~prior to 2017~~^{99.105}
 - b) avoid re-allocation of any water that might become available within the interim groundwater allocation limit or within the limit of any connected water body until there has been a review of the relevant allocation limits within this plan;
 - c) manage the Heretaunga Plains Groundwater Quantity Area Water Management Unit as an over-allocated management unit and prevent any new allocations of groundwater except as provided for by POL TANK 50A;
 - d) when considering applications in respect of existing consents due for expiry, or when reviewing consents, to;
 - (i) allocate groundwater the basis of the maximum quantity that is able to be abstracted during each year or irrigation season expressed in cubic meters per year; and^{3.15}
 - (ii) apply an assessment of ~~a~~A~~t~~actual and ~~R~~easonable use ~~that reflects land use and water use authorised in the ten years up to August 2017~~^{194.50} ~~(except as provided by Policy POL TANK 50A); and to take into account any water use required as part of a programmed or staged development specified~~

within the existing water permit or associated resource consents, if:

1. the consent holder can demonstrate that the existing investment is dependent on water use over and above Actual and Reasonable use; and
 2. the whole or part of the specified activity or development has not lapsed during the resource consent duration; and
 3. the activity or development is integral to the on-going operation of the activity or development for which the permit was issued; and
 4. water demand is calculated for rootstock only where there is evidence of a contract for the supply of that rootstock existing as at 2 May 2020.²⁰⁷, Drury SOE para 19
- e) mitigate stream depletion effects on lowland streams by providing for stream flow maintenance and habitat enhancement schemes.

POL TANK 43

The Council will manage river flows and lake or wetland water levels affected by surface water abstraction activities, including groundwater abstraction in Zone 1, during low flow periods so that they meet objectives for aquatic ecosystem health, mauri, tikanga Māori values, and other instream values by applying the minimum flows, flow maintenance triggers, and allocation limits specified in Schedule 31, except as provided for by POL TANK 45, 53 and 50A, when considering applications to take and use water;^{120.65, 210.64, 120 Grey EIC}

POL TANK 50A

The Council will consider applications to take and use groundwater for essential human health needs or unforeseen non-commercial needs that, by itself or in combination with other water takes in the same water quantity area, causes the total allocation limit as specified in Schedule 31 to be exceeded, if:

- a) the take is not in the Ngaruroro River or Tūtaekūri River Zone 1 Water Quantity Areas; and
- b) the volume and rate of take is reasonable for the use;
and when assessing the application the Council will take into account:
- c) the reason for water take and use
- d) extent to which demand can be met through other methods or sources and demonstrated exhaustion of all other options, including efficiency measures where applicable;
- e) the nature and scale of adverse effects, including but not limited to bore interference, stream depletion and potential derogation of existing surface water allocations;
- f) the significant values of connected wetlands, outstanding waterbodies in Schedule 25, and the values of connected waterbodies as expressed in OBJ TANK 10-14.

Rule	Activity	Status	Conditions/Standards/Terms
TANK 11a Groundwater take	<u>The take and use of groundwater</u>	<u>Non-Complying</u>	<ol style="list-style-type: none"> a) <u>The activity does not comply with the conditions of Rule TANK 11.</u> b) <u>The take and use is for:</u> <ol style="list-style-type: none"> (i) <u>essential human health needs; or</u> (ii) <u>an unforeseeable non-commercial need.</u>

TANK 12 Groundwater and Surface water take	The take and use of surface or groundwater	Prohibited	a) The activity does not comply with the conditions of Rule TANK 11 <u>or 11a</u> . No application may be made for this activity
--	---	-------------------	--