

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

Legal Submissions on behalf of the Director-General of Conservation

Dated: 25 June 2019

Block 2 Hearings

Submission Number: 71759

Department of Conservation
Private Bag 3072
Hamilton
Counsel Acting: Victoria Tumai
Email: vtumai@doc.govt.nz
Telephone: 07 838 5687

MAY IT PLEASE THE COUNCIL HEARING COMMISSIONERS:

Introduction

1. For the Block 2 Hearings and Part C Topics the following evidence has been lodged in relation to the Director-General's (the **Director-General**) submission:
 - a. In terms of rivers and streams, Ms McArthur's evidence focuses on diffuse discharge management, point source discharges, new policies and rules for inanga spawning habitat, stock exclusion and setback widths.
 - b. In terms of wetlands, Dr Robertson's evidence covers management of diffuse nutrients to protect and restore wetland ecosystem health, farm environmental plans (**FEP**), stock exclusion and prioritisation implementation.
 - c. In terms of lakes, Dr Stewart's evidence discusses **FEP**, stock exclusion rules, best practice management of peat lake catchments, nutrient reduction for 75th percentile, data deficient lakes, riparian buffer setback widths and measures to prevent loss of aquatic vegetation.
 - d. Ms Kissick's planning evidence covers the Topics for Block 2 as they related to the Director-General's submission.

2. My legal submissions will focus on the following legal issues:
 - a. With reference to relevant case law and the Vision and Strategy, whether the Director-General's Submission, or rather parts of it, is 'on' the Proposed Waikato Regional Plan Change 1 (the **Plan Change 1**) for the purpose of clause 6(1) of Schedule 1 of the Resource Management Act 1991 (the **RMA**),
 - b. Further evaluation of relief sought under s 32AA of the RMA,
 - c. Waterbody setbacks proposed by the experts called by the Director-General,
 - d. Inanga Spawning Habitat,
 - e. 75th percentile Nitrogen Leaching Value,
 - f. Biodiversity Offset provisions proposed in Policy 16 of the Plan Change,
 - g. Tangata Whenua Ancestral Lands definition proposed in the Plan Change,

- h. The Plan Change's Rule framework, and
- i. Joint Witness Statement on Table 3.11-1 – seeking clarification regarding hearing process going forward.

Is the Director-General's Submission 'on' Plan Change 1?

Schedule 1 RMA

- 3. A change (to a plan) means a change proposed by a local authority to a plan under clause 2 of Schedule 1.¹ Under clause 2, the change to a plan commences through the preparation of a plan change by, in this instance, Waikato Regional Council (**WRC**).
- 4. Relevantly, once WRC prepares a proposed plan change, it must give public (or limited) notice of the proposed plan change.² The public notice, and such further information as the WRC thinks fit relating to the Plan Change, must be sent to all ratepayers and other persons likely to be directly affected by the change³. Clause 5(2) requires WRC to give public (or limited) notice that any person may make a submission 'on' the proposed plan change. Once notified, any person may make a submission 'on it'.⁴

What is Plan Change 1 'on'?

- 5. The Explanatory Statement in the Plan Change 1 document states⁵:
'This document is a change to the Operative Waikato Regional Plan (WRP), to restore and protect water quality in the Waikato and Waipā Rivers by managing discharges of nitrogen, phosphorus, sediment and microbial pathogens to land in the catchment, where it may enter surface water or ground water and subsequently enter the rivers, or directly in to a water body.'

¹ Refer s 43AA RMA

² Refer cl 5(1)(b) Schedule 1.

³ Refer cl 5(1A) and (1B) Schedule 1.

⁴ Refer clause 6(1) & (3) Schedule 1 RMA. And subject to the limitations set out in cl 6(4)

⁵ Refer page 8 Plan Change 1 document - 3 December 2016.

6. In my submission, the Explanatory Statement and what Plan Change 1 is on must be considered in the context of the River Act⁶ and the Vision and Strategy. Not only is the Vision and Strategy intended by Parliament to be the primary direction-setting document for the Waikato and Waipā Rivers (the Rivers)⁷, and the management of activities within the catchments affecting the Rivers, Plan Change 1 must also give effect to the Vision and Strategy.⁸ I submit the Vision and Strategy is the catalyst for Plan Change 1. I note the Explanatory Statement states the change to the WRP is to **restore and protect** the water quality in the Rivers. In order to realise the vision, the restoration and protection of the health and wellbeing of the Rivers is to be pursued.⁹ ‘Pursued’ means to *‘follow with intent, proceed in compliance with’*.¹⁰
7. Parts of Plan Change 1 are even more explicit. On page 13, for example, it is stated:

‘The Vision and Strategy is being given effect to in Chapter 3.11 by ...

Ensuring that Waikato Regional Council continues to facilitate ongoing research, monitoring and tracking of changes on the land and in the water to provide for the application of Mātauranga Māori and latest scientific methods, as they become available.

Preparing for future requirements on what can be undertaken on the land, with limits ensuring that the management of land use and activities is closely aligned with the biophysical capabilities of the land, the spatial location, and the likely effects of discharges on the lakes, rivers and wetlands in the catchment.’

8. Furthermore, proposed Policy 17 is about considering the wider context of the Vision and Strategy and provides that *‘When applying policies and methods in Chapter 3.11, seek opportunities to advance those matters in the Vision and*

⁶ Waikato-Tainui Raupatu Claims (Waikato River) Act 2010. Also relevant are Ngāti Tuwharetoa, Raukawa, and Te Arawa Iwi Waikato River Act 2010, and Nga Wai o Maniapoto (Waipā River) Act 2012, noting these latter two Acts contain identical/similar provisions to those contained in the River Act.

⁷ Note that, for the purpose of the River Act, the Waikato River includes lakes and wetlands. Refer s 6 River Act.

⁸ Refer ss 5 and 13(4) of the River Act.

⁹ Refer Vision and Strategy, Schedule 2 clause 1(3)(a) River Act

¹⁰ *Concise Oxford Dictionary*, Clarendon Press, Oxford 1990 p.972

Strategy and the values for the Waikato and Waipā Rivers that fall outside the scope of Chapter 3.11, but could be considered secondary benefits of methods carried out under this Chapter, including but not limited to ... opportunities to enhance biodiversity, wetland values and the functioning of ecosystems’.

9. In light of the above, I submit Plan Change 1 is concerned with the implementation of the Vision and Strategy. Plan Change 1 is about the restoration and protection of the health and wellbeing of the Rivers. As mentioned in the footnote 7, Rivers include Wetlands and Lakes.
10. I discuss below the parts of the Director-General’s submission that other parties¹¹ have indicated that they consider is out of scope, or not ‘on’, Plan Change 1. I do wish to note at this stage that the relief sought in the Director-General’s submission and detailed particularly in the Block 1 Evidence of Kathryn McArthur, seeks to restore and protect the ecosystem health of the Rivers which is consistent with the Vision and Strategy, and the restoration of water quality so that it is safe for people to swim in and take food from throughout. I note that under the definition of ‘environment’ in s 2 of the RMA ‘ecosystems’ includes their constituent parts, including people and communities.

Caselaw

11. The opening legal submissions on behalf of Mercury NZ Limited identifies the test for whether a submission is ‘on’ a plan by referring to the *Clearwater* High Court decision¹². The approach taken in *Clearwater* identified a two-limb test¹³, or perhaps better described as two matters for consideration. It is noted that this case involved a variation rather than a plan change.

¹¹ For example, refer para 10 legal submissions for Mercury NZ Ltd, para 2.21 legal submissions for Fonterra Co-Operative Group Ltd asserts there is no scope for targets/limits on temperature being part of the relief sought in the Director-General’s submission,

¹² *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02,

¹³ *Ibid* at [66]

12. Firstly, the Court stated that: *'A submission can only fairly be regarded as 'on' a variation if it is addressed to the extent to which the variation changes the pre-existing status quo'*.¹⁴
13. Secondly, *'But if the effect of regarding a submission as 'on' a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly 'on' the plan variation'*.¹⁵

First Consideration

14. Dealing with the first consideration I note that in *Motor Machinist Limited*¹⁶, a decision that adopted the approach taken in *Clearwater* and involved a plan change, the Court stated at para [80] – [81] that:

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses the alteration

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change'

15. I submit this first consideration must be applied on the basis that Plan Change 1 encapsulates the objective of pursuing the restoration and protection of the health and wellbeing of the Rivers. In other words, the first consideration must be read in a way that recognises that Plan Change 1 seeks to give effect to the Vision and Strategy.

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ *Palmerston North City Council v Motor Machinist Limited* [2013] NZHC 1290 [31May 2013]

16. The RMA and the River Act, and the relevant provisions within each enactment, are complimentary. Both enactments ultimately seek the same outcome – the restoration and protection of the water quality, health and wellbeing of the Rivers.
17. The River Act goes further, and understandably so given it is the direction-setting document for the Rivers, by setting out specific objectives and strategies to realise and achieve the vision in the context of the Rivers.
18. There is an objective to pursue the adoption of a precautionary approach towards decisions that may result in significant effects on the Rivers that threaten serious or irreversible damage to the Rivers.
19. Also included are strategies; to ensure the highest level of recognition is given to the restoration and protection of the Rivers, to establish what the current health status of the Rivers are by utilising Mātauranga Māori and the latest available scientific methods, development of targets for improving the health and wellbeing of the Rivers by, again, using Mātauranga Māori and the latest available scientific methods, and the development and implementation of a programme of action to achieve the targets for improving the health and wellbeing of the Rivers.
20. In his relief, the Director-General's submission seeks the addition of targets for the following attributes for rivers; Periphyton biomass and cover (trophic state), Dissolved inorganic nitrogen, Dissolved reactive phosphorus, Cyanobacteria, fine deposited sediment, dissolved oxygen, temperature, pH range, toxicants/metals, and Macroinvertebrate community index. The Director-General's submission also seeks the refined attributes for protecting and restoring the ecosystem health of lakes, water quality attributes for protecting and restoring Whangamarino Wetland, and narrative targets for wetlands.

21. As confirmed in the expert evidence filed in relation to the Director-General's submission, targets for these attributes are necessary to ensure the ecosystem health of the Rivers, Lakes and Wetlands. In my submission, this relief is entirely consistent with the Vision and Strategy, and is 'on' Plan Change 1, as it not only pursues the objective of restoring and protecting the Rivers, but also relies on the latest available scientific methods, to develop targets and to implement a programme of action to achieve targets for improving the health and wellbeing of the Rivers. Furthermore, many of the additional targets sought are closely linked to the management of contamination by nitrogen, phosphorus, sediment and microbial pathogens via point source and diffuse discharges to water. Others are linked to providing for the values of ecosystems health, human health for recreation and the health and wellbeing of the Rivers.
22. To conclude my submission on the first consideration in *Clearwater*, the Director-General's submission is on Plan Change 1 because Plan Change 1 is not only about the restoration and protection of water quality in the Rivers by managing the discharge of the four identified contaminants, but because it must also, by virtue of the statutory obligations under the River Act, pursue the objective to restore and protect the health and wellbeing of the Rivers. I submit the scope of this pursuit encapsulates the additional targets and attributes sought in the Director-General's relief.

Second Consideration

23. Focusing now on the second consideration, the Court in *Clearwater* noted this consideration is consistent with the Environment Court's decision in *Halswater Holdings Ltd*¹⁷. In this case the Environment Court focused on the public notification process provided for in the RMA at the time that decision was made.

¹⁷ *Halswater Holdings Ltd & Others v Selwyn District Council* (1999) 5 ELRNZ 192

24. The Court in *Clearwater* stated, in relation to the second consideration, that:
- ‘It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of “left field”, there may be little or no real scope for public participation’.*¹⁸
25. Accordingly, to determine whether the additional targets and attributes sought by the Director-General can be considered an appreciable amendment to Plan Change 1, **without real opportunity for participation by those affected**, the relevant public notification requirements in Schedule 1 of the RMA should be considered, alongside the actual Plan Change 1 public notification process undertaken by WRC.

Public Notification Process

26. Pursuant to clause 7 Schedule 1 of the RMA, a local authority must give public notice of:
- a. the availability of a summary of decisions requested by persons making submissions on a proposed plan,
 - b. where the summary of decisions can be inspected,
 - c. the fact that no later than 10 working days after the day on which public notice is given, the persons described in clause 8(1) may make a further submission on the proposed plan. These persons include any person representing a relevant aspect of the public interest, any person that has an interest in the proposed plan greater than the interest that the general public has and the local authority itself.
 - d. the last day for making further submissions, and
 - e. the limitations on the content and form of a further submission

¹⁸ *Clearwater* at [69]

27. The local authority must serve a copy of the public notice of submissions on all persons who made submissions.
28. Pursuant to clause 8A Schedule 1, a person who makes a further submission must serve a copy of it on the relevant local authority and the person who made the submission to which the further submission relates.

Plan Change 1 Public Notification Process

29. Plan Change 1 was first notified on 22 October 2016. The partial withdrawal, removing the north eastern portion of the Waikato River catchment to undertake consultation with Hauraki Iwi authorities, was notified on 3 December 2016. Submissions on Plan Change 1 closed in March 2017, and a summary of submissions (or decisions requested) on Plan Change 1 were made available on WRC website in October 2017.
30. Both the Director-General's submission and WRC summary of decisions requested, made available in October 2017, identified the fact that the Director-General sought in his relief limits, targets and methods for additional attributes.
31. WRC notified, for public submissions, Variation 1 to Plan Change 1 on 10 April 2018. Submissions on Variation 1 closed in late May 2018. On 20 August 2018 WRC released a summary of decisions requested from the 1084 submissions made on Plan Change 1 and Variation 1. Further submissions closed on 17 September 2018.
32. While a summary of decisions requested on Plan Change 1 and Variation 1 was released on 20 August 2018, being just under one month before further submissions closed, as noted above a summary of decision requested on Plan Change 1 was first made available on the WRC website in October 2017.

33. The key point here is that a summary of the Director-General's relief, seeking additional targets and attributes, was first made publicly available in October 2017 through WRC summary of decisions requested on Plan Change 1. Further submissions on Plan Change 1 (and Variation 1) did not close until September 2018. Any person affected by the Director-General's relief had 11 months, almost a year, to oppose or raise concerns with the relief sought. This time period to make further submissions is much longer than what a person is normally given under a schedule 1 process. I would anticipate that any persons affected have made a further submission on the Director-General's submission given the large total number of submissions made. If they have not done so, it is not through a lack of opportunity to do so.
34. Any persons affected, including any person with an interest in Plan Change 1 greater than the general public, I submit, had a real opportunity to participate in the Plan Change 1 process. Even if WRC had not given notice to all persons with a greater interest than the general public, the extent of information available about Plan Change 1, especially on WRC website, would or should have alerted affected persons to the fact that Plan Change 1 seeks to achieve the Vision and Strategy.
35. There is extensive information on the WRC website about the Vision and Strategy. Furthermore, the foreword at the beginning of the Plan Change 1 document from both the Healthy Rivers Wai Ora committee co-chairs, and from the WRC Chair at the time of public notification, makes it clear that the Vision and Strategy is the primary direction setting document for the Rivers, that it sets a higher bar than the NPS for Freshwater Management 2014 and requires the development of a plan for the Rivers to be swimmable and safe for food collection. Given this foreword, and the wider content of Plan Change 1 referencing the Vision and Strategy and the intent to implement or give effect to it, I submit it cannot be said that the relief sought by the Director-General comes out of 'left field' in terms of the use of that phrase in the *Clearwater* decision.

36. In my submission the information on the WRC website and in the Plan Change 1 document itself would have alerted any person affected to the fact that Plan Change 1 seeks to give effect to the Vision and Strategy, or should have at least put any person on notice to make inquiries to better inform themselves, including reviewing the summary of decisions requested.
37. To conclude my submission on the second consideration in *Clearwater*, the public notification process of Plan Change 1 provided real opportunity for participation by those potentially affected by the relief sought by the Director-General. Given the total number of submissions (1084), it is likely those affected are participating in this process.

Section 32AA RMA – Further Evaluation Reports

38. Section 32AA(1) RMA requires a further evaluation for any changes that have been made to, or proposed for, the proposal¹⁹ since the evaluation report, required under s 32, for the proposal was completed.
39. Pursuant to s 32AA(1)(b), the further evaluation must be undertaken in accordance with s 32(1) to (4) and must, despite s 32AA(1)(b) and s 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes.
40. Relevantly, a further evaluation report must:
 - a. Examine the extent to which the objectives²⁰ of the proposal being evaluated are the most appropriate way to achieve the purpose of the RMA,
 - b. Examine whether the provisions²¹ in the proposal are the most appropriate way to achieve the objectives by –

¹⁹ Proposal means ‘change’ for which an evaluation report must be prepared

²⁰ Objectives means the purpose of the proposal

²¹ Provisions mean the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed change

- 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. Summarise the reasons for deciding the provisions²²

41. The efficiency and effectiveness assessment referred to above must 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 economic growth and employment anticipated to be provided or reduced. And, if practicable, quantify the anticipated benefits and costs of these anticipated effects. An assessment of the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions is also required.²³

42. I understand in response to a question asked of Mr McCallum-Clarke during the Block 2 Hearings that costs of stock exclusion from water bodies had not been assessed, and that they had not been quantified by WRC. And Mr McCallum-Clarke was of the view that there was a gap if WRC were inclined to accept the recommendations for stock exclusions proposed by the Director-General and the Fish and Game Council.

43. Attached, as Appendix A to these legal submissions, is a Further Evaluation for the proposal or changes sought in the Director-General's submission that are not captured in the s 32 Evaluation Report prepared by WRC. This Further Evaluation was undertaken by Ms Kissick in accordance with s 32AA. It is noted that this Further Evaluation reflects the information to date at the time of filing these submissions, and may be further revised once additional evidence becomes available, -for example the outcome of expert conferencing and the joint witness statement on table 3.11-1.

²² Refer s 32(1)(a) and (b)

²³ Refer s 32(2)

44. With respect I note, had WRC appropriately considered alternative options as required under s 32, much of Ms Kissick's analysis would not have been necessary.

Waterbody Setbacks

45. The Director-General's submission sought amendments to the stock exclusion provisions as follows:
- a. 10m setbacks for cultivation from permanent rivers, lakes and outstanding waterbodies,
 - b. 5m cultivation setbacks from intermittent rivers and wetlands,
 - c. 20m setback for cultivation from peat lakes, and
 - d. 20m grazing and cultivation setbacks for sloping land of 20 degrees or more.
46. In terms of animal exclusions, the Director-General sought exclusion of sheep from outstanding waterbodies and that cattle, horses, deer and pigs are excluded from all waterbodies, including ephemeral waterbodies as reflected in Schedule C of the submission.²⁴
47. Riparian management, such as stock exclusions and setbacks, serve to protect water quality through measures such as nutrient and contaminant interception and processing and shading.²⁵
48. Livestock access to waterbodies causes effects to freshwater ecosystems through the consumption of plant matter, trampling of riparian plants and fish habitat, pugging and consequential loss of sediment to water, nutrient inputs, microbial contamination and stream bank erosion²⁶ Cultivation of land

²⁴ Refer pp 94 – 95 and pp 98-99

²⁵ Ms McArthur's evidence [24]

²⁶ *ibid* [26]

adjacent to waterways can also impact on riparian spawning habitat through direct disturbance of spawning areas and removal of vegetation.²⁷

49. For river and lake margins where īnanga and other large-bodied galaxiid are known or predicted to spawn, Ms McArthur recommends a 20 m setback distance to ensure available and functioning spawning habitat and sustainable riparian vegetation.²⁸ Outside of these areas, Ms McArthur recommends a minimum setback of 10m from permanent rivers and streams to ensure more effective buffering of contaminant transport, along with identification and management of critical source areas in FEPs. For intermittent, ephemeral or headwater rivers and streams Ms McArthur recommends 5m setbacks but notes wider setbacks would be more effective at reducing contaminant transport to water.²⁹
50. In terms of wetlands, Dr Robertson recommends 10m setbacks apply to draining of wetlands and construction of drains near wetlands because the lowering and fluctuation of wetland water tables has a direct impact on the nutrient cycling in wetlands. Water table fluctuations contribute directly to the release of phosphorus.³⁰
51. The Director-General's expert evidence recommends the exclusion of cattle, horses, pigs, sheep and goats from all water bodies, except for intermittent stream and rivers and permanent streams and rivers where the exclusion of cattle, horses, deer and pigs is recommended.³¹
52. Dr Stewart recommends 20m setbacks for particularly sensitive habitats such as peat lakes and riverine lakes.³² As noted, the submission sought 10m setbacks for lakes.

²⁷ *ibid* [28]

²⁸ *ibid* [50]

²⁹ *ibid* [51]

³⁰ Dr Robertson evidence [29]

³¹ Ms Kissick evidence [79]

³² Dr Stewart evidence [31]

53. While Dr Stewart is generally supportive of a 10m setback, he states that 20m setbacks should apply to lakes because larger buffers will ensure improved near-shore habitat noting that stock exclusion from riparian habitat is important in lower catchment riverine lakes. In terms of peat lakes, 20m riparian buffers are important to help maintain perennially saturated marginal wetlands and riparian habitat. Dr Stewart states that Waikato lakes and their specific habitat requirements to sustain biodiversity is largely unknown and so a precautionary approach is appropriate and that it is likely galaxiid spawning is occurring in lakes throughout the catchment.³³

Īnanga Spawning Habitat

54. In terms of the values and uses section of Plan Change 1, the relief the Director-General sought was the expansion of the extant broadly defined ecosystem health value to effectively provide for ecological health, ecosystem processes and biological diversity at specific locations including, as a minimum, additional value to recognise Īnanga spawning, native fish migration, threatened and at risk species and biodiversity hotspots, being areas that are particularly outstanding due to their high proportion of native species and their role as native species 'refuge'.³⁴ The Director-General's submission also sought new policies and rules to protect spawning habitat³⁵
55. In his submission the Director-General discusses the fact that Īnanga spawn in the lower Waikato River, among riparian vegetation at the upper tidal extent during high spring tides. Furthermore, early records suggest that this occurs on the Waikato River downstream of Tuakau.
56. As discussed by Ms McArthur, maintaining or restoring adequate and vegetated riparian margins is key to enabling successful spawning and

³³ Dr Stewart evidence [43]-[49]

³⁴ Refer pp 28 – 30

³⁵ Refer pp 47 -48

recruitment of galaxiid fish in the Waikato and Waipā catchments and thereby providing for ecosystem health.³⁶

57. It is submitted that a new policy and rule framework is required to protect īnanga spawning habitat. The s 42A Report notes that such habitat is better left to the FEP process, and therefore does not recommend adopting the Director-General's submission on this issue. However, as Ms McArthur states, while Certified Farm Environment Planners may adequately identify issues with respect to farming operations and water quality effects, she notes that most are unlikely to be competent in identifying ecological and biodiversity values, including spawning habitats.³⁷
58. As WRC have predicted spawning information available via GIS layers it would be preferable if riparian spawning areas are identified and protected more widely for all riparian spawning galaxiid fish across the Waikato and Waipā catchments.³⁸
59. In order for Plan Change 1 to give effect to the relief sought in the Director-General's submission, Ms Kissick considers the identification and protection of īnanga habitat through mapping may be required³⁹, and Ms McArthur's evidence support this. As mentioned, the Director-General seeks an expansion of the ecosystem health value to provide for biological diversity at specific locations, including recognition of īnanga spawning and areas that play a role as a native species refuge.
60. While it is accepted that the relief sought does not specifically refer to mapping spawning habitat, it does seek recognition of this habitat. Ms Kissick evidence is that mapping will recognise spawning habitat. I submit there is scope in the Director-General's submission as mapping can be considered as a consequential amendment to the relief sought.

³⁶ Ms McArthur's evidence [18]

³⁷ *ibid* evidence [22]

³⁸ *ibid* [23]

³⁹ Ms Kissick evidence [92]

75th Percentile Nitrogen Leaching Value

61. The Director-General's submission supported the 75th percentile leaching value definition but at the same time sought clarity about how this approach would work. Ms Kissick is concerned the definition is not specific enough to improve water quality of lakes in the Waikato and Waipā catchments.⁴⁰
62. Ms Kissick refers to Dr Phillips Block 1 evidence which Dr Stewart reiterates in that lakes are particularly vulnerable to the impact of nutrient enrichment and are more effective at converting nutrients into phytoplankton.⁴¹
63. Given this concern Dr Stewart recommends that the nitrogen targets be set at the 60th percentile within lakes FMUs, as it best reflects differences in nitrogen use efficiency between rivers/reservoirs and lakes and recognises and accounts for differences in nutrient impact between rivers and lakes. This approach also maintains Plan Change 1 current strategy of targeting the heaviest polluters first.⁴²

Policy 11 – Application of Best Practicable Option and mitigation or offset of effects to point source discharges

64. The Director-General's submission⁴³ sought a hierarchy for the management of adverse effects associated with point source discharges, which the officers report considered was appropriate.
65. The Director-General also sought that waterbody values be considered when evaluating whether offsetting is an appropriate option given some waterbodies and their ecosystems and species are irreplaceable. This should

⁴⁰ *ibid* [107]

⁴¹ *ibid* [108]

⁴² Dr Stewart evidence [83] - [85]

⁴³ Refer pp 68

be a factor in considering whether offsetting is appropriate for point source discharges, as irreplaceability is one of the factors that indicates the inappropriateness of an offsetting approach. The Director-General's submission also referred to the Guidance on Good Practice Biodiversity Offsetting in New Zealand.

66. Ms McArthur notes 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 such as the Guidance on Good Practice Biodiversity Offsetting. Off-sets are a values-based approach whereby there is a need to generate a gain in values that are adequate to fully balance the losses in that same value. Ms McArthur concludes that proposed Policy 11 appears to be contaminant trading, rather than a true offset.⁴⁴
67. Accordingly, Ms Kissick recommends amendments to Policy 11 to remove the ability for offsetting relating to point source discharges.⁴⁵

Tangata whenua ancestral lands definition

68. Plan Change 1 defines 'Tangata whenua ancestral lands' to mean *'land that has been returned through settlement processes between the Crown and tangata whenua, or is, as at the date of notification (22 October 2016), Maori freehold land under the jurisdiction of Te Ture Whenua Maori Act 1993.*
69. While the Director-General did not submit on this definition, there is a legal issue with the wording of this definition. Caselaw holds that the term 'ancestral lands' as used in s 6(e) RMA is not limited to land held as Māori freehold land but includes land that has been owned by Māori ancestors.
70. *Royal Forest and Bird Protection Society Incorporated v W.A. Habgood Limited*⁴⁶ is a 1987 case, so decided under the jurisdiction of the Town and

⁴⁴ Ms McArthur evidence [12]

⁴⁵ Ms Kissick evidence [214]

⁴⁶ High Court, Wellington, 31/3/1987, Hollard J

Country Planning Act 1977. This was an appeal to the High Court that primarily concerned the meaning of the words ‘ancestral land’, which was declared to be of national importance in town planning matters under the Town and Country Planning Act 1977. – *‘their culture and tradition with their ancestral land’*

71. Before reaching his decision, Holland J referred to an earlier Tribunal decision which held: *‘First we hold as a matter of law that the land in question, not being Māori land or Māori freehold land, is no longer ancestral land of Māori...’*⁴⁷
72. However, on this issue, Holland J held that⁴⁸:

I can see no logical or legal reason why section 3(1)(g) should be of no application solely because the land in question is no longer owned by Māori....Parliament put no limitation on the ... nature of this relationship to the land and there is no jurisdiction for a judicial limitation being imposed. Each case will have to be considered on its merits and once the nature of the relationship has been established it will be necessary for the deciding body to consider in the circumstances the importance of that relationship to the overall consideration of the application before it. It accordingly follows that the Tribunal in the present case has erred as a matter of law in finding that section 3(1)(g) is of no application to the present case because the land is now owned by the Crown and not Māori’

73. The approach in *Habgood* has been confirmed by the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council*⁴⁹ and now reflects the approach to application of s 6(e) RMA. “Ancestral land is land that has been owned by ancestors (there being no requirement for current Maori ownership)”⁵⁰.
74. The definition of Tangata whenua ancestral lands used in Plan Change 1 imposes limits on land that could be captured under this definition. For example, in practice this would exclude Maori or ancestral land taken under

⁴⁷ *Ibid* p 6

⁴⁸ *Ibid* p 9-10

⁴⁹ [1989] 3 NZLR 257 (CA)

⁵⁰ Environmental and Resource Management Law, 5th ed, Nolan, p 937.

the Public Works Act, for a public road or school or similar, and then later returned but not through a settlement process. It would also exclude land that is no longer in Maori ownership, but which Maori still have an ancestral connection to and are in a position to develop. It also has the potential to constrain the application of s 6(e) RMA in the Region.

Rule Framework

75. Section 70 RMA requires that, before a regional council includes in a regional plan a rule that allows as a permitted activity:
- a. a discharge of a contaminant or water into water,
 - b. or a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,
- the regional council shall be satisfied that none of the following⁵¹ effects are likely to arise in the receiving water, after reasonable mixing, as a result of the discharge of the contaminant, either by itself or in combination with the same, similar, or other contaminants.

76. Proposed Rule 3.11.5.8 Permitted Activity Rule – Authorised Diffuse Discharges states:

The diffuse discharge of nitrogen, phosphorus, sediment and or microbial contaminants from farming onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA is a permitted activity, provided the following conditions are met:

1. *The land use activity associated with the discharge is authorised under Rules 3.11.5.1 to 3.11.5.7; and*

⁵¹ The effects are -The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials, any conspicuous change in the colour or visual clarity, any emissions of objectionable odour, the rendering of fresh water unsuitable for consumption by farm animals, any significant adverse effects on aquatic life

2. *The discharge of contaminant is managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters...'*

77. The rule then goes on to list the effects listed in footnote 51 above. However, rule 3.11.5.8(2) fails to include the full test in s 70(1). This test not only refers to effects arising after reasonable mixing, it also refers to effects arising as a result of the discharge of the contaminant either by itself or in combination with the same, similar, or other contaminants. This is a crucial aspect of the test to be met under s 70 for a discharge activity to be permitted. Rule 3.11.5.8(2) should be amended so as to be fully consistent with s 70(1).

Joint Witness Statement (JWS) on Table 3.11-1

78. The Joint Witness Statement reflects a considerable amount of work by the experts involved in the expert conferencing. Given the number of pages, 202, Counsel has had very limited time in which to consider the JWS or discuss its contents with witnesses prior to filing these written submissions.
79. I acknowledge the panel's 31 May 2019 directions that no further evidence will be accepted on Table 3.11.1, other than the JWS, and that any legal submissions on the Table may be presented at the Block 3 hearings.
80. I seek clarification whether further evidence on the JWS and Table will be accepted at the Block 3 hearings? I seek this clarification because there is likely to be other experts, some of whom may not have attended all or only attended some of the expert conferencing sessions, who may need to consider and address any implications of the JWS for their evidence.

Conclusion

81. I submit the Director-General's submission, in its entirety, is on Plan Change 1 when reading the whole Plan Change document, and when considered in the statutory context of the Vision and Strategy.

82. I further submit that persons affected by the relief sought in the Director-General's submission has had the opportunity to participate in the Plan Change 1 process.
83. The relief sought in the Director-General submission is, in my submission, necessary to restore and protect the health and wellbeing of the Rivers.



Victoria Tumai

Legal counsel for the Director-General of Conservation

25 June 2019.