IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2025] NZEnvC 098

IN THE MATTER OF	applications under ss 311 and 316 of the Resource Management Act 1991
AND	
IN THE MATTER OF	an application under section 320 of the Act
BETWEEN	ROTOKĀKAHI BOARD OF CONTROL
	(ENV-2025-AKL-000058)
	(ENV-2025-AKL-000059)
	PROTECT ROTOKĀKAHI INCORPORATED
	(ENV-2025-AKL-000064)
	Applicants
AND	ROTORUA DISTRICT COUNCIL
	Respondent

Court:	Alternate Environment Judge L J Newhook Deputy Environment Commissioner S G Paine
Hearing:	19 March 2025 (online via Microsoft Teams).
Appearances:	R Haazen and S Vincent for the applicants T Le Bas, W Embling, and M Crocket for the respondent
Date of Decision:	31 March 2025
Date of Issue:	1 April 2025

DECISION OF THE ENVIRONMENT COURT

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A: Applications dismissed.

B: Costs reserved but applications not encouraged.

REASONS

Introduction

[1] The respondent, Rotorua District Council (**RDC**) has been planning and latterly building a Tarawera Wastewater Reticulation Scheme (**the Scheme** or **the project**) since about 2015, to reticulate sewage away from approximately 440 properties near the shores of Lake Tarawera, to an existing public wastewater network terminating at the Rotorua Wastewater Treatment Plant at Lake Ōkareka.

[2] RDC's General Manager of Infrastructure and Assets, Stavros Michael, advised that the Scheme "responds to the obligations of RDC and the Bay of Plenty Regional Council (**BOPCR**) under the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) and the BOPCR's On-Site Effluent Treatment Plan (**OSET Plan**)[1].

[3] The Scheme is in two stages, the current one being Stage 1 involving installation of mains and pump stations connecting the Tarawera wastewater catchment to the existing network described above.

[4] The construction of the reticulation line from Tarawera to the Rotorua wastewater treatment plant involves the placement of a DN160PE100 pipe beneath the surface of the landward edge of public road by directional drilling and the installation of scour valves, safety isolation valves and air valves along the road corridor.

[5] RLC's contractors apparently commenced work on constructing the reticulation line in April 2023 and, to date, have completed approximately 23km of the pipeline. The final intended section of work relates to the construction of the reticulation line along the

[1] Second affidavit of Stavros Michael 6 March 2025.

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remaining approximate 1.4km stretch of Tarawera Road that runs parallel to the bank of Lake Rotokākahi, on the landward side of the legal road corridor. The works within and beneath Tarawera Road involve the horizontal drilling of the subsurface pipe and excavation and backfilling of associated temporary surface driving pits. While the majority of the works involve subsurface drilling and thrusting, there are to be 23 temporary surficial works in the 1.4km, open for between 2 and 5 days before being backfilled, being "haul pits", "relief holes" and "asset installs", all 1.5m deep and between 0.5m and 5m horizontal directions[2]. A total of 100m3 of temporary excavations is involved.

[6] The remaining 1.4km of piping works traverse an area in the District Plan called "Lakes A Zone" which hails from the first-generation Rotorua District plan notified back in 1993 as varied by Variation 12 made operative in December 2005 and which was not changed in the subsequent district plan notified in 2012 (now operative). The Lakes A section remained intact as a separate part of the district plan as from that time[3].

[7] RDC has until a few weeks ago proceeded on the basis that the whole of the Stage 1 works are permitted activities. That has been challenged at various times by the applicants. Perhaps remarkably in face of its earlier view, RDC issued a notice under **s87BB RMA ("Activities meeting certain requirements are permitted activities")** on 18 February 2025. That clearly became a catalyst for these proceedings and was a major source of argument between the parties, as we shall see below.

The applications for relief

[8] On 21 February 2025, Rotokākahi Board of Control (**RBC**) applied for declarations:

> 1. Adverse effects from earthworks (as part of the Tarawera Sewerage Scheme) within the Rotokākahi Lake Protection Area are more than minor and not temporary.
>
> 2. Rotorua District Council failed to adequately consult with the Rotokākahi Board of Control:

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[2] Largely common ground, the technical aspects drawn from the second affidavit of Mr Stavros and the affidavit on 6 March of Ms CLR Wratt, consultant planner called by RDC.
[3] Summarised from the affidavit of Ms Wratt.

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prior to its decision to proceed with the Spencer- Tarawera Road option in 2020; and

prior to its decision to grant a s87BB permitted activity notice.

3. The s87BB notification decision of Rotorua District Council dated 18 February 2025 was made on inaccurate and incomplete information.

4. Rotorua District Council requires a resource consent to undertake earthworks (as part of the Tarawera Sewerage Scheme) within the Rotokākahi Lake Protection Area under Rule B5.4.1, Part 5: Lakes A Zone, of the Rotorua District Plan, as a discretionary activity.

5. Rotorua District Council required resource consent to undertake earthworks (as part of the Tarawera Sewerage Scheme) within the Tarawera Sensitive Rural Management Area under Rule C5.3.1, Part 5: Lakes A Zone, of the Rotorua District Plan, as a restricted discretionary activity.

6. Works that have been carried out as part of the Tarawera Sewerage Scheme prior to 18 February 2025, proceeded without the necessary consents.

7. Rotorua District Council must consult with tangata whenua including the Rotokākahi Board of Control prior to filing any application for consent for earthworks within the Rotokākahi Lake Protection Area.

[9] Declarations 2 and 3 were withdrawn at the commencement of our hearing, the applicants' counsel Ms Haazen acknowledging that they would be within the jurisdiction of the High Court on judicial review, rather than before the Environment Court under Part 12 RMA.

[10] On the same date, RBC applied for enforcement orders as follows:

1. Cease any works or activities within the Rotokākahi Protect Area where there is a risk of damage or disturbance to wāhi tapu or burial sites.

2. That Rotorua District Council obtain the required resource consent under Rule B5.4.1, Part 5: Lakes A Zone, of the Rotorua District Plan if it wishes to progress with the proposed earthworks.

3. That Rotorua District Council must consult with affected tangata whenua, including the Rotokākahi Board of Control, before applying for any resource consent for earthworks within the Rotokākahi Lake Protection Area.

[11] On 24 February a new entity was registered as an incorporated society, Protect Rotokākahi Inc. On 25 February, that body filed an application for interim enforcement orders as follows:

1. Cease any works or activities associated with the Tarawera Sewage Scheme within the Rotokākahi Protection Policy Area as identified on Appendix F of the affidavit of Wally Lee

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(dated 21 February 2025).

2. That this interim order remains in force until the Court makes a final determination on the substantive enforcement order application.

[12] On 26 February, the Court (Judge Newhook) issued an urgent Minute in both proceedings, in summary questioning the absence of any application for permanent relief in the latter proceedings and wondering if the 3 sets of proceedings should be the subject of joinder; expressing a tentative view that the sudden emergence of the s87BB notice was troubling; and seeking explanation for the apparent extreme lateness of the applications given that most of the pipeline had been built over the last 2 years and just one final section remained to be built.

[13] The Court recognised the urgency of the proceedings in the Minute and suggested a very short timetable leading to an early hearing, and suggested RDC voluntarily stop works meantime. RDC volunteered such a course in light of the Court's urgent response and filed an affidavit of Mr Stavros after the works had stopped and been made safe.

The key issues in the case

[14] There appear to us to be 3 broad key issues, possibly with sub-issues embedded. They are: the activity status of the proposed works (and perhaps also the completed works); the nature of the s87BB notice; and whether the s87BB notice is amenable to challenge in the Environment Court whether by way of declaration or enforcement order.

[15] The logical starting point is to consider the activity status of the works, that is as to whether they are permitted activities or instead require resource consent.

[16] The main focus of the proceedings is on the remaining works of 1.4km within the Lakes A Zone and a Protection Rule Management Area named the Rotokākahi Policy Area shown on Map Overview III in the Lakes A Zone Policy Areas maps in the district plan. That focus is because of similar focus by cultural witnesses for the applicants about the area being wāhi tapu.

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The areas of the completed works outside this particular Protection Rule Area, were also the subject of applications for relief, but with nowhere near the detail of evidence about engineering of the works and any cultural sensitivities. Indeed in paragraph 47 of her legal submissions on behalf of the applicants[4], Ms Haazen acknowledged that there is very little information on the exact details of the works that have been undertaken.

[17] Hence, even if we find we have jurisdiction about those completed works we are constrained by such lack of evidence such that we would be unable to exercise discretion to grant relief.

Relevant provisions of the District Plan

[18] The applicants called Mr MJ Scott, a consultant planner of Nelson. He undertook a desktop survey of the district plan provisions he considered relevant, could undertake no site inspection in the short time available, and opined that under Rule B5.1.4, activity status for what he had been given to understand comprised the works, would be discretionary activity. He tried on several occasions over 4 days to gain dialogue with council officers, without success other than to be told they considered the status to be permitted. He was then presented with the s87BB notice on 19 February just passed, which we discuss later.

[19] Providing electronic links to some district plan provisions, Mr Scott advised that within a Protected Management Area, under Rule B5.1.1, earthworks would not be permitted activities. In Section 10 of the plan, "Definitions", earthworks are defined in the following way:

> Means the disturbance of land surfaces by excavation or filling, but excludes normal domestic and reserve gardening activities, normal turf and pasture maintenance and renovation practices, and the maintenance of walking tracks, farm and forestry tracks, driveways and roads.

[20] He advised that the definition would mean that the directional drilling of the pipeline would not trigger the earthworks rules but the excavation for the haul pits, relief connections and asset installs certainly would.

[21] Asked by the Court during the hearing whether that meant there was a measure of

[4] On 10 March 2025.

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agreement between him and the council's planning witness Ms Wratt on those points, he moved to what he now considered a more holistic assessment of the total works (drilling and pits) by looking at the objectives and policies including those about cultural effects, and considering the the inputs of tangata whenua in the 2019 (second) CIA, it would all be discretionary activity or even non-complying.

[22] Ms Wratt had the benefit of a few more days of analysis and reflection than the sheer urgency under which Mr Scott necessarily operated. In consequence Ms Wratt was able to offer us background to the parts of the district plan of varying ages (which we have touched on above); an outline of how the Lakes A Zone part of the ODP and the different policy areas and rule management areas operate; an assessment of the works as described by her and Mr Stavros against the rules relating to roads and sewage collection and disposal; an assessment of relevant definitions; and a brief summary of the approach to the designation of roads within the Lakes A Zone and the rest of the ODP. She exhibited extensive portions of the ODP as attachments.

[23] Ms Wratt then undertook a quite comprehensive analysis of issues, objectives and policies, activity status in the Lakes A Zone, provisions relating to roading, sewage collection and disposal, definition of "earthworks" and words found in the definition, operation of the earthworks rules, and designations in the Zone.

[24] We have considered her detailed evidence and made our own consideration of the materials she brought to our attention. Because of the care and detail with which she presented her evidence and attachments, the structure of our presentation of the relevant planning materials below is drawn from her evidence, with our own inputs and modifications, leading to our analysis and conclusions.

[25] We start with issues, **objectives and policies**.

[26] The description in 5.1.1 of the Lakes A Zone section explains that:

> Part 20 of the District Plan contains specific provisions to manage the unique and sensitive attributes of the lakes' environment. The high degree of intactness of the lakes' environment contributes to the national significance of their catchments.

[27] Fifteen matters are identified in Section 1.0, outlining the significant resource management issues:

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a) Reasonable use

b) Indigenous vegetation

c) Okareka and Tarawera

d) Landscape qualities

e) Riparian margins

f) Indigenous terrestrial ecosystems

g) Cultural and historic heritage

h) Relationship of Maori with the area

i) Effects on the Tangata Whenua

j) Recreation

k) Habitats for trout and indigenous aquatic fauna

l) Habitat for aquatic birds

m) Natural hazards

n) Noise

o) Natural character

[28] The overarching impression of the issues identified is the dominance of natural elements and natural character of the lakes environment. The tension between development pressure, reasonable use and the natural and cultural values is recognised. Among other matters, Section 2 identifies the key considerations in the Lakes A Zone provisions as being:

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a) The maintenance and enhancement of the Natural Character of the Lakes A Zone (S2A.1);

b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development (S2B); and

c) Recognising and providing for the relationship of the Tangata Whenua and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga (S2E).

[29] In terms of the issues and objectives for the Lakes A Zone, there is little distinction made between the Policy Areas. The issues and objectives appear to apply across the zone. There are nineteen objectives, with many of them bearing upon the project. The preface to the objectives and policies states:

> The objectives and policies that follow are not limited to the current planning period and provide a framework for sustainable management over the ensuing planning periods to ensure that the attributes of the Zone will not become eroded, either in character or degree.

[30] There is a noticeable flavour in the objectives of seeking to maintain or enhance the naturalness including as natural values (OB l), indigenous biodiversity (OB 1), water quality standards (OB 3), existing amenity values (OB 16) and naturalness of landscapes (OB 12).

[31] Some of the stronger "protection" objectives are applied to significant natural resources (OB 5), riparian areas (OB 9), viewpoints and scenic corridors of roads (OB 13), historic places and historic heritage (OB 14).

[32] Another objective of relevance to the project is OB 17 which seeks to manage roading, stormwater, sewage disposal, provision of potable water supplies and provision of energy and communication in ways that:

a) promote the health and safety, social, economic, and cultural wellbeing of people;

b) Avoid, remedy or mitigate adverse effects on the environment, whilst ensuring that the effects from activities on infrastructure and utilities are avoided, remedied or mitigated.

[33] The relationships of Tangata Whenua, their culture and traditions with their

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ancestral lands, water, sites, waahi tapu, and other taonga are recognised in OB14 in the context of land management practices. In addition, OB 15 seeks to acknowledge Tangata Whenua through:

a) Recognition that land and associated resources have characteristics of special spiritual, historical, and cultural significance to the Tangata Whenua;

b) Direct and effective involvement of the Tangata Whenua in sustaining the mauri of natural and physical resources;

c) Provision of appropriate development opportunities in selected locations to enable the relationship of the Tangata Whenua and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

[34] The direction of the objectives is weighted more towards protection, particularly of elements which contribute to the natural character and naturalness of the lakes, but also recognises that some development may be appropriate. Special spiritual, historical, and cultural significance to Tangata Whenua is also recognised in the objectives.

[35] We next consider the contentious matter of **activity status**.

[36] Clause 1.2.3 General Rules of the Lakes A Zone provides the approach to be taken to assessment of activity status:

(1) Unless otherwise specified in the Rules Tables:

a) All Activities that do not contravene any Rule in this plan shall be Permitted Activities.
b) All Activities that cannot comply with the conditions for Permitted Activities shall be Discretionary Activities.
c) All Activities that cannot comply with one or more of the standards that apply to Controlled or Restricted Discretionary Activities shall be Discretionary Activities.
d) All Activities that cannot comply with any one or more of the standards that apply to Discretionary Activities (where these are specified), shall be Non-Complying Activities. For the avoidance of doubt the effects of the entire application/proposal will be considered when any Activity

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defaults to Controlled, Discretionary or Non-Complying in accordance **with** (l)(b) to (d) above.

(2) Where a proposal comprises a number of different activities or effects (i.e. a number of Rules apply) and has a combination of statuses, then the stricter status test shall be applied e.g. a proposal with Controlled and Discretionary statuses would be considered as Discretionary.

[37] Ms Wratt undertook a comprehensive consideration of Chapter 33 of the Lakes A Zone relating to roads, together with assessment of relevant definitions such as "road", "building", and "structures". The importance of her having done that was to assist her consideration of whether the remaining works, under road surface in the main, would be captured as discretionary activities by Rule 33.4.2 (buildings and structures on roads).

[38] "Structures" by definition happen to include "utility services", but expressly only "above ground level".

[39] Reverting to the default permitted activity in Rule 1.2.3 (1)(a) above, Ms Wratt considered that the underground drilled/thrusted infrastructure of the project is a permitted activity.

[40] She next analysed the definition of "earthworks" we have set out above, and dictionary definitions of constituent words and phrases such as "disturbance of land surfaces", to reach a conclusion that the subsurface drilling and installation of pipes was not captured and therefore remained a permitted activity, but the pits, holes and installs would be a discretionary activity requiring resource consent.

[41] We have followed her logical analysis of the district plan provisions and agree with it. We do not need to write about it in more detail, because in their statements of evidence, she and Mr Scott were in agreement, our own consideration aligns, and Mr Scott only departed when asked questions by us, offering a rather unintuitive argument we have summarised above and which did not attract us at all. We find no ambiguities or difficulties in the approach taken and outcome reached by Ms Wratt.

[42] We asked Ms Wratt about the apparent archaic approach, granting sub-surface installation of infrastructure permitted activity status. During a break in the hearing, she

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conducted some research and advised that she had found 12 district plans in New Zealand taking that approach. She appeared to agree with us about the approach being archaic, but that does not affect our clear conclusion that subsurface activities of this kind are permitted in the relevant part of this district plan.

[43] Another line of thorough (but unfruitful) enquiry by Ms Wratt was as to whether roads in the zone are designated, the relevant notice of requirement on 31 October 2012 being for the inclusion of utility services including sewerage. However, roads in the Lakes A Zone were expressly excluded.

[44] We have earlier mentioned Ms Haazen's concession about shortage of information about prior works in the project. She nevertheless ventured a submission[5] that said: *While the Board's focus is on the unfinished works within the Rotokākahi Protection Area, the requirement for consents for Rotokākahi need to be set against the consents required for the overall project. Restricted discretionary and discretionary consents for the entire pipeline should have been applied for together and bundled.*[6]

[45] In further (reply) submissions on behalf of RDC[7], Ms Le Bas interpreted that latter submission in a way that included the permitted activity elements somehow needing to be brought into the bundle. Before we address that, we should complete our consideration of whether it is appropriate to identify two different activities (surface and sub-surface works) or whether they are one item. We have already noted Ms Wratt's opinion supporting the first approach, mirrored in Mr Scott's statement of evidence and only modified or qualified by him under questioning by the Court. We were not convinced at all by his modification/qualification in the absence of any uncertainty or ambiguity in the relevant rules. Hence, we find for the first proposition.

[46] Now to consider whether there should be some sort of bundling of discretionary, (or restricted discretionary) activities and permitted activities.

[47] Given that our analysis of the evidence of Mr Michael and Ms Wratt shows that the physical demarcation between surface activities and sub-surface is clear, we find that the

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[5] In her paragraph 51, submissions on behalf of the applicants, 10 March 2025.
[6] Referring to *Urban Auckland, The Society for Protection of Auckland City and Waterfront Inc. v Auckland Council* [2015] NZHC1382 AT [44]-[50].
[7] Paragraphs 44-46

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former requires consent, and the latter does not. There can no basis for bundling that for which consent need not be sought, with that for which consent is needed.

[48] We are encouraged in that finding by an aspect of an earlier decision of this Court, *Southpark Corporation Ltd v Auckland City Council*[8]. That case concerned a proposal for an overhead power line. The district plan of the time provided that where it passed over a road it was a discretionary activity, and where it passed over private land it was permitted. The Court identified the sort of division we perceive here, acknowledging in a general sense the desirability of bundling consents, but holding that permitted activities were "eliminated altogether" from the consenting. It made that finding after discussing several higher court decisions about bundling of applications by consent authorities.[9]

[49] The following section of this decision regarding the s87BB aspect, is therefore focussed on the surface works to the exclusion of the sub-surface.

Declarations and enforcement orders – and this Court's jurisdiction

[50] The applicants mounted a vigorous attack on the s87BB notice issued by the council in mid-February. Indeed, its issuance at that late stage, and its contents (and/or lack of content) has been a major catalyst for these proceedings.

[51] Section 87BB is an unusual provision, introduced by the amendment to the RMA in 2017. It appears designed to "smooth the path" of proposals involving *de minimis* departures from plan controls. Intriguingly, there appears to be no caselaw about it, which suggests to us that it has been used as a simple *de minimis* work-around and is not a "sizeable loophole" as advocated by Ms Haazen.

[52] It provides as follows:

> **87BB Activities meeting certain requirements are permitted activities**
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> (1) An activity is a permitted activity if—
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> (a) the activity would be a permitted activity except for a marginal or temporary non-compliance with requirements, conditions, and permissions specified in this Act, regulations (including any national

[8] Decision No. A111/2000 at paragraph [21].
[9] For instance, *Aley v North Shore City* [1998] NZRMA 361.

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environmental standard), a plan, or a proposed plan; and

(b) any adverse environmental effects of the activity are no different in character, intensity, or scale than they would be in the absence of the marginal or temporary non-compliance referred to in paragraph (a); and

(c) any adverse effects of the activity on a person are less than minor; and

(d) the consent authority, in its discretion, decides to notify the person proposing to undertake the activity that the activity is a permitted activity.

(2) A consent authority may give a notice under subsection (1)(d)—

(a) after receiving an application for a resource consent for the activity; or

(b) on its own initiative.

(3) The notice must be in writing and must include—

(a) a description of the activity; and

(b) details of the site at which the activity is to occur; and

(c) the consent authority's reasons for considering that the activity meets the criteria in subsection (1)(a) to (c), and the information relied on by the consent authority in making that decision.

(4) If a person has submitted an application for a resource consent for an activity that is a permitted activity under this section, the application need not be further processed, considered, or decided and must be returned to the applicant.

(5) A notice given under subsection (1)(d) lapses 5 years after the date of the notice unless the activity permitted by the notice is given effect to.

[53] Counsel agreed that a s87BB notice is <u>not</u> a resource consent[10]. We find that position to be correct.

[54] The jurisdictional question that confronts us is based on what the nature of the notice is. In particular, is it an administrative decision and therefore amenable only to judicial review in the High Court rather than by declaration and/or enforcement proceedings in this Court.

[55] We tested RDC's counsel in some detail about the nature of the notice. They responded firmly after a break in the hearing, that it is the former, not the latter. We now consider the position.

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[10] Ms Haazen slightly "hedged her bets about that and suggested a route to relief if we were to hold that it was a resource consent; we do not pursue the latter because we are clear from the wording of s87BB and related parts of s139 RMA.

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[56] At the heart of resolution of the issue we find, is the decision of the High Court on appeal from the Environment Court in *The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council*[11]. The High Court drew a distinction between a declaration of a particular RMA power, and a declaration "regarding the process undertaken by a council when [withdrawing a plan change], which is a matter for judicial review. Focussing on s310(c) subject-matter for Environment Court declarations (*"whether or not an act or omission…contravenes or is likely to contravene this Act…[regulations]…a rule in a plan…a requirement for a designation…or a resource consent"*), the High Court identified that the declaration there being sought was about **decision-making** behind the act said to contravene s8 RMA, which was in the realm of judicial review of decision-making.

[57] The High Court in that case also considered the apparent wide catch-all provision s310(h) (*"any other issue or matter relating to the interpretation, administration, and enforcement of this Act…"*), and held that it did no more than fill any gaps in the specific prior provisions and did not import a power of judicial review.

[58] Other decisions of the Environment Court and higher courts have consistently held that Environment Court declarations and enforcement orders on administrative grounds such as adequacy of reasons are not available[12].

[59] Subject to our following discussion of interplay between s87BB and s17 RMA, we find that the current fact matrix is not within our jurisdiction but might instead be amenable to High Court judicial review. The present case seeks to attack the decision-making behind the s87BB notice.

[60] We now consider the alleged interplay between those two provisions of the Act.

[61] Section 17 RMA provides as follows:

> **17 Duty to avoid, remedy, or mitigate adverse effects**
>
> (1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with—

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[11] [2022] NZHC 1846 at [30] citing with approval the similar findings of the Environment Court in [2020] NZEnvC 180 at [58]-[62].

[12] See for instance *Berryman v Waitakere City Council* Decision A046/98.

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(a) any of sections 10, 10A, 10B, and 20A; or

(b) a national environmental standard, a rule, a resource consent, or a designation.

(2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.

(3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part 12 to—

(a) require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Environment Court or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or

(b) require a person to do something that, in the opinion of the Environment Court or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.

(4) Subsection (3) is subject to section 319(2) (which specifies when an Environment Court shall not make an enforcement order).

[62] There appears to be some tension or incongruity between the cases we mention above describing limits to enforcement order powers, and s17 viewed in relatively clear and simple terms. After careful consideration, we find against the applicants' counsel's submitted link between sections 87BB and 17. Section 17 cannot be seen as a legal avenue to attack an administrative decision to issue a s87BB notice. It is instead an avenue to have the Environment Court restrain physical activities taking place or proposed in the environment.

[63] Section 17 is not pleaded in the applications for enforcement orders, but instead prayed in aid of an attack on the issue of the notice, in the applicants' submissions. Section 17 cannot be interpreted to introduce something akin to judicial review in the Environment Court by inference or stealth. Out of an abundance of caution however, despite lack of express pleading, we will approach s17 on a stand-alone basis as its own route to the seeking of enforcement orders concerning the physical activities described in detailed evidence called by all parties.

Section 17 standing alone

[64] The caselaw is clear that the jurisdiction under s17 must be exercised with great care. The provision could be the subject of quite draconian effect if not approached in a very

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principled way by the Court.

[65] We start by summarising the allegations in the applicants' evidence, as noted in Ms Haazen's submissions on 10 March. (The footnote numberings derive from Ms Haazen's footnotes in her submissions):

1 Lake Rotokākahi and its surrounds is a place of significant cultural and historical importance and a sacred site where the tupuna for mana whenua rest[13]. Lake Rotokākahi, Te Wairoa Stream and the shores around the lake (which have shifted overtime[14]) are considered tapu. The sacred nature of the Lake and the area is well known publicly and is generally respected. RLC have previously worked with the Board to ensure the tapu waters of the Lake are not disturbed.[15]

2 The tupuna of mana whenua rest in the land surrounding the lake. Wananga have been ongoing to determine the exact location of significant Rangatira in these areas. Wally Lee states that in the area near where Rotokākahi flows into Te Wairoa, two koiwi of Rangatira lie.

3 Despite undertakings to the contrary, RLC continued with extending the pipeline into the Rotokākahi Protection Policy Area in the early morning of the 27th of February and up until the 1pm that afternoon. This was despite the evidence of Wally Lee that this area contained two significant Rangatira. Rebecca Skipwith states the whenua itself is imbued with tapu and the very movement of the whenua is offensive[16] and Te Whatanui Skipwith states that the works on the 27th of February have resulted in significant cultural offence and potentially irreversible impacts to these koiwi.[17]

4 The remaining 1km of pipeline that has not been drilled will go through areas that contain koiwi and areas of tapu. The area closest to the lake is the area of old Pa sites, it follows that this is also the area where mana whenua consider there are more koiwi than when you move further away[18].

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[13] At [7] affidavit of Wally Lee, 21 February 2025.

[14] At [17], affidavit of Whatanui Skipwith, 6 March 2025. And at [6]-[20] affidavit of Wally Lee dated 18 October 2024, Exhibit C to affidavit of Wally Lee dated 7 March 2025.

[15] At [13], affidavit of Wally Lee, working to ensure mountain bikers don't enter the Lake.

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Wananga between the Board and Kaumatua who hold this information is ongoing.

5 The adverse effects from the pipeline are set out by Wally Lee as[19]:

c. The breach of tikanga for paru to go through this wāhi tapu area;

d. The extremely serious consequences for our roto and te Wairoa stream in the event that there is discharge from the pipe at any point during the pipe's lifetime;

e. The risk of desecration of koiwi from the drilling of the pipe; and

f. The resultant impact on mana and mauri.

6 In discussions between RLC and the Board, the Board has consistently opposed the pipeline. Mitigation options offered to the Board have only included mitigation of the pipeline in situ[20] and excluded consideration of movement of the pipeline to an area outside of Rotokākahi or even a track within Rotokākahi Protection Area that may avoid, mitigate or remedy adverse cultural effects.

7 Earthworks within the Rotokākahi Protection Area as result of the works totals almost a 100m^3 [21] and includes the excavation of 6 haul pits (each 2m wide, 4m long and 1.5m deep), 14 relief holes (circulate, 0.5m in diameter and 1.5m deep) and 3 "asset installs", which involve valve connections onto the rising main pipeline.

Excavation for the asset installs would be 2m wide, 2m long and 1.5m deep.[22]

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[16] At [5] affidavit of Rebecca Skipwith, 26 February 2025.
[17] At [14], affidavit of Te Whatanui Skipwith, 6 March 2025.
[18] Affidavit of Te Whatanui Skipwith, 6 March 2025.
[19] At [11], affidavit of Wally Lee, 21 February 2025.
[20] At [41], affidavit of Wally Lee, 21 February 2025.
[21] At [14], affidavit of Mike Scott, Exhibit A.

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8 Mr Mike Scott, planner for the Board notes that any impacts to koiwi from earthworks in not a temporary effect,[23] that 100m³ of earthworks is more than a marginal non-compliance and that the "the very tight provisions restricting earthworks in the Protection Area is considered to serve the purpose of protection of undeclared wāhi tapu, hence the need for the discretionary status for almost any earthworks".[24]

9 The works within the Rotokākahi Protection Area will result in adverse effects that are offensive and objectionable, including physical disturbance, damage, and destruction of culturally significant sites. Under s 17(3)(a), permanent enforcement orders are warranted.

[66] The wording of s17(3)(b) is essentially the same as that of s314(1)(a)(ii). Accordingly, consideration may be paid to decisions of the courts under the latter, to gain assistance with implementation of the former.

[67] Key among such decisions is *Watercare Services Ltd v Minhinnick*[13] , a decision of the Court of Appeal. A major sewage pipeline had been formally designated in district plans for about 20 years; there had been public consultations, including with Maori, with no opposition. Mrs Minhinnick and another now protested, and unsuccessfully sought enforcement orders from the Environment Court. On appeal, the High Court overturned the Environment Court's decision, which was followed by an appeal by Watercare and a cross-appeal by Mrs Minhinnick. The Court of Appeal upheld the High Court's decision that s8 RMA did not give Mrs Minhinnick a right of veto when considering applications under s17(3) and s 314(1)(a)(ii). It otherwise overturned the decision of the High Court.

[68] Of potential relevance to our case, the Court of Appeal paid respect to the Environment Court finding that an opinion under s314(1)(a) that something is likely to be noxious, dangerous, offensive or objectionable to such an extent that it is…likely to have an adverse effect on the environment, must be the opinion of the Court on behalf of New Zealand society as a whole, and not as the High Court held "by reference to a reasonable Maori person representative of the Maori community at large.

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[13] [1998] NZLR 294 (CA)

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[69] A four-step enquiry was required by the Court:

(a) Whether the assertion…is honestly made;

(b) Whether in the opinion of the Court, the subject matter is or is likely to be noxious, dangerous, offensive or objectionable;

(c) Whether such state(s) is likely to have an adverse effect on the environment;

(d) If so, whether in all the circumstances the Court's discretion should be exercised in favour of making the order sought or otherwise.

[70] RDC has expressly conceded the applicants' assertion here has been honestly made.

[71] Moving to the quartet of adjectives, some other decisions of courts have enhanced our understanding. For instance, "offensive" has been held to mean disgusting, nauseous, repulsive, causing anger or annoyance and that "objectionable" means unpleasant, offensive, repugnant"[14]. A subsequent Environment Court decision held these things must be to a high threshold, beyond "inappropriate" or "unacceptable"[15].

[72] The *Harvey* decision held that an ordinary reasonable person is likely to be more tolerant of an activity which is seen to be necessary and from which some public good derives, than of an activity which is purely for the gratification of the person engaged in it.

[73] We now consider the evidence we have in our case, against the guidance provided by the decisions over time.

[74] We have looked carefully at the evidence filed by Wally Lee of the Rotokākahi Board of Control on 21 February and 7 March 2025. In his first statement he described some of the history of the Tarawera Sewage Scheme from 2015, driven by the declining state of water quality in that lake [from many households' old and inadequate means of sewage disposal].

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[14] *Tasman Action Group Ltd v Inglis Horticulture Ltd* Decision C 12/2007 at [82].
[15] *Harvey v Nelson City Council* C077/08 at [25].

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[75] RDC co-ordinated a Tarawera Sewerage Steering Committee from 2016, on which there was no express representation by the Board of Control (**Board**) but involved the Te Arawa Lakes Trust (**TALT**) and the Tuhourangi Tribal Authority. In 2017 TALT produced a CIA for which Māori landowners (but not the Board) were consulted. That CIA appears to have reached no more than tentative conclusions about routes and impacts.

[76] In December 2017 Mr Lee became a member of the steering group as he was a subcontractor to TALT, with a view to a more in-depth CIA being produced. Unusually, he said that while at that time he was chair of the Board, he did not sit on the steering committee "in that capacity".

[77] In October 2018, the steering committee agreed that the best practicable option was to reticulate sewage to the pump station at Lake Ōkareka along Tarawera Road. Mr Lee seconded the recommendation. This was however before work on the second (2019) CIA and before the steering committee disbanded and handed the project back to RDC.

[78] For that second CIA, TALT organised a hui-a-hapū on 15 October 2019, at which there was unanimous rejection of the proposal. TALT recommended to RDC that it meet with Māori landowners affected by the scheme, and it wrote to them in December 2019, inviting them to a meeting in January 2020. The Board was not invited. Engineers produced a concept design for RDC, and the latter approved the project during 2020. An Archaeological Authority was obtained during 2023. Mr Lee noted that works began for installation of the pipe in April 2023. There have been various protests since, leading to an injunction in the District Court at Rotorua in November 2024.

[79] Some of these events were confirmed by Mr Lee in his second affidavit. He added that little seemed to be happening between late 2020 and early 2023. He complained that RDC then maintained it did not need resource consent. After the injunction proceedings concluded, the Board instructed RM specialist barrister Ms Haazen and planner Mr Scott, and learned of the 19 February decision about the s87BB notice.

[80] In an affidavit to answer our concerns about consultation and timing of these proceedings, Mr Stavros provided us with more detail about the decade-long history of the project, appearing reasonably consistent with Mr Lee's statements but offering more detail.

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[81] In the early stages of the steering committee's work, TALT had been assisting in engagement with iwi and hapū.

[82] The second (2019) CIA identified the preferred option (the current project), and a recommendation to RDC to assess the viability of an alternative, an in-catchment treatment plant in partnership with mana whenua. A study was subsequently undertaken. It uncovered serious limitations with the alternative, and was presented to a meeting of Māori landowners, tribal authorities and mana whenua in early 2020. The preferred option was adopted in the Long-Term Plan process in June 2021. This was followed by consultation with Mr Lee as 2019 CIA co-author and the Board, including after works got under way.

[83] Following a special hui of the Board and its beneficial owners on 5 November 2023, RDC received a letter from the Board dated 30 November advising that the owners and beneficiaries did not support the scheme, and a sub-committee of the Board had been formed to "find a pathway forward".

[84] RDC staff met with that subcommittee on 6 December 2023, and wrote to the Board on 8 December, recording that the council had always tried to take full account of the wide-ranging views and needs of the various communities; that constructing the pipeline would reduce the risk of accidental spillage from the regular trucks transporting the septage along Tarawera Road; that the contractor expected to be working in the Rotokākahi area in the new year (2024); and that delays would have direct cost implications for [ratepayers].

[85] Mr Stavros then described many attempts to engage with the Board, tribal authorities and mana whenua during 2024, and the injunction proceedings.

[86] He also described some physical mitigation measures proposed including double-sleeving the pipe.

[87] He discussed cost overruns, and potential loss of central government funding if the current stage is not completed by June this year.

Consideration

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[88] There can be no doubt in our minds about the importance of the project in the public interest. Improving the quality of the freshwater in Lake Tarawera must be a given, for all relevant communities including Māori.

[89] We consider that there has been extensive consideration of options since 2018, including one scheme constructively advanced by the authors of the 2019 CIA (including Mr Lee).

[90] Contrary to the claims of Mr Lee about relative silence between 2020 and 2023 on the part of the council, there have been considerable attempts at engagement including hui, correspondence, and offers of mitigation. Regrettably we find that the applicants have simply not accepted any ideas that did not reflect their own. They also need to understand that they cannot command a right of veto under s8 RMA[16].

[91] While the cultural offence offered by the piping of paru through a tapu area is considerable for the Māori community, it may not be so for the wider community as discussed by the Court of Appeal in *Minhinnick*. Also, there are competing factors of importance to the wider community. We cannot find that the project meets the high thresholds described in the *Tasman* and *Harvey* decisions above. We say this with some regret because we do understand the cultural offence felt by the applicants and other Māori.

[92] Our concerns expressed in our Minute to the parties of 26 February 2025, about the last-minute nature of the proceedings, has been born out and confirmed by the statements of both RDC's Mr Stavros and the applicants' Mr Lee described in some detail above. The works physically commenced nearly two years ago (confirmed by Mr Lee in his first statement). They must have been apparent to all in the Lakes community.

[93] While we remain concerned at the council's last-minute acknowledgment of the need for a resource consent, signalled by its issuing of the s87BB notice six weeks ago, we find in the exercise of our discretion that the bringing of these proceedings as late in the piece as they have, when the works are entering their very last stage, is the antithesis of timeliness. A considerable amount of time was consumed in protests and injunction proceedings, rather

[16] See reference to Minhinnick decision of the Court of Appeal above.

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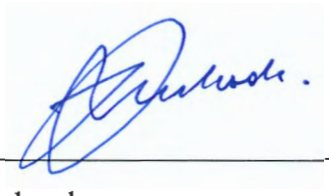
than the pursuit of any action under the RMA, let alone the taking of any judicial review proceeding in the High Court.

Conclusion

[94] Counsel for all parties confirmed at the end of our hearing that we were to deliberate on the substantive applications, rather than the interim one brought by the society.

[95] The applications are dismissed for the reasons recorded throughout this decision.

[96] We reserve costs, but do not encourage any application for same, in view of the somewhat inflammatory nature of the council granting itself a s87BB notice at the eleventh hour after having stoutly maintained to opponents it was operating entirely under permitted activity status.



L J Newhook

Alternate Environment Judge | Kaiwhakawā o te Kōti Taiao

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