

Memo

File No: 23 10 12

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To: Māori land sub-group

From: Emma Reed, policy workstream

Subject: **New wording of provisions and options for activity class**

1 Purpose

The policy mix for Healthy Rivers currently includes three outcome statements and placeholder headings for narrative objectives and policies for enabling provisions providing for the development of land returned under Te Tiriti o Waitangi settlements and multiple Māori owned land.

The purpose of this memorandum is to provide the edits to draft wording of the outcome, objective and policy which the sub-group developed on 11 April 2016, and pros and cons for different activity classes for a rule to allow development of settlement and multiple owned Māori land under Te Ture Whenua Maori Act 1993.

2 Background

The Māori land sub-group met for the first time on 15 March 2016 (DM#3723604), then on 1 April 2016 (DM#3757058) and for a third time on 11 April 2016 (DM#3764581). At the first workshop the sub-group confirmed the intent of the sub-group was to develop counterbalancing policy to allow for flexibility for land that has not been able to be developed due to legal/historical reasons/impediments.

The following documents were used at the third sub-group meeting on 11 April during the discussion:

- A report on policy options (DM# 3724784)
- A legal opinion produced by Simpson Grierson, supported by a phone conversation between the sub-group and Gerald Lanning during the meeting (cover memo DM#3761666 and legal opinion DM#3764674)
- Draft wording for an outcome, objective and policy (DM#3753373)

3 Key points of this memo

The three key points from a policy perspective, in the following hierarchy, 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 modelling, 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 will go against that required trend. The sub-group have previously discussed limiting the quantum of land available to change to reduce the total possible effect on the river, which would help address this point.

A consent under any rule activity class will require an assessment of environmental affects, and is equally as likely to be rejected on that matter alone under any rule activity class (except controlled, which must be granted).

2. Legal advice is to refer to **an activity not an applicant**. In drafting provisions policy staff have not found a way to do this in a rule, as the type of land is inherently linked to the legal ownership status. Legal advice has been requested on this matter. In order to incorporate this advice the approach would be to provide guidance at the policy level which links to Rule 2a non-complying activity rule which applies to all land use change in the catchment. This option has been described as 'Policy Option 2 – provide direction at a policy level'. This approach could also require in the policy that all effects are considered (which would include social and cultural positive effects), and link the type of land to the effect on the s6(e) relationship.
3. If the sub-group wants to pursue the option of having a **different rule class** for Māori land this would involve being up-front on the types of land these provisions apply to, which will have to refer to the legal ownership status. This then raises the question of which activity status would be most appropriate.

These points are further elaborated in the sections below.

4 Comments on legal opinion

The key points of the legal opinion (DM#3764674) are contained in paragraphs 5 to 9. Commentary on these points from a policy perspective, based on the three sub-group meetings so far, is noted in italics below each point:

- a) **There are potentially significant legal risks with the proposal which may or may not be able to be addressed through the drafting of provisions; and**
 - *The sub-group has received and understood the legal advice, and agreed to proceed with the option of including an objective, policy and a rule in Plan Change 1 to achieve the intent of a counterbalancing policy to allow for flexibility for land that has not been able to be developed for legal/historical reasons/impediments, knowing there are significant legal risks to this approach.*
 - *Legal advice included that having an equivalent activity status for a rule for development of settlement land or Māori freehold land under TTW requires less justification than an objective and policy, will reduce the risk of the provisions being challenged and potentially being found to be unlawful. The sub-group has agreed not to pursue this option, but rather an option which has a different, and less stringent, activity status for development of settlement or Māori freehold land under TTW.*
- b) **If Council wishes to develop provisions, the following may assist the drafting of the Proposed Provisions:**
 - i) **Ensure that they give effect to the objective of restoring and protecting the health and well being of the river, including the objective of avoiding adverse effects of activities on the health and wellbeing of the river; and**
 - *Information is still being developed on how these provisions would affect achieving the objectives of the plan change and therefore restoring and protecting the health and wellbeing of the river, including avoiding adverse effects.*
 - *We do know the river is over-allocated and there are significant reductions from the current level of discharges which need to be made over the next 80 years. Any activities on the land which increase discharges will have an effect on the river.*
 - *It is not possible to say at this stage if this objective can be met by the current approach.*

- However the sub-group have discussed that this policy can only be accommodated if the 10% target in 10 years will still be met.
 - ii) **Refer to a type of activity rather than a type of applicant; and**
- This advice has been incorporated into the drafting of all provisions to the extent possible. When referring to land use change on certain types of land in a rule it is not possible to describe that land without referring to the ownership as they are fundamentally linked. Note that the purpose of TTW Maori Act 1993 in its entirety has not been included in the policy as it refers specifically to Māori owners, so this part of the wording has been removed.
 - iii) **If the Proposed Provisions are to apply to land that only Maori have control over, then to potentially reduce the legal risk it will be necessary to demonstrate (through expert evidence) that the Proposed Provisions will:**
 - A. **Create benefits that are different/greater than the similar use of non-Maori land; and/or**
 - B. **Restore and protect the relationship of iwi with the river; and/or**
 - C. **Be consistent with or give effect to Kaitiakitanga and the principles of the Treaty of Waitangi.**
- This point is somewhat at odds with point ii) which advises not to refer to a type of applicant, while this point advises to demonstrate the benefits the effects for one section of the community. 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. This evidence will be 'breaking new ground' on what the courts have previously considered under the concept on kaitiakitanga.

5 Edits to wording of objective and policy

Draft wording for an outcome, objective and policy were provided to sub-group meeting #3 (DM#3753373) and the sub-group provided edits, which are shown below.

Edits from WRC implementation staff have also been included and comments from a legal review will be provided at the sub-group meeting on 19 April 2016.

The idea from the sub-group to combine the definition of land which is currently part of the objective into the policy, and call the outcome the objective, has also been reflected below.

Outcome 2 Objective: 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) the ability of tangata whenua 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, is maintained
- b) new impediments to the flexibility of the use of ancestral lands are minimised
- c) tangata whenua connection with the rivers and other water bodies in the catchment is strengthened
- 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.

New policy to guide applications under Māori land use rule 8

Land use change policy intent from policy mix document:

Policy intent is to avoid increases in discharges through strong guidance and rules to restrict land use change. This includes:

- *an approach that identifies and restricts the potential changes to those land uses that are most likely to increase discharges.*

When considering applications for resource consent under 'Rule 8' for land use change on 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 the following matters are taken into account:

- The creation of positive economic, social and cultural benefits of development of land which has had legal impediments placed upon it
- Whether the proposed development reflects best practice for that type of land use, and suitability of the land for development into that use (including sensitivity of the receiving water body).

Explanation for the policy

- The policy guides applications under rule 8. It acknowledges there are historical and existing legal impediments which the retention, use, development, and control of Maori land as taonga tuku iho and the consequential effects those impediments have had on the relationship with the ancestral lands.

6 Draft rule and options for activity class

The sub-group has asked to see a draft rule and options for different activity classes. This is shown below.

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**,

where the land:

- a) has been returned through settlement processes between the Crown and tangata whenua; or
- b) as at the date of notification of this plan, is under the jurisdiction of Te Ture Whenua Maori Act 1993, classed as Māori freehold land

is a XXXXX activity (requiring a resource consent) from 1 July 2016, subject to the following conditions, standards and terms:

- i) No land change may occur on Land Use Capability Class VIII; and
- ii) Land changing to the use of **dairy** is Land Use Capability Class I-V; and
- iii) Land changing to the use of dry stock grazing is Land Use Capability I-VII: and
- iv) Land changing to the use of **dairy** leaches a maximum of Xkg 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) and iii) above are met; and
- vi) *Other conditions which restrict the land which can change.*

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 the extra requirements added in, assuming the activity class is not non-complying. Suggest that any changes made to Rule 2a by plan drafting sub-group are reflected in this rule also.

Table 1: Pros and cons of different rule activity classes

Activity class	Pros	Cons
Permitted activity	<p><i>For the applicant</i> No resource consent is required, subject to conditions of the rule being met.</p>	<p><i>For the applicant</i> -</p>
	<p><i>Waikato and Waipa River health</i> -</p>	<p><i>Waikato and Waipa River health</i> In addition to all the point mentioned below for a controlled activity, this rule class does not require a consent and so the associated assessment of effects by council is not undertaken.</p>
Controlled activity	<p><i>For the applicant</i> The resource consent must be granted, subject to conditions which can only relate to the matters the council has specified it will reserved control over. These matters are listed in the rule. Controlled activity consent applications may be notified, although it is common for them to be non-notified.</p>	<p><i>For the applicant</i> As with all resource consents, the applicant will be charged an application fee, an annual fee for monitoring costs of WRC staff time for processing and monitoring.</p>
	<p><i>Waikato and Waipa River health</i> -</p>	<p><i>Waikato and Waipa River health</i> If the controlled activity rule allows all land within the ownership definitions to be developed (with some limitations, including on maximums of nitrogen leached from the new land use) there will be more contaminants in water bodies and adverse effects on River health. The location of the discharge in the catchment is important, where the same quantum of discharge may have a greater or lesser effect on water quality depending on soil type, rainfall, and whether the new diffuse discharges are in the upper or lower river. Advice from Technical Leaders Group on spatial variability is needed.</p> <p>In order to work out the scale of the potential adverse effects, the assumption has to be that the rule will be fully utilised. The section 32 justification will need to consider whether the effects of land use development up to the maximum permissible under the proposed activity could be adequately managed through the matters of control and resource conditions. There are two reasons for this:</p>

Activity class	Pros	Cons
		<p>1. Identify the total cumulative effects that may occur from resource use and development occurring as controlled activities</p> <p>2. Whether the matters of control can be effectively addressed through resource consent conditions. For instance, whether conditions could be placed on the consent that would mitigate the effects of the new land use.</p> <p>This rule class therefore will be the most difficult to justify in a s32 analysis given:</p> <ul style="list-style-type: none"> • the river is over-allocated and the objectives of the plan change require significant reductions in contaminants over the next 80 years • writing a rule for a particular type of land which only certain sections of the community control is legally challenging. <p>Amendments to the Act are proposed which will generally require applications to be non-notified, meaning there will be no opportunity for public participation.</p>
<p>Restricted discretionary activity</p>	<p><i>For the applicant</i> The consent may be granted or declined. If granted, the resource consent conditions can only relate to the matters which have been specified by the council in the Plan Change.</p> <p>Restricted discretionary rules are used to focus on the management of a specific form of activity that has a narrow set of cause/effect matters at issue. This may be seen as a benefit to the applicant, as it means the council has to only consider and set resource consent conditions on a limited set of considerations.</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>Applications for restricted discretionary activity consent must cover precisely those matters to which council has restricted its discretion.</p>

Activity class	Pros	Cons
	<p><i>Waikato and Waipa River health</i> As this consent class can be declined it allows some case-by-case decision making.</p>	<p><i>Waikato and Waipa River health</i> The matters which can be considered and managed through consent conditions are restricted to those specified in the rule. Once the rule is being implemented, there may be wider environmental, social or cultural matters that are not spelt out in the rule and therefore cannot be considered. If the restriction is too narrow then the council may not be able to set conditions on consents that avoid or mitigate significant adverse effects.</p>
<p>Discretionary activity</p>	<p><i>For the applicant</i> The consent may be granted, subject to conditions.</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><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 a wider range of information to be considered during the application.</p> <p>Conditions can be imposed through the consent which can relate to all Part 2 matters.</p>	<p><i>Waikato and Waipa River health</i> -</p>

Activity class	Pros	Cons
<p>Non-complying activity</p> <p>Not having a different rule i.e. Policy Option 2 – direction at policy level</p>	<p><i>For the applicant</i></p> <p>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 the applicant has with ancestral lands.</p>	<p><i>For the applicant</i></p> <p>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. If that “gateway” is satisfied, applications still need to be assessed on their merits under s104. This could be seen as ‘another barrier’.</p> <p>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><i>Waikato and Waipa River health</i></p> <p>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>

Commentary on notification

All applications for resource need to be assessed under RMA sections 95A-E on if to notify. A consent authority must publically notify the application if the activity will have or is likely to have adverse effects on the environment that are more than minor. This is regardless of the activity status.

7 Summary

The Māori owned land sub-group requested options for different activity classes for a rule in Plan Change 1. This has been provided, along with:

- A summary of the legal advice, with important points from a policy perspective
- Draft wording of an objective, policy and rule.

The three key points from this report are:

1. The **additional adverse effect** will this change in land use will have on the river due to the extra contaminants entering the water is vitally important, and currently unknown. Defining the quantum of land being changed to reduce the total possible effect on the river, is one way to help address this point. All rule activity classes will require an assessment of environmental affects, and are equally as likely to be rejected on that matter alone.
2. Legal advice is to refer to **an activity not an applicant**. In drafting provisions policy staff have not found a way to do this in a rule, as the type of land is inherently linked to the legal ownership status. This leaves the options of providing guidance at the policy level which links to Rule 2a non-complying activity rule which applies to all land use change in the catchment.
3. If the sub-group wants to pursue the option of having a **different rule class** for Māori land this would involve being upfront on the types of land these provisions apply to, which will have to refer to the legal ownership status. This then raises the question of which activity status would be most appropriate.

The next steps for the sub-group are to discuss the issues raised above and agree on wording of an objective, policy and rule and which activity class a rule should have, consider how the chosen approach fits with the benchmarking and 75th percentile concept and consider what guidance, if any, will be given about the future property level allocation and how the policy approach for TTW and settlement for the next 10 years fits with that.

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References

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