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IN THE WAITANGI TRIBUNAL

WAI 1200

UNDER	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER	of the Central North Island Regional Inquiry

06 6689398

CLOSING SUBMISSIONS ON BEHALF OF WAIKATO REGIONAL COUNCIL

Dated 14 October 2005

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CLOSING SUBMISSIONS ON BEHALF OF WAIKATO REGIONAL COUNCIL

INTRODUCTION

1. The Waikato Regional Council ("**Environment Waikato**") is a local authority under the Local Government Act 2002. It is a separate legal entity from the Crown. Environment Waikato manages and protects land, water, soil, air, coastal and geothermal resources in the Waikato region of the central North Island in accordance with its statutory functions in this regard under the Resource Management Act 1991 ("**RMA**").

2. Environment Waikato supports the right of the claimants in the Central North Island ("**CNI**") Inquiry to seek redress, through the Waitangi Tribunal ("**Tribunal**") process, with the Crown Treaty partner.

3. Environment Waikato greatly values its relationships with all tangata whenua in its region. Those relationships are essential to Environment Waikato's functions, and it is concerned to preserve and enhance them. Environment Waikato believes it is doing a good job in relation to consultation with tangata whenua and taking into account the principles of the Treaty in its decision-making processes, and that the allegations made against it by some claimants are unfair.

4. Environment Waikato applied to be heard in the CNI Inquiry, in accordance with its rights to natural justice under section 4A of the Commissions of Inquiry Act 1908, when it became aware that allegations had been made against it in the course of evidence being presented to the Tribunal in relation to the Crown in the CNI Inquiry.

5. Environment Waikato was also concerned to ensure that the Tribunal received the most accurate information within the Tribunal's tight timeframe for hearing evidence on matters concerning Environment

Waikato. In the course of its participation in the CNI Inquiry, Environment Waikato has sought to be cooperative, and to provide the Tribunal and claimant counsel with information they have sought. Throughout, Environment Waikato has been concerned to maintain and build on its relationships with tangata whenua in its region. To that end, it made a deliberate choice not to cross-examine tangata whenua witnesses and sought to limit its participation in the CNI Inquiry to responding to specific allegations made known to Environment Waikato by the Crown.

6. Environment Waikato has over 300 staff, and presented evidence from the four staff members with the best overall knowledge of the matters raised in the claimant briefs – Dr Petch, Mr Peploe, Mr Brockelsby and Mr Fletcher. Given Environment Waikato's late notification of the allegations against it, the absence of transcripts of evidence, and the limited time available in the Tribunal's timetable for the conclusion of the CNI Inquiry, Environment Waikato was not able to review all claimant briefs of evidence prior to the week 8 hearings. No disrespect was intended by this; it was simply due to the constraints of time available to it for the preparation of evidence.

7. If the Tribunal intends to make adverse findings or recommendations in respect of Environment Waikato, then the principles of natural justice require that these be specifically put to Environment Waikato for comment prior to the finalisation of a report by the Tribunal.

8. This submission outlines the status of regional councils under the Local Government Act 2002 and their role under the RMA, and then responds to submissions made by the claimants in the CNI Inquiry. The final section in this submission deals with the jurisdiction of the Tribunal to inquire into "the extent to which the Tribunal can consider facts that may be the subject of litigation in other legal fora".

SUMMARY

9. Environment Waikato takes very seriously its statutory obligations to tangata whenua. It has consulted with tangata whenua and worked in partnership, wherever possible.

10. Environment Waikato is not just concerned with Ngati Tuwharetoa, although it is a major iwi in the area. It values all of its relationships and is continually seeking to enhance these. The evidence shows that Environment Waikato has relationships with a broad range of iwi and hapu groups.

11. Environment Waikato sought limited participation in the CNI Inquiry because allegations had been made relating to its fulfilment of its statutory obligations, and it was concerned to respond to these. Many of those allegations were made by Ngati Tuwharetoa witnesses; hence the focus on the views of Ngati Tuwharetoa in Environment Waikato's evidence. This was not intended to signal that relationships with other iwi and hapu are less important to Environment Waikato.

12. Environment Waikato has never sought to discredit any tangata whenua witnesses. It has not even sought to cross-examine tangata whenua witnesses, but merely to provide evidence to give the other side of the story where the allegations that have been made against it are unfair, and to show that it is carrying out its statutory obligations.

13. When developing policy or considering a resource consent application, the RMA requires Environment Waikato to consider and balance the principles of the Treaty of Waitangi, while also always aiming to achieve the overall purpose of the RMA, sustainable management of natural and physical resources.

14. Environment Waikato has struck that balance as best it can in the circumstances, and has fulfilled its statutory obligations under the RMA. The evidence shows that there are a wide range of needs competing for priority in terms of river management. Environment Waikato has

undertaken consultation on those needs and has developed a work plan accordingly. In some areas, like the Lower Tongariro, the natural river processes and corresponding management options are highly complex, and further investigations have had to be completed before appropriate decisions can be taken. Environment Waikato is highly conscious of the views of tangata whenua in this area. Consultation does not equate to agreement however, or mean that a particular group has a right of veto in respect of any resource consent application.

15. Many of the concerns the claimants have in the CNI Inquiry can only be resolved in discussion with the Crown. They fall outside the scope of Environment Waikato's statutory role.

STATUS AND FUNCTIONS OF REGIONAL COUNCILS

16. Environment Waikato was constituted by the Local Government (Waikato Region) Reorganisation Order 1989. It is a regional council listed in Schedule 2 of the Local Government Act 2002. Under section 12(1) of that Act, a local authority is a body corporate with perpetual succession. Section 12(2) provides that to perform its role a local authority has full capacity to carry on or undertake any activity or business, do any act or enter into any transaction, and for that it, it has full rights, powers, and privileges.

17. Section 4 of the Local Government Act 2002 clarifies that it is the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi. It is the Crown that is the Treaty partner. Local authorities have particular obligations to tangata whenua under the Local Government Act, however these have not been the subject of allegations in the CNI Inquiry.

18. The allegations to which Environment Waikato has responded all relate to its functions under the RMA. Those functions are set out in section 30 of the RMA. For ease of reference, we have set out the most relevant legislative provisions in Appendix 1.

19. In all environmental management issues regional councils are always guided by the express purpose of the RMA as set out in section 5: sustainable management of natural and physical resources. Section 5 has been called the "lodestar" of the RMA (see *Lee v Auckland CC* [1995] NZRMA 241).

20. "Sustainable management" is defined in section 5(2). In effect, sustainable management means the management of resources in such a way as to enable people and communities to provide for their wellbeing while sustaining the potential of the resources to meet future needs. This involves safeguarding their life-supporting capacity and avoiding or mitigating adverse effects on the environment, while also providing for their health and safety.

21. Regional councils must also have specific regard to those matters listed in sections 6 to 8 of Part 2 of the RMA, namely: matters of national importance (section 6); other specified matters (section 7); and the principles of the Treaty of Waitangi (section 8). All represent factors contributing to the evaluation under the principal purpose of the RMA as expressed in section 5.

22. Although there are tensions inherent in the provisions of Part 2 of the RMA, the provisions indicate the level of weight to be given, effectively establishing a hierarchy by giving priority to the matters of national importance in section 6 over the matters set out for consideration in sections 7 and 8 (see *Ngati Maru Iwi Authority Inc v Auckland CC* (Baragwanath J, HC Auckland AP18-SW01)).

ISSUES IN THE CNI INQUIRY RELATE TO THE CROWN

23. Environment Waikato did not participate in the CNI Inquiry with the intention of providing evidence or expressing a view on all issues raised in the Inquiry. Environment Waikato sought limited participation to provide the Tribunal with a more complete picture with regard to particular allegations made against Environment Waikato, and to respond to those allegations.

24. Environment Waikato expresses no view on the adequacy or otherwise of the RMA in terms of fulfilment of the Crown's Treaty of Waitangi obligations. It seeks only to show that it is fulfilling its own functions under the RMA and other relevant legislation, and that it has gone to considerable effort in consulting with tangata whenua and taking into account its obligations under section 8 of the RMA.

25. Although issues 9.3 and 9.4 in the CNI Inquiry have peripheral relevance to Environment Waikato, Environment Waikato is not in a position to comment on the actions of the Crown. What it can comment on is how it has carried out its statutory obligations. Environment Waikato does take into account iwi and hapu concerns and makes a genuine effort to involve them in the statutory processes regarding policy development and resource consents in accordance with the provisions of the RMA, and it is submitted that this is supported by the evidence.

RESPONSE TO CLAIMANT CLOSING SUBMISSIONS

Submissions on behalf of Tauhara Hapu

26. The closing submissions on behalf of the Tauhara Hapu state that the "Crown's consultation process" is "flawed...particularly in relation to a Resource Consent application from the Taupo District Council to increase the amount of wastewater discharge into the Waitahanui Waste Water Treatment Plan" ("**WWTP**") (3.3.89, paragraph 75).

27. While this complaint strikes more generally at the heart of the statutory processes under the RMA and is therefore a matter for Crown submissions, Tauhara Hapu also level allegations against Environment Waikato with regard to the WWTP consenting process.

28. When exercising their functions and powers in relation to managing the use, development and protection of natural and physical resources, regional councils have both express and implied statutory obligations under the RMA to consult with tangata whenua.

29. The consultation obligations arise in the following ways:

    (a) Implied obligations imposed by particular provisions of the RMA including sections 6(e), 7(a) and 8;

    (b) Express obligations in the preparation and change of policy statements and plans (clause 3(1)(d) of the First Schedule) and the preparation of assessments of environmental effects as part of the information accompanying applications for resource consents (clause 1(h) of the Fourth Schedule); and

    (c) Consultation as a recognised principle of the Treaty of Waitangi which, by virtue of section 8, "all persons exercising functions and powers ... shall take into account".

30. The leading case on the general duty to consult remains *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671, where the Court of Appeal cited with approval the words of McGechan J in the first instance:

> Consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade. The concept is grasped most clearly by an approach in principle. **To 'consult' is not merely to tell or present. Nor, at the other extreme, is it to agree.** Consultation **does not necessarily involve negotiation** toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an **intermediate solution involving meaningful discussion.** Despite its somewhat impromptu nature, I cannot improve on the attempt at description which I made in *West Coast United Council v Prebble* at p 405:
>
> > **"Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done."**
>
> Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. **Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings.** Generalities are not helpful. (page 675).
> [emphasis added]

31. In *Beadle v Minister of Corrections* (A074/2002), the Environment Court, inferred that Māori who are to be consulted are those who hold rangatiratanga or kaitiakitanga in respect of the natural and physical resources affected by a proposal, and those who possess appropriate and accurate information on the potential effects of the proposal on affected Māori.

32. In *Waikanae Christian Holiday Park v Kapiti Coast DC* (MacKenzie J, HC Wellington CIV2003-485-1764) the High Court held that section 8 does not give rise to an additional obligation on a council or the Court to consider alternatives, beyond those already set out in sections 6(e) and 7(a). The High Court did not expressly recognise partnership as a principle. Reciprocity and mutual benefit, although perhaps desirable, cannot be elevated to ensure a particular course of action must be chosen in order to satisfy section 8.

33. The Courts have also noted that consultation is a two-way process. Section 8 does not give any individual the right to veto a proposal: *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 294 (CA).

34. When hearing and determining resource consent applications, a consent authority must act judicially in the light of the evidence. It is not under a duty to consult before the hearing, and must not prejudice its own quasi-judicial position by seeking to reach an accommodation or understanding with one party or interest group at the expense of another. Therefore, it is appropriate for a council to leave consultation with tangata whenua to council officers: *Mangakahia Māori Komiti v Northland RC* (A107/95) (PT).

35. If a consent authority considers that the consultative process has been inadequate, it may refer the matter back to the parties for further consultation prior to hearing. Officers of the consent authority may inquire into the views of tangata whenua in preparing a report for a consent authority. Their report back to the consent authority, moreover,

must be available for all parties to accept or contest along with all the other evidence: *Ngatiwai Trust Board v Whangarei DC* (A7/84) (PT).

36. The closing submissions on behalf of Tauhara Hapu state that Environment Waikato "ignored" a policy (the "Stake in the Ground" policy) developed by the Wharawaka Committee, and said to have been formally adopted by Environment Waikato (3.3.89, paragraph 76).

37. Counsel respectfully submits that there is no proper evidential basis for this allegation. The "Stake in the Ground" policy is mentioned in the evidence of Mere Rose Wall who states that:

> The Waikato Regional Council and Environment Waikato [sic] partook in a formal presentation to incorporate the Policy Statement as part of the Waikato Regional Plan and formally adopted 27 May 1997 at Waipahihi Marae. (E9, paragraph 43)

38. Ms Wall goes on to say that the "Stake in the Ground" policy document "formed the basis of the relationship between the Tauhara hapu and the Contact/Mercury Energy companies" and a "framework based on commercial objectives was developed" (E9, paragraphs 45-46).

39. What Ms Wall's evidence suggests is that there was a policy plan between the Tauhara hapu and the energy companies, which was adopted by the Marae and presented to Environment Waikato. There is no evidence that this was actually incorporated in the Waikato Regional Plan, and this was denied by Mr Brockelsby under cross-examination. Environment Waikato rejects the allegation that the plan referred to by Ms Wall (which appears to relate to geothermal issues) was adopted and ignored, and reiterates that there is no evidence to substantiate this point.

40. Further, Counsel for Tauhara hapu states in his closing submission that despite advising Environment Waikato who was the appropriate body to consult with on behalf of the Tauhara hapu, Environment Waikato "ignored" this as well (3.3.89, paragraph 77). Tauhara hapu claim their concerns have been disregarded by Environment Waikato, and as a group, the hapu have been marginalised (3.3.89, paragraphs 79-80).

41. Again, Counsel submits there is no evidential basis for this allegation. Indeed, the evidence shows that there has been considerable consultation with this hapu.

42. The evidence of Mr Mark Brockelsby (H26), confirmed by Mr Brent Fletcher (H19), is clear that in terms of the application by TDC for the WWTP, Environment Waikato's process has been "fair, open and in harmony with both Environment Waikato's Treaty obligations and its obligations under the RMA" (H26, para 12(e)).

43. Mr Brockelsby also describes the WWTP consent process in his brief of evidence at paragraphs 29 – 42, including the consultation and meetings which took place regarding this issue.

44. Mr Fletcher also describes his understanding of the consent process for the WWTP thus far in his brief of evidence (H19), second brief of evidence (I36), and addendum (I29). In answer to cross examination from Ms Sykes, Mr Fletcher stated that, in the case of the WWTP application, Environment Waikato "knew that we would need to consult widely about it. And, there was never any doubt about that..." (Draft Transcript of Week 8, page 359, line 35).

45. Tauhara Hapu also alleges that Environment Waikato predetermined the TDC consent application (paragraph 78). This very serious allegation is found in the evidence of Harvey Karaitiana in response to the evidence of Brent Fletcher (I9), where Mr Karaitiana states:

> During the course of the meeting after much discussion, EW declared at the meeting "That at this stage we see no reason why we should not grant Resource Application". (paragraph 9)

46. There is no corroboration of this evidence.

47. Mr Brockelsby was clear in his evidence that no decision has yet been made on the TDC application (H26, paragraph 11, 12(f)). Mr Fletcher also strongly refuted the allegations of predetermination by Mr Karaitiana in his second brief of evidence (I36). Mr Fletcher emphasised

that he has an "open mind with regard to what the final recommendation will be" on the WWTP application (I36 paragraph 11).

Submissions on behalf of Ngati Raukawa

48. The submissions on behalf of Ngati Raukawa state that:

> ...the majority of the briefs of evidence filed by Environment Waikato only spoke of the relationship they valued with Ngati Tuwharetoa and that they were the only group with interests in Lake Taupo. (3.3.80, paragraph 454)

49. Environment Waikato acknowledges the concerns expressed above and will certainly take account of these concerns in future. It should be noted, however, that the briefs of evidence of Dr Petch and Mr Peploe in particular were in response to specific allegations made in briefs of evidence filed by Ngati Tuwharetoa witnesses. Environment Waikato's evidence was necessarily focused on those tangata whenua briefs in which allegations against the regional authority were most explicitly articulated.

50. The vesting by the Government of legal title to the bed of Lake Taupo and its tributaries in Ngati Tuwharetoa has predicated who has kaitiaki status in respect of the lake.

51. It should be noted that the Project Watershed Funding document quoted in the evidence of Mr Peploe states:

> Iwi interests are acknowledged in this project. In particular it is acknowledged that Tuwharetoa, **Raukawa**, Waikato and Maniapoto Iwi are key stake holders in matters relating to the rivers in the catchment. These interests relate to the relationship of Māori, their culture and traditions with ancestral land, water, Waahi tapu sites, valued flora and fauna and other Taonga. (H25, paragraph 30)
> [Emphasis added]

52. Environment Waikato has existing relationships with the Ngati Raukawa Māori Trust Board, and wishes to further strengthen these relationships. In Environment Waikato's interactions with Ngati Raukawa to date, there has been no suggestion that Ngati Raukawa has a vested interest in Lake Taupo, but now that the indication has been given, Environment Waikato will take this into consideration in future.

Submissions on behalf of Ngati Hikairo

53. The closing submissions on behalf of Ngati Hikairo express concern at the focus by the Crown, and by inference, other government agencies on Tuwharetoa (3.3.64, para. 1.16). Environment Waikato acknowledges this concern.

54. Again, the focus of the Environment Waikato briefs was to respond to specific allegations notified to Environment Waikato by the Crown, which came predominantly from Ngati Tuwharetoa briefs.

55. As outlined in the evidence of Mr Peploe, Environment Waikato has had to prioritise management of the many rivers in its region, in fulfilling its function under the RMA of avoiding or mitigating natural hazards. There is no statutory requirement to address all river issues as identified by local communities:

> Rather, Environment Waikato has an obligation to identify hazards, assess the levels of risk, and promote solutions where they are supported by the local community and stakeholders and can be adequately resourced and funded. (H25, paragraph 20)

56. This point was further clarified by Mr Peploe under cross-examination:

> **The Tokaanu stream is identified as a priority stream in this area for future attention.** It has not yet been studied or investigated to any great extent. The best that I can indicate to you today is that it is on the list of priority streams to address. At the present time because of our focused resourcing on the two major rivers, the Tauranga-Taupo River and the Tongariro, the Tokaanu has not had a great deal of attention to date. (Draft Transcript of Week 8, page 331, line 28)
> [...]
> **We cannot do everything at once. They have to be prioritised.** Project Watershed is essentially, what it is, is a funding model that allows work to be done with the costs distributed across the ratepayers of the Waikato region...(Draft Transcript of Week 8, page 332, line 18)
> [Emphasis added]

57. Mr Peploe acknowledged under cross-examination that:

> ...as we work through our annual programmes we identify the specific rivers and it's at that point we tend to then focus more at that local level in terms of discussions and consultation so I'd have to say to you that in terms of the recognition of that local group to date, it will be limited but **as we bring forward this stream onto our programme, I would expect that contact will be initiated.** One thing we need to watch very carefully is managing the expectations, and making contact and preparing proposals and so on in advance of when they can physically get done

> raises the expectation of the people involved and we have to manage that process very carefully. (Draft Transcript of Week 8, page 332, line 37) [Emphasis added]

58. At the present time, as indicated in the cross-examination of Mr Peploe, there are only low key works on the Tokaanu Stream, and these are managed largely by the local River Care Group. The Department of Conservation is the lead agency for this Group, which Environment Waikato understood includes representatives from Ngati Hikairo. Environment Waikato will certainly ensure that consultation is undertaken with Ngati Hikairo in relation to all future works that it is involved with in relation to the Tokaanu Stream.

Submissions on behalf of Te Takere o Nga Wai

59. The closing submissions on behalf of Te Takere o Nga Wai state:

> Given Ms McKenzie's infamy within environmental legal circles, we were perplexed to discover that she did not register a mention on the database of people to contact for Environment Waikato. It is our submission that assertions of local authority pro-activity should be viewed within this context. (3.3.99, paragraph 183)

60. Environment Waikato acknowledges that Ms McKenzie's details were not included in that part of the database printed out and annexed to the brief of evidence of Mr Proffit (I28), and apologises for any offence this has caused. The printout of the database in evidence identified persons listed as "iwi" stakeholders. Ms McKenzie does in fact feature in the database, but she is currently not listed within the iwi stakeholders grouping, and therefore did not feature in the printout. Ms McKenzie is listed as a person to be contacted in respect of following areas of work: geothermal, policy submitter, Taupo rural landowner, and Taupo Variation. Her contact details are recorded as: Ngati Rauhoto, 14 Ngauruhoe Street, Taupo. Environment Waikato is happy to catalogue Ms McKenzie as an iwi stakeholder also.

61. The Ngati Rauhoto Land Rights Committee appears in the database in evidence. The database is not exhaustive, but it is one of the tools used

to facilitate consultation with tangata whenua. In his evidence, Mr Proffit described the database as follows:

> Over the years, Environment Waikato has built up a database list of Māori contacts in the catchment area who may be interested in various issues. This is an extremely useful resource in terms of the consultation process. It is dynamic and always evolving. (128, paragraph 10)

62. This was also stressed by Mr Proffit under cross-examination, where he stated:

> It illustrates that it's an evolving database that is being put together based on interactions that, that we have. It's not, in no way is it "the list" as I've already addressed earlier in questions, but it's an attempt to try and pull in that information.
> [...]
> Just that it's an incomplete list doesn't mean that we're not going to meet the requirements of consultation. (Draft Transcript of 8 August 2005, page 73)

63. As was confirmed by Ms Sykes in her cross-examination of Mr Proffit, Ms McKenzie was in fact regularly consulted by Environment Waikato:

> ...Wynn McKenzie and her group is often consulted by you...They were consulted as recently as this year on the nitrates issue...
> [...]
> ...She is regularly consulted on environment things like nitrates, on pollution...
> [...]
> But she's been consulted. Wynn McKenzie has been a part of this, for nearly 20 years she's been involved with various councils but with your own Environment Waikato, as recently as three months ago, she spent significant periods with various members of your group around nitrates. (Draft Transcript of 8 August 2005, page 73)

64. The evidence of Mr Proffit detailed the operations of Environment Waikato's Tai-ranga-whenua (Iwi Liaison Unit). This is a hard-working, proactive unit that underscores the importance of Environment Waikato's relationships with iwi and hapu groups.

65. Mr Proffit gave evidence that Environment Waikato is always seeking to improve its relationships with tangata whenua, and that his team is currently working on a draft iwi relationship strategy which addresses how Environment Waikato can build on its relationships with Māori and the capacity of Māori to participate in consultation. In his brief he stated:

> Environment Waikato has various means of engaging with local Iwi. There is no "one-size fits all" model. We work with the parties to determine how best to approach management of relationships. We have a

> number of Memoranda of Understanding with local Iwi Authorities, some of which cover a high-level governance relationship and some of which deal with operational matters. (128, paragraph 21)

66. Mr Proffit's evidence shows that Environment Waikato takes its statutory obligations in respect of tangata whenua very seriously, and is making real efforts with regard to consultation with tangata whenua.

67. The closing submissions on behalf of Te Takere o Nga Wai states:

> In the context of the evidence that was adduced by Environment Waikato, we are not surprised that their systems of management should be found to be so wanting. We are disheartened by the fact that aside from Mr Profit [sic] and Mr Fletcher, none of them were qualified, or even felt qualified to discuss the contents of their brief. (3.3.99, paragraph 184)

68. Environment Waikato rejects the allegation that its systems are "wanting".

69. Environment Waikato also rejects the comments regarding the qualifications of its witnesses. Mr Peploe is the Acting Group Manager, River and Catchment Services, for Environment Waikato. As such, he was the most appropriate person to provide evidence on the overall activities of this division of Environment Waikato. Mr Peploe has a Bachelor of Agricultural Science degree and has been involved with the design and management of land and water protection programmes throughout the Waikato region over the last 20 years. In the last three years he has had project management responsibility in respect of river issues with in the Lake Taupo Catchment.

70. As Mr Peploe oversees a large team of people with a variety of specialist expertise, it is quite unrealistic for any counsel to have expected him to be able to comment in detail on every technical issue they might conceive of in cross-examination. Nor would it have been reasonable for Environment Waikato to have filed hundreds of briefs of evidence. Counsel for Te Takere o Nga Wai appears to have misconceived the practicalities of the situation. There are approximately three hundred people employed by Environment Waikato. Had this been an inquiry

focussed specifically on Environment Waikato, obviously many more witnesses would have been required to provide evidence.

71. The same arguments apply in respect of Dr Tony Petch, who holds a Bachelor of Agricultural Sciences with Honours and a Doctorate in Philosophy of Earth Sciences. Dr Petch manages the Resource Information Group at Environment Waikato (a position he has held since 1995) and leads the Protecting Lake Taupo Project (since 1998). No single person has better overall knowledge of the range of matters covered in Dr Petch's brief of evidence (i.e. the issues associated with the draft proposals to reduce the nitrate levels in Lake Taupo) than Dr Petch does.

72. Mr Brockelsby was the best person available to depose to the three matters covered in his brief. He has a Bachelor of Science (Earth Sciences) and a Post Graduate Diploma of Science (Geology), and has worked in the regulatory arm of Environment Waikato for the best part of 22 years. He is responsible for the overall management of all RMA consent processes at Environment Waikato. Other staff members had knowledge about particular aspects covered in Mr Brockelsby's brief, but were unavailable to prepare their own briefs in the timeframe given by the Tribunal. For that reason, Environment Waikato offered up additional staff members for cross-examination at the week 8 hearings if that was desired by claimant counsel and the Tribunal.

73. It is therefore neither accurate nor fair to state that the Environment Waikato witnesses were not qualified to discuss their briefs of evidence. Witnesses could clearly not discuss matters outside the scope of their briefs and expertise, and it was unfair for counsel to have criticised those witnesses during cross-examination, especially for not answering what were essentially legal questions.

74. The submissions on behalf of Te Takere o Nga Wai state:

> [EW] had come to refute the assertions of tangata whenua, yet they have made no effort to contact them to ascertain the context of statements that they turned up to refute. They had not bothered to read the briefs of

> evidence of those who they came to call liars, they had not even checked the audio records of what was said.
>
> According to Mr Petch, this habit of ignoring tangata whenua is not one that is prevalent within the Environment Waikato organism. Respectfully, Mr Petch has provided no evidence to support this assertion, nor can he give his lack of qualification, which he admitted to under cross-examination.
>
> In our submission, Mr Petch's repetitive mantra "we merely responded to the brief that we were given" illustrates the existence of the state of affairs that he has tried to deny. The state of affairs that was conveyed to them was delivered by the Crown. This was the only perspective that was necessary. Essentially, tangata whenua were irrelevant. (3.3.99, paragraphs 185-187)

75. Environment Waikato strongly rejects the allegation that it has ever called any tangata whenua witness a liar or even implied that to be the case. It has simply provided the other side of the story where allegations have been made against it.

76. All Environment Waikato witnesses had read the evidence they were responding to. The majority of the briefs of evidence filed by the claimants did not contain specific allegations against Environment Waikato. In the very short timeframe that Environment Waikato had to prepare evidence, it was not possible for Environment Waikato witnesses to read all of these briefs. Nor was it possible to discuss all of these matters with the claimants or listen to hours of previous evidence, which had yet to be transcribed. Environment Waikato sought and received limited participation in the CNI Inquiry only. It tried to confine its participation so as to minimise any disruption to the Tribunal's timetable.

77. Environment Waikato strongly objects to any allegation that it has a "habit" of ignoring tangata whenua, and the evidence of Dr Petch has shown that Environment Waikato has gone to considerable efforts to consult tangata whenua (see for example H27 paragraphs 42-53). Consultation does not equate to agreement.

78. The submissions on behalf of Te Takere o Nga Wai state:

> It is little wonder that the experts that presented themselves knew little of taonga that tangata whenua was seeking to protect. When questioned about the small flower te waiora, a plant Ms McKenzie assets has the right to be protected from all development.

> When witnesses from Environment Waikato were questioned upon this precious taonga, they informed us that they were unable to reply as they were not weed experts. Perhaps this too is a result of the Crown's failure to meaningfully engage with tangata whenua. (3.3.99, paragraphs 188-189)

79. It is not surprising that in his role as project manager for protecting the water quality of Lake Taupo, Dr Petch does not have intimate knowledge of all plant life of significance to tangata whenua. This does not mean that such knowledge does not exist within Environment Waikato. As Environment Waikato was not specifically named in Ms McKenzie's brief, her brief was not read by Environment Waikato witnesses prior to the week 8 hearings. It was read subsequently and her world views have been taken account of by Environment Waikato.

Ohaaki

80. The submissions on behalf of Te Takere o Nga Wai refer to the "farcical attempts [by Environment Waikato] to engage with tangata whenua in connection with Ohaki [sic]" (3.3.99, paragraph 190).

81. Environment Waikato strongly disputes the allegation that its consultation with tangata whenua in relation to Ohaaki was "farcical".

82. The evidence of Mr Brockelsby refers to the wide range of parties consulted with regards to the Ohaaki resource consent process (H26, paragraphs 52-57). In particular, Appendix "C" of the additional information requested of Mr Brockelsby and included Counsel's memorandum (3.2.332) sets out Environment Waikato's understanding of which tangata whenua groups were contacted for the 1998 consent for Ohaaki. This document shows the wide range of tangata whenua consulted throughout the process, including Ngati Tahu, Tahorakuri 338 Trust, Te Runanga o Ngati Tahu Ngati Whaoa, Tainui Trust.

83. The submissions on behalf of Te Takere o Nga Wai also states, in relation to the process of consultation with Ohaaki:

> Amazingly, [Environment Waikato] was unaware that the land blocks and the reservations were under the authority of different entities. This lack

> of knowledge within [Environment Waikato] inescapably leads to the conclusion that there has been a failure to consult as the local authority cannot have engaged meaningfully with an entity it did not know existed. (3.3.99, paragraph 190)

84. Counsel for Te Takere o Nga Wai also alleged in their closing submission that Environment Waikato "failed" in its duty to ascertain those who were likely to be affected by the Ohaaki consenting process (3.3.99, paragraph 191).

85. Counsel respectfully submits that these allegations are neither fair, nor correct. There is no evidential basis for them. Under cross examination by several claimant counsel, Mr Brockelsby spoke at length about Environment Waikato's efforts to ascertain who might be affected by consent applications such as that at Ohaaki.

86. In response to questions from Ms Herbert as to how comprehensive Environment Waikato's list of interested parties in terms of tangata whenua is, Mr Brockelsby stated:

> [EW's] general practice is that anyone who puts their hand up or comes to see us or indicates that they have an interest, we include them, we're not in the business of excluding anyone who tells us that they have an interest ... (Draft Transcript of Week 8, page 281, line 11).

87. Mr Brockelsby deposed that, in terms of assessing who to consult with, Environment Waikato is both proactive and reactive in its approach:

> [S]ome of it is certainly reactive because people ring us up and say we're in this area, we have these interests, please can you put us on your database so we do that but we also have our own processes, our own linkages through our iwi liaison people and they're constantly providing bringing in new data and telling us at the consents level and having that information available in the database so I think it works both ways....
>
> [T]here are often changes within iwi structures where previously ... the understanding was that we talk to these people and we went through these contacts and that can change and quite rapidly and can change several times over a year or two years so we're constantly having to update our information. I'm sure that...our database isn't perfect. There will be gaps in it, there will be things that sometimes slip through the cracks. We try and minimise that as best we can, we've got a number of ... mechanisms in place but ... for significant applications,.... if we have missed someone out, those are notified applications so ... the anticipation is that if we do miss someone out then at least they can tell us through the submission process that they have an interest. (Draft Transcript of Week 8, page 281, lines 22 – 27; 39 – 50)

88. In response to a question by Dr Parsonson about the Ohaaki consultation process, Mr Pearks stated that Environment Waikato identified parties to consult "from conversations with Tuwharetoa, Whakaua, local marae and then consulting with the [Tahorakuri 338 Trust]" (Draft Transcript of Week 8, page 280, line 16).

89. In response to questions from Ms Patuawa, Mr Pearks (please note that the draft transcript incorrectly records the speaker as Mr Brockelsby) stated that Environment Waikato endeavoured to identify which group was going to be the best iwi to contact. Environment Waikato officers also tried to identify what was the closest marae to the actual area of interest. After these avenues of inquiry, it came back to Environment Waikato from tangata whenua that the Tahorakuri 338 Trust was the iwi group responsible for that particular issue (Draft Transcript of Week 8, page 257, line 10 – 15).

90. In response to a question by Mr Pou, Mr Pearks stated that, in terms of the Ohaaki process, he considered Environment Waikato was

> ...actually quite proactive in the process we took, we didn't just publicly notify it, put up a sign and say that was it, we actually went out and sought information from those organisations that we thought would be able to provide it to be able to identify the particular groups (Draft Transcript of Week 8, page 288, line 31)

91. The submissions on behalf of Te Takere o Nga Wai also state:

> This string of failures, in our submission, exposes a lack of veracity of the assertions of Petch, validating the tangata whenua feelings of disempowerment as a result of the local authority's sidelining of indigenous environmental obligations.
>
> The fact that Environment Waikato does not perceive their exercise of authority to be an exercise over tangata whenua is a view that we submit exacerbates this level of disempowerment. It is apparent in our submission that little attention has been given to the findings of the Waitangi Tribunal in the formation of Environment Waikato policy.
>
> As a result, Environment Waikato have relied upon statute to legitimise the encroachment upon the rights of tangata whenua that the Crown promised would be protected.
>
> Mr Dickie, like Mr Petch, have in our submission, merely undertaken an effort of patch protection. Mr Dickie's denial of constant tangata whenua opposition to initiatives consented to by Environment Waikato, is in stark contrast to the evidence of Ms McKenzie who spoke of the need to maintain an ongoing vigil. (3.3.99, paragraphs 192-195)

92. Environment Waikato does take into account tangata whenua perceptions of the environment, as stated by Mr Dickie in his written response to the question posed by Ms Sykes/Mr Pou:

> Environment Waikato takes into account Tangata Whenua perceptions of the environment in applying the principles in sections 5, 6, 7 and 8 of the Resource Management Act 1991 ("**RMA**"). See section 2 of the Regional Policy Statement, Module 2 of the proposed Waikato Regional Plan, and also the objectives throughout the resource based modules of the Waikato Regional Plan, for example Policy 6 of section 3.5.3; Objectives 4.2.2 (g) and (h). (3.2.363, paragraph 11)

93. The comment made by Mr Dickie in relation to "authority over tangata whenua" must be read in context. The question asked of Mr Dickie was whether he agreed that "Environment Waikato's managerial exercise over the taonga of Tangata Whenua is, by its very nature, an exercise of authority over Tangata Whenua, regulating and affecting them". Mr Dickie's response was:

> Environment Waikato exercises authority over the sustainable management of natural and physical resources in accordance with the RMA. Environment Waikato is only able to carry out the functions and roles given to it by statute. Some functions and roles may concern taonga of Tangata Whenua, but Environment Waikato does not exercise authority over Tangata Whenua in the broad sense implied by the question. (3.2.363, paragraph 14(b))

94. There is no agenda within Environment Waikato to usurp the rights of tangata whenua. Environment Waikato has a statutory role and it carries that out. It rejects any notion of "patch protection". Mr Dickie's response to a question regarding "consistent opposition of Tangata Whenua to initiatives consented to by Environment Waikato" was that:

> It is not agreed that there is consistent Tangata Whenua opposition to initiatives consented by Environment Waikato, or that Tangata Whenua concerns always lose in the balancing exercise. (3.2.363, paragraph 14(i))

95. Mr Dickie goes on to give the example of recent decisions in relation vegetation clearance at Waiuku, which demonstrate that the concerns of tangata whenua were given significant weight.

Submissions on behalf of Ngati Tuwharetoa

Protecting Lake Taupo

96. In the closing submissions on behalf of Ngati Tuwharetoa it is noted that Lake Taupo is under threat from the effects of intensive farming and urban land use practices. It is stated that the iwi is in the invidious position of seeking to protect the lake, but opposing Environment Waikato's proposed variation to the district plan, "due to the inequitable impact it will have on Ngati Tuwharetoa by enforcing the status quo". (3.3.106, paragraph 20.8)

97. The submissions acknowledge that the variation may not come into force in its present form, but states that:

> ... what is certain is that there is a need to reduce nitrate emissions, and that this will have an impact on land use one way or the other. (3.3.106, paragraph 34.12)

98. Further:

> The latest and most significant challenge has been generated by Environment Waikato's release of the Proposed Waikato Regional Plan Variation V – Lake Taupo Catchment on 9 July 2005. This aims at achieving the removal of nitrogen from the lake by managing rural land use and setting controls through the nitrogen allocation rights. The way in which the new rules will be operationalised, however, is by capping nitrogen emission rates based on existing land use. This approach thereby enforces the status quo and does not target the land uses that are responsible for high levels of nitrate leaching into the lake. In respect of Tuwharetoa land that is undeveloped, the enforcement of status quo will lock the current usage situation in and deny or limit many of the owners of forestry and undeveloped lands their right to freely utilise their lands in requirement with their needs. This in turn will lower the value of Tuwharetoa's assets and hence the ability to create wealth for its community. The tragic irony of this situation has not been lost on Tuwharetoa... (3.3.106, paragraph 35.68)

99. Through extensive consultation with Ngati Tuwharetoa, Environment Waikato is very familiar with the issues facing Ngati Tuwharetoa's views on the proposed variation to the regional plan, and has taken account of these concerns.

100. In proposing the variation, Environment Waikato is meeting its statutory obligations under section 30 of the RMA. In terms of consultation on

planning instruments, section 74(1) of the RMA requires councils to change their plans in accordance with Part 2 (sections 5 – 8).

101. Section 30(1)(a) provides that when establishing policies, in addition to balancing the hierarchy of matters in Part 2, regional councils must consider how to best achieve "integrated management" of the natural and physical resources of their region.

102. "Integrated management" is not defined in the RMA. However, it has been likened to a concept of "harmony". In *Kennedys Bush Developments Ltd v Christchurch CC* (Chisholm J, HC, Christchurch, CIV2004-485-1189 2) the High Court noted:

> In this case [in the first instance] the Environment Court was endeavouring to assess whether the rezoning of the land in question would constitute "integrated management" within the meaning of the Act. **In other words, whether there would be harmony.** It was not trying to combine all the components and attribute one meaning to them. To the contrary, **having identified all relevant considerations it stepped back and balanced the various considerations** (para 29]
> [Emphasis added]

103. Regional councils, in performing their function of integrated management (unlike that of territorial authorities), are not confined to considering effects (compare s 31(1)(a)), nor restricted to controlling activities in relation to land.

104. Environment Waikato has attempted to mitigate the impacts of the proposed variation on Ngati Tuwharetoa and on the rest of the community to the extent possible within the RMA.

105. In his brief of evidence, Dr Petch states:

> In undertaking its statutory functions, Environment Waikato alone cannot solve all the issues raised by Ngati Tuwharetoa relating to the lake, its future management, and the wellbeing of future generations of Ngati Tuwharetoa. Through work with its project partners, Environment Waikato has attempted to mitigate the impacts on Ngati Tuwharetoa and on the rest of the community to the extent possible within the RMA and through the application of public funds. (H27, paragraph 18)

106. Environment Waikato has promoted new measures to help mitigate the impacts on Ngati Tuwharetoa. These are summarised as:

- *A move away from a simple 'polluter-pays' approach to a capping regime.* This enables current Ngati Tuwharetoa and other community enterprises to continue as they do today. A pure 'polluter-pays' approach, advocated by some in the community, would significantly impact on Ngati Tuwharetoa interests by requiring reductions of nitrogen that may ultimately reduce the economic viability of their farmland. Similar impacts would occur on other community interests.

- *Allowing time for change.* Fifteen years has been suggested to make the changes necessary to protect the lake. This allows time for new, low nitrogen-producing enterprises to develop.

- *Establishment of a public fund to support rural land use change.* This fund recognises that the current land use changes required are a consequence of previous development and should not fall solely on the current land owners and residents of the Taupo catchment. The fund further recognises the local, regional and national community benefits from a clean lake. The fund also supports research on sustainable development options to allow continued economic growth of Ngati Tuwharetoa interests and those of the general community without increases in nitrogen discharge to the lake.

- *Policy that enables a nitrogen trading regime.* The benefits of a trading regime are discussed in a previous section of this evidence. A trading regime means that any current land use regime is not in locked forever to their current nitrogen discharges as would occur under a simple capping regime. This is particularly relevant for owners of forested and undeveloped land seeking to intensify land use. Development of undeveloped land to similar low nitrogen-discharging land uses, such as forests, is permitted without intervention for nitrogen management.

- *Project Partnership.* Ngati Tuwharetoa are Treaty partners with the Crown. The project partnership between Ngati Tuwharetoa and Environment Waikato builds on the relationship between the Tuwharetoa Māori Trust Board and Environment Waikato and a formally convened Ngati Tuwharetoa representative group known as the 'Nitrates Group'. Taupo District Council is a project partner because of its role in local governance in the Lake Taupo Catchment. Associated with the Protecting Lake Taupo Project, the project partnership is manifested by:

  (i) Establishment of the Lake Taupo Accord in 2001.
  (ii) Joint management of the Taupo-nui-a-Tia 2020 project (2001-2003).
  (iii) Close relationship and extensive consultation during policy development to Protect Lake Taupo and incorporation of a policy approach that mitigates impact.
  (iv) Proposed appointment of an independent commissioner endorsed by Ngati Tuwharetoa on the policy hearings committee to assist decision making on cultural matters.
  (v) Proposed membership on the joint committee that oversees management of the public fund. (H27, paragraph 89)

107. A key point in Dr Petch's evidence is that the Protecting Lake Taupo Project and the policy approach to protect the lake are only **part way** through a public process. It is a proposed policy, which may be modified. Public notification of the policy in July 2005 set in train the formal consultation process provided for in the First Schedule of the RMA comprising submissions; further submissions; hearing of the submissions; deliberations on the submissions and evidence received; changes to policy and section 32 analysis as determined by the hearings committee; and council adoption of the hearings committee recommendations, followed by public notification of Council's decisions on the policies to protect Lake Taupo.

108. This process is expected to be complete by late 2006. Following that, remaining issues of concern may be referred to the Environment Court, followed by negotiations and mediation on references and preparation for evidence for the Environment Court if required. A further 10 to 12 months is expected for this process so that final confirmation of the policy approach to Protect Lake Taupo could be possible by late 2007 (H27, paragraphs 64 - 67).

109. Dr Petch states:

> Environment Waikato acknowledges the special issues generated by the policy approach that is required by such a sensitive and precious taonga as Lake Taupo. Some of the issues identified by Ngati Tuwharetoa are beyond the scope of the RMA to manage fully and would likely fail a section 32 analysis for effectiveness and efficiency. (H27, paragraph 24)

110. Environment Waikato encourages Ngati Tuwharetoa to continue to participate fully in the process to be followed under the First Schedule of the RMA in relation to the proposed policy.

Lower Tongariro River

111. The submissions on behalf of Ngati Tuwharetoa state that the Tongariro Power Development had the effect of halving the volume of the Tongariro River. It states further that:

> Arthur Grace gave evidence on the filtration problems that have resulted from the lower sediment carrying capacity of the river, and his anguish at

> the threat erosion poses to the Urupa of Rangiamohia. Environment Waikato responded with extensive evidence that was largely beside the point, focussing as it did on Environment Waikato's obligations under the Resource Management Act. (3.3.106, paragraph 26.5)

112. Further:

> It is submitted that Mr Peploe's evidence only served to confirm what Mr Grace had been saying all along, which was that there is a 'Māori zone' and a 'Pakeha zone' to the Tongariro River, and far more emphasis has been placed on saving the real estate in the Pakeha zone than the Māori land below the bridge. Mr Peploe confirmed as much under cross examination, stating that Environment Waikato's top priority was protecting the houses. (3.3.106, paragraph 26.7)

113. It is this type of allegation that prompted Environment Waikato to seek a right of reply in the CNI Inquiry. Environment Waikato considers this to be a seriously misleading allegation that had to be responded to.

114. Counsel submits that it is not accurate to state, as Ngati Tuwharetoa does, that Environment Waikato's evidence on the filtration problems is beside the point. Environment Waikato is not in a position to comment on the effects of the Tongariro Power Development because it was not responsible for constructing the Development, and it is not part of Environment Waikato's role to conduct investigations into it. Environment Waikato is responsible for hazard management of the environment in its current state. What its evidence shows is that, with all due respect to Mr Grace, there is no simple solution to the current siltation problems in the lower Tongariro River. Environment Waikato is actively engaged in determining what the best option for the river is.

115. The functions of regional councils as regards natural hazards are set out in section 30(1)(c)(iv) of the RMA, which provides that every regional council is responsible for the control of the use of land for the purpose of "the avoidance or mitigation of natural hazards".

116. Flooding is specifically defined as a "natural hazard" in section 2 of the RMA:

> **Natural hazard** means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or **flooding) the action of which adversely affects or may**

> **adversely affect human life, property, or other aspects of the environment:**

117. The Court of Appeal has confirmed that section 30(1)(c)(iv) requires regional councils to avoid or mitigate the effect of a natural hazard, but does not require regional councils to control the occurrence of a natural hazard. In *Canterbury RC v Banks Peninsula DC* [1995] 3 NZLR 189, the Court said at p196:

> Earthquakes, tsunami and volcanic eruptions, which are examples given in the definition itself, cannot be controlled. **The regional council is rather given the power to control the use of land for the purpose of avoiding or mitigating the natural hazard, which means avoiding or mitigating the effects of the occurrence. One way of doing this would be by the control of the erection of buildings or structures in a flood plain.** A function of the regional council is to achieve integrated management of the resources of the region. It would be consistent with that function for the investigation of the flood plain and the decision as to the appropriate controls to be carried out where appropriate on a regional basis...
> [Emphasis added]

118. In avoiding or mitigating such natural hazards, the regional council must also, as always, have regard to the overarching purpose of the RMA found in section 5 of Part 2, which is to promote the sustainable management of natural and physical resources.

119. Mr Peploe's evidence shows how priority flood management, river management and soil conservation requirements within the Waikato River catchment were identified in the Waikato River and Catchment Services Project ("**Project Watershed**"). Project Watershed involved extensive consultation with tangata whenua over several years and resulted in a comprehensive 15 year work programme with identified priorities (H25, paragraphs 25-27, 29, Appendix 3, Appendix 5).

120. Not all flood and river management issues were addressed by Project Watershed because further investigation was required into a number of areas before sound long-term decisions could be made in respect of them. (H25, paragraph 28)

121. In respect of the Lower Tongariro River, further investigations were required into the natural processes occurring with the river, the

management options available, and the aspirations of the stakeholders. Extensive community consultation has been required in respect of any activities undertaken on this river (H25, paragraphs 31, 68).

122. The build up of sediment in the delta is a highly complex matter, and management options are equally complex (H25, paragraphs 35-37).

123. Environment Waikato established the Tongariro River Management Forum in 2003, comprising all key stakeholders. In May 2004, it entered into a Memorandum of Understanding with Ngati Turangitukua. Later that year, it engaged NIWA to prepare a report on the Lower Tongariro River. These options are currently being evaluated, and a Catchment Management Plan is due for completion in November 2005 (H25, paragraphs 37, 70-75, 87).

124. Environment Waikato emphatically denies any suggestion that there is a "Māori zone" and a "Pakeha zone" to the Tongariro River. There is significant Māori landholding in the upper Tongariro, and work could not begin on the lower Tongariro until more was known about the complexities of this part of the river. The necessary investigations have been undertaken, and decisions are expected to be made by the end of the year (H25, paragraphs 77-84).

125. Environment Waikato is mindful of the concerns of Ngati Tuwharetoa with regard to flooding and the Lower Tongariro, and is doing its best to consult them on the best long-term solution.

Submissions on behalf of Te Ahi Kaa Roa o Maketu

126. The closing submissions on behalf of Te Ahi Kaa Roa o Maketu states:

> It is unfortunate, that when elucidation was sought in writing from the Environment Waikato Policy Team as to the scope afforded by the Crown on this point, Mr Dickie was unwilling to answer. He did note later in his response however, that Environment Waikato *only* carry out statutory functions, and it will do so, even when these functions impinge upon the rights of tangata whenua as protected by the Treaty. (3.3.75, paragraph 67)

127. The statement that Mr Dickie was "unwilling" to answer certain questions mischaracterises his responses. The directions of the Tribunal dated 5 August 2005 provided that:

> Mr Dickie does not need to answer legal questions or those that go to whether the Crown is in breach of the Treaty of Waitangi. (2.3.76)

128. Mr Dickie's comment that "Environment Waikato only carries out statutory functions and roles", must not be taken out of context. It was made in response to question 14(c) by Ms Sykes and Mr Pou:

> ...would you agree that...the ability of Environment Waikato to assert authority over Tangata Whenua is delegated to it by the Crown by dint of Statute? (3.2.363, paragraph 14 sub (c))

Submissions on behalf of Ngati Tutemohuta

129. The submissions on behalf of Ngati Tutemohuta state that Mr Reginald Proffit was "evasive" in response to questions about resources (3.3.84, paragraph 472). It is submitted that this is an inaccurate characterisation of Mr Proffit's responses, and the record of the cross-examination speaks for itself. Mr Proffit had nothing to hide, (as can be seen from the statement quoted from his brief of evidence) but simply needed to clarify the questions that were asked of him on behalf of Counsel for Ngati Tutemohuta, who was not present. Mr Proffit was open and honest and did his best to answer difficult cross-examination questions.

Submissions on behalf of Ngati Rangitihi; Ngati Hineuru

130. In the closing submissions on behalf of Ngati Rangitihi, counsel states:

> The Waikato Regional Council has also embarked on a policy of "single operator" or "single tapper" system management under paragraph 74 of the current proposed plan variation. Asked whether the Bay of Plenty Regional Council has a similar policy, Mr Dickie's reply was "Not to my knowledge". This indicates that the two councils are managing fields rather differently. (3.3.62, paragraph 29.28)

131. The reference to the Integrated Management policy is incorrect. The Regional Policy Statement Change #1 reference is 3.7.2 Policy 5 and Proposed WRP Variation # policy reference is 7.4 Policy 3. The policy does not refer to "single tapper". The delegation of responsibility to

regional councils allows for local solutions to local issues. In different regions the geothermal systems will be different, and the communities associated with them will also be different, so it is reasonable for management to differ from region to region. With regard to the one common system in the regions of both Environment Waikato and the Bay of Plenty Regional Council, Counsel refers to the responses of Blair Dickie to questions 8 and 9 of Mr Boast, where Mr Dickie states that:

> There are no significant differences between the two councils with respect to the Waiotapu-Waikete-Waimangu Geothermal System which straddles the boundary between the two regions. (123)

132. In the submissions on behalf of Ngati Rangitihi, it is submitted that:

> It is also clear from the evidence resent at week 8 by the Councils that their consultation procedures are inadequate. Without the transcript being filed to date, Counsel are unable to refer to specific statements to reference this however we wish to draw this matter to the Tribunal's attention. (3.3.62, paragraph 45.5)

133. The same submission is made in paragraph 38.10 of the submissions on behalf of Ngati Hineuru. (3.3.63, paragraph 38.10)

134. Given that the rohe of these claimants is not within Environment Waikato's region, and no specific examples are provided from any of the briefs of evidence, Counsel submits that this generalisation is unfounded in respect of Environment Waikato, and refers the Tribunal to the extensive evidence provided on examples of consultation undertaken. Any process that relies on human interaction can never be perfect, but Environment Waikato has made a genuine effort to ensure that it does consult as required by law and does not accept that its consultation procedures are inadequate.

Generic Submissions on Natural Environment and Resource Management Issues

135. Counsel refers the Tribunal to the acknowledgement in the Claimants' Generic Submissions on Natural Environment/Resource Management Issues ("**Generic Submissions**") that issues of ownership of resources are not included in the RMA, and that the RMA does not "contain any

provisions recognising or allowing consent authorities to recognise situations where ownership of resources is contested" (3.3.78, paragraphs 6.1, 9.3(a)).

136. Counsel submits this is a correct interpretation. Ownership of resources is not of itself a relevant matter under the RMA, and the Environment Court has stated that it is not the appropriate forum to deal with ownership issues (see *New Zealand Federation of United Seafood Interests Inc v Canterbury RC* (C199/04) paras 18-20).

137. This does not mean, however, that the concerns of Māori and the principles of the Treaty are not relevant considerations for decision makers. As noted in the Generic Submissions, "the RMA contains a number of provisions which accord Māori issues a high level of standing" (paragraph 6.5). Part 2 of the RMA includes several references to Māori issues (see sections 6(e) - (g), 7(a), 8). In particular, section 8, which requires all persons exercising functions and powers under the RMA to take into account the principles of the Treaty, has been characterised as the clause which recognises the relationship of tangata whenua with natural and physical resources and encourages active participation and consultation with tangata whenua (see *Winstone Aggregates Ltd v Franklin DC* (A80/02), para 213).

138. Sections 6 to 8 of Part 2 establish matters of such importance in decision-making under the RMA that consideration must be given to them. All represent factors contributing to the evaluation under section 5. Overall, decision makers must always have regard to the matters listed in Part 2.

139. Counsel therefore respectfully submits that it is not strictly accurate to say, as in the Generic Submissions, that it is a failure of the RMA "for s8 to be carried through in the remainder of the Act..." (3.3.78, paragraph 7.6) or that analysis under section 32 does not allow for consideration of the Treaty (3.3.78, paragraph 7.7). As discussed above, the matters listed in Part 2, including those in section 8, are accorded priority in the RMA. Part 2 is a framework against which all the functions, powers, and duties

under the RMA are to be exercised for the purpose of giving effect to the Act. Any exercise of discretionary judgment must promote the statutory purpose (see *Royal Forest and Bird Protection Society v Manawatu-Wanganui RC* (A86/95)).

140. For example, when exercising their evaluative functions under section 32, local authorities must always bear in mind that their goal is to achieve the purpose of the RMA as set out in section 5, and to recognise and consider the other matters set out in sections 6 – 8. This includes taking into account the relevant and necessary Treaty principles.

141. Counsel also notes the acknowledgement in the Generic Submissions that the principle of "sustainable development" "does not seem to be supported by the RMA" (3.3.78, paragraphs 4.18; 4.28; 9.3(e)).

142. Counsel submits that this is an oversimplification of the careful balancing act required under the RMA. Section 5, which is considered the "lodestar" of the Act (see *Lee v Auckland CC* [1995] NZRMA 241), provides that the purpose of the RMA is to manage the use, **development** and protection of natural and physical resources in a **sustainable** way.

143. The RMA has an enabling function, and clearly promotes the sustainable development of the relevant resources (see *Ohope Point Developments Ltd v Whakatane* (EnvC A050/05)).

144. The Generic Submissions state that:

> The evidence from regional authorities demonstrates that they are aware of the provisions of the RMA 1991 dealing with Māori issues, and that they consult accordingly. However, as noted above, no authority has yet utilised s33, even at Whakarewarewa. (3.3.78, paragraph 8.1).

145. Counsel refers the Tribunal to the written answers of Blair Dickie to questions of Mr Boast numbered 5-7 in relation to hapu/iwi geothermal management plans (I23). Environment Waikato has made attempts to facilitate the development of such plans, and explicitly budgeted for the development of a hapu management plan for Ngati Kurauia in 2000-2001 and 2001-2002, but the hapu chose not to take this any further.

146. Overall, Counsel respectfully submits that Environment Waikato takes very seriously its obligations under the RMA. Counsel concurs with the Generic Submissions that:

> As can be seen from the evidence provided by the regional councils, **when it comes to the management of water and discharges, a great deal of attention is paid to Māori concerns in the CNI district.** (3.3.78, paragraph 6.6)
> [Emphasis added]

JURISDICTION OF TRIBUNAL

Introduction

147. At the conclusion of the week 8 hearing, the Tribunal invited all parties to make submissions on "the extent to which the Tribunal can consider facts that may be the subject of litigation in other legal fora", for example whether the Tribunal should consider or make recommendations or findings concerning breaches of the RMA. The issue arises because several of the claimants have made allegations that Environment Waikato has paid insufficient attention to claimants' concerns in undertaking its statutory duties under the RMA.

Background - Jurisdiction of the Waitangi Tribunal

148. The Tribunal does not have a general jurisdiction to consider or make findings in respect of any issue that is raised during the course of hearings. Rather, it has a jurisdiction based on the specific provisions of the Treaty of Waitangi Act 1975 ("**the Act**"), and the rules applying to Commissions of Inquiry generally. This jurisdiction is further governed by the principles of natural justice.

Treaty of Waitangi Act 1975

149. The Tribunal's jurisdiction to consider and report on claims is conferred by section 6 of the Act which provides:

> 1. Where any Māori claims that he or she, or any group of Māori s of which he or she is a member, is or is likely to be prejudicially affected—
> (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster,

> or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or
> (b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection ; or
> (c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
> (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.]
> 2. Subject to section 7 of this Act, the Tribunal shall inquire into every claim submitted to it under this section.
> 3. If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

150. Section 6 goes on to set out a large number of exceptions in respect of which the Tribunal may not inquire. Most of these relate to claims that have already been settled.

151. Under section 6(2), the Tribunal's duty to inquire into claims is subject to section 7 of the Act. Section 7 provides that the Tribunal has discretion to refuse to inquire into claims in certain circumstances. These include cases where there is an adequate remedy or right of appeal which the claimant(s) could reasonably be expected to use.

152. Under section 6(1), the Tribunal may make recommendations in respect of claims. It does not have power to make binding determinations except in the limited circumstances expressly provided for under the Act. In particular, the Tribunal cannot make binding or determinative findings as to whether the Crown, a claimant or any other party has complied with a legal duty arising under another statute, even though its decisions on such issues may be influential: *Thompson v Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98.

153. In this context, the Tribunal has previously recognised that it would be inappropriate for it to comment on the performance of statutory

obligations by territorial authorities under the RMA in circumstances where the essential grievance was against the statute itself. In the *Whanganui River Report* (Wai 167), the Tribunal stated:

> **It may very well be that the Resource Management Act 1991 requires a balancing and as a result, the council itself may be constrained. The balancing act is a statutory requirement, however, and should be attributed not to the Treaty but to its source – the statute.**
>
> We intend no other criticism of the regional council's proposed statement. A genuine concern to provide for Māori interests is self-evident. **The conflict is between the Treaty and the Act** and arises from the Crown's failure to acknowledge and protect the Māori ownership of the Whanganui River, or at least to give to Māori rights of private property ownership – the same rights and protection as are given to Europeans. **There is nothing the regional council can do about that, however. It is a matter between Māori and the Crown.**
>
> We have examined the objectives in this part of the proposed policy statement and consider that none contains an assurance that effect will be given to the Treaty rights of Atihaunui in relation to the river. With the exception noted, however, **this derives** not from an omission in the proposed policy statement but **from the terms of the legislation.**
> [Emphasis added]

Commissions of Inquiry

154. Under clause 8 of schedule 2 of the Act, the Tribunal is a Commission of Inquiry under the Commissions of Inquiries Act 1908. As such it is entitled to inquire into and make findings in respect of any issue that has been properly raised as a matter for inquiry and which is not otherwise excluded from the Tribunal's jurisdiction.

155. As a Commission of Inquiry, the Tribunal cannot investigate or otherwise inquire into a matter that has not been properly put before it. Section 6(2) limits its jurisdiction to claims made under section 6. For the purposes of jurisdiction, a claim to the Tribunal is analogous to the terms of reference of a Commission of Inquiry. As such, the Tribunal may not make findings or recommendations in respect of any matter outside the scope of the claim actually under consideration: see for example *Peters v Davison* [1999] 2 NZLR 164, 184 (CA). In this case, the matters before the Tribunal are those set out in the Final Statement of Generic Issues dated December 2004.

156. A Commission may investigate whether, for example, a person has committed a criminal offence, if that issue legitimately arises from the terms of reference (or claim in the Tribunal): see for example *Re Erebus* [1981] 1 NZLR 618, 666; *Fitzgerald v Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368, 375. But, in doing so, it must have regard to the principles of natural justice. Even though recommendations by the Tribunal are not binding, they are nevertheless influential. In the past, the Courts have been rigorous in ensuring that any recommendations or findings by Commissions of Inquiry that allege or suggest wrongdoing are made within the terms of reference and in accordance with principles of natural justice. In *Thompson*, Barker J stated:

> As was emphasised in the majority judgment in the *Erebus* case (at p 653) **findings by Commissions are in fact only expressions of opinion which, strictly speaking, do not alter the legal rights of the persons to whom they refer. Nevertheless, the findings may greatly influence the public and Government opinion and have a devastating effect on personal reputations.** Consequently, the Court must be ready, where necessary in relation to Commissions of Inquiry, to ensure they keep within the limits of their lawful powers and comply with any applicable rules of natural justice (page 102)
> [Emphasis added]

157. This principle is consistent with the Tribunal's discretion under section 7(1)(c) of the Act not to inquire when there is an adequate alternative remedy. In particular, it is submitted that it would be inappropriate for the Tribunal to inquire into a matter that is or may be the subject of criminal or civil proceedings. This includes appeals or judicial reviews of decisions made pursuant to the RMA. Any such inquiry could potentially prejudice a party in an appeal or review. In the past, the Tribunal has been scrupulous about observing the distinction between actual or potential Court proceedings and its own inquiries. For example, in its report *The Petroleum Report* (Wai 796), the Tribunal declined (at page 80) to consider claims to Māori rights in the seabed because the matter was before the Courts.

158. It follows that, when an issue of wrongdoing (such as compliance with the RMA) is properly raised by a claim, the Tribunal must not make

recommendations which impugn or are adverse to the interests of any person or organisation without first affording that person or organisation notice of its intention to doing so and providing them with sufficient opportunity to appear and be heard: *Re Erebus Royal Commission: Air New Zealand Limited v Mahon* [1983] NZLR 662, 671 (PC).

159. In this context, it should be borne in mind that while Environment Waikato has been represented in the CNI Inquiry to a limited extent, individual Commissioners and/or Judges of the Environment Court or other officers or employees of Environment Waikato are not individually represented and have not been given notice of any specific allegation against them. The Tribunal should therefore be cautious about making any finding or recommendation that could be adverse to the interests of such people. In particular, the Tribunal cannot inquire into or make findings or recommendations which allege bias, predetermination, failure to consult or other breach of natural justice or the RMA unless it has first given proper notice and an opportunity to respond to all interested persons.

160. Further, the Tribunal has previously recognised that it would be inappropriate for it to comment on the performance of statutory obligations by territorial authorities under the RMA in circumstances where the essential grievance was against the statute itself. See citation from the *Whanganui River Report* (Wai 167), referred to above.

Application of principles

161. As an example, in this case, one of the claimants' concerns relates to a proposed variation to a regional plan. The proposal has yet to complete the consultation process required under the RMA, a process in which the claimants are of course entitled to participate. In the event that they are dissatisfied with the final result of this process, the claimants have rights of appeal to the Environment Court under the RMA, as well as rights to seek judicial review in the High Court. It is submitted that it would be appropriate for the Tribunal to inquire into the adequacy of any process

or procedure employed by Environment Waikato only after Environment Waikato has made a final decision on the particular matter and the claimants have exhausted other remedies/rights of appeal.

CONCLUSION

162. The evidence provided by Environment Waikato shows that it has carried out its statutory obligations, and that it takes into account the principles of the Treaty of Waitangi in performing those obligations, as required by section 8 of the RMA.

163. Environment Waikato has valued its involvement in the CNI Inquiry. The proceedings have confirmed matters of importance to tangata whenua that Environment Waikato was aware of, and brought to light some new information concerning tangata whenua interests and concerns that will be taken into account by Environment Waikato.

Dated at Wellington this 14th day of October 2005

Mai Chen / Lecretia Scales
Counsel for Waikato Regional Council

APPENDIX 1 – RELEVANT LEGISLATIVE PROVISIONS IN THE RESOURCE MANAGEMENT ACT 1991

30. Functions of regional councils under this Act—

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(a) **The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:**

(b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

(c) **The control of the use of land for the purpose of—**

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:

(iii) The maintenance of the quantity of water in water bodies and coastal water:

(iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:

(iv) **The avoidance or mitigation of natural hazards:**

(v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

(ca) the investigation of land for the purposes of identifying and monitoring contaminated land:

(d) In respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—

(i) Land and associated natural and physical resources:

(ii) The occupation of space on land of the Crown or land vested in the regional council, that is foreshore or seabed, and the extraction of sand, shingle, shell, or other natural material from that land:

(iii) The taking, use, damming, and diversion of water:

(iv) Discharges of contaminants into or onto land, air, or water and discharges of water into water:

(iva) The dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:

(v) Any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

(vi) The emission of noise and the mitigation of the effects of noise:

(vii) Activities in relation to the surface of water:

(e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) The setting of any maximum or minimum levels or flows of water:

(ii) The control of the range, or rate of change, of levels or flows of water:

(iii) The control of the taking or use of geothermal energy:

(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

(fb) if appropriate, and in conjunction with the Minister of Conservation,—

(i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:

(ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:

(g) In relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in that water body:

(iii) The maintenance of the quantity of water in that water body:

(iv) The avoidance or mitigation of natural hazards:

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:]

(gb) the strategic integration of infrastructure with land use through objectives, policies, and methods:

(h) Any other functions specified in this Act.

(2) A regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control the harvesting or enhancement of aquatic organisms to avoid, remedy, or mitigate—

(a) the effects on fishing and fisheries resources of occupying a coastal marine area for the purpose of aquaculture activities:

(b) the effects on fishing and fisheries resources of aquaculture activities.

(3) However, a regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), or (vii) to control the harvesting or enhancement of aquatic organisms for the purpose of conserving, using, enhancing, or developing any fisheries resources controlled under the Fisheries Act 1996.

(4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) nothing in paragraph (a) affects section 68(7); and

(c) the rule may allocate the resource in anticipation of the expiry of existing consents; and

(d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—
  (i) allocate all of the resource used for an activity to the same type of activity; or
  (ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and
(e) the rule may allocate the resource among competing types of activities; and
(f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

[emphasis added]

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
(2) In this Act, **sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—**
  (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
  (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
  (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[emphasis added]

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
[(f) the protection of historic heritage from inappropriate subdivision, use, and development.]
[(g) the protection of recognised customary activities.]

[emphasis added]

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) **Kaitiakitanga:**
(aa) The ethic of stewardship:
(b) The efficient use and development of natural and physical resources:
(ba) the efficiency of the end use of energy:
(c) The maintenance and enhancement of amenity values:
(d) Intrinsic values of ecosystems:
(e) Repealed.
(f) Maintenance and enhancement of the quality of the environment:
(g) Any finite characteristics of natural and physical resources:
(h) The protection of the habitat of trout and salmon:
(i) the effects of climate change:
(j) the benefits to be derived from the use and development of renewable energy.

[emphasis added]

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[emphasis added]

First Schedule, Part 1: Preparation and change of policy statements and plans by local authorities

3 Consultation

(1) During the preparation of a proposed policy statement or plan, the local authority concerned **shall consult**—
  (a) The Minister for the Environment; and
  (b) Those other Ministers of the Crown who may be affected by the policy statement or plan; and
  (c) Local authorities who may be so affected; and
  (d) The tangata whenua of the area who may be so affected, through iwi authorities ...[; and]
  (e) the board of any foreshore and seabed reserve in the area.]

(2) A local authority may consult anyone else during the preparation of a proposed policy statement or plan.

(3) Without limiting subclauses (1) and (2), a regional council which is preparing a regional coastal plan shall consult—
  (a) The Minister of Conservation generally as to the content of the plan, and with particular respect to those activities to be described as restricted coastal activities in the proposed plan; and
  (b) The Minister of Transport in relation to matters to do with navigation and the Minister's functions under [Parts XVIII to XXVII of the Maritime Transport Act 1994]; and
  (c) The Minister of Fisheries in relation to fisheries management, and the management of aquaculture activities.

(4) In consulting persons for the purposes of subclause (2), a local authority must undertake the consultation in accordance with section 82 of the Local Government Act 2002.

[emphasis added]

Fourth Schedule: Assessment of effects on the environment

1 Matters that should be included in an assessment of effects on the environment

Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section [88] **should** include—

(a) A description of the proposal:

(b) Where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:

(c) Repealed.

(d) An assessment of the actual or potential effect on the environment of the proposed activity:

(e) Where the activity includes the use of hazardous substances and installations, an assessment of any risks to the environment which are likely to arise from such use:

(f) Where the activity includes the discharge of any contaminant, a description of—

(i) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects; and

(ii) Any possible alternative methods of discharge, including discharge into any other receiving environment:

(g) A description of the mitigation measures (safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect:

(h) **identification of the persons affected by the proposal, the consultation undertaken, if any, and any response to the views of any person consulted:**

(i) Where the scale or significance of the activity's effect are such that monitoring is required, a description of how, once the proposal is approved, effects will be monitored and by whom.

[emphasis added]