IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
NGĀMOTU ROHE

CIV-2021-443-15
[2022] NZHC 629

BETWEEN	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE Appellants
AND	TARANAKI REGIONAL COUNCIL First Respondent
	NEW PLYMOUTH DISTRICT COUNCIL Second Respondent
	WAKA KOTAHI NZ TRANSPORT AGENCY Third Respondent
	TE RŪNUNGA O NGĀTI TAMA TRUST Section 301 Party

Hearing:	18-19 October 2021 [Further submissions received on 22 and 26 October and 8 November 2021]
Appearances:	M Gibbs and R Gibbs for Poutama Kaitiaki Charitable Trust (until withdrawal from the hearing on 18 October 2021) S J Grey for D and T Pascoe (granted leave to withdraw on 18 October 2021) D Allen, C A Easter and T Ryan for Third Respondent P F Majurey and V N Morrison-Shaw for Te Rūnunga o Ngāti Tama Trust
Judgment:	30 March 2022

JUDGMENT OF ISAC J

Introduction

[1] This is an appeal on a point of law from decisions of the Environment Court granting approvals under the Resource Management Act 1991 for the construction of a new section of state highway.

[2] Te Ara o Te Ata is a proposed new six-kilometre stretch of State Highway 3 to the north of New Plymouth. On 8 December 2018, Taranaki Regional Council and New Plymouth District Council granted the New Zealand Transport Agency (Waka Kotahi) resource consents for the project and recommended the confirmation of Waka Kotahi's Notice of Requirement (NoR) altering the existing State Highway 3 designation.

[3] The proposed new road runs predominantly through Ngāti Tama land in the Mangapepeke and Mimi valleys. Te Rūnanga o Ngāti Tama, the iwi authority for the purpose of the Resource Management Act 1991, has been actively engaged in consultation with Waka Kotahi regarding the Project since April 2016. An agreement has been reached regarding the acquisition of approximately 22 hectares of land for the project with a further 15.9 hectares to be leased for the duration of construction.

[4] The appellants oppose the project. Mr and Mrs Pascoe (the Pascoes) hold a large piece of privately owned farmland, some of which is needed for the project. Mr Pascoe has lived in the Mangapepeke Valley for over 65 years. The level of activity surrounding their home during the construction period will be disruptive.[1] A trust called Poutama Kaitiaki Charitable Trust (Poutama) also claims an interest in the land through which the Project runs.

[5] The appellants have brought a series of previous challenges to the project, appealing the Environment Court's first interim decision on preliminary issues to the High Court, and unsuccessfully seeking leave for a direct appeal to the Supreme Court.

[1] *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 [High Court decision] at [7], citing the finding of the Environment Court that noise during the construction period would make it untenable for the Pascoes to continue to live in the house: *Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203 at [157].

The current appeal is against the second interim and final decisions of the Environment Court approving the resource consents and confirming Waka Kotahi's NoR.

[6] In a separate judgment issued today I have also provided my reasons for declining an application by Poutama for recusal and an application for an adjournment of the appeal hearing.[2]

Procedural background

[7] The background to the highway project is set out comprehensively in the earlier judgment of this Court.[3] The following is a summary.

First Interim Decision

[8] On 18 December 2020 the Environment Court issued an interim decision.[4] The Court found it was unable to determine that the effects of the project would be appropriately addressed at that time, as there was no certainty Waka Kotahi and Ngāti Tama would reach agreement as to the acquisition of the necessary land, or finalise an agreement for mitigation of cultural effects. However, the Environment Court did make final determinations that:

> (a) Waka Kotahi undertook a detailed and extensive consultation process and gave adequate consideration to alternative sites, routes, or methods of undertaking the project;[5]
>
> (b) Ngāti Tama are tangata whenua exercising mana whenua over the project area and accordingly are the only body to be referred to in conditions addressing cultural matters;[6]

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2 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 628.
3 High Court decision, above n 1, at [10]–[29].
4 *Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203 [first interim decision].
5 At [100]–[101] and [458].
6 At [333] and [462].

(c) Poutama are not tangata whenua exercising mana whenua over the project area and should not be recognised in any consent conditions addressing kaitiakitanga;[7]

(d) Mrs Pascoe and her family had not established they have and are able to maintain whanaungatanga relationships or exercise associated tikanga that would require recognition under Part 2 of the Act;[8]

(e) Mrs Pascoe is not kaitiaki in the sense the term kaitiakitanga is used in the Act;[9] and

(f) the significant adverse effects the project will have on the area may be appropriately addressed through proposed conditions.[10]

[9] The appellants appealed this interim decision to the High Court. The appeal challenged the ability of the Environment Court to issue an interim decision, the Court's assessment of customary and cultural rights, tikanga, mana whenua and kaitiaki, and other alleged adverse effects of the project. The High Court dismissed the appeal on all grounds.[11] A subsequent application for leave to bring a direct appeal to the Supreme Court was also declined.[12]

Second Interim decision

[10] The Environment Court issued its second interim decision on 10 March 2021.[13] The Court noted that, as Te Rūnanga and Waka Kotahi had reached agreement regarding the acquisition of land and related mitigation, it could complete its assessment of effects. Of relevance to the current appeal, the Environment Court made findings that:

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7 At [339] and [467].

8 At [318]–[326] and [463].

9 At [327]–[330] and [464].

10 At [212]–[214] and [469].

11 High Court decision, above n 1.

12 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 87. There have also been the following recall applications: *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZHC 326; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 124; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 153.

13 *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27 [second interim decision].

(a) given Ngāti Tama 's acceptance of the project and the acquisition of its land and the related agreements, the cultural effects of the NoR and the project would be properly addressed;[14]

(b) no aspect of the project will be inconsistent with any objective or policy contained in the National Policy Statement for Freshwater Management 2020;[15] and

(c) the conditions proposed appropriately address the adverse effects of the project on land-owners.[16]

[11] Accordingly, the Environment Court dismissed the appeals from Poutama and the Pascoes. The Court directed Waka Kotahi to make some minor amendments and lodge an amended complete set of NoR conditions, regional resource consent conditions and a full set of the latest plans to the Court.[17] Following receipt of these documents, the Court issued its final decision on 1 April 2021, issuing formal approval to the resource consents and confirming the NoR.[18]

[12] Shortly after the hearing of this appeal commenced on 18 October 2021, counsel for the Pascoes, Ms Grey, and Ms Gibbs on behalf of Poutama sought an adjournment. After I declined their application the appellants withdrew from the hearing and took no further part in it. Accordingly, I have addressed the grounds of appeal as they are identified in an amended notice of appeal dated 22 April 2021, and written submissions for the appellants dated 28 September 2021. My reasons for declining the late application for an adjournment are addressed in a separate judgment.[19]

14 At [11]–[12].
15 At [29]–[48].
16 At [69].
17 At [76].
18 *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 40 [final decision].
19 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 2.

Approach to appeal

[13] The appeal is brought pursuant to s 299 of the Resource Management Act 1999 (RMA). Appeals to this Court against a decision of the Environment Court are only available on a question of law.[20] The Supreme Court clarified the parameters of questions of law in *Bryson v Three Foot Six Ltd,*[21] which has since been applied in an RMA context.[22] This has helpfully been summarised in subsequent cases.[23] A court will have erred in law where it has:

(a) applied a wrong legal test. Misinterpretation of a statutory provision will obviously constitute an error of law;

(b) taken into account matters which it should not have taken into account;

(c) failed to take into account matters which it should have taken into account; or

(d) come to a conclusion without evidence or to one which, on the evidence, it could not reasonably have come.

[14] Any error of law must materially affect the result of the court's decision before it would be appropriate for the appellate court to grant relief.[24] Materiality is a matter of judgment for the appeal court rather than a question of proof to a particular standard.[25]

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20 Resource Management Act 1991, s 299(1).

21 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27].

22 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].

23 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492 at [60]; *Redmond Retail Ltd v Ashburton District Council* [2021] NZHC 2887 at [38]–[39].

24 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]–[54].

25 *Manos v Waitakere City Council [1996] NZRMA 145* (CA) at 148, as cited in *Auckland Council v Cabra Rural Developments Ltd* [2019] NZHC 1892, (2019) 21 ELRNZ 185 at [75].

Grounds of appeal

[15] While the appellants set out a number of allegations in their amended notice of appeal and in written submissions, the appeal mostly reflects an effort to relitigate factual and other findings that have been finally determined.

[16] In particular, many of the arguments raised on appeal:

(a) were the subject of final and binding determinations of the Environment Court in its first interim decision, or the decision of this Court on appeal, and are res judicata;

(b) are matters of fact that cannot be challenged on an appeal under s 299 of the RMA;

(c) are legally irrelevant to the appeal, which concerns the Environment Court's decision to approve the NoR and resource consents; or

(d) were not developed at all, or were inadequately addressed in submissions, and therefore cannot be given further consideration.

[17] These allegations cannot be advanced on appeal because the Court lacks jurisdiction, or the ability, to consider them. They are addressed in a schedule to this judgment.

[18] Two grounds of appeal have the potential to constitute challengeable questions of law and require more detailed consideration. The first is whether the Environment Court was wrong in its application of the National Policy Statement for Freshwater Management 2020 (Policy Statement). The second is whether the Environment Court was wrong not to impose a lapse date on the amended designation.

First ground of appeal: error in the application of the Policy Statement?

The Policy Statement

[19] Under the RMA the Minister for the Environment may create national policy statements.[26] These are directional instruments by which central government can set policy and environmental benchmarks to be met by local authorities when making decisions.

[20] Decision-makers under the RMA must have particular regard to any relevant national policy statement when determining an application for a resource consent.[27]

[21] The Policy Statement came into force on 3 September 2020,[28] over a year after the Environment Court hearing. The Environment Court recognised this in its second interim decision:[29]

> Although [the Policy Statement and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020] came into force well after the conclusion of the hearing, we are obliged to have particular regard to the [Policy Statement] in considering the NOR and the application for regional resource consents under the relevant provisions of ss 104 and 171 of the Act.

[22] The appellants advance two challenges to the second interim decision under this ground of appeal which could qualify as an appeal on a point of law. They submit the Environment Court wrongly applied the Policy Statement because it:

(a) failed to determine whether the Mangapepeke Wetland fell within the Policy Statement's definition of a "natural inland wetland"; and

(b) wrongly concluded that there is a "functional need" for the project in terms of cl 3.22(1)(b)(iii) of the Policy Statement.

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26 Resource Management Act 1991, ss 45–55.
27 Resource Management Act 1991, ss 104(1)(b)(iii) and 171(1)(a)(i).
28 National Policy Statement for Freshwater Management 2020 [Policy Statement], cl 1.2.
29 Second interim decision, above n 13, at [25].

Natural inland wetland

[23] The appellants argue that the Environment Court was required to determine whether an area of the lower Mangapepeke Valley was a natural inland wetland under the Policy Statement.

[24] The Policy Statement applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments.[30] Part 2 of the Statement sets out its objective and policies. Its objective is:

> **2.1 Objective**
>
> (1) The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:
>
> (a) first, the health and well-being of water bodies and freshwater ecosystems
>
> (b) second, the health needs of people (such as drinking water)
>
> (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[25] Clause 2.2 of the Policy Statement then identifies 15 policies which local authorities are required to give effect to. Policy six requires that:

> There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

[26] This policy is then implemented by cl 3.22, which provides:

> **3.22 Natural inland wetlands**
>
> (1) Every regional council must include the following policy (or words to the same effect) in its regional plan(s):
>
> "*The loss of extent of natural inland wetlands is avoided*, their values are protected, and their restoration is promoted, *except where*:
>
> …
>
> (b) the regional council is satisfied that:
>
> (i) the activity is necessary for the construction or upgrade of specified infrastructure; and

30 Policy Statement, above n 28, cl 1.5.

(ii) the specified infrastructure will provide significant or regional benefits; and

(iii) there is a *functional need* for the specified infrastructure in that location; and

(iv) the effects of the activity are managed through applying the effects management hierarchy.

(emphasis added).

[27] A key issue for the Environment Court was whether parts of the lower Mangapepeke Valley, owned by the Pascoes and through which part of the proposed new section of highway would run, falls within the Policy Statement's definition of a "natural inland wetland". If it does, the roading project would need to comply with policy six and cl 3.22 of the Policy Statement.

[28] A "natural inland wetland" is defined as "a natural wetland that is not in the coastal marine area".[31] And a "natural wetland" means:

> a wetland (as defined in the Act) *that is not*:
>
> …
>
> (c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling.

(emphasis added).

[29] The Policy Statement then defines improved pasture in these terms:

> **improved pasture** means an area of land where exotic pasture species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing.

[30] Both the appellants and Waka Kotahi have opposing views as to whether the lower Mangapepeke Valley constitutes a natural inland wetland and, as such, whether cl 3.22 is engaged. The appellants consider it is, and the project does not satisfy the specified infrastructure exception in cl 3.22(1)(b). Waka Kotahi's position is that it is

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31 Policy Statement, above n 28, cl 3.21(1).

not a natural inland wetland because the area falls within the improved pasture proviso contained in the definition of a wetland.

[31] The Environment Court struggled with the definition of "natural inland wetland", concluding:[32]

> In considering this matter we find the definition of "natural inland wetland" to be imprecise – it raises more questions than it answers, particularly in relation to the meaning of "improved pasture".

[32] In particular, the Court questioned whether management techniques beyond grazing are required for an area to be deemed "improved pasture", and whether "exotic pasture species" (not defined in the Policy Statement) include exotic herbaceous and rush species occurring in pasture, having significant implications when assessing whether "exotic pasture species" constitute over 50 per cent of the land in question.[33]

[33] The Court noted that, as the Policy Statement came into force after the hearing, it was unable to hear from ecological experts as to whether part or all of Mangapepeke Valley is a natural inland wetland for the purposes of the Policy Statement. Accordingly, it was unable to reach a firm conclusion as to the status of the wetland.[34]

[34] However, the Court concluded that, in any case, it was able to rely on the specific infrastructure exception in cl 3.22 of the Policy Statement:[35]

> We agree with the submissions of counsel that the Project fits within sub-clause (1)(b) of the policy in clause 3.22. We consider it is both a lifeline utility, as defined in the Civil Defence Emergency Management Act 2002, and specified infrastructure providing significant national and regional benefits. There is a functional need for the Project to occur in the identified location, identified after consideration of options in the route designation process. Further, we are satisfied that the adverse effects of the Project can be managed through the effects management hierarchy as we had previously identified in our interim decision.

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32 Second interim decision, above n 13, at [36].
33 At [36].
34 At [39].
35 At [41].

[35] In short, the Environment Court took a view of the status of the area in issue most favourable to the appellants and its analysis proceeded on the assumption that the lower Mangapepeke Valley *could* constitute a natural inland wetland.

[36] There was no error of law in this approach. Whether the lower Mangapepeke Valley constitutes a natural inland wetland is immaterial if the specified infrastructure exception in cl 3.22(1)(b) would apply anyway. As the Court found that it did, there was no need to finally determine the status of the land.

[37] The appellant's first criticism of the second interim decision therefore falls away.

Was there a functional need?

[38] The relevant functional need exception is contained in cl 3.22(1)(b) of the Policy Statement, as noted at [26] above. For the exception to apply, the Environment Court had to be satisfied that the four limbs contained in cl 3.22(1)(b)(i)–(iv) were met. The appellants did not challenge the first two requirements at (i) and (ii). Their focus was on (iii) and (iv), relating to the functional need for the specified infrastructure "in that location", and management of the effects of the activity through the "effects management hierarchy".

[39] The appellants submit that the Environment Court failed to apply the definition, intent and purpose of the Policy Statement, including 'functional need' in relation to the Mangapepeke Wetland.

[40] Next they contend a functional road already exists in the form of the current Mt Messenger section of State Highway 3. They also claim there is an 'online' route option that would cost $150m and is "more convenient, cheaper and shorter, and reduces the environmental damages by 90%". They say this demonstrates there is no functional need for the project to traverse the lower Mangapepeke Valley.

[41] Waka Kotahi's submissions regarding the functional need for the project are set out in full in the second interim decision and were expressly adopted by the Court:[36]

> There is a functional need for the Project to occur in this location. "Functional need" is defined in the [Policy Statement] as meaning "*the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.*" This is the case for this Project, for the following reasons:
>
> (a) The Project comprises large-scale, linear infrastructure. There cannot be gaps in the road – the whole route must fit together safely and efficiently.
>
> (b) The constraints on the design of the Project included reducing cultural, ecological, and landscape (by keeping the road low in the landscape) effects while ensuring the road could be appropriately designed and constructed and its geometric design will deliver a safe fit for purpose modern section of state highway.
>
> (c) The Project route was the subject of a "*detailed*" alternatives process; Waka Kotahi carefully selected the route as explained in the evidence of Mr Roan. As the Court noted "*the Agency as the requiring authority undertook a thorough and detailed evaluation of the route options before deciding on the preferred route along the Mangapepeke valley*."
>
> (d) The route design was refined at several points to avoid impacts on the ecologically significant Mimi wetland. These refinements included the addition of a bridge to the route across a tributary valley to the Mimi Wetland area, and shifting the southern end of the route further west away from the Mimi Wetland.
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> (e) As explained in the evidence of Mr Roan and Mr MacGibbon, and noted by the Court in its decision, the alignment though the Mangapepeke valley was shifted off the valley floor and moved to the eastern valley flanks, avoiding poorer soil conditions on the valley floor and an area that is a potential restoration target (for kahikatea swamp forest planting).

[42] In submissions, Waka Kotahi noted that an "online" option was considered and shortlisted, but ultimately rejected as it would have cost $180m *more* than the selected route option (due to significant engineering and geotechnical challenges) and pose significant traffic management challenges during construction. Further, Waka Kotahi notes that the lower Mangapepeke Valley floor has the lowest ecological values of any area within the project footprint.

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[36] Second interim decision, above n 13, at [42].

[43] The Policy Statement defines "functional need" as:[37]

> …the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.

[44] This is the same definition as that appearing in the National Planning Standards.[38]

[45] The difficulty with the first of the appellants' challenges — that the Environment Court failed to apply the Policy Statement's definition of "functional need" — is that it did.[39] So this asserted error of law simply fails to reflect the decision under appeal.

[46] Beyond this, the criticisms of the Environment Court's decision based on the presence of the existing highway or the asserted merits of the online route are not errors of law but an impermissible challenge to the Court's factual assessment.

[47] I accept, as submitted by Waka Kotahi, that the test is whether the project (being the specific infrastructure) itself meets the "functional need" threshold — namely that the project needs to traverse, locate or operate in a particular environment because the activity can only occur in that environment. The functionality of the existing road is a question of fact that is not relevant to this assessment, and in any case the issue was the subject of a finding in the first interim decision that the existing portion of State Highway 3 is not fit for purpose.[40] This finding is not open to challenge.

[48] The strict language of "can only" employs a high threshold to satisfy the functional need definition. Waka Kotahi referred me to a report issued by the Ministry for the Environment on the draft first set of National Planning Standards in which the

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37 Policy Statement, above n 28, cl 3.21(1).

38 Ministry for the Environment | Manatū Mō Te Taiao *National Planning Standards* (Wellington, November 2019) at 58.

39 The Environment Court's consideration of the Policy Statement is at [25]–[48] of the second interim decision, above n 13. At [30], the Court found the project is consistent with the objective and policy framework of the Policy Statement. And at [41]–[43], the Court accepted Waka Kotahi's submissions, identifying the definition of "functional need", and considering that definition against the facts.

40 First interim decision, above n 4, at [4]–[5] and [427]–[436].

definition of "functional need" is discussed. The report identified a concern raised by submitters that the definition may be too restrictive:[41]

> Functional need is often a key consideration when an activity can only locate within the coastal marine area (such as a port) and we consider it appropriate to retain the stricter requirement that the activity can locate within that environment. However, we recognise that there can be good reasons why an activity should be enabled to occur in a location even when the activity can occur elsewhere, or the activity must locate there for technical reasons. For example, this is often applicable to linear infrastructure that often has to traverse identified earthquake fault lines or flood hazard areas or has a valid reason to locate in the coastal marine area as in the oil companies' example above.

[49] The Ministry appeared to endorse the strict definition of functional need and went on to propose the addition of a new term — "operational need" — to cover activities that need to traverse, locate, or operate in a particular environment because of technical, logistical or operational characteristics or constraints:

> We consider that the term 'operational need' can be used to cover situations where there are valid reasons why an activity should be enabled to occur in a particular location. We recommend including the term 'operational need' in the Definitions Standard for those provisions where this is the desired approach.

[50] This recommendation was ultimately implemented in the National Planning Standards in November 2019.[42] Despite the existence and implementation of the new term in the National Planning Standards, it was not carried into the Policy Statement, published nine months later.[43]

[51] Waka Kotahi also referred me to *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* as indicating that 'functional need' does not require the proposed location for a development to be the only possible location. The case concerned the variation of land use consent conditions relating to the taking of groundwater as part of the expansion of a water bottling operation. It was argued that water extraction did not fulfil the definition of "rural processing activity" under the relevant plan. To fulfil

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41 Ministry for the Environment | Manatū Mō Te Taiao *2I Definitions Standard – Recommendations on Submissions Report for the first set of National Planning Standards* (Wellington, April 2019) at [3.43].

42 Ministry for the Environment, above n 38, at 62.

43 I note here that national planning standards fall lower on the planning documents hierarchy than a national policy statement, of which they are required to give effect: see Resource Management Act 1991, s 58C(1)(a).

this definition a rural land use activity was required to have a "functional need" for a rural location. Gault J agreed with the majority finding of the Environment Court that there was a functional need for the activity, notwithstanding that it might have been able to occur in other locations as "finding suitable supplies of water is not a certainty".[44]

[52] In both the Ministry for the Environment recommendations report and *Te Rūnanga o Ngāti Awa,* the focus was on the *location* of a particular activity. In the case of cl 3.22(1)(b)(iii) of the Policy Statement, it is of course correct that the functional need for the specified infrastructure can only be "in that location". But what is meant by "that location"?

[53] One answer might be to say that the "location" contemplated by cl 3.22(1)(b)(iii) is the "natural inland wetland", reflecting the opening words of cl 3.22(1). But this view overlooks the broader focus in the definition of "functional need". That focus is not on a particular location, but the need for an activity to locate in a "particular environment".

[54] The term "environment" is broadly defined in s 2 of the Resource Management Act. It includes:

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

[55] The RMA's definition of an "environment" is a much broader concept than a "location".

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44 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76 at [223] and [235], citing *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [225]–[226].

[56] In the present case, the project aims to improve existing linear infrastructure. It involves the creation of a new stretch of road approximately six kilometres in length which is required to join with two existing and fixed points on the highway.

[57] In order to connect these two points, it is necessary for the road to traverse the environment(s) between them. In this case, one of the environments is the lower Mangapepeke Valley. In theory, there could be an infinite number of route possibilities, or locations, connecting the relevant points of the highway. But these potential routes are constrained by practicalities, including distance, cost terrain, and constructability, as well as environmental considerations. With any linear infrastructure, alternative locations or routes will always exist. And the existence of any conceivable alternative would make the specified infrastructure exception in cl 3.22(1)(b) otiose. Such redundancy could not have been intended.

[58] I consider the Environment Court was correct to find that the project *can only* occur in the relevant *environment*, namely the lower Mangapepeke Valley. This is a context and fact specific inquiry, in which the Environment Court considered the comparatively short distance the project traverses, the nature of linear infrastructure, the environment it is proposed to traverse, as well as the alternatives considered by Waka Kotahi. There was no error of law in its consideration of these issues.

[59] Finally, the current section of State Highway 3 to be replaced already traverses in and out of the lower Mangapepeke Valley. While the project would intrude further into the Valley, the presence of both the existing and planned sections in the same environment is indicative of the need for the proposal to traverse it.

[60] Overall, not only do I consider the appellants have failed to identify an error of law in the Environment Court's approach, I also consider the Court's assessment of functional need was correct.

Second ground of appeal: is the absence of a lapse date in the NoR an error of law?

[61] Section 184(1) of the RMA provides that a designation lapses on the expiry of five years after the date on which it is included in a district plan unless it is given effect to before the end of that period.

[62] The appellants consider the Environment Court erred in failing to impose a lapse period on land subject to the newly amended NoR. They urged a five year lapse period before the Environment Court, submitting that without it, the Pascoes will be subjected to unreasonable uncertainty for an indefinite period of time.[45]

[63] Waka Kotahi's position is that imposition of a lapse date on a NoR to alter a designation is not permitted under the RMA. It refers to s 181 of the Act:

> **181 Alteration of designation**
>
> (1) A requiring authority that is responsible for a designation may at any time give notice to the territorial authority of its requirement to alter the designation.
>
> (2) Subject to subsection (3), sections 168 to 179 and 198AA to 198AD shall, with all necessary modifications, apply to a requirement referred to in subsection (1) as if it were a requirement for a new designation.

[64] Waka Kotahi notes that the range of designation provisions explicitly set out in s 181(2) of the Act does not include the five year lapse period prescribed in s 184 for a designation. There is an obvious logic to this. The lapse period in s 184 is intended to operate as a sunset provision in relation to land affected by a designation but where no steps are taken to implement it within the five year period. Section 181(2) of the RMA, however, appears to contemplate that the original designation — as with the present case — has been implemented. In such circumstances, a lapse date on a variation makes no sense because the land affected is already subject to an implemented designation.

[65] When considering this question the Environment Court concluded:[46]

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45 Second interim decision, above n 13, at [64].
46 At [66].

> The Court did not hear full argument on the matter of the lapse of the designation and is therefore reluctant to determine the matter. We will not impose a lapse date on the amended designation but in so doing are not endorsing the position of either party. We note however that the project has a de facto lapse period given that a lapse date of 10 years has been imposed on the resource consents.

[66] I accept the submission of Waka Kotahi. Section 181(2) prescribes the sections of the Act relevant to an alteration of a designation. The lapse provision requirement is explicitly excluded. Accordingly, the Environment Court did not err in failing to impose a lapse date on the NoR.

[67] In any case, while there may be no lapse date imposed in the amendment to the NoR, as the Environment Court noted, the project has a de facto lapse period given the resource consents will expire after 10 years. It follows that the appellants' concern of unreasonable uncertainty for an indeterminate period is not warranted.

Remaining grounds of appeal

[68] Decisions of the Environment Court are final unless reheard under s 294 or appealed under s 299.[47] As counsel for Te Rūnanga o Ngāti Tama Trust submitted, this statutory bar recognises the significant public interest in finality of litigation and reflects the Environment Court's expertise as a specialist tribunal. The statutory bar fits well with the law of res judicata.[48]

[69] The bulk of the appellants' remaining challenges cannot succeed because they are either collateral attacks on final and binding judicial determinations in the Environment Court's first interim decision, or the decision of this Court on appeal, or the decision of the Supreme Court declining leave to appeal.

[70] Most of these challenges are, in effect, an attempt to relitigate factual findings made by the Environment Court.

[71] In addition, some bald allegations were made by the appellants in written submissions that essentially appear to be a repetition of grounds articulated in their

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47 Resource Management Act 1991, s 295.

48 *André v Auckland Regional Council* [2003] NZRMA 42 (EnvC) at [25].

amended notice of appeal, which are not further addressed or addressed with any clarity in the written submissions, and cannot be considered further.

[72] For the reasons noted in the schedule attached to this judgment, all of them must be dismissed. Their number, and in many instances complete lack of merit, added unnecessarily to the complexity of the appeal.

Conclusion and result

[73] The appeal is dismissed.

[74] Costs should follow the event. If the parties are unable to resolve the issue memoranda may be filed. The respondents should file their memoranda within 10 working days of the date of this judgment. Any memorandum in reply for the appellants must be filed 10 working days thereafter.

Isac J

Solicitors:
Buddle Findlay, Wellington for Waka Kotahi
Atkins Holm Majurey, Auckland for Te Rūnanga o Ngāti Tama Trust

Schedule – Reasons for dismissing the balance of the appellants' claims

<table>
<tr><td colspan="2">GROUND A: The Environment Court failed to act in the interests of justice by relying on untruths and omissions from Waka Kotahi, including:</td></tr>
<tr><th>Sub-ground of Appeal</th><th>Answer</th></tr>
<tr><td>Ground A(1)(i)
Omissions regarding the withdrawal of the primary spoil offsite disposal site: appellants' submissions at [89]</td><td>The consent application as lodged identified the construction would generate 145,000m^3 of spoil disposal. This has been refined over the course of the project. The Environment Court heard evidence that the total volume of surplus fill would be 95,000m^3, to be accommodated in disposal sites within the designation. The Court in its first interim decision found these disposal sites and temporary stockpiling areas would be "contoured, landscaped and vegetated in accordance with the [ecology and landscape management plan]".[49] Therefore, this matter has been finally determined and is barred from being raised on appeal (res judicata).</td></tr>
<tr><td>Ground A(1)(ii)
Accepting untrue statements from Waka Kotahi, notwithstanding countervailing sworn evidence that Waka Kotahi contractors carried out unconsented draining in the Mangapepeke wetland prior to the ecological assessments: appellants' submissions at [51]–[58] and [90]</td><td>The Environment Court in its second interim decision accepted the respondent's explanation that neither Waka Kotahi nor its contractors created the drains present on the Valley floor but, more importantly, noted that the matter is in any event irrelevant to the Court's assessment of the NoR and application for regional resource consents.[50]

A matter of fact. The allegation has been dealt with and dismissed as irrelevant. There is no error of law in relation to this matter.</td></tr>
<tr><td>Ground A(1)(iii)
Waka Kotahi's omission that it was colluding with Heritage New Zealand to not comply with statutory conditions in regard to Poutama: appellants' submissions at [91]</td><td>There is no evidence which can support this allegation. Waka Kotahi obtained a project-wide archaeological authority under s 44(a) of the Heritage New Zealand Pouhere Taonga Act 2014, on a precautionary basis, to address impacts on any as-yet unknown archaeological sites. It followed the normal statutory process in seeking and obtaining the authority. The Environment Court in its first interim decision recorded the authority as an "approval required under other legislation".[51]</td></tr>
<tr><td>Ground A(1)(iv)
Omissions regarding the treatment of kiwis and their eggs and chicks monitored by the project: appellants' submissions at [92]</td><td>Questions regarding kiwi relocation were put to a witness for Waka Kotahi, Mr MacGibben, by Ms Gibbs for the appellants, addressed by Mr MacGibben and referred to in the first interim decision.[52]</td></tr>
</table>

49 First interim decision, above n 4, at [135].
50 Second interim decision, above n 13, at [60]–[61].
51 First interim decision, above n 4, at [64].
52 At [188]–[190].

<table>
<tr><td></td><td>The Environment Court concluded that, on the basis that the project is constructed and operated in accordance with Waka Kotahi's proposed conditions of consent for ecology, the immediate and long-term ecological effects of the project will be appropriately addressed.[53] Therefore, this issue was the subject of a final factual determination by the Environment Court and is not amenable to appeal.</td></tr>
</table>

<table>
<tr><td colspan="2">GROUND B: Errors of law</td></tr>
<tr><td>Sub-ground of Appeal</td><td>Answer</td></tr>
<tr><td>Ground B(1)
The Court failed to limit the designation area to the land required for the project: appellants' submissions at [68]–[72]</td><td>Pursuant to ss 168 and 171 of the RMA, the designation includes all land required directly for the construction and operation of the highway, and includes additional land intended to be used for construction related activities or ecological, mitigation, offset, or compensation activities, subject to agreement being reached with the Pascoes.

The Environment Court was aware the designation included some land that Waka Kotahi hoped to acquire on a willing buyer/seller basis. This matter was addressed in the hearing and closing submissions and in the first interim decision:[54]

> The area of Pascoes' land which the Agency proposes to be permanently acquired for the new highway is a little over 11 ha with a further 13.5 ha required for temporary occupation during its construction.

> In addition to these areas, on a willing buyer/willing seller basis the Agency would like to acquire:

- The Pascoes' dwelling and outbuildings so that the underlying land can be used for construction storage and related activities;
- A number of tongues of land extending up the side valleys off the new alignment to provide for core ecological mitigation/ offset compensation activities, the [pest management area] and restoration and mitigation planting;
- The largest of these tongues which would be used for temporary storage during construction.

It was open to the Court, and not an error of law, to accept the position on the area that should be confirmed as subject to the designation. The issue was resolved by the Environment Court as a matter of fact and is not amenable to appeal.</td></tr>
</table>

[53] At [214].

[54] At [447]–[448].

Ground B(2) The Court failed to impose a lapse date or lapse period on the land subject to the newly amended designation: appellants' submissions at [73]–[77]	This point is addressed in this judgment at [61]–[67].
Ground B(3) The Court failed to provide any resource consent conditions to address effects of the proposed project, including stewardship, on Poutama and the Pascoes: appellants' submissions at [78]–[81]	The Environment Court in its first interim decision determined there were no Māori cultural effects on the appellants that needed to be addressed via conditions.[55] It found they were not kaitiaki of the land but that their relationship with the land was better characterised as stewardship. The Court also found that the effects on the Pascoes would be significant but would be addressed by proposed consent conditions, including designation Condition 5A.[56] It noted that condition 5A is an "extensive package" which addresses effects on the Pascoes during pre-construction engagement, construction and operation of the project. It outlined the considerable obligations imposed on Waka Kotahi, including an explicit requirement to have regard to the Pascoes' stewardship over their land. The High Court did not disturb the conditions on appeal, noting that the proposed conditions explicitly recognised the Pascoes' stewardship over the land.[57] This issue has been finally determined and is not open to appeal. See also the discussion at Ground E (iii)–(v) below.

GROUND C: Irrationality	
Sub-ground of Appeal	**Answer**
Ground C The Court made findings so irrational that no reasonable authority could have come to them (or came to a conclusion without evidence)	The appellant's submissions did not develop this ground. There is no basis on which to consider that the Environment Court's findings were so irrational that no rational decision-maker could have made them. The appellant has failed to establish the very high hurdle that "the true and only reasonable conclusion contradicts the determination".[58]

55 First interim decision, above n 4, at [318]–[320], [326], [330], [339], [463]–[464] and [467].
56 At [117]–[119], [157]–[160] and [468].
57 At [207]–[217].
58 *Bryson v Three Foot Six Ltd*, above n 21, at [27].

GROUND D: Irrelevant matters	
Sub-ground of Appeal	**Answer**
Ground D The Court took into account irrelevant matters, namely that the Court erred in carrying out its own investigations, entered selected parts of those investigations into evidence, ignored requests to disclose those investigations to the parties, and failed to limit its consideration to the evidence from the parties in front of the Court	The appellant did not develop this ground and its nature is unclear. In the absence of further particulars, it is incapable of determination. Nevertheless, it is noted that the RMA grants the Environment Court wide discretion in how it regulates proceedings (s 269) and receives evidence (s 276). Further, the Court is a specialist court, comprising of experts in environmental issues who are entitled to apply their collective experience and relevant expertise in exercising their statutory power.[59]

GROUND E: The Court failed to have regard for relevant matters or failed to determine a materially contested matter.	
Sub-ground of Appeal	**Answer**
Ground E(1) The Court failed to address the issue that Waka Kotahi unlawfully obtained project information and evidence by way of unlawful entry onto land owned by the Pascoes, breached LINZ Licenses to Occupy, and failed to obtain permits to catch or kill protected wildlife: appellants' submissions at [82]–[86]	These allegations are not relevant matters to the Environment Court's assessment of the NoR and application for resource consents and, therefore, there cannot be any error of law in respect of them. In any event, the Environment Court was aware of the appellants' allegations of unlawful entry having received submissions and evidence on that issue. In relation to the wildlife permit allegation, the ecological effects of the project were addressed in detail, and finally, in the Environment Court's first interim decision[60] and by the High Court.[61] Those issues are not open on appeal.
Ground E(2) The Court failed to consider that flood modelling provided by Waka Kotahi was limited to post construction only: appellants' submissions at [87]	The Environment Court considered the potential for any flood risk to the Pascoes' property during construction. It concluded that in the event that the Pascoes elect to stay in their home during construction, the construction yard would need to be designed to forestall the increased flooding risk. The Court accepted that a Specific Construction Water Management Plan submitted to the Regional Council for certification would be a suitable mechanism

59 *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28]; *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* [2008] NZRMA 395 (EnvC) at [26].
60 First interim decision, above n 4, at [212]–[214].
61 High Court decision, above n 1, at [238]–[242].

	for ensuring that the construction yard is sited and designed to manage the risk of increased flooding around the home.[62] The High Court considered the Environment Court's assessment of the construction effects, noting its engagement with the conditions relating to forestalling increased flooding risks and Specific Construction Water Management Plan,[63] and concluded it made no errors of law in respect of those matters.[64]
Ground E(3) The Environment Court failed to give effect to the Policy Statement, including by:	
(i) Failing to reach a conclusion as to the status of the Mangapepeke Wetland pursuant to the Policy Statement definition of natural inland wetland: appellants' submissions at [7] and [64]–[65]	This point is addressed in this judgment at [23]–[37].
(ii) Failing to apply the definition, intent, and purpose of the Policy Statement, including "functional need" in relation to the Mangapepeke wetland: appellants' submissions at [9]–[18]	This point is addressed in this judgment at [39]–[59].
(iii) Failing to address the health and wellbeing of waterbodies in the Mangapepeke Valley: applicants' submissions at [38]–[42]	The Environment Court addressed these concerns in its first interim decision and found that the project's design would have negligible effects on the existing groundwater and springs regime in the Mangapepeke Valley.[65] Therefore, this issue has been finally determined and is not amenable to appeal.
(iv) Failing to address the health needs of Poutama, including drinking water, Mangapepeke puna waiora and mahinga kai: appellants' submissions at [33]–[45]	The Environment Court considered in detail the effects of the project on ecology, including stream and wetland ecology.[66] In making those findings, the Environment Court had submissions from Waka Kotahi and the appellants on the health and wellbeing of waterbodies in the Mangapepeke Valley, and on the health needs of Poutama, including Pascoe whānau drinking water, the Mangapepeke puna waiora and mahinga kai.

62 First interim decision, above n 4, at [129] and [157].
63 High Court decision, above n 1, at [203]–[204].
64 At [254]–[256].
65 First interim decision, above n 4, at [153]–[157].
66 At [168]–[214] and [469].

	The Court concluded that, on the basis that the project is constructed and operated in accordance with Waka Kotahi's proposed conditions of consent for ecology, the immediate and long-term ecological effects of the project will be appropriately addressed.[67] While there is no specific mention of the terms "puna waiora", or "drinking water" in the first interim decision, the Court does specifically refer to the protection and enhancement of mahinga kai within the region's waterbodies as a key policy element under the Regional Policy Statement.[68] In its second interim decision the Environment Court concluded that the proposed consent conditions to protect water quality and hydrology would enable a successful hydrological rehabilitation of the Valley floor.[69] The Environment Court's findings on ecological effects were upheld in the High Court and are not amenable to appeal.[70]
(v) Failing to address the ability of Poutama and the Pascoes to provide for their social, economic and cultural wellbeing: appellants' submissions at [28], [78]–[79]	Regarding cultural effects, the Environment Court concluded that neither Poutama nor the Pascoes are tangata whenua exercising mana whenua over the project area.[71] Regarding social effects, the Environment Court accepted that the project will have significantly adverse social effects on the Pascoes, who face losing their home and part of their land and their remaining land will be forever changed".[72] The Environment Court refers to an extensive package of measures to address the potential effects of the project on the Pascoes, including measures to address the social and economic effects on them.[73] The Court concluded that:[74] > There is no doubt that the Project will have significant adverse effects on the Pascoes and their lands. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.

67 At [214].
68 At [408.
69 Second interim decision, above n 13, at [40].
70 High Court decision, above n 1, at [242].
71 First interim decision, above n 4, at [339], [463]–[464] and [467].
72 At [160] and [397].
73 At [449]–[454].
74 At [468].

	These findings were upheld by the High Court and are not open on appeal.[75]
(vi) Failing to address that Waka Kotahi degraded the Valley, including the wetland, prior to the Waka Kotahi environmental assessments, including vegetation and hydrology: appellants' submissions at [7(f)]	The appellant asserted in written submissions that "[t]he degradation included unconsented drainage, impact of stock disturbance by the project, and multiple conflicting work fronts", though did not provide further particulars. The concern relating to unconsented drainage is addressed above in relation to Ground A. In relation to the concerns around vegetation and hydrology, these ecological matters (and why they are not amenable to appeal) are addressed above at Ground E (iii) and (iv). The claims relating to stock disturbance and conflicting work fronts lack sufficient particulars and are accordingly incapable of determination. In any event, the points do not seem to raise any errors of law relevant to this appeal.
(vii) Failing to consider the implications on the proposed project if the Mangapepeke Valley is not used for restoration plantings and/or pest control: appellants' submissions at [7(g)]	One of the ways in which Waka Kotahi propose to mitigate, offset and compensate for ecological effects of the project is through a comprehensive restoration package. The package includes an intensive pest management over a 3,650 ha area surrounding the project area as well as extensive replanting of effected indigenous and significant species.[76] The Environment Court was satisfied that the restoration package was sufficient to provide for on-site/near-site ecological benefits in the short term and ecological benefits over the whole pest management area in the long term.[77] The High Court upheld the Environment Court's findings in relation to its consideration of ecological effects.[78] Those findings are not amenable to further appeal.

75 High Court decision, above n 1, at [243]–[245].
76 First interim decision, above n 4, at [170].
77 At [208].
78 High Court decision, above n 1, at [240]–[242].