

BEFORE Waikato Regional Council Hearing
Commissioners

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Waikato Regional Proposed Plan
Change 1 – Waikato and Waipā River
Catchments

SYNOPSIS OF LEGAL SUBMISSIONS ON BEHALF OF WAIKATO AND WAIPĀ RIVER IWI

SUMMARY POSITION

1. Plan Change 1 is required to respond to the statutory imperative on the Waikato Regional Council (the **Council**) and the Waikato and Waipā River Iwi,¹ to achieve the overarching purpose of the Waikato River Settlement legislation.² Of particular importance, this includes the obligation to give effect to Te Ture Whaimana³ – the Vision and Strategy for the Waikato and Waipā Rivers (**Te Ture Whaimana**). Plan Change 1 is necessary to address the priority issue of effects of discharges to land and water in the Waikato and Waipā River catchments; the first step on the journey towards achieving Te Ture Whaimana by 2096.⁴
2. Te Ture Whaimana holds a unique place in the Resource Management Act 1991 (**RMA**) planning hierarchy. It has led to a fundamental change in the application of the provisions of Part 2, providing for a regional application of the requirements of the RMA to reflect the particular circumstances of

the Waikato and Waipā Rivers and their catchments and the legal status of Te Ture Whaimana.⁵

3. The River Iwi broadly agree with the direction of travel set out in Plan Change 1. In particular, the River Iwi support:
 - (a) the 80-year long-term objective to achieve Te Ture Whaimana;
 - (b) the short-term objective "to put in place the necessary mitigation measures required to achieve "10% of the journey towards Te Ture Whaimana" in 10-years and by 2026;
 - (c) the staged approach to achieve Te Ture Whaimana over 80-years;
 - (d) holding the line and preventing further degradation through unmanaged land use change;
 - (e) the pathway and principles for the development of multiple Māori owned land and land returned through Treaty of Waitangi settlements; and
 - (f) setting aside the question of allocating long-term rights to discharge contaminants at a property-scale (based on current discharges) until there is sufficiently detailed information to properly inform such a debate.⁶
4. The River Iwi consider that this overarching policy approach is foundational to Plan Change 1.
5. The River Iwi do not agree with Plan Change 1 in its entirety, and the River Iwi's technical experts will address those aspects that can be improved.

SUMMARY OF THE WAIKATO AND WAIPĀ RIVER IWI EVIDENCE

6. The River Iwi will present the following evidence today:

¹ Waikato-Tainui, Ngāti Maniapoto, Raukawa, Te Arawa River Iwi and Ngāti Tūwharetoa (the **River Iwi**).

² Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and the Ngā Wai o Maniapoto (Waipā River) Act 2012.

³ Literally, "the authoritative law".

⁴ Reflecting Plan Change 1's 80-year long-term objective to achieve Te Ture Whaimana.

⁵ *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223 at [133] and [143] – [146] (*Puke Coal*), reflecting on the implication of the Supreme Court's decision of Environmental Defence Society v NZ King Salmon [2014] NZSC 38 (*King Salmon*) with respect to Te Ture Whaimana.

⁶ This particular aspect of the overarching policy approach is significant. In the interest of property respecting this policy approach, the River Iwi have purposefully not provided evidence or submissions on the matters it raises.

- (a) *Individual River Iwi Evidence:* Each of the River Iwi made their own submissions on Plan Change 1, and each River Iwi have provided their own individual evidence on that basis. This evidence is to be given by Rukumoana Schaafhausen (for Waikato-Tainui), John Kaati (for Ngāti Maniapoto), Vanessa Eparaima for Raukawa, Evelyn Forrest for Te Arawa River Iwi, and Topia Rameka for Ngāti Tūwharetoa. The primary focus of this evidence is on the nature of the relationships that each River Iwi have with the Waikato and Waipā Rivers. In essence, their evidence is that the Rivers are central to their identity, and their health and well-being as iwi.
- (b) *Joint River Iwi Evidence:* The River Iwi, collectively, will also speak briefly to the process that has been followed to develop Plan Change 1, and the River Iwi's objectives in participating in that process.
- (c) *Technical Evidence of Ms Kydd Smith and Dr Ausseil:* The River Iwi have requested some technical amendments to Plan Change 1, most of which will be dealt with in Blocks 2 and 3. The primary evidence of the River Iwi's planning and freshwater scientists focuses on the aspects of the section 42A report that they disagree with, and their rebuttal evidence deals with some of the fundamental differences of opinion between the experts. Those differences concern:
- (i) various detailed amendments to Plan Change 1 as recommended in the section 42A report, some of which are supported, some of which are supported subject to specific wording amendments, and some of which are opposed; and
 - (ii) the language to be used to describe the numerical thresholds reflected in Plan Change 1, as well as some of the thresholds themselves.

7. In terms of the water quality and freshwater ecology provisions of Plan Change 1, the technical evidence for the River Iwi recommended that the relevant experts caucus these matters to attempt to resolve any differences of opinion among the experts. The Panel has adopted this suggestion.

CONTEXT – TREATY SETTLEMENTS AND PLAN CHANGE 1

8. The antecedents of Plan Change 1 are found many generations ago in the Crown's confiscation of the Waikato River in 1865. The Crown has acknowledged that its past dealings in relation to the Waikato River breached the Crown's obligations under Te Tiriti o Waitangi (the **Treaty of Waitangi**). The Crown's express acknowledgements recognise:⁷
- (a) that the historical Waikato River claims by Waikato-Tainui arise from the 1860s raupatu and its consequences;
 - (b) that the Crown's 1863 invasion by both land and the Waikato River was a double blow to Waikato-Tainui;
 - (c) that the Crown's breach of the Treaty of Waitangi denied Waikato-Tainui their rights and interests in, and mana whakahere over, the Waikato River;
 - (d) that Waikato-Tainui never willingly or knowingly relinquished their rights and interests in, or authority over, the Waikato River;
 - (e) the importance to Waikato-Tainui of the principle of te mana o te Awa;
 - (f) that to Waikato-Tainui the Waikato River is a tupuna which has mana and in turn represents the mana and mauri of Waikato-Tainui;
 - (g) that to Waikato-Tainui, the Waikato River is a single indivisible being;
 - (h) that for Waikato-Tainui, their relationship with, and respect for, the Waikato River gives rise to their responsibilities to protect the mana and mauri of the River and exercise their mana whakahaere in accordance with their long established tikanga;

⁷ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Preamble at (17). While the arrangements entered into between the Crown and the other River Iwi were not directly effected through Treaty settlements such that the same acknowledgments of Treaty breach are not found in the other two River Acts, the deeds entered into with those Iwi and the Preamble to the Ngā Wai o Maniapoto (Waipā River) Act 2012 also expressly recognise the analogous relationships between the other River Iwi and the Waikato and Waipā Rivers.

- (l) that for Waikato-Tainui, their relationship with, and respect for, the Waikato River lies at the heart of their spiritual and physical wellbeing, their tribal identity and culture;
 - (j) that the Crown has failed to respect, provide for and protect the special relationship of Waikato-Tainui with the Waikato River;
 - (k) that the deterioration of the health of the Waikato River, while under the authority of the Crown, has been a source of distress for the people of Waikato-Tainui;
 - (l) that the pollution, degradation and development of the Waikato River, its lakes, streams and wetlands have caused the decline of once rich fisheries that, for generations, had sustained the people's way of life and their ability to meet obligations of manaakitanga, and this is a further source of distress;
 - (m) that the Crown respects the deeply felt obligation of Waikato-Tainui to protect te mana o te awa;
 - (n) that the Crown seeks a settlement that will recognise and sustain the special relationship of Waikato-Tainui with the Waikato River;
 - (o) that the Crown undertakes to assist and work with Waikato-Tainui to restore their mana whakahaere; and
 - (p) that Waikato-Tainui wish to promote the concept of a korowai to bring the River tribes together as an affirmation of their common purpose to protect te mana o te awa.
9. The Crown and Waikato-Tainui began discussions in the early 2000s to attempt to resolve Waikato-Tainui's Treaty claims in respect of the Waikato River. In 2006, the Crown and Waikato-Tainui signed Terms of Negotiation, setting out how they intended to engage with each other to resolve these matters and an agreement in principle was signed in 2007.
10. A deed of settlement settling the claims was signed between the Crown and Waikato-Tainui in August 2008. That deed was subsequently varied and replaced, by agreement, by a further deed of settlement in December 2009. The deed of settlement as varied in 2009 contained the terms of the

new legal framework for the Waikato River (and activities in its catchment affecting the Waikato River) centred on Te Ture Whaimana. The agreements in the deed of settlement were given effect through the enactment of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (the **Waikato River Settlement Act**), which received its Royal Assent on 7 May 2010.

11. Importantly, the overarching purpose of the settlement between Waikato-Tainui and the Crown is to restore and protect the health and wellbeing of the Waikato River for future generations.⁸ The purposes of the Waikato River Settlement Act relevantly include, to:⁹
- (a) give effect to the settlement of raupatu claims under the 2009 deed;
 - (b) recognise the significance of the Waikato River to Waikato-Tainui; and
 - (c) recognise Te Ture Whaimana (the Vision and Strategy) for the Waikato River.
12. As noted, the framework negotiated by Waikato-Tainui related to the Waikato River as a whole from the Huka Falls to the mouth of the Waikato River and therefore necessarily required the involvement and support of the other River Iwi. Accordingly, the Crown also entered into negotiations with the other River Iwi in relation to their interests in the Waikato and Waipā Rivers and their participation in the new legal framework. In this regard:
- (a) Raukawa and the Crown entered into a deed in relation to a co-management framework for the Waikato River on 17 December 2009;
 - (b) The Arawa River Iwi and the Crown entered into a deed in relation to a co-management framework for the Waikato River on 9 March 2010;

⁸ Waikato River Settlement Act, section 3.

⁹ Waikato River Settlement Act, section 4.

- (c) Ngāti Tūwharetoa and the Crown entered into a deed in relation to co-management arrangements for the Waikato River on 31 May 2010; and
 - (d) Ngāti Maniapoto entered into a deed in relation to co-governance and co-management of the Waipā River on 27 September 2010.
13. The deeds with Ngāti Tūwharetoa, Te Arawa and Raukawa were given effect through the Ngāti Tūwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010 (the **Upper Waikato River Act**), which received Royal Assent on 26 October 2010. This deed with Ngāti Maniapoto was given effect through Ngā Wai o Maniapoto (Waipā River) Act 2012 (the **Waipā River Act**), which received Royal Assent on 5 April 2012.
14. This background, and the associated legislation, is important for a number of reasons:
- (a) It is beyond question that each River Iwi has significant and culturally important associations with the Rivers. Those associations are acknowledged by the Crown and included in legislation.¹⁰ The associations are reconfirmed by way of evidence before the Panel.¹¹
 - (b) To address the long-held grievances regarding the continued degradation of the Waikato and Waipā Rivers, the Crown and the River Iwi agreed on an overall framework governing the way that the Rivers would be managed. This approach is now enshrined in legislation through the Waikato River Settlement Act, the Upper Waikato River Act and the Waipā River Act (the **River Acts**). The River Acts establish a co-governance and co-management framework for the Rivers, involving the River Iwi and the Crown (represented by regional and local authorities).
 - (c) Te Ture Whaimana is a product of the process of agreement between the Crown and River Iwi regarding the co-governance and co-management of the Waikato and Waipā Rivers. Te Ture Whaimana is set out in each of the River Acts. It has legislative

effect.¹² It is unique in the sense that it is the only RMA planning document that is set out in primary legislation.

- (d) Te Ture Whaimana, therefore, is a fundamental element of the co-governance and co-management arrangements agreed to between the Crown and the River Iwi. It is clearly the primary direction-setting document for the Waikato and Waipā Rivers.
 - (e) Plan Change 1 is required to respond to the statutory imperative on the Council and the River Iwi to achieve the overarching objectives set out in the River Acts, including the obligation to give effect to Te Ture Whaimana. It is absolutely fundamental in delivering on the legislative settlement arrangements that reflect the vision and aspirations of River kaumātua (elders), uri (descendants), marae, hapū and iwi.
15. Plan Change 1 was developed through the co-governance and co-management arrangements established by the River Acts and set out in the Joint Management Agreements between individual River Iwi and the Council. Those arrangements require that the final recommendation to be made to the Council on the content of Plan Change 1 must be *decided jointly* by the Council and *each* of the five River Iwi.¹³ However, the River Iwi proceeded as a collective in their co-governance engagement on Plan Change 1, acknowledging that working together would be the most efficient way to proceed.¹⁴
16. The River Iwi participated in the Joint Working Party (comprising Executive Officers of the five River Iwi and Council) that provided management oversight of the plan change project and reported to the co-governance Healthy Rivers Wai Ora Committee (**HRWOC**), as well as the HRWOC (consisting of 5 elected Regional Councillors and one Trustee of each of the five River Iwi), who had governance oversight of the plan change.

¹⁰ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, sections 8(2) and (3).

¹¹ See the individual briefs of evidence of the Waikato River Iwi.

¹² Schedule 2 of the Waikato River Settlement Act, Schedule 1 of the Upper Waikato River Act and Schedule 1 of the Waipā River Act.

¹³ Section 46(2)(c) of the Waikato River Settlement Act, section 48(2)(c) of the Upper Waikato River Act and section 22(2)(c) of the Waipā River Act.

¹⁴ Joint Statement on behalf of the Waikato and Waipā River Iwi, 15 February 2019, at paragraph 13.

TE TURE WHAIMANA

17. Te Ture Whaimana is:
- (a) a statutory instrument, given legislative effect through the River Acts; and
 - (b) the primary direction setting document for the Waikato and Waipā Rivers and activities within their catchments affecting the Waikato and Waipā Rivers.¹⁵
18. Te Ture Whaimana's contents are beyond challenge.¹⁶
19. In the context of other planning instruments to which the panel must "give effect", the obligation to give effect to Te Ture Whaimana is the strongest direction that Parliament has given in relation to any RMA planning document. It prevails over any inconsistent provision in a national policy statement, the NZ Coastal Policy Statement and a national planning standard. It also prevails over a national environmental standard if more stringent than the standard.¹⁷
20. Te Ture Whaimana automatically forms part of the Regional Policy Statement (RPS), and the RPS cannot otherwise be inconsistent with Te Ture Whaimana.
21. Case law provides guidance on how this Panel should give effect to Te Ture Whaimana:
- (a) The weight and importance accorded Te Ture Whaimana through legislation is considerable.¹⁸

- (b) The Panel must "give effect to" Te Ture Whaimana.¹⁹ The phrase "give effect to" means to implement. It is a strong directive creating a firm obligation on the part of those subject to it.²⁰
- (c) To "give effect to" something is the highest legal weighting under the RMA.²¹

22. The obligation to "give effect to" Te Ture Whaimana must be interpreted in its statutory context.
23. The relationship between Te Ture Whaimana and Part 2 of the RMA has been the subject of a number of submissions and of expert evidence. Some submitters and expert witnesses argue that Plan Change 1 does not give effect to section 5 of the RMA and/or does not properly recognise and provide for economic matters.²² This argument appears to be that Plan Change 1 is too heavily weighted in favour of water quality to the detriment of the economic wellbeing of the community (particularly the farming community).²³
24. Three separate, but related, issues require consideration in this respect:
- (a) the legal relationship between Te Ture Whaimana and Part 2;
 - (b) the implementation of the statutory direction to "give effect to" Te Ture Whaimana; and
 - (c) the interpretation of Te Ture Whaimana (including any question of ambiguity).

Legal Relationship between Te Ture Whaimana and Part 2

25. The Environment Court in *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223 (*Puke Coal*) stated that Te Ture Whaimana has led to

¹⁵ Waikato River Settlement Act, sections 5(1) and 9(2) & Waipā River Act, section 8(1): applying to the Upper Waipā River.

¹⁶ The Waikato and Waipā River iwi understand that some submitters oppose Te Ture Whaimana on the basis of a lack of consultation or that it was not properly promulgated. With respect, that position misunderstands both the creation and the statutory enshrinement of Te Ture Whaimana. The legality of Te Ture Whaimana cannot be challenged and any attempt to do so is ultra vires the present planning process.

¹⁷ *Puke Coal* interpreting the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, section 12(4).

¹⁸ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 350 at [99].

¹⁹ Waikato River Settlement Act, section 13.

²⁰ *King Salmon* at [77].

²¹ As compared to "recognise and provide for", "to have particular regard to", "to have regard to" and "to take into account".

²² To which references in Part 2 include as part of section 5(2) and section 7(b).

²³ The Panel too, has been grappling with related issues, albeit in the context of whether Te Ture Whaimana is internally inconsistent: Minute of the Panel dated 19 February 2019.

a change in the interpretation of the provisions of Part 2 for the purposes of the Waikato Region.²⁴

[143] It seems to us that *EDS v King Salmon* has established the principle that it is possible for national documents, and we would suggest by analogy both regional and district documents, to promulgate particular approaches within their area of influence which are not in conflict with superior documents. Lower order documents must give effect to that approach if sufficiently clear.

[144] In this regard, we are unable to see any conflict between the requirement of the Vision and Strategy to protect and restore the Waikato River and the provisions of Part 2 of the Act, or any of the other documents. Therefore, in terms of the analysis suggested in *King Salmon*, there is no need to give priority to other parts of Part 2 over the Vision and Strategy for Waikato River.

[145] We conclude that the intent of the Act is that it can provide for regional or district interpretation of the requirements of that Act to fit the particular circumstances of that region. Where the Government or the Regional Council has identified an area of importance (such as in the National Coastal Policy Statement) and provided an emphasis to avoid affects, then that is a matter which binds documents lower in the hierarchy. Regional and Local Plans cannot be inconsistent with the superior document i.e. they must give effect to that policy.

[146] We are unable to see anything in the Vision and Strategy for the Waikato River, adopted by legislation, which conflicts with the Act, and in fact as Mr Mulligan suggests, these documents fit remarkably well together. We suggest that 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.

26. This regional or district interpretation of the requirements of the RMA arises from the Supreme Court's rejection in *King Salmon* that giving effect to the NZ Coastal Policy Statement requires a referral back to Part 2 of the RMA.²⁵

[85] ... In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change.

27. And further:

[130] ... The necessary analysis should be undertaken on the basis of the NZCPS albeit informed by s 5. As we have said, s 5

should not be treated as the primary operative decision-making provision.

28. This statement of the law, as it relates to the relationship between Te Ture Whaimana and Part 2 of the RMA, is important. It addresses the argument by submitters that Plan Change 1 is too heavily weighted in favour of water quality to the detriment of the economic well-being of the community, by confirming that it is entirely appropriate for Te Ture Whaimana to adopt a position that is heavily weighted toward restoring water quality. Indeed, this is what was intended and directed in the River Acts.

Implementation of the statutory direction to "give effect to" Te Ture Whaimana

29. *King Salmon* did identify what it called a "caveat" in relation to the implementation of the statutory direction to "give effect to" Te Ture Whaimana:

[80] The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

30. The Court described the appropriate approach as:

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible.

²⁴ *Puke Coal* at [133]. This position was unanimous.

²⁵ See also, *King Salmon* at [152] and [153].

31. The obligation to give effect to Te Ture Whaimana, informed by the statutory context, therefore requires the Plan Change to reflect the significant importance of the Te Ture Whaimana as the primary direction-setting document for the Rivers. To do so, the Panel must reasonably take the following steps:

- (a) First, the Panel must identify the objectives of Te Ture Whaimana that are relevant to Plan Change 1. In doing so, the Panel must pay careful attention to the way in which those objectives are expressed.
- (b) Secondly, the Panel must consider how the relevant objectives of Te Ture Whaimana are to be given effect. The way in which the objectives and strategies in Te Ture Whaimana are expressed matters. As confirmed in *King Salmon*, it is possible for an objective in Te Ture Whaimana to be worded in such directive terms that the Panel will have no option but to implement it.
- (c) Thirdly, after this analysis has been undertaken, if any ambiguity remains, then guidance must be sought to the interpretation of Te Ture Whaimana.

Guiding Principles of Interpretation

32. In considering each of these matters, it is important that the Panel is aware of principles of interpretation found in the River Acts in which Te Ture Whaimana is set out.

33. Each of the River Acts contains a provision entitled 'Guiding principles of interpretation.' In the Waikato River Settlement Act, this provision states that the Act must be interpreted in a manner that best furthers the following:²⁶

- (a) the overarching purpose of the Waikato River settlement;²⁷
- (b) Te Ture Whaimana is intended by Parliament to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River; and

- (c) the agreements expressed in the 2009 deed and the Kiingitanga Accord.

34. The same interpretive clause in the Upper Waikato River Act states that the Act must be interpreted in a manner that best furthers:²⁸

- (a) the overarching purpose of the Act (to restore and protect the health and wellbeing of the Waikato River for present and future generations);²⁹
- (b) the additional purposes of the Act:³⁰
 - (i) recognising the significance of the Waikato River to Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi;
 - (ii) recognising Te Ture Whaimana for the Waikato River;
 - (iii) establishing and granting functions and powers to the Waikato River Authority;
 - (iv) establishing the Waikato River Clean-up Trust;
 - (v) acknowledging and providing a process that may recognise certain customary activities of Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi;
 - (vi) providing co-management arrangements for the Waikato River; and
- (c) the intention by Parliament for Te Ture Whaimana to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River.³¹

35. The Waipā River Act provides in even greater interpretive guidance. As with the other River Acts, it confirms that the Waipā River Act must be

²⁶ Waikato River Settlement Act, section 5.

²⁷ To restore and protect the health and wellbeing of the Waikato River for future generations.

²⁸ Upper Waikato River Act, section 5.

²⁹ Upper Waikato River Act, section 3.

³⁰ Upper Waikato River Act, section 4.

³¹ Upper Waikato River Act, section 5(1).

interpreted in a manner that best furthers Parliament's intent for Te Ture Whaimana to be the primary direction-setting document and the Act's overarching purpose.³² However, importantly, the overarching purpose of the Waipā River Act is worded differently to the other River Acts. It states:³³

The overarching purpose of this Act is to restore and maintain the quality and integrity of the waters that flow into and form part of the Waipā River for present and future generations and the care and protection of the mana tuku iho o Waiwaia.

36. The Act sets out the following principles of interpretation:³⁴

- (3) Guiding principles of interpretation are found in—
 - (a) subsection (4), which contains principles to do with mana; and
 - (b) subsection (5), which contains principles to do with practical and effective outcomes; and
 - (c) subsections (6) to (16).
- (4) The guiding principles to do with mana are—
 - (a) respect for the mana of Waiwaia and recognition that Waiwaia is the mauri and waiora of the Waipā River; and
 - (b) respect for the mana of Maniapoto and recognition of the significance of the Waipā River to the mana of Maniapoto; and
 - (c) recognition that Maniapoto have their own distinct relationship with the Waipā River and that the area encompassing the Upper Waipā River is distinct and the particular characteristics of the Upper Waipā River and its place within the rohe and customs of Maniapoto must be respected.
- (5) The guiding principles to do with practical and effective outcomes are—
 - (a) acknowledgement that the Crown and Maniapoto are Treaty partners working with one another to achieve positive results for the Waipā River and the Waikato River; and
 - (b) acknowledgement that work is needed to restore and protect the quality and integrity of the waters that flow into and form part of the Waipā River and that this is inextricably tied to the health and wellbeing of the Waikato River; and
 - (c) avoidance of unnecessary bureaucracy in co-governance and co-management arrangements with a focus on practical arrangements that will work now and over time.
- (6) A guiding principle is rangatiratanga, which, to Maniapoto,—
 - (a) means only Maniapoto can represent Maniapoto interests within the Maniapoto rohe; and

- (b) includes Maniapoto decision-making within the Maniapoto rohe and tino rangatiratanga over Maniapoto knowledge and resources.

(7) A guiding principle is kawanatanga, which means that—

- (a) the Crown provides laws and makes decisions for the community as a whole having regard to the economic and other needs of the day; and
- (b) Parliament has sovereign authority to make laws for the good and security of the country, including Māori and the wider community; and
- (c) obligations and agreements entered into by the Crown (including Ministers) depend upon the capability, resources, and mandated work programmes of the responsible departments, Crown agencies, statutory officers, and chief executives, and the priorities of the government of the day.

(8) A guiding principle is the Treaty of Waitangi, because Maniapoto and the Crown are partners under the Treaty of Waitangi and the agreements in the deed in relation to co-governance and co-management of the Waipā River, which are given effect through this Act, are sourced in this Treaty relationship.

(9) A guiding principle is te mana o te wai (the quality and integrity of the waters), which is paramount to Maniapoto, and, historically, was such that it would provide all manner of sustenance to Maniapoto including physical and spiritual nourishment that has over generations maintained the quality and integrity of Maniapoto marae, whanau, hapu, and iwi.

(10) A guiding principle is nga wai o Maniapoto, meaning the deep felt obligation of Maniapoto to restore, maintain, and protect all waters within the Maniapoto rohe (nga wai o Maniapoto), including the waters that flow into and form part of the Waipā River, whether the waters are above, on, or under ground.

(11) A guiding principle is te mana o te Waipā. The relationship between Maniapoto and the Waipā River is historic, intellectual, physical, and spiritual. To Maniapoto, the Waipā River has mana and in turn represents the mana of Maniapoto. This relationship requires the restoration and maintenance of te mana o te wai. The restoration and maintenance of the Waipā River, as part of a larger catchment, needs to be coordinated as a whole, consistent with the desire of Maniapoto to keep intact the mauri of the Waipā River, ko Waiwaia, in its entirety.

(12) A guiding principle is te mana tuku iho o Waiwaia, meaning the deep felt obligation of Maniapoto to care for and protect te mana tuku iho o Waiwaia and to instil knowledge and understanding within Maniapoto and the Waipā River communities about the nature and history of Waiwaia.

(13) A guiding principle is kaitiakitanga, which is integral to the mana of Maniapoto and requires—

- (a) restoration of the relationship of Maniapoto with the wai; and
- (b) restoration and maintenance of the ability of nga wai o Maniapoto to provide for the practice of manaakitanga; and

³² Waipā River Act, section 4(2).

³³ Waipā River Act, section 4(1).

³⁴ Waipā River Act, section 4.

- (c) recognition and respect for the kawa, tikanga, and kaitiakitanga of the marae, whanau, hapu, and iwi of the Waipa River; and
- (d) encouragement and empowerment of active involvement by Maniapoto in the expression of their kaitiaki responsibilities.

(14) A guiding principle is co-governance and co-management, as Maniapoto and the Crown have committed to a new approach involving co-governance and co-management through a collaborative approach that reflects partnership, the highest level of good faith engagement, and consensus decision-making as a general rule, while having regard to statutory frameworks and kaitiakitanga responsibilities of Maniapoto.

(15) A guiding principle is integration because, to be effective, co-management must be implemented and achieved at a number of levels and across a range of agencies including the Crown and local and regional authorities and within a co-governance framework that reflects the shared aspirations of each of the iwi for whom the Waipa River and the Waikato River have significance.

(16) A guiding principle is integrity, as Maniapoto and the Crown share a commitment to act to protect the integrity of the deed in relation to co-governance and co-management of the Waipa River and the Waiwala Accord and to do so in a manner that is consistent with and achieves co-governance and co-management of the Waipa River.

37. These principles of interpretation are the statutory directed guides to identifying the relevant objectives in Te Ture Whaimana for the purpose of Plan Change 1, and to assessing whether any internal ambiguity or conflict exists within Te Ture Whaimana.

Relevant objectives and strategies of Te Ture Whaimana

38. Any assessment of Te Ture Whaimana must start with an assessment of its vision. The vision for the Rivers is as follows:³⁵

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

Our vision is for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come.

39. It is beyond any doubt that the primary focus of the vision is the health and wellbeing of the Waikato and Waipā Rivers:

- (a) The primary statement in the vision is for healthy Rivers that sustain abundant life and prosperous communities. The focus is clearly on healthy Rivers.

- (b) The focus on healthy Rivers reflects the statutory framework.³⁶ One of the purposes of the Waikato River Settlement Act is to give effect to this settlement, and the Act must be interpreted in a manner that best furthers the purpose of the settlement.³⁷ The statutory framework is focused on the health and wellbeing of the Rivers, and the vision reflects this framework.

- (c) The vision specifies some intended consequences of having healthy Rivers, being that they will sustain abundant life and prosperous communities. 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.

- (d) The vision contemplates obligations on the part of communities. That obligation is expressed as being responsible for restoring and protecting the health and wellbeing of the Rivers. This focus on the restoration and protection of the health and wellbeing of the Rivers also reflects the statutory framework.

40. The vision of Te Ture Whaimana is intended to be realised through the pursuit of a number of objectives and strategies. The section 42A report prepared by the Council indicates that some of the objectives and strategies relate to processes and activities that are outside of the RMA framework or the Council's functions. The section 42A report does not specify which of the objectives and strategies it considers fall into this category. However, importantly

- (a) All of the objectives and strategies are relevant to Plan Change 1, as they inform how Te Ture Whaimana is to be given effect.

³⁵ Waikato River Settlement Act, Schedule 2, clause 1(1) and (2).

³⁶ The purpose is to restore and protect the health and wellbeing of the Waikato River for future generations. Waikato River Settlement Act, section 3.

³⁷ Waikato River Settlement Act, section 5(2)(a).

- (b) Strategies 2(e), (h), (j) and (l) are arguably not strictly relevant to Plan Change 1, although they are relevant considerations when deciding how to give effect to Te Ture Whaimana.

Assessment of the directive nature of the relevant objectives and strategies

41. Once the Panel has identified the relevant objectives and strategies from Te Ture Whaimana, it must assess how the direction in each objective is expressed.
42. Before dealing with each objective specifically, a number of general observations can be made:
- (a) Most of the objectives are expressed by reference to a direction to "restore and protect". This type of direction reflects the statutory framework, and the purpose of the Waikato River settlement to restore and protect the health and wellbeing of the Rivers for future generations.
- (b) The obligation to restore and protect, as expressed in the objectives of Te Ture Whaimana, is a significant one. To the River iwi, restoration means that water quality of the Waikato and Waipā Rivers continually improves and, will support an abundance and diversity of freshwater fisheries resources, flora and fauna.³⁸ Protection has a dual meaning of: (i) ensuring current water quality does not decline and (ii) protecting the quality of water bodies once restoration targets have been achieved.³⁹ In respect of the "restore and protect" language, the Environment Court has confirmed that "the only reasonable conclusion that can be reached is that there is an intention to improve that catchment of the River itself within a reasonable period of time (several decades) to a condition where it is safe for swimming and food gathering over its entire length".⁴⁰

³⁸ Joint Statement of River Iwi, 15 February 2019, at paragraph 26(g)(iii).

³⁹ Joint Statement of River Iwi, 15 February 2019, at paragraph 26(g)(iv).

⁴⁰ *Puke Coal* at [87].

- (c) *King Salmon* confirms that "the requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy that is worded at a higher level of abstraction."⁴¹ The Supreme Court also confirmed that policies that seek to avoid certain outcomes provide something in the nature of an "environmental bottom line".⁴²
- (d) The "restore and protect" obligation is a higher obligation than to avoid certain outcomes. After discussing the impacts of *King Salmon* on the interpretation and implementation of Te Ture Whaimana, the Environment Court in *Puke Coal* made the following observation:⁴³

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

- (e) Although *Puke Coal* concerned a resource consent application, the principle that the concept of "restore and protect" is intended to go further than avoiding effect is equally applicable to Plan Change 1. Therefore, the "restore and protect" obligations in Te Ture Whaimana not only encompass the concept of avoiding adverse effects (albeit positively framed as obligations to restore and protect), but they go further. They are, therefore, more than environmental bottom lines. Accordingly, they are stronger directions than those considered in *King Salmon*.
43. Turning now to the assessment of each objective:
- (a) *Objective 1(3)(a): the restoration and protection of the health and wellbeing of the Waikato River*. This is a clear and direct statement that the objectives of Te Ture Whaimana are focused on the restoration and protection of the health and wellbeing of the Rivers. It is specific and unqualified. It requires more than avoiding (actual

⁴¹ *King Salmon* at [80].

⁴² *King Salmon* at [132].

⁴³ *Puke Coal* at [92].

or potential) adverse effects. It constitutes more than an environmental bottom line. It requires some degree of betterment.

- (b) *Objective 1(3)(b): the restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships.* This is also a clear and directive statement, requiring more than avoidance, and imposing more than an environmental bottom line. It is specific and unqualified. The relationships referred to in this objective must be restored and protected through the recreation of a past state. Betterment is required.
- (c) *Objective 1(3)(c): the restoration and protection of the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships.* This is a further clear and directive statement, of similar effect to objective 1(3)(b). It is specific and unqualified. It also requires assessment of the tikanga and kawa of the River Iwi.
- (d) *Objective 1(3)(d): the restoration and protection of the relationships of the Waikato Region's communities with the Waikato River, including their economic, social, cultural, and spiritual relationships.* This objective is expressed by reference to the directive of "restoration and protection", so it too involves more than avoiding effect and creates more than an environmental bottom line. It is also specific and unqualified. It is expressed by reference to relationships of communities with the Rivers. The direction to restore and protect assumes that the relationship must be one that has degraded over time, meaning that those relationships that have improved over time (for example, those economic relationships that have benefited by having greater access to water or assimilative capacity within the Rivers) are not relevant to this objective.
- (e) *Objective 1(3)(e): the integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River.* This objective is not expressed by reference to an obligation to restore and protect, and instead refers to an approach. This obligation is therefore not as strong in its

direction as other objectives, meaning that decision-makers have more discretion regarding how to give effect to it.⁴⁴

- (f) *Objective 1(3)(f): the adoption of a precautionary approach towards decisions that may result in significant adverse effects on the Waikato River and, in particular, those effects that threaten serious or irreversible damage to the Waikato River.* This objective is also expressed by reference to an approach, so it informs how decisions are to be made. It is not as directive as some of the other objectives, but still calls for decision-makers to adopt a precautionary approach. Accordingly, the Panel must be able to show that, in making decisions on Plan Change 1, it has taken such a precautionary approach.
- (g) *Objective 1(3)(g): the recognition and avoidance of adverse cumulative effects, and potential cumulative effects, of activities undertaken both on the Waikato River and within the catchment on the health and wellbeing of the Waikato River.* This objective refers to the recognition and avoidance of adverse cumulative effects, which is similar to aspects of the NZ Coastal Policy Statement that the Supreme Court has held as providing something of an environmental bottom line. It is specific and unqualified.
- (h) *Objective 1(3)(h): the recognition that the Waikato River is degraded and should not be required to absorb further degradation as a result of human activities.* This objective is expressed in two parts. The first part acknowledges that the Rivers are degraded. The second part recognises that the Rivers should not be required to absorb further degradation as a result of human activities. It is specific and unqualified. This objective can be viewed as an avoidance provision (similar to the environmental bottom line provisions of the NZ Coastal Policy Statement), and so is a clear and directive provision for decision-makers.
- (i) *Objective 1(3)(i): the protection and enhancement of significant sites, fisheries, flora, and fauna.* This objective is expressed differently to others in that it refers to "protection and enhancement". It implicitly

⁴⁴ However it does have a strong connection to Policy C1 of the NPS-FM 2014 (2017).

assumes that the subject matter of the objective (significant sites, fisheries, flora and fauna) do not need to be restored (in the manner that the health and wellbeing of the Rivers and associated relationships must be restored), but their present state must be protected and enhanced. It is specific and unqualified. This objective necessarily requires a degree of betterment, through the use of the term "enhancement".

- (j) *Objective 1(3)(j): the recognition that the strategic importance of the Waikato River to New Zealand's social, cultural, environmental, and economic wellbeing requires the restoration and protection of the health and wellbeing of the Waikato River. Although this objective refers to New Zealand's social, cultural, environmental and economic wellbeing, it does so by reference to the fact that they depend on the restoration and protection of the health and wellbeing of the Rivers. Again, the primary purpose of the statutory framework, being the restoration and protection of the health and wellbeing of the Rivers, is the primary consideration. Importantly, this objective does not elevate any of the individual wellbeings over the restoration and protection of the health and wellbeing of the Rivers.*
- (k) *Objective 1(3)(k): the restoration of water quality within the Waikato River so that it is safe for people to swim in and take food from over its entire length. This objective is clear in its direction. It is very specific and unqualified. It is an environmental bottom line in the King Salmon sense, but goes further than simply avoiding adverse effects because it requires restoration (being the recreation of a past state). To the River iwi, objective 1(3)(k) is satisfied when kai is safe to eat raw, while acknowledging the practicalities of this goal. Swimmable includes in all seasons across a range of flows, with the understanding that different standards might apply at flood flows.⁴⁵*
- (l) *Objective 1(3)(l): the promotion of improved access to the Waikato River to better enable sporting, recreational, and cultural opportunities. This objective is expressed as requiring "promotion" of improved access. In this sense, it is worded with a relatively higher*

degree of abstraction. This means that decision-makers have a greater degree of discretion in giving effect to it.

- (m) *Objective 1(3)(m): the application to the above of both maatauranga Maaori and the latest available scientific methods. This is a process objective, so decision-makers will need to show that maatauranga Maaori and the latest scientific methods have been applied to determine the final content of Plan Change 1.*

44. In summary, the objectives in Te Ture Whaimana are mostly framed in a specific and unqualified manner. The obligation to give effect to them, therefore, is relatively prescriptive in nature. Many of the objectives in Te Ture Whaimana are more than environmental bottom lines, as they require a degree of betterment. As a result, the Panel's legal obligation to give effect to these objectives is significant.

45. In terms of the strategies set out in Te Ture Whaimana:

- (a) Importantly, the purpose of the strategies in Te Ture Whaimana is to "achieve" the vision. The strategies, therefore, are expressly directed at the vision. The strategies must be interpreted and applied by reference to the vision, which in turn is squarely focussed on the restoration and protection of the health and wellbeing of the Rivers.
- (b) Strategy 2(a) is to ensure that the highest level of recognition is given to the restoration and protection of the Waikato River. This is a very direct and clear strategy. It is unqualified. It clearly provides that the overarching principle in Te Ture Whaimana is the restoration and protection of the Rivers.
- (c) Strategy 2(c) is to develop targets for improving the health and wellbeing of the Waikato River by utilising maatauranga Maaori and the latest available scientific methods. This is precisely what Plan Change 1 attempts to do.
- (d) Strategy 2(d) is to develop and implement a programme of action to achieve the targets for improving the health and wellbeing of the Waikato River. Plan Change 1 is the first step in setting out and implementing that programme of action.

⁴⁵ Joint Statement of Evidence of the River Iwi, 15 February 2019, at paragraph 26(g)(ii).

Is there any ambiguity (or internal inconsistency) within Te Ture Whaimana?

46. There are no inconsistencies within Te Ture Whaimana. All of the objectives are focused on the purpose of the original Treaty settlements in relation to the Waikato and Waipā Rivers, being to restore and protect the health and wellbeing of the Rivers. The Rivers are the absolute focus. With this focus in mind, any potential ambiguity or conflict within or between the vision, objectives and strategies in Te Ture Whaimana are able to be resolved.
47. The Panel has posed questions to the Council in relation to potential conflicts within Te Ture Whaimana, because (by way of example) the provisions focusing on restoration and protection of the health and wellbeing of the Waikato River might be seen by some submitters to conflict with sustaining prosperous communities and protection of the economic relationships some communities have with the River. With respect, this conflict is illusory.
48. On close analysis of the objectives, the only objectives that refer to sustaining prosperous communities and protection of economic relationships (other than those of the River Iwi) are objectives 1(3)(d) and (j). In respect of both objectives, the economic relationship and wellbeing referred to is one of a number of relationships and wellbeings referenced. Other relationships and wellbeings, which must also be restored and protected under these objectives are social, cultural, environmental and spiritual. To suggest, as some submitters are, that there is a tension between "economic objectives" and other objectives within Te Ture Whaimana is to import into objectives 1(3)(d) and (j) a weighting favouring economic relationships and wellbeings to the exclusion of, or in preference over, others. Put simply, these are not "economic objectives". They are objectives about the restoration and protection of a range of relationships and wellbeings, among them, economic.
49. Additionally, as noted above, objective 1(3)(j) is expressed as an acknowledgement that the strategic importance of the Rivers to New Zealand's social, cultural, environmental, and economic wellbeing *requires* that the health and wellbeing of the Rivers is restored and protected. This objective does not elevate economic wellbeing above the health and

wellbeing of the Rivers. Instead, it acknowledges that all wellbeings are dependent on healthy Rivers. The notion that objective 1(3)(j) creates a conflict within Te Ture Whaimana can therefore be rejected.

50. Objective 1(3)(d) provides:

the restoration and protection of the relationships of the Waikato Region's communities with the Waikato River, including their economic, social, cultural, and spiritual relationships.

51. This objective assumes that the relationship is degraded or has deteriorated over time, because it relates to "restoration and protection". It therefore requires the creation of a past state. Accordingly, if any relationships have improved over time (for example, those economic relationships that have benefited by having greater access to water or assimilative capacity within the Rivers), this objective does not apply to those relationships.⁴⁶
52. Even if this objective can be applied to economic relationships that have improved over time, the reference to the need to "restore and protect" relationships, among them economic, means that the relationship to which the objectives relates is predicated on the health and wellbeing of the Waikato and Waipā Rivers. Economic activity, for example, that does not contribute to that outcome is not permitted simply because economic relationships are referred to in this objective. This objective cannot override the entire purpose of the statutory framework.
53. In any event, the Panel must attempt to resolve any apparent conflict. If, despite the River Iwi's position that there are no irreconcilable conflicts, the Panel considers that conflicts exist, such conflict must be kept as narrow as possible in accordance with *King Salmon*.⁴⁷ If there is a conflict within Te Ture Whaimana (which is not accepted), it would have to be resolved by giving preference to those provisions that ensure the restoration and protection of the health and wellbeing of the Rivers (because that is the statutory purpose) and the relationships of the River Iwi to those Rivers

⁴⁶ Indeed, application would result in an absurdity whereby, if such relationships were to be restored to a past state, the objective would contemplate them diminishing.

⁴⁷ *King Salmon* at [130].

consistent with the guiding principles for interpretation contained in the River legislation.

FINAL MATTER ARISING

54. In their Joint Submission, the River Iwi sought an amendment to Objective 2 of Plan section - 3.11.2(2) to read:

Objective 2: Social, economic, spiritual and cultural wellbeing and prosperity is maintained in the long term ...

Waikato and Waipā communities and their economy benefit from the restoration and protection of water quality in the Waikato River catchment, which enables the people and communities, in particular the Waikato and Waipā River Iwi, to continue to provide for their social, economic, spiritual and cultural wellbeing and prosperity.

55. The rationale for the River Iwi position was that they understood Objective 2 to be integral to the rationale for the Collaborative Stakeholder Group adopting an 80-year timeframe to achieve Te Ture Whaimana, and considered the spiritual wellbeing an important matter to inform transitioning from the current water quality state to Te Ture Whaimana in 80-years.
56. The Reporting Officers recommended that the River Iwi submission not be accepted on the basis that Objective 2, as notified, gave effect to the purpose of the RMA with respect to social, economic and cultural wellbeing. This was a matter for which Ms Kydd-Smith, the Planner for the River Iwi, concurred in her evidence insofar as she considered that "spiritual" was encompassed within the term 'social, cultural and economic wellbeing' derived from section 5 of the RMA and therefore, unnecessary."
57. "Spiritual" is used in objectives 3(b),(c) and (d) of Te Ture Whaimana when describing the restoration and protection of the relationships of Waikato-Tainui, all River Iwi and the Waikato Region's communities with the Waikato and Waipā River. It is also a feature of the Maniapoto guiding principles for interpretation of Te Ture Whaimana. Accordingly, its express inclusion is appropriate to give effect to Te Ture Whaimana.

CONCLUSION

58. Plan Change 1 is required to respond to the statutory imperative on the Council and the River Iwi to achieve the overarching purpose of the Waikato River Acts, and is necessary to address the priority issue of effects of discharges to land and water in the Waikato and Waipā River catchments.
59. Plan Change 1 represents the first step on the journey toward achieving Te Ture Whaimana by 2096. To realise the freshwater objectives set out in Plan Change 1 the River Iwi expect to see meaningful reduction in contaminant discharges from land use and a corresponding improvement in water quality by 2026.
60. The Waikato and Waipā Rivers must be protected from further degradation. The statutory framework, including Te Ture Whaimana, demands it:
- (a) The aim must be to prevent further degradation of the Waikato and Waipā Rivers acknowledging there is a lag effect of some nutrients.
 - (b) The inter-generational timeframes, lag effects and complexity of the problem are not defensible reasons to delay putting in place management interventions.
 - (c) Maintaining the status quo will not contribute to achieving restoration outcomes nor will the status quo prevent water quality from deteriorating further.

*Tooku awa koiora me oona pikonga he kura tangihia o te maataamuri.
The river of life, each curve more beautiful than the last.⁴⁸*



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⁴⁸ Waikato River Settlement Act, Schedule 2 (Te Ture Whaimana), clause 1(a), adopting the words of King Tāwhiao (refer statement of evidence of Rukumoana Schaaffhausen at para 47).