

**Before the Hearing Panel
At Manawatū-Whanganui Regional Council**

Under the Resource Management Act 1991

In the matter of an application by Aquifer 182 Holding Company Limited to the Manawatū-Whanganui Regional Council (reference: APP-2018202028.00) for the abstraction of groundwater for the purposes of commercial water bottling and ice manufacturing

Legal submissions on behalf of Aquifer 182 Holding Company Limited

Date: 1 August 2022



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INTRODUCTION

- 1 These legal submissions support the resource consent application by Aquifer 182 Holding Company Limited (**Aquifer**) to the Manawatū-Whanganui Regional Council (**Council**) for the abstraction of groundwater for the purposes of commercial water bottling and ice manufacturing (the **Application** for the **Project**). Reference: APP-2018202028.00
- 2 These submissions provide an overview of the proposal, the matters at issue and address the evidence to be called. The primary focus is to confirm the legal framework to enable resource consent for the proposal to be issued. Specific matters arising in the hearing will be addressed in Aquifer's reply.
- 3 Aquifer agrees with the conclusions and recommendations reached in the independent expert evidence that it has presented. Accordingly, Aquifer largely agree with the Council's section 42A report, except where stated otherwise in the expert evidence it has presented. The applicants submit that the resource consent sought should be granted on the conditions as now agreed between the planners. Section 42A Report of Jasmine Mitchell, dated 8 July 2022 (**Section 42A Report**)

Structure of submissions

- 4 Taking into account the detail already provided in the section 42A report and evidence filed on behalf of Aquifer, these legal submissions focus on the key issues before the Panel. Accordingly, these submissions are structured as follows:
- 4.1 Overview of the proposal.

- 4.2 The statutory framework, including Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and the Resource Management Act 1991.
 - 4.3 Summarise the evidence and assessment of the environmental effects, including key issues such as cultural effects and end use.
 - 4.4 Summarise the relevant planning framework.
 - 4.5 The proposed conditions of consent.
- 5 The evidence before the Panel on behalf of Aquifer is:
- 5.1 Mr Geoffrey Murdoch – co-founder of Aquifer.
 - 5.2 Mr Terry Hughes – expert evidence on groundwater take effects.
 - 5.3 Ms Brenda O’Shaughnessy – expert planning evidence.
- 6 These legal submissions focus on the key issues identified in the submissions received. It is noted that three of these submitters wish to be heard at the hearing – Te Awhina Kaiwahia-Hamahona (Submission No. 19), Denise Locket (Submission No. 29) and Whanganui Peace Action Group (Submission No. 31).

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| 7 | By way of summary, and as set out in Council’s section 42A report, the three submitters raised issues relating to the following: | Section 42A Report, at p 10 |
| 7.1 | Ownership of water; | Submission No. 19 and 31 |
| 7.2 | Impact on cultural values; | Submission No. 19 and 29 |
| 7.3 | Impact on the Whanganui River/Te Awa Tupua; and | Submission No. 19 |
| 7.4 | Impact on environment from end use. | Submission No. 29 |
| 8 | These submissions will address these key concerns. Some matters raised are not relevant resource management matters, such as concerns relating to the ownership of Aquifer. | Submission No. 31 |

OVERVIEW OF THE PROPOSAL

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| 9 | On 26 September 2018, Aquifer lodged an application for resource consent with the Council. The application sought permission to take groundwater from existing groundwater bore 790014 (the Bore) for the purpose of bottling and ice manufacturing. | Section 42A Report, at [13]-[14] |
| 10 | The section 42A report addresses the proposal and site, however by way of summary: | |
| 10.1 | The site is located at 182-183 Anzac Parade, Whanganui East, Whanganui. The property is legally described as Lots 1 – 4 and Pt Lot 26 DP 2212 (the Site). The bore is located within the Whanganui | Section 42A Report, at [26]-[27]; Water Permit Application (WPA) dated |

- Groundwater Management Zone (**GMZ**) as set out in the Council's One Plan (**One Plan**). September 2018, at 5
- 10.2 The Application seeks to abstract groundwater from the bore for the purposes of commercial water bottling and ice manufacturing. The application seeks to abstract a daily maximum of 107m³/day and up to 750m³/week from the bore. The two other existing bores on site (#790160 and #790162) will not be used. WPA, at 7
- 10.3 The application was subject to a range of further information requests from the Council. The requests and responses are summarised in the section 42A report. Section 42A Report, Part C, at 4
- 10.4 In March 2019, Te Rūnanga o Tūpoho (**TROT**) were confirmed as the iwi lead for this project by Ngā Tāngata Tiaki o Whanganui. Engagement was subsequently coordinated through the Tūpoho Working Group (**Working Group**) at the request of TROT. Brenda O'Shaughnessy dated 18 July 2022, at [16]
- 10.5 The application was placed on hold while a Cultural Impact Assessment (**CIA**) was prepared on behalf of Ngā Hapū o Tūpoho which was submitted on 1 November 2019 as part of a further information request, with an assessment against Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (**Te Awa Tupua**). Ms O'Shaughnessy, at [17]-[18]

- 10.6 While the application was on hold, Ms O'Shaughnessy, at [21]
 Aquifer liaised with the Working Group. On 16 December 2020, the Working Group indicated they could no longer speak on behalf of ngā hapū and that direct engagement with each hapū would be required.
- 10.7 On 4 February 2021, the application for Ms O'Shaughnessy, at [20]
 resource consent was publicly notified on the basis that the CIA and assessment under Te Awa Tupua indicated the proposal may have potentially more than Section 42A Report, at [18]
 minor cultural effects. Following notification, 37 submissions were received on the application.
- 11 Under the One Plan, the proposed abstraction of groundwater requires a resource consent as a 'discretionary activity' because the daily volume sought will exceed the permitted activity standard of 50m³/day under Rule 16-2.

APPLICABLE STATUTORY FRAMEWORK

- 12 The activity occurs adjacent to the Whanganui River. The bore is located within the Whanganui River catchment. Both the Resource Management Act 1991 (**RMA**) and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (**Te Awa Tupua**) are considered the relevant legislation.
- 13 These legal submissions address both pieces of legislation. Firstly, these submissions will address the application of Te Awa Tupua in terms of relevance to the RMA process, before secondly

addressing the application of section 104 of the RMA.

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

14 Te Awa Tupua gives the Whanganui River legal personality, resulting in the river having the rights, powers, duties and liabilities of a legal person. It is submitted that the statutory status of the Whanganui River is an important matter for consideration.

15 Under section 7 of the Te Awa Tupua, the Whanganui River is defined as:

(a) the body of water known as the Whanganui River that flows continuously or intermittently from its headwaters to the mouth of the Whanganui River on the Tasman Sea and is located within the Whanganui River Catchment; and

(b) all tributaries, streams, and other natural watercourses that flow continuously or intermittently into the body of water described in paragraph (a) and are located within the Whanganui River catchment; and

(c) all lakes and wetlands connected continuously or intermittently with the bodies of water referred to in paragraphs (a) and (b) and all tributaries, streams, and other natural watercourses flowing into those lakes and wetlands; and

(d) the beds of the bodies of water described in paragraphs (a) to (c).

16 Section 7 of Te Awa Tupua defines the Whanganui River Catchment as:

the area shown titled as the Whanganui River catchment on SO 469123.

- 17 This confers a heightened obligation when applying for resource consent under the RMA, to consider the impact of the application activities on the Whanganui River and its catchment.
- 18 Section 15 of Te Awa Tupua, states that those decision makers (as listed in Schedule 2 of Te Awa Tupua), in exercising their powers and functions under the RMA, must consider Te Awa Tupua if the exercise of that function relates to the Whanganui River or an activity within the Whanganui River Catchment that affects the Whanganui River.
- 19 In complying with Te Awa Tupua, both the decision-maker and applicant must follow the Te Pā Aurora framework set out in section 11.
- 20 It is submitted that the consent authority, through the section 42A report, the CIA, and the applicant through further information responses, engagement with hapū and iwi and evidence filed, have provided sufficient consideration of Te Awa Tupua.
- 21 Aquifer concur with the section 42A report as it relates to the assessment of Te Awa Tupua and the consideration that the connection between the River and aquifer is 'low'. The section 42A report states:

For this application, the location of the take is within the Whanganui catchment and in close proximity to the Whanganui River, however it not directly from the river itself. Based on the assessment from both the Application review within the Cultural Impact Assessment and evidence from Mr Thomas the connection between the River and

Section 42A
Report, at [37]

the aquifer is considered to be low. This means there is not a direct connection to the river which will protect the health and wellbeing of the river.

- 22 As noted by Ms O’Shaughnessy, the three hydrogeologist experts, including Mr Hughes, find that the lack of direct connection will protect the health and wellbeing of the River. The section 42A report and Ms O’Shaughnessy describe that given there are no direct concerns or connections to the River, a standard RMA evaluation for discretionary activities ought to be followed, rather than requiring any separate process to provide an assessment of Te Awa Tupua. Ms O’Shaughnessy, at [29]
- 23 The Application itself includes an assessment against Te Awa Tupua, which is consistent with that set out in the section 42A report. WPA, at 9
- 24 Aquifer submits that sufficient consultation and engagement has occurred. A record of consultation with hapū and iwi is outlined partly within Appendix 2 to the section 42A report, and the additional records of engagement are outlined in the evidence of Ms O’Shaughnessy. Ms O’Shaughnessy, at [34]

Resource Management Act 1991

- 25 As noted above, the proposal is considered a discretionary activity under the One Plan. Accordingly, a section 104 assessment is required. Section 104(1) of the RMA provides that, when considering applications for resource consent and any submissions, the Court must, subject to Part 2 of the RMA, have regard to:

- (a) any actual and potential effects on the environment of allowing the activities;
- (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;
- (b) any relevant regulations and provisions of statutory planning documents; and
- (c) any other matter the Court considers relevant and reasonably necessary to determine the applications.

26 Under section 104B of the RMA, after considering an application for a discretionary activity, a consent authority may grant or refuse the application, and if granted, may impose conditions under section 108.

27 The purpose of the RMA is to ‘promote the sustainable management of natural and physical resources’, as set out in section 5.

28 Sections 6 to 8 set out the relevant matters that the Court must consider, including:

28.1 section 6 (e) – the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;

28.2 the 'other matters' in section 7; and

28.3 the principles of the Te Tiriti o Waitangi/ Treaty of Waitangi as set out in section 8.

29 For this Project, of particular relevance is section 6(e) of the RMA. A key issue is cultural effects of

See submissions 5, 6, 11, 16, 19-28 and 30

the activity, which are raised in a number of submissions.

EFFECTS ASSESSMENT

30 As set out in section 104(1) of the RMA, in consideration of this application, the consent authority must have regard to any actual and potential effects on the environment of allowing the activity. Discussion relating to the environmental effects of the proposal are included in the evidence of Mr Murdoch, Mr Hughes and Ms O’Shaughnessy. These submissions provide direction and guidance through summarising the evidence on the effects on the environment from the activity.

Reasonable and efficient use of water

31 The take and use consent is for commercial water bottling and ice manufacturing. The consent consists of a take of up to 750 m³ per week. Initially, the expected use will be up to 150 m³ per week with a progressive rise over the subsequent 2-3 years of the consent.

32 It will be the evidence of Mr Hughes that the proposed approach to take will be both reasonable and efficient, as the consented water taken will be used and applied to the activity as proposed, and not left unused. Terrence Jon Hughes dated 18 July 2022, at [13]

33 The CIA recommended a retention of 20% of the water take for the health of the water. It is submitted that this conflicts with Policies 5-12(c) and 5-13 of the One Plan as detailed in the section 42A report, See Section 42A Report, at [72], and Ms O’Shaughnessy, at [67]

which Aquifer concurs with through the evidence of Ms O'Shaughnessy.

- 34 It is submitted that the approach of using only the water necessary relieves the concerns raised in the CIA, while also being a reasonable and efficient abstraction from the bore in terms of Policies 5-12(c) and 5-13 of the One Plan.

Positive effects

- 35 The section 42A report briefly acknowledges the positive effects which result from the proposal. These include, as stated in the application, new jobs created locally by the activity, therefore contributing to the economic wellbeing of the District and Region. Section 42A Report, at [73]; Application, at 8
- 36 The statement of evidence of Mr Murdoch addresses the positive effects of the proposal in more detail. The proposal and new water bottling business will create employment for both skilled and unskilled persons. Aquifer proposes employing local people and will ensure equal access to employment and promotional opportunities. Indirect additional employment will also result from the regular demand for truck deliveries and use of the rail siding at Eastown. Geoffrey Peter Murdoch dated 18 July 2022, at [22] and [24]
- 37 The proposal, it is submitted, is as much about the restoration and revitalisation of the bore and buildings on site as it is about the development of a locally owned and operated business and product. Mr Murdoch, at [7]-[9]

38 Mr Murdoch will give evidence that the proposed activity will support a circular economy. By way of summary, this will be achieved by: Murdoch, at [22]-[24]

38.1 Reuse and re-purpose of the existing bore, building, facilities and loading bays;

38.2 Operating in a sustainable and ethical manner to protect and enhance the environment through the avoidance of plastic products, and the use of reusable rubber bladders and bottles;

38.3 Use of glass bottles for retail and restaurant trade, and corn-starch / recycled packaging;

38.4 Encouraging the reduction of the office carbon footprint, including through local employment and installation of solar panels on site; and

38.5 Landscaping of the site to enhance amenity and safety.

39 Community is important to Aquifer, as is the fundamental objective of being a responsible locally grown business to provide and protect an adequate water supply and system, the running of which will continue to seek guidance from hapū. Mr Murdoch, at [8] and [25]

Groundwater effects

40 As set out in the evidence of Mr Hughes, an assessment was made into the potential impacts and

cumulative effects of the proposed groundwater take on:

- 40.1 the surrounding groundwater users, Mr Hughes, at [14]-[19]
 - 40.2 nearby surface water features, and At [20]-[24]
 - 40.3 water quality due to seawater intrusion. At [25]-[28]
- 41 The hydrogeological environment relevant for the proposal is described in the evidence of Mr Hughes. This includes the location of the bore in the GMZ, with the relevant Whanganui Aquifer currently having 36% allocation remaining. At [10] and [11]
- 42 The evidence of Ms O’Shaughnessy and the Council’s section 42A report summarise the same three potential effects of the proposed groundwater take. Both concur, and it is submitted by Aquifer in summary that the proposed groundwater take:
- 42.1 would not result in over allocation of groundwater in the Whanganui Groundwater Management zone (**GMZ**);
 - 42.2 effects resulting in depletion on surface waterbodies is less than minor;
 - 42.3 given the small-scale volume of the water take, along with the bore being approximately 7.5km from the coast, risk of saltwater intrusion is limited; and
 - 42.4 effects of the operation of the bore on neighbouring bores is less than minor.

43 Ms O’Shaughnessy’s conclusions rely on the evidence of Mr Hughes. Mr Hughes will give evidence that:

43.1 due to the low number of consented neighbouring bores (2) within a 5 km radius and at the same depth interval, the complex layered geology of sediments and the small volume proposed to be taken and most importantly the stable nature of groundwater levels in the general area over the last 10 to 20 years, there would be a less than minor effect on neighbouring groundwater users. Two well interface effects assessments on drawdown came to the same conclusion. Mr Hughes, at [17]-[19]

43.2 Groundwater effects assessments concluded that water would not be depleted from the nearby Whanganui River as a result of the proposed take. This is because of the low permeable layers between the River and abstraction depth precluding flow. Additionally, monitoring of nearby bores over the last 30 years indicate the aquifer was not under stress. At [20]-[23]

43.3 Groundwater effects assessments concluded that saltwater would not intrude into the proposed abstracted aquifer as a result of the proposed take. This is due to the distance from coast, 7.5 km, being too great to induce a gradient to draw saltwater back into the freshwater aquifers, as well as the clay layers present At [26] and [27]

in the aquifer between the abstraction depth and the coast.

43.4 Groundwater effects assessments At [30]-[33]
concluded that cumulative effects would not result if consent was granted due to the observed long-term stability of groundwater levels in the general area. Mr Hughes highlights the allocation available in the Whanganui aquifer.

44 Aquifer therefore submit that, for the reasons set out above, the effects of the proposal on the groundwater are less than minor.

Cultural effects

45 The RMA expressly requires all persons exercising functions and powers under the Act to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, as a matter of national importance under section 6(e).

46 Section 6(e) of the RMA provides that:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

Section 6(e),
RMA

...

(e) the relationship of Māori and their culture and traditions with

their ancestral lands, water, sites,
waahi tapu, and other taonga:

- 47 It is well-settled that Mana Whenua are specialists in tikanga of their iwi or hapū, and that it is for them to convey their position on cultural matters in resource management applications and proceedings. *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [157] and [166]-[177] upheld in the High Court [2019] NZHC 900
- 48 The courts have accepted that 'cultural effects' can be a category of 'effects on the environment' under the RMA. In the Environment Court's decision in *Ngāti Whātua Ōrākei Whai Maia Limited v Auckland Council*, the Court accepted the appellant's arguments that cultural effects were a particular category of effects. Following a review of relevant case law, the Court also accepted that cultural effects could be tangible or intangible. *Ngāti Whātua Ōrākei Whai Maia Limited v Auckland Council* [2019] NZEnvC 184
- 49 Similarly, the Environment Court in *Te Runanga o Ngāi te Rangi Iwi Trust & others v Bay of Plenty Regional Council* rejected the proposition that the RMA requires only physical effects to be taken into account, stating that:
- We do however reject the submissions made for the Port that only physical effects must be taken into account by this Court, as clearly cultural effects include a range of impacts that may affect historic, traditional and spiritual aspects of the relationship Māori have with their ancestral lands, waters, waahi tapu and other taonga and their kaitiakitanga...
- 50 In *Ngāi Hapū Incorporated v Bay of Plenty Regional Council*, the Environment Court found that its [2017] NZEnvC

understanding of cultural effects in that case (concerning the Rena) was informed not only by sections 6(e) and 7(a) of the RMA but also from the applicable hapū management plans and the evidence of the many cultural witnesses before the Court. In this regard, in its overall evaluation of cultural effects, the Court found:

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[330] We recognise that for a percentage of marae, hapū and members of various iwi through the Bay of Plenty the granting of consent will not resolve their ongoing concerns. For some it will break their relationship with Otaiti and their confidence in their local environment. For others it may mean that they will not eat food from the reef.

At [330]-[331]

[331] For most Maori they will move on whether or not the consent is granted. In our view there should be steps taken to positively recognise and provide for Maori and the ongoing effects of granting the consent. This has the broader effect of recognising the relationship of Maori with the reef and the broader recognition of the rohe moana and Te Moana a Toi in general.

Effects on tangata whenua and cultural values

51 The effects on tangata whenua and their intrinsic cultural values are addressed extensively in the evidence of Ms O’Shaughnessy and the section 42A report. Both concur that the key cultural themes from submitters, the CIA and Ngā Paerangi feedback were in relation to concerns about the potential effects on the Whanganui River and about abstracting groundwater and the potential impact on cultural values, including on the ‘mauri’ of water.

52 Regular constructive engagement has occurred between Aquifer, NTT, TROT and Ngā Paerangi

hapū as identified earlier in these submissions, and as described both in the section 42A report and evidence of Ms O’Shaughnessy. Aquifer wishes to acknowledge TROT and the Working Group for taking time to engage and help them to learn in greater detail their concerns within the cultural landscape in a way which is consistent with the values and essence of Te Awa Tupua.

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| 53 | <p>In relation to concerns regarding the effects on the Whanganui River, Ms O’Shaughnessy concurs with the assessments made in the section 42A report. The conclusions state that the direct physical connection with the Whanganui River is considered to be low, as noted in the previous section of these submissions.</p> | <p>Ms O’Shaughnessy, at [43]; Section 42A Report, at [48]</p> |
| 54 | <p>Ngā Hapū o Te Rūnanga o Tūpoho considered there to be inadequate data on groundwater takes. A joint letter with TROT was provided to the Council for the purpose of gaining further information as to surface water and ground water monitoring to ensure the River is protected. The letter:</p> <p style="padding-left: 40px;">provides indications that TROT sought to find a way forward to enable the economic benefits to be realised whilst ensuring the River is protected. It acknowledges that TROT is supportive of the Applicant’s responses to the CIA recommendations and confirms NTT handed over leadership of the engagement to TROT to represent ngā hapū.</p> | <p>Joint letter to Council from TROT, NTT and Applicant dated 8 October 2020 - emailed on 12 October 2020</p> <p>Ms O’Shaughnessy, at [45]</p> |
| 55 | <p>It is submitted that the confirmed monitoring regime between TROT and Council will ensure the River is protected, the benefit being that the whole catchment</p> | <p>At [46]</p> |

approach will ensure its protection outside of this single application.

- 56 As highlighted in the evidence of Ms O’Shaughnessy, Aquifer have also provided for the environmental, employment, economic and education key decision making criteria identified by TROT, in a way that is consistent with the intrinsic values expressed in the CIA. This includes through: At [47]-[53]
- 56.1 Environmental effects being considered less than minor;
 - 56.2 Aquifer adopting affirmative action in the recruitment process by taking proactive steps, such as in the recruitment and search process, to ensure equal access to employment and promotional opportunities.
 - 56.3 Aquifer continuing to work with TROT and the Working Group for more than four years to continue building a relationship and journey of cultural learning to better understand and appreciate the pathway and significance for tangata whenua in achieving Te Awa Tupua Act.
 - 56.4 Aquifer proposing to establish professional links with secondary schools and workplace experience for school leavers, establish education scholarship fund for employees, and potentially providing public education about facility, operations and natural resources.

- 57 The independent hearing panel appointed by Council in relation to the recent application by Grenadier Limited for resource consents associated with the construction and development of a proposed eighteen-hole links golf course and ancillary activities on land at 765 Muhunua West Road, Ōhau, also engaged with effects on tangata whenua and cultural values (*Re Douglas Links*). *Re an application by Grenadier Limited (APP-2020203164.01)*, Independent Hearing Panel, Horizons Regional Council, dated 25 July 2022
- 58 Particularly, the Panel considered the impact of the proposed vegetation clearance and earthworks activities on the relationship of iwi and hapū with land, water, sites, wāhi tapu, wāhi tupuna and other taonga. The Panel in *Re Douglas Links* found that, in relation to the earthworks activities, evidence suggested that the activity would have ‘significant adverse effects’ on the wāhi tapu values associated with the ancestral pā site and kāinga known to the tangata whenua. At [8.36]-[8.37]
- 59 It is submitted that this matter regarding Aquifer’s application for water take and use does not have the same evidence of significant adverse effects before it. A comparison of earthworks and a water take from an existing aquifer is a very different context. Additionally, given the expert evidence before the Panel is that the effect of the water take on the Whanganui River is less than minor, it is submitted that the Panel ought to take a different approach to the decline of consent on cultural values relating to the earthworks in *Re Douglas Links*.

‘End use’ and impacts on Mauri of the water

- 60 The CIA opposes the water take based on its impact on the mauri of the wai and on the mixing of the

mauri of waters, if water is exported outside of the rohe.

61 As set out in both the section 42A report and the evidence of Ms O’Shaughnessy, opposition to the application has been expressed in terms of the end use of the water taken.

62 Feedback from the Working Group stated that:

Ngā Paerangi is at principle opposed to use and access of ground water within the hapū rohe for commercial purposes.

Ms O’Shaughnessy, at [72]

63 Further, recommendation T from the CIA indicated opposition of the water take based on its impact on the:

Mauri of our Taiao as a result of increased waste in the form of plastic.

Cultural Impact Assessment, Nga Hapū o Te Runanga o Tūpoho, dated 31 October 2019 (CIA), at 11; Ms O’Shaughnessy at [73]

64 In response to the CIA, and as discussed earlier in these submissions, the bottling of water will be done in a sustainable manner, through the avoidance of plastic bottles, use of rubber bladders and bottles, and glass bottles.

65 The end use of water, particularly regarding the use of plastics, is of particular concern to a number of other submitters also. Given the concern, these submissions address the Courts’ approach to taking into account the end use of water.

66 The law relating to the end use of water and whether, and to what extent, this can be considered

is a growing area of law, particularly as it relates to take and use of water for water bottling.

- 67 Appendix 3 to the section 42A report contains legal advice provided to the Council on this issue. The approach taken in the letter is to set out the recent law, but for the recent Court of Appeal decision *Aotearoa Water Action Inc v Canterbury Regional Council*, which was published on 20 July 2022. These submissions summarises the case law, and indicates the potential impact of the *Aotearoa Water Action* decision.
- Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 235

Courts' approach to end use

- 68 In *Beadle v Minister of Conservation*, the Environment Court found that a consent authority can have regard to the intended end-use of a proposed activity, and any consequential effects on the environment that might have, when considering any resource consent application, if those effects are 'not too uncertain or remote'.
- Beadle v Minister of Corrections*
EnvC Wellington
A074/2002, 8
April 2002 at [90]–[91]

- 69 The High Court in *Te Rūnganga o Ngāti Awa v Bay of Plenty Regional Council* agreed with the Environment Court's summary of legal principles, which stated that:
- Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZRMA 76, at [81]–[82]

Nexus here refers to the degree of connection between the activity and the effect, while remoteness refers to the proximity of such connection, both being considered in terms of causal legal relationships rather than simply in physical terms.

- 70 The High Court confirmed that limitations of nexus and remoteness must apply when assessing which
- At [82]

effects on the environment of allowing the activity are relevant under s 104(1).

71 The *Te Rūnanga o Ngāti Awa* case is particularly relevant given it relates also to the take and use of water for commercial use, particularly water bottling for exportation. The High Court was concerned with whether, and to what extent, the Environment Court could consider the environmental and cultural effects for Māori arising out of the use of plastic bottles and the discarding of plastic bottles overseas.

72 The High Court considered whether the Environment Court was wrong in deciding it did not have jurisdiction to consider the ‘end use’ of the water take, ie the fact that the water was to be exported overseas. The Environment Court had observed:

...while there is public debate about export of water from New Zealand, there is no legal basis on which we might restrict that activity...

[2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [107]

73 When focussing on the key effects raised by Ngāti Awa, which were cultural and related to, such as in the present case, the ‘mauri’ of the water, the Court found that the cultural effects of the export of water from the aquifer occurred in New Zealand. On that basis the effects were not too remote or disconnected from the activity to be discounted. The High Court limited its findings to the facts of this case, noting that in each case the test of remoteness will be one of fact and degree.

74 Despite its finding on remoteness, the High Court considered that the Environment Court’s conclusion that ‘exporting bottled water is beyond the scope of

At [142]

consideration in an application for resource consent to take water' went too far.

- 75 The adverse effects of discarding plastic water bottles was a key concern of Sustainable Otakiri and the wider community. However, the High Court found that the effects of water bottles discarded overseas were too remote and outside the scope of the RMA. For plastic water bottles discarded in NZ, the High Court found that such adverse effects may potentially be taken into account, but subject to questions of fact and degree. At [149] At [153]
- 76 It is submitted that as Aquifer have indicated their change in approach away from plastic bottles, such a consideration is not required in this case. The Panel need not turn its mind to the discarding of plastic bottles.
- 77 *Aotearoa Water Action* concerned the appeal of a High Court decision to uphold the Council's grant of resource consents to applicants who were seeking to take water in reliance on the rights previously granted but for the purposes of bottling the water and selling it.
- 78 The Court of Appeal considered whether it was lawful for the Council to grant consent for the water bottling activities without granting new consents in each case to take the water. Originally, the Council decided the application should be processed as an application for a new use, influenced by the wording in section 14 of the RMA. The Court found that:

While many uses of water result in a discharge into the environment, discharges are dealt with under s 15(1) of the Act; it is not possible to limit the ordinary meaning of

At [96]

“use” on the basis that the water is used for the purpose of bottling and not discharged.

79 In such circumstances the Court concluded that At [97]
when water leaves a pipe and enters a bottle, that
amounts to a use of water.

PLANNING FRAMEWORK

80 The Court is directed by sections 104 to have regard
to, or particular regard to, the relevant regulations
and provisions of the statutory policy and planning
documents, as well as any other matter the Court
considers relevant and reasonably necessary.

Regulations, policy and planning documents

81 Under the One Plan, the proposed abstraction of
groundwater requires a resource consent as a
Discretionary Activity because the daily volume
sought will exceed the permitted activity standard of
50m³/day under Rule 16-2.

82 There is detailed evidence before the Panel from Ms
O’Shaughnessy for Aquifer, as well as within the
section 42A report, on the relevant national, regional
and district planning instruments relevant to this
application. There is a high level of consensus
between them of what the relevant objectives and
policies are relevant to the Project. These regulations
and policy and planning documents are:

82.1 Resource Management (Measurement and
Reporting of Water Takes) Regulations
2010 (Updated 2020) (**Regulations**);

- 82.2 National Policy Statement for Freshwater Management 2020 (**NPS-FW**);
- 82.3 Regional One Plan Policy Statement (**RPS**); and
- 82.4 Regional One Plan (**One Plan**).

Resource Management (Measurement and Reporting of Water Takes) Regulations 2010 (Updated 2020)

- 83 The section 42A report, and the evidence of Ms O’Shaughnessy, concur that the Regulations are relevant as the proposed take is at a rate greater than 5l/second. Section 42A Report, at [77]; Ms O’Shaughnessy, at [76]
- 84 It is submitted that conditions 3 – 8 of the proposed conditions ensure that the take is compliant with Regulation 4.

National Policy Statement for Freshwater Management 2020

- 85 The section 42A report, and the evidence of Ms O’Shaughnessy, concur that the NPS-FM is relevant. The relevant Objective of the NPS-FM and the following Policies are considered to be relevant to the consideration of the application:
 - 85.1 Objective – ensure that natural and physical resources are managed in a way that prioritises the health and well-being of water bodies and freshwater ecosystems; the health needs of people (such as drinking water); and the ability of people and communities to provide for

their social, economic, and cultural well-being, now and in the future

- 85.2 Policy 1 – every Regional Council must give effect to Te Mana o te Wai by actively involving tangata whenua in freshwater management (including decision-making processes).
- 85.3 Policy 2 – ensure that Tangata Whenua are actively involved in the management of freshwater and that Maori freshwater values are provided for.
- 85.4 Policy 3 – that freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-catchment basis, including the effects on receiving environments.
- 85.5 Policy 11 – that freshwater be allocated and used efficiently, all existing over-allocation is phased out and future over-allocation is avoided.
- 85.6 Policy 15 – ensure that communities are enabled to provide for their social, economic, and cultural wellbeing in a manner that is consistent with the NPS-FM.
- 86 Aquifer concurs with the assessment against the relevant Objective and Policies as set out in the section 42A report.
- 87 Specifically, through the engagement with the Working Group and ngā hapu, Aquifer

Ms
O'Shaughnessy,

- acknowledges the concern of iwi and hapū and the potential impacts of the proposed water take. at [81]
- 88 As set out in the evidence of Ms O’Shaughnessy, Aquifer proposes to minimise the take by use of efficient methods and processes, and to return to the community through tangible benefits such as providing water to lower Whanganui marae, avoiding as far as practicable the use of plastics, and establishing new jobs that could be filled by hapū. Ms O’Shaughnessy, at [81]
- 89 It is submitted that the active involvement of iwi and hapū to address their concerns gives effect to Te Mana o Te Wai by restoring and preserving the balance between the water, the wider environment, and the community, and therefore consistent with Policy 1.
- 90 The CIA preparation and ongoing engagement with iwi and hapū to ensure their active involvement in the management of the water, and that their intrinsic cultural and physical environmental values are provided for is consistent with Policy 2.
- 91 The lack of effect on the overall groundwater resource and less than minor effect on water allocation ensures that Policies 3 and 11 are also met, whilst Policy 15 is met through the positive effects described above.

Regional One Plan Policy Statement

- 92 The Application, the CIA and the Aquifer’s response to the CIA provide a full assessment of the proposal against the RPS. Aquifer concurs with the section Application, at 11 and Updated Further Information, dated 1 November 2019,

42A report assessment of both Policies 2-1 and 2-4 at 11
of the RPS, in that:

92.1 the proposed take will not adversely affect
the ability of hapū and iwi to provide for
their social, economic and cultural well-
being; and

92.2 the proposed water take will not adversely
affect the groundwater resource or any
neighbouring users.

93 As addressed in the evidence of Ms O'Shaughnessy, Ms
Aquifer concur also with the assessment of the O'Shaughnessy,
section 42A report in relation to Objectives 5-2 and at [87]
5-3 and Policies 5-12, 5-13, 5-20 and 5-21 for the
reasons set out in the effects assessment of these
submissions. Ultimately, the proposed abstraction
fits within the allocation for the GMZ, and its effects
on groundwater are less than minor.

Regional One Plan

94 The section 42A report assess the application against
the relevant provisions of the takes, uses and
diversions of water chapter (Chapter 16) of the One
Plan. The relevant provisions are Objective 16-1
and Policies 16-1, 16-5, 16-6, 16-7 and 16-8.

95 As addressed in the evidence of Ms O'Shaughnessy,
Aquifer concur with the assessment of the section
42A report, but for the reports assessment of Policy
16-7 which states that:

In addition, consents to take
groundwater within 5 km of the
coastal mean high water springs
line must contain conditions[^]
relating to the monitoring of

electrical conductivity and the restriction or suspension of takes if specified electrical conductivity thresholds are reached or exceeded. These monitoring requirements and electrical conductivity thresholds will be determined on a case-by-case basis.

- 96 In reliance on the evidence of Mr Thomas, Policy 16-7 does not apply to the bore as the relevant bore is ‘approximately 7km from the coast’. It will be Ms O’Shaughnessy’s evidence that the conditions that may be imposed under Policy 16-7 will not apply to Aquifer’s application.
- Section 42A Report (Hydrogeology) of Neil Thomas, dated 7 July 2022, at [22]

SUBMISSIONS

- 97 The content of the submissions has largely been addressed throughout these submissions. In addition, Ms O’Shaughnessy provides a table of submissions with responses. The section 42A report further provides a response to those submission points which are outside the jurisdiction of Regional Council.
- Ms O’Shaughnessy, at [101]
- 98 The Courts have considered the weight to be given to vocal minority groups or submissions covering minor concerns.
- 99 *Minhinnick v Watercare* is useful in assessing the weight to be given to tangata whenua views on RMA matters. Although concerning how to assesses what is ‘noxious’ or offensive’ for an application for an enforcement order, the Court of Appeal was clear that Māori do not have a veto by right of the Treaty of Waitangi’s incorporation into the statutory scheme, and rejected the approach taken by the High Court assessment by reference to a ‘reasonable Māori person... representative of the Māori
- Minhinnick v Watercare* [1998] NZRMA 113 at [127]

community as a whole’, considering that the Court should still approach the issue from a position representative of New Zealand society as a whole. Nonetheless, while weight must be given to the views of mana whenua, it is just not decisive and other considerations will intersect.

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| 100 | <p>A similar approach was taken in <i>Golden Bay Grandstand Community Trust</i>. The Environment Court rejected Council’s submissions that because opposition to the demolition of a historic grandstand were those of a small but well organised minority, they should not be given weight. A small ‘focal’ group’s opposition was a valid consideration. However, whether something was ‘objectionable’ or ‘offensive’ is to be assessed objectively from the perspective of a reasonable person.</p> | <p><i>Golden Bay Grandstand Community Trust (Inc) v Heritage New Zealand Pouhere Taonga</i> [2018] NZRMA 133</p> |
| 101 | <p><i>Waikato Environmental Protection Society Inc</i> concerned an appeal against the grant of consents for continued operation of a mushroom compost production site on the basis of its odour. There is a useful discussion on the neighbours’ evidence in opposition to the resource consent. The applicants argued that they were a ‘hyper-sensitive minority’. When addressing the views of the wider community, it was relevant that the applicant’s efforts had reduced the effect of the odour on the wider community, but that the fact that the odour was affecting immediate neighbours was still relevant.</p> | <p><i>Waikato Environmental Protection Society Inc v Waikato Regional Council</i> [2008] NZRMA 431, at 468</p> |

CONSENT CONDITIONS AND DURATION

Conditions

- | | | |
|-----|--|-----------------------------------|
| 102 | <p>Aquifer accepts the suitability of the conditions of consent proposed through the appendix to the</p> | <p>Joint Statement (Reporting</p> |
|-----|--|-----------------------------------|

Council's section 42A report, subject to the subsequent agreement reached in discussions between the planners. A refined set of conditions were attached to the joint statement of the reporting planners, Ms Mitchell and Ms O'Shaughnessy.

Planners) dated 27 July 2022.

- 103 The set of conditions is important to assess, as the effects to be assessed are those as mitigated by the proposed conditions. The conditions are relevant to consider on an ongoing basis to address any matters arising through the hearing.

Duration of consent

- 104 The Application as lodged in 2018 requested a duration of consent of 27 years, with an expiry date of 1 July 2045. Aquifer is concerned with the delay on determining the consent application, which has meant that the period is now reduced to 23 years.

- 105 It will be the evidence of Mr Murdoch that in order to secure the long term viability of the project, repay the relevant finance obligations and to ensure a successful commercial operation, the duration of consent sought is required to be the full remaining 23 years. Less would not enable such outcomes.

Mr Murdoch, at [29]-[33]

- 106 Policy 12-5(b)(i) sets out the criteria for a longer term of consent. Ms O'Shaughnessy will give evidence to the effect that the application fits this criteria, and therefore an expiration date of 1 July 2045 would provide greater confidence for business development given the sensitivity to the proposed end use.

Ms O'Shaughnessy, at [97]-[98]

CONCLUSION

107 For the reasons set out above, and in the application and AEE, Aquifer’s evidence and the Council’s section 42A report, the resource consent for the take and use of water as sought should be granted subject to the proposed conditions as agreed by the planners.

Date: 1 August 2022



.....
Stephen F Quinn

Counsel for Aquifer 182 Holding
Company Limited

