

**IN THE ENVIRONMENT COURT
AUCKLAND REGISTRY**

ENV-2020-AKL-

**I MUA I TE KOOTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU**

UNDER the Resource Management Act 1991
(RMA)

IN THE MATTER OF an appeal under clause 14(1) of Schedule
1 of the RMA against the decision of the
Waikato Regional Council on Proposed
Plan Change 1 to the Waikato Regional
Plan

BETWEEN **CNI IWI LAND MANAGEMENT LIMITED**
Appellant

AND **WAIKATO REGIONAL COUNCIL**
Respondent

**NOTICE OF APPEAL ON BEHALF OF CNI IWI LAND MANAGEMENT
LIMITED AGAINST THE DECISION ON PLAN CHANGE 1: WAIKATO
AND WAIPĀ RIVER CATCHMENTS**

8 July 2020

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**To: The Registrar
Environment Court
Auckland Registry**

CNI Iwi Land Management Limited (**CNI**) appeals against part of the 18 March 2020 decision by the Waikato Regional Council (the **Regional Council**) in relation to Plan Change 1: Waikato and Waipā River Catchments (**PC1**).

Introduction

1. CNI Iwi Holdings Limited is the trustee company of the CNI Iwi Holdings Trust, which is the collective post-settlement governance entity for the CNI Iwi¹ for the purpose of the Central North Island Forest Lands Deed of Settlement and the Central North Island Forests Land Collective Settlement Act 2008 (together, the **CNI Settlement**).
2. Under the CNI Settlement, which formed part of the settlement of the historical Treaty claims of the CNI Iwi, CNI Iwi Holdings Trust received over 170,000 hectares of Crown forest licensed land (the **CNI Treaty Settlement Land**) on behalf of the CNI Iwi, of which approximately 34,000 hectares is located within the catchment of the Waikato River.
3. CNI Iwi Holdings Limited (as trustee of the CNI Iwi Holdings Trust) has delegated responsibility of the day-to-day management of the CNI Treaty Settlement Land to its wholly-owned subsidiary, CNI. CNI therefore appeals in that capacity.
4. CNI made a submission and further submission on PC1.
5. CNI is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (the **RMA**).

¹ Being: Ngāi Tūhoe, Ngāti Manawa, Ngāti Tūwharetoa, Ngāti Whakaue, Ngāti Whare, Raukawa, the Affiliate Te Arawa Iwi/Hapū and Ngāti Rangitīhi.

6. CNI received notice of the Regional Council decision to adopt the recommendations of the PC1 Independent Hearing Panel (the **Panel**) on 23 April 2020 (the **Decision**).

Parts of the Decision Supported

7. PC1 was developed by the Regional Council and the Waikato and Waipā River Iwi to address the degradation of the Waikato and Waipā Rivers (together, the/ngā **Awa**), and particularly to manage the effects of diffuse non-point discharges, and thereby give effect to Te Ture Whaimana o Te Awa o Waikato / the Vision and Strategy for the Waikato River (**Te Ture Whaimana**). This reflects the legislative imperative under the Waikato and Waipā River Settlement Legislation:²
 - (a) to restore and protect the health and wellbeing of the Waikato River for future generations;
 - (b) for Te Ture Whaimana o Te Awa o Waikato (the Vision and Strategy for the Waikato River) (**Te Ture Whaimana**) to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River; and
 - (c) to give effect to Te Ture Whaimana (as part of the regional policy statement) in regional and district plans.
8. CNI is committed to the objectives and strategies of Te Ture Whaimana and the protection and restoration of the health and wellbeing of the Awa.
9. In the Decision, the Panel has sought to amend the notified version of PC1 to better align with and promote Te Ture Whaimana. CNI endorses that intent and supports the Decision insofar as it:
 - (a) interprets the status and effect of Te Ture Whaimana;

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

- (b) increases the improvement required in the 10-year period after which PC1 becomes operative to 20% of the long-term goals;
- (c) retains the long-term water quality goal to be achieved by 2096;
- (d) signals resource consents for farming and commercial vegetable production (**CVP**) should generally not be granted for durations beyond 2035;
- (e) signals further diffuse discharge reductions and future management regimes (including potentially allocation of diffuse discharges of contaminants) in subsequent plan changes; and
- (f) retains a pathway to develop Tangata Whenua Ancestral Lands (being land returned through Te Tiriti o Waitangi settlement processes or Māori freehold land under the jurisdiction of Te Ture Whenua Maori Act 1993).

Parts of the Decision Appealed

- 10. CNI does not support those parts of the Decision that are not aligned with Te Ture Whaimana and, in particular, considers that the “protect and restore” imperatives of Te Ture Whaimana should apply to existing land uses in a manner that better recognises the particular historic disadvantage faced by the owners of Tangata Whenua Ancestral Lands in accordance with the principles of Te Tiriti o Waitangi / the Treaty of Waitangi.
- 11. CNI appeals against parts of the Decision on PC1 that include, but are not limited to the:
 - (a) policy approach to the development of Tangata Whenua Ancestral Lands, including:

- (i) the inclusion of specific reference to Te Ture Whaimana only in the policy that applies to land use change for Tangata Whenua Ancestral Lands;³ and
 - (ii) the removal of provisions that provide a clearer pathway for change in the land use of underutilised Tangata Whenua Ancestral Lands;⁴
- (b) removal of the end date for land use changes requiring non-complying land use consent; and
- (c) modification of policy that would give effect to Te Ture Whaimana in the future.

Reasons for the Appeal

Policy approach to Tangata Whenua Ancestral Lands

12. The Panel has expressly restricted the development Tangata Whenua Ancestral Lands by making only land use change for Tangata Whenua Ancestral Lands subject to Te Ture Whaimana in Objective 4(b). This contrasts and conflicts, for example, with the approach taken to land use change for CVP in Rule 3.11.4.8 which has no such express constraint.
13. This added restriction seems contrary to the Panel's position in the Decision where the need for specific provision for the development of Tangata Whenua Ancestral Lands is acknowledged. The Panel has erred by inappropriately distilling this policy intent into the Decision Version of PC1.
14. To expressly provide limits on Tangata Whenua Ancestral Lands alone suggests that Tangata Whenua Ancestral Lands require a more restrictive policy than other land. This is conflict with the objective of addressing the historical limits on the development of Tangata Whenua Ancestral Lands and risks creating fresh injustices, particularly for underutilised Tangata Whenua Ancestral Lands. This

³ Objective 4(b) of the Decision Version of PC1.

⁴ Objective 4, Policy 6 and Policy 16 of the Notified Version of PC1.

issue is further heightened by the removal of the end date in Rule 3.11.4.9 (as noted further below).

Removal of the end date for non-complying land use consent where existing land use is being changed

15. As notified, Rule 3.11.5.7⁵ required a non-complying land use consent for any change to the existing land use as specified in the rule, that activity status was only until 1 July 2026 (the **End Date**).⁶ That End Date was deleted in the Decision Version of PC1 at Rule 3.11.4.9.
16. The End Date provided a set timeframe within which the Regional Council would be required commit to establish a new rule (or provisions) for any change to existing land uses. The result being that that non-complying activity rule is retained in a manner that prefers land users on a first-in, first-served basis.
17. CNI considers that the End Date remains critical to commit the Regional Council to a more equitable method of determining the status of changes in land use.
18. CNI is not aware of submissions before the Panel requesting that Rule 3.11.5.7 of the notified version of PC1 be retained without the End Date. CNI was one of at least two submitters who proposed either the:
 - (a) deletion of Rule 3.11.5.7 of the notified version of PC1; or
 - (b) alternatively, retention of the End Date in that Rule.
19. As such, in addition to concerns about the Panel's scope. in view of submissions before it, to remove the End Date, CNI does not consider that the deletion of the End Date is justified, particularly given additional CNI's concerns about the future allocation (as noted below).

⁵ Now Rule 3.11.5.9 in the Decision Version of PC1.

⁶ The Hearing Panel's Recommendation Report, Volume 1 (the **Decision**), at [1631].

Future allocations and giving effect to Te Ture Whaimana

20. Policy 7 of the Notified Version of PC1 has been diluted in the Decision Version of PC1 (now Policy 10). The intent in Policy 7 was to promote a method of allocation of diffuse discharges of nitrogen, phosphorus, sediment and microbial pathogens and, accordingly, move away from a first-in, first-served method of land use in the future.
21. In doing so, several principles were set out to be considered in any future allocation mechanism, including an allowance for flexibility of Tangata Whenua Ancestral Lands.⁷ The flexibility of Tangata Whenua Ancestral Lands in particular is closely linked to Te Ture Whaimana and reflected in Objective 4 of PC1. The lifetime of Te Ture Whaimana is accepted to far exceed a single plan change.
22. The allowance for flexibility of Tangata Whenua Ancestral Lands disappeared from the Policy 10 altogether. In considering Policy 10 (Policy 7 of the Notified Version of PC1) the Panel adopted and relied upon the Block 3 section 42A Report (the **Block 3 Report**).⁸ Based on that report, a minority of submissions opposed Policy 7(b) and no conclusion was reached in favour of its removal. The Panel reliance on the Block 3 Report is not reflected in the Decision.

Further Resource Management Reasons for Appeal

23. In addition to the above, CNI oppose the identified parts of the Decisions because they:
 - (a) fail to provide for the relationship of the CNI Iwi and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga;
 - (b) do not promote the efficient use and development of natural and physical resources;

⁷ The others being land suitability, minimising social disruption and costs of new data and knowledge that may be gathered in the future.

⁸ Decision, at [1274].

- (c) fail to take into account the principles of the Treaty of Waitangi generally, particularly as they relate to the CNI Settlement;
 - (d) do not have proper regard to the requirements of, and do not give effect to, the National Policy Statement – Freshwater Management and the National Environmental Standards for Freshwater;
 - (e) are not the most appropriate means of achieving the purpose of the RMA in the protection and restoration of the Awa in accordance with Te Ture Whaimana;
 - (f) undermine the Tangata Whenua Ancestral Lands non-complying activity rule pathway, thereby rendering that pathway comparably ineffective such that it has little utility; and
 - (g) are otherwise inconsistent with the relevant provisions of the RMA, including the purposes and principles of the RMA under Part 2.
24. Unless changes are made to PC1, owners of Tangata Whenua Ancestral Lands in the catchments of the Awa will be:
- (a) significantly restricted from the development of Tangata Whenua Ancestral Lands;
 - (b) in the instance of very low nitrogen leaching activities, locked into current land use in perpetuity; and
 - (c) unfairly restricted compared to other land owners/users in those catchments.

Relief

25. CNI seek a robust version of PC1 that reflects the interests of CNI in relation to Part 2 of the Act and Te Ture Whaimana that properly reflects the Intent of the IHP.
26. CNI seeks the following specific relief:

- (a) reinstatement of the terms of Objective 4 of the Decision Version of PC1;
- (b) the proposed amendments to PC1 set out in the **Appendix** to this notice of appeal;
- (c) such further relief or other consequential amendments that are considered appropriate and necessary to address CNI concerns; and
- (d) costs.

Service

27. An electronic copy of this notice is being served today by email on the Regional Council at PC1Appeals@waikatoregion.govt.nz. Waivers and directions have been made by the Environment Court in [2020] NZEnvC 063 in relation to the usual requirements of the RMA as to service of this notice on other persons.

Attachments

28. Waivers and directions have been made by the Environment Court in [2020] NZEnvC 063 in relation to the usual requirements of the RMA to file a copy of the appellant's submissions and/or further submissions on PC1, the Council's decision, and a list of the names and addresses of each person required to be served with the notice of appeal, and the date of service on each such person.

DATED at Wellington this 8th day of July 2020



J P Ferguson / T T H Hullena
Counsel for the Appellant

THIS Notice of Appeal is filed by **JAMES PHILIP FERGUSON**, solicitor for the Appellant, of the firm Kāhui Legal, Wellington. The address for service of the Appellant is Level 11, Intilecta Centre, 15 Murphy Street, Thorndon, Wellington 6011.

Documents for service may be left at that address for service (Attn: J P Ferguson and T T H Hullena) or may be:

- (a) posted to the solicitors at PO Box 1654, Wellington 6140 (Attn: J P Ferguson and T T H Hullena); or
- (b) emailed to the solicitor at jamie@kahuilegal.co.nz and tyson@kahuilegal.co.nz.

COPIES TO: Registrar of the Environment Court at Auckland

AND TO: Waikato Regional Council

Advice for recipients of copy of notice of appeal

How to become party to proceedings

1. If you wish to be a party to the appeal, as per the requirements in Environment Court decision [2020] NZEnvC 063, within 30 working days after the period for lodging a notice of appeal ends you must:
 - (a) lodge a signed or unsigned notice of your wish to be a party to the proceedings (in form 33) with the Environment Court by emailing WRC.PC1appeals@justice.govt.nz;
 - (b) serve copies of your notice on the Waikato Regional Council on PC1Appeals@waikatoregion.govt.nz; and
 - (c) serve copies of your notice on the appellant electronically.
2. Service on other parties is complete upon the Court uploading a copy of the notice onto the Environment Court's website.
3. You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).
4. Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

How to obtain copies of documents relating to appeal

5. Environment Court decision [2020] NZEnvC 063 waived the requirement on all parties to attach a copy of appellant documents relating to the appeal to this notice.
6. Documents relating to the appeal can be obtained at <https://www.waikatoregion.govt.nz/council/policy-and-plans/healthy-rivers-plan-for-change>.

Advice

7. If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland

APPENDIX

Objective/Policy/Rule (Decision Version)	Amendments sought to Decisions Version of PC1
Objective 4 / Te Whāinga 4 (Decision Version)	<p>AMEND as follows:</p> <p>Objective 4/Te Whāinga 4: Tangata whenua values are integrated into the management of the rivers and other water bodies within the Waikato and Waipā River catchments such that:</p> <ul style="list-style-type: none"> a. Tangata whenua have the ability to: <ul style="list-style-type: none"> i. manage their own lands and resources, by exercising mana whakahaere, for the benefit of their people; and ii. actively sustain a relationship with ancestral land and with the rivers and other water bodies in the catchments; and b. Any impediments to the flexibility of the use of tangata whenua ancestral lands and land returned via treaty settlements are <u>minimised</u> restricted to those necessary to give effect to Te Ture Whaimana o Te Awa o Waikato; and c. Improvement in the rivers' water quality and the exercise of kaitiakitanga increase the spiritual and physical wellbeing of iwi and their tribal and cultural identity.
Policy 18 / Te Kaupapa Here 18 (Decision Version)	<p>AMEND as follows:</p> <p>Policy 18/Te Kaupapa Here 18:</p> <p>For the purposes of considering land use change applications enabling the development of tangata whenua ancestral lands, recognise and provide for:</p> <ul style="list-style-type: none"> a. The relationship of tangata whenua with their ancestral lands; and b. The exercise of kaitiakitanga; and c. The creation of positive economic, social and cultural benefits for tangata whenua now and into the future, in a way that gives effect to Te Ture Whaimana o Te Awa o Waikato.
Policy 10 / Te Kaupapa Here 10	<p>AMEND as follows:</p> <p>Policy 10 / Te Kaupapa Here 10</p> <p>Prepare for further diffuse discharge reductions and any future management regime (including potentially the allocation of diffuse discharges of contaminants) <u>that will be required by</u> subsequent regional plans by collecting information and undertaking research, including, but not limited to, collecting information about current discharges, developing appropriate modelling tools to estimate</p>

	<p>contaminant discharges, and researching the spatial variability of land use and contaminant losses and the effect of contaminant discharges in different parts of the catchment <u>that will</u> assist in the design of any future management regime.</p> <p><u>Any future plan should use this information to consider land suitability which reflects the biophysical and climate properties, the risk of contaminant discharges from that land, and the sensitivity of the receiving water body, as a starting point.</u></p>
<p>Rule 3.11.4.9</p>	<p>AMEND as follows:</p> <p>Rule 3.11.4.9 Non-Complying Activity Rule – Land use change</p> <p>Notwithstanding any other rule in this Plan, the following changes in the use of land are non-complying activities <u>until 1 July 2026</u>:</p> <ol style="list-style-type: none"> 1. Any change in the use of land to commercial vegetable production that, either itself or in combination with any extant resource consents, is not regulated by Rule 3.11.4.5 and does not meet the conditions of Rule 3.11.4.8. 2. Any of the following changes in land use within a property, where the change exceeds a cumulative net total of 4.1 ha from that which was occurring at 22 October 2016: <ol style="list-style-type: none"> a. woody vegetation to farming; or b. any land use to dairy farming. <p>AND add a discretionary rule as follows:</p> <p>Rule 3.11.4.# Discretionary Rule – Tangata Whenua Ancestral Lands use change</p> <p>From 2 July 2026 the change of use of tangata whenua ancestral lands, including any associated diffuse discharge of nitrogen, phosphorus, sediment and microbial pathogens into water or onto or into land in circumstances which may result in those contaminants entering water, is a discretionary activity subject to the following conditions:</p> <ol style="list-style-type: none"> 1. The change exceeds a cumulative net total of 4.1 ha from that which was occurring at 22 October 2016; 2. The property is registered with the Waikato Regional Council if required by and in conformance with Schedule A; and 3. A Nitrogen Leaching Loss Rate is produced for the property in conformance with Schedule B; and 4. A Farm Environment Plan: <ol style="list-style-type: none"> a. has <u>been prepared in conformance with Schedule D2</u>;

	<p><u>and</u></p> <ul style="list-style-type: none">b. <u>has</u> been approved by a Certified Farm Environment Planner as:<ul style="list-style-type: none">i. being in conformance with Schedule D2; andii. providing evidence to demonstrate the Nitrogen Leaching Loss Rate for the property in conformance with Schedule B; andiii. showing actions and mitigations that demonstrate how the farming activity will achieve the goals and principles set out in Part D of Schedule D2; andc. is provided to the Waikato Regional Council by the relevant Application Date specified in Table 3.11-3; and <p>5. Full electronic access to any software or system that models or records diffuse contaminant losses for the farming authorised by this rule is granted to the Waikato Regional Council, and if requested, any analysis produced by an approved software or system is provided to the Waikato Regional Council.</p>
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