

**BEFORE THE INDEPENDENT COMMISSIONERS APPOINTED BY WAIKATO
REGIONAL COUNCIL**

In the matter of the Resource Management Act 1991

And Hearing of submissions and further submissions on Proposed
Waikato Regional Plan Change 1 – Waikato and Waipā River
Catchments (PPC1)

Submitter's Name: Hamilton City Council

Submission Number: 74051

Hearing Topic: **BLOCK 1**
Part B – Outcomes:
Overall direction and whole plan submissions
Values and uses
Objectives

**SUPPLEMENTARY LEGAL SUBMISSIONS
ON BEHALF OF HAMILTON CITY COUNCIL – BLOCK 1**

Dated 13 March 2019

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MAY IT PLEASE THE HEARING PANEL

1. The legal submissions lodged on behalf of Hamilton City Council ("HCC") prior to the presentation of its evidence on Block 1 signalled the intention to address the key section 32 evaluation matters in the context of Block 2. This is on the basis that the critical relief sought by HCC relates to the proposed policies in Proposed Plan Change 1 ("PPC1"), which will be the subject of evidence in Block 2.
2. Matters have arisen during the first two days of the hearing which have prompted the preparation of supplementary submissions. These submissions primarily relate to Mr Ryan's proposed amendments to Objective 3 and whether the proposed amended version of Objective 3 is appropriate to give effect to the Vision & Strategy, the NPS-FWM and the NPS-UDC. This also relates to the question of the location of monitoring sites in relation to the zone of reasonable mixing, in the context of Objective K of the Vision & Strategy. This point was raised by Commissioner Robinson on the opening day of the hearing. (In that regard, I note that the witnesses for WARTA raise this issue in their evidence and counsel for WARTA will no doubt address the matter next week in legal submissions.)

Statutory framework

3. I do not propose to set this out, as the Commissioners are familiar with the hierarchy of documents which must be considered in any evaluation of the proposed provisions of PPC1. As you know, a critical question is whether PPC1 gives effect to the Vision & Strategy, bearing in mind the relationship between this and the two relevant NPS, including the National Policy Statement on Urban Development Capacity ("NPS-UDC")¹, and the purpose of the RMA. While the point will be expanded

¹ Refer to paragraphs 7.1 to 7.9 of the HCC submission and Mr Ryan's statement of rebuttal evidence, Overall direction and whole plan submissions, 26 February 2019, paragraphs 7 to 9.

on through Block 2 evidence, the absence of recognition of the NPS-UDC within PPC1 is a critical issue for HCC. It is both appropriate and necessary for PPC1 to give effect to the NPS-UDC, given the application of its provisions to municipal and urban discharges which are directly linked to urban growth.

Vision & Strategy

4. Mr Milne for the Waikato Regional Council (“WRC”) discussed the Vision & Strategy in his opening legal submissions. With respect, in my submission the Vision & Strategy does not expressly “require” that the Waikato River be safe for people to swim in and safe for people to take food from over its entire length”.² Objective K is one of a range of Objectives to be pursued in order to realise the Vision and which relate to the health and wellbeing of the Waikato River.³ Nevertheless, achieving Objective K is a fundamental aspiration of PPC1 and HCC accepts that this is ultimately an objective to be achieved over time. I agree that the Vision & Strategy “holds a unique place in the hierarchy of RMA instruments” and there is no question that it must be given effect to by PPC1.⁴

5. Mr Milne cited Environment Court decisions which have considered the Vision & Strategy. In my submission, the decisions in *Puke Coal v Waikato Regional Council*⁵ and *Carter Holt Harvey v Waikato Regional Council*⁶ are the most relevant to assist with determining what the Vision & Strategy requires. Mr Milne cites these decisions and the key excerpts from those which address the implications of the Vision & Strategy for RMA decision making (in the context of a resource consent process and a plan change process). I anticipate that the Commissioners are familiar with both decisions.

² Submissions by counsel for Waikato Regional Council 11 March 2019, paragraph 17.

³ *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010*, Schedule 2, Vision and Strategy for Waikato River, 1. Vision, clause (3).

⁴ *Supra* n1, paragraph 18.

⁵ [2014] NZEnvC 223.

⁶ [2011] NZEnvC 380.

6. While the decision in *Puke Coal* concerned an application for resource consent (and therefore the statutory “test” is different to that for a plan change), the following principles are helpful to assist the Hearing Panel in making decision on PPC1 (emphasis added):
- (a) The adoption of the Vision and Strategy within regional and district planning instruments has led to a **stepwise change** in approach to consents affecting the catchment of the Waikato River.⁷
 - (b) Looking at the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (“Settlement Act”) and regional and district planning instruments as a whole, there is an intention to improve the **catchment of the Waikato River within a reasonable period of time (several decades) to a condition where it is safe for swimming and food gathering**.⁸
 - (c) Resource consent applications must, to the extent relevant, **protect and restore** the River, but any protection or restoration must be **proportionate to the impact of the application on the catchment**.⁹
 - (d) Protection and restoration intends to go further than avoiding effects. It includes preservation from future and restoration from past damage. Some element of **betterment** is intended.¹⁰
7. Against this background, bearing in mind the reference in the Vision & Strategy to, *inter alia*, “prosperous communities” and the “restoration and protection of the relationships of the Waikato Region’s communities with the Waikato River, including their economic, social, cultural and spiritual relationships”¹¹, with regard to Mr Milne’s comment at

⁷ *Supra* n4, paragraph 86.

⁸ *Supra* n4, paragraph 87.

⁹ *Supra* n4, paragraphs 91 and 92.

¹⁰ *Supra* n4, paragraph 92.

¹¹ *Supra* n2, subparagraphs (2) and (3)(d).

paragraph [48]¹², it is not a matter of whether economic considerations have priority. Rather, economic considerations, along with other considerations, are relevant in the context of achieving the Vision and the restoration and protection of the Waikato and Waipa Rivers. It is understood that this was a factor considered by the Collaborative Stakeholder Group and that the “step wise” change to be implemented over a reasonable period of time, such that the Waikato River is safe for swimming and food gathering, is intended to be reflected in the provisions of PPC1.

Proposed amendments to Objective 3

Evidence of Mr Ryan

8. Mr Ryan has had cause to review and re-consider the amendments he proposed to Objective 3 in his evidence in chief and rebuttal evidence. With your leave, Mr Ryan has prepared a supplementary statement of evidence which explains his amended relief sought. In my submission, this does not have a material impact on the outcome sought such that another party is prejudiced in this process as it is consistent with the reasons for the relief sought by HCC.
9. The amendments relate to matters of clarity and certainty. However, the proposed amendments also concern the timing for the application of the attribute states in Table 3.11-1 for point source discharges which are already consented. Subject to expert caucusing and the resolution of the status of the numerics in Table 3.11-1, in my submission it is appropriate that the objective reflects the original intent as described in PPC1 as notified that point-source discharges will be required to confront the Table 3.11-1 attribute states when consent terms are due to expire.
10. This recognises the expected significant costs of achieving those outcomes and the “step wise” change required to implement the Vision

¹² [48] In our submission it cannot credibly be suggested that economic considerations have priority under the Vision & Strategy.

& Strategy over a period of time, which is consistent with the requirement that WRC gives effect to the NPS-UDC and also gives effect to the NPS-FM. In the interim, it remains open to WRC to engage section 14 of the Settlement Act and begin a review under section 128 of the RMA of the conditions of a resource consent for a point source discharge.¹³

Zone of reasonable mixing

11. On the first day of the hearing, Commissioner Robinson raised a query regarding the evidence on the need for monitoring sites in the context of Table 3.11-1 to be located outside the zone of reasonable mixing. Commissioner Robinson noted the language in Objective K of the Vision and Strategy which refers to the river being “safe to swim in over its entire length” (emphasis added). I understand that he sought comment on how this objective can be given effect to through PPC1 if there is allowance made for the zone of reasonable mixing.
12. HCC did not file evidence directly on this point, however, Mr Ryan’s proposed amendments to Objective 3 are based on the understanding that the monitoring points will be located outside the zone of reasonable mixing.
13. In that regard, a purposive interpretation should be applied to Objective K and a degree of reasonableness is appropriate, within the context of the requirement to give effect to the Vision & Strategy.¹⁴ In short:
 - (a) It is unfeasible and, in some instances, prohibitively expensive to implement mitigations which would allow for all parts of the Waikato and Waipa Rivers to be safe for swimming and fishing at

¹³ *Supra* n2, section 14 “Effect of vision and strategy on resource consent conditions and designations”, subsection (2), which states that a local authority may begin a review under section 128 of the RMA of the conditions of a resource consent to make them consistent with the vision and strategy.

¹⁴ The Supreme Court in *Environmental Defence Society v New Zealand King Salmon Company Limited* [2014] NZSC 38 [17 April 2014] referred to the purposive approach to interpretation of a higher order planning document. This was discussed in the context of the three “caveats” which the Hearing Panel is no doubt familiar with.

any given time, recognising that the definition of the Waikato River in the Settlement Act includes all its tributaries – not just its main stem;

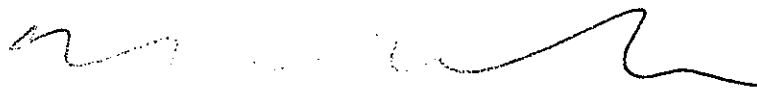
- (b) Taken literally, the language in Objective K could also apply to areas of the river where naturally occurring processes and currents make swimming and food gathering unsafe, including in situations where that is not due to contaminant concentrations;
- (c) The Vision & Strategy refers to the use of best scientific evidence¹⁵; and
- (d) I understand that it is accepted practice that the zone of reasonable mixing is considered in the context of resource consents for point source discharges.¹⁶

Conclusion

14. In summary, the amendments proposed by Mr Ryan are consistent with the requirement to give effect to the Vision & Strategy and the NPS-UDC. A purposive and reasonable interpretation should be applied to Objective K in the context of the relief which seeks to allow for the zone of reasonable mixing for monitoring Table 3.11-1 attribute states.

Witness for HCC

15. Mr Ryan will now present his planning evidence, on behalf of HCC.



M Mackintosh
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13 March 2019

¹⁵ For example, strategy (c).

¹⁶ Should the Hearing Panel not accept the approach to interpretation described above, in my submission it follows that one of the caveats in *King Salmon* applies. That is, uncertainty in the interpretation and application of Objective K. It follows that the Hearing Panel may have recourse to Part 2 of the RMA to assist in the interpretation of that Objective (*supra* n16, paragraph [88]).