

WAIKATO RIVER AUTHORITY'S SUBMISSION ON WATERCARE'S RESOURCE CONSENT APPLICATION

INTRODUCTION

1. The Waikato River Authority (**WRA**) appreciates the opportunity to submit on the resource consent application by Watercare Services Limited (**Watercare**) for a water take and discharge (and associated infrastructure) from and to the Waikato River.
2. In December 2013 Watercare lodged the resource consent application to the Waikato Regional Council (**WRC**), and subsequently amended and lodged their application with the Environmental Protection Authority on 11 December 2020 (**the application**).
3. The application has now been referred to the Board of Inquiry (**BOI**) for determination.

Background

4. There is significant context behind the Waikato River arrangements.
5. Those arrangements arise out of significant and lengthy negotiations between the Crown and five Iwi of the Waikato River.
6. Those negotiations resulted in Deeds and ultimately three Acts of Parliament:
 - (a) the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010;
 - (b) the Ngāti Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; and
 - (c) the Ngā Wai o Maniapoto (Waipā River) Act 2012.
7. The impact of this legislation needs to be front and centre in any application of this nature under the Resource Management Act 1991 (**RMA**).
8. This background context (including in relation to the Treaty settlements and agreements which gave rise to these arrangements over the Waikato River) is both relevant and significant, in its own right, and it brings into play the principles of the Treaty of Waitangi as recognised through section 8 of the RMA, and other provisions such as section 6(e) and 7(a) of the RMA.
9. There are a unique set of specific statutory provisions relating to the WRA and Te Ture Whaimana o te Awa o Waikato - Vision and Strategy (**Te Ture Whaimana**) which make it one of the most powerful planning documents in New Zealand.

ROLE OF THE WAIKATO RIVER AUTHORITY

10. The WRA was established as an independent statutory authority under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the Ngāti Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and the WRA has additional functions under the Ngā Wai o Maniapoto (Waipā River) Act 2012.
11. The purpose of the WRA is to:¹

¹ See (for example) section 22 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

- (a) set the primary direction through Te Ture Whaimana to achieve the restoration and protection of the health and wellbeing of the Waikato River for future generations;
- (b) promote an integrated, holistic, and co-ordinated approach to the implementation of Te Ture Whaimana and the management of the Waikato River; and
- (c) fund rehabilitation initiatives for the Waikato River in its role as trustee for the Waikato River Clean-up Trust.²

12. The principal function of the WRA is to achieve that purpose.

TE TURE WHAIMANA O TE AWA O WAIKATO (VISION AND STRATEGY)

13. Section 5 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 sets out the 'guiding principles for interpretation' in relation to Te Ture Whaimana:

5 Guiding principles of interpretation

(1) The vision and strategy is intended by Parliament to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River.

(2) This Act must be interpreted in a manner that best furthers—

(a) the overarching purpose of the settlement; and

(b) subsection (1); and

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

14. In summary:

- (a) Te Ture Whaimana is a central element of the unique legislation enacted in relation to the Waikato River, its catchment, and all it encompasses including the Waipā River;
- (b) Te Ture Whaimana is intended by Parliament to be the 'primary direction setting document' for the Waikato River;³
- (c) the legislation reflects a long history and recognises the mana of the rivers themselves (Te Mana o Te Awa) and the significance of the relationship between the Iwi and the rivers (Mana Whakahaere);⁴
- (d) Te Ture Whaimana is unique under the RMA in that it has been incorporated directly into the Waikato Regional Policy Statement (**RPS**), and the rest of the RPS must be consistent with Te Ture Whaimana;⁵
- (e) Te Ture Whaimana is also unique in that it prevails over any inconsistent provision in an NPS or the NZCPS, and amendments cannot be made to RMA planning documents to give effect to an NPS/NZCPS, if that would make the document inconsistent with Te Ture Whaimana;⁶
- (f) a regional plan must consequently 'give effect to' Te Ture Whaimana (as it forms part of the RPS); and

² WRA has directly invested \$50m since 2011 in river restoration activities.

³ Section 5(1) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

⁴ See the preamble of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

⁵ Section 11 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

⁶ Section 12(1) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

- (g) the BOI is required to 'have particular regard' to Te Ture Whaimana when considering applications for resource consent.⁷
- 15. Those matters reinforce the pre-eminent weight to be afforded to Te Ture Whaimana when decisions are being made under the RMA. There is no other example nationally of an external planning document that is to be given greater weight and effect through RMA planning processes.
- 16. The WRA's position is that the utmost respect and weight must be given to Te Ture Whaimana through this process.

WAIKATO RIVER IWI

- 17. WRA acknowledges and respects the role and mana of Waikato-Tainui and the River Iwi. Waikato-Tainui are taangata whenua of the area where the resource consent activity is sought to be undertaken. WRA supports Waikato-Tainui and defers to them on matters appropriate to mana whakahaere in relation to the water take location. The WRA also acknowledges the mana whakahaere of River Iwi elsewhere in the catchment whose interests will be affected by this take.

THE APPLICATION

- 18. WRA opposes Watercare's application for resource consent. In summary:
 - (a) the applicant did not engage in any meaningful way with WRA on its application and hence the application is not informed by the perspectives of the WRA;
 - (b) the application does not provide a meaningful or robust assessment of Te Ture Whaimana;
 - (c) the application is not consistent with Te Ture Whaimana;
 - (d) there remains uncertainty and concerns regarding the environmental effects that may arise if the application is approved;
 - (e) the application represents a wealth transfer from the Waikato region to the Auckland region, and this is at the expense of the communities of the Waikato region;
 - (f) that water will be permanently lost from the Waikato River catchment if the application is approved;
 - (g) the application does not adequately assess the cultural effects of the assessment, particularly as these arise through the objectives of the Te Ture Whaimana;
 - (h) it is not clear that this is the only viable option to meet Auckland's water needs and that alternatives have been appropriately considered; and
 - (i) as a whole, the application is not consistent with the RMA (including its purpose and principles) or the relevant RMA planning documents.

Lack of meaningful engagement with WRA

- 19. Watercare did not engage with the WRA in any meaningful way.⁸ The Assessment of Environmental Effects (AEE) provides an overview of who Watercare consulted with on its application, including

⁷ Section 17(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

⁸ There were discussions between Watercare and the WRA prior to Minister Parker's call-in, and around a formal meeting with the WRA board, but that did not eventuate.

back in 2013 when the original application was made.⁹ At no point is reference made to consultation between Watercare and WRA. The application has not therefore been informed by the views of the WRA.

20. That is a significant omission given that the WRA is the independent statutory authority established through Treaty settlement legislation with its purpose focussed specifically on the Waikato River. That should have encouraged Watercare to ensure early, meaningful and sustained engagement with the WRA on this application. Despite the discussions that were had, that early, meaningful and sustained engagement did not occur.

21. Further, the first purpose of the WRA is to set the primary direction for the Waikato River through Te Ture Whaimana:¹⁰

"set the primary direction through the vision and strategy to achieve the restoration and protection of the health and wellbeing of the Waikato River for future generations."

22. Again, given that the role of the WRA is to set the primary direction for the Waikato River through Te Ture Whaimana, the WRA would have expected that Watercare would have been far more committed to engaging with the WRA by allowing the time necessary for this to occur. The issues with the application itself (discussed further below), including in relation to Te Ture Whaimana, reflect that lack of engagement.

No robust assessment of Te Ture Whaimana

23. The application does not include or reflect a meaningful or robust assessment against Te Ture Whaimana.¹¹ Te Ture Whaimana is the primary direction setting document for the Waikato River and it requires and deserves careful focus and attention in the context of an application of this scale. In fact, Te Ture Whaimana should have been front and centre in the application given its status in the legislation and the Treaty settlement history and context. That simply has not been the case with 3 pages of brief and high-level comments being provided.

24. The AEE states:¹²

"Overall, the proposed activity, and the manner in which it proposes to assess and manage its interaction with the Waikato River, is demonstrably consistent with Te Ture Whaimana o te Awa o Waikato."

25. The application does not assess in any meaningful way the extent to which it is consistent with Te Ture Whaimana and the application falls significantly short of being "*demonstrably consistent*" with Te Ture Whaimana.

26. The 'vision' of Te Ture Whaimana is:¹³

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

⁹ AEE, part 11, at pages 108-114.

¹⁰ Section 22(2)(a) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

¹¹ See AEE, part 12.3.6, at pages 138-141.

¹² Section 12.3.6 on page 141.

¹³ Schedule 2 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

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.

27. The application does not address or provide confidence that this vision (from the primary direction setting document for the Waikato River) will be realised, including how the activity would sustain prosperous Waikato communities or the health and wellbeing of the river for future generations. The focus of the application is on Auckland (including the costs to Auckland of not providing this water), not the Waikato region (including the costs and loss of value to the Waikato communities of losing this water from the catchment permanently).
28. In terms of the objectives of Te Ture Whaimana, and by way of example only, there is no robust analysis of how the application is consistent with the following objectives:¹⁴
 - (a) the restoration and protection of the health and wellbeing of the Waikato River (**objective (a)**);
 - (b) the restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships (**objective (b)**);
 - (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 (**objective (c)**);
 - (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 (**objective (d)**);
 - (e) the integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River (**objective (e)**); and
 - (f) the recognition that the Waikato River is degraded and should not be required to absorb further degradation as a result of human activities (**objective h**).
29. The application is not consistent with Te Ture Whaimana including the vision and objectives.
30. For example, Watercare rely on section 9 of their AEE (being the effects assessment) and the agreement with Te Whakakitenga o Waikato (WRA note that none of the other River Iwi nor the WRA form part of this agreement) that provides for the establishment of a Trust with the "*purpose of protecting and promoting the health and wellbeing of the Waikato River consistent with Te Ture Whaimana*", in respect of objective (a). There is no clarity or detail provided in relation to these matters nor how the BOI can be expected to be satisfied that the Te Ture Whaimana vision or objectives will be achieved.
31. Further, the Environment Court has found that, in respect of protecting and restoring the Waikato River, this goes further than avoiding effects, and in particular some element of betterment is intended by Te Ture Whaimana.¹⁵ The application is unclear in terms of how the water take will contribute to the 'restoration' of the Waikato and similarly it does not address the issue of 'betterment' in any

¹⁴ A range of other objectives are also relevant, including objectives (f), (g), (i), (j), (k), (l) and (m) at Schedule 2 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

¹⁵ *Puke Coal Ltd v Waikato Regional Council* [2014] NZ EnvC 223, at [92].

meaningful way. It is not clear how restoration or betterment will be achieved, in particular through an integrated and coordinated approach with all parties, including the WRA, Waikato-Tainui and River Iwi.

Cultural effects

32. The WRA defers to Waikato-Tainui / the River Iwi to address the cultural effects arising from Watercare's application.

Consistency with RMA planning documents

33. There are number of RMA planning documents relevant to the application, including:
- (a) National Environmental Standards, including the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**Freshwater NES**) which came into force on 3 September 2020;¹⁶
 - (b) National Policy Statements, including the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) which came into force on 3 September 2020;
 - (c) the Waikato Regional Policy Statement (**RPS**) which was made operative in 20 May 2016. Section 11 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 provides that Te Ture Whaimana is part of the RPS in its entirety; and
 - (d) the Waikato Regional Plan (**WRP**) which was made partially operative on 28 September 2007, and fully operative on 10 April 2012 on resolution of variation 6 relating to water allocation (and a number of other variations).
34. The AEE provides analysis of each of these RMA planning documents and concludes that the application is consistent with these. However, there are gaps in Watercare's analysis, and it is not clear that the application is consistent with the relevant RMA planning documents.
35. As noted above, WRA's position is that the application is not consistent with Te Ture Whaimana. The RPS incorporates Te Ture Whaimana in its entirety, which was a key element of the legislation that created the WRA and the new frameworks over the Waikato River. The WRP has a number of relevant objectives and policies in respect to water allocation that require giving effect to Te Ture Whamiana, and the overarching purpose to restore and protect the health and wellbeing of the Waikato River for present and future generations.¹⁷ If the application is not consistent with Te Ture Whaimana, then by extension it cannot be consistent with the RPS and the WRP.
36. Further, Watercare appear to place considerable weight on the establishment of the Trust when assessing whether their application is consistent with various provisions in the RMA planning documents (for example, the Te Mana o Te Wai provisions in the NPSFM). As discussed above, there is little detail provided in relation to the Trust or what it will achieve, and consequently there can be no confidence that the application is in fact consistent with these RMA planning documents on that basis.

¹⁶ We note that some of the regulations do not come into force until 1 May 2021 and 1 July 2021.

¹⁷ See for example, Objective 3.3.2(a) and Policy 11(a) of the WRP.

OUTCOMES SOUGHT

37. The WRA seeks that the application be declined for the reasons set out above.
38. However, without prejudice to that position, if the BOI is minded to grant the application, WRA seeks that:
 - (a) the volume of take is reduced to the minimum that can be justified over the shorter-term;
 - (b) term of the consent is reduced;
 - (c) conditions are imposed to ensure that Watercare's contributions and commitments to delivering on the following outcomes are clear (by way of example only):
 - (i) the vision and objectives of Te Ture Whaimana are realised;
 - (ii) the 'restoration' of the Waikato River, through the adoption of an integrated and coordinated approach with WRA, Waikato-Tainui and River Iwi, and Waikato River communities;
 - (iii) the needs of the communities of the Waikato region are prioritised where their needs, in the future, exceed the appropriate supply of water from the Waikato River, and Watercare is required to make water available to meet that shortfall;
 - (iv) Watercare (and Auckland Council) is required to publicly report its progress in achieving a water demand management plan, in particular by demonstrably lowering its reliance on the Waikato River catchment; and
 - (v) 'betterment' to the Waikato River within and beyond the activity area.