

**In the Environment Court of New Zealand  
Wellington Registry**

**I Te Kooti Taiao o Aotearoa  
Whanganui-a-Tara**

ENV 2022

Under the Resource Management Act 1991 (RMA)  
In the matter of an appeal under Clause 14(1) of the First  
Schedule of the Act  
Between Ngāti Kahungunu Iwi Incorporated  
Appellant  
And Hawkes Bay Regional Council  
Respondent

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**Notice of Appeal by Ngāti Kahungunu Iwi Incorporated (Plan  
Change 9 to Hawkes Bay Regional Resource Management Plan)**

**Dated this 26<sup>th</sup> day of October 2022**

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Filed by  
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To: The Registrar  
Environment Court  
Whanganui-a-Tara

- 1 Ngāti Kahungunu Iwi Incorporated (**Ngāti Kahungunu**) appeals against decisions of the Hawkes Bay Regional Council (**Council**) on Plan Change 9 to the Hawkes Bay Regional Resource Management Plan (**Decision** or **Plan Change 9**, as the context requires).
- 2 Ngāti Kahungunu made a submission (#120), and further submission, on Plan Change 9.
- 3 Ngāti Kahungunu is not a trade competitor for the purposes of s308D RMA.
- 4 Ngāti Kahungunu received notice of the Council's decisions for Plan Change 9, on 09 September 2022.
- 5 The decisions were made by independent Commissioners with delegated authority on behalf of Council.
- 6 Relevant provisions appealed by Ngāti Kahungunu, and associated relief, are set out below.

### **Reasons for the appeal**

- 7 Plan Change 9 was identified by the Decision as a "complex" plan change, reflecting the inter-relationship between water quality (surface and groundwater) and water quantity (including allocation and abstraction). The Decision acknowledged "strong links between flows in rivers and streams, and water levels in the aquifer."<sup>1</sup>. Plan Change 9 includes (*inter alia*):
  - a new rules framework, including substantive amendments to operative rules in Chapter 6 of the RRMP;
  - long term water quality outcomes in Schedule 26;

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<sup>1</sup> Decision at [1.3] & [1.6]

- minimum flows and limits on water allocation in Schedule 31;
  - interim allocation limit for taking groundwater from the Heretaunga Aquifer of 90 million cubic metres per annum;
  - future allocation of water on the basis of an “actual and reasonable use” test;
  - excluding water quality outcomes for threatened species, mahinga kai, and mātauranga Māori from Schedule 26 (and elsewhere in plan provisions) in reliance on a future Plan review process (the **Kotahi Plan**);
  - detailed groundwater attributes are also deferred pending Kotahi Plan.
- 8 The TANK catchment contains the significant freshwater taonga of Ngāti Kahungunu, which includes their living physical and metaphysical ancestors, the four Awa (Rivers): Tūtaekuri, Ahuriri, Ngaruroro and Karamū (**the TANK catchments**), as well as their ancestor and taonga, the Heretaunga Plains aquifer.
- 9 Ngāti Kahungunu, and their hapū, exercise rangatiratanga over these freshwater taonga. Over-allocation, over-abstraction, and water quality are related issues, and need to be addressed as part of an integrated response, to give effect to the priorities identified by the NPS-FM 2020.
- 10 In 1840, Ngāti Kahungunu had full, exclusive and undisturbed rangatiratanga over the TANK catchments. There has been no extinction of that right. Ngāti Kahungunu continues to exercise rangatiratanga and kaitiakitanga over the TANK catchments. The TANK catchments are over-allocated, mauri and water quality are degraded. Plan Change 9 does not address these fundamental issues.
- 11 Given the nationally significant values, and their whakapapa relationship, Ngāti Kahungunu lodged a comprehensive

submission on Plan Change 9 seeking detailed relief. For the most part, the decisions version of Plan Change 9 has rejected, or rejected in part, that submission and relief. Accordingly, this Appeal relies on the same or similar grounds, relief, and scope identified by Ngāti Kahungunu's submission (#120), as identified by the **Appendices** to this Appeal.

12 General reasons for the appeal include that Plan Change 9:

12.1 does not promote sustainable management of resources, and will not achieve the purpose of the RMA;

12.2 Plan Change 9 is inconsistent with Part 2 RMA,<sup>2</sup> including sections 6(e), 7(a), and 8;

12.3 does not meet the relevant statutory considerations in Schedule 1 and Part 5 RMA;

12.4 does not give effect to the relevant provisions of the NPS-FM 2020;

12.5 does not give effect to, or is inconsistent with, other relevant national and regional regulations and planning instruments. This relevantly includes the NZCPS, Regional Policy Statement, and Plan Change 7 (Outstanding Water Bodies) to the RPS; and may include (if confirmed), the proposed National Water Conservation Order for the upper Ngaruroro River and its tributaries; and hapū and iwi management plans identified by the Decision at paragraphs [1.111] to [1.112].

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<sup>2</sup> To the extent that Pt 2 RMA is ultimately relevant.

12.6 does not promote integrated management of freshwater, and Te Mana o te Wai, consistent with Council's statutory functions;

12.7 does not represent the most appropriate way of exercising Council's functions, having regard to the efficiency and effectiveness of other reasonably practicable options, and is not appropriate in terms of s32 and related provisions of the RMA;

12.8 does not implement tikanga, or recognize its relevance to appropriateness of Plan Change 9 provisions;

12.9 does not recognise and provide for Ngāti Kahungunu's ancestral connections to named ancestral rivers and tributaries, wāhi tapu and taonga;

12.10 does not address relevant principles of te Tiriti o Waitangi, including rangatiratanga, and active protection of freshwater taonga, and fails to address the relevant Treaty rights and proprietary interests of Ngāti Kahungunu and their hapū.

### **General relief**

13 By way of overview, Ngāti Kahungunu seeks that substantial amendments are made to Plan Change 9 so that it reflects and gives effect to the national priorities in the NPS-FM 2020, other relevant national and regional policy instruments, and (to the extent relevant) Part 2 RMA.

14 Changes are required so that priority is given to the health and well-being of the water bodies and freshwater ecosystems that comprise the TANK catchment. This inevitably requires changes to existing and future management of water allocation, abstraction, and water quality thresholds. General and consequential relief are sought to address these general reasons

for the appeal. This is in addition to the specific relief identified below.

14.1 As primary relief, amend Plan Change 9 to address the IIn matters identified by this Appeal.

14.2 If primary relief is not granted, then decline or withdraw Plan Change 9 because it fails to address the relevant statutory and planning framework, including rangatiratanga, active protection of freshwater taonga, does not give effect to the NPS-FM 2020, and is inconsistent with (to the extent relevant) Part 2 RMA.

14.3 Other considerations are identified in this appeal. If all of the amendments identified by Ngāti Kahungunu are not made, then Plan Change 9 should be withdrawn or declined.

### **Specific reasons for appeal and specific relief**

15 Specific reasons for the appeal, and specific relief are set out below, and also identified in **Appendices 1, 2 and 3** to this Appeal. Specific relief is not intended to limit the scope of general relief in this Appeal. For the purposes of this Appeal, the Appellant relies on the full scope of relief sought in its submission on the notified version of Plan Change 9.

16 In accordance with tikanga, and traditional social structures, Ngāti Kahungunu also relies on the scope of submissions lodged by their whanaunga, including Ngāti Kahungunu taiwhenua, hapū, Marae and whanau.<sup>3</sup>

17 Specific reasons for this Appeal include:

- Preliminary issue (error of law);
- Substantive reasons.

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<sup>3</sup> The relevant scope of these submissions will be particularized as part of the Appeals process.

These are set out below.

### **Preliminary issue (error of law)**

18 The Appellant identifies the following preliminary issue that involves a question of law in relation to the duty to give effect to the NPS-FM 2020 under section 67(3)(a) RMA. The Appellant contends that this preliminary question should be addressed at an early stage of the proceedings.

### **Error of law – NPS-FM 2020**

18.1 The Decision was wrong in law in finding at paragraphs [1.77] to [1.86], and [2.47] to [2.63], that:

- (a) The duty to give effect to the NPS-FM 2020 was limited by the scope of relief sought by submissions that were jurisdictionally “on” Plan Change 9;
- (b) Plan Change 9 does not need to (and cannot) give “full” effect to the NPS-FM 2020;
- (c) By having regard to an irrelevant consideration or counterfactual (appropriateness of provisions under the superseded NPS-FM 2014, (as amended in 2017));
- (d) In relation to Freshwater Management Units (**FMUs**), the Decision:
  - demonstrates contradictory reasoning, by finding (on the one hand) that Commissioners had jurisdiction to include FMUs for the TANK Catchments, but excluded FMUs on discretionary grounds;
  - finding (on the other hand) that the Commissioners had “no authority” to establish FMUs for the TANK catchments;
  - having determined that there was scope to include FMUs for the TANK catchments, the Decision wrongly found that there was a discretion under the NPS-FM 2020 to

exclude FMUs, pending future plan review process by Council.

- (e) Wrongly relied on a future plan review process by Council (the Kotahi Plan) as a reason to avoid, or delay, giving effect to the relevant provisions of the NPS-FM 2020. While it is mandatory for Council to notify a plan review by 2024, the contents of the Kotahi Plan are still being resolved and rely on future exercise by Council of discretionary judgment.
- (f) Scope of relief sought by submitters was wide-ranging, including (for example) seeking that Plan Change 9 must give effect to the NPS-FM. Accordingly, this was not a constraint on scope, and the Decision does not generally identify how this putative constraint limited the otherwise mandatory duty under section 67(3)(a) RMA.
- (g) Relevant timeframes should be shortened to be within the life of the Plan; or, if longer, should follow the NPS-FM 2020 requirements to include interim target attribute states (set for intervals of not more than 10 years) to assess progress towards achieving the target attribute state in the long term (NPS-FM 2020: Clause 3.11(6)(a)). A time-frame is required to achieve the long term target attribute state and interim targets for every 10 years to that date are required in Schedule 26 to implement the NOF.

18.2 By not giving effect to the NPS-FM 2020, the Decision does not ensure that natural and physical resources are managed in a way that prioritises the physical and spiritual wellbeing of the Tūtaekuri, Ahuriri, Ngaruroro, Karamū catchments, and their freshwater ecosystems, and the Heretaunga muriwaihou.

18.3 Failure to give effect to the NPS-FM 2020 affects the entire structure and priorities in Plan Change 9, and accordingly should be addressed as a preliminary question.



## **Substantive Reasons for Appeal**

### **Tikanga**

- 19 The Decision was wrong in law in finding that tikanga is customary lore, not law, and that only western law determines RMA outcomes, at (*inter alia*) paragraph [1.137].
- 20 As with the general law, tikanga is now recognized as both a source of customary practice, and a source of law of equal (or greater) standing with other forms of law. There was no dispute that Ngāti Kahungunu (and their hapū) exercise ahi kā and mana whenua within the TANK catchment (which forms part of their wider rohe), and that their tikanga required active protection of their freshwater ancestors.

### **Substantive duty to give effect to NPSFM 2020**

- 21 If the Court does not accept the preliminary question, then the Appellant adopts the grounds at paragraphs [18] to [18.3] above as relevant to the merits issues on Appeal.
- 22 Plan Change 9 was required to give effect to the NPSFM 2020, in relation to the TANK Catchments. The duty cannot be deferred until the date specified in s80A(4)(b) RMA (31 December 2024).
- 23 Plan Change 9 was required (or entitled) to identify Freshwater Management Units (**FMUs**) for the TANK Catchment as this was within scope of the Plan Change and relevant relief sought in submissions.
- 24 Where an aquifer or water body in the TANK catchment is over-allocated or over-abstracted, causing harm to the health and wellbeing of water bodies and freshwater ecosystems, then Plan Change 9 must avoid and reduce over-allocation or over- abstraction in order to give effect to the hierarchy of obligations

relevantly identified in Objective 1 and Clause 1.3(5) of the NPS-FM 2020. “Over-allocation” includes “over-abstraction”, for the purposes of the NPS-FM 2020.

**Making findings (on cultural values and practices) but not implementing these**

- 25 The Decision at [1.132] to [1.162] provides an overview of evidence provided to Commissioners by the Appellant and other tangata whenua submitters during the Plan Change 9 hearings. Commissioner findings on this evidence included that:
- (a) Ngāti Kahungunu have rangatiratanga in their rohe;
  - (b) The obligations that tangata whenua have as kaitiaki of taonga like awa are binding;
  - (c) Geographic features like awa have their own personality and are related by whakapapa to Ngāti Kahungunu. Tangata whenua have a unique relationship with the four awa, spanning many generations;
  - (d) Water shortage is a major problem that has led to the drying up of river beds in and around Bridge Pā, and other areas.
  - (e) Water shortages impact customary practices, including mahinga kai, swimming, bathing, rituals.
  - (f) At paragraph [2.32], that a collaborative process was undertaken with stakeholders and tangata whenua over a 6-year process, but no final consensus was reached, and submissions on the Plan Change identified tensions between the rights and values of tangata whenua and the framework of water allocation, use and discharge.
- 26 Problematically, these evidential findings are not reflected in the Decision and Plan Change provisions. Plan Change 9 fails to address these factual matters as materially relevant or determinative considerations.

### **Objectives, Policies, Methods**

27 The Objectives, Policies, Methods (including Rules), and other provisions (such as definitions) in the Decision do not give effect to, or are inconsistent with, the relevant statutory and planning frameworks identified above.

### **Heretaunga Aquifer**

28 The Decision adopted an interim allocation limit of 90 million cubic metres per year (Policy TANK34), based on the new definition of "Actual and Reasonable" Water use. The Decision bluntly accepted that 90 million cubic metres was an arbitrary or otherwise uncertain limit, in light of uncertain information. A precautionary threshold was not adopted. The concept of "Actual and Reasonable water use" protects status quo, existing users of water, at the expense of the health and wellbeing of freshwater bodies and ecosystems (Te Mana o te Wai). The Decision wrongly disregarded evidence from tangata whenua submitters, including the Appellant, that supported a precautionary interim limit of 70 million cubic metres per year (or an alternative method for imposing a precautionary limit below 90 million cubic metres annually).

### **Further grounds for appeal**

29 Without limiting the general reasons and relief, specific reasons and relief are set out in Appendices 1, 2 and 3 to this Appeal. Relief sought includes consequential relief.

### **Other matters**

30 The Appellant attaches the following documents to this notice:

- 30.1 The decision subject to appeal;
- 30.2 Submission and further submission by Ngāti Kahungunu Iwi Incorporated
- 30.3 A table of submitters to be served with this Appeal
- 30.4 Evidence of filing fee payment;
- 30.5 Also attached are Appendices 1 to 3 of this Appeal.

**Dated** this 26<sup>th</sup> day of October 2022



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RB Enright  
Counsel for Ngāti Kahungunu Iwi Incorporated

Address for service of the Appellant:  
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Advice to recipients of copy of notice of appeal

*How to become party to proceedings*

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

\*How to obtain copies of documents relating to appeal

The copy of this notice of Appeal served on you does not attach a copy of the appellant's submission or the decision appealed. These documents may be obtained, on request, from the appellant.

#### Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

- Schedule 1 form 7 heading: amended, on 1 November 2010, by [regulation 19\(1\)](#) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2010 (SR 2010/279).
- Schedule 1 form 7: amended, on 1 November 2010, by [regulation 19\(1\)](#) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2010 (SR 2010/279).
- Schedule 1 form 7: amended, on 1 June 2006, by [regulation 10\(4\)](#) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2006 (SR 2006/99).

## **Appendix One: Specific reasons and specific relief**

31 Plan Change 9 does not promote sustainable management and is inconsistent with Part 2 RMA. It is inconsistent with, or results in adverse effects to:

- the s6(e) RMA relationship between Ngāti Kahungunu and our culture, traditions, whanaungatanga and tikanga over our ancestral lands and waters, wāhi tapu and taonga;
- implementation of the principles of Te Tiriti o Waitangi (including rangatiratanga, our native title and proprietary rights and interests in the TANK catchment, and the duty to actively protect freshwater ecosystems and other taonga);
- exercise of kaitiakitanga by Ngāti Kahungunu s7(a) RMA;
- preservation of the natural character of wetlands, lakes and rivers and their margins, and the protection of them from inappropriate use and development, and integrated protection of estuaries and coastal environments relevant to the TANK catchments s6(a) RMA;
- protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna s6(c);
- the efficient use and development of natural and physical resources s7(b)
- the maintenance and enhancement of amenity values s7(c)
- intrinsic values of ecosystems s7(d)
- maintenance and enhancement of the quality of the environment s7(f)
- any finite characteristics of natural and physical resources s7(g)
- Council's statutory functions and powers, appropriateness, and the relevant tests in s32 RMA, other relevant statutory provisions, Part 2 RMA, and the relevant planning instrument hierarchy (including the NPS-FM 2020).

- The findings of the Waitangi Tribunal report (Waitangi Tribunal 2012, The stage 1 & 2 Reports on the National Freshwater and Geothermal Resources claim WAI 2358) which describe the inadequacies of providing for tangata whenua within resource management planning in New Zealand.

- 32 Plan Change 9 will continue to result in more than minor, and significant, actual, potential and cumulative adverse effects on the environment. These include significant adverse cultural effects to Ngāti Kahungunu.
- 33 The overall approach taken in the plan change and subsequent catchments is that recognition of cultural values is through Te Ao Pakeha values and indicators. There's an assumption that tangata whenua values will be met by these indicators that approximate our cultural values, such as Mauri. It's our submission that tangata whenua indicators add value and provide a strong foundation and framework for sound holistic assessment of overall environmental well-being, long term sustainability and sound management. We submit coexistence of parallel world views can exist in this context and that existing outcomes demonstrate that priority focus and measures for Te Ao Pakeha values are not comprehensive enough to uphold Council's responsibilities. For example, Ngāti Kahungunu submissions to protect the Heretaunga Aquifer (Havelock North drinking water) were seen as too precautionary; "over beating the egg" and ignored.
- 34 The plan fails to recognise the breadth and scope of cultural values; the insertion of a place holder in schedule 26 for "matauranga Māori attributes", a schedule solely focused on water quality is evidence of this and contrary to the recommendations made by tangata whenua. This placeholder

also has no attachment to policies, objectives or rules. This is covered further by the Te Taiwhenua o Heretaunga submission.

- 35 Plan Change 9 raises the issue of allocation of water within degraded, over abstracted and over-allocated TANK catchments. It does not use the allocative tools that are available to give effect to Te Mana o Te Wai, and address key cultural parameters under sections 5, 6(e), 7(a) and Treaty principles. The RMA enables a range of methods to allocate scarce natural and physical resources. Proper consideration to these alternatives is required, given the active duty to protect taonga. Relevant alternatives identified by the Court of Appeal in *Fleetwing Farms v Marlborough District Council* [1997] 3 NZLR 257 (CA) include:
- "(1) provide for a comparative assessment of the competing alternatives;
  - (2) provide for purchase of the entitlement say by tender;
  - (3) provide for a proportional allocation, based, for instance, on the applicant's history in the activity;
  - (4) provide for allocation by lot;
  - (5) proceed on a first come first served basis."
- 36 These are non-limiting examples. Allocative models may also include tikanga, whakapapa, recognition of rangatiratanga and Ngāti Kahungunu's native title and proprietary interests; and a mixed model that applies elements of the above. Plan Change 9 must be amended to address the wider range of allocative models available, to ensure sustainable management and give effect to Te Mana o Te Wai and Treaty principles.
- 37 Objectives, policies, rules and methods for the coastal marine area and estuarine receiving environment, were to be included as part of the development of the TANK catchment plan process and are recorded as such in the stakeholder group Terms of



Reference. This was viewed as a logical consideration, to avoid adverse effects in the ultimate receiving environments. Particularly in terms of issues such as sedimentation and eutrophication. However, despite the interest to do so from the TANK stakeholders, Ngāti Kahungunu and Hawke's Bay Marine and Coastal Group, this did not occur. Integrated management, the NZCPS and NPSFM 2020, require that additional provisions are promoted to manage the ultimate receiving environment. This may require a new method, to identify steps being taken by Council in conjunction with tangata whenua, as Treaty partners. to undertake further plan review.

- 38 A significant amount of data, information and reports were not shared with all stakeholders and Ngāti Kahungunu, post the conclusion of the TANK Stakeholder collaborative process. In fact, new information was constantly being considered by Council and other groups like the Joint Drinking Water collective. This makes full informed decision making impossible, in breach of Treaty partnership and information-sharing principles.
- 39 Additional relief is set out in **Appendix Two**. These form part of the grounds of Appeal and relief sought.
- 40 Plan Change 9 should be amended to address the general and specific relief identified in this Appeal and Appendices.
- 41 Problematically, it is difficult to provide a full suite of alternative provisions in this Appeal, pending clarification of the duty to give effect to the NPS-FM 2020; and, the need for greater simplicity in Plan Change 9, which reflects the national priorities for Te Mana o te Wai, as identified in the single Objective for the NPS-FM 2020.
- 42 Plan Change 9 is prolix, poorly drafted, and includes far too many Policies and other provisions that are inappropriate in light of the simple hierarchy for Te Mana o te Wai established by the NPS-Fm

2020. It is therefore difficult to provide full particulars of relief sought at this juncture, and this Appeal therefore identifies the relevant Themes, general parameters, and to the extent practicable (detailed relief).

- 43 Further particulars of relief sought will be provided, within the scope of this Appeal and original submitter(s) relief. This Appeal challenges, but has not redrafted all relevant provisions required, and has identified the relevant RMA issues, effects and general nature of relief, that require amendments to Plan Change 9.
- 44 General relief includes to include directive provisions (including objectives, policies, methods, rules) within the scope of Plan Change 9 that:
  - Reduce over abstraction and allocation of the Heretaunga Aquifer by introducing a capped total allocation limit of a maximum of 70 million m<sup>3</sup> per annum;
  - Cease mining groundwater and phase out over-drafting within the Heretaunga Plains Aquifer System, including mining of springs and spring fed streams.
  - Reduce over-abstraction and over-allocation of TANK surface waters (see **Appendix 3** for numerical values).
  - Introduce (over the 10 year life of the Plan) a new system of allocation of water in the TANK catchments that does not rely exclusively on "first in, first served" and "grandparenting"; and that enables allocation of water in a way that provides for the hierarchy established by Te Mana o te Wai; including tikanga, whakapapa, recognition of rangatiratanga and Ngāti Kahungunu's native title and proprietary interests in the TANK catchments, and wider sustainable management.
  - Over the life of Plan Change 9, introduce a mixed allocative model that enables recognition of competing interests, giving appropriate priority to Te Mana o Te Wai and Ngāti

Kahungunu's cultural and Treaty interests. A core allocation, or similar, should be established that gives priority to specified limits that provide for mauri and environmental protections, and followed by a cultural share to Ngāti Kahungunu and allocation for essential community wellbeing and use (such as drinking water for communities). Beyond these core allocation purposes, allocation could occur via a mixed market model incorporating a tender or bidding system for water allocation to commercial users on a competitive (willing lessee) on a discretionary basis, that also takes into account existing users.

- Amend PC9 to give effect to the NPS-FM 2020 in priority to the NPSFM 2017 (if the 2017 instrument remains relevant after September 2020).

45 Add new provision as follows:

NEW OBJECTIVE – Tangata whenua objective

Restore and revitalise the mauri and mana o te wai; recognise and provide for Ngāti Kahungunu’s relationships, tikanga and beliefs with their ancestral waters and taonga (including rangatiratanga and kaitiakitanga), and restore tangata whenua values, customs, culture and relationships with all the waters within the Karamu, Ngaruroro, Tutaekuri, Ahuriri catchments and in particular the Heretaunga muriwaihou.

Policy: Council will recognise, provide for, protect and prioritise Ngāti Kahungunu tikanga, customs, cultural relationships, and Treaty interests and rights with these waters by;

Protecting and enhancing Mauri and Mana o te Wai.

Ngāti Kahungunu in their ancestral waters and taonga.

Ngāti Kahungunu

Enabling access and use of waterways and resources associated with customary practices

Enabling Mahinga kai and Uu practices (as defined in Ngaruroro Values and Attributes Report, 2016)

Identifying and enabling nohoanga for each hapu (see corresponding policy and values noted in the Regional Policy Statement), and ensuring these are accessible.

Protecting the hauora (health and well-being) of native flora and fauna.

Providing for cultural monitoring facilitated by Taiwhenua and Ngāti Kahungunu Iwi Incorporated who will determine methodology and conduct monitoring through hapu / kaitiaki.

Resourcing, through the long term plan.

Enabling data and information collection to improve management of TANK waters in accordance with this objective.

This objective and policy is given effect in part by amendments to the proposed rules framework (including environmental bottom lines, such as allocation of cultural share) and a new tangata whenua schedule (see Attachment 2).

### **Water Quality - Relief Sought**

- 46 Water quality and ecosystem health are degraded in some areas of the TANK catchments. The Ngaruroro River has high water quality and exceptional indigenous fish communities that need to be protected and maintained. However, sediment is a key issue for the Ngaruroro River along with elevated nutrients sourced from land in the tributaries.
- 47 The Tūtaekurī River shows some evidence of declining ecosystem health in the lower reaches and has elevated nutrients in the mainstem and tributaries.
- 48 Nutrient inputs to the Waitangi Estuary from the Ngaruroro, Tūtaekurī and Karamū Rivers need to be reduced to provide for ecosystem health.
- 49 The Ahuriri and Karamū catchments have degraded ecosystem health, heavy sedimentation (including contaminated sediment) and poor dissolved oxygen levels which need to be improved – they have the poorest water quality in the Hawkes Bay Region and are unsuitable for primary contact despite being highly valued culturally and recreationally.
- 50 The diffuse impacts of production land use and contaminants from urban land are key contributors to degraded water quality in the TANK catchments and should be more effectively regulated through PC9 to maintain or achieve water quality objectives and targets in Schedule 26 and to meet the requirements of sections AA and A of the NPS FM.

- 51 Clear objectives (with stated goals or outcomes) are needed to safeguard life-supporting capacity, ecosystem health and human health, to protect the significant values of outstanding freshwater bodies and wetlands, to maintain or improve water quality and to recognise Te Mana o te Wai.
- 202 52 FMUs are not clearly defined in PC9 and there are multiple references to different management units that need to be clarified throughout the plan.
- 203 53 Freshwater values are not clearly identified in PC9, a schedule of freshwater values is needed for each FMU, this could include the values listed in Schedule 26 within a separate schedule of values which defines what they mean and where they apply.
- 204 54 Outstanding freshwater bodies, wetlands and their significant values are not defined in PC9 and it is difficult to see how they will be protected by the proposed provisions.
- 55 Implementation of PC9 water quality provisions is largely through non-regulatory measures specified in a non-statutory document (the draft TANK implementation plan) and generally through permitted activities in the Plan rules. As such, the outcomes are not certain with respect to freshwater objectives and providing for tangata whenua, compulsory, and other values. Regulatory implementation must be included in the statutory document (PC9) to ensure outcomes and objectives are certain for freshwater values and water quality.
- 56 Regulation of production land use is needed in priority catchments with identified water quality issues and these catchments need to be clearly defined within Schedule 28 of PC9, alongside timeframes by which the water quality issues will be addressed. Regulation of land use is also needed in other

catchments where water quality objectives are not currently met, to achieve the targets within the life of the plan. Devolving the management of land use to third parties via permitted activity status, catchment collectives and industry programmes does not provide a clear and certain regulatory pathway to achieving the objectives and targets and therefore does not give effect to the requirements of the NPS FM 2020 (and the earlier NPS FM 2017).

- 205A            57    Schedule 26 (water quality) must contain all of the freshwater objectives for all waterbodies in the TANK catchments and include the objectives in Schedule 27 (including for Ahuriri, Karamū and both estuaries – Ahuriri and Waitangi). Freshwater objectives to provide for values are not optional under the NPS FM. Targets (where objectives are not currently met) must be clearly identified within Schedule 26 so progress can be measured and reported over time.
- 205B            58    The relief sought in relation to water quality is generally set out below as well as in other parts of the submission;
- Include clear objectives and policies to maintain or improve water quality, safeguard life-supporting capacity, ecosystem health and human health, protect the significant values of outstanding freshwater bodies and wetlands and provide for other instream freshwater values (including tangata whenua values). In addition, PC9 must give effect to the RPS objectives for no degradation of the quality of the Heretaunga Aquifer.
- 206            •     Include schedules of FMUs and freshwater values and clearly define where they apply.
- 207            •     Include the Ahuriri and Waitangi Estuaries in separate and distinct FMU's, in accordance with the recommendation in the Parliamentary Commissioner for the Environment's recent report "Managing our estuaries" (August 2020).

- 208 • Water quality attributes listed in Schedule 27 that relate to estuarine health in the Ahuriri and Waitangi estuaries be listed in Schedule 26, and that objectives are met within the life of the plan.
- 209 • Include a schedule of outstanding waterbodies and wetlands and their significant values for protection.
- 210 • Include all water quality objectives in Schedule 26 and identify limits and targets to be achieved within the life of the plan where objectives are currently not met.
- 211 • Set objectives and targets in Schedule 26 for the Ahuriri catchment and estuary.
- 212 • Amend Schedule 26 to ensure it is correct, fit for purpose, and contains all water quality objectives and targets for the TANK area (including those in proposed Schedule 27).
- 213 • Identify (delineate) priority catchments and define timeframes for improvement in Schedule 28.
- 214 • Regulate (require consent for) production land in priority catchments to resolve water quality issues in Schedule 28 and in catchments required to meet water quality targets in Schedule 26 within the life of the plan.
- Control the use of production land all other catchments to maintain water quality.
- 215 • Require farm plans for all farms >4ha in the TANK catchments.
- Exclude stock from all wetlands, lakes and rivers and from riparian margins used for fish spawning (specifically including inanga) regardless of slope with minimum setbacks of at least 10 metres.
- 216
- 217A • Exclude break-feeding from all waterbodies regardless of slope.



- Include defined setbacks from water for all stock exclusion provisions.
- Regulate and manage all stormwater discharges and require them to meet water quality objectives and targets in Schedule 26 within the life of the plan.
- Regulate and manage all point source discharges and require them to meet water quality objectives and targets in Schedule 26 within the life of the plan.

217B

- Increase setbacks for vegetation clearance and cultivation to 10 metres to avoid sedimentation.

### **Additional Specific Relief**

218

59 In addition to the above general relief in respect of water quality, specific relief is sought as set out in **Appendix 2**.

### **Water Quantity and Allocation- Relief Sought**

219

60 Water levels and flows are a primary issue of concern in the TANK catchments. NKII consider that PC9 fails to ensure that over-abstraction and over-allocation of the TANK waterbodies will be phased out during the lifespan of Plan Change 9. The Plan Change provides for unsustainable patterns of water use, including over-abstraction and over-allocation, and does not effectively address the resource management issue. Figure 1 shows the increase in groundwater abstraction for irrigation over time and difference between use and actual consented volume of groundwater (total consented allocation of approx. 180Mm<sup>3</sup>/annum or around 200% of estimated consented pumpage, as at 2015). HBRC Groundwater Scientist Pawel Rakowski was succinct in his summation of this disparity ‘...if the full allocation were to be used, it would be dangerous, e.g. probable salt water intrusion’.

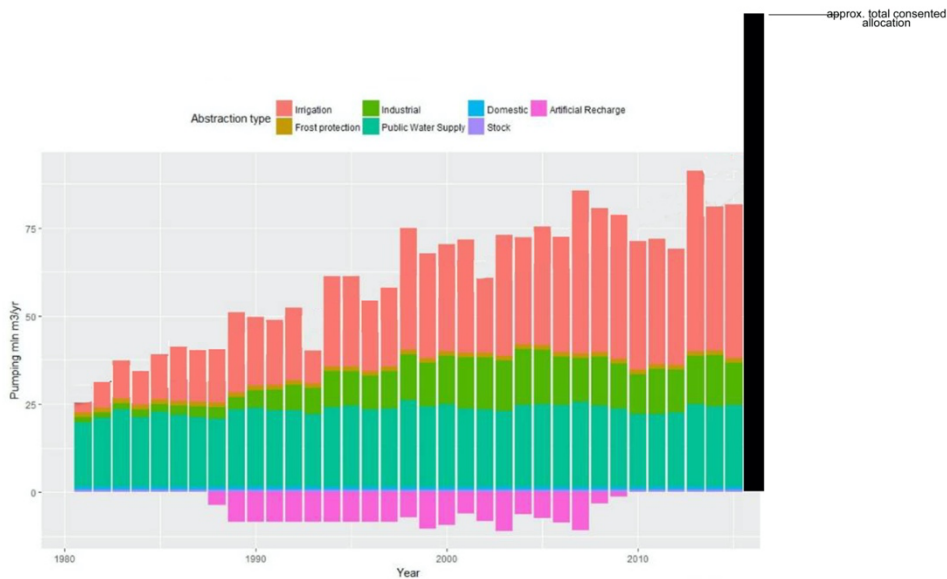


Figure 1: Estimated groundwater pumpage from the Heretaunga Aquifer by abstraction type, and approximate representation of consented allocation (black bar).

- 220A 61 Over-abstraction and over allocation must be halted and phased out during the life of Plan Change 9, with future over-allocation avoided, and consented allocations clawed back accordingly. (As opposed to supporting individual water users, to vary their consent to use their full allocation, as noted in Regional Planning Committee meeting minutes Wednesday 3rd June 2020, in total opposition to the stated objectives of the proposed plan and the risks identified by Council hydrologists.) As drafted, Plan Change 9 does not meet the requirements of Objective B2 of the NPS FM (2017) and the NPSFM 2020.
- 220B
- 221A 62 A range of changes are required to PC9 if the current trend is to be halted, and ultimately reversed, and if the higher order national direction is to be given effect to. This includes adoption of clear, regulatory flow management regimes now (not at a future date) and the setting of minimum flows and low and high flow allocations as opposed to the setting of only minimum flow requirements and flow maintenance triggers as per Schedules 31 and 32 as drafted. All takes must be subject to minimum and

221B cultural flows (e.g., cease take at minimum flow) except for restricted (and reduced) takes for essential human drinking water below minimum flow. No takes for primary production including stream augmentation should occur below minimum and cultural flows and takes for these purposes should not be given priority under water shortage directions. Only takes within the allocation limit should be allowed consent, water takes beyond the allocation limits (both low flow and high flow allocations) should be prohibited by PC9 (include those for water storage), if water is to be efficiently allocated and waterbodies protected from over-abstraction.

221C

- 63 Furthermore, high flow allocation limits should be set to ensure there is no significant departure from natural hydrological regimes (e.g., as a percentage departure from/alteration of natural FRE3). This includes the Ngaruroro and Tūtaekurī River mainstem high flow allocations, which are not set to maintain high flow regimes in these rivers, and are likely to result in excess sedimentation and accumulation of algae, and alter the natural character. All minimum flows should provide adequate habitat for indigenous freshwater species to safeguard the life-supporting capacity, uphold, and give effect to Te Mana o te Wai, and active protection of taonga.
- 64 Secondly, a groundwater allocation limit of 70 million m<sup>3</sup> per year needs to be implemented for the Heretaunga Plains Aquifer. There has been considerable debate during the Plan Change 9 development process as to the limit that should be set and we consider that the 90 million m<sup>3</sup> per annum interim limit is grossly inappropriate, and merely encompasses a best guess as to what is being used currently if the 'actual and reasonable use' test is applied. Evidence suggests that even the estimated pumped groundwater quantity of 78.1m<sup>3</sup>, as stated in the HBRC Heretaunga Groundwater Model Report, would contribute to the overall declining trend in groundwater levels, and this is

unacceptable. The allocation limit must be a conservative one that provides for Te Mana o te Wai and Ngāti Kahungunu's cultural interests.

- 222
- 65 As currently drafted, PC9 lacks a clear message to plan users that water resources within the TANK catchments are over-allocated and therefore that there must be reduction in takes of water (e.g., over-allocation is phased out, consistent with Objective B2 of the NPS FM (2017) and the NPSFM 2020; and new allocative models are introduced over the lifespan of Plan Change 9). Rather, the Plan provides for a system by which existing consents are able to 'rolled over', and whilst they are subject to an 'actual and reasonable use' test, that is inadequate. It is in opposition to the need to claw back consents and over allocation. There is in fact no appropriate process by which water is 'clawed back' and in effect returned to the waterbodies.
- 66 State of the Environment monitoring of groundwater levels at selected sites, e.g. bore 10371, indicates an overall declining trend within the Heretaunga Aquifer recharge zone, and this must be halted and reversed. It is submitted that proportional claw backs across all existing consents are required in order to ensure that Te Mana o Te Wai is given full and proper effect, and that the Mauri and other cultural values of the waterbodies within the TANK catchments are restored and protected. This must be reflected in the rules framework.
- 67 We also consider that the renewal of water take permits needs to be on a case by case, discretionary basis, rather than implicitly provided for by PC9. Existing consents for water abstraction were issued under previous regimes and therefore those permits do not address the existing over allocation issues, adverse cultural effects to Ngāti Kahungunu and their relationships and tikanga with their ancestral waters and taonga, and do not reflect up to date information on effects and the state of water resources

within the TANK catchments. Allowing a roll-over of all existing consents and setting allocation limits at the current level of consented use grandparents over-allocation and over-abstraction in the TANK catchments. The first in, first served, allocative model must be reformed in the lifespan of Plan Change 9.

223 68 With respect to surface water takes, the existing regime and allocable volumes are based on the Summer 7-day Q95 statistic, whereby allocation is the difference between the minimum flow and the Summer 7-day Q95. The 7-day Q95 statistic is calculated on flows which are already subject to abstraction and effects. This is not consistent with robust setting of minimum flows, using naturalised flow statistics (e.g., MALF) to determine the acceptable degree of hydrological alteration and effects.

224 69 PC9 allows a roll-over of existing consents and replaces the assessment criteria with a more lenient system than that which currently applies. It is considered that the criteria proposed are not scientifically robust. Furthermore, the Plan enables takes which are not sustainable by providing a pathway by which the effects of these takes can be mitigated by damming activities (which in turn have their own adverse effects) and 'stream flow enhancement' schemes. Any dam for this purpose has yet been consented or built, and the efficacy of proposed mitigations are unproven. This is akin to supporting unsustainable practices until  
225 sometime in the future, when we 'may be able to' mitigate over-allocation and we submit that this is unacceptable and uncertain to address the current effects.

226 70 There are a number of interrelated concerns as to how water is allocated which we submit need to be accounted for and remedied within PC9 and in fact indicate the need to ensure alignment between PC9 and the RRMP to ensure integrated management occurs across all receiving environments and ecosystems (e.g., including estuarine environmental flows).

- 227 71 For example, excessive surface water and groundwater extraction from the Maraekakaho Stream catchment exacerbates irrigation bans of longer durations and thus exerts longer duration low flow pressures on ecosystems in the Ngaruroro River. Water takes from the Ngaruroro River tributaries should form a percentage of total takes allowed for the Ngaruroro catchment as a whole, and the volume and rates of take that aggregate/add up must be an overall sustainable total for the 6-month irrigation season.
- 228 72 Before the start and after the end of the irrigation season (on the shoulders of the season), irrigation can continue, and abstraction for irrigation overlaps with high volume abstraction for dam filling and frost protection. Total instantaneous rates of take increase markedly and the surface water resource is under more stress. Therefore, there needs to be a limit placed on each river and stream both for total instantaneous rate of take, and weekly volume. Limits must be supported by policies and rules to ensure they are effective at avoiding, remedying or mitigating the current significant adverse effects.
- 73 Outside of the irrigation season, we seek that higher flow minima are maintained to assist resource recovery, enable fish migration/fish passage, enable higher rates of groundwater recharge and restore the habitats of indigenous species and flushing flows, recognise and provide for Ngāti Kahungunu's relationship, tikanga and beliefs with its ancestral waters and taonga, and related Treaty principles.
- 229 74 In some cases (e.g., Ngaruroro mainstem), higher minimum flows are needed to provide adequate habitat for indigenous species during low flow periods and in others, lower (and catchment integrated) allocation limits are needed to support a more natural hydrological recovery from abstraction during low flows (e.g., Maraekakaho).

- 230 75 By way of example, impoundment of water at the Maraekakaho confluence reduces inflows to Ngaruroro River during low flow events, which in turn increases the potential for low flow pressures on ecosystems and irrigation bans regulated through the Fernhill monitoring site. Groundwater abstraction near Maraekakaho intercepts flow that would otherwise enter the Ngaruroro River. It is submitted that these consents should be aligned with total surface water depletion quantum and accounted for in the management regime. Surface water depletion effects of groundwater takes near Maraekakaho need to be regulated through Fernhill, because the minimum flow site for the Maraekakaho Stream is at Tait Road, several hundred metres above the confluence with the Ngaruroro. As an alternative, the monitoring site could be moved to the actual confluence.
- 76 The relief sought in relation to water quantity is generally set out below as well as in other parts of the submission:
- Consider all groundwater (including shallow groundwater) within the allocation limits and stream depletion provisions.
  - Resource and support the development and implementation of a mātauranga Māori framework to monitor the mauri of the Heretaunga Aquifer and its groundwater dependent ecosystems.
  - Limit groundwater allocation to 70 million m<sup>3</sup> per year from the Heretaunga Plains Aquifer.
  - Ensure all water takes are required to cease at minimum flows, except essential water takes for human drinking water supplies (which should be required to reduce during water shortages and at minimum flows).
- 231
- Remove all references to trigger flows in Schedule 26.
  - Abstractions which deplete streams should cease when minimum flows are reached in all cases.

- Ensure all water takes (including those for water storage and if retained in PC9 stream flow maintenance schemes) are within low flow, cultural allocation to Ngāti Kahungunu, and high flow allocation limits.
- 232
- Ensure all allocation limits are less than 30% naturalised MALF.
  - Set allocation limits for the Karamū and Ahuriri catchments.
  - Set minimum flows for the Ahuriri catchment (and estuary).
  - Recognise the Karewarewa and Paritua as separate distinct streams with separate characteristic hydrology and mauri with each having their own individual minimum flows, and respective flow monitoring sites.
- 233
- Significantly increase the minimum flow in the Ngaruroro River to provide more habitat for indigenous fish at low flows (e.g., 80 - 90% of habitat at MALF).
  - Set high flow allocations for all rivers that ensure hydrological alteration of the flow regime is minimised and maintained close to natural flow regimes (e.g., using percent departure from natural FRE3).
- 234
- Do not allow transfer of water permits into over-allocated ground and surface water management units or between catchments.
- 235
- Prohibit all new large run-of-river damming and require safe fish passage for all new small dams (catchment < 50ha).
- 236
- Do not enable managed aquifer recharge or stream flow 'maintenance (in our opinion it is more accurately described as stream flow compensation) to address depletion and quality effects, i.e. classify applications for these applications as a non-complying activity. Protect and enhance lowland springs given the immense cultural significance these have for tangata whenua, such that there



should be no negative effects on spring flows from water allocation.

- 237 • Restore and revegetate immediate area surrounding lowland springs, and ensure access to these springs for cultural reasons is improved.
- 238 • Restore depleted surface water flows and extent of streams, wetlands and springs through sustainable and precautionary allocation limits.
- 239 • Phase out, during the life of PC9, the grand-parenting and first in, first served regime in favour of an improved allocative model that enables recognition of the cultural and biodiversity values identified in this submission.
- Increase minimum flow requirements for the TANK catchment to address the cultural and biodiversity issues identified in this submission.
- 240 • Introduce prohibited status for allocations that do not meet the above criteria.
- 241 • Ensure commercial water takes (particularly groundwater) do not compromise existing private drinking water bores (existing infrastructure) and human health is the priority consideration. In this regard, a consequential amendment to remove from the RRMP Policy 77 (c) the word “efficient” and the footnote reference is warranted. This policy has
- 242 been used to justify adverse impacts on households access to drinking water, and the rights of tangata whenua and marae.
- Ensure to streams and rivers for the purposes of diverting water for impoundment does not alter the natural character of the area, does not impede fish passage or recruitment processes, and does not significantly adversely effect the ability of tangata whenua to exercise kaitiakitanga, and conduct their cultural practices.

## SUMMARY OF DECISIONS SOUGHT

- 77 Grant the general and specific relief identified above and in  
243A **Appendices 1 & 2.** In addition, and without limiting:
- 243B • Re-order the objectives so that the key priorities are first (e.g., Te Mana o te Wai, recognise and providing for Ngāti Kahungunu relationships, tikanga and beliefs as to ancestral waters and taonga), then objectives relating to the values for each water body (ideally, these are included by  
244 reference to a new schedule in PC9 which described the values and where they apply), then the methods based (actions) (e.g., NPS FM requirements to maintain and improve water quality, protect outstanding freshwater bodies, avoid new and phase out existing over-allocation etc) and consideration (decision making) objectives; review  
245 phrasing and sequencing of all provisions in order that the purpose of each is clear and the hierarchical relationship shows a clear line of sight from issue, to objective, to policy to rule or other method and that Te Mana o Te Wai and the identified cultural values and Treaty principles are explicitly and appropriately given effect to.
  - 246 • Amend PC9 to explicitly provide for the re-establishment, restoration and protection of the relationship of Ngāti Kahungunu with water and waterways within the TANK catchments including a new objective/s (which reference Ngāti Kahungunu values in a new schedule within PC9), policy/policies and rules/methods including attributes and provision for the resourcing, development and implementation of indicators and monitoring using mātauranga Māori.
  - 247 • Comprehensively address over-abstraction and water allocation issues through PC9 by amending provisions so as to remove the presumption that all existing consent holders will be able to renew their water take permits regardless of

- use or volume. Require all takes of water to be within sustainable (high and low) allocation limits and that all takes will cease at minimum flow except provision for explicitly prioritised essential uses including community supplies).
- 248 Implement a framework by which existing takes will be phased out (along with over-allocation and over abstraction) and consequently enable a (low flow) tangata whenua allocation to be provided for.
- 249
- Reduce the number of objectives and policies in the plan in order to provide clarity and ease of use for plan users and decision makers and strengthen the weight and direction of the PC9 provisions to meet the requirements of national policy directions. For example, where an objective or policy relates to all TANK catchments (e.g., Te Mana o te Wai, Maintaining or improving water quality, addressing over-allocation etc) it needn't be repeated for each catchment and should instead be included in a plan area-wide provision. This will allow plan users to be clear on the common objectives and policies that apply throughout the catchments and on the specific objectives and policies for each area.
- 250A
- Increase the level of regulation with regard to nutrient and sediment loss from land use and farm plans by setting clear environmental standards for these activities in the plan, in line with the identified water quality issues across TANK in a way that the actual effects are able to be managed and measured now and into the future. Contaminant reduction
- 250B (e.g., nutrients and sediment) must be addressed in this plan now, not at some date in the future by requiring Farm Environment Plans within specified, short term timeframes and within a consenting (not a permitted activity) framework with defined performance, monitoring and auditing standards.

- 251A

  - Provide for consideration of the appropriateness and efficiency of an activity within the TANK catchments in terms of its water use and contaminant loss aspects by removing the presumption that all existing water takes will automatically be renewed (as above) and that land uses will continue unchecked by regulation; introduce consenting requirements and prohibited status to avoid over-allocation during the life of the Plan.
- 251B

  - Remove policies and other provisions relating to 'stream flow maintenance and enhancement' and the ability to transfer water take permits between catchments. Instead address the effects of stream depletion and over-abstraction and require riparian habitat enhancement through consent standards for Farm Environment Plans.
- 252

  - Any cultural allocation to Ngāti Kahungunu shall not have a stipulation as to its use and the policy should not be used as a tokenistic method of addressing the cultural needs and aspirations of Māori.
- 253

  - Undertake thorough editing and legal vetting of the provisions in order that grammatical, syntax, scope and intent/responsibility issues are reduced and consistent across the plan and to ensure that all consequential amendments are implemented including those from Plan Change 5 which appear to be excluded.
- 254

  - Any and all amendments to PC9 in order to provide relief to the submissions, both general and specific, as set out within this submission document including its attachments.
- 255