

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

**BLOCK 3 LEGAL SUBMISSIONS ON BEHALF OF
THE WAIKATO AND WAIPĀ RIVER IWI**

INTRODUCTION

1. The Waikato and Waipā River Iwi¹ (**River Iwi**) approach this appearance acknowledging that:
 - (a) at this point in the hearing, the Panel has been presented with legal submissions and evidence on the central Block 3 issues from a broad range of perspectives represented by the submitters to Plan Change 1 (**PC1**); and
 - (b) with the exception of specific issues to which these submissions refer, the River Iwi continue to support the direction of travel of PC1.
2. The narrow focus of these legal submissions is the Block 3 issues for which the River Iwi have residual concerns. As with Block 2, the evidence that will be presented by Janeen Kydd-Smith (planning) and Hamish Lowe (farm production systems) is broader. Consistent with the general River Iwi position supporting PC1, their evidence continues to offer

¹ Comprising Waikato-Tainui, Ngāti Maniapoto, Raukawa, Ngāti Tūwharetoa and Te Arawa River Iwi.

clarifications and amendments necessary to assist with the workability of PC1 matters.

3. In light of the 5 September 2019 release for public consultation of the Government's *Action for healthy waterways* reform proposals², we first briefly address the status and relevance of those proposed reforms.

ACTION FOR HEALTHY WATERWAYS REFORM PROPOSALS

4. The Government's proposed freshwater reforms include a range of initiatives addressing broadly similar policy issues as those in PC1. The documents recently released comprise:
 - (a) *Action for healthy waterways* – A discussion document on national direction for our essential freshwater;
 - (b) Draft National Policy Statement for Freshwater Management;
 - (c) Proposed National Environmental Standards for Freshwater; and
 - (d) Draft Stock Exclusion Section 360 Regulations.
5. The Government's proposals have only been released for consultation and therefore remain in their formative stage in terms of any legislative or regulatory change. The *Action for healthy waterways* Discussion Document itself confirms only that when the consultation period has ended, feedback will be collated and reviewed by officials and an independent advisory panel. Cabinet will then consider final legislative and regulatory provisions relating to freshwater.³
6. With respect to the draft National Policy Statement for Freshwater Management (**NPS-FM**) the Environment Court in the Variation 6 decision has held that only national policy statements that have been approved

² Comprising a Discussion Document, Draft National Policy Statement for Freshwater Management, Proposed National Environmental Standards for Freshwater and Draft Stock Exclusion Section 360 Regulations.

³ *Action for healthy waterways* – A discussion document on national direction for our essential freshwater, Ministry for the Environment (2019, Wellington) (**Discussion Document**) at page 102.

and issued under section 52 of the RMA must be given effect.⁴ Proposed national policy statements should not be afforded any weight.⁵

7. Further, the unique legislative context of Te Ture Whaimana is relevant. The Panel is aware that Te Ture Whaimana prevails over any inconsistent provision in a national policy statement, the NZ Coastal Policy Statement and a national planning standard. It also prevails over a national environmental standard if more stringent than the standard.⁶ To that end, the reforms may enhance or expand, but cannot undermine, the policy intent of PC1 that gives effect to Te Ture Whaimana. Nor is it the intent of the reform proposals. The Discussion Document records:⁷

We have undertaken an initial analysis to ensure the Essential Freshwater policies are consistent with existing Treaty settlement obligations. For example, the **Waikato River**, Te Awa Tupua and Ngāti Rangī settlements include obligations on the Crown relating to specific aspects (ie, values and strategy documents) of their settlements when developing national direction.

[Emphasis added]

8. Indeed, in large part the Government's reform proposals affirm the policy position at the centre of PC1.

KEY BLOCK 3 ISSUES FOR THE RIVER IWI

9. The concern of the River Iwi about the direction of PC1 in the Block 3 Section 42A Report, arises from its derogation from the policy approach that was critical to the decision of the River Iwi to agree (jointly with the Council) on the final recommendation on the content of PC1 as notified.
10. The River Iwi have previously identified this policy approach in their Block 1 and 2 legal submissions, and therefore repeat only those elements relevant to the Block 3 hearing:

⁴ Section 67(3)(a) of the RMA requires that plans must give effect to any national policy statement.

⁵ *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at [51] (known as the **Variation 6** Decision).

⁶ *Puke Coal* interpreting section 12(4) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Waikato River Act**).

⁷ Discussion Document at page 22.

- (a) the 80-year long-term objective to achieve Te Ture Whaimana; and
 - (b) 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.
11. The focus of the balance of these submissions is on the key Block 3 issues in that context, namely:
- (a) Policy 7 (signalling the future); and
 - (b) Consent duration.

POLICY 7 – SIGNALLING THE FUTURE

12. The River Iwi favour the retention of Policy 7, subject to the amendments proposed in the Block 3 Rebuttal Evidence of Ms Kydd-Smith.⁸
13. Policy 7 sends two signals to water users in the catchment:
- (a) *Further reduction of diffuse discharges* – That water users must prepare for further diffuse discharge reduction of the four contaminants and collect data required to support further reductions.
 - (b) *Future allocation* – That water users must prepare for future allocation of diffuse discharges and collect data required to support future allocation. In respect of allocation, it identifies four future allocation principles.

Further reduction of diffuse discharges

14. It appears to be more readily accepted by submitters that the aspect of Policy 7 that signals further diffuse discharge reductions and associated data collection is appropriate for retention (albeit some prefer through

⁸ Janeen Kydd-Smith Block 3 Rebuttal Evidence, 19 July 2019, at [15].

implementation methods⁹).¹⁰ The River Iwi agree and say that this is fundamental to giving effect to Te Ture Whaimana.

15. While existing plans are not determinative when deciding the shape of any future plan review, statutory direction is. The direction that further reductions will be required beyond the ten-year life span of PC1 is present in the statutory references to:

(a) the vision of Te Ture Whaimana:¹¹

...for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come.

(b) the following objectives of Te Ture Whaimana to achieve the vision:¹²

(a) the restoration and protection of the health and wellbeing of the Waikato River;

...

(g) the recognition and avoidance of adverse cumulative effects, and potential cumulative effects, of activities undertaken both on the Waikato River and within the catchment on the health and wellbeing of the Waikato River;

(h) recognition that the Waikato River is degraded and should not be required to absorb further degradation as a result of human activities;

⁹ Including the legal submissions of the Director General of Conservation dated 7 August 2019 at [12] to [30] and the legal submissions of Mercury NZ Ltd dated 2 August 2019 at [32] to [39].

¹⁰ Block 3 Section 42A Report at [442], page 102.

¹¹ Waikato River Act, Schedule 2 (Te Ture Whaimana), cl 1(2). Refer also to references to restoring and protecting the health and wellbeing of the Waikato River for future generations in sections 3, 22(2)(a), 32(3), 44(a) and 80(3)(b) of the Waikato River Act. Equivalent provisions are located in the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and Ngā Wai o Maniapoto (Waipā River) Act 2012.

¹² Waikato River Act, Schedule 2 (Te Ture Whaimana), cl 1(3).

16. These statutory directives are the reason that 80-year targets are relevant in the context of a ten-year planning document. This unique direction overcomes the suggestion that future plan reviews cannot be constrained. Those plan reviews will take place in the context of the statutory direction.
17. While the exact wording of Policy 7 and the direction as to data collection may be subject to change in future plan reviews, the policy intent to signal that further reduction of diffuse discharges is required, is necessary to meet the requirements in the Waikato and Waipā River legislation. The River Iwi therefore support its retention.

Future allocation

18. The future allocation aspect of Policy 7 has attracted stronger calls for deletion from submitters. The section 42A Report has expressed the view that, insofar as Policy 7 sets out a preferred future framework, the best future allocation approach should not be pre-judged at this time.¹³
19. The evidence of Ms Kydd-Smith is that Policy 7 does not establish a future allocation framework, nor does it lock any future framework into only being able to consider those principles outlined in the policy. It simply identifies 'principles' that "any future allocation should consider".¹⁴ Those principles are:
 - (a) land suitability;
 - (b) allowance for flexibility of development of tangata whenua ancestral land;
 - (c) minimising social disruption and costs in the transition to a land suitability approach; and
 - (d) future allocation decisions should take advantage of new data and knowledge.
20. With respect to land suitability, the River Iwi agree that, at this time, the reference inappropriately constrains the range of allocation options that

¹³ Block 3 Section 42A Report, at paragraphs [477] (page 106) and [482] (page 107).

¹⁴ Janeen Kydd-Smith Block 3 Evidence in Chief, 5 July 2019, at [20].

might be examined. To make an informed decision, the full range of allocation mechanisms should be explored, including land suitability. The amendment to Policy 7 proposed by Ms Kydd-Smith in her Block 3 Rebuttal Evidence deletes the reference to land suitability and associated footnote 8.¹⁵

21. As Ms Kydd-Smith states in her evidence, Policy 7 (including the principle of allowing flexibility for the development of tangata whenua ancestral land) links to Policy 16¹⁶, Objective 5¹⁷, and the statutory direction in Objective 3(c) of Te Ture Whaimana to:¹⁸

restore and protect the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships.

22. The River Iwi strongly support the retention of Policy 7b. The principle signals the need for future allocation to recognise and affirmatively address the historical and contemporary restrictions placed on Māori freehold and Treaty settlement land, and ensure that future allocation in the case of Treaty settlement land does not create a new prejudice, in respect of lands that were provided with the intention of redressing past prejudice.
23. Policy 7b does not pre-determine the outcome, but rather ensures that the principle is front of mind in future plan reviews, consistent with Te Ture Whaimana. In the context of the ongoing discussion around resolution of rights and interests between iwi/hapū and the Crown¹⁹, and consistent with the concerns raised in the section 42A Report, the signal in Policy 7

¹⁵ Janeen Kydd-Smith Rebuttal Evidence, 19 July 2019, at [11] and [15]. Ms Kydd-Smith's evidence refers to the footnote to Policy 7a as Footnote 5. For clarity, in the Block 3 Section 42A Report it is Footnote 8.

¹⁶ Policy 16: Flexibility for development of land returned under Te Tiriti o Waitangi settlements and multiple owned Māori land.

¹⁷ Objective 5: Protecting and restoring tangata whenua values.

¹⁸ Waikato River Act, Schedule 2 (Te Ture Whaimana), cl 1(3)(c).

¹⁹ The latest statement from the Crown in the Discussion Document (at page 9) is that "The Government will continue to work with Māori to address their rights and interests in freshwater, particularly in the context of addressing allocation issues."

actively avoids a “potentially unjustified expectation”²⁰ as to a framework for the future.

24. The balance of Policy 7 signals that principles for future allocation decisions should include minimising social disruption and costs in the transition to a new approach,²¹ and the use of new data and knowledge (for which collection is required by the policy). The River Iwi consider these principles to be sound and appropriate touchstones for any new plan review.

Policy or implementation method

25. The River Iwi are aware that presentations on Policy 7 to date have given rise to questions from the Panel about whether retention should occur through a policy or method. Importantly, counsel understands that the discussion has largely taken place in the context of the more limited approach to the content of Policy 7 (for example, limiting the content to gathering information needed to support any future allocation of diffuse discharges).
26. Counsel submits that the Policy 7 content that the River Iwi seek to retain should be presented as a policy. A policy is a course of action²², a direction; better suited than an implementation method to strongly signal that a future plan change is intended to re-allocate (at least nitrogen) and require further reductions. While methods are within the ambit of a regional council’s functions²³, they are not appropriate for signalling this policy content. Retention of Policy 7 as a policy is fundamental to implementing Te Ture Whaimana.

²⁰ Block 3 Section 42A Report at [480], page 106.

²¹ The version promoted by the River Iwi - located at [15] of the Block 3 Rebuttal Evidence of Janeen Kydd-Smith - deletes the reference to land suitability in Policy 7c.

²² *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 at page 23.

²³ Section 30(1)(a) of the RMA specifically identifies methods, alongside objectives and policies, as ways for ‘achieving integrated management of the natural and physical resources of the region.’

27. The evidence of Ms Kydd-Smith is that, if Policy 7 is retained with the amendments she proposes, Implementation Methods 3.11.4.7 and 3.11.4.8 can be deleted.²⁴

CONSENT DURATION

28. During the Block 2 hearing, counsel engaged in a discussion with the Panel about the appropriate wording for Policies 4 (and 13) with respect to consent duration. The River Iwi position was:
- (a) Long term resource consents that exceed only the short-term water quality states in Table 3.11-1 (the 10-year targets) as proposed by Policy 4 have the potential to lock contaminant reductions into a consent duration that may not be consistent with future plans or plan changes to achieve reductions in contaminant losses.
 - (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) It is more appropriate to authorise activities for a limited duration (e.g. 10-12 years, and with common expiry dates in sub-catchments to align with the regional plan life span) that will enable further reductions in contaminant losses to be implemented through replacement consents.
29. The River Iwi consider that Policy 7 properly and necessarily provides guidance for consent duration . The signal in Policy 7 that further diffuse discharge reductions will be required reflects that the longer-term numerical water quality targets in Table 3.11-1 will likely require change through future Regional Plan reviews and that consents with terms that exceed 10-12 years are highly likely to fall short of those updated reduction targets.
30. In these circumstances, the grant of longer-term consents has significant potential to undermine the achievement of Te Ture Whaimana. This is

²⁴ Janeen Kydd-Smith Rebuttal Evidence, 19 July 2019, at [11].

particularly so when the Block 2 amendments to Policies 4 and 13 proposed in the section 42A Report appeared to contemplate the appropriateness of a longer term consent²⁵ where there was demonstration of “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”.²⁶

31. For these reasons, the River Iwi are strongly of the view that PC1 should provide policy direction that favours resource consents for a limited duration (ie, 10-12 years, and with common expiry dates in sub-catchments to align with the life span of the Regional Plan), thereby enabling further reductions in contaminant losses that are required by any amended Regional Plan to be implemented through replacement consents.
32. Long-term consents should only be granted where the 80-year targets in Table 3.11-1 are being met *at the time of application*. This provides exceptions for the truly exceptional – ie, those water users who are committed to and can achieve Te Ture Whaimana now – having regard to the likelihood that:
 - (a) the water quality targets beyond 10 years in Table 3.11-1 will be adjusted in future plan changes as more data and information is available; and
 - (b) long-term consents that are granted with regard to current water quality targets will consequently not meet any adjusted targets in the latter period of such consents.

CONCLUSION

33. PC1 represents the first step on the journey toward achieving Te Ture Whaimana by 2096.

²⁵ For farming activities (Policy 4) or point source discharges (Policy 13).

²⁶ This was the risk identified by the River Iwi expert witness, absent the full contemplation of the impact of the Block 3 Policy 7 issue: Janeen Kydd-Smith Evidence in Chief, 3 May 2019 at [18].

34. To realise the freshwater objectives set out in PC1 the River Iwi expect to see:
- (a) strong signals that future plans are intended to re-allocate and require further reductions;
 - (b) consent duration provisions that do not undermine achieving Te Ture Whaimana.

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

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



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