

BEFORE Waikato Regional Council Hearing
Commissioners

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Waikato Regional Proposed Plan
Change 1 – Waikato and Waipā River
Catchments

**SYNOPSIS OF LEGAL SUBMISSIONS ON BEHALF OF
THE WAIKATO AND WAIPĀ RIVER IWI
(BLOCK 2)**

STATEMENT OF POSITION

1. In the Block 1 hearing, legal submissions and evidence of the Waikato and Waipā River Iwi¹ focused on the Plan Change 1 (**PC1**) outcomes that are necessary to respond to the statutory imperative to achieve the purpose of the River Iwi Acts,² including the obligation to give effect to Te Ture Whaimana:³
 - (a) PC1 is necessary to address the priority issue associated with effects of discharges to land and water in the Waikato and Waipā River catchments; the first step on the journey toward achieving Te Ture Whaimana by 2096.⁴
 - (b) Te Ture Whaimana holds a unique place in the Resource Management Act 1991 (**RMA**) planning hierarchy. It has led to a fundamental change in the application of the provisions of Part 2,

¹ Waikato-Tainui, Ngāti Maniapoto, Raukawa, Te Arawa River Iwi and Ngāti Tūwharetoa (the River Iwi).

² Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and the Ngā Wai o Maniapoto (Waipā River) Act 2012 (the River Iwi Acts).

³ Te Ture Whaimana is the Vision and Strategy for the Waikato and Waipā Rivers. Literally, “the authoritative law”.

⁴ Reflecting PC1’s 80-year long-term objective to achieve Te Ture Whaimana.

providing for a regional application of the requirements of the RMA to the Waikato and Waipā River catchments.⁵

2. PC1 is the first part of the staged approach to meeting the 80-year water quality targets and Te Ture Whaimana must be at the forefront when deciding on appropriate Block 2 provisions. PC1 is not just about implementing short-term mitigation measures required to achieve 10% of the journey towards Te Ture Whaimana by 2026, it is about putting in place a framework that demands, and can achieve, further reductions to ensure the 80 year targets are met.
3. Accordingly, the involvement of the River Iwi in Block 2 is targeted toward ensuring that the detail of the PC1 provisions does not lose sight of, and directly or inadvertently undermine, the Block 1 imperatives.
4. We repeat the policy approach of PC1 that was critical to the decision of the River Iwi to agree, jointly with the Council, on the final recommendation of the content of PC1 as notified, namely:
 - (a) the 80-year long-term objective to achieve Te Ture Whaimana;
 - (b) the staged approach to achieve Te Ture Whaimana over 80-years;
 - (c) the short-term objective “to put in place the necessary mitigation measures required to achieve “10% of the journey towards Te Ture Whaimana” in 10-years and by 2026;
 - (d) holding the line by preventing further degradation through unmanaged land use change;
 - (e) the pathway and principles for the development of Māori freehold land and land returned through Treaty of Waitangi settlements; and
 - (f) setting aside the question of allocating long-term rights to discharge contaminants at a property-scale (based on current discharges) until there is sufficiently detailed information to properly inform such a debate.

⁵ *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223 at [133] and [143] – [146], reflecting on the implication of the Supreme Court’s decision of *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38 with respect to Te Ture Whaimana.

5. On the basis of this foundational policy approach, the River Iwi broadly agreed with the direction of travel of PC1 as notified, though they considered that parts of the plan change could be improved.
6. The Block 2 Section 42A Report reflects a shift in position in relation to many aspects of PC1 as notified. This is largely a positive shift, with changes now addressing the practical limitations of many of the notified provisions.
7. However, the Section 42A Report has made two key changes that, as drafted, preference existing consent holders by pre-determining the parameters within, or circumstances in which:
 - (a) further reductions in the diffuse discharges of the four contaminants might be achieved over time, where required to meet the 80 year targets; and
 - (b) any future allocation regime might be designed once sufficient data is available.
8. This is of concern to the River Iwi. It has the potential to undermine both the intention to reduce contaminant discharges over 80 years and the decision to set aside the question of allocating long-term discharge rights until there is sufficiently detailed information to properly inform such a debate.
9. Signalling, and ensuring the PC1 provisions are sufficiently flexible to accommodate future change is at the heart of the River Iwi position that:
 - (a) As the primary consideration, further reductions in the diffuse discharges of the four contaminants must be achieved over time to meet or exceed the 80-year water quality targets necessary to give effect to Te Ture Whaimana.
 - (b) A 'grandparented' approach to allocating rights to discharge contaminants is unacceptable.
 - (c) In the context of PC1, which involves setting the foundation for future plan changes to 2096, so too is implementing provisions that constrain or pre-determine by default, the parameters within, or

circumstances in which, any future allocation regime might be designed.

THE WAIKATO AND WAIPĀ RIVER IWI EVIDENCE

10. The River Iwi will present the following evidence today:
 - (a) *Janeen Kydd-Smith*: planning.
 - (b) *Hamish Lowe*: the impact of PC1 on farming systems.
11. The evidence on behalf of the River Iwi is consistent with relief sought in the joint River Iwi submission and proceeds on the basis that:
 - (a) While developing a regulatory framework for the management of water quality is complex, giving effect to Te Ture Whaimana requires that these actions be taken, and all users need to take responsibility to contribute to the solutions.
 - (b) The policies and rules of PC1 are workable; they just need refinement in some areas. The River Iwi evidence focuses on clarifications and amendments necessary to assist with the workability of PC1.

TWO KEY CHANGES TO PC1

Change 1 - Rule 3.11.5.7

12. Rule 3.11.5.7, as notified, is an interim rule to 22 August 2026 that controls, by making a non-complying activity, specified land use changes in the catchment that are otherwise expected to result in additional diffuse discharges of the four contaminants.
13. The River Iwi support this increased control on land use to prevent further land use intensification in the short-term. At this time, the 'hold the line' approach is the most practical way to prevent further cumulative increases of diffuse contaminants that are discharged into the Waikato and Waipā Rivers.
14. A key factor in the acceptability of this Rule to the River Iwi was its interim nature, which signals that the relevant rule, and indeed the regulatory framework, will be replaced rather than embedded in future plan changes.

Central to this interim nature is the non-complying activity rule's 22 October 2026 end date (which the Block 2 Section 42A Report has recommended be removed).⁶

15. The Section 32 Report states of Rule 3.11.5.7 that:⁷

A key factor in the acceptability of this policy and rule is its interim nature, which foresees that these provisions will be replaced by future plan changes. **It was judged to be unacceptable to lock in current land uses indefinitely without this specified timeframe. Therefore, an important part of the non-complying activity rule for land use change is the end date of 2026.**

If the land use rule no longer has effect from the date specified in the rule, then the change of land use will no longer require resource consent. Specifying an 'end date' means that the adverse effects of any land use change after that date are only covered by the remaining rules. **The intention is to commit the Waikato Regional Council to establishing new rule(s)."**

[Emphasis added]

16. For the River Iwi, the 22 October 2026 end date in Rule 3.11.5.7 signalled an intention to transition to a future allocation system for diffuse and point source contaminants. The 2026 end date operated as a trigger to commit the Council to putting out a new plan before the end date, with the adverse effects of any land use change after that date falling to be covered by the remaining rules.
17. The evidence of Ms Kydd-Smith is that, as a result of the Block 2 Section 42A Report recommendations, land use change otherwise covered by the non-complying activity rule would default to a discretionary activity after 22 October 2026 under section 87B(1) of the RMA.⁸
18. The Block 2 Section 42A Report recommends the removal of the 2026 end date.⁹ The River Iwi accept that, given the delays to finalising PC1, it seems unrealistic that a new planning regime would be ready for notification by 22 October 2026. This could lead to the need for a future plan change just to

⁶ Block 2 Section 42A Report at [532].

⁷ Section 32 Report at page 188.

⁸ Block 2 Evidence in Chief of Janeen Kydd-Smith, 3 May 2019 at [69].

⁹ Block 2 Section 42A Report, at [532].

remove the date.¹⁰ This is the Officers' rationale for removing the *fixed* end date.

19. Despite this, the River Iwi remain opposed to losing the 10-year interim period represented by the *fixed* end date. Removal of the 2026 end date:
 - (a) removes this trigger to commit the Council to establish new land use plan provision(s); and
 - (b) signals the potential for retention of the non-complying activity rule (contrary to the stated 'interim' purpose of notified Rule 3.11.5.7) in a manner that locks in existing land uses.
20. Accordingly, the River Iwi recommend retention of an end date 10 years from the date on which PC1 becomes operative.

Change 2 - Consent durations

21. The Block 2 Section 42A Report recommends the following Policy 4 wording:¹¹

To grant resource consents that authorise farming activities for a duration that will enable further reductions in contaminant losses to be implemented through replacement resource consents rather than by way of a review of consent conditions; unless the application demonstrates clear and enduring ongoing reductions of contaminant losses beyond those imposed in response to the short-term water quality attribute states in Table 3.11-1 and the property is not in a Priority 1 subcatchment.

22. The River Iwi do not support the underlined wording, which is also reflected in Policy 13 in relation to point source discharges.
23. In relation to Policy 4, Ms Kydd-Smith's evidence is that:
 - (a) Long term resource consents that exceed only the short-term water quality states in Table 3.11-1 (the 10-year targets) have the potential to lock contaminant reductions in to a consent duration which may not be consistent with future plans or plan changes to achieve reductions in contaminant losses.

¹⁰ Block 2 Section 42A Report at [532].

¹¹ Officers' Block 2 "Track Changes" Recommendations Section 42A Report at Page 32.

- (b) The approach is not consistent with a staged approach to achieving the water quality attribute targets in Table 3.11-1 supported by Policy 5.
 - (c) Wording should be added to Policy 4 that grants resource consents authorising farming activities for a limited duration.
24. On that basis, and for consistency with Policy 4, the River Iwi submits that Policy 13(a) should be substituted with wording that reflects these recommended revisions.

TANGATA WHENUA LAND ANCESTRAL LAND

25. PC1 includes provision for the flexibility of the use of land returned under Treaty of Waitangi settlement processes and Māori freehold land under the jurisdiction of Te Ture Whenua Māori Act 1993. The relevant provisions include Objective 5 and Policy 16.¹²
26. Objective 5 and Policy 16 provide policy guidance to the Council for applications for use of tangata whenua ancestral land that falls to be considered under Rule 3.11.5.7 (the non-complying activity rule).
27. The decision-maker is obliged to (among other things) ‘recognise and provide for’ the relationship of tangata whenua with their ancestral lands when assessing the appropriateness of the proposed land use. The intent is to address past and future inequities and impediments to the flexible use of Māori land.
28. Other than the consideration of Objective 5 and Policy 16, the resource consent process is the same for tangata whenua as other landowners.
29. The Block 2 Section 42A Report recommends that Objective 5 and Policy 16 be retained on the basis that it is important to provide for tangata whenua ancestral land through the policy framework, acknowledging the historical and contemporary factors that have limited land development opportunities.¹³

¹² Objective 5 was considered as part of Block 1. Objective 5 (among other things) relates to the relationship of tangata whenua with their ancestral lands in the catchment, and seeks to minimise new impediments to the flexibility of the use of tangata whenua ancestral land.

¹³ Block 2 Section 42A Report at [934].

30. The River Iwi strongly support the retention of Objective 5 and Policy 16. In addition to the important matters recorded in favour of the policy approach and the Section 42A Report, the River Iwi say that:
- (a) The policy approach in Objective 5 and Policy 16 recognises and seeks to affirmatively address the historical and contemporary restrictions placed on Māori freehold and Treaty settlement land, and ensures PC1 does not provide a further impediment to the use and development of tangata whenua ancestral land (which, in the case of Treaty settlement land, creates a new prejudice in respect of lands that were provided with the intention of redressing past prejudice).¹⁴
 - (b) Objective 5 and Policy 16 do not fully enable or guarantee the use of and development of Māori land, nor do these provisions enable the development of tangata whenua ancestral land without consideration for contaminant loads. Policy 16 provides guidance on the factors to be recognised and provided for when considering and managing tangata whenua ancestral land consent applications.¹⁵
 - (c) The owners of tangata whenua ancestral land will still need to go through the same non-complying activity rule resource consent process as other landowners. The only difference is that decision makers will have regard to Objective 5 and Policy 16 in undertaking the section 104D policy ‘gateway test’ when considering such consent applications.
 - (d) Given the overall scheme of PC1, including the overarching requirement to give effect to Te Ture Whaimana, the granting of applications to develop tangata whenua ancestral land will still be subject to high policy expectations regarding contaminant losses notwithstanding Objective 5 and Policy 16 (in fact, the second part of Policy 16 expressly notes that such matters must be taken into account).¹⁶

¹⁴ Block 2 Section 42A Report at [953].

¹⁵ Block 2 Section 42A Report at [958].

¹⁶ PC1 can also be distinguished from the position considered in Variation 6. The Variation 6 decision concerned the proposed inclusion of a controlled activity rule in the Regional Plan providing for the taking of surface water for “iwi development”. It was not tied to specific activity and the rule was rejected on the basis that it applied to the status of an applicant rather than an activity: see *Carter Holt Harvey*

- (e) The provisions related to the development of tangata whenua ancestral land is not only consistent with the relationships that are to be restored and protected under objectives (b) and (c) of Te Ture Whaimana, but is also consistent with upholding the principles of the Treaty of Waitangi, which includes active protection of the right to economic development (as recognised by the Supreme Court in *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation*¹⁷).

CONCLUSION

31. PC1 represents the first step on the journey toward achieving Te Ture Whaimana by 2096. To realise the freshwater objectives set out in PC1 the River Iwi expect to see:

- (a) meaningful reduction in contaminant discharges from land use;
- (b) a corresponding improvement in water quality by 2026; and
- (c) a flexible planning framework that can accommodate:
 - (i) further reductions in the diffuse discharges of the four contaminants over time, where required to meet the 80 year targets; and
 - (ii) the design of a future allocation regime once sufficient data is available.

Tooku awa koirora me oona pikonga he kura tangihia o te maataamuri.

The river of life, each curve more beautiful than the last.



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Ltd v Waikato Regional Council [2011] NZEnvC 380 at [436] – [441]: The Environment Court applied *Hauraki Māori Trust Board v Waikato Regional Council*, which found that section 68 (relating to 'Regional Rules) "does not contemplate the making of rules that would give preference to a particular section or sections of the community": *Hauraki Māori Trust Board v Waikato Regional Council* HC, CIV-2003-485-999, Auckland Registry, Randerson J.

¹⁷ [2018] NZSC 122.