

Hawke's Bay Regional Resource Management Plan

TANK Plan Change Document

Peer Review Findings

Context

The Hawke's Bay Regional Council is working through a collaborative process to establish water quality and quantity objectives and limits for the Tutaekuri, Ahuriri, Ngaruroro and Karamu Rivers and their tributaries (collectively comprising the TANK catchments).

The key reason for the extent of the study area is the interconnectedness of the Heretaunga Plains aquifer systems with the surface water catchments – Karamu, Ngaruroro, Tutaekuri and Tutaekuri-Waimate, Ahuriri and the Taipo and Napier urban waterways.

The main emphasis of this plan change process is to set water quality and quantity objectives and limits to meet the needs of the values for which water is to be managed. Methods to achieve desired outcomes will influence the use of water and land, particularly land used for horticulture and agriculture. The plan change is to be proposed as amendments to the Hawke's Bay Regional Resource Management Plan (RRMP) which is a 2nd Generation combined Regional Policy Statement and regional plan that became operative in 2006. The TANK plan change is one of HBRC's key workstreams to progressively implement the National Policy Statement for Freshwater Management 2017.

The TANK plan change will bring into effect new methods (including rules) to manage land and water in the TANK catchment. These methods will include allocation limits and a regime to manage flows in the rivers, which will also affect groundwater users. At the same time water quality objectives are to be set and a regime of statutory and non-statutory methods implemented to improve the quality of water in these waterbodies. In some instances, the methods will affect, and require new, land use practices.

By way of summary only, but to provide context to the peer review, the following sets out the principal issues faced by each of the catchments, surface and groundwater and which the plan change is focused upon addressing:

- Karamu/Clive Rivers – too many weeds, insufficient bugs and insects, low oxygen, high nutrient levels, urban stormwater discharges
- Tutaekuri/Ngaruroro – sediment and phosphorus in rivers, water quality in the estuary and the coastal waters
- Ahuriri – sediment, nutrients, urban stormwater, contaminants, pest organisms
- Groundwater – Heretaunga Plains water is very interconnected; all groundwater takes deplete lowland rivers and streams; any total take restriction will have very little river flow impact; recharge must offset total abstraction to prevent long-term aquifer depletion; security of supply standards must be reasonable
- Surface water – surface water and groundwater takes across the Heretaunga Plains deplete Ngaruroro/Tutaekuri river flows, these rivers add groundwater flow to Heretaunga Plains

and lowland rivers; river flows must be sufficient to meet healthy ecosystem, mauri and other core values; security of supply standards must be reasonable.

The development of the TANK plan change has been dependant on input from the TANK Collaborative Stakeholder Group (TANK Group) through recommendations. This has resulted in an iterative approach to plan drafting and has resulted in the peer review being confined to working (although substantially complete) drafts of the plan change.

The Project

The peer review of TANK Plan Change (PC9) has been designed to determine whether the Plan Change achieves the project outcomes; whether the provisions of the Plan Change work; and to identify whether there are any gaps in the provisions and/or linkages with the parent plan (RRMP).

This peer review has been undertaken as follows:

- attendance at a briefing meeting to confirm the TANK project outcomes and receive a briefing on the key issues to be addressed in the plan change and the methods to address those issues;
- undertake an evaluation of the drafted plan provisions and provide feedback to Council;
- complete a further review of amended plan provisions;
- attendance at workshops to discuss draft findings and assist with provision drafting; and
- preparation of this report.

The plan change comprises several parts as follows:

- a statement of issues
- TANK objectives
- TANK policies
- Explanations and principal reasons
- TANK rules
- Proposed amendments to HBRRMP rules
- A series of schedules to assist with implementing the rules.

The peer review was first completed on the version of the Plan Change dated 31 May 2018. Due to the stage reached with the collaborative TANK Group, this version was incomplete. It did, however, contain a largely complete suite of objectives, policies and rules (although some of the detail was omitted because it had not been landed by the TANK Group) and a partially complete suite of schedules.

The first review was reported back to Council through margin notes on an electronic version of the document. Those margin notes raised questions regarding the provisions, how they worked, the language used, as well as questioning some of the content in terms of the need for it. A conference call discussion was convened to discuss the matters raised. This occurred during a period of continuous amendment to and development of the plan change.

The second review was completed on a version dated 26 July 2018 (that date being the date the version was due to be discussed with the TANK Group rather than the date on which it was prepared). This version was significantly more complete, but it was not until the workshop at which this review was discussed that some of the critical elements were available (eg Tables 1 and 2 – now

Schedules 1 and 2). This did not detract in any material way from the peer review I was able to undertake. My review was not about questioning the content of those table/schedules but rather was concerned with how they were integrated into the plan change.

Findings

General

As a starting point it has been necessary to determine the project objectives. The clearest enunciation of these is to be found in the TANK Group terms of reference, coupled with the general 'flavour' of the operative HBRRMP.

Specific to this project the objectives can be summarised as:

- Identify the various values for each waterbody within the TANK catchment
- Establish plan provisions that provide for those values either through enabling specified activities or placing restrictions on activities while providing for economic activity and environmental protection or enhancement (as appropriate)
- Establish water quality and water quantity limits and targets (to address over-allocation) where the allocation status is determined by reference to the identified values.

In considering how well the plan change achieves these objectives I have considered how well it fits with the operative provisions of the RRMP, the specific text of the plan change, and whether the provisions leave any gaps the exploitation of which could undermine the achievement of the objectives.

The success of the plan change requires a paradigm shift in terms of how land uses are undertaken, and such a shift would normally be supported by directive regulation. That is not the case here. However, on the understanding that resource management within the RRMP is focussed less on regulation and more on enablement of activities coupled with education, voluntary compliance and Council funded and managed programmes, the TANK plan change is consistent with the parent plan, is likely to achieve the environmental outcomes sought, and therefore will achieve the project objectives.

A consistent theme throughout the peer review has been the architecture of the provisions and the consequences of this for plan accessibility, understandability, readability and enforceability. Amendments have been made in response to suggestions and all of the issues identified have been corrected.

The difficulties of accommodating collaboratively agreed solutions to resource management issues are becoming widely known. This plan change is no different and there are, arising from this, one or two instances where either the drafting is incomplete at this time or the drafting is less than optimal. When the gaps in the drafting are filled the solutions package will be completed. Any remaining significant drafting issues can be resolved through the submission process but as a general observation, the plan change provisions are internally consistent, there are no obvious gaps, and there is consistency with the parent plan.

Finally, under this heading it is necessary to observe that the text of the plan change would benefit from a thorough editorial review (spelling, layout and numbering, grammar) once the drafting is complete. This review is unlikely to reveal and resource management content issues but will ensure full workability of the provisions.

Objectives

During the course of the review a number of key questions were raised regarding the draft objectives. These questions covered matters of the architecture or construction of the provisions, their content, and their complexity in terms of matters included within a single objective.

Of particular concern during the initial review was the inclusion of what can best be described as 'process objectives' as compared to 'outcome objectives'. This matter was discussed in some detail, some amendments were made to the text, their place within the RRMP was better understood and as a result they have been retained.

The architecture that caused the most concern arose principally from the length of some of the objectives, and as a result the use of numbered lists with the objective. This issue has been resolved through breaking into its separate component parts those offending objectives. In addition, some minor editorial amendments have overcome issues of complexity and readability without taking anything away from the purpose or intent of the objective.

Policies

A wide range of issues were raised during the review of the draft policies. These included:

- Policy subject matter – policies of process compared to policies of outcome and whether or not these should be relocated to either the implementation plan or at end of each topic area
- The general length of some of the policies – the concern being the consequent complexity of the message, internal consistency, and overall readability
- Issues with integration between the policies and operative RRMP provisions
- Links between the policies and the rules or other methods
- Consistency of language – both within and between different policies (for example the use of “good” and “best” practice)
- The issue with using fixed numbers arising from the application of OVERSEER and in particular the effects of the regular updates to OVERSEER on the status (permitted or requiring resource consent) of land use activities
- The general workability of collectives, particularly how they are “approved” and then held to account for achieving outcomes
- The issue of “approving” Farm Environment Plans
- Whether or not a plan can constrain abstractions that are permitted by S14(3)(b) of the RMA
- The issue of the use of prohibited activity status to ensure resource limits are not breached
- Issues around dams and out of river storage facilities and the potential need to separate these because their effects are different.

Policies are designed to implement objectives. If the objective is the outcome or end state to be reached, then the policies are the road-map. In reviewing the draft policies this has been a key consideration.

Through a process of iteration and discussion each of the issues raised concerning the policies in general or the drafting of any particular policy have been resolved. The result is a suite of policies that tell the story of how the objectives will be achieved, signal what involvement can be expected from the Council in this process, and provide direction to a consent authority when called upon to assess an application for resource consent. The language used is certain, concise, and clear while consistent with that used in the parent plan.

Explanations and principal reasons

Explanations and principal reasons are not a mandatory part of a regional plan. While they can be useful they are sometimes rather problematic in that they can result in inconsistencies of interpretation. Further, they add unnecessary length to the document.

If an objective or policy requires explanation the question should be asked whether the expression could be improved so that the intent and meaning is absolutely clear and does not require explanation.

If it is felt that some capturing of the principal reasons is required then the better place for this might be the Section 32 Report. This is the place that plan readers should turn to when they are looking for an explanation of the reasons behind particular plan provisions. Further, during the public submission phase of plan development there is a very real possibility that provisions will be amended. Any amendments must be reported on in a s32AA report prepared by the decision-maker. By having all explanations and reasons in a single place it is possible to keep those matters current.

Removal of this section of the plan change has been suggested and agreed.

Rules

During the review of the rules section of the plan change a wide range of matters were raised. These included:

- The general structure of the rules, including the ordering and layout of the various components of each rule; provisions for dealing with non-compliance with rule conditions; consistency and certainty of language used; legality of the proposal
- The use of controlled activity status (where consent must be granted) for dealing with non-compliance with rule provisions
- Specificity of the wording used; clarity of meaning and application of the various rule components; use of “or” and “and” in rules lists and the implications of this for rule interpretation and application
- How the necessary amendments to Rule 7 in the RRMP are best expressed and identified in the plan change
- Issues concerning the restrictions proposed around water takes provided for in S14(3)(b) of the RMA
- Whether or not it would be appropriate to use prohibited status to avoid a limit being breached
- The issue of satisfactorily defining “land use change” so that the environmental outcomes can be achieved
- The particular wording of the stormwater provisions and the timing of their implementation

Rules in plans implement the policies. They must be unambiguous, certain and clearly expressed. And for a permitted activity rule they must not be reliant upon any third-party input.

As occurred with the review of the policies, improvements which achieved all these basic drafting requirements has resulted from an iterative process. That process included: identification of the omission, confusion, lack of clarity or lack of certainty; discussion regarding the outcome sought or purpose of the rule; redrafting. This has been an iterative process, but the issues identified during the course of the peer review have now been satisfactorily addressed.

Further improvements could be made, and probably will be made during the submission process but the rules as they presently are drafted are fit for purpose and should, if implemented as intended and supported by non-statutory interventions and actions, achieve the objectives of the plan change.

Schedules

Final versions of many of the schedules have not been available for review as part of this project although the general content and intent of those incomplete schedules has been discussed. The proposed schedules are an important part of the regulatory framework and are a key element in making the rules work.

From the initial review, the following key issues were identified:

- Landowner collective and industry programme – how was this going to work and how was it going to be enforced (because it is a key component of the resource management regime)
- Uncertainty regarding the process for ‘approval’ of land owner collectives and farm environment plans
- How “land use change” can be satisfactorily defined in Schedule 2 so that the rules will work and the outcomes will be achieved

Further, during the review it was decided to move Tables 1 and 2 from the objectives into the Schedules. This move is supported because in that location they will be more readily accessible.

The issues identified in respect of what had until recently been identified as Schedule 1 (Landowner collectives, etc) have been resolved through the addition of new content and the redrafting of other content. Given the style of plan being prepared, and the emphasis on non-statutory methods to achieve catchment wide outcomes, that schedule is considered to be fit for purpose. There remains a concern about enforceability where non-performance is identified or where objectives are not being achieved but those matters can be addressed through a future plan change should the need actually arise.

At the time of writing this report the issue of land use change remains unresolved. This same comment applies to the remaining incomplete schedules.

Conclusion

Based on my understanding of the objectives of the TANK plan change project, my review of the plan change documents, discussions with Council staff and the amendments to the document that have arisen from both the review and those discussions, it is my opinion that the plan change is fit for purpose, is consistent with the parent plan (RRMP) and the provisions will achieve the environmental outcomes sought by the TANK Group. Further, the plan change meets requirements of the Resource Management Act 1991.

Peter Constantine

24 July 2018

About the Peer Reviewer

Peter holds the degrees Bachelor of Arts (Sociology and Geography) and Bachelor of Town Planning. He is a Full Member of the New Zealand Planning Institute. He has been practising planning since 1977.

Peter has more than 40 years diverse planning and resource management experience ranging from district and regional plan preparation, to urban design and heritage conservation and resource consenting for a wide variety of land use activities.

His particular skills and expertise are in the areas of plan and plan change preparation and Schedule 1 processes, planning assistance to hearing panels during deliberations, and the management of application and appeal processes. Peter is an accredited hearing commissioner and holds the chair endorsement.

Peter is an active participant in the New Zealand Planning Institute having held the position of Branch Chairperson of the Otago Branch and the Nelson/Marlborough Branch and he has served as a Councillor on the national body of the Institute. For 8 years Peter sat on the Board of Studies for the Master of Planning programme at Otago University and also was an occasional lecturer on that programme.

In November 2017 Peter established PlanWrite, a specialised consultancy established specifically to help councils achieve the environmental outcomes they seek from plan change and plan review processes; and to provide hearing commissioner services.

Between May 2011 and November 2017, Peter held the position of Principal Planning Advisor in the Strategy and Planning Directorate at Canterbury Regional Council. In this role the full range of Peter's planning expertise and experience was called upon as the Council embarked on and successfully concluded an ambitious plan review process pursuant to the provisions of the Environment Canterbury Act 2010.

This work programme involved the comprehensive review of freshwater and land management plans, the designing writing and promulgation of a new integrated and comprehensive instrument that met the requirements of all higher order instruments (regional policy statement, national policy statement for freshwater management) as well as assisting with the implementation and attainment of the vision and principles of the Canterbury Water Management Strategy.

This plan was designed to set out provisions that set the region-wide policy direction and would have region-wide application while also enabling community-based catchment solutions for water quality and quantity to be incorporated over a period of time. To date the LWRP has been made operative and 5 sub-region sections (each promulgated independently) have been completed. In addition, an omnibus tidy up plan change has been completed.

In parallel with the LWRP, Peter was involved with the review of the Canterbury Air Regional Plan. He assisted with provision drafting, report reviews and preparation of the 'decisions-version' of the Plan.

During this period Peter's skills were extensively used as the planner assisting the independent hearing panels appointed by Council to hear and make recommendations on submission on the various planning instruments.

This involved the provision of expert advice on the implications of policy and rule redrafting being contemplated by the hearing panels; detailed review of decision tables to ensure decisions are consistent with recommended amendments to the plan; cross-referencing recommended plan amendments with submission points (to demonstrate scope); and editorial assistance with recommendation reports.

Peter has also provided input to a number of submissions on proposed legislation, national policy statements and the national planning standard.

Between February 2008 and April 2011 Peter held the position of Principal Planner at Marlborough District Council. The key responsibilities of this position were to promote best practice amongst the resource consents team, to up-skill the individuals within that diverse team, to assist with resource management plan and legislation interpretation, to provide technical advice to Council's Hearings Committees, to act as peer reviewer in respect of hearings reports, to manage all objections and appeals against Council's decisions on resource consent applications, and to provide technical and strategic advice to other departments of Council.

Prior to his time at Marlborough District Council Peter was a consultant planner with Beca Limited and on his own account. As a consultant Peter was involved with plan reviews on behalf of both public and private sector clients; acted for private and public sector clients in respect of applications for resource consents and notices of requirement for a wide variety of land use and resource use projects.

Draft for Review