

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Waikato District Plan (Stage
1) – 21B - Landscapes

**LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION
IN RELATION TO HEARING 21B - LANDSCAPES**

15 SEPTEMBER 2020

Department of Conservation

Private Bag 3072

Hamilton 3240

Counsel: Troy Ulrich

Email: turlich@doc.govt.nz

Telephone: 027 324 8991

MAY IT PLEASE THE COMMISSIONERS

1. INTRODUCTION

1.1 These legal submissions are made for the Director-General of Conservation (the **Director-General**). The legal submissions address the Director-General's submission and further submission on the "landscapes" section of the Proposed Waikato District Plan (the **Proposed Plan**).

1.2 For the most part, the Director-General supports the Council Officer's recommendations, as set out in the Section 42A Report (the **Report**) and Section 42A Report Rebuttal Evidence (the **Rebuttal Evidence**).¹

1.3 These legal submissions focus on addressing an issue raised in the Rebuttal Evidence regarding consistency between Mr Riddell's evidence and the Director-General's position, recognition of the Waikato River, the scope of the Director-General's submission on natural character in the coastal environment and on outstanding natural features (**ONF**).² They are set out as follows:

- (a) evidence;
- (b) Rebuttal Evidence;
- (c) recognition of the Waikato River;
- (d) preservation of natural character – scope;
- (e) ONF.

2. EVIDENCE

2.1 In addition to these legal submissions, evidence will be presented by:

- (a) Mr Riddell on the planning provisions in the Proposed Plan;
- (b) Mr La Cock on the functioning of coastal dune systems.

¹ The recommendations that the Director-General does not agree with are highlighted in these submissions and/or the evidence of Mr Riddell. The Director-General anticipates that Mr Riddell will respond to the revised recommendations in the Rebuttal Evidence at the upcoming hearing.

² Respectively, FS1293, FS1293.18, 585.3 and FS1293.1.

3. REBUTTAL EVIDENCE

- 3.1 The Rebuttal Evidence records that the Director-General's further submission (FS1293.3) supports notified Policies 3.3.2, 3.3.3 and 3.3.4 and that Mr Riddell's evidence, being that the policies understate the "avoid" directives, is inconsistent with the Director-General's position.³
- 3.2 The Section 42A Report records that FS1293.3 relates to the Director General's further submission in support of adding more policies and rules to protect ONF and providing for the potential identification of others.⁴ It does not convey support for the related policies, as notified.
- 3.3 Part 3 of Mr Riddell's evidence addresses this aspect of the Director-General's further submission. The evidence provided is consistent with the Director-General's position.
- 3.4 The Rebuttal Evidence refers to FS1293.3 as an example of where Mr Riddell's opinion differs from the position of the Director-General and notes that there are other cases.⁵
- 3.5 The Director-General wishes to note for the record, that he is concerned that other points raised in his submission and further submission may have been misinterpreted and defers to the references contained in Mr Riddell's evidence to establish consistency between the evidence provided and his position.

4. THE WAIKATO RIVER

- 4.1 The submission of Waikato–Tainui seeks that the Waikato River is included as an ONF and outstanding natural landscape (**ONL**). The Director-General supports the "intent of the submission and appropriate mapping of the Waikato River as and ONF and ONL to afford it adequate protection under the Proposed Plan".⁶

³ J Macartney *Section 42A Report Rebuttal Evidence Hearing 21B: Landscapes (Rebuttal Evidence)* (11 September 2020) at [125].

⁴ J Macartney *Section 42A Report on submissions and further submissions on the Proposed Waikato District Plan – Stage 1 Hearing 21B: Landscapes* (6 August 2020) (**42A Report**) at [127], p. 46. FS1293.3 in support of submission 8.4.

⁵ Rebuttal Evidence at [125].

⁶ 42A Report at [472], p. 145.

- 4.2 The Officer’s Recommendation is to accept the submissions in part. This is because parts of the Waikato River are included in ONFs and ONLs.⁷
- 4.3 The Director-General recognises that Waikato-Tainui and other iwi/hapuu who have ancestral relationships with the Waikato River are best placed to speak to the related cultural associations.
- 4.4 The purpose of this section is to provide context to the Director-General’s submission. The reference to “intent” relates to affording greater protection to the Waikato River. The Director-General considers that higher order protection is in line with the:
- (a) overarching purpose of the Vision and Strategy for the Waikato River (the Vision and Strategy) – to restore and protect the Waikato River;
 - (b) Part 2, Resource Management Act 1991 (**RMA**) requirements to recognise and provide for cultural associations, have particular regard to kaitiakitanga and account for Te Tiriti principles, given the extremely high cultural significance of the Waikato River.
- 4.5 There appears to be common acceptance that some areas of the Waikato River may not be considered ONF or ONL, when assessed against the *Pigeon Bay* criteria.⁸
- 4.6 In the absence of the Waikato River qualifying as an ONF and/or ONL, the Director-General supports exploration of alternative approaches, as proposed in the evidence for Waikato-Tainui and the evidence of Mr Riddell.⁹

5. PRESERVATION OF NATURAL CHARACTER - SCOPE

- 5.1 The Director-General acknowledges that there appears to be some uncertainty as to whether the ambit of his submission encompasses preservation of the coastal environment’s natural character in relation to Policy 3.5.1.¹⁰

⁷ 42A Report at [509].

⁸ Rebuttal evidence at [152] referencing evidence for Waikato-Tainui, Statement of Evidence of A. Riddell dated 20 August 2020 (**SOE, A. Riddell**) at [6.8].

⁹ For example, see Statement of Evidence of A. Coffin dated 21 August 2020 at [118], Statement of Evidence of G. Donald (undated) at [11.3] – [11.4], SOE, A. Riddell at [6.9].

¹⁰ Rebuttal Evidence at [135], SOE, A. Riddell at [8.7].

- 5.2 The legal principles relating to the scope of a submission are well-settled and are captured in the *Clearwater* two-part test, which requires that the:¹¹
- (a) submission must address the proposed plan change;
 - (b) consideration of whether there is a real risk that a person who might be directly affected by the relief sought has been denied an effective opportunity to respond to the submission.
- 5.3 The Director-General opposed notified objective 3.5.1 on the basis that consideration is required of all natural character. Relief sought by the Director-General includes specific amendments to provide for the protection of the coastal environment's natural character or alternative relief and any consequential amendments required.
- 5.4 The Director-General's submission identifies that he seeks amendment of the Proposed Plan to give effect to section 6(a), RMA and Policy 13, New Zealand Coastal Policy Statement 2010 (**NZCPS**) – both of which require that the coastal environment's natural character is preserved.
- 5.5 The Director-General submits that it is appropriate to take a substance over form approach to his submission.
- 5.6 The associated amendments proposed in the evidence of Mr Riddell integrate the section 6(a), RMA and Policy 13, NZCPS requirements.¹² Put another way, the amendments embody the substance of the Director-General's submission.
- 5.7 The Director-General accepts that the primary relief sought in his submission does not adequately address the concerns raised. The Director-General agrees that the alternative relief and consequential amendments advanced by Mr Riddell and recommended by the Council Officer are appropriate.¹³
- 5.8 Incorporating the requirement to preserve the natural character of the coastal environment should not cause surprise or prejudice, given the Proposed Plan

¹¹ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003, also see *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [80]-[82].

¹² SOE A. Riddell dated 20 August 2020 at [8.4] – [8.9].

¹³ SOE A. Riddell dated 20 August 2020 at [8.9] – [8.10], Rebuttal Evidence at [3.7.1].

must implement the provisions cited in the Director-General's submission¹⁴ and that the provisions were assessed as a part of the section 32 Report.¹⁵

5.9 In this instance, the Director-General's submission satisfies the *Clearwater* test. That is, the Director General's submission was on the Proposed Plan, the substance encompasses preservation of the natural character of the coastal environment and the relief sought will not cause prejudice.

6. OUTSTANDING NATURAL FEATURES

6.1 The Director-General's principal concern is that the criteria to assess the outstandingness of a natural feature in the Waikato Regional Policy Statement (**WRPS**) is not being accurately interpreted and/or applied. As a result, sites such as those listed by GSNZ may not be afforded the protection contemplated by section 6(b), RMA.¹⁶

6.2 The method applied to assessing the sites listed by GSNZ appears to have involved an overall assessment of the attributes set out in 12B, WRPS, which relate to landscapes. In undertaking the assessment, equal weight was applied to all attributes considered.¹⁷

6.3 Relevant expert evidence filed highlights that the fundamental point of difference in expert opinion relates to which criteria are relevant and which approach is appropriate to adopt in assessing a discrete part of a landscape as an ONF.¹⁸

6.4 Environment Court observations of relevance include that the words "landscape" and "feature" are deliberately used in section 6(b), RMA.¹⁹ A landscape is made up of three sets of components – biogeographical elements,

¹⁴ Resource Management Act 1991, ss 72, 74(1)(b).

¹⁵ *Section 32 Report – Part 2 Landscape & Natural Character* (July 2018). For example, see [1.4].

¹⁶ Being protection from inappropriate subdivision, use and development.

¹⁷ Boffa Miskell *Proposed Waikato District Plan – Review of ONFL* (13 July 2020) at [3.1].

¹⁸ See Evidence of B. Hayward dated 20 August 2020 at [6.6] – [6.7]. Mr Hayward considers that the landscape assessment methods should not apply to features; SOE, A. Riddell at [7.7] – [7.9], similarly, Mr Riddell considers a feature can be outstanding for reasons other than landscape values; at Evidence of R. Ryder dated 11 September 2020 at [54], Ms Ryder's opinion is that all landscape dimensions apply to features; Rebuttal Evidence at [178], the WRPS criteria apply to both landscapes and features.

¹⁹ *Wakatipu Environment Society v Queenstown Lakes District Council C129/01 (Wakatipu)* at [33].

the associative or relationship contributions and the perceptual aspects.²⁰ A feature means a distinctive or characteristic part of the landscape.²¹

- 6.5 In recognition of the differences between a “feature” and a “landscape”, the Environment Court in *Wakatipu* modified the *Pigeon Bay* criteria,²² which applies to landscapes, to assess whether a site qualified as an ONF by giving more weight to certain attributes.²³ The weight to be afforded to each attribute is site specific. As articulated by the Environment Court in *Mainpower NZ*, there are no invariable criteria for outstandingness, it depends on the specific characteristics of the natural landscape or natural feature.²⁴
- 6.6 Against this background and in line with Mr Riddell’s evidence, the Director-General considers that a feature may be identified as outstanding for reasons other than landscape values.²⁵
- 6.7 Policy 12B, WRPS requires an overall appraisal of the qualities, taking into account physical, aesthetic and associative attributes. The Policy lists factors that correspond with the attributes and sets out that there is scope to add further factors and to exercise discretion to determine the relevance of those factors.
- 6.8 The Director-General submits that determining the relevance of factors, adding factors where appropriate and giving more weight to certain attributes to assess whether a feature is outstanding is entirely consistent with the WRPS and in some instances, necessary to achieve the RMA’s purpose. Declining recognition of such sites on the basis that they do not meet the criteria tailored to landscapes, a discreet and separate standard, is contrary to the requirement to recognise and provide for outstanding natural features as a matter of national importance.

²⁰ *Upper Clutha Tracks Trust v Queenstown Lakes District Council* [2010] NZEnvC 432 at [51]. This description aligns with the explanation of a landscape at 12B, WRPS.

²¹ *Wakatipu* at [33], WRPS, Policy 12B.

²² *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 at [56]. Aspects relevant to the significance of a landscape include natural science factors, aesthetic values, its expressiveness, whether the values are shared or recognised, its value to tangata whenua and historical associations.

²³ *Wakatipu* at [34], [42].

²⁴ *Mainpower NZ Limited v Huruhui District Council* [2011] EnvC 384 at [334] on evaluating the appropriateness of defining a test to determine outstandingness.

²⁵ SOE A. Riddell at [7.9].

Dated 15 September 2020

A handwritten signature in blue ink, appearing to read 'T. Ulrich', written in a cursive style.

Troy Ulrich

Counsel for the Director-General of Conservation