

**BEFORE THE INDEPENDENT COMMISSIONERS APPOINTED BY WAIKATO
REGIONAL COUNCIL**

In the matter of the Resource Management Act 1991

And a submission and further submissions on Proposed Waikato
Regional Plan Change 1 – Waikato and Waipā River
Catchments (PPC1)

Submitter's Name: Hamilton City Council

Submission Number: 74051

Hearing Topic: **BLOCK 2**
Parts C1-C6: Policies, Rules and Schedules (most)

**MEMORANDUM ON BEHALF OF HAMILTON CITY COUNCIL IN RESPONSE TO
QUESTIONS FROM THE INDEPENDENT HEARING COMMISSIONERS
REGARDING BLOCK 2**

Dated 5 August 2019

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MAY IT PLEASE THE HEARING PANEL

1. This memorandum responds to questions from the independent commissioners during the presentation on behalf of Hamilton City Council (“HCC”) on the 8th of July 2019 regarding Block 2.
2. Commissioner Robinson questioned whether the proposed wording of Policy 10a, as set out in the evidence of Mr Ryan, sought to fetter the discretion of Waikato Regional Council (“WRC”) to the extent that the proposed policy could be considered unlawful. The purpose of this memorandum is to respond to that question.
3. A secondary purpose of this memorandum is to clarify a response to questioning from the independent commissioners regarding the legal submissions concerning the status of the Vision and Strategy. While the independent commissioners did not seek a specific response from counsel for HCC, for completeness, counsel wishes to clarify the point of the submission.

Proposed new Policy 10a

4. In its original submission, HCC sought an additional policy to secure the proposition from the section 32 report and PPC1 that existing point source discharge consents will be allowed to run their course on their current terms until they expire, and only when those consents are renewed would those consented discharges be required to comply with PPC1. This was not supported by the section 42A author in the block 2 report.
5. As set out in Mr Ryan’s evidence, HCC is concerned that without the inclusion of the proposed Policy 10a, HCC may be required to comply with PPC1 at an earlier stage, which would trigger the need for resource intensive consenting processes for both HCC and WRC. Premature review of existing regionally significant point source discharge consents will add cost and undermine the economic efficiency of previous investments in

improved water quality outcomes and will not necessarily achieve the 80-year goal any faster, given the staged approach adopted in PPC1.¹

6. Unlike diffuse discharges, point source discharges have been regulated for several decades. Compliance with discharge consent conditions has already involved significant investment in, and contribution to, the restoration and protection of the Waikato River. Accordingly, it would be inequitable to require regionally significant point source discharge consents to be reviewed prior to their expiry.
7. As explained in HCC's submission and its evidence, HCC accepts that, when its discharge consents expire, it will need to invest significant capital in upgrades to infrastructure and new technology, which will assist with improvements in the quality of the point source discharges for which it has statutory responsibility.

Policy 10a

8. In his evidence, Mr Ryan proposed the following wording for new Policy 10a. The part of the proposed draft Policy 10a which counsel understands is at issue is highlighted in **bold underlined** font:

Policy 10a: Review of conditions of existing point source discharge consents of regional significance

To recognise past progress made to improve point source discharges from regionally significant infrastructure and regionally significant industry that was consented as at notification of this plan, being 22 October 2016, the requirements of the Vision and Strategy will be incorporated into such consents when the consents are renewed and **the conditions of any such consent will not be reviewed under section 128(1)(b) of the Resource Management Act during the term of the existing consent.**

¹ P Ryan, Block 2 Primary Evidence, 30 April 2019, paragraph 70 and Table 5 in Attachment B.

9. Counsel understands that the independent commissioners are concerned that the directive statement “will not be reviewed” represents an unlawful fettering of Waikato Regional Council’s discretion to initiate a review pursuant to section 128(1)(b) of the Resource Management Act 1991 (“RMA”).
10. Upon review of the proposed drafting, counsel acknowledges the policy direction that the conditions of any such consent “will not be reviewed under section 128(1)(b) of the Resource Management Act” means that the discretion under section 128(1)(b), would effectively be overridden where the circumstances arise that are described in the first part of the proposed policy.
11. The rationale for the wording at issue, and the policy more broadly, is based on the proposition that the point of PPC1 is to “give effect” to the Vision and Strategy. As notified, PPC1 will do so over time in a staged manner. That staging anticipates that existing point source discharge consents may continue to be exercised but that when these came to be renewed, the applicant would be expected to comply with or address the requirements of PPC1.
12. On that basis, it would be counter to the policy direction of PPC1 for an existing resource consent to be subjected to a review under section 128(1)(b) which is based on a requirement to give effect to the Vision and Strategy. If PPC1 is the planning document which gives effect to the Vision and Strategy and the policies of PPC1 recognise the need for a staged approach, including allowing existing regionally significant infrastructure and regionally significant industry, the discretion in section 128(1)(b) effectively becomes redundant.
13. Nevertheless, while it may be argued that it would be counter intuitive to initiate a review prior to the expiry of a consent, it is acknowledged that the proposed wording potentially fetters the statutory discretion of

Waikato Regional Council to an unacceptable extent.² Accordingly, counsel submits that the following alternative wording would address the concern expressed by Mr Ryan in his evidence and would not be an unacceptable fettering of the discretion of Waikato Regional Council³:

Policy 10a: Review of conditions of existing point source discharge consents of regional significance

To recognise past progress made to improve point source discharges from regionally significant infrastructure and regionally significant industry that was consented as at notification of this plan, being 22 October 2016, and the staged approach to giving effect to the Vision and Strategy, the requirements of the Vision and Strategy will primarily be incorporated into such consents when the consents are renewed. Waikato Regional Council will take into account this policy when considering whether to initiate a review of conditions of such existing point source discharge consents under section 128(1)(b) of the Resource Management Act, where such a review is proposed prior to the expiry of the consent. and the conditions of any such consent will not be reviewed under section 128(1)(b) of the Resource Management Act during the term of the existing consent.

14. In order to introduce this proposed alternative wording, counsel respectfully seeks leave to file a short supplementary statement of evidence of Mr Ryan. In anticipation of directions to that effect, a supplementary statement of evidence of Mr Ryan in response to the questions from the independent commissioners is **attached** and marked A.

² Taylor, G., "Judicial Review – A New Zealand Perspective", 3rd ed, (2014), p 724, paragraph 15.68. The discretion is set out in section 128(1)(b) of the RMA and in section 14(2) of the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010*.

³ The proposed amendments to the version of proposed policy 10a presented in Mr Ryan's Block 2 evidence are shown in red font which is either underlined (new text), or struck through (deletion of text).

Clarification of Submission Point

15. Counsel made a submission at the Block 2 hearing on 8 July 2019 regarding the Vision and Strategy for Waikato River (“Vision and Strategy”) and that it did not set “environmental bottom lines” in the same sense as the New Zealand Coastal Policy Statement in the context of the *King Salmon* line of authority. This was questioned by the independent commissioners and counsel respectfully wishes to clarify the intent of that submission.
16. It is well established that the Vision and Strategy prevails over any inconsistent provision in a National Policy Statement⁴. However, while HCC’s evidence is based on the proposition that the NPS-FM, NPS-UDC and the Vision and Strategy can be “read together” so that there is no inconsistency, should there be any circumstance arising which questions that proposition, the ability to have recourse to Part 2 remains available to the decision maker.
17. The submission point referencing “environmental bottom lines” was intended to make the point that, if the relevant higher order documents cannot be read together, the Vision and Strategy does not create environmental bottom lines in the sense that recourse to Part 2 of the Resource Management Act 1991 (“RMA”) is precluded. If one or both of two relevant caveats (incompleteness or uncertainty) are in play, then the independent commissioners may have recourse to Part 2 to determine an issue.
18. As pointed out by Commissioner Robinson, HCC and its counsel would need to demonstrate where those caveats apply and, therefore, in what context the Hearing Panel should have recourse to Part 2. This will be dependent upon whether the decisions of the independent hearing

⁴ This is further prescribed in sections 11 to 15 of the *Waikato-Tainui Ruapatu Claims (Waikato River) Settlement Act 2010*.

commissioners accept the evidence on behalf of HCC. If not, this will be a matter which HCC will need to address at a future date.

DATED this 5th day of August 2019

A handwritten signature in blue ink, appearing to read 'M Mackintosh', written over a horizontal line.

M Mackintosh
Counsel for Hamilton City Council