

**Before Hearing Commissioners at
Waikato Regional Council**

**I mua i te kaikōmihana
ki te kaunihera o te rohe o Waikato**

Under the Resource Management Act 1991
In the matter of Proposed Plan Change 1 to the Waikato Regional Plan and in the
matter of Hearing Block 3

Between

Genesis Energy Limited

Submitter 74052

And

Waikato Regional Council

Consent Authority

Legal submissions of behalf of Genesis Energy Limited

6 September 2019

BELL GULLY

BARRISTERS AND SOLICITORS

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May It Please the Hearing Panel:

Summary

1. Genesis Energy Limited (**Genesis** - submitter 74052) supports Te Ture Whaimana o Te Awa o Waikato, the Vision and Strategy for the Waikato River (the **Vision and Strategy**), and the intent of PC1 in terms of contributing to giving effect to the Vision and Strategy.
2. Genesis submits that the inclusion of some additional attributes, including temperature, is outside of scope because it is not “on” the Plan Change 1 (**PC1**). Genesis submits that PC1 is limited to the four key contaminants and related attributes as set out in the notified version of PC1.
3. PC1 still gives effect to the Vision and Strategy if it is limited to the four key contaminants. It was not intended for PC1 to be a broad and all-encompassing plan change. Instead it was intended to contribute to the implementation of the Vision and Strategy, and be just be one of many changes and other measures which would as a whole give effect to the entire Vision and Strategy.¹
4. In the event that the Panel considers the addition of other attributes, including temperature and other toxicants are within scope, as set out in Mr Matthews’ evidence, it is unclear from the Joint Witness Statement (**JWS**) what specific changes to Table 3.11-1 are being proposed or what the implications of those changes will be.² In particular, including temperature as an additional attribute could have significant impacts on the security of electricity supply to New Zealand, which could result in significant flow-on costs and economic effects.³

¹ Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 4.

² Evidence of Mr Richard Matthews on Joint Witness Statement regarding Table 3.11-1, dated 12 July 2019, at [19] – [23].

³ Evidence of Mr Richard Matthews on Joint Witness Statement regarding Table 3.11-1, dated 12 July 2019, at [40(d)].

Scope

Legal Framework

5. Genesis submits that the inclusion of temperature and other toxicants as additional attributes is outside of scope because it is not “on” PC1.
6. As recently affirmed by the High Court,⁴ there is a two limb approach to whether a submission is “on” a plan change:⁵
 - (a) It addresses the extent to which the plan change will alter the status quo (or in other words whether the submission reasonably falls within the ambit of the proposed plan change); and
 - (b) It would not cause the plan to be appreciably amended without the real opportunity for participation by those potentially affected.
7. The issue of scope has already been raised in legal submissions by various Counsel throughout the PC1 hearings.⁶ Therefore we consider that it would be unnecessarily repetitive to repeat the law on scope in the body of these submissions. A more detailed discussion on the law is contained at **Appendix 1** to these submissions.

Application to PC1

8. Genesis accepts that there were several submissions that sought additional attributes be included in Table 3.11-1. However, Genesis submits that those submissions, and in particular the submissions relating to including temperature and toxicants in Table 3.11-1, are not “on” PC1.
9. Genesis submits that PC1 is limited to the four key contaminants and their related attributes as set out in the notified version of PC1 and as

⁴ *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [81].

⁵ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66]; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [80] – [82].

⁶ For example, in the Legal Submissions on behalf of Mercury NZ Limited, dated 14 March 2019 at [12] – [29].

such there is no scope to include additional attributes, such as temperature, in PC1.

10. This is evident from a number of documents on PC1 which are publicly available on Waikato Regional Council's website.
11. The first half of the "Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project" document (the **Scope Document**) outlines the scope agreed by the Partners (River Iwi and Waikato Regional Council).⁷
12. The Scope Document notes that the following were initially included in the project scope:⁸
 - (a) Diffuse and point source discharges to land and water. Both discharges are in scope given the related subject matter and potential for efficiencies in scale in reviewing both sources of discharges.
 - (b) Adverse effects of rural land use activities on water bodies. The current regional plan does not adequately address how to manage activities on land to protect water quality and manage the effects of problematic amounts of sediment, bacteria and nutrients entering water bodies.
 - (c) All land and water bodies contained within the Waikato and Waipā River Catchments.
 - (d) Consequential changes to regional plan provisions, to ensure the Waikato River catchment is integrated with the rest of the regional plan.
13. However, as further work continued on developing the project scope, the scope was further refined from being "...to address the priority issue of effects of discharges to land and water..." to focusing on the

⁷ Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 2.

⁸ Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 3.

biggest contributors to water quality decline in the Waikato and Waipā Rivers (nutrients, bacteria and sediment).⁹

14. In particular, the Scope Document notes that the ‘content’ scope of the project is to:¹⁰
- (a) “Promote the reduction, over time, of sediment, bacteria and nutrients (nitrogen and phosphorus) entering waterways (and groundwater) in the Waikato and Waipā river catchments.
 - (b) This includes measures that do not specifically control discharges, but aim to mitigate the effects of discharges (i.e. riparian and wetland management).
 - (c) To play a part in restoring and protecting the health and wellbeing of the rivers for current and future generations. Note that this project in itself is not aiming to ensure the regional plan in its entirety gives effect to the Vision and Strategy. Additionally this project is only one of many measures Waikato Regional Council and other agencies are providing to give effect to the Vision and Strategy.”
15. The scope is prescribed in this way because although from the River Iwi perspective it was considered more preferable to undertake a single, comprehensive review of the regional plan, it was acknowledged that there are budget and resource constraints with such an approach.¹¹ Therefore the Scope Document states that because of the approach that has to be taken, the project scope has been deliberately defined as follows:¹²

⁹ Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 3.

¹⁰ Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 4.

¹¹ Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 5.

¹² Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 5.

- (a) “Focus on the critical issues and what’s really going to make a difference to give effect to the Vision and Strategy (i.e. reducing the four contaminants – nitrogen, phosphorus, sediment and bacteria).
 - (b) A focused scope allows identification of priorities and these to be applied to resourcing and to meet the timelines as anticipated.
 - (c) A tight focus does not compromise the holistic view of the Vision and Strategy, as there are other pathways to address other matters, and the broader context still forms the bigger picture in which the four contaminants are considered.
 - (d) Focusing on the four contaminants will allow the project to stay on track (notification of a draft plan in 2015), and other wider issues will be addressed by the full regional plan review at a later date, and by other means.
 - (e) The leading cause of project failure is too wide a scope.”
16. The above scope was reflected in the public notice for PC1 which states:
- (a) “The purpose of Proposed Plan Change 1 is to protect and restore water quality by managing land use and discharges of nitrogen, phosphorus, sediment and bacteria to land where it may enter the surface water or groundwater within the Waikato and Waipā River catchments”.¹³
17. The Section 32 report notes that:¹⁴

¹³ Public notice of Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments <<https://www.waikatoregion.govt.nz/assets/WRC/Council/Policy-and-Plans/HR/ReadProposedPlan/publicNotice.pdf>>. This is similar to the public notice for Variation 1 to PC1 which stated: “Plan Change 1 aims to address nitrogen, phosphorus, sediment and bacteria that affect the water quality in the Waikato and Waipā River catchments” (Healthy Rivers / Wai ora Public notice of Variation to Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments <https://www.waikatoregion.govt.nz/assets/WRC/Council/Policy-and-Plans/HR/Variation-1/Public-Notice-Variation-1.pdf>).

¹⁴ Proposed Plan Change 1 Section 32 Report at C.2.2.8.

- (a) “Attributes considered include those described in the National Objectives Framework (**NOF**) as well as others that might be developed if they were within scope and related to the four contaminants.”
- (b) “The agreed attributes are based on the NOF for nitrate, ammonia and E.coli; the NOF for phytoplankton (chlorophyll a), total nitrogen and total phosphorus for lakes except that they are also to be applied to the Waikato River main stem (in recognition of the hydro-lakes); and on a proposed clarity attribute developed by the Technical Leaders Group (**TLG**) to address sediment with input from the Collaborative Stakeholder Group to define appropriate bands”.
18. The scope of PC1 was limited to the four key contaminants such that temperature was not and could not have been considered in the s 32 report.¹⁵
19. The public notices for PC1 and Variation 1, the s 32 report, the Overview of Collaborative Stakeholder Groups Recommendations and the Scope Document all make it clear that the attributes to be included in PC1 are limited to those relating to the four key contaminants.
20. Therefore, Genesis submits that it cannot be said that submissions seeking to include additional attributes, such as temperature, reasonably fall within the ambit of PC1.
21. Further, Genesis submits that there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submissions have been denied the chance to give an effective response to those additional changes in the plan process. This is because potential submitters reviewing the initial materials would consider that PC1 was limited to the four key contaminants. If those four key contaminants were not relevant to the potential submitter then it is unlikely they would have submitted on the attributes in Table 3.11-1

¹⁵ See discussion on scope in Appendix 1 - *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [81]; *Bluehaven Management Limited & Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].

or even on PC1 at all. To include additional attributes later on that may affect the potential submitter, where it was made clear at the outset that only the four key contaminants would be included, then denies the potential submitter the opportunity to respond and participate in the PC1 process.

Response to other submitters

Director-General of Conservation

22. In the legal submissions on behalf of the Director-General of Conservation for Hearing Block 2, Counsel argued that including the additional attributes is “on” PC1 because it would be entirely consistent with the Vision and Strategy.¹⁶
23. As the notified version of PC1 notes, an intergenerational 80-year timeframe has been chosen to achieve the water quality objectives of the Vision and Strategy.¹⁷ PC1 is not the sole vehicle by which Waikato Regional Council will give effect to the Vision and Strategy. It was never intended that PC1 would be a broad plan change that covered all attributes and delivered everything required by the Vision and Strategy. Instead, PC1 identified four key contaminants that required better management in order to contribute to implementing the Vision and Strategy, and therefore ensure that the health and wellbeing of the Waikato River improves.
24. In particular, and as set out above, it was noted in the Scope Document that this project in itself is not aiming to ensure the regional plan in its entirety gives effect to the Vision and Strategy. This is reflected in Objective 4 which recognises that further contaminant reductions will be required by subsequent regional plans. Additionally, this project is only one of many measures Waikato Regional Council and other agencies are providing to give effect to the Vision and Strategy.¹⁸

¹⁶ Legal Submissions on behalf of the Director-General of Conservation, dated 25 June 2019, at [3] – [22].

¹⁷ Proposed Plan Change 1 at 15.

¹⁸ Scope, goals and drivers of the Healthy Rivers: Plan for Change/Wai Ora: He Rautaki Whakapaipai Project, Prepared for the Collaborative Stakeholder Group Workshop 2 (6-7 May 2014) at 4.

25. It was also noted in the Terms of Reference for the Collaborative Stakeholder Group that an integral purpose of PC1 is to “contribute to giving effect to the Vision and Strategy for the Waikato and Waipā Rivers” (emphasis added).¹⁹ Further, in the Overview of Collaborative Stakeholder Groups Recommendations for Waikato Regional Plan Change No.1 – Waikato and Waipā River Catchments, it is noted that the change to the Waikato Regional Plan “will assist in giving effect” to the Vision and Strategy.²⁰
26. That same document then concludes that “the desired future state of water quality in the Waikato and Waipā River catchments is full achievement of the Vision and Strategy....Reaching full achievement of the Vision and Strategy is an inter-generational goal the whole community needs to work towards. Achieving this goal involves a journey that requires preparation. The first stage of this journey will be PC1 to the Waikato Regional Plan in 2016”.²¹
27. In the summary of the proposed rules prepared by Waikato Regional Council, it is stated that the new rules will complement existing rules in the Waikato Regional Plan. Existing rules in the Waikato Regional Plan will continue to apply.²² PC1 is essentially “filling in the gaps” in regards to the four key contaminants, where the existing Waikato Regional Plan does not have adequate objectives and policies and rules and as such is not giving effect to the Vision and Strategy in respect of those four key contaminants.²³

¹⁹ Terms of Reference – Collaborative Stakeholder Group at 4.

²⁰ Restoring and protecting our water – Overview of Collaborative Stakeholder Groups Recommendations for Waikato Regional Plan Change No.1 – Waikato and Waipā River Catchments at 1.2.

²¹ Restoring and protecting our water – Overview of Collaborative Stakeholder Groups Recommendations for Waikato Regional Plan Change No.1 – Waikato and Waipā River Catchments at 11.

²² Summary of the Proposed Rules dated April 2018, at 1.

²³ Waikato Regional Council’s National Policy Statement for Freshwater Management 2017 Implementation Programme <<https://www.waikatoregion.govt.nz/council/policy-and-plans/plans-under-development/npsfm-implementation-programme/>>; Healthy Environment Waikato Regional Plan and Regional Coastal Plan review <<https://www.waikatoregion.govt.nz/council/policy-and-plans/plans-under-development/waikato-regional-plan-review/>>.

Additional attributes – temperature and other toxicants

28. As outlined in Mr Matthews' evidence, as there has not been any specific outcome or consensus reached in relation to temperature and other toxicant attributes during expert witness conferencing, it is unclear from the JWS what specific changes to Table 3.11-1 are being proposed or what the implications of those changes will be.²⁴
29. In the event that the Panel considers there is scope to include temperature and other toxicants as additional attributes in Table 3.11-1, Mr Matthews' has identified in his evidence that the economic costs of including additional attributes in Table 3.11-1 could be significant to not only Waikato, but the whole of New Zealand.²⁵
30. In particular, electricity generation at the HPS could be severely limited throughout the summer months due to the ambient temperatures in the Waikato River already being elevated. This could have significant impacts on the security of electricity supply to New Zealand, with significant flow-on costs and economic effects, as thermal electricity generation provides essential electricity supply for New Zealand in summer when other electricity generation may be constrained.²⁶



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²⁴ Evidence of Mr Richard Matthews on Joint Witness Statement regarding Table 3.11-1, dated 12 July 2019, at [19] – [23].

²⁵ Evidence of Mr Richard Matthews on Joint Witness Statement regarding Table 3.11-1, dated 12 July 2019, at [40(c)].

²⁶ Evidence of Mr Richard Matthews on Joint Witness Statement regarding Table 3.11-1, dated 12 July 2019, at [40(d)].

Appendix 1:

1. The leading authorities on whether a submission is “on” a plan change are the High Court cases of *Clearwater Resort Ltd v Christchurch City Council*,²⁷ and *Palmerston North City Council v Motor Machinists Ltd*.²⁸ The *Clearwater/Motor Machinist* test, recently affirmed in *Mackenzie v Tasman District Council*,²⁹ sets out a two limb approach:³⁰
 - (a) The first limb addresses the extent to which the plan change will alter the status quo (or in other words whether the submission reasonably falls within the ambit of the proposed plan change); and
 - (b) the second limb looks at whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan process.³¹
2. The first limb of the test acts as a “filter” to determine whether there is a direct connection between the submission and the degree of alteration proposed to the existing plan.³² The Court in *Motor Machinists* noted that one method of analysing the first limb is to look at whether the submission raises matters that should have been addressed in the s 32 evaluation report. If the s 32 report does not raise those matters, the submission is unlikely to fall within the ambit of the plan change.³³

²⁷ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003.

²⁸ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

²⁹ *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [81].

³⁰ *Clearwater v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66]; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [80]-[82].

³¹ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [82].

³² *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [80].

³³ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [81].

3. The Environment Court in *Bluehaven* clarified this analysis by stating that the inquiry is not simply whether the s 32 evaluation report did or did not address the issue raised in the submission. If the submission point was an option that the Council should have considered in the s 32 report, then that should not be considered out of scope of the plan change.³⁴
4. Another method is to determine whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be “on” the plan change.³⁵
5. The second limb of the *Clearwater/Motor Machinist* test looks at ensuring there is an adequate opportunity for public participation for those potentially affected in the plan change process.³⁶ In *Clearwater*, the Court considered that a submission that is “coming out of ‘left field’” may provide little or no real scope for public participation,³⁷ and was a strong factor against finding a submission to be “on” the plan change.³⁸
6. The High Court in *Motor Machinists* concluded that it is appropriate when considering submissions in a plan change context for Council to apply a precautionary approach. This is to ensure that a plan change does not:³⁹

“so morph that a person not directly affected at one stage...might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument”.

³⁴ *Bluehaven Management Limited & Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].

³⁵ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [81]; *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [98].

³⁶ *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [105].

³⁷ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [69].

³⁸ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [55].

³⁹ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 at [77].