

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submissions on Proposed Plan Change 1 (and Variation 1) to the Waikato Regional Plan

TOPIC 1

**BY FEDERATED FARMERS OF NEW ZEALAND INC,
FEDERATED FARMERS OF NEW ZEALAND
(WAIKATO REGION) 1999 INCORPORATED,
FEDERATED FARMERS OF NEW ZEALAND –
ROTORUA TAUPO PROVINCE INCORPORATED,
FEDERATED FARMERS OF NEW ZEALAND
(AUCKLAND PROVINCE) INCORPORATED**

(“FEDERATED FARMERS”)

Submitter with ID: 74191

To WAIKATO REGIONAL COUNCIL

**LEGAL SUBMISSIONS ON BEHALF OF FEDERATED FARMERS
ON HEARING TOPIC 1**

21 March 2019



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INTRODUCTION AND ISSUES

1. Federated Farmers (**FFNZ**) has made comprehensive written submissions on the Proposed Plan Change 1 and Variation 1 (**PC1**) to the Regional Plan by Waikato Regional Council (**Council**).
2. Hearing topic 1 focuses on the high-level overview of PC1 and so will these submissions.
3. These submissions consider the overarching legal issues by:
 - 3.1. Commenting on the broad requirements on deciding between competing policies;
 - 3.2. Interpreting the Vision and Strategy.

SUMMARY

4. The Hearing Panel's task is to decide how the mandatory requirements in the Resource Management Act 1991 (**RMA**) will be met (including how to give effect to the Vision and Strategy) and thereby achieve in the most efficient and effective and least restrictive manner the water quality and other objectives of PC1.
5. A policy framework that allows for movement within a NOF band¹ when water quality is not degraded and require improvement to an acceptable NOF band when water quality is degraded can give effect to the Vision and Strategy.
6. The Vision and Strategy is the primary direction-setting document for the Waipa River and the Waikato River and activities within its catchment affecting the Waipa River and the Waikato River. However, the way the Vision and Strategy expresses the vision, objectives and strategies leaves

¹ National Objectives Framework bands in the National Policy Statement for Freshwater Management 2014.

flexibility and scope in deciding on policies that will satisfy the Vision and Strategy. Accordingly there could be more than one policy framework that satisfies the Vision and Strategy.

7. It is not appropriate to pick out certain objectives of the Vision and Strategy. This runs the risk of detracting from the holistic nature of the Vision and Strategy and inappropriately implies that some are more important than others.
8. An interpretation that requires the Waikato River and Waipa River to be safe for swimming and taking food at all times and at each and every place along the entire length will lead to an absurdity and be unworkable. If more than one interpretation is available, then the interpretation that avoids absurdity or anomalous outcomes should be preferred.

DECIDING BETWEEN COMPETING POLICIES

9. When preparing and changing a regional plan, the Council must give effect to any national policy statement and New Zealand coastal policy statement and any regional policy statement (which includes the Vision and Strategy).²
10. A regional council must prepare and change any regional plan in accordance with, amongst other matters, its functions under section 30 RMA, the provisions of Part 2, and its obligation to prepare and have particular regard to an evaluation report prepared in accordance with Section 32.³
11. Pursuant to section 32 of the RMA, an evaluation must:
 - 11.1. examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act; and

² Resource Management Act 1991 ("RMA"), s66(2) read with s67(3)

³ RMA, s66(1)

- 11.2. examine whether the proposed provisions are the most appropriate way to achieve the objectives by identifying other reasonably practicable options for achieving the objectives; and by assessing the efficiency and effectiveness of the proposed provisions in achieving the objectives; and
 - 11.3. contain a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects that are anticipated from implementation of the proposal.
12. It is presumed that where the purpose of the RMA and the objectives of the Plan can be met, a less restrictive regime should be adopted.⁴
 13. The Hearing Panel's task is to decide how the mandatory requirements in the RMA will be met (including how to give effect to the Vision and Strategy, NPS-FM and RPS) and thereby achieve in the most efficient and effective and least restrictive manner the water quality and other objectives of PC1.
 14. The theme of FFNZs submissions to PC1 is that:
 - 14.1. FFNZ's proposal will satisfy the mandatory requirements in the RMA; and
 - 14.2. do so in the most efficiently and effectively manner and in the least restrictive manner.

⁴ *Wakatipu Environmental Society v Queenstown-Lakes District Council* C153/2004 at [56] and *Royal Forest and Bird Protection Society Inc v Whakatane District Council* [2017] NZ EnvC 051 at [59].

THE VISION AND STRATEGY

15. There are three co-governance Acts that relate specifically to the Waikato River and Waipa River⁵ (together **Waikato and Waipa River Legislation**).
16. The Waikato and Waipa River Legislation attached the Vision and Strategy as a schedule and it forms part of legislation. Statutory interpretation principles and the Interpretation Act 1999 can give guidance when ascertaining the meaning of the Vision and Strategy as it was adopted in legislation.

Restore and protect

17. In interpreting the Vision and Strategy we first need to consider the text (ie the words used) specifically “restore” and “protect”, and then consider what meaning should be taken from them in the light of their purpose, and any indications provided in the Vision & Strategy.⁶
18. “Protect” has the dictionary definition of ‘to keep safe, defend, guard from harm or injury’ and ‘aim to preserve’.
19. “Restore” is not to leave the thing as it is. It requires some form of action, which will return the subject of the action to a previous condition, or as close to that condition as possible. It implies that the thing has to be degraded, deteriorated or decayed.
20. “Degrade” has the dictionary definition of ‘lower the quality of’ -or- ‘reduce to a lower rank’. It requires that the decline be of a standard that takes it to another grade or level.

⁵ Waikato-Taunui Raupatu Claims (Waikato River) Settlement Act 2010; Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; Nga Wai o Maniapoto Waipa River Act 2012.

⁶ Interpretation Act 1999, s5 and *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) at [35].

21. Accordingly, I submit in water quality the term ‘degrade’ means more than just a movement in water quality but incorporates the idea of a decline in quality that takes it to another and unacceptable grade or level.
22. The Environment Court⁷ has determined that the Vision and Strategy requires:
 - 22.1. restoration of water quality over a reasonable period where it is degraded which means an improvement or an element of betterment from the damage caused⁸; and
 - 22.2. preservation of the water quality where it is not degraded;⁹
 - 22.3. any protection or restoration action must be practical workable (proportionate to the impact on the catchment)¹⁰;
23. I submit looking at the ordinary meaning of the words “restore”, “degrade” and “protect” and the case law then a policy framework can give effect to the Vision and Strategy which:
 - 23.1. preserves water quality by keeping applicable attributes in their current state in the NOF Band (where they are not degraded); and
 - 23.2. restore the water quality where it is considered degraded by requiring improvement of applicable attributes to an acceptable NOF band.

Vision and Strategy or policy choices.

24. Parliament intended the Vision and Strategy to be the primary direction-setting document for the Waipa River and the Waikato River and activities within its catchment affecting the Waipa River and the Waikato River. Although the Vision and Strategy is the primary direction setting document it

⁷ *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223.

⁸ At [87].

⁹ At [92].

¹⁰ At [92].

is generally phrased without specifying the manner in which the vision and objectives need to be achieved. This leaves flexibility in deciding on policies that will satisfy the Vision and Strategy. Accordingly it is possible that several different policy frameworks may all satisfy the Vision and Strategy.

25. For instance the text (ie the words used) in the Vision and Strategy and their ordinary meaning in the light of their purpose, does **not** include:

25.1. Any reference to the grade or standard that is required to which the Waikato River and Waipa River need to be restored to.

25.2. Any language that distinguishes between diffuse discharge and point source discharges or rural zones and other zones.

25.3. Any exceptions for hydro-dams and significant infrastructure.

26. The list above is not an 'alternative interpretation' or an interpretation of the Vision and Strategy but simply represents policy choices. FFNZ does not specifically oppose restoration to the 1863 (if it is to the NOF band state) of the Waikato River and Waipa River or the other policy choices.

27. The purpose of this part of the submission is to ensure that the Hearing Panel take care when coming across a phrase that implies that it is an interpretation of the Vision and Strategy when it is just a policy choice. Policy proposals in competition with PC1 that satisfies the Vision and Strategy should not be 'off the table' but should be judged on whether they are the most efficient and effective and the least restrictive provisions.

Does the Vision and Strategy give priority to certain objectives?

28. The Hearing Panel asked the following question in its Minute dated 19 February 2019:

...Given the legal obligation to give effect to it, does the Council consider that some elements of the Vision and Strategy take precedence? If so, what is the basis for that view, and which elements are prioritised. If the Council considers there is no internal priority, how does the Council suggest the Panel resolve areas of perceived conflict?

29. In *Carter Holt Harvey Ltd v Waikato Regional Council*¹¹ (*Variation 6*) the Court made the following helpful observations:
- 29.1. It is not appropriate to pick out certain Objectives of the Vision and Strategy. This runs the risk of detracting from the holistic nature of the Vision and Strategy and inappropriately implies that some are more important than others¹²;
- 29.2. Although the Vision and Strategy prevails over any inconsistent provisions in any National Policy Statement or New Zealand Coastal Policy Statement it would require clear and unambiguous words to do so¹³ (and I submit only after an attempt to resolve the tension in accordance with the guidance given in the *King Salmon* decision).¹⁴
30. In response to the first question, *Variation 6* held that no objective in the Vision and Strategy should have precedence over others. Accordingly the specific economic considerations like the vision of a prosperous community and the economic considerations in objective d) does not trump the requirement to restore and protect the water quality in the Waikato River and Waipa River and vice versa. I submit that the Vision and Strategy requires decision makers to consider both requirements to restore and protect water quality within the Waikato River and Waipa River and economic wellbeing.
31. In response to the second question, the *King Salmon*¹⁵ decision was concerned with the resolution of tensions in NZCPS. Accordingly if there is a perceived tension between policies the approach taken by the majority in *King Salmon* should be applied to try and resolve that tension.

¹¹ *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZ EnvC 380.

¹² At [429].

¹³ At [440].

¹⁴ *Royal Forest and Bird Protection Society v Bay of Plenty Regional Council* [2017] NZHC 3080 at [76].

¹⁵ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

32. The approach the majority in the Supreme Court considered appropriate is to attempt to resolve the tensions and to make “a thoroughgoing attempt to find a way to reconcile” the provisions it considered to be in tension.
33. The majority expressed the view that when dealing with a plan change application, the decision-maker must first identify those provisions 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.¹⁶
34. The Court considered that there will only be justification for reaching a determination which has one provision prevailing over another if the conflict remains after the required analysis has been undertaken. It observed that the area of conflict should be kept as narrow as possible, and that the necessary analysis should be undertaken on the basis of the higher order document being considered, albeit informed by s 5 of the Act. Section 5 should not, however, be treated as the primary operative decision-making provision.¹⁷

The entire length of the river

35. During the hearing, the Panel questioned the Council on the language in objective k) of the Vision and Strategy which refers to the Waikato River and Waipa River “being safe to swim in and take food from over its entire length”.
36. I consider there are several possible ways to interpret “over its entire length”. It could mean:
 - 36.1. Safe for swimming and take food every single place along the entire length of the Waikato River and Waipa River;

¹⁶*Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [129].

¹⁷ At [130].

36.2. Safe for swimming and take food at locations found along the entire length of the Waikato River and Waipa River;¹⁸

36.3. everything in between.

37. In response to a question by the Hearing Panel, Mr Cooper engaged as the Council expert stated that it is not realistic or achievable for the Waikato River to be swimmable all seasons at every place along the entire length. This makes sense. It is well accepted that sometimes swimming will not be possible nor recommended (for instances in a flood or where there are natural processes that makes it unsafe to swim). The working of the hydro dams require that swimming is not permitted in specific spots for safety reasons.

38. Accordingly, I submit that if an interpretation is applied that requires the Waikato River and Waipa River to be safe for swimming and taking food at each and every place along the entire length then it will lead to an absurdity and be unworkable. In accordance to principles of statutory interpretation an interpretation should be preferred that avoids absurdity, anomalous outcomes.¹⁹

39. I therefore submit that the Hearing Panel should prefer an interpretation that does not require the Waikato River and Waipa River to be safe for swimming and take food at each and every spot along its entire length.

Schedule of Witnesses

40. FFNZ will present its position on PC1 in the following order:

40.1. Mr McGiven, president for Federated Farmers Waikato, will introduce the Hearing Panel to Federated Farmers.

¹⁸ See primary evidence of Reeves and Taylor at [21].

¹⁹ *Nanden v Wellington City Council* [2000] NZRMA 562 at [48]. Also *R v Wall* [1983] NZLR 238 (CA), *H&S Chisholm Farms Ltd v Waikato Regional Council* [2018] NZ HC 1885.

40.2. Mr Meier will present the legal submissions;

40.3. Dr Le Miere will present his evidence;

40.4. Mr Eccles will present his evidence on behalf of FFNZ.



MJ Meier