Having made appropriate inquiries to ascertain whether these submissions contain any suppressed information, I certify that, to the best of my knowledge, these submissions are suitable for publication.

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Plastics – a regional consent authority perspective

- Starting point – what activities require consent: "*Take and use of groundwater for bottling … on the consent holder's property*" (Rule 43 and PC9 WQR10). AEE relates to that activity. AEE not "evidence" (sufficient detail for purpose). Schedule 4(1)and (2).

- Export and plastic disposal facilities not controlled under regional plan (*ultra vires* s30). Unsurprising not included in AEE / requested by Council. While RCs manage discharge of contaminants to land/air, microplastic contamination doesn't require consent (*de minimis* / diffuse). If it did, discharge consent is the responsibility of bottle disposer.

- RMA only governs activities occurring in NZ. NZ actors can cause relevant effects outside NZ ("environment" = global). BUT RMA breaches must be enforceable in NZ, otherwise rule/ condition ultra vires. Also need clear nexus for enforcement purposes (consider s17).

- Nexus & remoteness (in RMA decisions) not incorporating civil concepts of liability. Principally about enforceability. Can effects be controlled in NZ through *vires* and enforceable conditions? If not, likely too remote (s108AA "directly connected" test).

- If can't condition, shouldn't consider. Otherwise only reason for considering is to decline. Requiring assessment in all cases (even to consider and dismiss), without filter, places unreasonable burden on applicants and overburdened councils (a driver of RMA reform).

- Holding water bottler liable for ultimate effect of microplastics requires evidence, e.g. of demand, product substitutability, off-shore recycling practices, plastics lifecycle. If in glass bottles or kegs, would regard need to be had to the CO^2 produced by trucks, planes etc?

- Calls for "national solution" reflect RMA policy cascade (national->regional->local) then consents (one method of giving effect to policy). NPS / NES *could potentially* address plastics. Requires s32 analysis (s52(1)(c) and 44(1)(b)). Test is whether most efficient / effective method for achieving objective. Likely Waste Regs a better tool (written subs, 22-23). Attempts to backfill through ad hoc consenting is tail wagging dog and de facto policy.

- RMA not *just* an environmental statute. "Enables" sustainable management of resources (including physical). Should allow activities which enhance community wellbeing whilst managing effects. Positive and adverse effects of allowing activity required to be taken into account (s104(1)(ab)). Both subject to remoteness inquiry.

- Consents are enabling: don't preclude consent holder adopting more sustainable approach (voluntarily or through regulation). No existing use rights for water. Can review under RMA.

EC's approach to jurisdiction blinkered approach to tikanga evidence (HC decision)

- SC granted leave on whether HC erred in upholding EC's decision relating to "negative tikanga effects". Requires close attention to what EC found on <u>that issue</u>.

- HC upheld EC's finding that tikanga effects *were* occurring in NZ, *were* relevant, and *were* considered (HC [117]-[119]).

- That finding favours TRONA (effects not too remote). TRONA's issue is that EC didn't find in favour of its witnesses <u>and</u> findings didn't lead to decline. Properly construed, those are factual findings / exercise of discretion (as found by HC and CA).

- TRONA now seeks to argue EC erred in "approach" to tikanga effects because EC was constrained by misdirected jurisdictional finding. Argument was not run in the HC therefore not squarely considered. Only appealable finding of the HC is that the jurisdictional error was not material to the EC's assessment of tikanga effects.

- Materiality not established. Cultural effects only one consideration (discretionary application subject to "generally grant" policy direction: WQ P11), effects on Ngāti Awa clearly considered. Subject of detailed conditions providing for kaitiakitanga and effects on mauri / cultural effects *on the aquifer* (conditions 9.2viii, 10.2, Joint Authority Index Tab 58).

- No clear link between jurisdictional "misdirection" and approach to tikanga effects. Misdirection was not that cultural effects could not be considered. Rather, misdirection was that EC "went too far" in framing general proposition about scope, rather than fact specific inquiry of nexus and remoteness (HC [142]). Importantly, HC did not find EC erred in its subsequent tikanga assessment.

- Properly construed, EC never concluded that tikanga effects (felt in NZ) were an "out of scope" effect of bottling or export. Therefore, the EC's tikanga analysis falls outside the frame of the HC's identified error.

- Regardless, EC's approach was correct. Issues of "jurisdiction" raised by EC concerned RC's functions under s30 (which don't include bottling or export) and "territorial" jurisdiction of RMA which governs actions in NZ (at [64]). Those findings are correct (and not challenged

by HC, although it preferred a more flexible approach focussed on nexus and remoteness than concepts of "jurisdiction).

- But never argued by any party (and no finding by EC or HC) that cultural effects on Ngāti Awa in NZ were not in frame. Squarely in frame under ss6,7 and 8 and Plan.

- True complaint is that EC viewed tikanga effects through western lens. Not squarely argued in HC (instead raised in the context of Pt2). Either way, HC found EC's analysis not limited to physical sustainability but considered "metaphysical" effects ([114]-[115]). Finding was reasonably open to it on the evidence ([118]).

- Cultural considerations broader than sustainability but still informed by tikanga evidence. *Ngāti Hokopu* "rule of reason" allows *testing* of tikanga evidence. EC not "judging" tikanga based on western paradigm. Uncontested biophysical evidence one check, but not determinative ([101]-[107]). EC also carefully weighed reliability in light of extensive cross-examination which produced some anomalies (e.g, iwi water bottling; absence of settled position; EC transcript 201.0353; 202.0606). Water export an emerging issue, therefore not viewed (or argued as being) as analogous to historic "mixing" cases. Regional Plan specifically identifies "mixing" of water as affecting mauri (Method 17) but not export of water.

- Case framed as "too much water sold too far away" (EC at [35]). Focus on export and foreign tikanga understandable, given evidence of abundance of aquifer, other iwi water bottling, Ngati Awa's own aspirations. Focus of evidence on mauri, but EC also considered impact on kaitiakitanga despite limited evidence.

- *He Poutama:* Cites rule of reason as existing approach (7.11 - 7.13). Cautions applying "precedent" approach to tikanga (4.9). Tikanga is evolving and can be rohe specific. EC very alert to these considerations (water bottling an emerging issue and Ngāti Awa position not crystallised)

Failure to revert to Part 2 (Court of Appeal)

- No gap. Gap occurs where Pt2 matter not adequately addressed in plan. Here, comprehensive provisions on ss6,7,8 (in some cases more stringent e.g. RPS Policy IW 2B 302.0372 – "recognise and provide for" cf. s7(a) "have particular regard to").

- Whether plan "furnishes a clear answer" (*Davidson*) doesn't mean Plan directs consent outcome (would foreclose exercise of discretion – can permit or prohibit activities). Means fails to provide sufficiently clear direction on Pt2 matters which govern exercise of discretion. Not the case here. RPS and RNRP have clear direction on Pt2 (Court of Appeal at [109]).

- Failure to provide for this activity not a gap. Not all plans can provide for all activities. Focus for water take and use is on efficiency of use whatever the use (e.g. WQ P13).

- No obligation to "cross-check" – discretionary if perceived to add value (*Davidson*). Requirement risks return to overall broad judgement and undermining plan (involved iwi consultation, reflects iwi management plans and community objectives). *McGuire* entreaty (bear in mind at every stage) has occurred if properly given effect to in plan.

- Materiality not established (how would general Pt2 provisions produce a different outcome to specific plan directions which give effect to Pt2).