

BEFORE THE WAIKATO REGIONAL
COUNCIL HEARING COMMISSIONERS

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER Proposed Plan Change 1 to the Waikato Regional Plan and
Variation 1 to that Proposed Plan Change: Waikato and
Waipā River Catchments

Closing Legal Submissions on behalf of the Director-General of Conservation

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Submission Number: 71759

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MAY IT PLEASE THE COUNCIL HEARING COMMISSIONERS:

Introduction

1. These closing submissions for the Director-General of Conservation (the **Director-General**) will largely focus on the issue of Scope raised in other submitters¹ legal submissions for Block 3. These closing submissions will also touch on the Vision and Strategy, Water body Setbacks and Biodiversity Offsets.
2. Attached to these closing submissions is a revised copy of PC1 prepared by Ms Kissick. The revised PC1 is a further iteration to that version attached to Ms Kissick's Block 3 evidence-in-chief, and contain changes following questions from the Hearings Commissioners at the Director-General's Block 3 hearing. The revised PC1 also corrects drafting, grammar and spelling errors. A table listing changes made in this revision is also attached as these changes are not marked-up.

Scope

3. In the Block 3 legal submissions for Mercury Energy it is stated that:
*'Mercury Energy is concerned that including new attributes based on the JWS would amount to an unlawful process involving wide-ranging un-notified amendments to PC1, with incomplete analysis of the relevant attributes and provisions, and no opportunity for public interest on those provisions'*²
4. Mercury Energy's view is that including new attributes based on the Joint Witness Statement (the **JWS**) would;
 - a. go beyond the lawful scope of amendments to notified provisions able to be made in the course of a plan change process as there would be no opportunity for notification and submissions;
 - b. be impractical, as the JWS is not clear, fully developed or agreed; and
 - c. be inappropriate as the merit and robustness of additional attributes, and associated provisions, have not been adequately assessed.

¹ Legal submissions of Mercury Energy, Beef+Lamb NZ Ltd, Fonterra Co Operative Group Ltd, Federated Farmers of NZ, Genesis Energy

² Refer [9]

5. Mercury Energy assert that s 32AA Resource Management Act (the **RMA**) requires additional analysis to be undertaken in relation to changes made or proposed and that this has not been undertaken.³
6. The Director-General agrees that including new attributes based solely on the JWS would be impractical, as it is incomplete and lacks certainty. Instead, I submit the additional attributes should be included in Plan Change 1 (the **PC1**) based on the expert evidence of the Director-General and Auckland/Waikato Fish and Game which is comprehensive and robustly supports the inclusion of new attributes. This expert evidence covers additional attributes⁴ for rivers, streams, tributaries, lakes and wetlands. The experts for the Director-General and Fish and Game have gone to significant effort to provide comprehensive short, medium and long-term water quality limits and targets for each attribute.
7. Counsel does not agree with Mercury Energy's view that the addition of new attributes would go beyond the lawful scope of amendments to notified provisions due to there being no opportunity for notification and submissions on such amendments. As discussed in Counsel's Block 2 legal submissions⁵, the Director-General's original submission and Waikato Regional Council's summary of decisions requested, made available to the public in October 2017, identified that the Director-General sought not only additional attributes, but also targets and limits for these additional attributes. Further submissions on PC1 (and Variation 1) did not close until September 2018.
8. Any person affected by the Director-General's relief or interested in the additional attributes sought by the Director-General, which are the same additional attributes subject of the JWS, had almost a year to oppose or raise concerns with the relief sought, or with the inclusion of additional attributes.
9. In my submission, it cannot be said that there has not been (or would not be) any opportunity for notification and submissions on the additional attributes. At the very

³ Refer [10]. Block 3 legal submissions for Federated Farmers also discusses scope in terms of the tests in *Motor Machinist*.

⁴ Additional attributes sought by the Director-General include periphyton biomass, cyanobacteria, dissolved oxygen, MCI, clarity, fine deposited sediment, DIN, DRP, toxicants metals, water temperature, pH range, Fish index of Biotic integrity,

⁵ Refer [30].

least, the Director-General's original submission alerted any persons affected to the fact additional attributes would be considered in the PC1 process. If they were interested in this point, they had almost a year to make a submission. If they have not done so, it is not through a lack of opportunity to do so.

10. In terms of a s 32AA RMA analysis, this is discussed in the Director-General's Block 3 legal submissions⁶. While s 32AA requires an assessment of the social, environmental, economic and cultural effects that are anticipated from the implementation of PC1⁷, the quantification of the benefits and costs of these anticipated effects is only required to be undertaken if it is practicable to do so.
11. As discussed in *Meridian Energy Limited v Central Otago District Council*⁸, while economic evidence can be useful, a s 32 analysis requires a wider exercise of judgment. It is simply not possible to express some benefits or costs in dollar or economic terms. It would be difficult, if not impossible, to express some of the criteria within Part 2 of the RMA in terms of quantitative values.
12. The *Meridian* decision confirms impacts on the environment are often not capable of expression in dollar terms and that the RMA does not make it mandatory for all benefits and costs to be quantified in this way. Environmental benefits, in terms of ss 6 and 7 of the RMA, must be recognised and provided for, or had particular regard to, even if they are only capable of expression in qualitative, as opposed to quantitative, terms.⁹
13. Without the inclusion of relevant water quality attributes and targets to support ecosystem health characteristics¹⁰, such as biodiversity, indigenous fish and threatened species, there is significant risk that PC1 will not deliver water quality outcomes that will achieve ecosystem health across all sub-catchments, waterbodies and freshwater ecosystems of the Waikato-Waipā catchments.¹¹ For example, Ms

⁶ Refer [59] to [71]

⁷ This assessment is likely to have been adequately covered in the expert evidence lodged on behalf of submitters involved in the PC1 process.

⁸ HC DUN CIV 2009 412 000980 [16 August 2010] or [2010] 1 NZLR 482. Refer to [59] to [71] of the Director-General's Block 3 legal submissions for a full discussion.

⁹ Refer [106] to [108] *Meridian*

¹⁰ Section 7(f) RMA requires the maintenance and enhancement of the quality of the environment. 'Environment' is defined in the RMA to include ecosystems, their constituent parts, including people and community.

¹¹ Refer Ms McArthur's Block 1 EIC [19]

McArthur's evidence is that managing periphyton is important because high biomass and cover of periphyton causes diurnal (or during the day) fluctuations in dissolved oxygen and pH due to the continued oxygen demand of cellular respiration throughout the night when oxygen-producing photosynthesis ceases. Low dissolved oxygen causes avoidance behaviour (fish will not enter low oxygen habitats), hypoxia (suffocation), and growth effects in fish. Increased nutrients (nitrogen and phosphorus) accelerates periphyton growth. Managing the maximum biomass and/or cover of periphyton and subsequent reductions in dissolved oxygen is needed to avoid suffocation of indigenous aquatic life.¹²

14. The environmental benefit of managing periphyton is that it will help to prevent low dissolved oxygen levels and ensure indigenous aquatic life do not suffocate. The environmental cost of not managing periphyton is disturbingly obvious, the suffocation and loss of indigenous aquatic life. This cost clearly does not accord with the restoration of water quality so that the Waikato River is safe for people to take food from. In my submission, it is not practicable to assess this benefit or cost in economic terms, nor does the *Meridian* decision require it to be assessed in this way.
15. I submit, the Director-General's expert evidence is sufficiently comprehensive and robust to provide the necessary environmental cost and benefit analysis required under s 32AA RMA.
16. In my submission, additional attributes should be addressed in PC1 now, not in an upcoming Regional Plan review or future change process, if there is to be any hope of giving effect to the Vision and Strategy within the 80-year timeframe.
17. Counsel for Mercury Energy considers that PC1 is a relatively discrete and subject-specific plan change and that the scope of potential changes is limited to managing and reducing the diffuse discharges of the four identified contaminants.¹³ This view does not take into account the Vision and Strategy that PC1 is required to give effect to, being the primary direction-setting document for the Waikato (and Waipā) River and the activities within its catchment affecting the River. Given this statutory direction, I submit that in managing and reducing the diffuse discharges of the four identified contaminants, the management of additional attributes is, according to the

¹² *Ibid* [127]

¹³ Refer Mercury Energy's Block 3 legal submissions [15].

Director-General's expert evidence, important to ensure PC1 gives effect to the Vision and Strategy.¹⁴

Vision and Strategy

18. Genesis Energy's Block 3 legal submissions¹⁵ responds to the Director-General's argument that, including the additional attributes is on PC1 because it would be entirely consistent with the Vision and Strategy. In Counsel for Genesis Energy's response it refers to PC1's intergenerational 80-year timeframe to achieve the water quality objectives of the Vision and Strategy, notes that PC1 is not the sole vehicle by which Waikato Regional Council will give effect to the Vision and Strategy, and that it was not intended for PC1 to be a broad plan change that covered all attributes and delivered everything required by the Vision and Strategy. Counsel for Genesis Energy states that: *'Instead, PC1 identified four key contaminants that required better management in order to contribute to implementing the Vision and Strategy, and therefore ensure that the health and wellbeing of the Waikato River improves'*
19. Firstly, I submit that the Director-General's original submission, including the additional attributes, is on PC1 because it satisfies the tests set out in the *Clearwater and Motor Machinist* decisions.
20. It is fully appreciated that PC1 is likely to be the first of many plan changes to come on the journey toward achieving the Vision and Strategy. This was acknowledged in Counsel's opening submissions for Block 1. I also stated in opening submissions that this journey should not limit the necessary water quality improvements required in PC1 to give effect to the Vision and Strategy. Past and current land use and discharge patterns, and a lack of proper allocation mechanisms for discharge, has resulted in the current degraded states of the Waikato and Waipā Rivers. Immediate action needs to be taken now to ensure the 80-year timeframe is met.
21. Ms McArthur's evidence¹⁶ is that the management of the identified contaminants has not been appropriately carried through into PC1 for the majority of the waterways, including the whole Waipā catchment and all tributaries of the Waikato. She

¹⁴ Refer to Director-General's Block 2 legal submission for a full discussion on the Vision and Strategy

¹⁵ Refer to para 22 to 27

¹⁶ Refer Ms McArthurs Block 1 EIC para 142.

considers that it is difficult to imagine how management of only these four contaminants, without addressing additional attributes such as trophic state, dissolved oxygen, deposited sediment, dissolved nutrient or biological attributes, limits and targets in these waterways will make a positive contribution to the water quality in the Waikato River, or at the local level within the Waipā catchment and Waikato tributaries. Without the inclusion of further direction between the short-term targets and the 80-year water quality attributes states, a future that achieves the Vision and Strategy is in jeopardy.¹⁷

22. I submit that it is essential to include the additional attributes in PC1 in order to adequately manage the four identified contaminants now and in such a way that will achieve, within the 80-year time frame, the Vision and Strategy and therefore the health and wellbeing, of the Waikato and Waipā Rivers.

Waterbody Setbacks

23. In the Block 3 legal submissions of OJI Fibre Solutions NZ and Hancock Forest Management¹⁸ (OJI & Hancock) Counsel confirms that, under the Settlement Act, a rule included in a plan for the purpose of giving effect to the Vision and Strategy prevails over a NES if it is more stringent. Counsel agrees with this position.
24. Counsel for OJI and Hancock continues to say that the: *‘Settlement Act does not direct rules to be more stringent per se’*. If the National Environmental Standard for Plantation Forestry (NES-PF) gave effect to the Vision and Strategy, there would be no need to have a rule in PC1. The fact that a rule is necessary in PC1 to give effect to the Vision and Strategy means, in my submission, that the NES is inadequate in this respect and that a more stringent rule is required in the context of the degraded condition of the waterbodies in the Waikato and Waipā catchments.
25. This is evident in the NES-PF, for example, in terms of how it deals with harvesting as a permitted activity. While harvesting¹⁹ machinery must not operate within 10m of a lake larger than 0.25ha, there are exceptions to this rule. The 10m setback does not apply if disturbance to the water body is minimised and harvesting machinery

¹⁷ Refer Ms McArthur’s Block 1 EIC [139]

¹⁸ Refer [3.6]

¹⁹ Harvesting includes felling trees, processing trees into logs or loading on to trucks for processing

operates at water body crossing points, slash removal is necessary or where it is necessary for directional felling from within the 10m setback. Where these exceptions apply, all soil disturbance must be deposited to avoid it entering water and to avoid degradation of any aquatic habitat or riparian. However, the NES-PF does not impose any standards to ensure adequate avoidance measures are implemented, nor are there any provisions to monitor such measures.

26. Given the way in which the NES-PF manages harvesting activities, for example, I submit a more stringent rule is warranted in PC1 in order to ensure the health and wellbeing of the Waikato and Waipā Rivers, and therefore to give effect to the Vision and Strategy.
27. Counsel for OJI and Hancock considers that, whether a rule is required to give effect to the Vision and Strategy, remains subject to a full s 32 evaluation. I submit the s 32AA discussions set out above applies here.
28. While, under s 32AA, it is not a mandatory requirement to quantify the anticipated economic benefits and costs of implementing the water body setbacks proposed by the Director-General, Federated Farmers has presented evidence to inform a quantitative benefits and costs evaluation. I submit the environmental and economic evidence presented by the Director-General and Federated Farmers in relation to proposed water body setbacks is sufficient for a quantitative and qualitative benefits and costs evaluation as required under s 32AA. Accordingly, it is open to the Hearings Panel to consider and implement in PC1 the water body setbacks proposed by the Director-General.

Biodiversity Offsets

29. Watercare Services Block 2 legal submissions advocate amendments to policy 11 that do not limit offsetting to the same contaminant. This is on the basis that: *‘offsetting provisions in PC1 should be amended to provide the greatest flexibility feasible. Doing so is likely to provide for more “bangs for buck” in achieving the V & S than the narrow and inflexible provisions currently contained in PC1’*.²⁰

²⁰ Refer [5.7] to [5.8]. Also note the Block 2 legal submissions for WARTA who advocate for the same amendments to policy 11.

30. Firstly, just to confirm, the Director-General's evidence on policy 11 as currently proposed in PC1 is that it appears to be contaminant trading, rather than a true offset.²¹ The use of off-sets in resource management is usually applied to biodiversity off-setting, for which best-practice guidance and principles have been developed.²² The amendments advocated for by Watercare Services reinforce a contaminant trading scheme rather than a true biodiversity offset. Accordingly, the Director-General does not agree with the amendments sought by Watercare Services.
31. Furthermore, the principles of biodiversity offsetting include no net loss and preferably a net-gain.²³ According to the Guidance on Good Practice Biodiversity Offsetting in New Zealand²⁴:

'A key concept explicitly linked to demonstrating no net loss is that biodiversity exchanges should be like for like. This is because as the degree of dissimilarity between the biodiversity components being lost and gained increases, the more difficult it becomes to replace all the components lost because they may not exist at the offset site. No net loss for 'out of kind' exchanges is difficult to demonstrate because, currently, there is no accepted robust method for comparing and exchanging different types of biodiversity. The biodiversity offset process therefore requires that every reasonable effort is made to ensure that biodiversity gains and losses are as comparable as possible both in ecological terms and from a conservation -priority perspective'.

32. While the guidance has been developed specifically in the context of biodiversity offsetting, there is no such guidance directed at 'contaminant offsetting'. In addition to policy 11 already falling well short of what a true offset should look like, the amendments sought by Watercare Services do not meet the offset principle of like for like because it supports an approach that is not limited to the same contaminant, or rather is not trading the same contaminants.

²¹ Refer Ms McArthur's Block 2 EIC [12]

²² *Ibid*

²³ *Ibid* [13]

²⁴ August 2014

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=2ahUKEwiXslGGo-3kAhUV73MBHR2sDNoQFjADegQIARAB&url=https%3A%2F%2Fwww.doc.govt.nz%2Fabout-us%2Ffour-policies-and-plans%2Fguidance-on-biodiversity-offsetting%2F&usg=AOvVaw1C2eVslFkYvJ6zDumv353K>

33. Ms McArthur's evidence is that, without a contaminant allocating regime in place, she is sceptical of the technical feasibility of the approach taken in policy 11, or whether any point source offset would provide additional water quality gains, beyond the requirements of PC1, to manage diffuse discharges.²⁵



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26 September 2019.

²⁵ Ms McArthur's Block 2 EIC [18]