**BEFORE THE INDEPENDENT HEARINGS PANEL**

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| **IN THE MATTER** | of the Resource Management Act 1991 |
| **AND** | |
| **IN THE MATTER** | of Plan Change 1: Waikato and Waipā River Catchments to the Waikato Regional Plan |

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**CLOSING STATEMENT FOR THE WAIKATO REGIONAL COUNCIL**
**(as plan change proponent)**
**10 October 2019**

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**MAY IT PLEASE THE COMMISSIONERS:**

## 1. INTRODUCTION

**1.1** This is the closing statement on behalf of the Waikato Regional Council (**Council**) as proponent of Proposed Plan Change 1 to the Waikato Regional Plan (**PC1**). To be read as part of this closing statement, we have **attached**:

(a) a Closing Planning Statement prepared by the section 42A reporting team (**Annexure A**);

(b) a 'tracked changes' version of the PC1 provisions since the last section 42A report version (**Annexure B**);

(c) a 'tracked changes' version of the PC1 provisions since notification (**Annexure C**); and

(d) a 'mock resource consent' for a controlled activity under proposed Rule 3.11.5.4 (**Annexure D**).

**1.2** Together these documents represent the position of the Council, in response to the evidence and legal submissions provided by the submitters.

**1.3** As explained in the Closing Statement of Mr Mark Tamura (dated 26 September 2019), this closing statement[1] also represents the position of the Waikato Regional Council as submitter.

**1.4** This closing statement addresses the following issues:

(a) Planning Context: The Vision & Strategy/Te Ture Whaimana and the NPS-FM;

(b) Scope to make changes to PC1;

(c) The limits to what can be a permitted activity;

1 i.e. The Closing Statement for the Waikato Regional Council (as plan change proponent) dated 10 October 2019.

(d) Controlled activity or restricted discretionary activity for farming?

(e) Scope to change an FEP;

(f) Applying for resource consent 'ahead of time';

(g) Including the "uses" and "values" in PC1;

(h) Changes for forestry;

(i) Providing for the development of Tangata Whenua Ancestral Lands;

(j) The 'principle of retroactivity';

(k) Relevance of the Government's Essential Freshwater: Action for Healthy Waterways Package; and

(l) PC10 (Lake Rotorua Nutrient Management) Interim Decision.

## 2. THE PLANNING CONTEXT

*The Vision & Strategy/Te Ture Whaimana.*

**2.1** As PC1 itself makes clear, achieving the Vision & Strategy for the Waikato River/Te Ture Whaimana o Te Awa o Waikato (**Vision & Strategy**), is the fundamental purpose of PC1. The background to, and legislative status of, the Vision & Strategy is set out in our opening legal submissions (11 March 2019). Importantly, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Settlement Act**) makes it clear that the Vision & Strategy is a critical part of the settlement of raupatu claims by Waikato-Tainui. In addition, the Settlement Act has formed the model for the other settlements relating to the Waikato and Waipā Rivers.[2]

**2.2** The Vision & Strategy is intended by Parliament to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River".[3] Moreover, it should be interpreted in a manner that best furthers (amongst other things) "the overarching purpose of the settlement" of the raupatu claim, which is to "restore and protect the health of the Waikato River for future generations".[4] This statutory direction is important.

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2 Ngāti Tūwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010; and the Ngā Wai o Maniapoto (Waipā River) Act 2012. But for ease of reference this closing refers to the Settlement Act as a shorthand reference to all three settlement statutes. Likewise, a reference to the "Waikato River" is shorthand for a reference to the "Waikato and Waipā Rivers".

3 Settlement Act, section 5(1). As noted above, the same approach applies to the Waipā River.

4 Sections 5(2) and 3.

**2.3** The key points to emphasise, in relation to this closing statement and the Panel's consideration of PC1, are that the Vision & Strategy:

(a) must be "given effect to", as part of the Regional Policy Statement;[5] and

(b) prevails over any inconsistent provision in the Regional Policy Statement,[6] a national policy statement - including the National Policy Statement for Freshwater Management 2014 (**NPS-FM**).[7]

**2.4** The Vision & Strategy sets out the following Vision:

> ...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.

**2.5** It then sets out a number of objectives to be pursued to "realise the Vision". Consistent with the "overarching purpose of the settlement" the core theme of the Vision and the objectives is the "restoration and protection" of the "health and wellbeing" of the River. Importantly, in this context, the Vision & Strategy expressly recognises that the "Waikato River is degraded and should not be required to absorb further degradation as a result of human activities";[8] and requires the "adoption of a precautionary approach towards decisions that may result in significant adverse effects on the Waikato River..."[9].

**2.6** While the objectives require relationships (including economic relationships) with the River to also be restored and protected[10] – this is "in order to realise the vision". In this regard where an existing relationship is causing degradation, it cannot be a relationship that should be "protected".

**2.7** Therefore, the Vision & Strategy provides a strong directive to decision–makers to, amongst other things, not allow the River to "absorb further

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5 Section 67(3)(c) of the RMA.
6 Section 11(4) of the Settlement Act.
7 Section 12(1) Settlement Act.
8 Objective 3(h).
9 Objective (3)(f).
10 Objectives (3)(b)-(d).

degradation as a result of future activities". Giving effect to the Vision & Strategy requires Regional Plan provisions that will restore and protect the wellbeing of the River, even if that adversely affects, for example, economic interests. In this regard, the Vision & Strategy is 'unashamedly' focused on the wellbeing of the River[11]. That is its purpose which, as the Court said in the *Puke Coal* decision, does not conflict with Part 2 of the RMA because:[12]

> ... this is intentional and is intended to demonstrate that within the Waikato Region the restoration and protection of the river is to be regarded as a primary objective guiding policy and outcomes under the Act.

**2.8** In this regard, we disagree with the legal submissions on behalf of WARTA, who appear to argue that (in effect) economic interests can outweigh the need to restore and protect the wellbeing of the River. They focus on the words of the Vision that refer to "prosperous communities", and say that the PC1 provisions will, by imposing additional costs on farmers, not create "prosperous communities". For example, at paragraph 4.16 of counsel's Block 1 legal submissions, they say:

> While the Vision is undoubtedly directed towards protecting and restoring the Waikato River, the Vision specifically envisages that those objectives will be achieved while sustaining prosperous communities. A delicate balance is required to be struck – if we move too fast in imposing controls to achieve an ideal, significant economic and social harm could be caused for little environmental benefit.

**2.9** Putting aside whether there is any evidence to support WARTA's concerns regarding the effects of the PC1 provisions, the interpretation of the Vision & Strategy is incorrect. The sole focus on the one part of the Vision that refers to "prosperous communities" is inappropriate. The objectives and strategies to be "pursued" to "realise the Vision" are clearly focused on the need to restore and protect the River. The objectives and strategies do *not* mention "prosperous communities" but do refer to economic and other relationships *with the River*. A plain interpretation of the Vision & Strategy is that pursuit of the objectives and strategies will achieve the Vision, including "prosperous communities". In this regard we agree with counsel for the River Iwi, who said:[13]

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11 In their Closing Statement the River Iwi described the Vision & Strategy and PC1 as being "grounded in a unified *demand* for meaningful change" (para 23). And, at paragraph 38 they stated that "there is no question that the Waikato and Waipa Rivers must be protected from further degradation. The statutory framework, including Te Ture Whaimana, *demands* it".

12 *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223, paragraph [146].

13 Block 1 submissions, paragraph 39(c).

> These outcomes are expressed as intended consequences of a future that involves healthy Rivers. Accordingly, the references to the sustenance of abundant life and prosperous communities are not aims in themselves to be achieved by any means, but instead are intended to be the result of healthy Rivers.

**2.10** Counsel for WARTA then made the following submission:[14]

> No provision of the Settlement Act overrides the requirement for PC1 to achieve the purpose of the RMA. This was recognised in the Environment Court's decision on Variation 6:[15]
>
> > [440] The Settlement Act and the Vision and Strategy do not extend the functions and powers of the Regional Council under the Resource Management Act. Ms Forret mounted an argument based on the words restoration and protection in Objective C in the Vision and Strategy. Objective C does not extend the Council's functions and powers as set out in Section 30 of the Resource Management Act. The Settlement Act legislation would require clear and unambiguous words to override the principal Act which creates the functions and powers of decision-markers.

**2.11** With respect, the paragraph quoted from the Variation 6 decision does not support the submission:

(a) The Variation 6 quote relates to the question of whether the Vision & Strategy expands the Regional Council's plan making functions under section 30 of the RMA (which it does not).

(b) The Settlement Act (including the Vision & Strategy) expressly intends to *use the RMA processes* as a key part of delivering on the raupatu settlement. There can be no doubt that the Settlement Act does intend that the Vision & Strategy is the "primary direction setting document" *under the RMA* for the Waikato River catchment[16].

(c) The Vision & Strategy does not "override" the RMA. Rather it is a part of the RPS, which prevails over (i.e. 'overrides') inconsistent RPS or NPS provisions.

**2.12** Therefore, the Vision & Strategy must be "given effect to" (i.e. "implemented") by PC1. The obligation to give effect to "higher order" planning documents applies to all Schedule 1 processes. The Supreme

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14 Block 1 submissions, paragraph 4.19.
15 Carter Holt Harvey Ltd & Ors v Waikato Regional Council [2011] NZEnvC 380.
16 Section 5(1) Settlement Act; and as noted at paragraph 100 of the Variation 6 decision.

Court in *Environmental Defence Society v NZ King Salmon*[17] held that these "higher order" planning documents are, having passed through the RMA process, "deemed" to give effect to Part 2 matters.[18] There is generally little or no room to refer back to Part 2 and carry out a "balancing of all relevant interests in order to reach a decision".[19] In this regard:

(a) In *King Salmon*, the Supreme Court found that this meant that once the Board of Inquiry (that decided the matter at first instance) had found the proposal would not give effect to certain policies in the NZCPS requiring adverse effects to be "avoided", it had to decline the Plan Change. It was not open to the Board to refer back to Part 2 and weigh those adverse effects against other Part 2 considerations such as the economic benefits of the proposal under section 5 of the RMA.[20]

(b) In a similar fashion, in the WRC's submission, the RPS contains a very clear directive (in the Vision and Strategy) that the Waikato and Waipā Rivers are to be "restored and protected". PC1 *must* give effect to this. Like in *King Salmon*, this directive cannot be "traded off" or "watered down" by weighing it against other Part 2 matters including the social and economic well-being that may result from allowing land use to continue in a way that does not improve water quality.

**2.13** In light of this, it is submitted that:

(a) Submissions requesting provisions that allow for the continued degradation of the River; or do not improve water quality must be rejected.

(b) The request by Wairakei Pastoral to change the references to "restore and protect" to "improve and maintain" should be rejected. It is entirely appropriate for the PC1 provisions to use

17 [2014] 1 NZLR, 593.
18 *King Salmon*, [77], where the Supreme Court refers, with approval, to statements of principle in the Environment Court's decision in *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvc 211.
19 Except in cases where the higher order planning document is, invalid, incomplete in its coverage, or uncertain, *King Salmon*, [88]-[90].
20 *King Salmon*, [92] and [93], and [153].

the same wording as the Vision & Strategy (i.e. the document that PC1 must give effect to). Moreover, "improve" is not the equivalent of "restore":

- "Restore" requires improvement to the point of reaching a pre-damaged end state; and

- *Any* material improvement from the status quo will be "improvement", even if it does not fully "restore" the environment.

*The NPS-FM*

**2.14** The NPS-FM also prioritises the health and well-being of freshwater. Objective AA1 is to "consider and recognise Te Mana o te Wai in the management of freshwater".

**2.15** Recognising Te Mana o te Wai is, in accordance with the NPS-FM, "an integral part of freshwater management". Te Mana o te Wai is "the integrated and holistic well-being of a freshwater body". The health and well-being of freshwater "is vital for the health and well-being of our land, our resources (including fisheries, flora and fauna) *and our communities*".[21]

**2.16** The NPS-FM explains that:

> By recognising Te Mana o te Wai as an integral part of the freshwater management framework it is intended that the health and well-being of freshwater bodies is at the forefront of all discussions and decisions about fresh water, including the identification of freshwater values and objectives, setting limits and the development of policies and rules. This is intended to ensure that water is available for the use and enjoyment of all New Zealanders, including tangata whenua, now and for future generations.

**2.17** Broadly speaking, the NPS-FM prescribes a process by which freshwater quality must be maintained (where it is good) and improved (where it is degraded).[22] In this regard, it is noted that the Vision & Strategy's

21 NPS-FM, page 7. Emphasis added.
22 Objective A2.

requirement to "restore" the Rivers' wellbeing is not inconsistent with the NPS-FM's requirement to "improve" water quality – it's just that the Vision & Strategy requires improvement to the point of restoration.

**2.18** In this regard, we agree with the following paragraph from the River Iwi closing statement[23]:

> It is apparent therefore that the policy intent of Te Mana o te Wai within the context of the NPS-FM is broadly synonymous with the overarching purpose of the River Acts (and related deeds) and also the vision in Te Ture Whaimana.

**2.19** As the Panel is aware, because of the timing of PC1 development and notification relative to the 2017 amendments of the NPS-FM becoming operative PC1 does not give full effect to the NPS-FM. The key issue in this regard is that PC1 does not include all the NPS-FM compulsory values. However, as explained in our opening legal submissions[24]:

> ... while Plan Change 1 was drafted to give effect to the 2014 version of the NS-FM, it must now be assessed under 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*.... 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. (Emphasis added)

**2.20** The scope to make changes to PC1 provided by submissions is discussed next.

## 3. SCOPE TO MAKE CHANGES TO PC1

**3.1** A number of submitters have sought that PC1 be amended so that it includes targets and rules for various water quality attributes that were not included in PC1, as notified.

**3.2** Submitters who say that there is jurisdiction to make these amendments argue that:[25]

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23 Paragraph 20
24 Paragraph 79
25 For example see the Block 2 legal submissions on behalf of DoC.

(a) by only addressing the four contaminants (attributes), PC1 is not giving full effect to the Vision & Strategy;

(b) addressing further attributes is necessary to give effect to the Vision & Strategy; and

(c) submissions were lodged (and included in the summary of submissions) asking for the additional attributes.

**3.3** In relation to the first two points above ((a) and (b)):

(a) there is nothing unlawful or inappropriate in promulgating a plan change that does not give effect *fully* to a higher order planning document – especially in this case given the scope and complexity of the issues to be addressed to achieve the Vision & Strategy. Moreover, councils are entitled to take a staged or iterative approach to giving effect to higher order planning documents;[26] and

(b) if it is determined that the regional plan is not giving effect to the Vision & Strategy (or any other NPS) then the RMA imposes obligations to address that.[27] But, unless the NPS directs otherwise, a proposed plan change is required to modify the regional plan. Neither the Vision & Strategy nor the NPS-FM "directs" that the additional attributes are included in regional plans, without using the Schedule 1 RMA process.

**3.4** This is not to say that PC1 cannot be modified *now* in a way that might give 'more' effect to the Vision & Strategy. But scope to do this cannot be created by the Vision & Strategy. It can only be done if the modifications are within the scope of a submission that is "on" PC1 (as notified) – see point (c) above.

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26 See the discussion below (paragraph 13.5(h)) regarding the Environment Court's recent decision on PC10 (Rotorua).

27 Under section 55(2) the Council must amend the regional plan if an NPS "directs so" to include objectives, policies etc - without using the Schedule 1 process. However, any other amendment to the Regional Plan (i.e. not directed by the NPS) "required to give effect to any provision in an NPS" must be made using the Schedule 1 process.

**3.5** In the Council's submission, the submissions at issue are not submissions "on" PC1[28]. The lawful scope of submissions on PC1 is limited to seeking changes to:

(a) the targets for the attributes contained in PC1 as notified[29]; and

(b) changes to the objectives, policies and rules in PC1 that seek to ensure the relevant states for those attributes are achieved.

**3.6** As discussed in our opening legal submissions[30], *Clearwater Resort Limited v Christchurch City Council*[31] and *Palmerston North City Council v Motor Machinists Limited*[32] set out a two part test for determining whether a submission is "on" a plan change:

(a) first, the submission must fall within the ambit of the plan change; and

(b) second, the decision maker must consider whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those changes.

**3.7** In the Council's submission, neither of these tests are met by submissions seeking provisions in relation to other attributes:

(a) the additional water quality attributes identified in submissions are not within the "ambit" of PC1. A decision was made, early on in the process for preparing PC1 by the Council (and agreed with River Iwi co-governance partners) to focus on the biggest contributors to water quality decline and therefore only the four main contaminants would be addressed. Management of other contaminants would be addressed through later plan changes,

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28 Under clause 6(1) of Schedule 1 of the RMA submissions can only be lodged "on" a proposed plan change.
29 Nitrogen, Phosphorus, Sediment and Microbial Contaminants.
30 Paragraphs 72-75.
31 HC Christchurch AP34/02, 14 March 2003.
32 [2013] NZHC 1290.

or plan review.[33] Accordingly, the other water quality attributes sought for inclusion in PC1 by submitters were either not addressed, or not addressed in detail in depth in the section 32 assessment for PC1. Where changes to a plan change raised by submitters are not addressed in the section 32 assessment for a plan change, the Court has held these changes are unlikely to be within the plan changes ambit; [34] and

(b) with respect to the second limb of the test, including the additional water quality attributes sought by submitters creates a real risk that that persons directly or potentially directly affected by this have been denied the opportunity to be heard. While in a general sense PC1 relates to improving the water quality of the Waikato and Waipā Rivers, PC1 as notified was clearly "ring fenced" to the management of nitrogen, phosphorus, sediment, and microbial contaminants. There was no notice to potentially affected parties considering making a submission on PC1 that the management of other attributes was also potentially in play.[35]

**3.8** Moreover, it is notable that PC1 must give effect to the NPS-FM and, in particular, the national objectives framework under Part CA. In that regard, freshwater values, attributes, attribute states, objectives etc must be developed "through discussion with communities, including tangata whenua", applying the process set out in Policy CA2. As noted above, in this case, it was decided to limit PC1 to the four contaminants. Adding new attributes at this stage of the process would be inconsistent with the consultation-based process required by the NPS-FM.

**3.9** In the Council's submission, for the reasons set out above, there is no scope for the additional water quality attributes sought by submitters to be included.

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

34 *Motor Machinists* at [81].

35 See also the opening legal submissions on behalf of Mercury Energy Limited for Hearing Block 1, dated 14 March 2019, paragraphs 12-36 and the legal submissions on behalf of Genesis Energy Limited for Hearing Block 3 dated 6 September 2019, paragraphs 5-21, with which the Council is in agreement.

## 4. THE LIMITS TO WHAT CAN BE A PERMITTED ACTIVITY

**4.1** A number of submitters have sought greater use of permitted activity rules, rather than requiring resource consents for farming activities. The rationale, in terms of increasing certainty and reducing compliance costs is understood. However, there are limits to what can be achieved by permitted activity rules.

**4.2** Counsel for Miraka Ltd, in their Block 3 legal submissions, provide a useful and accurate summary of the legal principles relating to the validity of permitted activity rules.

**4.3** In short, while there is some scope for permitted activity conditions to contain some subjective elements, to provide for some flexibility – this is limited. From the Panel's point of view, your key consideration is whether you can objectively determine the nature and scale of the activities (and their effects on the environment) that would be permitted. The very nature of farming, occurring across a wide variety of geographic scenarios, means that there is limited scope for a permitted activity – that can provide the certainty and flexibility desired.

**4.4** In our submission, Officers have given close and detailed consideration of the extent to which the diffuse discharges from farming can be managed – to ensure that the reductions required are achieved, while providing for the numerous different farming scenarios. The recommended PC1 rules have, in our submission, extended the permitted activities as far as they can lawfully go – while giving effect to the objectives and policies, and the Vision & Strategy. The question becomes, therefore, what resource consent activity status is appropriate, which is addressed next.

## 5. CONTROLLED OR RESTRICTED DISCRETIONARY ACTIVITY FOR FARMING

**5.1** In the Council's view a controlled activity status for farming is appropriate. This is because:

(a) PC1 should adopt the least stringent activity status necessary to achieve the policies;

(b) it will create certainty for applicants that consent will be granted; and

(c) allows for some flexibility in terms of developing conditions (including the FEP) tailored to a particular farm.

**5.2** The alternative is a restricted discretionary activity, which is not preferred because it (unnecessarily) creates uncertainty (applications can be declined), and the need for more complex applications and regulatory input. In our submission, however, a controlled activity status is appropriate *only* if the Panel concludes that an activity complying with the controlled activity conditions should *always* be granted resource consent.

## 6. SCOPE TO CHANGE AN FEP

**6.1** We understand that the Panel has raised questions regarding the scope to modify an FEP that is approved and incorporated into a resource consent. In this regard an FEP can be seen as a type of 'management plan'.

**6.2** The legal issues associated with management plans will be well understood by the Panel and can be summarised as follows:[36]

(a) resource consent conditions that allow for management plans to be approved (or modified) at a later date should set out the environmental outcomes that must be achieved. Preferably, these outcomes should be objective but they can allow for some subjective judgement (by people with appropriate expertise);

(b) the management plan sets out the detail as to how the environmental outcomes will be achieved – and the certification of the plan is, in effect a 'check' that this is the case; and

36 See, for example the High Court's discussion in the King Salmon litigation (*Environmental Defence Society v The New Zealand King Salmon Company Ltd* [2013] NZHC 1992) (paragraphs 120-128). This was adopted by the Environment Court in *Northcote Point Heritage Preservation Society Inc v Auckland Council* [2016] NZEnvC 246, [2017] NZRMA 405.

(c) modifications to the management plan can then occur (usually subject to another certification process) – provided that the environmental outcomes are still achieved.

**6.3** It is critical, therefore, that the FEP or the consent conditions adequately describe the environmental outcomes to be achieved. In our submission the provisions recommended by the Officers meet these legal requirements. In particular:

(a) To be a controlled activity there must be an FEP "prepared in conformance with Schedule D" and showing[37]:

> … actions and mitigations that demonstrate how the farming activity will achieve and maintain Good Farming Practices and that losses of nitrogen, phosphorus, and sediment will not exceed the maximum annual losses that were occurring within the reference period in Schedule B.

(b) These are environmental outcomes to be achieved by all FEPs. In addition, all FEPs must "be consistent with the objectives and principles set out in part C" of Schedule D[38] (or at least, where a farming activity is not consistent, an FEP must identify what "actions and practices" are necessary to make it comply).

(c) The requirements of the controlled activity rule and the objectives and principles set out in Schedule D all describe outcomes that are able to be certified by an appropriately qualified and experienced person. To the extent this requires some judgment[39], it is within the bounds of what the courts have said is acceptable.

**6.4** Therefore, it is submitted that the rule framework, and Schedule D in particular, provide a lawful basis upon which proposed modifications to FEPs can be made – provided that the FEP still achieves the environmental outcomes set out above (and that will be reflected in any resource consent conditions).

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37 Rule 3.11.5.4(4)(b)ii
38 Schedule D, Part B
39 For example, "minimise losses", "match plant requirements"

**6.5** The 'mock' resource consent (Annexure D) illustrates how these requirements may be reflected in a resource consent. Notably, the Condition 3 ensures that the FEP is in accordance with Schedule D; and any changes to the FEP are made in accordance with Part E of Schedule D (which, in turn requires that the objectives and principles are achieved).

## 7. APPLYING FOR CONSENT 'AHEAD OF TIME'

**7.1** Wairakei Pastoral Ltd (**WPL**) sought amendments to the rules so that consent could be sought from "2016 onwards".[40]

**7.2** The proposed rules provide for farming as a permitted activity on an interim basis – until specified dates, after which time resource consent will be required. This is to address the 'administrative' issues created by bringing several thousand farms into a (mostly controlled activity) consenting regime.

**7.3** WPL submitted that applicants should be encouraged to apply for resource consent under these provisions from "2016 onwards" in order to "maximise compliance and regulatory efficiency". WPL proposed amendments to PC1 to provide for this.[41]

**7.4** The Council agrees that enabling applicants to lodge their required applications for controlled activity consent "ahead of time" will maximise regulatory efficiency. However, this is not precluded by the wording of the rules as notified (nor what is now recommended by the Officers):

(a) the rules, as notified, provided for farming activities up until the specified dates[42]. Applicants then have a further 6 months in which to apply for and obtain their resource consent;

(b) however, there is nothing in the drafting of the rules that prevents an applicant for applying for resource consent in advance, if it chose to. Nor is there anything in the scheme of

40 Legal submissions for Wairakei Pastoral Ltd Block 1 Hearing Topics, dated 5 March 2019, Appendix 1, paragraph 1.10 (page 88).
41 Ibid.
42 The Officers recommend that this approach be maintained, although the dates from which consent will be required have been modified - see Rule 3.11.5.1A and Table 3.11-2.

the RMA (section 87A, 104, 104A and the 4th Schedule) that precludes this; and

(c) such a resource consent could be granted subject to a condition that the consent only commenced after the date on which the requirement for controlled activity consent in that particular sub-catchment "came into force".[43] As currently recommended, the focus of applications under the Rule is on the assessment of an FEP, setting out how farming activities are to be undertaken and what measures will be put in place to manage and control discharges of sediment, nitrogen, phosphorus and microbial pathogens. An applicant preparing and putting forward such an application "ahead of time" is agreeing, from dates specified in the Rule, to manage its farming activities in accordance with the FEP approved by the Council. In our submission there is nothing inherent in the matters for assessment that means resource consent cannot be applied for "ahead of time", if an applicant chose to[44].

**7.5** Therefore, WPL's proposed amendments are not necessary to achieve this outcome.

## 8. SHOULD THE "USES" AND "VALUES" BE INCLUDED IN PC1?

**8.1** There has been some criticism of the "uses" and "values" as set out in PC1 – on the basis that they are "all things to all people" and are, therefore unhelpful. As explained in Annexure 1, Officers recommend that the uses and values be removed from PC1.

**8.2** Identifying the "uses" of water is not expressly required by the NPS-FM. It is part of identifying freshwater values, which is a fundamental part of the national objectives framework under the NPS-FM.[45] However, neither the RMA nor the NPS-FM require inclusion of the uses and values in PC1.

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43 Section 116(1) expressly anticipates resource consents commencing when it is free of appeals "unless the resource consent states a later date".

44 Noting that such an application may create issues in terms of accurately assessing effects on the environment.

45 Policy CA2(b).

**8.3** Under section 67(1) of the RMA a regional plan must state:

(a) the objectives for the region; and

(b) the policies to implement the policies; and

(c) the rules (if any) to implement the policies.

**8.4** A regional plan "may" include other information including "the issues the plan seeks to address" and "the principal reasons for adopting the policies and methods"[46] – which could potentially allow the uses and values to be included. However, importantly, this is not required and should only be included if the Panel considers it useful to do so, and that it is "relevant to the purpose of [the RMA]".[47]

## 9. CHANGES FOR FORESTRY

**9.1** In relation to effects on water quality (sediment) from plantation forestry:

(a) Fish and Game's submission on PC1 seeks the introduction of rules regulating the clearance of plantation forestry, including setbacks for forestry, restrictions on clearance, and timeframes for replanting;[48] and

(b) DOC has proposed a new rule requiring planation forestry to be set back 20 metres from all waterbodies.[49]

**9.2** The 20 metre setback proposed by DOC was not specifically sought in any submission. The Council accepts that there may be scope for this amendment to PC1, based on the relief sought in Fish and Game's submission. However, it is questionable as to whether the Panel has evidence upon which to undertake a section 32AA analysis, which is particularly important given that what is being requested in more stringent than the National Environmental Standard – Plantation Forestry. In any event, it is submitted that the submission is not "on" PC1 because:

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46 Section 67(2)(a) and (c).
47 Section 18A(b)(i) RMA.
48 Submission by Auckland-Waikato Fish and Game Council; Eastern Region Fish and Game Council, pages 47 and 48.
49 Statement of Evidence-in-Chief of Ms Deborah Kissick for Block 3 Topic C, dated 5 July 2019, paragraphs 122-126, Schedule 1 to her evidence proposed principle 4 for Objective 6 (at page 60), and Appendix 2, her section 32AA Assessment regarding setbacks from waterbodies (page 52).

(a) PC1 is primarily focused on the control of farming to manage diffuse discharges of the four contaminants to the River; and

(b) there are *no* proposed rules relating to forestry in PC1, except for a reference to a requirement for harvesting plans.

**9.3** Accordingly, there is no jurisdiction, in our submission, to make the changes sought.

## 10. PROVIDING FOR DEVELOPMENT OF TANGATA WHENUA ANCESTRAL LANDS

**10.1** Issues have been raised in relation to the PC1 provisions that "provide for" the development of Tangata Whenua Ancestral Lands. Broadly, these provisions do not change the non-complying activity status of such development[50] - but set out a policy framework that recognises the unique, positive cultural benefits of allowing such development. This policy framework is particularly, but not solely, relevant when considering the "threshold tests" under section 104D.

**10.2** In their Block 3 submissions, counsel for Forest & Bird submitted that this was "another example of the implications of provisions not being properly thought through.[51] In our submission that is neither correct nor fair.

**10.3** The provisions respond to a legitimate and important RMA issue. In particular, they fulfill the requirements of sections 6(e), 7(a) and 8 of the RMA by, broadly, recognising the cultural, spiritual and social benefits of enabling the use of tangata whenua ancestral lands (that do not necessarily accrue with activities on land generally). The provisions will ensure that these matters are properly considered under sections 104 and 104D. By not altering the non-complying activity status, the provisions also recognise both:[52]

50 Rule 3.11.5.7.
51 Paragraph 97.
52 It also means that the provisions do not "*allow for development and intensification of tangata whenua ancestral lands*", as submitted by counsel for Forest and Bird (Block 3, paras 95-96).

(a) the Vision & Strategy's strong direction to restore and protect the health and well-being of the River (discussed above); and

(b) the prejudice (reduced development potential) created by the decline in water quality since the raupatu whereby iwi lost the opportunity to use their land, while the subsequent use of their lands by others has caused the degradation.

**10.4** As counsel for the River Iwi said in their Block 2 submissions:[53]

(a) The policy approach in Objective 5 and Policy 16 recognises and seeks to affirmatively address the historical and contemporary restrictions placed on Māori freehold and Treaty settlement land, and ensures PC1 does not provide a further impediment to the use and development of tangata whenua ancestral land (which, in the case of Treaty settlement land, creates a new prejudice in respect of lands that were provided with the intention of redressing past prejudice).

(b) Objective 5 and Policy 16 do not fully enable or guarantee the use of and development of Māori Land, nor do these provisions enable the development of tangata whenua ancestral land without consideration for contaminant loads. Policy 16 provides guidance on the factors to be recognised and provided for when considering and managing tangata whenua ancestral land consent applications.

**10.5** And the provisions have been drafted to avoid the legal difficulties associated with plan rules that purport to create different rule frameworks based on ethnicity/cultural identity of the applicants.[54] This is not an issue with the proposed PC1 provisions because they:[55]

(a) refer to a type of *activity* (by reference to land status); and

(b) do not alter the non-complying activity status.

53 Paragraph 30.
54 Variation 6 Decision, applying *Hauraki Māori Trust Board v Waikato Regional Council HC*, CIV-2003-485-999. Auckland Registry, Randerson J.
55 See also the Block 3 legal submissions for the River Iwi, footnote 16.

## 11. THE "PRINCIPLE OF RETROACTIVITY"

**11.1** Rule 3.11.5.7 (as notified) requires certain changes in land use that were already occurring or underway at 22 October 2016 and will exceed 4.1 hectares in area before 1 July 2026 to apply for resource consent as a non-complying activity.

**11.2** WPL submits that Rule 3.11.5.7 is unlawful and offends against the "principle of retroactivity" because it imposes a requirement to obtain resource consent where parties may be able to assert rights under section 139 and 20A of the Act. At the outset, counsel is not aware of a "principle of retroactivity" – although the concern appears to relate to the legal effect of proposed regional plan rules on existing activities i.e. the concern is with the way the RMA operates, rather than PC1.

**11.3** Section 139 of the RMA provides parties with the ability to apply to the Council for a certificate of compliance in respect of one of the types of land use change caught by Rule 3.11.5.7, on the basis that at the time the application was made, the activity was permitted. If granted, a certificate of compliance is deemed to be a resource consent. Section 20A provides that where a certificate of compliance was not obtained, a party can still continue to undertake an activity that was lawfully established at the time a regional rule requiring resource consent was notified, provided the activity continues to be of the same character scale and intensity, and is not discontinued for more than 6 months. However, once the rule requiring resource consent becomes operative, the party has to apply for resource consent within 6 months.

**11.4** In our submission, there is nothing in Rule 3.11.5.7 (as notified) that cuts across section 139 or 20A of the Act (even if that was possible):

(a) Rules in proposed plans are routinely notified that change the status of existing activities and result in resource consent being required for activities that could previously have been carried out without a resource consent.

(b) Sections 139 and 20A create a limited statutory exception to the need to obtain consent when a regional rule that has immediate legal effect is notified.

(c) Fundamentally, Rule 3.11.5.7 cannot "cut across this" as WPL alleges. Rule 3.11.5.7 does not, and as a matter of law, cannot change how sections 139 and 20A operate.

(d) Accordingly, where parties can rely on rights under section 139 or 20A of the RMA they will be exempt from applying for resource consent under Rule 3.11.5.7. If not, a resource consent will need to be obtained. Rule 3.11.5.7 itself is fundamentally sound. It seeks to control, via the consenting process, land use change that has the potential to adversely affect water quality, and prevent a rush of such land use changes, before the new policy frame work becomes operative. In our submission, the rule is an appropriate way to give effect to objectives in Pc1 seeking to improve water quality.

## 12. RELEVANCE OF THE GOVERNMENT'S FRESHWATER PACKAGE

**12.1** On 5 September 2019 the Government released, as part of its freshwater policy package "Action for Healthy Waterways" a proposed new NPS-FM, draft National Environmental Standards for Freshwater and proposed Stock Exclusion Regulations.[56]

**12.2** These documents expressly say that they are "Not Government Policy – Consultation Draft". They were released for public comment, until 17 October 2019 (now extended until 31 October 2019). No official timeline has been provided for the period after closing of submissions. Accordingly, it is currently unclear when (if at all) the draft NPS-FM and draft NES would be adopted (and if so, whether there would be changes in response to submissions). Given the need for submissions to be summarised and advice to be provided to the Cabinet, it may be that the draft NPS-FM and draft NES are not adopted before the end of the year.

**12.3** Until they have been made operative they are not relevant to the Panel's deliberation and must in my submission be ignored. Section 66 of the RMA sets out the matters that must be considered. In particular section 66(1)(ea) and (f) requires PC1 to be "in accordance" with):

56 Amendments to the process for approving future plan changes for freshwater are also proposed in a draft Resource Management Amendment Bill.

(ea) a national policy statement a [NZCPS] and a national planning standard; and

(f) any regulations.

**12.4** The proposed NPS-FM, is not a "national policy statement" as it has not yet been approved and issued under section 52 of the RMA. The proposed NES and regulations are not yet "regulations" for the purposes of section 66.[57] Section 66 of the RMA sets out the matters to be considered by Regional Council's when preparing or changing regional plans. There is no scope under section 66 to consider draft or proposed national policy statements or environmental standards.[58] The obvious policy reason for this is that draft national policy statements or environmental standards will, once released for consultation, often be the subject of considerable debate and amendment. The current draft documents are unlikely to be an exception. Accordingly, seeking to amend PC1 to reflect these documents while they are still "draft" and not yet "government policy" would be premature and unlawful.[59] In this regard I note that counsel for the River Iwi are of the same view.

**12.5** In their Block 1[60] and Block 3[61] submissions Counsel for WPL indicate a different point of view, suggesting that "the documents released by the Minister in October 2018 setting the freshwater agenda will be relevant in relation to PC1"[62]. As support for this submission counsel refer to the *Environmental Defence Society v Auckland Regional Council* decision. With respect that case does not support the submission as it related to the relevance of government policy to a resource consent decision. The Court held[63] that the policy was another 'relevant matter' under section 104(1)(c) of the RMA.[64] No similar general 'catch-all' provision is available to decision-makers under Schedule 1.

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57 Which requires regional plans to be prepared "in accordance with..."a national policy statement...and any regulations" (subclauses (ea) and (f)).
58 It is also notable section 104 only refers to operative national documents being relevant to the consideration of resource consents.
59 Block 3 submissions, paragraph 6.
60 Paragraphs 67-75.
61 Paragraphs 5 and 6.
62 Paragraph 71.
63 Paragraph [28].
64 Or Section 104(1)(i) as it was at the time of that decision.

**12.6** Counsel also refer to the Variation 6 hearing, during which the NPS-FM was made operative. The Court's direction to consider the NPS-FM was appropriate in that case because the NPS-FM was *operative*. As explained above, that is not the case here.

## 13. PC10 (LAKE ROTORUA NUTRIENT MANAGEMENT) INTERIM DECISION

**13.1** The Environment Court issued its interim decision on PC10 to the Bay of Plenty Regional Plan on 9 August 2019.[65]

**13.2** While not binding on the Panel in this case, the Court's findings are relevant and useful. PC10 is intended to address the adverse effects of nitrogen and phosphorous discharges into Lake Rotorua from human activities. It seeks to do this by introducing[66]:

> …policies, rules and other methods to limit the amount of nitrogen from land use entering the Lake. Its purpose is to reduce nitrogen losses from pastoral farming activities on rural land within the Lake Rotorua groundwater catchment in the Bay of Plenty Region…

**13.3** The critical issue to be resolved in this interim decision was which of two nitrogen allocation approaches should be used, described generally as follows:

> [11] In its appeal, CNI did not support the nitrogen allocation method used in PC10. This allocates available nitrogen among the various land use activity sectors within the Lake Rotorua groundwater catchment and sets sector limits and/or ranges, which all dischargers in each sector must meet or be within. CNI considered that this approach gives preference to existing high nitrogen dischargers, especially existing dairy and drystock farmers. They also considered that it disadvantages forest, bush and scrub landowners, particularly some Māori land owners who may wish to convert their land to farming, by reducing or removing opportunities to develop such land for more intensive use.
>
> [12] Instead, CNI proposed an alternative approach based on the natural capital of land for farm production, adopting the New Zealand Land Use Capability (**LUC**) Classification system[67] as a proxy for natural capital. They

65 *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZEnvC 136.
66 Paragraph [2]
67 As described in the *Land Use Capability Survey Handbook* (3rd ed.2009) Manaaki Whenua Landcare Research and available at: https://www.landcareresearch.co.nz/publications/books/luc

considered this would be a more equitable approach as it would reflect the underlying productive capacity of land without giving priority to existing high nitrogen dischargers and providing opportunities for land currently in forest, bush and scrub to be used more productively. NCI was supported in this approach by the Māori Trustee, the Rotorua District Council and a number of other parties under s 274 RMA as listed below, and these parties identified themselves as the Natural Capital Group (**NCG**).

**13.4** The Court referred to the first approach as the "sector range approach", and the latter as the "Alternative Natural Capital Approach" (or "ANCA"). For a range of reasons the Court preferred the sector range approach.

**13.5** The Panel should exercise "considerable caution" when applying the findings of the Court to PC1, given that PC10 was addressing a different set of specific issues and circumstances[68]. However, at a high level the following is relevant in our submission:

(a) The Court recognised the complexity of the issues and the fact that no one solution was 'perfect'. In this regard the Court considered and weighed the positive and adverse aspects of each option. It concluded that the "ANCA method is significantly less robust than the sector range method"[69], and the "sector range method is most appropriate by a significant margin and on most bases of comparison"[70]. The decision should be read in full but the following paragraph provides a flavour of the Court's overall reasoning:[71]

> [362] The Lake Rotorua catchment is seriously over-allocated in terms of its capacity to cope with discharges of nutrients from human activities. This is not a situation where there is an existing surplus of nitrogen to allocate, so the first priority must be to reduce existing nitrogen (and phosphorus) discharges substantially if the desired water quality outcomes for the lake are to be achieved in the most practicable timeframe. The options to do this are limited. A requirement that existing farmers substantially reduce their discharges to meet a defined and agreed water quality target is a significant matter. To require them in addition to make substantial further reductions which

68 At paragraph [4] the Court stated that "the same circumstances likely do no exist anywhere else, so considerable caution should be used before seeking to transfer the findings of this decision to other locations without a thorough evaluation of their applicability and appropriateness".
69 Paragraph [364].
70 Paragraph [371].
71 Paragraph 362.

are then allocated to others for their own use would go a significant step further. There would need to be compelling reasons in the public interest to use rules in a regional plan to compel such transfers. The evidence failed to demonstrate that such reasons exist, particularly when considered alongside the reasons outlined above for preferring the sector range method.

(b) In a similar vein to PC1, the Court recognised that PC10 was the beginning of what would need to be a significantly longer term process to address the issues of nutrient discharges on Lake Rotorua[72]:

> It is an unavoidable conclusion from the evidence that there are many important aspects of nutrient management in the Lake Rotorua catchment that are uncertain, and that time will be required before the outcome of policies and methods put in place now will become apparent. Under these circumstances, *it is necessary for all parties to accept that PC10 is part of a long-term process, and that further plan changes will likely be required in terms of policy direction in the future to take account of experience and further scientific data*.
> (Emphasis added)

(c) The Court considered the issues associated with using Overseer in a regulatory context. However, the Court said:

> [115] Notwithstanding these concerns, we have no evidence that there is any realistic alternative method presently available to the Regional Council or to farmers to obtain the necessary information about nitrogen loads in order to manage them.
> ...
> [116] We are also particularly concerned to ensure that, as far as is reasonably practicable resources should be used for environmental improvements on-farm, not for unnecessarily high regulatory and monitoring costs.

(d) Using Overseer in the context of a regulatory approach based on benchmarking and 'Nutrient Management Plans' (similar to FEPs) were noted for their "likely contribution to simplifying the use of Overseer, making it a more efficient management tool and providing greater certainty for farm managers and the regulator"[73]. Importantly, the Court concluded that the use of Overseer in a regulatory context "should be regarded as a "work in progress", which is likely to require modification over time"[74].

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72 Paragraph [37].
73 Paragraph [368].
74 Ibid.

**13.6** In a general sense (and bearing in mind the Court's caution about applying its findings to different circumstances) PC1 and the Council's recommended changes to PC1 are, in our submission, consistent with the PC10 decision.

## 14. CONCLUSION

**14.1** The Council wishes to record its appreciation for the significant amount of work the Panel has done, and to recognise the professional and efficient way in which the hearings have been conducted.

**14.2** We note the suggestion in Fonterra's closing statement that the Panel "issue an interim decision and provide a short period of time for people to provide further specific comments only on the detail of any FEP Schedule"[75]. This is opposed by the Council.

**14.3** In our submission the Panel has been presented with a significant amount of evidence and representations from the submitters. It has had more than adequate opportunity to explore the positions of the submitters and the supporting evidence. On that basis, it is submitted that the Panel has adequate information upon which to make recommendations (including the detailed wording of the PC1 objectives, policies and rules (including Schedules) for the Council's final decision.

Gerald Lanning
Counsel for the Waikato Regional Council

75 Paragraph 4.2