

Report to the Collaborative Stakeholder Group – for Agreement and Approval

File No: 23 10 06
Date: 21 April 2016
To: Collaborative Stakeholder Group
From: Bill Wasley, CSG Independent Chair
Subject: **Māori Land Sub-group – Update from meetings 3 and 4**
Section **For Agreement and Approval**

Disclaimer

This report has been prepared by Waikato Regional Council staff for the use of Collaborative Stakeholder Group Healthy Rivers: Wai Ora Project as a reference document and as such does not constitute Council's policy.

1 Purpose

The purpose of this report is to provide the Collaborative Stakeholder Group (CSG) with:

- 1) an update of Māori land sub-group meetings held on 11 April and 19 April 2016 and
- 2) the sub-group's recommendations to the full CSG.

Recommendation:

1. That the report 'Māori Land Sub-group – Update from meetings 3 and 4' (Doc # 3771967 dated 21 April 2016) be received, and
2. That the Collaborative Stakeholder Group agree to the following, as discussed by the Māori land sub-group:
 - a) The general land use change rule, aka Rule 2a, and any new rule for Māori land use change, has an expiry date.
 - b) The policy and methods¹ around the principles of future allocation and work required to be undertaken between now and allocation, are important and need to be a clear theme of Plan Change 1, and the principles for future allocation need to be clearly expressed in Policy 6.
 - c) Plan Change 1 should contain an objective and a policy reflecting the intent discussed by the sub-group, as shown in Text box 1 and 2 of this report – CSG to discuss and confirm or amend.
 - d) CSG discuss the two preferred options for rule activity class, as outlined in Section 4 of this report, and agree on which option to include in Plan Change 1, and
 - i) If Option B is selected, use or amend the draft rule contained in Text box 3 of this report.

¹ In the plan change document these are Policy 6. and methods 3.11.4.10 and 3.11.4.11.

2 Update of sub-group meetings

CSG has been discussing the implications that the Healthy Rivers Plan Change may have on undeveloped Māori owned land over the past few months. A sub-group was formed to investigate options to ensure the plan change does not impose a further impediment to the development of undeveloped Māori owned land (CSG focus day workshop notes DM#3727426).

A written report to the CSG on 4 April 2016 (DM#3751614) provided an update on the first sub-group. A verbal update on the second sub-group meeting was given on the day, and the notes were tabled.

This report covers the discussion and outcomes from the third (11 April DM#3764581) and fourth (19 April DM#3773495) Māori land sub-group meetings.

3 Summary of sub-group agreements

The following is a list of agreements reached by the Māori land sub-group, for CSG discussion:

- 1) Ensure the general land use change rule, aka Rule 2a, and any new rule for Māori land use change, has an expiry date.
- 2) The policy and methods² around the principles of future allocation, and work required to be undertaken between now and allocation, are important and need to be a clear theme of Plan Change 1, and the principles for future allocation need to be clearly expressed in Policy 6
- 3) Plan Change 1 should contain an objective and a policy reflecting the intent discussed by the sub-group; the sub-groups recommended wording is shown in Text box 1 and 2.

Text box 1: Wording of objective

Objective (Objective 5 in plan change)

Mana Tangata – protecting and restoring tangata whenua values

Tangata whenua values are integrated into the co-management of the rivers and other water bodies within the catchment such that:

- a) tangata whenua have the ability to
 - 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
- b) new impediments to the flexibility of the use of ancestral lands are minimised; and
- c) tangata whenua connection with the rivers and other water bodies in the catchment is strengthened; and
- d) improvement in the rivers' water quality and the exercise of kaitiakitanga increases the spiritual and physical wellbeing of iwi and their tribal and cultural identity.

² In the plan change document these are Policy 6. and methods 3.11.4.10. and 3.11.4.11.

Text box 2: Wording of policy

Policy (Policy 12 in plan change)

Flexibility of use of tangata whenua ancestral lands

Land use change of **tangata whenua ancestral lands** shall be managed in a way that recognises and provides for:

- a) The relationship of tangata whenua with their ancestral lands; and
- b) The creation of positive economic, social and cultural benefits for tangata whenua now and into the future;

Taking into account:

- c) Best practice land management actions for the new type of land use; and
- d) The suitability of the land for development into a new use, including the risk of contaminant loss from that land and the sensitivity of the receiving water body, reflecting the principles for future allocation as contained in Policy 6.

Explanation for the policy

- The policy guides applications under Rule (2a or 8). It acknowledges there are historical and existing legal impediments which affect the retention, use, development, and control of Māori land as taonga tuku iho and the consequential effects those impediments have had on the relationship of tangata whenua with the ancestral lands.

Definition

Tangata whenua ancestral lands

Land that has been returned through settlement processes between the Crown and tangata whenua of the catchment, or is, as at the date of notification, Māori freehold land under the jurisdiction of Te Ture Whenua Maori Act 1993.

4 Main topic for CSG discussion

The sub-group have been discussing options for how to achieve the objective and implement the policy written above. The sub-group has narrowed the options down to two preferred options, for CSG to discuss.

These two options are:

Option A: have the same non-complying activity rule for all land use change, which is guided by the objective and policy above, or

Option B: have a discretionary activity rule, which is only for tangata whenua ancestral land use change, and is guided by the objective and policy above.

A summary of the key points on this topic are:

1. What **additional adverse effect** will this change in land use have on the river due to the extra contaminants entering the water? This information is currently being developed by TLG, but what we do know is there will need to be significant reductions in contaminants over the next 80 years to reach the water quality goal for the Vision and Strategy, and any increase in contaminants as a result of the land use change will go against that required trend.

A consent under either of the rule activity classes under discussion will require an assessment of environmental effects, which will be assessed against the Vision and

Strategy as the primary direction-setting document, and both are equally as likely to be rejected on that matter alone.

2. Legal advice is that a rule which gives preference to a particular section of the community would present a high risk of being successfully challenged. That risk can be reduced by referring to **an activity not an applicant**. In drafting provisions the activity is the change in land use, but when referring to this change on certain types of land it is not possible to describe that land without referring to ownership, as they are inherently linked. In order to incorporate this advice the approach would be to provide guidance at the policy level which links to a non-complying activity rule which applies to all land use change in the catchment. This option is Option A above. This approach includes in the policy all effects are considered (which would include social and cultural positive effects), and links the type of land to the effect on the RMA s6(e) ancestral relationship, but the objective and policy will refer to applicants.
3. If the CSG decides to pursue the Option B of having a **different rule class** which is less stringent for Māori land, this would involve being up-front about the types of land these provisions apply to, which will have to refer to the legal ownership status. This could be done either by describing the land, or by listing the land in a schedule which is referred to in the rule. The sub-group considered that a discretionary activity rule would be the most appropriate rule class for this rule, if this option is chosen.

In order to reduce the risk of a legal challenge being successful, expert evidence will be required to demonstrate there are additional benefits of the activity (land use change) when this activity is carried out by tangata whenua on their ancestral lands, and that the benefits are wider than to the applicant. These benefits could be due to the relationship with ancestral lands (Section 6(e)), exercising kaitiakitanga (Section 7 (a)) or the principles of the Treaty of Waitangi (Section 8). This evidence will be 'breaking new ground' on what the courts have previously considered, for example benefits considered under these provisions have traditionally been limited to customary uses, not commercial activity. The s32 analysis for these provisions will require a cost and benefit assessment regardless, and so this work is currently being undertaken with assistance from the TLG.

A summary of the pros and cons of the two rule options are shown in Table 1.

Table 1: Summary of pros and cons of the two rule options for Māori land use change

Option for rules	General comments	Pro	Con
<p>Option A</p> <p>One non-complying activity rule for all land use change</p>	<p>This rule class is used in situations where the activity generally is not desired, but there may be circumstances in which it is appropriate OR When there may be something out of the ordinary which couldn't be anticipated.</p>	<p><i>For the applicant</i> When making a decision on an application council would look to the objectives and policies of the plan, which include guidance on considering the legal impediments on the land, the benefits of developing that type of land and the relationship with ancestral lands.</p>	<p><i>For the applicant</i> Applications are subject to a “gateway” test prior to consideration. As a matter of jurisdiction, applications must be declined unless the Council is satisfied that either the adverse effects of the activity on the environment will be minor OR the application is for an activity that will not be contrary to the objectives and policies of the plan. This could be seen as ‘another barrier’. If that “gateway” is satisfied, applications still need to be assessed on their merits under s104.</p> <p>Applications may be publicly notified if the adverse effects of the activity are more than minor. The consent may be declined. Decision-makers would look at all the objectives and policies and weigh them up, where they appear to be conflicting.</p> <p>When making a decision on the consent and writing conditions council may consider all Part 2 matters (e.g. natural character or indigenous vegetation etc).</p>
	<p>In this situation land use change in general is not desired, but it may be in circumstances such as Māori land development, which historically has been legally constrained and will be developed according to conditions.</p> <p>This option fits with legal advice by referring to activities rather than applicants, so has less risk of legal challenge.</p>	<p><i>Waikato and Waipa River health</i> As this consent class can be declined it allows for case by case decision making, which may be particularly relevant due to the spatial variability of the water quality in the catchment and the variability in the type of land. For aspects such as spatial variability, where more information is being gathered through the life of the Plan Change, a non-complying activity allows all Part 2 matters to be considered during the application.</p> <p>This option provides consistency between landholders, as applications are made under the same rule. This retains the logic within the CSG policy mix package, requires a lower level of justification and evidence in a s32 analysis by addressing the legal issues raised above.</p>	<p><i>Waikato and Waipa River health</i></p> <p>-</p>

Option for rules	General comments	Pro	Con
<p>Option B</p> <p>A discretionary activity rule just for Māori land use change</p>	<p>This rule class is generally for activities which have been contemplated and there is scope for them to occur, but the effects need to be considered and managed, and council wants to have oversight on how they are managed. Currently the effect on the 10 water quality targets is not know.</p>	<p><i>For the applicant</i> The consent may be granted, subject to conditions.</p> <p>The discussion around Māori land use change will be discussed upfront through the plan development process and so whatever the outcome is it will be clear for applicants. If this rule forms a part of the operative plan then the pathway is clear for applicants.</p>	<p><i>For the applicant</i> Applications may be publicly notified if the adverse effects of the activity are more than minor. The consent may be declined.</p> <p>When making a decision on the consent and writing conditions council may consider all Part 2 matters (e.g. natural character or indigenous vegetation etc).</p> <p>The discussion around Māori land use change will be discussed upfront through the plan development process and so whatever the outcome is it will be clear for applicants. This rule may not make it through to the operative plan due to the legal issues around specifying an applicant.</p>
	<p>In this situation land use change of Māori land would be contemplated as historically it has been legally constrained and will be developed according to conditions.</p> <p>This option does not fit with legal advice as it refers to applicants, as well as activities, so has significant risk of a successful legal challenge.</p>	<p><i>Waikato and Waipa River health</i> As this consent class can be declined it allows for case by case decision making, which may be particularly relevant due to the spatial variability of the water quality in the catchment and the variability in the type of land. For aspects such as spatial variability, where more information is being gathered through the life of the Plan Change, a discretionary activity allows all Part 2 matters to be considered during the application.</p>	<p><i>Waikato and Waipa River health</i> -</p>

If **Option B** is chosen (to have a discretionary activity rule only for Māori land use change) a rule has been drafted for CSG discussion, as shown in Text box 3.

Text box 3: Wording of rule

Rule 8 – Change in the use of settlement land or Te Ture Whenua Māori freehold land

A change in the use of land in the Waikato and Waipa River catchment, of more than 4 hectares in area, from:

1. **indigenous vegetation to dry stock grazing**; or
2. **indigenous vegetation to dairy**; or
3. **planted production forest to dry stock grazing**; or
4. **planted production forest to dairy**; or
5. **dry stock grazing to dairy**; or
6. **indigenous vegetation to cropping**; or
7. **planted production forest to cropping**; or
8. **dry stock grazing to cropping**,

where the land is **tangata whenua ancestral land**³ is a discretionary activity (requiring a resource consent) from the date of notification until 1 July 2026, subject to the following conditions, standards and terms:

- i) No land use change may occur on Land Use Capability Class VIII; and
- ii) Land changing to the use of **dairy** is Land Use Capability Class I-IV; and
- iii) Land changing to the use of **dry stock grazing** is Land Use Capability I-VII; and
- iv) Land changing use leaches no more than the freshwater management unit median kilograms of nitrogen per effective hectare per annum; and
- v) A Farm Environment Plan is prepared in accordance with Rule 5, and nitrogen reference data collection is undertaken in accordance with Rule 7, both of which demonstrate how clauses i) to iv) above are met; and
- vi) Land use change shall only occur where the principles of future allocation, as shown in Policy 6, are demonstrated; and
- vii) Land changing use provides for the tangata whenua relationship with ancestral lands, demonstrates kaitiakitanga, *and the benefits for tangata whenua which are generated from the change in land use are realised and secured into the future.*

For the purposes of this rule a change in land use includes reversion to a previous land use where there has been a greater than two year period since it has been used for those purposes, from 1 July 2016.

For the avoidance of doubt, change in land use does not include:

- a) the growing of crops as part of a pasture renewal programme
- b) what could reasonably be considered to be seasonal variation or rotation of crops within a farming enterprise, where the change in productive area affected by the land use change is less than 4 hectares.

*This rule mirrors Rule 2a and has extra requirements added in. Suggest that any changes made to Rule 2a are reflected in this rule also.

³ Alternatively you could list the land in a schedule and refer to the schedule in the Rule e.g. this paragraph would read “where the land is listed in Schedule X.

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Attachments

Attachment 1: Māori Land Sub-Group meeting notes #3 DM#3764581

Attachment 2: Māori Land Sub-Group meeting notes #4 DM#3773495

Attachment 3: Reports to Māori land sub-group

References

Māori land sub-group notes. Māori land sub-group meeting #1. 15 March 2016. DM#3747040.

Māori land sub-group notes. Māori land sub-group meeting #2. 1 April 2016. DM#3757058.

Māori land sub-group notes. Māori land sub-group meeting #3. 11 April 2016. DM#3764581.

Māori land sub-group notes. Māori land sub-group meeting #4. 19 April 2016. DM#3773495.

Simpson Grierson 2016. Plan Change 1 – Initial comment on proposed provisions relating to the development of Māori land DRAFT. Privileged and confidential. Dated 8 April 2016. DM#3764674

Waikato Regional Council 2016. Cover memo for legal opinion. For Māori land sub-group. Dated 7 April 2016. DM#3761666

Waikato Regional Council 2016. Drafting outcomes, objectives and policies. For Māori land sub-group. Dated 7 April 2016. DM#3753373

Waikato Regional Council 2016. Māori land sub-group – Update from meetings 1 and 2. Agreement and Approvals report to CSG dated 29 March 2016. DM#3751614

Waikato Regional Council 2016. New wording of provisions and options for activity class. For Māori land sub-group. Dated 15 April 2016. DM#3767585

Waikato Regional Council 2016. Policy options for discussion by Māori land sub-group. For Māori land sub-group. Dated 30 March 2016. DM#3724784

Waikato Regional Council 2016. Restoring and protecting our water/Te whakapaipai me te tiaki i ō tātou wai: Overview of Collaborative Stakeholder Group's Recommendations for Waikato Regional Plan Change No. 1 – Waikato and Waipa River Catchments. March 2016. DM#3351821.

Attachment 1: Māori Land Sub-Group #3 meeting notes see DM#3764581

Attachment 2: Māori Land Sub-Group #4 meeting notes see DM#3773495

Attachment 3: Reports to Māori land sub-group

The following documents were prepared for the Māori land sub-group and are available on the CSG portal:

Māori land sub-group #2 - 1 April 2016

Waikato Regional Council 2016. Policy options for discussion by Māori land sub-group. For Māori land sub-group. Dated 30 March 2016. DM#3724784

Māori land sub-group #3 - 11 April 2016

Waikato Regional Council 2016. Drafting outcomes, objectives and policies. For Māori land sub-group. Dated 7 April 2016. DM#3753373

Waikato Regional Council 2016. Cover memo for legal opinion. For Māori land sub-group. Dated 7 April 2016. DM#3761666

Simpson Grierson 2016. Plan Change 1 – Initial comment on proposed provisions relating to the development of Māori land DRAFT. Privileged and confidential. Dated 8 April 2016. DM#3764674

Māori land sub-group #4 - 19 April 2016

Waikato Regional Council 2016. New wording of provisions and options for activity class. For Māori land sub-group. Dated 15 April 2016. DM#3767585