



Te Mana o te Wai in the water services sector

Water New Zealand

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INTRODUCTION

There are number of important provisions relevant to ‘matters Māori’ in legislation that apply to water services, in general terms these are:

- A requirement under the Water Services Bill for those exercising functions, powers and duties to give effect to Te Mana o te Wai (the meaning of which is set out in the National Policy Statement – Freshwater Management 2020 (**NPSFM 2020.**)
- Requirements under the Resource Management Act 1991 (**RMA**) for those exercising functions and power:
 - to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
 - to have particular regard to kaitiakitanga:
 - To take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
- In the Local Government legislation requirements on local authorities when making decisions on any matter to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes.

PURPOSE AND SCOPE

The purpose of this Guide is to assist water services sector members in understanding key concepts and values underpinning the Māori world view of the environment. In particular, this Guide focuses on the meaning of Te Mana o te Wai as that term is used in the NPSFM 2020.

In relation to RMA decision making on plans, policy and resource consents this guide should be read together with a document prepared for the Making Good Decisions programme administered by the Ministry for the Environment entitled Māori Values Supplement, December 2010 ([Supplement](#)).

This Guide is divided into the following sections:

- A discussion of the meaning of Te Mana o te Wai;
- A discussion of Māori interests in freshwater;
- An overview of the key principles of the Treaty of Waitangi relevant in the context of freshwater;
- What Te Mana o te Wai means in relation to decision making around water services infrastructure.

As noted there is a requirement in the Water Services Bill for those exercising functions, powers and duties to give effect to Te Mana o te Wai as that is defined in the NPSFM 2020 as follows:

1.3 Fundamental concept – Te Mana o te Wai Concept

- Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.
- Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement Framework.
- Te Mana o te Wai encompasses 6 principles relating to the roles of tangata whenua and other New Zealanders in the management of freshwater, and these principles inform this National Policy Statement and its implementation.
- The 6 principles are:
 1. Mana whakahaere: the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater
 2. Kaitiakitanga: the obligation of tangata whenua to preserve, restore, enhance, and sustainably use freshwater for the benefit of present and future generations
 3. Manaakitanga: the process by which tangata whenua show respect, generosity, and care for freshwater and for others
 4. Governance: the responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future
 5. Stewardship: the obligation of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations
 6. Care and respect: the responsibility of all New Zealanders to care for freshwater in providing for the health of the nation

The meaning of Te Mana o te Wai is very broad. In relation to water services it not only focuses on source water but also includes the distribution and use of the water in the environment and community. The concept clearly relates to discharges into water bodies from wastewater and stormwater systems.

In general terms the concept will require all those making decisions around freshwater use to note that stronger protection of the freshwater bodies is signalled. The sustainable use of the water taken and used (whether it be for consumptive use or for discharging into) is also paramount. The maintenance and improvement of water ways for future generations is also clearly identified as fundamental.

Decision making is still at the local level albeit with national standards being set. It is inevitable that the implementation of quality and quantity standards is likely to vary between local authorities, and in some cases it may not result in a substantial change from the status quo. Importantly the NPSFM also does not specify what “protection” involves and how such protection is to be enforced.

The core concept of Te Mana o Te Wai will require water suppliers to engage thoroughly with Māori and include them in decision-making processes regarding the management and use of water bodies. The broad terminology of the six principles favours an approach that integrates local iwi and mana whenua in each step of water services operations from management level decision-making processes to general everyday maintenance and enhancement of the water bodies.

The concept confirms that the overall health and well-being of water bodies is paramount. This is likely to remove some of the trade-offs that have occurred where adverse effects are offset or compensated for. The focus will now be on improving the health of the freshwater body under consideration.

Inevitably changes are required at the central government level to provide for the relationship of Māori with freshwater. Obligations to sustain present and future generations may also require a more equitable approach to allocation than the first in first served approach which, Māori have argued, contradicts tikanga.

MĀORI INTERESTS IN FRESHWATER

In various Waitangi Tribunal and other Court proceedings Māori have consistently sought to be decision makers in the management of their freshwater resources.

As noted by the Waitangi Tribunal in its freshwater claims reports – Māori are not wanting to just be submitters and appellants in processes involving Freshwater, rather they want to be at the table, to be decision-makers for the resources over which they exercise tino rangatiratanga¹ and kaitiakitanga².

¹ Political sovereignty, chieftainship, leadership, self determination, self management

² Kaitiaki/Kaitiakitanga – guardian/guardianship; intergenerational responsibility inherited through whakapapa (genealogy of all things) and whanaungatanga (relationship or kinship) at birth to care for the environment

The existence, nature and extent of any Māori proprietary interests in freshwater is a matter that remains unsettled and subject to significant dispute. In 2013 the Supreme Court considered the Waitangi Tribunal's Stage 1 Report on the National Freshwater and Geothermal Resources Claim (**Stage 1 Report**).³

The Tribunal's finding was that the proprietary interest guaranteed to Māori in 1840 was the exclusive right to control access to and use of water while it was in their rohe (area). The Crown's position in Stage 1 was that it had acted consistently with the principles of the Treaty of Waitangi and that any possible Māori proprietary interests fell "short of full ownership". The Court acknowledged that how this right to control would be recognised in modern circumstances was subject to the second stage of the inquiry.

In the 2019, in the Waitangi Tribunal's Stage 2 Report on the claim, the Tribunal traversed the history of the freshwater reform programme which has been running since 2003 with a particular focus on 2009 to 2017. During this period the Tribunal noted a number of the Crown's acknowledgments in various fora and official documents including that:

- » Māori have rights and interests in fresh water that relate to both 'control' and 'use' of freshwater resources, including an economic interest, and that those rights and interests need to be addressed;
- » Māori values need to be better reflected in freshwater decision-making; and
- » Māori participation in freshwater management has sometimes been inadequate, partly as a result of under-resourcing, and needs to be enhanced.

In addition, the Tribunal noted the Crown's collaboration with the Freshwater Iwi Leaders Group and the 'co-design' of reform options by Crown officials and iwi advisors in 2014-17. This programme resulted in three major reforms designed to address Māori rights and interests:

- » a section in the National Policy Statement for Freshwater Management (NPS-FM) (2017) designed to ensure that Māori values are reflected in freshwater decision-making;
- » inclusion of the concept 'te mana o te wai' – the health of the water body comes first in the NPS-FM (2017); and
- » new iwi participation mechanisms (called Mana Whakahono a Rohe) in the RMA via the Resource Legislation Amendment Act 2017.

In the claimants' view, however, these reforms were insufficient to recognise their rights and protect their freshwater taonga. Further although the reforms have made some improvements, the Iwi Leaders Group's view was that they do not go far enough and are not Treaty compliant.

The Tribunal also noted that the freshwater reform programme has been driven by growing pressure on freshwater resources. In particular they noted that water quality has undergone a significant decline in many water bodies since 1991, specifically in urban and pastoral catchments, and over-allocation had become a problem in many catchments. The Tribunal noted that iwi and hapū had grave concerns about the degraded state of freshwater taonga, such as Lake Horowhenua and the Manawatū River, and these concerns were predominant in the evidence of claimants and interested parties in stage 2.

³ *New Zealand Māori Council v Attorney General* [2013] NZSC 6

The claimants and interested parties did not agree that the Crown's proposed reforms address the gravity of what they said was 'a crisis for their freshwater taonga'.

The Tribunal found that despite the various reform efforts the RMA and the freshwater management regime is not Treaty compliant. In its recommendations the Tribunal set out specific amendments it considered were necessary to the RMA and also recommended a number of detailed paths and mechanisms for co-governance and co-management for particular rohe.

The Crown has not formally responded to the Tribunal's recommendations and there is hint of further litigation in relation to this. What has happened is a new NPSFM with an elevation of the concept of Te Mana o te Wai such that the health of the water is first and foremost. How the next generation of freshwater plans are developed will be crucial to determining the implementation of Te Mana o te Wai.

TREATY PRINCIPLES

Both the Resource Management and the Local Government Act contain specific provisions essentially requiring those exercising functions to take into account the principles of the Treaty of Waitangi. There is limited guidance in the legislation as to what these principles are and how they are to be applied. However, there is significant guidance that has developed over the years from the various judicial bodies that have considered the Treaty in a variety of contexts.

The Waitangi Tribunal sets out the principles of the Treaty that are relevant to the inquiry into freshwater the Tribunal is undertaking. These principles are:

- Partnership – a duty on Māori and the Crown to act towards each other with utmost good faith
- Māori autonomy and the guarantee of tino rangitiratanga – a recognition that iwi and hapū have rights to manage resources – they have kaitiakitanga (or stewardship) over their ancestral lands and waters
- Equal treatment – a duty on the Crown to act fairly and impartially towards all Maori
- Active protection – in the context of freshwater is the Crown's obligations in respect of water quality reforms and restoration of taonga (treasures)
- Equity – a duty on the Crown to act fairly as between Māori and non-Maori.

Note that the principles are not exhaustive and new and/or refined principles may be enunciated depending on the circumstances of the case.

Local Authorities and Treaty obligations

While local authorities are not the Treaty partner the Waitangi Tribunal has held that local authorities are effectively agents of the Crown in respect of honouring Treaty obligations.⁴ The High Court has made similar statements in the RMA context:⁵

It is the responsibility of successors to the Crown, which in the context of local government includes the Council, to accept responsibility for delivering on the Article 2 promise. Nowadays the Crown is a metaphor for the Government of New Zealand, here delegated by Parliament to the Council, which is answerable to the whole community for giving effect to the Treaty vision. That includes “avert[ing] the evil consequences which must result from the absence of the necessary Laws and institutions” needed to secure justice to all New Zealanders.

These statements acknowledge the role of local authorities in giving effect to and implementing the Crown’s Treaty obligations, including in the RMA context.

Treaty Settlements relevant to freshwater

There are a number of Treaty settlements that have addressed Māori rights and interests in freshwater, including:

- The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. This provides for a significant co-management regime in respect of the Waikato River, including reviews of regional and district plans and resource consents. Further complemented by Waikato River co-management deeds from the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and Nga Wai a Maniapoto (Waipa River) Act 2012.
- Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. Reflecting Whanganui iwi’s unique ancestral relationship with the river this conferred legal personality to the Whanganui River, giving it the same rights and responsibilities as a person.
- The Ngāti Tūwharetoa Claims Settlement Act 2018. This established the statutory co-management body to restore, protect and enhance the environmental, cultural and spiritual health and wellbeing of the Taupo Catchment.
- Te Arawa Lakes Settlement Act 2006. This returned the lakebeds to Te Arawa, recognising that the lakes are of spiritual, cultural, economic, and traditional importance to Te Arawa.

There may also be specific localised arrangements between iwi and local authorities that may have a bearing on water services governance and operations.

⁴ Manukau Report WAI-7, p 95; cf Orakei Claim WAI-9, pages 147-148; Muriwhenua Fishing Report WAI-22, pages 190-192; Ngawha Geothermal Resources Report WAI304; Whanganui River Report WAI 167.

⁵ Ngāti Maru ki Hauraki Inc v Kruithof [2005] NZRMA 1 at paragraph [57] (HC).

KEY MATTERS THAT WATER SERVICES PROVIDERS WILL NEED TO CONSIDER

As with all matters Māori, relationships are key to ensuring that Te Mana o Te Wai is implemented appropriately in water services governance and operations.

It will be necessary for water service providers to develop their own relationships with Māori in their respective areas and not simply rely on the processes and procedures in place at the council level.

Now is the time for water services providers to start the conversation with Māori to determine how Te Mana o Te Wai needs to be implemented at the local level.

Some examples of how this may apply in practice are:

Governance and decision making

Council decision making involving renewal, upgrading and significant maintenance of water supply, wastewater and stormwater infrastructure. This could be the details of the specific changes that are being proposed to the infrastructure and getting approval for capital or operational expenditure.

Under the Local Government Act Council is required to consider what consultation and engagement it should undertake and with whom. This applies to the council community as a whole but there are specific requirements in relation to Māori.

Additionally, Council is required to consider what opportunities it should provide for Māori participation in decision making. This requirement sits at the Local Government Act level it is not simply in relation to the Resource Management Act which is commonly where consultation, engagement and participation in decision making occurs.

The requirement to give effect to Te Mana o te Wai means that there is very clear direction to councils to involve Maori in all decision making with regards to water supply, wastewater and stormwater infrastructure.

Resource consenting and planning

As noted above there is already a requirement under the RMA to consider various matters Māori when undertaking planning and policy development and when considering resource consents. In both planning and policy development and the consenting process the NPSFM requires consideration of Te Mana o te Wai. The requirement to give effect to this in the water services legislation elevates the concept to a higher level for consenting and planning (in the RMA sense) water services infrastructure than for other council infrastructure.

Hoaketanga: Ka ora te wai, ka ora te whenua, ka ora ngā tāngata.

Purpose: If the water is healthy, the land is healthy, the people are healthy.

Water New Zealand is the industry body for the three waters sector – drinking water, wastewater and stormwater.

We advocate and promote the sustainable management of the water environment and in particular, the three waters through supporting members, and engaging with key partners and stakeholders.

We are the “go-to” three waters advisor, providing independent technical advice and data, workforce training, and delivering and enabling knowledge-sharing across New Zealand and internationally.

Our membership is made up of 2400 decision-makers and technologists from local and central government, industry, the academic and research communities, consultants and service/equipment and supply organisations.

