

**BOARD OF INQUIRY
Watercare Waikato River Water Take Proposal**

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF a Board of Inquiry appointed under s149J of the
Resource Management Act 1991 to consider the
application for resource consents by Watercare
Services Ltd to increase abstraction of water from the
Waikato River

**STATEMENT OF EVIDENCE OF ROBERT RAY PENTER ON BEHALF OF THE
WAIKATO RIVER AUTHORITY**

Dated: 18 June 2021

BUDDLE FINDLAY

Barristers and Solicitors
Wellington

Solicitor Acting: **Paul Beverley / Cerridwen Bulow**
Email: paul.beverley@buddlefindlay.com / cerridwen.bulow@buddlefindlay.com
Tel 64 4 462 0406 Fax 64 4 499 4141 PO Box 2694 DX SP20201 Wellington 6011

INTRODUCTION

1. My full name is Robert Ray Penter. I am the Chief Executive of the Waikato River Authority (**WRA**).
2. I hold Bachelor of Science, Bachelor of Arts (Hons) and Master of Science degrees from the University of Canterbury.
3. I have 25 years' experience in the environmental planning, science and engineering fields having held peer-assessed memberships with the New Zealand Planning Institute, Engineering New Zealand (including several years as an elected member on the Canterbury Branch Committee), and Environment Institute of Australia and New Zealand (including sitting on a number of assessment panels for Certified Environmental Practitioner applicants).
4. I have been the Chief Executive of the WRA since I was appointed by the Crown in mid-2010 to establish the WRA as a new independent statutory authority.
5. Prior to my role with the WRA, I was employed by GHD Limited in various roles from 2004 -2010 as South Island Group Manager – Planning, Environment and Geotech, Christchurch Manager and New Zealand/Pacific Business Leader – Environment and Water Resources. While at GHD I was appointed to the role of Senior Crown Appointed Adviser to the Waikato River Guardians Establishment Committee (**GEC**). The GEC was a co-governance entity of Waikato River Iwi and Crown appointees tasked with preparing Te Ture Whaimana o Te Awa o Waikato - Vision and Strategy (**Te Ture Whaimana**).
6. Prior to my role at GHD, I was employed by the Office of Te Rūnanga o Ngāi Tahu from mid-1998 (prior to the passing of the Ngāi Tahu Claims Settlement Act 1998) – 2004, the final position I held was General Manager – Environmental Resources. Before that I was employed by the Taranaki Regional Council from 1996-1998 as a Consents Officer.
7. During my career I have been a hearing commissioner and chair for regional plans and consent applications made under the Resource Management Act 1991 (**RMA**), and regulations under other legislation.
8. In my current role with the WRA I report to its co-governed board via Iwi appointed and Crown appointed Co-Chairs. I am responsible for

implementing the annual work programme and budget of the WRA. This includes overseeing the deployment of \$220m in river clean-up restoration funds (the WRA is the sole trustee of the Waikato River Clean-Up Trust).

9. I am authorised to provide this evidence on behalf of the WRA in respect of the resource consent application by Watercare Services Limited (**Watercare**) for a water take and discharge (and associated infrastructure) from and to the Waikato River (**the application**).
10. The application is now before the Board of Inquiry for determination. The WRA made a submission on the application on 26 March 2021 opposing the application (**WRA's submission**).
11. My evidence addresses:
 - (a) the role and functions of the WRA, including specific examples of the exercise of the WRA's functions;
 - (b) Variation 6 of the Waikato Regional Plan and subsequent reviews of the Waikato Regional Plan;
 - (c) the proposed review of Te Ture Whaimana and what this may mean for RMA planning documents; and
 - (d) the WRA's position on the application.
12. I have also responded to Watercare's evidence where relevant.
13. I am providing this evidence as a representative of the WRA rather than an independent expert witness. However, I am familiar with, and understand, the Expert Witness Code of Conduct set out in the Environment Court's Practice Note 2014 and will comply with it, to the extent my evidence addresses matters in which I have expertise.

Waikato River Iwi

14. The WRA acknowledges and respects the role and mana of Waikato-Tainui and the River Iwi.¹ Waikato-Tainui are taangata whenua of the area where the resource consent activity is sought to be undertaken. The WRA supports Waikato-Tainui and defers to them on matters appropriate to its mana whakahaere in relation to the water take location. The WRA also

¹ Where I refer to 'River Iwi' this means Ngāti Tuwharetoa, Raukawa, Te Arawa River Iwi and Maniapoto, as well as Waikato-Tainui.

acknowledges the mana whakahaere of other respective River Iwi in the catchment whose interests will be affected by this take.

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

EXECUTIVE SUMMARY

16. The WRA was established as an independent statutory authority as a result of the significant Waikato River Treaty settlements and agreements.
17. The statutory purpose of the WRA includes to 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.
18. The WRA is the sole trustee of the Waikato River Clean-Up Trust and plays a leading role in governance, management, planning and operational activities relating to the Waikato River.
19. While the regional plan may provide for water takes such as the current take proposed by Watercare, it is important to emphasise that the current version of the regional plan does not necessarily give effect to Te Ture Whaimana and further reviews will be required. There is also an upcoming review of Te Ture Whaimana itself that will influence the future planning framework for the river, which will need to fully give effect to Te Ture Whaimana.
20. The WRA opposes Watercare's application, including because:
 - (a) there has been a lack of meaningful engagement with the WRA - given the WRA's role and functions, and the significance of Te Ture Whaimana to any application for consent relating to the Waikato River, the WRA would have expected genuine, robust and meaningful engagement from Watercare which has not been the case at all;
 - (b) the assessment of Te Ture Whaimana in Watercare's application is inadequate - 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 in the AEE;
 - (c) the application is inconsistent with the vision and objectives of Te Ture Whaimana, the primary direction setting document for the Waikato River and activities within its catchment that affect the Waikato River;

- (d) the Board of Inquiry, River Iwi, the WRA and the Waikato communities cannot have any confidence that the proposed trust arrangement will provide 'betterment' to the Waikato River, proportionate to the activity (which is a significant water take and transfer outside of the Waikato region) when we have no certainty that it will even happen. It is not appropriate to simply identify an arbitrary payment in financial terms and assume that will comply with Te Ture Whaimana – that is not what is intended by the Waikato River arrangements;
- (e) as Ms Mahuta notes in her evidence, the WRA considers that Watercare's approach has been presumptuous, dismissive and disrespectful of the Waikato River, the WRA and Te Ture Whaimana; and
- (f) the WRA defers to Waikato-Tainui and River Iwi in terms of cultural matters.

ROLE AND FUNCTIONS OF THE WAIKATO RIVER AUTHORITY

- 21. The WRA was established as an independent statutory authority under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and the WRA has additional functions under the Nga Wai o Maniapoto (Waipa River) Act 2012.
- 22. There is a significant Treaty settlement history to the WRA, as explained by Ms Mahuta, the Iwi Co-Chair of the WRA, and I anticipate that will be addressed in the evidence provided on behalf of Waikato-Tainui.
- 23. The WRA has 10 board members, five are appointed by the River Iwi and five by the Minister for the Environment in consultation with the Minister of Maaori Affairs, Minister of Local Government and the Minister of Finance (with 2 nominations from relevant local authorities).²
- 24. The purpose of the WRA is to:
 - (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;

² Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Schedule 6.

- (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.
25. The principal function of the WRA is to achieve that purpose.
26. The WRA was established on 25 November 2010 and the first meeting was held on 21 December 2010.
27. The WRA plays a leading role in governance, management, planning and operational activities relating to the Waikato River. The WRA has close working relationships with central government agencies, the Waikato Regional Council, territorial local authorities and various other entities.
28. In carrying out its functions, the WRA has, in the last 11 years, been involved across a number of resource management policy, planning and consenting processes, as well as other initiatives through the Waikato River Clean-Up Trust and more generally through engagement with local authorities and organisations. I summarise these activities below.

RMA planning processes

29. The WRA has provided submissions on various National Policy Statements and National Environmental Standards, and other policy/consultation documents relevant to the Waikato River, including:
- (a) 2011 – input into the Waikato Regional Policy Statement via appointment of a hearing commissioner to the hearing panel;
 - (b) 2012 - ETS Review -Submissions;
 - (c) 2016 - Review of Vision and Strategy Promotion;
 - (d) 2017 - Proposed Plan Change 1 (Healthy Rivers);
 - (e) 2017 - Clean Water Consultation;
 - (f) 2018 - WRC Long Term Plan – Submission (2018 – 2028);
 - (g) 2018 - Variation 1 to the Proposed Waikato Regional Plan Change and Further Submissions;

- (h) 2018 - National Planning Standards;
 - (i) 2018 - Proposed Waikato District Plan (Stage 1);
 - (j) 2018 - Conservation (Indigenous Freshwater Fish) Amendment Bill;
 - (k) 2019 - PPC1 Healthy Rivers - Evidence - Block One;
 - (l) 2019 - NPS Highly Productive Land;
 - (m) 2019 - Action for Healthy Waterways;
 - (n) 2019 - RMA Amendment Bill;
 - (o) 2020 - Improving Whitebait Management; and
 - (p) 2020 - COVID 19 Recovery Consenting Bill.
30. The submissions on these processes and documents are made to ensure that the status of Te Ture Whaimana (as the primary direction setting document for the Waikato River) is recognised, as well as the Treaty settlements and agreements that are the foundation of the WRA and Te Ture Whaimana.
31. That is particularly important given that the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 provides that Te Ture Whaimana is intended by Parliament as the primary direction setting document for the Waikato River and prevails over any inconsistent provision in a national policy statement.³
32. In addition to providing submissions, the WRA has also written directly to the Minister for the Environment, seeking confirmation that Te Ture Whaimana prevails over inconsistent provisions of the National Policy Statement for Freshwater, in particular infrastructure exceptions to national bottom lines.
33. The WRA has been heavily involved in the Waikato Regional Council's proposed plan change 1 (**PC1**) to the Waikato Regional Plan (**WRP**).
34. The WRA had an ex-officio seat (with no voting rights) on the River Iwi/Waikato Regional Council steering group Te Roopuu Hautuu through the plan change process. The purpose of this group was to maintain oversight of the plan change process and provide integrated direction to the project team

³ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss 9 and 12(1)(a).

responsible for reviewing the WRP, as it relates to the effects of discharges on the health and wellbeing of the Waikato and Waipaa River.

35. The WRA was involved in the appointment of a Technical Leadership Group, Collaborative Stakeholders Group, and commissioners to the hearing committee for PC1.
36. To a significant extent, PC1 has respected and reflected the direction of Te Ture Whaimana. The collaborative approach taken by the Waikato Regional Council with River Iwi and the WRA must be acknowledged, as it was respectful of the River Iwi, the foundation Treaty settlements and agreements, the WRA and Te Ture Whaimana. That is also reflected in the decisions version of PC1 which provides significant weight to Te Ture Whaimana.
37. The WRA also participated as a submitter on PC1 and is a party to a number of appeals before the Environment Court, to ensure that the integrity of Te Ture Whaimana is protected. The WRA is very supportive of the direction of PC1 and the work of the Waikato Regional Council but has appealed some limited aspects of the decision version, and is participating as a section 274 party to all appeals, to ensure the integrity of PC1 in giving effect to Te Ture Whaimana is not diminished through the appeal process.

Resource consent processes

38. The WRA has appointed 25 accredited hearing commissioners to river related hearing panels in consultation with the River Iwi. We also nominated Nicholas Manukau to this Board of Inquiry under section 29(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, noting the decision to appoint was for the Minister for the Environment.
39. The WRA also works with resource consent applicants to ensure they engage with relevant mana whenua and provide any assistance the consent applicants may need in understanding Te Ture Whaimana.
40. To date, there has not been a resource consent application for a water take of the scale of Watercare's application and therefore the WRA has not been heavily involved in other similar resource consent application hearings.

Watercare's water takes from the Waikato River

41. I address Watercare's current application and the lack of engagement with the WRA below.
42. However, in terms of resource consent processes, I note that in June 2020 Watercare also exercised emergency powers under section 330(1) of the RMA to take up to 25 MLD of water in addition to its existing consent.
43. The reason for this emergency take was to address immediate pressure on Watercare's metropolitan supply system created by the ongoing drought in the upper North Island. The WRA wrote to Watercare in respect of this emergency take requesting additional information and documents. The WRA also wrote to the Minister of Local Government (Hon Nanaia Mahuta) in June 2020 requesting a government inquiry into the Auckland City water crisis and raised issues relating to Watercare's proposed water take (subject to this application) and that it was not sustainable for more water to be going out of the Waikato catchment.
44. In 2020, the Waikato Regional Council Chair (Russ Rimmington) instigated a series of Water Summits to discuss Auckland's water shortage and explore short-term solutions. The parties involved in these talks included Waikato-Tainui, the WRA, Watercare and the Waikato Regional Council. The Minister of Local Government (Hon Nanaia Mahuta) and the Minister for the Environment (Hon David Parker) also participated at times. Water Summits were held in Hamilton on 1 July 2020 and on 13 July 2020 at Hopuhopu (Ngāruawhia). The WRA was to host a 3rd Water Summit and contacted the parties to make arrangements on 1 October 2020. No response was received from Watercare.

Waikato River Clean-up Trust

45. The WRA is appointed under legislation as the sole trustee of the Waikato River Clean-Up Trust.
46. In that trustee role, the WRA has directly awarded \$55.6 million of the Clean-Up Trust funds since 2011 to over 300 projects that support the restoration and protection of the health and wellbeing of the Waikato River (including the Waipaa River) and its catchments as expressed by Te Ture Whaimana. In the lower Waikato River catchment, projects have included riparian fencing and planting on farmland, retirement of steep erosion prone land from grazing animals, restoration of significant sites to Iwi, remediation of stream

bank and hillside erosion, remediation of barriers to migratory fish, restoration of whitebait habitat, restoration of habitats for taonga species, walkways to enable community and school groups to access waterways and view restoration projects, development of best practice guidelines for tuna restoration, willow clearance and riparian restoration.

47. In 2018, the Hon David Parker (Minister for the Environment) launched the Waikato and Waipā Rivers Restoration Strategy (**Restoration Strategy**). It was developed through a partnership between the WRA, WRC and DairyNZ with support from mana whenua, landowners and many other people in the catchment.
48. The Restoration Strategy provides a framework to help with 'on the ground' activities for restoration work and allows a coordinated and integrated approach to river restoration.
49. The Restoration Strategy is for anyone planning to undertake restoration work, from organisations and councils, to local Iwi and community groups. The goals and projects selected have specific, technically achievable and prioritised actions to ensure they make the biggest difference in the Waikato catchment.

Other functions

50. The WRA also utilises various opportunities to make presentations and hold discussions with various sectors in the catchment regarding the role and function of the WRA and Te Ture Whaimana.
51. The WRA has been invited by Iwi and Councils around the country (and internationally) to share practical examples of good co-governance and funding distribution to support the health and wellbeing of waterways and their communities.
52. The funding approach of the WRA, including its processes, systems, financial sustainability and communication, was praised by the Office of the Auditor-General in its 2019 investigation of Crown investment in freshwater clean-up.
53. On 20 May 2021 the WRA was a catalyst for a Water Leaders' Forum in Hamilton co-hosting alongside Waikato-Tainui, Waikato Regional Council, DairyNZ and Mercury.

54. On 11 June 2021, the Minister for the Environment, Hon David Parker, travelled to Hamilton to meet with the WRA at our offices to discuss freshwater and resource management reform and the role of the WRA.
55. The WRA plays an integral part in ensuring that the vision of Te Ture Whaimana is realised. The WRA works closely with Iwi and the community, and has gained their confidence, trust and respect in undertaking this role.

VARIATION 6 OF THE WAIKATO REGIONAL PLAN

56. One of the general functions of the WRA is to engage with, and provide advice to, local authorities on amending RMA planning documents to make them give effect to Te Ture Whaimana.⁴
57. The WRA has undertaken this function in respect of PC1 and, as discussed above, was heavily involved in all stages of the process. However, WRA's role in Variation 6 was considerably different.
58. Variation 6 was notified for submissions in late 2006 and heard across 2007-2008 before a decision was made in October 2008. The decision was then appealed to the Environment Court. Variation 6 was largely developed prior to the Waikato-Tainui River settlement and without Te Ture Whaimana being in force.
59. I understand that a five-month Environment Court hearing was held from February to August 2011 and the Court issued a decision on the appeals on 30 November 2011. Variation 6 was made operative on 10 April 2012.
60. The WRA was established on 25 November 2010. Accordingly, the WRA was not a party to the Variation 6 appeal process, which was well advanced prior to the first meeting of the WRA on 21 December 2010.

Review of the WRP

61. The WRA was required to review Te Ture Whaimana within 3 months after its establishment and consider if any changes to it were required. The WRA, in April 2011, determined that no changes to Te Ture Whaimana were necessary at that time. The WRA again considered changes to Te Ture Whaimana arising from the Nga Wai o Maniapoto (Waipa River) Act 2012 in 2012 and again determined no changes at that time were required. That

⁴ See for example Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 23(2)(a).

decision enabled the effect of Te Ture Whaimana to extend to 'Area C' of the upper Waipā River catchment.

62. In 2013 WRC commissioned an independent review of the operative WRP against the objectives and strategies in Te Ture Whaimana. A report was prepared by Opus International Consultants Ltd dated 5 July 2013, attached as Appendix A (**the report**).⁵ An accompanying paper was also prepared by the Group Manager – Policy and Transport on 26 July 2013, attached as Appendix B (**council paper**).
63. The report concluded that the WRP would require amendments to give effect to Te Ture Whaimana. In respect of Variation 6, the report concluded that:⁶

In recognition of the Environment Court decision, Variation 6 sections of the regional plan, substantially give effect to the Vision and Strategy. However, as the planning regime evolves, it is anticipated that over time, there will be room to further improve and amend those provisions. It is accepted that this is unlikely to happen in the short-term.

64. Appendix 2 of the report provides a more detailed assessment of each objective and strategy in Te Ture Whaimana against the WRP provisions.⁷ Some Variation 6 provisions were assessed as having limited effect or not giving effect to some objectives and strategies of Te Ture Whaimana. The council paper provides further context around this and provides that:⁸

As an example, the following provisions of the Vision and Strategy were identified by Opus as not given effect in the Variation 6 provisions:

- *Objective B The restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural and spiritual relationships*
- *Strategy 5 Develop and share local, national and international expertise, including indigenous expertise, on rivers and activities within their catchments that may be applied to the restoration and protection of the health and wellbeing of the Waikato River*

⁵ I have included the main report, as well as Appendix 2 to the report (and page numbers added for ease of reference). Appendix 1 to the report is a copy of Te Ture Whaimana which I have not included.

⁶ Appendix A, p 36 (p 33 of the report).

⁷ Appendix A, pp 38-72.

⁸ Appendix B, p 4.

It is considered that the provisions in section 3.3 and 3.4 could not give effect to Objective B because it was developed in isolation of a co-management process with Waikato-Tainui. The settlement legislation and the legal weighting of the Vision and Strategy were introduced towards the end of the Variation 6 court process. Therefore it is considered that the time and collaborative process needed to appreciate how to restore and protect the relationship of Waikato-Tainui with the Waikato River, was impracticable at the time, and ultimately resolved in some Variation 6 provisions identified by the Opus report as not giving effect to Objective B.

65. While the regional plan may provide for water takes, it is important to emphasise that the current version of the regional plan does not necessarily give effect to Te Ture Whaimana and further work is required.
66. The nature and extent of the PC1 review process provides a recent and relevant example of the work that is required to fully give effect to Te Ture Whaimana. I understand that there will be further reviews of the water allocation provisions in the regional plan; ensuring that the plan gives effect to Te Ture Whaimana (as the primary direction setting document for the river) will be central to that process.

REVIEW OF TE TURE WHAIMANA

67. Under the Waikato River legislation, the WRA is required to periodically review Te Ture Whaimana and consider what changes, if any, should be made to it. In 2020 the WRA determined that, as part of its review process, amendments to Te Ture Whaimana should be considered. The WRA has recently called for expressions of interest from suitable parties to support that process.
68. If amendments are considered necessary to Te Ture Whaimana then the WRA must notify a proposed Te Ture Whaimana document calling for submissions on it. Submitters are then given an opportunity to be heard through a hearing process. Following the hearing, the WRA must recommend to its appointers (the 5 River Iwi and the Crown) an amended Te Ture Whaimana for their consideration.
69. Following a review of Te Ture Whaimana, the Waikato Regional Council is required to review the Waikato Regional Policy Statement to ensure it is

consistent, and the WRP must also be reviewed to ensure it gives effect to Te Ture Whaimana.⁹

70. This further reinforces that there could be significant changes to the overall planning framework for the Waikato River, and the RMA planning provisions could be subject to significant change, particularly to give effect to Te Ture Whaimana.

THE WAIKATO RIVER AUTHORITY'S POSITION ON THE APPLICATION

71. The WRA opposes Watercare's application for resource consent, for the reasons set out in the WRA's submission.¹⁰
72. My evidence focuses particularly on the following issues:
- (a) lack of meaningful engagement with the WRA;
 - (b) no robust assessment of Te Ture Whaimana in Watercare's application; and
 - (c) why the application is inconsistent with Te Ture Whaimana.
73. The WRA's position is that the application is not consistent with Te Ture Whaimana. Further, the relevant RMA planning documents may also not give full effect to Te Ture Whaimana.

Lack of engagement with the WRA

74. Given the WRA's role and functions, and the significance of Te Ture Whaimana to any application for consent relating to the Waikato River, the WRA would expect robust and meaningful engagement from any resource consent applicant, particularly for a consent for a large water take (regardless of whether it is within the limits in the WRP).
75. The Environment Court in *Puke Coal Ltd v Waikato Regional Council*, found that:¹¹

We are unanimous in our view that the adoption of the Vision and Strategy Statement of the Settlement Act within the Regional and District Plans, has led to a stepwise change in the approach to consents affecting the catchment of the Waikato River.

⁹ See for example Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 13.

¹⁰ WRA's submission, at paragraphs 18-36.

¹¹ *Puke Coal Ltd v Waikato Regional Council* [2014] NZ EnvC 223, at [86].

76. Watercare did not engage with the WRA in any meaningful way, either in 2013 with their original application or prior to the Minister's call-in in 2020. The engagement section of the AEE that accompanied the application does not mention the WRA, despite the WRA coming into effect on 25 November 2010 and the application being submitted in December 2013 (originally) and then subsequently amended and submitted on 11 December 2020.
77. Watercare did not engage appropriately with the WRA, prior to the amended application being submitted. There were discussions between Watercare and the WRA prior to Minister Parker's call-in, and around a formal meeting with the WRA board (proposed to occur February this year), but that did not eventuate.
78. In addition, as discussed above, there was some correspondence between Watercare and the WRA in respect of the emergency water take in June 2020. Watercare mentioned in its letter dated 17 June 2020 that, in respect of its various applications (including this application and the emergency water take), it was engaging with Waikato-Tainui and discussing restoration options, and that it will engage with the WRA on how its funding contribution can be utilised and align with the WRA's projects.
79. Following this, there were discussions between various parties, including Watercare, Te Whakakitenga o Waikato Incorporated, the WRA, the Waikato Regional Council and Auckland Council to form an agreement in relation to current and short-term water takes and potential further water takes. This included discussions around seed funding and a trust. My understanding was that this was to recognise Watercare's existing reliance on the Waikato River and not as a mitigation option for this application. This agreement did not proceed and Watercare ultimately disengaged with the WRA. I address this issue further below in respect of the mitigation options proposed by Watercare.
80. Mr Waiwai noted in his evidence that Watercare met with the WRA on 15 May 2021 and will continue discussions with the WRA.¹² This is the only meeting that the WRA has had with Watercare in respect of the application and it has only occurred after the application was lodged and the WRA's submission was filed. This meeting has not resulted in the WRA's concerns being addressed. Further, we have not received any further correspondence from Watercare despite the significant issues raised in the WRA submission.

¹² Statement of Evidence of Richard Nae Waiwai, at paragraph 7.5.

For completeness, I note I received a telephone call from Mr Fisher (Watercare) at noon on 14 June 2021. Mr Fisher noted that after evidence for the Board of Inquiry is filed there is a six-week window for the parties to engage one another. I suggested that Watercare makes use of that time with the WRA.

81. The application itself has therefore not been informed by the views of the WRA nor have Watercare made any meaningful efforts to understand the views of the WRA or Te Ture Whaimana or reflect these in the application or conditions of consent.
82. 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.
83. The first purpose of the WRA is to set the primary direction for the Waikato River through Te Ture Whaimana:¹³

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.

84. Again, given that the role of the WRA is to set the primary direction for the Waikato River through Te Ture Whaimana, and the scope of Te Ture Whaimana as set out in section 9 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the WRA would have expected that Watercare would have been far more committed to engaging with the WRA, including 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

85. The application does not include or reflect a meaningful or robust assessment against Te Ture Whaimana.¹⁴ 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

¹³ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22(2)(a).

¹⁴ See AEE, part 12.3.6, at pages 138-141.

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.

86. The AEE states:¹⁵

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.

87. 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.

88. The 'vision' of Te Ture Whaimana is:¹⁶

*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.

89. 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).

90. That approach is starkly reinforced in the evidence provided by Mr Fisher on behalf of Watercare, where the focus is on the needs of Auckland, but with very little attention to the needs of the Waikato River or the Waikato communities.

¹⁵ AEE, part 12.3.6, at page 141.

¹⁶ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Schedule 2.

91. 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:¹⁷

- (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)**).

Application is inconsistent with Te Ture Whaimana

92. The WRA does not consider that the application is consistent with Te Ture Whaimana including the vision and objectives.
93. Te Ture Whaimana requires to 'restore and protect', rather than 'avoid, remedy and mitigate' as guided by the RMA. The WRA's position is that there are fundamental differences in these meanings, and that the application of 'restore and protect' initiates a restoration approach that is a level above current practices to achieve sustainability under the RMA.

¹⁷ 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.

94. This is supported by the *Puke Coal* decision, where the Environment Court held that:¹⁸

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.

95. Based on the intent of the WRA's enabling legislation, it is no longer sufficient for resource users to demonstrate that adverse effects are avoided, remedied or mitigated. Instead, resource users should demonstrate that any resource use within the Waikato River will also result in some positive benefit contributing to the restoration of the Waikato River, proportionate to the activity in question.
96. It is difficult to understand how Watercare can determine what 'betterment' is proportionate to the activity, without a fulsome assessment of Te Ture Whaimana (informed by the WRA and the River Iwi) against the application.
97. Further, the cultural effects of the assessment must be considered so that any assessment of what may be 'proportionate' is informed by those effects. A cultural impact assessment was not developed as part of the application which is common practice with all major applications within the catchment, and we defer to the evidence of Waikato-Tainui in this respect.
98. It is therefore difficult to understand how, for example, Watercare could assert that the application is "*demonstrably consistent*" with (for example) objectives (b) and (c), given the strong opposition from River Iwi to the application and the concerns raised by the WRA in its submission.
99. Watercare's application relies heavily on its effects assessment (ie that effects are no more than minor) and in respect of 'betterment' proposes:¹⁹
- (a) to provide and protect land adjacent to the Waikato River within its present site for ecological enhancement purposes;

¹⁸ *Puke Coal Ltd v Waikato Regional Council* [2014] NZ EnvC 223, at [92].

¹⁹ Statement of Evidence of Philip Hunter Mitchell, at paragraph 3.3.

- (b) to reduce reliance, primarily through committing to development of alternative sources of water for future Auckland water supplies;
- (c) to provide \$2 million per year for the duration of the consent, for the purpose of restoring and protecting the health and wellbeing of the Waikato River; and
- (d) to establish monitoring and research programmes relating to the health and wellbeing of the Waikato River.

100. These proposals are either:

- (a) uncertain in terms of their outcomes;
- (b) not reflected directly in the proposed consent conditions; or
- (c) the relevant conditions are not certain and are therefore unenforceable.

Reduction in reliance

101. Reducing reliance on the Waikato River to service the Auckland communities is essential to achieve 'betterment', the objectives and strategies of Te Ture Whaimana and to realise the 'vision' to 'restore and protect' the Waikato River for future generations.

102. Watercare's application provides no certainty to the WRA that there will be a reduction on reliance of the Waikato River for this purpose. The evidence of Mr Fisher refers to the Kawenata Whakawhanaunga entered into between Te Whakakitenga and Watercare in December 2020 that records key agreements relating to a reduction in reliance of the Waikato River over time.²⁰ However, in the evidence of Mr Mitchell it was noted that, in the context of Watercare's application, this reduction means a reduction in the percentage contribution of Waikato River water to Auckland's water supply and not a reduction in the absolute volume of water taken from the Waikato River.²¹

103. This essentially means that the overall take from the Waikato River could increase, particularly given the projected increase in Auckland's water demands over time. None of the proposed consent conditions reflect that there will, in fact, be a reduction in reliance. There is no certainty in this

²⁰ Statement of Evidence of Robert Anthony Fisher, at paragraphs 3.6 and 10.7.

²¹ Statement of Evidence of Philip Hunter Mitchell, at paragraph 6.28(a), footnote 7.

application that there will be a reduction in reliance, to the extent necessary to achieve 'betterment' to the Waikato River.

Establishment of a trust

104. To achieve 'betterment' proportionate to the activity, Watercare rely heavily on the establishment of a trust to administer \$2 million per year for the duration of the consent, for the purpose of restoring and protecting health and wellbeing of the Waikato River.
105. There is no certainty that this trust will be established and, if it is, that it will provide 'betterment' proportionate to the activity.
106. Watercare has indicated that whether the trust is established is dependent on discussions with Waikato-Tainui (however they may establish it and appoint their own trustees if no agreement is reached). Mr Fisher, in his evidence, indicated that if no agreement is reached the funds could be invested in the Waikato River Clean-Up Trust administered by the WRA.²²
107. Although the WRA (as sole trustee) may accept other sources of funding, it is not required to do so, and it would be highly unlikely to do so if that were opposed by the River Iwi. The administrative cost and risks that would be borne by the WRA in managing a separate amount of funding (the proposed \$2 million per annum) would also require assessment.
108. As I discussed above, following Watercare's application for an emergency water take from the Waikato River in mid-2020, there were some discussions between Watercare and the WRA (and other parties) in respect of Watercare's various existing and proposed water takes, and Watercare proposed seed funding of \$1.5m for restoration and protection. My understanding was that that agreement was not specifically in relation to this application, but rather Watercare's existing water takes, emergency takes, as well as proposed water takes. No agreement was ultimately reached between the various parties involved.
109. The WRA is charged with custodianship of Te Ture Whaimana and funding projects that support the achievement of Te Ture Whaimana. However, the WRA has not been involved in any meaningful discussions with Watercare in relation to the establishment and functioning of the trust that it is now proposing as part of its mitigation package, and how this may 'restore and

²² Statement of Evidence of Robert Anthony Fisher, at paragraph 11.4.

protect' the health and wellbeing of the Waikato River. For Watercare to understand whether a proposal is acceptable at all, and if so, whether 'betterment' is proportionate to the activity, this would require meaningful engagement with River Iwi and the WRA.

110. It is difficult to see how the Board of Inquiry, River Iwi, the WRA or the Waikato communities can have any confidence that this form of mitigation will provide 'betterment' to the Waikato River, proportionate to the activity (which is a significant water take and transfer outside of the Waikato region) when we have no certainty that it will happen. It is not appropriate to simply identify an arbitrary payment in financial terms and assume that will comply with Te Ture Whaimana – that is not what is intended by the Waikato River arrangements.
111. In overall terms, and as Ms Mahuta notes in her evidence, the WRA considers that Watercare's approach has been presumptuous, dismissive and disrespectful of the Waikato River, the WRA and Te Ture Whaimana. As noted, the WRA defers to Waikato-Tainui and River Iwi in terms of cultural matters.

Ecological enhancement/monitoring and research programmes

112. Given the lack of engagement between Watercare and the WRA, it is difficult to know whether the other mitigation options proposed by Watercare will protect and restore the Waikato River, and whether this is proportionate to the significant water take proposed by Watercare.

OUTCOMES SOUGHT BY THE WAIKATO RIVER AUTHORITY

113. The WRA seeks that the application be declined. The outcomes sought by the WRA are identified in the WRA's submission.²³



Robert Ray Penter

18 June 2021

²³ WRA's submission, at paragraphs 37-38.