

**IN THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA  
KI TĀMAKI MAKAURAU**

**Decision [2024] NZEnvC 047**

IN THE MATTER

the Resource Management Act  
1991

AND

of an appeal under section 120 of  
the Act

BETWEEN

WASTE MANAGEMENT NZ  
LIMITED

(ENV-2021-AKL-000137)

Appellant

AND

HAURAKI DISTRICT COUNCIL  
WAIKATO REGIONAL COUNCIL  
Respondents

AND

MARK OFSOSKE  
TE KUPENGA O NGĀTI HAKO  
Section 274 Parties

Court: Environment Judge D A Kirkpatrick  
Environment Commissioner A C E Leijnen  
Environment Commissioner J Hodges

Hearing: 3 - 5 and 24 - 25 May 2023

Last event: Closing submissions filed 13 June 2023

Appearances: A Arthur-Young, S Pilkington and A Gilbert for Waste  
Management NZ Limited  
R Ashton and R Taurau for Hauraki District Council  
P Lang for Waikato Regional Council  
P Kapua for Te Kupenga o Ngāti Hako

Date of decision: 19 March 2024

Date of issue: 19 March 2024



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**DECISION OF THE ENVIRONMENT COURT**

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- A. The appeal is dismissed.
- B. Costs are reserved. Any application must be made within 15 working days of the date of delivery of this decision. Any party against whom costs are sought has a further 15 working days to respond.

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## **Part 1 - Introduction and background**

[1] Waste Management NZ Limited operates an existing landfill at 6306 State Highway 26, Tirohia, approximately 6.5 km south of Paeroa and 13 km north of Te Aroha in the Hauraki District. The land rises from the Waihou river on the Hauraki Plains to high ground towards the east. This area of high ground is called Rae ō te Papa and is the tūpuna maunga of Ngāti Hako, who are tangata whenua here.

[2] A quarry into Rae ō te Papa has operated since 1912. A landfill for municipal waste was established in the worked-out area of the quarry in 1998. A covenant was registered against the title to the land in 2003 when certain consents relating to the landfill were granted. The covenant requires that there be no further landfilling beyond 25 July 2038. This covenant was put in place by Waste Management's predecessor in title following negotiations with Ngāti Hako to resolve their objection to the grant of those consents.

[3] The last cell of the existing landfill, called Phase B, is expected to reach capacity in 2024 at current landfilling rates but could continue beyond that date if filling rates are reduced. On 18 June 2020 Waste Management lodged applications with the Hauraki District Council and the Waikato Regional Council for the resource consents needed to construct and operate a new Phase C of the landfill on a different part of the site. The regional consents were sought for a term ending in 2038, to accord with the covenant. It is proposed that refuse placement in Phase C would start once filling of Phase B is complete. The application has a discretionary activity status under both the Hauraki District Plan and the Waikato Regional Plan.

[4] The application was publicly notified on 13 November 2020. 21 submissions were received by the Regional Council and 19 submissions were received by the District Council, all of which were in common with the ones

received by the Regional Council. Of these submissions, 15 were in opposition, 2 were neutral and 4 were in support.<sup>1</sup>

[5] Following a joint hearing by the Hearings Commissioners appointed by the Councils, the application was declined. Waste Management appealed to this Court against the whole of the decision, seeking that its applications be granted subject to conditions.

### **1.1 Notice of appeal**

[6] Waste Management identified that the assessment of adverse effects on Te Rae ō te Papa against the regional and district planning framework and the relevant statutory provisions was a key issue at the first instance hearing. The Notice of Appeal stated that the Commissioners determined the conditions proposed by Waste Management would not adequately mitigate the effects identified by Ngāti Hako and in making this finding, the Commissioners had erred in several material ways. This included in the interpretation of the relevant plan provisions, including the finding that the provisions relating to cultural values and discharges to land were determinative and erroneously treating the plan provisions relating to cultural values as hard limits requiring avoidance of adverse effects.

[7] Waste Management accept that Ngāti Hako as mana whenua are best placed to identify the adverse effects of the application on them and their taonga, stating that Waste Management's responsibility is to demonstrate how the application would appropriately avoid, remedy and mitigate those effects, as well as responding to the broad range of other policy directives in the relevant plans.

[8] As one of the specific reasons for the appeal, Waste Management stated that the Commissioners disagreed with the advice of the three planners for

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<sup>1</sup> Notice of appeal at 4.

Waste Management and the two Councils, who, by the end of the hearing with differing emphases reflecting their different roles, advised that the application was deserving of consent and, in doing so, the Commissioners consistently misapplied the relevant planning framework.

[9] Other specific issues raised in the notice of appeal are:

- (a) The Commissioners incorrectly found the terms “sites” and “areas” of significance to Māori are used synonymously in the District Plan.
- (b) The Commissioners found the application does not qualify as regionally significant infrastructure as defined in the Regional Plans.
- (c) In undertaking their detailed review of planning provisions, the Commissioners erroneously applied a test requiring the application to achieve consistency with each aspect of each provision, which Waste Management considers goes well beyond the requirement of section 104(1) RMA.
- (d) In relation to the mitigation proposed, the appeal stated:

The RMA and relevant planning framework required the mitigation proposed by Waste Management to be directly and specifically interrogated and assessed. The Commissioners failed to undertake that fundamental assessment. Instead, the Commissioners simply accepted at face value the proposition that the identified effects could never be mitigated, no matter what was proposed. That is a material error that invalidates the Decision in its entirety.
- (e) Waste Management disputed the Commissioners’ finding that the initial operation of Cell C for the first couple of years while the LFG extraction is being established would be likely to result in offensive and objectionable odours offsite.<sup>2</sup>

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<sup>2</sup> Decision at [127].

## 1.2 Issues on appeal

[10] Counsel for the Regional Council put matters succinctly in setting out the issues before the Court as they relate to the specific concerns raised on this appeal:

- (a) Whether the adverse cultural effects on Ngāti Hako caused by the proposed landfilling into Rae ō te Papa will be acceptable, taking account of mitigations proposed by the Appellant and the positive effects of providing further landfilling space within Hauraki District.
- (b) The consistency of the Appellant's proposal with the objectives and policies in the relevant planning instruments particularly relating to cultural effects on tangata whenua.
- (c) The acceptability of potential adverse odour effects of the proposal, alone and cumulatively with cultural effects.
- (d) Connected with all the issues listed above is the consideration of alternative waste disposal options, including other locations. This issue arises under ss 104(1)(c) and 105(1)(c) of and cl 6(1)(a) and (d) of Schedule 4 to the RMA.
- (e) The status of the proposed landfilling as regionally significant infrastructure or as an activity of regional public significance, which may be important in determining the consistency of the Appellant's proposal with relevant provisions in planning instruments.

[11] We are mindful of the particular requirement in this case 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 s 6(e) of the RMA and the requirement to have particular regard to the range of matters set out in s 7.

[12] The main issues relating to cultural effects and how they are to be addressed in accordance with the planning framework were traversed in detail in both submissions and evidence. While relevant, fresh-water matters were not a strong focus of the hearing as the effects were largely agreed at the technical level and were not the focus of the cultural evidence.

### **1.3 Parties joining the appeal under s 274 of the RMA**

[13] Te Kupenga o Ngāti Hako, which incorporates and includes Tirohia Marae, Hako Tupuna Trust, Mr John Linstead and Ms Josephine Anderson, is a party to the proceedings. Ngāti Hako represents mana whenua interests in and around the Tirohia landfill area and accordingly has an interest in the proceedings greater than the public generally. The proceedings concern an application on land that is a tupuna maunga of Ngāti Hako and has special significance (cultural, spiritual and physical) to Ngāti Hako.

[14] Ngāti Hako stated it supports entirely the Respondents' decision to decline the application.<sup>3</sup>

[15] Mr M Ofsoske was a party to the proceedings and opposed the relief sought by Waste Management, seeking that the Commissioners' decision be upheld. Subsequent agreement was reached between Waste Management and Mr Ofsoske on further amendments to condition 2 of consent AUTH141959.06.01 relating to discharges to air. Mr Ofsoske confirmed he would abide the Court's decision in relation to any further changes to the proposed odour conditions that the Court may consider appropriate. Mr Ofsoske sought leave from the Court to not file evidence or to attend the

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<sup>3</sup> Section 274 notice.



hearing.<sup>4</sup> This was granted by the Court on 7 December 2022. Mr Ofsoske remained a party to the proceedings.<sup>5</sup>

### **1.3 The scope of the appeal**

[16] The parties agreed by joint memorandum of counsel dated 19 January 2023,<sup>6</sup> that the key issues in contention (and corresponding briefs of evidence filed) were cultural effects, air quality effects and planning.

[17] The parties also confirmed they would have no questions for the following Waste Management witnesses and considered that in the interests of an efficient and focussed hearing, they could be excused from attending the hearing if the Court had no questions for them:

- (a) Alan Gregory (traffic);
- (b) Andrew Shallard (engineering);
- (c) Dean Miller (freshwater ecology);
- (d) Hamish McEwan (geotechnical);
- (e) John Goodwin (landscape and visual);
- (f) Leon Pemberton (hydrogeology);
- (g) Matthew Campbell (archaeology);
- (h) Mathew Cottle (noise);
- (i) Regan Robinson (hydrology); and
- (j) Rob van de Munckhof (water quality).

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<sup>4</sup> Joint memorandum of counsel for Waste Management, the Regional Council and Mr Ofsoske dated 30 November 2022.

<sup>5</sup> Email dated 2 December 2022 from Ms Zame, counsel for Mr Ofsoske.

<sup>6</sup> On behalf of counsel for Waste Management, the two Councils and Ngāti Hako.

[18] After reading their evidence, the Court confirmed we had no questions for these witnesses. They were excused but required to be available if matters arose during the hearing that required their input.

[19] While we read all the evidence thoroughly and had regard to the Commissioners' decision as we are required to do under s 290A of the RMA, our decision focusses primarily on the issues in dispute and the relevant provisions of the Act, with other aspects of the case referred to only to the extent relevant and necessary to provide context. Ms Walker, giving evidence for the District Council, agreed that effects on natural and physical resources are able to be appropriately managed through design and the proposed conditions of consent.<sup>7</sup>

[20] In reviewing Waste Management's evidence and the commissioners' decision,<sup>8</sup> we noted that the District Council and the Regional Council had engaged independent experts to peer review many aspects of that evidence. The Commissioners' decision records that peer reviews included planning (with both Councils engaging their own experts), landfill design and engineering, geotechnical, hydrogeology, surface water, stormwater, ecology, air quality, landscape and noise.

[21] The decision also stated that a significant volume of the evidence was highly technical and uncontested by the independent experts engaged by the councils. The Commissioners generally accepted the experts' consensus view that the proposal is consistent with good practice engineering and design and would not have adverse effects if subject to appropriate conditions of consent.<sup>9</sup>

[22] Neither the peer reviewers' reports nor their evidence were before us, but it was clear from the evidence of different experts advising Waste

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<sup>7</sup> Ms Walker, EIC at 7.3.

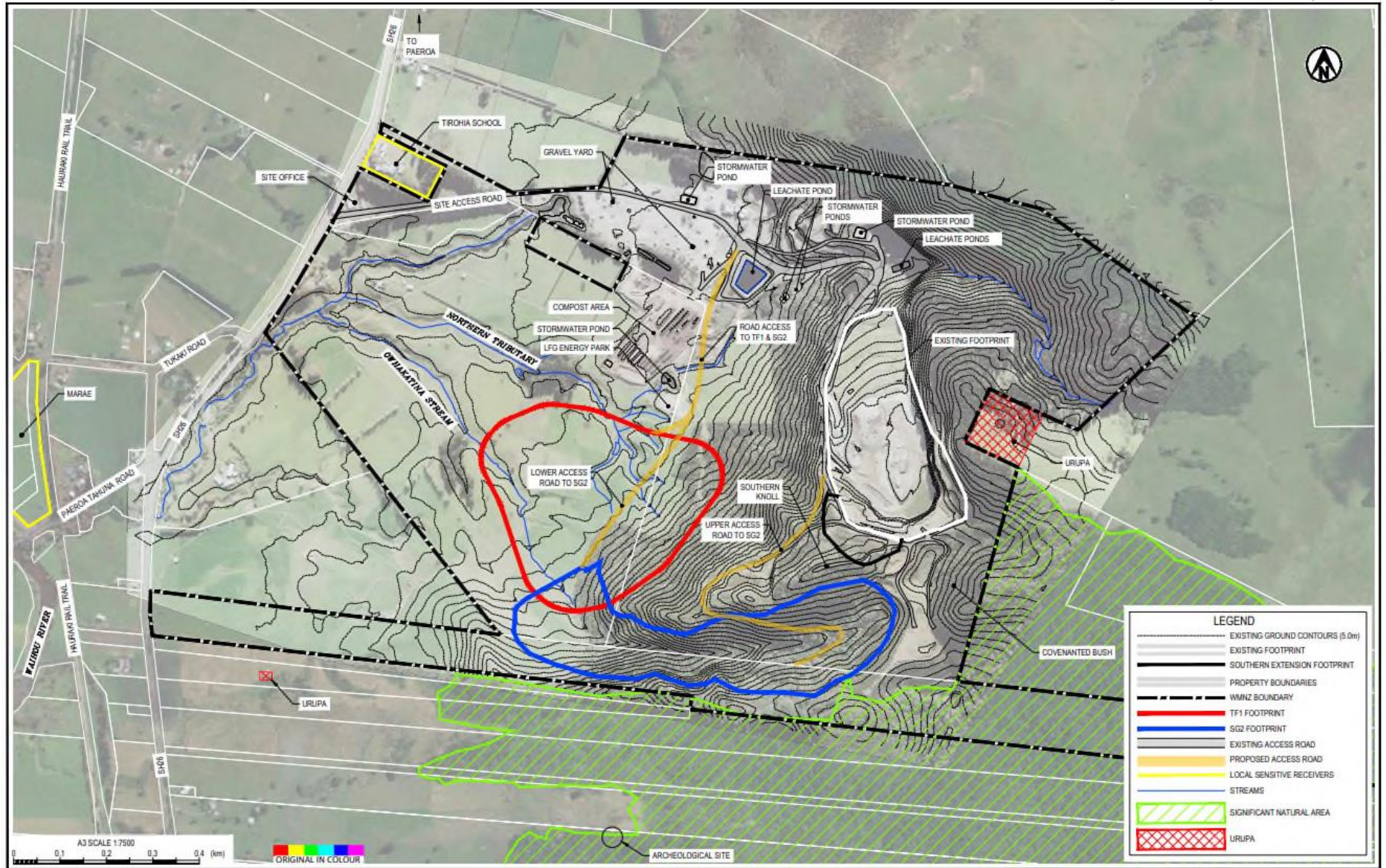
<sup>8</sup> Decision at 17.

<sup>9</sup> Decision at 41.

Management that overall, there were only limited areas of disagreement between experts and their peer reviewers. We took note of where that was the case. Unless stated otherwise in this decision, we accept the evidence of the ten Waste Management experts listed above.

#### **1.4 The site and its locality**

[23] The site owned by Waste Management and the existing activities carried out on the site are shown on the figure on the next page reproduced from Appendix A to the evidence in chief of Mr J H Jefferis, a technical manager – operational and technical services for Waste Management. The figure also shows the proposed location of Phase C and an alternative site for Phase C considered to the south. The site comprises 184 ha of mixed-use land.



[24] There are two distinct landform types within the site, being:

- (a) an area of low-lying flat land, which is part of a wider landscape type that extends across the Hauraki Plains to the west; and
- (b) an area of elevated foothill country (up to 200m above sea level) that connects with the Kaimai Ranges to the east.

[25] The low-lying land, in which Phase C of the landfill is proposed to be predominantly located, is highly modified, being largely in pasture with groups of exotic pine trees and other shelter belt vegetation typical of the transition between the foothills and plains area surrounding SH26 to the north and south.<sup>10</sup> Overall, the vegetation that will be cleared for the landfill cell is of very low ecological value. The ecological values associated with the birds and lizards that utilise the Project footprint are low.<sup>11</sup>

[26] In geomorphological terms,<sup>12</sup> the lower lying land is described as an alluvial terrace and the foothills above are termed the Western Ridge. The alluvial terrace is an undulating landform and has been incised by several spring-fed streams, which have formed a series of parallel gullies running to the west. It comprises alluvial and fan deposits of the Tauranga Group. The Western Ridge is a moderately steep hill (approximately 1V:2.5H) and vegetated in pine and scrub. The ridge comprises andesite lava and various tuffs and breccia of the Coromandel Group Volcanics.

[27] There are two groundwater systems within the site.<sup>13</sup> The upper system or aquifer is located within the surface geology of the alluvial terrace and is referred to in the evidence as The Tauranga Group aquifer system. The

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<sup>10</sup> Mr Goodwin, EIC at and Mr Mac Gibbon, EIC at 1.3.

<sup>11</sup> Mr MacGibbon, EIC at 4.8 and 5.7.

<sup>12</sup> Mr McEwan, EIC at 3.2 and 3.3.

<sup>13</sup> Mr McEwan, EIC at 5.7 and 5.8.

deeper system is located within the underlying Coromandel Group Volcanics. The deeper system is confined by overlying low permeable soil layers, separating it from the overlying Tauranga Group system. There is a hydraulic potential for vertical groundwater flow upwards from the Coromandel Group.

[28] The average hydraulic conductivity value for the shallow Tauranga Group is  $9.4 \times 10^{-7}$  m/s and for the Coromandel Group is  $3 \times 10^{-7}$  m/s. Based on the Waste Management Institute New Zealand (**WasteMINZ**) *Technical Guidelines for Disposal to Land*,<sup>14</sup> Mr Pemberton stated these average hydraulic conductivity values indicate the movement of groundwater through the geological units is slow.<sup>15</sup>

[29] Monitoring of groundwater quality beneath the proposed footprint of Phase C recorded dissolved zinc concentrations above the Australian and New Zealand Guidelines for Fresh and Marine Water Quality (**ANZG**) (2018) 95% guidelines for freshwater in each of the monitoring wells sampled during 2019. Dissolved copper concentrations were found to be elevated in four monitoring well locations and nickel at one location. Mr Pemberton considered the most likely cause of these elevated concentrations was from an agricultural source. He stated that the Regional Council's peer reviewers for the Council hearing acknowledged support for his conclusion but indicated some uncertainty around the actual source, suggesting leachate migration from the existing landfill could be occurring.<sup>16</sup>

[30] Mr Jefferis stated:<sup>17</sup>

Despite variability of groundwater results showing some above and some below the acceptable limit, our assumption is that some form of treatment may ultimately be required to enable the discharge of this water to the environment.

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<sup>14</sup> Waste Management Institute New Zealand Incorporated, *Technical Guidelines for Disposal to Land*, August 2018, accessed at <<https://www.wasteminz.org.nz/pubs/technical-guidelines-for-disposal-to-land-april-2016>>.

<sup>15</sup> Mr Pemberton, EIC at 6.8.

<sup>16</sup> Mr Pemberton, EIC at 6.9 to 6.11.

<sup>17</sup> Mr Jefferis, EIC at 5.6.

Monitoring of the groundwater will continue during the enabling works to establish a better understanding of the true levels of contaminants in the groundwater.

[31] Mr D C Miller, a principal freshwater ecologist engaged by Waste Management described the surface water hydrology in the locality.<sup>18</sup> The Owhakatina Stream flows through the site and into the Waihou River approximately 3 km downstream of the site. The stream originates in native bush and pine forest upstream of the proposed footprint of Phase C and is perennial through the site.

[32] There was some confusion as to which of the watercourses on the site is the Owhakatina Stream. This was clarified by Mr K J Linstead, a kaumatua and a trustee and the vice chair of Te Kotahitanga Marae at Tirohia. He confirmed that the Owhakatina itself will not be touched by the proposed Phase C landfill cell and that the stream identified as the Owhakatina on the maps is incorrect, being a tributary of the Owhakatina that will be diverted around Phase C before discharging back into the stream.<sup>19</sup> To minimise confusion, where we refer to effects on the stream, we have not attempted to change the way it is named in Waste Management's evidence.

[33] Within the proposed footprint, the tributary currently flows through pasture, unfenced with no riparian vegetation, which has resulted in it being heavily pugged by livestock. It has been observed to have an unnatural loading of fine sediment. Downstream of the proposed footprint it widens and becomes a shallow boggy swale, which is also pugged and unfenced.

[34] A northern tributary of the stream rises partly within the proposed landfill footprint. The tributary is ephemeral within the footprint area and perennial downstream. It is highly modified within the Project footprint and is characterised by reduced aquatic habitat quality due to current agricultural

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<sup>18</sup> Mr Miller, EIC at sections 4 and 5.

<sup>19</sup> NOE at page 348.

land use and management practices. The lower gradient section of the tributary system comprises boggy and pugged pasture with scattered rush species and no defined channel.

[35] A southern tributary is a small ephemeral channel running through open pasture located outside the proposed landfill footprint. It is pugged by livestock, other than the section that runs through a patch of pine forest.

[36] A water quality reference site upstream of the proposed landfill footprint had a good Macroinvertebrate Community Index (MCI) score and a moderate percentage of EPT taxa.<sup>20</sup> All sites within and below the proposed landfill footprint showed poor<sup>21</sup> soft bottom MCI scores. This is indicative of reduced water quality and habitat conditions for macroinvertebrates. Mr Miller concluded that these streams generally lack riparian buffers, have been influenced by land use practices such as unrestricted stock access and are of low ecological value in their current state.<sup>22</sup>

[37] Long-tailed bats, with a threat status of Threatened – Nationally Critical, utilise parts of the Project footprint and adjacent area with generally low levels of activity recorded. No other nationally or locally rare or threatened terrestrial plant or animal species have been recorded on or adjacent to the Project footprint.<sup>23</sup>

[38] Mr J M Goodwin, a landscape architect, described existing landscape and visual aspects of the site as follows:

- (a) Overall, the level of natural character of the existing watercourses and their margins within the proposed landfill

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<sup>20</sup> The total number of taxa within the “pollution sensitive” orders Ephemeroptera (mayflies), Plecoptera (stoneflies), and Trichoptera (caddisflies).

<sup>21</sup> John D Stark and John R Maxted *A User Guide for the Macroinvertebrate Community Index* (Ministry for the Environment, 2007) at [3.4].

<sup>22</sup> Mr Miller, EIC at 1.3.

<sup>23</sup> Mr MacGibbon, EIC at 1.4.



cell footprint and further downstream within the site, to the existing fenced and vegetated length of stream, is low.

- (b) The existing Phase B landfill cell contains a number of remnant benches and faces from a former quarry, as well as the ongoing waste placement operation, which includes haul roads, small remnants of the blue liner, landfill waste material, as well as daily and permanent cover. Due to its elevation and contrasting character, the existing landfill cell and former quarry remain an obvious utilitarian visual element in views from west of the Waste Management landholdings.
- (c) The surrounding area is almost exclusively farmed, apart from the settlement area around Tirohia and along SH26, with most of the land in pasture or under cultivation for crops such as maize. The land is of a generally open character, with buildings mainly limited to dwellings and farm structures directly associated with rural production activities.
- (d) There are no Outstanding Natural Landscape Areas or District Amenity Landscape Areas<sup>24</sup> within, or in close proximity to, the site that could be affected by the project. There is the Significant Natural Area located partly within the site to the south and east, approximately 150m from (and entirely outside of) the proposed landfill cell footprint at the closest point.<sup>25</sup>

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<sup>24</sup> As set out in the Waikato Regional Policy Statement or HDP.

<sup>25</sup> Mr Goodwin's EIC at 3.13 states that the Kaimai Range Outstanding Natural Feature and Landscape lies beyond 4 km from the proposed landfill cell footprint but can be seen in the wider context of the Waste Management landholdings in views from the Hauraki Plains. the Waikato Regional Landscape Assessment identified the presence "*of Pa sites along the west facing slopes. Maori settlers formed tracks through the bush hunted and used its plants for food and medicine*".<sup>6</sup> The Regional Landscape Assessment translates this into "High" historical, tangata whenua and shared and recognised values.

[39] There are some 15 dwellings in the general locality, with the two closest to Phase C being approximately 700 metres from the centre of the landfill footprint and the rest being between 900 and 1200 metres from the centre. The two closest dwellings are located on SH26. Tirohia School is located approximately 600 metres from the centre of the landfill. Tirohia Te Kotahitanga Marae is located on Tukaki Road, on the western side of SH26, approximately 1.2 km from the centre of Phase C. There are three Urupa approximately 500 metres from the site.<sup>26</sup>

### **1.5 History of the site relevant to landfilling**

[40] Quarry operations commenced at the site in 1912. Landfill operations were commenced by H G Leach & Co Ltd, the previous owners of the site, in 1998.<sup>27</sup> The initial consents provided for 1.2 million m<sup>3</sup> of refuse and other materials to be placed in the void left by quarrying. Further consents for Phase B to increase the capacity to 4 million m<sup>3</sup> were granted in 2003 for a term of 35 years expiring in 2038. This expiry date had been agreed between H G Leach and Ngāti Hako during the previous consenting process. The now proposed Phase C was investigated by Waste Management on the basis that they would make use of as much of the existing infrastructure as possible and respecting the 2038 expiry date.<sup>28</sup>

[41] The existing consents were transferred to Waste Management when it purchased the site from H G Leach in December 2016.<sup>29</sup>

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<sup>26</sup> Mr Cottle, EIC at section 4, where he notes the three Urupa are “Identified as HAU319, HAU323 and HAU324 in the HDP. HAU319 is located 480m east of the proposed Project footprint, HAU323 is 590m south, and HAU324 is 450m south.”

<sup>27</sup> Mr Howie, EIC at 7.3

<sup>28</sup> Mr Jefferis, EIC at 4.4.

<sup>29</sup> Mr Jefferis, EIC at section 3.

[42] Mr D N Howie, Waste Management's General Manager for the North Island, referred to a covenant registered against the title to the site in favour of the District Council and providing as follows:

- A The Covenantor is registered as proprietor of an estate in fee simple of land described in the First Schedule, which are within the Council's district ("the Land).
- B For a land use number 2002/03-170 in respect of the Land the Council has required a covenant to be given over the Land pursuant to Section 108(2)(d) of the Resource Management Act 1991.

THE COVENANTOR COVENANTS IN FAVOUR OF THE COUNCIL AS FOLLOWS:

1. The extraction of rock and land filling of refuse authorised by the consent shall cease not later than 35th anniversary of the date of commencement of the consent being 25 July 2003 and no further application shall be made to extend those activities on the Land beyond that term.

[43] Mr Howie stated Waste Management's position in relation to this covenant as follows:<sup>30</sup>

The covenant was required to be registered under the conditions of HG Leach's 2003 resource consent to increase the airspace for waste filling in the excavated quarry pit. Waste Management's legal advice is that the covenant does not place any restrictions on the current resource consent application for the Phase C landfill cell. Rather, the covenant restricts any consent applications being made to enable landfilling to continue on the site beyond 25 July 2038. Waste Management's current consent application, should it be granted, will therefore not infringe the covenant, as the term of the regional consents being sought is not beyond July 2038. I can confirm, on behalf of Waste Management, our commitment to cease all landfilling operations on the site by July 2038 at the latest ...

As part of its proposal to increase the airspace for waste filling in the excavated quarry in 2003, HG Leach also entered into a MOU with Ngāti Hako. Amongst other things, that MOU sets out a commitment by HG Leach that there shall be no further landfilling at the Tirohia site beyond the limits provided in the resource consents granted to HG Leach in November 2002, or beyond 2038.

I confirmed with HG Leach at the time that Waste Management supported an MOU process with Ngāti Hako, but that we recognised that these agreements are specific to the parties that set them up and that they are not generally appropriate to assign to another party. The approach taken by Waste Management at the time was to look to establish our own relationship with Ngāti Hako post-acquisition and then review the opportunity to establish an MOU or other appropriate agreed document that reflected that relationship. HG Leach's MOU with Ngāti Hako was therefore not assigned to us as part of the sale process.

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<sup>30</sup> Mr Howie, EIC at 7.10 to 7.8.

I also acknowledge that the issues surrounding the HG Leach MOU have caused hurt to Ngāti Hako. That said, Waste Management remains fully committed to ensuring and formalising an ongoing and meaningful partnership with Ngāti Hako, both in respect of the Project and more broadly. This could include, for example, the negotiation of a new MOU or other form of Relationship Agreement between Waste Management and Ngāti Hako recording the commitments of the two parties as partners moving forward.

[44] The Memorandum of Understanding (**MOU**) came about as a result of further consents that were required by HG Leach after the substantive case for consents for the continued quarry and landfill operation was heard in 2003. Ms P Clarkin explained that the first series of cases had taken a toll on Ngāti Hako's people and resources and when it was looking like they would all need to go through it all again they commenced negotiations with HG Leach and the District Council which culminated in a MOU.<sup>31</sup> Ms Clarkin is currently Operations Manager for Ngāti Hako's post settlement governance entity Hako Tūpuna Trust. Previously, she was the Manager of Te Kupenga o Ngāti Hako Inc that held the mandate to represent the social, cultural, economic, spiritual and environmental matters on behalf of our iwi Ngāti Hako.

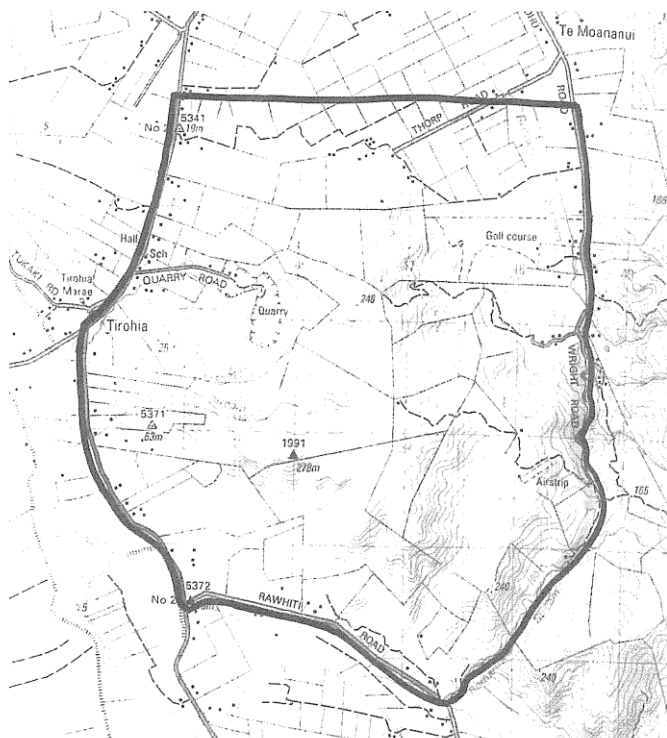
[45] She went on to explain:

When we signed the MOU with HG Leach & Co Ltd our intent was two-fold – first to ensure that there would be a timeframe to completion of the landfill, we would see the closure and rehabilitation of the landfill on the Maunga by 2038 and therefore the Maunga could begin to heal. Secondly, we wanted to ensure there would be no further landfilling or quarrying on Rae ō te Papa . The area of Rae ō te Papa was expressed in attachment 1 of the MOU.

[46] The following plan shows the area defined as Rae ō te Papa in the attachment.

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<sup>31</sup> Ms Clarkin, EIC at 10.2.



[47] The MOU acknowledged that Ngāti Hako are the tangata whenua of Rae o Te Papa and this relationship has been in existence since time immemorial and that Ngāti Hako vehemently opposed the granting of these consents because of the cultural and spiritual significance of Rae o te Papa to Ngāti Hako. The principles of the MOU agreement included:

- H G Leach & Co Ltd acknowledges that placing refuse into Rae o te Papa is offensive to Ngāti Hako.
- H G Leach agrees that there is to be no further landfilling (i.e. disposal of solid waste or refuse) and extension of quarrying beyond the final limits described within the current application for new consents<sup>32</sup> or beyond the year 2038, within Rae o te Papa which is the area identified on Attachment 1 and recorded against the property titles by a mechanism to be determined and implemented within six months of signing of this agreement. This agreement will be legally binding on both parties. (*our emphasis*)
- Both parties acknowledge some additional RMA consents will be required from time to time for matters such as closure, aftercare and rehabilitation of the site, along with consents for other technologies such as gas to energy production, green waste composting etc.
- Te Kupenga o Ngāti Hako Inc. records that it will not support, and will object to, all future applications by any third parties for any landfill or

<sup>32</sup> November 2002 Tirohia Landfill & Quarry Extension application which defines the final extent of solid waste landfilling and quarrying on its Tirohia site.

quarrying consents on Rae ō te Papa or within close vicinity of the current operations.

[48] Paragraph 9 of the MOU records that:

Te Kupenga has objected to HG Leach's November 2002 application for the record to show its objection to the project, but immediately following the signing of this Memorandum will withdraw that objection, and will not appeal or otherwise challenge the grant of consent.

[49] Ms Clarkin concluded her evidence in relation to the MOU by stating:<sup>33</sup>

We are clear the intent of the MOU was to ensure that there would be no increase of volume of waste on Rae ō te Papa and that once the consented landfill was full there would be no increase of footprint or any new cell anywhere on Rae ō te Papa . The time frame of 2038 was to ensure that the maunga would rest.

[50] Mr Linstead described the MOU as a commitment made by Te Kupenga, H G Leach and Hauraki District Council to find a pathway forward and to ensure there would be an end to landfilling. He stated that at the end of 2003 a caveat was registered against the land title and it was agreed at the time that this was the strongest mechanism to ensure that the landfill operations would cease when either it reached capacity or be fully completed by 2028 with rehabilitation being completed by 2038. He stated that Te Kupenga made the agreement in good faith and thought that each party would act honourably, with no reason to mistrust the Leach whanau and Hauraki District Council.<sup>34</sup>

[51] In December 2003, Ngāti Hako received from HG Leach a copy of the registered deed of covenant signed by the company and the District Council, from which Ms Clarkin could see an end to landfilling on Rae ō te Papa.<sup>35</sup> However as noted by Mr Howie, while the covenant required that landfilling cease not later than the 35th anniversary of the date of commencement of the consent, being 25 July 2038, it did not restrict further landfilling beyond the

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<sup>33</sup> Ms Clarkin, EIC at 10.14.

<sup>34</sup> Mr Linstead, EIC from 59.

<sup>35</sup> Ms Clarkin, EIC at section 10.

final limits described within the area subject to the current application for new consents.

[52] The covenant relates to Land Use number 2002/03-170, which by reference to the Report on Historical Resource Consent Application by Hauraki District Council (30 April 2002)<sup>36</sup> was to provide for the disposal of approximately 4.0 million m<sup>3</sup> of refuse within the void to be created by the ultimate extent of authorised quarry. The consent described the activity on the site as:

... Landfilling activities during the year since commencement have resulting in the deposit of approximately 100,000 tonnes of refuse. Landfilling is proposed to fill the void space created by quarry activity up to a specified finished contour, rather than to a specified volume limit. However it is estimated that the void has a volume of 3.75 million m<sup>3</sup> of which 3.25 million m<sup>3</sup> could be refuse, the remainder being liner or cover material. The rate of refuse delivery will depend on the market and could vary between 70,000 and 150,000 tonnes per annum. An average of this range indicates a landfill life of around 30 years.

[53] In addressing the cultural effects and consultation with Tangata Whenua, it is recorded that Ngati Hako lodged a submission in opposition. The report made reference to the MOU including the following:

... The memorandum of understanding also addresses the eventual termination of landfilling and quarrying at the site. The company has agreed that there will be no further landfilling or extension of quarrying beyond the limits encompassed in the present application and in any event beyond 2038. The parties wish to have this agreement recorded against the property titles and the applicant has written to the Council to formally request that it impose a condition relating to the agreement. The condition is an unusual one as it is not common to limit a land use consent in such a manner. However, the company warrants that it will not challenge the validity of the condition in any Court of competent jurisdiction.

[54] The consent contained the following condition relating to the term of the consent:

Term:

5. The extraction of rock and the landfilling of refuse authorised by this consent shall cease not later than the 35th anniversary of the date of commencement of this consent and no further applications shall be made to extend those activities on the site beyond that term. Pursuant to section 108(2)( d) of the Resource Management Act 1991, the consent holder shall enter into a covenant in favour of the Council in respect of the performance of this condition. Such covenants shall be at the consent holder's cost and shall be in a form acceptable to the

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<sup>36</sup> CB 0842

Council. This condition shall not restrict ongoing rehabilitation and aftercare of the site.

[55] By way of further background, Mr Ashton submitted in opening that on 10 April 2003 H G Leach wrote to the District Council requesting that a covenant condition be imposed on the basis of the applicant's request, and that:

On 2 May 2003, Ms Clarkin wrote to DISTRICT COUNCIL advising that Ngāti Hako had received and assessed the final staff report on the 2003 Consent which was forwarded by DISTRICT COUNCIL to Ngāti Hako. On this basis, Ngāti Hako formally withdrew from the hearings process. Accordingly, DC's decision imposed the covenant condition offered by HG Leach.

[56] We note that a copy of HG Leach's letter to the Council was sent to Ngāti Hako and that Ms Clarkin's letter to the Council referred to having reviewed and assessed the final Staff report but made no reference of Leach's letter, the MOU or the covenant.

[57] Mr Howie confirmed under cross examination that he had read the MOU as part of Waste Management's due diligence before purchasing the site, stating that the document:<sup>37</sup>

... was recognised as being an agreement or memorandum formed between HG Leach and Ngāti Hako. It didn't form part of the acquisition process and it was not a document that was assigned to Waste Management because we were not a party to that. Our intent with the engagement process that we embarked on post-acquisition with HG Leach was to formulate a memorandum of understanding between Waste Management and Ngāti Hako to replace that document.

[58] Mr Jefferis stated under cross examination that Waste Management did not ignore the MOU and were well-aware of it.<sup>38</sup>

[59] Waste Management does not consider itself to be bound by the MOU as it was not a party to it. This has effectively resulted in a chasm between Ngāti Hako and Waste Management and the evidence confirmed that the differing

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<sup>37</sup> NOE at pages 50 and 72.

<sup>38</sup> NOE at page 99.



positions of Ngāti Hako and Waste Management in relation to the MOU were a major matter of dispute between them.

[60] We were not asked to make any determination in relation to the MOU. In any event, this Court has no jurisdiction in relation to land transfer matters or in relation to adjudicating matters of contract. However, as noted, we consider the terms of the MOU and the covenant are relevant to this case at least as far as being part of the evidence of Ngāti Hako's relationship with Rae ō te Papa and its efforts to provide for that relationship.

[61] To the extent that this Court may interpret the MOU for the purposes of this case, we find that it is clear that the intention of the parties at the time was to restrict both the term and the scale of the activity to that authorised by the resource consents and that Ngāti Hako withdrew its objections to the Phase B consent application on that basis. We also find, for the purposes of this case, that the full intention of the parties to the MOU was not reflected in the words of the covenant that was subsequently registered against the title to the land.

## **1.6 Existing landfill operations**

[62] The existing Phase B landfill operates in accordance with conditions of consent that fall well short of those that apply to today's state-of-the-art landfills in New Zealand. The Court has no jurisdiction to change that as part of the current application. However, Waste Management identified and has taken steps to address a number of aspects of the existing operation that needed improvement. This included the need to urgently replace or upgrade existing plant, including the landfill gas (LFG) generator, which seldom worked, and the LFG flares, which were undersized and faulty. LFG capture has been improved from approximately 38% in 2016 to 81% in 2022. The Renewable Energy Centre includes two new electricity generators which can

each produced one megawatt of electricity on a continuous basis. No issue was raised by either council or Te Pupenga about this aspect of the proposal.

[63] The capacity to dispose of leachate off-site has been increased. The capacity of the stormwater ponds has been increased and the ponds desilted. New refuse handling plant and equipment has been purchased, resulting in significant improvements in the way waste is placed and covered. A de-odourising cannon has been set up to operate continuously. New emergency response procedures have been put in place and an environmental technician has been employed to undertake monitoring required by resource consent conditions.

[64] The site has good existing vehicle access to SH 26, along with much of the related infrastructure that is required to operate a landfill.<sup>39</sup> Other facilities and activities undertaken on the site include:

- (a) Waste Management's site office at the junction of the access road with SH26;
- (b) Leachate and stormwater ponds;
- (c) The energy centre;
- (d) A composting facility operated by Living Earth Ltd, a wholly owned subsidiary of Waste Management; and
- (e) An aggregate processing operation and workshops for plant servicing undertaken by HG Leach under a lease arrangement to December 2026.

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<sup>39</sup> Mr Shallard, EIC at 1.7.

[65] Approximately 300,000 tonnes of waste a year has been accepted at the site for the last five years, which represents about half the disposal requirements of the Waikato and Bay of Plenty regions. At current rates, it is expected to reach capacity in 2024, but this is being slowed down because of the limited capacity remaining.<sup>40</sup>

[66] Progressive closure of the existing Phase B cell is currently underway. The north facing landform will be a continuous slope with horizontal benches at 20 metre vertical intervals that divide the overall slope into five discrete slope surfaces along the face. The lower portion, comprising approximately 40% of the face, has been capped with greater than one metre of clay. Further capping is expected to result in at least 80% of the overall surface area of the landfill being capped off by the time proposed Phase C would be ready to accept waste.

[67] Mr Jefferis stated that the lower slopes will be grassed and stabilised into a natural looking landform by the time Phase C starts to receive waste. He also stated that it is proposed as a condition of consent that waste placement activities will cease entirely in the Phase B area before disposal starts in the new Phase C cell. Capping and closure of the upper slopes of Phase B will continue for a period after refuse is first placed in Phase C.

## **1.7 Proposed Phase C**

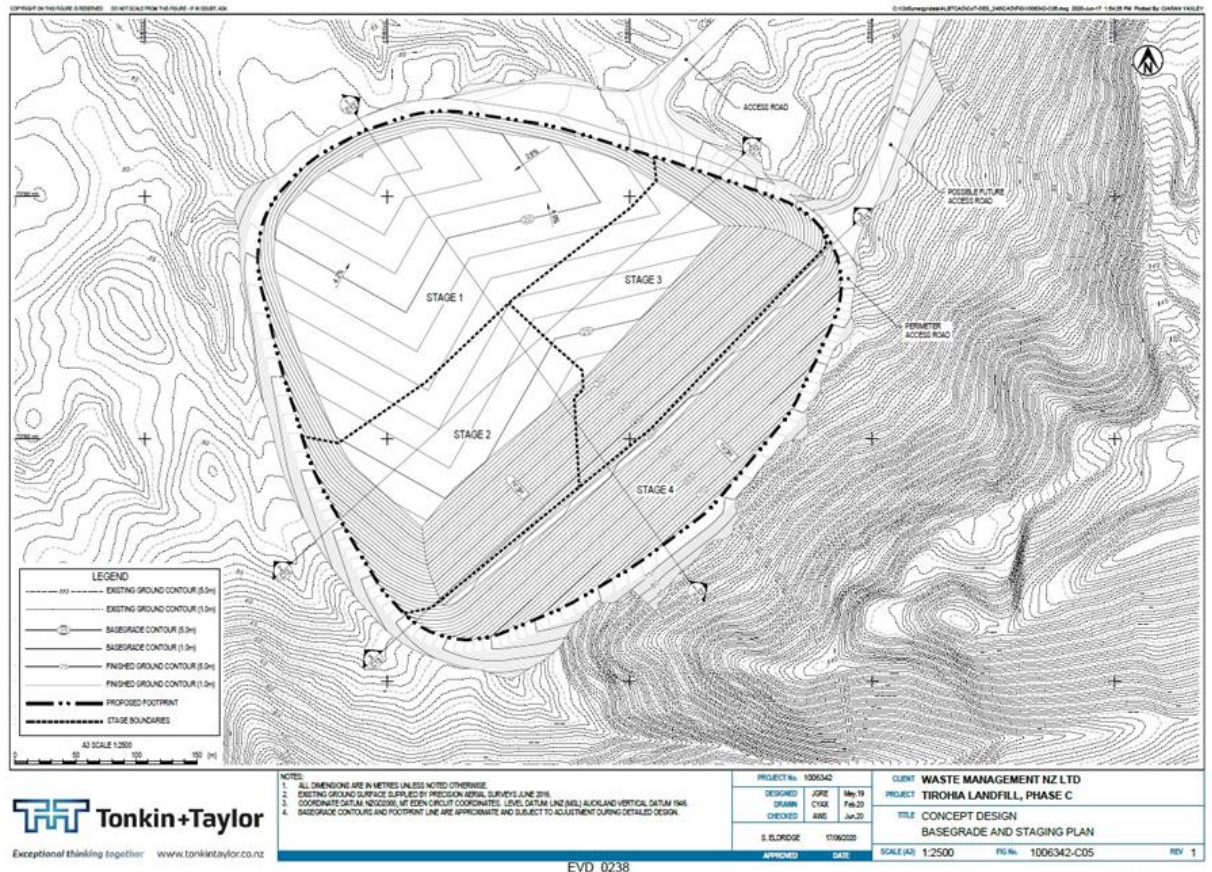
[68] The proposed design of Phase C is generally described in the evidence of Mr Jefferis and Mr A W Shallard, who is a principal civil and environmental engineer at Tonkin and Taylor. The Court has significant experience in landfill engineering, which was outlined to the parties at the start of the hearing, and is familiar with the design concepts proposed. We record that we found the design to be of a high standard and in accordance with current good practice. As there is no dispute between parties as to the engineering, geotechnical,

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<sup>40</sup> Mr Howie, EIC at section 11.

hydrogeology or hydrology aspects of the project, we do not discuss them in any detail in this decision. However, for completeness, we include the following brief summary of key aspects of the landfill design and operation.

[69] Phase C will cover an area of approximately 15 hectares<sup>41</sup> and have an estimated capacity to receive approximately three million cubic metres of waste. It is expected to have a life of just over 10 years. It will be constructed in four stages as shown on the following concept design plan<sup>42</sup> and to meet the WasteMINZ *Technical Guidelines for Disposal to Land*.<sup>43</sup> Each stage will have an approximate life of two years, with the exception being Stage 3, which has a projected life of approximately four years.



<sup>41</sup> AEE at page 1.

<sup>42</sup> Reproduced from Appendix B of Mr Shallard's EIC.

<sup>43</sup> Mr Shallard, EIC at 3.4.

[70] Existing soils in the Stage 1 area of Phase C will be excavated and the materials stored for use for bund construction and as future daily cover, intermediate cover, capping and topsoiling. Other soils will be won from the next or future stages to minimise earthworks movements and the need for stockpiling of soils.<sup>44</sup>

[71] Drains will be installed to collect groundwater and maintain it at a level below the base of the landfill.<sup>45</sup> The drains will be capped prior to landfill closure and in the intervening period, the water will be used on site. Mr Jefferis considers there is potentially scope to provide some of this water to Ngāti Hako for use during the dry periods when water is typically scarce, subject to further assessment with Ngāti Hako to ensure it is fit for purpose.<sup>46</sup>

[72] The landfill base on the floor and sides will be lined with a composite liner comprising a synthetic geomembrane overlain on a low permeability natural mineral soil layer. A free draining gravel layer will be placed on top with drains running through it to collect leachate and stop it building up on top of the liner. The whole of the leachate collection and pumping system will be located above the liner, meaning no penetrations through the liner, which could be points of weakness, will be required. The leachate will be stored in a leachate pond and trucked off-site to a number of different wastewater treatment plants in the surrounding area for disposal.

[73] During operation of the landfill, daily cover soil will be placed over the waste to reduce odour and control litter, birds and vermin. As waste placement is completed in each area, the cover will be thickened to improve water shedding and LFG capture. Where waste will not be placed for longer periods of time, the cover will be further thickened and grassed to form

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<sup>44</sup> Mr Jefferis, EIC at 6.3.

<sup>45</sup> Natural groundwater levels are above the base of the landfill and, if not controlled, could uplift and cause damage to the liner before sufficient refuse has been placed to hold the liner down.

<sup>46</sup> Mr Jefferis, EIC at 5.7.

intermediate cover. On progressive completion of landfilling, it will be capped with a minimum of 150 mm of topsoil, over 300 mm of lightly compacted “growth medium” soil, over 600 mm of compacted soil “barrier”, over 150 to 600 mm of daily and intermediate cover.<sup>47</sup>

[74] LFG will be collected and used to generate electricity, with the number of generators being increased from the existing two to five over time, one of which will be a standby.

[75] Clean stormwater will be diverted away from operational areas, so that it does not become contaminated by the waste, or by the erosion of soils. Stormwater from the project footprint will be directed into a stormwater pond system for treatment and monitoring. This will comprise a treatment pond designed in accordance with Regional Council guidelines and a wetland “to remove sediments that pass through the pond, and as a secondary treatment device to remove a wider range of stormwater contaminants that may pass through the pond.”<sup>48</sup>

[76] Erosion and sediment control measures will be used within construction areas, and where these are within the landfill cell footprint, they will be discharged via the treatment pond system.

[77] Once waste filling is complete, the landfill will be closed. Prior to this, a Landfill Rehabilitation and Aftercare Plan and Post Closure Management Plan will be prepared detailing the required activities for closure and aftercare. The main aim of closure will be to ensure that the waste is properly contained and will remain so throughout the aftercare period.

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<sup>47</sup> Mr Shallard, EIC at 1.20

<sup>48</sup> Mr Robinson EIC at from 6.1.

[78] Tree planting has been undertaken or is proposed around the outside perimeter and within the site to screen views of the landfill from outside the site.<sup>49</sup> A south-western screening bund is proposed to be constructed.<sup>50</sup>

[79] Mr Goodwin summarised the purpose of the planting as follows:<sup>51</sup>

Planting fast growing indigenous trees and shrubs in a 10m wide strip along the western and southern boundary of the Waste Management landholdings (in the finger of land) to the southwest of the Project footprint i.e. adjacent to SH26. This is to provide screening of the landfill cell for travellers heading in a northerly direction on SH26, from the nearby Urupa to the southwest, and for residents in the two dwellings at 6119 SH26 and from 6172 and 6174 SH26. This planting was completed in 2020 and, as observed on my July 2022 site visit, is now well established.

[80] No clearance of native bush is to occur as part of the landfill project.<sup>52</sup>

[81] Based on the descriptions used in the evidence,<sup>53</sup> approximately 517 m of the perennial tributaries of the Owhakatina Stream will be permanently lost during the construction of Phase C. An estimated 120 m of perennial stream and 115 m of the ephemeral section of the Northern tributary stream, as well as 680 m of ephemeral channels also will be permanently lost.<sup>54</sup> As noted above, Mr Miller concluded that these streams generally lack riparian buffers, have been influenced by land use practices such as unrestricted stock access and are of low ecological value in their current state.<sup>55</sup>

[82] Mr Miller recommended ecological offset work to address stream reclamation (loss) and modification and achieve no net loss in ecological function and value as a result of the project as follows:<sup>56</sup>

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<sup>49</sup> Mr Jefferis, EIC at 5.10.

<sup>50</sup> Mr Jefferis, EIC at 5.2.

<sup>51</sup> Mr Goodwin, EIC at 5.18 (c).

<sup>52</sup> Mr Goodwin, EIC at 8.3.

<sup>53</sup> Noting that the Owhakatina Stream was incorrectly named.

<sup>54</sup> Mr Miller, EIC at Table 4.

<sup>55</sup> Mr Miller, EIC at 1.3.

<sup>56</sup> Mr Miller, EIC at 7.7.

- (a) 584 m Owhakatina diversion channel with planting to offset for loss of the Owhakatina Stream channel;
- (b) 157 m diversion channel with planting to offset for loss of 120 m of perennial Northern Tributary channel; and
- (c) a minimum of 608 lineal metres of planting (both banks) along the remaining Owhakatina Stream channel downstream of the proposed Project footprint.

[83] The proposed mitigation is shown on the following figure, reproduced from Figure 3 - Proposed ecological mitigation planting areas, in Mr Miller's Appendix 3:



[84] He stated that:<sup>57</sup>

Figure 3 integrates the recommended restoration planting for both freshwater and terrestrial ecological mitigation (offset) purposes, and this is focussed along the stream corridors. The freshwater mitigation comprises the planting within 10 m of the stream edge on both banks (a combined width of 20 m) and extending for some 1,750 lineal metres. This is more than the minimum length determined to achieve no net loss by the SEV/ECR calculations (1,349 m), and if well implemented, should result in a net gain from freshwater ecology perspective.

<sup>57</sup> Mr Miller, EIC at 7.9 and 7.10.



Focussing both the freshwater and terrestrial mitigation planting work along the stream environments around the Project site has ecological benefits in terms of creating additional stream buffering as well as improving connectivity for both terrestrial and freshwater fauna. The proposed mitigation planting will create vegetated riparian corridors through the Project site providing for improved linkages between the Waihou River and existing forested areas to the southeast of the Project, including SNA T13UP87.

[85] Mr R N Robinson, a civil and water resource engineer at Tonkin and Taylor, described the stream bed material in the Owhakatina Stream as predominantly alluvial with some boulders and cobbles present in the upper reaches, transitioning into weak fine-grained sediment in the lower reaches. He described the bed material in the Southern Tributary as predominantly fine grained alluvials with a similar composition to the Owhakatina Stream and the main bed materials throughout the reaches of the Northern Tributary as fine grained alluvials.<sup>58</sup>

[86] He described proposed enhancement as follows:<sup>59</sup>

Instream structures for habitat enhancement have been included in the stream diversion designs. The location of these structures was selected based on an internal REGIONAL COUNCIL guideline,<sup>14</sup> as well as input from Ms Conn. Instream features include cascades, step pools, riffles, log weirs, point and lateral bars, overhanging vegetation root wads, log groynes and log overhangs. These structures simulate a natural stream environment.

Planting has been included along the length of the stream diversions to improve stream stability, water quality, habitat enhancement and aesthetics.

[87] We also note the following from Mr Robinson's evidence:<sup>60</sup>

- (a) There will be no notable change in potential flood effects at the site boundary arising from stormwater discharges as a result of landfill cell construction; and
- (b) Box culverts are required on the Owhakatina Stream and Northern Tributary to enable access over the streams to the new landfill cell. The box culverts are designed to pass the 100-year

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<sup>58</sup> Mr Robinson, EIC at 3.10 to 3.12.

<sup>59</sup> Mr Robinson, EIC at 5.8 and 5.9.

<sup>60</sup> Mr Robinson, EIC at 6.7 and 5.13.

ARI with climate change peak discharge and allow for fish passage in accordance with the New Zealand Fish Passage Guidelines.<sup>61</sup>

## 1.8 Landfill operation

[88] Wastes to be accepted for disposal in Phase C will be:

- (a) non-hazardous commercial wastes;
- (b) non-hazardous industrial wastes;
- (c) residential wastes;
- (d) construction and demolition debris;
- (e) contaminated soils; and
- (f) sludges from wastewater treatment plants with a solids content greater than 20% and site-generated sludges.<sup>62</sup>

[89] As with the existing Phase B of the landfill, Phase C will not be open to the public. The working face will be the limited area where waste is being permanently buried and a wheeled compactor is compressing the waste into place. It will be open from 6 a.m. to 6 p.m. Monday to Saturday and closed overnight. Daily cover will be placed over the waste progressively when possible during the day and used to cover the face at the end of each day.<sup>63</sup>

[90] Landfill operations are intended to be undertaken in accordance with a landfill management plan (LMP) which will be certified by the Councils six months prior to waste being accepted in Phase C. Performance against the

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<sup>61</sup> Franklin, P; Gee, E; Baker, C; Bowie, S. 2018. New Zealand Fish Passage Guidelines for Structures up to 4 metres. NIWA Client report 2018019HN.

<sup>62</sup> Wastewater treatment plant sludges with a solids content less than 20% may be accepted if the chemical and physical stabilisation processes ensure that the sludges contain no free liquids as determined by the paint filter test at the point of loading into trucks going direct to the landfill cell (Footnote 19 of Mr Jefferies' EIC).

<sup>63</sup> Mr Jefferies, EIC at Section 6.

LMP will be reviewed internally on an annual basis and an independent peer review panel will be engaged to assess performance against the requirements of the LMP.<sup>64</sup>

[91] Mr Jefferis acknowledged that neighbours had raised concerns about odour from time to time and that odour management is a key issue. He presented 15 paragraphs of evidence on how this will be achieved,<sup>65</sup> indicating to us that this is seen by Waste Management as a significant issue.

[92] One component of the proposed management approach includes the cessation of composting operations at the site before the first waste is placed in Phase C, which Mr Jefferis stated was in response to concerns raised by Ngāti Hako. Another component is strict control on the acceptance and placement of what are known as special odorous wastes, including provision to refuse to accept them.

[93] We address landfill operation in relation to odour control below.

## **1.9 Resource consents required**

[94] The following resource consents are required:<sup>66</sup>

### ***Waikato Regional Plan***

<b>Rule reference/description</b>	<b>Activity status</b>
3.3.4.24 – Taking of groundwater	Discretionary
3.5.4.5 – Discharge of contaminants to water or onto or into land	Discretionary
3.5.11.8 – Discharge of stormwater (to water or land)	Discretionary

<sup>64</sup> Mr Jefferis, EIC at 7.2 and 7.3.

<sup>65</sup> Mr Jefferis, EIC at 3.21 and 6.20 to 6.34

<sup>66</sup> Ms Brabant, EIC at Appendix B and agreed by Ms Walker at EIC at 7.2.

3.6.4.14 – New dams/damming of water	Discretionary
4.2.9.3 – The use, erection, placement, alteration or extension of a culverts and associated bed disturbance, in or on the bed of a river for catchment areas not exceeding 500 ha	Controlled
4.3.4.4 – Bed disturbance activities including reclamation or drainage	Discretionary
5.1.4.15. Soil disturbance, roading and tracking and vegetation clearance in High Risk Erosion Areas	Discretionary
5.2.7.1 - Discharge of contaminants into or onto land and any subsequent discharge of contaminants into water or air as part of the operation of a landfill	Discretionary
6.1.9.2 – Discharge of contaminants into air from an industrial or trade premises i.e. waste management process	Discretionary

***Hauraki District Plan***

<b>Rule reference/description</b>	<b>Activity status</b>
5.1.4.4 (D11) – Landfills in the Rural Zone	Discretionary
7.8.5.4 (D1) – Earthworks in the rural zone (outside any overlays or policy areas)	Discretionary
7.4.5.5 (D1) - Renewable electricity generation activities not otherwise provided for as a permitted activity in the Rural Zone	Discretionary

***National Environmental Standards for Freshwater***

<b>Rule reference/description</b>	<b>Activity status</b>
Clause 57 – Reclamation of the bed of any river.	Discretionary
Clause 71 – The placement, use, alteration, extension, or reconstruction of a culvert in, on, over, or under the bed of a river is a discretionary activity if it does not comply with any of the conditions in regulation 70(2).	Discretionary

[95] Consents are also required in accordance with the National Environmental Standards for Freshwater 2020.<sup>67</sup>

## **Part 2 - The planning framework**

[96] We received expert planning evidence on behalf of the District Council from Ms C J Walker, a principal planning and policy consultant and the Hamilton Manager at 4Sight Consulting, primarily relating to the land use functions of the District Council. We received evidence from Dr P H Mitchell and Ms A L Brabant on behalf of Waste Management. Dr Mitchell is a partner of Mitchell Daysh Limited and Ms Brabant is a technical director – planning at Tonkin and Taylor. The three experts and Mr C Batchelar produced a joint witness statement on planning matters (**JWS Planning**) dated 22 April 2022. Mr Batchelar did not provide evidence to the Court.

[97] The experts agreed that the key statutory planning documents for the application are as stated in paragraph [38] of the Agreed Statement of Facts dated 11 April 2022.<sup>68</sup> In their evidence, they focussed primarily on:

- (a) The National Policy Statement of Highly Productive Land (**NPS-HPL**);
- (b) The Waikato Regional Policy Statement (**RPS**);
- (c) The Waikato Regional Plan (**Regional Plan**); and
- (d) The Hauraki District Plan (**District Plan**).

[98] The JWS Planning also set out the relevance of Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011, Resource Management (National Environmental Standards for Freshwater) Regulations 2020, Resource Management (National Environmental Standards for Air Quality)

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<sup>67</sup> Agreed Statement of Facts.

<sup>68</sup> JWS Planning.

Regulations 2004, Resource Management (Measurement and Reporting of Water Takes) Regulations 2010, National Policy Statement for Freshwater Management 2020, National Policy Statement for Renewable Electricity Generation 2011, Hauraki Gulf Marine Park Act 2000, Whaia te mahere Taiao a Hauraki - Hauraki Iwi Environmental Plan. The National Policy Statement of Highly Productive Land was also addressed.

[99] No evidence was given which suggested that the RPS or either of the Plans were in any way deficient in terms of the purpose and principles of Part 2 of the RMA.

[100] We have considered the matters set out in the JWS Planning and the evidence of the expert planning witnesses and see no need to traverse all of it in this decision. The fundamental debate in this case was focused on a narrow range of issues. We can focus on the RPS and the Regional and District Plans to determine those issues. However, we stress that we have done so in the context of the wider evaluation described by the other relevant documents we have listed above.

## **2.1 Regional Policy Statement**

[101] Ms Walker identified the following RPS objectives and policies relating to cultural values:<sup>69</sup> IM-07 Relationship of tangata whenua with the environment, LF-01 Mauri and values of fresh water bodies, HCV-01 – Historic and cultural heritage and HCV-P2 – Relationship of Māori to taonga. She also noted that a number of objectives and policies primarily relating to other matters, such as freshwater and biodiversity also acknowledge the interrelated nature of tangata whenua’s holistic view of ecosystems

[102] These objectives and policy require the relationship of tangata whenua with the environment and with their culture and traditions with their

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<sup>69</sup> Ms Walker, from 10.24.

ancestral lands, water, sites, wāhi tapu and other taonga to be recognised and provided for, giving effect to s 6(e) of the RMA. They also require the mauri and identified values of freshwater bodies to be maintained or enhanced and that sites, structures, landscapes, areas or places of historic and cultural heritage are protected, maintained or enhanced.

[103] Dr Mitchell identified a number of objectives and policies as being relevant to cultural values, generally similar to those identified by Ms Walker, but adding Policies HCV-P2 and IM-P3. Policy HCV-P2 gives effect to Objective HCV-O2 and Policy IM-P3 relates to opportunities for tangata whenua to express, maintain and enhance the relationship with their rohe through resource management and other local authority processes.

[104] He stated:<sup>70</sup>

A general theme that emerges from the RPS though is that tāngata whenua are to be involved in processes that affect them, the use and enjoyment of culturally important resources is recognised and provided for, as are the exercising of kaitiakitanga and the relationships with ancestral lands, water, sites, wāhi tapu and other taonga.

In my opinion, these matters are relevant to both the scheduling of sites in the District Plan and to the provisions of the District Plan itself, as well as, in particular, with the setting of resource consent conditions for particular proposals.

[105] The RPS contains a number of objectives and policies relating to regionally significant infrastructure. These were addressed by the planning experts in terms of how they affect the interpretation of the Regional Plan and District Plan. Their evidence sought to advance submissions on interpretation and the application of the definition of infrastructure in s 2 of the RMA and of regionally significant infrastructure in the RPS.

[106] We note that while neither of those definitions expressly refer to landfills, the statutory definition is to be applied subject to context and the definition in the RPS is inclusive. A strict abstract application of the definitions

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<sup>70</sup> Dr Mitchell, EIC at 7.7.

may not be appropriate in our wider consideration of the resource management issues in this case. A slightly broader approach in the present context would allow other works and facilities which serve the region and are significant in some way to come within the meaning of these words. However, we do not see this issue as determinative, as Class 1 landfills can clearly have significance in the region whether they are “infrastructure” or not.

[107] Notably, landfills are generally anticipated by the Regional and District Plans as they are listed as discretionary activities, as are many of their associated activities. In a broad sense we accept the importance of waste facilities to the management of anthropogenic waste.

[108] As stated by Mr Howie in relation to the regional importance of the proposal:

In terms of waste collection within the Waikato and Bay of Plenty regions, following a recent council tender process Waste Management has been awarded the contracts to collect kerbside waste and recycling for Thames Coromandel District Council (“TCDC”), Hauraki District Council (“HDC”), and Matamata Piako District Council (“MPDC”).

For HDC and MPDC the respective contracts are to collect waste, recycling, food waste, and glass as four separate collection streams. For TCDC the contract is for similar collections and also includes the operation of Transfer Stations / Resource Recovery centres. Whilst the Tirohia Landfill site is ideally located to service these contracts, and the site will continue to act as a regional hub for Waste Management operations in this region, I need to make it clear that these collection contracts are not directly linked to the availability of waste disposal at the Tirohia site, including whether this Project may ultimately proceed.<sup>71</sup>

[109] In terms of many of the potential adverse environmental effects that can be associated with landfills, the high quality of Waste Management’s proposed design and operational procedures that comply with current best practice mean that the proposal has not raised issues that are unresolvable. Independent of the Court’s own assessment, this is evidenced by the technical evidence not being tested at the hearing but being accepted by all parties.

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<sup>71</sup> Mr Howie EIC para [3.7 - 3.8]



## 2.2 Waikato Regional Plan objectives and policies relating to cultural effects

[110] The WRP specifically addresses Tangata Whenua relationships with Natural and Physical Resources in Section 2.3. The objective of this section is to minimise uncertainty for all parties regarding the relationship between tangata whenua and resources for which they are Kaitiaki and to enable tangata whenua to give effect to kaitiakitanga.

[111] There are two policies which follow this objective. The first sets out to define the process to determine the relationship of tangata whenua with the natural and physical resources for which they seek Kaitiaki. The second is to increase awareness in the community of the relationship of tangata whenua with the natural and physical resources for which they seek Kaitiaki.

[112] There are many implementation methods which follow these policies, including what the Regional Council will do to achieve them. This includes establishing relationships, supporting and integrating initiatives, iwi management plans and working to identify areas or characteristics of special value to tangata whenua that require protection from use or development. However, we were told Rae ō te Papa is not identified in the Regional Plan.

[113] The Regional Plan, as is expected, provides more direction than the RPS and relevant objectives and policies cited to us include Section 5.2 “Discharges Onto or Into Land” where landfills are included among the activities covered. Objective 5.2.2 states relevantly:

Discharges of wastes and hazardous substances onto or into land undertaken in a manner that:

...

- c) does not have adverse effects related to particulate matter, odour or hazardous substances that are inconsistent with the Air Quality objectives in Section 6.1.2

...

- e) avoids significant adverse effects on the relationship that tangata whenua as Kaitiaki have with their taonga such as ancestral lands, water and waahi tapu
- f) remedies or mitigates cumulative adverse effects on the relationship that tangata whenua as Kaitiaki have with their identified taonga such as ancestral lands, water and waahi tapu.

[114] Principal reasons for adopting this objective include managing contaminant levels in soils and recognising the interconnected nature of the environment from, for instance, watercourse to rivers to the coast, land instability, flooding and the like the reasons. In relation to clauses e) and f), the reasons acknowledge the relationship of tangata whenua as Kaitiaki have with their land over which they hold mana whenua.

[115] Here it is also stated:

The intention of the phrase ‘the relationship of tangata whenua as Kaitiaki’ is to state that Council will give priority to the concerns of Maori based on the status as tangata whenua and as Kaitiaki, whilst maintaining the ability of Council to consider the concerns of other groups who are not tangata whenua. The phrasing addresses the concerns of tangata whenua who exercise kaitiakitanga over specific resources, ahead of other Maori submitters to a resource consent who have a relationship that is not based on the present day exercise of kaitiakitanga.

The term ‘significant adverse effects’ means those effects that if allowed to occur, would destroy a site or taonga that is of such importance to tangata whenua as Kaitiaki that its loss or degradation is assessed to be unacceptable and unable to be remedied or mitigated.

[116] Policy 2 which follows Objective 5.2.2 is relevant here after Policy 1 addresses permitted activities. Policy 5.2.3(2) is:

**Policy 2: Other Discharges Onto or Into Land**

Manage discharges of contaminants onto or into land not enabled by Policy 1, in a manner that avoids, where practicable, the following adverse effects and remedies or mitigates those effects that cannot be avoided:

- a) contamination of soils with hazardous substances or pathogens to levels that present a significant risk to human health or the wider environment
- b) the discharge is not inconsistent with policies in Section 5.1.3
- c) any effect on water quality or aquatic ecosystems that is inconsistent with the purpose of the Water Management Classes as identified by the policies in Section 3.2.3

- d) the adverse effects outlined in the policies and rules for air quality in Chapters 6.1 and 6.2, particularly for odour and particulate deposition
- e) damage to archaeological sites, waahi tapu or other identified sites of importance to tangata whenua as Kaitiaki.

[117] There was no planning witness for the Regional Council but Ms Walker for the District Council concluded that Objective 5.2.2:

... includes a directive that discharges of wastes onto or into land are undertaken to avoid significant adverse effects on the relationship of tangata whenua with ancestral lands.

[118] Additionally, should the proposal result in cumulative adverse effects arising from the establishment of Phase C, it was her understanding that:

... this is not meaningfully reduced as a result of the Applicant's Proposal to cease filling in the current Phase B, prior to commencement of filling in Phase C.

[119] Dr Mitchell disagreed with Ms Walker's interpretation, which we return to in our evaluation, together with our consideration of other matters of dispute between the planning experts.

### **2.3 Hauraki District Plan objectives and policies relating to cultural effects**

[120] We first note that while this plan addresses Historic Heritage in Chapter 6 and specifically addresses relevant matters in ss 6 and 7 of the RMA and sets out to specifically identify waahi tapu and other sites requiring protection, it does not identify Rae ō te Papa in the schedule of historic sites. The importance and difficulty in undertaking identification of these sites is traversed in this chapter of the plan, particularly at 6.1.2 (7 -10). This includes the statement:

Council recognises that ongoing consultation with the tangata whenua is necessary to ensure that waahi tapu and other sites are recognised in a culturally appropriate manner and that acceptable mechanisms are put in place for their protection. Council accepts that in some circumstances there is an inherent conflict between the identification of waahi tapu and their protection, and in

some instances, the Māori Community may not wish to have particular sites identified.

[121] As recorded in the JWS Planning, the planning experts agreed that where sites are identified through the resource consent process (or otherwise meet the criteria) as Areas of Significance to Māori in Regional Plan Objective 3, Policy (iii) in Part 6.1.3, then the effects of subdivision, land use and development on the heritage item should be “avoided, remedied or mitigated”.

[122] The issue of Rae ō te Papa not being identified in the Plan was raised during the hearing. It was not explained how this would specifically influence our decision because the evidence was clear and unchallenged that Rae ō te Papa is the tūpuna maunga of Ngāti Hako. We do not know if Waste Management might have considered things differently if they had found this area identified in the Plan but during their due diligence prior to the purchase of the land, they had knowledge of the area’s significance to Ngāti Hako.

[123] For completeness, we note that the site and surrounds are zoned Rural under the District Plan and Chapter 5.1 sets out the provisions for this zone. Objective 1 and Policy (iv) were particularly drawn to our attention as they seek to provide for rural land use activities which benefit from the productive potential, location and rural character of the zone. The policy requires that only activities which have a functional or legitimate need for the rural location are anticipated and others should not be established in the rural zone unless they are able to be undertaken without constraining the lawful operation of rural production activities which are carried out in accordance with accepted management practices.

[124] Objective 2 is to preserve and enhance the open rural landscape character, and Objective 4 is to ensure effects of a land use activity on the environment or on the amenities of neighbours are avoided, remedied or

mitigated. Policies include traffic network issues and other matters not in contention. However, Policy (iii) is:

Other adverse effects (eg noise, smell, glare, vibration, visual) on the environment and amenity of the District (particularly where they are near to residential or other sensitive activities) should where practicable be avoided, or remedied or mitigated.

[125] There is a school, residences and Tirohia Marae near the site and odour remained an issue in contention through the hearing. We address the subject of odour in Part 3.

[126] The activity table at 5.1.4.4 line D11 of the District Plan lists landfills in this area as a Discretionary Activity. "Landfill" is defined as the controlled disposal of refuse by sanitary landfill operation, including the rehabilitation of the area so filled.

[127] Objective 3 in Chapter 6 of the District Plan specifically addresses cultural issues and was discussed by the planning experts in evidence before us and as set out in their JWS. This was, as Ms Brabant put it, the determinative Objective in the Commissioner's decision to decline consent. Objective 3 and its relevant policies are:

Objective 3

To recognise and protect sites of significance to Maori.

(a) Policies

Objective 3 will be achieved by the implementation of the following policies:

- (i) Identification and protection, in consultation and partnership with local iwi, of sites of significance to Maori.
- (ii) Avoid a reduction of historical, cultural and spiritual values associated with sites of significance to Maori.
- (iii) Avoid, remedy or mitigate the adverse effects of subdivision, land use and development on identified Areas of Significance to Maori.
- (iv) Ensure that local iwi are consulted over the use, development or protection of sites of significance to Maori.

[128] There was contention between the parties regarding this objective. The JWS stated in relation to Objective 3 and its policies:

The planners agree that when considering the applicability and interpretation of the terms *sites of significance to Māori* and *Areas of Significance to Māori*, the plan is ambiguous and that a level of uncertainty remains. However, taking a purposive approach, the following interpretation is agreed:

- a) The term *sites of significance to Māori* refers to the range of heritage items that need identification and protection, be that an archaeological site, group of sites, waahi tapu, land of high spiritual significance, traditional site, etc. This is an ordinary term that isn't defined in the District Plan.
- b) The term *Areas of Significance to Māori* refers to the District Plan policy instrument (or the method) used as part of the District Plan framework to identify and protect a heritage item.
- c) The definition of '*Areas of Significance to Māori*' is inclusive, and recognises that further heritage items/sites of significance may need to be identified and protected through other processes such as resource consent applications, future plan changes, etc.

[129] Based on the above agreement the planning experts considered that Objective 3 and its policies should be interpreted as follows:

Objective 3 establishes the plan purpose is to recognise and protect sites (heritage items) of significance to Māori.

- Policy (i) is that identification and protection of heritage items should occur via consultation with tāngata whenua.
- Policy (ii) is that the protection mechanism should avoid a reduction of historical, cultural and spiritual values at a District Level.
- Policy (iii) is that where sites of significance are identified (or otherwise meet the criteria) as Areas of Significance to Māori then the effects of subdivision, land use and development on the heritage item should be "avoided, remedied or mitigated" through the resource consent process.
- Policy (iv) is that tāngata whenua should be consulted over the use, development, or protection of heritage items in the implementation of the District Plan provisions.

Policy (ii) sets out an overarching, general intention to 'avoid' a loss of values of heritage values at a District level. It probably predates (or otherwise ignores) the King Salmon decision 'avoid means avoid'.

The related Restricted Discretionary Activity assessment criteria confirm that avoidance of adverse effects is not the policy intention in all cases, by including matters such as: 'The extent to which the heritage values are likely to be retained, protected and/or enhanced' and 'The extent to which the works may adversely affect cultural and spiritual values'. This will be matter of fact and degree.

Furthermore, the "reasons" for adopting these provisions do not connote an avoidance of all effects because it states that "[s]ites of significance to Maori ... should be protected from inappropriate subdivision, use and development."

[130] We also note that the experts provided no evidential basis to support their agreed position that Policy (ii) should be interpreted as requiring the

avoidance of a reduction of historical, cultural and spiritual values at a District Level. In our view, the wording can equally be interpreted to mean at an individual site or area level. Under cross examination, Dr Mitchell acknowledged that there is nothing in the policy wording that says this is not to be applied in a resource consent application context.<sup>72</sup>

[131] We considered this issue particularly carefully in our evaluation, including how the definitions of “Area of significance to Māori” and “sites of significance to Māori” should be interpreted in the District Plan. We found nothing to support the “district level” agreement reached by the planning experts, but ultimately, it was not a determinative issue, as it would only have reinforced our findings in relation to effects of the proposal in accordance with Policy (iii).

#### **2.4 Submissions on cultural provisions in the Plans**

[132] Counsel for Waste Management submitted that the district and regional planning frameworks enable landfills, do not include any cultural bottom lines that require consent to be declined, and do not direct avoidance of the effects of the activity. He submitted that the mitigation package must be considered. This package seeks not only to respond to Te Kupenga’s concerns about the effects of the new Phase C landfill cell, but also seeks to address Te Kupenga’s hurt arising from historical landfill and quarrying activities on the site over many decades and prior to Waste Management’s ownership. It is intended to continue beyond the life of the Phase C cell and assist with the healing of the whenua, and the restoration of mauri and wairua, which Te Kupenga have identified as a critical concern to them. Waste Management proposes to give over 100ha of land to Ngāti Hako, representing its genuine desire to provide Ngāti Hako with greater opportunities to connect with Rae

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<sup>72</sup> NOE at page 312.

ō Te Papa, revitalise cultural practices and support the expression of kaitiakitanga, rangatiratanga and other values that may be important to them.

[133] Counsel for Waste Management drew our attention to the decision in *Ngāti Maru v Ngāti Whatua*<sup>73</sup> and Whata J's comments about the evidential process of testing claims regarding beliefs. Counsel submitted that while the starting point is that tangata whenua are best placed to identify the cultural effects they experience,<sup>74</sup> the Court should not refrain from understanding what the identified cultural effects of a proposal may be at a more granular level, or how the identified effects may be addressed by the proposal, including through conditions, and whether those methods may appropriately avoid, remedy or mitigate those effects. Counsel also referred to the High Court's comment that the Environment Court is purpose-built to assist parties to find (often non-binary) resolution of disputes regarding cultural effects.

[134] Both counsel for the Councils submitted that the need for avoidance of significant adverse effects on the relationship of tangata whenua with their ancestral lands in accordance with Regional Plan Policy 5.2.3(2)(e) is clear. This would also apply to consideration of the regional consents relating to the discharge of contaminants to land and water and subsequent discharge of contaminants to air, as all the consents applied for under both the regional and district plans are required for the proposal to proceed. If avoidance is not able to be achieved, they submit that the Court would be obliged to decline consent. Put another way, if we accept that the District Plan has no directive policy to avoid adverse effects on cultural interests, then the lower benchmark of remedying or mitigating such effects, if achieved, would still mean an inconsistency with the Regional Plan policy of avoidance.

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<sup>73</sup> *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [79].

<sup>74</sup> *Tauranga Environmental Protection Society v Bay of Plenty Regional Council* [2021] NZHC 1201, [2021] 3 NZLR 882, [2021] NZRMA 492.



[135] Counsel for the District Council submitted that there are adverse cultural effects associated with the operation of Phase B of the landfill which form part of the environment. Further, this application gives rise to new adverse cultural effects, namely:

- (a) Permanent landform modification and stream diversions of a new area of the cultural landscape of the tūpuna maunga, Rae ō Te Papa, by interring waste, this creating a 'paru mound' that is in closer proximity to the marae than existing operations;

[136] Counsel also submitted that the conditions proposed by Waste Management, while thorough, do not adequately mitigate, remediate, off-set or compensate, the acknowledged significant adverse cultural effects of the application, having regard to the relevant provisions in the plans, including in particular:

- a. Objective 5.2.2 (c) of the Regional Plan and its associated policies which counsel submitted formed a 'cultural bottom line';
- b. In the district plan, section 6.1.3.3 policy (ii) is also submitted to form a cultural bottom line in respect of sites of significance to Māori:

Avoid a reduction of historical, cultural and spiritual values associated with sites of significance to Māori.

[137] He did note, however, that the next policy (iii) in Section 6.1.3.3 of the District Plan sets out a different approach of "*Avoid, remedy or mitigate the adverse effects of subdivision, land use and development*" in respect of Areas of Significance to Māori.

[138] On the basis of the agreement among the expert planning witnesses that there was ambiguity in these provisions, counsel submitted that an evaluation under Part 2 of the RMA was appropriate. On that basis the District Council sought that the appeal be dismissed and the consent declined in order to accord with the applicable policy framework in the plans and the purpose of the Act.

[139] Counsel for the Regional Council submitted that:<sup>75</sup>

There is a consistent policy thread of directive objectives and policies seeking to avoid significant effects on Māori relationships with ancestral lands and sites of significant to Māori. Lesser effects on such relationships and values are to be avoided, remedied or mitigated.

If the Court accepts that the effects of the proposed landfill extension on the relationship of Ngati Hako with their ancestral lands and other taonga will be significant and/or that the historical, cultural and spiritual values of Ngati Hako will be reduced by that extension, the inevitable conclusion is that the proposal is in conflict with the most relevant cultural effects objectives and policies in the Regional and District Plans.

The intended waste deposits would either permanently or for a very long period alter the way in which Ngati Hako exercise kaitiakitanga for their tupuna maunga, thereby altering their role as rangatira and reducing their mana.

## 2.5 Objectives and policies relating to odour

[140] Regional and local air quality management is addressed in Part 6 of the WRP. The relevant objectives and policies are:

Objective 2:

No significant adverse effects from individual site sources on the characteristics of air quality beyond property boundary.

Objective 3:

Cumulative effects of discharges on ambient air quality do not relevantly:

...

- f) cause significant adverse effects on the relationship tangata whenua as Kaitiaki have with their identified taonga such as air, ancestral lands, water and waahi tapu.

Policy 2

Manage other discharges of contaminants to air through controlled and discretionary activity rules having particular regard to the effects of the discharge on:

...

- f) significant adverse effects of the discharge on the identified values of tangata whenua as Kaitiaki,
- g) the sensitivity of the receiving environment,

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<sup>75</sup> At 23, 37 and 42.

- h) existing ambient air quality and any cumulative effects as a result of the discharge on the receiving environment, ...

#### Policy 5

Recognise the positive benefits to people and communities arising from activities that affect air quality by enabling a range of activities to use the air (including existing activities) whilst ensuring that:

- a) high quality air resources are protected,
- b) degraded air quality is enhanced,
- c) adverse effects on air quality are avoided, remedied or mitigated

## **2.6 Whaia Te Mahere Taiao a Hauraki / Hauraki Iwi Environment Plan 2004**

[141] Central principles set out in this iwi environment plan include:

The belief the natural world is the domain of Atua and that all things, both tangible and intangible are interconnected and possess a life energy principle or mauri guides our interactions with the environment. Sustaining the mauri of a taonga, whether a resource, species or place, is central to the exercise of kaitiakitanga.

Mauri is the life energy force or unique life essence that gives being and form to all things in the universe. Tikanga has emerged around this duty bringing with it an intimate knowledge and understanding about local environments and a set of rules that guide our way of life, both spiritual and secular.

[142] Central goals of the plan include:

- 3.1 Mauri - Hauraki Whānui sustaining and enhancing the mauri of ecosystems, habitats, species and natural resources under their care in the Hauraki tribal region.
- 3.2 Protecting our Past - Hauraki Whānui protecting wāhi tapu, cultural heritage sites, places and landscapes and associated traditional knowledge in the Hauraki tribal region.
- 3.3 Supporting Kaitiaki - The kaitiaki role of Hauraki Whānui is being maintained and enhanced.
- 3.4 Making Decisions - Hauraki Whānui are making informed decisions about the environment and heritage of the Hauraki tribal region in accordance with tikanga.

[143] Section 3 of the plan addresses Te Whenua o Hauraki, he Taonga. Objectives relating to waste management include:

...

- c) Ancestral taonga valued by Hauraki Whānui are actively protected from the impacts of growth in the Hauraki tribal region.
- d) Sustainable land use and energy efficiency practices including the safe disposal of contaminants, the reduction, re use and recycling of waste is standard practice amongst Hauraki Whānui and local communities.
- e) The environmental risks of new, existing and closed mines, quarries, and landfills and contaminated sites are significantly reduced.

### **Part 3 - Environmental effects of the proposed landfill**

[144] Many of the potential adverse environmental effects were addressed in technical reports and evidence which were not in contention. For completeness we summarise the evidence here.

#### **3.1 Traffic effects**

[145] We accept the evidence of Mr A Gregory, a principal transport planner with Tonkin and Taylor, that:

... with the proposed conditions, which have been agreed with Waka Kotahi NZ Transport Agency (“**Waka Kotahi**”), the Project will have no measurable impact on the safety and efficiency of State Highway 26 (“**SH26**”), or the adjacent local roads and that the traffic volumes generated through this operation will be identical to those currently experienced at that location.

#### **3.2 Noise effects**

[146] We accept the evidence of Mr M J Cottle, an associate with Marshall Day Acoustics, that noise generated from the construction and operation of the Project can achieve full compliance with the relevant District Plan noise limits.

#### **3.3 Engineering, geotechnical, hydrogeology or hydrology**

[147] As noted in Part 1, we consider the design of the landfill to be state of the art and accept Waste Management’s evidence in relation to these aspects

of the project and have taken them into account in our assessments of effects below.

### **3.4 Effects on water quality and aquatic ecology**

[148] Mr R van der Munckhof, a principal and senior environmental engineer at Tonkin and Taylor, undertook a stormwater and water quality assessment of the project. His work was peer reviewed during the council-level hearing on behalf of the Regional Council and generally agreed. He made amendments to the proposed conditions to incorporate improvements suggested by the peer reviewers.

[149] When considering stormwater management and the potential effects of landfill operations on water quality, the effectiveness of leachate management is important. We are satisfied that the containment and collection systems proposed are in accordance with accepted good design practice in New Zealand. As noted in Part 1, leachate will be tankered off-site for disposal, which will avoid any local effects on water quality from that source.

[150] Mr van der Munckhof stated that any stormwater which comes into contact with waste will be treated as leachate and the leachate will be kept separate from on-site stormwater. Continuous conductivity monitoring of the perimeter drains is proposed, with the requirement to take remedial action including removing any leachate accumulated within the drains in the event of any detection. On-going stormwater and water quality monitoring is proposed at the outlet from the treatment devices and within the receiving environment to demonstrate that the treatment systems and controls are being effective at avoiding or minimising any adverse effects on the downstream receiving environment.

[151] Mr van der Munckhof stated he was confident any potential stormwater and water quality effects will be avoided or appropriately mitigated.

[152] Mr D C Miller, a principal freshwater ecologist at Tonkin and Taylor, stated that existing watercourses are of low ecological value in their current state.<sup>76</sup> However, the streams do support native eels in the lower reaches and could provide permanently and intermittently available habitat, if habitat conditions were improved.

[153] He went on to say that potential effects on native fish, which were of concern to Ngāti Hako at the council hearing, will be addressed by undertaking fish salvage and relocation prior to and / or during decommissioning of streams and culvert works and by ensuring fish passage is provided for in culvert and diversion structures. He also stated that the quantum of stream offset work proposed is more than what has been calculated to achieve “no net loss” in stream ecological function and value. The proposed design was agreed with the Regional Council’s ecology peer reviewer during the council hearing.

[154] Overall, Mr Miller stated his opinion as:

... provided the proposed freshwater effects management measures in the form of the diversions and riparian planting are implemented, the Project will likely result in a net gain in stream ecological function and value, and an improvement relative to the current situation. ...

[155] The science evidence of the two experts on water quality and aquatic ecology was not challenged. Mr van der Munckhof noted that the Commissioners’ decision concluded that the panel was satisfied that through the adherence to proposed conditions of consent, the proposal would result

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<sup>76</sup> Mr Miller, EIC at section 1.

in a new improvement in water quality and that there will not be any significant (physical) adverse effects on aquatic ecosystems.<sup>77</sup>

[156] We accept the experts' evidence in a western science context and agree with the findings of the Commissioners. We consider effects on cultural values separately below.

[157] We note that the proposed works do not directly affect the Owhakatina Stream, which was identified as having particular significance to Ngāti Hako.<sup>78</sup>

### **3.5 Effects on terrestrial ecology**

[158] Mr R J MacGibbon, a principal ecologist at Tonkin and Taylor, stated the proposed construction and operation of the project has the potential to create moderate adverse effects, before effects management on long-tailed bats and very low effects before effects management on birds and lizards.<sup>79</sup> Measures have been incorporated within the proposed conditions of consent that will reduce the likelihood of harm being caused to native bats, birds and lizards. He further stated that:

A mitigation planting programme to plant an area of 3.7 ha on the Waste Management landholdings in native trees and shrubs will fully replace the bat foraging habitat that will be lost within 6 to 8 years of planting. This will likely, when supported by the proposed pest control programme, result in a substantial improvement in foraging habitat for bats on the Waste Management landholdings compared to the current situation. The new area of planting will also provide benefits for native birds and lizards that exceed the likely effects of the Project on this fauna.

Overall, with the implementation of the recommended effects avoidance, minimisation and mitigation measures, it is my professional opinion that all terrestrial ecological effects of the Project will be appropriately addressed, and in the medium to long-term the ecological values of the Waste Management landholdings will be enhanced relative to the existing situation.

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<sup>77</sup> Mr van der Munckhof, EIC at 1.8, referring to the Commissioners' Decision at Appendix 1, p 48 at [c].

<sup>78</sup> Mr Linstead, EIC.

<sup>79</sup> Mr MacGibbon, EIC at section 1.

[159] The Project does not involve any loss of a natural wetland.<sup>80</sup>

[160] The nature and extent of potential ecological effects resulting from the project and the measures proposed to address them was agreed with the Regional Council's ecology peer reviewer during the council hearing and no concerns were raised in the Commissioners' decision.

[161] Mr MacGibbon's evidence was not challenged and we accept it. We agree with Mr MacGibbon that in the medium to long-term the ecological values of the Waste Management landholdings will be enhanced relative to the existing situation.

### **3.6 Visual effects**

[162] Mr Goodwin assessed the visibility of the proposed landfill from different locations outside the site.<sup>81</sup> He found that visibility of the Phase C would be restricted largely to an approximate 180° area from the north, the west, and around to the south-west, with no visibility from off-site locations to the east due to elevated topography and associated vegetation. He considered visual amenity effects of the landfill from eight off-site viewpoints, which he considered representative of views from roads, pathways and private properties at distances of 500 m to 2.2 km from the landfill.

[163] He stated that:

From locations beyond the Project footprint, visibility of the majority of the lower elevation of the landfill cell would be obscured by existing vegetation within the Waste Management landholdings and surrounding landscape. This is particularly so from the majority of nearby viewing locations within 500-1,000m of the proposed landfill cell where there is a cluster of smaller size landholdings with attendant dwellings. It is only when the landfill cell reaches Stage 3 and Stage 4 levels that it would become visible from these locations.

Beyond 1km and out to 4 km from the Project footprint, the extent of visibility increases as the landscape is more open (i.e. there are fewer trees in the

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<sup>80</sup> Mr MacGibbon, EIC at 4.7.

<sup>81</sup> Mr Goodwin, EIC at section 7.



foreground to obscure views towards the site) with larger landholdings and fewer dwellings. However, as with closer views, the lower levels of the landfill cell would be less visible, and visibility becomes more extensive as construction reaches the higher elevation and later stages.

For members of the public, consisting of road users and those along the Hauraki Rail Trail walkway / cycleway, views of the Project will be transitory and often fleeting for short durations. For private viewing audiences, being those in dwellings and people at the Marae, views will be static / fixed for longer durations. The visibility analysis in Figure 7 shows that visibility beyond the site tends to be more from open farmland areas rather than from individual dwellings and associated outdoor living areas.

[164] Mr Goodwin considered the visual effects of the landfill on the Marae from Tukaki Road. He stated that “... the landfill cell will be obscured during site establishment and Stages 1 and 2 but ... there would be partial views through a gap in foreground vegetation of Stage 3 and a more extensive view above mid-ground vegetation of Stage 4 landfill activities and the final landform.” He confirmed that the landfill will not be visible from the dwellings on Mr Ofsoske’s properties.<sup>82</sup>

[165] He summarised the visual effects as follows:

... the greatest level of adverse effect is when the landfill reaches higher elevations associated with Stages 3 and 4 of the filling operations. At times and from some locations, when filling and associated truck / machinery operations may be visible on the upper-most part of the landfill for short durations these effects will in my opinion be moderate. However, for the majority of the filling operation, as the placement of fill will be obscured by the progressively revegetated outer face of the landfill, these effects will be low-moderate.

### **3.7 Landscape effects**

[166] Mr Goodwin<sup>83</sup> assessed the potential adverse effects on the landform, watercourses and vegetation of the site and on the landscape character of surrounding farmland and forested foothills as being moderate during site establishment and landfill activities, reducing to low to moderate as the landfill increases in size. After completion of the landfill and the planting has matured, he considers the adverse effects will be low. This is because of the

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<sup>82</sup> Mr Goodwin, EIC at section 9.

<sup>83</sup> Mr Goodwin, EIC at section 6.

ability to return the land to a rural character with an improved vegetative character within the site. He considers that the natural character of the site will be improved by the proposed enhancement works.

[167] In relation to the wider landscape setting, where the landfill would be seen at a distance and in the context of other agricultural activities, he considered the visibility of the activities and hence visual effects would be low during site establishment and early landfill activities. As the height of the landfill increases in height during Stage 3, the adverse effects on the wider landscape character would increase to low-moderate and for the two to three-year period during Stage 4 would at times be up to moderate. On completion of the landfill, he considered the adverse effects on the wider landscape would be very low.

[168] In relation to the effects on the long-term rural character of the wider area, he considered that "... once the final landform is grassed and established it will be seen as a logical extension to the foothills, much like the existing spurs which are clearly visible from the west, and form part of the character of this transitional landscape between the Kaimai Ranges and the Hauraki Plains." He concluded that "... the long-term effects of the project on the rural landscape character of the wider area will be low within the immediate surrounds and very low in relation to the wider context."

[169] Mr Goodwin stated that:<sup>84</sup>

There are no ONLs (*Outstanding Natural Landscapes*), amenity landscapes or sensitive zones that have been identified within the Waste Management landholding or within the surrounding landscape where the project could have any effect on the values associated with these features.

While the landfill cell is located adjacent to an identified SNA there is no mention of any landscape values associated with the SNA. Apart from the SNA area forming a part of the wider hills landscape to the southeast of the landfill, the landfill activity will not result in any physical effects on this vegetated area.

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<sup>84</sup> Mr Goodwin, EIC at 8.4 and 8.5.

### 3.8 Effects on the cultural landscape

[170] Mr Goodwin referred to the recently adopted New Zealand Institute of Landscape Architects Te Tangi a te Manu, Aotearoa New Zealand Landscape Assessment Guidelines (2022).<sup>85</sup>

[171] He explained that:

The main shift in approach now reflected in our updated methodology is in relation to Te Tangi a te Manu’s emphasis on visual effects being a subset of landscape effects and the importance of assessing all relevant attributes (physical, perceptual and associative) when establishing the landscape baseline and subsequently assessing potential landscape effects.

[172] He described visual effects as relating to the amenity values of the landscape, quoting the RMA definition of amenity values as “natural and physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and **cultural** and recreational attributes.” (our emphasis).

[173] He acknowledged concerns raised by Ngāti Hako at the council-level hearing that the proposal will impinge on their cultural, environmental and spiritual values through the development of the project at the base of Rae ō te Papa . He referred to evidence given by Ms Anderson for the Tirohia Marae that emphasised:

... the perceived negative impacts on the spiritual and cultural significance of landscapes. It asserted that the Project extends across the Marae rohe and will affect the aesthetic value of the cultural landscape, which includes the sacred mountain range of Rae ō te Papa .

[174] Following the council hearing, he reviewed a range of documents<sup>86</sup>. Based on that review he set out his understanding that:

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<sup>85</sup> Mr Goodwin, EIC at Appendix A.

<sup>86</sup> Mr Goodwin, EIC at 9.7, listing the documents as the Hauraki Collective Redress Deed between the Crown and the Iwi of Hauraki (and in particular the agreement in principle between Ngāti Hako and the Crown), the Memorandum of Understanding between Ngāti Hako and HG Leach, the Ngāti Hako Māori Cultural Values Assessment (April 1998), the evidence of Ngāti Hako witnesses

The Kaimai Mamaku Range is an area of high spiritual and cultural significance to Ngāti Hako and that there are number of important peaks of cultural and spiritual significance to Ngāti Hako in the wider area, including Rae ō te Papa , as well as waterways within and beyond the site, in particular Owhakatina Stream.

[175] He acknowledged that Ngāti Hako’s relationship to the whenua, awa and landscape is different to a western view of landscape and amenity and stated that he did not “purport to fully understand, nor have I attempted to assess, the connection and values held by Ngāti Hako associated with the whenua or awa of the Waste Management property and landfill site and its relationship to the wider area.” He stated that his assessment did not address Te Ao Māori cultural landscapes, although he considered Ngāti Hako’s Māori Values Assessment and evidence from the Council-level hearing in preparing his evidence for the Environment Court.

[176] We note that the Court understands the difficult position landscape architects whose experience was gained through a western lens find themselves in when undertaking landscape assessments in accordance with the Te Ao Māori provisions of the new guidelines. We found Mr Goodwin’s approach to be well-balanced and to fairly set out the issues as he understands them without going further in a way that would have been outside his expertise. We were assisted by the way his evidence was presented.

[177] We accept Mr Goodwin’s evidence from a Te Ao Pakeha world view, using the terminology of Te Tangi a te Manu. Based on this evidence, we find that landfill operations may be visible on the upper-most part of the landfill for short durations with moderate visual effects. However, for the majority of the filling operation, as the placement of fill will be obscured by the progressively revegetated outer face of the landfill, these effects will be low-moderate.

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from the Council hearing, Ngāti Hako’s section 274 notice, as well as previous Court decisions relating to the Tiorhia landfill site.

[178] We find that the potential for adverse effects on the landform, watercourses and vegetation of the site and on the landscape character of surrounding farmland, forested foothills and wider landscape also will be low to moderate, depending on the stage of landfilling. In the longer-term after restoration of the landfill, the effects of the project on the rural landscape character of the wider area will be low within the immediate surrounds and very low in relation to the wider context. In this regard, we note that the conditions provide for restoration of the entire Waste Management landholdings and go further than is required by existing conditions for the Phase B landfill.

[179] We undertake our assessment of effects on the cultural landscape in the section on cultural values below.

### **3.9 Air quality and odour effects**

[180] We received evidence that the Marae and local residences in which some members of Ngāti Hāko live have been adversely affected by odour from the landfill and/or composting plant from time to time. Other than relating to a particularly significant odour event at the Marae in February 2022, the evidence did not enable us to make any quantitative evaluation of how often, for how long and how significant the effects were. However, it was clear odour was a significant concern to Ngāti Hako, with Mr Linstead stating that “The unpleasant smell from the landfill has been a *whakama* (*embarrassment*) to us as Ngāti Hako especially when hosting *manuhiri* (*visitor, guest*) on our marae.”<sup>87</sup>

[181] The main odour sources to be considered are from both the existing and proposed landfill phases and from composting. The closest odour sensitive receivers to the proposed boundary of Phase C are 6260 State Highway 26 at a distance of 510 m to the west; 17 Tukaki Road at 650 m to

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<sup>87</sup> Mr Linstead, EIC at 29.

the west; Tirohia School at 570 m to the northeast; and two Urupā located approximately 550 m to the southwest and 650 m to the south. Tirohia Marae is located 1020 m to the west.<sup>88</sup> There are 20 dwellings (and a school) between 500 m and one kilometre of the proposed project footprint and these are all within a 180° arc on the western side.<sup>89</sup>

[182] Proposed Phase C is located closer to most sensitive receivers than the existing landfill, with the separation distance reduced to 60%, indicatively, of what it is for some receivers.<sup>90</sup> Ms Freeman advised that the separation distance to the Marae would reduce from 1640 to 840 metres.<sup>91</sup>

[183] We received comprehensive expert evidence on air quality from Ms J M Simpson on behalf of Waste Management and Ms T Freeman on behalf of the Regional Council (**the air quality experts**). We also received three air quality joint witness statements dated 21 April, 28 June 2022 and 1 May 2023. We reviewed the evidence in detail before the hearing and sought clarification from the experts on any aspects that were not clear to us. We do not traverse the evidence itself in this decision, instead focussing on key findings. However, for the avoidance of doubt, our evaluation took into account the following:

- (a) Ngāti Hāko evidence relating to the effects of odour from the existing landfill;
- (b) The extensive experience of Waste Management as a landfill operator and the landfill management procedures required by proposed conditions of consent, particularly in relation to the management of special odorous wastes;

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<sup>88</sup> Ms Simpson, EIC at 3.1.

<sup>89</sup> Ms Simpson, EIC at 10.34.

<sup>90</sup> NOE at page 170.

<sup>91</sup> NOE at page 444.

- (c) The inclusion of an independent peer review panel;<sup>92</sup>
- (d) The proposal to stop the composting operation and placing waste in Phase B before Phase C receives its first refuse;
- (e) Special odorous waste management procedures witnessed by the Commissioners<sup>93</sup> and Ms Freeman<sup>94</sup> during their site visits which, based on our understanding, were clearly not effective at controlling odours;
- (f) The results of odour dispersal monitoring, noting the issues arising from different meteorological data over time and the different conditions that are more likely to result in off-site odour effects;
- (g) Field odour observations and complaints, noting a potential ongoing issue with the Regional Council complaints register identified by Ms Freeman;<sup>95</sup>
- (h) The different location of Phase C, significantly closer to sensitive receivers, and the uncertainties inherent in odour monitoring surveys and predicting the potential for landfill odours;
- (i) The difficulties faced by regulators in monitoring odour effects because of the need for a suitably qualified person to be present when an odour occurs, which can be at different locations and at any time of the day, and it is not practicable to always be there when an odour occurs; and
- (j) The findings of the Council hearing decision.

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<sup>92</sup> To review and monitor the design, construction, operation and maintenance of the landfill Cell, and to assess whether the work is consistent with the requirements of the conditions of the consent and is undertaken by appropriately qualified personnel in accordance with good practice in accordance with proposed HDP condition E9.

<sup>93</sup> Decision Report at 115.

<sup>94</sup> Ms Freeman, EIC from 6.2.

<sup>95</sup> Ms Freeman, EIC at 8.35 to 8.37.

[184] The air quality experts agreed that there is a very low risk of amenity effects due to landfill-related dust emissions, and similarly a very low risk of health effects for people living near the Tirohia landfill site due to emissions to air from the landfill.<sup>96</sup> We accept that evidence.

[185] They agreed that the intensity and duration of odours noticeable at the Ofsoke property are likely to be significantly reduced compared to current odours.<sup>97</sup>

[186] They both confirmed that removal of composting operations will reduce off-site odour effects.<sup>98</sup>

[187] They also confirmed that the management practices proposed here for general landfill operation, including odorous waste management, are best management practice in New Zealand at the present time.<sup>99</sup>

[188] In the June 2022 air quality JWS, Ms Freeman agreed with Ms Simpson that:

Provided the landfill is operated to a high standard, as provided for in the proposed consent conditions, the risk of odours occurring at a combined frequency, intensity and duration that would constitute an offensive or objectionable effects is small. However, on some occasions, due to failures in controls, and/or under certain meteorological conditions, odour discharges may result in noticeable odours at the Marae.

[189] Based on our preliminary reading of the evidence, we did not consider that odours from Phase C can be assumed to be the same as those from Phase B. Phase B conditions of consent are significantly less onerous than those proposed for Phase C and Phase C would be designed and operated to best practice modern landfill standards from the outset, which was not the case with Phase B. We accept that Waste Management is committed to best

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<sup>96</sup> Ms Freeman, EIC at 3.1

<sup>97</sup> JWS Air Quality dated 28 June 2022 in response to Question 3(b).

<sup>98</sup> Ms Simpson, NOE at page 171 and Ms Freeman at page 443.

<sup>99</sup> Ms Simpson, NOE at page 171 and Ms Freeman at page 444.



practice and we saw evidence of this on our site visit, with the energy centre and leachate management system having been upgraded to high standards.

[190] Because of the importance of this issue, we sought further clarifications from the air quality experts during the hearing.

[191] Ms Simpson considered that most of the current off-site odour is related to the composting plant, but not all, and that without the composting plant there would be occasional occurrences of discernible odour beyond the boundary from Phase B. She was unable to say in relation to Phase C what would be the likely frequency of discernible odours beyond a 500-metre separation distance or if their intensity would be likely to cause an offensive or objectionable effect. We accept this is a very difficult thing to predict. She said there are many landfills that operate with the same sort of separation distances as Phase C and some do result in off-site odour and some do not.<sup>100</sup>

[192] Ms Freeman considered there would be the potential for off-site odour within the 500 to 800 metre separation range, but it would depend on the effectiveness of fugitive emission control.<sup>101</sup>

[193] The Commissioner's decision recorded that: "The evidence before us is that, on occasion, there will be adverse odours from proposed operations, not least during the first two years before landfill gas extraction is fully established."<sup>102</sup> The air quality experts have since agreed that provided LFG extraction is commenced as soon as possible once appreciable LFG is being generated, the effects of odour emissions from Phase C are unlikely to be materially different during the first 18 months to two years of operation compared to later operational phases. This is because the LFG from the new Phase will be collected in the existing LFG system and extraction will be able

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<sup>100</sup> NOE from page 169.

<sup>101</sup> NOE from page 443.

<sup>102</sup> Council hearing decision at page 61.

to commence much sooner than if this were a greenfields landfill.<sup>103</sup> We accept the expert evidence and do not agree with the finding in the Commissioner's decision.

[194] We are satisfied, based on the air quality evidence as a whole and the agreement reached by the experts in the June 2022 JWS, in particular, that while off-site odours can be expected to occur from time to time, "... the risk of odours occurring at a combined frequency, intensity and duration that would constitute an offensive or objectionable effects is small."

[195] On that basis, we consider that effects on air quality could be managed appropriately, with some changes to conditions. These would need to include methods to minimise risk of offensive or objectionable odours affecting the Marae at times when important events were occurring, such as Tangihanga.

### **3.10 Effects on cultural values**

[196] The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is a matter of national importance which must be recognised and provided for. The significance of Rae ō te Papa to Ngāti Hako and their relationship to it, and the potential effects on these cultural values are at the heart of this case.

[197] We have traversed the most relevant provisions of the planning documents in Part 2 of the decision, including Objective 5.2.2 (e) and (f) of the Regional Plan and Objective 3 in Part 6.1.3 of the District Plan. The experts agreed, and we understand that it is accepted by all parties, that the adverse effects of the proposal on Ngāti Hako's relationship with its taonga, Rae ō te Papa, and reduction of historical, cultural and spiritual values associated with it would be significant.

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<sup>103</sup> JWS Air Quality dated 28 June 2022 in response to Question 1(c).

[198] Waste Management's case is that the mitigation package it has put in place means that the adverse effects would be sufficiently reduced that the proposal could proceed. We set out the cultural evidence in the level of detail we consider necessary to enable us to determine first if that is the case. That then determines if we would need to make a determination on whether the objectives and policies in the either Plan require avoidance. We have taken this route because if there is doubt regarding the avoidance policy, and the proposal fails the lesser test, we can be confident our decision is sound and provides certainty for all parties.

[199] We received evidence on behalf of Te Kupenga o Ngāti Hako from:

- (a) Mr P R Otimi, a senior kaumatua for Ngāti Hako who is a descendent of Hako, and who was born of Ranginui and Papatuanuku and descended to earth during the period known as Te Ao Marama, the World of Light and Life.
- (b) Mr KJ Linstead, a kaumatua and vice chair of Te Kotahitanga Marae at Tirohia and who has been a trustee for over 40 years. He lives within a kilometre of the current landfill operations and his family has lived on the land for several generations.
- (c) Ms A Te Ira Anderson, a trustee of Tirohia Marae and a trustee of the Hako Tūpuna Trust, the iwi governance entity that now represents the interests of Ngāti Hako. Members of her family are current mineral rights owners where the landfill operations are being carried out at present and her brother, sister and late father all have land within one kilometre of the current landfill site.
- (d) Ms P Clarkin, who is the Operations Manager for the new post settlement governance entity Hako Tūpuna Trust. For the previous 20 years, she was the Manager of Te Kupenga o Ngāti Hako Inc that held the mandate to represent the social, cultural, economic, spiritual and environmental matters on behalf of Ngāti Hako. She is a trustee of Tirohia Marae and has been the iwi contact for the

Tirohia landfill and quarry since 1998 with both HG Leach and Waste Management.

[200] We received expert evidence on cultural values from Ms J K Chetham, who was initially engaged by Waste Management to prepare an Interim Cultural Values Assessment.<sup>104</sup> Mr J L Te Whakaheke Whetu provided expert evidence on behalf of Waste Management in relation to a “Waste Management Digital Dashboard” and to assist Waste Management in relation to cultural matters, including the provision of planning comments. Mr Whetu is a director of Whetu Consultancy Group, which provides assistance, support and leadership in the integration and incorporation of Māori perspectives in resource management processes. He is also a director of Stream, which was contracted to build the dashboard.

[201] Mr D Isaacs gave expert evidence on behalf of the District Council. He is a technical director mātauranga Māori and planning at 4Sight Consulting Limited.

[202] Counsel for Ngāti Hako submitted in opening that:

The position of Ngāti Hako is relatively straight forward. Their position has remained unchanged since the first applications for a landfill were lodged in 1997. And their reasons for such strong opposition are not difficult to understand.

Rae ō te Papa is the tupuna maunga of Ngāti Hako. ... Rae ō te Papa is a cornerstone of their identity. And it is an area of significance that encompasses traditional sites of significance including rivers, streams, mahinga kai and kainga.

[203] Counsel for Waste Management submitted in opening that the proposed conditions have been carefully developed to specifically provide for the meaningful and ongoing exercise of kaitiakitanga by Ngāti Hako. Counsel acknowledged that cultural effects can be physical or metaphysical, including

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<sup>104</sup> Ms Chetham is a professional consultant and described her experience in section 2 of her evidence, which included the preparation of cultural impact assessments and advice on tangata whenua engagement.

spiritual, and should be identified by tangata whenua as they are best placed to identify impacts of any proposal on the physical and cultural environment valued by them.<sup>105</sup> For identified cultural effects based on beliefs, counsel submitted that evidence of those beliefs must be probative and capable of being tested, citing *Ngāti Maru Trust v Ngāti Whatua Orakei Whai Maia Ltd*<sup>106</sup> where Whata J endorsed the “rule of reason” set out in the Environment Court’s decision in *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council*<sup>107</sup> as appropriate metrics for assessing conflicting evidence from within the Māori system, including assessing divergent claims about iwi and hapū values and traditions by reading and examining, among other things:

- whether the values correlate with physical features of the world (places, people);
- people’s explanations of their values and their traditions;
- whether there is external evidence (e.g. of the Land Court Minutes) or corroborating information (e.g. waiata, or whakatauki) about the values. By “external” we mean before they become important for a particular issue and (potentially) changed by the value-holders;
- the internal consistency of people’s explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

[204] We adopt the *rule of reason* approach as our starting point but adapt it to the circumstances of the case. In view of the significance of the tangata whenua evidence to the outcome, we took time to ensure we properly understood the beliefs, values and traditions on which the evidence was based. As indicated by the High Court in *Tauranga Environmental Protection Society Inc v Tauranga City Council and Transpower NZ Limited*<sup>108</sup> we were

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<sup>105</sup> *SKP Inc v Auckland Council* [2018] NZEnvC 81 at [147].

<sup>106</sup> *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [68] and [117].

<sup>107</sup> *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC)

<sup>108</sup> *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201.

required to do this to assess the credibility and reliability of the witnesses, as we must do with all evidence that comes before us.

[205] We have no doubt of the truthfulness of the cultural evidence in this case, particularly from Ngāti Hako witnesses but also from witnesses assisting the applicant. As we will address, when faced with a proposal of this type affecting their ancestral tūpuna maunga their reaction aligned with that of Ngāti Hako. The cultural importance of the site to Māori is not in issue. The issues, and the evidence about them, focused on whether the adverse effects can be adequately remedied or mitigated. Notwithstanding our acceptance of the evidence of cultural effects, the position of Ngāti Hako opposing the proposal on that ground cannot be treated simply as a veto of it.<sup>109</sup>

[206] There is no dispute that Ngāti Hako are the kaitiaki and tangata whenua of the lands and maunga known as Rae ō te Papa. Mr Lindstead stated it was viewed by the old people as a sacred place. He also stated that the block of land on which the quarry and landfill are located is part of Rae ō te Papa, the tribal ancestral mountain of Ngāti Hako.<sup>110</sup> Counsel for Waste Management acknowledged in closing submissions that it is clear the Rae ō te Papa landscape that the Ngāti Hako witnesses spoke of is extensive and extends well beyond the Waste Management landholdings and the smaller Phase C site.

[207] Tirohia Marae is located on the whenua Rae ō te Papa. It is the principal marae of Ngāti Hako, which is also the oldest tribe within the Hauraki rohe (region).<sup>111</sup> The marae was one of two at which hui were held as part of the preparation of Whaia te Mahere Taiao a Hauraki.<sup>112</sup> Within the area known to

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<sup>109</sup> *Watercare Services Ltd v Minhinnick* [1998] NZLR 294, [1998] NZRMA 113 (CA).

<sup>110</sup> Mr Linstead, EIC at 20 and 33.

<sup>111</sup> Ms Anderson, EIC at 4.

<sup>112</sup> Whaia te Mahere Taiao a Hauraki at Figure 1.

Ngāti Hako as Rae ō te Papa there are three urupā, wāhi tapu and other historical sites of significant cultural value to Ngāti Hako.

[208] Mr Otimi explained that proverbs and sayings express the unique cultural connection of a person, a whanau, a tribe or a race of people.

Ko Rae ō te papa te maunga  
 Ko Waihou hononga tangata te awa  
 Ko Tohorā te tipua  
 Ko Tikapa te moana  
 Ko Tirohia te marae  
 Ko Te Kotahitanga te wharenuī  
 Ko Te Oranga te pataka kai  
 Ko Hako te tūpuna  
 Ko Ngāti Hako te iwi

*The brow of this land is our mountain (Rae ō te Papa)  
 The dedicated waters of our river joins the people  
 Borne here by our ancestral whale  
 Raised up by the mourning tidal sea  
 There stands a courtyard of seers  
 Where unity is a large house  
 Wellbeing is our food store Hako is the ancestor  
 From Hako we are the tribe.*

Hoki atu au ki tāku maunga ki Te Rae ō te Papa, ki Rae ō te Rangi. Kia purea ai i ngā hau ō Tawhirimātea. Tāku maunga whakahirahira, ta-tarehua, tāku maunga te Rae ō e Papa, ki te Rae ō te Rangi, he maunga teitei ki te Rangi tū haha ō ngā atua. Kei te mihi, kei te tangi. Ko tēnei te ara wairua ō rātou mā kua wehe atu ki te pō, hoki wairua mai, titiro whakamuri mai anō.

*I return to my mountain Rae ō te Papa, Rae ō te Rangi (from the brow of this land to the heavens horizon) to be purified by the winds of Tawhirimātea. To my lofty and majestic mountain that enshrines and encompasses us. The place where the gods called home. I greet you; I cry for you. The mountain is the spiritual pathway of those who have returned to the darkness, I call to you my ancestors, to glance back from the darkness one more time.*

[209] He quoted tauparapara or incantations that connect to the above pepeha. One connected the wider tribal region to Rae ō te Papa. He explained that “The cause and effects on one mountain will have an impact on others. There is an interconnectedness within our world view. Our taiao and

environmental view is both physical and metaphysical.” A second incantation connected Ngāti Hako to the environmental gods of the heavens and the weather on Mother Earth. A third described lines of descent specific to Ngāti Hako and their relationship to their sites of significance on Rae ō te Papa and her surrounds.

[210] In response to a question from the Court about how everything is interconnected, Mr Otimi confirmed that if one of part is adversely affected, it affects everything else, adding that the land comes first.<sup>113</sup>

[211] He explained that:

Rae ō te Papa is the link between the mountain peaks and the heavens. Rangi and Papa were joined in darkness. And then came into the world of light. And so Rae ō te Papa is basically rae is the forehead that joins us to the heavens. Mother earth’s forehead for us. The sacred forehead of Mother Earth to us is joined directly to the heavens. Te Rae o Te Rangi, that’s the next phase, they are always join(ed).

[212] When asked what is a tūpuna maunga, he explained:

... We personify everything so we are able to make the connections between all life on Mother Earth and all life as we know it in respect of the heavens. The stars. The universe. ...

... And the creation of all things. Similar to the Bible Genesis. ... from the nothing came the spark of creation. That’s our parallel. We live it every day. I live it every day. I can’t say the same for anybody else.

... But we all agree, and it’s in line with other traditional kōrero from Hawaii to all of the islands of the Pacific Rim that our connectivity is that which comes from creation itself down to us today.

We have lived over 23 years of the present landfill on our sacred mountain. We still carry out the rituals. Silently, sometimes in the dark. Because that’s our whenua. All of our young. We return our whenua, the umbilical cords, back to that place. Not just to Rae ō te Papa , and not just to Owihakatina.

[213] We asked about the significance of Rae ō te Papa being the first thing he talked about in his pepeha. He told us that:

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<sup>113</sup> NOE from page 336.



Rae ō te Papa again is connectivity. The most sacred part. One of the most sacred parts of my body. My head. That's the font of knowledge individually. And so I personified myself as being that mountain peak. For the knowledge that our ancestors have shared in respect of our connection from myself to te Rae ō te Papa and to the skies horizons. That's that strong connectivity that I have and many of us of Ngāti Hako still hold onto. That's why it is seen as one of our most sacred places. ...

[214] Mr Linstead stated that:

The maunga is the toka (anchor) in my life and in the lives of our people of Hako. It watches over us and our whanau. It hears our karakia and protects us. It nourishes us and sustains us both physically, mentally and spiritually. It also reminds us of our obligations back to it and the whenua that forms part of it.

Just as the maunga forms part of our identity, we also view the maunga as a Tūpuna (ancestor) with its own wairua (essence) and mauri (life force). The waters that flow from the maunga were used for healing purposes. The land and resources were, and still are, used to sustain our people both physically and spiritually.

Our people consider the maunga and the whenua to be one, there is no separation between the two. "*Ko Rae ō te Papa te maunga, ko Rae ō te Papa te whenua*".

My pito (umbilical cord) and whenua (placenta) are buried on Rae ō te Papa. I and many of our whanau continue this practice today of bringing our mokopuna pito and whenua back to Rae ō te Papa.

[215] Ms Anderson stated that there was no dispute that Rae ō te Papa is the ancestral maunga of Ngāti Hako and that the iwi, hapū and whanau have maintained a deep cultural and spiritual relationship with Rae ō te Papa since time immemorial. She referred to the saying "Ko au ko te maunga, ko te maunga ko au - The mountain is me and I am the mountain" and stated that any negative effects on the maunga will have a direct effect on the mauri of the kaitiaki.

[216] Ms Clarkin reinforced the evidence of other witnesses for Ngāti Hako that Rae ō te Papa is central to their wellbeing and plays a central role in the maintenance of Hako spiritual and cultural beliefs, being one of the identifiers for the iwi, hapū, whanau and marae. To Ngāti Hako, Rae ō te Papa is an outstanding cultural landscape. She stated Rae ō te Papa is held in the most

highest regard for Ngāti Hako and in its wholeness is a Waahi tapu - a place of sacred significance for Ngāti Hako.<sup>114</sup> She described the landscape of Rae ō te Papa as being a navel connecting present generations to the tribe's history, values and pride, as the unbroken link to their whakapapa and that the current landfill and proposed new landfill have and will continue to unbalance the natural order of the landscape of Rae ō te Papa.

[217] She described the relationship of Ngāti Hako and their culture and traditions with the natural world and with our Tupuna maunga o Rae ō te Papa. This included not treating natural resources as commodities but as relations; there is an interconnectedness and interdependency amongst Ngāti Hako and the landscape of Rae ō te Papa and natural resources; there is an inextricable link between the physical and spiritual realms; and the Ngāti Hako worldview is a holistic one; the natural, physical and spiritual aspects all interact and affect each other.

[218] She referred to rangatiratanga (authority) and mana (power) stemming from having Turangawaewae (a place to stand) as the ancestors had exercised since time immemorial. She explained the phrase “ki uta ki tai”, which she said underpins much of the contemporary environment and resource management practices of Māori and describes a “whole of landscape” approach that emphasises interconnectivity between all elements and entities. She stated that Ngāti Hako believes that this proposed application does not provide for the ki uta ki tai of Ngāti Hako and Rae ō te Papa.

[219] In her Interim Cultural Values Assessment, Ms Chetham described Rae ō Te Papa as a Tupuna maunga that is sacred to Ngāti Hako and that as kaitiaki they are responsible for upholding its mauri.

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<sup>114</sup> Ms Clarkin, EIC at 8.5.

[220] Ms Clarkin advised Waste Management that Ngāti Hako's values regarding the landfilling operation had not changed since its first Māori Values Assessment (MVA) Report that was written in 1998 for HG Leach and suggested that this should be the MVA report. She sought feedback from the iwi, and it was decided that they would not do another report and would rely on the original report.<sup>115</sup>

[221] Ms Anderson explained this further by referring to a marae trustees meeting in 2020, at which the trustees confirmed that the MVA undertaken in 1998 articulated their values, concepts, aspirations and the significance of the maunga to the marae and iwi of Ngāti Hako. The trustees did not accept an Interim Cultural Values Assessment prepared by Ms Chetham on behalf of Waste Management.

[222] Ms Clarkin explained that Ngāti Hako iwi participated in the MVA report, which emphasised the cultural values of importance for Ngāti Hako iwi, the marae of Te Kotahitanga Tirohia, Paeahi Waitoki and Te Iti o Hauraki Kerepehi, alongside the iwi organisation. Concerns identified were:

- That the site holds a number of historical sites that are of significant cultural value to Ngāti Hako. Ten sites were identified as being directly impacted by the landfill proposal.
- The Māori values of mauri, tapu and mana will be directly impacted on by the proposed landfill site. Rae ō te Papa is a most sacred Maunga of Ngāti Hako.
- Waters that come from Papatūānuku and Ranginui are part of the mauri of the peoples.
- If the mauri of the waters is damaged so too will be the mauri of the peoples.
- Waters are taonga and are interdependent with all other taonga of the environment physical, social, and cultural. Any activity involving waters will then directly impact on the rest of the environment.
- The loss of traditional and customary rights and values means the loss of mana. Tangata whenua are the Kaitiaki of Rae ō te Papa who have a

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<sup>115</sup> Ms Clarkin, EIC at 7.1.

responsibility to ensure that the traditional Maunga of Rae ō te Papa maintains an acceptable state of mauri or life force.

- Hapu and iwi have inherited an intergenerational responsibility to ensure that they pass on to their descendants an environment which has been enhanced by their presence and efforts.

[223] She stated that the report emphasised that the proposed land fill site of HG Leach was not culturally acceptable to the marae of Ngāti Hako or the iwi of Ngāti Hako.<sup>116</sup> She also confirmed that the Interim Cultural Values Assessment completed by Ms Chetham had no interaction or input by Ngāti Hako into its content and recommendations.

[224] We asked Mr Linstead what process Ngāti Hako follows to make a decision on whether to support or oppose a consent application. He replied that:

... we would call all of our, all of our marae people back to the marae. And that would be put on our agenda to have some kōrero around what the issue is and particularly pertaining to this, not just our marae people, all of those that whakapapa back to that particular whenua of ours.

So we try to cast the net out as wide as we could

[225] He confirmed that the process had been going on for some time.

[226] Ms Chetham described the purpose of the Interim Cultural Values Assessment (ICVA) that she prepared as being to identify the potential cultural relationships and values associated with the Project site and surrounds, and the potential areas of concern for Mana Whenua, including the Project's potential effects on the cultural relationships and values that had been identified. Its preparation was predicated on a desk top review of relevant information. In her evidence, Ms Chetham provided commentary on aspects of Ngāti Hako's MVA, considering that Ngāti Hako have identified

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<sup>116</sup> Ms Clarkin, EIC at 8.3.

significant adverse cumulative effects as a result of the Project due to the effects of interring rubbish into or on the maunga.

[227] Ms Chetham stated that:<sup>117</sup>

I consider the key cultural relationships and values identified in the MCVA (*Ngāti Hako's Māori Values Assessment*) to include: the focus on Ngāti Hako as Mana Whenua, rangatira and kaitiaki; the focus on Rae ō Te Papa and Tirohia Marae as primary relationships in terms of ancestral land, sites and wāhi tapu; and the focus on the Waihou River and Owhakatina Stream network as key relationships in terms of waterways.

At the Council-level hearing issues relating to the cultural, environmental, and spiritual values of Ngāti Hako and the cultural landscape of Rae ō Te Papa, including whakapapa, kaitiakitanga, mana and mauri values were raised.

I acknowledge the obligations of Ngāti Hako as kaitiaki, and the implications of the placement of landfill within the maunga Rae ō Te Papa and alterations to the Owhakatina Stream network for values such as mauri, mana and whakapapa and the integrity of the cultural landscape as a whole.

The key cultural relationships and values in the Interim CVA are broadly consistent with those presented in the Ngāti Hako submissions and hearing evidence and, likewise for the MCVA ...

Ngāti Hako evidence to the Council-level hearing described how landscape extends beyond visual, landscape and natural character values to encompass a deeper, more meaningful connection and set of values and that the landscape of Rae ō Te Papa is a fundamental component of tribal history and identity. **I support this statement.** (Our emphasis)

The permanent physical alteration to the landform (including the alterations to the Owhakatina Stream network), whether visible or not, and the effects of Paru (waste) being interred in the Maunga (which Ngāti Hako have stated is not consistent with tikanga, whakapapa and other cultural norms and values) must be recognised.

[228] Under the heading of “Rae ō te Papa Landscape”, she stated that she agreed with Ngāti Hako and Tirohia Marae witnesses at conferencing that:

The effects on the tūpuna maunga, Te Rae ō te Papa, by interring rubbish into or on it has significant adverse cultural effects that are accumulative and compounding.

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<sup>117</sup> Ms Chetham, EIC from 1.5 and from 5.3.

[229] She acknowledged that when taking into account the intangible and spiritual effects in conjunction with the physical alteration to the landform, the cumulative effect will be significantly adverse, and mitigation is essential. In her opinion, careful consideration had been given to a mitigation package to recognise and provide for the relationship of Ngāti Hako to Rae ō te Papa and to address the cultural effects of the Project that have been identified.<sup>118</sup>

[230] She agreed that:

Owhakatina Stream and the Waihou River are of high cultural significance and are components of the Rae ō te Papa landscape. However, the evidence given at the Council-level hearing suggests that many of the important traditional uses, e.g. sites of eel weir, drinking waters, Tauranga waka, kohanga ika, white baiting and so forth have been affected by other land uses such as the quarry, drainage and flood protection schemes, vegetation clearance and agriculture.

[231] She did not think it could be said that they are currently in a state of wai ora and the new landfill cell will cause them to decline to a state of wai mate.

[232] Ms Chetham described the mitigation proposals, which we return to below and, in her opinion, the proposed suite of Mana Whenua conditions are appropriate to mitigate the effects on the cultural relationships identified and are consistent with the requirements of ss 6(e), 7(a) and 8 of the RMA.<sup>119</sup>

[233] Mr Otimi stated in response to the ICVA prepared by Ms Chetham:<sup>120</sup>

The submissions that we laid down are the ancient old-world history of Ngāti Hako, that goes back to the age of stone. For Hako it is not a cut and paste desktop exercise by people who are not Hako and have no knowledge of our genealogy or who we are. They are not of this whenua, of Rae ō te Papa, and are unaware of the connection and context in which such knowledge was given, and when and how it should be used. I have read her Juliane Chetham's evidence and I do not agree with what she has written.

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<sup>118</sup> Ms Chetham, EIC at sections 5 and 6.

<sup>119</sup> Ms Chetham, EIC at 6.30.

<sup>120</sup> Mr Otimi, EIC at 31

[234] Mr Linstead referred to the consent hearings between 1998 and 2002, stating:

Our position back then which still stands today is that the activity of landfilling continues to destroy and denigrate the cultural and spiritual relationship that exists with the landscape of Rae ō te Papa and Ngāti Hako. The current landfill operations have a direct negative impact on our wairua, our mauri and our relationship with Rae ō te Papa.

[235] He went on to say:

There are many wahi tapu on Rae ō te Papa including within the current quarry and landfill area, and adjacent to the proposed new landfill cell site. There are also some very special sites that we use for healing. The new landfill cell site will therefore have a direct impact on the relationship that we hold with these sites.

The proposed site for the new landfill cell is in the vicinity of the Owhakatina Pa site which was located alongside the banks of the Owhakatina stream. The placing of rubbish and waste including human waste on our sacred sites is considered a desecration of our wahi tapu.

As we have said in the council hearings there is no acceptable mitigation that can be offered that can mitigate the loss of Ngāti Hako to our tupuna maunga. ... I do not support the statements that suggest that there is mitigation that balances the cultural loss of Ngāti Hako and Rae ō te Papa

[236] Ms Clarkin stated:

The current landfill and proposed new landfill have and will continue to unbalance the natural order of the landscape of Rae ō te Papa .

When whenua is compromised, its mauri is weakened and its ability to heal is affected. The interring of waste into the womb of Papatūānuku will and has the most everlasting effect on the mauri of Rae ō te Papa . In my view, the mauri has been seriously compromised. When we talk about “restoring the mauri” of a stream, a lake, or a landscape, then we are talking about restoring the connections that enable those places to thrive. It is in this context that the everlasting effect of paru in Rae ō te Papa will remain until the breaking down of the waste occurs and it may return back to a reasonable state to which the whenua can be healed and can thrive again. This is when mauri ora is achieved.

Rae ō te Papa has endured over time a number of land changes that has reduced its mauri. ..., 60 plus years of quarrying followed by 20 years of landfilling up until the present date. The physical and visual change in the landscape appearance has been seen over the generations. The impact of each of these landscape changes are both felt and endured by Ngāti Hako across generations.

... the effects of the proposed application to establish a new landfill Cell C at the foot of this landscape is as culturally offensive as the current landfill.

[237] Ms Chetham acknowledged that the proposed additional landfill cell will compound metaphysical and physical effects on Ngāti Hako and agreed it could take several generations for the mauri of the Rae ō te Papa to be restored.<sup>121</sup> She accepted that the interment of paru into a tūpuna maunga is a significant action and is a primary effect of the proposal that from Ngāti Hako's perspective could not be mitigated. She also accepted that the effects on Ngāti Hako are intergenerational?<sup>122</sup>

[238] When Ms Kapua asked Ms Chetham what her iwi, Patuharakeke, would do if there was a proposal to put rubbish into their maunga, she replied that they would oppose it. She acknowledged that she understood why Ngāti Hako opposed the application but said that there is already an existing landfill in this case, whereas there is no landfilling on their maunga.<sup>123</sup>

[239] Mr Whetu was asked by the Court if he considered that putting Phase C on Rae ō te Papa will have significant effects or not significant effects on cultural values, he replied they would be significant. However, he considered there may be ways of reducing them if Ngāti Hako were willing to explore them.<sup>124</sup>

[240] Mr Isaacs visited Tirohia Marae and met with members of Ngāti Hako, including Mr Linstead, Ms Clarkin, Mr Victor Graham and Ms Anderson, and on another occasion with Mr Otimi. He described a concern for Ngāti Hako is that:

... while physical improvements such as planting to enhance the mauri of the waterway by improving water quality and enabling the return of taonga species is a positive outcome, these physical improvements do not subsequently lead to the wairua being settled.

Collectively Ngāti Hako believe wairua will not settle until the landfill activity that continues to physically contaminate the whenua ceases. Ngāti Hako believe

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<sup>121</sup> Ms Chetham, EIC at 5.17 and rebuttal at 2.15.

<sup>122</sup> NOE from page 186 and 190.

<sup>123</sup> NOE at page 179.

<sup>124</sup> NOE at page 233.



the balance of mauri and wairua are not in sync. Wairua is therefore not being improved, even if mauri recovers over time.

[241] He explained that:

The Ngāti Hako cultural belief is that this generation and for many generations to follow they will not receive the privilege of the maunga until they heal the maunga. In time the maunga will heal, but Ngāti Hako will never be able to truly enjoy the full mana enhancing benefits of the maunga, as they believe the maunga is in a state of mate (decline).

[242] He stated:

... the interring of paru (waste) in the tūpuna maunga Rae ō te Papa Maunga is not consistent with tikanga, whakapapa and other cultural norms and values of Ngāti Hako. This in turn gives rise to significant adverse effects on the exercise of rangatiratanga and kaitiakitanga, mauri and wairua, and the relationships of Ngāti Hako with the cultural landscape and associated cultural practices.

The proposal will cause a significant permanent alteration to the landform of the cultural landscape of Rae ō te Papa .... This alteration will not be remedied over time and will remain with Ngāti Hako.

It is my opinion, that generally the cultural conditions proposed by Waste Management that are discussed in the evidence of Mr Whetu and Ms Chetham provide for positive overcomes and some mitigation. However, while some positive outcomes may eventuate, the fundamental issue still remains, which is the continued and expanded landfilling operations limiting the ability for Ngāti Hako to exercise kaitiakitanga.

My provisional conclusion (subject to further input from Ngāti Hako concerning the new conditions now offered) is that even with the proposed conditions, to open a new landfill cell on the Site will cause significant adverse and intergenerational effects on Ngāti Hako's exercise of rangatiratanga and kaitiakitanga, and their ancestral relationships with Rae ō te Papa .

[243] He confirmed under cross examination that his provisional conclusion was now his final conclusion.<sup>125</sup>

### **Mitigation proposed by Waste Management and Ngati Hako's responses**

[244] Waste Management proposed an extensive mitigation package to seek to avoid, remedy or mitigate the cultural effects identified by Ngāti Hako where possible and to recognise and provide for their key identified relationships with Rae ō Te Papa, Tirohia Marae, the Owhakatina Stream

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<sup>125</sup> NOE at page 395.

(including tributaries) and the Waihou River.<sup>126</sup> Mr Isaacs and Ms Walker acknowledged that the package is significant and comprehensive.

[245] The consistent position of Ngāti Hako witnesses was that there is no mitigation package that will enable them to agree to a further extension of landfilling beyond that agreed in the MOU. By way of example, Ms Anderson acknowledged the further mitigation conditions offered by Waste Management but stated:

We have not been engaged with Waste Management over the newly proposed conditions. However I do not believe we will change our minds as mana whenua and agree to the extension of the landfill. Our ancestral maunga has suffered enough and it is time to preserve, protect and enhance what remains. As kaitiaki, our relationship with our ancestral maunga is of the utmost importance hence why we are here giving evidence before the Court.

[246] To accept Ngāti Hako's position without a careful evaluation of the package would effectively grant them a veto, which is not provided for the RMA.<sup>127</sup> In determining the case, we considered each part of the package, as set out below, together with all other matters we are required to in accordance with s 104 and other relevant requirements of the RMA.

[247] Waste Management was clear that it wants to establish its own relationship with Ngāti Hako and ideally enter into its own MOU or other appropriate agreed document that reflected that relationship.<sup>128</sup> As we recorded above, Ngāti Hako's understanding was that their MOU with HG Leach provided certainty that there would be no further landfilling beyond the quantity and footprint limits set in the consent conditions current at the time.

[248] As Waste Management chose not to accept that limitation, we observe that it appears uncertain that Ngāti Hako would consider entering into a further MOU, particularly with the party that chose not to respect the earlier

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<sup>126</sup> Closing submissions at 1.2 and 5.2.

<sup>127</sup> *Watercare Services Ltd v Minhinnick* fn 109.

<sup>128</sup> Mr Howie, EIC from 7.15.

one. As a result, while accepting Waste Management's desire to build a positive relationship with Ngāti Hako, we do not see the possibility of a new MOU being signed as being sufficiently likely to enable us to put weight on the outcomes it could achieve.

[249] A Mana Whenua Executive Committee (MWEC) is proposed with broad scope to enhance Ngāti Hako involvement in all aspects of the management, monitoring, cultural assessment and governance of te taiao. It is proposed that the committee will be co-chaired by an Executive Member of Waste Management and the appointed Ngāti Hako representative.<sup>129</sup> Further details are set out in Ms Chetham's evidence and we accept that what is being offered is a significant role for Ngāti Hako, which Waste Management sees as enabling them to undertake a positive kaitiaki role.

[250] Mr Ashton put it to Ms Chetham that this part of the proposal would put Ngāti Hako in a co-governance role that was not in accordance with tikanga, is inherently offensive to them and which they oppose. She acknowledged the issue and interpreted it to be in relation to the interring of parū, whereas the proposed conditions respond to other concerns such as leachate risk.<sup>130</sup> It is clear that the interring of parū is Ngāti Hako's primary concern.<sup>131</sup>

[251] Based on Ngāti Hako's responses to the mitigation proposals overall, it appears unlikely they would wish to participate in the MWEC. Waste Management has foreseen this as a possibility and proposed Regional Council Condition 35 and District Council Condition C 15A, in accordance with which Waste Management would request the Councils:

... to appoint, at the Consent Holder's cost, an iwi liaison to provide cultural values advice into the ongoing management and monitoring of environmental effects from the activities authorised by the consent. Any Council iwi liaison appointed under this condition shall thereafter be invited by the Consent Holder

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<sup>129</sup> Mr Howie, EIC at 8.12.

<sup>130</sup> NOE from page 195.

<sup>131</sup> Ms Chetham, EIC at 5.17 and rebuttal at 2.15.

to perform the role of the MWEC Co-Chair in respect of all conditions referring to the MWEC, with the exception of condition 43.

[252] Waste Management proposed a commercial partnership with Ngāti Hako in the Energy Centre.<sup>132</sup> Mr Whetu considered this acknowledges the values of Ngāti Hako and the mana and mauri of Rae ō te Papa, is a form of reciprocity and utu and could directly benefit Ngāti Hako either as household electricity supply or as dividends.<sup>133</sup> He considered it to be a way of giving back.<sup>134</sup> He acknowledged that only Ngāti Hako can determine and confirm whether a such a partnership would be an appropriate interpretation of the mana and mauri of Rae ō te Papa as he described by them.

[253] Ms Clarkin acknowledged the proposed partnership but did not support it because it was proposed by someone who was not Ngāti Hako, Rae ō Te Papa was not their tūpuna maunga and they had not carried the 20 years of effects of the current landfill.<sup>135</sup>

[254] The Court accepts this would be a positive effect of the proposal if accepted by Ngāti Hako.

[255] With regard to the proposed Mātauranga Māori monitoring framework and Waste Management Digital Dashboard, Ms Clarkin stated when talking about a visit to the landfill with Mr Whetu, that:

During the site visit it became obvious to James that a dashboard was not a mitigation measure that we would support. Where a monitoring system for reporting scientific results, time and dates was then placed in a Māori maramataka (lunar calendar) would not be sufficient to balance the cultural effects of this application on Hako. However I committed to raising it with our people and to get back to him. I responded accordingly by email that we did not want to advance the offer.

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<sup>132</sup> Mr Howie, EIC at 8.8.

<sup>133</sup> Mr Whetu, EIC from 4.14.

<sup>134</sup> NOE at 220.

<sup>135</sup> Ms Clarkin, EIC from 12.12.

[256] Other components of the mitigation package proposed by way of conditions submitted in closing by Waste Management were:

- (a) the offer to transfer approximately 100 ha of freehold land to Ngāti Hako as soon as reasonably practicable following commencement of consent to enhance Ngāti Hako connections with Rae ō te Papa including from the Tirohia Marae, as set out in proposed District Council Condition C28;
- (b) the establishment of the proposed monetary fund, with a quantum of no less than \$50,000 to assist Ngāti Hako with the practical expression of their kaitiakitanga, with the process for allocation of funds as determined by Ngāti Hako;
- (c) the development of a Rae ō Te Papa Restoration Plan, the purpose of which would be to restore and enhance Rae ō Te Papa, as set out in proposed District Council Condition C27;
- (d) The establishment and maintenance for the duration of the consent of a community trust, making the annual sum of no less than \$25,000 available for purposes beneficial to those people whose principal place of residence is within the area identified in the Landfill Management Plan, including the Tirohia Marae and Tirohia School, as set out in proposed District Council Condition C29; and
- (e) The cessation of composting operations at the site prior to the commencement of Phase C, as set out in proposed District Council Condition C42.

[257] These are positive outcomes which we consider in our overall evaluation of the proposal. In doing so we also consider the following:

- (a) The return of land would normally be seen as a very significant positive outcome. Mr Otimi confirmed that is what Ngāti Hako

was seeking in its Treaty of Waitangi claims and that “It had nothing to do with the money.”<sup>136</sup> The fact that Ngāti Hako has been unwilling to accept the return of the land as mitigation for Phase C proceeding is, in our view, a clear statement as to how significant they consider the adverse effects of the proposal to be and the strength of their commitment to protecting Rae ō Te Papa from the effects of further landfilling. Also, the transfer of land requires an agreement. The Court cannot force a person who doesn’t wish to take land to receive that land. We can note the offer on an *Augier* basis,<sup>137</sup> which is a way of acknowledging that we would be putting the condition into the set of conditions without the jurisdiction to do so, but on the basis that the other party would be willing to accept it.

- (b) We do not consider the offer of \$50,000 to assist Ngāti Hako with the practical expression of their kaitiakitanga can be considered mitigation when they see their kaitiaki role as requiring them to oppose any further landfilling on Rae ō te Papa.
- (c) While the development of a Rae ō Te Papa Restoration Plan would be beneficial, it would be unlikely to result in significant mitigation compared to the adverse effects of the proposal on Ngati Hako’s cultural values.
- (d) The offer of a community trust is seen similarly to the offer of a fund.
- (e) Any land-use activity must be managed to ensure there are no unacceptable adverse off-site effects on neighbours. If the cessation of composting is considered necessary as a means of reducing off-site odours, that should not be seen as a positive

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<sup>136</sup> NOE at page 338.

<sup>137</sup> As explained in *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202[2010] NZRMA 29 at [22] – [34].

benefit of the proposal but something required to meet the requirements of the RMA.

[258] As part of the overall package, Waste Management submitted in opening that “... no further application for landfilling in the Hauraki district without prior agreement of Te Kupenga will occur.”<sup>138</sup> While we understand the intent, it does not mitigate effects of the proposed landfill on Rae ō te Papa.

### **Findings in relation to cultural effects**

[259] There was no dispute that Ngāti Hako are the kaitiaki and tangata whenua of the lands and tūpuna maunga known as Rae ō te Papa, or that tangata whenua are best placed to identify the effects of any proposal on the physical and cultural environment valued by them.

[260] In terms of the “rule of reason”, we find that:

- (a) Ngāti Hako’s values as explained in the evidence indisputably correlate with physical features of relevance to the proposal, including but not limited to Rae ō te Papa, the Owhakatina Stream and Tirohia Marae.
- (b) Ngāti Hako’s explanations of their values and traditions and the effects of the proposal on them were clearly, coherently and consistently expressed by witnesses and were unchallenged, leaving no doubt as to their veracity and the sincerity with which they are held and observed;
- (c) The explanations were corroborated by proverbs, tauparapara or incantations and whakatauki;

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<sup>138</sup> NOE at page 34.

- (d) The explanations were consistent with Mr Goodwin's research findings referred to above that:

The Kaimai Mamaku Range is an area of high spiritual and cultural significance to Ngāti Hako and that there are number of important peaks of cultural and spiritual significance to Ngāti Hako in the wider area, including Rae ō te Papa, as well as waterways within and beyond the site, in particular Owhakatina Stream.

and

- (e) The values are consistent with those expressed in Whaia Te Mahere Taiao a Hauraki.

[261] When assessing the effects of the proposal on Ngāti Hako and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, it is necessary to consider first the significance of Rae ō te Papa to Ngāti Hako. We find from the evidence that, indisputedly, Rae ō te Papa is an integral and fundamental part of the lives of Ngāti Hako and Tirohia Marae; the tūpuna Maunga of the Iwi; considered sacred, providing links between atua, tūpuna and tangata whenua. We are also satisfied that in a Te Ao Māori world view, adverse effects on Rae ō te Papa adversely affect the wider landscape, including the well-being of the associated whenua, wai and tangata. It is difficult to perceive of a site or area of greater significance to Ngāti Hako than Rae ō te Papa, when all the evidence is considered.

[262] We find that Ngāti Hako's values against which the proposal must be assessed include:

- (a) the cultural, historical, spiritual and metaphysical importance of Rae ō te Papa to Ngati Hako as a taonga and their tūpuna maunga or ancestral mountain, including its sacredness and role in connecting tangata whenua through whakapapa to their tūpuna and atua;



- (b) Rae ō te Papa’s role as an anchor, protector, sustainer, identifier and a Turangawaewae for Ngāti Hako;
- (c) The importance of upholding and/or restoring Ngāti Hako’s mana and customary rights and the mauri, tapu and wairua of Rae ō te Papa;
- (d) the interconnected nature of the metaphysical and physical worlds, including land, air, water and people, and the importance of integrated management to ensure that what happens in one part of the whole does not adversely affect other parts;
- (e) The importance of being able to exercise kaitiakitanga effectively for the benefit of future generations.

[263] We find, as acknowledged by counsel for Waste Management, that “... it is clear the Rae ō te Papa landscape that the Ngāti Hako witnesses spoke of is extensive and extends well beyond the Waste Management landholdings and the smaller Phase C site.”

[264] There was no dispute that the cultural effects associated with interring paru (waste) into the maunga are significant, cumulative and compounding.<sup>139</sup> For Ngāti Hako, Mr Linstead stated “... the activity of landfilling continues to destroy and denigrate the cultural and spiritual relationship that exists with the landscape of Rae ō te Papa and Ngati Hako. The current landfill operations have a direct negative impact on our wairua, our mauri and our relationship with Rae ō te Papa.”

[265] As noted above, Mr Isaacs stated that the interring of paru (waste) in the tūpuna maunga Rae ō te Papa Maunga is not consistent with tikanga, whakapapa and other cultural norms and values of Ngāti Hako.<sup>140</sup> Ms Chetham

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<sup>139</sup> JWS Cultural.

<sup>140</sup> Mr Isaacs, EIC at 5.3.

acknowledged that the proposed additional landfill cell will compound metaphysical and physical effects on Ngāti Hako and agreed it could take several generations for the mauri of the Rae ō te Papa to be restored.<sup>141</sup> Ms Brabant acknowledged that the proposal does not avoid adverse effects on the mana and mauri of Rae ō te Papa.<sup>142</sup>

[266] A further adverse effect of the proposal which we consider to be of considerable significance is that Ngāti Hako have been forced to go through another series of Council and Environment Court hearings opposing the placement of further paru on Rae ō te Papa, when they had a written agreement with the previous owner of the landfill that there would be no further landfilling after Phase B. “H G Leach agrees that there is to be no further landfilling (i.e. disposal of solid waste or refuse) and extension of quarrying beyond the final limits described within the current application for new consents.”<sup>143</sup>

[267] As Ms Clarkin explained, the previous consenting process left Ngati Hako “battle fatigued”.<sup>144</sup> We consider this adverse effect includes not only considerable personal, emotional and financial cost to Ngāti Hako associated with the consent process itself, but also their having to live with a new site owner who chose to disregard an agreement made in good faith with the previous owner that there would be no further landfilling beyond Phase B because of adverse effects on cultural values.

[268] Based on the evidence, we find that the effects of the proposal on Ngāti Hako and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga would be significant. They would be cumulative with existing significant adverse effects on the relationship that have been

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<sup>141</sup> Ms Chetham, EIC at 5.17 and rebuttal at 2.15.

<sup>142</sup> NOE at page 284.

<sup>143</sup> MOU between Te Kupenga o Ngati Hako Inc. and H. G. Leach & Company Limited dated March 2003.

<sup>144</sup> Ms Clarkin, EIC at 10.1.

ongoing for more than two decades as a result of landfilling and much longer when the effects of quarrying are considered.

[269] The effects of the existing activities will mean it will be many decades yet before the healing of Rae ō te Papa will progress towards some form of completion. Placing more parū on the maunga would extend that time further. The proposal will extend the effects of landfilling into a new area of Rae ō te Papa, previously unaffected by quarrying and requiring new excavation of the whenua. The placement of more parū will not contribute to the restoration of land towards a pre-existing form, as in the case of the existing landfill, but will add to adverse effects on the landform and the relationship.

[270] We find that the mitigation package offered by Waste Management, nor likely any alternative mitigation package, would provide for further landfilling on Rae ō te Papa without resulting in further significant adverse effects on Ngāti Hako and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. We also find that Ngāti Hako would be unable to exercise kaitiakitanga in a way that would prevent further harm to Rae ō te Papa if consent was granted.

### **3.11 Positive effects of the proposal**

[271] An important positive effect is that the proposal provides for essential waste disposal services for Hauraki District and other communities in the Waikato and Bay of Plenty regions and beyond for the term of the consent. No formal or substantive evidence was provided on the economic benefits of the proposal compared to any alternative. The only information provided in closing submissions is that the estimated additional cost of transporting Hauraki District Waste to Hampton Downs would be \$28. This was based on Mr Jefferis' responses to questions from the Court and we accept it. However, the evidence did not enable us to undertake any form of assessment of the extent of economic benefits that would be provided by the proposal.

[272] The proposal also continues to produce benefits from the use of LFG as a source of energy.

[273] In terms of matters to which we are required to have particular regard under s 7 of the RMA, the proposal would result in the following positive effects:

- (b) the efficient use and development of natural and physical resources, by continuing to use existing landfill infrastructure;
- (c) the maintenance and enhancement of amenity values as a result of reduced adverse odour effects;
- (f) maintenance and enhancement of the quality of the environment through a range of management plans, including rehabilitation, after-care and post-closure management plans, with improved water quality and freshwater and terrestrial ecology compared to the current situation; and
- (j) the benefits to be derived from the use and development of renewable energy.

[274] There could be potential to provide groundwater to Ngāti Hako for use during the dry periods when water is typically scarce, subject to further assessment with Ngāti Hako to ensure it is fit for purpose.<sup>145</sup>

[275] As recorded above, we consider there would be benefits arising from some aspects of Waste Management's mitigation package, but these do not outweigh the adverse effects of granting consent when considered as part of the proposal as a whole.

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<sup>145</sup> Mr Jefferis, EIC at 5.7.

## **Part 4 - Evaluation and findings**

### **4.1 Introduction**

[276] In accordance with ss 104(1) and 290 of the RMA, we must have had regard to:

- (a) actual and potential effects on the environment of allowing the activity and the measures proposed by the applicant for the purpose of ensuring positive effects on the environment, as described in Part C of this decision; and
- (b) all relevant statutory instruments as set out in the Agreed Statement of Facts dated 1 April 2022; and
- (c) Whaia te Mahere Taiao, being a relevant consideration under section 104(1)(c) of the Act.

[277] We are satisfied that the RPS and Regional and District Plans give effect to the RMA and in particular to ss 6(e), 7(a) and 8. We do not see a need to refer to Part 2.

### **4.2 Preliminary matters**

[278] Before undertaking our evaluation, we address the following preliminary matters of dispute between experts and parties through the hearing: the consideration of alternative sites and, for the purposes of our evaluation under the relevant planning documents, whether the Tirohia landfill is “regionally significant infrastructure”.

[279] As noted above we also considered in some detail whether Rae ō te Papa is an “Area of significance to Maori” or a “site of significance to Maori.” We are satisfied that if we were to determine this issue, it would not change our decision.

## Consideration of alternative sites

[280] Clause 6(1)(a) of Schedule 4 to the RMA states that an assessment of an activity's effects on the environment must include a description of any possible alternative locations or methods for undertaking the activity if it is likely that the activity will result in any significant adverse effect on the environment.

[281] Waste Management did not give any comprehensive consideration to alternative landfill sites outside of the existing Tirohia site because of the time and cost required to consent a new landfill on an alternative site.<sup>146</sup>

[282] The s 42A Report stated in relation to alternative sites and productive land that:

12.12.6 The location of the site also provides for ready access from the State Highway and provides a central location for the greater Waikato, Bay of Plenty and Thames-Coromandel Districts.

12.12.7 This is not to dismiss the argument put forward by a number of submitters that there is no reason that the operation could not locate at an alternative site, within either the Hauraki District or a surrounding District, given the geographical area from which waste is imported. Rather, it is to noted that the proposal in general has a functional and compelling reason to locate both within the Rural Zone and within the subject site.

[283] The Council resource consent decision records that both Councils accepted the application as full and complete under s88 of the RMA and did not raise the issue of alternatives with the applicant.<sup>147</sup>

[284] Ms Walker considered that the availability of other potentially suitable sites for landfilling activity in the district is a relevant and reasonably necessary consideration when assessing the acceptability of the cultural effects of this application.

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<sup>146</sup> Mr Jefferis, EIC at section 4

<sup>147</sup> Council decision at 163, 162 and 160 respectfully.

[285] The decision in *TV3 Network Services v Waikato District Council*<sup>148</sup> is usually cited for the proposition that when an objection is raised as to a matter being of national importance on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance. The issue may then be how wide-ranging that question is.

[286] In opening submissions counsel for Waste Management relied on the decision of the full court of the High Court in *Meridian Energy Ltd v Central Otago District Council*<sup>149</sup> as authority for the proposition that any consideration of alternatives need only be within the district where the activity is to be located. As discussed with counsel, and respectfully, we suggest that the proposition in that decision should be considered in the context in which it was made. In that case, the proposal was for a windfarm which would supply electricity to the National Grid. While concluding that alternatives could be relevant, the High Court found that having particular regard to s 7(b) of the RMA and the efficient use of resources did not require any wide-ranging consideration of locations and indicated that the scope of the assessment in that case might be in the South Island.<sup>150</sup>

[287] This case involves a waste facility that serves at least Bay of Plenty region as well as Waikato region and may, given the scarcity of Class 1 landfills in the upper North Island, could well serve other regions or parts of them. The inquiry should, we think, extend at least as far as the area of service.

[288] Counsel for the District Council referred to the decision of the Supreme Court in *Environmental Defence Society v New Zealand King Salmon*<sup>151</sup> on this point and to the comment in *Tauranga Environmental Protection Society Inc v*

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<sup>148</sup> *TV3 Network Services v Waikato District Council* [1998] 1 NZLR 360, [1997] NZRMA 539.

<sup>149</sup> *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477.

<sup>150</sup> *Meridian Energy Ltd v Central Otago District Council* fn 150 at [93] – [94].

<sup>151</sup> *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [170] – [172].

*Tauranga City Council*<sup>152</sup> that the former decision has overtaken the decision in *Meridian Energy*. It is unclear how that might be so as the former decision is about a change to a plan and the proper application of ss 32 and 67(3) of the Act while *Meridian Energy* is about applications for resource consent and the proper application of ss 104, as we discuss further in our evaluation of this case.

[289] Counsel for Waste Management submitted in closing that it accepted the relevance of alternatives in this case in terms of section 104(1)(c), principally because Te Kupenga had identified that the application will have significant adverse effects on them and their values.<sup>153</sup> Counsel also submitted that they agreed that the decision in *TV3 Network Services* is clear that when an objection is raised as to a matter of national importance in section 6, the question of whether there are other viable alternative sites for the proposed activity is relevant.

[290] At the time Waste Management acquired the Tirohia site, there was 1.7 million cubic metres of consented air space available.<sup>154</sup> The filling rate was indicatively 150,000 to 170,000 tonnes per year<sup>155</sup> and the 2001 Environment Court decision recorded that the expected filling rate was intended to be between 70,000 and 120,000 tonnes a year.<sup>156</sup> Maintaining tonnages at those or slightly less would have provided adequate time to find an alternative site without the need to expand the landfill footprint at Tirohia.

[291] Our finding in relation to the consideration of alternative sites is that they should have been addressed more comprehensively by Waste Management at the application stage and this should have been required by both councils. It would be inappropriate for the Court to attempt to put its

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<sup>152</sup> *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882, [2021] NZRMA 492 at [132] – [133] and [143].

<sup>153</sup> NOE at page 11.

<sup>154</sup> Memorandum of counsel on behalf of Waste Management dated 22 May 2023.

<sup>155</sup> NOE at page 52.

<sup>156</sup> *Te Kupenga O Ngāti Hako Inc v Hauraki District Council* EnvC A10/2001.



own interpretation on what the outcome might have been and, on the basis that Waste Management's approach was not challenged by the consent authorities, we have considered the application on its merits.

[292] In doing so, we accept Mr Howie's evidence that already consented Class 1 landfills are available as alternatives, albeit at greater cost for disposing of wastes from Hauraki District.

### **Is Tirohia landfill regionally significant infrastructure?**

[293] There was a dispute between planning experts as to whether the Tirohia landfill is regionally significant infrastructure.

[294] Ms Walker followed a strict approach relying on the express wording of the definitions in the RMA and the relevant planning documents and reached the conclusion that the proposal does not qualify as regionally significant infrastructure as defined in the WRPS. However, she went on to say that while she did not consider the landfill facility to be regionally significant infrastructure, she did consider it appropriate to take into account the positive effects arising from the provision of an engineer-designed landfill within the region.

[295] Dr Mitchell considered that the positive effects acknowledged by Ms Walker are precisely the reason why the project can and should be considered to be regionally significant infrastructure for the purposes of the RPS and the NPS-HPL as it achieves the positive effects that in particular Objectives UFD-01 and UHD-01 3.2 and Policy EIT-P1 of the RPS seek to recognise.

[296] The Council's hearing commissioners agreed that the proposed landfill fulfils a regionally significant role<sup>157</sup> but took a similarly strict approach as Ms Walker, stating that:<sup>158</sup>

We have examined the definition of regionally significant infrastructure in the Waikato Regional Policy Statement, and the definition of lifeline utilities in the Civil Defence Emergency Management Act 2002. We accept that the proposed landfill fulfils a regionally significant role but conclude that it does not qualify as regionally significant infrastructure.

[297] As we have previously noted, we do not consider that the relevant definitions need to be or should be so strictly interpreted. What is more pertinent is to recognise that had the landfill at Tirohia been restricted to the receipt of waste from within the Waikato region, it is possible that no expansion of it would have been required before 2038. In that case, it is most likely that sufficient time would have been available for alternative sites to be properly evaluated and an alternative site found and acquired. However, we do not consider this to be determinative in this case.

### **4.3 Key conclusions of the planning experts**

[298] The key conclusions of each expert are set out below.

[299] Ms Walker concluded:

The associated positive effects of the Proposal can and should be taken into consideration under section 104 of the Act.

Conversely, on the basis of the information before me at the time of writing, I understand that the significant adverse cultural effects of the Proposal are not able to be sufficiently remedied or mitigated to an acceptable extent.

The Proposal is contrary to the NPS-HPL and objectives and policies relating to high class soils within the Regional Plans. ... I consider the Proposal to be inconsistent with, but not contrary to the direction of the District Plan insofar as it relates to high class soils.

The Proposal is also contrary to objectives and policies, relating to cultural values, within key planning documents. Most notably, the Proposal is contrary to Objective 5.2.2 of the Regional Plan, which seeks that discharges of wastes

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<sup>157</sup> Decision at 181.

<sup>158</sup> Decision at 188.

onto or into land avoid significant adverse effects on the relationship that tangata whenua, as Kaitiaki, have with their taonga such as ancestral lands.

... in my opinion the adverse cultural effects and conflicts with sections 6(e) 7(a) and 8 of the Act mean that the refusal of consent better serves the purpose of the Act.

[300] Ms Brabant considered that:<sup>159</sup>

... by granting consent for the Project, the key objectives and policies of the RPS will be able to be met and Phase C will be able to help cater for the ongoing need for waste disposal to landfill (including any possible future growth) while ensuring that the existing resource is utilised.

[301] She concluded that:

I have concluded that, from a cultural effects perspective, the Project sits comfortably within the statutory planning framework and there is nothing that indicates to me that consent must be declined.

My overall conclusion is that consent can be granted with the imposition of the proposed suite of consent conditions.

[302] Dr Mitchell opined that there is nothing in the statutory planning documents regarding cultural effects that is sufficiently directive to conclude that the Project is fatally flawed, such that consent must be declined. He considered the package of conditions proposed by Waste Management as to whether they recognise and provide for s 6(e), 7(a) and 8 matters and to avoid, remedy or mitigate cultural effects to be extremely comprehensive.<sup>160</sup> He acknowledged the difficulty in coming to a categorical opinion on these matters but concluded that the Project aligns with the statutory planning framework in a satisfactory manner and that the proposed conditions are appropriate for addressing the matters listed.

#### **4.4 Our evaluation against the relevant plan provisions**

[303] In undertaking our evaluation, we considered the adverse effects of the existing landfill as part of the existing environment and that the proposal

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<sup>159</sup> Ms Brabant, EIC at 3.15.

<sup>160</sup> Dr Mitchell, EIC from 10.2.

would reduce some of those effects. We also considered the adverse effects arising from the proposal both individually and cumulatively.

[304] We consider first Objective 5.2.2 of the Regional Plan and Objective 3 in Part 6.1 of the District Plan and their associated policies.

[305] Counsel for the District Council submitted in opening that Objective 5.2.2 of the Waikato Regional Plan and its associated policies are particularly directive, to the extent that they form a “cultural bottom line”. We think that care must be exercised before characterising a plan objective or policy in those terms. The phrase “environmental bottom line” was discussed by the Supreme Court in *Environmental Defence Society v New Zealand King Salmon*<sup>161</sup> in the context of how to approach s 5 of the RMA and was examined in contrast to an “overall judgment”.

[306] The Supreme Court said that policies 13(1)(a) and (b) and 15(a) and (b) of the New Zealand Coastal Policy Statement provided something in the nature of a bottom line.<sup>162</sup> That decision was given in relation to a proposed change to the Marlborough Sounds Resource Management Plan and the requirement in s 67(3) of the RMA for a regional plan to give effect to certain planning documents, including the New Zealand Coastal Policy Statement. This case is concerned with an application for resource consent and so s 67(3) does not apply: the relevant provision is s 104. The provisions of the planning documents listed in s 104(1)(b) (including the New Zealand Coastal Policy Statement) are matters to which a consent authority (and this Court under s 290) must have regard, but are not matters which must be given effect to. They do not create a bottom line in the sense of an invariable rule, but they do

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<sup>161</sup> *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [38] – [43].

<sup>162</sup> *Environmental Defence Society v New Zealand King Salmon* fn 160 at [132].

form part of the context and there must be a fair appraisal of the objectives and policies read as a whole.<sup>163</sup>

[307] Turning to the words of Objective 5.2.2 of the Regional Plan, Ms Walker and Dr Mitchell disagreed as to the interpretation of the part of it that states:

Discharges of wastes and hazardous substances onto or into land undertaken in a manner that:

- ...
- (e) avoids significant adverse effects on the relationship that tangata whenua as Kaitiaki have with their taonga such as ancestral lands, water and waahi tapu
  - (f) remedies or mitigates cumulative adverse effects on the relationship that tangata whenua as Kaitiaki have with their identified taonga such as ancestral lands, water and waahi

[308] Ms Walker stated the objective includes a directive that discharges of wastes onto or into land are undertaken to avoid significant adverse effects on the relationship of tangata whenua with ancestral lands. She considered the proposal to be contrary to this objective.<sup>164</sup> Dr Mitchell considered that Ms Walker did not evaluate the objective correctly, as it refers to discharges occurring:<sup>165</sup>

“in a manner that” (among five other things) “avoids significant adverse effects” on the cultural relationships listed. The objective does not direct, as Ms Walker suggests, that the discharges themselves must be undertaken so that the significant effects can be avoided.

[309] As Dr Mitchell acknowledged, this may be a matter of semantics. In common English usage, the phrase “in a manner that” in this context means that the discharges must occur in a way that avoids significant adverse effects on the relationship. The plan intent is clear that significant adverse effects on the relationship are to be avoided, as set out in the Plan’s Principal Reasons for Adopting the Objective, which state:

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<sup>163</sup> *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [66] – [75], and *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25].

<sup>164</sup> Ms Walker, EIC at 5.8 and 10.42 to 10.46.

<sup>165</sup> Dr Mitchell, rebuttal at 4.2.

Parts e) and f) acknowledge the relationship of tangata whenua as Kaitiaki have with their land over which they hold mana whenua. Activities involving discharge onto or into land need to avoid significant adverse effects on the relationship of tangata whenua with their identified taonga such as ancestral lands, water, and waahi tapu.

The intention of the phrase ‘the relationship of tangata whenua as Kaitiaki’ is to state that Council will give priority to the concerns of Māori based on the status as tangata whenua and as Kaitiaki, whilst maintaining the ability of Council to consider the concerns of other groups who are not tangata whenua. The phrasing addresses the concerns of tangata whenua who exercise kaitiakitanga over specific resources, ahead of other Māori submitters to a resource consent who have a relationship that is not based on the present day exercise of kaitiakitanga.

The term ‘significant adverse effects’ means those effects that if allowed to occur, would destroy a site or taonga that is of such importance to tangata whenua as Kaitiaki that its loss or degradation is assessed to be unacceptable and unable to be remedied or mitigated.

[310] In our view, the proposal does not fully avoid significant adverse effects on the relationship between Ngāti Hako and Rae ō Te Papa. We do not consider that the proposal would result in adverse effects of such significance that they would destroy Rae ō te Papa as a taonga, which is the test of significance set out in the reasons in the Plan. To that extent, the proposal is not contrary to Objective 5.2.2 when the reasons for adopting that objective are taken into account. Even so, that consideration does not reduce the severity of the effects that we must consider in our overall evaluation under s 104 of the RMA.

[311] With regard to Objective 3 in Part 6.1 of the District Plan, the planning experts considered how the terms “sites of significance to Māori” and “Areas of Significance to Māori” should be interpreted. Objective 3 is to recognise and protect sites of significance to Māori, which is to be achieved by the implementation of policies which include:

- (ii) Avoid a reduction of historical, cultural and spiritual values associated with sites of significance to Māori.
- (iii) Avoid, remedy or mitigate the adverse effects of subdivision, land use and development on identified Areas of Significance to Māori.

[312] The experts considered this in some detail when conferencing and agreed there is ambiguity and that a level of uncertainty remains.<sup>166</sup> We also considered the objective and policies in detail and agree with the experts, finding the extent of ambiguity and uncertainty to be significant.

[313] The experts also agreed at conferencing that the plan framework allows for the full suite of measures to avoid, remedy, or mitigate adverse effects to be utilised when dealing with sites/areas of significance. After particularly careful consideration of the framework, we accept that opinion for the purposes of our evaluation.

[314] Ms Brabant also referred to the planning experts' agreement that avoidance of adverse effects is not the policy intention<sup>167</sup>, going on to say:

There is however clear direction to avoid, remedy or mitigate effects in relation to specific sites, such as Rae ō te Papa ...

On the advice of Ms Chetham, that the package of mitigation measures offered by way of the proposed mana whenua conditions provide an appropriate set of actions to mitigate the cultural effects that have been identified by Ngāti Hako,<sup>168</sup> I consider that the proposal is able to avoid, remedy and mitigate effects to a level whereby consent can be granted.

[315] While Rae ō te Papa is not listed in the schedule of historic sites in the District Plan, that does not preclude it from being considered as one. The District Council recognises that the schedule is not a complete picture of all heritage items in the District.<sup>169</sup> The planning experts agreed that the definition of '*Areas of Significance to Māori*' is inclusive, and recognises that further heritage items or sites of significance may need to be identified and protected through other processes such as resource consent applications, future plan changes, and so on.<sup>170</sup>

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<sup>166</sup> JWS Planning

<sup>167</sup> Ms Brabant, EIC at 3.32.

<sup>168</sup> Ms Chetham, EIC at 1.14.

<sup>169</sup> District Plan at 6.1.1(4).

<sup>170</sup> JWS Planning

[316] Our finding, based on the evidence and our review of the relevant provisions of the District Plan as a whole, is that Rae ō te Papa meets the criteria for heritage significance in Section 6.1.6.8, Appendix 1:

- a. Focal point for spiritual, cultural, customary, religious, social, political, philosophical values of the community;
- b. Symbolic value;
- c. Strong feelings of community association;
- d. Distinctiveness of community identity, social history or way of life;  
and
- e. Tangata whenua values.

[317] There can be no dispute that Rae ō te Papa is an area of significance to Ngāti Hako or that Policy (iii) applies. We are satisfied that by avoiding, remedying or mitigating the adverse effects of land use and development on Rae ō te Papa, the purpose of the Act will be achieved.

[318] We do not need to and accordingly do not make any finding as to how Policy (ii) should be interpreted.

[319] Having addressed the above objectives and policies, we move on to our overall evaluation against the planning framework, considering all relevant planning documents and their objectives and policies and observing the strong directions contained in ss 6(e), 7(a) and 8 of the RMA, as asseverated by the Privy Council in *McGuire v Hastings District Council*.<sup>171</sup>

[320] The proposal is consistent with objectives and policies relating to sustainable resource use, including renewable energy generation, regionally significant infrastructure and the maintenance and enhancement of

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<sup>171</sup> *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].



freshwater bodies. We noted Ms Walker's inclusion of RPS objectives and policies relating to High Class Soils, which she stated had not been updated to give effect to the NPS-HPL due to timing. We have had regard to them, the relevant District Plan provisions and the NPS-HPL but do not consider them to be determinative in our decision.

[321] As stated earlier in our decision, there are various requirements to recognise and provide for the national importance of the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga in accordance with s 6(e) of the RMA. There is also the need to have regard to kaitiakitanga in accordance with s 7(a), for example in as required by Objective IM 07 of the RPS and Objective 2.3.2 b) of the Regional Plan. When considering these matters, we had regard to Whaia Te Mahere Taiao a Hauraki. This includes a "central principle" that sustaining the mauri of a taonga, whether a resource, species or place, is central to the exercise of kaitiakitanga.

[322] Our evaluation against the planning framework reflects our findings relating to cultural effects in Part 3.10. We found that the mitigation package offered by Waste Management would not avoid, remedy or mitigate the adverse effects of the proposal and that providing for further landfilling on Rae ō te Papa would result in significant further adverse effects on Ngāti Hako, so the proposal does not recognise and provide for their relationship with their ancestral lands and other taonga, contrary to s 6(e) of the RMA. We also found that Ngāti Hako would be unable to exercise kaitiakitanga in a way that would prevent further harm to Rae ō te Papa if consent was granted, meaning the proposal would not have particular regard to s 7(a) of the RMA.

#### **4.5 Section 290A of the RMA**

[323] In undertaking our evaluation, we had regard to the Commissioners' decision as required by s 290 of the RMA.

[324] We agree with the Commissioners that most of the physical effects of the proposal have been satisfactorily addressed by the applicant through good practice design supported by thorough and extensive evidence and proposed conditions of consent.<sup>172</sup> We do not agree with their finding at 127 that the initial operation of Cell C for the first couple of years while the LFG extraction is being established is likely to result in offensive and objectionable odours offsite.<sup>173</sup> We accept the evidence of Ms Simpson and Ms Freeman before us that it is unlikely to be materially different during the first 18 months to two years of operation compared to later operational.

[325] We agree with the Commissioners that the MoU is a relevant matter for consideration, but it is not a material factor in our decision.<sup>174</sup>

[326] At paragraph 157 of their decision, the Commissioners assessed both the cultural heritage provisions and the land provisions of the RPS, Regional Plan and District Plan as being determinative. We considered all relevant provisions in accordance with their plain reading and made our determination on that basis, without seeing a need to address whether some were determinative and others were not. We did not see value in listing all objectives and policies that the Commissioners found the proposal to be inconsistent with.<sup>175</sup> That was not necessary for us to make our determination.

[327] With regard to the use of the terms “areas” and “sites” of significance to Māori,<sup>176</sup> we agree with the Commissioners that Rae ō te Papa is an Area of significance to Māori in terms of the relevant District Plan definition. We did not find it necessary to make a determination as to whether Rae ō te Papa is

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<sup>172</sup> Commissioners’ decision at 172.

<sup>173</sup> Commissioners’ decision at 127.

<sup>174</sup> Commissioners’ decision at 168.

<sup>175</sup> Commissioners’ decision at 184.

<sup>176</sup> Commissioners’ decision at 151.

also a site of significance to Māori or whether the terms are used synonymously in the Plan.

[328] We agree with the Commissioners that the proposed conditions of consent cannot adequately remedy or mitigate the significant and cumulative adverse cultural effects.<sup>177</sup>

#### 4.6 Outcome

[329] We find that the proposal would result in some local enhancement of the aquatic and terrestrial environment within Waste Management's landholdings and significant positive effects by providing waste disposal services to a large community as regionally significant infrastructure.

[330] We also find, after taking into account the mitigation package proposed by Waste Management, that the proposal would result in significant adverse cultural effects, including adverse effects on Ngāti Hako's values associated with Rae ō te Papa. It would not recognise and protect a site of significance to Māori in accordance with the District Plan and would be contrary to ss 6(e) and 7(a) of the RMA.

[331] The appeal is accordingly dismissed.

[332] Costs are reserved. Any application must be made within 15 working days of the date of delivery of this decision. Any party against whom costs are sought has a further 15 working days to respond.

For the Court:




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D A Kirkpatrick  
Chief Environment Court Judge

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Commissioners' decision at 187.

