IN THE MATTER of Schedule 1 of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submissions on proposed Plan Change 1: Waikato and Waipā River Catchments to the Waikato Regional Plan

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SUBMISSIONS BY COUNSEL FOR WAIKATO REGIONAL COUNCIL
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Content

These submissions cover the following matters:

MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. My name is Jim Milne and I appear with Gerald Lanning as counsel for the Waikato Regional Council ("WRC") as the proponent of proposed Plan Change 1.

2. We are here today to make an opening presentation which is intended to be non-contentious and to provide the Hearing Panel with an overview of issues and historical context.

3. We (together with the WRC witnesses listed below) will also provide answers to the Hearing Panel's written questions in its Minute dated 19 February 2019.

4. We do not intend to be present throughout the hearing but will attend on an as-needed basis to assist the Hearing Panel with any legal issue that may arise.

Evidence

5. The WRC as plan change proponent has provided to the Panel:

   (a) Evidence-in-chief from:

      (i) Vaughan Payne, Chief Executive of the Council;

      (ii) Tracey May, Director of the Council's Science and Strategy Directorate;

      (iii) Dr Bryce Cooper, General Manager – Strategy at the National Institute of Water and Atmosphere;

   (b) An overview by Matthew McCallum-Clark of his section 42A report for Block 1;

(c) Further evidence to address questions to the WRC from the Panel in its Minute dated 19 February 2019, as follows:

(i) supplementary evidence from Dr Bryce Cooper (Questions 1 and 2);

(ii) evidence from Dr Michael Scarsbrook, Science Manager for the Council (Questions 5 and 13);

(iii) evidence from Bill Vant, Water Quality Scientist at the Council (Question 7);

(iv) supplementary evidence from Matthew McCallum-Clark (Questions 4, 8, 9, 10, 11, 12, 14 and 15).

The Waikato Regional Council

6. The WRC was constituted as a regional council under the Local Government (Waikato Region) Re-organisation Order 1989 and the Local Government Act 1974. The latter Act has since been largely, but not completely, repealed and replaced by the Local Government Act 2002.

7. The Waikato Region is the area defined in Survey Office Plans specified in the Local Government Orders. The boundary of the Waikato Region has been adjusted since 1989, most recently as a consequence of the Auckland Council restructuring. Proposed Plan Change 1 relates to a defined part of the Waikato Region.

8. The WRC has the powers, functions, and duties of a regional council under the Resource Management Act 1991. It has promulgated three instruments under that Act:

- The operative Waikato Regional Policy Statement. This applies to the whole of the Waikato Region. The Vision and Strategy for the Waikato River (which will be referred to later) forms part of this instrument;

- The operative Waikato Regional Coastal Plan. This applies to that part of the Region below the line of mean high water springs. It is not relevant to the present proceedings;

- The operative Waikato Regional Plan. This applies to all of the Waikato Region above the line of mean high water springs. Proposed Plan Change 1 is a change to this instrument.

9. The WRC also has functions, powers, and duties under, and is subject to, other statutes. Particularly relevant are the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Ngaati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and the Nga Wai o Maniapoto (Waipa River) Act 2012 (collectively "the River Iwi Acts") which are specific to the WRC and apply to defined parts of the Waikato Region. Collectively these Acts required the WRC to directly insert (without using the process in Schedule 1 of the RMA), the Vision and Strategy for the Waikato River into the Waikato Regional Policy Statement. They also introduced co-management and co-governance arrangements for the Waikato River and its tributaries (of which the Waipa River is the largest) from its mouth to the Huka Falls.

10. Plan Change 1 is a WRC instrument notwithstanding its unique development through the Special Consultative Group, as explained in the evidence.

11. The WRC is also a submitter. Clause 6(2) of Schedule 1 expressly provides that a local authority in its own area may make a submission. The WRC submission seeks to improve the workability of the instrument but does not

challenge its policy direction. Mr Mark Tamura has lodged evidence for WRC as submitter.

12. The WRC submission has the same status, and is to be considered by the Panel on the same basis, as any other submission. The amendments that it seeks can be brought about only by a decision of the Hearing Panel to that effect. The only means by which WRC itself could have altered the wording of the notified plan change would have been by variation.

13. Mr Tamura states in paragraph 6 of his evidence:

> Overall I agree with the recommendations of the section 42A report. There are minor matters which I seek the further consideration of the Panel and which I address in my evidence.

14. In the event that there are matters of divergence between the section 42A report and WRC as submitter that require decision by the Hearing Panel then these are to be evaluated and determined in the usual way.

The Vision and Strategy for the Waikato River

15. As noted earlier, in the River Iwi Acts Parliament directed that the Vision and Strategy be directly inserted into the Waikato Regional Policy Statement without using the Schedule 1 RMA process. It was accordingly not subject to submissions and there were no rights of appeal.

16. The objectives in the Vision and Strategy include:

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

(k) The restoration of water quality within the Waikato River so it is safe for people to swim in and take food from over its entire length.

17. Parliament has directed that the Vision and Strategy is the primary direction setting document for the Waikato River Catchment. Furthermore, Parliament has directed that the Vision and Strategy prevails over any inconsistent provision in an RMA planning instrument, including any national policy statement. The Vision and Strategy prevails over the National Policy Statement for Freshwater Management 2017 where there are any inconsistencies, and requires more stringent water quality conditions to be met in that it requires the Waikato River to be safe for people to swim in and safe for people to take food from over its entire length.

18. The Vision and Strategy is therefore a very powerful document and holds a unique place in the hierarchy of RMA instruments.

19. The River Iwi Acts also required the WRC to review its Regional Policy Statement and Regional Plan to see if they were consistent with the Vision and Strategy and, if not, to amend them to remove the inconsistency. The WRC undertook that review and determined that its instruments as they stood were not consistent with the Vision and Strategy. It agreed with its Iwi co-governance partners to address inconsistencies in the Regional Policy Statement through the new Regional Policy Statement which has since become operative. Proposed Plan Change 1 resulted from the statutory direction to remove inconsistencies with the Vision and Strategy from the Regional Plan.

20. The WRC is in a statutory position of co-management and co-governance. Under the River Iwi Acts the WRC has Joint Management Agreements with

each of the River Iwi. The proposed plan change could not be approved for public notification without a prior recommendation from River Iwi.

21. The Vision and Strategy has been judicially considered in five proceedings which are discussed below.

The WRC Variation 6 Environment Court decision

22. The Vision and Strategy was promulgated in 2010, after decisions on submissions on Variation 6, Water Allocation, had been made but before the appeals were heard. The decision on the appeals was the first Environment Court decision to consider the Vision and Strategy.[1] It remains the only decision to consider the Vision and Strategy in the context of Schedule 1 of the RMA.

23. The Court described the development of the Vision and Strategy in the following passage (footnotes omitted):

> [90] Consequently, Waikato-Tainui initiated claims before the Waitangi Tribunal. Negotiations with the Crown regarding the river claim were commenced in 1999. These negotiations culminated in the signing of an agreement in principle for settlement in December 2007. This agreement provided for the formation of a Guardians Establishment Committee consisting of Crown and Waikato River iwi representatives. The committee's main function was to develop a *"vision and strategy for the Waikato River"*
>
> [91] Following the agreement in principle, the Crown and Waikato-Tainui signed a Deed of Settlement in relation to the Waikato River on 22 August 2008. Importantly, this Deed of Settlement included as Clause 2.1:
>
> > **OVERARCHING PURPOSE**
> >
> > 2.1 The overarching purpose of the settlement is to restore and protect the health and wellbeing of the Waikato River for future generations.
>
> [92] The 2008 Deed also incorporated, as Part 1 of the Schedule to that Deed, the Vision and Strategy developed by the Guardians Establishment Committee, and subsequently approved by both the Crown and Waikato-Tainui. In 2009, aspects of the 2008 Deed and the co-management arrangements for the Waikato River were reviewed resulting in agreement and the signing of a 2009 Deed. Like

[1] CHH v Waikato Regional Council [2011] Whiting EJ at [86] – [100]

> the 2008 Deed, it's [sic] successor incorporated the same overarching purpose in Clause 3.1, and the Vision and Strategy developed by the Guardians Establishment Committee as Part 1 of the Schedule to that Deed.
>
> [93] The 2009 Deed was implemented through the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, which received royal assent on 7 May 2010 and came fully into force as at 25 November 2010. Consistent with the 2009 Deed, the Settlement Act records (inter alia):
>
> > The various Crown acknowledgments made with respect to the Raupatu, and the impact of this on Waikato-Tainui's special relationship with the Waikato River, by denying their ability to protect the importance of Te Mana o to Awa and exercise mana whakahaere over the river;
> >
> > [ii] The overarching purpose of this settlement has been to restore and protect the health and well-being of the Waikato River for future generations; and
> >
> > [iii] The Vision and Strategy, which is attached as Schedule 2 of the Settlement Act 2010, is Te Ture Whaimana o Te Awa o Waikato, and intended by Parliament to be the primary direction setting document for the Waikato River and activities within its catchment affecting the Waikato River.

24. The Court then noted the direct insertion of the Vision and Strategy into the Waikato Regional Policy Statement by operation of law and that it was intended by Parliament to be the primary direction setting document for the Waikato River and activities within its catchment affecting the River. It concluded: "*Clearly, therefore the Vision and Strategy must be accorded importance in the current process*." [2] and that the variation must therefore give effect to the Vision and Strategy, there being no argument in that regard. [3]

25. The Court set out in full the 13 objectives in the Vision and Strategy without providing any analysis or comment.[4]

[2] Ibid at [94]
[3] Ibid at [95]
[4] Ibid at [97]

26. The Court noted that the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 formed a model for the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 which implements an identical co-management framework for the River.

27. The Court observed that the weight and importance accorded to the Vision and Strategy is considerable,[5] before concluding:

> [100] The co-management regime established by the Settlement Act and the River Iwi Act is radically different to what hitherto existed under the Resource Management Act and what currently exists elsewhere in New Zealand. Parliament has accorded great weight and importance to the Vision and Strategy as the primary direction-setting document for the Waikato River catchment.

The Puke Coal decision

28. The application of the Vision and Strategy to applications for resource consent was considered for the first time by the Environment Court in its interim decision in *Puke Coal Ltd v Waikato Regional Council*. [6] The Vision and Strategy forms part of the operative Waikato Regional Policy Statement. Those are instruments which section 104(1)(b)(v) of the RMA directs that a consent authority must have regard to. However, the somewhat convoluted wording of section 17 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 means that in addition, a consent authority must have *particular regard* to the Vision and Strategy when considering an application that relates to the Waikato River or to an activity within the catchment that affects the Waikato River.

29. Under the heading "*Protect and restore surface water is paramount*", the Court said [bold emphasis added]:

> "*[86] We are unanimous in our view that the adoption of the Vision and Strategy Statement of the Settlement Act within the Regional*

[5] Ibid at [99]
[6] [2014] NZEnvC 223, Smith EJ, 23 October 2014.

> *and District Plans, has led to a* ***stepwise change in the approach to consents*** *affecting the catchment of the Waikato River.*
>
> *[87] We consider that looking at the Waikato River Settlement Act and the Regional and District Plans as a whole,* ***the only reasonable conclusion that can be reached is that there is an intention to improve the catchment of the river itself within a reasonable period of time*** *(several decades) to a condition where it is safe for swimming and food gathering over its entire length.*"

30. After discussing the Supreme Court decision in *EDS v King Salmon* [7] the Environment Court said:

> "*[92] Implicit in the Supreme Court decision was the matter of workable practicality thus any protection or restoration must be proportionate to the impact of the application on the catchment.* ***However, it is clear that it intends to go further than avoiding effect. We have concluded protection and restoration includes preservation from future and restoration from past damage. Restoration can only involve recreation of a past state. Thus, some element of betterment is intended****.*"

31. And:

> *"[94] We conclude the Settlement Act* ***requires the improvement of Waikato water quality over a reasonable period****.*"

32. And:

> "*[95] In short, we agreed that this* ***application must, to an appropriate extent, protect and restore the Waikato River****.*"

33. In discussing the specifics of the case the Environment Court said:

> "*[126] … We have concluded that in respect of the interpretation of Rule 3.2.4.2, the fact that Surface Water Class Standards will be maintained, misses the point, in our view, of the* ***higher threshold now inserted by reference to the Settlement Act****. Thus while this situation may be achieved,* ***maintaining the Water Class Standard per se, this will not meet the policy directives which now apply****.*"

34. In our submission the Court's conclusion through the above passages is that for activities within the catchments subject to the Vision and Strategy,

[7] [2014] NZSC 38.

it is no longer sufficient for an applicant to demonstrate that adverse effects are avoided, remedied, or mitigated. Instead, an applicant must now demonstrate that the application will result in some positive benefit contributing to the restoration of the Waikato River (as defined), proportionate to the activity in question.

35. Our submission is reinforced by the Court's conclusions in its discussion of Part 2 RMA matters where it said [bold emphasis added]:

> "*[133] As we have indicated, we are unanimously of the view that the* ***Vision and Strategy*** *for* [sic] *Waikato River and its consequent adoption in the Regional and District Plans* ***has led to a change in the interpretation of the provisions of Part 2 for the purposes of the Waikato region****.*
>
> *[134] Accordingly, it is our view that* ***every application affecting the river catchment will need to demonstrate ways in which it protects and restores the river in proportion to****:*
>
> *[a] The activity to be undertaken;*
>
> *[b] Any historical adverse effects; and*
>
> *[c] The state of degradation of the environment. Section 8.2.1 of the Iwi Management Plan assists us in an approach to achieve protection and restoration.*
>
> *…*
>
> *[137] It is our view that the Vision and Strategy recognises that on an application for a resource consent, affecting the Waikato waterways, there is an important opportunity to provide for the protection of restoration of the river in a more direct fashion. In such a case,* ***the applicant would need to show that, in proportion to the impact of the proposal, there was real benefit to the river catchment****.*
>
> *[138] We use the words* in proportion *as qualifying because it is clear from the reading of the whole of the Vision and Strategy that it does not intend that the first applicant is responsible for the entire upgrade of the river catchment, nor could such an approach be in accordance with the Act. But nevertheless, the generational impacts upon the river should be recognised and addressed.*

> *[139] The scale of that is clearly a matter for the discretion of the Council relevant to each case, but we would expect that* ***it would be interpreted as there being an opportunity wherever possible within the catchment to improve any streams or waterways and the water quality within it. This can largely be achieved by consent conditions requiring the provision of riparian planting or other methods to avoid contaminated run off, to improve the water quality, in particular the MCI Index, lower the nitrate levels, lower e-coli, and improve habitats for fish and other forms of stream taxa****.*"

36. It is therefore our submission that the *Puke Coal* decision requires a major change to the way in which resource consent applications within the Waikato River catchment (as defined) are assessed. No longer is it sufficient to demonstrate that adverse effects of a proposal are avoided, remedied, or mitigated. In the words of the Court [8] the applicant would need to show that, in proportion to the impact of the proposal, there was a real benefit to the river catchment. The Court's suggestions as to how that benefit might be achieved are set out in [139] quoted above.

The WDC road stopping decision [9]

37. *Waikato District Council v Morgan* is an Environment Court decision under the 10th schedule of the Local Government Act 1974 on an objection to a proposed road stopping adjacent to the Waikato River at Horotiu. The Court referred to the River Iwi Acts and stated:

> [74] Section 17(5) of the Waikato-Tainui River Settlement Act provides that any person carrying out functions or exercising powers under the LGA 1974 must have particular regard to the vision and strategy if the functions or powers relate to the Waikato River or activities in the catchment that affect the Waikato River. Given that the definition of the *Waikato River* includes its banks, the requirements under s 17(5) may be engaged in a case such as this.
>
> [75] We mention these matters because we do not consider that the position is as straight-forward as the Council seems to have assumed. On the face of it the specific obligation to consult on the matters outlined above do not appear to cover this particular situation; however, because of the matters we have referred to in Schedule 2 of the Waikato-Tainui River Settlement Act and the

[8] [137]
[9] *Waikato District Council v Morgan* [2016] NZEnvC 177 Harland EJ

> mirror Schedules in the River Iwi Act and Nga Wai o Maniapoto Act, it is possible that regard nonetheless needs to be had to the vision and strategy, depending on what they say about access to the Waikato River.

38. The Court considered that given the existence of a public cycleway, the portion of the unformed road to be stopped did not form part of the banks of the River and that there was appropriate public access provided to the River by the cycleway.[10] For those reasons it was satisfied that it was safe to proceed without further material being provided about the Vision and Strategy.[11]

39. The Court had earlier noted that one of the objectives to be pursued to realise the Vision was: "*The promotion of improved access to the Waikato River to better enable sporting, recreational, and cultural opportunities*" and that one of the strategies to achieve the Vision is to: "*Ensure appropriate access to the Waikato River while protecting and enhancing health and well-being of the Waikato River*."

The Hort NZ judicial review

40. Hort NZ applied for judicial review of the WRC decision to partially withdraw Plan Change 1. Its application for interim relief was dismissed on 7 March 2017 with the High Court giving its reasons the following day. The decision refers to the Vision and Strategy as part of the statutory background narrative.[12] The decision (not surprisingly) does not contain any analysis of the Vision and Strategy. Hort NZ subsequently withdrew its substantive application for judicial review so there is no decision on that matter.

[10] Ibid at [76]
[11] Ibid at [77]
[12] Ibid at [17], [18], and [20]

The Minister of Corrections v Otorohanga District Council [13]

41. This Environment Court decision arose from the direct referral of the notice of requirement to alter the designation for Waikeria Prison to increase its capacity. The hearing did not include the regional consents which were processed separately. Judge Borthwick showed great interest in the Vision and Strategy during the hearing and the decision has 11 references to it.[14] The decision considered matters such as the termination of a discharge of treated sewage to the Puniu River and actions to restore the ecological health of part of the Waikeria Stream in relation to the Vision and Strategy. The Court applied the Vision and Strategy rather than analysing it.

42. The Court noted that:

> There is an emphasis on integrated management of the Region's resources under the Vision and Strategy for the Waikato River (which has the status of a National Policy Statement) and Regional Policy Statement; these documents address the environment in a holistic fashion.[15]

43. And drew attention to Objective 3.4 and related policies in the RPS:

> [138] Addressing the Vision and Strategy head-on, it is an objective of the Waikato Regional Council in its Regional Policy Statement that:
>
> > Objective 3.4
> >
> > The health and wellbeing of the Waikato River is restored and protected and Te Ture Whaimana o Te Awa o Waikato (The Vision and Strategy for the Waikato River) is achieved.
>
> [139] Of the 23 policies that implement this objective, seven are directly relevant. To achieve the strong direction that the health and wellbeing of the Waikato River be "restored" and "protected", decision-makers are to adopt an integrated approach to resource management. These policies are listed at paragraph [130] a)—g) above.

[13] [2017] NZENVC 213 Borthwick EJ
[14] Ibid at [32], [118], [122], [125], [138], [143], and Attachment A condition 8(e)(i)
[15] Ibid at [118]

The hearing Panel's question

44. In its Minute dated 19 February 2019 the Hearing Panel has asked the following question:

> *PC1 is required to "give effect" to the Vision and Strategy. The Vision and Strategy contains, amongst other things, the vision, together with a number of objectives and strategies. The Panel foresees that submitters may argue that different elements of the Vision and Strategy suggest different responses. For example, the provisions focussing on restoration and protection of the health and wellbeing of the Waikato River might be seen by some submitters to conflict with sustaining prosperous communities and protecting of the economic relationships some communities have with the River. Given the legal obligation to give effect to it, does the Council consider that some elements of the Vision and Strategy take precedence?*
>
> *If so, what is the basis for that view, and which elements are prioritised. If the Council considers there is no internal priority, how does the Council suggest the Panel resolve areas of perceived conflict?*

45. None of the case law discussed above addresses these questions.

46. In response to the first question, it is submitted that there is a clear and paramount theme in the Vision and Strategy, namely the protection and restoration of the Waikato River. This is explained in the history of the Vision and Strategy set out in the Environment Court's decision on Variation 5 quoted above and is expressly enshrined in clause a of the Strategy (to achieve the Vision) which states:

> *ensure that the highest level of recognition is given to the restoration and protection of the Waikato River:*

47. We have identified in bold text the words "recognise and protect" or similar and underlined economic factors in the version that follows:

Vision and Strategy for Waikato River

1. Vision

(1) Tooku awa koiora me oona pikonga he kura tangihia o te maataamuri. The river of life, each curve more beautiful than the last.

(2) Our vision is 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.*

(3) In order to realise the vision, the following objectives will be pursued:

- *(a) the* ***restoration and protection*** *of the health and wellbeing of the Waikato River:*
- *(b) the* ***restoration and protection*** *of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships:*
- *(c) the* ***restoration and protection*** *of the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships:*
- *(d) 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:*
- *(e) the integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River:*
- *(f) the adoption of a precautionary approach towards decisions that may result in significant adverse effects on the Waikato River and, in particular, those effects that threaten serious or irreversible damage to 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) the recognition that the Waikato River is degraded and should not be required to absorb further degradation as a result of human activities:*
- *(i) the protection and enhancement of significant sites, fisheries, flora, and fauna:*
- *(j) the recognition that the strategic importance of the Waikato River to New Zealand's social, cultural, environmental, and economic wellbeing requires the* ***restoration and protection*** *of the health and wellbeing of the Waikato River:*
- *(k) the* ***restoration*** *of water quality within the Waikato River so that it is safe for people to swim in and take food from over its entire length:*
- *(l) the promotion of improved access to the Waikato River to better enable sporting, recreational, and cultural opportunities:*
- *(m) the application to the above of both maatauranga Maaori and the latest available scientific methods.*

2. Strategy

To achieve the vision, the following strategies will be followed*:*

*(a) ensure that the highest level of recognition is given to the **restoration and protection** of the Waikato River:*

(b) establish what the current health status of the Waikato River is by utilising maatauranga Maaori and the latest available scientific methods:

(c) develop targets for improving the health and wellbeing of the Waikato River by utilising maatauranga Maaori and the latest available scientific methods:

(d) develop and implement a programme of action to achieve the targets for improving the health and wellbeing of the Waikato River:

*(e) develop and share local, national, and international expertise, including indigenous expertise, on rivers and activities within their catchments that may be applied to the **restoration and protection** of the health and wellbeing of the Waikato River:*

*(f) **recognise and protect** waahi tapu and sites of significance to Waikato-Tainui and other Waikato River iwi (where they do decide) to promote their cultural, spiritual, and historic relationship with the Waikato River:*

*(g) **recognise and protect** appropriate sites associated with the Waikato River that are of significance to the Waikato regional community:*

(h) actively promote and foster public knowledge and understanding of the health and wellbeing of the Waikato River among all sectors of the Waikato regional community:

*(i) encourage and foster a "whole of river" approach to the **restoration and protection** of the Waikato River, including the development, recognition, and promotion of best practice methods for **restoring and protecting** the health and wellbeing of the Waikato River:*

*(j) establish new, and enhance existing, relationships between Waikato-Tainui, other Waikato River iwi (where they so decide), and stakeholders with an interest in advancing, **restoring, and protecting** the health and wellbeing of the Waikato River:*

(k) ensure that cumulative adverse effects on the Waikato River of activities are appropriately managed in statutory planning documents at the time of their review:

*(l) ensure appropriate public access to the Waikato River while **protecting and enhancing** the health and wellbeing of the Waikato River.*

48. In our submission it cannot credibly be suggested that economic considerations have priority under the Vision and Strategy.

49. In response to the second question, the Court of Appeal in its recent decision in *RJ Davidson Family Trust v Marlborough District Council* [16] (in the context of a resource consent appeal) stated:

> Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies and a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole"[17].

50. That decision does not detract in any way from the decision of the Supreme Court in *King Salmon*[18] holding that prescriptive or directive policies in a superior instrument must be given effect to in a plan and that the plan making authority, or the Environment Court on appeal, cannot invoke a broad overall judgement to avoid doing so.

The plan-making process

51. Part 5 of the RMA is entitled "S*tandards, policy statements, and plans*". It provides for a hierarchy of instruments:

- National policy statements and national environmental standards (promulgated by central government);
- Regional policy statements (promulgated by a regional council) which must give effect to any national policy statement, NZ coastal policy statement, or national standard; [19]
- A regional plan for the whole or part of the region for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g), or (ga). [20]

52. Section 2(1) of the RMA states that "*change*" has the meaning given in section 43AA, which includes a change proposed by a local authority to a

[16] [2018] NZCA 316 at [73] per Cooper J
[17] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25]; (CA)
[18] *Environmental Defence Society Inc v NZ King Salmon* [2014] NZSC 38
[19] Section 62(3) RMA.
[20] Section 65(1) RMA.

plan under clause 2 of Schedule 1. Under section 43AAC(a) "*proposed plan*" includes a change to a plan proposed by a local authority that has been publicly notified under clause 5 of Schedule 1 but has not become operative in terms of clause 20 of that schedule. Proposed Plan Change 1 is both a "change" and a "proposed plan" in terms of those definitions.

53. A regional plan must:

- be prepared in accordance with Schedule 1 of the RMA. [21]
- give effect to any national policy statement and the regional policy statement (which in this case includes the Vision and Strategy for the Waikato River). [22]
- not be inconsistent with the regional coastal plan.[23]

54. A regional council must change any regional plan in accordance with: [24]

(a) its functions under section 30; and

(b) the provisions of Part 2; and

(c) (does not apply); and

(d) its obligations to prepare an evaluation report under section 32; and

(e) its obligation to have particular regard to such evaluation report; and

(ea) national policy statement, a NZ coastal policy statement, and a national planning standard; and

[21] Section 65(2) RMA.
[22] Section 67(3) RMA.
[23] Section 67(4)(b) RMA.
[24] Section 66(1) RMA

(f) any regulations.

55. In changing a regional plan, a regional council shall have regard to management plans and strategies prepared under other Acts, and fisheries regulations to the extent that their content has a bearing on resource management issues of the region. [25]

56. In Schedule 1 of the RMA:

- A proposed plan change must be publicly notified under clause 5(1).
- Once a plan change has been publicly notified then any person may make a submission (that does not relate to trade completion or the effects of trade competition) pursuant to clause 6. A local authority in its own area may make a submission under subclause (2).
- A plan change may be withdrawn in part under clause 8D before any appeal has been made to the Environment Court or the plan has been approved by the local authority. In response to Pare Hauraki's application for judicial review, the WRC withdrew Plan Change 1 from a defined northern area to enable consultation with Pare Hauraki to take place. Plan Change 1 remained in force over the balance area of the Waikato River catchment as defined.
- Once the consultation with Pare Hauraki had been completed, the WRC promulgated a variation to bring the excluded northern area back within Plan Change 1. The variation was publicly notified pursuant to clause 5 and from that date Plan Change 1 had effect under clause 16B(2) as if it had been so varied. Submissions were received on the variation. At that point the variation and the plan change were at the same procedural stage. In terms of clause 16B(1) the variation merged in and became

[25] Section 66(2)(c)(i) and (iii) RMA.

part of proposed Plan Change 1. From that date there was a single merged instrument which you are dealing with today.

- The plan making authority must prepare a summary of submissions and publicly notify the availability of the summary combined with notice that certain persons may make a further submission no later than 10 working days after the date of public notice – clause 7(1). The WRC prepared a summary of the submissions on the merged instrument and called for further submissions.

- The WRC may invite any submitter to meet with it for the purpose of clarifying or facilitating the resolution of any matter – clause 8AA(1).

- With the consent of the submitter, the Hearing Panel may refer issues to independent mediation pursuant to clause 8AA(3) and (4).

- Submitters having asked to be heard, the WRC must hold a hearing under clause 8B.

57. Section 34A authorises the WRC to delegate the hearing functions, other than the approval of the plan change, to hearings commissioners. In the present case the WRC resolved that the hearing be conducted by five independent commissioners with appropriate expertise.

58. Under section 40(1) submitters who have stated that they wished to be heard at the hearing may speak (either personally or through a representative) and call evidence.

59. Under section 41B (3) and (4) the Hearing Panel may direct submitters who intend to call expert evidence to provide briefs of that evidence at least 5 working days before the hearing.

60. The WRC (in this case through its consultant, Mr McCallum-Clark) has prepared a report under section 42A of the RMA on Block 1 matters setting

out recommendations on the submissions, including any suggested amendments to the plan change.

61. Returning to Schedule 1:

- Under clause 10 the Hearing Panel must give decisions on submissions including reasons. In terms of subclause (3), the Hearing Panel is not required to give a decision that addresses each submission individually. Under subclause (2)(a) the Panel may address the submissions in its reasons by grouping them according to provision or subject matter. The need for a further evaluation report under section 32AA is addressed separately in the next section of these submissions.

- The decisions must be given no later than two years after notifying the proposed plan change under clause 5. This period has been extended under section 37 in the present case.

Section 32AA further evaluation

62. The Resource Management Amendment Act 2013 was enacted on 3 September 2013. Part 2 of the Amendment Act (which came into force on 3 December 2013) substituted a new section 32 and 32AA (*inter alia*) and amended section 32A in the principal Act.

63. These provisions apply to Plan Change 1 because it was publicly notified on 22 October 2016, well after the 2013 Amendment Act was in force.

64. Plan Change 1 was accompanied by an evaluation report under section 32. That report is available on the WRC website.[26]

65. The obligation on the Hearing Panel to undertake a further evaluation in accordance with section 32AA before making a decision arises under

[26] https://www.waikatoregion.govt.nz/council/policy-and-plans/plans-under-development/healthy-rivers-plan-for-change/the-hearings/

clause 10(2)(ab) of Schedule 1 and clause 10(4)(aa) which states that the Hearing Panel must have particular regard to the further evaluation when making its decision. As a matter of logic the further evaluation report must be undertaken before the decision is made.

66. In terms of section 32AA a further evaluation is required only for any changes made after the evaluation report was completed, must be undertaken in accordance with section 32(1) to (4), must be undertaken at a level of detail that corresponds to the scale and significance of the changes and must be published in an evaluation report at the same time as the decision on the proposal as publicly notified or be referred to in the decision-making record in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with this section.

67. In terms of section 32(1) the required evaluation must –

(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and

(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by –

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) summarising the reasons for deciding on the provisions; and

(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

68. In terms of subsection (2) such assessment must –

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for –

(i) economic growth that are anticipated to be provided or reduced;

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) Assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

69. That is a potentially onerous and time-consuming task for the Hearing Panel. Whilst submitters are not obliged to address section 32, the Panel may care to ask questions to elicit the information required to support the further evaluation under section 32AA.

Scope for Amending PC 1

70. The Panel's role is to hear submissions on PC1 (clause 8B of Schedule 1) and "give a decision on the provisions and matters raised in submissions" (clause 10(1)).

71. The Panel will no doubt be familiar with the law relating to your jurisdiction to make changes to PC 1. As the High Court said in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [[1994] NZRMA 145, at p166], the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. There are two related issues to consider:

- Is the submission "on" PC1? and
- If so, are the proposed amendments to PC1 within the scope of the submission?

72. The Courts have emphasised the need to approach the interpretation of submissions in a "realistic workable fashion rather from the perspective of legal nicety". [27]

73. Equally, the Courts have emphasised the need for 'procedural fairness' to ensure that parties affected by an amendment are given an opportunity to participate in the plan change process. This needs to be considered when determining if a submission is "on" the plan change; and when considering the extent to which it creates scope to amend the plan change. As the High Court stated in *Clearwater Resort Ltd v Christchurch CC* [28] the two key questions are:

> (i) Whether the submission addresses the change to the status quo advanced by the proposed plan change; and
> (ii) Whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

74. In *Bluehaven Management Ltd v Western Bay of Plenty DC*[29] the Environment Court suggested that:

> ...one might also ask, in the context of the first limb of the *Clearwater* test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.

75. We have not undertaken an analysis of the submissions on PC1 in light of the above. That is something the Panel will need to do when considering what amendments should be made. However, we make the following high level observations:

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[27] *RFBPS v Southland DC* [1997] NZRMA 408, at 413
[28] AP34/02, 14 March 2003, at para [66]
[29] [2016] NZEnvC 191 at [37]

(a) Some submitters on both PC1 and Variation 1 have lodged submissions that are inconsistent. For example in its original submission on PC1 Federated Farmers seeks that the Values and Uses be retained. But its submission on Variation 1 seeks a number of changes to these provisions, despite them not being altered by Variation 1. The Panel can ask these submitters to clarify their position, although statements made at the hearing cannot broaden the scope of the written submissions.

(b) In some cases submissions do not state with any particularity what relief is sought. In these cases, the Panel will need to determine whether, read as a whole, it is reasonably clear what relief is requested. It is particularly important in these cases to consider the 'procedural fairness' issues discussed above. The Panel can ask the submitters for clarity at the hearing – but, again, a submitter cannot broaden the scope of their written submission through what they might say at the hearing.

(c) Further submissions can only support or oppose an original submission. In some cases further submissions seek to expand on the submitter's original submission. In such a case the further submission cannot broaden the scope of the original submission.

Giving effect to the National Policy Statement for Freshwater Management ("NPS-FM")

76. As explained in Ms May's evidence (paras 41-42), a key driver for Plan Change 1 is the NPS-FM. Under sections 67(3)(a) and 66(1)(ea) of the RMA, Plan Change 1 must "give effect to" the NPS-FM.

77. Potential issues are created in this case because the NPS-FM was changed in September 2017 which was:

(a) After notification of Plan Change 1 (October 2016) and the close of submissions on PC1 (March 2017); but

(b) Before notification of Variation 1 (April 2018), the close of submissions on Variation 1 (May 2018), and the close of further submissions on the merged Plan Change 1 document (September 2018).

78. There are no 'transitional provisions' in the RMA preserving the earlier (2014) version of the NPS-FM as the one that must be given effect to. Rather, unless the NPS itself directs certain provisions to be included in plans,[30] the RMA schedule 1 process must be used to amend plans to give effect to the NPS (section 55(2) - (2D) RMA).

79. Accordingly, while Plan Change 1 was drafted to give effect to the 2014 version of the NPS-FM, it must now be assessed against the 2017 version. However, this does not allow Plan Change 1 to be amended to give effect to the NPS-FM unless there is scope in the submissions to do so (see discussion above). Where amendments are necessary to give effect to the NPS-FM and the amendments are not within the scope of submissions a further variation or plan change will be required.

80. Mr McCallum-Clark has identified that there are two key areas where full compliance with the NPS-FM may not be achieved:

(a) Values and uses are not clearly specified for each FMU, and, as the targets and limits are based on sub-catchments – it is not clear what the targets and limits are for each FMU; and

(b) Not all compulsory attributes from the NPS-FM are included in the targets and limits.

[30] See, for example, Policies A4 and B7 of the NPS-FM.

81. As the hearing proceeds and these issues arise it will be necessary to closely analyse the relevant submissions to determine what scope there may be to address these issues (if required and desirable).

Relevance of the NZCPS

82. In its questions the Panel has noted DoC's submission points regarding the need to PC1 to give effect to the NZCPS (especially in relation to coastal water quality) and asked:

> Does the Council agree with the DOC submission; to what extent does the Council agrees that the NZCPS is relevant to the Panel's consideration of PC1, and how the PC1, or any likely recommended amendments to it, addressed this issue?

83. The NZCPS contains objectives and policies "in relation to the coastal environment", which includes land beyond the landward boundary of the coastal marine area. PC1 must "give effect to" the NZCPS (section 67(3)(b) RMA), to the extent it is relevant.

84. As shown on the attached plan the PC1 boundary (purple line) extends 'past' the CMA boundary (red line) and therefore does include land that would likely be within the "coastal environment"[31].

85. PC1 provisions managing land uses that create discharges *directly* into the CMA clearly require consideration against the NZCPS. The DoC submission appears to argue that all of PC1 needs to be assessed against the NZCPS because all discharges to the Waikato and Waipa rivers eventually 'discharge' to the coast at Port Waikato. That is correct from a theoretical point of view. But, the extent to which the NZCPS is relevant will depend on the nexus between the effects of the land uses and their effects on the coastal environment.

[31] But the PC1 provisions do not apply within the CMA. This area is covered by the Regional Coastal Plan.

86. In any event, it is submitted that by maintaining and reducing contaminants in the Rivers, PC1 will be giving effect to the NZCPS, including objective 1:

> To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by...Maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

87. Accordingly, no amendments to PC1 are required to address this issue.

Validity of Permitted Activity Rule 3.11.5 (Certified Industry Schemes)

88. Rule 3.11.5.3(4) provides that:

> Except as provided for in Rule 3.11.5.1 and Rule 3.11.5.2 the use of land for farming activities (excluding commercial vegetable production) where the land use is registered to a Certified Industry Scheme, and the associated diffuse discharge of nitrogen, phosphorus, sediment and microbial pathogens onto or into land in circumstances which may result in those contaminants entering water is a permitted activity subject to the following conditions:
>
> > …(4) The Certificate Industry Scheme meets the criteria set out in Schedule 2 and has been approved by the Chief Officer of Waikato Regional Council.

89. The criteria set out in Schedule 2 includes that:

> …The application must demonstrate that the Certified Industry Scheme:
> 1. Is consistent with:
> a. the achievement of the water quality targets referred to in Objective 3; and
> b. the purposes of Policy 2 or 3; and
> c. the requirements of Rules 3.11.5.3 and 3.11.5.5…

90. There is a concern in relation to the vires of Rule 3.11.5.3(4). In their questions the Panel notes that:

> A number of submitters have raised the vires of the use of "Certified Industry Schemes" and consider the rules (eg 3.11.5.3) essentially delegate a WRC function to industry without proper process, and effectively creates and enables an alternative resource management bureaucracy.

91. And at paragraph 134 of their report the section 42A reporting officers state:

> ...Officers note the management efficiencies of farming sector involvement and grouping multiple farming activities under a single management framework, but question whether the Certified Industry Scheme framework provides for improved practices and reduction in discharges, and whether the permitted activity framework meets the requirements of section 70 of the RMA.

92. We understand that the primary issue is whether Rule 3.11.5.3(4) creates too much uncertainty as to what is permitted, such that the rule might be invalid due to the inherent vagueness.

The relevant legal principles

93. Section 87A(1) of the RMA provides that a resource consent is not required for a permitted activity if it complies with the requirements, conditions, and permissions, specified in the RMA, regulations, plan, or proposed plan.

94. In addition, there is a long line of cases stating that rules require certainty. The main authority on vagueness leading to invalidity is the decision of McGehan J in *A R and M C McLeod Holdings v Countdown Properties Ltd*.[32] Here the High Court noted:

> ... predominant use rights must not be described, even in objective fashion, in terms so nebulous that the reader is unable to determine whether or not a use may be carried on in the zone.
>
> …The law does not require predominant uses to be defined ("specified") with scientific or mathematical certainty. Some degree of flexibility is permissible. A decision making body frequently must hear evidence, and reach a conclusion after weighing competing factors. In the end, the question reduces to one of degree: is the subject description too wide, or too vague, to have "some measure of certainty"? That is not an inquiry assisted by imported references to "discretion" and "value judgments". It is not a situation for automatic condemnation because some degree of evaluation is involved.

95. *McLeod Holdings* was decided under the Town and Country Planning Act 1977. However, the Environment Court has adopted the same approach in the context of the RMA in a series of other cases.[33]

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[32] *A R and M C McLeod Holdings v Countdown Properties Ltd* (1990) 14 NZTPA 362 at 373.

[33] *Twisted World Ltd v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at [62]-[64]; *Friends of Pelorus Estuary Inc v Marlborough District Council* EnvC Blenheim C004/08,

96. In particular, *Twisted World Ltd v Wellington City Council* concerned the determination of the true construction of a district rule and its application to the signs in question. The permitted activity standard provided that:[34]

> Signs must be displayed only on plain wall surfaces where they do no obscure windows or architectural features.

97. The Court analysed the meaning of the words "obscure" and "architectural" and stated that:[35]

> We accept that concepts of subjective formulation and vagueness should be distinguished…
>
> … It is in the nature and purpose of district plans that some classifications and rules cannot be expressed in measurable units, such as of height or area. Objectively phrased conditions of permitted activities are not necessarily ruled out merely because they require an exercise of judgement. But they are to be assessed for validity on their own degree of certainty or lack of it. So we accept the submissions of counsel for the appellants that we have to consider whether the condition in question is too wide or too vague to have that element of certainty by which a decision-making body could reach a conclusion after hearing evidence and weighing competing factors.

98. The allowance for some evaluation was noted by Judge Hassan in *Rawlings v Timaru DC* [2014] NZEnvC 49.[36] His Honour said (at para [23]):

> ...A similar example, cited by counsel for the Pilchers, is *Friends of Pelorus Estuary Inc v Marlborough District Council* EnvC C004/08. There, a permitted activity rule that left some scope for discretion, by use of the words "significant" and "best practicable option", was held intra vires.[37]

Is Rule 3.11.5.3 invalid?

99. In light of the above case law, the overall test is whether the permitted activity rule can be objectively determined without it being too wide or

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24 January 2008 at [108]; *Central Otago District Council v Greenfield Rural Opportunities Ltd* EnvC Queenstown C128/2009, 14 December 2009 at [61] to [62]; and *New Zealand Winegrowers Horticulture New Zealand v Marlborough District Council* [2013] NZEnvC 7 at [44].

[34] *Twisted World Ltd v Wellington City Council*, above n 2, at [12].

[35] *Twisted World Ltd v Wellington City Council*, above n 2, at [62] and [64].

[36] In this case, Judge Hassan concluded that a permitted activity requiring it to be "accommodation for a dependent relative" allowed for too much "subjective discretionary judgment" [paras 39-40].

[37] *Friends of Pelorus Estuary Inc v Marlborough District Council* EnvC C004/008, at [100].

vague. Importantly, however the rule is not necessarily held to be invalid merely because it entails some level of evaluation.

100. In terms of Rule 3.11.5.3(4), it is possible to ascertain objectively that the Permitted Activity conditions are met.

101. There are two elements to Rule 3.11.5.3(4), being that the Scheme:

(a) Meets the criteria in Schedule 2; and

(b) Has been approved by the Chief Executive.

102. There can be little argument that there is any uncertainty in relation to element (b) ie whether an approval has been given. That is simply a matter of providing evidence that this has occurred, as a matter of fact.

103. Element (a) does however include some evaluation – primarily in relation to criteria A(1), which is that the Scheme must be "consistent with":

> a. The achievement of the water quality targets referred to in Objective 3; and
> b. The purposes of Policy 2 or 3; and
> c. The requirements of Rules 3.11.5.3 and 3.11.5.5.

104. In practice, those two elements constitute one action ie the Chief Executive being satisfied (and therefore giving approval) that the Schedule 2 criteria will be met. In that regard the Rule could be improved by rewording it to something like:

> The Certified Industry Scheme has been certified by the Chief Executive of Waikato Regional Council as complying with the criteria of Schedule 2.

105. In our submission the extent of evaluation required when certifying a Scheme does not render the rule invalid, especially when the above provisions are read in the context of the rule as a whole and the other permitted activity conditions that must be met. However, if required, it may

be possible to modify the wording to increase the certainty as to what must be achieved when certifying a Scheme.

The Collaborative Stakeholder Group process

106. The Hearing Panel has asked: "*to what extent was the content of the various elements of PC 1 the subject of consensus among the CSG?*" That information is recorded in a document which is being produced to the Hearing Panel.

107. The information about the CSG process contained in the WRC evidence is provided as a matter of historical narrative and context only. The WRC considers that it was innovative in the approach that it took with the CSG and that the consultation with, and process to involve the community went well beyond any statutory requirement. Nevertheless, some submitters in their evidence are critical of the process.

108. We emphasise that the Hearing Panel does not have jurisdiction to adjudicate over any dispute about a non—statutory process. Its role in terms of clause 10 of Schedule 1 is to give a decision on the proposed Plan Change provisions and matters raised in submissions. Proposed Plan Change 1 as publicly notified says what it says irrespective of what the voting behind it may have been.

Rules – section 9 and section 15

109. The Panel has posed the following question:

> The Panel accepts that the Rules will be addressed in subsequent hearings, but to set the context for the future hearings asks the following -
>
> Most of the rules appear to be a combination of a section 9 landuse rules and a section 15 discharge
> rule (eg Rule 3.11.5.1 - "*The use of land for farming activities and the associated diffuse discharge of nitrogen, phosphorus, sediment and microbial pathogens onto into land in*
> *circumstances which may result in those contaminants entering water ").*

> Are the rules a land use rule (and 'run' with the land') or a discharge rule (giving rise to the possibility of transfer), or both?
>
> This also raises the question of who 'owns' the Farm Environment Plan (FEP)and any established Nitrogen Reference Point(NRP) (in particular with respect to leased land) and the 'right' to be able to discharge (diffusely) if it is a discharge, as opposed to a land use, consent.
>
> Is it envisaged that any discharge consent is able to be 'transferred' (section 137 - Transferability of discharge permits). If so, what is the likely impact on the land from which the transfer has occurred, which would then either not comply with its FEP, or have a reduced or no ability to diffusely discharge any of the 4 contaminants if the transfer had 'obtained' all of the discharge capacity for the site?

110. In its decision on the appeals on the WRC Variation 5 Lake Taupo, the Environment Court addressed in some detail the issue whether Rules 3.10.5.1 to 3.10.5.10 should be framed as discharge rules and land-use rules or land-use rules.[38] The Court commenced its discussion:

> [165] The rules in RPV5 were originally framed as land use rules under section 9(3) of the Act. Rules 3.10.5.1 — 3.10.5.10 were all, and still are, introduced with the words "the use of land … ". Further, the heading of that section was, and still is, "implementation methods — land use controls".
> [166] Carter Holt sought to make the rules discharge rules under section 15 as well. As a consequence the Regional Council has adopted a cautious "belt and braces" approach by proposing to add the words " … and Discharges … " to the heading; and " … and the associated discharge of nitrogen to land … " to the rules. This would effectively make them hybrid rules under both section 9 and section 15.
> [167] The purpose behind the Regional Council proposing to make the rules discharge rules under section 15 as well as land use rules under section 9 was out of an abundance of caution. Such caution arose out of the Regional Council's concern that non-point source discharges from animal emissions and nitrogen fixing plants may well be unlawful discharges under section 15(1)(b) of the Act.

111. The Court clearly identified the difficulties that could follow if land use and discharge authorisations were not clearly distinguished:[39]

[38] Carter Holt Harvey Limited v Waikato Regional Council decision A123/08, 6 November 2008 at [165]
[39] footnotes omitted

> [196] We also agree with Mr Milne[40] and Mr Rogers, that combining discharge permits and land use rules within the one rule could create administrative difficulties for the processing of, and decisions on, resource consent applications. As Mr Rogers pointed out **section 87 of the Act defines the types of resource consents in a manner which clearly distinguishes land use consents from discharge permits. This distinction is important as other sections of the RMA treat them differently. For example:**
>
> - (i) Section 9(3) creates a presumption that land may be used unless a regional plan provides otherwise. By contrast, section 15(1) prohibits discharges unless allowed by a regional plan or resource consent;
> - (ii) Sections 105 , 107 and 108(8) describe matters relevant to discharge applications and restrictions on their grant. These sections do not apply to land use consents;
> - (iii) Section 108(2)(e) specifically allows the imposition of a condition on a discharge permit requiring the holder to adopt the best practicable option. No corresponding provision exists for land use consents;
> - (iv) The default duration for land use consents is unlimited, whereas the default duration for a discharge permit is 5 years (with a maximum duration of 35 years); [108]
> - (v) Land use consents attach to the land, whereas discharge permits may be transferred in certain circumstances; [109] and
> - (vi) Section 128(1)(b) enables the review of a discharge permit to meet, among other things, standards of water quality promulgated in an operative regional plan. No such review applies to a land use consent.
>
> [197] Accordingly, if the region wide discharges rules are to be incorporated into RPV5, they should be clearly differentiated from the land use rules.
> [emphasis added]

112. The Court stated further:

> [203] [Waikato Regional Council] seeks to ensure that the rules of RPV5 are framed in such a way as to encompass and properly authorise all aspects of activities to which the rules relate, including, if necessary, discharges from farm animals. It did not seek a specific finding on the issue of whether farming non-point source discharges are contrary to section 15. Its concern was to ensure the wording of the rules is sufficient to authorise such discharges, if such authorisation is necessary.

[40] Phillip Milne

> [204] We reiterate, that subject to the need for certainty and completeness, we can see no legal reason why a "catch all" discharge rule could not be promulgated. Such a rule could expressly allow discharges of nitrogen from specific activities; in accordance with a detailed Nitrogen Management Plan, compiled to ensure that an **NDA** is complied with, or in accordance with specific permitted land use activities; and which would otherwise contravene section 15. Incorporating such a rule into RPV5 would ensure that the rules provide a one-stop shop.

113. The Court concluded:

> **Land use and discharge rules — findings**
>
> [206] We find that:
>
> - (i) We have jurisdiction to amend RPV5 to incorporate appropriate discharge rules by invoking section 293 of the Act.
> - (ii) RPV5 needs to be integrated with the region-wide rules of the regional plan. This can be done by either:
>
> (a) **providing for discharge rules, or a discharge rule, to control the discharges of nitrogen in RPV5**; or [emphasis added]
>
> (b) in some way cross-referencing the other region-wide rules and RPV5 and providing for a mechanism to accommodate any discrepancy — for example the threshold of any permitted discharge under the region-wide rules may be exceeded by the equivalent discharges allowed under the NMP and NDA.
>
> - (iii) **There is no legal reason why discharges of nitrogen from specific activities, in accordance with the detailed Nitrogen Management Plan compiled to ensure that an NDA is complied with, or in accordance with specific permitted land use activities, and which would otherwise contravene section 15, should not be expressly allowed in a rule.** [emphasis added]
> - (iv) It is our tentative view, that in the interests of simplicity, it would be more appropriate to incorporate the discharge rules within RPV5.
> - (v) **Any discharge rules incorporated into RPV5 should be clearly differentiated from the land use rules.** [emphasis added]
>
> Accordingly we direct:
>
> - (a) The respondent is to prepare changes to the rules of RPV5 or the regional plan so that any associated discharges of nitrogen that would otherwise be in breach of section 15 are expressly allowed;

- (b) The respondent and Federated Farmers planning witnesses (Mr van Voorthuysen and Mr Hartley) are to caucus in regard to the changes and the respondent is thereafter to consult with all of the appellants and section 274 parties in regard to the changes, including any agreed changes arising from caucusing;
- (c) The respondent is to prepare any consequential amendments to RPV5 and the regional plan arising out of this decision.
- (d) Counsel for the respondent is to liaise with counsel for the other parties following caucusing in an endeavour to agree on the legal issues, and failing agreement, to identify succinctly any remaining legal issues outstanding;
- (e) Following the caucusing and consultation, counsel for the respondent is to file with the Court a memorandum setting out the proposed process and timeframes for progressing matters.

114. The process directed by the Court was followed, and an amended set of provisions agreed, as described in the planners' caucusing statement. In particular that the statement records:

> **2.1 Land use rules**
>
> In accordance with the Court's Decision rules 3.10.5.1 to 3.10.5.9 are now land use rules.
>
> **2.2 New discharge rules**
>
> We then implemented the Court's finding on its Fifth Issue (page 4 of the Decision) as follows.
>
> **2.2.1 Rule 3.10.5.10**
>
> Firstly, we drafted a new permitted activity rule 3.10.5.10 to authorise the discharge of nitrogen onto or into land arising from the land use activities authorised under rules 3.10.5.1 to 3.10.5.9 in circumstances which may result in nitrogen entering water, where the discharge of nitrogen would otherwise contravene section 15(1) of the RMA.

115. The joint memorandum of the parties dated 20 December 2010 attached the caucusing statement. The provisions attached to that memorandum were subsequently approved by the Court[41] which stated:

> "[3] We have read and considered the provisions that have been filed and are satisfied that they reflect the directions in the Courts [sic] interim decision."

[41] Carter Holt Harvey v WRC [2011] NZEnvC 163

The approved provisions now form Chapter 3.10 of the operative Waikato Regional Plan.

116. Rules 3.10.5.1 to .7 and .9 all commence with the words: “The use of land”. Rule 3.10.5.8 commences: “Any use of land”.

117. Rule 3.10.5.10 authorises as a permitted activity discharges arising from the land use activities authorised under Rules 3.10.5.1 to .9.

118. The Introduction to the Rules in 3.10.5 states:

> The purpose of these rules is to implement the policies that adopt nitrogen capping and offsetting to protect the water quality of Lake Taupo. The rules manage existing and new nitrogen leaching activities either as permitted activities with standards, or as controlled activities that determine landowner nitrogen discharge allowances. **The rules require that farmers obtain land use consents. Discharges** of nitrogen arising from land use activities **are authorised by a separate permitted activity rule**. [emphasis added]

119. It is clear:

- Rules 3.10.5.1 to .9 are land use rules which provide for land uses;
- Rule 3.10.5.10 is a discharge rule which authorises certain discharges as a permitted activity;

The WRC has carried out the direction of the Environment Court to clearly differentiate the discharge rule from the land use rules. There are no “hybrid” rules in Chapter 3.10.

120. We submit that the Court’s reasoning in the Variation 5 decision, and in paragraph [196] in particular, is compelling and that for those reasons the hybrid rules in proposed Plan Change 1 should be decoupled.

121. Mr McCallum-Clark will answer the other aspects of the question.

Attachments

122. Plan showing Coastal Marine Area Waikato River Mouth boundary.

123. Table of who is answering the Hearing Panel’s questions; by person and by question number.

Dated at Hamilton 11 March 2019

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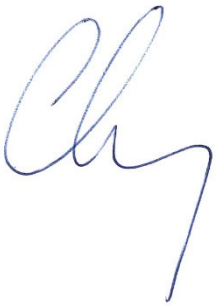
J Milne
Counsel for WRC



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G Lanning
Counsel for WRC

Plan showing Coastal Marine Area Waikato River Mouth boundary

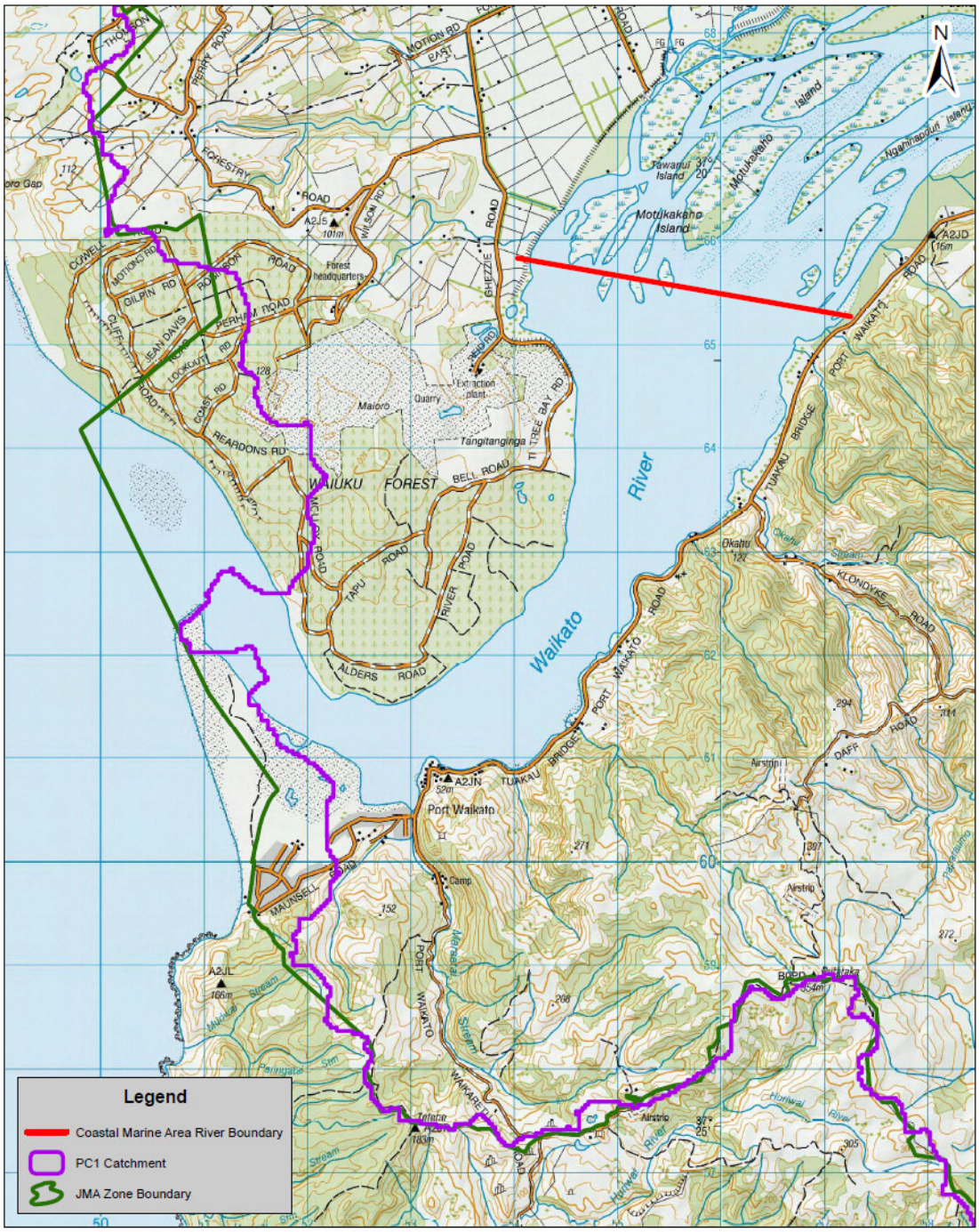

Table of who is answering the Hearing Panel's questions – by person

#	Name	Questions responding to:
1.	Legal Submissions	Q1. Interpreting and Implementing the Vision and Strategy Q3. Collaborative Stakeholder Group (CSG) Process Q6. National Policy Statement for Freshwater Management 2014 Q8. Coastal and River interface Q10. Rules - Section 9 and section 15 Q12. Certified Industry Schemes
2.	Bryce Cooper	Q1. Interpreting and Implementing the Vision and Strategy Q2. Science and economic modelling underpinning the provisions of PC1
3.	Mike Scarsbrook	Q5. Table 3.11.1 Numerical Values Q13. Nitrogen Load to Come
4.	Bill Vant	Q7. The report - Trends in river water quality in the Waikato region, 1993 – 2017
5.	Matthew McCallum-Clark	Q4. Documents we must: give effect to, not be inconsistent with, have regard to, and take into account Q6. National Policy Statement for Freshwater Management 2014 Q8. Coastal and River interface Q9. Sub-catchment based planning approach Q10. Rules - Section 9 and section 15 Q11. Overseer Q12. Certified Industry Schemes Q14. Section 42 A report Q15. Sub-catchment based planning approach

Table of who is answering the Hearing Panel's questions – by question number

#	Question	Response from
1.	Interpreting and Implementing the Vision and Strategy	Legal Submissions Bryce Cooper
2.	Science and economic modelling underpinning the provisions of PC1	Bryce Cooper
3.	Collaborative Stakeholder Group (CSG) Process	Legal Submissions
4.	Documents we must: give effect to, not be inconsistent with, have regard to, and take into account	Matthew McCallum-Clark
5.	Table 3.11.1 Numerical Values	Mike Scarsbrook
6.	National Policy Statement for Freshwater Management 2014	Legal Submissions Matthew McCallum-Clark
7.	The report - Trends in river water quality in the Waikato region, 1993 – 2017	Bill Vant
8.	Coastal and River interface	Legal Submissions Matthew McCallum-Clark
9.	Sub-catchment based planning approach	Matthew McCallum-Clark
10.	Rules - Section 9 and section 15	Legal Submissions Matthew McCallum-Clark
11.	Overseer	Matthew McCallum-Clark
12.	Certified Industry Schemes	Legal Submissions Matthew McCallum-Clark
13.	Nitrogen Load to Come	Mike Scarsbrook
14.	Section 42 A report	Matthew McCallum-Clark

15.	Sub-catchment based planning approach	Matthew McCallum-Clark